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Foreword: Elected Branch Influences in Constitutional Decisionmaking

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FOREWORD

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Sofia, Bulgaria—to put it mildly—seems an odd point of departure for this symposium on elected branch constitutional decisionmaking. *But* it was in Sofia that the idea for this project took hold. Let me explain. Through the auspices of the American Bar Association, I visited Sofia as part of an ABA effort to assist fledgling democracies in the crafting of their constitutions and other laws. To my great surprise, the principal message I conveyed had very little to do with the substance of the Bulgarian Constitution; instead, I told these constitution writers that they should worry less about how well crafted their text was and worry more about the political institutions that will help drive the agenda and content of constitutional decisionmaking. That I gravitated toward this message helped focus my thinking about the role of elected branch influences in the study of U.S. constitutional decisionmaking. Indeed, the genesis for this project was the realization that I spent as much time talking about elected branch interpretation to Bulgarian officials in just a few days as I typically spend on this subject with my first year law students.

The proposition that the elected branches are active participants in the shaping of constitutional values is hardly novel. One-hundred years ago, James Bradley Thayer wrote of Congress's role in interpreting the Constitution.¹ In

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As special editor of this volume, I have had the good fortune of working with several outstanding individuals. First and foremost, the contributors to this symposium were fantastically collegial and extraordinarily professional. It was a pleasure to work with each and every one of them. Thanks are also owed to Ruth Dowling and Mike Elston, student editors at *Law and Contemporary Problems*, for keeping the project on track and the contributors happy. Finally, special thanks are owed to Theresa Glover, faculty and general editor of *Law and Contemporary Problems*, who played an instrumental role in pushing this project along and maintaining her composure and good nature when problems arose.

1. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 17 (1893).

1921, Justice Cardozo reminded us that the "great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."² Today, although the constitutional law course remains case-centered,³ a growing number of legal academics and political scientists are examining the propriety, quality, and influence of elected branch interpretations.⁴

Congress, the White House, government agencies, and the states all play critical interdependent roles in interpreting Supreme Court decisions and the Constitution itself. The sweep and influence of these interpretations are broad and pervasive. Before a case comes to Court, Congress or the states must enact a law or the executive branch must promulgate a regulation. Once a case is in Court, the states, the Justice Department, and congressional coalitions—sometimes as parties and sometimes as amici—inform the judiciary of their views. Through the appointments-confirmation process, moreover, the president and Senate control the composition of the federal bench. After a case is adjudicated, elected government may seek to expand or limit the holding through a number of techniques ranging from the interpretation of the judicial ruling to the nullification of the ruling through constitutional amendment.

Most landmark Supreme Court decisions cannot be understood without paying attention to the politics surrounding them. First, Justices pay attention to politics in crafting their decisions. John Marshall's sequencing of merits and jurisdiction in *Marbury v. Madison*⁵ and Earl Warren's efforts at crafting a unanimous opinion in *Brown v. Board of Education*⁶ were both preemptive strikes designed to limit the political repercussions of unpopular decisions. Second, politics is informative in assessing Supreme Court doctrine. Legislation limiting the impact of *Garcia v. San Antonio Metropolitan Transit Authority*⁷ speaks to whether states' rights concerns are adequately represented in Congress.⁸ Analysis of the decision to defer to military decisionmaking in *Korematsu v. United States* should take into account that the internment of Japanese-Americans was a subterfuge perpetuated by the military and approved by the Justice Department.⁹ Third, political judgments shape Court doctrine. Congress's choice to ground the public accommodations section of the 1964 Civil Rights Act in the Commerce Clause as well as the Fourteenth Amendment

2. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1921).

3. See Neal Devins, *Correspondence: The Stuff of Constitutional Law*, 77 IOWA L. REV. 1795 (1992).

4. See LOUIS FISHER, CONSTITUTIONAL DIALOGUES (1988); GERALD ROSENBERG, THE HOLLOW HOPE (1991); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763 (1993).

5. 5 U.S. 137 (1803); see LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW 27-38 (1992).

6. 347 U.S. 483 (1954); see S. Sidney Ulmer, *Earl Warren and the Brown Decision*, 33 J. POL. 689 (1971).

7. 469 U.S. 528 (1985).

8. 99 Stat. 787 (1985), discussed in FISHER & DEVINS, *supra* note 5, at 109-20.

9. 323 U.S. 214 (1944); see PETER IRONS, JUSTICE AT WAR (1983).

allowed the Court to treat *Heart of Atlanta Motel, Inc. v. United States*¹⁰ and *Katzenbach v. McClung*¹¹ as commerce cases.¹² Similarly, amendments to the 1987 Ethics in Government Act proved critical to *Morrison v. Olson* by expanding Justice Department authority in independent counsel investigations.¹³ Fourth, politics contributes to the ultimate meaning of Court action. The institutional dynamics that made the legislative veto so popular before *I.N.S. v. Chadha*¹⁴ explain why the device continues to be used, with well over two hundred legislative vetoes put into place in the past decade.¹⁵ The limits of *Brown II's*¹⁶ delegation of remedial authority to southern district court judges are underscored by mid-1960s elected branch action which resulted in more desegregation in 1965 than in the decade following *Brown*.¹⁷ And, fifth, once the Supreme Court has decided a case, a "constitutional dialogue" takes place between the Court and elected government, often resulting in a decision more to the liking of political actors. Congress ultimately persevered in challenging the Court's 1918 rejection of the Commerce Clause as the basis for child labor legislation.¹⁸ Executive and legislative action to express disapproval of *Roe v. Wade*¹⁹ through funding restrictions was approved by the Court in both *Harris v. McRae*²⁰ and *Rust v. Sullivan*.²¹

The articles contained in this volume reinforce the above propositions and offer several additional insights to the appropriateness and impact of elected branch interpretations. Contributors to this symposium explore this topic either by exploring the workings of an institutional actor across a range of issues or by examining a single topic in some detail. At the same time, all of the contributors are attentive to both institutional and topical concerns. Questions considered in this volume include whether elected branch fact finding can address individual rights concerns more comprehensively than judicial fact finding can; whether and when the elected branches take seriously their responsibility to interpret the Constitution; how the structure and procedures of the executive and legislative branches affect elected branch interpretation; whether the judiciary gives due regard to elected branch attitudes and interpretations; and, finally, how the executive, legislative, and judicial branches should share the task of constitutional

10. 379 U.S. 241 (1964).

11. 379 U.S. 294 (1964).

12. See FISHER & DEVINS, *supra* note 5, at 98-107.

13. 487 U.S. 654 (1988); see Paul Gerwitz, *Congress, as well as the Courts, Must Make Constitutional Law*, HARTFORD COURANT, July 24, 1988 at C-3.

14. 462 U.S. 919 (1983).

15. Louis Fisher, *The Invalidated Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273 (Autumn 1993).

16. 349 U.S. 294 (1955).

17. See GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION* 1-39 (1969).

18. See FISHER & DEVINS, *supra* note 5, at 78-85.

19. 410 U.S. 113 (1973).

20. 448 U.S. 297 (1980).

21. 111 S. Ct. 1759 (1991); see Neal Devins, *Through the Looking Glass: What Abortion Teaches Us about American Politics*, 94 COLUM. L. REV. (forthcoming Jan. 1994).

interpretation. The balance of this foreword will provide a snapshot of how the contributors to this volume address these issues.

Elected Branch Fact Finding and Individual Rights. Differences between elected branch and judicial fact finding play a prominent role in several articles. My contribution on the Reagan Federal Communication Commission's ("FCC") battles with Congress over the fairness doctrine and diversity preferences calls attention to the critical role that elected branch fact finding plays in the resolution of constitutional disputes.²² The Reagan FCC claimed that fairness and diversity preferences inhibited broadcast diversity and were therefore unconstitutional; Congress reached the opposite conclusion. The resolution of both issues ultimately hinged on whether the courts would view congressional or FCC fact finding as controlling governmental policy. John Garvey's contribution on the flap surrounding the National Endowment of the Arts' ("NEA") funding of Robert Mapplethorpe and others calls attention to Congress's ability to respond constructively to equality concerns in its resolution of a First Amendment issue.²³ Specifically, by requiring the Endowment to "respect . . . the diverse beliefs and values of the American public,"²⁴ Garvey suggests that legislative fact finding—by viewing the Religious Right as a minority in need of protection—may prove more far-ranging than judicial fact finding.²⁵

Congress's ability (if not propensity) to craft statutes that provide greater protections for individual rights by taking into account facts that courts might not otherwise consider lays at the heart of Kathy Abrams's contribution on gender and sexual orientation in the military²⁶ and Peter Shane's article on voting rights.²⁷ Kathy Abrams argues that the military's exclusionary policies are a by-product of androcentrism, namely, the military's desire "to preserve combat effectiveness in a force that leaders had always (if not always correctly) conceived of as consisting exclusively of straight male soldiers."²⁸ To combat this androcentrism, Abrams proposes a combination of judicial and elected branch influences. Judicial influences provide focus and publicity, if not counter-majoritarian victories; legislative oversight of the military, although hampered by the close working relationship between committee members and military

22. Neal Devins, *Congress, the FCC, and the Search for the Public Trustee*, 56 LAW & CONTEMP. PROBS 145 (Autumn 1993).

23. John H. Garvey, *Black and White Images*, 56 LAW & CONTEMP. PROBS. 189 (Autumn 1993).

24. *Id.* at 204 (citing 20 U.S.C.A. § 954(d)(1) (Supp. 1992)).

25. Although not directly related to elected branch influences, a student editor of *Law and Contemporary Problems* explores the constitutional decisionmaking process of the Supreme Court in the context of funding for the arts and other conditionally offered government benefits in the last piece of this issue. The note updates a previous contribution to the journal and addresses an issue that Professor Garvey's article specifically defines as beyond its scope. Michael J. Elston, *Artists and Unconstitutional Conditions: The Big Bad Wolf Won't Subsidize Little Red Riding Hood's Indecent Art*, 56 LAW & CONTEMP. PROBS. 327 (Autumn 1993).

26. Kathryn Abrams, *Gender in the Military: Androcentrism and Institutional Reform*, 56 LAW & CONTEMP. PROBS. 217 (Autumn 1993).

27. Peter M. Shane, *Voting Rights and the "Statutory Constitution"*, 56 LAW & CONTEMP. PROBS. 243 (Autumn 1993).

28. Abrams, *supra* note 26, at 228.

personnel, allows for an examination of systematic problems. Peter Shane's treatment of voting rights legislation casts Congress as constitution maker through its role in creating "the system of laws, customs, and conventions that define most fundamentally for the nation what are its organs of government, and their relationship to one another and to the people."²⁹ In Shane's view, statutes may be "genuinely constitutional" if they transform public mores and the "then-current legal regime."³⁰ For Shane, voting rights legislation is part of this statutory constitution with Congress, through its skills as fact finder, engaging in "the sort of balancing that the Court itself customarily undertakes" and reaching judgments contrary to the Court's along the way.³¹ Indeed, as Shane rightly observes, modern voting rights legislation has had a far more profound effect on "the content of our fundamental law" than the Twenty-Fourth and Twenty-Sixth Amendments.

The Seriousness of Elected Branch Interpretation. The question of whether and when the elected branches take seriously their authority to interpret the Constitution is discussed by nearly all of the contributors. Sometimes this discussion is simply the backdrop to another concern. The principal purpose of Shane's discussion of 1982 voting rights legislation, for example, is to advance his statutory constitution argument. That this discussion also speaks to the seriousness of legislative deliberations is, at best, an ancillary objective. Likewise, Kathy Abrams's observation about the possible identity of interests between the military establishment and their oversight committees is only incidentally concerned with the seriousness of elected branch interpretation.

Stephen Wermiel, Jeremy Rabkin, John McGinnis, and Louis Fisher follow a similar pattern. Stephen Wermiel's primary concern is to assess what influence, if any, Senate confirmation hearings have on judicial behavior.³² In examining this question, Wermiel makes clear that the senators themselves must care about constitutional interpretation if they hope to affect the judicial philosophy of prospective nominees. Jeremy Rabkin's evaluation of the White House Counsel calls attention to the need to have a lawyer unencumbered by the bureaucratic demands of the Justice Department providing the president with advice on constitutional matters.³³ That this advice may well differ from Justice Department pronouncements provides a revealing look into the deliberateness of White House constitutional interpretation. John McGinnis's assessment of whether the three branches engage in an implicit bargain to sort out who shall have principal authority to define foreign relations, individual rights, and other issues also

29. Shane, *supra* note 27, at 243.

30. *Id.* at 252.

31. *Id.* at 261.

32. Stephen Wermiel, *Confirming the Constitution: The Role of the Senate Judiciary Committee*, 56 LAW & CONTEMP. PROBS. 121 (Autumn 1993).

33. Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, 56 LAW & CONTEMP. PROBS. 63 (Autumn 1993).

provides useful insights on the seriousness of elected branch interpretation.³⁴ The willingness of one branch to cede an interpretive role on one issue so that another issue remains within its control speaks volumes to the seriousness of both elected branch and court interpretations. Louis Fisher's revelatory accounting of how the legislative veto persists in the face of *Chadha* makes clear that the Court's legislative veto decision is little more than a throw weight that inevitably gives way to the tugs and pulls of political necessity.³⁵ While the seriousness of elected branch interpretation is not the focus of this accounting, Fisher's case study sheds light on the precedential effect of Supreme Court decisions on elected branch action.

The seriousness of elected branch interpretation plays a more prominent role in John Garvey's study of NEA funding and my study of FCC-congressional relations. Garvey concludes that Congress took First Amendment values seriously while crafting a legislative compromise principally rooted in equality concerns. Pointing to Congress's rejection of a draconian funding ban of "indecent materials . . . which denigrates the objects or beliefs of the adherents of a particular religion,"³⁶ Garvey emphasizes that Congress's real concern was the impropriety of content controls since the people targeted by this prohibition, "pornographers, blasphemers, bigots, had few patrons in Congress."³⁷ My contribution provides a less sanguine look at elected branch interpretation. Diversity preferences and especially the fairness doctrine portray House and Senate committees as concerned only with policy outcomes. The article also reveals that the FCC would rather provide a weak defense of disfavored policies than forthrightly call into question the constitutionality of these programs. For both the FCC and the Congress, political strategy mattered much more than constitutional deliberations.

The Structure and Procedures of Elected Government. The manner and degree of elected branch influences is largely a function of bureaucratic divisions of responsibility within the executive branch and Congress as well as procedures governing elected branch activity. Stephen Wermiel's examination of the Senate Judiciary Committee, Jeremy Rabkin's study of the White House Counsel, and Roger Davidson's assessment of the role of congressional procedure all speak to this phenomenon. Stephen Wermiel's suggestion that, in the wake of the Bork nomination, the Senate Judiciary Committee seeks to indirectly influence a nominee's constitutional decisionmaking calls attention to the wide open nature of the Senate's advice and consent function.³⁸ Committee members may examine a nominee's judicial philosophy as well as hinge their vote on whether they find the nominee's responses satisfactory. Jeremy Rabkin's treatment of the

34. John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 LAW & CONTEMP. PROBS. 293 (Autumn 1993).

35. Fisher, *supra* note 15, at part IVA.

36. Garvey, *supra* note 23, at 193.

37. *Id.* at 215.

38. See generally Wermiel, *supra* note 32.

White House Counsel is far more mystifying, because it is the tale of an office without statutory authorization that rarely produces a paper record of its handiwork and invokes attorney-client privilege to keep secretive the precise contours of its operations.³⁹ With that said, fingerprints are occasionally left and Rabkin demonstrates both the influence of this office and the reality that if the president “wants to play an effective role in the evolution of constitutional law, he will need to have a sizable and capable White House Counsel’s Office.”⁴⁰ Specifically, since post-Watergate presidents have been pressured to treat the Justice Department as a safe harbor for independent professionalism, the White House Counsel often serves as the president’s chief lawyer on politicized constitutional disputes. For example, Clinton White House Counsel Bernard Nussbaum spearheaded Administration efforts to treat Hillary Clinton as a government official in order to keep secret the workings of her health care task force.⁴¹ Structural divisions of responsibility as well as procedural requirements also play a large role in Roger Davidson’s treatment of “attributes of contemporary congressional decisionmaking” that shape Congress’s role as constitutional interpreter.⁴² Davidson’s analysis points to the critical role played by procedural rules governing multiple referrals and overlapping jurisdiction between policymaking authorizations committees and appropriations committees that control funding. Davidson also calls attention to the varied practices between the lawyer-driven Judiciary Committee and policy-driven committees such as Energy and Commerce. Illustrative of the differences between the Judiciary and Energy and Commerce Committees is Judiciary’s scholarly cautiousness in its handling of flag burning legislation and Energy and Commerce’s ramshod handling of dial-a-porn legislation.⁴³ Combusting with the structural and procedural variables are Congress’s “tendency to obfuscate and compromise” as well as issues of congressional leadership and whether the White House and Congress are controlled by the same political party. This mix of factors and circumstances makes clear why “Congress rarely speaks with a single, clear, unambiguous voice.”⁴⁴

Court Attitudes Toward Elected Branch Interpretation. The willingness (or unwillingness) of the judiciary to defer to elected branch interpretations figures prominently in several of the articles. Peter Shane’s contribution on voting rights acknowledges the large role that the Supreme Court plays in the development of “our statutory constitution” through its recognition of sweeping congressional authority to enforce the Fourteenth Amendment.⁴⁵ John McGinnis also sees the courts as sometimes facilitating the exercise of power by the elected branches. McGinnis, for example, argues that the courts keep out of foreign

39. See generally Rabkin, *supra* note 33.

40. *Id.* at 98.

41. *Id.* at 63.

42. Roger H. Davidson, *The Lawmaking Congress*, 56 LAW & CONTEMP. PROBS. 99 (Autumn 1993).

43. *Id.* at 113.

44. *Id.* at 118.

45. See generally Shane, *supra* note 27.

affairs as part of an implicit bargain where each branch controls spheres of authority that match its institutional needs.⁴⁶ Louis Fisher's study of the legislative veto, in contrast, sees the courts playing an obstructionist role. Noting that "the Court [in *Chadha*] attempt[ed] too broad a remedy and fail[ed] to recognize the practical needs that led Congress and the executive branch to adopt the legislative veto in the first place,"⁴⁷ Fisher finds it only fitting that "pragmatic agreements hammered out between the elected branches" play a more prominent role in this area than do constitutional doctrines announced by the Supreme Court.⁴⁸

The most sweeping investigations of the nexus between elected government action and judicial doctrine are those of Stephen Wermiel and Robert Nagel. Wermiel concludes in his study of the "post-Bork era of Supreme Court nominations" that "members of the Senate Judiciary Committee have learned to shape the constitutional dialogue in confirmation hearings to make clear to nominees that a willingness to profess belief in some threshold constitutional values is prerequisite for the job."⁴⁹ For Wermiel, the saliency of this post-Bork model is vividly illustrated by the Court's reaffirmation of both abortion rights in *Planned Parenthood v. Casey* and church-state separation in *Lee v. Weisman*.⁵⁰ In contrast to Wermiel's study of elected branch efforts to influence jurists before they decide a case, Robert Nagel examines what weight—if any—courts should give to elected government resistance to court decisions.⁵¹ Recognizing that "the use of state and local laws to help define our constitutional traditions is fully consistent with the constitutional structure,"⁵² Nagel sets out to understand whether there is some principle that explains why courts should not consider local resistance when deliberating on constitutional questions. Arguments rooted in the belief that courts should articulate enduring neutral principles and that adjudication should resolve disputes and not spur on continuing uncertainty, for Nagel, are unsatisfactory. For example, judicial efforts to stymie legislative opposition to *Roe*—by expanding abortion rights in the decade after *Roe*—undercut both stability and respect for the rule of law by "[making] the effective meaning of the right to privacy even more unacceptable to segments of the public."⁵³

Power Sharing Among the Branches. Descriptions of power sharing among the branches play a large role in many of the contributions. Peter Shane's explication of a "statutory constitution" is very much an account of how Congress and the courts work in tandem in the creation and validation of

46. See generally McGinnis, *supra* note 34.

47. Fisher, *supra* note 15, at 275.

48. *Id.* at 273.

49. Wermiel, *supra* note 32, at 121-22.

50. *Id.* at 122.

51. Robert F. Nagel, *Disagreement and Interpretation*, 56 LAW & CONTEMP. PROBS 11 (Autumn 1993).

52. *Id.* at 23-24.

53. *Id.* at 33.

statutory-based constitutional rights.⁵⁴ Kathy Abrams's examination of military androcentrism likewise calls for the courts and Congress to work together by filling in the gaps left by the other.⁵⁵ Louis Fisher's accounting of how the Court's legislative veto decision was effectively nullified by overwhelming political forces calls attention to a much different type of power sharing between the elected branches and the courts.⁵⁶ My case study on FCC-legislative-judicial relations calls attention to an intricate dance in which the FCC sought to advance its deregulatory agenda in the face of a hostile Congress by attempting to manipulate unmanipulable D.C. Circuit judges.⁵⁷

Two of the contributions provide normative models from which to understand the power sharing issue. John McGinnis argues in his piece on foreign affairs that "the power of constitutional interpretation, the fundamental authority in a constitutional republic, is not indivisible nor immovable, but may be disaggregated and so as to allot a portion to the branch that will gain the most utility from its exercise."⁵⁸ For McGinnis, executive control of war-making simply reflects the reality that this subject is much more central to the executive than to the judiciary or Congress. In contrast, the subject of individual rights is more central to the judiciary and the power of the purse is more central to the Congress. Geoffrey Miller also serves up a normative model of power sharing through his "unified theory" of the president's power of constitutional interpretation.⁵⁹ To start, Miller rejects the executive supremacy argument, noting that "complete executive autonomy would so seriously undermine the authority of the federal judiciary as an autonomous branch of government as to threaten the basic premises of the separation of powers."⁶⁰ Miller, instead, proposes a unified theory which incorporates considerations such as energy in government, faction-avoidance, liberty, and checks and balances. Unlike the executive autonomy model, Miller's unified theory is sensitive to the effect of binding court decisions, which may only be disobeyed "in extraordinary circumstances when the integrity of the nation is threatened"⁶¹ as well as the principle of liberty which "suggests that the president should be constrained to favor interpretations that protect individual liberties."⁶² Miller also advocates that the president should defer to settled judicial precedent and keep to a minimum his review of existing legislation. Unlike McGinnis who supports expansive presidential authority in areas critically important to the White House, Miller's unified theory, rather than

54. See generally Shane, *supra* note 27.

55. See generally Abrams, *supra* note 26.

56. See generally Fisher, *supra* note 15.

57. Devins, *supra* note 22, at part V.

58. McGinnis, *supra* note 34, at 294.

59. Geoffrey Miller, *The President's Power of Interpretation: Implications of a Unified Theory of Constitutional Law*, 56 LAW & CONTEMP. PROBS. 35 (Autumn 1993).

60. *Id.* at 41.

61. *Id.* at 37.

62. *Id.* at 51.

being tied to spheres of authority, places general limits on presidential constitutional interpretation.

* * *

The growing academic recognition of elected branch constitutional interpretation is well deserved. The articles contained in this symposium leave no doubt that constitutional decisionmaking is a dynamic process involving both elected government and the courts. Contributions on institutional actors suggest that every committee, subcommittee, department, agency, and office within government is involved in resolving constitutional disputes. Case studies likewise reveal the significance and perhaps dominance of elected branch constitutional interpretation. Although the case studies are far from a representational cross-section of government action, the pervasiveness of elected branch interpretation in each of these studies makes clear that political action is an indispensable feature of constitutional decisionmaking.

Whatever conclusions one reaches about the constitutional dialogues that take place between elected governments and the courts, the centrality of this dynamic process cannot be discounted. By considering a broad spectrum of institutional actors and case studies, it is hoped that this symposium will prove a useful tool in studying the political dynamics of constitutional law.