Cornell Law Review

Volume 86
Issue 4 *May 2001*

Article 3

Avoiding Constitutional Questions as a Three-Branch Problem

William K. Kelley

AVOIDING CONSTITUTIONAL QUESTIONS AS A THREE-BRANCH PROBLEM

William K. Kelley†

If a statute is susceptible to more than one reasonable construction, the avoidance canon holds that courts are bound to choose an interpretation that avoids raising serious constitutional doubts. Though the avoidance canon is a venerable norm of constitutional litigation, Professor Kelley argues that it cannot survive a sustained critique. Courts developed the canon, and continue to rely upon it, because it purports to serve the separation of powers

† Associate Professor of Law, University of Notre Dame. I am grateful to John Nagle, Patrick Schiltz, Nicole Garnett, Richard Garnett, Ronald Mann, John Manning, and Henry Monaghan for comments on a prior draft, and to Patti Ogden of the Kresge Law Library for her research help. I also thank the participants in faculty workshops at the University of Minnesota Law School and the University of Illinois Law School for their challenging and insightful comments. I thank Christopher Regan, David Petron, and Anne Peterson for valuable research assistance.

by keeping the court within its appropriate role of deferring to Congress's legislative supremacy. In practice, the avoidance canon is in tension with legislative supremacy because it frequently results in questionable statutory interpretations and because it places the burden on Congress to act explicitly before a court will interpret a law as coming close to the constitutional line—even though the enacting legislature might have intended to pass a constitutionally questionable statute and even though such a statute might, in fact, be constitutional. Moreover, the avoidance canon frequently does not avoid the making of constitutional law, but instead shifts the nature and timing of constitutional decisions. Professor Kelley argues, contrary to longstanding assumptions, that the avoidance canon therefore does not place the courts in a deferential mode in relation to Congress.

Professor Kelley then offers a new critique of the avoidance canon that exposes its even deeper flaws. The avoidance canon most seriously intrudes upon the powers and prerogatives of the Executive by imposing statutory constructions over the objection of the Executive, usually in the form of an agency, which has offered an alternative reading in the course of determining how to execute the laws, and which has concluded that its statutory reading is constitutional. That judicial intrusion reflects not only a lack of interbranch comity, but also arrogates to the court the Article II power to execute the laws. Professor Kelley concludes that the avoidance canon's failure to serve its purported purpose calls for its abandonment.

INTRODUCTION

The rule of "constitutional doubt" holds that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to adopt the latter."[1] That familiar canon of statutory construction—which this Article will call the "avoidance canon"—has been "repeatedly affirmed"[2] to the point that it has achieved rare status as a "cardinal principle" that "is beyond debate."[3] Indeed, some form of the avoidance canon has been a fundamental norm of constitutional litigation for almost two centuries,[4] and it continues today to be generally regarded as central to how

---

1 Jones v. United States, 526 U.S. 227, 239 (1999) (quoting United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909)).

2 *Id.*

3 Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

4 The first traces of the canon can be found in an 1804 opinion by Chief Justice Marshall. *See* Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). There the Court stated (without citing any authority) that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Id.* at 118. The earliest explicit invocation of the avoidance canon was by Chief Justice Marshall riding circuit in *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558). As I shall discuss, *see infra* note 58 and accompanying text, the avoidance canon's modern form dates to the decision in *Delaware & Hudson Co.*, 213 U.S. at 408.

courts perform their function in constitutional litigation. Every term, opinions for the Court invoke the canon time and again,[5] and virtually never has any Justice voiced doubts about its legitimacy.

Until relatively recently, moreover, commentators seemed not to focus much attention on the avoidance canon and whether it in fact advances its purported purpose of serving the separation of powers. And the academic commentary that was ventured offered only relatively mild criticism.[6] As Judge Friendly said, challenging the avoidance canon traditionally has been "rather like challenging Holy Writ."[7] Recent years have witnessed, however, a significant kindling of academic interest in the avoidance canon.[8]

---

5 There have been nearly thirty cases in the last decade or so in which the Court invoked the avoidance canon, or an individual Justice urged that the Court do so. *See* Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 488 (1999); Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998); Fed. Election Comm'n v. Akins, 524 U.S. 11, 32 (1998) (Scalia, J., dissenting); Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 356 (1998) (Scalia, J., concurring); Almendarez-Torres v. United States, 523 U.S. 224, 250 (1998) (Scalia, J., dissenting); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 112 (1998) (Stevens, J., concurring); Salinas v. United States, 522 U.S. 52, 59-60 (1997); Edmond v. United States, 520 U.S. 651, 658 (1997); United States v. Winstar Corp., 518 U.S. 839, 875 (1996); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 182 (1996) (Souter, J., dissenting); Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 441 (1995) (Souter, J., dissenting); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 216 n.2 (1995); United States v. X-Citement Video, Inc., 513 U.S. 64, 73 (1994); Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 628-29 (1993); Reno v. Flores, 507 U.S. 292, 334 (1993) (Stevens, J., dissenting); R.A.V. v. City of St. Paul, 505 U.S. 377, 412 (1992) (White, J., concurring); New York v. United States, 505 U.S. 144, 170 (1992); Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992); Burns v. United States, 501 U.S. 129, 138 (1991); Gollust v. Mendell, 501 U.S. 115, 126 (1991); Rust v. Sullivan, 500 U.S. 173, 190-91 (1991), *abrogation recognized by* Richmond Med. Ctr. for Women v. Gilmore, 55 F. Supp. 2d 441 (E.D. Va. 1996); Webster v. Reprod. Health Servs., 492 U.S. 490, 514 (1989) (plurality opinion); Pub. Citizen v. DOJ, 491 U.S. 440, 455 (1989); Gomez v. United States, 490 U.S. 858, 864 (1989); Mesa v. California, 489 U.S. 121, 137 (1989); Mistretta v. United States, 488 U.S. 361, 406 n.28 (1989); Morrison v. Olson, 487 U.S. 654, 682 (1988); *see also* Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 516 (1991) (relying on previous cases that used the avoidance canon to construct the same statute at issue); Chapman v. United States, 500 U.S. 453, 464 (1991) (rejecting petitioner's argument that the Court invoke the canon); United States v. Monsanto, 491 U.S. 600, 611 (1989) (same).

6 *See, e.g.*, Harry H. Wellington, Machinists v. Street: *Statutory Interpretation and the Avoidance of Constitutional Issues*, 1961 SUP. CT. REV. 49.

7 HENRY J. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* BENCHMARKS 196, 211 (1967).

8 Several recent articles have dealt primarily with the avoidance canon. *See* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994) [hereinafter Kloppenberg, *Avoiding Constitutional Questions*]; 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) [hereinafter Kloppenberg, *Free Speech Concerns*]; Brian C. Murchison, *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases*, 30 GA. L. REV. 85 (1995); Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71. Looking farther back, Judge Friendly questioned the canon—with, in Judge Posner's words, his "customary power," RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 284 (1985)—in a 1964 essay. FRIENDLY, *supra* note 7, at 211-12. Two decades later Judge Posner echoed Judge Friendly's views, pointing out the possibility that constru-

Traditional thinking about the avoidance canon has considered only the relationship between the Court and Congress; on that conventional account, constitutional litigation is a two-branch problem involving a confrontation between only Congress and the Judiciary. This Article offers a new critique of the avoidance canon—one that considers the role of the Executive, as well as that of Congress, in relation to the Court. The avoidance canon implicates the structural relationships among all three branches[9] of the federal government. This Article argues that the canon seriously intrudes upon the roles of both Congress and the Executive in the constitutional scheme.

Indeed, it is the role of the Executive which the avoidance canon most seriously threatens. As a general matter, litigation over the constitutionality of a law enacted by Congress will most often entail the presence of the Executive—either in the form of the Attorney General speaking on behalf of the President[10] or some administrative agency answerable (at some level) to the President. When the Court refuses to credit the Executive's reading of a statute in the name of avoiding the resolution of a serious constitutional question, it threatens to displace the President in his discharge of his constitutional duty to "take Care that the Laws be faithfully executed."[11]

Not only does the avoidance canon threaten the role of the Executive, it also fails to serve the deferential ends that it sets for itself vis-à-vis Congress. Rather than serving the norm of legislative supremacy—a laudable goal in the abstract—statutory interpretations adopted in order to avoid deciding serious constitutional questions often end up bearing no resemblance to anything that the legislature foresaw or intended.[12] Thus, the avoidance canon ironically results in the Court's impinging on Congress's supreme role in the legislative sphere, in the name of not doing so.

---

ing a statute to avoid deciding constitutional issues will result in a meaning never contemplated by the Congress that enacted the words at issue. POSNER, supra, at 284-85.

9 I use the colloquial term "branches" to refer to the three Departments of the federal government established by the Constitution. *See* U.S. CONST. arts. I-III; *cf.* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1156 n.6 (1992) ("The use of the word 'branch' is unfortunate."); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1270 n.6 (1996) (following the "dominant practice of the founding generation by [using the term] 'departments'").

10 *Cf.* 28 U.S.C. § 2403(a) (1994) (requiring a court to notify the Attorney General if the constitutionality of an Act of Congress becomes at issue in litigation involving private parties, and giving the Attorney General a right to intervene to defend the statute on the government's behalf). On occasions when the Attorney General, representing the Executive Branch, decides *not* to appeal a court decision affecting a statute's constitutionality, she must give notice to the Senate, which then has the right to defend the statute. *See* 2 U.S.C. § 288k(b) (1994).

11 U.S. CONST. art. II, § 3.

12 *See infra* notes 105-63 and accompanying text.

We see, then, that the avoidance canon's operation can create two distinct kinds of conflicts. With respect to the Executive, the avoidance canon threatens *actual* and *direct* conflict because it disregards the Executive's power and duty to see to the faithful execution of the laws, including the Constitution. In contrast, the conflict between Court and Congress that the avoidance canon was designed to avert—the inherent confrontation that arises whenever the Court undertakes even to decide a constitutional question—is *hypothetical* and *indirect.*

My proposal is simply that the canon be abandoned—that courts should interpret statutes without the background norm that constitutionally troublesome readings are impermissible. Courts would no longer be in the position of refusing to permit law executors to implement the law as they see fit because their preferred course *might be* (not *is*) unconstitutional, even though that preferred course might well be perfectly consistent with the law as established by Congress. On the contrary, the Executive's reading of a statute will stand or fall on its own merits—on whether it is consistent with traditional standards of statutory construction and comports with the Constitution—without also having to survive what is effectively a court-imposed, heightened standard for what the Constitution itself requires. To the degree that the Executive seeks to execute the laws through statutory interpretations that are *actually* unconstitutional, inter-branch comity and the constitutional structure of separated powers would not be harmed by the Court's saying so.

The Article has three parts. Part I traces the development of the canon, its grounding in legislative supremacy, and the anti-democratic character of judicial review in a system of separated powers. Part II then recounts the traditional critiques of the avoidance canon, while refining and expanding those arguments. Part III of the Article moves beyond the traditional focus of critiques of the avoidance canon on relations between Court and Congress, and turns attention to the effect of the canon on the relationship between the Court and the Executive. Part III argues that the avoidance canon does particular harm to the separation of powers in contexts when Congress has delegated law-elaboration authority to the Executive. In such situations, the avoidance canon comes into conflict with both the power of the President to execute the law and the power of Congress to make the law.

I

DEVELOPMENT OF THE AVOIDANCE CANON AND ITS CONVENTIONAL MODERN ACCOUNT

According to the conventional understanding, judicial review is an exceptional event for the simple reason that it rests on the assumption that the Court can legitimately render ineffective the product of the democratic lawmaking process.[13] Thus, every case involving the question of whether an act of Congress[14] is unconstitutional literally entails a constitutional confrontation between the Court and Congress.[15] Given the dramatic character of judicial review, the Court has from the beginning taken care to minimize the frequency of that confrontation—that is, the number of occasions on which it undertakes even to *decide* a constitutional question. Out of respect for Congress as the most representative branch,[16] and out of defensive instincts lest its institutional capital be squandered,[17] the Court has steadfastly adhered to the principle of necessity: it refuses to decide a constitutional question unless it must.[18]

One can trace this principle's roots to the initial justifications for judicial review itself. In *Marbury v. Madison*,[19] Chief Justice Marshall grounded the power of judicial review largely in the obligation to prefer the fundamental law of the Constitution to ordinary law in the course of discharging the judicial duties Article III assigned to the

---

13 *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 3-4 (1962); JOHN HART ELY, DEMOCRACY AND DISTRUST 4 (1980); CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW 9-10 (1986); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 149 (1893).

14 I am concerned in this Article mainly with federal statutes and the Supreme Court's interpretive stances as to them. The federal courts' power of judicial review extends, of course, to actions taken by states, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 342 (1816), but the power authoritatively to interpret state laws does not, Herb v. Pitcairn, 324 U.S. 117, 127-28 (1945). Thus, as a formal matter the Court does not have the ability to interpret state laws to avoid constitutional questions; sometimes, however, the Court, Stenberg v. Carhart, 120 S. Ct. 2597, 2615 (2000), or individual Justices, *id.* at 2648 (Thomas, J., dissenting), recognize that the avoidance canon should be applied even with respect to state laws. They do so, however, without attending to the complexities added by the fact that the Court's posture in interpreting state law is generally to accept the State's own construction. *But see id.* at 2614-15 (rejecting the Attorney General's interpretation of the state statute). Although issues involving the Court's proper interpretive stance when state laws pose serious constitutional doubts are interesting, they are not the subject of this Article.

15 *See* Thayer, *supra* note 13, at 130 (calling this a "remarkable power").

16 *Cf.* ELY, *supra* note 13, at 4-5.

17 ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 13 (2d ed. 1994).

18 Rescue Army v. Mun. Court, 331 U.S. 549, 568 (1947); Ashwander v. TVA, 297 U.S. 288, 345-46 (1936) (Brandeis, J., concurring); *cf.* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 28-29 (13th ed. 1997) (speaking of this principle in the context of advisory opinions).

19 5 U.S. (1 Cranch) 137 (1803).

Court.[20] If, as *Marbury* established, judicial review is justified by Article III's case-deciding dictate, it is also justified *only* insofar as the case-deciding function makes necessary. The Court presumes that the legislature acts in accordance with the Constitution, and the Court has no power even to consider the possibility that the legislature has not, unless a case or controversy forces it to.[21]

The avoidance canon, as it was originally conceived, fit nicely into this account of judicial review. In *Murray v. The Schooner Charming Betsy*,[22] the case that many view as containing the germs of the avoidance canon,[23] Chief Justice Marshall noted that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[24] Although the "law of nations" was not at the time,[25] and is generally not now,[26] the same as the law of the United States Constitution, Chief Justice Marshall (while riding Circuit) later developed from this idea the maxim that "a just respect for the legislature requires" that the constitutionality of its laws "not be unnecessarily and wantonly assailed."[27] The Court should presume that Congress, as the lawmaking body, has legislated constitutionally; and as an unrepresentative body should avoid inserting itself in a manner that rejects the product of the democratic process. Part of the judicial function, as Chief Justice Marshall saw it, was to construe the legislature's work to avoid even raising doubts as to its constitutionality.[28] But Chief Justice Marshall said, "[i]f [constitutional questions] become indispensably necessary to the case, the court must meet and decide them."[29] Thus, the necessity principle and the avoidance canon were connected from the outset.[30] The Court's subsequent prac-

---

20 *Id.* at 179-80.

21 *Cf.* Letter from John Jay to George Washington (August 8, 1773), *in* 15 THE PAPERS OF ALEXANDER HAMILTON 111 n.1 (H. Syrett ed. 1969) (refusing to issue advisory opinions to President Washington).

22 6 U.S. (2 Cranch) 64 (1804).

23 *See* Schauer, *supra* note 8, at 73 n.9. *But see* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948 n.13 (1997) (attributing the inception of the canon to *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800)).

24 *Charming Betsy*, 6 U.S. (2 Cranch) at 118.

25 *See id.* (applying this doctrine to avoid a construction that would "violate neutral rights, or . . . affect commerce, further than is warranted by the law of nations as understood in this country").

26 *See* BLACK'S LAW DICTIONARY 886 (6th ed. 1990) (referring to "[i]nternational law").

27 *Ex parte* Randolph, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558).

28 *See id.*

29 *Id.*

30 It is fair to say that Chief Justice Marshall did not uniformly interpret statutes to avoid deciding constitutional questions, inasmuch as *Marbury* has long been recognized as having adopted a statutory construction that led the Court to decide constitutional issues that would otherwise not have been raised on a more natural reading of the statute. *See* MCCLOSKEY, *supra* note 17, at 26-27; William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 8.

tice validated Chief Justice Marshall's admonition in *Charming Betsy* and in *Ex parte Randolph* that courts were, if possible, to interpret statutes to avoid deciding constitutional questions.

It has been well-chronicled that the Court generally used its power of judicial review cautiously and sparingly, at least with respect to the federal government, for virtually the entire nineteenth century.[31] The avoidance canon, however, was far from a prominent part of the Court's work for the remainder of that century. Although treatises of the times mentioned the canon,[32] it showed up only occasionally in the work of the Supreme Court.[33] The reasons for this are easy to speculate upon—for example, by virtue of simple chronology, there were not many federal statutes with which to deal. Moreover, under our predominantly common law system and the regime of *Swift v. Tyson*,[34] the business of the Supreme Court was to develop the general law that would govern in federal courts.[35] Thus, cases involving statutes were relatively rare, and cases involving constitutional challenges to federal statutes were rarer still. In addition, and perhaps most significantly, the interpretive standards of the time treated the mere existence of constitutional doubts as insufficient reason to invalidate a statute; thus, as Professor Nagle has noted, "if a court determined that an interpretation of a statute simply raised doubts about its constitutionality, the court abided by that interpretation and rejected the constitutional challenge."[36]

As our legal and social institutions developed, however, the Supreme Court became less willing to stand by and permit legislatures to impinge upon then-accepted notions of private rights to liberty of

---

31 After striking down Section 13 of the Judiciary Act of 1789 in *Marbury*, the Court did not invalidate another significant federal statute until five decades later when it invalidated the Missouri Compromise. *See* Scott v. Sandford, 60 U.S. (19 How.) 393, 452 (1856); BICKEL, *supra* note 13, at 14.

32 *See, e.g.*, THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS 184 (Special ed. 1987; 1st ed. 1868) (noting "*that the court, if possible, must give the statute such a construction as will enable it to have effect*"); THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN STATUTORY AND CONSTITUTIONAL LAW 312-13 (1857) ("It has been said that it is a safe and wholesome rule, to adopt the restricted construction of a statute when a more liberal one will bring us in conflict with the fundamental law.").

33 *But see* Harriman v. ICC, 211 U.S. 407, 422 (1908) (employing the avoidance canon); Hooper v. California, 155 U.S. 648, 657 (1895) (same); Grenada County Supervisors v. Brogden, 112 U.S. 261, 269 (1884) (same); Miller v. United States, 78 U.S. (11 Wall.) 268, 309 (1870) (same); United States v. Coombs, 37 U.S. (12 Pet.) 72, 75 (1838) (same); Rutherford v. Greene's Heirs, 15 U.S. (2 Wheat.) 196, 203 (1817) (same).

34 41 U.S. (16 Pet.) 1, 19 (1842) (establishing a role for federal common law), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

35 *See* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1256 (1996).

36 John Copeland Nagle, Delaware & Hudson *Revisited*, 72 NOTRE DAME L. REV. 1495, 1510 (1997).

contract and property.[37] The constitutional history is familiar—the *Lochner*[38] era followed, and the Court struck down many of these sorts of statutes under notions of substantive due process now considered illegitimate.[39] Thus, although the political culture increasingly came to view statutes as a legitimate and normal means of setting policy, specific measures were always constitutionally vulnerable.[40] In this context, principles of judicial restraint became important to judges who opposed the aggressiveness of *Lochner*-style judicial review, and who instead took seriously traditional notions of legislative supremacy.[41]

At the same time, the Court transformed the nature of the avoidance canon. Until early in this century, the avoidance canon was generally about preferring a statutory reading that met constitutional scrutiny to one that was *actually* unconstitutional.[42] First in *Harriman v. Interstate Commerce Commission*,[43] and then definitively in *United States ex rel. Attorney General v. Delaware & Hudson Co.*,[44] the Court subtly but significantly changed the avoidance canon into a principle of avoiding statutory interpretations that merely *raise* serious constitutional doubts.[45] As the Court put it in *Delaware & Hudson*, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."[46]

---

37 *See* William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction* to HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS, at liv-lvi (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) [hereinafter HART & SACKS]; Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 383-84 (1908).

38 Lochner v. New York, 198 U.S. 45 (1905).

39 Of course, the Court did not strike down all (or even most) such measures. From 1905 through the New Deal revolution, the Court struck down some 200 social and economic regulations and upheld about the same number. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 829 (3d ed. 1996). The point here is that the Court's interpretative stance—its attitude—was dramatically different; it was far less tolerant of constitutional doubts and more willing to step in, even if it did not always do so. *See id.* at 830-34 (giving representative examples of both outcomes).

40 *See, e.g.*, Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1229-36 (1986) (describing the Court's activity in the *Lochner* era).

41 *See* Ashwander v. TVA, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring); *see also* Thayer, *supra* note 13, at 155-56 (advocating limiting judicial review to expand legislative power).

42 Professor Nagle has explored the ambiguous circumstances in which courts in the nineteenth century appeared to rely on what he calls the "doubts canon" ("modern avoidance," in my parlance) prior to *Harriman* and *Delaware & Hudson*. Nagle, *supra* note 36, at 1510-12. Apart from a few instances of ambiguous reference to a doubts canon, "the balance of the nineteenth century cases left little doubt" that the canon was about avoiding readings of statutes that were actually unconstitutional. *Id.* at 1512.

43 211 U.S. 407 (1908). *Harriman* is the subject of an illuminating discussion in Professor Nagle's article. *See* Nagle, *supra* note 36, at 1510-11.

44 213 U.S. 366 (1909).

45 *See id.* at 408; *Harriman*, 211 U.S. at 418.

46 *Delaware & Hudson*, 213 U.S. at 408.

The change from the original version of the avoidance canon (which others have termed "classical avoidance"[47]) to its current form (known as "modern avoidance"[48]) was significant. Every instance in which the Court invoked classical avoidance precluded a direct constitutional confrontation between the Court and Congress.[49] In cases of classical avoidance, without invocation of the avoidance canon, the result would have been a holding that Congress acted unconstitutionally.[50] Thus under classical avoidance, the Court was able to defer to the norm of legislative supremacy precisely up to the constitutional line. If the best reading of the statute raised a serious constitutional question but was nonetheless *in fact* constitutional, then it would be given effect; on the other hand, if that reading was unconstitutional, then the claim of legislative supremacy had to give way to the demands of the Constitution.[51] At that point, the Court had two choices, either to adopt another permissible reading of the statute that was constitutional, or to give effect to the best reading and thereby doom the statute to a ruling of unconstitutionality.[52] Recognizing, even in those pre-realist times, that statutes can be susceptible to more than one reasonable reading, the classical avoidance canon took the view that a court should prefer a permissible, even if not an optimal, reading of the statute to which it can give effect to a pure statutory reading that it must strike down.[53]

Classical avoidance, however, led to some awkwardness. First, a court could not recognize the circumstances calling for its invocation until it had first effectively engaged in judicial review and concluded that a particular reading of a statute would render it unconstitutional.[54] At that point, the canon obliged the court to adopt a different, but still permissible, interpretation,[55] which then had the effect of appearing to turn into dicta what had come before. Because this placed the Court in the apparent position of rendering advisory opinions on constitutional questions, it shifted to the doctrine of the modern avoidance canon in *Delaware & Hudson*.[56] As the Court stated in an oft-quoted portion of the opinion:

---

47 Vermeule, *supra* note 23, at 1949.

48 *Id.*

49 *See id.* at 1958-59.

50 *See id.* at 1959.

51 *See generally* Nagle, *supra* note 36, at 1498-1512 (describing the historic practice under classical avoidance).

52 *See* Vermeule, *supra* note 23, at 1959.

53 United States v. Coombs, 37 U.S. (12 Pet.) 72, 75 (1838).

54 Vermeule, *supra* note 23, at 1958.

55 *Id.* at 1959.

56 *See* United States *ex rel.* Attorney Gen. v. Delaware & Hudson Co., 213 U.S. 366, 407 (1994).

> And unless this rule [the avoidance canon] be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.[57]

Thus, in *Delaware & Hudson* the Court moved to the rule of modern avoidance—that courts should avoid interpretations *even raising serious constitutional doubts*—in order to avoid rendering advisory opinions on constitutional questions.[58]

In the wake of *Delaware & Hudson*, the doctrine of modern avoidance became part of the constitutional culture.[59] Seven years later, Justice Holmes could state definitively that "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."[60] Justice Brandeis later produced his famous concurrence in *Ashwander v. TVA*,[61] among the most influential concurring opinions in the Court's history.[62]

In his *Ashwander* concurrence, Justice Brandeis provided the most sustained judicial defense of the notion that the Court defers to Congress and thereby serves the separation of powers by not deciding constitutional questions.[63] For Justice Brandeis, it was fundamental to the constitutional structure—to the separation of powers—that the judiciary not exercise judicial review unless all alternative grounds for decision have been exhausted.[64] Only then, when there is no other option, is it proper for the Court to take on the constitutional confrontation that inheres in the very act of deciding a constitutional issue.[65] In service of this principle, Justice Brandeis catalogued a series of interpretive principles that fleshed out the command that courts

---

57 *Id.* at 408.

58 Nagle, *supra* note 36, at 1518 (observing that classical avoidance "smacks of an advisory opinion").

59 *Id.* at 1495.

60 United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916) (citing *Delaware & Hudson*, 213 U.S. at 408).

61 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

62 Nagle, *supra* note 36, at 1495 (calling it a "famous" opinion).

63 *Ashwander*, 297 U.S. at 345 (Brandeis, J., concurring).

64 *See id.* at 346-48 (Brandeis, J., concurring) (putting forth a series of rules designed to avoid constitutional questions).

65 *Id.* at 345 (Brandeis, J., concurring); *see also* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 593 (1995) (noting that each act of statutory interpretation by the courts is "an interbranch encounter of sorts").

not intervene on constitutional grounds unless absolutely necessary.[66] The avoidance canon, in its modern form, was among those principles.[67]

Justice Brandeis grounded his stance against unnecessary decision of constitutional cases in Article III's case or controversy requirement.[68] As passive instruments of government, courts were not to do anything unless parties came before them with a genuine legal dispute.[69] Thus, federal courts are not empowered to issue advisory opinions, even when the parties seem to think that they are embroiled in a genuine legal dispute.[70] The ban on advisory opinions applies, of course, to all litigation in federal courts, constitutional or otherwise.[71] In constitutional cases, though, the Court has been even more stingy; indeed, the Court regularly has said that its obligation is to avoid deciding constitutional questions unless there is no alternative.[72] And the fundamental reason for the case or controversy requirement is simply that the proper resolution of the problem (if it is to be resolved by the federal government at all[73]) is otherwise within the purview of Congress or the Executive.[74]

On this conventional *Ashwander* account,[75] the avoidance canon seeks to serve the substantive end of preserving the separation of powers. The Court's reluctance to decide constitutional questions even within genuine cases or controversies is bottomed on respect for the boundaries between legislative and judicial power. Nearly contemporaneously with the *Ashwander* concurrence came the end of the *Lochner* era,[76] and the Court's acceptance that in all but the most extraordinary circumstances it is inappropriate to second-guess legislative policy judgments on constitutional grounds.[77] As the Court put it

---

66 *Ashwander*, 297 U.S. at 346-48 (Brandeis, J., concurring).

67 *Id.* at 348 (Brandeis, J., concurring).

68 *Id.* at 345-46 (Brandeis, J., concurring).

69 *Id.* (Brandeis, J., concurring).

70 Muskrat v. United States, 219 U.S. 346, 361 (1911).

71 *E.g.*, Lord v. Veazie, 49 U.S. (8 How.) 251, 255-56 (1850) (dismissing a contract action for lack of controversy).

72 *E.g.*, Rescue Army v. Mun. Court, 331 U.S. 549, 568 (1947) (following "a policy of strict necessity in disposing of constitutional issues").

73 Similar concerns are present in the Court's treatment of issues concerning the prerogatives of the States in the federal system, including so-called plain statement rules. *See, e.g.*, BFP v. Resolution Trust Corp., 511 U.S. 531, 539-40 (1994); Gregory v. Ashcroft, 501 U.S. 452, 461 (1991).

74 *See Muskrat*, 219 U.S. at 361 (denying that the Court is a "body with revisory power over the action of Congress").

75 *See* Schauer, *supra* note 8, at 83-84.

76 W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937).

77 Of course, the Court's hands-off attitude has been mainly in the area of what it terms social and economic legislation. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (opening the possibility of judicial review in the context of "discrete and insular minorities"). The last half-century has witnessed an enormous expansion of

a decade later, "if government is to function constitutionally," courts must "keep within [their] power" by adhering to a rule of strict necessity by which they will not consider any constitutional issue unless there is no alternative.[78] In the wake of the *Ashwander* concurrence and the New Deal repudiation of the *Lochner* era it thus became an accepted part of our separation of powers culture that legislative supremacy dictated that the Court decide constitutional questions only when there was no other alternative.

II
THE AVOIDANCE CANON AND LEGISLATIVE SUPREMACY

A. The Avoidance Canon's Grounding in Legislative Supremacy

Although scholars have debated the degree to which the Constitution adopts a system of legislative supremacy,[79] the avoidance canon unreservedly accepts a strong version of legislative supremacy as the foundation of constitutional adjudication.[80] The avoidance canon and similar doctrines, such as the presumption of constitutionality[81] and the doctrine of severability,[82] are required by "a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body."[83] The avoidance canon self-consciously recognizes and seeks to respect Congress's primacy in the sphere of lawmaking.

Unlike some canons of interpretation, then, the avoidance canon is not a rule of construction designed to aid in resolving ambiguities in the law.[84] On the contrary, the avoidance canon is "a default rule[ ] that implement[s] substantive interpretive, institutional, and distributive policies."[85] In other words, the avoidance canon is a legal

---

the Court's willingness to intervene in other contexts. *See* GUNTHER & SULLIVAN, *supra* note 18, at 516. Even in these other contexts, however, the Court has adhered to the principle of the avoidance canon. Kloppenberg, *Free Speech Concerns*, *supra* note 8, at 3. My point here is simply that the necessity principle so influentially stated by the *Ashwander* concurrence gained its acceptance as part of a legal culture that accepted legislative supremacy in tandem with the rejection of *Lochner*-style judicial scrutiny of legislation.

78 Rescue Army v. Mun. Court, 331 U.S. 549, 569 (1947).

79 *Infra* note 95.

80 *See* Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477, 512-17.

81 *See, e.g.*, Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827).

82 *See* Vermeule, *supra* note 23, at 1950-55.

83 *Ogden*, 25 U.S. at 270.

84 *See* WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 329-30, 348-49 (2000); *cf.* FRIENDLY, *supra* note 7, at 210-11 (citing Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 477 (1957) (Frankfurter, J., dissenting)); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983) ("[The canon] shifts the plane of analysis from [interpretation] to that of maintaining a proper separation of powers."); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 927-34 (1992) (listing several "[l]inguistic [c]anons").

85 Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 85 (2000).

rule that allocates authority in the system in the pursuit of a substantive policy judgment.[86] The policy judgment underlying the avoidance canon (and avoiding unnecessary constitutional litigation as a general matter) is that the Court has a responsibility to respect Congress's role in the constitutional scheme.[87] The Court has said that because Congress "is bound by and swears an oath to uphold the Constitution," the Court is obliged to indulge any possible construction that avoids constitutional difficulties.[88] To follow any other course would be to disregard the "Court's appropriate place within [the federal system's] structure."[89] Because Congress has the lawmaking power under Article I,[90] and because Congress presumably intends to legislate within constitutional bounds, the Court is bound to interpret the legislature's work in any way that will result in its validation.[91] Justice Brennan summed up the typical justification for the avoidance canon as "confin[ing] the judiciary to its proper role in construing statutes, which is to interpret them so as to give effect to congressional intention."[92] Justice Breyer recently elaborated for the Court:

> The doctrine seeks in part to minimize disagreement between the branches by preserving congressional enactments that might otherwise founder on constitutional objections. . . . [T]he doctrine serve[s] [the] basic democratic function of maintaining a set of statutes that reflect, rather than distort, the policy choices that elected representatives have made.[93]

It is worth emphasizing again the important connection between the doctrine of legislative supremacy and the system's traditional wariness of the counter-majoritarian institution of judicial review. Similarly, courts and commentators have worried for generations about judicial review precisely because legislative supremacy is a fundamental premise of democratic self-government. In a democracy, those with electoral mandates—and thus electoral accountability—ought generally to make policy through law. Thus, the insight that judicial review is a "remarkable practice"[94] in this country is based entirely on the fact that it places the judicial department in the position of rejecting the product of the democratic lawmaking process. Good rea-

---

86 ESKRIDGE ET AL., *supra* note 84, at 339, 348; William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598-99 (1992); Vermeule, *supra* note 85, at 85.

87 ESKRIDGE ET AL., *supra* note 84, at 348.

88 Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

89 Rescue Army v. Mun. Court, 331 U.S. 549, 570 (1947).

90 U.S. CONST. art. I, § 1.

91 *See* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827).

92 NLRB v. Catholic Bishop, 440 U.S. 490, 511 (1979) (Brennan, J., dissenting).

93 Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998).

94 Thayer, *supra* note 13, at 130.

sons support placing judges in this position; but our traditional and strong preference for ensuring that policy judgments have a democratic pedigree explains our constitutional tradition that the judicial branch is bound to defer to the legislature's judgment absent a very good, constitutionally grounded reason.[95] Even when the legislature's policy choices are harsh and seem unreasonable, the Courts have no power "to soften the clear import of Congress' chosen words."[96]

The avoidance canon is part of how this tradition of legislative supremacy is implemented.[97] Thus the canon dictates that judges refrain from wielding the power of judicial review if there is a statutory construction available to avoid doing so. Time and again, the Court has been plain about this value. "Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons."[98] The Court has been emphatic: "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoida-

---

95 How "strong" this principle of legislative supremacy ought to be is, to be sure, open to debate. *See, e.g.*, William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 322 (1989) (arguing that it is wrong to suppose that the legislature can really bind judges by their words, and that judges inevitably will make policy in the interpretation of statutes); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 292-93 (1989) (questioning legislative supremacy and arguing that judges are not bound to defer to expectations of legislators that have not been clearly expressed). Although they differ as to the degree of legislative clarity that is accomplished in the real world, Professors Farber and Eskridge essentially argue that in the absence of such clarity judicial policy-making is inevitable and legitimate. In Professor Farber's words, even a weak conception of legislative supremacy "may allow courts to go beyond (but not against) clear legislative intent." Farber, *supra*, at 282. There is room for disagreement, to be sure, on the degree of harm (if any) done to the constitutional structure when a court implements its policy preference where the legislature has not been clear. Certainly the harm done to the separation of powers in such instances is not comparable to the harm done by judicial flouting of a clear legislative command. For purposes of this Article, it does not matter how strongly devoted one is to legislative supremacy as a general matter. The point is that the avoidance canon (and the Court's traditional aversion to unnecessarily deciding constitutional questions) is self-consciously premised upon the Court's respecting Congress's role as the primary lawmaker. *Cf.* Thayer, *supra* note 13, at 130.

96 United States v. Locke, 471 U.S. 84, 95 (1985).

97 It is worth emphasizing that my argument in this Part does not depend upon the adoption of any particular theory of statutory interpretation. What I do claim is that the *Court* has conceived and justified the avoidance canon based upon a faithful agent theory of statutory interpretation grounded in legislative supremacy, and that commentators have generally analyzed the canon on those terms. It is on those terms, therefore, that I criticize the canon. It is possible, of course, that one might attempt to defend the canon against my critique by arguing that the avoidance canon is simply part of the judicial power to adopt policy-based norms of litigation, and that its failure to respect legislative supremacy (and the role of the Executive) is simply beside the point. Neither the courts nor commentators have offered such a defense, however, and I shall not address the point further.

98 Siler v. Louisville & Nashville R.R., 213 U.S. 175, 193 (1909).

ble."[99] In short, the avoidance canon rests on the premise that the legislature is supreme within the lawmaking sphere, and that the Court's role in statutory cases is simply to be the faithful agent implementing the legislative will.[100]

B. Traditional Critiques of the Avoidance Canon

Commentators have criticized the avoidance canon on two general grounds. First, critics have suggested that in practice the canon does not serve the value of legislative supremacy. Second, critics have argued that both in fact and in theory the canon does not avoid the unnecessary making of constitutional law. Both claims, then, rest on the fundamental ground that the avoidance canon fails to serve its asserted purposes.[101]

1. *The Avoidance Canon's Illusory Respect for Legislative Supremacy*

Critics have focused first on the question whether the avoidance canon in fact serves the underlying structural value of legislative supremacy. On analysis, the assumption that the avoidance canon serves legislative supremacy turns out to be oversimplified. First, given the complexities of the legislative process, it might well be that Congress would want a statute to be construed in a manner that makes the constitutional question unavoidable. Second, it is no service to Congress, no great act of deference, to construe a statute in a manner contrary to its text and history in order to avoid even confronting a constitutional doubt. Indeed, the Court has recognized the latter point, noting that the avoidance canon is not "a license for the judiciary to rewrite language enacted by the legislature."[102]

By requiring courts to adopt any plausible interpretation of a statute that does not raise constitutional doubts, the modern avoidance canon assumes that Congress never intends to depart from constitutional comfort zones unless it is absolutely clear about it. Such an

---

99 Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944).

100 *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 10-22 (2001) (describing the role of the faithful agent theory in competing camps of statutory construction). William Eskridge has urged that courts have inherent power to do equity in implementing a statute, regardless of the legislature's understanding as expressed through the text or history of the act. *See* William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1524 (1998) (book review). This debate over whether the Constitution takes as a premise a faithful agent theory of statutory interpretation and the vision of legislative supremacy that underlies that theory, or whether it takes a more free-wheeling, equitable view of the power of courts is important and interesting. There is no doubt, however, that the Court has grounded the avoidance canon in the fundamental constitutional structure, and that the Court has understood part of that structure as including legislative supremacy.

101 Frickey, *supra* note 80, at 512-13.

102 United States v. Albertini, 472 U.S. 675, 680 (1985); *see also* United States v. Monsanto, 491 U.S. 600, 611 (1989) (quoting *Albertini*, 472 U.S. at 680).

assumption is undefended in the cases, and there seems to be little reason to believe that experience proves it to be warranted as a general matter.[103] Congress might well intend for the law to be interpreted in a way that raises constitutional doubts, whether or not particular members were aware that the statute was approaching the constitutional line when they voted for it.[104] In exploring this point, I will focus in some detail on what are probably the three most prominent avoidance cases.

Consider *NLRB v. Catholic Bishop*,[105] a case involving the scope of coverage of the labor laws enacted between 1935 and 1974.[106] The relevant statute limiting the jurisdiction of the NLRB defined the term "employer" generally, but excluded several different sorts of organizations (such as government entities) without addressing religious organizations specifically.[107] To Justice Brennan and the three other dissenters, that was strong evidence that Congress meant for religious employers *not* to be excluded from the statute's coverage.[108] On top of that, Justice Brennan pointed to legislative history indicating that Congress had considered excluding religious employers, but in the end decided not to include such a provision in the statute.[109] Thus, Justice Brennan argued fairly persuasively that the Court had endorsed a reconstruction, rather than a fair construction, of the statute.[110] The Court, on the other hand, noted the longstanding canon that statutes are to be construed to avoid even raising serious constitutional questions and that extending the labor laws to religious employers would implicate serious First Amendment issues.[111] Rather than face those issues unnecessarily, the Court required evidence of an af-

---

103 *See* Lawrence C. Marshall, *Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation*, 66 CHI.-KENT L. REV. 481, 489-90 (1990) (noting that Congress might well wish for legislation to be interpreted up to the constitutional line); Vermeule, *supra* note 23, at 1962 (making the same point).

104 *See* Vermeule, *supra* note 23, at 1962.

105 440 U.S. 490 (1979).

106 *Id.* at 504-06. Harold Krent has offered an excellent analysis of the implications of the avoidance canon's use in NLRB cases. *See* 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 (1983).

107 *Catholic Bishop*, 440 U.S. at 512-13 (Brennan, J., dissenting).

108 *Id.* at 514-15 (Brennan, J., dissenting).

109 *Id.* at 512-13 (Brennan, J., dissenting).

110 *Id.* at 516 (Brennan, J., dissenting).

111 *Id.* at 499-504. The Court, perhaps to its credit inasmuch as it did not decide the case on this basis, was unclear about the specifics of the First Amendment doubts. *Id.* The Court seemed more concerned, however, with the possibility of excessive entanglement between the government (in the form of the NLRB) and religious schools than it seemed to be with the free exercise rights of the schools, their students and their teachers. *Id.* at 501.

firmative congressional intent to cover religious organizations.[112] Because the statute was silent on the question whether it covered religious employers—even though such employers fit within its general definition of employers—the Court concluded that Congress had not granted the NLRB jurisdiction over religious organizations.[113]

Kent v. Dulles[114] is another, and perhaps more famous, example of how the avoidance canon operates in the context of general statutory language that, if applied as written, would raise constitutional concerns. In *Kent* the Court narrowly construed the grant of statutory authority to the Secretary of State to issue passports as not allowing him to deny passports to Communists or those who refused to state under oath that they were not Communists.[115] Although on its face the statute at issue did not limit the Secretary's authority, the Court nonetheless imposed a limiting construction.[116]

The Court's statutory construction was based upon a close analysis of the history of passport legislation and the Secretary of State's historic practices relating to granting and denying passports.[117] The Secretary's statutory grant of authority, which was established in 1926, provided that the Secretary was empowered to grant passports to citizens subject to regulations that the President deemed fit to promulgate.[118] It was not until 1952, however, that passports became mandatory for those wishing to engage in foreign travel.[119] Prior to that time, the Secretary of State was empowered to issue passports, and the amendment of the statutory scheme in 1952 to establish the requirement (rather than just the option) of a passport did not address—either to expand or retract—the scope of the Secretary's authority.[120] After Congress passed the 1952 Act, the Secretary promulgated the regulations at issue, which forbade the issuance of passports to persons who were members of the Communist Party or who engaged in activities that supported the Communist Party.[121]

Against this complex statutory and regulatory background, the Court concluded that the Secretary was not authorized by law to deny

---

112 *Id.* at 501. On the contrary, a 1974 amendment to the statute extending its coverage to nonprofit hospitals did allow employees with religious scruples against joining labor organizations to forgo union membership so long as an amount equivalent to union dues was donated to charity. *Id.* at 506. The negative implication of this amendment might reasonably be that Congress otherwise expected religious institutions to be covered.

113 *Id.* at 507.

114 357 U.S. 116 (1958).

115 *Id.* at 130.

116 *Id.* at 127-30.

117 *Id.* at 121-29.

118 *Id.* at 123-26 (recounting the history of United States passport legislation).

119 *Id.* at 121-22.

120 *Id.*

121 *Id.* at 117-18.

passports to Communists.[122] The Court refused to assume that in failing to qualify its delegation of authority, Congress meant for it to be unqualified.[123] The Court defended this narrowing of the general statutory language based on the assumption that *Congress* would have wanted it to interpret the law that way.[124] Congress's delegation of passport authority, the Court said, was implicitly limited to the extent that the exercise of that authority raised serious constitutional concerns.[125]

The opinions in *Catholic Bishop* and *Kent* share an important feature that illuminates the assumptions underlying the avoidance canon. Once a serious constitutional issue appeared on the horizon, the Court in both cases adopted an interpretive posture that required the government affirmatively to establish that Congress intended to authorize the conduct at issue. In *Catholic Bishop*, the Court stated that as a matter of statutory construction it would require "the affirmative intention of the Congress clearly expressed" to authorize the challenged conduct before it would reach the constitutional issue.[126] In *Kent*, the Court emphasized that in the context of an apparent abridgement of a constitutional freedom, it would "hesitate to impute to Congress . . . a purpose to give [the Secretary of State] unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose."[127] Absent a provision of such authority "in explicit terms," the Secretary may not deny passports "to restrict the citizens' right of free movement."[128]

Except for relying on general notions of legislative supremacy, the Court has not defended its assumption about legislative preferences. In both *Kent* and *Catholic Bishop*—and probably as a general matter—the assumption that Congress would want its work construed to avoid even raising a constitutional doubt is questionable as a matter of fact. In both *Catholic Bishop*[129] and *Kent*[130] the statutory language was general and unqualified; and ordinarily, of course, the language chosen by Congress is the best evidence of its intent.[131] Nor in either case was there anything in the statutory background to suggest any

---

122 *Id.* at 130.

123 *See id.* at 129-30.

124 *Id.* at 130.

125 *Id.*

126 *Catholic Bishop*, 440 U.S. at 501. The Court drew the quoted language from *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963), which in turn drew from *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957).

127 *Kent*, 357 U.S. at 128.

128 *Id.* at 130.

129 440 U.S. at 512-13 (Brennan, J., dissenting).

130 357 U.S. at 127.

131 *E.g.*, United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980); United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940).

understanding by members of Congress that the general statutory language should be qualified through judicial interpretation. In *Catholic Bishop*, the statute at issue expressed a congressional policy choice that workers should have the right to union representation if they so chose.[132] In *Kent*, the statute at issue expressed the policy choice that the Secretary of State was to have the power to grant passports for reasons as he saw fit.[133] But in both cases the Court imputed an intent to Congress to limit the effective reach of the statutory language that was enacted into law.

That imputation of intent to Congress under the avoidance canon was based upon the Court's own speculation about what Congress would have wanted. As a general matter, though, it is fair to wonder, "why [should] the legislature . . . care that its statute raises a constitutional question[?]"[134] Moreover, in *Catholic Bishop* and *Kent*, the text and history of each statute, fairly read, led more readily to the conclusion that Congress would have expected the constitutionally dubious course to be followed—that the right to organize into bargaining units should extend to employees of religious institutions and that potentially disloyal Americans should not have passports.

As for the *Catholic Bishop* scheme, one can easily imagine good arguments on both sides of that question. On the one hand, there is no reason to suppose that those voting for the National Labor Relations Act or its amendments did *not* want to cover religious employers. On the other hand, it seems reasonable to expect that some voters in Congress (it is impossible to say how many) would have wanted to compromise on the statute's extension to avoid trampling unnecessarily on the autonomy of religious groups. How Congress would have struck that balance if the question had been squarely posed and voted upon, however, is a subject of pure speculation.[135] As Professor Krent

---

132 *Catholic Bishop*, 440 U.S. at 506.

133 *Kent*, 357 U.S. at 124-25.

134 POSNER, *supra* note 8, at 284.

135 Here the connection between avoiding constitutional questions and doctrines of severability is salient. *See* Vermeule, *supra* note 23, at 1947 (giving insightful consideration to this connection). The Court treats the question whether the unconstitutional portion of a statute is severable from the remainder as one of congressional intent; to determine severability, a court is to determine whether Congress would have passed the statute without its unconstitutional provisions. *E.g.*, Regan v. Time, Inc., 468 U.S. 641, 653 (1984); Buckley v. Valeo, 424 U.S. 1, 108-09 (1976) (per curiam). This inquiry is necessarily speculative to some degree, even in situations where Congress has included a statutory provision addressing the question. *See* Bowsher v. Synar, 478 U.S. 714, 783 (1986) (Blackmun, J., dissenting). For present purposes, I simply note that both the avoidance canon and the doctrine of severability depend upon a hypothetical construction and implementation of congressional intent. Although the real world consequences of the hypothetical construction of congressional intent seem more stark in the context of severability analysis, in fact the avoidance canon has the same effect—to impose a statutory construction based upon hypothesized congressional intent.

has noted, the avoidance canon in this context risks "supplanting congressional policy" through the imposition of the Court's preferences masked as Congress's.[136]

With respect to *Kent*, nowadays there does not seem to be much of an argument for passport denials on ideological grounds. So the Court's assumption that Congress would not have wanted to permit that practice seems at first blush to be a reasonable reflection of reality. But recall the times in which the statute at issue was passed. In 1952, when Congress most recently had addressed the passport issue, there was no reason to think that the legislative branch would have been more tolerant of Communist sympathizers than the Secretary of State.[137] The assumption of *Kent* makes a great deal of sense if the canon invoked were classical avoidance—and it must be said that Justice Douglas's opinion goes a long way toward stating on the merits that the Secretary's policy in fact violated the Constitution.[138] But the Court explicitly claimed that it was engaging in modern avoidance; it disclaimed reaching any constitutional question, preferring to rely on its statutory construction to resolve the case.[139] Thus, taken on its own terms, *Kent* is an exercise not so much in pure speculation (as was the case in *Catholic Bishop*), but in assuming the best of Congress. Again, though, that assumption is just that—an assumption that did not necessarily reflect the reality of the times.[140]

The objection to the Court's reconstruction of legislative intent goes even further. Public choice theory[141] suggests that it is impossible to determine whether legislation in fact reflects the aggregated preferences of the voting members of a legislature, because a variety of factors apart from the substance of the measure (such as agenda control and strategic voting) can affect the outcome of the complicated and expensive legislative process.[142] In the absence of clear lan-

---

136 Krent, *supra* note 106, at 212.

137 *See Kent*, 357 U.S. at 140-42 (Clark, J., dissenting).

138 *Id.* at 129-30.

139 *Id.* at 129.

140 For example, although the Court concluded—based on an assumption and not any clear expression—that in 1952 Congress had not intended to allow the denial of passports to Communists, *id.* at 130, just two years earlier Congress had passed a statute affirmatively barring the application for or granting of a passport to members of Communist organizations that were subject to registration requirements, *id.* at 140 (Clark, J., dissenting).

141 Public choice theory, coupled with the insights of game theory, seeks to explain the behavior of political institutions through economic analysis. *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991) (describing public choice theory and advocating for its modest role in analysis of law and government); *see also* Geoffrey Brennan & James M. Buchanan, *Is Public Choice Immoral? The Case for the "Nobel" Lie*, 74 VA. L. REV. 179, 179 (1988) (defining public choice theory).

142 *See* FARBER & FRICKEY, *supra* note 141, at 38-42; *see also* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963) (setting forth a mathematical theory for public choice). According to Arrow's Theorem, in a multi-member voting body in which each member does not have a single preference as to the outcome, majority rule will not

guage answering the problem, then, "judicial predictions of how the legislature would have decided issues it did not in fact decide are bound to be little more than wild guesses."[143] That is even more true with respect to speculation about what the legislature might have done had it focused upon the serious constitutional problem posed by an interpretation of its work and decided whether it nonetheless would press for such a construction and thus force a constitutional decision from the courts.

In other words, it is simply not possible to say what the outcome of the legislative process would have been if the question were put to the members of both Houses—just how would you have voted on some hypothetical bill if you knew that the language chosen would put the courts to the decision of a constitutional question? How would you have voted had an alternative formulation of the language been offered before (or after) that language? How would you have voted for potential amendments? These inquiries are simply unanswerable. All we know is that each member voted for (or against) a particular bill at a particular time. Each might have anticipated the constitutional problems and concluded that it was worth provoking a constitutional decision in order to accomplish the goals of the legisla-

---

necessarily produce a genuine ordering of preferences (even if one assumes that one exists) because the order in which alternatives are voted upon, and in which alternatives are placed in competition, determines the outcome. *See* FARBER & FRICKEY, *supra* note 141, at 38-39; Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 101 (1991); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 685 (1997); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 242 (1992). In a phenomenon known as cycling, different majorities can endlessly produce contradictory outcomes unless, as a matter of process, voting is ended at some point. Manning, *supra*, at 685-86 & n.53. Thus it is that agenda control and vote-trading (logrolling) can arbitrarily determine the outcome. *See* FARBER & FRICKEY, *supra* note 141, at 40-41.

143 Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 548 (1983). I should add that the literature analyzing the applicability of public choice theory to statutory interpretation is vast. *See generally, e.g.*, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 7-8 (1994); FARBER & FRICKEY, *supra* note 141, at 88-106; NEIL K. KOMESAR, IMPERFECT ALTERNATIVES 193-94 (1994); JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 81-105 (1997); Jim Rossi, *Public Choice Theory and the Fragmented Web of the Contemporary Administrative State*, 96 MICH. L. REV. 1746 (1998) (book review) (applying public choice theory to administrative law); *cf.* Linda Cohen & Matthew Spitzer, *Term Limits*, 80 GEO. L.J. 477 (1992) (applying public choice theory to term limits); Saul Levmore, *Bicameralism: When Are Two Decisions Better than One?*, 12 INT'L REV. L. & ECON. 145, 147-51 (1992) (applying public choice theory to bicameralism); Pablo T. Spiller & Emerson H. Tiller, *Decision Costs and the Strategic Design of Administrative Process and Judicial Review*, 26 J. LEGAL STUD. 347 (1997) (applying this theory to administrative process and judicial review). And the use of public choice theory in legal scholarship has been criticized. *See* Edward L. Rubin, *Public Choice and Legal Scholarship*, 46 J. LEGAL EDUC. 490 (1996). The account here is narrow and simplified to make the point that it is guesswork to attribute a specific intent to Congress with regard to any particular statute as to how it would choose to have the law interpreted if its members knew that a serious constitutional question was presented.

tion. Or each might have refused to vote for a bill that adopted in plain terms the construction the Court later chose in order to avoid the constitutional decision, and might have voted for the actual bill only on the understanding that it *did* present serious constitutional difficulties. Or each member of Congress might have voted in ignorance of the lurking constitutional difficulties, or might have been aware of them and indifferent about them. The point is that it is impossible after-the-fact to construct what might have happened in the legislative process had things gone differently. All we have is the bill that Congress ultimately passed.[144]

To illustrate further these problems, consider *United States v. X-Citement Video, Inc.*[145] That case raised the question whether the Protection of Children Against Sexual Exploitation Act of 1977 contained a scienter requirement that the defendant knew that minors depicted in pornography were underage.[146] The statutory text provided that a person commits a felony if he "knowingly transports or ships in interstate or foreign commerce . . . any visual depiction, if . . . the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct."[147] Reading the statute so that the "knowingly" requirement attached only to the transportation in interstate commerce element of the offense would raise a First Amendment freedom of speech issue due to the established doctrinal fact that the First Amendment protects nonobscene pornography involving adults, but does not protect pornography involving minors.[148] On the one hand, under that reading of the statute, a pornographer would face essentially strict liability if the participants turned out, unbeknownst to him, to be underage.[149] On the other hand, this First Amendment issue goes away if the "knowingly" requirement is read as modifying not only the transportation element but also the requirement that the

144 Of course, many commentators offer a more optimistic vision of the Court's role in statutory interpretation, and urge, even if the text of the statute does not dictate an answer, that the Court can nonetheless fulfill its role by implementing some version of the legislature's intent. *See, e.g.*, T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 23-24 (1988) (describing the argument that courts should try to discern how the enacting legislature would have answered the specific question); Posner, *supra* note 84, at 817-21 (arguing that the court should try to imagine what the legislature would want). Others claim that reviewing courts serve their function by trying to implement the overall general purpose of the legislation as discerned from all relevant sources of meaning. *See, e.g.*, ESKRIDGE, *supra* note 143, at 5-8; HART & SACKS, *supra* note 37, at 1253-54. I take no position here on these questions, except to claim that the avoidance canon's reconstruction of legislative preferences is not (in the absence of real world evidence) based on *actual* data but is instead speculative.

145 513 U.S. 64 (1994).

146 *Id.* at 68-69.

147 *Id.* at 68 (quoting 18 U.S.C. § 2252(a)(1) (1994)).

148 *See, e.g.*, Osborne v. Ohio, 495 U.S. 103, 109-11 (1990).

149 *X-Citement Video*, 513 U.S. at 69.

depiction involve the use of a minor.[150] In other words, outlawing the use of minors in pornography if its purveyors knew the age of the participants raises no freedom of speech problem.[151]

Invoking the avoidance canon, the *X-Citement Video* Court read the statute as extending the scienter requirement to the age of the participants as well as the interstate shipment of the materials.[152] Although the Court acknowledged that as a matter of language its interpretation of the text was difficult to sustain, the serious First Amendment concerns that would otherwise arise justified such a reading.[153] Thus, attributing an intent on Congress's part not to pass an unconstitutional statute, the Court read the text in a manner that was contrary to its apparent meaning.[154]

As Professor Schauer has pointed out, there are several problems with the Court's performance here.[155] First, and most saliently, it is textually difficult to read the adverb "knowingly," which appears directly before the verb "transports" in the first line of the statutory section at issue, as reaching into two subsequent subsections of the statute which both contain verbs unmodified by any adverb at all.[156] Here, then, as in *Catholic Bishop*, the Court misconstrued a statute to avoid the constitutional confrontation that is inherent any time it undertakes the process of judicial review.[157] It did so, however, apparently unaware of the lack of respect shown by adopting a wrong construction of the language that Congress actually wrote.[158]

The Court might respond, however, that Congress obviously would not intend to pass a constitutionally questionable statute. It is certainly true that the system presumes that Congress intends to act constitutionally—it would be lawless for Congress ever to intend otherwise—and for its work product to be construed if possible to be constitutional.[159] It is quite a different point, however, to assume that Congress would want its work to be interpreted as not even approaching the constitutional line. Consider the politics of the child pornography situation. If we put it to an up or down vote in Congress, it is far from clear that we could expect the political process to err on the side of not forcing a constitutional decision if it meant simultaneously reg-

150 *Id.* at 78.
151 *Id.*
152 *Id.* at 69.
153 *Id.* at 68, 70-73.
154 *Id.* at 76.
155 Schauer, *supra* note 8, at 81.
156 *X-Citement Video*, 513 U.S. at 80-81 (Scalia, J., dissenting).
157 *See* NLRB v. Catholic Bishop, 440 U.S. 490, 506-07 (1979).
158 *X-Citement Video*, 513 U.S. at 82-87 (Scalia, J., dissenting).
159 *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 469 (1989) (noting that the avoidance canon "responds to Congress' probable preference for validation over invalidation").

ulating child pornography less completely. The crucial difference is between a situation in which the best reading of the statute would be actually unconstitutional and one in which a less-than-best construction is adopted to avoid even deciding on the statute's constitutionality.[160] In cases like *X-Citement Video*, the Court has told Congress that it will not permit the legislature even to come close to the constitutional line. As others have noted, this creates a judge-made penumbra around the actual demands of the Constitution and therefore, as a practical matter, arguably limits the legislative hand even more than invalidation after engaging in judicial review.[161]

How serious is this judicial intrusion? Here it is important to be precise about what we are analyzing; our conclusions about the proper interpretive course depend upon an understanding of the different possible points of comparison. The first issue is whether it is preferable to misinterpret a statute in order to avoid even having to decide a constitutional question. Defenders of the avoidance canon might object that this is an unfair scenario to paint; after all, the canon, by its terms, only kicks in if the competing interpretive possibilities are "fair" constructions of the statute.[162] Experience has shown, however, that the Court's conclusions about the interpretations that count as "fair" constructions of statutes can be highly dubious.[163] Moreover, the fact that there might be numerous "fair" constructions of a statute does not mean that there is not one that is best. The very point of the avoidance canon is to require that even the best construction of a statute be rejected in favor of a less plausible alternative if the former raises a serious constitutional question and the latter does not. So we are back where we started: is the detriment of misinterpreting a statute (or choosing an interpretation other than the most plausible one) to be preferred along with the benefit of avoiding judicial review?

Others have argued persuasively that the answer to this question is no.[164] The time has long passed when concerns about the legitimacy of judicial review, or its political acceptability, counseled serious

160 *See* Nagle, *supra* note 36, at 1498 (noting the importance of the distinction and defending construing statutes to avoid actual unconstitutionality).

161 United States v. Marshall, 908 F.2d 1312, 1318 (7th Cir. 1990) (Easterbrook, J.); Posner, *supra* note 84, at 816.

162 Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998).

163 *See, e.g., X-Citement Video*, 513 U.S. at 68 (acknowledging that its reading of the statute was not the most natural or grammatical one available); Pub. Citizen v. DOJ, 491 U.S. 440, 454-55 (1989) (rejecting a "literal reading" of the statute in favor of one that avoided a constitutional question).

164 *See* FRIENDLY, *supra* note 7, at 210-12; Posner, *supra* note 84, at 816-17; Schauer, *supra* note 8, at 97-98; Shapiro, *supra* note 84, at 947.

caution about deploying it.[165] For one thing, for better or worse, our legal and political culture is accustomed to the idea.[166] As one commentator recently said, "[t]oday, judicial review is hardly controversial."[167] Moreover, our constitutional history has taught us that judicial review is not in and of itself threatening to democratic values. As far back as the time of the founding generation, it was said that judicial review, when practiced properly, in fact *enhances* democracy in important ways.[168] Thus, although there is an element of presumptuousness in the Court's even undertaking judicial review, the legitimacy of the Court's doing so is our unbroken constitutional tradition. In short, it is no longer the act of judicial review that is troubling. Rather, it is judicial review done badly. The Court's legitimacy is threatened not by the act of answering constitutional questions at all, but by giving the *wrong* answers to them.

That does not mean, however, that courts ought to be immodest in their conception of the scope of judicial power. Just as it is our unbroken tradition that courts engage in judicial review, it is also our tradition to prefer nonconstitutional grounds for a decision to a constitutional ground.[169] Thus it makes perfect sense from the standpoint of the separation of powers for a court to hesitate before declaring an act of a coordinate department unconstitutional.[170] Adhering to such traditional policies as a default rule—in order to main-

---

165 *See* Ashwander v. TVA, 297 U.S. 288, 345-46 (1936) (Brandeis, J., concurring) (the Court "for its own governance," and not because of concerns about the legitimacy of judicial review, refrains from deciding constitutional cases "confessedly within its jurisdiction" unless it is necessary to do so); Rescue Army v. Mun. Court, 331 U.S. 549, 569-71 (1947) (rule of necessity is "basic to the federal system and this Court's appropriate place within that structure"); Thayer, *supra* note 13, at 135.

166 *See* Joel K. Goldstein, *The Presidency and the Rule of Law: Some Preliminary Explorations*, 43 ST. LOUIS U. L.J. 791, 820 (1999).

167 *Id.*

168 Indeed, the original and most influential statements supporting the theory of judicial review relied on this very argument. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179-80 (1803) (noting the superior democratic pedigree of the Constitution over statutes and the vindication of democratic values achieved by striking down unconstitutional laws); THE FEDERALIST No. 78, at 578 (Alexander Hamilton) (John C. Hamilton ed., 1865) ("[T]he constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."). Modern scholars have emphasized the democracy-enhancing prospects of judicial review. *See, e.g.*, ELY, *supra* note 13, at 8-9.

169 *E.g.*, Siler v. Louisville & Nashville R.R., 213 U.S. 175, 193 (1909); Burton v. United States, 196 U.S. 283, 295 (1905).

170 *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA 11 (1990); ELY, *supra* note 13, at 4-5; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 13-15 (2d ed. 1988); Thayer, *supra* note 13, at 143-44. In short, commentators from across the political spectrum agree that the Court ought not to feel free to reject willy nilly on constitutional grounds the acts of other government actors. Of course, it goes without saying that *where* one falls on the spectrum of when courts should intervene in the name of the Constitution, and the reasons *why* one is willing to let the courts step in, vary widely. But virtually all agree that it is a serious and sobering act, and not one that ought to be taken lightly.

tain the proper place of the judicial department within the constitutional scheme—is unproblematic. Problems arise, however, when we adhere to traditional devices that are meant to serve that purpose without giving any attention to whether such devices (in particular, the avoidance canon) actually *disserve* the policies they are assumed to advance.

This point becomes even more clear if we compare the nature of the disrespect courts show Congress when engaging in judicial review (the simple undertaking to decide a constitutional case) with the level of disrespect courts show by statutory *mis*interpretation as the result of the avoidance canon. Invoking the avoidance canon does not ipso facto show more respect for Congress. The avoidance canon is not inherently respectful, and engaging in judicial review is not inherently disrespectful. As Professor Mashaw has argued, "[a] court that sustains and applies a statute interpreted by reference to [the avoidance] canon surely shows no greater solicitude for legislative preferences than does a court that attempts to understand what was meant and then engages in a serious constitutional analysis of the validity of the statute."[171]

The Court has recognized this as well. Indeed, it has stated the strongest version of this point directly—that it positively violates the separation of powers to misconstrue a statute to avoid a constitutional question. The avoidance canon, the Court says, "is not a license for the judiciary to rewrite language enacted by the legislature. . . . Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution."[172] Given the Court's ready and repeated acceptance of this seemingly obvious point, what accounts for the Court's stubborn, indeed unquestioning, allegiance to the canon? It is possible that the answer lies in an unstated belief that the avoidance canon is really about avoiding constructions of statutes that are outright unconstitutional. That is, it might be that the formal terms of the canon—avoiding even serious constitutional doubts—fail to reflect its reality and that the modern avoidance canon in fact is no different from pre-*Delaware & Hudson* classical avoidance.

It turns out, however, that the avoidance canon in its modern form is not necessarily at all about avoiding *actual* holdings of unconstitutionality. As Professor Vermeule has noted, the Court has repeatedly later *upheld* the constitutionality of legal interpretations that it

171 Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 840 (1991).

172 Salinas v. United States, 522 U.S. 52, 59-60 (1997) (citations omitted) (quoting United States v. Albertini, 472 U.S. 675, 680 (1985)); *see* United States v. Locke, 471 U.S. 84, 95-96 (1985); Heckler v. Mathews, 465 U.S. 728, 741-42 (1984).

had earlier refused to confront after invoking the avoidance canon.[173] So the belief that the avoidance canon in fact avoids only true unconstitutionality is belied by the reality of at least some of the Court's cases.[174]

An erroneous interpretation of a statute is, in at least one sense, less damaging to the constitutional structure than the invalidation on constitutional grounds of an act of Congress. The simple reason why is that Congress can correct such an error by passing a new statute. But the comparison between the ease of undoing erroneous statutory interpretations and difficulty of overturning erroneous constitutional interpretations oversimplifies matters. In the first place, it might be that a statute *should* be struck down in the course of deciding a case; if Congress has in fact acted unconstitutionally, it does no harm to the separation of powers for the Court to say so. For instance, in *X-Citement Video,* the Court almost certainly would have found unconstitutional the absence of a scienter requirement in the Protection of Children Against Pornography Act had it interpreted the statute, in its own terms, by giving it the "most grammatical reading."[175] Or, to refer to an example from two generations ago, the Court today likely would hold unconstitutional on First Amendment grounds[176] (and right to travel grounds)[177] a statute denying citizens passports based upon their membership in the Communist Party.[178] It might well be that that would have been the *right* constitutional result in both cases.

This suggests that whether the Court appropriately decided a constitutional case depends upon the substantive correctness of the Court's judgment. It is indeed a troubling and significant disruption to the separation of powers for the Court to give the wrong answer to such questions. On the one hand, if the Court errs on the side of unconstitutionality, it has wrongly taken it upon itself to reject the product of the democratic process. On the other hand, if Congress has passed an unconstitutional statute, then the right thing (assuming a proper case or controversy is brought) is for the Court to strike it down. In that situation, Congress has by definition arrogated to itself power that it does not possess.

---

173 Vermeule, *supra* note 23, at 1960-61 (gathering and discussing examples).

174 Moreover, even if the descriptive claim that the avoidance canon is about avoiding actual, as opposed to potential, unconstitutionality is true, there is no reason why the Court should not say so. The avoidance canon should be evaluated, in other words, on its own terms; if the canon is about something other than what the Court claims, then that is itself reason enough to abandon it.

175 United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994).

176 *See* Aptheker v. Sec'y of State, 378 U.S. 500, 507 (1964) (holding a statute denying passports to communists unconstitutional on First Amendment grounds).

177 *See* Kent v. Dulles, 357 U.S. 116 (1958) (implying that refusal to grant a passport on ideological grounds violates the constitutional right to travel).

178 *Id.* at 117 n.1.

One might respond that it is naive to suppose *either* that statutes have one true meaning *or* that the Constitution provides one correct answer to a question. Thousands of pages of opinions, articles, and books reflect the lack of agreement on almost every constitutional question that one can imagine needs answering,[179] as well as the lack of agreement as a matter of theory that one answer exists.[180] The avoidance canon itself, however, by taking as a premise that there is a range of permissible statutory meanings, necessarily also takes as a premise that there are impermissible statutory meanings. When the Court points out that the avoidance canon "is not a license for the judiciary to rewrite language enacted by the legislature,"[181] it takes as a premise that the range of permissible constructions is finite—that there are wrong answers. And interpretive norms generally take the same premise for interpretation of the Constitution.[182]

In light of these premises (which are central to how the legal system operates daily), the avoidance canon's devotion to legislative supremacy becomes even more important. The avoidance canon takes on faith the idea that the democratically accountable legislature makes the law and that the Court's role is to offer faithful interpretations of the legislature's work. The Court is justified in standing in the legislature's way only if the higher law of the Constitution demands it.[183] Both the traditional conception of the Court's job in statutory interpretation as faithfully "giv[ing] effect to the will of Congress"[184] and the avoidance canon's value of invoking the power of judicial review only when necessary are grounded in the constitutional principle of the separation of powers.

---

179 The list of citations for these propositions would encompass most of the United States Reports and the bulk of constitutional law scholarship.

180 *See, e.g.*, STEVEN D. SMITH, THE CONSTITUTION AND THE PRIDE OF REASON ix (1998) (endeavoring to "make sense" of "the seeming chaos we call 'constitutional law'"); MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 313 (1988) (concluding that "the liberal tradition makes constitutional theory both necessary and impossible"). Philip Bobbitt has made an influential treatment of the varieties of constitutional arguments that are appropriate to, and persuasive in, different contexts. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE 3-122 (1982).

181 United States v. Albertini, 472 U.S. 675, 680 (1985).

182 *See* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 357-58 (1981).

183 Scholars have perceptively questioned both the theoretical basis for legislative supremacy in statutory interpretation, *see, e.g.*, Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 CASE W. RES. L. REV. 1129, 1129-30 (1992); Eskridge, *supra* note 95, at 321-22; Farber, *supra* note 95, at 281-83; Schacter, *supra* note 65, at 593-96, and the degree to which in practice the Court actually adheres to traditional norms of legislative supremacy, *see, e.g.*, Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1091-1120 (1992). For my purposes, the important point is that the avoidance canon itself continues to depend on a strong version of legislative supremacy.

184 Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982).

Thus a statutory misinterpretation, even when motivated by respect for Congress and the separation of powers, works the same kind of damage to the system as the improper invalidation of a statute. In both situations, the Court fails to respect the supremacy of the legislature in the lawmaking sphere. In both situations, the Court says to the legislature that it cannot have its preferred way. Indeed, as Professor Mashaw has pointed out, there is something more underhanded about the damage done by misinterpretation than that done by invalidation.[185] In the former situation, the system pretends that nothing has gone awry; in the latter, the Court has solemnly invoked its ultimate power and judged the legislature to have violated our fundamental law. Thus the Court does not do any more inherent damage to the separation of powers by striking down a statute erroneously than it does by saving a statute through interpretive sleight of hand.

And matters are even worse than that. The argument thus far has compared the damage of *actual* invalidation with the damage of misinterpretation. In fact, however, the avoidance canon is explicitly designed to avoid *potential*, rather than actual, invalidation. This distinction provided the basis for the move from classical avoidance to modern avoidance that the Court's decision in *Delaware & Hudson* inaugnrated and that Justice Brandeis's *Ashwander* concurrence cemented into the law. In other words, the avoidance canon claims that it is essential to avoid even the occasion of sin (the affront to Congress of merely undertaking the consideration of a constitutionally doubtful question), rather than the sin itself (actual constitutional invalidation). But there is nothing inherently wrong about either undertaking a constitutional decision or declaring an act of Congress unconstitutional. And there is nothing inherently right about misinterpreting a statute to avoid the occasion for such undertakings.

2. *The Avoidance Canon and the Unnecessary Making of Constitutional Law*

The second general criticism of the canon is that it does not avoid the unnecessary making of constitutional law. In any case in which the avoidance canon dictates the statutory interpretation, the argument goes, constitutional values have an impact on the law. To return to familiar examples, in cases like *Kent*, constitutional principles *dictated* the choice of statutory meaning that becomes the law.[186]

---

185 *See* Mashaw, *supra* note 171, at 840.

186 This argument is in some tension with the argument I made above that the avoidance canon is actually a *doubts* canon because experience shows that the Court sometimes later upholds the constitutional interpretation that earlier was the source of the doubts which led the Court to adopt a particular statutory interpretation. *See supra* note 173 and accompanying text. This point further undercuts the avoidance canon, however, because it means that the prior statutory interpretation, which by definition was chosen to avoid

That means that the constitutional questions that the Court purported not to decide in fact had a substantive effect on the outcome of those cases. Absent the constitutional right to travel, a Communist sympathizer would not be entitled to a passport from the Secretary of State.[187] Absent the right to due process, a criminal defendant would not be entitled to notice from the district court before it imposes an upward departure in applying the sentencing guidelines.[188] Or absent the principle of the separation of powers, the American Bar Association would have to open its deliberations on judicial nominations to the public pursuant to the Federal Advisory Committee Act.[189] In a real sense the Court makes constitutional law every time it invokes the avoidance canon, but with "a whisper rather with a shout."[190] The very essence of the avoidance canon is to ensure that constitutional doubts, which might or might not be justified, dictate the result in the case.

This sub silentio constitutional law making is problematic. Professor Schauer argues that its costs outweigh its benefits,[191] and increasingly commentators seem to agree.[192] The most obvious cost is that courts give statutes a meaning they would not ordinarily bear in the service of an illusory principle. What use is it to mangle a statute if you do not even accomplish the goal of avoiding the making of constitutional law?

Moreover, even if we were to agree that the Court has not *formally* made constitutional law, it at least arguably has done so as a practical matter. For example, it is not difficult to predict a future holding that a strict liability element regarding the age of underage performers in pornography violates the First Amendment. And as a result no Congress is likely to force such a holding; thus did the Court's signals in *X-Citement Video* likely settle as a practical matter the constitutional question that it purported to avoid.

The objection to backdoor constitutional law making of this sort goes even further. Although the Court justifies the avoidance canon based on the difference in effect between a statutory decision and a constitutional one—one is correctable through the normal lawmaking process and the other is only correctable through a constitutional

---

constitutional doubts, was adopted to no good effect—the statutory interpretation that earlier gave rise to doubts was in fact later determined to be constitutional.

187 *See* Kent v. Dulles, 357 U.S. 116, 130 (1958).

188 *See* Burns v. United States, 501 U.S. 129, 138 (1991).

189 *See* Pub. Citizen v. DOJ, 491 U.S. 440, 466 (1989).

190 Schauer, *supra* note 8, at 88.

191 *Id.* at 97-98.

192 *See* Kloppenberg, *Free Speech Concerns*, *supra* note 8, at 90; *cf.* Nagle, *supra* note 36, at 1507-08 (suggesting that the avoidance canon upsets the separation of powers more than the unconstitutionality canon does).

amendment—that difference in the real world is largely theoretical. The lawmaking process is complicated and expensive,[193] and commentators have convincingly demonstrated that Congress is unlikely to pass statutes to overrule *any* Supreme Court statutory decision.[194] Although it sometimes happens, such a change requires formidable forces to bring to bear and likely faces intense opposition. One need reflect only for a moment on the infrequency of such legislative responses,[195] and the notorious bitterness of the debate even in instances where Congress passes a responsive law,[196] to agree that such occasions are rare and difficult to accomplish. And the situation is much more difficult for those wishing to pass a responsive statute when the Supreme Court decision in question is based on the avoidance canon.[197] The likelihood, in light of the Court's expressed constitutional doubts, that a responsive law would be struck down as unconstitutional provides an additional and formidable obstacle in the lawmaking process beyond even the normal difficulties. The effort to force such a constitutional confrontation hardly seems worth exerting, and "[i]t is not surprising that no instances" of Congress having done so "come to mind."[198]

There is even more to the traditional case against the avoidance canon. The damage done by the canon is greater even than first appears, because it imposes on constitutional values even when there is

---

193 *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 229 (1986).

194 *See* Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 184-96 (1989). *Contra* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 335 (1991).

195 *See* Beth M. Henschen, *Statutory Interpretation of the Supreme Court: Congressional Response*, 11 AM. POL. Q. 441, 445 (1983) (noting, in a study on congressional responses to Supreme Court labor and antitrust decisions, that "the total number of Supreme Court decisions to which Congress reacted is quite small").

196 *See, e.g.*, Lena William, *Panel Approves a Key Measure to Battle Bias*, N.Y. TIMES, May 21, 1987, at A22 (reporting the "long and difficult battle" over the Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (1994), passed in response to *Grove City College v. Bell*, 465 U.S. 555 (1984)). Other civil rights bills intended to undo Supreme Court action have similarly been controversial. The debates in the public forum—both within Congress and without—over what became the Civil Rights Act of 1991 were notoriously intense. *See* Steven A. Holmes, *Battle Lines Form on New Rights Bill*, N.Y. TIMES, Feb. 8, 1991, at A16. The legislative coalition and the political forces that ended up carrying the day had a sympathetic cause (a series of Supreme Court decisions that appeared to some as willfully anti-civil rights), *see Thumbing His Nose at Congress; Mr. Bush Signs—and Undermines—the Rights Bill*, N.Y. TIMES, Nov. 22, 1991, at A30, and a President who wanted to make political hay by signing a civil rights bill, *id.* Even in these circumstances, the law that was enacted was vague and complicated. *See* Rivers v. Roadway Express, Inc., 511 U.S. 298, 302-33 (1994); Landgraf v. USI Film Prods., 511 U.S. 244, 256-77 (1994). And the act only became law on its second trip to the Oval Office, having elicited a presidential veto on its first go-round. *Landgraf*, 511 U.S. at 255-56.

197 *See* Marshall, *supra* note 103, at 485.

198 *Id.*

uncertainty over whether Congress actually has gone too far. This argument is another variant on the earlier point that the avoidance canon creates a penumbra that Congress may not enter because to do so would come close to the constitutional line—even though it in fact might not go over the line.[199] In this way, the canon *extends* the reach of the Court even further into the lawmaking process than the institution of judicial review does on its own. Judge Posner has made the point well, noting that the avoidance canon makes it practically difficult for Congress to insist on constitutionally dubious, but nonetheless lawful, results.[200] *Kent*[201] is only one of several ready examples of this phenomenon. Justice Douglas's opinion for the Court, which concludes that the grant of legislative authority to the Secretary of State to issue passports did not permit their denial on ideological grounds,[202] extends the Court's reach into the legislative process and effectively makes constitutional law without saying so. To take the latter point first, Justice Douglas's majority opinion first establishes that the "right to travel" is part of the liberty the Due Process Clause of the Fifth Amendment guarantees.[203] The Court immediately rendered that discussion—which proved to be influential in the future[204]—dicta, however, by stating that the case provided no occasion for the Court to decide whether that constitutional right had been abridged when the Secretary withheld a passport on the ground that the applicant refused to deny membership in the Communist Party.[205] Instead, the Court resolved the case prior to reaching that constitutional question by examining the scope of the Secretary's statutory grant of authority.[206] On what basis, then, could the Court justify its discussion of the constitutional question? Just as in *Delaware & Hudson*, the foundational case for the modern avoidance canon, the Court pointed to the ostensible need to establish the premise that the constitutional question was serious in order to justify the interpretive choice under the statute at issue.[207] In other words, in order to avoid deciding a consti-

199 Judge Richard Posner has made the point persuasively. *See* POSNER, *supra* note 8, at 285. Professor Shapiro, however, disagrees. *See* Shapiro, *supra* note 84, at 946-47.

200 *See* Posner, *supra* note 84, at 816.

201 Kent v. Dulles, 357 U.S. 116 (1958).

202 *Id.* at 129-30.

203 *Id.* at 125.

204 *See* Shapiro v. Thompson, 394 U.S. 618, 630 n.8 (1969) (relying on *Kent* in the course of recognizing a right to interstate travel), *overruled in part by* Edelman v. Jordan, 415 U.S. 651 (1974); Zemel v. Rusk, 381 U.S. 1, 14 (1965) (stating that in *Kent* freedom to travel abroad was grounded in the Due Process Clause of the Fifth Amendment); Aptheker v. Sec'y of State, 378 U.S. 500, 505-506 (1964) (stating that in *Kent* the Court "declared that the right to travel abroad is 'an important aspect of the citizen's "liberty"' guaranteed in the Due Process Clause of the Fifth Amendment").

205 *Kent*, 357 U.S. at 129.

206 *Id.*

207 *Id.* at 128-29.

tutional question, the avoidance canon requires that the question's seriousness first be established; and it is predictable that such a showing will result in dicta that will inevitably be influential.

Professor Schauer has been the primary proponent of the view that the avoidance canon in fact does not avoid the making of constitutional law because it portends a merits-based conclusion.[208] Despite its apparent force, Professor Schauer's argument is ultimately overstated. The simple reason is that in the next case—the one in which the constitutional issue is formally and squarely raised and decided—the constitutional question is treated as open. Thus, although the Court might well have signaled its views on the merits in the course of avoiding the constitutional question in the prior case, it is highly significant (especially to litigants) that the question is technically still open. Moreover, for a variety of reasons the Court might well decide the question differently when it confronts it squarely.

Professor Schauer's point, however, has an additional dimension. Even in circumstances where the Court has invoked the avoidance canon, the Court still makes constitutional law by *upholding* the constitutionality of the statutory construction that it adopts as the result of the canon.[209] In other words, by failing to question the constitutional validity of a statutory construction, the Court implicitly holds that the construction passes muster. Again, however, the point is overstated. Such a "holding"—the constitutional validation of the statutory construction that is adopted in favor of the dubious statutory reading—is not a holding at all. It is instead merely a necessary consequence of every statutory decision that does not explicitly raise and decide a constitutional issue. In other words, unless the point is actually litigated, in the next case the parties are free to claim that the statutory construction that the Court earlier adopted (in the course of avoiding a different serious constitutional question) itself violates the constitution. The Court has long held that an issue not raised, even if a necessary premise underlying the Court's decision, is not formally decided until it is actually controverted in the next case.[210] Thus, although Professor Schauer's point has practical force, as a formal legal matter it is not the case that the avoidance canon inevitably results in the making of constitutional law.

---

208 *See* Schauer, *supra* note 8, at 88-89.

209 *See id.* at 86-87; *cf.* Shapiro, *supra* note 84, at 947 n.134 (wondering whether it makes sense to view the Court as holding that a statute not actually passed by Congress is unconstitutional).

210 *See, e.g.*, United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 38 (1952); United States v. More, 7 U.S. (3 Cranch) 159, 172 (1805) (Marshall, C.J.).

C. The Incompleteness of Traditional Critiques of the Avoidance Canon

As a general matter, traditional critiques of the avoidance canon object less to the *theory* that underlies it and instead question more whether its *practice* serves the ends it seeks to achieve. As demonstrated in Part II.B, for example, the most common and persuasive objection to the avoidance canon is that it leads to implausible constructions of statutory language, a result that is just as, if not more, disrespectful to Congress than the mere decision of a constitutional case. That criticism depends on the implausibility of the statutory construction that the canon produces, however, and does not account for the cases in which statutory language is genuinely and fairly susceptible to multiple interpretations. If the statute is genuinely ambiguous, and is also susceptible to more than one reasonable construction, why *not* choose the construction that avoids a serious constitutional question?

Other common criticisms of the avoidance canon are subject to similar rejoinders in defense of the canon. Consider, first, the argument that the avoidance canon rests on an overly hypothetical construction of what Congress would have wanted; there is no basis, critics say, for claiming that Congress would prefer a statutory misconstruction to a constitutional holding on the correct interpretation of the language Congress passed.[211] Or consider the penumbral argument—that the canon illegitimately creates a safety zone around difficult constitutional problems, requiring Congress to be explicit before it forces a constitutional decision on a question.[212] Even granting that these critiques have substantial force—and I believe that they do—they are subject to the following rejoinder: once it is established as the default rule that Congress must be clear to force the Court to decide a serious constitutional question, there is far less basis for objecting when the Court refuses to act on a constitutional question in the absence of legislative clarity. On this account, moreover, allowing Congress to dictate through the terms of its enactments the circumstances in which constitutional questions will necessarily be answered fully vindicates the norm of legislative supremacy.[213]

Critics of the avoidance canon nonetheless have yet a further response. First, it is difficult for Congress to achieve pristine legislative

---

211 *See supra* notes 103-04 and accompanying text.

212 Posner, *supra* note 84, at 815-16; *see* FRIENDLY, *supra* note 7, at 210.

213 Of course, Congress cannot create the particular litigation circumstances that will result in the constitutional question being answered. *See* Muskrat v. United States, 219 U.S. 346, 362-63 (1911). But Congress can determine the scope of the questions that will be answered, and whether those answers will be given on constitutional or statutory grounds, by the degree of clarity that it provides in the text enacted into law.

clarity on any given problem; statutes are virtually always over- and underinclusive in relation to their animating purposes. The more precision that the judicial process demands from the legislative process, the more difficult it is for Congress to achieve its substantive policy goals through legislation. In other words, the avoidance canon's demand that the legislative process adhere to judicial interpretive preferences (even as a default rule) makes it more difficult to legislate and thus imposes on the legislative process. Moreover, the avoidance canon's insistence that Congress clearly demonstrate its desire to force a constitutional decision places the onus on Congress to foresee the nature of the interpretive problems that will arise under a particular statute; it is clear, however, that the legislative process cannot adequately anticipate every potential issue (constitutional or otherwise) that might arise.[214] Thus the argument that the canon is unproblematic because of its status as a mere default rule takes an oversimplified and unrealistic view of the legislative process. At the very least, it takes as a premise a judicial role that appropriately instructs Congress as to the latter's institutional obligations if it wishes to have constitutional questions decided by the courts.

Even if the traditional critiques of the avoidance canon falter in the face of the default position argument, the avoidance canon suffers from an additional infirmity. In practice, the unpredictability of the avoidance canon's invocation renders it an arbitrary and manipulable interpretive norm. The Court sometimes turns somersaults to construe a statute against its apparent meaning to avoid deciding a constitutional question,[215] yet on other occasions it will deny either that a statute is ambiguous or that the statutory construction adopted raises a "serious" constitutional question.[216] As Professor Eskridge has noted, "for every case . . . which interprets statutes to avoid constitutional doubts, there are other cases where a statute is construed boldly, to face substantial constitutional troubles."[217] The objection, then, is not necessarily to the establishment of a default rule, but to an overly manipulable and unstable interpretive regime that leaves it unpredictable as to when the Court will decide a case on constitutional grounds or will instead strain to find a statutory meaning that avoids the constitutional question.[218]

---

214 *See* POSNER, *supra* note 8, at 278-84.

215 *See, e.g.*, Pub. Citizen v. DOJ, 491 U.S. 440, 466-67 (1989).

216 *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 203 (1991).

217 William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1073 (1989).

218 A prime example of this phenomenon is the Court's decision in *Rust v. Sullivan*, 500 U.S. 173 (1991). I shall have more to say about *Rust* in Part III, below, but for now I just note the following. One of the issues in that case was whether it violated the First Amendment for the Department of Health and Human Services to issue regulations barring doctors in federally-funded family planning clinics from providing their patients with

The critiques of the avoidance canon are powerful, even when they are subject to more or less persuasive rejoinders.[219] As a rule of statutory construction that is avowedly based in substantive policy—to minimize the role of the Court in relation to Congress by reducing the number of occasions on which the product of the democratic process is subject to rejection on judicial review and to better enable the Court to fulfill its role as Congress's faithful agent in statutory interpretation—the avoidance canon should stand up to scrutiny as to whether it in fact serves its goals. This Part attempts to illustrate the problems that the avoidance canon runs up against even when measured by the goals that it sets for itself. Part III will endeavor to show that the avoidance canon's defects are much deeper even than that.

III

THE AVOIDANCE CANON AND THE ROLE OF THE EXECUTIVE

I now turn to an argument that adds a new dimension to previous critiques of the avoidance canon. Previous analyses of the avoidance canon have failed to consider the role of the Executive in the constitutional structure generally and in constitutional litigation in particular. In circumstances when the Executive is a participant in the litigation (which, in one form or another, is most of the time)[220] the avoidance canon does much more than create the hypothetical tear in the fabric of the separation of powers—a potential conflict between Court and Congress—when the Court gives a statute a strained or implausible reading. Rather, the avoidance canon commonly creates a here-and-

---

information regarding abortion even if their medical judgment indicated that an abortion was appropriate. *Id.* at 192. Although the statute at issue did not compel the agency's reading—which normally would have called for the avoidance canon to be invoked to avoid what seemed to be a substantial free speech problem—the Chief Justice's opinion for the Court simply denied that the First Amendment claim was substantial. *Id.* And it did so despite the views of one Justice that the regulations raised serious constitutional doubts, *id.* at 225 (O'Connor, J., dissenting), and the views of two others that the regulations in fact violated the First Amendment, *id.* at 204 (Blackmun, J., dissenting). It is fair to say that it was less than persuasive for the Court to claim that the doubts raised in that instance were not at least serious. *See* Kloppenberg, *Free Speech Concerns*, *supra* note 8, at 51-52 (arguing that the constitutional question posed was a serious one); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 989 & n.87 (1992) (noting that the Court's opinion was conclusory on whether the constitutional question was serious).

219 An additional rejoinder, which I have failed to mention thus far, is simply that the avoidance canon should be retained for reasons of stare decisis. That is, even if I am correct about the defects of the canon, it should nonetheless be retained for reasons of stability in the law. In light of the serious and pervasive nature of the canon's defects that I have identified in this Part, and the further defects I shall identify in Part III, I am unpersuaded. A full consideration of the stare decisis argument, however, would require elaborating and agreeing upon a theory of *stare decisis*—a task that is beyond the scope of this Article.

220 *See supra* note 10.

now conflict between Court and Executive.[221] That conflict results when the Court insists on giving effect to its view over the Executive's, even when the Executive has offered the better reading of the law and when it has independently adjudged that interpretation to be constitutional in the exercise of its Article II powers.

This Part shall analyze the context in which the avoidance canon's intrusion into Article II values is most clear—in cases in which the Executive has exercised law-elaboration authority delegated from Congress, which would ordinarily be entitled to judicial deference pursuant to the rule of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[222] If Congress has left statutory ambiguity, *Chevron* recognizes that it is the Executive's role authoritatively to give content to the statute.[223] The avoidance canon constrains that power, however, by limiting it to circumstances that do not raise serious constitutional doubts. Short of an actual constitutional violation, however, the avoidance canon's operation in this context simply is to displace the Executive's judgment as to how to execute the law Congress passed.

Treating the avoidance canon's operation in the *Chevron* context as illustrative of its intrusion into Article II, this Part then turns to a more general consideration of the role of the Executive in public law litigation. This Part argues that the avoidance canon intrudes upon the Executive's authority and responsibility to see to the execution of the laws, including both statutes and the Constitution. In applying the avoidance canon to executive action, the Court is rejecting the Executive's explicit legal judgment about the meaning of both the statute and the Constitution, not because the statute is unconstitutional but because it is not clearly constitutional. Such treatment of a coordinate branch not only shows a lack of inter-branch comity, it positively turns *Marbury v. Madison*[224] on its head. The avoidance canon has these effects despite the fact that neither the Constitution nor the laws of the United States require its application. Thus does the avoidance canon—which the Court adopted and has adhered to out of a stated desire to maintain judicial modesty—threaten separation of powers values.

---

221 It is important to note that the avoidance canon by its own force does not demand that the views of the Executive be rejected. It is perfectly possible that the Executive would invoke the canon to persuade the Court to adopt its preferred construction. *See, e.g.*, Reply Brief for Petitioner the United States at 1, United States v. X-Citement Video, 513 U.S. 64 (1994) (No. 93-723). As a matter of fact, however, the avoidance canon commonly operates as a barrier "with respect to purely administrative (or executive) judgment on the matters in question" which "erect[s] a decisive barrier to certain discretionary decisions by the executive." Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 335-36 (2000).

222 467 U.S. 837, 842-43 (1984).

223 *See id.*

224 5 U.S. (1 Cranch) 137 (1803).

The Court has never taken note of these effects of the avoidance canon. As a rule of judicial prudence and policy, though, it is difficult to see how the Court can continue to justify the avoidance canon without some attempt to account for the role of the Executive in public law litigation.

A. The Avoidance Canon, Article II, and *Chevron*

The context in which it is easiest to see the avoidance canon's direct conflict with Article II values is when the Executive—whether an agency or the President—adopts a statutory construction as part of the exercise of delegated power from Congress. That familiar context triggers the rule of *Chevron*,[225] a case that is acknowledged to be the most significant administrative law case in a generation or more.[226] *Chevron* established the now-familiar analytic framework by which a court reviewing agency action first determines whether Congress has expressed itself clearly on the question at issue. "If Congress has done so, the inquiry is at an end; the court 'must give effect to the unambiguously expressed intent of Congress.'"[227] In circumstances when "Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible."[228]

The Court has justified *Chevron* on two primary grounds, both of which are relevant to this argument. First, the Court has said that deference to agency interpretations of unclear statutes is justified because filling in the gaps is essentially a matter of policy, and "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones."[229] That is to say, in the absence of clear direction from Congress, the policy choices inherent in determining how statutory regimes will be implemented are quintessentially executive in nature.

The Court's second justification for *Chevron* is closely related to the first. The Court has grounded deference in situations of ambiguity on congressional delegation. As the Court recently stated, "[d]eference under Chevron to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity

---

225 *Chevron*, 467 U.S. at 842-43.

226 *See, e.g.*, PETER L. STRAUSS ET AL., GELLHORN & BYSE'S ADMINISTRATIVE LAW 620-21 (9th ed. 1995) (emphasizing the landmark nature of the case); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2075 (1990) (same).

227 FDA v. Brown & Williamson Tobacco Corp., 120 S. Ct. 1291, 1300 (2000) (quoting *Chevron*, 467 U.S. at 843); *see also* INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (using the *Chevron* analysis); Auer v. Robbins, 519 U.S. 452, 457 (1997) (same).

228 *Brown & Williamson*, 120 S. Ct. at 1300.

229 *Chevron*, 467 U.S. at 866.

constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[230] If Congress has not spoken clearly about how it wishes the law to be administered, it falls by default to the Executive—ordinarily in the form of an administrative agency—to make the policy choices necessary to giving concrete content to the law. As Professor Pierce has put it, *Chevron* says to Congress, if "you decline to make a policy decision through the legislative process, we will deem your failure to so act as ceding the power to make that policy to the President."[231] It is perfectly consistent with the Constitution for the President to exercise that power, because Article II devolves upon him not only the duty but also the *power* to execute the laws. That is the theory, at least, of *Chevron*.[232]

The Court has applied *Chevron* broadly to a variety of statutory schemes involving a plethora of executive agencies. Indeed, it has rarely pulled back from its devotion to *Chevron*, though, as we shall now see, one such occasion is when the agency's construction raises serious constitutional doubts.

In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*,[233] the Court again faced an NLRB policy that implicated constitutional values.[234] The case involved union distribution of handbills at a shopping mall urging consumers not to frequent the mall because one of the mall's contractors paid substandard wages.[235] The mall owner filed an unfair labor practice complaint with the NLRB on the ground that the handbilling violated Section 8(b)(4) of the National Labor Relations Act because it urged a boycott of the mall, with which the union had no dispute, rather than the contractor with which it did.[236] The Board ultimately concluded that the handbilling did violate the labor laws and that under the applicable law the First Amendment did not stand in the way of holding the

230 *Brown & Williamson*, 120 S. Ct. at 1314; *see also* Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990) (noting that a precondition to obtaining *Chevron* deference is a delegation of authority from Congress); *Chevron*, 467 U.S. at 843-44 (speaking of "express delegation").

231 Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2231 (1997).

232 The Court's justification for *Chevron*, which I have recounted here is closely parallel to Professor Monaghan's important, pre-*Chevron* account for why judicial deference to agency interpretations of law can be justified at all. *See* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 25-28 (1983). Post-*Chevron*, an enormous literature analyzing its correctness and impact has been created. For present purposes, I am interested in the *Court's* own account for *Chevron*, which it is fair to say rests primarily on delegation and gap-filling being inherently a matter for the Executive. My argument in this Article takes the Court at its word and assesses the avoidance canon in that context.

233 485 U.S. 568 (1988).

234 *See id.* at 571-73.

235 *Id.* at 570.

236 *See id.* at 570-72.

union's leafleting unlawful.[237] The case made its way to the Supreme Court, with the Solicitor General ultimately urging the Court on behalf of the Board to uphold the Board's order and arguing that its construction of the applicable labor laws did not violate the First Amendment.[238]

The Court agreed that under normal *Chevron* principles it would defer to the Board's reasonable construction of the labor laws.[239] But it went on to note that "[a]nother rule of statutory construction . . . is pertinent here"—namely, the avoidance canon.[240] After describing the avoidance canon and its roots,[241] the Court simply stated that it believed "that this case calls for the invocation" of the avoidance canon, "for the Board's construction of the statute, as applied in this case, poses serious questions of the validity of § 8(b)(4) under the First Amendment."[242] Concluding that the statute "is open to a construction that obviates deciding"[243] that First Amendment question, the Court rejected the Board's reading and chose an alternative construction.[244]

Two points about the analysis in *Edward J. DeBartolo Corp.* bear emphasis at this point. First, the Court did not claim that it must answer the statutory question at step one of the *Chevron* analysis; in other words, it did not conclude that the statute was unambiguously contrary to the Board's view.[245] And second, the Court did not conclude that the Board's view actually violated the First Amendment, but only that the First Amendment questions were substantial.[246] In fact, the analysis was quite like that in *Catholic Bishop,* in which the Court required evidence that Congress affirmatively intended to cover the situation at hand rather than the normal *Chevron* inquiry of determining whether Congress has foreclosed any agency discretion in the matter.[247]

The end result, then, is that the Court concluded that the avoidance canon simply trumps *Chevron.*[248] Unfortunately, however, the opinion in *Edward J. DeBartolo Corp.* contains *no* explanation for why the Court reached that conclusion.[249] As Professor Merrill has noted,

---

237 *See id.* at 573.
238 *See* Brief for the NLRB at 1, *Edward J. DeBartolo Corp.* (No. 86-1461).
239 *Edward J. DeBartolo Corp.*, 485 U.S. at 574.
240 *Id.* at 575.
241 *Id.*
242 *Id.*
243 *Id.* at 578.
244 *Id.* at 588.
245 *Cf. id.* at 574.
246 *Id.* at 575.
247 NLRB v. Catholic Bishop, 440 U.S. 490, 501 (1979).
248 *See* Merrill, *supra* note 218, at 1023 & n.206.
249 *See Edward J. DeBartolo Corp.*, 485 U.S. at 574-75.

moreover, "Chevron itself supplies no rationale for such a holding."[250] Indeed, on the rationale of *Chevron* it would fall to the Executive as an exercise of delegated power to determine how to implement the law within statutory and constitutional bounds. Nonetheless, the Court simply first acknowledged that *Chevron* would ordinarily govern and then announced that the avoidance canon would instead be the applicable interpretive rule.[251]

There is an unavoidable tension between the Court's invocation of the avoidance canon in *Edward J. DeBartolo Corp.* and Article II values. The Labor Board, charged by Congress to execute the laws, concluded with the support of the Justice Department that its view of the scope of the labor laws was consistent with both the governing statutes and the Constitution.[252] The Court, on the other hand, simply disregarded that view of how the law should be executed, *not* because any statute or the Constitution affirmatively ruled out the Executive's preferred course, but only because the Court deemed it desirable not to decide a constitutional question. When the Executive exercises power pursuant to a delegation, it stands in the shoes of Congress.[253] If the agency speaks unambiguously in implementing a valid delegation, the Court must assess the agency's action as such. *Chevron* and *Marbury* suggest that the Court can disturb the Executive's explicit determination in these circumstances only if it conflicts with Congress's clear directions or the Constitution.[254]

The defects in the operation of the avoidance canon are particularly clear in the *Chevron* context, perhaps because the Executive has a congressional delegation of power behind its statutory interpretation. The *Edward J. DeBartolo Corp.* rule, in other words, pits the Court not only against the Executive, but also against the congressional alloca-

250 Merrill, *supra* note 218, at 1023.

251 *Edward J. DeBartolo Corp.*, 485 U.S. at 574-75.

252 *Id.* at 573.

253 Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe R.R., 284 U.S. 370, 386 (1932) (stating that when exercising delegated authority, an agency "speaks as the legislature, and its pronouncement has the force of a statute").

254 This is not to suggest that *Chevron* is constitutionally mandated. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514-16 (arguing that *Chevron* is not constitutionally based but is instead based upon congressional delegation). Rather, starting from the premise that policymaking is better handled by representative institutions, the Court reasonably assumes that when Congress leaves gaps, it is for the agency and not the courts to fill them. Congress of course could provide by law that the avoidance canon should govern, even in the context of agency gap-filling where *Chevron* might otherwise apply. Or it might explicitly provide that the Executive should not have discretion to fill in the blanks in particular statutes. In other words, Congress remains free to control the occasions for the exercise of delegated power. *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 152-57 (1991); Adams Fruit Co. v. Barrett, 494 U.S. 638, 650 (1990). When there is such a delegation, however, the Court must respect the agency's exercise of authority within the boundaries set by statute unless it concludes that such an exercise is unconstitutional.

tion of law-elaboration authority to the Executive.[255] While the *Chevron* context is an important illustration of the avoidance canon's intrusion into Article II, those cases are only a part of the larger universe of public law litigation involving the Executive in which the avoidance canon harms the separation of powers.

B. The Role of the Executive in Public Law Litigation

Although historically there were exceptions,[256] the norm in modern federal public law litigation is that the Executive—in theory, the President himself, a department whose head stands in the President's shoes, or an administrative agency executing the law pursuant to congressional design—is a party to every constitutional case, and thus to every case in which the avoidance canon comes into play.[257] The Supreme Court has made clear that, under the Constitution, litigation on behalf of the United States is at the core of Executive power and "may be discharged only by persons who are 'Officers of the United States.'"[258] As part of the executive branch, the Attorney General "is undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States, and of the litigation which is neces-

255 Thus far I have used the term "Executive" to apply to any law executor, including independent agencies whose heads Congress has insulated from plenary presidential removal power. Indeed, the NLRB, the agency at issue in both *Catholic Bishop* and *Edward J. DeBartolo Corp.*, is a quintessential independent agency. *See* 29 U.S.C. § 153(a) (1994) (limiting the President's authority to remove members of the Board to specified causes). For purposes of my argument, the distinction between executive and independent agencies, while not irrelevant, is not terribly important. Because the President retains some control over all agencies, Article II values are implicated in the Court's dealings even with agencies whose heads can be removed by the President only for cause. Even in circumstances involving independent agencies, moreover, the *agency* is the entity charged by the Constitution with executing the law, subject to the minimal demands Article II places on ultimate presidential control. *See* Morrison v. Olson, 487 U.S. 654, 682-83 (1988). Under no theory is it part of the *Court's* role to execute the laws. Thus, although the practical power of the President of the United States to control the exercise of delegated power is less when an independent agency rather than an executive agency is at issue, the theoretical objections to the impact of the avoidance canon on Article II prerogatives remain the same.

256 *See, e.g.*, Raoul Berger, *Intervention by Public Agencies in Private Litigation in the Federal Courts*, 50 YALE L.J. 65, 67 (1940) (describing statutory development of the federal government's right to intervene to defend the constitutionality of statutes that are assailed in private litigation); Edward H. Levi & James Wm. Moore, *Federal Intervention* (pt. 2), 47 YALE L.J. 898, 901-02 (1938) (same); Note, *Federal Intervention in Private Actions Involving the Public Interest*, 65 HARV. L. REV. 319 (1951) (same); *see also* Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 YALE L.J. 970, 971 (1983) (arguing that congressional defense of otherwise undefended statutes appropriately corrects the imbalance in constitutional authority between the legislative and executive branches).

257 *See generally* GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT 1-2 (2000) (describing the central role of the government in public law litigation).

258 Buckley v. Valeo, 424 U.S. 1, 140 (1976) (per curiam) (quoting U.S. CONST. art. II, § 2).

sary to establish the rights of the government."[259] Congress has recognized these prerogatives of the Executive by requiring that the Attorney General, on behalf of the United States, be notified whenever litigation brings into question the constitutionality of an act of Congress and permitted to intervene to defend the statute's constitutionality.[260]

Both as a matter of constitutional structure and statute, then, it is rare for the Court to face a decision on a constitutional issue involving a federal statute without the government in some form being in court as a party.[261] Moreover, the Attorney General—a quintessentially executive officer who serves at the pleasure of the President[262]—is empowered, indeed generally obligated, to provide legal representation to any agency or governmental party to litigation.[263] In such litigation, the client agency itself has both legal and programmatic interests to vindicate; the Attorney General has similar interests to vindicate; and the President's administration has general legal policy interests that can sometimes be central to its political and policy agenda.[264] Public law litigation, including virtually any litigation that may lead to the invocation of the avoidance canon, virtually always implicates the

---

259 United States v. San Jacinto Tin Co., 125 U.S. 273, 279 (1888); *see also* Confiscation Cases, 74 U.S. (7 Wall.) 454, 458-59 (1868) (noting that "so far as the interests of the United States are concerned, [all suits] are subject to the direction, and within the control of, the Attorney-General").

260 28 U.S.C. § 2403(a) (1994). On occasions when the Attorney General, representing the Executive Branch, decides *not* to defend a statute's constitutionality, she must give notice to the Congress, which then has the right to defend the statute. 2 U.S.C. § 288k(b) (1994).

261 In some instances the government has not intervened to defend a statute whose constitutionality was being assailed. *See* Baker v. GTE N. Inc., 110 F.3d 28, 30 (7th Cir. 1997) (reporting that the government was not properly notified); Tonya K. v. Bd. of Educ., 847 F.2d 1243, 1247 (7th Cir. 1988) (reporting that the attorney general had actual notice and failed to exercise the government's right to intervene). The latter case involved a situation in which the answer to the constitutional question was relatively clear, *see id.* at 1248, and thus the Executive likely did not feel the need to intervene to ensure what appeared to be a foreordained result. The opposite posture—in which no government entity is willing to defend the constitutionality of a statute—is conceivable, but also very unlikely to occur in the real world. Even if it did, moreover, the likelihood would be that the Executive would appear to *attack* the statute's constitutionality. *See* Morrison v. Olson, 487 U.S. 654, 659 (1980).

262 *See Morrison*, 487 U.S. at 692 (noting that executive power travels "through the Attorney General"); Ponzi v. Fessenden, 258 U.S. 254, 262 (1922) (characterizing the Attorney General as "the hand of the President"); William K. Kelley, *The Constitutional Dilemma of Litigation Under the Independent Counsel System*, 83 MINN. L. REV. 1197, 1217-18 (1999) (noting that the Attorney General serves at the pleasure of the President and that Congress has not seen fit to alter that understanding).

263 28 U.S.C. §§ 512, 514, 516.

264 *See* CHARLES FRIED, ORDER AND LAW 13-21 (1991) (describing the centrality of law and litigation in the author's attempt, as Solicitor General, to vindicate the Reagan Administration's policy agenda).

interests of the Executive.[265] Those interests include discretionary judgments, informed by the Executive's views of sound policy, about how the law—within the limits set by Congress—will be implemented and enforced. They also include judgments about how to exercise delegated power from Congress, including rulemaking and enforcement decisions. With respect to both, the President has a positive power and duty to "take Care that the Laws be faithfully executed."[266] This means that, in determining whether and how to execute the laws, the Executive must make a determination that its action complies with (or in Article II terms, "faithfully execute[s]")[267] the Constitution.

The conduct of litigation by the Executive—which it carries out as part of that take care power—is in turn part of the interplay that makes up the separation of powers. As part of the execution of the

---

265 I recognize that the constitutional relationship between the President—the constitutional officer charged with executing the law—and the independent agencies is unclear and controverted. *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 106-08 (1994); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578-79 (1984). The Court has itself not been clear about whether independent agencies are executing the law in constitutional terms, *see* Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935), but it seems clear that they are, *see* Bowsher v. Synar, 478 U.S. 714, 736 (1986); Buckley v. Valeo, 424 U.S. 1, 109, 118-19 (1976) (per curiam). For present purposes, two points are important. First, as a leading treatise has noted, whether or not agencies are independent (in the sense that their heads are removable by the President only for cause), the President "cannot [be] prohibit[ed] from having a substantial role in agency policymaking." 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE, § 2.5, at 50 (3d ed. 1994). Second, whatever the proper role of Congress in limiting the President's power to dictate how agencies will execute the law, there is no basis for inferring from the constitutional structure that it is the role of *courts* to control execution in the hands of independent agencies. As perhaps the leading functionalist separation of powers scholar has recognized, both as a matter of politics and law that whether "the President is to be a decider or a mere overseer, or something between, [Article II] requires that he have significant, ongoing relationships with all agencies responsible for law-administration." Strauss, *supra*, at 648.

266 U.S. CONST. art. II, § 3; *see also* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 570-99 (1994) (arguing that Article II grants the President an affirmative power to execute the laws passed by Congress); Calabresi & Rhodes, *supra* note 9, at 1158-59 (making an analogy between the Article II and the Article III vesting clauses); Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 391 (1987) (sketching an outline of the President's take care power); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 10-11 (1993) (arguing that the President only has a general power to protect the United States from harm); Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 212 (1992) (noting that "[t]he Take Care Clause confers a power insofar as it grants to the President, and no one else, the authority to oversee the execution of federal law"); Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 991-94 (1993) (arguing in favor of a strong interpretation of the President's take care powers).

267 U.S. CONST. art. II, § 3.

law, the Executive must decide whether to litigate[268] and what legal positions the Administration will advance. Those decision often carry significant implications for the balance of powers between not only it and the Court, but also with Congress. The last three presidential administrations have engaged in important public law litigation that has drawn considerable criticism and defensive responses from both Court and Congress. For example, consider the Reagan Administration's 1984 decision not to defend the constitutionality of certain provisions of the Competition in Contracting Act, which it claimed violated Article II by vesting executive power in the Comptroller General, an official removable by Congress.[269] Putting aside the merits of the dispute for present purposes,[270] what bears noting is the response in Congress and in the courts to the Executive's litigation position. Members of Congress held hearings to express their displeasure; the Justice Department then retreated from forcing a political confrontation by ordering the statute to be enforced pending resolution of litigation; and Congress then responded in kind, passing legislation to correct the constitutional defect identified by the President.[271] In the courts, the Ninth Circuit expressed outrage at the audacity of the Executive's presuming to interpret and apply the Constitution in the course of executing the law,[272] and the issue escaped ultimate review by the Supreme Court once Congress amended the law.[273]

For other examples, consider the Reagan and Bush Administrations' pursuit of their goal of seeing *Roe v. Wade*[274] first curtailed, and then overruled, which was widely criticized both within and without the Court.[275] Consider also the Justice Department's decision early in

---

268 *See* United States v. Armstrong, 517 U.S. 456, 463-65 (1996) (noting that while the Court has the power to review exercises of prosecutorial discretion for unconstitutional motives, the power is narrow); Wade v. United States, 504 U.S. 181, 185-86 (1992) (same).

269 Michael Stokes Paulsen has written a description of these events. *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 268 (1994).

270 It is worth noting, though, that the Supreme Court later vindicated the Administration's legal position, holding that any vesting of executive power in the Comptroller General was unconstitutional because that officer was removable by a Joint Resolution in Congress. Bowsher v. Synar, 478 U.S. 714, 732-34 (1986).

271 Paulsen, *supra* note 269, at 328-30.

272 *See* Lear Siegler, Inc. v. Lehman, 842 F.2d 1102, 1122-26 (9th Cir. 1988), *withdrawn on other grounds*, 893 F.2d 205 (9th Cir. 1990) (en banc).

273 *See* United States Army Corps of Eng'rs v. Ameron, Inc., 488 U.S. 918 (1988) (dismissing certiorari for this reason).

274 410 U.S. 113 (1973).

275 For an engrossing account of the Reagan administration's efforts, see FRIED, *supra* note 264, at 71-88; for an unsympathetic account of the same events, see LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 135-54 (1987). For Justice Blackmun's dim view of the Executive's efforts, see Webster v. Reprod. Health Servs., 492 U.S. 490, 537-38 (1989) (Blackmun, J., concurring in part and dissenting in part); Transcript of Oral Argument at 20-21, City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983) (No. 31-746) (suggesting that Solicitor General Rex Lee's

the Clinton Administration to "essentially side[ ] with a . . . convict" in a child pornography case, in a reversal of positions taken by the Bush Administration as well as the Department officials who were in authority during the gap between President Clinton's inauguration and the installation of his political appointees in the Department.[276] After members of Congress expressed dismay, President Clinton ordered the Attorney General to modify the Department's views and seek corrective legislation if necessary.[277] And the Senate Judiciary Committee later held hearings to examine the Justice Department's conduct in that case and others.[278]

There are numerous similar examples throughout our history. Congress has expressed its displeasure with agency enforcement decisions in a variety of areas, including as to the Executive's handling of tax and environmental issues, and has specifically instructed the Justice Department as to the scope of its lawful litigating authority on a number of occasions.[279] In the 1980s, for example, Congress responded to inklings that the Federal Communications Commission might intensify efforts to roll back certain licensing preferences for minorities and women—including by asserting in litigation that such preferences are unconstitutional[280]—by passing a law barring the expenditure of funds for that purpose or even for reexamining the agency's prior policies.[281] Finally, history is replete with high stakes confrontations between the Court and the Executive.[282]

---

amicus brief on behalf of the United States advocated that the Court overturn *Roe v. Wade*). For the Court's response to the efforts of the Bush administration, see Planned Parenthood v. Casey, 505 U.S. 833, 845-46 (1992) (plurality opinion); *id.* at 942 (Blackmun, J., concurring in part and dissenting in part).

276 Joan Biskupic, *Administration Redefines Child Pornography Case*, WASH. POST, Nov. 2, 1993, at A4. The case in question was Knox v. United States, 510 U.S. 939 (1993).

277 *See* Michael Isikoff & Ruth Marcus, *Clinton Enters Child Pornography Dispute*, WASH. POST, Nov. 12, 1993, at A1.

278 *See id.*; *Solicitor General Oversight, Hearings Before the Senate Comm. on the Judiciary*, 104th Cong. 3 (1995) (statement of Sen. Thompson).

279 *See* Neal Devins & Michael Herz, *The Battle that Never Was: Congress, the White House, and Agency Litigation Authority*, LAW & CONTEMP. PROBS., Winter & Spring 1998, at 205, 211-12.

280 *See Minority-Owned Broadcast Stations: Hearing on H.R. 5373 Before the Subcomm. on Telecomm., Consumer Prot., and Fin. of the House Comm. on Energy and Commerce*, 99th Cong. 1-3 (1986) (statement of Rep. Collins) (expressing objections to an FCC brief in a case before the U.S. Court of Appeals for the D.C. Circuit arguing that the preferences were unconstitutional).

281 *See* Pub. L. No. 100-202, 101 Stat. 1329-31 (1987) (appropriating funds to the FCC, but prohibiting the use of any funds to repeal or reexamine "the policies of the Federal Communications Commission . . . to expand minority and women ownership of broadcasting licenses").

282 *See* Joel K. Goldstein, *The Presidency and the Rule of Law: Some Preliminary Explorations*, 43 ST. LOUIS U. L.J. 791 (1999) (discussing the prominent occasions of Court-Executive confrontations).

The debate over the role of the Office of the Solicitor General in the Department of Justice reflects the separation-of-powers implications of litigation involving the Executive. A large body of literature analyzes the proper role of the Solicitor General in developing the legal positions of the executive branch, with scholars expressing disagreement over the extent to which the Solicitor General is obliged to do the administration's litigation policy-bidding or to assist the Supreme Court in a dispassionate manner free from the political biases of whatever presidential administration happens to be in power. Some have claimed that the Solicitor General's role is to serve the interests of the Court, as a sort of super-advisor on the correct answer to legal questions;[283] others stress that the Solicitor General's job is to advocate (within reasonable limits) the legal positions of the executive branch in the Supreme Court.[284]

---

283 *See, e.g.*, FRANCIS BIDDLE, IN BRIEF AUTHORITY 97 (1962) (stating that the Solicitor General is "responsible neither to the man who appointed him nor to his immediate superior"); CAPLAN, *supra* note 275, at 3 (arguing that the Solicitor General's role is to serve dispassionately as the "Tenth Justice"); Rex E. Lee, *Lawyering for the Government: Politics, Polemics & Principle*, 47 OHIO ST. L.J. 595, 597 (1986) (describing how the Solicitor General benefits the Court); Wade H. McCree, Jr., *The Solicitor General and His Client*, 59 WASH. U. L.Q. 337, 345-46 (1981) (suggesting agencies are a primary place for "preserving the credibility of the Solicitor General's Office in the Supreme Court"); Burt Neuborne, *In Lukewarm Defense of Charles Fried*, 21 LOY. L.A. L. REV. 1069, 1071 (1988) (arguing that "the Solicitor General's traditional role as the Supreme Court's friend is infinitely preferable to its . . . role as point man for the executive branch"); David M. Rosenzweig, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L.J. 2079, 2081-82 (1994) (noting that the Solicitor General's position before the Supreme Court would be undermined if that special relationship were exploited to serve the President); Eric Schnapper, *Becket at the Bar—The Conflicting Obligations of the Solicitor General*, 21 LOY. L.A. L. REV. 1187, 1195 (1988) (arguing that the Solicitor General must husband his or her credibility with the Justices); Joshua I. Schwartz, *Two Perspectives on the Solicitor General's Independence*, 21 LOY. L.A. L. REV. 1119, 1122 (1988) (arguing that the "limited independence of the Solicitor General [from the executive] branch serves an invaluable function for the judicial branch"); David A. Strauss, *The Solicitor General and the Interests of the United States*, LAW & CONTEMP. PROBS., Winter & Spring 1998, at 165, 170-71 (1998) (arguing that the Solicitor General best serves the President by fulfilling his institutional role as officer of the Supreme Court).

284 *See, e.g.*, FRIED, *supra* note 264, at 14 (arguing that the Solicitor General's role is to serve the Administration as an effective advocate, which requires a measure of deference to the Court); Erwin N. Griswold, *The Office of the Solicitor General—Representing the Interests of the United States Before the Supreme Court*, 34 MO. L. REV. 527, 536 (1969) (describing the Solicitor General's role as essentially one of advocacy rather than statesmanship); Michael W. McConnell, *The Rule of Law and the Role of the Solicitor General*, 21 LOY. L.A. L. REV. 1105, 1117-18 (1988) (arguing that it is more helpful to see the Solicitor General as an executive officer than as a "Tenth Justice"); John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799, 802 (1992) (book review) (describing the Solicitor General's "duty to an individual—the President—who has a constitutional responsibility to interpret the law *independently* from the Supreme Court"); James L. Cooper, Note, *The Solicitor General and the Evolution of Activism*, 65 IND. L.J. 675, 695 (1990) ("The tension in the Solicitor General's Office between the President and the Supreme Court is increasingly being resolved in favor of the President."); Janene M. Marasciullo, Essay, *Removability and the Rule of Law: The Independence of the Solicitor General*, 57

Regardless of one's view about the proper role of the Solicitor General, there is widespread agreement on the following proposition. As a staff member in the Solicitor General's office once said, the interactions between the Court and Department of Justice are among the "few occasions when one branch of government speaks directly to the other," and on such occasions the Executive as litigant is required to act with integrity to the law and respect for the Court in order to be "faith[ful to] the separation of powers."[285] In other words, constitutional litigation has implications for the separation of powers, as interactions between the branches always do, and thus the Executive is bound to treat the Court with the respect due a co-equal branch of government. There is no reason why a corresponding obligation on the Court's part does not exist.

And the Court has recognized this obligation. Perhaps the best example is its recent controversial decision in *Clinton v. Jones*.[286] In that case, the Court held that a sitting President is subject to civil suit in his private capacity, but emphasized the judiciary's obligation to accommodate the interests of the Executive in the course of such litigation.[287] The Court recognized that "high respect" for the Presidency "should inform the conduct of" legal proceedings involving the Executive.[288] Thus the Court has often remarked upon the need for

---

GEO. WASH. L. REV. 750, 752 (1989) ("It is . . . imperative that the Solicitor General act in accordance with the President, and that the President exercise some control over him."); Note, *The Solicitor General and Intergovernmental Conflict*, 76 MICH. L. REV. 324, 364 (1977) ("Ultimately, [the Solicitor General] serves the President."); *see also* Drew S. Days III, *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 KY. L.J. 485, 503 (1994-95) (noting that "it is important for the Solicitor General to keep in mind his responsibility to be a forceful and effective advocate for the government while ensuring that he maintains a reputation for 'absolute candor and fair dealing' in the Supreme Court and lower federal courts"); Richard G. Wilkins, *An Officer and an Advocate: The Role of the Solicitor General*, 21 LOY. L.A. L. REV. 1167, 1169 (1988) (arguing that the proper role of the Solicitor General lies somewhere between that of advocate for the administration and independent officer of the Court); George F. Fraley, III, Note, *Is the Fox Watching the Henhouse?: The Administration's Control of FEC Litigation Through the Solicitor General*, 9 ADMIN. L.J. AM. U. 1215, 1230-33 (1996) (recognizing the Solicitor General's dual responsibility as government advocate and officer of the Court).

285 CAPLAN, *supra* note 275, at 211-12.

286 520 U.S. 681 (1997). Among the many critics of that case is Judge Richard Posner, who has called it evidence of the Supreme Court's lack of connection with the real world. *See* RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 225-30 (2000).

287 *Clinton*, 520 U.S. at 708-09. Some, particularly Michael Paulsen, consider the independent role of the Executive to be so significant that the President, for example, is not bound to comply with constitutional judgments of the court with which he disagrees. *See, e.g.*, Paulsen, *supra* note 269, at 221-22. My argument here does not relate to that point. Instead, I maintain that while respect for law and for the courts' constitutional role requires the Executive to comply with a duly issued judgment against it, the correlative duty of the courts is to consider respectfully the legal arguments made by the Executive before them.

288 *Clinton*, 520 U.S. at 707.

deference and respect for the Executive,[289] even when it was otherwise in the course of rejecting the President's legal arguments.[290]

Thus, the complex interplay of forces that make up the separation of powers includes the interactions in court between judges and the Executive. Ordinarily, the *merits* of the constitutional disputes that bring the Executive into court provide the tension points in the relationship. The President might be concerned in litigation about the merits of whether the legislative veto is constitutional,[291] or whether some version of the line item veto is;[292] but there is ordinarily little controversy over whether the Court's treatment of the Executive in the course of litigation itself implicates the separation of powers. The Constitution does not contain, in other words, any structural principle identifying the *specific* manner in which the Judiciary and Executive must interact in court; in the present context, at least, it contains no lines marking the boundaries of permissible and impermissible conduct.[293] The fact remains, however, that litigation calls for mutual comity and respect.

C. The Avoidance Canon, Article II, and the Separation of Powers

When one considers the role of the Executive, the tensions between the avoidance canon and the separation of powers become clear. The canon disregards the Executive's considered judgment—both in *Chevron* and non-*Chevron* contexts—in the discharge of the power and duty to see to the execution of the laws, as to how the laws Congress enacted will be implemented. It does so with respect to dis-

289 *See, e.g.*, United States v. Nixon, 418 U.S. 683, 715 (1974); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 633 (1952) (Douglas, J., concurring); United States v. Burr, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692d). The Court has often noted the need to defer to the Executive's judgment in the field of foreign affairs, *see, e.g.*, Regan v. Wald, 468 U.S. 222, 243 (1984) (deference to an executive decision in foreign policy); Rostker v. Goldberg, 453 U.S. 57, 66 (1981) (deference to legislative and executive judgments in military matters), and it has noted more broadly the "unique constitutional" role of the President, Franklin v. Massachusetts, 505 U.S. 788, 800 (1992); Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (deference to an executive decision in foreign policy); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936) (deference to the President in foreign policy); *see also* United States v. Armstrong, 517 U.S. 456, 465 (1996) (noting the need to defer to the prosecutorial discretion of the Executive).

290 *See, e.g., Clinton*, 520 U.S. at 708-09; *Nixon*, 418 U.S. at 715; *Youngstown*, 343 U.S. at 633.

291 *See* INS v. Chadha, 462 U.S. 919, 922-23 (1983).

292 *See* Clinton v. City of N.Y., 524 U.S. 417, 420-21 (1998).

293 *Cf.* Chadha, 462 U.S. at 956-59 (holding the legislative veto unconstitutional on the ground that Congress can legislate only through the process of bicameralism and presentment prescribed in U.S. CONST. art. I, § 7); Bowsher v. Synar, 478 U.S. 714, 723 (1986) (holding that Congress can effect the removal of one who executes the law only through impeachment).

cretionary judgments as to how the law will be enforced if Congress has left room for discretion. And it does so with respect to exercises of delegated power from Congress to give content to open-ended statutory mandates. The avoidance canon therefore not only shows a lack of comity toward the Executive; it also intrudes into the heart of the President's Article II authority to execute the law.

1. *The Avoidance Canon and Comity*

In deploying the avoidance canon, the Court adopts—by design—a statutory interpretation that might not be the best or most natural reading in order to avoid the necessity of deciding a serious constitutional question. In the cases with which we are concerned here, moreover, in invoking the canon, the Court rejects the statutory interpretation offered by the Executive.[294] Although there is ordinarily no disrespect implied by simply rejecting a party's legal position, in the avoidance canon context the grounds on which the Executive's position is rejected are by no means ordinary. Rather than saying that the Executive is wrong, the avoidance canon says that a court will not give effect to the Executive's reading only because it perhaps comes close to the constitutional line. Indeed, the canon requires that a court reject the Executive's reading prior even to considering whether it is a permissible or even the correct reading of the statute. The canon, then, ignores the fact that the Executive has an independent and constitutionally mandated role in the discernment and articulation of constitutional meaning in connection with its execution of the laws.[295]

---

294 *See supra* note 222 and accompanying text.

295 Over the past decade or so, the avoidance canon—whether invoked by the Court or by a Justice in a separate opinion—has often, though not uniformly, operated to reject the Executive's preferred course for how the law will be executed. *See* Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 501 (1999) (Souter, J., dissenting); Almendarez-Torres v. United States, 523 U.S. 224, 249 (1998) (Scalia, J., dissenting); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 119 (1998) (Stevens, J., concurring) (rejecting the position supported by the EPA); United States v. Winstar Corp., 518 U.S. 839, 875 (1996) (plurality opinion); Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 437-38 (1995) (O'Connor, J., concurring) (rejecting the arguments of the United States where the named respondent was a federal employee); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 216 n.2 (1995) (reporting that the Solicitor General defended the constitutionality of the congressional statute at issue); Reno v. Flores, 507 U.S. 292, 340 (1993) (Stevens, J., dissenting); Burns v. United States, 501 U.S. 129, 130, 138-39 (1991); Webster v. Reprod. Health Servs., 492 U.S. 490, 562 n.4 (1989) (Stevens, J., concurring in part and dissenting in part) (United States as amicus curiae); Gomez v. United States, 490 U.S. 858, 864 (1989); Mesa v. California, 489 U.S. 121, 137 (1989) (ruling against petitioner postal workers in their official capacity, represented by the Solicitor General); Morrison v. Olson, 487 U.S. 654, 682 (1988) (ruling against the position supported by United States as amicus curiae); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574-75 (1988) (ruling against the position supported by Solicitor General as amicus curiae); *see also* Pa. Dep't of Corrs. v. Yeskey, 524 U.S. 206, 212 (1998) (rejecting a state's interpretation of a federal statute); R.A.V. v. City of St. Paul, 505 U.S. 377, 412 (1992) (White, J., concurring) (rejecting the state's interpretation of a state statute).

The Court's *Marbury* power includes the power authoritatively to reject the Executive's judgments (and Congress's as well) when the Court concludes that they conflict with higher law.[296] But it is difficult to maintain that the Court is free to disregard those judgments without first determining that the Executive has either misread the statute or acted unconstitutionally.

As I discussed in Part II,[297] others have commented upon the aggrandizement worked by the avoidance canon's refusal to permit *Congress* to approach the constitutional line.[298] As Judge Posner put it, the avoidance canon creates a sort of penumbra around the real lines drawn by the Constitution, into which the Court refuses to permit Congress to venture.[299] This affront is greater with respect to the Executive than it is to Congress. When a plausible (but less natural) interpretation would avoid serious constitutional questions, it is likely but not unmistakably clear that the Court, in applying the avoidance canon, has disturbed legislative preferences.[300] With respect to the Executive, however, there is no ambiguity. No doubt is possible when the Executive makes the determination that a particular interpretation of the statute is not only desirable, but (in the Executive's judgment) constitutional. Hence, when the Court invokes the avoidance canon, it creates a here-and-now conflict with the Executive over the meaning of federal law. And the Court insists on adopting an interpretation of the meaning of federal law—regardless of what the best interpretation might be—that not only conflicts with the Executive's reading but also is, by hypothesis, not the only permissible construc-

---

In other cases, however, the Executive has been able to employ the canon in support of its own reading of the law. *See* FEC v. Akins, 524 U.S. 11, 32 (1998) (Scalia, J., dissenting); Edmond v. United States, 520 U.S. 651, 658 (1997); Seminole Tribe v. Florida, 517 U.S. 44, 182 (1996) (Souter, J., dissenting) (United States as amicus curiae); Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 628-29 (1993) (Pension Benefit Guaranty Corp. as amicus curiae); Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992) (Solicitor General arguing on behalf of United States Forest Service); Gollust v. Mendell, 501 U.S. 115, 126 (1991) (SEC as amicus curiae); Chapman v. United States, 500 U.S. 453, 464 (1991); United States v. Montsanto, 491 U.S. 600, 611 (1989); Pub. Citizen v. DOJ, 491 U.S. 440, 465-67 (1989); Mistretta v. United States, 488 U.S. 361, 406 n.28 (1989).

296 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179-80 (1803); *cf.* Brown v. Allen, 344 U.S. 443, 540 (Jackson, J., concurring) (famously observing that "[w]e are not final because we are infallible, but we are infallible only because we are final"). Justice Jackson's insight reflects the fact that the Court's power as final expositor of constitutional meaning depends upon the necessity of its acting in the course of deciding a case. Congress and the President necessarily have the power to expound upon the Constitution in the course of discharging their respective duties.

297 *See supra* Part II.B.1.

298 *See, e.g.*, POSNER, *supra* note 8, at 285; Mashaw, *supra* note 171, at 840.

299 POSNER, supra note 8, at 285.

300 *See supra* text accompanying notes 105-40.

tion.[301] In short, the Court displays a serious lack of comity when it rejects the Executive's proffered construction of the law without saying that it is contrary to law—either to the laws of the United States or to the Constitution itself. The avoidance canon, by its terms, rules out both conclusions, and the Court is left with nothing more than an assertion of power over the Executive.

2. *The Avoidance Canon and the Power to Execute the Laws*

The last point suggests that the Court's treatment of the Executive in deploying the avoidance canon is more than just bad manners. In fact, whenever the Court denies the Executive its preferred statutory reading on avoidance grounds, the practical effect is for the Court to dictate how the laws shall be executed, or, more precisely, how they shall not be. That arrogation by the Court creates the serious potential of violating Article II by displacing the President as the executor of the laws.

It is an essential feature of the separation of powers that no branch be able to control the lawful exercise of authority by the others. Thus, for example, it is impermissible for either the Executive or Congress to revise the judgment of an Article III court,[302] because any such revisions undermine the independent authority of the courts granted by Article III to decide cases and controversies. Similarly, Congress's authority to pass legislation limiting the President's authority to remove those who aid in the execution of the laws is limited,[303] and there is an absolute bar on Congress (and, by implication, the Court) having *any* role in the removal of executive officers except

---

301 *See* Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998) (noting that the avoidance canon only comes into play after a conclusion that the statute can be fairly read more than one way).

302 *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 240 (1995) (holding unconstitutional a federal statute that directed the reopening of final judgments issued by Article III courts); Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948) (refusing to construe a statute authorizing judicial review of an administrative board's decisions to allow for presidential review of the court's judgment); United States v. Klein, 80 U.S. (13 Wall.) 128, 148 (1871) (holding unconstitutional a statutory amendment dictating the result in a pending case and undermining the President's pardon power); Hayburn's Case, 2 U.S. (2 Dall.) 409, 411-12 (1792) (holding that the executive may not revise judicial decisions).

303 *See* Morrison v. Olson, 487 U.S. 654, 694-97 (1988) (holding that the President's authority to remove inferior officers can be limited by statute provided that the limitations do not too greatly impede his ability to see to the execution of the laws, and stating in dicta that the removal authority for some officers cannot be limited); Humphrey's Ex'r v. United States, 295 U.S. 602, 631-32 (1935) (holding that the President's authority to remove those who aid in the execution of the law can be limited by statute in some circumstances); Myers v. United States, 272 U.S. 52, 176 (1926) (holding that the President's authority to remove principal officers cannot be limited by statute).

through the constitutionally-prescribed route of impeachment.[304] The Court has explained that these formal structural principles are required—particularly those relating to inter-branch control over removal—so that each branch can carry out its constitutional role without interference, beyond that allowed by the Constitution itself, from the others.[305] In *Bowsher v. Synar*,[306] the Court insisted that allowing Congress to have *any* role (other than through impeachment) in the removal of an officer "would, in practical terms, reserve in Congress control over the execution of the laws."[307] The same notion underlies the decision in *INS v. Chadha*[308] holding unconstitutional the legislative veto, which would have effectively permitted Congress to dictate after the fact how the law was executed.[309]

The Court has made precisely the same point with respect to the judiciary. For example, in *Lujan v. Defenders of Wildlife*,[310] it held that Congress could not create general "citizen suit" provisions permitting anyone to sue the Executive for violating federal law, because to do so would "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'"[311] That would expand the Court's proper constitutional role, from that of adjudicating cases or controversies, to "'assum[ing] a position of authority over the governmental acts of another and co-equal department,' and [thus] becom[ing] 'virtually

---

304 *See* Bowsher v. Synar, 478 U.S. 714, 736 (1986) (holding unconstitutional a statute that vested some executive functions in the Comptroller General of the United States, an officer removable by Congress); *cf.* Wash. Metro. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 255 (1991) (holding unconstitutional a federal law allowing members of Congress to appoint the members of, and serve on, a regional airport board).

305 *See, e.g.*, Barenblatt v. United States, 360 U.S. 109, 112 (1959) (noting that the separation of powers does not permit Congress to "supplant the Executive in what exclusively belongs to the Executive"). I should note here that my argument does not depend upon any notion of a strongly unitarian (or non-unitarian) Executive, a debate that has long raged in the commentary. *See* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1453-56 (1997) (describing the academic debate and gathering sources). For just a tiny sample of the academic debate, see Calabresi & Prakash, *supra* note 266, at 550; Calabresi & Rhodes, *supra* note 9, at 1165-68; Lessig & Sunstein, *supra* note 265, at 4; Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1731 (1996); A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1347 (1994); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 124 (1994). My argument is *not* that Congress cannot greatly influence how the law will be executed through the passage of legislation, nor is it that the Court cannot affect how the laws are executed by deciding cases in conformity with the Constitution and laws of the United States. It is, rather, that the avoidance canon is a judicial rule of policy, and is not required by law.

306 478 U.S. 714 (1986).

307 *Id.* at 726.

308 462 U.S. 919 (1983).

309 *See id.* at 956-59.

310 504 U.S. 555 (1992).

311 *Id.* at 577 (quoting U.S. CONST. art. II, § 3).

continuing monitors of the wisdom and soundness of Executive action.'"[312] The following extended quotation captures the point that the judicial power does not extend to dictating how the laws are executed:

> When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. . . . This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the Executive supervise the acts of administrative agents.[313]

Thus, the Court has recognized the structural principle that the judiciary, like Congress, may not control how the President executes the law.[314] How, then, does the avoidance canon pose the danger of interfering with that principle? In this Part, I will describe the impact of the avoidance canon on the Executive's ability to execute the laws by pointing to several real world examples. It bears noting, however, that what follows are just examples of how the avoidance canon puts the Court in the position of effectively dictating how the law will be executed; in fact, these problems arise in virtually every instance in

---

312 *Id.* (citations omitted) (quoting Massachusetts v. Mellon, 262 U.S. 447, 489 (1923), and Allen v. Wright, 468 U.S. 737, 760 (1984) (quoting Laird v. Tatum, 408 U.S. 1, 15 (1972))).

313 *Id.* (quoting Stark v. Wickard, 321 U.S. 288, 309-10 (1944) (footnote omitted)).

314 *See* Bowsher v. Synar, 478 U.S. 714, 726 (1986). I should note here that I will soon discuss important limitations on this principle, primarily with regard to the power of Congress to pass legislation requiring the President to conform his or her official conduct to legal standards. Within the bounds of the law, however, Congress cannot control discretionary decisions as to how the law will be executed. Professor Sunstein has powerfully criticized the standing decision in *Lujan*, arguing that it denigrates the power of Congress to dictate by statute how the laws will be enforced (including through judicial decision). *See* Sunstein, *supra* note 266, at 164-97. Though he also argues that Article II is irrelevant to the question of injury under the law of standing, *see id.* at 211-15, he does not deny that the Take Care Clause devolves upon the President both the power and duty to see to the execution of the laws, *see id.*; *see also* Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1163-65 (1993) (criticizing *Lujan* for relying on Article II in disregarding congressional desires in conferring standing); Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife: *Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1186-88, 1200 (1993) (criticizing standing analysis in *Lujan* in part on the ground that it transfers power from Congress to Executive). In the avoidance canon context—in contrast to the situation in *Lujan*, in which Congress had passed a law granting citizen standing that the Court found to violate Article II—no law empowers the Court as part of the exercise of its judicial powers to disregard the considered decision of the Executive as to how the law will be executed. For commentary generally defending the Court's approach in *Lujan*, see John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1231-32 (1993).

which an executive agency is told that the avoidance canon rules out its preferred course of conduct in executing the law.[315]

At the outset it is important to emphasize that there are two respects in which the avoidance canon infringes upon the Executive's authority and responsibility to execute the laws. First, without a prior judgment that the Executive's preferred course is unconstitutional, it rejects the Executive's own judgment about the interpretation of the statute that best serves its purposes. That interferes with the Executive's responsibility to take care that the *statute* be faithfully executed. Second, as a matter of constitutional duty, when the Executive decides on its preferred course of statutory implementation, it must make an independent determination of the constitutionality of that interpretation. It must exercise its own *Marbury* powers.[316] By refusing to consider the legitimacy of the Executive's constitutional judgment in cases of doubt, the Court is denying the Executive its authority and responsibility to take care that the *Constitution* be faithfully executed.

Consider again the situations in both *Kent v. Dulles*[317] and *NLRB v. Catholic Bishop*.[318] I discussed both cases extensively above,[319] but now look at them from the perspective of Article II. In *Kent*, recall that the Secretary of State had issued a regulation requiring as a condition for obtaining a passport that one certify that one was not, and had not been, a member of the Communist Party.[320] The Secretary acted pursuant to a 1952 Act of Congress that generally required[321] passports for international travel, but only upon the issuance of a presidential proclamation that the national interest so required.[322] Although Congress had from time to time regulated passports, the Court has recoguized a general understanding "that the issuance of a passport" is largely within the "discretion of the Executive and that the Executive [will] exercise this power in the interests of the national

315 As I have noted, my argument here is exactly contrary to existing doctrine. *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

316 *See* Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 905-06 (1990).

317 357 U.S. 116 (1958).

318 440 U.S. 490 (1979).

319 *See supra* text accompanying notes 105-25.

320 *Kent*, 357 U.S. at 118-19 (describing the passport regulations extant at the time).

321 The Court has exhibited some confusion as to when the requirement of a passport first became a matter of statutory law. In *Kent*, the Court stated that, with "minor exceptions," the first general requirement was enacted in the 1952 act. *Id.* at 121. In *Haig v. Agee*, however, the Court stated that the requirement was first made general in the mid-nineteenth century. 453 U.S. 280, 293-94 (1981). For present purposes, it does not matter when the requirement became law, only that Congress in enacting the 1952 requirement did not insist that the Executive not come close to the constitutional line in executing its mandate.

322 *Kent*, 357 U.S. at 121-22.

security and foreign policy of the United States."[323] Although there is perhaps some question about the scope of *congressional* power to regulate the issuance of passports,[324] there is no suggestion that it is up to the *Court* to do so.

In *Catholic Bishop*, the National Labor Relations Board had interpreted the general language protecting the right to organize[325] as covering religious employers,[326] and the Court rejected that conclusion on avoidance grounds; the Court said that although Congress "[a]dmittedly . . . defined the Board's jurisdiction in very broad terms," it would nonetheless look for an affirmative intent to delegate to the Board the specific authority that it had attempted to exercise there.[327] Absent language or history affirmatively providing that the Board could cover religious employers, the Court interpreted the labor laws as not giving that authority.

In both *Kent* and *Catholic Bishop*, the result was that the Court effectively imposed extra-legal limits on the power of those who execute the law to do so within lawful bounds.[328] It is worth quoting the language of the statutory grant of authority to the Executive at issue in *Kent*. The statute provided that upon a proclamation by the President that the national interest required these measures, and "until otherwise ordered by the President or the Congress,"

> it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.[329]

Although the language of the statute unmistakably conferred broad discretion—something that was not surprising in light of a long tradition of executive autonomy in the issuance of passports "derived from the generally accepted view that foreign policy was the province and

---

323 *Haig*, 453 U.S. at 293.

324 *See* Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. Off. Legal Counsel 18 (1992) (noting Article II limits placed on Congress's power to regulate passport issuance).

325 *See* 29 U.S.C. § 157 (1994).

326 *See* Roman Catholic Archdiocese, 216 N.L.R.B. 249, 250 (1975) (explaining the NLRB's position that its jurisdiction did not reach religious institutions "only when they are completely religious, not just religiously associated"); Catholic Bishop, 220 N.L.R.B. 359, 359 (1975) (same).

327 NLRB v. Catholic Bishop, 440 U.S. 490, 504 (1979).

328 Although the National Labor Relations Board is an independent agency whose members may only be removed for good cause, there is no doubt that the work of the Board is execution of the laws in the constitutional sense.

329 Act of June 27, 1952, §§ 215(a)-(b), 66 Stat. 190 (codified at 8 U.S.C. §§ 1185(a)-(b) (1994)).

responsibility of the Executive"[330]—the Court held that the statute must be read implicitly to limit the Executive's discretion to deny passports to those who refused to renounce the Communist Party.[331] The problem the Court saw, of course, was that the statute authorizing the regulation would raise serious constitutional problems if the Court construed it to authorize a regulation that so greatly affected the right to travel.[332] In light of the importance of that right, the Court said it would not lightly infer that Congress delegated authority to limit it.[333] On the contrary, the Court stated, "Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement."[334]

Similarly, the language granting power to the Labor Board to recognize bargaining units did not in any way imply a limit on its reach when religious schools were at issue.[335] Yet the Court stepped in there as well, concluding that unspecified problems under the Religion Clauses of the First Amendment counseled against reading the statute as broadly as it was written.[336] And the Court therefore prevented the Board from executing the law as it saw fit.

As I discussed in Part II, it is by no means clear that the Court was correct in its imagining of congressional desires in the context of these cases.[337] What is clear, however, is that the language of the relevant statutes did not purport to limit the law administrator's authority to situations in which the constitutionality of his or her conduct was not in doubt. Indeed, the passport statute in *Kent* went so far as to make its effective date (and expiration date) depend upon the President's judgment.[338] Although there is no way to tell, there is at least as much reason to suppose that Congress meant for an extraordinarily broad delegation of power as to suppose that it did not. The Court in *Kent*, however, simply decided that the impingement on personal liberty from the regulation was so great—though it explicitly disclaimed actual reliance on constitutional grounds[339]—that it would construe the statute as a matter of sound policy to limit the scope of the Executive's authority because otherwise it would have to decide a constitutional case. The same was true in *Catholic Bishop*. And the Court made that judgment not only in the face of the Executive's position that its

330 *Haig*, 453 U.S. at 293-94; *see also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936) (speaking of the President's foreign policy responsibility).

331 *Kent*, 357 U.S. at 129-30.

332 *Id.* at 130.

333 *Id.* at 129.

334 *Id.* at 130.

335 NLRB v. Catholic Bishop, 440 U.S. 490, 504 (1979).

336 *Id.* at 507.

337 *See supra* text accompanying notes 129-40.

338 *See Kent*, 357 U.S. at 122 n.4 (quoting from the statute).

339 *Id.* at 129 (noting that "we do not reach the question of constitutionality").

preferred course was consistent with the law, but also that it was consistent with the Constitution.

Viewed from the perspective of Article II, the result in these cases was that the Court stepped in and effectively insisted that a federal statute be executed in a way that was contrary to the policy wishes of the law administrator charged by Congress with executing the law. Congress had passed no law that limited the discretion of the Secretary of State, on behalf of the President, to implement the passport rules as he saw fit. Congress had passed no law limiting the power of the NLRB to cover religious employers. And neither the Court nor any other government actor had deemed the passport rules, or the Board's coverage rules, to violate the Constitution of the United States. To be sure, the Court *implied* that the rules did, but it did not hold as much in the course of deciding a case or controversy.

The Court's disregard of the Executive's judgment as to how the law will be enforced without declaring the Executive's course unlawful or unconstitutional is in deep tension with the President's take care power. The Constitution imposes an affirmative duty on the President to see that the laws are executed. Unless Congress has dictated through law what course that execution shall take, with that duty comes the power to determine how the law will be enforced. If the *law*, whether a statute or the Constitution, rules the Executive's judgment out of bounds, then it is no usurpation for the Court to say so in a proper case or controversy. That is the law declaration function recognized since *Marbury*.[340] But the *Marbury* power ends at the point where the law ceases to provide an answer. In the avoidance canon context, because no law dictates the Court's interpretive choice, and by hypothesis the Court has not reached any constitutional question, the Court's purported exercise of its law declaration function in fact becomes an exercise of the executive power.

The Court's disregard of the Executive's view of the law also does not adequately deal with the fact that the responsible government officials had necessarily, by virtue of their constitutional oath,[341] reached a judgment that the course they had chosen in executing the law was both authorized by statute and consistent with the Constitution.[342] As others have recognized, the Court is not the exclusive interpreter of

340 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (stating that "[i]t is emphatically the province and duty of the judicial department to say what the law is").

341 *See* U.S. CONST. art. VI.

342 *See* Lawson & Moore, *supra* note 9, at 1287; *cf.* David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 121-22 (1993) (criticizing the argument that the oath entitles the President to autonomy in interpreting the Constitution as question-begging).

law and the Constitution.[343] Indeed, recent years have witnessed a widespread recognition of the important role nonjudicial interpretation of the Constitution plays, and a heated debate about the scope of that power vis-à-vis the power of the Court.[344] Some have argued for a very broad conception of Executive review,[345] while others have urged that the Court's role as final expositor of the Constitution demands that the Executive defer to its constitutional readings.[346] That debate, however, is not at issue here. One can readily agree that once the Court has issued a constitutional judgment the Executive is bound by it, not only in the specific case but also generally, yet still object that the avoidance canon does not involve that situation. On the contrary, its very *design* is to avoid a constitutional judgment altogether. In any avoidance situation, the Executive is in court with the responsible actors, having concluded pursuant to their constitutional oath that their preferred course is lawful. Of course, in a contested case or controversy it is emphatically up to the court "to say what the law is."[347] Again, however, it is not a discharge of that law declaration function to say that the law is *not* what the Executive offers for reasons only of

---

343 *See* Easterbrook, *supra* note 316, at 905-06; Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 349-50 (1994); John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371, 372-73 (1988); Lawson & Moore, *supra* note 9, at 1268; Paulsen, *supra* note 269, at 219.

344 *See* Gary Apfel, *Whose Constitution Is It Anyway? The Authority of the Judiciary's Interpretation of the Constitution*, 46 RUTGERS L. REV. 771, 773-75 (1994); Steven G. Calabresi, *Thayer's Clear Mistake*, 88 NW. U. L. REV. 269, 272-76 (1993); Easterbrook, *supra* note 316, at 905-06; Eisgruber, *supra* note 343, at 348; Lawson & Moore, *supra* note 9, at 1268; Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373, 373-74 (1994); Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 868-69 (1994); John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 377-78 (1993); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 44-45 (1993); Geoffrey P. Miller, *The President's Power of Interpretation: Implications of a Unified Theory of Constitutional Law*, LAW & CONTEMP. PROBS., Autumn 1993, at 35, 42-43 (1993); Robert F. Nagel, *Name-Calling and the Clear Error Rule*, 88 NW. U. L. REV. 193, 211 (1993); Michael Stokes Paulsen, *The* Merryman *Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 84 (1993); Michael Stokes Paulsen, *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 GEO. L.J. 385, 385 (1994); Michael J. Perry, *What Is "the Constitution"? (and Other Fundamental Questions)*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 99, 119-24 (Larry Alexander ed., 1998); Michel Rosenfeld, *Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers*, 15 CARDOZO L. REV. 137, 141-42 (1993); *see generally* Strauss, *supra* note 342 (discussing executive branch interpretation of the Constitution); Symposium, *Elected Branch Influences in Constitutional Decisionmaking*, LAW & CONTEMP. PROBS., Autumn 1993, at 1 (1993) (same).

345 *See, e.g.*, Lawson & Moore, *supra* note 9, at 1270; Paulsen, *supra* note 269, at 223.

346 *See, e.g.*, Burt Neuborne, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 375, 376-77 (1988).

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

judicial policy ungrounded in either the Constitution or laws of the United States.

D. Avoidance and the Nondelegation Doctrine

To the extent that commentators have focused on the avoidance canon's impact on the Executive at all, they have largely noted that the canon serves as a sort of nondelegation doctrine. As Professor Sunstein has recognized, the impact of the avoidance canon is to limit the scope of policymaking authority that Congress delegates to law administrators.[348] The principle underlying the avoidance canon, Professor Sunstein says, is that serious constitutional questions in law administration "will not be permitted to arise unless the constitutionally designated lawmaker has deliberately and expressly chosen to raise them."[349] Other commentators have made similar points.[350] In particular, Professor Sunstein has offered the view that the avoidance canon (and other canons as well) reflect judicial enforcement of "underenforced constitutional norms" such as the nondelegation doctrine.[351] Precisely because the Court lacks the ability directly to enforce the nondelegation doctrine, the argument goes, the avoidance canon legitimately serves the structure of the Constitution by limiting the scope of delegations indirectly; if Congress wants to force a constitutional issue, it must be clear about that desire.[352]

As others have recognized, in the absence of countervailing factors, it makes sense for the Court to conduct its business so as to reinforce the fundamental constitutional structure, even if only

---

348 *See* Sunstein, *supra* note 159, at 468-69; Sunstein, *supra* note 226, at 2111-13; *see also* CASS R. SUNSTEIN, ONE CASE AT A TIME 27 (1999) (talking about the canon as promoting judicial minimalism).

349 *See* Sunstein, *supra* note 221, at 331.

350 *See, e.g.*, Eskridge & Frickey, *supra* note 86, at 606-07.

351 *See* Sunstein, *supra* note 159, at 469-71. The nondelegation doctrine holds that the constitutional requirement that the legislature provide an intelligible principle to channel executive discretion limits Congress's power to delegate policymaking authority to the Executive. Mistretta v. United States, 488 U.S. 361, 372 (1989). Only twice has the Supreme Court struck down delegations as excessive. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529-42 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935). The Court has continued to maintain, however, that the constitutional rule against excessive delegation exists, *see* Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980), though it acknowledges that it is largely beyond judicial enforcement, *see Mistretta*, 488 U.S. at 371-74; *id.* at 415-18 (Scalia, J., dissenting).

352 *See* Sunstein, *supra* note 226, at 2111-13 (arguing that the avoidance canon serves underenforced nondelegation norms by forcing Congress to deliberate and be specific about delegating of power that might raise constitutional doubts); *cf.* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213-20 (1978) (arguing that many constitutional norms go underenforced due to institutional concerns rather than conceptual limits).

indirectly.[353] Moreover, there is much force to this *description* of the avoidance canon's effects. The case for *why* it is desirable, however, has been less clearly made and seems less clearly persuasive. The positive account rests largely on the proposition that the popularly elected Congress ought to make the fundamental policy choices in society, and especially those that raise serious constitutional doubts.[354] Professor Sunstein argues that the avoidance canon (like other canons he terms "nondelegation canons") promotes "judicial minimalism" because it forces decision making on important policy questions away from the court to the most appropriate and accountable decision makers.[355] As he puts it, such canons reflect a judicial "effort . . . to trigger democratic (in the sense of legislative) processes and to ensure the forms of deliberation, and bargaining, that are likely to occur in the proper arenas."[356] He also recognizes, however, the practical effect of such canons on the Executive as discretion-limiting.[357]

For the reasons I offered in Part II, it seems as though the *actual* democracy-enhancing effects of the avoidance canon are not as great as Professor Sunstein's argnment supposes. As scholars from Judges Friendly and Posner to Professors Schauer and Mashaw have noted,[358] it is far from clear that the avoidance canon in fact operates in a way that is deferential to the legislative branch, a defect that leaves the "canon in grave need of either refurbishing or rejection."[359] What is more, as Professor Pierce has recognized, the true effect of the avoidance canon is not necessarily to shift power from the Executive to Congress, but instead is to "confer[ ] on politically unaccountable judges the power to make fundamental policy decisions."[360] Even if the nondelegation justification for the avoidance canon limits the scope of delegations to the Executive, it does so at the cost of lodging more power in the courts. Indeed, in avoidance cases where the Court rejects the more natural reading of a statute, as well as the Executive's permissible interpretation of that statute, the Court arguably displaces the judgments of both representative branches without ever determining that those judgments are unconstitutional. In light of the uncertain democracy-enhancing effects of the canon and its de-

353 This has been an important theme in the work of Professor Manning. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 617-19 (1996); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 675 (1997).

354 *See* Sunstein, *supra* note 221, at 331-33.

355 *Id.* at 335-37.

356 *Id.* at 335.

357 *Id.* at 335-36.

358 *See* FRIENDLY, *supra* note 7, at 210-12; POSNER, *supra* note 8, at 284-85; Mashaw, *supra* note 171, at 840; Schauer, *supra* note 8, at 88.

359 Mashaw, *supra* note 171, at 840.

360 Pierce, *supra* note 231, at 2231 n.29.

monstrable imposition on Article II values, the best answer is that the nondelegation benefits, to the extent that the canon realizes them at all, are not worth pursuing.

Of course, properly deployed, the avoidance canon in its original form might operate on the margins to serve nondelegation values. There is a difference between deploying the avoidance canon to prevent the Executive from exercising otherwise concededly lawful delegations of power in a way that raises serious constitutional doubts, and deploying it in fact to avert a holding that a delegation of power is unconstitutionally excessive.

As for the former situation, consider the decision in *Rust v. Sullivan*.[361] In that controversial case, the Court upheld the Bush Administration's rule barring federal grant recipients under Title X of the Public Health Service Act of 1970[362] from providing information or referrals relating to abortion as part of their family planning services.[363] The Secretary of Health and Human Services had promulgated that rule pursuant to Section 1008 of the Act,[364] which prohibited the use of federal funds in programs that used abortion as a method of family planning. Private parties claimed that the rule was inconsistent with the governing statute, and that it also violated the Constitution.[365] Most of the focus in the Supreme Court was on the resolution of the constitutional claims, which the Court rejected at the urging of the Solicitor General on behalf of the Secretary.[366]

---

361 500 U.S. 173 (1991).

362 42 U.S.C. §§ 300-300a-6 (1994).

363 *Rust*, 500 U.S. at 203. The rules were codified at 42 C.F.R. §§ 59.2, 59.8-.10 (1989). *Id.* at 179. Fulfilling a campaign promise, President Clinton ordered the repeal of the so-called "gag rule" on the second day of his administration. Ann Devroy, *Clinton Cancels Abortion Restrictions of Reagan-Bush Era*, WASH. POST, Jan. 23, 1993, at A1. For the text of President Clinton's order, see *Memorandum on the Title X "Gag Rule,"* 1 WILLIAM J. CLINTON, PUBLIC PAPERS OF THE PRESIDENT 10 (1993).

364 42 U.S.C. § 300a-6 (1994).

365 The constitutional argument rested on three grounds: first, the plaintiffs claimed that the rule violated the First Amendment's Speech Clause by regulating on the basis of viewpoint the information that a health care provider could impart to her patient; second, they claimed that the rule impermissibly conditioned the receipt of a government benefit on the forfeiture of a constitutional right; and finally they claimed that the rule burdened the constitutional right to abortion. *Rust*, 500 U.S. at 194-200.

366 *Id.* at 192-203. The Court also rejected the claims that the rule impermissibly conditioned the right to a benefit upon the forfeiture of a constitutional right and that it violated the right to abortion. *Id.* at 196-203. I am not concerned here with the correctness of these holdings, which are subject to fair criticism. *See, e.g.*, Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201, 206 (1994); David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 682 (1992); Michael Fitzpatrick, Note, *Rust Corrodes: The First Amendment Implications of* Rust v. Sullivan, 45 STAN. L. REV. 185, 188 (1992); Moira T. Roberts, Note, *Individual Rights and Government Power in Collision: A Look at* Rust v. Sullivan *Through the Lens of Power Analysis*, 49 WASH. &

Prior to deciding the constitutional questions, however, the Court first had to answer the antecedent statutory question whether the Public Health Service Act authorized the Secretary's rule in the first place. Based on the avoidance canon, the dissents by Justice Blackmun and Justice O'Connor urged a construction of the Act that did not authorize the rule.[367] Justice Blackmun argued that construing the statute to restrict clinics from providing information on abortion as a method of family planning unnecessarily raised the issue of the statute's constitutionality under the First and Fifth Amendments.[368] Justice O'Connor, agreeing with Justice Blackmun's adherence to the avoidance canon,[369] stopped short of holding the regulations unconstitutional, and instead believed the Court should have determined that they were unreasonable interpretations of the statute.[370]

If one views the avoidance problem in *Rust* as a nondelegation issue, the bluntuess of the instrument is apparent. The Title X scheme's delegation of rulemaking authority to the Secretary did not remotely violate the nondelegation doctrine. Nor was there any danger that the delegation would allow the Secretary to make important policy decisions without scrutiny. The highly public and controversial nature of the rules—and the new President's repeal of them as one of his first official acts—siguifies that the law executor was fully and democratically accountable.

If the avoidance canon's nondelegation function is viewed simply as erecting a barrier to constitutionally dubious agency activity, then it is fair to say that the canon's invocation there would have served that purpose (notwithstanding the Court's claims to the contrary,[371] the constitutional objections raised were fairly termed serious). But if that is the nondelegation function of the avoidance canon, then it is a blunt instrument indeed. It is both over- and underinclusive as a nondelegation canon. As discussed above, the avoidance canon is overinclusive because it permits courts to disturb the Executive's exercise of otherwise legitimately delegated authority simply because the resulting action might be unconstitutional. At the same time, the avoidance canon is underinclusive as a nondelegation check because it leaves undisturbed administrative action that has enormous impact, both financial and otherwise, on the society at large. Thus there is no

---

LEE L. REV. 1023, 1024 (1992); Ann Brewster Weeks, Note, *The Pregnant Silence:* Rust v. Sullivan, *Abortion Rights, and Publicly Funded Speech*, 70 N.C. L. REV. 1623, 1625 (1992).

367 *See Rust*, 500 U.S. at 204-05 (Blackmun, J., dissenting); *id.* at 223-25 (O'Connor, J., dissenting).

368 *Id.* at 204 (Blackmun, J., dissenting)

369 *Id.* at 224 (O'Connor, J., dissenting).

370 *Id.* at 225 (O'Connor, J., dissenting).

371 *See id.* at 191 (holding that the regulations at issue "do not raise 'grave and doubtful constitutional questions'" (quoting United States ex rel. Attorney Gen. v. Del. & Hudson Co., 241 U.S. 394, 408 (1916))).

logical connection between a nondelegation problem and the simple raising of a constitutional question. Agency action implicating constitutional problems can pose no threat to nondelegation values at all, whereas agency action without constitutional implications can have enormous impact and thus threaten nondelegation values. It is, in the end, just happenstance that the avoidance canon checks the former sort of agency action and leaves untouched the latter.

Consider now a different example in which the nondelegation problem is significant. In *American Trucking Associations v. EPA*,[372] the D.C. Circuit held that the Environmental Protection Agency's interpretation of the scope of its rulemaking authority under certain provisions of the Clean Air Act[373] rendered the scope of the statutory delegation of power to the agency unconstitutional under the nondelegation doctrine.[374] The court of appeals held that the statute on its face provided no intelligible principle to channel the discretion of the agency as it determined permissible ambient air quality standards; the statute used only the open-ended standard that the permissible levels were to protect public health with an adequate margin of safety.[375] Under the agency's reading, the statutory standard would permit regulation of pollution levels at virtually any amount that the agency chose; on the record before the court, moreover, there was no scientifically reliable way to say whether one or another regulatory standard was better.[376] That being so, the court concluded that the agency's reading of the statute left it unsupervised by Congress in its rulemaking and thus the statutory authority was unconstitutional under the nondelegation doctrine.[377]

Rather than declaring the statute unconstitutional, however, the court of appeals was willing to consider a reasonable construction of the Clean Air Act that adequately limited the agency's rulemaking discretion and thus could possibly be administered in a constitutional way.[378] The court stated that because "an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its own."[379] Thus the court remanded for the agency to seek to implement the statute consistently with nondelegation principles.

---

372 175 F.3d 1027 (D.C. Cir. 1999), *reversed*, Whitman v. Am. Trucking Ass'ns, 121 S. Ct. 903 (2001).

373 *See* 42 U.S.C. §§ 7408-09 (1994).

374 *American Trucking*, 175 F.3d at 1034.

375 *See id.* at 1034-35.

376 *Id.*

377 *See id.* at 1057.

378 *Id.* at 1038.

379 *Id.*

The Supreme Court reversed that decision, holding (as to the nondelegation point) that neither the statute at issue nor the agency's interpretation of it was so open-ended as to leave the agency unsupervised by Congress in making rules.[380] For present purposes, the significance of the Supreme Court's decision lies in its rejection of the D.C. Circuit's view that a statute might effect an unconstitutional delegation on one interpretation but not on another. Justice Scalia's opinion for the Court stated that, if the agency's initial interpretation of the statute violated the nondelegation doctrine, to allow the agency on remand to choose a different interpretation would also violate the nondelegation doctrine.[381] Upon analysis, however, it is not clear why that is so. Essentially the Court said that if the statute effected an unconstitutional delegation, then the proper course was for the court simply to declare so, and not to remand for the agency to get another chance to implement the scheme lawfully. That position would surely be correct if the agency's reading were the only permissible one. On remand, however, it is possible that the agency reasonably could have concluded that the statute's text and history admitted of a limiting construction that would have guided the agency's discretion in rulemaking so as to solve the nondelegation problem in the prior interpretation. Such a construction might in fact have not been available, but if that were so the courts would have had an opportunity to say so when the case returned from the agency. In cases of statutory ambiguity, however, there is no logical reason why an agency cannot unreasonably construe its statutory authority so broadly as to violate the nondelegation doctrine in the first instance, but later reasonably arrive at a more narrow construction that comports with the Constitution. After all, that is precisely the course routinely taken by the courts in deploying the avoidance canon.

The D.C. Circuit's decision eschewed reliance on the avoidance canon as a trump over *Chevron*; instead the court recognized that it can better serve nondelegation norms—interpreting ambiguous grants of statutory authority not to allow the agency to approach the constitutional line—by declaring the agency's interpretation unconstitutional and remanding to see if a constitutional construction is available. In that way, the court was able to vindicate constitutional nondelegation principles, while also giving serious and genuine consideration to the agency's view of how it should execute the law; and once the court concluded that the agency could not constitutionally execute the law as it wished, it remanded to the political branch for it to attempt to execute the law in a constitutional way. The Supreme

380 Whitman v. Am. Trucking Ass'ns, 121 S. Ct. 903, 913 (2001).

381 *Id.* at 912; *see also* Am. Trucking Ass'ns v. EPA, 195 F.3d 4, 14 (D.C. Cir. 1999) (Silberman, J., dissenting from the denial of rehearing en banc).

Court's disagreement on the merits makes the decision of the court of appeals of only academic interest. For purposes of my argument, however, the court of appeals's decision illustrates the proper judicial role in the avoidance context. Although the court rejected the agency's view of how it should run the regulatory program, it did so only after assuring itself that the agency's reading was *actually*, as opposed to *possibly*, unconstitutional.[382]

In contrast to the situation in *Rust*, where the constitutional issues were not remotely related to the nondelegation doctrine, the decision in *American Trucking* directly concerns the interplay between avoidance and the structural norm against excessive delegations of power to law executors. Even in that context, however, the Court could vindicate nondelegation norms without actually striking down an act of Congress.[383] Avoidance in that context only would add an unnecessary level of confusion. Without the avoidance canon in the picture, the court's decision path was to consider whether the agency's construction of the statute effected an unconstitutional delegation. If it did, then the proper course was to remand to the agency for it to

---

382 Given what appears to be the inconsistency in substance between the Court's decision in *Edward J. DeBartolo Corp.* and *Rust v. Sullivan*, there is room to question whether the later-decided *Rust* decision undermines the proposition that the avoidance canon trumps *Chevron*. But the Court in *Rust* claimed that the constitutional problem there did not raise doubts that were serious enough to warrant invoking the canon, and said nothing to suggest that *Edward J. DeBartolo Corp.* was no longer good law. Taking the Court at its word, in his dissent from the denial of rehearing en banc in *American Trucking*, Judge Silberman pointed out that the Supreme Court has concluded that "the constitutional avoidance canon trumps *Chevron* deference." Am. Trucking Ass'n v. EPA, 195 F.3d 4, 14 (D.C. Cir. 1999) (Silberman, J., dissenting from the denial of rehearing en banc).

383 This point suggests another reason why the avoidance canon's benefits are not as great as they first seem. The conventional account is that the primary benefit of the canon is to avoid putting the Court in the position of striking down an act of Congress. In the context of judicial review of executive implementation of a statute, however, the avoidance canon will never avert such a holding. Consider the situation in a case like *American Trucking*, in which the Executive's statutory reading is subject to constitutional judicial review. Once the court concludes that the agency's reading does not pass constitutional muster, it does not strike down the statute; instead, it sends the case back to the Executive for it to determine whether there is another available statutory reading that *is* constitutional. If there is no such alternative reading available, then the court will be bound to strike down the statute when it returns on judicial review. If the court had instead invoked avoidance and adopted the alternative construction for itself without remanding, it could have precluded the constitutional judgment that the agency's *reading* of the statute was unconstitutional. Even if the court had reached the constitutional question, however, it would not have struck down the *statute itself*. The agency would have remained free to adopt a new reading on remand. If there is no available reading of the statute that avoids the constitutional defects, however, then the statute is simply unconstitutional. In that circumstance, the avoidance canon is irrelevant. Thus, although the avoidance canon perhaps averts a holding that a particular reading of a statute is unconstitutional, it *never* averts a holding that a statute is unconstitutional altogether. The avoidance canon might therefore reduce the number of actual constitutional decisions, but it is unnecessary to preserve the separation of powers from the true inter-branch conflict of the courts telling the legislature that it has violated the fundamental law.

attempt to arrive at a constitutional construction; on the other hand, if the agency's construction was lawful, then the court's proper response would have been simply to declare so. The only benefit from avoidance would have been to *overenforce* the nondelegation norm, which is hardly a benefit at all if the canon's only grounding is in a judicial assessment of good policy and not in the laws passed by Congress or the actual requirements of the Constitution. That situation is not compellingly attractive, especially in light of the fact that the alternative is *not* to declare an act of Congress unconstitutional, but instead to remand for the law executor to have another opportunity to execute the law in a constitutional manner. If it turns out that there is no permissible construction of the relevant law, then the avoidance canon would not (at least legitimately) be able to save a law that is actually unconstitutional in all its applications.

CONCLUSION

This Article has raised objections—going well beyond serious doubts—to one of our most venerable canons of construction. On close analysis, the avoidance canon, which is designed to maintain the Court's proper place in the constitutional structure, turns out to be deeply troubling to the separation of powers. With respect to Congress, the avoidance canon in practice often does not serve the value of legislative supremacy. The canon wrongly assumes that Congress legislates without ever intending to approach the limits of the Constitution. And it often results in the Court adopting interpretations that the legislative branch could not have foreseen nor intended.

With respect to the Executive, the avoidance canon in practice disregards Executive judgments as to how to discharge the power and duty to take care that the laws be faithfully executed. That is true for discretionary judgments as to how, as a matter of policy, gaps in statutory schemes will be filled. And that is even more true for Executive exercises of delegated power to give content to statutory commands from Congress.

Neither the Constitution nor federal statute requires the avoidance canon; it is instead a rule of judicial policy designed to achieve the substantive ends of the separation of powers. Yet the Court has shown little awareness of the potential impact on congressional prerogatives from statutory misinterpretations in the pursuit of avoidance. And it has shown *no* awareness that the avoidance canon can effectively place it in the shoes of the President as the law executor in our constitutional system. In every application of the canon, the Court would do well to stop and recognize that understanding the proper scope of the avoidance canon requires seeing that avoiding constitutional questions is a three-branch problem.