THE CONSTITUTIONAL AVOIDANCE CANON OF STATUTORY CONSTRUCTION

BY GUNNAR P. SEAQUIST

I. The Foundations of the Canon

Although frequently discussed as a singular canon, the constitutional avoidance doctrine encompasses a series of rules of construction by which the judiciary avoids statutory interpretations that might create doubt as to the constitutionality of a legislative act. Through this doctrine the courts seek to maintain a careful, and sometimes uneasy, balance between protecting constitutional mandates and respecting the will and intent of democratically-elected legislators.[1] Indeed, since Chief Justice John Marshall penned the Supreme Court's opinion in *Marbury v. Madison*, which formally established the federal judiciary's power to void congressional actions it deems unconstitutional,[2] the judiciary has on several occasions found itself the subject of intense backlash and accusations of "judicial activism" from the political branches of government and the public in response to court decisions striking down majority-enacted laws.[3]

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The risk to the courts of this type of head-on confrontation with the populist branches goes far beyond the threat of mere verbal rebuke by politicians. Congress has, in response to some opinions of the Court, threatened to use its powers under Article III of the Constitution to limit the jurisdiction of the federal courts, a threat referred to as "jurisdiction-stripping."[4] While the legality and practical limits of the exercise of this congressional power are not entirely clear, the threat of the jurisdiction-stripping power nevertheless lurks as a menacing disincentive for the courts to challenge the political will of Congress improvidently or unnecessarily. More importantly, when the judiciary directly confronts or overturns legislation enacted by elected representatives, it risks damaging the true source of its power, which, as the Supreme Court explains, is the "people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."[5] Thus, the Court "must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make."[6]

Perhaps nowhere is this admonition more apropos than to the "great gravity and delicacy" of the judicial responsibility to opine on the constitutional validity of legislative enactments.[7] As stated in Thomas Cooley's foundational treatise on constitutional limitations, "[i]t must be evident to anyone that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility."[8] Accordingly, Justice Felix Frankfurter observed that, "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not pass on questions of constitutionality…unless such adjudication is unavoidable."[9] This article provides a general overview of the development and application of the constitutional avoidance principles employed by the judiciary to avoid rendering unnecessary decisions of constitutional magnitude.

II. The Substantive Provisions of the Constitutional Avoidance Doctrine

At the heart of the constitutional avoidance doctrine is the "time honored presumption" that Congress enacts a law with the intent that it be constitutional.[10] This presumption is anchored in the fact that "[t]he Congress is a coequal branch of government whose Members take the same oath as [the judiciary] to uphold the Constitution of the United States."[11] Thus, out of respect for a coordinate branch of government, the courts will not "lightly assume that Congress intended to infringe constitutionally protected liberties or usurp powers constitutionally forbidden to it."[12] To that

end, "the elementary rule [of statutory interpretation] is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."[13] Indeed, words may be strained in the candid service of avoiding a serious constitutional doubt.[14]

The judicial decision most commonly associated with the doctrine of constitutional avoidance is Justice Brandeis's concurring opinion in *Ashwander v. Tennessee Valley Authority*.[15] In *Ashwander*, the majority held that a government contract did not exceed the executing agency's constitutional authority. Although Brandeis concurred in this conclusion, he argued that the Court should not have reached the constitutional question. As support for his position, Brandeis identified and collected Supreme Court decisions outlining seven rules under which the Court had "avoided passing upon a large part of all the constitutional questions pressed upon it for decisions."[16] Of these, two in particular form the basis of the constitutional avoidance doctrine:

1) The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of; and

2) When the validity of an act of the Congress is drawn into question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.[17]

It is the latter principle that is commonly referred to as the constitutional avoidance canon,[18] and its origin in federal case law arguably predates *Marbury v. Madison*.[19] Thus, for as long as the federal courts have been construing legislative enactments, they have done so with the express understanding that legislative acts should be construed to avoid a violation of the Constitution if possible.[20]

For its part, Texas has also long adhered to the presumption of constitutionality of legislative enactments and the doctrine of constitutional avoidance. As early as 1922, the Texas Supreme Court echoed the sentiments of its federal counterpart, observing that:

> "In determining the constitutionality of an act of the Legislature, courts always presume in the first place that the act is constitutional. They also presume that the Legislature acted with integrity, and with an honest purpose to keep within the restrictions and limitations laid down by the Constitution. The Legislature is a co-ordinate department of the government, invested with high and responsible duties, and it must be presumed that it has considered and discussed the constitutionality of all measures passed by it."[21]

Moreover, since 1967, the Texas Legislature has codified the presumption of constitutionality as part of the Code Construction Act, which aids Texas courts in interpreting codes adopted pursuant to the Texas Statutory Revision Program.[22] The Texas Supreme Court has further agreed with federal authorities that it is the duty of the courts "to construe statutes in a manner which avoids serious doubts as to their constitutionality."[23] And where such serious doubts arise, Texas law also holds that "courts should determine whether a construction of the statute is 'fairly possible' by which the constitutional question can be avoided."[24]

III. Application and Practical Criticisms of the Avoidance Doctrine

When faced with a statutory challenge that might implicate some constitutional doubt, the judiciary first examines whether there exists some other ground on which the case may be resolved. Known as the Last Resort Rule, this principle has been described by scholars as "procedural avoidance" because it merely directs the sequence in which events should be considered by the courts, not how the constitutional issue should be substantively decided, if reached.[25] If a particular statutory question cannot be resolved on a non-constitutional basis pursuant to the Last Resort rule, the court applies the constitutional avoidance canon to arrive at a construction of the statute that does not create constitutional doubt. As such, the constitutional avoidance canon is a substantive rule of decision—"a tool for choosing between competing plausible interpretations of a statutory text" based on the presumption that Congress did not intend an alternative that raises constitutional doubts. [26]

It should be noted that, as with all canons of construction, the courts will not apply the doctrine of constitutional avoidance if the statutory language is unambiguous. Constitutional avoidance "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible to more than one meaning."[27] Furthermore, courts may only adopt alternate saving constructions of legislative provisions if it is *fairly possible* to do so.[28] Courts, therefore, may not adopt an alternate statutory interpretation that is plainly contrary to the

intent of the legislature.[29] Thus, where a constitutionally dubious construction is mandated by the plain language of the statute or the clear intent of the legislature and the issue is not amenable to decision on other grounds, the courts cannot—or at least should not—employ the constitutional avoidance doctrine to shrink from their duty "as the bulwar[k] of a limited constitution against legislative encroachments."[30] Rather, in that circumstance, the courts must exercise their "emphatic…role and duty…to say what the law is."[31]

When the judiciary does invoke the avoidance canon, however, it must do so cautiously lest it undermine the very principles of judicial restraint that the canon is meant to serve. One of the chief criticisms of constitutional avoidance is that in endeavoring to avoid a constitutional infirmity, the court nevertheless signals its belief that the enactment at issue is, in at least some respect, constitutionally amiss.[32] Paradoxically, the court's exercise of constitutional avoidance can, in some circumstances, arguably have a more imposing effect on legislative autonomy than simply rejecting a legislative provision as unconstitutional. In the latter case, the court carefully considers the merits of the issue and offers a reasoned explanation for its conclusion. By applying the avoidance canon, however, the court acknowledges, either expressly or implicitly, the constitutional elephant in the room but foregoes any meaningful analysis of the merits and contours of the issue. This abstract hint at constitutional frailty can cast an even greater pall of uncertainty over the legislature's ability to enact laws in constitutionally sensitive areas. The result is what Judge Posner has called a "judge-made constitutional penumbra that has the same prohibitory effect as the … Constitution itself."[33] On the other hand, some scholars have downplayed Judge Posner's concerns by suggesting that these so-called penumbras are ultimately beneficial as they provide greater protection for the principles of the Constitution.[34] These competing positions continue to reflect the underlying tensions created by an independent judiciary tasked with deferring to the legislature on matters of policy while still ensuring the fundamental protections of the constitution.

IV. Conclusion

Both federal and Texas courts have long adhered to the constitutional avoidance canon as a means of holding the line between deference to the legislature and fidelity to the supreme law of the constitution. While it is assured that controversy will continue to surround the courts constitutional pronouncements on the validity of legislative acts, through the judicious use of the avoidance canon, courts can continue to foster "the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests."[35]

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1 *See e.g., Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (Stating that the constitutional avoidance canon "not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears by an oath to uphold the Constitution.") (internal citation omitted).

2 *Marbury v. Madison*, 5 U.S. 137, 177-178 (1803) (Reasoning that "[i]t is emphatically the province and duty of the judicial department to say what the law is…and [because] the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.").

3 For a good synopsis of the most notorious of these criticisms and controversies, *see generally* Nolan, Andrew, *The Doctrine of Constitutional Avoidance: A Legal Overview*, Congressional Research Service, September 2, 2014, at pp. 3-5 and p. 1, n.1.

4 *See* U.S. Const. Art. III, § 1 (providing that "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish") and § 2 (providing the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.). *See also*, Devine, Neal, *Constitutional Avoidance and the Roberts Court*, 32 Dayton L. Rev. 340-41 (2007) (Noting that in response to several rulings against the government in cases involving Communists in the 1950s, "Congress loudly signaled its disapproval, coming, as Chief Justice Warren put it in his memoirs 'dangerously close' to enacting legislation that would have stripped the Court of appellate jurisdiction in five domestic security areas.") (citing Warren, Earl, The Memoirs of Earl Warren 313 (Doubleday 1977)).

5 *See* Nolan, *The Doctrine of Constitutional Avoidance: A Legal Overview*, at pp. 6; *see also Planned Parenthood v. Casey*, 505 U.S. 833, 865-66 (1992).

6 *Casey*, 505 U.S. at 865.

7 *See e.g., Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-36 and n. 3 (1936) (Brandeis, J., concurring) (collecting cases).

8 *See id.* (citing Cooley, Thomas, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (8th Ed.), p. 332).

9 *See* Nolan, *supra*, at p. 8; *citing Spector Motor Service Inc. v. McLaughlin*, 323 U.S. 101, 103 (1944).

10 *Reno v. Condon*, 528 U.S. 141, 148 (2000).

[11] *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981).
[12] *Edward J. DeBartolo Corp.*, 485 U.S. at 575 (noting that this approach not only "reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution".).
[13] *Id.* (citing *Hooper v. California*, 155 U.S. 648, 657 (1895)).
[14] *See Ullman v. U.S.*, 350 U.S. 422, 433 (1956).
[15] 297 U.S. 288, 341-356 (1936); *see also* Nolan, *supra*, at p. 8 (citing Lisa A. Kloppenburg, *Avoiding Constitutional Questions*, 35 B.C. L. Rev. 1003, 1012 (1994) (describing Brandeis's concurrence as "the most famous articulation of the constitutional avoidance doctrine.")).
[16] *Ashwander*, 297 U.S. at 346-48.
[17] *Id.* at 347-48.
[18] *See e.g., Clark v. Martinez*, 543 U.S. 371, 380-381 (2005).
[19] *See Edward J. DeBartolo Corp.*, 485 U.S. at 575 (stating that the avoidance canon is a "cardinal principle [that] has its roots in Chief Justice Marshall's opinion for the Court in *Murray v. The Charming Betsy*, 2 Cranch 64, 118, 2 L.Ed. 208 (1804) and has for so long been applied by this Court that it is beyond debate."), citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-01 (1979).
[20] Some scholars have argued that constitutional avoidance actually predates the Supreme Court's 1803 decision in *Marbury*, and that the origins of the doctrine are found in the Court's decision in 1800 in the case of *Mossman v. Higginson*, *supra*. *See* Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945, 1948 (1997).
[21] *St. Louis Southwestern Ry. Co. of Texas v. Griffin*, 171 S.W.703, 704 (Tex. 1914).
[22] Tex. Gov't Code § 311.021(1) ("In enacting a statute, it is presumed that compliance with the constitutions of this state and the United States is intended"). *See also* Ronald Beal, *The Art of Statutory Construction*, 64 Baylor L. Rev. 339, 370-71 (2012).
[23] *Federal Savings and Loan Ins. Co. v. Glen Ridge I Condominiums, Ltd.*, 750 S.W.2d 757 (Tex. 1988), citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986).
[24] *Id.*; also citing *Crowell v. Benson*, 285 U.S.22, 52 (1932).
[25] *See* Earnest A. Young, *Constitutional Avoidance, Resistance, Norms and the Preservation of Judicial Review*, 78 Tex. L. Rev. 1549, 1575 (2000).
[26] *Clark v. Martinez*, 543 U.S. 271, 381-82 (2005) (internal citation omitted)
[27] *Id.* at 384 (internal citation omitted); *see also Roark Amusement & Vending, L.P.*, 422 S.W.3d 632, 635 (Tex. 2013) ("when a statute's words are unambiguous and yield but one interpretation, the judge's inquiry is at an end".).
[28] *Catholic Bishop of Chicago*, 440 U.S. at 510.
[29] *See e.g., Edward J. DeBartolo Corp.*, 485 U.S. at 575 (Court will construe statutes to avoid constitutional infirmities *unless* such a construction is plainly contrary to the intent of Congress).
[30] *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 194 (2009); *but see Bond v. United States*, 134 S. Ct. 2077, 2094 (2014) (Scalia, J., dissenting) (arguing that the Court "shirk[ed] its job" of interpreting the Constitution by applying the avoidance doctrine to an unambiguous definition in the Chemical Weapons Convention Implementation Act).
[31] *Marbury*, 5 U.S. at 173.
[32] Nolan, *supra*, at p. 2; *see also,* Young, *supra*, at 1579, *citing* Vermeule, *supra* at 1959 ("[c]lassical avoidance does not avoid, but in fact decides, a constitutional question.").
[33] *See id.* at 26; *Young*, *supra*, at 1581-82.
[34] *Young*, *supra*, at 1585, *et. seq.*
[35] *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring); *see also* Nolan, *supra*, at p. 6.