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Avoiding Avoidance: Why Use of the Constitutional Avoidance Canon Undermines Judicial Independence - A Response to Lisa Kloppenberg

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AVOIDING AVOIDANCE: WHY USE OF THE CONSTITUTIONAL AVOIDANCE CANON UNDERMINES JUDICIAL INDEPENDENCE—A RESPONSE TO LISA KLOPPENBERG

Michelle R. Slack[†]

As currently used, the constitutional avoidance canon does not actually avoid constitutional issues. Instead, because the canon is triggered by simply *raising* a serious constitutional issue, its use often results in expanding constitutional law beyond the limits of any constitution. Moreover, the canon forces judges to engage in legislation—either expressly or implicitly—a role not traditionally belonging to the judicial branch. Although the canon is purportedly a canon of restraint, the constitutional avoidance canon results in true judicial activism. Accordingly, use of the constitutional avoidance canon undermines judicial independence.

INTRODUCTION

A response to the question whether use of constitutional avoidance promotes judicial independence, as well as a response to Dean Lisa A. Kloppenberg, necessitates first examining fundamental questions of judicial independence. *Independence from whom? Independence to do what?* Under our constitutional system, the judiciary is not com-

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pletely independent. Our system of checks and balances, as well as the whole concept of separation of powers, embodies the belief that complete independence is undesirable, even dangerous.[1]

With these observations in mind, I begin with the premise that the judicial independence we wish to promote is the judicial power to perform the traditional judicial role—that of deciding cases and controversies[2]—independent of substantial intervention through either direct or indirect action. For example, when Congress tries to tell judges "how to judge" by setting acceptable reasoning and exacting standards, the judiciary's ability to perform its traditional role is directly challenged.[3] By contrast, when the President threatens "court packing" or Congress denies federal judges pay raises to pressure judges to decide cases differently, the judiciary's ability to perform its traditional role is indirectly challenged.[4] Although some may take the position that these examples are just permissible checks under our system of separation of powers, the fact remains that such action does interfere with the traditional judicial role of deciding cases.

In addition to defining the notion of judicial independence, the concept of "judicial activism" must be addressed. As Dean Kloppenberg states, "Rhetoric about judicial activism abounds in modern political campaigns."[5] *Judicial activism* has largely been used as a synonym for judges whose decisions favor liberal views, protect civil liberties, and expand the protections of the Bill of Rights.[6] Yet,

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[1] As Dean Kloppenberg acknowledges in her paper, "Our divided system of democratic governance affords an opportunity for dialogue . . . . [And] it is critical for this to be 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." Lisa A. Kloppenberg, *Does Avoiding Constitutional Questions Promote Judicial Independence?* 56 CASE W. RES. L. REV. 1031, 1031 (2006).

[2] Professor Durchslag quotes *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is." Melvyn R. Durchslag, *The Inevitability (and Desirability?) of Avoidance: A Response to Dean Kloppenberg*, 56 CASE W. RES. L. REV. 1043, 1043 (2006) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). I agree with Professor Durchslag that what this means is, itself, a hotly debated point, but I start with a basic premise that deciding cases and controversies is the traditional judicial role. Although the traditional role involves interpreting statutes and precedent, creating common law, and enforcing judgments, the judiciary's primary purpose is to decide—not legislate or execute.

[3] Mark Tushnet, *The "Constitution Restoration Act" and Judicial Independence: Some Observations*, 56 CASE W. RES. L. REV. 1071, 1076-78 (2006) (examining how the proposed Constitution Restoration Act of 2005 will control perceived abuses of judicial authority).

[4] *See, e.g.*, Jonathan L. Entin & Erik M. Jensen, *Taxation, Compensation, and Judicial Independence*, 56 CASE W. RES. L. REV. 965, 965-67 (2006) (considering whether the compensation clause, which prevents Congress from lowering the salaries of federal judges during their tenure, has any effect on Congress's taxing power).

[5] Kloppenberg, *supra* note 1, at 1031.

[6] *See, e.g.*, Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RES. L. REV. 911, 915 (2006) (arguing that judicial accountability should turn on the judge's state of mind rather than mere political concerns).

decisions such as *Bush v. Gore*[7] and the recent federalism cases highlight the fact that activism can come from both sides of the political spectrum.[8] Thus, rather than using activism as a synonym for a particular political ideology, this response will use activism to mean judicial conduct that steps outside the traditional role of judges and embarks upon a role traditionally left to the legislature or executive.

With all this concern about judicial activism, particularly the courts' expansion of constitutional civil liberties, it might seem as if constitutional avoidance would further judicial independence. After all, as reflected in Justice Brandeis's concurring opinion in *Ashwander v. Tennessee Valley Authority*,[9] outlining the principles of constitutional avoidance, avoiding constitutional issues demonstrates judicial restraint. Moreover, in Alexander Bickel's famous piece, *The Passive Virtues*, avoidance is elevated to a virtue—in which it is named as passive, not active, judicial decision-making.[10] Yet, as discussed further in this response, unlike other types of avoidance, the constitutional avoidance canon actually undermines several of the *Ashwander* principles, leading to something more akin to passive-aggressive activism[11] and ultimately undermines judicial independence.

CONSTITUTIONAL AVOIDANCE—DEAN KLOPPENBERG'S POSITION

In her book[12] and her paper,[13] Dean Lisa A. Kloppenberg takes the position that through use of numerous avoidance techniques, courts sidestep important constitutional issues and, as a result, fail to protect constitutional rights and undermine the development of the law.[14] Moreover, according to Kloppenberg, because these avoidance techniques are selectively used in mainly the socially and politically

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[7] 531 U.S. 98 (2000).

[8] Kloppenberg, *supra* note 1, at 1031.

[9] 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

[10] Alexander M. Bickel, *The Supreme Court, 1960 Term–Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

[11] *But see* Philip 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, 416 (2005) (suggesting that at least in some instances the canon is "a passive virtue rather than a passive-aggressive vice").

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

[13] Kloppenberg, *supra* note 1.

[14] *See also* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994) (arguing that federal courts should dismiss the last resort rule except in cases in which they are asked to void a legislative or executive action); 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) (arguing that the Supreme Court should directly address constitutional issues in free speech cases rather than allow political considerations to influence its application of the avoidance canon).

sensitive cases, those most in need of the court's protection of their constitutional rights are left unprotected.[15] Ultimately, Kloppenberg proposes that avoidance, itself, should be avoided.

IN RESPONSE TO DEAN KLOPPENBERG ON THE USE OF CONSTITUTIONAL AVOIDANCE

A. Basic Considerations

In response, I agree with Dean Kloppenberg on a number of preliminary points, as well as on her ultimate conclusion. In addition, as Kloppenberg does in her article, I too wish to focus my response on the avoidance canon and presumptions. Yet, because I will approach the canon from a different angle, with different concerns and presumptions in mind, I disagree that the use of the canon fails to protect alleged constitutional rights when it is invoked. Rather, precisely because the avoidance canon goes beyond the Constitution and protects more than constitutional rights, placing the courts in legislative roles, I believe its use ultimately undermines judicial independence and should be avoided.

I begin my agreement where Dean Kloppenberg begins her article. I agree with the premise that the duty and ability to uphold the Constitution belong to more than just the judiciary. As Kloppenberg states, "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."[16] Indeed, the legislative and executive branches have the duty to uphold the Constitution, and I believe it is a duty taken quite seriously. In fact, as explained later, it is precisely because this duty also belongs to Congress, as well as the judiciary, that I find the avoidance canon so offensive and problematic.

Next, I agree with Dean Kloppenberg's premise that the avoidance doctrine is invoked primarily in socially and politically sensitive cases. Some of the examples given by Kloppenberg include desegregation, discrimination, and dissent speech (the Cold War cases).[17] From my own experience in the Department of Justice's Civil Division, Office of Immigration Litigation, I have seen the courts invoke avoidance techniques in socially sensitive immigration cases, avoiding the constitutional implications of actions such as the indefinite

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[15] Kloppenberg, *supra* note 1, at 1036.
[16] *Id.* at 1031.
[17] *Id.* at 1036.

detention of illegal aliens[18] and habeas corpus review over deportation orders for criminal aliens.[19] Similarly, in an era of increased threats to national security, the courts are invoking avoidance techniques in the related area of counterterrorism and detention of suspected terrorists.[20] In many respects, the courts' use of avoidance techniques in the area of counterterrorism is comparable to its prior Cold War era use in the dissent speech cases.[21]

I also agree with Dean Kloppenberg on the motives of judges in using avoidance techniques in socially sensitive cases.[22] Judges are threatened with both professional and personal harm when they make socially or politically unpopular decisions. Such threats come from within government and from the public.[23] Having clerked for the Honorable Frank J. Battisti, who ordered the desegregation of the Cleveland Public Schools, I became aware of the pressures on judges to avoid such issues.

Furthermore, like Dean Kloppenberg, I too wish to focus on the avoidance canon. But, it is at this point that my response parts ways with Kloppenberg, at least until the ultimate conclusion of avoiding avoidance.[24] This is because the avoidance canon, unlike other avoidance techniques, actually serves to overprotect those alleging constitutional infringement without actually recognizing a constitutional right—the litigants that Kloppenberg claims avoidance leaves unprotected.

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[18] *See, e.g.*, Clark v. Martinez, 543 U.S. 371 (2005) (finding that petitions for habeas corpus should have been granted on statutory grounds); Zadvydas v. Davis, 533 U.S. 678 (2001) (finding an implicit "reasonable time" limitation on detentions of aliens under the statute in question).

[19] *See, e.g.*, INS v. St. Cyr, 533 U.S. 289 (2001) (holding that the alien could seek relief under the applicable statute); *see also* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (discussing use of avoidance in immigration cases).

[20] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 574-75 (2004) (Scalia, J., dissenting) (suggesting that the plurality is merely avoiding the constitutional issue posed by detaining citizen enemy combatants without bringing criminal charges).

[21] *See* Frickey, *supra* note 11, at 463-64 (comparing the tension and motives for using avoidance in the Cold War speech cases with those of the current war on terrorism).

[22] Kloppenberg, *supra* note 1, at 1035 (stating that "due to the concerns about deference, foreclosure and threats to judicial independence, the U.S. Supreme Court has employed avoidance techniques selectively over the last three decades. . . . Sometimes it is overt—the justices write about political pressure on the courts; more often, the political controversy goes unstated").

[23] *Id.* at 1031 ("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.").

[24] Kloppenberg's article proposes a presumption against avoidance, stating that "courts should reverse [the Rehnquist Court's] presumption" favoring avoidance. *Id.* at 1040; *see also* KLOPPENBERG, *supra* note 12, at 271-77 (concluding the book with a chapter entitled "Looking Toward the Future: A Presumption Against Avoidance").

Ordinarily, when a court declines to reach the merits of a constitutional claim based upon a lack of standing, the complaining litigant receives no protection from the allegedly unconstitutional action without the court ever deciding the constitutional issue.[25] Likewise, in a case in which a court abstains from deciding the merits of a constitutional claim, the complaining litigant usually receives no protection from allegedly unconstitutional action without ever deciding the constitutional issue.[26]

Similarly, the avoidance canon results in no clear decision on the constitutionality of a particular problematic interpretation. As Kloppenberg explains, "The canon is a tool used by courts to interpret statutes narrowly when they raise 'serious constitutional questions.'"[27] Instead of invalidating legislation, the court "avoids" the issue by giving the statute a different meaning than the *possibly* offensive one.

Yet, unlike other avoidance techniques, the avoidance canon usually does result in protection for the litigant complaining of possible unconstitutional conduct. Thus, contrary to Dean Kloppenberg's premise, the selective enforcement of avoidance in socially sensitive cases, at least when it comes to the avoidance canon, serves to protect those less politically powerful in society—those most in need of court protection.[28] Unfortunately, it is this distinction between the avoidance canon and other avoidance techniques that increases the tension between the government branches when the canon is used, thereby undermining judicial independence.

As I will explain herein, the use of the avoidance canon undermines judicial independence because it protects without deciding, presumes unconstitutionality when constitutionality should be presumed, rewrites legislation while claiming to be restrained, and in the end, actually fails to avoid the constitutional issue.

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[25] *See* KLOPPENBERG, *supra* note 12, at 39-66 (discussing standing in environmental cases); *id.* at 67-55 (discussing standing in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (refusing to enjoin the use of choke holds by the City of Los Angeles Police Department based upon standing)); *see also* Durchslag, *supra* note 2, at 1052 (discussing *Lyons*).

[26] *See* KLOPPENBERG, *supra* note 12, at 5-9 (discussing abstention doctrine).

[27] Kloppenberg, *supra* note 1, at 1037.

[28] Although use of the canon ordinarily does protect the less politically powerful, exceptions do exist. In *Johnson v. Governor of Florida*, 405 F.3d 1214, 1229-32 (11th Cir. 2005) (en banc), the Eleventh Circuit applied the avoidance canon to avoid the constitutional issue that would be raised if the Voting Rights Act (VRA) applied to a felony disenfranchisement statute. As a result, the disenfranchised felon's action, under the Voting Rights Act, was dismissed because the court read the VRA to not apply to felony disenfranchisement statutes.

B. The Avoidance Canon: Presuming Unconstitutionality

The avoidance canon, unlike other avoidance techniques, functionally results in a presumption of unconstitutionality. Because the canon is triggered by a mere possibility of a serious constitutional question, courts applying the canon never directly decide the constitutionality of the questionable reading of a statute. As a result, the canon creates a protective zone around possibly unconstitutional interpretations because the court will not get close enough to the Constitution to tell us how close is too close, thereby expanding the reach of constitutional prohibitions. Dean Kloppenberg recognizes this peculiar result, calling this protective zone "shadow or phantom constitutional norms."[29] Judge Posner, too, recognized the canon's effect of creating a "judge-made penumbra" around certain constitutional issues, permitting judicial expansion of the Constitution.[30] Regardless of terminology, the result is the same—an additional zone around the Constitution the courts will protect without ever recognizing an actual constitutional violation.

Further expanding this protected zone, the avoidance doctrine can be applied to avoid the "lowest common denominator"—cases in which no serious constitutional issue is presented by the current litigant's case, but by other possible litigants not currently before the court. The Supreme Court applied this principle recently in *Clark v. Martinez*.[31] In *Clark*, the Court faced the issue whether inadmissible aliens could be indefinitely detained when their country of origin refused to accept their return. In an earlier case, *Zadvydas v. Davis*,[32] the Court faced a similar issue when it decided that previously admitted aliens, who had subsequently violated the law and were under valid deportation orders, could not be detained beyond a certain period of time, even when their countries of origin refused to accept their return. In *Zadvydas*, the Court used the avoidance canon to avoid the "serious constitutional issue" raised by reading the detention statute to permit long term detention of previously admitted aliens.[33] The Court specifically recognized that "[a]liens who have not yet gained

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[29] Kloppenberg, *supra* note 1, at 1037; *see also* Motomura, *supra* note 19, at 549 (explaining "phantom constitutional norms").

[30] Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983) (discussing the "penumbra" resulting from avoidance doctrine); *see also* Sanford G. Hooper, Note, *Judicial Minimalism and the National Dialogue on Immigration: The Constitutional Avoidance Doctrine in* Zadvydas v. Davis, 59 WASH. & LEE L. REV. 975, 991 (2002) (discussing Judge Posner's recognition of the "penumbra effect").

[31] 543 U.S. 371, 380-81 (2005) (applying "lowest common denominator" principle to avoid constitutional issues that might be raised by those not currently before the Court).

[32] 533 U.S. 678 (2001).

[33] *Id.* at 682; *see also Clark*, 543 U.S. at 388 (Thomas, J., dissenting).

initial admission to this country would present a very different question" from those admitted to the United States, thereby explicitly reserving the issue of detaining inadmissible aliens.[34]

Yet, in *Clark*, the Court applied the same interpretation of the detention statute to inadmissible aliens as it had applied to previously admitted aliens in *Zadvydas*, relying upon the principle of "the lowest common denominator." As Justice Scalia's majority opinion explains, "If one [of two plausible constructions of a statute] would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court."[35] In sharp contrast to the view of some commentators,[36] the Court made clear that "[t]he canon is not a method of adjudicating constitutional questions by other means,"[37] but rather "the role played by the canon of constitutional avoidance is statutory interpretation."[38] As a result, this protected zone created by the avoidance canon grows further, by covering matters that do not even raise serious constitutional issues.

Theoretically, the question of whether the allegedly problematic reading is constitutional or not is left for another day. In fact, this is one of the goals behind avoidance—affording an opportunity for dialogue between the courts and Congress.[39] Unfortunately, in most instances, this is pure theory, not reality. The reason for this incongruity between theory and reality here is basically two-fold. The first reason for this incongruity is the legislative realities presented by legislating in an area the courts have marked as raising "serious constitutional issues." The second reason for the incongruity is found in courts' responses to legislative action once the avoidance doctrine has been used to avoid a particular meaning to a statute.

As a matter of practical and political reality, the legislature often will not respond to a court's avoidance of any particular intended interpretation of a statute.[40] As Kloppenberg recognizes, it often appears difficult for Congress to respond to the Supreme Court's phantom norms, either resulting from a lack of "time or political will to

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[34] *Zadvydas*, 533 U.S. at 682.

[35] *Clark*, 543 U.S. at 380-81.

[36] Frickey, *supra* note 11, at 402 (purporting "to demonstrate that the avoidance canon is not so much a maxim of statutory interpretation as it is a tool of constitutional law").

[37] *Clark*, 543 U.S. at 381.

[38] *Id.*

[39] Kloppenberg, *supra* note 1, at 1038.

[40] *See, e.g.*, Frickey, *supra* note 11, at 400-01 (reviewing critiques of the avoidance canon and discussing the practical difficulties involved "for Congress to dislodge [judicially rewritten statutes] from the statute books").

reconsider the issue."[41] In addition to a lack of political will, the Court creates an additional political hurdle to legislation vaguely marked in a constitutional "danger zone." Yet, in instances in which the legislature refocuses on the piece of legislation, musters up the political will, and overcomes the heightened political controversy to revise a statute (making it clear that the avoided reading is the intended reading), the courts respond in a hostile manner by "chid[ing] other governmental actors for not avoiding a constitutional 'danger zone.'"[42] Instead of a meaningful dialogue, therefore, Congress is left questioning why the Court did not originally say the clearest reading was unconstitutional. This creates frustration, resulting in more tension between the branches and more threats to judicial independence. In any event, regardless of the reasons, these phantom norms within this so-called danger zone remain protected from governmental action, creating what I will call a presumption of unconstitutionality.

C. The Avoidance Canon's Presumption of Unconstitutionality Runs Head-On into the Presumption of Constitutionality

By creating a presumption of unconstitutionality for any interpretation within the protected penumbra around the Constitution, the avoidance canon runs right into another canon of statutory interpretation—the presumption of constitutionality. Generally, when an issue of constitutionality arises, courts presume a statute's constitutionality. In fact, in my experience working with the Department of Justice's Judicial Appointments Committee,[43] the canon presuming constitutionality was often the first response judicial nominees gave to questions on statutory interpretation posed by senators during hearings before the Senate Judiciary Committee.[44]

The basic principle behind the presumption of constitutionality is the recognition that courts are not the only governmental actors with the duty and ability to uphold the Constitution,[45] a premise raised in the introduction to this response and the beginning of Dean Kloppen-

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[41] Kloppenberg, *supra* note 1, at 1038; *see also Clark*, 543 U.S. at 402 (Thomas, J., dissenting) (stating "the realities of the legislative process often preclude readopting the original meaning of a statute that we have upset").

[42] Kloppenberg, *supra* note 1, at 1038.

[43] While serving as an attorney for the Department of Justice, I served as a volunteer on the Judicial Appointments Committee in the Office of Policy Development. The Committee worked to vet nominees, as well as prepare nominees for hearings before the Senate Judiciary Committee.

[44] Notably, I do not recall any instance in which a nominee referred to the constitutional avoidance canon when posed with questions on statutory interpretation or constitutional law.

[45] *See* Frickey, *supra* note 11, at 411 (recognizing the "strong presumption of constitutionality to Acts of Congress" and discussing the rationale behind this rule).

berg's article.[46] Yet, unlike the avoidance canon, the presumption of constitutionality canon is truly deferential—an actual canon of judicial restraint—that furthers judicial independence by respecting the other branches' roles and duty to uphold the Constitution.

For obvious reasons, the presumption of constitutionality does not protect legislation from all constitutional attacks. If a particular interpretation is clearly unconstitutional, the presumption is overcome. Likewise, if a particular reading raises no serious constitutional problem, the presumption is unnecessary in interpreting the statute in question. Yet, like other legal presumptions, absent clear evidence to the contrary and in situations that could go either way, the presumption should carry the day. In other words, the presumption should protect interpretations that come close to the constitutional limits, but do not exceed them clearly. Essentially, when there is constitutional doubt, Congress should get the benefit of the doubt. Unfortunately, the presumption of constitutionality is most appropriately invoked for the same zone of cases—those in the zone around the Constitution—covered by the avoidance canon and its corresponding presumption of unconstitutionality. As a result, the avoidance canon's presumption of unconstitutionality, ironically, runs head-on into the presumption of constitutionality.

D. The Presumption of Constitutionality Should Win the War over the Danger Zone

In this war over the constitutional danger zone in which constitutional issues are merely raised by a particular interpretation, the presumption of constitutionality should defeat the avoidance canon. Congress should get the benefit of the constitutional doubt, not the other way around. If the real goal is judicial restraint, mutual respect of coequal branches, and fostering dialogue, the presumption of constitutionality wins out over the avoidance canon. Applying the presumption of constitutionality when the constitutionality of a particular reading is unclear gives the presumption true meaning. Moreover, it will go much further in promoting harmony between the legislature and the judiciary than would the avoidance canon, thereby promoting judicial independence.

As previously explained, the avoidance canon leads to the peculiar result of creating a zone of phantom constitutional norms around the Constitution, expanding its reach.[47] Additionally, the application of

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[46] Kloppenberg, *supra* note 1, at 1031.

[47] *See id.* at 1037 (discussing phantom constitutional norms); Posner, *supra* note 30 (discussing judge-made penumbra).

the lowest common denominator principle to the avoidance canon further expands this quasi-constitutional reach. This is hardly the passive judicial action canon it purports to be. By contrast, the presumption of constitutionality provides deference to Congress and is more likely to foster true dialogue between the branches than the avoidance canon.

One reason the avoidance canon provokes controversy, despite its purported goal of restraint, is that it places the judiciary in a legislative, not judicial, role.[48] In many cases, the Court applies the canon to essentially rewrite statutes that were clear on their face.[49] As Justice Kennedy observed in *Zadvydas*, use of the canon can lead to the Court's "own grave constitutional error" by creating "a statutory amendment of its own" that is an "obvious disregard of congressional intent."[50] By applying the presumption of constitutionality in instances in which there is doubt, the judiciary can remain true to its traditional role.

Moreover, giving the legislature the benefit of the constitutional doubt by presuming constitutionality when doubt exists furthers the presumption's true meaning. Professor Frickey dismisses the application of the presumption unless "it appears that the precise point in issue here has been considered by Congress and has been explicitly and deliberately resolved."[51] In my opinion, however, a presumption that requires clear evidence before it is invoked is no presumption at all. Presumptions are meant to apply unless there is evidence to the contrary. Thus, giving the presumption of constitutionality true meaning would presume that Congress recognized the constitutional obligations, rather than assume congressional ignorance.

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[48] *See, e.g.*, Frickey, *supra* note 11, at 399 n.6 (citing cases addressing the avoidance doctrine's tendency to place the judiciary in a legislative role); *id.* at 400-01 (acknowledging that the canon is "really legislative in character" and results in a "judicially rewritten statute"); Hooper, *supra* note 30, at 988 (stating that "[a] survey of scholarly criticism of the constitutional avoidance doctrine reveals" that many agree that "the avoidance canon is conducive to judicial usurpation of powers traditionally reserved for other branches of government"); Harold J. Krent, *Avoidance and Its Costs: Application of the Clear Statement Rule to Supreme Court Review of NLRB Cases*, 15 CONN. L. REV. 209, 245 (1983) (concluding that avoidance usurps the legislative role, leading to "judicial policymaking").

[49] *See* Clark v. Martinez, 543 U.S. 371, 400 (2005) (Thomas, J., dissenting); Zadvydas v. Davis, 533 U.S. 678, 705 (2001) (Kennedy, J., dissenting); INS v. St. Cyr, 533 U.S. 289, 327-36 (2001) (Scalia, J., dissenting); Public Citizen v. Dep't of Justice, 491 U.S. 440, 481-82 (1989) (Kennedy, J., concurring in judgment); Lowe v. SEC, 472 U.S. 181, 212-13 (1985) (White, J., concurring in result).

[50] *Zadvydas*, 533 U.S. at 705.

[51] Frickey, *supra* note 11, at 411.

E. Putting the Avoidance Canon in Its Proper Place—Avoiding the Avoidance Canon

After reaching the conclusion that when in constitutional doubt, the presumption of constitutionality should govern, a logical question remains—*What role, if any, remains for the avoidance canon?*

At this point in my response, I return to Dean Kloppenberg's conclusion that avoidance itself should be avoided. In my opinion, when it comes to the avoidance canon, I agree with Dean Kloppenberg. Rather than employing the avoidance canon when a mere constitutional doubt exists and creating a penumbra around the Constitution, the avoidance canon should be applied as a last resort. The avoidance canon should be applied only when the Court has exhausted other available tools of statutory construction and the reading goes beyond a vague, undefined danger zone into the clearly marked red zone of unconstitutional interpretations. If the Court avoided the avoidance canon and made it its own doctrine of last resort, the *Ashwander* principles of judicial restraint would be a reality—not mere theory.

By making the canon itself a last resort, the *Ashwander* concern over the "delicate and final nature of judicial review" is satisfied. As a doctrine of last resort, the canon still protects statutes from invalidation, but only as a final measure. When there is doubt, the presumption of constitutionality would apply to also protect the legislation from invalidation. Both tools of construction would have their place rather than clashing with one another.

Moreover, the canon should only be used in a court of last resort—the United States Supreme Court on issues of federal constitutional law and the state's highest court for issues of state constitutional law. Judicial review is not final until the issue is before a court of last resort. Thus, the "delicate and final nature of judicial review" is not truly at play until the issue is before a court of last resort.

Avoiding the avoidance canon in this manner also increases the judicial dialogue on constitutional issues. When lower courts invoke the canon to avoid a constitutional issue, it thwarts lower court examination of the constitutional issue and prevents the Supreme Court from benefiting from the lower courts' opinions on the merits of a constitutional claim, thereby undermining the development of the law prior to the highest court weighing in on the issue. Building a judicial dialogue among the judiciary will also alert the legislature of potential problems with its legislation by giving the legislature an opportunity to weigh in on the matter and clarify its intent. Thus, before an issue gets to the court of last resort, the legislature will more likely be aware of the difficulties with a given interpretation and will be capa-

ble of responding prior to the Court considering the issue. As a result, leaving use of the avoidance canon to courts of last resort would increase the dialogue between the judiciary and the legislature.

CONCLUSION

In the interests of preserving judicial independence, the judiciary should be mindful of its traditional role and careful not to step on legislative toes. Congress should get the benefit of the constitutional doubt and avoidance, itself, should be avoided. Although my reasons may differ, I agree with Dean Kloppenberg. In fact, in my opinion, by making this doctrine its own doctrine of last resort, the concern over the "delicate and final nature of judicial review" remains protected, and the dialogue between the branches can be heard.