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The Inevitability (and Desirability) of Avoidance: A Response to Dean Kloppenberg

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THE INEVITABILITY (AND DESIRABILITY?) OF AVOIDANCE: A RESPONSE TO DEAN KLOPPENBERG

Melvyn R. Durchslag[†]

INTRODUCTION

At the point in my Constitutional Law course when we incant the watchword of our judicial faith—"[i]t is emphatically the province and duty of the judicial department to say what the law is"[1]—I tell my students that, in one way or another, we will spend the balance of the semester trying to figure out what that statement means. More often than not they look at me skeptically or grumble under their breath, "What? Is this guy nuts?" I may well be. But much of what law professors and judges do in constitutional law is debate that very question. Indeed, the central question of constitutional law is the so-called who decides question, or as it more directly relates to the question of avoidance, "who decides what questions, and when and how do they decide them?"

Dean Kloppenberg, in her paper today,[2] and in previous writings,[3] apparently takes Chief Justice Marshall at his word, particularly the *duty* part of his admonition. In doing so, she takes issue with Justice Brandeis's famous concurrence in *Ashwander v. Tennessee Valley Authority*[4] questioning the premises upon which he advocated avoidance of constitutional questions and offering an alternative position: "The rights protection function of the courts, particularly federal courts in our democratic system, as well as the 'paramount impor-

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† Professor of Law, Case Western Reserve University. I thank Bob Strassfeld for reading an earlier draft of this paper and saving me from some embarrassing errors. Kimberley Spagna did an admirable job of filling in the research gaps.

1 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

2 Lisa A. Kloppenberg, *Does Avoiding Constitutional Questions Promote Judicial Independence?* 56 CASE W. RES. L. REV. 1031 (2006).

3 LISA A. KLOPPENBERG, PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF THE LAW (2001).

4 297 U.S. 288, 341-56 (1936) (Brandeis, J., concurring).

tance' of constitutional adjudication should lead to *less avoidance* of constitutional issues by the courts, not more."[5] "At least," she argues, "there ought to be a presumption against avoidance rather than the other way around."[6]

On a number of points Dean Kloppenberg and I agree completely. First, it is troublesome when courts abandon or defer to popularly elected branches of government the protection of individual rights, certainly when those rights are asserted by minorities and those who hold unpopular views.[7] Moreover, I respect her result-neutral approach. It matters not to Dean Kloppenberg whether a particular Court is likely to come out on the "right" side of a constitutional dispute. What is important is that the Court perform the constitutional role that *Marbury* staked out for it—to say what the law is.

Second, Dean Kloppenberg is certainly correct that some of the oft-cited benefits of avoidance have proven to be illusory.[8] Narrow construction of syndicalism statutes during the early and mid-1950s did nothing to ease tensions between the Court and Congress. Quite the contrary.[9] Nor did it lead to any sensible constitutional conversation either about the limits of political dissent in Congress, between Congress and the Courts, or more generally in the polity as a whole. The same can be said of the Court's far more recent construction (if one may call it that) of the jurisdictional statute enacted by Congress to resolve the *Schiavo* case,[10] or Justice Breyer's valiant rescue of the federal mandatory sentencing statute in *United States v. Booker*.[11] Moreover, the "judicious" use of standing, mootness, and justiciability to avoid "substantive" constitutional rulings has made Establishment Clause doctrine look like a model of clarity and predictability.[12]

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[5] Kloppenberg, *supra* note 2, at 1035.

[6] KLOPPENBERG, *supra* note 3, at 277.

[7] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (arguing that intrusive judicial review ought to be limited to those situations in which minority interests can not be protected by the normal workings of pluralistic politics).

[8] *See* 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); Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); *see also* Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951 (2005).

[9] Frickey, *supra* note 8, at 426-32 (noting how a defiant Congress passed numerous bills to override decisions of the Warren Court).

[10] *See* Bush v. Schiavo, 885 So. 2d 321 (Fla. 2004), *cert. denied*, 125 S. Ct. 1086 (2005); Schindler v. Schiavo, 916 So. 2d 814 (Fla. Dist. Ct. App.), *application for stay of enforcement denied*, 125 S. Ct. 1622 (2005); Schiavo *ex. rel.* Schindler v. Schiavo, 403 F.3d 1289 (11th Cir.), *application for stay of enforcement denied*, 125 S. Ct. 1722 (2005).

[11] 543 U.S. 220, 243-71 (2005) (Breyer, J., delivering Court's opinion, in part).

[12] For a better understanding of the perils of using the Establishment Clause as a model of clarity and predictability, see, for example, B. Jessie Hill, *Putting Religious Symbolism in Con-*

The "passive virtues" may be a legal realist teacher's dream, but the doctrine is an incoherent muddle.[13]

Third, a device, designed, in part at least, to express judicial humility and fallibility ends up being the ultimate tool of judicial discretion, and, (although I hate the term), judicial activism.[14] Finally, there is the matter of statutory interpretation to avoid constitutional issues. As Dean Kloppenberg argues,[15] avoidance strategies, certainly those involving restrictive statutory interpretation, are punctuated, either explicitly or by inference, with constitutional dictum and/or assumptions about how the constitutional issues might have been decided had the Court not avoided them, or what the Court *might* have to say about this or a similar statute if Congress does not clean up its act (so to speak).[16] And while Professor Frickey might argue that this is all part of what constitutional adjudication ought to be about,[17] one cannot help being both skeptical and troubled.

Does that mean I agree with Dean Kloppenberg that avoidance techniques ought to be (pardon the intentional redundancy) avoided, if not at all costs, at least in a presumptive way? No. Preliminarily, I offer three reasons. First, as the title to this paper suggests, judicial avoidance is an inevitable by-product of a system that separates the judiciary from the political branches—there is simply nothing that we can do about it. Second, while avoidance often does little to advance the cause of individual liberties, at least it can stave off an erosion of individual liberties when structural norms restrain the Court's ability to recognize or expand individual rights. Finally, as others have argued, avoidance can contribute to reducing constitutional confusion in those cases in which constitutional consensus is out of reach.[18] Each of these propositions will be considered separately. My purpose here is not to extensively analyze each of these assertions. Rather I simply want to raise some questions that have troubled me about the position that avoidance costs us more than we receive back in benefits.

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text: A Linguistic Critique of the Endorsement Test, 104 MICH. L. REV. 491 (2005).

[13] *See, e.g.*, KLOPPENBERG, *supra* note 3, at 39-66 (discussing standing to enforce federal environmental statutes).

[14] Gunther, *supra* note 8, at 25 ("Bickel's 'virtues' are . . . a virulent variety of free-wheeling interventionism.").

[15] Kloppenberg, *supra* note 2, at 1037-41.

[16] *Id.*; *see also* Gonzales v. Oregon, 126 S. Ct. 904, 939-40 (2006) (Thomas, J., dissenting) (bemoaning the majority's federalism dictum and its inconsistency with *Gonzales v. Raich*, 125 S. Ct. 2195 (2005)).

[17] Frickey, *supra* note 8, at 402 ("[T]he avoidance canon . . . is a tool of constitutional law.").

[18] *See* CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 4, 263 (1999).

Before doing so, however, a word about the complexity of the subject matter. Avoidance techniques take many forms:[19] construing statutes to avoid constitutional rulings if at all reasonable to do so;[20] invoking both constitutional and prudential "rules" of standing, justiciability, and ripeness/mootness to avoid "substantive" constitutional rulings; confining constitutional rulings to the peculiar facts of the case before it rather than making broad constitutional pronouncements; remanding a case to the lower courts for further development of the facts rather than deciding the case on the record before the Court; distinguishing sometimes indistinguishable precedent to avoid broader rulings that would overrule those precedents; using overbreadth and vagueness doctrines in first amendment cases to avoid more far-reaching theories; abstaining rather than deciding certain questions; and most obviously, using discretionary review to allow a constitutional issue to "percolate" in the lower courts or to avoid the difficulties attendant to a lack of consensus.

To explore each of these is well beyond the limited scope of this response. Suffice it to say that each avoidance technique presents its own problems and has its own benefits. It is consequently difficult, indeed inaccurate, to lump them together in an effort either to condemn or to praise them. With that in mind, the next section will briefly discuss the inevitability of avoidance devices.

I.

Avoidance did not begin with Justice Brandeis's opinion in *Aswander* but has its origins far earlier than that.[21] The reason is sim-

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[19] The various avoidance techniques that follow are discussed in a variety of sources. *See, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1986); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW §§ 2.4-2.8, 11.2.2 (2d ed. 2002); KLOPPENBERG, *supra* note 3; SUNSTEIN, *supra* note 18; Gunther, *supra* note 8.

[20] Addressing the appropriate remedy for a statute requiring that a minor notify her parents prior to seeking an abortion, the Court in *Ayotte v. Planned Parenthood of Northern New England*, 126 S. Ct. 961 (2006) outlined "[t]hree interrelated principles": (1) "we try not to nullify more of a legislature's work than is necessary"; (2) "*mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from 'rewrit[ing] state law to conform it to constitutional requirements*'"; and (3) "a court cannot 'use its remedial power to circumvent the intent of the legislature.'" *Id.* at 967-68 (emphasis added). Of course, there is a wide margin between interpreting ambiguous statutory language and "rewriting" a statute. Like beauty, the difference is often in the eyes of the beholder.

[21] *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 441 (1821) ("[I]t will be unnecessary, and consequently improper, to pursue any inquiries, which would then be merely speculative, respecting the power of Congress in the case."); Muskrat v. United States, 219 U.S. 346, 356 (1911) ("[T]his court has consistently declined to exercise any powers other than those which are strictly judicial in their nature."); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 354-55 (1936) (discussing previous cases that recognize the importance of judicial avoidance into the

ple—the so-called majoritarian difficulty. *Marbury* carved out for the Court the constitutional responsibility of saying "what the law is." But it was not without recognition that some matters, while they may raise constitutional concerns, are beyond the Court's purview, in that case "discretionary" acts of the executive.[22] Sixteen years after *Marbury*, in *McCulloch v. Maryland*,[23] Chief Justice Marshall recognized that the Court's power to assess the constitutionality of congressional legislation had its limits, despite the broad language of *Marbury*: "to undertake here to inquire into the degree of its [referring to the means Congress adopts to achieve its ends] necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a *power*."[24]

The point is not to suggest that Marshall's recognition of certain matters of executive and legislative discretion as being beyond the Court's power to adjudicate were exercises in avoidance. Far from it. It is to suggest, however, that the Court, even in its more hegemonic moments, understood that its decisions had to account for the powers and prerogatives of the other branches of government. And that is precisely what avoidance, at its most fundamental dimension, purports to achieve. As Professor Frickey argues, "the avoidance canon is not so much a maxim of statutory interpretation as it is a tool of constitutional law."[25] Dean Kloppenberg appears to agree: "the Court predicates its avoidance doctrine on the separation of powers principle (respecting the power of other federal branches); federalism concerns (respecting the powers of the states); . . . [and] the final and delicate nature of judicial review . . . ."[26] These are constitutional, not prudential, concerns. They recognize the limits of judicial power, not the limits of judicial discretion.

I am not arguing that if the Court were to abandon using avoidance techniques, the result would be a runaway Court, stretching or breaking the outer limits of its constitutional authority. Nevertheless, when the Court and Congress (to say nothing of the executive) are structured to share law-making authority, how else, other than through some kind of what is broadly defined as avoidance, is a court to

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sphere of legislative power).

[22] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 169-70 (1803).

[23] 17 U.S. (4 Wheat.) 316 (1819).

[24] *Id.* at 423 (emphasis added).

[25] Frickey, *supra* note 8, at 402.

[26] KLOPPENBERG, *supra* note 3, at 3.

"function in the real world?"[27] Dean Kloppenberg would undoubtedly answer—"by performing the role the Constitution gives it—interpreting the constitution in a principled way rather than avoiding constitutional questions in a way that only leads to confusion, constitutional dictum, inconsistency, and a host of other problems." I am skeptical. Even if it is correct that we make too much of the downsides of constitutional confrontation between the Court and Congress,[28] and, indeed, even if we may at times be better off with clarity of constitutional rules rather than the ambiguity that avoidance sometimes produces,[29] I doubt these arguments will, can, or maybe should trump inherent worries about the limits of the Court's role in an otherwise "democratic" polity.

In short, all of the cries for abandonment, presumptive abandonment, or curtailment of the use of avoidance is likely to be for naught. We are stuck with it—in one form or another, avoidance will be part of our jurisprudential future as it has been part of our past, nearly from the inception of the Republic. Maybe the best we can hope for is that avoidance be used more selectively and when used, not abused.

II.

No branch of government functions without recognition of the others.[30] Congress rarely enacts legislation that it knows will be vetoed by the executive, certainly without assurance of an override. And the executive rarely proposes legislation that it knows will be "dead on arrival," except maybe as a negotiation strategy. Nor will the executive ordinarily veto legislation knowing it will suffer a certain override by Congress.[31] Rather, Congress will ordinarily tailor its legislation to avoid executive objections, and the executive will draft legislation to anticipate congressional complaints. Things do not change when the judiciary is added to the equation. Except when scoring political points, Congress ordinarily attempts to craft its laws

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[27] Frickey, *supra* note 8, at 443; *see also* Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreward: The Passive Virtues*, 75 HARV. L. REV. 40, 50 (1961–1962) ("The Court exists in the Lincolnian tension between principle and expediency.").

[28] Kloppenberg, *supra* note 2, at 1034.

[29] For further discussion of the balance between clarity of constitutional rules and the ambiguity of avoidance, see SUNSTEIN, *supra* note 18, at 56-57; Siegel, *supra* note 8, at 2006.

[30] Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 311-13 (2005) (reviewing positive scholarship describing the "separation of powers game").

[31] When the bill to prohibit the United States from engaging in torture was first introduced in the United States Senate (National Defense Authorization Act, S. 1042, 109th Cong. (2005)), the president vehemently opposed it. But when it became clear that it would pass both houses of Congress with veto proof majorities, he signed it, albeit accompanied by a "signing statement."

to meet anticipated judicial concerns.[32] And even in these days of the unitary executive, it is rare that executive action is taken without some reference to the constitutional parameters established by the Supreme Court.[33]

The Court tends to play by the same rules. When it decides cases, the Court is well aware of the institutional and structural impacts of its rulings. I am not referring here to the Court's looking over its collective shoulder to measure congressional, executive, or popular reaction, though studies would suggest that more of that goes on than many, at least law professors, care to admit.[34] Rather, I am referring to the Court's interpretation of individual rights to account for values of constitutional federalism and separation of powers.[35] It is well established that individual rights have, on occasion, been given a narrow interpretation to account for federalism values.[36] Most recently, in *Johnson v. California*,[37] Justice Thomas, joined by Justice Scalia, refused to recognize as race discrimination the California Department of Correction's unwritten policy of temporarily separating newly arrived prisoners on the basis of race for a period of sixty days. Rather, Thomas said, this was a case of state prison administration, which required the Court to defer to the discretion of state corrections officials.[38] Even Justice O'Connor's majority

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[32] Two examples will suffice. In *Reno v. ACLU*, 521 U.S. 844 (1997), the Court invalidated several sections of the Communications Decency Act of 1996. Congress then enacted the Child Online Protection Act (COPA), 47 U.S.C. § 231 (1998), in an attempt to cure the defects noted by the Court in *Reno*. It did not work—in *Ashcroft v. ACLU*, 124 S. Ct. 2783 (2004), the Court upheld a preliminary injunction against enforcement of COPA. The other example is Congress's rewriting of 18 U.S.C. § 922(q) to add a "jurisdictional element" that the Court in *United States v. Lopez*, 514 U.S. 549 (1995), found lacking.

[33] In defending his warrantless interception of certain international telephone conversations, President Bush cited to Supreme Court authority that, in his judgment, gave him the legal authority to do what he did. President George W. Bush, Landon Lecture at Kan. State Univ. (Jan. 23, 2006) (transcript available at http://www.washingtonpost.com/wp-dyn/content/article/2006/01/23/AR2006012300931_pf.html).

[34] Friedman, *supra* note 30, at 320-29 (discussing the role public opinion may play in the decision-making of the Supreme Court).

[35] Barry Friedman argues that restraints on the Court's constitutional decision-making are not by any means limited to the formalism of separation of powers and federalism. Congress's power to alter the number of judges sitting on a court, to impeach federal judges, to strip a court of its jurisdiction, and to starve the judiciary through its control of the budget invariably have an impact on a court's "independence." The same can be said of the executive's power to enforce (or not) judicial orders, to say nothing of the president's bully pulpit. Friedman, *supra* note 30, at 313-16.

[36] *See, e.g.*, Melvyn R. Durchslag, *Federalism and Constitutional Liberties: Varying the Remedy To Save the Right*, 54 N.Y.U. L. REV. 723 (1979); Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 912 (1987) ("Constitutional law is often an uneasy mixture of substantive theory and institutional constraint. The existence of institutional limits . . . forces the courts to limit the scope of substantive constraints on government action.").

[37] 125 S. Ct. 1141 (2005).

[38] *Id.* at 1157-71 (Thomas, J., dissenting).

opinion, over Justice Stevens's objections,[39] did not hold that the California policy was unconstitutional race discrimination.[40] Instead the case was remanded to the district court to afford the state the opportunity to demonstrate that it had a compelling interest in the racial separation policy and that no less drastic means were available to implement that interest.

To further illustrate my point, I will mention two additional cases, one involving separation of powers and the other federalism. Separation of powers concerns, like federalism, have had an impact on the scope of individual liberties. The First Amendment is replete with cases in which respect for the prerogatives of the political branches have trumped free speech assertions, ranging from the respect for military regulations regarding the headgear its personnel are permitted to wear[41] to the deference shown the Park Service regarding the use of national parks for first amendment activity[42] to respecting Congress' judgment about the corrosive effect of campaign money on the democratic process.[43]

Perhaps the crowning example of separation of powers limiting individual liberties was *Koramatsu v. United States*[44] in which the Court, despite its incantations of how abhorrent racial classifications were,[45] essentially deferred to the judgment of the military governor of the Western Defense Command that security concerns warranted removal of all Japanese, aliens and citizens alike, from their homes to inland "detention centers."

Now, *Koramatsu* was decided sixty-one years ago, ten years before *Brown v. Board of Education.*[46] We have come along way since then. Coupled with all of the *mea culpas* that occurred since *Koramatsu*,[47] it is tempting to say that such a result would never reoccur today. If the Court would simply enforce the constitutional norm articulated in *Brown* and its progeny, avoidance by deference in cases like this would be a thing of the past. Not so fast. The late Chief Justice was not confident that the same result would not obtain if similar circumstances arose today.[48] And given the dissenting opinion in

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[39] *Id.* at 1153-57 (Stevens, J., dissenting).

[40] *Id.* at 1152.

[41] Goldman v. Weinberger, 475 U.S. 503 (1986).

[42] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1983).

[43] McConnell v. Federal Election Comm'n, 540 U.S. 93 (2003).

[44] 323 U.S. 214 (1944).

[45] *Id.* at 240.

[46] 347 U.S. 483 (1954).

[47] The culmination of this country's collective guilt was a statute that compensated those who were incarcerated (and/or their families) in the detention centers. 50 U.S.C. app. § 1989 (1988).

[48] WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 218-25 (1998).

Johnson, and Justice Thomas's dissent in *Hamdi v. Rumsfeld*,[49] it is likely that Chief Justice Rehnquist has two adherents.

Was there an alternative? Justice Jackson thought so. In a dissenting opinion that was avoidance writ large, Jackson, always the realist, argued for no decision at all: "the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that [is] wholly delusive."[50] Put in a more modern setting, the plurality's decision on the process due Mr. Hamdi and his fellow prisoners accounted for the president's extensive and largely indefinable war powers,[51] just as the process due a prisoner who is transferred to a "super-max" facility accounts for the fact that federal courts are not equipped to micromanage state and federal prisons.[52]

In one sense, *Koramatsu* proves one of Dean Kloppenberg's points, not mine. If one of the benefits of avoidance is to promote democratic values by engaging a conversation between Congress and the courts (and in the polity generally) regarding constitutional values,[53] certainly that conversation is prompted more by the contrasting opinions of Justices Black and Murphy than by Justice Jackson's avoidance dissent. On the other hand, was the cause of racial equality, or individual liberty more generally, enhanced or diminished by the substantive interpretation of the equal protection clause in *Kormatsu* and the later *mea culpas* (which I assume count as part of the constitutional dialogue)? I do not know the answer. Nor do I think that the answer is even knowable. But in light of Chief Justice Rehnquist's opinions, I cannot lightly dismiss Justice Jackson's observations.

The other example looks at the same problem but from the perspective of federalism. The avoidance technique was to deny standing, and the case was the much maligned *City of Los Angeles v. Lyons*.[54] In *Lyons*, the Court held that the plaintiff lacked standing to obtain an injunction against the use of choke holds by the Los Angeles police department because he could not demonstrate that *he* was in danger of being subject to choke holds *in the future*. He could

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[49] 124 S. Ct. 2633, 2674-78 (2004) (Thomas, J., dissenting). For an extended discussion of *Hamdi* and the use of avoidance, see Siegel, *supra* note 8, at 1997-2000.

[50] 323 U.S. 214, 248 (1944).

[51] 124 S. Ct. 2633, 2646-48 (2004).

[52] *See* Wilkinson v. Austin, 125 S. Ct. 2384 (2005).

[53] *See* KLOPPENBERG, *supra* note 3, at 274; SUNSTEIN, *supra* note 18. If, however, congressional reaction to the *Schiavo* and *Booker* cases is any gauge, the extrajudicial constitutional debate that law and political science professors so yearn for may well be little more than a collective dream.

[54] 461 U.S. 95 (1983).

still sue for damages, although that claim also might not have produced a clear ruling on the constitutionality of using choke holds because of qualified immunity.[55] So the standing ruling avoided the question of whether the policy of using choke holds when an officer's life was not threatened constituted a substantive due process violation, as the district and Ninth Circuit courts had held.[56]

The impact of *Lyons* on access to the federal courts to challenge police excesses is not to be underestimated.[57] And in terms of where my sympathies lie, I would have liked the Supreme Court to have affirmed the Court of Appeals and said very clearly that the Due Process Clause of the Fourteenth Amendment prevents a police officer from using potentially deadly force except when she reasonably believes that her life or that of another person is in danger. Any policy, written or otherwise, that permits the use of deadly force in circumstances other than that is unconstitutional, and may be enjoined. But I am not at all confident that would have been the outcome given the Court's history of tempering individual rights claims in the name of federalism.

It is true that the Court in *Lyons* may have overplayed its federalism hand. It could have reached the substantive due process issue and enjoined the Los Angeles police regulation without significantly altering the relationship between the federal courts and the states by subjecting everyday police activity in every police department in the country to potential federal contempt proceedings. It would have been no different than enjoining any statute or ordinance on constitutional grounds. After all, the plaintiff alleged and the district court found that the city *authorized* the use of potentially deadly choke holds even when no danger of violence existed.[58] But the police saw the case as potentially putting federal judges in every police precinct in the country.[59] And, correctly or incorrectly, the Court apparently agreed, viewing *Lyons* as opening the door to widespread systemic relief against police departments nationwide.[60] As the Court had previously held such federal judicial monitoring of local and state governments was a

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[55] *See generally* Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974) (discussing the availability of qualified immunity for officers of the executive branch); Pierson v. Ray, 386 U.S. 547, 557 (1967) (discussing the requirements of good faith and probable cause for police officers to be granted qualified immunity).

[56] Lyons v. City of Los Angeles, 646 F.2d 1243 (9th Cir. 1981) (affirming the district court's ruling granting a preliminary injunction aginst police use of choke holds).

[57] KLOPPENBERG, *supra* note 3, at 67-75; Siegel, *supra* note 8, at 1963, 1966.

[58] *Lyons*, 461 U.S at 113-14 (Marshall, J., dissenting).

[59] *Id.* at 132; *see also* KLOPPENBERG, *supra* note 3, at 69.

[60] *Lyons*, 461 U.S. at 112.

threat to federalism.[61] In light of these concerns, would it have been "better" for the Court to have confronted the substantive due process issue head on? Certainly a constitutional conversation could have taken place. But at what cost? Was it "better" to limit the scope of the right, as was likely,[62] or avoid that and limit standing? A case can be made for the latter. When separation of powers and/or federalism concerns act to limit the scope of individual liberties, as is too often the case, (a) the Court gives the political branches a green light to proceed in a rights restrictive way even when the structural concerns are not nearly so pressing, and (b) the Court helps generate a rights restrictive inertia that may be difficult to overcome.[63]

In sum, it is not necessarily true that the life tenure protected federal judiciary is more able to protect individual liberties than the political branches of federal government or the largely elected state court systems. The constraints are different, political in the latter and structural in the former. But history has demonstrated that structural norms can be as corrosive of individual liberties as political responsibility. And that is assuming that the federal judiciary is agnostic to political considerations.[64]

III.

For those who criticize judicial avoidance, the confusion created by the selective use of avoidance and the hypothetical nature of the constitutional inquiry when the Court interprets a statute in order to avoid a constitutional ruling rank high on their scale of objections. And they have a point. The selective use of the avoidance trilogy—standing, ripeness/mootness, and justiciability—is hardly the model of clarity. Indeed the doctrine (such as it is) is all but incomprehensible. Narrow construction of statutes to avoid constitutional questions adds confusion of a different nature. Despite Professor Frickey's as-

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[61] Rizzo v. Goode, 423 U.S. 362, 380 (1976) (finding that the principles of federalism limit the application of injunctive relief against the executive branch of a state or local government); O'Shea v. Littleton, 414 U.S. 488, 498 (1974) (noting that principles of federalism limit federal courts' interference "with the normal operation of state administration of its criminal laws").

[62] *See, e.g.*, Paul v. Davis, 424 U.S. 693, 697-700 (1976) (finding that the Fourteenth Amendment does not encompass a right not to be defamed); *Rizzo*, 423 U.S. at 378-79 (finding that 42 U.S.C. § 1983 does not create a broad right to equitable relief from the action of a state executive branch).

[63] *But see* Gunther, *supra* note 8, at 7 ("The legitimation notion is open to question as a description of the political impact of a Supreme Court decision rejecting a constitutional challenge on the merits.").

[64] *See* Friedman, *supra* note 30, at 259-60 (arguing that normative constitutional scholars severely underestimate the role of "politics" [broadly defined] in federal courts' constitutional interpretation).

sertion that the dictum used to articulate the possible constitutional objections to a statute, which the Court then decides (for reasons of avoidance) does not exist, is a good means to enforce "underenforced constitutional norms,"[65] dictum is dictum. It may be adhered to in cases in which avoidance is not appropriate, and it may not. It is certainly easy to distinguish a case in which the Constitution is used as a backdrop for statutory interpretation from one in which the constitutional issue is fully briefed, argued, and considered. Moreover, the constitutional expression is hypothetical and highly contingent, making its precedential value suspect, whatever one may say about whether the constitutional musings are dictum or not.[66]

On the other hand, is it more likely that clarity will be enhanced if constitutional issues are confronted directly, on their merits? Not necessarily. Indeed, reading some recent Court opinions, one might yearn for a little avoidance here and there.[67] The Court is as ideologically divided as the country itself. That is *the* reason so much time, effort, and money poured into the recent nomination hearings of Chief Justice Roberts and Justice Alito. Given an ideologically divided Court, in which consensus around a constitutional principle is difficult if not impossible to garner, is avoidance such a bad alternative?[68] In terms of the educative functions of the Court, are we worse off with an opinion that stretches the meaning of a statute to avoid a fractured opinion than we are with the confusion produced by a divided Court in which no opinion stands as the reasoning?

Early in the 2005–2006 term, the Court decided *Gonzales v. Oregon*,[69] the Oregon physician assisted suicide case. As many people predicted, the Court avoided the difficult constitutional issues by holding that the Controlled Substances Act[70] did not authorize the Attorney General to determine what was a "medically appropriate use" of a drug.[71] As Justice Scalia's dissent argued, the majority's

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[65] Frickey, *supra* note 8, at 462.

[66] Gonzales v. Oregon, 126 S. Ct. 904, 939-40 (2006) (Thomas, J. dissenting) (bemoaning the majority's federalism dictum and its inconsistency with *Gonzales v. Raich*, 125 S. Ct. 2195 (2005)).

[67] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (containing six separate opinions); Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261 (1990) (containing five separate opinions).

[68] *Cf.* Frickey, *supra* note 8, at 439 & n.252 (noting that avoidance is used less frequently when the Court and Congress are politically aligned). One reason is that when the Court and the elected branches are politically aligned, the Court's decisions can be bolder. *See* Friedman, *supra* note 30, at 318 (noting that legislative and executive branches have little incentive to combat judicial activism when they agree ideologically with the courts).

[69] 126 S. Ct. 904 (2006).

[70] 21 U.S.C. § 801 (2000).

[71] *Id.*

interpretation of the statute was anything but preordained.[72] But it disposed of the case, at least until Congress decides (if it ever does) to explicitly give the executive the power it claimed. Let us imagine what the opinion (opinions actually) would have looked like if the Court had tackled the difficult issue of whether Congress had the power under the Commerce Clause to override state determinations of appropriate medical care specifically and, more generally, the state's supervision of those whom it licenses. And then there are the imbedded individual liberty claims of due process/death with dignity and equal protection, reminiscent of *Roe v. Wade*[73]—the wealthy who can afford private physicians can die as they choose in the privacy of their own homes, but the poor and lower middle class, dependent on publicly funded clinics or HMOs, cannot. Consensus would be difficult to come by on all three plausible constitutional objections.

In terms of constitutional clarity, would we be better off had the Court grappled with the difficult constitutional issues that *Gonzales* presented, rather than Justice Kennedy's vague references to Congress's Commerce Clause power[74] and Justice Thomas's confused response regarding how the majority's federalism concerns can be squared with *Raich v. Gonzales*?[75] A firm "yes" answer is problematic. If I asked my clerk (or legislative intern) to tell me whether Congress could legislate in the area after *Gonzales v. Oregon*, would she be in any better position to advise me with an opinion that read "Justice X announced the judgment of the Court and delivered an opinion in which Justices Y and Z concur in parts I, II A, and C, and in which Justice D concurs in part III E, etc., etc.," than she would be with an avoidance opinion that commanded a six Justice majority? I may be missing something, but I do not see how.

CONCLUSION

It may not sound like it, but I am ambivalent about avoidance techniques. They are clearly useful sometimes and not so useful at other times. They are least useful, and do the most systemic damage, when the technique involves purported interpretations of Article III standing and justiciability. More often than not, little is gained by postponing the "substantive" constitutional issue, except to further muddle an already incoherent doctrine. More importantly, the muddle

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[72] *Gonzlaes*, 126 S. Ct. at 926-39 (Scalia, J., dissenting).

[73] 410 U.S. 113 (1973).

[74] *Gonzales*, 126 S. Ct. at 937-38.

[75] *Id.* at 939-41 (Thomas, J., dissenting) (citing Gonzales v. Raich, 125 S. Ct. 2195 (2005)).

is a constitutional muddle, since the Court is allegedly interpreting Article III. So the impact on future cases can be dramatic, denying judicial access to an unknowable number of persons with legitimate constitutional injury. Yet, sometimes the benefits might be worth the costs. *Lyons*, for example, where federalism was likely to lead to a greater restriction of individual liberties than the denial of standing, is one such case. Moreover, that risk is reduced if the Court, as it did in *Elk Grove Unified School District v. Newdow*,[76] resorts to "prudential" rather than constitutional standing.

In contrast to Dean Kloppenberg, I am far less troubled by the Court's maybe questionable statutory interpretation to avoid constitutional questions. Even though that position ignores all sensible canons of statutory construction, and probably does no more to quiet legislative disaffection than a declaration of unconstitutionality,[77] at least Congress has an outlet for its anger. And canons of interpretation aside, the implausible interpretation of one statute to avoid a constitutional issue, particularly one on which consensus cannot be achieved, will not carry over to the next case. In other words, there is often little or no systemic harm from the statutory construction avoidance device even if constitutional dictum is imbedded in the opinion. And as far as individual liberties are concerned, the legislature has precisely the same options as it did before the Court's action. True, as Dean Kloppenberg argues, avoidance often preserves the status quo, to the detriment of minorities and those whose views lay outside the political mainstream.[78] But are those interests and individuals better off either in the short or long term, with an adverse constitutional decision, one that is dictated more by structural than individual concerns, simply because a constitutional conversation (recriminations do not count) *may* be prompted? Does a theoretical construct of "democracy in action" trump an inevitable constriction of individual liberties? Sometimes maybe. But often maybe not.

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[76] 542 U.S. 1 (2004).

[77] *See supra* notes 9-10 and accompanying text.

[78] KLOPPENBERG, *supra* note 3, at 3.