Appealing to Congress

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In recent years, a swelling chorus of critics has taken aim at the Roberts Court's (mis)use of avoidance canons. For many of these critics, Exhibit A has been a pair of cases involving constitutional challenges to the Voting Rights Act (VRA). In the first of these cases, Northwest Austin Municipal Utility District No. 1 v. Holder*, the Court invoked the avoidance canon and decided the case on (dubious) statutory grounds. It left open the ultimate question of the VRA's constitutionality, but it did raise constitutional scruples rooted in the novel doctrine of "equal sovereignty." In the second case,* Shelby County v. Holder*, the Court relied on those* Northwest Austin *dicta to invalidate the VRA's preclearance provisions. Defenders of these decisions suggest that the* Northwest Austin *Court clearly signaled to Congress that the VRA was in constitutional peril, and that the* Shelby County *Court simply made good on that earlier admonition. Long ago Alexander Bickel wrote that, in constitutional cases, the Supreme Court "nearly always has three courses of action open to it: it may strike down legislation as inconsistent with principle; it may legitimate it; or it may do neither."*[1] *The avoidance canon has, in the view of the Roberts Court's defenders, been the Court's favored way of "doing neither."*

But, as an alternative to invalidating or upholding a federal statute, the modern avoidance canon leaves much to be desired. This Article describes why this is so, and points to a more attractive "third way," one first developed in Germany. In judgments known as "appeal decisions," the German Constitutional Court does one of two things: it either declares

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[1] Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 50 (1961).

that the challenged law is constitutional "as yet," or it rules that the law's unconstitutionality must be provisionally accepted. In both cases, the Court "appeals" to the legislature to act affirmatively — in the one case to prevent a foreseeable constitutional defect; in the other to cure a defect that already exists. Counterintuitively, this seemingly aggressive practice can actually promote dialogue and deference.

At a superficial level, the U.S. Supreme Court has long engaged in analogous practices, but those practices have been covert, half-hearted, and inadequate. Of late, the situation has grown worse. This Article contends that there would be great advantages to adopting the German practice openly and in full. The U.S. Supreme Court should, in certain settings, appeal to Congress.

TABLE OF CONTENTS

INTRODUCTION

Striking down a legislative act is, as a circuit-riding John Marshall once put it, the most momentously delicate thing a constitutional court ever does.[2] The political costs of doing so can be great, and in any case, courts are often queasy about nullifying the work of a body whose democratic legitimacy seems more obvious and straightforward than their own. On the other hand, protecting citizens against unconstitutional legislation makes up a central part of a constitutional court's *raison d'être*. Every constitutional court must navigate between the Scylla of intruding upon the legislature's democratic prerogative and the Charybdis of being untrue to the court's own trust and commission.

Traditionally, the canon of constitutional avoidance has been one of the principal mechanisms by which the U.S. Supreme Court has sought to navigate this dilemma.[3] Proponents of the canon have traditionally seen it as a powerful instrument of judicial restraint.[4] By

[2] *Ex parte* Randolph, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558) ("No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of a legislative act. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other points, a just respect for the legislature requires, that the obligation of its laws should not be unnecessarily and wantonly assailed.").

[3] *See, e.g.*, Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1281-92 (2016).

[4] The most famous endorsement of the canon — actually several canons — appeared in Justice Brandeis's concurring opinion in *Ashwander v. Tennessee Valley*

enjoining the Court to avoid statutory interpretations that would render a law unconstitutional, or even suspect, the canon purports to limit the use of the Court's most fantastic power and to promote deference to the legislature.

Recently, however, the avoidance canon has come under fire. Commentators have long maintained that the canon can be used as a tool of covert activism. Now, critics allege, this is precisely what the Roberts Court does with some regularity.[5] The critics' examples-in-chief are often the Roberts Court's voting rights cases, *Northwest Austin* and *Shelby County*.[6] In *Northwest Austin*, decided in 2009, the Court ostensibly avoided ruling on a constitutional challenge to the Voting Rights Act's preclearance provisions, but raised "serious questions" about the Act's constitutionality along the way.[7] Those questions centered on the doctrine of "equal sovereignty," which the Court declared to be "fundamental." Critics objected, however, that the Court had invented the doctrine out of whole cloth.[8] Just four years later, in *Shelby County*, the Court again confronted a constitutional challenge to the VRA's preclearance provisions, but this time, invoking the scruples articulated in the *Northwest Austin* dicta, the Court invalidated the challenged provisions by a vote of 5 to 4.

Authority, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

[5] *See, e.g.*, Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 184 [hereinafter *Avoidance and Anti-Avoidance*]; Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2111-12 (2015); Richard M. Re, *The Doctrine of One Last Chance*, 17 GREEN BAG 2D 173, 174 (2014); Damon Root, *John Roberts' Constitutional Avoidance*, REASON (June 4, 2014, 11:30 AM), http://reason.com/archives/2014/06/04/john-roberts-constitutional-avoidance.

[6] Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013); Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193 (2009).

[7] *Nw. Austin*, 557 U.S. at 212 (Thomas, J., concurring).

[8] *See* Zachary S. Price, *NAMUDNO's Non-Existent Principle of Equal Sovereignty*, 87 N.Y.U. L. REV. 24, 24 (2013) ("The suggestion that federal legislation must treat states equally is a chimera, without support in constitutional text, history, or precedent."); Richard A. Posner, *The Voting Rights Act Ruling Is About the Conservative Imagination,* SLATE (June 26, 2013, 12:16 AM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html ("[T]here is no doctrine of equal sovereignty. The opinion rests on air."); Nina Totenberg, *Whose Term Was It?: A Look Back at the Supreme Court*, NPR (July 5, 2013, 3:35 AM), http://www.npr.org/2013/07/05/198708325/whose-term-was-it-a-look-back-at-the-supreme-court (quoting Professor Michael McConnell: "There's no requirement in the Constitution to treat all states the same. It might be an attractive principle, but it doesn't seem to be in the Constitution").

Defenders of these decisions insist that *Northwest Austin* clearly signaled to Congress the need to update the VRA or risk its being invalidated, and that *Shelby County* merely made good on that earlier admonition.[9] Long ago Alexander Bickel wrote that, in constitutional cases, the Supreme Court "nearly always has three courses of action open to it: it may strike down legislation as inconsistent with principle; it may legitimate it; or it may do neither."[10] The avoidance canon has, in the view of the Roberts Court's defenders, been the Court's favored way of "doing neither."

But, as an alternative to invalidating or upholding a federal statute, the modern avoidance canon leaves much to be desired. This Article describes why this is so, and points to a more attractive "third way," one first developed in Germany. This approach involves what German scholars have called "appeal decisions" (*Appellentscheidungen*). An appeal decision does two things. First, it rules that a challenged law is constitutional "as yet" — or that, because of some higher consideration, its unconstitutionality must be provisionally accepted. Second, it "appeals" to the legislature to correct a constitutional defect before a stated or implicit deadline, or to exercise ongoing oversight to ensure continued conformity with the constitution. In its strongest form, an appeal decision is a clear admonition: the legislature must cure the infirmity within a given period or the Court will strike the offending provision when the period ends. In its softer forms, it is a summons to legislative vigilance. The Court in such cases notes that the factual predicates for assessing the law's constitutionality remain unclear. That being so, there is no basis for the Court to invalidate the law, but there is also no cause for legislative complacency. The legislature must carefully watch over the law, amending it as needed to prevent or cure constitutional defects.

At first blush, the practice seems an aggressive one. The Court seems to be ordering the legislature around. But, as should become clear in the course of this Article, appeal decisions can also be a useful and attractive form of deference to the legislature. This is particularly true when

[9] *See, e.g.*, George F. Will, *Supreme Court Is Correct on Voting Rights Act*, WASH. POST (June 26, 2013), http://www.washingtonpost.com/opinions/george-will-supreme-court-is-correct-on-voting-rights-act/2013/06/26/b15c8d84-de81-11e2-b797-cbd4cb13f9c6_story.html. Earlier, before the Court decided *Shelby County*, Will wrote that, "[t]he Roberts court was excessively deferential in not overturning Section 5 in a 2009 case, when it merely urged Congress to reconsider the section." George F. Will, *'Democracy and Disdain' Misses the Point of Judicial Review*, WASH. POST (Dec. 28, 2012), http://www.washingtonpost.com/opinions/george-will-democracy-and-disdain-misses-the-point-of-judicial-review/2012/12/28/753b6c08-505b-11e2-8b49-64675006147f_story.html.

[10] Bickel, *supra* note 1, at 40.

traditional forms of deference to the legislature, such as construing statutes to avoid constitutional questions, break down.

As it happens, a growing number of commentators insist that traditional canons of deference are under strain or are breaking down at the hands of the United States Supreme Court.[11] Some of these scholars have contended that the fault lies with the Court, others that it lies with the canons themselves. Some maintain that the Justices are misusing the deference canons or ignoring them; others urge that the canons should be modified or, in part, abandoned.[12] This Article makes the very different point that there is a useful function of deference for which current American judicial practice has no formal mechanism — and that the gap can be filled by embracing, with certain caveats and accommodations, the German practice of appealing to the legislature. This Article contends that, in certain contexts, the U.S. Supreme Court should appeal to Congress.

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My argument proceeds in three Parts. Part I suggests that in certain contexts the U.S. Court has tried to craft a solution similar to German-style appeal decisions but has done so indirectly by deploying — and, some argue, distorting — canons of constitutional avoidance.[13] Part I focuses on the most prominent recent example of this phenomenon — the Court's response to constitutional challenges to the Voting Rights Act (VRA) in *Northwest Austin* and *Shelby County*. On the surface, *Northwest Austin* looks something like an appeal decision, and *Shelby County* looks like an enforcement decree following Congress's failure to respond to an appeal decision. But this appearance is deceiving. *Northwest Austin* was what I shall call a "pseudo-appeal decision." On its own terms, it was not a *constitutional* decision at all.

Part II highlights several American analogs to the German practice, but suggests that the American analogs look, by comparison, covert and half-hearted.[14] My core contention in Part II is that the U.S. Supreme Court has been issuing decisions that resemble appeal

[11] *See, e.g.*, Katyal & Schmidt, *supra* note 5; Re, *supra* note 5.

[12] Katyal and Schmidt contend both that the Court has abused the canon and that, because the canon lends itself to such abuse, it should be partially abandoned. Katyal & Schmidt, *supra* note 5, at 2165. For criticisms focused on the Roberts Court's use of the canon, see Hasen, *Avoidance and Anti-Avoidance*, *supra* note 5, at 184-89, and Root, *supra* note 5. For a defense of the canon, even when it allows courts to rewrite statutes, see Fish, *supra* note 3, at 1281-94.

[13] *See infra* Parts I, III.

[14] *See infra* Part II.

decisions for a long time, but that its jurisprudence would be enriched by adopting the German practice openly and as fully as the peculiarities of American constitutional procedure would allow.

Part III asks whether appeal decisions could or would work in an American context.[15] It answers yes on both fronts. Appeal decisions are not impermissible advisory opinions, and they are, in many contexts, more attractive than the currently available alternatives.

My conclusion offers some cautions about when the Court should, and should not, appeal to Congress.[16]

I. *SHELBY COUNTY* AND THE VARIETIES OF CONSTITUTIONAL AVOIDANCE

By any standard, the final week of the October 2012 Supreme Court Term was set to be a blockbuster. During the last days of June 2013, the Court would rule on the constitutionality of affirmative action in collegiate education, federal and state bans on same-sex marriage, and one of the greatest legislative landmarks of the civil rights era. A year after the Court affirmed the constitutionality of the Affordable Care Act in what had been billed the "case of the century,"[17] the Court seemed poised to hand down four further landmarks in a single week.

In the event, there were two 5–4 landmarks and two big dodges. The landmarks were *United States v. Windsor*,[18] in which the Court invalidated provisions of the Defense of Marriage Act that limited the recognition of marriage under federal law to opposite sex couples, and *Shelby County v. Holder*,[19] in which the Court struck down the preclearance provisions of the Voting Rights Act. The dodges were *Hollingsworth v. Perry*,[20] in which the Court declined, on standing grounds, to consider the constitutionality of *state* bans on same-sex marriage, and *Fisher v. University of Texas at Austin*,[21] in which the Court declined to reconsider the substance of its precedents on affirmative action in higher education, remanding the case to the

[15] *See infra* Part III.

[16] *See infra* CONCLUSION: When — and When Not — to Appeal to Congress.

[17] *See, e.g.*, Jonathan Cohn, *Obamacare on Trial: Case of the Century?*, NEW REPUBLIC (Mar. 17, 2012), https://newrepublic.com/article/101826/health-reform-supreme-court-challenge-commerce-necessary-proper-medicaid; Howard Foster, *The Case of the Century*, FRUMFORUM (Nov. 14, 2011), http://www.frumforum.com/the-case-of-the-century/.

[18] 133 S. Ct. 2675 (2013).

[19] 133 S. Ct. 2612 (2013).

[20] 133 S. Ct. 2652 (2013).

[21] 133 S. Ct. 2411 (2013).

lower courts instead with instructions to review the challenged policy more searchingly.

Some Court-watchers viewed even the dodges as signals to state legislatures — as admonitions that large changes were afoot, but that the Court would not introduce them just yet.[22] Alongside *Windsor*, the *Hollingsworth* decision could be taken as a signal that the days of same-sex marriage bans were numbered — that a nation-wide revolution was on its way. If so, the Court followed up on this signal in June 2015, when the Court declared state bans on same-sex marriage unconstitutional in *Obergefell v. Hodges*.[23] Similarly, *Fisher* could be taken as a signal that the Court was considering, but not yet ready to implement, major changes in affirmative action doctrine. (The death of Justice Antonin Scalia in February 2016 obviously undermined the conservative majority's capacity to follow up on that signal, and in any case, Justice Kennedy ultimately joined the Court's three liberal Justices to uphold the University of Texas program by a vote of 4 to 3.)[24]

All of these decisions were perhaps part of a broader trend within the Roberts Court of issuing more or less direct admonitions to state and federal legislatures.[25] In the case of *Shelby County*, the other June 2013 landmark, the admonition came earlier.

A. Northwest Austin, Shelby County, and "Active Avoidance"

Shelby County was not the Roberts Court's first encounter with a constitutional challenge to the VRA's preclearance provisions. The Court had faced a similar challenge four years earlier, in *Northwest Austin Municipal Utility District No. 1 v. Holder*, but chose not to respond to that challenge — at least not directly.[26] Instead, the Court invoked the canon of constitutional avoidance, resolved the *Northwest Austin* dispute on statutory grounds, and left the pre-clearance provisions in place to fight another day.[27]

The substance and history of the VRA's pre-clearance provisions are eminently familiar. In 1965, with tremendous fanfare, Congress passed and President Lyndon Johnson signed into law the Voting Rights Act, which required, in Section 5, that certain "covered states" secure the

[22] *See* Re, *supra* note 5, at 174.
[23] 135 S. Ct. 2584 (2015).
[24] Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198 (2016).
[25] *See* Re, *supra* note 5, at 184.
[26] Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 198-204 (2009).
[27] *Id.* at 204-05.

federal government's permission before changing their voting practices or procedures.[28] South Carolina swiftly challenged Section 5 and other core provisions of the VRA, but the Supreme Court sustained the challenged provisions as appropriate exercises of Congress's enforcement powers under Section 2 of the Fifteenth Amendment.[29]

Section 5 was originally set to expire after five years, but, over the decades, Congress continued to renew it — for five additional years in 1970, for seven years more in 1975, and for twenty-five years in 1982 and 2006. After the 1982 renewal, the City of Rome, Georgia challenged the constitutionality of the renewed preclearance provisions, but the Court rejected the challenge over the dissenting opinions of Justices Powell, Rehnquist, and Stewart, who flagged federalism concerns.[30] Over the next two decades, especially after Rehnquist became Chief Justice, the Supreme Court issued a series of landmark federalism decisions constraining Congress's authority over the states.[31] Against this backdrop, after the 2006 renewal, the Court faced another frontal assault on the preclearance provisions, this time with Rehnquist's former law clerk, John Roberts, as Chief Justice.

The new challenge came from an obscure utility district in Austin, Texas. The district — cumbersomely christened Northwest Austin Municipal Utility District No. 1 — contended both that Section 5 was unconstitutional and that, in any case, the district was exempt from its requirements under a statutory bailout clause.

The bailout argument struck most observers as roundly implausible.[32] The federal district court, which rejected both the statutory and the constitutional argument, disposed of the bailout argument quite summarily, devoting about five pages to the statutory question compared with nearly fifty to the constitutional question.[33]

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[28] 52 U.S.C. § 10304 (Supp. 2014).

[29] South Carolina v. Katzenbach, 383 U.S. 301, 325-33 (1966).

[30] City of Rome v. United States, 446 U.S. 156, 173-78 (1980).

[31] *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); City of Boerne v. Flores, 521 U.S. 507 (1997); United States v. Lopez, 514 U.S. 549 (1995).

[32] *See* Heather K. Gerken, *The Supreme Court Punts on Section 5*, BALKINIZATION (June 22, 2009), http://balkin.blogspot.com/2009/06/supreme-court-punts-on-section-5.html ("[T]he statutory argument is one that that [sic] almost no one . . . thought was particularly tenable because of prior Court opinions."); Richard L. Hasen, *Sordid Business: Will the Supreme Court Kill the Voting Rights Act?*, SLATE (Apr. 27, 2009, 11:59 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2009/04/sordid_business.html ("Since there's no good statutory loophole, the larger constitutional question seems unavoidable.").

[33] *See* Nw. Austin Mun. Util. Dist. No. 1 v. Mukasey, 573 F. Supp. 2d 221, 231-35 (D.D.C. 2008) (three-judge court).

At oral argument before the Supreme Court, the statutory argument received minimal airtime. The Justices focused their attention on the VRA's constitutionality. On that question, the conservative Justices seemed quite skeptical.[34] Supporters of the VRA feared the worst.[35]

But the worst didn't come — at least not yet. By a vote of 8 to 1, the Court ruled that the utility district was exempt from the VRA's preclearance requirements under the bailout provision.[36] The majority never reached the constitutional question — or, rather, it never *answered* the constitutional question. But Chief Justice Roberts's opinion did pose that question quite pointedly.[37]

The preclearance schema, observed the Chief Justice, "differentiates between States, despite our historic tradition that all States enjoy 'equal sovereignty.'"[38] Any "departure from the fundamental principle of equal sovereignty requires a showing that a statute's geographic coverage is sufficiently related to the problem that it targets."[39] But "[t]he evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance."[40] The VRA's preclearance formula was old and perhaps outdated. During debates about the 2006 renewal, "Congress heard warnings from supporters of extending § 5" that the formula was problematic.[41] The preclearance program might still be necessary, "[b]ut the Act imposes current burdens and must be justified by current needs."[42] Regardless of the relevant standard of review, the VRA's "preclearance requirements and its coverage formula raise serious constitutional questions."[43]

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[34] *See, e.g.*, Transcript of Oral Argument at 27, Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193 (2009) (No. 08-322) (Chief Justice Roberts: "Counsel . . . our decision in *City of Boerne* said that action under section 5 has to be congruent and proportional to what it's trying to remedy. Here, as I understand it, one-twentieth of 1 percent of the submissions are not precleared. That, to me, suggests that they are sweeping far more broadly than they need to, to address the intentional discrimination under the Fifteenth Amendment."); *id.* at 34 (Justice Kennedy: "[T]he Congress has made a finding that the sovereignty of Georgia is less than the sovereign dignity of Ohio. The sovereignty of Alabama, is less than the sovereign dignity of Michigan. And the governments in one are to be trusted less than the governments than the other.").

[35] *See, e.g.*, Adam Liptak, *Skepticism at Court on Validity of Vote Law*, N.Y. TIMES (Apr. 29, 2009), http://www.nytimes.com/2009/04/30/us/30voting.html.

[36] *Nw. Austin*, 557 U.S. at 208-11.

[37] *Id.* at 200-06.

[38] *Id.* at 203 (quoting United States v. Louisiana, 363 U.S. 1, 16 (1960)).

[39] *Id.*

[40] *Id.*

[41] *Id.* at 204.

[42] *Id.* at 203.

[43] *Id.* at 204.

But the Court, Roberts answered, needn't address those questions. "Our usual practice," he wrote, "is to avoid the unnecessary resolution of constitutional questions,"[44] and the Court's construction of the bailout provision to cover the utility district made resolution of the constitutional question unnecessary.[45]

In its invocation of the canon of constitutional avoidance, the majority never mentioned the traditional requirement that the saving interpretation of the statute be plausible.[46] And to many observers, the Court's statutory interpretation was manifestly *not* plausible.[47] The majority's willingness to embrace a tortured reading of the statute led many to conclude something unusual was afoot. Many suspected that the Court's conservative majority was not really bending over backwards to save the VRA; it was announcing that the statute's days were numbered.[48]

The opinion, on this view, was an admonition to Congress. It "details constitutional objections to Section 5 of the Voting Rights Act," observed Tom Goldstein, "that seem ready-made for a later decision invalidating the statute if it is not amended."[49] Richard Pildes described the dicta as an ultimatum: "modernize Section 5 or risk seeing it struck down in a future decision."[50] Others saw a different kind of "constitutional threat[]" — a tacit warning that should Congress seek to override the Court's *statutory* interpretation, the Court might respond by quashing the Act on *constitutional* grounds.[51]

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[44] *Id.* at 197.

[45] *See id.* at 204-11.

[46] *See* Hasen, *Avoidance and Anti-Avoidance*, *supra* note 5, at 204.

[47] *See id.* at 198-204; Katyal & Schmidt, *supra* note 5, at 2130-31.

[48] *See, e.g.*, Jonathan H. Adler, *Judicial Minimalism, the Mandate, and Mr. Roberts*, *in* THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS 171, 172-74 (Nathaniel Persily et al. eds., 2013); Hasen, *Avoidance and Anti-Avoidance*, *supra* note 5, at 220-21; Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 1996 (2010); Heather Gerkin, *Online VRA Symposium: Reading the Tea Leaves — the Uncertain Future of the Act*, SCOTUSBLOG (Sept. 11, 2012, 1:40 PM), http://www.scotusblog.com/2220212/09/online-vra-symposium-reading-the-tea-leaves-the-uncertain-future-of-the-act/.

[49] Tom Goldstein, *Thoughts on This Term and the Next*, SCOTUSBLOG (June 29, 2009, 10:04 PM), http://www.scotusblog.com/2009/06/thoughts-on-this-term-and-the-next/.

[50] Richard H. Pildes, *Voting Rights: The Next Generation*, *in* RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 17, 25 (Guy-Uriel E. Charles et al. eds., 2011).

[51] Paul Stancil, *Congressional Silence and the Statutory Interpretation Game*, 54 WM. & MARY L. REV. 1251, 1326-27 (2013).

Richard Hasen speculated that, on the least charitable reading of the opinion, the conservatives Justices intended to strike down Section 5 all along, and *Northwest Austin* was merely a stay of execution designed to provide political cover. On this view, Hasen wrote, "the Voting Rights Act's time of demise will come, and the public will come to expect it once the Court first raised constitutional doubts in" *Northwest Austin*.[52]

The time of demise did come, and when it arrived, the Court proclaimed that Congress should have seen it coming. In *Shelby County v. Holder*, decided four years after *Northwest Austin*, a five-Justice majority ruled that Section 5 of the VRA was unconstitutional.[53] Once again, the Chief Justice wrote for the Court.

The *Shelby County* majority opinion began by reciting the "serious doubts about the Act's continued constitutionality" expressed in *Northwest Austin*.[54] Although these "doubts" (the earlier case called them "questions") were plainly dicta, the Chief Justice insisted that "[e]ight Members of the Court subscribed to" them.[55] The Chief Justice cited his own earlier language about current burdens being justified by current needs, and about the burden of justification required whenever Congress departs "from the fundamental principle of equal sovereignty . . . ."[56] "These basic principles," Roberts observed, "guide our review of the question before us."[57] Roberts chided the dissenting Justices for "analyz[ing] the question presented as if our decision in *Northwest Austin* never happened," and for "refus[ing] to consider the principle of equal sovereignty, despite *Northwest Austin*'s emphasis on its significance."[58]

For the majority, then, *Northwest Austin* was governing constitutional law, despite the fact that *Northwest Austin* itself was decided (ostensibly) on statutory grounds. In the intervening four years, questions had become doubts and dicta had become precedent. The application of that precedent to the case at hand was straightforward. Section 5 flouted the fundamental principle of equal sovereignty and failed to justify that departure in terms of current needs. This being so, the preclearance provision could not stand. The

[52] Hasen, *Avoidance and Anti-Avoidance*, *supra* note 5, at 220.

[53] Shelby Cty. v. Holder, 133 S. Ct. 2612, 2631 (2013).

[54] *Id.* at 2621.

[55] *Id.*

[56] *Id.* at 2622 (quoting Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 203 (2009)).

[57] *Id.*

[58] *Id.* at 2630.

Court didn't reach this conclusion lightly, but it reached it nonetheless.[59] The Court concluded by congratulating itself for having taken care, in *Northwest Austin*, "to avoid ruling on the constitutionality of the Voting Rights Act when asked to do so."[60] In the meantime, "Congress could have updated the coverage formula . . . but did not do so."[61] The omission was fatal. As the Chief Justice put it, Congress's "failure to act leaves us today with *no choice* but to declare § 4(b) unconstitutional."[62] The majority felt that its hands were tied. If so, they were tied less by Congress's inaction than by their own earlier dicta.

The Court's decision in *Shelby County* convinced many commentators that, in the hands of the Roberts Court, the canon of constitutional avoidance had become something different from what it once was.[63] Critics of *Shelby County* revived and expanded the criticism — now nearly half a century old — that the avoidance canon, ostensibly a tool of judicial restraint, actually fosters a kind of stealth activism.[64] The core of the traditional criticisms has been that when courts employ the avoidance canon, they often leave in place a law quite different from the one Congress wished to pass — a law, indeed, that Congress does not want but might struggle to repeal. This result, in the critics' view, is in many instances more counter-majoritarian and less restrained than simply striking the offending provisions.[65]

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[59] *Id.* at 2631.

[60] *Id.*

[61] *Id.*

[62] *Id.* (emphasis added).

[63] *See, e.g.*, Hasen, *Avoidance and Anti-Avoidance*, *supra* note 5 (noting, prior to *Shelby County* but partly predicting its outcome, that the Roberts Court's use of the canon was changing); Katyal & Schmidt, *supra* note 5, at 2112; Re, *supra* note 5, at 173.

[64] One of the first of these critics was Judge Henry Friendly. *See* HENRY J. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* BENCHMARKS 196, 209-12 (1967). For other formidable critiques, see Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1405-06 (2002); Richard A. Posner, *Statutory Interpretation — in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 815-16 (1983); Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 74.

[65] The more compelling modern defenses of the avoidance canon have essentially conceded these charges. *See* Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 461 (2005) (describing the avoidance canon as "a powerful judicial tool" and an "aggressive technique" that empowers courts to rewrite statutes despite "clear statutory language suggesting a contrary interpretation"); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the*

Now, some critics maintain, the Roberts Court has made matters even worse. In a recent article, Neal Katyal and Thomas Schmidt criticize the Roberts Court's use of the avoidance canon as an attempt to "camouflage[] acts of judicial aggression."[66] That aggression, according to Katyal and Schmidt, has taken two forms. The first they call the "rewriting power." The rewriting power allows the Court to create new legislation by construing a statute beyond recognition. The rewriting power has been a focus of critical fire for many decades.[67] The second form, new to the Roberts Court, is "generative avoidance," by which the Court "use[s] avoidance cases to announce new rules of constitutional law and major departures from settled doctrine."[68] The trouble with generative avoidance, write Katyal and Schmidt, is that it "allows the Court to articulate (or at least advert to) a constitutional principle in a context where its real impact will not be felt."[69] Generative avoidance allows the Court to "create constitutional law without facing its 'gravest' consequence in the case at hand."[70] Together, the rewriting power and generative avoidance constitute what Katyal and Schmidt call "*active* avoidance — using the avoidance canon to usher in legal change."[71] Their example-in-chief of both sins is *Northwest Austin*, which they describe as "an archetypal instance of active avoidance."[72]

In its statutory interpretation, Katyal and Schmidt contend, the *Northwest Austin* majority engaged in arrant rewriting: "the text, structure, legislative history, and basic rationale of the Act plainly foreclosed the district's interpretation that it was eligible for a bailout."[73] And yet the majority held otherwise, and it justified that

Preservation of Judicial Review, 78 TEX. L. REV. 1549, 1581-85 (2000).

66 Katyal & Schmidt, *supra* note 5, at 2112.

67 *See, e.g.*, FRIENDLY, *supra* note 64, at 199-201; JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 105 (1997); Katyal & Schmidt, *supra* note 5, at 2112; William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 834 (2001); Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 UC DAVIS L. REV. 1, 23-24 (1996).

68 Katyal & Schmidt, *supra* note 5, at 2112. *But see* Coyle v. Smith, 221 U.S. 559, 580 (1911) ("[T]he constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution.").

69 Katyal & Schmidt, *supra* note 5, at 2123.

70 *Id.*

71 *Id.* at 2112.

72 *Id.* at 2130.

73 *Id.* at 2131.

holding as a deferential choice to avoid the constitutional question. But, of course, the majority didn't avoid the constitutional question entirely. Before formally dodging the constitutional question, the majority announced — "invention" is the term Katyal and Schmidt use[74] — that "the fundamental principle of equal sovereignty" requires special justification whenever federal law treats different states differently.[75] This "fundamental principle," of course, became the basis for quashing the challenged portions of the VRA four years later in *Shelby County*. "The invention of the 'equal sovereignty' doctrine in [*Northwest Austin*]," write Katyal and Schmidt, "was a clear case of generative avoidance."[76] The Court created a new constitutional rule, but didn't apply it in that case. The Court made new law without having to display the courage of its convictions by striking down a statute. In this sense, "*Northwest Austin* was basically a cost-free articulation of a new constitutional principle."[77] And that articulation, moreover, was magnificently vague. It gave precious little guidance to Congress — and mighty discretion to future Courts. Critics could be forgiven for concluding, after *Shelby County*, that the avoidance canon had become something other than an instrument of deference.

B. Germany's Third Way

The criticism that avoidance canons don't always function in a manner deferential to the legislature has been leveled in other countries for a long time — including by justices of foreign constitutional courts. One of the earliest of these was Justice Wiltraut Rupp-von Brünneck, a Justice on the German Federal Constitutional Court (FCC) from 1963 to 1977.

Like the U.S. Supreme Court, the German FCC seeks to construe statutes in ways that preserve their constitutionality. And, like its American counterpart, the FCC does so in the name of deference to the legislature and judicial self-restraint. But saving interpretations, as Justice Rupp-von Brünneck frequently pointed out, can bind legislatures as well as empower them.[78] Her point was illustrated dramatically by a 1973 decision rejecting a constitutional challenge to

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[74] *Id.* at 2133.

[75] Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 203 (2009).

[76] Katyal & Schmidt, *supra* note 5, at 2133.

[77] *Id.* at 2134.

[78] *See, e.g.*, Wiltraut Rupp-von Brünneck, *Verfassungsgerichtsbarkeit und gesetzgebende Gewalt*, 102 ARCHIV DES ÖFFENTLICHEN RECHTS [AöR] 1, 19-20 (1977) (Ger.) [hereinafter *Verfassungsgerichtsbarkeit*].

the Basic Treaty between East and West Germany — a treaty that gave *de facto* international recognition to East Berlin. The Court upheld the treaty, but did so by means of a saving construction that, in the eyes of the treaty's champions, undermined its central purpose.[79] The Court found the treaty to be constitutional because it concluded that the government could reasonably believe that recognition of East Germany could promote the ultimate goal of reunification — a goal that the Court declared to be constitutionally mandated.[80]

The upshot was that, although the FCC approved the treaty, it also ruled that the government's foreign policy must be guided forever after by the so-called "reunification command" (*Wiedervereinigungsgebot)*[81] — a command that, to put matters mildly, was unpalatable to the Federal Republic's eastern neighbors. The Court insisted, furthermore, that the federal government, in its future foreign policy, would be bound not only by the decision's outcome, but by its "decisive rationale" (*tragende Gründe*).[82] The judgment explicitly invoked (in English) the principle of "judicial self-restraint."[83] But to critics, the judgment was far more restraining than restrained.

In Katyal and Schmidt's terms, the *Basic Treaty* judgment featured both rewriting and generative avoidance. It turned the Basic Treaty into something far different from what its signatories intended, and it introduced a new rule of constitutional law that considerably hampered the government's future negotiations with East Germany and the Soviet Union. In the ensuing years, as the Court faced unprecedented popular and political criticism, critics cited the *Basic Treaty* judgment as a prime example of the Court's overreaching.[84]

Justice Rupp-von Brünneck didn't take part in this particular judgment, but she was keenly aware that constitutional avoidance is not always deferential to the legislature. The Court's rescuing interpretation, she observed, might be far removed or even diametrically opposed to the legislature's intent.[85] Despite its best

[79] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 31, 1973, 36 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGGERICHTS [BVERFGE] 1 (Ger.).

[80] 36 BVERFGE 1 (20-24).

[81] *Id.* at 17-20. [Ed. Note: Unless otherwise indicated, all translated quotations from German sources in this article were translated by the author.]

[82] *Id.* at 36.

[83] *Id.* at 14.

[84] I discuss this judgment, its background, and its aftermath in my history of the FCC. *See* JUSTIN COLLINGS, DEMOCRACY'S GUARDIANS: A HISTORY OF THE GERMAN FEDERAL CONSTITUTIONAL COURT, 1951-2001, at 134-48 (2015).

[85] Rupp-von Brünneck, *Verfassungsgerichtsbarkeit*, *supra* note 78.

intentions, the Court might sometimes intrude more aggressively on legislative prerogative by saddling a law with a saving interpretation than by quashing it outright — a point Justice Rupp-von Brünneck and her colleague, Justice Helmut Simon, made forcefully in a 1972 dissent.[86] Invalidating a law, in whole or in part, might leave a gap in the legislative design, or send the legislature back to the drawing board. A saving interpretation might distort the policy picture indefinitely.

In a scholarly article published in 1970, Justice Rupp-von Brünneck pointed to a third way — a *via media* between declaring a law unconstitutional and saving it through interpretation. The title of her essay posed a question: "May the Federal Constitutional Court Appeal to the Legislature?"[87] Her answer was not only that it might, but that in certain circumstances it should.

In the Court's twenty-year history, she began, "there are several significant decisions, which, although they declared the challenged law to be (as yet) constitutional, have nonetheless led to — and were designed to lead to — repeal of the law by the legislature itself."[88] The judgments had this effect because they "expressed massive reservations about the constitutionality of the law" and "in some instances even announced that the law would, in the near future or at some specified point in time, become void for unconstitutionality."[89] Such judgments — which have also been adopted by the constitutional courts of Italy[90] and Austria — are known as "appeal decisions" (*Appellentscheidungen*), sometimes translated as "admonitory decisions." They are the principal means by which the German FCC signals a constitutional difficulty to the legislature without invalidating a challenged act.

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[86] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 25, 1972, 33 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGGERICHTS [BVERFGE] 52, 78 (Ger.).

[87] Wiltraut Rupp-von Brünneck, *Darf das Bundesverfassungsgericht an den Gesetzgeber appellieren?*, *in* FESTSCHRIFT FÜR GEBHARD MÜLLER ZUM 70: GEBURTSTAG DES PRÄSIDENTEN DES BUNDESVERFASSUNGSGERICHTS 355, 355 (Theo Ritterspach & Willi Geiger eds., 1970) (Ger.) [hereinafter *Gesetzgeber appellieren?*]. Justice Rupp-von Brünneck published a similar essay in English. Wiltraut Rupp-von Brünneck, *Admonitory Functions of Constitutional Courts: Germany: The Federal Constitutional Court*, 20 AM. J. COMP. L. 387, 387 (1972) [hereinafter *Admonitory Functions*].

[88] Rupp-von Brünneck, *Gesetzgeber appellieren?*, *supra* note 87.

[89] *Id.*

[90] The Italian decisions are called *sentenze additive*, or additive judgments. *See* GUSTAVO ZAGREBELSKY & VALERIA MARCENÒ, GIUSTIZIA COSTITUZIONALE 400-05 (2012) (It.).

The key language is Justice Rupp-von Brünneck's parenthetical "as yet" (*noch*).[91] Strictly speaking, an appeal decision rules that the challenged law is *still* constitutional — or not yet *un*constitutional — but that the law might, or will, become unconstitutional later on. Such a conclusion neither invalidates a law nor rescues it through interpretation. It occupies, instead, what some commentators have called a "grey zone" on the constitutional continuum.[92] An appeal decision is an appeal — a call for the legislature to take affirmative steps to remedy a latent or emergent infirmity before the challenged law becomes unconstitutional.

The FCC did the deed many times before it spoke the name. The Court's first explicit mention of appeal decisions came only in 1992, and then only in passing.[93] Academic commentators, by contrast, have generated a large literature on the topic.[94] Some scholars have described an appeal decision as a holding that a law is "on the path to unconstitutionality" (*auf dem Weg zur Verfassungswidrigkeit*).[95] On this view, there is a point of "turnover" (*Umschlag*), at which the law, hitherto heading toward unconstitutionality, has reached its destination.[96] An imminent transition requires preventive legislation. Others have used similar language, but have contended that an appeal decision implies that the challenged law is unconstitutional *already*, but that, for reasons of policy or failure of nerve, the Court chooses not to say so overtly until the legislature has had a chance to remedy the defect.[97] In this Article, I advance an ecumenical definition of appeal decisions — one that encompasses any decision in which the Court identifies a constitutional difficulty but, rather than invalidate

[91] Rupp-von Brünneck, *Gesetzgeber appellieren?*, *supra* note 87.

[92] *See* TZU-HUI YANG, DIE APPELLENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 26 (2003) (Ger.); *see also* Christian Pestalozza, *"Noch verfassungsmäßige" und "bloß verfassungswidrige" Rechtslagen*, *in* 1 BUNDESVERFASSUNGSGERICHT UND GRUNDGESETZ: FESTGABE AUS ANLAß DES 25 JÄHRIGEN BESTEHENS DES BUNDESVERFASSUNGSGERICHTS 519, 540 (Christian Starck ed., 1976) (Ger.). For a helpful graphic representation of the continuum, see YANG, *supra*, at 30.

[93] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 24, 1992, 86 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGGERICHTS [BVERFGE] 369 (379) (Ger.).

[94] For a thorough summary of the leading ideas, see YANG, *supra* note 92, at 51-99. For Yang's own view, see *id.* at 99-118, and for a general bibliography on the topic, see *id.* at 53-54 n.14.

[95] Pestalozza, *supra* note 92, at 540.

[96] Martin Schulte, *Appellentscheidungen des Bundesverfassungsgerichts*, 103 DEUTSCHES VERWALTUNGSBLATT [DVBL] 1200, 1201 (1988) (Ger.).

[97] *See, e.g.*, Theodor Maunz, *Das verfassungswidrige Gesetz*, 111 BAYERISCHE VERWALTUNGSBLÄTTER [BAYVBL] 513, 518 (1980) (Ger.).

the law, calls on the legislature to remedy or preempt the existing or potential infirmity.

II. AMERICAN ANALOGS

In recent decades, American academic commentators have proposed, and the U.S. Supreme Court has employed, a number of practices that seem on the surface to parallel German-style appeal decisions. This Part explores several American analogs to appeal decisions, first in academic proposals, then in judicial practice. Unfortunately, the Supreme Court's apparent appeals have for the most part been covert and unclear, half-hearted and ineffective.

A. Scholarly Proposals

1. Certifying to Congress

Over the years there have been a handful of proposals that the Supreme Court (or even federal appellate courts) adopt practices designed to solicit congressional intervention. One of the most prominent of these, proposed by Amanda Frost, is that of certifying questions to Congress.[98] Under Frost's proposal, if the Supreme Court or a federal court of appeals must apply an ambiguous federal statute, the court should stay the proceedings, retain the mandate, and certify the question of statutory interpretation to Congress. If Congress fails to respond to the certified question, courts should interpret congressional silence as implied authorization for the court to resolve the matter itself.[99] Frost argues that this procedure — modeled on the certification of state law questions to state supreme courts — would be especially useful when it would allow courts to avoid declaring laws unconstitutional.[100] Frost's proposal shares with Justice Rupp-von Brünneck and others the insight that saving a law through statutory interpretation is not necessarily deferential to the legislature, nor is it always an honest exercise in statutory interpretation. "Certifying to Congress" and "Appealing to Congress" both attempt to solicit legislative intervention, though they differ in both their operation and their animating impulse.

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[98] Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1 (2007).

[99] *Id.* at 6.

[100] *Id.* at 62.

2. Democratic Experimentalism

Michael Dorf and Charles Sabel also propose something resembling appeal decisions in their call for a "Constitution of democratic experimentalism."[101] Eighteen years ago, Dorf and Sabel expressed the need for "a new category (or new categories) of explicitly experimental constitutional adjudication."[102] "Under current doctrine," they complained,

> a state policy or practice either is or is not constitutional. Courts have no opportunity to rule that a proposed experiment was [originally] well designed . . . ; that, on its face, the proposal had some reasonable likelihood of succeeding in giving effect to the relevant constitutional guarantee; and that it gave serious attention to that guarantee.[103]

As an alternative, Dorf and Sabel propose a model of judicial review that gives the Court three options: (1) "declare the experiment a contingent success and allow expansion"; (2) "declare the experiment to have been ex ante legitimate but an ex post failure"; or (3) invalidate "sham experiments" and offer those harmed by them "both retrospective and prospective relief."[104]

Appeal decisions clearly cover the first two options.[105] "Duty to remedy" decisions, or soft appeals, expand on Dorf and Sabel's first option by ensuring ongoing legislative oversight of "contingent" successes. Strong appeal decisions fit squarely in Dorf and Sabels's second category. Such decisions allow the Court to rule that a law that was originally legitimate has become, or is becoming, illegitimate. Appeal decisions accommodate democratic experimentation by postponing annulment of experiments that were legitimate ex ante. Indeed, appeal decisions invite further experimentation by giving the legislature the first opportunity to revisit and revise the failed or failing experiment. Appeal decisions are not coterminous with democratic experimentalism, but a significant part of their appeal lies

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[101] Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

[102] *Id.* at 463.

[103] *Id.* at 463-64.

[104] *Id.*

[105] The third option, of course, is covered by the Court's traditional power to declare "sham experiments" null and void.

in their providing a framework for the brand of experimentalism extolled by Sabel and Dorf.

3. Suspended Invalidation

Several years ago, Bill Nardini described in detail the Italian practice — also prominent in Canada and South Africa — of suspending declarations of unconstitutionality.[106] Nardini observed that the U.S. Supreme Court has occasionally used similar techniques.[107] He recommended that the Court continue to do so in order, when needed, to "build in a delay between the issuance of declaratory and injunctive relief."[108] The Court could do so, Nardini argued, by declaring a law invalid but staying injunctive relief until the legislature had time to reform the law.[109] Such a practice would mirror the FCC's strongest appeal decisions, which hold that a challenged law is unconstitutional already, but that its unconstitutionality must be provisionally accepted.

4. Thayerian Review

In one of the canonical essays of American constitutional law, James Bradley Thayer maintained that courts should invalidate legislation only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one, — so clear that it is not open to rational question."[110] Mark Tushnet has referred to this principle as "Thayerian review." Thayerian review, Tushnet summarizes, "involves statutes that the court believes to be

[106] William J. Nardini, *Passive Activism and the Limits of Judicial Self-Restraint: Lessons for America from the Italian Constitutional Court*, 30 SETON HALL L. REV. 1 (1999).

[107] *Id.* at 50-54. The examples Nardini discusses include *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (ruling that the federal bankruptcy system was unconstitutional, but allowing Congress three months' time in which to reform it); *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (declaring unconstitutional various aspects of federal campaign finance laws, but staying the judgment for thirty days to "afford Congress an opportunity to reconstitute the [Federal Election] Commission"). By international standards, a stay of just three months or thirty days is stunningly brief. Recently, Eric Fish suggested that *N. Pipeline* illustrates the difficulties of soliciting legislative remedies and argued against such solicitation more generally. *See* Eric S. Fish, *Choosing Constitutional Remedies*, 63 UCLA L. REV. 322, 360-63, 383-86 (2016).

[108] Nardini, *supra* note 106, at 57.

[109] *Id.* at 41-63.

[110] James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

unconstitutional . . . but which the court nonetheless refrains from striking down."[111] Such review has found only rare, mild, and tacit support from the U.S. Supreme Court.[112] Tushnet describes as Thayerian the concurring opinion of Justice Souter in *Nixon v. United States*,[113] which joined the majority's approval of Senate impeachment proceedings, but added that one could "envision different and unusual circumstances that might justify a more searching review of impeachment proceedings" — circumstances in which "the Senate's action might be *so far beyond the scope of its constitutional authority* . . . as to merit a judicial response."[114] The Thayerian element, according to Tushnet, is Justice Souter's suggestion that the proceedings must reach a certain *degree* of unconstitutionality before the Justices will intervene — that the Court should stay its hand on certain political questions unless the infraction is egregious.[115]

Appeal decisions are sometimes Thayerian. Tushnet describes Thayerian review as "tutelary" — a chance for judges to "instruct legislators on their constitutional obligations by telling them that the statute . . . is unconstitutional and that they have to live with that unconstitutionality."[116] For the true Thayerian, that is the end of the matter. The Court will not intervene unless the unconstitutionality becomes patent and intolerable. Appeal decisions go further by threatening future invalidation. But, like "Thayerian" review, some appeal decisions have spared an unconstitutional law "as yet" because its unconstitutionality was not so clear and calamitous as to require immediate nullification. This is especially so when the FCC concludes that a law has become *less* constitutional over time. At a certain point, the law reaches the point of "turnover" (*Umschlag*) and becomes unconstitutional.[117]

But the Court is unable, or at least reluctant, to say when that point has been reached. Even when the Court concludes that the line has been crossed already, it often appeals to Parliament rather than

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[111] Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2798 (2003) [hereinafter *Alternative Forms*].

[112] *See id.* at 2798.

[113] 506 U.S. 224 (1993).

[114] *Id.* at 253-54 (Souter, J., concurring) (emphasis added).

[115] Tushnet, *Alternative Forms*, *supra* note 111, at 2798.

[116] *Id.* at 2800.

[117] *See* Eckart Klein, *Verfahrensgestaltung durch Gesetz und Richterspruch: Das "Prozeßrecht" des Bundesverfassungsgerichts*, *in* 1 FESTSCHRIFT: 50 JAHRE BUNDESVERFASSUNGSGERICHT 507, 526-27 (Peter Badura & Horst Dreier eds., 2001) (Ger.).

invalidate the law directly.[118] Only later, when the unconstitutionality has become truly obvious — and the legislature has failed to cure it — will the Court intervene directly and annul the law. As noted earlier, the area surrounding the point of turnover has been characterized as a "grey zone."[119] For a Thayerian, the grey zone is the space between mere unconstitutionality and unconstitutionality requiring judicial repeal.[120] In an appeal decision, it is the space between a constitutional difficulty that triggers an appeal and a constitutional infirmity that prompts the Court to follow up on that appeal's implicit threat.

B. Judicial Practice

For several decades, the U.S. Supreme Court has developed practices that, on their surface, resemble German-style appeal decisions. As appeal decisions, most of these practices are highly unsatisfactory. The "appeals" have generally been vague and incomplete, often recognizable only in retrospect. But these parallel practices do suggest that the Supreme Court has been moving toward something like appeal decisions for a long time. There would be real advantages, I contend, to adopting the German practice explicitly and in full. A brief review of the parallels will help explain why I think this is so.

1. Constitutional Avoidance and the Doctrine of One Last Chance

Perhaps the most prominent and most recent parallel, and the one noted at the outset of this Article, has been the Roberts Court's use of the canon of constitutional avoidance. Richard Re has characterized the Roberts Court's constitutional avoidance cases as creating a "doctrine of one last chance."[121] "Under this doctrine," Re writes, "the Court must signal its readiness to impose major disruptions before actually doing so."[122] Thus, the Court signaled its willingness to strike the VRA's preclearance scheme in *Northwest Austin* before actually doing so in *Shelby County*; it narrowly upheld the Bipartisan Campaign Reform Act in *FEC v. Wisconsin Right to Life, Inc.*,[123] before ruling

[118] *Id.*

[119] *See* sources cited *supra* note 92.

[120] *See* YANG, *supra* note 92, at 26; Pestalozza, *supra* note 92, at 523. A similar sensibility is on display in the concurring opinion of Judge Guido Calabresi in *United States v. Then*, 56 F.3d 464, 467-69 (2d Cir. 1995), discussed *infra* pp. 501-02, 509-12.

[121] Re, *supra* note 5, at 173-74.

[122] *Id.* at 174.

[123] 551 U.S. 449 (2007).

broadly against the Act in *Citizens United*;[124] and it suggested, in *Rasul v. Bush*,[125] that constitutional habeas *might* extend to Guantanamo before ruling positively, in *Boumediene v. Bush*,[126] that it did.[127] A similar dynamic might be at work in the transition from *Hollingsworth v. Perry*,[128] in which the Court avoided a challenge to state same-sex marriage bans on standing grounds, and *Obergefell v. Hodges*,[129] in which the Court invalidated such bans in a dramatic 5–4 ruling; or in the transition from *Fisher v. University of Texas at Austin*,[130] in which the Court declined to revisit its earlier, conditional approval of affirmative action in higher education, to its reconsideration of *Fisher* in the 2015 Term.[131]

Re has several things to say in praise of the doctrine of one last chance, most of which are striking for their similarity to things said in defense of appeal decisions in the German context. "The doctrine of one last chance," Re writes, "decrees that the Court's willingness to avoid should vary with time."[132] Moreover, "giving advance notice of major decisions can mitigate reliance and transition costs."[133] The doctrine obviates the need for disruptive decisions by fostering "cooperative avoidance" — that is, by prompting the political branches to modify the problematic law before the Court revisits it.[134] It requires judicial majorities to be stable over time before issuing major decisions, and it "creates a window for feedback from interested groups and from experts" between the time when the Court signals a problem and the time when the Court revisits the question.[135] Finally, it shields the Court against charges of activism by introducing major change only gradually.[136]

The doctrine of one last chance has drawbacks, too, as Re quickly acknowledges. Paradoxically, the doctrine promises restraint "but only

[124] Citizens United v. FEC, 558 U.S. 310 (2010).
[125] 542 U.S. 466 (2004).
[126] 553 U.S. 723 (2008).
[127] *See* Re, *supra* note 5, at 174-77.
[128] 133 S. Ct. 2652 (2013).
[129] 135 S. Ct. 2584 (2015).
[130] 133 S. Ct. 2411 (2013).
[131] Neither *Obergefell* nor *Fisher II* had been decided when Re published his essay.
[132] Re, *supra* note 5, at 178.
[133] *Id.* at 179.
[134] *Id.* at 179-80.
[135] *Id.* at 180.
[136] *See id.* at 181.

as a potential means toward later action."[137] What's more, "[p]recisely because it reduces the ultimate costs of doctrinal change, a policy of only temporary avoidance would likely increase the Court's willingness to signal constitutional problems."[138] In this sense, the doctrine "facilitate[s] nearly costless rulemaking"[139] — a criticism that anticipates Katyal and Schmidt's critique of generative avoidance. The process can look cynical, and for that reason "offering the political branches one last chance can sometimes heighten rather than ameliorate interbranch tensions."[140]

In my view, the trouble with the doctrine of one last chance lies with the adjective it drops from the old torts doctrine whose name it resembles. The one last chance is never a last *clear* chance. It becomes clear only in retrospect. The political branches know that the chance is their last only when the Court has said so — only, that is, when it is too late. The political branches recognize the chance as their last only when they have lost it.

Most appeal decisions don't have this problem.[141] For one thing, the rule-making can never be costless, both because the Court must articulate clearly the constitutional bases for its decision — it can never pretend to be deciding the case on sub-constitutional grounds — and because the Court must be explicit about its willingness, or even its intention, to strike the law later on. The Court cannot, in other words, pretend to complete deference. It must be open about its exercise of authority, and it must do more than gesture in passing toward vague and ill-defined constitutional scruples. In an appeal decision, the Court must declare its doubts openly, explain whence they derive, and articulate how they apply to the case at hand. Appeal decisions thus capture many of the benefits of the one-last-chance doctrine without the shortcomings.

2. "All Deliberate Speed"

Another striking analog to German-style appeal decisions appears at the very center of the modern Supreme Court canon — in *Brown v.*

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137 *Id.*

138 *Id.* at 182.

139 *Id.*

140 *Id.* at 184.

141 Weak appeal decisions might seem to carry some of the demerits of one-last-chance, but that appearance is likely deceptive since the FCC's standard of review in following up on a weak appeal decision is highly deferential. *See infra* note 263 and accompanying text.

Board of Education and its decree that Southern schools desegregate "with all deliberate speed."[142] As is well known, the Justices of the Warren Court debated fiercely the nature and timing of the remedy in *Brown*. In essence, they considered three options: (1) immediate relief; (2) gradual relief; or (3) deadlines.[143]

For various reasons, the Justices rejected deadlines out of hand.[144] Some thought deadlines would excuse dithering; others that they would provoke defiance.[145] Justice Frankfurter fretted that a deadline would seem "arbitrary" and would "alienate instead of enlist favorable or educable local sentiment."[146] Several Justices believed, moreover, that the practical and administrative obstacles to desegregation — redrawing districts, merging schools, reorganizing finances, repairing ramshackle schools — justified some delay.[147] In the end, the Justices chose gradualism — some of them against their better judgment. Perhaps they saw gradualism as the price of unanimity.

The gradualist approach — "with all deliberate speed" — resembled a weak appeal decision. It was akin to early German decisions in which the FCC directed Parliament to remedy an unconstitutional condition "within a reasonable time."[148] A deadline, by contrast, would have resembled a strong appeal decision — akin to those decisions in which the FCC directs Parliament to remedy a defect before a stated date.

The general merits or demerits of the Court's remedial approach in *Brown II* have been canvassed so exhaustively as to require little comment.[149] I wish to make only two points about *Brown II* as it relates to appeal decisions. The first is that desegregation was perhaps an unfortunate context in which to experiment with appealing to

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[142] Brown v. Bd. of Educ. of Topeka, Kan. (*Brown II*), 349 U.S. 294, 301 (1955).

[143] *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 316-17 (2004). As Klarman notes, "Deadlines and gradualism are not the same issue, as deadlines can be immediate or delayed." *Id.* at 316.

[144] *Id.* at 316-17.

[145] *Id.* at 317.

[146] *Id.*

[147] *Id.*

[148] See especially the Saar statute decision, discussed *infra* pp. 503-04.

[149] *See generally* CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION (2004) (lamenting the slow implementation of desegregation following, and thanks to, *Brown II*); Paul R. Dimond, *Panel II: Concluding Remarks*, 61 FORDHAM L. REV. 63 (1992) (defending the appropriateness of separating right and remedy and arguing that courts should combine broad statements of principle with constraint in ordering remedies).

legislatures. The second is that, within that context, a strong appeal would have been better than a weak one.

The NAACP had pushed either for immediate integration or for a deadline no later than September 1956.[150] But the deadline need not have been so soon. The *Brown II* Court might have imposed a deadline three or four years off. It is impossible to say what effect this might have had, but a strong appeal would have accommodated the Justices' concern "that administrative problems genuinely justified some delay,"[151] and although the delay might have given recalcitrant states a pretext for not acting earlier, that excuse would have been much weaker than the excuse supplied by the Court's combination of vagueness and gradualism. Indeed, meaningful progress in school desegregation came only when courts began to issue what looked increasingly like strong appeal decisions, and as they began to enforce those decisions by supervising consent decrees.[152]

3. Prophylactic Rights

There are other analogs to appeal decisions in the Warren Court canon. Consider the famous right-to-silence warnings outlined in *Miranda v. Arizona*.[153] Ostensibly, the *Miranda* Court's outline was not prescriptive. The Court maintained that, although the Constitution required *some* remedy, it did not require any *particular* remedy.[154] It was impossible, moreover, for the Justices "to foresee the potential alternatives . . . which might be devised by Congress or the States."[155]

The Court was confident that there would be such alternatives. The majority even called for them explicitly: "We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws."[156] On the other hand, the Justices warned, "unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence

150 KLARMAN, *supra* note 143, at 316.

151 *Id.* at 317.

152 *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. Cty. Sch. Bd., 391 U.S. 430 (1968). Consent decrees resemble appeal decisions in that state officials have the first opportunity to establish constitutional conditions, but do so under the threat of judicial sanction if they fail. *See* Gilmore v. California, 220 F.3d 987, 995 (9th Cir. 2000).

153 384 U.S. 436, 444-58 (1966).

154 *Id.* at 467.

155 *Id.*

156 *Id.*

and in assuring a continuous opportunity to exercise it, the following safeguards must be observed."[157] There followed the famous *Miranda* warnings — famous alike for their televisual ubiquity and their practical impotence.

Federal and state legislators have been slow — i.e. magnificently immobile — in their response to the Warren Court's invitation to experiment.[158] One reason for reticence is the form the invitation took. The *Miranda* Court not only supplied a baseline, it implied perils for legislation that falls short of that baseline. A legislature that replaces the judicial baseline, but whose replacement is found wanting, risks post-hoc liability.[159] Given the choice between such a risk and a practice the Supreme Court effectively promised to uphold, it is hardly surprising that legislatures have not experimented.

Courts and commentators have described the *Miranda* rule, together with other Warren-Court canons of criminal procedure, as "prophylactic rules."[160] Prophylactic rulings mirror appeal decisions in that the Court (1) recognizes that the existing state of affairs is constitutionally problematic but (2) is uncomfortable prescribing *how* the infirmity is to be cured. The *Miranda* Court disavowed any intention to "create[] a constitutional straitjacket which will handicap sound efforts at reform."[161] In practice, however, that has been precisely the decision's impact.

Things might have been different if the Court had issued a true appeal decision. Suppose, for instance, that the *Miranda* Court had appealed to Congress and state legislatures to take adequate measures, before a stated date, to prevent investigative abuse and to ensure that persons in custody were apprised of their constitutional rights. This would have created real space for "sound efforts at reform." If legislatures responded in good faith, the Court could have responded to further challenges with soft appeals requiring ongoing oversight. If

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[157] *Id.*

[158] *See* Dorf & Sabel, *supra* note 101, at 453-59.

[159] *See id.* at 463 ("[T]he mere invitation to the states to seek advantages through experimentation is ineffective without mechanisms to reduce the associated risks.").

[160] *See, e.g.*, Howes v. Fields, 132 S. Ct. 1181, 1190 (2012); Berghuis v. Thompkins, 560 U.S. 370, 404 (2010); Brecht v. Abrahamson, 507 U.S. 619, 647 (1993) (White, J., dissenting); Brewer v. Williams, 430 U.S. 387, 423-25 (1977) (Burger, C.J., dissenting); Michigan v. Tucker, 417 U.S. 433, 439, 445-46 (1974); Schneckloth v. Bustamonte, 412 U.S. 218, 251 (1973) (Powell, J., concurring). Justice Scalia, writing for the majority in *Maryland v. Shatzer*, has even referred to one extension of *Miranda* as a "super-prophylactic rule." Maryland v. Shatzer, 559 U.S. 98, 108 n.3 (2010) (citing Edwards v. Arizona, 451 U.S. 477 (1981)).

[161] *Miranda*, 384 U.S. at 467.

legislatures dallied, the Court could have responded to additional challenges with greater energy. But, because *Miranda* gave legislatures no opportunity for genuinely independent reform, the Court's interim solution became an enduring default. The floor became a ceiling.

The Warren Court's most famous Fourth Amendment decision, *Mapp v. Ohio*, did not call for experimentation at all.[162] In decisions following *Mapp*, the Court conceded that the exclusionary rule was not immediately required by the Constitution, but it nonetheless insisted upon the rule as *the* particularized remedy for evidence obtained illegally.[163] Post-*Mapp* decisions characterized the exclusionary rule as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect."[164] None of these decisions invited *legislative* remedies pursuing the same end.

One might, however, see *Mapp* as a response to state legislatures' failure to respond to an earlier appeal. In *Wolf v. Colorado*[165], the Supreme Court declined to apply against the states the federal exclusionary rule announced in *Weeks v. United States*.[166] The *Wolf* Court refused to preempt state remedies that might be equally effective: "Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn . . . other methods which . . . would be equally effective."[167] One might read this language as an implicit appeal to state legislatures — a promise not to impose the exclusionary rule so long as states consistently applied other methods equally effective in protecting constitutional rights. On this reading, *Mapp* was a response to states' failure to respond appropriately to that earlier appeal.[168] But

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[162] 367 U.S. 643 (1961).

[163] *See, e.g.*, Stone v. Powell, 428 U.S. 465, 482-85 (1976); United States v. Calandra, 414 U.S. 338, 348 (1974).

[164] *Calandra*, 414 U.S. at 348.

[165] Wolf v. Colorado, 338 U.S. 25 (1949).

[166] 232 U.S. 383 (1914).

[167] *Wolf*, 338 U.S. at 31.

[168] Both *Mapp* and *Miranda*, of course, revisited earlier holdings. As noted *infra* Section II.C.2, the German FCC has occasionally issued appeal decisions when revisiting its prior decisions. The U.S. Supreme Court has applied similar principles to accommodate legislative reliance on Court precedent. *See, e.g.*, Teague v. Lane, 489 U.S. 288, 310 (1989) ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."); Cannon v. Univ. of Chi., 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring) ("[T]he factors to which I have here briefly adverted apprise the lawmaking branch of the Federal Government that the ball, so to speak, may well now be in its court. Not only is it 'far better' for Congress to so specify when it intends private litigants to have a cause of action, but

if *Wolf* was an appeal to legislatures, it was a splendidly indirect one. As Justice Scalia might have put it, *Wolf* did not come as a wolf.[169]

4. Affirmative Action

Affirmative action programs are classic examples of policies whose justification depends on historical circumstances. If the programs are successful, those circumstances will change. If the change is sufficiently drastic, the programs' validity will become doubtful. This, at least, was the view taken by Justice O'Connor in her controlling opinion in *Grutter v. Bollinger*.[170] In one of the most unusual passages of her opinion, Justice O'Connor acknowledged that race-conscious admissions programs would not *always* be constitutional:

> It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.[171]

To say that racial preferences will "no longer be necessary" is to say that they will no longer be narrowly tailored to further a compelling governmental interest — i.e. that they will one day flunk strict scrutiny. This passage, of course, was mere prediction — and hence dicta — not a firm holding. It was a far cry from an appeal decision with an unyielding deadline. Even so, *Grutter* breathes the spirit of appeal decisions in its recognition that what passes constitutional scrutiny under one set of circumstances might not survive under another. In her gesture to the year 2028, Justice O'Connor suggested,

for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch."). A similar dynamic is at work in the Court's qualified immunity jurisprudence. *See generally* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583 (1998); John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207 (2013); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1 (2015); James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601 (2011).

169 *See* Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) ("[T]his wolf comes as a wolf.").

170 539 U.S. 306 (2003) (approving a modestly race-conscious admissions program at the University of Michigan Law School).

171 *Id.* at 343 (citation omitted).

however gently, that race-conscious admissions were heading toward unconstitutionality.

In a concurring opinion, Justice Ginsburg, joined by Justice Breyer, warned that the way down that path might be excruciatingly slow. "[O]ne may hope," she wrote, "but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action."[172] There is a wide gap between a prediction that a program "will no longer be necessary" and a "hope" that it will be "safe to sunset." The concurring Justices agreed, apparently, that race-conscious admissions should end someday. But they were unwilling to characterize the challenged program as an anomaly that would become invalid within a generation. Instead (in German parlance) they recast the majority's quasi-appeal decision as a generic duty to remedy — i.e. to monitor race relations going forward, without getting one's hopes up or letting one's guard down.

Justice Thomas also recast Justice O'Connor's twenty-five-years dictum, but in the opposite direction. "I agree with the Court's holding," he wrote, "that racial discrimination in higher education admissions will be illegal in 25 years."[173] This might be the oddest "concurring opinion" in the history of the Court — a single sentence of a separate opinion agreeing with a single sentence of the controlling opinion. At this point, Justice Thomas's opinion looked almost like a strong appeal decision. But the very next sentence struck at a basic premise of appeal decisions. "I respectfully dissent from the remainder of the Court's opinion," Justice Thomas wrote, "because I believe that the Law School's current use of race violates the Equal Protection Clause and *that the Constitution means the same thing today as it will in 300 months*."[174] To say that the constitution's meaning remains constant, however, need not mean that its application remains frozen in time.[175] A core predicate of the controlling opinion was that a law or practice that is constitutional at one historical moment might become problematic later on — and that the Court has the authority, perhaps the duty, to warn of foreseeable difficulties. This, of course, is the basic instinct of appeal decisions. One might, therefore, read the controlling opinion in *Grutter* as a (very) soft appeal decision. If so, one could argue that the Court declined to follow up on that appeal in

[172] *Id.* at 346 (Ginsburg, J., concurring).

[173] *Id.* at 351 (Thomas, J., dissenting).

[174] *Id.* (emphasis added).

[175] Justice Thomas, of course, joined the *Shelby County* majority, which held that what was constitutionally permissible in 1965 had become impermissible in 2013.

the two *Fisher* cases, decided in 2013 and 2016.[176] But one could also argue that the University of Texas, by declining to consider race directly and explicitly, was actually heeding *Grutter*'s appeal.

5. Advicegiving

Justice O'Connor's controlling opinion in *Grutter* can also be classed within a broader category of judicial advicegiving.[177] On one reading, Justice O'Connor's opinion placed legislatures on notice that race-conscious admissions programs would not always be constitutional and advised them to seek effective ways to phase them out. (It also assured legislatures that they could take their time.) Neal Katyal has surveyed a long tradition of judicial advicegiving in the United States — a tradition in which "judges recommend, but do not mandate, a particular course of action based on a rule or principle in a judicial case or controversy."[178]

Advicegiving has taken many forms. Consider, for instance, Justice O'Connor's decision in *New York v. United States*, which struck down a challenged law on federalism grounds but gave several examples of how Congress might achieve its announced aims without transgressing federalism limits.[179] Or consider Justice Souter's concurring opinion in *Washington v. Glucksberg*, in which the Court upheld Washington State's ban on assisted suicide.[180] Justice Souter agreed with the majority that the State's asserted interests were sufficiently weighty to justify the ban, but he hinted that this might not always be so. "The day may come," he wrote, "when we can say with some assurance which side [in the debate over the consequences of legalizing assisted suicide] is right, but for now it is the substantiality of the factual disagreement, and the alternatives for

176 Fisher v. Univ. of Tex. at Austin (*Fisher I*), 133 S. Ct. 2411 (2013); Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S. Ct. 2198 (2016).

177 On judicial advicegiving generally, see Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1710 (1998); Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1, 4-9 (1998).

178 *See* Katyal, *supra* note 177, at 1710.

179 New York v. United States, 505 U.S. 144, 166-68 (1992); *see also* Katyal, *supra* note 177, at 1792-96 (discussing *New York v. United States* as an example of advicegiving through exemplification).

180 Washington v. Glucksberg, 521 U.S. 702 (1997); *see also* Katyal, *supra* note 177, at 1768-79.

resolving it, that matter. They are . . . dispositive . . . *at this time*."[181] But things, he stressed, might change.[182]

Up to this point, Justice Souter's *Glucksberg* concurrence read like a soft appeal decision imposing a "duty to remedy." In his view, the law was constitutional *as yet*, but additional information might someday overthrow that assumption. Justice Souter went further, however, by calling on legislatures to gather additional information and warning that failure to do so might have consequences. His warning was elliptical but unmistakable. "I do not decide here," he wrote, "what the significance might be of legislative foot dragging in ascertaining the facts . . . . Sometimes a court may be bound to act regardless of the institutional preferability of the political branches as forums for addressing constitutional claims."[183] In other words, if states didn't fulfill their duty of ongoing oversight and evidence gathering, the Court's soft appeal might become, retroactively, a strong one.

Katyal describes this form of advicegiving as *penalization*, a process by which the Court dispenses nonbinding counsel to the legislature but then, in Katyal's terms, attaches a "fuse."[184] If the legislature does not respond to the Court's counsel, the fuse will one day detonate in a finding of unconstitutionality.[185] Of course, if the legislature can be "penalized" for failing to follow the Court's advice, the advice begins to sound like something more than advice. It is "nonbinding" only in the sense that it will not bind *the Court* in future cases. The Court may change its mind, but the legislature may ignore the Court's counsel only at the risk, sooner or later, of watching the fuse explode.

Most forms of judicial advicegiving resemble soft appeal decisions. Advice attached to a penalty looks like a strong appeal decision.[186] But there are differences. The holding of a strong appeal decision is, for every practical purpose, a *holding*, not merely advice appended to a holding. The strongest appeal decisions hold explicitly that a law will be unconstitutional after a certain date. That holding will constrain future courts. In some settings, strong appeal decisions and advice fuses might function similarly, almost identically. But a crucial

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[181] *Glucksberg*, 521 U.S. at 786 (Souter, J., concurring) (emphasis added).

[182] *Id.* at 787.

[183] *Id.* at 788.

[184] *See* Katyal, *supra* note 177, at 1720-21.

[185] *Id.* at 1721 ("These cautions work as judicial fuses: If political actors do not listen, then the judicial time bomb will explode and the court will strike down the act.").

[186] As Katyal notes, threats of penalization have early roots in the Court's history. *See id.* at 1723-37 (discussing Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792)).

difference is that, in most cases, appeal decisions *seem* more aggressive; through them the Court calls on the legislature to act. Advice fuses, on the other hand, seem more amicable — even when the Court furrows its brow and grumbles about "legislative foot dragging." Both might, in effect, be equally coercive. But advice fuses purport to be merely advisory. Appeal decisions require the Court to be much clearer about what it is doing.[187]

6. Second-Look Doctrines

Several years ago, Dan Coenen systematically canvassed the Supreme Court's second-look doctrines, or what Coenen calls "structural rules."[188] Like appeal decisions, second-look doctrines depart from a conventional "on-or-off" view of constitutional interpretation. They involve "remands" that invite political actors to reconsider the challenged law in light of procedural and structural constraints elaborated by the court. During the "remand" period, the law loses force.[189] But a second-look decision allows political actors to "overturn the judicially effected result by putting back in place a program that is actually or functionally identical to the program the Court has provisionally rejected."[190]

Consider, for example, the controlling opinion of Justice Stevens in *Califano v. Goldfarb*.[191] Justice Stevens joined four other Justices in

[187] Many state courts have done similar things at a non-constitutional level, effectively "threatening" to alter the legal landscape through common law evolution if the state legislature did not introduce needed changes by statute. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 149-58 (1982) (citing examples involving, among other things, the shift from contributory to comparative negligence).

[188] Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1596-1603 (2001) [hereinafter *Constitution of Collaboration*]. The name suggests that these rules "safeguard substantive rights in a structural way." *Id.* at 1596.

[189] *Id.* at 1587, 1702, 1711.

[190] *Id.* at 1587. This is almost never true of German-style appeal decisions. Typically, an appeal decision does not ask the legislature to reconsider according to better procedures, to give sounder reasons, or to use clearer language. It merely gives the legislature the first chance to prevent or cure a constitutional infirmity. Typically, an appeal decision focuses on the substance rather than the form of a challenged law or practice. Appeal decisions, in short, do not articulate second-look doctrines, and they do not apply structural rules. They have a different purpose. They allow the legislature to choose from among a range of remedial options without the disruption of a law going out of force. They do not permit a return to the status quo if the legislature leaps with sufficient grace and élan through judicially prescribed procedural hoops.

[191] Califano v. Goldfarb, 430 U.S. 199 (1977).

ruling that the Social Security Act's grant of special benefits to widows vis-à-vis widowers violated equal protection.[192] Justice Stevens wrote that the law's discrimination "against a group of males" was "merely the accidental byproduct of a traditional way of thinking about females"[193] — and "something more than accident [was] necessary to justify the disparate treatment."[194] But this didn't mean the law could never be justified. "Perhaps," Justice Stevens added, "an actual, considered legislative choice would be sufficient to allow this statute to be upheld."[195] Implicitly, this opened the door for Congress to reinstate the law, or something close to it. In subsequent iterations of the Social Security Act, however, Congress "made no serious attempt to overturn the Court's decision and reenact the cost-saving discrimination on 'acceptable' grounds."[196]

A group of second-look decisions with particularly strong affinity to appeal decisions are those by which the Court "invites the legislature to reconsider the wisdom and scope of a prior enactment in light of constitutional values viewed through the prism of current conditions."[197] This category includes cases in which the Court takes stock of "evolving standards of decency"[198] and "sends back constitutionally sensitive policy decisions to *society at large* for a thoughtful reconsideration of their continuing merit in light of *changing values*."[199] The outstanding example is *Furman v. Georgia*,[200] in which the Court invoked "evolving standards of decency" [201] to impose a national moratorium on the death penalty and thereby, as Professor Coenen puts it, "triggered a societywide plebiscite on the continued legitimacy of capital punishment."[202]

In other settings, courts have found that changes in the underlying facts required a legislative "remand."[203] In these cases, challenged laws had become constitutionally suspect with the passage of time.[204] The

192 Widowers had to prove dependency; widows did not.

193 *Califano*, 430 U.S. at 223 (Stevens, J., concurring).

194 *Id.*

195 *Id.* at 223 n.9.

196 CALABRESI, *supra* note 187, at 10.

197 Coenen, *Constitution of Collaboration*, *supra* note 188, at 1699.

198 *See id.* at 1698, 1714.

199 *Id.* at 1713 (emphasis added).

200 408 U.S. 238 (1972).

201 *Id.* at 242 (Douglas, J., concurring) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

202 Coenen, *Constitution of Collaboration*, *supra* note 188, at 1714-15.

203 *Id.* at 1709.

204 *Id.* at 1711-12; *see also* Wengler v. Druggists Mut. Life Ins. Co., 446 U.S. 142,

states could reinstate the program, but "only if [the state's] policymakers can conclude . . . that the program continues to serve a proper purpose in a changing world."[205]

Although there are obvious parallels between appeal decisions and second-look doctrines, the practical impact is very different. Appeal decisions leave the challenged law in place but require eventual reform; second-look decisions invalidate the law but permit eventual reinstatement. In both cases, the court shifts the burden of inertia to the legislature. But the posture of that burden is quite different. After a second-look decision, the legislature must hoist the burden from the ground; after an appeal decision, it must prevent the load from falling. It is the difference between saving a life and raising the dead. Despite this difference, time-sensitive second-look decisions and appeal decisions both recognize that laws once constitutional can become unconstitutional as circumstances change.

7. Pseudo Appeal Decisions

This Article began with a discussion of *Northwest Austin* and *Shelby County*, and with a summary of criticisms of the Court's use (or misuse) of the avoidance canon in those cases. It would have been preferable on several levels, I contend, had the Supreme Court responded to the first constitutional challenge to the VRA's renewal by issuing an appeal decision.

Some commentators, as noted earlier, did read *Northwest Austin* as an appeal to Congress.[206] So, apparently, did the *Shelby County* majority. But, treated as an appeal decision and the enforcement of an appeal decision, *Northwest Austin* and *Shelby County* leave much to be desired.

For one thing, the majority's assertion in *Shelby County* that Congress's failure to update the preclearance formula left the Court with "*no choice* but to declare § 4(b) unconstitutional"[207] performs a logical leap. If a teenage son returns from the barber with a bizarre coiffure and his father mutters that he has "serious questions" about the new style's appropriateness but doesn't want to talk about it right

151-52 (1980); Quill v. Vacco, 80 F.3d 716, 732, 735 (2d Cir. 1996) (Calabresi, J., concurring); Abele v. Markle, 342 F. Supp. 800, 807-10 (D. Conn. 1972) (Newman, J., concurring); Milnot Co. v. Richardson, 350 F. Supp. 221, 225 (N.D. Ill. 1972); Leathers v. City of Burns, 444 P.2d 1010, 1018-19 (Or. 1968) (en banc).

[205] Coenen, *Constitution of Collaboration*, *supra* note 188, at 1713.

[206] *See* sources cited *supra* notes 5 & 9.

[207] Shelby Cty. v. Holder, 133 S. Ct. 2612, 2631 (2013) (emphasis added).

now, the son will rightly protest if, days later, the father confronts him with a set of shears and the observation that, "Your failure to act leaves me no choice but to shave your head." Logical objections aside, the trouble with *Shelby County* is that it treats *Northwest Austin* as an appeal decision when, by its own terms, *Northwest Austin* was nothing of the sort. Indeed, *Northwest Austin* professed to be a routine application of the avoidance canon.[208] And yet, in *Shelby County*, despite saying that *Northwest Austin* "left the constitutional issues for another day,"[209] the Court effectively told Congress: "We warned you four years ago, but you didn't listen. Now we must back our earlier warning with decisive action."

In my view, *Northwest Austin* is a *pseudo* appeal decision treated, in retrospect, as a *de facto* appeal decision. The difference between appeal decisions and pseudo appeal decisions is not merely technical. Pseudo appeal decisions are dangerous in ways that appeal decisions are not. To appreciate the danger, consider an important critique of second-look doctrines. A quarter century ago Mark Tushnet highlighted the possibility that "[c]lever judges" would "invoke structural [second-look] review when they predict that the legislature will be unable to [re-]enact legislation that contravenes the judges' personal preferences."[210] Judges could thus deploy structural doctrines to "'rig' a desired substantive outcome."[211] Dan Coenen summarizes the criticism (before refuting it) in this way: second-look judges "pretend to be exercising judicial restraint by declaring that the legislature may reinstate an invalidated law, all the while knowing that, as a practical matter, it cannot."[212] Richard Hasen has suggested, though not quite embraced, a similar "political calculus" explanation for recent deployments of the avoidance canon.[213] On this view, "the Court uses constitutional avoidance and similar doctrines . . . to soften public and Congressional resistance to the Court's efforts to move the law in the

[208] Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 205-06 (2009).

[209] *Shelby Cty.*, 133 S. Ct. at 2621.

[210] MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 211 (1988). Gerald Gunther raised this possibility a quarter century before Tushnet. *See* Gerald Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964) (reviewing and criticizing Alexander Bickel's support of avoiding constitutional adjudication on the merits).

[211] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 17-3, at 1686 (2d ed. 1988) (footnote omitted).

[212] Dan T. Coenen, *Structural Review, Pseudo-Second-Look Decision Making, and the Risk of Diluting Constitutional Liberty*, 42 WM. & MARY L. REV. 1881, 1882 (2001).

[213] Hasen, *Avoidance and Anti-Avoidance*, *supra* note 5, at 219.

Justices' preferred policy direction."[214] Constitutional change, like acrid medicine, goes down better in small doses. The Court mutes criticism by laying the groundwork for major changes before formally introducing them. The avoidance canon thus becomes "just another doctrinal tool in the Court's arsenal to move constitutional law and policy in the Court's direction and at the Court's chosen speed."[215]

This criticism may or may not hit home in the context of second-look doctrines.[216] In the context of the avoidance canon, it has an undeniable contemporary sting. Whatever the danger of pretended deference when the Court applies second-look doctrines, the danger is much greater when the Court treats an earlier application of avoidance canons as a *de facto* appeal decision. On the face of things, avoiding a constitutional question altogether usually *seems* more deferential than invalidating a law on sub-constitutional grounds. But the transition from *Northwest Austin* to *Shelby County* raises the specter of a Court that (at Time 1) applies avoidance canons and congratulates itself for its restraint, but then (at Time 2) excuses its assertion on the ground that Congress's inaction leaves the Court "no choice" but to annul the law. The Court thus gets all the credit of restraint at Time 1 and much less blame for aggression at Time 2. The next time around, if Congress takes the hint at Time 1, there will be no Time 2 — and the process will repeat itself with the Court looking more and more deferential all the time. "Clever judges" could thus achieve desired substantive outcomes by applying what is ostensibly a core canon of judicial restraint. In this scenario, "avoiding" constitutional questions becomes a means of prodding Congress to render those questions moot. And the Justices needn't be cynical or instrumental about this; the effect could be the same no matter how pure their motives.

That effect would be facilitated by the obscurity of the earlier warning. *Northwest Austin* functioned as an appeal decision in one direction only, and only after the fact: only *the Court* treated *Northwest Austin* as an appeal decision and only four years later. We have no way of knowing whether *Congress* saw *Northwest Austin* in the same way.

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214 *Id.*

215 *Id.* at 220.

216 My suspicion is that American judges who apply structural review do not do so for cynical or strategic reasons. I believe that such judges wish genuinely to prompt a serious second-look from the legislature. Perhaps some judges do underestimate the difficulties of legislative compromise and just how heavy the burden of inertia can be. On the other hand, they might understand the difficulty perfectly well, and believe that it is precisely the difficulty of legislation and the burden of inertia that justify second-look decisions from a majoritarian perspective.

We do know that Congress did nothing — did not even hold a hearing — in response to *Northwest Austin*.[217] Nothing in the decision *required* legislators to read the decision as a threat or an appeal, no matter how readily commentators read between the lines.

Is this a distinction without a difference? I don't think so. An explicit appeal decision has the virtues of explicitness — transparency, clarity, honesty. A pseudo appeal decision parading as avoidance has the vices of equivocation — opacity, ambiguity, subterfuge. An appeal decision is a decision — a direct answer to a constitutional question raised in a live case. Its pseudo corollary is a non-decision — a vow not to address the constitutional question this time around. (This distinction, by the way, helps highlight why an appeal decision is not an advisory opinion.) In the aftermath of *Northwest Austin* and *Shelby County*, cautious legislatures might well treat avoidance decisions with admonitory dicta as *de facto* appeal decisions. But appeal decisions are an exercise of judicial power, and it is undesirable and unseemly for courts to exercise that power under the guise of restraint. Better to appeal to Congress openly.

8. American Appeal Decisions?

Thus far we have been discussing American *analogs* to German-style appeal decisions. On at least one occasion, however, a federal judge has invoked the German practice overtly. In *United States v. Then*, the Second Circuit considered an equal protection challenge to the federal sentencing guidelines' disparate treatment of crack and powder cocaine.[218] As it had done before, the court rejected the challenge. In a concurring opinion, however, Judge Guido Calabresi reflected that perhaps this particular constitutional challenge should occasion an appeal to Congress.

A law that was originally constitutional, he noted, might become less so over time. It isn't easy, however, "for courts to step in and say that what was rational in the past has been made irrational by the passage of time, change of circumstances, or the availability of new knowledge."[219] The possibility of a transition from rational to irrational — or from constitutional to unconstitutional — raised bewildering questions. "Precisely at what point does a court say that what once made sense no longer has any rational basis? What degree of legislative action, or of conscious inaction, is needed when that

[217] Katyal & Schmidt, *supra* note 5, at 2132-33.

[218] United States v. Then, 56 F.3d 464 (2d Cir. 1995).

[219] *Id.* at 468 (Calabresi, J., concurring).

(uncertain) point is reached?"[220] These difficulties, Judge Calabresi concluded, counseled powerfully in favor of judicial restraint.

Restraint, however, should be informed by comparative insight. As Judge Calabresi summarized:

> Both the Constitutional Courts of Germany and Italy have addressed the problem of laws that were rational when enacted, but which, over time, have become increasingly dubious. Rather than jumping in and striking the laws down, or leaving them undisturbed and thereby allowing legislative inertia to dominate, these Courts have found a middle ground. They have, in a few cases, announced that laws, because of changed circumstances, were *heading toward unconstitutionality*. In this way, the continental Courts have put their parliaments on notice that a serious and thoughtful legislative review and reconsideration was in order and that failure to undertake such a review might in time result in judicial action and perhaps even nullification of the laws.[221]

Judge Calabresi did not go so far as to embrace this approach in *Then*. But he did suggest that it "might be appropriate in future iterations of issues like the one before us today."[222]

One might quibble pedantically with Judge Calabresi's summary of the continental practice,[223] but it represents a powerful suggestion by a leading appellate court judge of the potential utility and wisdom of appeal decisions in an American context.[224] A year later, in a concurring opinion in *Quill v. Vacco*, Judge Calabresi sounded Thayerian themes when he wrote of laws that were "neither plainly unconstitutional . . . nor plainly constitutional" — laws inhabiting the grey zone on the constitutional continuum.[225] When faced with such laws, he suggested, courts should give the legislature the first opportunity to respond. They should, in short, appeal to Congress.

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[220] *Id.*

[221] *Id.* at 468-69 (emphasis added) (citations omitted).

[222] *Id.* at 469.

[223] For one thing, the German FCC has issued appeal decisions in more than "a few cases."

[224] Since *Then*, Judge Calabresi has revisited some of these themes in his scholarly writings. *See, e.g.*, Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1307 (2003).

[225] 80 F.3d 716, 738 (2d Cir. 1996) (Calabresi, J., concurring).

C. The Appeal Decisions of the German Federal Constitutional Court

Before asking whether German-style appeal decisions would be legal or useful in an American context, it is worth looking at the German practice a little more closely. Considering how appeal decisions have worked in practice can help clarify the implications of adopting the practice in the United States.

The FCC's appeals to the legislature take various forms. The appeal may be soft or stern, admonitory or imperative. The proper form depends on context, as the following examples should make clear.

1. Serving Higher Goals and Avoiding Catastrophes

Appeal decisions originated during the final phases of the Allied occupation of West Germany. The foundational judgment was not, technically, an appeal decision.[226] In 1955, the Court approved a statute implementing the 1954 Paris treaty regarding the Saar region.[227] In at least one respect, the Court observed, the treaty plainly violated the letter of the constitution.[228] But, on the whole, the treaty promoted the constitution's spirit: it created a state of affairs that more closely approximated constitutional requirements than did the *status quo ante*.[229] With regard to the Saar statute, the Court concluded that the treaty's constitutional benefits were greater than its costs, and so declined to condemn the treaty as unconstitutional.[230]

The decision contained an implicit appeal to Parliament. The treaty's constitutional defects could be tolerated only during "a transitional period" during which Parliament must presumably work to achieve full conformity.[231] The Court indicated neither how long that

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[226] *See* YANG, *supra* note 92, at 101.

[227] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 4, 1955, 4 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGGERICHTS [BVERFGE] 157 (Ger.). The Saar region had been contested between France and Germany for decades. In October 1954, the governments of France and West Germany signed an agreement that would give the inhabitants of the Saar the option of independent status under the auspices of the Western European Union. The complainants argued that the agreement was unconstitutional because it would prevent the Saarland from acceding to the Federal Republic under Article 23 GG. The Court agreed, but ruled that the treaty would actually promote Saarland accession in the long run. *Id.* at 170. As in fact it did.

[228] *Id.* at 173-78.

[229] *Id.* at 170. Specifically, the Treaty began the gradual dismantling of the Saar's status as an occupied region. It made it possible for the Saar, eventually, to accede to the Basic Law, which it did on January 1, 1957. *See generally* BRONSON LONG, NO EASY OCCUPATION: FRENCH CONTROL OF THE GERMAN SAAR, 1944-1957, at 187-235 (2015).

[230] 4 BVERFGE 157 (178).

[231] *Id.* at 157, 170, 174.

transitional period would be, nor what would happen when it ended. But it was a striking decision all the same. The Court had held that a flawed law could remain in force, but not forever. The legislature must purge the impurities. The Court had prepared the path for future appeals to Parliament.

The Court took two further steps in 1963. In one case, a farmer's daughter challenged an occupation-era statute that favored male heirs.[232] The law clearly offended the constitution's guarantee of gender equality, and the Court said so.[233] But a 1955 treaty, which began the restoration West German sovereignty, provided that occupation law would remain in force without regard to its constitutionality until the German Parliament replaced it.[234] The Court had no power, then, to strike down unconstitutional occupation law. The Court might, perhaps, have ruled that the law became void the moment the Bundestag obtained power to repeal it. But such a holding would create considerable uncertainty and enforcement problems. Instead, the Court ruled that Parliament was required, "within a reasonable time," to harmonize occupation law with the constitution.[235] The Court did not say how much time was reasonable, but it did make clear that its appeal to Parliament was more than dicta. The Court promised to review whether the legislature had "fulfilled this duty."[236]

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[232] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 20, 1963, 15 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGGERICHTS [BVERFGE] 337 (Ger.).

[233] *Id.* at 337, 342-46.

[234] *See* Vertrag über die zwischen Beziehungen der Bundesrepublik Deutschland und den Drei Mächten ("Deutschlandvertrag"), Oct. 23, 1954 (Ger.), http://www.documentarchiv.de/brd/dtlvertrag.html. The treaty entered force after the ratification of the Paris Treaties on May 5, 1955.

[235] 15 BVERFGE 337 (352).

[236] *Id.* at 351. The idea that a law could remain temporarily in force notwithstanding a constitutional infirmity had some precedent in the constitution itself. Article 3(2) GG guaranteed tersely that "men and women have equal rights," but this single sentence, applied literally and immediately, would have blasted a crater in the family law provisions of Germany's patriarchal Civil Code. The 1949 constitution allowed Parliament roughly four years — until March 31, 1953 — to amend the code to establish gender equality. When Parliament missed the deadline, the Court ruled that ordinary courts must now apply the code in the spirit of the constitution. When Parliament finally passed a reform statute in 1957, the Court found that it didn't go far enough, and annulled the offending provisions. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 29, 1959, 10 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGGERICHTS [BVERFGE] 59 (Ger.). Rather than attempt a second reform, Parliament decided (by its inaction) to let the law stand as modified by the Court. *See* COLLINGS, *supra* note 84, at 52-54. In its 1963 appeal for Parliament to remedy the unequal inheritance law "within a reasonable time," the

In a later 1963 judgment, the Court issued a similar appeal to Parliament, this one with a firm deadline.[237] The case involved a challenge to the districts drawn for the 1961 parliamentary election. The districts dated back to West Germany's first election in 1949. They were renewed without amendment in 1953 and 1956, and the 1956 renewal governed the 1961 election. But the absolute and relative populations of the original electoral districts had changed, in some cases dramatically, between 1949 and 1961. The complainants objected that these divisions now violated equal protection.

The Court agreed. As of 1963, the Justices wrote, the division of electoral districts had "become unconstitutional because it is clear that it is no longer in harmony with the current distribution of the population."[238] But it was unclear precisely when this state of affairs had come about. The shift toward unconstitutionality had been gradual. As of 17 September 1961 — the date of the election — the law's unconstitutionality was "not so unambiguously manifest that it must be regarded as having already by that time become invalid."[239] Annulling the law retroactively would have drastic consequences.[240] Annulment would void the election and oust the sitting Parliament, leaving no one in place to design new districts for a new election. Perhaps the Court could have done the redesigning itself, but for obvious reasons it was reluctant to do so. Instead, the Court called upon Parliament to reform the law before the next election in September 1965.[241] Parliament beat the deadline by seventeen months.[242]

Both these decisions shared a pragmatic impulse. The Court believed the contested laws were *already* unconstitutional, but either shrank from the consequences of direct annulment or accommodated a political *fait accompli*. Each case had a dual holding: (1) the

Court took its cue from this constitutional precedent.

[237] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 22, 1963, 16 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGGERICHTS [BVERFGE] 130 (Ger.).

[238] *Id.* at 141-42.

[239] *Id.* at 142.

[240] As a general matter, courts are reluctant to declare the outcome of national elections. *But see* Bush v. Gore, 531 U.S. 98, 110-11 (2000).

[241] 16 BVERFGE 130 (144).

[242] Gesetz zur Änderung des Bundeswahlgesetzes [Law amending the Federal Electoral Law], Feb. 14, 1964, BGBL I at 61 (Ger.), http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl#__bgbl__%2F%2F*%5B%40attr_id%3D%27I_2016_39_inhaltsverz%27%5D__1472672844008.

constitutional offense must be tolerated for a transitional period, but (2) Parliament must remedy the offense promptly.[243]

2. Changed Circumstances

In another set of cases, the FCC ruled that a law's constitutionality had been undermined by changed circumstances. Sometimes the change is internal to the Court's jurisprudence. In 1972, for instance, the FCC held that the fundamental rights of prisoners — like those of other citizens — can be limited only by statute or on the basis of statute.[244] This holding reversed the traditional understanding that prisoners were subject to a "special relationship" with the authority of the state. Traditionally, restrictions of inmate rights were permitted whenever prison administrators thought them necessary to maintain safety and order. The Court, which had given no earlier indication that this doctrine was constitutionally suspect, now abolished it entirely.[245] "One judgment of the Constitutional Court," sighed a critic, "and entire volumes of jurisprudence become waste-paper."[246]

The Court's holding would require massive reforms in prison administration. As it happened, such reforms were already underway: the federal government had recently called for comprehensive legislation in this area.[247] Noting this, the Court allowed existing restrictions on prisoner rights to remain in force for a brief transitional period.[248] After the close of the current legislative period, however, restrictions on prisoner rights that lacked statutory foundation would become unconstitutional.[249]

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[243] This duality characterized several subsequent appeal decisions. *See, e.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 8, 1988, 78 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGGERICHTS [BVERFGE] 249 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 19, 1974, 37 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGGERICHTS [BVERFGE] 38 (56) (Ger.).

[244] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 14, 1972, 33 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGGERICHTS [BVERFGE] 1 (Ger.).

[245] *See* COLLINGS, *supra* note 84, at 124-25.

[246] Heinz Müller-Dietz, *Verfassung und Strafvollzugsgesetz*, 26 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1162, 1162 (1972) (Ger.).

[247] 33 BVERFGE 1 (13).

[248] *Id.*

[249] *Id.* For a similar logic, see Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 12, 1975, 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGGERICHTS [BVERFGE] 169 (Ger.) (giving Parliament time to reform a pensions law that the Court had previously approved but now condemned).

3. Unfulfilled Constitutional Duties

Some appeal decisions are the product of a German doctrine with only weak American parallels: the doctrine of affirmative legislative duties.[250] Some duties are imposed by the constitutional text; others by a judicially elaborated duty to protect (*Schutzpflicht*). In the former category are duties derived from the constitution's equality provisions, such as Article 6(5)'s ban on discrimination against non-marital children.

The ban collided with the Civil Code, which discriminated openly against "illegitimate" children.[251] The Basic Law's framers realized that harmonizing Code and constitution would take time and require compromise.[252] Accordingly, the constitution commanded the legislature to secure equal protection for non-marital children. But the constitution imposed no deadline.[253]

Parliament took its time. The plaintiff who ultimately forced the legislature's hand was born in November 1950 — eighteen months *after* the Basic Law entered force. She was an adult when Parliament at last fulfilled the mandate of Article 6(5). Even then, Parliament acted only under prodding from the Constitutional Court. In a prominent 1969 judgment, the Court held that twenty years were more than enough for Parliament to pass the required reforms.[254] This finding was straightforward and even obvious, but it put the Court in an awkward position. Invalidation could not fulfill an affirmative legislative duty; the Justices lacked authority to rewrite the Code on their own.

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[250] The German Basic Law, like many constitutions enacted after the Second World War, but unlike the U.S. Constitution, guarantees positive rights and thus imposes affirmative duties. *See, e.g.*, SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES (2008); Dieter Grimm, *The Protective Function of the State*, *in* EUROPEAN AND U.S. CONSTITUTIONALISM 119 (Georg Nolte ed., 2005); Frank I. Michelman, *The Protective Function of the State in the United States and Europe: The Constitutional Question*, *in* EUROPEAN AND U.S. CONSTITUTIONALISM, *supra*, at 131; David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 867-71 (1986).

[251] BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], §§ 1705-12 (Ger.).

[252] *See* SYBILLE BUSKE, FRÄULEIN MUTTER UND IHR BASTARD. EINE GESCHICHTE DER UNEHELICHKEIT IN DEUTSCHLAND, 1900-1970, at 204-06 (2004) (Ger.).

[253] GRUNDGESETZ [GG] [Basic Law] art. 6(5) (Ger.), *translation at* http://www.gesetze-im-internet.de/englisch_gg/index.html. For gender equality more generally, the constitution imposed a deadline of four years after adoption. *See* GG art. 3(2); GG art. 117(1).

[254] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 29, 1969, 25 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGGERICHTS [BVERFGE] 167 (Ger.).

They resolved the dilemma by appealing to the legislature. Parliament, the Court ruled, must reform the Code in accordance with Article 6(5) GG before the end of the current legislative period.[255] If Parliament failed to act, the courts must work, insofar as they were able, to implement "the will of the constitution" on their own.[256] The deadline was only eight months away, but the Bundestag met it with a comprehensive reform law, promulgated on August 19, 1969.[257]

4. Legislative Discretion and the Duty to Remedy

In yet another class of cases, the Court has ruled that the challenged law presented no constitutional difficulties *as yet*, but has added that, with additional knowledge and experience, it someday might. The best-known examples are a 1978 judgment dealing with nuclear energy[258] and a 1979 judgment dealing with labor relations.[259] In both cases, the Court concluded that there was no current violation, but that, because the law's future operation remained unclear,[260] the legislature had an affirmative duty to supervise the law's ongoing implementation and to amend the law, as needed, to prevent constitutional injuries. Scholars have characterized this as a "duty of observation and remedy" (*Beobachtungs- und Nachbesserungspflicht*).[261] In June 2016, the FCC imposed just such a duty in its reluctant approval of the European Central Bank's program of outright monetary transfers (OMT).[262] The standard of review is a generous

255 *Id.* at 188.

256 *Id.* at 167.

257 *See* Gesetz über die rechtliche Stellung der nichtehelichen Kinder [Law on the legal status of illegitimate children], July 1, 1970, BGBL I at 1243 (Ger.).

258 Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court] Aug. 8, 1978, 49 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGGERICHTS [BVERFGE] 89 (Ger.).

259 Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court] Mar. 1, 1979, 50 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGGERICHTS [BVERFGE] 290 (Ger.).

260 49 BVERFGE 89 (132); 50 BVERFGE 290 (332-336).

261 *See* CHRISTIAN MAYER, DIE NACHBESSERUNGSPFLICHT DES GESETZGEBERS (1996) (Ger.); EDA TEKIN, DIE BEOBACHTUNGS- UND NACHBESSERUNGSPFLICHT DES GESETZGEBERS IM STRAFRECHT (2013) (Ger.); Peter Badura, *Die verfassungsrechtliche Pflicht des gesetzgebenden Parlaments zur "Nachbesserung" von Gesetzen*, *in* STAATSORGANISATION UND STAATSFUNKTIONEN IM WANDEL. FESTSCHRIFT FÜR KURT EICHENBERGER ZUM 60. GEBURTSTAG at 481, 484 (Georg Müller et al. eds., 1982) (Ger.); Helmut Miemik, Die Verfassungsrechtliche Nachbesserungspflicht des Gesetzgebers (Dec. 17, 1997) (Ger.) (unpublished Ph.D. dissertation, University of Leipzig) (on file with author).

262 *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13, June 21, 2016 (Ger.), http://www.bverfg.de/e/rs20160621_2bvr272813.html. Actually, the Court did not approve the OMT program. It merely conceded that the Court of Justice of the European

one. A duty to remedy is breached "only if it is evident that because of intervening change of circumstances the originally lawful regulation has become unacceptable, and the legislature has nonetheless remained inactive or has taken manifestly deficient corrective measures."[263]

A duty-to-remedy decision is the softest of appeal decisions. In them, the Court holds neither that the law is objectionable already nor that it is on the path to unconstitutionality. It finds only that the law presents a risk, and that the legislature must respond remedially should that risk materialize. On the other hand, the Court puts the legislature on notice that the law is not secure for all time against constitutional challenge.

III. SHOULD THE U.S. SUPREME COURT APPEAL TO CONGRESS?

In this final Part, I address some risks and benefits of appeal decisions, as well as potential difficulties of transferring the German practice — or a near equivalent — into an American context. I conclude that the benefits will exceed the risks, and that the problems of transfer are not insurmountable. But my call for American appeals to Congress is a qualified one. The Article concludes with some preliminary thoughts on when the Supreme Court should, and should not, issue such appeals.

A. Are Appeal Decisions Advisory Opinions?

Before addressing risks and benefits, however, one must ask whether appeal decisions would even be legal.[264] When Judge Calabresi raised

Union did not clearly overstep its competence when the CJEU concluded that the ECB, by promulgating OMT, did not clearly overstep *its* competence. The upshot from the FCC judgment is that OMT may proceed without violating the German constitution, but that the German political branches must exercise careful oversight to prevent further encroachments. For a summary of the judgment (in English) in the FCC's own press release, see Press Release, Bundesverfassungsgericht [Federal Constitutional Court], Constitutional Complaints and Organstreit Proceedings Against the OMT Programme of the European Central Bank Unsuccessful (June 21, 2016), http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-034.html.

[263] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 14, 1981, 56 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGGERICHTS [BVERFGE] 54 (81) (Ger.).

[264] This is an issue at the *federal* level. Federal courts have traditionally eschewed "advisory opinions" because those courts are bound by the federal Constitution's "case or controversy" requirement. But not all state constitutions include such a requirement. In those states without a substantial case or controversy requirement — I count nine of them — there is no concern at all about the *constitutionality* of judicial appeals to the legislature.

the possibility of appealing to Congress in *Then*, his colleagues accused him of offending the spirit (if not the letter) of the traditional ban on advisory opinions in the federal courts. "[W]e decline," they wrote,

> to accept the invitation by the concurrence to notify Congress that if it does not adopt the recommendation of the Sentencing Commission, this Court in the future might invalidate the sentencing ratio as unconstitutional. Just as we ordinarily do not issue advisory opinions, we should not suggest to Congress that it ought to adopt proposed legislation. Our role is limited to interpreting and applying the laws that Congress passes, and striking down those that we conclude are unconstitutional.[265]

In response, Judge Calabresi insisted that his concurrence was neither an advisory opinion nor a call for Congressional action. Advisory opinions, he wrote, "decide situations which have not yet occurred."[266] His concurrence merely "indicate[d] what the majority ha[d] not yet decided because it [was] not yet before the Court."[267] It did not "invite any particular action from the Congress."[268] Moreover, the role of courts is *not* limited to interpreting, applying, affirming, or annulling Congressional laws. Such a cramped view of judging ignored a long "tradition of courts engaging in dialogue with legislatures" — a tradition "well-established" both on the Second Circuit and elsewhere.[269]

Whether Judge Calabresi's concurrence was a forbidden advisory opinion is obviously a crucial question for this Article. If it was, virtually *any* appeal decision on the German model would be barred. As an appeal decision, Judge Calabresi's concurrence was extremely soft. It was not a decision of the court, stated no deadlines, and offered only the gentlest of admonitions. It merely noted that the Court was unprepared as yet to find a constitutional violation and alerted Congress that this might not always be so. If such a soft appeal in a concurring opinion was an advisory opinion, wouldn't a stronger appeal in a majority opinion be impermissible *a fortiori*?

Some commentators didn't think Judge Calabresi's appeal was so soft. Ronald Krotoszynski paraphrased it thus: "Congress should do as the judiciary says now, or should be prepared to do as the judiciary

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265 United States v. Then, 56 F.3d 464, 466 (2d Cir. 1995).

266 *Id.* at 466 n.1 (Calabresi, J., concurring).

267 *Id.*

268 *Id.*

269 *Id.*

says later" — in other words, "the Imperial Judiciary lives."[270] But Krotoszynski concluded nonetheless that the concurrence did "not violate either the letter or the spirit of the prohibition against advisory opinions."[271] This was so for at least three reasons. First, the concurrence was issued in the context of a live "case or controversy"; second, it was neither formal nor binding;[272] and third, there is a long tradition in this country (including among Justices of the Supreme Court) of individual jurists tendering "advice" to legislators — sometimes advice much more aggressive than that offered by Judge Calabresi in *Then*.[273] Judge Calabresi's concurrence might be improper *dicta*,[274] Krotoszynski concluded, but it was not a forbidden advisory opinion.

I share Professor Krotoszynski's assessment that Judge Calabresi's *Then* concurrence was not an advisory opinion. But with respect to appeal decisions more generally, we are not out of the woods yet. For an appeal decision is, after all, *a decision*. In this context, we are not dealing with the advice of an individual jurist in a separate opinion. We are dealing with a judgment of the Court. Is such a judgment formal and binding?

At least in one respect, appeal decisions certainly seem to be binding in Germany. German appeal decisions are meant to bite, and they have in fact bitten. German legislatures often respond to appeal decisions with alacrity.[275] On the other hand, the formal legal status of appeal

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[270] Krotoszynski, *supra* note 177, at 7 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 996 (1992) (Scalia, J., dissenting)).

[271] *Id.* at 16.

[272] *Id.* at 18-20. Later in his article, Krotoszynski offered an extended historical defense of this position.

[273] *See* Katyal, *supra* note 177, at 1723-53; Krotoszynski, *supra* note 177, at 23-24, 35-37.

[274] What makes dicta "improper" is hard to say. Provided that dicta identifies itself as dicta, drawing a line between proper and improper dicta strikes me as a difficult job. Dicta that is explicitly dicta might be foolish, irrelevant, or dull, but I am not sure what makes it *improper*.

[275] For instance, in response to the FCC's November 1999 judgment on financial equalization among the states, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 11, 1999, 101 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGGERICHTS [BVERFGE] 158 (Ger.), Parliament passed the required "standards law" (*Maßstäbegesetz*) in September 2001 (the deadline was January 2003) and the required "equalization law" (*Finanzausgleichsgesetz*) in December 2001 (the deadline was December 2004). The equalization law went into force, just as the Court had prescribed, on 1 January 2005. For the law of September 9, 2001, see Sept. 9, 2001, BGBL I at 2301, Nr. 47. For the law of December 20, 2001, see Dec. 20, 2001, BGBL I at 3955, Nr. 74.

decisions has always been uncertain, and the Court itself has done little to clarify it. As noted earlier, the Court has done the deed more often than it has spoken the name.[276] Technically, an appeal decision is a finding that a challenged law is constitutional *as yet*. So much, of course, is formal and binding. Is the Court's subsequent admonition that the law might not always pass constitutional muster — or that the Court will quash it after a stated date — similarly formal and binding? I'm not sure, but both the Court and the legislature certainly act as though appeal decisions are binding. In any case, the Court *does* tell the legislature what to do — or rather, that it must do *something* — an appellative gesture that Judge Calabresi's concurrence, in that particular context, explicitly disavowed.[277]

Even so, I maintain that appeal decisions — even if they "tell Congress what to do," and even if they are formal and binding — would be permissible at the federal level in the American context. I rest this position on several considerations.

First, the Court can issue an appeal decision only in the context of a live case or controversy and (if the legislature ignores the appeal) can enforce it only in the context of another live case or controversy. In the first case, the Court holds that a law is constitutional "as yet"; in the second, that it is now unconstitutional. I think it uncontroversial that the Court has authority to do both of these things.

Second, an appeal decision does not prescribe specific legislative action. It merely alerts the legislature that, at some point, the Court might or will negate a law that the Court is willing, for now, to let stand. An appeal decision does not tell the legislature what it *must* do; it admonishes the legislature that, if the legislature does not cure a constitutional infirmity by amending the law, the Court will cure the infirmity by annulling it. The U.S. Supreme Court arguably did something similar in the antecedents to *Mapp* and *Miranda*, though without the clarity customary to the German FCC.[278]

Third, American appeal decisions would be formal and binding in the most significant sense in which all decisions are formal and binding: they would bind the parties before the Court. The immediate effect of an appeal decision is that the constitutional challenge *fails*.

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[276] To be clear, the Court is explicit in appealing to Parliament; but it has actually used the term *Appellentscheidung* only rarely.

[277] *See* United States v. Then, 56 F.3d 464, 466 n.1 (2d Cir. 1995) (Calabresi, J., concurring). As noted earlier, the concurrence *did* suggest that clear calls for congressional action might be appropriate in other contexts. *Id.*

[278] For the major antecedents, see *Wolf v. Colorado*, 338 U.S. 25, 33 (1949), and *Weeks v. United States*, 232 U.S. 383, 391-92 (1914).

The challenged law is (provisionally) *approved*, and with it the law's application to the case at hand.

Finally, the U.S. Supreme Court has traditionally engaged in decisional practices more advisory than appeal decisions would be. Consider, once again, *Northwest Austin*. If the Court has the authority to issue pseudo appeal decisions in the form of dicta parading as constitutional avoidance, it surely has the authority to issue true appeal decisions openly. There would be great gains in honesty and transparency if it did. Consider also those cases, such as *Miranda*, in which the Court has issued what amount to interim regulations. The Court in *Miranda* described a set of procedures that had not been challenged in a live case or controversy and suggested that it would approve that set of procedures in the event that they were challenged.[279] I do not mean to suggest that this makes *Miranda* an advisory opinion. I mean to suggest that if *Miranda* was not an advisory opinion, strong appeal decisions are not advisory opinions either, and soft appeal decisions are not advisory *a fortiori*. One might object that the *Miranda* Court advised legislatures *after* an explicit finding of unconstitutionality. But if the Court can issue detailed advice to the legislature after quashing a law, why can it not issue a general appeal to the legislature that, if heeded, will allow the Court to *avoid* quashing the law? A similar point could be made about second-look doctrines. Qualified immunity cases provide yet another setting in which the Supreme Court announces constitutional principles but doesn't apply them to the case at hand.[280]

In sum, an appeal decision is a concrete answer to a concrete constitutional question raised in a live case or controversy. It differs from ordinary constitutional decisions only by offering, at the remedy phase, greater flexibility and often greater transparency. At worst, an appeal decision qualifying the Court's approval of a challenged law is *obiter dicta*. But such dicta can be very useful and can serve important values. In any event, appeal decisions are more modest and less prescriptive than other types of decision that the Court already issues. The difference between appeal decisions and other mechanisms that the Court already employs is one of degree rather than kind. The authority to issue appeal decisions is a lesser authority included in the greater.

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[279] Miranda v. Arizona, 384 U.S. 436, 444-45 (1966).

[280] *See supra* note 168.

B. Could It Work Here?

That appeal decisions at the federal level would be *constitutional*, however, does not mean that they would be workable. On the face of it, my call for American appeal decisions is a call for a legal transplant — with all the attendant difficulties.[281] But those difficulties are not, in this case, insurmountable. Certain features of the American setting might even make it more hospitable to appeal decisions than the German setting. As I have been at some pains to show, the Supreme Court has already employed techniques — however hidden or half-hearted — similar to appeal decisions. But there are striking differences between constitutional justice in Germany and constitutional justice in the United States, and those differences must be faced squarely. Some are differences of constitutional culture, others of judicial process.

One of the biggest cultural differences is the enormous prestige enjoyed by the German Constitutional Court and the deference afforded its decisions by political actors.[282] This is not merely a matter of the FCC's fiats being *accepted*; it is often a matter of the FCC's intervention being *desired*. The German justices themselves have occasionally complained that parliamentarians are too eager to punt prickly questions to Karlsruhe.[283] Far from resenting appeal decisions, German politicos often embrace them — even when they are highly prescriptive — with a kind of quiet gratitude.[284] Sometimes an appeal decision forces a compromise that was politically unattainable; sometimes it supplies cover for unpopular reforms. Politicians

[281] For a sampling of the large literature on legal and constitutional transplants, see generally THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., 2006); ALAN WATSON, LEGAL TRANSPLANTS (1974); Vlad Perju, *Constitutional Transplants, Borrowing, and Migrations*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1304 (Michel Rosenfeld & András Sajó eds., 2012).

[282] These themes are explored at length in COLLINGS, *supra* note 84.

[283] Shortly after becoming the Court's first female Chief Justice, Jutta Limbach said in an interview with the *Berliner Zeitung*, "The Federal Constitutional Court is, with increasing frequency, taken advantage of by politicians as a kind of arbitration agency. This is an unfortunate development. Every authority in this State has its role to play. Politicians must accept their own responsibility." *Die neue Verfassungsrichterin Jutta Limbach mahnt Verantwortung an Klageflut der Politiker*, BERLINER ZEITUNG (Mar. 5, 1994) (Ger.), http://www.berliner-zeitung.de/die-neue-verfassungsrichterin-jutta-limbach-mahnt-verantwortung-an-klageflut-der-politiker-17402376.

[284] *See, e.g.*, the responses to the 1999 *Financial Equalization* Judgment, 101 BVERFGE 158, reported in *Machtwort zum Schluss*, FRANKFURTER ALLGEMEINE ZEITUNG (Nov. 12, 1999) (Ger.); *Positive Reaktionen bei Geber- und Nehmer-Länder*, HANDELSBLATT (Nov. 12, 1999); *Bundesländer sind froh über das "weise" Urteil*, FRANKFURTER RUNDSCHAU (Nov. 12, 1999) (Ger.).

perceive, perhaps rightly, that certain unpalatable medicines will be swallowed more readily if the prescription stems from Karlsruhe than if it hails from Berlin. In this regard, one might predict that appeal decisions would provoke greater resistance in the United States than they have in Germany.[285] On the other hand, there are also frequent reports in the United States of politicians who hope a Supreme Court decision will allow them to duck a difficult issue.[286]

Procedural differences might be even more important. Many prominent appeal decisions are a product of the FCC's "abstract review" — review of new legislation upon petition from the federal government, a state government, or a qualified parliamentary minority.[287] Abstract review is unfettered by any case or controversy requirement. When the Court does appeal to Parliament in the context of a live case or controversy, it does so in response to the referral of an abstract constitutional question from a lower court. The Court answers only the constitutional question, and the lower court applies that answer to the concrete case. The Constitutional Court can also issue an appeal decision in response to a direct complaint from an individual citizen who has exhausted all other judicial and administrative remedies. By contrast, the U.S. Supreme Court could appeal to Congress only in the context of a live case or controversy over which the Court has full jurisdiction.

These cultural and procedural differences suggest that appeal decisions would work somewhat differently in the United States than they do in Germany. But this does not mean that they would not work at all. The differences might actually be reassuring. The prospect of resentment or pushback from Congress could be quite salutary. It might help limit the number of appeal decisions and confine them to circumstances in which they are truly appropriate. The same is true of the case or controversy requirement. The unique cultural and

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[285] They have generated plenty of criticism in Germany, often imbedded in broader critiques of the Court's politicization. *See* DONALD P. KOMMERS & RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 39 (3d ed. 2012). Much of that criticism, in the best and worst senses, has been academic.

[286] For a recent example, see Jeremy W. Peters & Jonathan Martin, *Gay Marriage Case Offers G.O.P. Political Cover*, N.Y. TIMES (Jan. 18, 2015), http://www.nytimes.com/2015/01/19/us/politics/marriage-case-offers-gop-political-cover.html. In the event, the Court's *Obergefell* decision has allowed Republican presidential candidates to avoid the issue of same-sex marriage almost entirely.

[287] *See, e.g.*, 101 BVERFGE 158; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 22, 1995, 93 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGGERICHTS [BVERFGE] 121 (Ger.); Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court] Feb. 8, 1977, 43 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGGERICHTS [BVERFGE] 291 (Ger.).

procedural features of the American setting might help make appeal decisions what they are supposed to be in Germany — relatively rare.

These differences, moreover, should not be overstated. As I have taken some pains to point out, the U.S. Supreme Court already engages in various decisional practices analogous to German appeal decisions. These practices are indigenous to the American tradition and evolved within that tradition. In practice, introducing appeal decisions in the American context could be less a foreign transplant than an extension and improvement of preexisting practices.

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But if American appeal decisions would be legal and feasible, would they also be wise? The answer depends, in part, on two dimly foreseeable factors: how the Court would employ such decisions, and how Congress would respond to them.

In the latter regard there does not, at first blush, seem to be much of a problem. The Court already has power to strike statutes entirely, so why worry about the lesser power to approve them provisionally? However grumblingly, Congress already stomachs decisions that tell it "No!"; why worry about decisions that say, "Yes, but . . ."? Wouldn't appeal decisions merely give both Congress and the Court greater flexibility, and greater capacity to cooperate, as they grapple with hard questions? The answer to this last question is that I think appeal decisions would do just that. But they wouldn't do *only* that. They would also place a powerful new weapon in the judicial arsenal, a weapon susceptible of abuse and overuse. And Congress, of course, is sure to recognize the risk.

In my view, appeal decisions ought to be rare,[288] but there is no guarantee that they will be. When the Canadian Supreme Court introduced the suspended declaration of unconstitutionality, it was at pains to stress that suspensions would be surpassingly unusual.[289] In fact they became routine.[290] There is no way to guarantee that

[288] The point, however, is not obvious. Mark Tushnet once remarked of second-look doctrines that, if their superiority over ordinary constitutional decision-making was as pronounced as their champions suggested, perhaps they ought to become the norm rather than the exception. *See* Mark Tushnet, *Subconstitutional Constitutional Law: Supplement, Sham, or Substitute*, 42 WM. & MARY L. REV. 1871, 1876-77 (2001).

[289] *See* Re Manitoba Language Rights, [1985] 1 S.C.R. 721 (Can.).

[290] *See* Bruce Ryder, *Suspending the Charter*, 21 SUP. CT. L. REV. (2d) 267, 272 (2003) (noting that between 1999 and 2003, the Supreme Court of Canada suspended 8 of its 14 declarations of invalidity).

something similar won't happen if the U.S. Supreme Court adopts German-style appeal decisions.

One could argue, of course, that the prospect of proliferating appeal decisions should trouble no one. One might suppose that appeal decisions would produce a wash: for every case in which the Court appeals to Congress instead of approving a challenged law without reservation, there might be another case in which the Court appeals to Congress rather than nullifying the law in whole or in part. But that is an empirical question, impossible to answer in the abstract. There are other possibilities. The Court might go on annulling laws at roughly the same ratio, while appealing to Congress in a host of cases in which, formerly, it would have stayed its hand entirely. In that case, an ostensible instrument of flexibility and deference could become a mechanism for routine judicial meddling.

The risk is real, but there are reasons to doubt its realization. For one thing, the contexts to which appeal decisions are best suited are, for various reasons, more likely to recur in Germany than in the United States — and even in Germany appeal decisions are not the norm.[291] To some degree, moreover, the risks endure in Germany because the Court has never articulated clear standards governing appeal decisions. The U.S. Supreme Court might reduce the risk by explaining clearly when, why, and how appeal decisions should be used. What's more, there might be practical and tactical reasons why the Court would be loath to appeal too often.[292] Every appeal decision expends political capital, and there are structural limits to the Court's capital reserves. In any case, the risks are worth running if the alternatives are pseudo-appeal decisions, like *Northwest Austin*, or super-appeal decisions, like *Miranda*. If appeal decisions produce a marginal increase in transparency and restraint, the specter of their overemployment is not particularly frightening.

C. The Risk of Congressional Resentment

But how would Congress respond? This question calls to mind the oft-invoked dialogue from *Henry IV*, Part One:

[291] The most notable reason is the existence in Germany of positive legislative duties.

[292] I stress that this *might* be the case. It is by no means a sure thing.

GLENDOWER: I can call spirits from the vasty deep.

HOTSPUR: Why, so can I, or so can any man;
But will they come when you do call for them?[293]

Even if the Supreme Court can and ought to appeal to Congress, will Congress answer when the Court appeals?

One response is to shrug one's shoulders. If Congress ignores the appeal, isn't that Congress's problem? In response to an appeal decision, Congress can either heal or avert the constitutional ailment, or see its handiwork invalidated after a reasonable time or a stated deadline. It's really up to them, so why worry? In any case, if Congress accepts decisions that strike legislation *tout court*, then *a fortiori* it ought to accept (and apparently *has* accepted) decisions that invalidate legislation under second-look doctrines. And if Congress accepts provisional *invalidation* of its handiwork in a second-look decision, then it ought, *a fortiori*, to accept provisional *approval* of its handiwork in an appeal decision. I think it fair to say that such reasoning reflects the historical experience in Germany, where, with rare exceptions, state and federal legislatures have been highly responsive to judicial appeals.

There might be reason, however, to anticipate a different response. Some members of Congress might well reason that if one accepts that the Court has the power take an axe to a given law, one ought to respond graciously when the Court lays the axe aside and hands Congress a scalpel. But appeal decisions would be sufficiently novel that others might respond differently. It is one thing for Congress to be told that it *may not act* as it has tried to act; it is another thing altogether for Congress to be told that it *must act* in some new way *or else*. The latter injunction is, quite likely, less invasive than the former. But it might not *feel* that way. Some members of Congress, who might only grumble at a Supreme Court *pro*scription, might erupt in an apoplexy of howls confused at what feels like a high-court *pre*scription. "Who are the Justices," an angry Member might ask, "to tell us what we must do and when we must do it? They should stick to the business of saying 'Yay' or 'Nay.' Their job is to approve or to annul what we have already done, not to call on us to do something else."

[293] WILLIAM SHAKESPEARE, THE FIRST PART OF KING HENRY THE FOURTH act 3, sc. 1. This passage has been invoked by, among others, Mark Tushnet and Justice Stephen Breyer. *See* Stephen Breyer, *Making Our Democracy Work: The Yale Lectures*, 120 YALE L.J. 1999, 2001 (2010); Mark Tushnet, *Shut Up He Explained*, 97 NW. U. L. REV. 907, 912 (2001).

Ironically, some Congressional resentment might stem from legislators' desire to duck uncomfortable issues and make the Court decide them. Appeal decisions put the ball back in Congress's court, and Congress may not like that. In a representative democracy, however, dealing with hard issues is a legislature's job.[294]

In any case, the specter of congressional resentment should be comforting as well as disconcerting. It might limit the number of appeal decisions issued and foster restraint within the appeals the Court does issue. The more detailed the prescriptive character of an appeal decision, the greater the legislative hostility to that decision is likely to be. It is not clear to what extent the Justices would try to anticipate congressional reaction to appeal decisions, nor how good a job they would do if they did try. But if the Justices do contemplate how their appeals to Congress are likely to be received, the specter of Congressional acrimony might be more salutary than disabling.

On the other hand, appeal decisions could foster *cooperation* between the Court and the Congress. By "cooperation," I do not mean harmonious deliberation between peers as to the meaning and requirements of the constitution. Appeal decisions are exercises of constitutional judicial review and, as such, they place the judiciary in a privileged interpretive position.[295] Appeal decisions do not invite the legislature to consider *whether* something ought to be done; they direct the legislature to cure an existing constitutional defect, to monitor a potential defect, or to nip an incipient defect in the bud. But they do try to preserve legislative discretion with regard to *what* ought to be done. Some legislators, I suspect, will be pleased to retain that degree of discretion.

D. Benefits of Appeal Decisions

In my conclusion, I renew my suggestion that an appeal decision would have been a proper and salutary response to constitutional challenges to the Voting Rights Act. The Court would be wise to appeal to Congress (or state legislatures) in other contexts as well, some of which I have alluded to already — criminal procedure,

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[294] How appeal decisions might impact the congressional proclivity to punt is a hard question. Appeal decisions, once issued, will naturally make it harder for Congress to punt in those cases. But a Congress that anticipates future appeal decisions might be more likely to punt in the first place.

[295] *See* Christine Bateup, *The Dialogic Promise Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOK. L. REV. 1109, 1111-12 (2006) (criticizing various dialogic theories of judicial review on the ground that they privilege the role of judges).

affirmative action — and others of which will come readily to mind. In some circumstances, appeal decisions foster dialog, inter-branch cooperation, and democratic experimentation. In nearly all circumstances, they enhance comity, flexibility, and transparency. They might even promote collegiality and consensus *within the Court*. The Justices might find more common ground absent the all-or-nothing character of most constitutional controversies.[296] At the very least, appeal decisions allow greater recognition of the complexity and intractability of many constitutional controversies.

1. Flexibility, Transparency, Dialogue

Appeal decisions have two principal virtues: they expand a court's range of options and they allow the court to signal clearly to the legislature what it is up to. Half a century ago Alexander Bickel wrote that, in its power of constitutional judicial review, the U.S. Supreme Court "wields a threefold power. It may strike down legislation as inconsistent with principle. It may validate, or . . . 'legitimate' legislation as consistent with principle. *Or it may do neither*."[297] By "doing neither," Bickel had reference to what he called the "passive virtues,"[298] ways of prodding legislative reconsideration without directly affirming or denying a law's constitutionality.

The passive virtues exert their force indirectly, in an opaque and often roundabout way. Years ago Judge Calabresi championed the use of second-look decisions in situations where legislatures have been guilty of "haste" or "hiding."[299] The risk, however, is that second-look doctrines themselves can become a means of hiding if "clever judges" (to use Tushnet's moniker) use them to reach desired substantive outcomes without paying the political price of achieving that outcome directly. Bickel referred to the passive virtues as "techniques of 'not doing.'"[300] But the passive virtues might become vices if "not doing" becomes doing by other means, a point raised long ago by Gerald Gunther, one of Bickel's earliest and most formidable critics.[301] Appeal

296 This can also be true, of course, of the avoidance canon. Remember that *Northwest Austin* was decided by a vote of 8 to 1. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009).

297 Bickel, *supra* note 1, at 50.

298 *Id.*

299 Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 104 (1991).

300 ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 169 (1962).

301 *See* Gunther, *supra* note 210.

decisions are not a technique of *not doing*; they are a technique of not doing *yet*. A court that appeals to the legislature cannot pretend to have avoided the issue altogether. By not acting yet, the court has still acted and has done so openly. Such transparency and accountability are two of the great virtues of appeal decisions.

By not acting *yet*, of course, the court invites the legislature to act now. That invitation creates possibilities for inter-branch dialogue.[302] Those possibilities should not be exaggerated, but neither should they be denied. The Court, of course, retains a privileged interpretive position. If the legislature responds to the Court's appeal by doing nothing or by doing too little, the Court can enforce its appeal by invalidating the law later on. But if the legislature responds with its considered judgment that only a modest reform is necessary, and if that judgment enjoys broad popular support, the Court may invalidate the law only by expending a great deal of political capital. It can, of course, strike the law anyway, but it could have done so in the first place rather than issue an appeal decision, and it can do so in the face of the legislative response only by being openly activist — and by seeming to have engaged in an exercise of bait and switch.[303] There are risks for a court that steamrolls a legislative response, just as there are risks for a legislature that ignores a judicial appeal. Appeal decisions require a legislative response and the dynamic set in motion by that response is dialogic. My guess is that in the United States, where Congress might prove less pliant in the face of judicial appeals than the German Bundestag, that dynamic might be more pronounced than it is in Germany.

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[302] For various assessments of the possibility of judicial-legislative dialogue, see generally ROBERT A. KATZMANN, COURTS AND CONGRESS (1997); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); Anne Meuwese, *Constitutional Dialogue: An Overview*, 9 UTRECHT L. REV. 123 (2013); Kent Roach, *Dialogue or Defiance: Legislative Reversals of Supreme Court Decisions in Canada and the United States*, 4 INT'L J. CONST. L. 347 (2006); Luc B. Tremblay, *The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures*, 3 INT'L J. CONST. L. 617 (2005). In the modern American state, of course, "inter-branch" dialogue necessarily involves administrative agencies.

[303] Justice Scalia accused his colleagues of doing just this in the transition from *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), to *Boumediene v. Bush*, 553 U.S. 723 (2008). In response to *Hamdan*'s invitation to the political branches to deal with the problem of prolonged detention in Guantanamo, Congress passed the Military Commissions Act — which the Court promptly struck down in *Boumediene*. Dissenting in *Boumediene*, Justice Scalia quoted the language from *Hamdan* that seemed clearly to invite congressional intervention. "Turns out they were just kidding," he growled. *Boumediene*, 553 U.S. at 830-31 (Scalia, J., dissenting).

2. The Grey Zone: Hard Cases and *Aporia*

Five years ago, in a passionate *Foreword* to the *Harvard Law Review*, Dan Kahan observed that "[j]udicial opinions are notoriously — even comically — unequivocal. It is rare for opinions to acknowledge that an issue is difficult, much less that there are strong opinions on both sides."[304] Justices of the U.S. Supreme Court tend to write — especially in sharply divided decisions — as though all the relevant authorities point in one direction and one direction only.[305] In Kahan's view, such cymbal clashes of opposing certitudes escalate conflict among the Justices and undermine confidence in the Court.[306] As a remedy, Kahan prescribes "judicial idioms of aporia."[307]

By *aporia* Kahan means, above all else, "acknowledgment of complexity."[308] Aporetic engagement acknowledges that issues before the Court tend to be "wickedly complex . . . fraught with empirical uncertainty" and "difficult to analyze"[309] — that "[s]ometimes the most valuable lesson that a lawyer or philosopher can convey to a lay audience about concrete practical issues . . . is that those issues are not straightforward matters in which one side is principled and the other is not."[310] Kahan argues "that this can be a valuable message for the Court to convey about its own understanding of the issues it is deciding if it wants to assure those likely to be threatened by the outcome that the Court is not insensitive to their values and perspective."[311]

On the whole, the German FCC has, in recent decades, been a more *aporetic* tribunal than the U.S. Supreme Court. Some of the reasons are structural, others methodological, still others ethical. For one thing, the FCC is populated by centrists.[312] Justices must be approved by a

304 Dan Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 59 (2011).

305 *Id.* at 59-60 ("How can it be that all the arguments unambiguously favor only one outcome in case after case when the main criterion for granting certiorari is a division of authority among lower courts? In a case that splits the Justices, how can five or more view all the relevant sources of guidance as pointing in one direction when they can see that . . . experienced jurists disagree? How can the dissenters be just as convinced that all the relevant sources point the other way?").

306 *Id.* at 60-62.

307 *Id.* at 62.

308 *Id.*

309 David A. Strauss, *Principle and Its Perils*, 64 U. CHI. L. REV. 373, 386 (1997) (reviewing RONALD DWORKIN, FREEDOM'S LAW (1996)).

310 *Id.*

311 Kahan, *supra* note 304, at 64.

312 *See* COLLINGS, *supra* note 84, at 274.

two-thirds parliamentary supermajority, which means that no candidate can be pushed through by one party who is unacceptable to the others. The FCC sits, moreover, in two senates of eight judges each. A tie within the Senate goes against a finding of unconstitutionality, so that a legislative act must be invalidated, if at all, by a majority vote of at least 5 to 3.

The ethos of the FCC also promotes aporetic discourse. It is a point of professional pride among the German Justices that they give careful consideration to all arguments raised by all parties, and that they grapple with all the relevant issues in all their irreducible complexity. Justice Dieter Grimm, who served on the Court from 1987 until 1999 and was judge *rapporteur* in a series of highly controversial free speech cases, recalls that it was always his goal, in drafting a decision, to explain why the loser had lost."[313]

The German Justices favor consensus, and they often find it. In comparison with the U.S. Supreme Court, dissenting opinions on the FCC — which were not published at all until after 1970 — are exquisitely rare and endearingly polite. A German "great dissenter" will dissent less often in a twelve-year tenure than will the typical American Justice in a single Term.[314] When the German Justices do dissent, they commonly criticize the majority for treating a constitutional question as easier than it really is.[315] In Kahanian terms, German dissenters take their colleagues to task for being insufficiently aporetic.[316]

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[313] Personal correspondence with the author, 11 August 2016.

[314] Under current rules, a German justice may sit for a single, non-renewable term of twelve years or until she reaches the age of sixty-eight, whichever comes first. Germany's "great dissenters" include Wiltraut Rupp-von Brünneck (1963–1977), Helmut Simon (1970–1987), Ernst-Wolfgang Böckenförde (1983–1996), and Ernst Gottfried Mahrenholz (1981–1994). For some comparative perspective, in his twelve-and-a-half years on the Court, Justice Böckenförde wrote or joined a total of twelve dissenting opinions. Patrick Bahners, *Im Namen des Gesetzes. Böckenförde, der Dissenter*, *in* VORAUSSETZUNGEN UND GARANTIEN DES STAATES. ERNST-WOLFGANG BÖCKENFÖRDE'S STAATSVERSTÄNDNIS 145, 146 (Reinhard Mehring & Martin Otto eds., 2014) (Ger.). By contrast, in the 2014 Term of the U.S. Supreme Court — the last time the Court was fully staffed for a full Term — there were 135 dissenting votes — an average of fifteen per Justice — ranging from 6 by Justice Breyer to 30 by Justice Thomas. *See The Statistics: Table 1a: Actions of Individual Justices*, 129 HARV. L. REV. 381, 381 (2015).

[315] *See, e.g.*, 93 BVERFGE 121 (149-65) (Böckenförde, J., dissenting); Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court] May 29, 1973, 35 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGGERICHTS [BVERFGE] 79 (148-70) (Ger.) (Simon, J., and Rüpp-von Brünneck, J., dissenting).

[316] This was the case in the 1973 *University Governance* decision, in which the dissenting Justices, Helmut Simon and Wiltraut Rupp-von Brünneck, chastised their

Appeal decisions reflect an aporetic instinct. As noted earlier, appeal decisions sometimes occupy the "grey area" in which a law is neither fully constitutional nor yet so unconstitutional as to justify judicial intervention.[317] This is not to say that the German Court punts in hard cases or that it decides them equivocally. On the contrary, some of the Court's sharpest critics complain that the Court confronts too many hard issues, and that it resolves them too confidently.[318] But the Court does acknowledge the depth and complexity of the constitutional issues with which it wrestles — especially issues raised by laws that were originally sound but have become problematic over time. In many of its appeal decisions, the Court acknowledges and accommodates the difficulty by leaving the law provisionally in force but prodding the legislature to correct the infirmity or clarify the ambiguity.

By contrast, one of the disappointing features of the *Shelby County* opinions is that both sides of that 5 to 4 decision treated the case as easy. For the majority, the analysis required a simple syllogism.[319] For the dissent, the case's logic was even simpler: Congress had plausible reasons to renew the law, and that's the end of it. An appeal decision, by contrast, allows the Court to acknowledge just how close a question the case presents, and to solicit the legislature's aid in resolving the difficulty.

CONCLUSION: WHEN — AND WHEN NOT — TO APPEAL TO CONGRESS

Appeal decisions would, I believe, be a valuable addition to the Supreme Court's decisional repertoire. In certain circumstances it would be better for the Court to appeal to Congress than to annul a law directly or approve it without qualification. The Court should, on occasion, appeal to Congress.

On which occasions, then? As noted earlier, the German Court has not given the practice a concrete doctrinal or theoretical articulation. It has rarely used the name. If the U.S. Supreme Court is to adopt the practice, it should do so openly, with clear standards regarding when,

colleagues for the specificity and the certitude with which they drew detailed conclusions from a spare constitutional text. 35 BVerfGE 79 (148-70).

317 *See supra* note 92.

318 For outstanding examples, see the four sharp essays collected in DAS ENTGRENZTE GERICHT: EINE KRITISCHE BILANZ NACH SECHZIG JAHREN BUNDESVERFASSUNGSGERICHT (Christoph Möllers et al. eds., 2011) (Ger.).

319 *Major Premise*: The VRA preclearance provisions were originally justified by exceptional circumstances. *Minor Premise*: Those circumstances no longer obtain. *Conclusion*: The preclearance provisions are no longer justified.

and when not, to appeal to Congress. In what follows, I propose a handful of guidelines for when appeal decisions are appropriate. The list that follows does not pretend to be definitive. It aims rather to start a conversation. The guidelines have as their frequent reference points the voting rights cases, in which an appeal to Congress would have been appropriate, and the school desegregation cases, in which appealing to the legislature was unsuccessful because the appeal was either inappropriate or too weak.

A. Hard Cases

Appeal decisions are for hard cases only. Perhaps this goes without saying. If the Justices agree unanimously and without qualification that a law is constitutional, there is of course no need to appeal to Congress. There is nothing in such a case for Congress to do. On the other hand, if the Justices agree unanimously that a law is *unconstitutional*, and if they believe its unconstitutionality was evident when the law was passed, there is no need — except, perhaps, to prevent particularly anarchic practical consequences — to delay the law's invalidation.

Alas, most constitutional cases that reach the Supreme Court are hard cases, so this first standard might not do much to limit the range of appeal decisions. On the other hand, the principal quasi-appeal decision in Supreme Court history was *Brown II*, which came on the heels of a unanimous holding in *Brown I* that racial segregation in public schools was unconstitutional *already*. The quasi-appeal in *Brown II* — as opposed to an immediate desegregation order or strong appeal decision with a deadline — was, of course, part of the price of unanimity. But the fact of unanimity and the obviousness of the violation suggest either that the *Brown II* Court should not have appealed at all or that it should have appealed in earnest. In any case, appeal decisions are better suited to cases, like the voting rights cases, in which the question is hard and the Court sharply split.

B. Changed Circumstances

As I have argued earlier, appeal decisions are especially valuable in contexts marked by shifting circumstances. Appeal decisions allow courts to enforce constitutional requirements in the face of historical development while still respecting comity and preserving (some) legislative discretion. The VRA cases provide a classic example of such a context, and it is unfortunate, in my view, that the Court issued a pseudo appeal decision in *Northwest Austin* and then professed to have

"no choice" but to strike down the preclearance provisions in *Shelby County*.

How could *Northwest Austin* have been decided differently as an appeal decision? For one thing, the Court could have paid more attention to timing. Granting the *Shelby County* dissenters' case that the preclearance requirement and the formula for its application were still justified in 2006 (or in 2013), it is harder to make the case that, without some modification, they would remain justified in 2031, when the law would next come up for renewal. Whatever the novelty of the doctrine of "equal sovereignty," it is not unprecedented for the constitution of a federal State to require that laws that differentiate dramatically in their treatment of member states be justified by good and sufficient reasons.[320] Twenty-five years might be too long for such a law to remain in force without review of its ongoing efficacy or need.

This being so, the Court in *Northwest Austin* could have issued at least two kinds of appeal decision. It could have called on Congress explicitly to update the preclearance provisions — perhaps before some stated deadline but certainly sooner than the distant sunset of 2031. Or it could have issued a softer appeal: it could have imposed a duty of ongoing, potentially remedial, oversight. Both options would involve provisional approval followed by an appeal to Congress.[321] In either case, the Court could rule that the law was constitutional "as yet," but that Congress would or might need to act to ensure ongoing constitutionality. The Court could have pushed Congress to seek a remedy for racial disparities in voting that did not discriminate among states — a remedy, of course, that was not available or practicable when the VRA was originally enacted but might be possible now.

In this respect, a decision of the German FCC provides an interesting model. In its judgment of 11 November 1999, the FCC approved provisionally a "finance equalization" law passed in the aftermath of German reunification.[322] To confront the economic exigencies of reunification, and to soften the vast disparities between Eastern and Western states, the Bundestag provided for massive

[320] Supreme Court decisions *affirming* the VRA's constitutionality contended that its "federalism costs" were justified by "extraordinary circumstances." Miller v. Johnson, 515 U.S. 900, 926 (1995); *see also* Lopez v. Monterey Cty., 525 U.S. 266, 282 (1999).

[321] Choosing between the two, of course, will depend on the Justices' sense of the seriousness, the constitutional difficulties, and the imminence of the turnover into unconstitutionality.

[322] 101 BVERFGE 158. For background on the decision, see COLLINGS, *supra* note 84, at 246-48, and KOMMERS & MILLER, *supra* note 285, at 97-99, 103-104. For a translated excerpt from the judgment, see *id.* at 99-103.

transfers from wealthy Western states to their indigent Eastern peers. Several Western states challenged the law's constitutionality. In its judgment responding to that challenge, the FCC allowed the law to remain in force until the end of the current legislative period — a period of just over five years.[323] But the Court appealed to the legislature to do two things: first, enact a framework law establishing general standards that would govern all future interstate financial transfers; second, cure the current law's constitutional defects. The first law had to be passed before the beginning of 2003; the second before the beginning of 2005. The constitutionality of the latter would depend, in part, on the adequacy of the former.

The *Northwest Austin* Court, of course, needn't have been as aggressive or imaginative as the *Finance Equalization* Court. A much simpler appeal would have done — a call for a shorter sunset, a deadline for modernized application formula, or even a generalized duty to remedy. The point is that appeal decisions can be especially valuable in federalism disputes, that they would have offered greater flexibility than the *Northwest Austin* and *Shelby County* Courts thought they had, and that there is flexibility within the category of appeal decisions as well.

C. Competing Constitutional Values

The VRA cases were a prime candidate for an appeal decision, not only because they involved changed historical circumstances, but because the challenged law sought to promote a value of constitutional stature: the right to vote. The Court originally upheld the 1965 Act because, however it might restrict federalism values, its contribution to the individual right to vote was enormous and (therefore) within Congress's enforcement powers under the Reconstruction amendments.[324] But if the Act succeeded it would, over time, undermine its own justification. Over time, the law's infringement on federalism values would remain constant while its marginal contribution to voting rights would decrease.[325] At some point, at least in theory, the law's federalism infringement would exceed its voting rights enhancement. The law's constitutional costs, in other words, would exceed its constitutional benefits.

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[323] 101 BVERFGE 158, 160.

[324] *See* South Carolina v. Katzenbach, 383 U.S. 301, 325-32 (1970); *see also Lopez*, 525 U.S. at 282; City of Rome v. United States, 446 U.S. 156, 175-78 (1980).

[325] *See* Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of its Own Success?*, 104 COLUM. L. REV. 1710, 1712-13 (2004).

That point would mark the turnover (*Umschlag*) into unconstitutionality. But it is very hard for anyone, even constitutional judges, to say when that Rubicon has been crossed. It is less difficult, however, for courts to identify that the point exists, or that a law is approaching it. In some cases, a court can readily discern that the line has been crossed already. But whether the turnover is imminent, distant, or recent, an appeal decision is an appropriate judicial response. In the VRA context, even if one insists that the turnover had not come by 2009 (*Northwest Austin*) or 2013 (*Shelby County*), it might still have arrived before 2031. And if one agrees with the *Shelby County* majority that the turnover had come already, an appeal decision would have been a better response than direct invalidation — or, at least, it would have been the ideal response in *Northwest Austin* when the Court delivered a pseudo appeal instead.

Readers will think of other scenarios in which a law furthers one constitutional value at the expense of another — or even creates tension *within* a given value.[326] Earlier I discussed briefly the Court's quasi-appeal decision in the affirmative action context[327] — a context in which legislatures seek to advance equality but do so through programs that treat some parties unequally. One can read the final paragraphs of Justice O'Connor's opinion in *Grutter* as a prediction that, at some point, the infringement on equality inherent in race-conscious admissions programs will eclipse the benefit to equality conferred by those same programs. Justice O'Connor thought the "turnover" would come within twenty-five years. Justice Ginsburg worried that it was much more distant. Given these Justices' views, the only kind of appeal decision appropriate in the affirmative action context would be a soft appeal. But a later Court, revisiting the issue, might conclude that the turnover was closer at hand, or indeed already past. In that case, a stronger appeal would be appropriate. This, in my view, would be a better outcome than moving from ostensible avoidance in *Fisher* to directly overruling *Grutter* in some later case.

D. Affirmative Rights

The German FCC has often issued appeal decisions when called upon to enforce affirmative rights. The reason lies close at hand. The Court is extremely reluctant — indeed, it believes it lacks the competence — to decide *how* an affirmative right is to be

[326] Think, for instance, of campaign finance laws. *See, e.g.*, Ognibene v. Parkes, 671 F.3d 174, 198-201 (2d Cir. 2011) (Calabresi, J., concurring).

[327] *See supra* Section II.B.4.

implemented.[328] That, the Court stresses, is a question for the legislature. The Court has been willing, on occasion, to find that the legislature has *failed* to implement an affirmative right, but typically it has not prescribed what the legislature must do instead.[329] In such cases the FCC has often issued appeal decisions.[330]

One traditional view posits that there are no affirmative rights in the U.S. Constitution, only negative rights.[331] But many rights, of course, may be characterized as either positive or negative. The right to counsel, for instance, can be conceived both as a negative right *against* the State (the State must not convict unrepresented persons) and as an affirmative duty *of* the State (the State must provide counsel to all accused persons). Similarly, the ban on cruel and unusual punishment can be seen as proscribing certain punishments, but also — as in the prison conditions context — as requiring affirmative provisions.

When the Constitution requires the State to fulfill an affirmative duty, courts are often ill-equipped to prescribe the specific terms of that duty's fulfillment. This is both because courts lack concrete powers of enforcement and because it is in this context that courts engage most directly in the project of positive legislation. Appeal decisions diminish both dangers. They give the legislature the first chance to fulfill the affirmative duty and, if the legislature seizes that opportunity, they obviate the need for judicial enforcement.

E. Pragmatic Considerations

As discussed earlier, many of the FCC's early appeal decisions were inspired by pragmatic considerations. The U.S. Supreme Court has occasionally responded to practical concerns by staying its

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[328] *See* KLAUS SCHLAICH & STEFAN KORIOTH, DAS BUNDESVERFASSUNGSGERICHT: STELLUNG, VERFAHREN, ENTSCHEIDUNGEN 282-84, 289 (9th ed. 2012) (Ger.).

[329] There are exceptions, some of them dramatic — most prominently in the abortion context. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 28, 1993, 88 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGGERICHTS [BVERFGE] 203 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGGERICHTS [BVERFGE] 1 (Ger.).

[330] For overviews of the Court's "duty to protect" (*Schutzpflicht*) jurisprudence, see JOHANNES DIETLEIN, DIE LEHRE VON DEN GRUNDRECHTLICHEN SCHUTZPFLICHTEN (2d ed. 2005); Klaus Stern, *Die Schutzpflichtenfunktion der Grundrechte*, 63 DIE ÖFFENTLICHE VERWALTUNG 241 (2010).

[331] *See* Jackson v. City of Jollet, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.) ("[T]he Constitution is a charter of negative rather than positive liberties. The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them."), *cert. denied*, 465 U.S. 1049 (1983).

decisions.[332] Such stays, however, have been rare and exquisitely brief. The Courts that issued them may have underestimated the difficulty of legislation or lacked sensitivity to other legislative priorities. Appeal decisions offer more flexibility and more nuance. There is, of course, the risk that the Court would appeal to Congress out of pragmatic considerations too often — that pragmatic appeals would become a vehicle for ducking issues or hiding motives. But this risk is hardly unique to appeal decisions. One wants judges to be pragmatic; one also wants them to be principled. The two exist in tension. One must either abandon one wish or trust judges to grapple with the tension. In my view, the Supreme Court could appropriately appeal to Congress for pragmatic reasons, but should do so only when the consequences of immediate invalidation would be truly dire. The Court should not appeal to Congress whenever striking down a law directly would incommode the political branches. The pragmatic appeal should be an exceptional, emergency measure.

There might be a stronger case to be made for pragmatic appeals to state legislatures. Some of the notable quasi appeal decisions discussed in this Article — *Wolf*, *Brown*, *Miranda* — have shared a pragmatic impulse and have been directed at the states. As appeal decisions, some of these decisions were problematic, for reasons I have suggested. *Brown II* presents a case in which a legitimate pragmatic consideration — the administrative and logistical difficulty of integrating schools and improving the quality of formerly all-black schools — mingled with what in my view was an illegitimate pragmatic consideration — the possibility that the Court's decision would be defied. On my reading of *Brown II*, it was the legitimate pragmatic concern that prompted the Court to allow some delay, but it was the dubious concern that dissuaded the Court from issuing a strong appeal.

Brown was also, incidentally, a case in which the Court reversed prior precedent. The German FCC has occasionally appealed to the legislature when reversing precedent or announcing new rules.[333] The U.S. Supreme Court might do the same. Such appeals — really another form of pragmatic appeal — give political actors time to accommodate the new requirement. They might also spur experimentation.

[332] *See* cases cited *supra* note 107.

[333] *See, e.g.*, 33 BVERFGE 1.

F. Individual Rights

It was unfortunate for the future career of appeals to the legislature that so central a decision as *Brown* took the form of a *quasi*-appeal (I am tempted to call it an *under*-appeal) and that its immediate impact was so disappointing. Perhaps the strongest objection to the use of a quasi-appeal in *Brown* — and indeed, in later cases involving equality of spending at state schools — is that *Brown* involved glaring violations of individual rights. For the individuals affected, justice delayed was too frequently justice denied.

In all cases, appeal decisions carry risks and impose costs. The most obvious cost is borne by the individual complainant, who is left without a remedy. This was the dilemma raised by Justice Rupp-von Brünneck in an early essay on the admonitory functions of constitutional justice in Germany. "One must not . . . overlook," she wrote, "the effect of an [appeal] decision on the individual litigant: His attack on the statute in question fails . . . ."[334] This harsh reality was softened, for Justice Rupp-von Brünneck, by two considerations. First, the FCC does not decide cases or controversies, and even the individual constitutional complaint serves "not only to secure individual justice, but to clarify a constitutional issue once and for all."[335] Second, "an [appeal] decision gives all citizens concerned, including the litigant, an opportunity to profit from any future change of the law."[336]

The first factor is cold comfort in the American context, in which the Supreme Court intervenes *only* in cases and controversies and decides constitutional questions "once and for all" only incidentally. The second factor might be more assuring, but it is not equally assuring in all contexts — which is, in part, why appeal decisions are not equally appropriate in all contexts. For Justice Rupp-von Brünneck, the "crux of the matter" was this:

> [Appeal] decisions were developed for "unique and special situations" where statutes, originally conforming to the constitution, become unconstitutional as a result of later changes, and where a simple declaration of unconstitutionality would not have provided an adequate solution to the dilemma. In these situations, the new formula combines the necessary

[334] Rupp-von Brünneck, *Admonitory Functions*, *supra* note 87, at 403.

[335] *Id.*

[336] *Id.*

> unconditional enforcement of the Constitution with a regard for the desirability that the legislature take the lead.[337]

This formulation does not cover the full gamut of appeal decisions, but it does highlight a core category of appeal decisions and suggests that, the further afield from that core a given case lies, the less appropriate an appeal decision will be. Relatedly, appeal decisions are increasingly inappropriate the greater the ongoing burden on the unsuccessful complainant.

Consider, to take a drastic example, the death penalty. Suppose the Court were one day to conclude — on the basis of historical change or evolving standards of decency — that capital punishment has become a cruel and unusual punishment in violation of the Eighth Amendment to the Constitution. Such a decision would, of course, reverse precedents relied on by political actors in dozens of states. But this factor, though it might support appeal decisions in *other* contexts, manifestly would not justify an appeal decision in *this* context. If the burden borne by the disappointed complainant is the loss of life, then leaving the problematic law in force until legislatures have a chance to revisit it is worse than unwise; it is abhorrent.[338] A similar sensibility inspired the Court in *Furman v. Georgia*.[339] The *Furman* Court apparently concluded that the constitutionality of the death penalty was in doubt, but that its unconstitutionality was not yet clearly established.[340] This being so, the risk of error in one direction was far greater than the risk of error in the other direction. Consequently, the proper response was a (*de facto*) moratorium, not provisional approval.

I use this example, not because I suspect for a moment that any court would respond to a challenge to capital punishment with an appeal decision, but because it highlights an important principle: appeal decisions are less appropriate when the challenged norm or practice infringes a core *individual* right. This is why the Court's use of a feeble appeal in *Brown* is so unsettling. I have little hesitation,

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[337] *Id.*

[338] There have, however, been states — Connecticut, for instance — that abolished the death penalty only prospectively and therefore might, in theory at least, still execute inmates sentenced before abolition.

[339] Furman v. Georgia, 408 U.S. 238 (1972).

[340] As is well known, the majority in *Furman* could not agree on a rationale for overturning the death sentences in the consolidated cases, and so issued a one-paragraph per curiam. *Id.* at 239-40. Congress and state legislatures understood the decision as a prod to reconsider whether the death penalty could be administered in a non-discriminatory way. *See* Coenen, *Constitution of Collaboration*, *supra* note 188, at 1714-19.

however, in championing an appeal decision when, as in a case like *Northwest Austin*, the constitutional value threatened is not a fundamental *individual* right but the structural right of an institution — in that case a state.

There are surely other considerations and principles relevant to deciding when or when not to appeal to Congress. The common thread in most appeal decisions will be that a law that was constitutionally justified when passed has become less so over time, but that some countervailing interest — or some consideration of institutional capacity, or even mere lack of information — makes it inadvisable for the Court to annul the law just yet. In such circumstances, it is best to give the legislature the first crack at reform. It is too late for the Court to do so in the voting rights context. But there are great gains to be had — gains of flexibility and transparency, deference and dialogue — if future Courts will, in appropriate cases, appeal to Congress.