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Does Avoiding Constitutional Questions Promote Judicial Independence

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DOES AVOIDING CONSTITUTIONAL QUESTIONS PROMOTE JUDICIAL INDEPENDENCE?

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Courts are not alone in wielding the responsibility and power of constitutional interpretation. Congress and state legislatures, federal and state executive officers, and many others act to interpret the U.S. Constitution in their daily work, including police officers, public school officials, and local politicians. Our divided system of democratic governance affords an opportunity for dialogue among government officials and the electorate in a variety of forms as constitutional law evolves. Constitutional law should be formulated in an ongoing, long-term dialogue in which judges, legislators, and other constitutional actors participate actively in shaping our understanding of the Constitution's protections and limitations.[1]

Rhetoric about judicial activism abounds in modern political campaigns. Bar associations and judicial organizations regularly voice concern about the need to protect judges from encroachments on judicial independence. Judicial independence is threatened from some quarters, as particular judges are targeted for unpopular decisions with death threats, through email or media campaigns, or by calls for recall or impeachment proceedings. For example, great furor and attention was generated by decisions of Judge Harold Baer in New York for criminal rulings perceived as protecting defendants too extensively. Judge Alfred Goodwin in California was lambasted by public officials and others for authoring the opinion striking "under God" from the Pledge of Allegiance, based on the court's reading of Establishment Clause precedent. Judicial independence is threatened systemically as well, through failure to provide sufficient funding for

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[1] For further descriptions of constitutional dialogue, see sources cited in Lisa A. Kloppenberg, *Measured Constitutional Steps*, 71 IND. L.J. 297, 314-17 nn.98-115 (1996).

judicial operations, highly politicized federal judicial confirmation processes, and the increasing cost of judicial campaigns in many states. As both Democrats and Republicans work overtly to elect judges or gain confirmation for judges who share their views, when they charge judges who do not share their views with activism, they demonstrate that both politically "conservative" and "liberal" judges can be labeled activist.

One way in which many judges try to deflect political pressure from their courts, and thus promote judicial independence, is by resorting to avoidance techniques. The avoidance doctrine urges judges to avoid decision of "unnecessary" constitutional questions. It encompasses a number of tools, from justiciability barriers and abstention doctrines that bar courts from ruling on the merits of constitutional issues to minimalist approaches to constitutional decision-making if the merits of an issue are reached.[2] Sometimes constitutional rulings are merely delayed; sometimes they are completely avoided. Many judges and scholars have praised avoidance as a way to preserve judicial independence and promote deference to other constitutional decision-makers.[3] The avoidance doctrine is longstanding and has often been praised by the Rehnquist Court as a foundational principle of constitutional adjudication for federal courts. Many state courts employ similar presumptions about avoidance.

After canvassing briefly some of the costs of avoidance, which are too often overlooked, this essay questions some of the rationales proffered for avoiding decisions of controversial constitutional issues. When courts employ avoidance techniques, do they actually act in a less aggressive manner and thereby promote judicial independence? And, even if some avoidance techniques foster judicial independence in the short run, do they foster a vibrant long-term role for the judiciary as an independent interpreter of the Constitution?

I. JUSTIFICATIONS FOR AVOIDANCE

The justifications for avoidance can be grouped into a few categories, based on Justice Brandeis's famous *Ashwander* formulation of

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[2] *See generally* LISA A. KLOPPENBERG, PLAYING IT SAFE (2001).

[3] *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962) [hereinafter BICKEL, LEAST DANGEROUS BRANCH]; ALEXANDER M. BICKEL, THE MORALITY OF CONSENT (1975) [hereinafter BICKEL, MORALITY]; CASS R. SUNSTEIN, ONE CASE AT A TIME (1999); Hon. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992); Hon. Richard A. Posner, *Foreward: A Political Court*, 119 HARV. L. REV. 31 (2005).

1936.[4] Perhaps the most understandable and defensible justification is the proposition that federal courts should avoid unnecessary constitutional questions to promote federalism and separation of powers. Thus, to the extent Congress or a state is charged with authority in a particular substantive area, courts should carefully ensure the ability of these actors to interpret the Constitution in their work by not foreclosing options. Judicial review that invalidates another branches' constitutional work should be a last resort due to its purportedly "delicate" and "final" nature; similarly, states and other constitutional actors should be given the benefit of the doubt when possible and their actions repudiated only when absolutely necessary.[5]

While deference is an important and valid stance for courts in our multilayered democracy, it is not simple to apply. The precise dictates of federalism and separation of powers, for example, are not clear, making more difficult the judgment call about whether lawsaying by a court is "necessary." These are changing areas involving difficult constitutional and political issues as well as fairly vague and broad principles. In recent decades, these issues have emerged as major areas for power struggles between the federal and state governments, businesses, and individuals, with courts delineating the scope of these powers regularly and "mediating" these struggles. For example, the Rehnquist Court's judicial activism is most obvious in its many closely divided federalism rulings over the past fifteen years.[6] Since the War in Iraq, it is evident that President George W. Bush and his advisors share a broad view of separation of powers not shared by all judges or legislators. While avoiding constitutional issues to afford time for some of the political battles to play out or the crises to diminish may be attractive, it entails costs for parties who must spend excessive time and expense in securing protection for constitutional rights. Additionally, a court's invocation of an avoidance mechanism does not always lead to greater deference to other constitutional actors or advance constitutional dialogue.[7]

A second set of justifications for avoidance is even more troubling. These concerns center on the pressure placed on courts resulting from constitutional adjudication. They include a court's credibility and viability, and are directly linked to fears for judicial independence. The *Ashwander* formulation arose in part as a response to the activism

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[4] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346-48 (1936) (outlining several rules the Court developed for avoiding constitutional questions).

[5] The *Ashwander* justifications are explored more fully in Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1035-65 (1994).

[6] KLOPPENBERG, *supra* note 2, at ch. 7.

[7] *See* Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71 (1995).

of the conservative U.S. Supreme Court of the *Lochner* era. The fears of political reprisal and long-term credibility or viability of unelected Article III judges certainly animate the general avoidance doctrine, as captured so well in Alexander Bickel's work on the countermajoritarian difficulty and passive virtues.[8]

These concerns can be exaggerated. Courts have thrived during much of the last century, becoming increasingly important in constitutional adjudication, despite political attacks, funding battles, and other pressures. Courts in the United States, along with courts in other countries, have played a significant role in the development of constitutional law, sometimes in socially sensitive areas,[9] without much success by those who attempt to curb courts' authority through jurisdiction-stripping laws, budget restrictions, or other means (e.g., altering the size of the Supreme Court). Courts have made numerous decisions regarding federalism, separation of powers, criminal procedure, privacy rights, race and gender relations, sexual orientation, and religion over the past century without diminishing significantly in power or in public perception of credibility. Thus, having courts seen as active participants in constitutional dialogue, with robust judicial review and input on the most socially sensitive controversies of the day, does not clearly result in a less independent court system.

Even if fears regarding continued independence for the judiciary are more credible than assessed here and are actually capable of forcing changes on the courts, judges play an important constitutional role in checking the majoritarian impulses of other branches or governments or politicians, who are under greater pressure than judges to respond to the crisis du jour and majoritarian sentiments. Litigants must sometimes bring issues to courts precisely because legislative or executive officials have ducked a controversy for fear of retaliation at the polls. This role is particularly apt for those judges with Article III protection, which does not include a good portion of the federal judicial officers today, given the growth of non-life-tenured federal judges in recent decades.[10] State judges also are often called upon to decide controversial issues because other political actors do not want to take the heat or because someone challenges state or local government action (including direct-democracy measures in half the states), that are not crafted carefully or implemented with sufficient regard to

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[8] BICKEL, LEAST DANGEROUS BRANCH, *supra* note 3; BICKEL, MORALITY, *supra* note 3.

[9] *See* JUDGES IN CONTEMPORARY DEMOCRACY (Robert Badinter & Hon. Stephen Breyer, eds., 2004) (examining the judiciary's role in supervision of the political process).

[10] For more details on the growth of federal judicial officers and the controversy surrounding the appropriate number of life-tenured judges, see Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 984-92 (2000).

constitutional concerns. Although they do not have as much protection as federal judges, state judges also swear to uphold the law and are expected to act impartially to advance the Constitution and applicable federal and state laws. One of the most important functions of a judge is to ensure that an individual or entity's constitutional rights are protected against governmental overreaching.

Finally, avoidance techniques are justified by courts sometimes because of the "paramount importance of constitutional adjudication in our system."[11] This might be a fear of foreclosing other constitutional actors or a fear of issuing an unpopular decision that might impact the court's viability. Prominent judges and scholars have acknowledged the concerns or pressures on the federal courts' role in controversies such as abortion issues or desegregation.[12] The rights protection function of the courts, particularly federal courts in our democratic system, as well as the "paramount importance" of constitutional adjudication should lead to *less avoidance* of constitutional issues by courts, not more.

Moreover, some of the *Ashwander* justifications contain faulty assumptions about the delicacy and finality of judicial review. Fears that court rulings will foreclose future legislative action are often excessive, although it is admittedly hard to gauge the impact of constitutional rulings and account thoroughly for all the pressure points that cause constitutional law to change, even after the U.S. Supreme Court has issued an authoritative decision in the area.[13] Judicial review should be viewed through a long-term lens, in which constitutional adjudication and responsive debate, including constitutional interpretation by the legislature, implementation by the executive, and changes made by future courts, develop constitutional understandings over time.

As a result of concerns about deference, foreclosure, and threats to judicial independence, the U.S. Supreme Court has employed avoidance techniques selectively over the past three decades and often in categories of cases involving controversial issues or "sensitive area[s]

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[11] Rescue Army v. Mun. Ct. of City of L.A., 331 U.S. 549, 571 (1947).

[12] *See, e.g.*, Hon. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985); Hon. Stephen Breyer, *Judicial Review: A Practicing Judge's Perspective*, 78 TEX. L. REV. 761 (2000); Posner, *supra* note 3; BICKEL, LEAST DANGEROUS BRANCH, *supra* note 3, at 111-98; CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 147 (1993); GERALD N. ROSENBERG, THE HOLLOW HOPE (1991).

[13] *See, e.g.*, NEAL DEVINS & LOUIS FISHER, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW (3d ed. 2001); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993). HON. ROBERT A. KATZMANN, COURTS AND CONGRESS (1997); Hon. Robert A. Katzmann & Stephanie M. Herseth, *An Experiment in Statutory Communication Between Courts and Congress: A Progress Report*, 85 GEO. L.J. 2189 (1997).

of social policy."[14] For example, the Court has used avoidance techniques frequently in litigation involving dissident speech (notably the Cold War cases), civil rights claims and issues of equity for women, racial minorities, gays, lesbians, and cases involving the protection of religious minorities.[15] Sometimes it is overt—the justices write about political pressure on the courts; more often, the political controversy goes unstated. The decision to avoid a constitutional issue is *itself* a decision, and it is impossible to separate our analysis of the procedural tool completely from our view of the merits of the underlying constitutional questions. As judges determine whether it is "necessary" to address a constitutional issue, their views of the merits are intertwined frequently with that decision. Political pressure on courts may influence when courts issue "minimalist" rulings, affording less clarity and guidance to other constitutional actors. For example, in the Ten Commandments cases of 2005,[16] Justice Breyer found two fact situations distinguishable and the Court upheld one court display of the Commandments, but not another. Judge Posner praised this minimalist technique precisely because

> [c]ompromise is the essence of democratic politics and hence a sensible approach to dealing with indeterminate legal questions charged with political passion—this is Bickelian prudence minus Bickelian teleology. . . . [T]o give a complete victory to the secular side of the debate (or for that matter to the religious side) could be thought at once arrogant, disrespectful, and needlesslesly inflammatory.[17]

Again, we come to the question of necessity. When is it necessary for the U.S. Supreme Court to decide an important social controversy with constitutional implications at its heart?

The costs of avoiding constitutional questions are borne too often by the poor and marginalized in our society, those most in need of help securing protections for their constitutional rights and civil liberties. In contrast, in its federalism rulings of recent decides, the Court has not been hesitant to address other controversial constitutional issues, holding against victims of domestic violence, state workers who claimed discrimination and those claiming intellectual property

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[14] The designation comes from *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 498 (1941).

[15] For multiple examples of the Court's avoidance in recent decades of socially sensitive cases, see generally KLOPPENBERG, *supra* note 2.

[16] McCreary County v. ACLU of Ky., 125 S. Ct. 2722 (2005); Van Orden v. Perry, 125 S. Ct. 2854 (2005).

[17] Posner, *supra* note 3, at 102.

rights. While the Rehnquist Court has not created a vibrant body of equal protection law for those on the margins of our society and still subject to serious discrimination, it did use equal protection to intervene in the *Bush v. Gore*[18] dispute, despite a constitutional role set forth in the Constitution for Congress in determining disputed elections. Nevertheless, Congress and the public acquiesced, and some polling indicates that the Court's credibility was not marred significantly by this activism.[19]

While it is impossible to delineate every choice by the Rehnquist Court to invoke avoidance, some interesting patterns are apparent and the Court's avoidance practices deserve further attention

II. THE AVOIDANCE CANON

This brief essay will examine only one aspect of avoidance, the use of the canon of statutory construction to avoid "unnecessary" constitutional decisions and centering on one example, rather than a group of cases. The canon is a tool used to interpret statutes narrowly when they raise "serious constitutional questions."[20] The canon is premised in part on deference to the legislature's role in constitutional interpretation. Rather than invalidate troubling legislation, a court "merely" revises the offending aspect of legislation. In theory, this affords legislatures another opportunity to consider the constitutional issues posed and strike a different balance between furthering its primary legislative aims and invading constitutionally protected areas.

In practice, the avoidance canon is sometimes deployed with considerable aggressiveness. Many scholars provide examples of the contortions that can result from using this purportedly deferential canon.[21] Some courts have used it to create shadow or phantom constitutional norms rather than enforce clear, existing precedent at the

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[18] 531 U.S. 98 (2000).

[19] Lanny Sommese, *Who Can Check the President?*, N.Y. TIMES, Jan. 8, 2006, § 6 (Magazine), at 56-57.

[20] *See* 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 (1996) (examining several groups of First Amendment cases, from the Cold War era to the 1990s).

[21] *See, e.g.*, William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 PA. L. REV. 1007 (1989); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992); Phillip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397 (2005); Lawrence C. Marshall, *Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation*, 66 CHI-KENT L. REV. 481 (1990); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990); Schauer, *supra* note 7.

time of the legislative enactment.[22] Of course, a court's view of the scope of constitutional protection will sometimes differ from the legislature's reading of the Constitution. Where there is room for debate—as there often is in constitutional interpretation—the court can use the canon to enforce its view of the constitutional concerns, developing constitutional law through dicta or on statutory interpretation grounds without clear demarcation of constitutional boundaries. The Supreme Court has sometimes used the canon to develop phantom norms, and then, in later cases, chide other governmental actors for not avoiding a constitutional "danger zone so clearly marked" when the danger was only mentioned at a sub-constitutional level; that is, as a *potential* constitutional problem, in its earlier precedent.[23] That approach is not significantly different from direct constitutional lawsaying in the first instance, at least in terms of deference to other constitutional actors and the linked argument about promoting judicial independence.

In some circumstances, courts have used the canon to rewrite statutes to contravene fairly clear legislative intent, undercutting the law significantly without invalidating it. Courts essentially "remand" a controversial law to the legislature. The legislature may not have the time or political will to reconsider the issue. Thus, while the canon is advanced as a rich mechanism for dialogue between courts and legislature on constitutional issues, it is often used as a way of deciding constitutional issues on the merits without a full airing of the issue, without sufficient reasoned elaboration, and without purporting to rule on the merits at all.

In 1994, the Court applied the canon to uphold a congressional act aimed at protecting children from exploitation in pornographic materials.[24] The Court read a scienter requirement into the law to avoid perceived constitutional problems, requiring that the government show that a defendant knew he was using a child under a specific age in the pornographic material.[25] Justices Thomas and Scalia dissented, finding those constitutional doubts baseless, and accusing the majority of rewriting the statute and eviscerating legislative intent.[26] They emphasized that the Court's precedent did not clearly demarcate the danger zone.

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[22] *See* Motomura, *supra* note 21; Eskridge & Frickey, *supra* note 21.
[23] *See, e.g.*, Yates v. United States, 354 U.S. 298, 319 (1957).
[24] United States v. X-Citement Video, 513 U.S. 64 (1994).
[25] *Id.* at 69.
[26] *Id.* at 80-81 (Scalia, J., dissenting).

The dissenters argued that it would be better to invalidate the act entirely, affording Congress more leeway to rewrite the law.[27] The majority might have been attempting to avoid some political heat by upholding the law, which was aimed at protecting children from exploitation. But it did make a decision about the content of constitutional law, at least at a quasi-constitutional level, and that interpretation would have a real impact on prosecution of pornography purveyors. The majority's interpretation conflicted clearly with congressional intent, examining the text, history, and context of the enactment. Thus, the Court's use of the canon was hardly deferential. Did avoiding the constitutional question through statutory construction advance judicial independence? If so, it seems to do so by elevating form over substance, perhaps to avoid media and public scrutiny of the Court's role in making it tougher to prosecute those who exploit children. If the outcome is consistent with your reading of the Constitution, you might prefer that the Court memorialize that understanding with a definitive constitutional ruling. If you disagree that the scienter requirement should apply when children under sixteen are used in pornography, the Court's quasi-constitutional ruling forecloses Congress in much the same way a constitutional ruling would limit congressional options.

How troubling is the use of the canon in contrast to other avoidance techniques? When the U.S. Supreme Court avoids constitutional questions through the use of justiciability or abstention doctrines, as it did in the Pledge of Allegiance case recently,[28] it refuses to deal with the merits of the constitutional issues implicated, at least for the present moment. In contrast, the Court's use of the canon can provide some guidance on the justices' leaning on a given issue. If it is a lower federal court or state court, the ruling has less precedential force when other judges or panels consider the same issue. Arguably, this leaves more room for dialogue on issues that the judges perceive raise constitutional questions, analogous to the idea that states might sometimes function as laboratories for democracy. Judge Posner has characterized Professor Bickel's avoidance project as promoting a "coercive" kind of dialogue.[29] "It would be a Bickelian Court's hope that the legislators would have their eyes opened by the Court's tutorial or that reenactment would founder on the intertial difficulty of enacting legislation."[30] In terms of promoting dialogue, the canon affords less clarity as the Court shapes constitutional law. The Court

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[27] *Id.* at 85-87.

[28] Elk Grove Unified School Dist. v. Newdow, 524 U.S. 1 (2004).

[29] Posner, *supra* note 3, at 82.

[30] *Id.* at 82-83.

could step away from the ruling, or alter the boundaries of the "danger zone" identified in future cases. Professor Murchison has said the canon advances a rather "muffled" and "tentative" dialogue, with a "blend of indirection, impatience, pause and reply," but nevertheless concludes that it is important and useful.[31]

Courts will never reject avoidance techniques completely; judges need some flexibility in adjudication. The Rehnquist Court suggests that federal courts should pause at the outset of a ruling and ask whether addressing a constitutional question is truly necessary. Instead, courts should reverse that presumption, considering carefully the costs of avoidance to litigants and others before avoiding decision.[32] They should also examine whether the rationales for avoidance are promoted by deploying the canon. Would deference and judicial independence truly be advanced? Direct repudiation by a court, if it perceives clear constitutional problems with legislation or executive practice, is a better way to protect constitutional rights.

It need not foreclose all dialogue. The level of foreclosure depends, of course, on the level of court. The impact of one trial judge's ruling in Ohio is less than the impact of the Supreme Court invalidating congressional legislation, at least in terms of finality. Yet it is also important for federal and state appellate courts not to avoid controversial and important constitutional issues reflexively. Again, claims of finality are often overstated. Even if the Supreme Court does void a federal enactment, the President can use his bully pulpit to foster public opinion and can nominate justices and judges more deferential to the executive or congressional readings of the Constitution. Congress can pursue other avenues to promote its legislative aims, bringing public attention to bear through hearings, speeches by members, etc. States are already responding vigorously, for example, to the Supreme Court's recent eminent domain ruling.[33]

In many instances, there appears to be a great gulf between the justifications for avoidance (e.g., deference to other constitutional actors) and the actual effects of avoidance and judicial review. Is avoidance truly promoting judicial independence? It is difficult to see how the Court's use of the canon in the child pornography case, that is using the avoidance canon to rule at a sub-constitutional level rather than engage in direct lawsaying, significantly enhances judicial independence. Is it necessary to preserve judicial independence? Justice Breyer, mindful of the primacy of legislative decision-making, dis-

[31] Brian C. Murchison, *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases*, 30 GA. L. REV. 85, 169 (1995).

[32] For more details on this proposed analysis, see Kloppenberg, *supra* note 20, at 90-93.

[33] Kelo v. City of New London, 125 S. Ct. 2655 (2005).

cussed the need for an independent judiciary recently. He asserted that emerging democratic societies see a need for an independent judiciary to help secure basic liberties.

> [An] independent judiciary may protect them by helping gradually to develop among citizens and legislators liberty-protecting habits based in part upon their expectation that liberty-infringing laws will turn out not to be laws. And such protection might seem particularly necessary in a new democracy or one with a highly diverse citizenry or sizeable minority groups. That independent judiciary may also protect through the kind of force . . . that a court can bring to bear when, faced with a law that *clearly* violates a constitutional provision, that court says "no."[34]

In many ways, his advice is sound for preserving judicial independence in our democracy as well.

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[34] Breyer, *supra* note 12, at 774.