U.C. DAVIS LAW REVIEW

University of California Davis

VOLUME 30 FALL 1996 NUMBER 1

ARTICLES

Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns

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INTRODUCTION

When faced with a constitutional challenge to a statute, the Supreme Court will often determine whether it can rest its ruling on a non-constitutional ground before addressing the constitutional issues. In making this decision, the Supreme Court is often reluctant to void a statute on constitutional grounds, reasoning that it takes greater effort for the majoritarian branches or states to alter the Supreme Court's interpretation of the Constitution.[1] Additionally, the Court hesitates to void a statute because of separation of powers and federalism concerns, as the Court has read the Constitution as calling for a limited role for the federal courts.[2]

Therefore, the Supreme Court and lower courts often apply the "avoidance canon," which authorizes a court to construe statutes to eliminate "serious constitutional doubts" perceived by that court.[3] But even when avoiding a direct determination

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[1] *See, e.g.*, Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (holding that if otherwise acceptable construction of statute would raise serious constitutional problems, Court will construe statute to avoid such problems unless such construction is plainly contrary to intent of Congress). Professor Thayer proposed that federal courts should invalidate statutes as contrary to the Constitution only when Congress has "not merely made a mistake, but ha[s] made a very clear one — so clear that it is not open to rational question." James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893). *See also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 35 (2d ed. 1986) (discussing Thayer's view that courts should pay utmost respect to other governmental branches' powers and discretion); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992) (discussing concerns about foreclosing legislative action and commending "measured motions" in constitutional and common law adjudication); Wallace Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71, 73 (1978) (explaining Justice Holmes's, Brandeis's, and Frankfurter's adherence to Thayer's principle of voiding statutes only when they manifestly violate constitutional provisions); Brian C. Murchison, *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases*, 30 GA. L. REV. 85, 102 (1995) (discussing Thayer's influence on Justice Brandeis).

[2] *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 345-46 (1936) (Brandeis, J., concurring) (discussing Court's self-imposed restrictions on use of its power to rule on validity of congressional act); *see also* Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 229 (1990) (discussing limited view of "case or controversy" recently espoused by Supreme Court); BICKEL, *supra* note 1, at 116 (espousing limited role of federal courts due to countermajoritarian difficulty). *But see* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 667-68 (1993) (questioning extent and force of countermajoritarian difficulty).

[3] *See* Murchison, *supra* note 1, at 113 (stating that when Court entertains serious con-

about whether a statute is constitutional, a court invoking this canon nevertheless develops constitutional law and engages in discourse about constitutional values. Moreover, in using the avoidance canon as an adjudicatory device, the Supreme Court sends crucial signals to other courts, legislatures, and agencies about appropriate methods of constitutional adjudication and dialogue.

This Article examines the Supreme Court's use and rejection of the avoidance canon in a variety of free speech cases from the 1950s to the 1990s. It explores the two primary formulations of the canon used by the Court and identifies the costs of avoiding direct constitutional rulings. The Article suggests some limits on use of the avoidance canon and offers factors for employing the canon, differentiating between appropriate justifications for avoidance by the lower courts and by the Supreme Court.

The multitude of cases in which courts utilize the avoidance canon are too numerous to be comprehensibly analyzed in one article.[4] Therefore, this Article examines the significance of the Supreme Court's use of the avoidance canon in free speech cases.[5] These cases illustrate several points. First, the free speech

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stitutional doubts about statutory interpretation, it asks whether alternative interpretation would avoid constitutional issues); *The Supreme Court, 1994 Term, Leading Cases*, 109 HARV. L. REV. 111, 284-85 (1995) [hereinafter *Leading Cases*] (discussing application of avoidance canon).

[4] The avoidance canon was referenced in approximately 55 Supreme Court cases involving First Amendment questions since 1944. Search of WESTLAW, SCT Database (Oct. 1995 & May 1996). The Court has decided more than 100 cases since 1944 involving the presumption that it should construe a statute to avoid constitutional difficulties. *Id.*

[5] This Article concentrates on the Supreme Court because it is the apex of our hierarchical and precedential system and because statutory interpretation plays a central role in how the current Court enforces or slights particular constitutional norms. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 335 n.3 (1994) (noting that approximately half of Court's annual opinions involve statutory construction questions). Of course, the state and lower federal courts contribute substantially to the development of federal constitutional law. The Supreme Court decides fewer than 200 cases annually. State courts perform the vast bulk of constitutional interpretation in criminal cases. *See* Michigan v. Long, 463 U.S. 1032, 1042 n.8 (1983) (stating that "[i]n 1982, more than 12 million criminal actions . . . were filed in the 50 state court systems . . . . By comparison, approximately 32,700 criminal suits were filed in federal courts during that same year."); *see generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION §10.5.3 (1994) (illustrating Supreme Court's deference to state courts in interpreting state law). By 1995, federal criminal filings reached approximately 46,000. *Caseload Increases Throughout Judiciary*, THE THIRD BRANCH, Mar. 1996, at 1, 3. But the Supreme Court has a heightened role in promoting uniformity in federal law and guidance for constitutional norms. Lisa A. Kloppenberg, *Measured Constitutional*

context involves politically sensitive, controversial issues in which the Court seems to manipulate the canon selectively based on its view of the merits of the case.[6] Second, free speech cases implicating constitutionally problematic statutes emphasize the tension between the Court's role as guardian of individual rights against majoritarian encroachment and its role as protector of structural constitutional values through application of the avoidance canon.[7] Finally, free speech cases demonstrate the extremes possi-

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Steps, 71 IND. L.J. 297, 298 (1996). The Court's interpretation of statutes in specific cases has broad precedential ramifications of a substantive nature.

[6] *Compare, e.g.*, Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2387 (1996) (concluding that Cable Television Consumer Protection and Competition Act of 1992, as implemented by FCC in regulating "patently offensive" material, is consistent with First Amendment) *and* Rust v. Sullivan, 500 U.S. 173, 200 (1991) (affirming validity of Public Health Services Act § 1008 which discourages abortion counselling) *with* City of Ladue v. Gilleo, 114 S. Ct. 2038, 2047 (1994) (holding that city ordinance banning any residential signs, with some statutory exceptions, was unconstitutional in disallowing signs stating "For Peace in the Gulf") *and* New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964) (striking down Alabama Code tit. 7 §§ 908-917 for violating First and Fourteenth Amendments by providing for defamation damages to public officials).

This selectivity is not a new phenomenon. For example, Roscoe Pound noted that courts during the *Lochner* era frequently ignored the canon when confronted with constitutional challenges to progressive legislation and thereby preserved the status quo. *See* Roscoe Pound, *Law in Books and Law in Action*, *in* AMERICAN LEGAL REALISM 39, 39 (William W. Fisher, III et al. eds., 1993) (stating that "[i]t is a settled dogma of the books that all doubts are to be resolved in favor of the constitutionality of a statute . . . . But it cannot be maintained that such is the actual practice, especially with respect to social legislation claimed to be in conflict with constitutional guaranties of liberty and property."). William Eskridge and Philip Frickey detailed how the Rehnquist Court used the canon and other clear statement techniques to preserve the status quo and favor structural constitutional values over individual rights claims. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 612-15 (1992). *See also* ESKRIDGE, *supra* note 5, at 275-306 (addressing canon but canvassing theories throughout work). Justice Frankfurter argued for a broad formulation of the canon both to support deference to legislative judgments of constitutionality on matters of progressive social policy and to respect legislative judgments curtailing individual liberties during the cold war era. *See infra* Part IV.A-B (discussing Supreme Court decisions upholding convictions of communists for political speech during the cold war era); MELVIN I. UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES 20-22, 31 (1991) (discussing Justice Frankfurter's deference to legislative determinations that meet "reasonableness" standard of review); Mendelson, *supra* note 1, at 81-83 (describing Justice Frankfurter's firm belief in democratic process and his strict avoidance of constitutional decisions); Nomi M. Stolzenberg, *Un-Covering the Tradition of Jewish "Dissimilation": Frankfurter, Bickel, and Cover on Judicial Review*, 3 S. CAL. INTERDISC. L.J. 809, 818-34 (1994) (describing Justice Frankfurter's commitment to judicial restraint). Instead of facing the constitutional challenges squarely, the Court revised statutes through use of the canon.

[7] *See* Eskridge & Frickey, *supra* note 6, at 612-15 (discussing Supreme Court's evolving

ble in the Court's reaction to certain constitutional challenges and in its choices concerning avoidance.[8] These cases thus highlight the effect of the political and social climate on constitutional adjudication and the Court's approaches to the canon.

The Court's method of addressing free speech issues has varied with the political context giving rise to these cases. At times, the Court has been highly protective of free speech. For example, it developed the overbreadth doctrine to protect against possible chilling of protected speech, noting the importance of that right, and it mandated heightened appellate review of constitutional facts in speech cases due to the social values at stake.[9] But when it employs the avoidance canon, the Court sidesteps its "lawsaying" responsibility that requires it to directly address constitutional rights and values.[10] Thus, an examination

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attitude toward protecting individuals through statutory interpretation).

[8] *See, e.g.*, United States v. X-Citement Video, Inc., 115 S. Ct. 464, 472 (1994) (rejecting broad reading of congressional child pornography legislation to avoid free speech problems); *cf.* Rust v. Sullivan, 500 U.S. 173, 191-200 (1991) (failing to apply avoidance canon). The *Rust* Court ignored First Amendment concerns raised by abortion "gag rules," as well as separation of powers concerns raised by the executive countermand of congressional intent, when the Court affirmed a broad reading of the Agency's interpretation of Title X. *Rust*, 500 U.S. at 191.

[9] *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57 (1973) (recognizing that legitimate state interests are subject to specific constitutional prohibitions); Branzburg v. Hayes, 408 U.S. 665, 690 (1972) (stating that legitimate governmental purpose cannot be pursued by broadly restricting fundamental liberties); United States v. Thirty-Seven Photographs, 402 U.S. 363, 388 (1971) (Black, J., dissenting) (expressing importance of constitutionally protected free speech); New York Times Co. v. Sullivan, 376 U.S. 254, 269-72 (1964) (proclaiming deep national commitment to unfettered political speech). On heightened appellate review standard, see *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984).

Although the overbreadth doctrine has not been explicitly discarded, its use as an exception to normal standing requirements has waned in recent decades. For example, in *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615 (1973), the Court stated that because overbreadth review is "strong medicine," the excessive scope must "not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *But see* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 294 (1994) (arguing that disposition of facial challenges should be linked to substantive area of constitutional law and other inquiries). Perhaps the doctrine is less necessary now that courts and other constitutional actors can reference a highly developed body of First Amendment principles for concrete factual situations.

[10] When the Court directly addresses the constitutionality of an act, it must either uphold the act or assert that "an act of the legislature, repugnant to the Constitution is void." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-77 (1803).

The avoidance canon is not as direct as Justice Marshall's method of judicial review. Nonetheless, in applying it, the Court inevitably interprets the Constitution. In choosing

of the Court's manipulation of the avoidance canon to allow it to either sidestep or address the free speech issues fairly raised by these cases furthers an assessment of the canon's stated purposes and actual use. Such an assessment reveals that the Court allows political considerations to influence its application of the canon.

This Article argues that the Court should favor direct discussion of the merits of constitutional issues. The Supreme Court has a heightened role in addressing constitutional issues in order to guide other courts and promote uniformity in federal constitutional law. When the Court applies the canon, it often affects the direction of constitutional law without providing clarity and certainty. Moreover, the claimed benefits of avoidance, such as promoting deference and respecting separation of governmental powers, are not generally realized when the Court uses the canon. For example, when using the avoidance canon to justify radically rewriting a statute, the Court is not deferring to Congress. And the Court's own sense of political and institutional frailty is not a valid reason for avoiding its lawsaying responsibility.

However, when courts do decide to apply the canon, they should do so discerningly and consistently. This Article develops factors to assist all courts in determining when avoidance is appropriate. Central issues in this evaluation include whether the outcome is sufficiently protective of individual rights or other constitutional concerns in the substantive context. Courts should also consider the canon's effect on long-term dialogue and development of constitutional law and the political controversy surrounding the constitutional challenge, including interaction between various constitutional actors on the given constitutional issue. Additional factors include a court's treatment of precedent in applying the canon and the extent of ambiguity surrounding legislative intent. The court should decide whether its role is that of divining legislative intent or, alternatively, artic-

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whether to apply the avoidance canon, the Court must first construe the Constitution to identify areas of "serious doubt" or determine problematic applications of the statute. Only then does it "ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Crowell v. Benson, 285 U.S. 22, 62 (1931). The Court can thus send signals about what it considers constitutionally problematic without directly ruling on a constitutional issue.

ulating and promoting public values. Finally, the proper application of the canon may vary with the level of the court undertaking review.

Part I discusses the two major formulations of the avoidance canon, the broad and narrow approaches. It then briefly explores the justifications for avoiding constitutional questions and assesses the assumptions underlying the use of the canon. This Part argues that the weaknesses in these justifications and assumptions call for a reevaluation of the courts' use of the canon.

Part II uses the Court's recent decisions in *United States v. X-Citement Video*[11] and *Brockett v. Spokane Arcades*[12] to demonstrate the broad approach to the avoidance canon. The *X-Citement Video* Court identified "serious constitutional doubts" and interpreted child pornography legislation to avoid reaching a First Amendment issue.[13] The *Brockett* Court rewrote a state moral nuisance statute to eliminate questions about its constitutionality.[14]

In Part III, the broad approach is contrasted with the narrow approach to the avoidance canon as illustrated by *Rust v. Sullivan*.[15] *Rust* involved a statute which arguably raised serious constitutional doubts. Rather than applying the broad approach, under which the Court would interpret the statute to avoid such constitutional doubts, the Court reasoned that the canon should not be applied unless the statute was clearly unconstitutional.[16] Part III argues that the *Rust* Court opted for this formulation of the canon merely because it wanted to address the constitutional issue.

Part IV focuses on some of the cases which developed the free speech doctrine, using them to illustrate the interaction of volatile political issues and application of the avoidance canon. This Part focuses on two sets of cases. The first involves prosecutions of Communists under the Smith Act. The second involves prosecutions under the Federal Registration of Lobbying Act. In

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[11] 115 S. Ct. 464 (1994).
[12] 472 U.S. 491 (1985).
[13] *X-Citement Video*, 115 S. Ct. at 472.
[14] *Brockett*, 472 U.S. at 504-07.
[15] 500 U.S. 173 (1991).
[16] *Rust*, 500 U.S. at 203.

both sets of cases, the Supreme Court managed to avoid direct constitutional confrontation through sometimes creative use of the avoidance canon.[17] These cases demonstrate how heavily the Court relies on the avoidance canon when faced with highly politicized issues.

From the analyses of these free speech cases, the Conclusion draws together a set of factors that courts should consider when deciding whether to apply the avoidance canon. These factors provide a framework within which courts may consider the ramifications of avoiding constitutional issues. Use of these factors will result in more consistency and predictability. These factors are also presented in the hope that their application will promote dialogue with Congress and other constitutional actors about constitutional boundaries on restrictions of free speech.

I. THE AVOIDANCE CANON

The "avoidance canon" is one of a large group of techniques used to avoid "unnecessary" constitutional questions, as explicitly set out in Justice Brandeis's famous concurrence in *Ashwander v. Tennessee Valley Authority*.[18] These techniques, constituting the

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[17] *See infra* Part IV.A-B (discussing Supreme Court's use of avoidance canon in cases involving prosecutions of Communists and prosecutions under Federal Registration of Lobbying Act).

[18] 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). *See generally* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1016-24 (1994) (listing components of avoidance doctrine and analyzing their justifications). Commentators also characterize other judicially created doctrines, such as the justiciability doctrines of standing, ripeness, and mootness, as additional avoidance techniques. Alexander M. Bickel, *The Supreme Court 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 43 (1961); Gerald Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 10 (1964) (discussing use of ripeness and political question doctrine to decline exercising proper jurisdiction); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1433-34 (1988) (discussing use of standing as means to decline exercising proper jurisdiction).

The *Ashwander* Court developed, "for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Ashwander*, 297 U.S. at 346 (Brandeis, J., concurring). The rules explicated by Justice Brandeis are:

> 1. The Court will not pass upon the constitutionality of legislation in a friendly, nonadversary, proceeding . . . .
> 2. The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it . . . ."
> 3. The Court will not "formulate a rule of constitutional law broader than is

"general avoidance doctrine," are closely related to other doctrines of justiciability and jurisdictional limitations.[19] The Court's application of the avoidance canon is problematic because, in applying the canon, the Court engages in statutory construction and indirect constitutional lawmaking, while sidestepping its responsibility to directly and fully address constitutional questions. Further, all courts should be wary of the canon because it is built on numerous debatable justifications and problematic assumptions. Therefore, before applying the canon, a court should carefully examine the circumstances surrounding an action to determine if it can justify its use.

A. *Formulations of the Avoidance Canon and Its Use as a Tool of Statutory Construction*

The avoidance canon is one of several "substantive canons" reflecting constitutional values that govern the interplay of statutory interpretation and constitutional lawmaking.[20] The avoidance canon is generally described as having two approaches: one broad and one narrow.[21] Under the broad approach, a court

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> required by the precise facts to which it is to be applied . . . . "
> 4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of . . . .
> 5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation . . . .
> 6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits . . . .
> 7. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, . . . this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided . . . . "

Id. at 346-48 (Brandeis, J., concurring) (citations omitted).

[19] *See* BICKEL, *supra* note 1, at 119-21 (discussing use of standing as avoidance doctrine); Kloppenberg, *supra* note 18, at 1015-24 (discussing guidelines for application of avoidance doctrine).

[20] William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1020 (1989). Eskridge states that "[t]he most important meta-rule based upon constitutional values dictates that statutes should be interpreted to avoid constitutional problems." *Id.* Sunstein characterizes the avoidance canon as a substantive interpretive norm with constitutional foundations. Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2111 (1990); *see generally* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (analyzing courts' role in statutory interpretation).

[21] Eskridge, *supra* note 20, at 1020-21; *Leading Cases*, *supra* note 3, at 285.

should apply the canon whenever a statute raises serious constitutional doubts.[22] The Supreme Court used this formulation of the canon in *United States v. X-Citement Video* to add a mens rea requirement to the challenged legislation.[23] The narrow approach provides that "if one permissible reading will be constitutional and another will not be, the former must be chosen."[24] This approach was used by the Court when it rejected the canon's applicability in *Rust v. Sullivan.* Finding that the challenged regulations were not *clearly* unconstitutional, the *Rust* Court addressed and upheld statutory limitations on abortion counselling.[25]

The Supreme Court has used a wide range of formulations of these two major approaches to the avoidance canon, some limiting potential uses of the canon and others giving judges substantial latitude to rewrite statutes. For example, sometimes the Court limits the canon to correcting a "scrivener's error" — a grammatical mistake where the legislature's meaning is clear, but was "ineptly or inadequately expressed."[26] In so limiting its use of the canon, the Court indicated that the canon is not applicable when Congress has clearly addressed the constitutional issue.[27] At other times, the Court has suggested that when

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[22] Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). Eskridge describes it thus: "The Court interprets a statute to avoid constitutional problems even though the broader interpretation would not necessarily be invalid." Eskridge, *supra* note 20, at 1021.

[23] United States v. X-Citement Video, Inc., 115 S. Ct. 464, 471-72 (1994); *see infra* Part II (discussing *X-Citement Video* Court's approach to avoidance canon).

[24] Murchison, *supra* note 1, at 91 (quoting HENRY J. FRIENDLY, BENCHMARKS 210 (1967)).

[25] Rust v. Sullivan, 500 U.S. 173, 183 (1991).

[26] *Leading Cases, supra* note 3, at 285 (quoting *X-Citement Video*, 115 S. Ct. at 474 (Scalia, J., dissenting)).

[27] *See* Tull v. United States, 481 U.S. 412, 417 n.3 (1987) (explaining that statute should be construed without constitutional interpretation by searching for congressional intent through language or legislative history); United States v. Locke, 471 U.S. 84, 98 (1985) (stating that statute's overriding purposes and logic must be followed when determining legislative intent for open-ended, undefined statutory terms); Regan v. Time, Inc., 468 U.S. 641, 652-55 (1984) (mandating that courts uphold parts of statutes if legislature clearly intended those parts to become effective); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 900-02 (1984) (stating that court overstepped its reviewing authority by granting Board broader discretion to remedy unfair labor practices without analyzing legislative intent); City of Rome v. United States, 446 U.S. 156, 173 (1980) (stating that constitutional analysis is unnecessary where statutory meaning and congressional intent are plain).

the plain meaning of legislation is unreasonable, "courts should look to the legislative history to determine whether that meaning comports with the drafters' intent" and use the canon to find a more reasonable interpretation.[28] Its application of the canon when legislative intent is ambiguous creates difficulties. The Court has neither determined how much ambiguity is required to apply the canon, nor has it suggested guidelines, factors or circumstances to include in an ambiguity analysis. Therefore, if the canon is applied whenever there is ambiguity about legislative intent, there would be no meaningful limit on the canon.[29]

The First Amendment challenges discussed in this Article incorporate both the narrow and broad approaches to the canon and offer a sampling of the range of formulations the Court has used in employing the canon. With both approaches, the canon rests on justifications and assumptions which do not withstand close scrutiny.

B. Justifications for the General Avoidance Doctrine

Many people believe that unelected, life-tenured federal judges play a crucial role in vindicating individual rights in a majoritarian democracy.[30] The reluctance of federal courts to address constitutional questions surprises those who believe that

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[28] *Leading Cases, supra* note 3, at 286. Professor Marshall argues that courts should employ the avoidance canon only when two statutory readings are equally plausible or when there is actual evidence that Congress attempted to avoid a specific constitutional difficulty. Lawrence C. Marshall, *Divesting the Courts: Breaking the Interpretation*, 66 CHI.-KENT L. REV. 481, 491-92 (1990).

[29] In one of its broadest formulations, the Court radically rewrote a congressional act in *United States v. Rumely*, 345 U.S. 41 (1952), because its limitation of the word "lobbying" to mean direct (and not indirect) activities was "not barred by intellectual honesty." *Id.* at 47 (citing Blodgett v. Holden, 275 U.S. 142, 148 (1928)).

[30] *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 75 (1980) (stating that stricter judicial scrutiny may be appropriate when enactments adversely affect groups lacking political power); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135 (1980) (suggesting that Court's role in protecting minorities should extend beyond removing barriers to participation in political process); Ginsburg, *supra* note 1, at 1206 (suggesting that Court should "step ahead of the political branches in pursuit of a constitutional precept" when minority rights are not sufficiently protected by majoritarian branches). For an argument that substantive results are as important as a fair process, see Richard Davies Parker, *The Past of Constitutional Theory — And Its Future*, 42 OHIO ST. L.J. 223, 224-25 (1981) (critiquing Choper and Ely approaches).

federal courts exist primarily to decide claims based on federal law and that the Supreme Court has a particular mission to decide important and far-reaching issues of constitutional law.[31] Certainly, the Court's certiorari policy supports that view. Consistent with its heightened obligation to promote uniformity in federal law and provide guidance on federal law issues, the Court states that it chooses either cases where two or more federal circuit courts are in conflict or cases which present "important" or "significant" legal questions.[32] But the Court has praised and justified avoidance techniques so extensively that the idea of avoidance whenever possible seems an inextricable foundation of the current judicial consciousness.[33] In light of the Court's role in protecting individual rights, busy federal judges who might view avoidance as an efficient tool for disposing of cases should consider the costs of using the avoidance canon.

Based on "the unique place and character . . . of the judicial review of governmental action for constitutionality," the Supreme Court has set out six justifications for applying the avoidance doctrine.[34] In brief, these justifications are: (1) the delicacy and

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[31] Kloppenberg, *supra* note 5, at 339-40.

[32] SUP. CT. R. 10. *See also* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 165-210 (7th ed. 1993) (discussing cases construing Rule 10). Further, the fact that the Court's appellate review of state court cases extends only to issues of federal law, and that state court judgments are final on questions of state law, reinforces this perception. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 599, 634-36 (1874).

[33] *See, e.g., Ex parte* Randolph, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (asserting that questions involving constitutionality of legislative acts are of "greatest delicacy"). Although Chief Justice John Marshall was not particularly concerned with the countermajoritarian difficulty, he is frequently quoted for the view that the federal judiciary hears no questions of "greater delicacy" than those challenging the constitutionality of a legislative act, and thus the courts should address these questions with the greatest deference. *Id.* Justice Brandeis most fully articulated the reverence for avoidance in *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Justice Frankfurter seems to have "carried the torch" of judicial restraint after Brandeis retired from the Court, evidenced in cases such as *United States v. Congress of Indus. Orgs.*, 335 U.S. 106, 124-29 (1948) (Frankfurter, J., concurring). *See also* UROFSKY, *supra* note 6, at 31 (indicating that Frankfurter felt that courts should play restricted role in far reaching questions of constitutionality); Mendelson, *supra* note 1, at 83 (indicating that Frankfurter may have gone even farther than Brandeis in adherence to judicial limitations). Scholars of the legal process school have also praised avoidance. *See generally* BICKEL, *supra* note 1 (discussing authority and power of Supreme Court); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1111-380 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (discussing role of courts in interpretation of statutes).

[34] Rescue Army v. Municipal Court, 331 U.S. 549, 571 (1947), *quoted in* Kloppenberg,

(2) finality of judicial review of legislative acts; (3) the limitations on the authority and jurisdiction of the federal courts; (4) the "paramount importance of constitutional adjudication in our system"; (5) separation of powers concerns raised by ruling on the acts of coequal branches; and (6) the need to show respect for other branches.[35] It is important to critically examine those justifications now that judicial review is so firmly entrenched in our polity.[36] Not all of these justifications rest on a firm analytical foundation. While the last two are more firmly grounded in separation of powers concerns, the first four justifications for the general avoidance doctrine are less weighty because they are based on exaggerated perceptions of both the federal judiciary's power and weakness.

In part, the gravity and delicacy of judicial review of legislative and administrative acts arise from the finality of a court's constitutional ruling; that is, once that final decision has been made, Congress and other constitutional actors can only change that ruling by the arduous process of constitutional amendment.[37] Under this rationale, a court should carefully consider the ramifications before it engages in direct judicial review of acts by the majoritarian branches because it has "the power to apply and construe the Constitution, in matters of the greatest moment, against the wishes of a legislative majority, which is, in turn, powerless to affect the judicial decision."[38] If this view of judicial review as "a delicate and final function" is accurate, it implicates both the countermajoritarian difficulty and separation of powers concerns.[39] However, the finality of direct constitutional adjudication by the federal courts is exaggerated both by the

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supra note 18, at 1035.

[35] Kloppenberg, *supra* note 18, at 1035-55. These justifications have also been summarized as: "(1) judicial economy, . . . (2) the hierarchical analytic requirements of legal reasoning, . . . (3) the 'gravity and delicacy' of judicial review, and (4) the text of Article III." James A. Gardner, *The Ambiguity of Legal Dreams: A Communitarian Defense of Judicial Restraint*, 71 N.C. L. REV. 805, 812 (1993).

[36] *See* Frederick Schauer, Ashwander *Revisited*, SUP. CT. REV. 71, 74 (1995) (arguing that justifications for avoidance canon are weakened by modern trend towards more aggressive judicial review).

[37] *See* Kloppenberg, *supra* note 18, at 1036-42 (analyzing delicacy and finality justifications in detail).

[38] BICKEL, *supra* note 1, at 20.

[39] Kloppenberg, *supra* note 18, at 1037.

courts and by other constitutional actors.[40] Therefore, the concerns raised by the finality of a ruling are not well founded.

In addition to being based on fears of a federal judiciary powerful enough to produce finality and foreclosure, the avoidance doctrine is also based on another, seemingly inconsistent, picture — that of a weak federal judiciary. Avoidance is grounded on "the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement."[41] This self-proclaimed limited authority and relative vulnerability of the federal courts raises concerns about maintaining the credibility of the courts and protecting them from political attack.[42] Judges fear that overuse of judicial review invites retaliation in the form of congressional limitations on jurisdiction or refusal to create new judgeships or adequately fund judicial operations.[43] In short, under this justification, the judicial branch must step carefully to avoid political land mines.[44] However, as with the courts' concerns over finality, this view of the judiciary's weakness is exaggerated. The federal courts, including the Supreme Court, are remarkably vital and enduring despite nearly two hundred years of judicial review.

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[40] *See* Friedman, *supra* note 2, at 665-66 (describing pro-choice movement's resurgence after *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989)); Kloppenberg, *supra* note 5, at 318-25 (discussing ferment of activity among other branches and states after *Webster*). For example, when David Frohnmayer, former Oregon Attorney General, attended a conference of attorneys general and candidates for political office, he noted that many politicians who had previously hesitated to state a position on abortion felt pressure to take a position shortly after *Webster*, and did so. *Id.* at 319 n.123; *see also* Friedman, *supra* note 2, at 643-48 (asserting that judicial "finality" is faulty assumption); Robert A. Katzmann, *Making Sense of Congressional Intent: Statutory Interpretation and Welfare Policy*, 104 YALE L.J. 2345, 2358 (1995) (book review) (discussing how case studies by Melnick and Eskridge demonstrate that Congress modifies or reverses numerous judicial decisions).

[41] Rescue Army v. Municipal Court, 331 U.S. 549, 571 (1947).

[42] Kloppenberg, *supra* note 18, at 1042-43.

[43] *See* WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937, 285-311 (1994) (detailing political controversy surrounding judicial review, including retaliatory proposals, from 1925 through 1937).

[44] Kloppenberg, *supra* note 18, at 1035-61. Avoidance is sometimes explained by the perception that direct constitutional decisions are more damaging to the Court's political capital because it appears that it is announcing an inflexible, irrevocable rule of constitutional law. Marshall, *supra* note 28, at 486; *see also* Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 659-61, 664 (1992) (stating that judges use canons when societal consequences of judgment are unclear, when they lack expertise in subject, or when the decision may cause subsequent embarrassment).

Even accepting the courts' vulnerability, their duty to address constitutional issues fairly presented should take precedence over the courts' concern for their own political viability. The duty to directly address federal constitutional questions is particularly heightened for the Supreme Court.[45] Further, the importance of constitutional adjudication calls for more, not less, direct discussion of constitutional claims.[46] Therefore, the Supreme Court's role in discussing constitutional issues is particularly pronounced.[47]

These first four justifications are also inextricably linked with the separation of powers and comity justifications for judicial avoidance of constitutional questions. The role of the federal judiciary must be defined in light of the roles of other federal branches and the states. The separation of powers and comity justifications for avoidance do raise concerns — the boundaries of which are difficult to define and apply.[48] Thus, these last two justifications may explain why the Court frequently uses the avoidance canon in politically charged cases and may assist us in evaluating that usage.

Courts offer several reasons why the canon alleviates separation of powers and comity concerns. First, they claim that the canon avoids constitutional adjudication.[49] But when they in-

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[45] Kloppenberg, *supra* note 5, at 341.

[46] Kloppenberg, *supra* note 18, at 1035-61.

[47] *See* BICKEL, *supra* note 1, at 127 (citing Solicitor General James Beck's opinion that it was "a citizen's right to have any constitutional issue ultimately decided by the Supreme Court, 'as the final conscience of the Nation in such matters'").

[48] *See* Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory*, 80 GEO. L.J. 653, 654 (1992) (discussing research suggesting that Congress and federal courts are largely unaware of other's activities relating to their own work); *see also* David B. Frohnmayer, *The Separation of Powers: An Essay on the Vitality of a Constitutional Idea*, 52 OR. L. REV. 211, 231-34 (1973) (arguing that legislative and executive branches must take more responsibility for constitutional interpretation). Professor Althouse has thoroughly explored comity concerns. *See* Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1488 (1987) (discussing various aspects of comity and focusing on federal interest in promoting effective functioning of States); Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 980 (1993) (considering two Supreme Court views on purpose of federalism).

[49] *See* Kloppenberg, *supra* note 18, at 1004 (stating that Supreme Court has instructed lower courts to decide federal constitutional issues only as last resort); *Leading Cases*, *supra* note 3, at 284-85 (stating that courts use avoidance canon to avoid unnecessary constitutional decisions).

voke the canon, courts do develop constitutional law by engaging in "quasi-constitutional lawmaking"[50] and developing "phantom constitutional norms."[51] The use of constitutional principles instead of direct constitutional rulings contributes to confusion for Congress, courts, and other constitutional interpreters, such as state legislatures and administrative agencies, who often strive to act within boundaries illuminated by the courts.[52]

Further, the canon is justified by the fiction that avoidance promotes deference to the majoritarian branches[53] and that it

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[50] *See* Eskridge & Frickey, *supra* note 6, at 612 (characterizing avoidance canon as method of "quasi-constitutional lawmaking" whereby Supreme Court under Chief Justice Rehnquist has overprotected structural constitutional values such as federalism and separation of powers). In contrast, Eskridge and Frickey demonstrate that the malleable canon has not been used so vigorously by the Rehnquist Court to protect individual rights. *Id. See also* Marshall, *supra* note 28, at 481 (stating that "we now have a Supreme Court that will be extremely reluctant to use the Constitution to shield traditionally powerless groups and individuals from majoritarian decisions, much less to provide these groups and individuals positive entitlements to governmental benefits and protection").

[51] Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990). Professor Motomura argues that the Supreme Court has developed "phantom constitutional norms" in immigration law by frequently employing the canon to undermine the plenary power doctrine through statutory interpretation rather than through more explicit constitutional lawmaking. *Id.*

> [C]onstitutional norms manifest themselves in two principal ways. First, they govern expressly constitutional decisions . . . . Second, in a less intuitive but equally correct use of the term, "constitutional" norms provide the background context that informs our interpretation of statutes and other subconstitutional texts. This second use of constitutional norms explains and reflects the time-honored canon that courts ought to interpret statutes so as to avoid constitutional doubts.
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> Immigration law, as it has developed over the past one hundred years under the domination of the plenary power doctrine, represents an aberrational form of the typical relationship between statutory interpretation and constitutional law.

Id. at 548-49.

[52] *See infra* Part IV.A-B (discussing *Dennis-Yates* line of cases); *see also* Marshall, *supra* note 28, at 487 n.25 (stating that questions are raised about "the vitality of an initial avoidance-driven interpretation of a statute when later developments in constitutional law remove the constitutional concerns that prompted the earlier decision").

[53] *See Leading Cases*, *supra* note 3, at 285 (arguing that "primary justifications for avoidance canon are to prevent absurd results, to promote legislative efficiency and to facilitate judicial deference to legislative intent"). Professor Sunstein notes that the canon reflects separation of powers concerns and "responds to Congress's probable preference for validation over invalidation." Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 469 (1989). Eskridge states that the canon is explained in part by

promotes dialogue on constitutional issues between the courts and legislatures.[54] Under this rationale, the Court uses the canon to send signals to Congress about constitutional problems it perceives in legislation.[55] The canon thus may afford Congress

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institutional competence. The Court seeks to avoid confrontations with Congress. Eskridge, *supra* note 20, at 1023.

Professor Sunstein suggests that through the use of the canon, courts can satisfy the probable preference of Congress "that its enactments be validated rather than invalidated." Sunstein, *supra* note 20, at 2107. However, others have questioned why Congress should prefer judicial interpretations practically foreclosing its options over constitutional consideration of its legislation. FRIENDLY, *supra* note 24, at 210; *Leading Cases*, *supra* note 3, at 287. Similarly, Professor Mashaw argues that this is not deferring to legislative preferences; instead, courts should just engage in serious constitutional analyses of statutes. Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 840 (1991). *See also* Richard A. Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 815 (1983) (arguing that policy of avoiding constitutional questions is rife with problems). If "Congress was conscious of constitutional difficulties, yet opted to enact a statute that seemingly tested the constitutional limitations," Professor Marshall argues, "Congress would want its enactment tested for *constitutionality*; not for a determination of whether it raises a *difficult constitutional question*." Marshall, *supra* note 28, at 489.

[54] *See* Marshall, *supra* note 28, at 485 (citing professors Bickel and Wellington as stating, "Many supporters of the avoidance canon have, therefore, justified it as a tool for promoting judicial restraint and for stimulating dialogue between the courts and Congress on constitutional issues."); *see also* Eskridge, *supra* note 20, at 1017 (stating that "opportunities for public dialogue — between the Court as it sets forth values of interpretation and Congress as it drafts statutes — are potentially greater in statutory interpretation cases").

Professor Murchison praises the canon for advancing a rather "muffled" and "tentative" dialogue. Murchison, *supra* note 1, at 169. Murchison's article concludes:

> [I]t might be said that the interrogative individualism of the judges was too modest, the talk too truncated, the questions too indirect. Seeking non-authoritative dialogue, did the judges speak too softly? Should the avoidance canon facilitate more than murmurings about law and change? Or is change often the product of just this blend of indirection, impatience, pause, and reply? Our own impatience for new visions should not minimize the inelegant usefulness of *Ashwander* or the importance of even muffled conversation.

Id. In examining separation of powers cases, Murchison finds that the canon "illuminat[es] the struggle of judges with the complexities of precedent and the dynamics of executive and congressional politics." *Id.* at 93; *see also id.* at 114 (stating, "Use of the canon implicated coming to terms, or being unable to come to terms, with precedent in a difficult and politically charged area of law."). Judges use the canon to raise tensions about their role, define themselves and assert individualism and independence. *Id.* at 93.

[55] Eskridge, *supra* note 20, at 1020-21. Eskridge explains: "The Court should assume that Congress is sensitive to constitutional concerns and presumably would not pass an unconstitutional statute; by narrowly construing statutes venturing close to the constitutional periphery, the Court can *signal* its concerns to Congress." ESKRIDGE, *supra* note 5, at 276 (emphasis added).

a chance to clarify its intent. In doing so, Congress could conform to the Court's precedents or it could demonstrate that it wants to challenge the Court's precedents, perhaps hoping that the Court will alter its earlier position.[56] However, the dialogic justification for the canon "would be considerably stronger if there was some evidence that Congress is likely to accept the Court's invitation to engage in constitutional dialogue."[57] In practice, Congress rarely alters a statute to push the constitutional boundaries in response to the Court's use of the canon. Congress is beset with problems of inertia and a heavy workload.[58] There may also be reluctance to confront the Court.[59] Further, Congress may lack political will on specific constitutional issues. Instead of spurring dialogue, the Court's construction of the Constitution through the avoidance canon frequently passes into a "penumbra" of constitutional law without legislative response.[60]

The Court's use of the avoidance canon may actually discourage meaningful dialogue on constitutional issues. Legislative reluctance to respond to the canon may foster the common perception that the Supreme Court has the "last word" in the constitutional dialogue.[61] Over the long haul, this perception encourages a lack of legislative responsibility for developing

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[56] *See* Katzmann, *supra* note 40, at 2358 (discussing how case studies by Melnick and Eskridge demonstrate that Congress modifies or reverses numerous judicial decisions). Additionally, the Court has changed its constitutional interpretations over time and there may be other methods of challenging the finality of the Court's readings of the Constitution. *See generally* Friedman, *supra* note 2, at 643-48 (asserting that judicial "finality" is faulty assumption).

[57] Marshall, *supra* note 28, at 485. Marshall notes that "The hoped for colloquy between the courts and Congress virtually always ends up as a judicial soliloquy." *Id.*

[58] *Id.*; *see generally*, Posner, *supra* note 53, at 821 (discussing revival of strict construction).

[59] Marshall, *supra* note 28, at 485.

[60] Posner, *supra* note 53, at 816. Judge Posner terms the "phantom norms" created by the avoidance doctrine a "constitutional penumbra." *Id.* He warns that use of the canon yields this dangerous constitutional penumbra due to Congress's general inability or unwillingness to reject a judicial misconstruction of its statutes. *Id.*

[61] *See* Marshall, *supra* note 28, at 493 (arguing that use of canon often perpetuates courts' perceived monopoly on constitutional interpretation). Marshall states that the "prevalent model of judicial review has helped create a perception that the courts do take full care of the Constitution," even when they do not. *Id.*; *see also* Kloppenberg, *supra* note 5, at 352 (discussing different standards of flexibility in application of canon and emphasizing importance of competing factors).

constitutional interpretation.[62] Thus, repeated use of the canon may actually inhibit meaningful interaction over time among legislatures and courts, or discourage participation of other constitutional actors in constitutional dialogue.[63] Employing the avoidance canon does *not* "alleviate the impression that the courts are the only credible expositor of constitutional values and that the only constitutional job of the other branches is to obey."[64] By failing to reach the core constitutional issues and remanding a case with a new interpretation of the underlying statute, the Court only compounds the shifting of responsibilities and does not increase accountability.

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[62] Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, SUP. CT. REV. 231, 250 (1990).

> But worse than being built on fiction, the assumption that Congress must have wanted to avoid constitutional questions denigrates the notion of serious constitutional discourse by Congress; it creates a sense that Congress can never really be expected to actually talk about and debate constitutionality in a serious manner, and that it can, therefore, be safely assumed that Congress always wants the Court to do what the *Court* believes is constitutionally purest.

Marshall, *supra* note 28, at 488.

Marshall further notes that "Congress ought to be taking its duty to support the Constitution seriously, instead of treating the Constitution as a collection of inspirational quotes to be used with rhetorical flourish or as a shorthand reference to what the Supreme Court is likely to hold on a given issue." *Id.* at 482.

[63] *See generally*, Marshall, *supra* note 28, at 493 (stating that use of avoidance canon will not stimulate increased congressional attention to constitutional issues). The limited role of courts in determining concrete cases and controversies may make the activities of these other actors all the more imperative. *See id.* at 482 (discussing courts' constrained readings of Constitution and citing Robin West, *The Meaning of Equality and the Interpretive Turn*, 66 CHI.-KENT L. REV. 451, 456-65 (1990)). Professor Thayer saw a similar danger with judicial review and warned that "the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors." JAMES BRADLEY THAYER, JOHN MARSHALL 106 (1974), *quoted in* Marshall, *supra* note 28, at 492.

[64] Marshall, *supra* note 28, at 495 (stating that courts should "carefully distinguish between, on the one hand, its description of *how courts will adjudicate constitutional challenges* and, on the other hand, the appropriate *standard of conduct for government actors*"). Professor Marshall proposes that courts "remand" statutes for express constitutional deliberation rather than rewriting statutes through the canon. *Id.* at 502-05. Legislators "would be forced to grapple with constitutional issues, instead of engaging in the routine constitutional buck-passing that is currently so common." *Id.* at 502. In addition to increasing accountability, he argues that such a remand would create a more complete record for judicial review. *Id.* at 502-03.

Moreover, the canon is founded on several problematic assumptions about how legislatures function.[65] Determining legislative intent is frequently a difficult and creative enterprise.[66] For example, Congress passes legislation with "both specificity and ambiguity," so that courts and other constitutional actors can sometimes fill in the gaps.[67] The canon recognizes that legislative intent is often susceptible to several reasonable readings and the canon affords judges the flexibility to read their own constitutional values into statutes by reference to the text, legislative history, and natural or grammatical readings.[68] This flexi-

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[65] *See* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 596-97 (1995) (exploring enterprise of statutory construction and tracing modern scholarly developments that influence readings of statutory text and heighten skepticism about fixed meanings and legislative intent). Of course, Karl Llewellyn pointed out the mutually inconsistent nature of the canon 50 years ago. Eskridge & Frickey, *supra* note 6, at 595. Dean Pound critiqued how courts employed the avoidance canon nearly 90 years ago. Pound, *supra* note 6, at 39. *See generally* AMERICAN LEGAL REALISM (William W. Fisher, III et al. eds., 1993) (collecting works of legal realists and illuminating modern statutory construction problems). Drawing on lessons from legal realism, critical legal studies, feminism, postmodernism, hermeneutics, civic republicanism, public choice theory and pragmatism, Professor Schacter challenges traditional conceptions of the role of courts in construing statutes. *See* Schacter, *supra*, at 594-96 (discussing traditional deference to legislature and belief in interpretative neutrality, and advocating new method of judicial statutory interpretation by channelling decision making through interpretative principles); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 322-23 (1990) (criticizing statutory interpretation models that emphasize legislative intent, purpose, and text based on theoretical foundations which overemphasize universal over particular values).

[66] *See* ESKRIDGE, *supra* note 5, at 13-47 (examining wide range of theories to illustrate problems in determining legislative intent). This extremely helpful book draws on prior work done by Professors Eskridge and Frickey. *See also, e.g.*, Eskridge & Frickey, *supra* note 6, at 616 (discussing revival of intentionalism and inherent problems in finding actual intent of legislature); Eskridge & Frickey, *supra* note 65, at 598 (discussing different canons of interpretation).

[67] Katzmann, *supra* note 40, at 2348.

[68] Schacter, *supra* note 65, at 599-603 (collecting references to numerous commentators). Schacter's summary is illuminating:

> It has become increasingly commonplace to question the capacity of statutory language to do the work the essentialist model requires. Such "meaning skepticism" targets assumptions at the heart of the traditional account — for example, that legislators in fact anticipated and resolved the questions raised in litigation about the meaning of a statute; that at least a majority of legislators had the same intent or broad purpose in mind; that language can capture such a collective design and make that design uncontroversially accessible to a court; and that a collective legislative design can and does bind subsequent judicial readers of the statute. If meaning does not inhere in a statute upon enactment, however, the court cannot passively and neutrally carry out its assigned task of

bility may be beneficial for updating statutes to incorporate changing constitutional views over time,[69] or for updating institutional assumptions made by courts about other constitutional actors.[70] This updating is similar to the courts' federal common law role of gap-filling.[71] The courts assume that the legislature presumes that courts will use the canon to correct constitutional problems.[72] However, to the extent a court's perception of constitutional doubts is different from the legislature's perception, this federal common law function is too expansive. It allows courts using the broad approach to the canon too much leeway to misconstrue legislative intent.[73]

The canon also embodies the assumptions that Congress understands the Court's constitutional precedents and tries to legislate within the boundaries of those precedents. But these assumptions are questionable in light of the multiple factors animating legislation and the complexity of the legislative pro-

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mechanically retrieving that meaning.

Id. at 599. *See also* ESKRIDGE, *supra* note 5, at 42, 119, 133, 224 n.91 (critiquing Justice Scalia's strict textualism).

[69] *See Leading Cases*, *supra* note 3, at 285-86 (discussing courts' use of avoidance canon to update statutes "to reflect society's evolving values as they relate to the Constitution"). "Meanwhile, public choice analysis suggests that courts use the avoidance canon to 'update statutes by construing them to reflect society's evolving values as they relate to the Constitution.'" *Id.* (quoting Eskridge, *supra* note 20, at 1021). Marshall asserts: "If you belong to the public values school — interpret statutes to make them more palatable to judges' perception of modern accepted values, the Constitution is a better place than most in which to find such values." Marshall, *supra* note 28, at 490.

[70] *See infra* Part III (discussing Court's selection of approach to canon in *Rust*); *see also* Murchison, *supra* note 1, at 166 (discussing Justice White's use of canon to "question[] the majority's arguably outdated understandings of power and politics" in separation of powers context). Additionally, such flexibility may produce "democraticizing effects." Schacter, *supra* note 65, at 595.

[71] Eskridge, *supra* note 20, at 1063 nn.263-64. Eskridge suggests that statutes are sometimes deliberately open-textured, and to the extent that the countermajoritarian difficulty is raised as an objection to public values interpretation, he urges that Congress sometimes delegates a gap filling duty to the courts. *Id.* Nearly one hundred years ago, Dean Pound suggested a similar "solution" to the problem he perceived in the inherent gap between the law and current public values. Pound, *supra* note 6, at 41-42.

[72] Sunstein, *supra* note 53, at 456 (characterizing canon as "implicit rather than explicit [legislative] interpretive instructions").

[73] *See* Marshall, *supra* note 28, at 486 (asserting that "if one believes that the judiciary's role qua statutory interpreter is to implement Congress's constitutionally valid choices whenever they can be discerned, then the specter of superconstitutional bending of statutes is quite problematic").

cess.[74] Skepticism about whether Congress engages in a rational, coherent decision making process compounds concerns about determining legislative assumptions.[75] But even if a legislature attempted to heed the Supreme Court's view of the Constitution, it would often require remarkable foresight (or guesswork) on the part of the legislature to divine clearly the applicable constitutional principles from the Court's sometimes fractured and murky precedents.[76] This is particularly true given some of the Court's applications of the canon in which the Court appears to recognize a new constitutional "danger zone" or extend the old one beyond prior precedent.[77]

These considerations indicate that the avoidance canon neither fosters deference nor advances a long-term constitutional dialogue. Instead, use of the canon yields changes in constitutional law without the protection of reasoned elaboration[78] and without the Court taking responsibility for directly addressing constitutional questions. Further, the Court's inconsistent and unpredictable application of the avoidance canon may suppress

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[74] Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 995-98 (1992). Professor Marshall concludes that "[u]nless there is actual evidence that Congress was concerned with some specific constitutional issue, it is unrealistic to assume that Congress gave much consideration to the constitutional ramifications of the statute it enacted." Marshall, *supra* note 28, at 488 (citing Abner Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 609-10 (1983)). Judge Mikva relates that members of Congress often believe that courts, not they, bear the responsibility for addressing the constitutionality of legislation. *See* Mikva, *supra*, at 593-606 (discussing Congress's role in assessing constitutionality). Katzmann has shown that there is little awareness of court decisions among the persons responsible for drafting congressional legislation. Katzmann, *supra* note 48, at 654-55. Katzmann has also demonstrated that it is problematic to determine what Congress was *assuming* in the complex realities of the legislative process. Katzmann, *supra* note 40, at 2347. For example, Congress might legislate in light of anticipated court deference to administrative interpretations, but Congress also might legislate in light of the avoidance canon and other avoidance practices of courts. Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 468-69 (1989); Merrill, *supra*, at 995-96.

[75] *See generally*, Katzmann, *supra* note 40, at 2355-60 (reviewing public choice theory and public interest theory); Schacter, *supra* note 65, at 603-06 (discussing legitimacy in statutory interpretation).

[76] *See generally* Ginsburg, *supra* note 1, at 1191 (discussing virtues and problems with Court failing to act as "collegial body").

[77] *See infra* Part IV.A-B (discussing *Yates v. United States*, 354 U.S. 298 (1957), *overruled on other grounds by* Burks v. United States, 437 U.S. 1 (1978)).

[78] *See* Schauer, *supra* note 36, at 88-90 (discussing avoidance canon in context of *Ashwander* and *X-Citement Video*).

dialogue between the Court and other actors about free speech.[79] Developing constitutional law through use of the canon is a way to avoid meaningful communication.[80] This is a poor substitute for dialogue. Magnifying its own frailty and exaggerating the majoritarian accountability of the other branches, the Court attempts to shift responsibility for constitutional interpretation through the dialogic justification for avoidance to another branch which is also anxious to avoid politically difficult decisions.

II. BROAD APPLICATIONS OF THE AVOIDANCE CANON

Courts have traditionally applied the broad approach to the avoidance canon. The Supreme Court decisions in *United States v. X-Citement Video* and *Brockett v. Spokane Arcades* illustrate the effects of this approach.[81] In *X-Citement Video*, the Court applied the broad approach to the canon when assessing the constitutionality of a federal statute. While there are several possible justifications for this approach to the canon, the approach can be criticized for creating separation of powers problems by foreclosing opportunities for the legislature to take a lead in advancing constitutional interpretation.[82] Similarly, federal courts constrain state legislatures when they apply the avoidance canon in assessing the constitutionality of state legislation. *Brockett* illus-

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[79] Marshall, *supra* note 28, at 484. "Judge Friendly observed that questioning this doctrine 'is rather like challenging the Holy Writ.'" HENRY J. FRIENDLY, BENCHMARKS 210 (1967)

[80] *See, e.g.*, Owen M. Fiss, *The Supreme Court 1978 Term, Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 13 (1979) (stating that judges may exercise power only after engaging in dialogue about meaning of public values); Friedman, *supra* note 2, at 665-67 (speculating on public opinion and judicial decision interdependence in abortion case); Katzmann, *supra* note 40, at 2345-47 (summarizing current Supreme Court and congressional concern about ascribing proper meaning to legislation). However, Professor Tushnet criticizes public values reasoning as utopian because it presumes greater public dialogue and consensus than we now have. Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1541 (1985).

[81] United States v. X-Citement Video, Inc., 115 S. Ct. 464, 472 (1994); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 509 (1985); *see also infra* Part III (exploring Supreme Court's rejection of traditional approach in *Rust v. Sullivan*, 500 U.S. 173 (1991), in favor of narrow version of canon); *infra* Part IV (identifying yet another canon formulation in which Supreme Court identifies new areas of "serious doubt").

[82] *Leading Cases*, *supra* note 3, at 287-89.

trates the federalism concerns raised when the Court rewrote a statute to avoid a constitutional issue.[83]

A. *Separation of Powers Concerns and the Avoidance Canon — Rewriting Federal Law in* United States v. X-Citement Video

In its recent decision in *X-Citement Video*, the Court applied the avoidance canon to uphold "the only federal legislation designed to prevent the exploitation of children in pornographic materials."[84] The Protection of Children Against Sexual Exploitation Act[85] (the Act) prohibits "interstate transportation, shipping, receipt, distribution or reproduction of visual depictions of minors engaged in sexually explicit conduct."[86] The Court upheld the Act by interpreting it to contain a scienter requirement as to the age of a child used in sexually explicit materials.[87] The dissenters claimed that the Court thus narrowed the reach of the Act in a manner contrary to congressional intent and foreclosed future legislative options for regulating the exploitation of minors.[88]

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[83] *See infra* Part II.C (discussing federalism concerns raised by *Brockett*).

[84] *Leading Cases*, *supra* note 3, at 284.

[85] 18 U.S.C. § 2252 (1988).

[86] *X-Citement Video*, 115 S. Ct. at 466 (citing 18 U.S.C. § 2252 (1988)). The Act provided that:

> (a) Any person who —
> (1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if —
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
> (B) such visual depiction is of such conduct;
> (2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if —
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
> (B) such visual depiction is of such conduct; . . . . shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 2252 (1988).

[87] *X-Citement Video*, 115 S. Ct. at 472.

[88] *Id.* at 476 (Scalia, J., dissenting).

This case arose when Rubin Gottesman, owner of X-Citement Video, Inc., sold videotapes featuring a child to an undercover police officer.[89] Gottesman was indicted for violating the Act.[90] At trial, evidence was presented that he sold the tapes with "full awareness of [the child's] underage performances."[91] The district court convicted Gottesman.[92] In his appeal, Gottesman challenged the constitutionality of the Act.[93]

On appeal, the Ninth Circuit ultimately reached Gottesman's constitutional claims, finding the Act facially unconstitutional because it lacked an age-scienter requirement.[94] The panel reasoned that "the term 'knowingly' modifies only the surrounding verbs: transports, ships, receives, distributes, or reproduced" and not the separate phrase relating to the age of the child.[95]

Reversing the Ninth Circuit, the Supreme Court found that the statute did contain the necessary age-scienter requirement and therefore did not violate Gottesman's First Amendment free speech rights.[96] The Court agreed with the Ninth Circuit that under the "most natural grammatical reading" of the statute,[97] "the word 'knowingly' would not modify the elements of the minority of the performers or the sexually explicit nature of the material, because they are set forth in independent clauses separated by interruptive punctuation."[98] Nevertheless, the majority cited the avoidance canon, among other reasons, as a justifica-

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[89] *Id.* at 466.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.* at 466-67. The Supreme Court stated that the Ninth Circuit found that it was necessary "that the defendant possess knowledge of the particular fact that one performer had not reached the age of majority at the time the visual depiction was produced." *Id.* During Defendant Gottesman's initial appeal, the Ninth Circuit remanded the case for reconsideration in light of its holding that the Act did not contain a scienter requirement. *Id.* at 466 (citing United States v. Thomas, 893 F.2d 1066, 1070 (9th Cir. 1990)). In *Thomas*, the Ninth Circuit did not reach the constitutional challenges to the Act, apparently because the court failed to recognize any First Amendment issues. *Thomas*, 893 F.2d at 1068.

[95] *X-Citement Video*, 115 S. Ct. at 467.

[96] *Id.* at 466.

[97] *Id.* at 467. In contrast, Justice Stevens found it most natural to treat "knowingly" as modifying each of the elements of the offense in the subsection. *Id.* at 472 (Stevens, J., concurring).

[98] *Id.* at 467.

tion for rejecting what admittedly was the most natural reading of the Act.[99]

The Supreme Court gave three reasons for interpreting the clause to impose a scienter requirement relating to age.[100] First, the Court reasoned that the opposite construction would result in anomalies which Congress must not have intended.[101] Second, the Court relied on the presumption that courts should imply broad scienter requirements in criminal statutes, even if the statute does not contain them.[102] This presumption is closely related to the "rule of lenity," under which the Court adopts the more lenient reading of a criminal statute unless Congress clearly indicates otherwise.[103] The traffickers' knowledge of the age of the participants in the sexually explicit depictions was thus critical in separating legally permissible from impermissible conduct.[104]

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[99] *Id.* at 468.

[100] *Id.* at 467-68.

[101] *Id.* at 467. For example, if "knowingly" modifies only the surrounding verbs like "transports," the statute would apply to "actors who had no idea that they were even dealing with sexually explicit material." *Id.* In the Court's view, Congress could not have intended the "positively absurd" result of criminalizing the conduct of a retail druggist who develops film containing sexually explicit depictions of minors without inspecting it, or a Federal Express courier who delivers a box marked "film" without knowing the content of such film. *Id.* at 467-68.

[102] *Id.* at 468. For example, in *Morissette v. United States*, 342 U.S. 246 (1952), the Supreme Court relied on the common law mens rea requirement to read a broad scienter requirement into a federal embezzlement statute which used the term "knowingly" to modify only the third of three verbs included in the statute. *Id.* at 271-73. The *X-Citement Video* Court pointed out that, consistent with this approach, it had recently applied the scienter presumption in interpreting the National Firearms Act. *X-Citement Video*, 115 S. Ct. at 468 (citing Staples v. United States, 511 U.S. 600, 619 (1994)). The *X-Citement Video* Court noted that the presumption stemmed from concerns about broadly criminalizing "apparently innocent conduct" and attaching "harsh penalties" for unwitting violations. *Id.* (citing *Staples*, 511 U.S. at 609). As the *X-Citement Video* Court explained, based on precedent, "one would reasonably expect to be free from regulation when trafficking in sexually explicit, though not obscene, materials involving adults." *X-Citement Video*, 115 S. Ct. at 469.

[103] *See* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, SUP. CT. REV. 345, 345 (1994) (quoting McNally v. United States, 483 U.S. 350, 359-60 (1987)) (stating that lenity provides that "Court should adopt the 'harsher' of 'two rational readings of a criminal statute only when Congress has spoken in clear and definite language'"). Professor Kahan argues that the rule of lenity "promotes legislative supremacy by *forcing* Congress to take the lead in the field of criminal law and to forgo judicial assistance in defining criminal obligations." *Id.* at 351-55.

[104] *X-Citement Video*, 115 S. Ct. at 467-68. The Supreme Court has traditionally discussed

Third, the Court applied the avoidance canon even though it had never directly addressed the issue of an age-scienter requirement for child pornography traffickers and it had recognized in other cases that child pornography poses different concerns than does pornography with adult performers.[105] Despite the lack of clear constitutional precedent, the Court relied on the avoidance canon to support its reading of the Act.[106] Examining the legislative history of the challenged statute, the Court found that it "speaks somewhat indistinctly" to the particular scienter requirement at issue,[107] but noted that Congress was aware of the Court's relevant First Amendment rulings when the Court considered child pornography legislation in 1977.[108] The Court also looked to precedent, citing four other decisions that suggested a statute "completely bereft" of a scienter requirement relating to the age of the performers "would raise serious constitutional doubts."[109] Although these cases address the scienter requirement in similar anti-pornography and obscenity statutes, they discuss scienter only generally, and not in reference to the age of the performer.[110] Based on these factors, the Court concluded that it must read the statute "to eliminate those doubts so long as such a reading is not plainly contrary to the intent of

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the avoidance canon when the breadth or intent requirements of criminal statutes are challenged. *See, e.g.*, Linder v. United States, 268 U.S. 5, 23 (1925) (reversing conviction of doctor who prescribed opium without filling out federal forms under Harrison Narcotic Drug Act); Baender v. Barnett, 255 U.S. 224, 225-27 (1921) (affirming denial of habeas corpus relief and avoiding intent question by finding that defendant had pled guilty to knowing and intentional possession of counterfeiting equipment); United States v. Jin Fuey Moy, 241 U.S. 394, 402 (1916) (upholding quashed indictment made under Harrison Narcotic Drug Act due to concerns that criminalizing mere possession might be beyond congressional authority and due to federalism concerns); *see generally* Kahan, *supra* note 103, at 346 (discussing related "rule of lenity").

[105] Schauer, *supra* note 36, at 75-76.

[106] *X-Citement Video*, 115 S. Ct. at 467.

[107] *Id.* at 469.

[108] *Id.* For example, the Court noted that it had invalidated a California statute which did not include a "mens rea requirement as to the contents of an obscene book." *Id.* (citing Smith v. California, 361 U.S. 147, 154 (1959)).

[109] *Id.* at 472 (citing Osborne v. Ohio, 495 U.S. 103, 122 (1990); New York v. Ferber, 458 U.S. 747, 765 (1982); Hamling v. United States, 418 U.S. 87, 123 (1974); *Smith*, 361 U.S. at 153).

[110] *Osborne*, 495 U.S. at 122; *Ferber*, 458 U.S. at 765; *Hamling*, 418 U.S. at 123; *Smith*, 361 U.S. at 153.

Congress."[111] Specifically, the Court said: "In [construing the statute] we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked."[112] Thus, the broad approach to the canon allows the Court to presume that Congress has heeded the Court's precedential warnings and that Congress concurs with the Court's constitutional interpretation, even if the text and legislative history of the statute do not support that presumption.

The *X-Citement Video* Court's reliance on the avoidance canon troubled the dissenters.[113] Justices Scalia and Thomas found two problems with the Court's use of the doctrine.[114] They acknowledged that the Court "will often strain" to construe statutes to save them from constitutional attack.[115] The dissenters likened this practice to a "scrivener's error" doctrine which "permits a court to give an unusual (though not unheard-of) meaning to a word which, if given its normal meaning, would produce an absurd and arguably unconstitutional result."[116] But the essence of such a practice "is that the meaning genuinely intended but inadequately expressed must be absolutely clear; otherwise we might be *rewriting the statute* rather than correcting the mistake."[117] The Court has frequently noted that only "reasonable" constructions of statutes should be used to save them from unconstitutionality.[118] Without such a limitation, "there

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[111] *X-Citement Video*, 115 S. Ct. at 472.

[112] *Id.* at 470 (quoting Yates v. United States, 354 U.S. 298, 319 (1957), *overruled on other grounds by* Burks v. United States, 437 U.S. 1 (1978)). The Court refused to "impute to Congress an intent to pass legislation that is inconsistent with the Constitution *as construed by this Court*." *X-Citement Video*, 115 S. Ct. at 470 (emphasis added). *See infra* Part IV.A.3 (discussing *Yates* and avoidance of constitutional questions).

[113] *X-Citement Video*, 115 S. Ct. at 473 (Scalia, J., dissenting).

[114] *Id.* at 476 (Scalia, J., dissenting).

[115] *Id.* (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 841 (1986)).

[116] *Id.* at 474 (Scalia, J., dissenting). Justice Scalia also implied that it might be more appropriate to confine such a "scrivener's error" doctrine to the civil context. *Id.*

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

[118] *See, e.g.*, Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (noting that statute should not be construed contrary to congressional intent in order to render it constitutional); Hooper v. California, 155 U.S. 648, 657 (1895) (stating that reasonable construction is preferred over unconstitutionality). In Justice Brandeis's famous *Ashwander* recitation of the general avoidance doctrine, Brandeis quoted *Crowell v. Benson*, 285 U.S. 22, 62 (1932), when he described the avoidance canon. Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J.,

would be no such thing as an unconstitutional statute" — the federal courts could simply rewrite legislation to conform to their interpretation of the Constitution.[119] Here, the dissenters charged that the Court misapplied the avoidance canon by going beyond a reasonable construction to contravene congressional intent.[120]

In addition to what the dissenters considered the Court's alteration of congressional intent in this construction of the statute, they perceived a larger problem.[121] In their view, the Court rewrote the Act "more radically than its constitutional survival demands."[122] The dissenters did not believe that the Act would raise "serious constitutional doubts" if it lacked a scienter requirement concerning the age of the performers.[123] The dissenters read the same Supreme Court precedent differently: "We have made it entirely clear . . . that the First Amendment protection accorded to such materials is not as extensive as that accorded to other speech."[124] Thus, they believed that Congress could propose alternative schemes that might pass constitutional muster, such as a strict liability scheme as to the age of a performer for certain types of child pornography.[125] Alternatively, Congress might choose to enact a recklessness requirement as the standard of liability.[126]

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concurring).

The *Crowell* Court proposed a fairly weak "reasonableness" limitation: "When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is *fairly possible* by which the question may be avoided." *Crowell*, 285 U.S. at 62 (emphasis added). Justice Brandeis, dissenting in *Crowell*, proposed a narrower version of the avoidance doctrine, arguing that the Court should only use the avoidance doctrine where a statute is "equally susceptible of two constructions, under one of which it is clearly valid and under the other of which it may be unconstitutional . . . ." *Id.* at 76 (Brandeis, J., dissenting). He concluded that the statute challenged in *Crowell* was not equally susceptible to two constructions. *Id.* However, in *Ashwander*, Brandeis memorialized the *Crowell* majority's formulation of the canon. *Ashwander*, 297 U.S. at 348 (Brandeis, J., concurring).

[119] *X-Citement Video*, 115 S. Ct. at 476 (Scalia, J., dissenting).

[120] *Id.* at 474 (Scalia, J., dissenting).

[121] *Id.* at 476 (Scalia, J., dissenting).

[122] *Id.*

[123] *Id.* at 474 (Scalia, J., dissenting).

[124] *Id.*

[125] *Id.* at 475 (Scalia, J., dissenting).

[126] United States v. X-Citement Video, Inc., 982 F.2d 1285, 1296-97 (9th Cir. 1992)

The primary criticism of the dissent was that the majority "raise[d] baseless constitutional doubts that will impede congressional enactment of a law providing greater protection for the child-victims of the pornography industry."[127] The dissenters read the majority as foreclosing future legislative options by suggesting that a law imposing absolute liability on those trafficking in sexually exploitative materials involving children would violate the First Amendment.[128] In sum, the dissenters accused the Court of leaving "a relatively toothless child pornography law that Congress did not enact," and which would be difficult to strengthen.[129]

B. Ramifications of the Broad Approach to the Canon

The *X-Citement Video* decision has deeper implications than merely adding a scienter requirement for child pornography statutes. Both the majority and the dissent in *X-Citement Video* demonstrate that when the Court uses the avoidance canon, it construes the Constitution. The dissent suggests that invalidation would be a more measured step which would better promote a dialogue with Congress about the First Amendment. Although it may be doing so at a "subconstitutional" or "quasi-constitutional" level, the effect of the Court's ruling is to give additional weight to that Court's interpretation of constitutional precedents, and to signal what the Court considers to be the constitutional roles of Congress and the federal courts. Because the Court presumes that Congress listens to its earlier rulings and would not enter "a constitutional danger zone so clearly marked,"[130] it affirms its role of defining constitutional boundaries.

This approach to the avoidance canon may generally impede constitutional dialogue by not allowing for differing constitutional interpretations over time to reflect current public values or democratic theories.[131] It makes the Supreme Court the locus

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(Kozinski, J., dissenting), *rev'd*, 115 S. Ct. 464 (1994); *Leading Cases*, *supra* note 3, at 288 nn.70-71.

[127] *X-Citement Video*, 115 S. Ct. at 476 (Scalia, J., dissenting).

[128] *Id.* at 475-76 (Scalia, J., dissenting).

[129] *Id.* at 476 (Scalia, J., dissenting).

[130] *Id.* at 470 (quoting Yates v. United States, 354 U.S. 298, 319 (1957), *overruled on other grounds by* Burks v. United States, 437 U.S. 1 (1978)).

[131] *See generally* Eskridge & Frickey, *supra* note 6, at 629 (arguing that Supreme Court

of most change in constitutional law. While this situation may lend stability in terms of gradual change in the law, it is impractical and frustrating in light of the Court's limited resources and capacity; and the practical result is longer retention of the status quo.[132]

When the Court applies the avoidance canon, it ostensibly affords Congress a chance to clarify its intent to push the limits of the boundaries.[133] But Congress may not respond to the Court's request for a clearer statement.[134] This legislative reluctance may mean that the Court's use of the avoidance canon to reaffirm or extend its own precedent effectively terminates constitutional dialogue on an issue, without even a full airing among the Justices.[135] Moreover, the Court's use of the avoidance canon to set quasi-constitutional boundaries on Congress's power may foster abrogation of legislative responsibility for ensuring that legislation meets constitutional requirements. As Judge Abner Mikva, a former member of Congress, noted: "The fastest way to empty out the chamber [of Congress] is to get up and say, 'I'd like to talk about the constitutionality of this bill.' Members of Congress believe that's what courts are for."[136] In

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actively reads constitutional values into statutes); Schacter, *supra* note 65, at 594-96 (arguing that "metademocratic" method of judicial interpretation advances important democratic goals). Numerous scholars advocate that an "important role of constitutional interpretation is to articulate and enforce 'public values' for our nation." Eskridge, *supra* note 20, at 1007 (citing commentators). *See also* ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 87-88 (1987) (arguing that constitutional interpretation is process of deciding which fundamental values should be safeguarded from political majorities).

[132] *See* Kloppenberg, *supra* note 5, at 334-35 (discussing role of stare decisis in preserving status quo in constitutional adjudication).

[133] Rust v. Sullivan, 500 U.S. 173, 224 (1991) (O'Connor, J., dissenting).

[134] *X-Citement Video*, 115 S. Ct. at 475 (Scalia, J., dissenting). Judge Posner notes that, due to Congress's general inability or unwillingness to override a judicial misconstruction of one of its statutes, the canon yields "a judge-made constitutional 'penumbra'." Posner, *supra* note 53, at 816; Marshall, *supra* note 28, at 485.

[135] *Leading Cases*, *supra* note 3, at 288. "The Court should refrain from using the avoidance canon as a crutch to circumvent 'difficult and sensitive questions' because it essentially denies Congress the opportunity to *push the limits of the Constitution* as it seeks to solve social, economic, and legal problems." *Id.* at 289 (quoting NLRB v. Catholic Bishop, 440 U.S. 490, 507 (1979) (emphasis added)).

[136] Linda Greenhouse, *What's a Lawmaker to Do About the Constitution*, N.Y. TIMES, June 3, 1988, at B6; *see also* Marshall, *supra* note 28, at 481 (discussing "rule of lenity" and avoidance canon).

other words, the canon may allow both Congress and the Court to "sidestep" constitutional questions over time.[137]

For this reason, an important factor in evaluating the Court's use of the avoidance canon is whether the constitutional danger zone is in fact clearly marked by precedent or merely sketched out by dicta. With regard to the scienter issue presented in *X-Citement Video*, the majority viewed the First Amendment boundaries as fairly well developed and "clearly marked."[138] In contrast, the dissenters characterized the precedent as leaving room for a different First Amendment test as to an age-scienter requirement in child pornography.[139] They charged the Court with reaching beyond existing precedent to recognize a new danger zone.[140] In situations where the precedent is unclear or not directly on point, reasoned elaboration, involving a full and direct airing of the policy concerns and precedent, is preferable to use of the canon.

Additionally, while a frequent justification for avoidance is the Court's deference to Congress,[141] the *X-Citement Video* Court's use of the canon does not result in greater deference. Following this decision, Congress was left with a weakened statute and a quasi-constitutional law warning against constitutional dangers, rendering enforcement of its legislative aims more difficult. Instead, Congress might prefer constitutional consideration of its legislation over judicial interpretations foreclosing its options.[142]

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[137] *See Leading Cases*, *supra* note 3, at 286-88 (suggesting that avoidance canon discourages Congress from being as careful as it could be, which may frustrate dialogue between Congress and Court); *see also* Kloppenberg, *supra* note 5, at 318-30 (discussing effect of Supreme Court's decision in *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), on dialogue with other constitutional actors); Marshall, *supra* note 28, at 490 (pointing out danger that courts may use avoidance canon "to choose a construction not necessarily to save the statute, but to save the court from having to decide on the statute's constitutionality").

[138] *X-Citement Video*, 115 S. Ct. at 469 (quoting Yates v. United States, 354 U.S. 298, 319 (1957), *overruled on other grounds by* Burks v. United States, 437 U.S. 1 (1978)).

[139] *Id.* at 474 (Scalia, J., dissenting).

[140] *Id.* at 473 (Scalia, J., dissenting); *see also* Motomura, *supra* note 51, at 547-50 (noting developing limitations of plenary powers doctrine under which courts rarely challenge other branches).

[141] *See infra* notes 161-65 and accompanying text (discussing federalism concerns as purpose for applying doctrine).

[142] *See* Marshall, *supra* note 28, at 489 (stating that Supreme Court should not presume Congress's preference to comport with its preference); Posner, *supra* note 53, at 815-16 (noting merits of avoidance canon, but concluding that canon is detrimental because it

As noted by the *X-Citement Video* dissenters, the most serious problem raised by the majority's application of the canon involved separation of powers — the future foreclosure of legislative options for imposing liability on purveyors of child pornography.[143] After the *X-Citement Video* ruling, Congress could directly challenge the Court's reading of the First Amendment in the child pornography context by attempting to pass the statute again without an age-scienter requirement. However, Congress will probably conclude that to challenge the Court on the extent of protection the First Amendment affords purveyors of child pornography is futile. Thus, it is highly unlikely that a meaningful constitutional dialogue between the branches will ever get started; use of the avoidance canon has cut it short.

Congress should not allow the use of the canon in *X-Citement Video* to signal the end of debate. Instead, Congress should view the opinion as an opportunity to make its intent clear, to more fully air the issue in legislative debate, to clarify the text of the Act, and try again to impose a higher standard of liability on child pornography purveyors. The revised Act would likely be challenged, but another set of Justices might rule differently than did the *X-Citement Video* Court.[144] Even if the Court's composition remains constant, the Justices could revise their thinking about the First Amendment in light of such a clear, strong statement of congressional intent.

Some may argue that this scenario is naive considering how Congress functions and how stare decisis constrains constitutional law. But that charge only underscores the costs of avoidance. Congress and the public would benefit more from a direct and in-depth discussion of First Amendment protection for child pornographers, with majority and dissenting Justices attempting to persuade us to adopt their visions of the First Amendment. *X-Citement Video* illustrates that the supposed benefits of

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enlarges judge-made constitutional prohibitions); *Leading Cases*, *supra* note 3, at 287 (commenting on "modernist" statutory interpretation which goes beyond legislative intent).

[143] *See supra* notes 113-29 and accompanying text (discussing *X-Citement Video* dissent's position on less restrictive alternatives).

[144] *See* Kloppenberg, *supra* note 5, at 315-17 (citing examples where judicial decrees were not Court's last word); Friedman, *supra* note 2, at 644-53 (discussing examples where judicial decisions were not final word); Katzmann, *supra* note 40, at 2358 (discussing work of Melnick and Eskridge explaining legislative success in overturning court rulings).

avoidance — including deference to Congress and promotion of dialogue — are often illusory.

C. *Federalism Concerns and the Avoidance Canon — Rewriting State Law in* Brockett v. Spokane Arcades

When a federal court hears a constitutional challenge to a state statute, federalism principles are implicated, as *Brockett v. Spokane Arcades*[145] demonstrates. Decided ten years before *X-Citement Video*, the *Brockett* Court partially invalidated a state obscenity statute.[146] Although it did not use the avoidance canon, the Supreme Court rewrote the state statute to conform to its precedent.[147] The result was similar to the Court's rewriting in *X-Citement Video*.[148] Both statutes were held not to violate the Constitution as construed by the Court, but only after the Court interpreted the statutes in a way that significantly modified them.[149] However, *Brockett* raises additional concerns because the Court rewrote state rather than federal law. While it may be difficult to reach agreement on the strength of federal and state interests, the interplay of interests is relevant in determining whether to apply the canon.

In *Brockett*, the State of Washington passed a broadly written state moral nuisance law. This statute curtailed publication of materials appealing not only to "shameful," "morbid," or "perverted" sexual interests, but also materials appealing to normal, healthy sexual interests.[150] It was challenged on its face in federal district court within days of enactment.[151] The Ninth Circuit completely invalidated the law, reasoning that it was uncon-

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[145] 472 U.S. 491 (1985).

[146] *Id.* at 506-07.

[147] *Id.* at 504-05. The Court invalidated the statute "only insofar as the word 'lust' is taken to include normal interest in sex." *Id.* at 504. Alternatively, the Court could have excised the word "lust" from the statute if the word referred *only* to normal sexual interest. *Id.* at 505. However, the word "lasciviousness" would still be left intact for regulation of material appealing to truly prurient sexual interests. *Id.*

[148] *Compare* United States v. X-Citement Video, Inc., 115 S. Ct. 464, 472 (1994) (interpreting term "knowingly" to apply to both nature of material and age of performers) *with Brockett*, 472 U.S. at 504 (finding partial invalidation when statute was read to prohibit normal as well as unhealthy interests).

[149] *X-Citement Video*, 115 S. Ct. at 472; *Brockett*, 472 U.S. at 504.

[150] WASH. REV. CODE § 7.48A.010-.900 (1996).

[151] *Brockett*, 472 U.S. at 491.

stitutionally overbroad and that it chilled activity protected by the First Amendment.[152]

Upon review, the Supreme Court found the Ninth Circuit's facial invalidation of the Washington statute "improvident" because complete invalidation provided no chance for the state to apply the statute in a narrow manner.[153] Specifically, state courts (or even state officials charged with prosecuting persons under the statute) had no opportunity to "save" the statute through use of the avoidance canon[154] and no chance to interpret it as conforming to the Court's obscenity precedents.[155] The Court noted that Washington courts had previously followed its precedent and that the Washington legislature had incorporated much — albeit not all — of this standard into its new law.[156]

In *Brockett*, the Court reached the same result as in *X-Citement Video* — narrowing a statute so as to conform to Supreme Court First Amendment precedent.[157] The Court accomplished this

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[152] J-R Distribs., Inc. v. Eikenberry, 725 F.2d 482, 493 (9th Cir. 1984), *rev'd*, *Brockett*, 472 U.S. at 507. However, the Supreme Court rejected the Ninth Circuit's holding in *J-R Distributors*, stating that there is nothing in the First Amendment context to require invalidation of the law. *Brockett*, 472 U.S. at 502. Although the overbreadth doctrine has never been explicitly overruled, its vitality has been limited in recent decades. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 613, 615 (1973) (barring plaintiffs charged with violating statute from invoking overbreadth doctrine because their acts were not within allegedly overbroad portion of statute). Professor Dorf raises issues relating to the Court's recent approach to facial challenges and the overbreadth doctrine. Dorf, *supra* note 9, at 294.

[153] *Brockett*, 472 U.S. at 501.

[154] *Id.* at 502-04. The Court cited other portions of the avoidance doctrine, but not the avoidance canon. *Id.* at 501-03. Nonetheless, the result — the narrowed interpretation of a statute — is an outcome similar to that obtained through traditional use of the avoidance canon. *See infra* note 160 and accompanying text (discussing similar concerns in ripeness cases).

[155] *See* Miller v. California, 413 U.S. 15, 23-26 (1973) (describing "obscene" materials). The Court stated that obscene material is that which:

> (a) the average person, applying contemporary community standards, would find appeals to the prurient interest; (b) . . . depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted).

[156] *See Brockett*, 472 U.S. at 506 n.13 (noting that Washington courts had construed statute to incorporate Court's obscenity test).

[157] *X-Citement Video*, 115 S. Ct. at 469; *Brockett*, 472 U.S. at 504.

through partial invalidation rather than by "rewriting" a statute with reference to the canon.[158] The Court stated that "[p]artial invalidation would be improper if it were contrary to legislative intent in the sense that the legislature had passed an inseverable Act or would not have passed it had it known the challenged provision was invalid."[159] But the Washington statute included a severability clause, and the Court reasoned that it "would be frivolous to suggest . . . that the Washington Legislature, if it could not proscribe materials that appeal to normal as well as abnormal sexual appetites, would have refrained from passing the moral nuisance statute."[160]

In response to both *X-Citement Video* and *Brockett*, legislators have the option to revise the statute to reflect the Court's interpretation, or to amend the statute to assert the legislature's true intent. Arguably, redacting a single clause is clearer in terms of constitutional law because it serves as a micro-constitutional ruling (i.e., "if we didn't decide you really didn't mean to include this phrase, we would have to find the whole statute to be unconstitutional"), but this is an extremely fine distinction. Because its purpose and effect are virtually indistinguishable from that of the avoidance canon, partial invalidation could be categorized as an adjudicatory approach with results similar to the application of the broad approach to the avoidance canon.

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[158] *Brockett*, 472 U.S. at 506.

[159] *Id.*

[160] *Id.* at 506-07. In contrast, Justices O'Connor, Rehnquist, and Burger in *Brockett* advocated yet another approach for avoiding constitutional difficulties while retaining much of the legislative product. *Id.* at 507-10 (O'Connor, J., concurring). They suggested that the federal courts should have abstained under *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 508 (1941), rather than reach the constitutional claim. *Brockett*, 472 U.S. at 508-09 (O'Connor, J., concurring). Troubled by the breadth of the facial challenge brought in federal court only days after the statute's enactment, the Justices raised concerns similar to those in ripeness cases. *Id.* at 507 (O'Connor, J., concurring). They believed that the opportunity for Washington courts to "provide authoritative adjudication of questions of state law" outweighed the federal court's general duty to adjudicate federal questions properly before it. *Id.* at 508 (O'Connor, J., concurring). In rejecting abstention, the Ninth Circuit had stated that free expression is "always an area of particular federal concern." J-R Distribs., Inc. v. Eikenberry, 725 F.2d 482, 487-88 (9th Cir. 1984). However, the Supreme Court rejected this view. *Brockett*, 472 U.S. at 509-10 (O'Connor, J., concurring). Instead, the Court stated that, in completely invalidating the statute, the Ninth Circuit had engaged in "[s]peculation" and "a premature and avoidable interference with the enforcement of state law in an area of special concern to the States." *Id.* at 510 (O'Connor, J., concurring).

Federalism concerns are implicated whenever a federal court construes a state statute. Using several components of the avoidance doctrine and various abstention techniques, federal courts frequently defer to state courts, giving them the first chance to review the scope and validity of state statutes, especially when the challenged statute has not yet been applied. This permits a state court to either construe the statute so that it does not raise federal constitutional issues, or to decide the federal constitutional question in a manner consistent with Supreme Court precedent, perhaps by severing any unconstitutional provisions. In short, federalism concerns argue for exhaustion of state remedies before the federal courts address the constitutionality of state law. Thus, in her *Brockett* concurrence, Justice O'Connor argues that federalism concerns mandate abstention (at least temporarily) by the federal courts as to the Washington statute.[161]

But federalism concerns compete here with a federal court's mission to engage in judicial review — to resolve constitutional challenges and thereby give legal guidance. The Ninth Circuit directly complied with this duty when it invalidated the Washington statute in *Brockett*.[162] It provided a lengthy discussion of the First Amendment designed to guide the legislature in future revision of the statute.[163] Federal courts continually define and state courts continually apply federal constitutional law, particularly in criminal cases. The Constitution defines the minimum rights of each individual, and a state constitution, statute, or judicial decision cannot limit or modify that minimum. Applying a different standard to state legislative actions as a matter of prudence seems inconsistent and inappropriate, particularly when the only significant issue is whether the statute violates the Federal Constitution. Here, both the Ninth Circuit and the Supreme Court assume that the statute as written did violate the First Amendment.[164]

The *Brockett* majority chose a middle-ground alternative between abstention and facial invalidation. The Court partially

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[161] *Brockett*, 472 U.S. at 507 (O'Connor, J., concurring).

[162] *Id.* at 495.

[163] *J-R Distribs.*, 725 F.2d at 485-87.

[164] *Brockett*, 472 U.S. at 495, 504.

rewrote the statute, arguing that the state legislature (must have) intended the new result, one consistent with the Court's prior precedents.[165] Apparently, the Court believed that a state court would have reached the same result when it construed the statute in light of the First Amendment. This adjudicatory move, with an outcome so similar to the avoidance canon, seems an odd way to promote deference to states and avoid unnecessary federal intervention in state law. When broadly applying the canon in reviewing state statutes, the Court runs the risk of raising constitutional doubts without defining the parameters of its concerns or the doctrines involved in resolving such doubts. At the same time, the Court takes on a quasi-legislative role by engaging in actual revision of the statute. These acts in themselves might raise federalism concerns. When relying on the canon to rewrite state legislation, the Court fails to fulfill its central role of directly determining federal constitutional questions, while arguably intervening too directly in the legislative function of the state.

In *Brockett*, the Court does more clearly and directly discuss First Amendment constraints than in many cases in which it uses the avoidance canon. But the partial rewriting of the statute in *Brockett*, and similar applications of the avoidance canon, cannot be justified on federalism grounds. Therefore, courts should carefully scrutinize federalism interests and question whether rewriting the statute is more deferential than affording the state legislature an opportunity to make clear its intent after a court makes clear its understanding of the Constitution.

III. A FAILURE TO APPLY THE CANON IN OBVIOUS CIRCUMSTANCES

Courts traditionally apply the avoidance canon when they may construe an ambiguous statute in such a way as to avoid reaching a constitutional issue, particularly when the legislative history can reasonably support such a construction and it is consistent with prior Supreme Court precedent. As in *X-Citement Video*, frequently the Court has applied the avoidance canon in First Amendment challenges to narrowly construe the challenged

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[165] *Id.* at 506.

statute and thus avoid the necessity of determining the outer reaches of the First Amendment.[166] However, the application of the avoidance canon in *Rust v. Sullivan*[167] had a very different result.

Several years before its decision in *X-Citement Video*, the Court eschewed application of the avoidance canon in *Rust v. Sullivan*.[168] In *Rust*, the plaintiff's challenge to constitutionally questionable regulations presented the classic situation in which the Court has applied the avoidance canon.[169] The statute under which the regulations were issued permitted an interpretation that would have avoided reaching the constitutional question under the broad approach to the canon.[170] Nonetheless, the Court selected a narrow version of the canon in order to reach a contentious and politically volatile constitutional issue: speech rights concerning abortion.[171] An attempt to reconcile the broad application of the canon in *X-Citement Video* with its narrow application in *Rust* highlights how application of the avoidance canon may be driven by politics.

A. Rust v. Sullivan

Rust demonstrates that the Court engages in constitutional interpretation when it determines whether the canon applies or not.[172] Disputing whether the constitutional questions were "serious," Justices in both the majority and dissent interpreted the Constitution to reach opposite conclusions about the canon's applicability.[173] In contrast to the rest of the court, in her dissent, Justice O'Connor refused to state her position on the merits of the constitutional question, and instead advocated applica-

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[166] *See infra* Part IV (discussing cases extending free speech protection by construing statutes narrowly and avoiding First Amendment issues).

[167] 500 U.S. 173 (1991).

[168] *Id.* at 191.

[169] *Id.*

[170] *Id.* at 223-24 (O'Connor, J., dissenting).

[171] *Id.* at 190-91.

[172] *Id.* at 191.

[173] *Id.* at 191, 205 (Blackmun, J., dissenting).

tion of the avoidance canon so that Congress could clarify its intent regarding the recent regulation.[174]

Rust involved a challenge to newly promulgated rules restricting Title X providers.[175] In Title X of the Public Health Service Act,[176] Congress provided funding for family planning clinics to serve low-income women, who frequently face "disproportionately high rates of teenage pregnancy, infant mortality, and impaired health."[177] While Title X funds clearly could not be used to perform abortions,[178] "the [A]ct made no mention of restricting abortion counseling."[179] For almost eighteen years, the regulations authorized Title X providers to give "non-directive counseling about all available alternatives, including prenatal care, adoption, and abortion."[180] Although repeated attempts were made in Congress to amend the Act to prohibit abortion counseling, they all failed.[181]

In 1988, the Secretary of Health and Human Services ("Secretary") promulgated new regulations providing in part that a Title X project "may not provide counselling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning."[182] The new regulations also prohibited a Title X provider from engaging in activities that "encourage, promote or advocate abortion as a method of family planning."[183] The Secretary noted that the changed interpretations responded to the political climate, including

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[174] *Id.* at 223-24 (O'Connor, J., dissenting).

[175] *Id.* at 181.

[176] Public Health Service Act, §§ 1002, 1008 (codified in 42 U.S.C. § 300a, 300a-6 (1994)).

[177] Walter Dellinger, *Gag Me with a Rule: Bush and Abortion Counseling*, THE NEW REPUBLIC, Jan. 6, 1992, at 14 nn.28-29.

[178] *Rust*, 500 U.S. at 184. Section 1008 of Title X provides that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." *Id.*

[179] Dellinger, *supra* note 177, at 14.

[180] *Id.*

[181] *Id.* Additionally, during the last portion of President Reagan's second term, his administration expended tremendous effort to prohibit Title X abortion counseling through administrative action. *Id.* Reagan's aide, Gary Bauer, who was the head of a prominent anti-abortion lobbying group, spearheaded the effort. Interview with Garrett Epps, Assistant Professor of Law, University of Oregon School of Law in Eugene, Or. (July 13, 1994).

[182] *Rust*, 500 U.S. at 179.

[183] *Id.* at 180 (quoting 42 C.F.R. § 59.10(a) (1989)).

changed attitudes toward the "elimination of unborn children by abortion."[184] These regulations — commonly called the "gag rules"[185] — were "an extreme departure" from almost eighteen years of agency policy, and they "placed a heavy burden on the fund grantees."[186]

B. The Majority's Reliance on the Chevron *Doctrine and Resolution of the Merits*

In *Rust*, the Supreme Court relied upon a narrow approach to the avoidance canon to find that the newly promulgated regulations were not clearly unconstitutional and therefore the Court need not apply the canon.[187] Under this approach, the Court was able to reach the constitutionality of the controversial new federal regulations and uphold them by a five to four margin.[188] The plaintiffs, consisting of both Title X grantees and doctors suing on behalf of themselves and their patients, argued that the regulations were inconsistent with the plain language of the statute, which forbid "Title X projects only from *performing* abortions."[189] The Court rejected the argument that the regulations contravened congressional intent or the statute's plain language, conceding only that the statutory language is "ambiguous" because it "does not speak directly to the issues of counsel-

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[184] 53 Fed. Reg. 2923-24 (1988). Note, however, that these changed attitudes had not permeated Congress such that the proposed Title X amendments restricting abortion counseling could pass.

[185] *See, e.g.*, Carole I. Chervin, *The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights*, 41 STAN. L. REV. 401, 401 (1989) (noting that regulations are commonly known as "gag rules").

[186] Linda Maher, *Government Funding in Title X Projects: Circumscribing the Constitutional Rights of the Indigent:* Rust v. Sullivan, 29 CAL. W. L. REV. 143, 143 (1992). Maher notes that the "previous administrative interpretation at first permitted and then required the projects to provide information about and referrals for abortion." *Id.* at 149 & n.41.

[187] *Rust*, 500 U.S. at 184.

[188] *Id.* at 192, 201-03. The *Rust* Court, relying on the *Salerno* principle, points out that plaintiffs brought a facial challenge and thus must meet a heavy burden. *Id.* at 183. The *Salerno* principle maintains that a "facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). Professor Dorf challenges the validity of the *Salerno* principle, arguing that this rule is problematic for both constitutional and prudential reasons. Dorf, *supra* note 9, at 238-39.

[189] *Rust*, 500 U.S. at 181 (emphasis added).

ling, referral, advocacy, or program integrity" — the issues to which the regulations are directed.[190] All Justices except one agreed that Title X was ambiguous in this respect.[191] The Court also found that the legislative history of the statute was ambiguous on these issues.[192]

Because the statute was ambiguous as to the challenged regulations, the Court upheld the regulations by relying on the *Chevron*[193] doctrine of administrative deference.[194] The majority reasoned that "[t]he Secretary's construction of Title X may not be disturbed as an abuse of discretion if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress's expressed intent."[195] Because Congress had not expressed an intent counter to the regulations in a manner the Court deemed sufficiently clear, it concluded that the regulations were a permissible construction of Title X and deferred to the agency's interpretation.[196] The Court was not disturbed by the Agency's reversal of eighteen years of agency policy because the Secretary had reasonably justified the reversal, in part relying on a changed political attitude toward abortion.[197] Nor was the Court troubled that the Agency acted upon this perceived change although Congress had failed to

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[190] *Id.* at 184 (quoting 42 U.S.C. § 300a, 300a-6 (1994)).

[191] *Id.* at 185; *id.* at 207 (Blackmun, J., dissenting). Justice Stevens argued that the language and history of the statute were clear in prohibiting only *conduct*, rather than dissemination of information. *Id.* at 221 (Stevens, J., dissenting).

[192] *Id.* at 185.

[193] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[194] *Id.* at 842-43. Under *Chevron*, courts must first interpret the statute under which the agency acted to determine whether the statute spoke to the precise question at issue. *Id.* at 842. If Congress did not address the specific issue, or if its intent is ambiguous, the court will defer to the agency's interpretation if it is based on a permissible construction of the statute in question. *Id.* at 843.

For a helpful assessment of the courts' use of the *Chevron* doctrine, see Merrill, *supra* note 74, at 921-1003. Professor Merrill also discusses the Supreme Court's application of the avoidance canon in *Rust*, which applied the *Chevron* doctrine, and *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988), which used the canon to "trump" the *Chevron* doctrine. *Id.* at 988-89. For another perspective on the administrative state, see Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1513-14 (1992).

[195] *Rust*, 500 U.S. at 184 (citing *Chevron*, 467 U.S. at 842-43).

[196] *Id.* at 185-86.

[197] *Id.* at 186-87.

pass numerous bills amending Title X to specifically prohibit abortion counselling.[198]

After declining to apply the avoidance canon, the *Rust* majority concluded that the Secretary's regulations did not offend the Fifth or First Amendments.[199] The Court reasoned that the regulations did not violate the free speech rights of the providers, their staffs, or Title X patients because the regulations did not discriminate on the basis of viewpoint.[200] Further, the Court found that the regulations did not unconstitutionally condition receipt of Title X funding on the relinquishment of a constitutional right to engage in abortion counseling.[201] Reasoning that the government can choose to fund one constitutionally protected activity over another (i.e., childbirth over abortion), the Court also rejected Fifth Amendment challenges to the regulation.[202] The Court noted that Title X's indigent clients are in "no worse position than if Congress had never enacted Title X."[203]

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[198] Dellinger, *supra* note 177, at 14. As noted earlier, the regulatory reform was led by an executive aide associated with a prominent anti-abortion group. *See supra* note 181 and accompanying text (discussing Reagan administration's failed efforts to defeat Title X abortion counselling).

[199] *Rust*, 500 U.S. at 203.

[200] *Id.* at 192-200. The majority reasoned that selective government funding of activities is acceptable. It held that the government can regulate speech through reasonable time, place and manner restrictions so long as the government does not condition the acceptance of funds on the recipients' willingness to espouse a particular viewpoint. *Id.* at 194-200. The Court applied this to the gag rule as follows:

> [The government could] selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

Id. at 193.

Professor Wells argues that this conflation of speech and activity is inconsistent with the Court's traditional approach of carefully scrutinizing viewpoint-based regulations. Christina E. Wells, *Abortion Counseling as Vice Activity: The Free Speech Implications of* Rust v. Sullivan *and* Planned Parenthood v. Casey, 95 COLUM. L. REV. 1724, 1731-32 (1995). Moreover, Wells demonstrates that the gag rule "sought to silence only one side of the discussion concerning legitimate family planning alternatives." *Id.* at 1730.

[201] *Rust*, 500 U.S. at 191-200.

[202] *Id.* at 200-03.

[203] *Id.* at 203.

The majority rejected the dissenters' argument that the Court should apply the canon in order to allow Congress to clarify whether it intended the statute to permit the gag rules because the regulations posed serious constitutional questions.[204] The majority reasoned that the regulations did not raise sufficiently "grave and doubtful constitutional questions" to indicate that Congress intended to preclude their issuance.[205] The Court held, therefore, that it "need not invalidate the *regulations* in order to save the *statute* from unconstitutionality."[206]

Significantly, the *Rust* majority reached the constitutional questions — determining that plaintiffs' arguments did not "carry the day" — *before* refusing to apply the more cautious approach to the canon, thus affirming that they would not have to find the regulations (if within the permissible scope of the statute) *un*constitutional.[207] *In other words,* the majority justified not applying the canon by peeking ahead to the merits and realizing that five Justices would vote for the constitutionality of the gag rules. This may be a natural result of the Court's selection of the narrow approach to the canon rather than the broad approach. As noted in Part I, the narrow approach provides that if one reading *will be* unconstitutional, the constitutionally permissible reading should be chosen; the broad approach allows avoidance whenever a statute raises serious constitutional doubts.[208]

Selection of the narrow approach heightens the appearance that political ideology was the dominant reason for reaching the constitutional question in *Rust.* Consideration of political context surrounding regulations is appropriate under the *Chevron* doctrine because the elected executive branch head appoints agency heads who implement specific political agendas.[209] But if political agendas raise constitutional doubts, courts should consider the political context in the initial selection between the narrow

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[204] *Id.* at 204-05 (Blackmun, J., dissenting).

[205] *Id.* at 191 (citation omitted).

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

[207] *Id.*

[208] *See supra* notes 20-25 and accompanying text (discussing various approaches to avoidance canon).

[209] Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc., 467 U.S. 837, 865-66 (1984).

or broad approach to the canon, and in deciding whether to subsequently use the canon.

C. *Opposing Views of the* Rust *Court's Use of the Avoidance Canon*

The dissenters in *Rust* criticized the majority for "sidestepping" the avoidance canon in its "zeal" to resolve important constitutional issues.[210] As Justice Blackmun stated, "Whether or not one believes that these regulations are valid, it avoids reality to contend that they do not give rise to serious constitutional questions."[211] It appears indisputable that the dissenters are correct that the regulations raised a "serious" constitutional question.[212] Federal circuit courts had differed in resolving constitutional challenges to the regulations.[213] Of the three courts of appeal that heard challenges to the regulations, two had invalidated them as unconstitutional.[214] Three dissenting Supreme Court Justices found the regulations unconstitutional under the First and Fifth amendments.[215] As Justice Blackmun noted, "the extent to which the government may attach an otherwise constitutional condition to the receipt of a public benefit . . . implicates a troubled area of our jurisprudence."[216]

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[210] *Rust*, 500 U.S. at 204 (Blackmun J., dissenting); *id.* at 220-23 (Stevens, J., dissenting); *id.* at 223-25 (O'Connor, J., dissenting); *see also* Maher, *supra* note 186, at 146 (stating that *Rust* majority misapplied canon).

[211] *Rust*, 500 U.S. at 205 (Blackmun, J., dissenting). The dissent identified several serious constitutional questions. Regulation of abortion-related speech implicated the "extent to which the Government may attach an otherwise unconstitutional condition to the receipt of a public benefit" and "the Regulations impose viewpoint-based restrictions upon protected speech and are aimed at a woman's decision whether to continue or terminate her pregnancy." *Id.*; *see* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989) (reviewing doctrine of unconstitutional conditions). For an update on viewpoint-based restrictions, see *Rosenberger v. Rector & Visitors of University of Virginia*, 115 S.Ct. 2510, 2516 (1995), which discusses a state's denial of funding for a christian student organization constituting unconstitutional viewpoint discrimination.

[212] *Rust*, 500 U.S. at 205 (Blackmun, J., discussing).

[213] *Compare* Planned Parenthood Fed'n v. Sullivan, 913 F.2d 1492, 1506 (10th Cir. 1990) (Baldock, J., dissenting) (holding that regulations violate First and Fifth Amendments) *and* Massachusetts v. Secretary of Health & Human Servs., 899 F.2d 53, 53 (1st Cir. 1990) (en banc) (holding new regulations unconstitutional) *with* New York v. Sullivan, 889 F.2d 401, 401 (2nd Cir. 1989) (upholding regulations against constitutional challenge).

[214] *Rust*, 500 U.S. at 205 (Blackmun, J., dissenting).

[215] *Id.* at 207-21 (Blackmun, J., dissenting).

[216] *Id.*

Because the regulations presented an important constitutional question, the dissenters in *Rust* urged that the canon should apply because the statute was ambiguous[217] and it "easily sustain[ed] a constitutionally trouble-free interpretation."[218] If the statute was read "to prohibit *only the actual performance of abortions* with Title X funds," as the Agency did for nearly eighteen years, the statute would be constitutional under prior Supreme Court rulings permitting selective government funding of childbirth versus abortion.[219] Once the Secretary read the statute as permitting regulation of abortion-related speech between Title X providers and patients, the dissenters found serious constitutional questions.[220]

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[217] *Id.* at 207 (Blackmun, J., dissenting). Because they deemed the statute "decidedly ambiguous," the dissenters urged application of the avoidance canon. *Id.* In addition, the *Rust* dissenters quote Sunstein's discussion of *Chevron*: "It is thus implausible that, after *Chevron*, agency interpretations of ambiguous statutes will prevail even if the consequence . . . is to . . . raise constitutional doubts." *Id.* (quoting Sunstein, *supra* note 20, at 2113). But not all agree that Title X was ambiguous about restrictions on abortion counseling and referral. *See, e.g.*, Maher, *supra* note 186, at 174-78 (arguing that legislative history demonstrates intent to make broad-based family planning services, including abortion counseling, available to indigent women); Dellinger, *supra* note 177, at 14 (stating that "sponsors intended that Title X patients would be informed of, and referred to, appropriate medical services that could be obtained outside the program").

[218] *Rust*, 500 U.S. at 206 (Blackmun, J., dissenting).

[219] *Id.* at 206 n.1 (Blackmun, J., dissenting) (emphasis added). The Justices specifically referred to *Harris v. McRae*, 448 U.S. 297 (1980), and *Maher v. Roe*, 432 U.S. 464 (1977). *Id.*

[220] *Id.* at 207 (Blackmun, J., dissenting). The dissenters argued that "this is not a situation in which 'the intention of Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power.'" *Id.* (quoting George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933)). The Secretary's regulations pressed the limits and implicated "core constitutional values." The dissenters presumed that the statute would have been explicit if Congress had intended to press the outer limits of constitutionality. *Rust*, 500 U.S. at 205 (Blackmun, J., dissenting). The dissent charged the majority with rejecting a "constitutionally sound construction in favor of one that is by no means *clearly* constitutional." *Id.* at 206 n.1 (Blackmun, J., dissenting) (emphasis added).

Commentators have argued that the Court's perception of abortion is that it is a "vice activity" comparable to gambling. *See, e.g.*, Wells, *supra* note 200, at 1725-26 (arguing that by focusing on economic conduct, Court affords speech insufficient protection and conveys its "emerging view that abortion is no longer a fundamental right"). The Court sees abortion *protest* activity as squarely implicating the First Amendment's protection of "political speech." *Id.* at 1762-63. However, Wells points out that in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Court failed to recognize the First Amendment implications of a state statute that required in part that health care providers carry the State's anti-abortion message. Wells, *supra* note 200, at 1734-39. Linda Maher argues that the regulations also raise gender discrimination problems because they only impact women. Maher, *supra* note 186, at 170.

While Justice O'Connor joined in the dissent's presumption that the regulations raise serious constitutional problems,[221] she refused to join Justices Blackmun, Marshall and Stevens to the extent they dissented from the majority's substantive outcome on the constitutional issues.[222] Instead, she advocated using the canon as a matter of judicial restraint, arguing that the Court "acts at the limits of its power when it invalidates a law on constitutional grounds."[223] In her view, "[i]n recognition of our place in the constitutional scheme, we must act with 'great gravity and delicacy' when telling a coordinate branch that its actions are absolutely prohibited absent constitutional amendment."[224] O'Connor's preferred use of the canon would thus act as a warning signal to Congress and the Secretary, saying in essence that if they pursue this course, the Court may invalidate the gag rules.[225]

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[221] *Rust*, 500 U.S. at 223 (O'Connor, J., dissenting).

[222] *Id.* at 223-24 (O'Connor, J., dissenting). Similarly, Justice O'Connor has refused to reveal her thoughts on the merits of a constitutional dispute when applying the avoidance doctrine in other cases. *See* Kloppenberg, *supra* note 18, at 1006-11 (discussing benefits of addressing constitutional violations before litigating other nonconstitutional grounds); *see, e.g.*, Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 24 (1993) (O'Connor, J., dissenting) (opining that Court should remand case for trial on statutory and regulatory grounds before addressing constitutional issue).

[223] *Rust*, 500 U.S. at 224 (O'Connor, J., dissenting). Justice O'Connor noted that:

> If we rule solely on statutory grounds, Congress retains the power to force the constitutional question by legislating more explicitly. It may instead choose to do nothing. That decision should be left to Congress; we should not tell Congress what it cannot do before it has chosen to do it.

Id.

Additionally, in calling for restraint, O'Connor relied on traditional justifications for the canon, emphasizing those linked with concerns about the judiciary striking down popular legislation, particularly when popular action concerns controversial political issues. *See id.* (favoring canon of construction which avoids constitutional analysis if Court can make decision on other grounds); *see supra* notes 31-45 and accompanying text (discussing basis and justifications for judicial restraint).

[224] *Rust*, 500 U.S. at 224 (O'Connor, J., dissenting) (quoting Adkins v. Children's Hosp., 261 U.S. 525, 544 (1923)).

[225] *Id.*; *see* Marshall, *supra* note 28, at 502 (arguing that by requiring congressional consideration of policy's constitutionality, Court could improve both legislative and adjudicative processes); *see generally Rust*, 500 U.S. at 224 (O'Connor, J., dissenting) (arguing that Court should not address constitutional questions until Congress first confronts them and should instead give warnings).

As indicated by the dissenters, if the broad formulation of the canon were applied to *Rust*, the constitutional questions raised by the regulations would be avoided and the statute would be narrowly construed to prohibit the gag rules. Under the majority's narrow formulation in *Rust*, the canon is a barrier to constitutional adjudication only when the action of other branches clearly would be unconstitutional. Under such an analysis, the canon only has force when the actions of other branches are clearly constitutionally deficient on the merits,[226] and should be of less concern when the Court *upholds* the constitutionality of agency action as it did in *Rust*.

The *Rust* decision illustrates the dangers presented by the availability of alternate formulations of the canon. Because there are two versions of the canon, courts are able to sidestep the canon when, for political reasons, they wish to address the constitutionality of controversial statutes and regulations.[227] Instead, courts should base their application of the canon upon explicit factors aimed at evaluating the costs and benefits of avoidance, rather than inconsistently and opportunistically selecting between two *very* different approaches.

D. Dialogue Ramifications of the Rust *Formulation of the Avoidance Canon*

Rust demonstrates that neither side can avoid constitutional *interpretation* in determining whether the canon applies; the majority and dissent just make different judgments about the constitutionality of the regulations. The *Rust* Court "previewed" the merits of the constitutional issues and stated that the avoidance canon did not apply.

In general, the Supreme Court should address constitutional issues squarely — even controversial, politically sensitive ones. In *Rust*, the Court was able to do this because the Justices

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[226] This explains Justice Brandeis's departure from the avoidance doctrine in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Kloppenberg, *supra* note 18, at 1050-52.

[227] Wells, *supra* note 200, at 1758-61. The same perception "drove" a number of Justices in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *Id.* Furthermore, it may have motivated those who recently inserted language into the Communications Decency Act, 47 U.S.C. § 223 (1996), banning discussion of abortion and other "indecent" material on the Internet. *See* Peter H. Lewis, *Protest, Cyberspace-Style, for New Law*, N.Y. TIMES, Feb. 8, 1996, at A16 (discussing passage of Communications Decency Act and reactions).

disagreed over proper formulation of the avoidance canon. Under the broad formulation, the canon would apply because the abortion gag rules challenged in *Rust* raised serious constitutional doubts. But these rules were not *clearly* unconstitutional to five Justices, so by using the narrow formulation, the Court considered the merits and upheld the constitutionality of the gag rules. This *selective* use of the broad or narrow formulation is troubling. If the Court is going to retain the canon, it should choose a single version. The narrow approach is preferable because it would result in less avoidance; the court would reach the merits in more cases.

So — apart from its outcome on the merits — what is wrong with the Court reaching the constitutional issue in *Rust*? In light of the Court's ruling, Congress could revise Title X to preclude the new regulations. Indeed, after *Rust*, Congress did strive to repudiate the regulations as a misinterpretation of Title X.[228] The Senate passed the legislation by a margin of 73 to 25 votes and the House by 272 to 156 votes.[229] But President Bush vetoed the legislation and Congress narrowly failed to muster the two-thirds vote necessary to override his veto.[230] Nonetheless, the gag rules remained an important political issue, and President Clinton rescinded the regulations by executive order shortly after his inauguration in early 1993.[231] Thus, the Court's declaration of the regulations' constitutionality spurred long-term political dialogue and reaction on the issue.[232]

In *Rust*, the Court fulfilled its important function of deciding constitutional questions. While this aspect of the decision is positive, *Rust* clearly indicates that the Court does not apply the canon consistently in determining *which* constitutional issues to reach. The divergence in approaches to the canon between the

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[228] Dellinger, *supra* note 177, at 14. The legislation was the Family Planning Amendments Act. *See* S. Res. 323, 102d Cong., 138 CONG. REC. S15157-02 (1992) (extending and amending Federal Family Planning Program under Title X of Public Health Service Act) (unenacted).

[229] Dellinger, *supra* note 177, at 3.

[230] *Id.*; *see also* ESKRIDGE, *supra* note 5, at 169-70 (examining political shifts giving rise to gag rule).

[231] *See* Maher, *supra* note 186, at 179 n.227 (acknowledging President Clinton's rescission of gag rule); *Title X "Gag Rule"*, 29 WEEKLY COMP. PRES. DOC. 87-88 (Jan. 22, 1993) (suspending gag rule).

[232] ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 361-62 (1992).

Court in *X-Citement Video* on one hand and *Rust* on the other underscores this inconsistency.

An additional factor may have influenced the Court's use of the narrow formulation of the canon in *Rust*. This case raised abortion issues as well as free speech issues. The Court's jurisprudence in the abortion arena comprises contradictory applications of the avoidance doctrine which appear politically motivated and results-oriented.[233] Therefore, the majority's selection of the narrow version of the canon in *Rust* may be merely a political exercise related to the zeal of five Justices to reach the merits and affirm the gag rules.[234] The Court's invocation of the narrow formulation, however, may encourage other courts to apply the canon in a very limited manner and decide the merits of more constitutional challenges. This is likely to increase confusion for lower courts considering the canon's various formulations.

Further, avoidance — or at least selection of the broad, "serious doubts" formulation — seems more appropriate in *Rust* than in many cases because the new regulations posed a serious constitutional question under the Court's precedent.[235] As Justice

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[233] Despite the Court's much hailed and much decried recognition of constitutionalizing abortion rights in *Roe v. Wade*, 410 U.S. 113 (1973), the Court has frequently used avoidance techniques in abortion challenges. For example, in *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), the Court employed and vigorously debated the rule of measured constitutional steps. *See id.* (demonstrating Justices' inconsistent views relating to constitutionality of abortion laws); *see also* Kloppenberg, *supra* note 5, at 306-11 (discussing *Webster*'s inconsistent approaches to rule of measured steps). In *Webster*, five Justices construed the viability testing provision to save the statute from constitutional infirmity, relying on the avoidance canon. *Webster*, 492 U.S. at 513-15. Additionally, in a criminal case prior to *Roe*, the Court used the avoidance canon to deflect a constitutional ruling on abortion rights. *See* United States v. Vuitch, 402 U.S. 62, 70 (1971) (stating that courts should construe statutes whenever possible so as to uphold constitutionality).

[234] "The Supreme Court's recent flamboyant disregard of [the avoidance canon] in *Rust* . . . in all probability reflects less a weakening of the norm than a weakening of the commitment to *Roe v. Wade* . . . ." Seth F. Kreimer, *Sunlight, Secrets and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 124 n.331 (1991). *See also* Marshall, *supra* note 28, at 491 (inferring that Supreme Court refused to apply avoidance doctrine but chose interpretation that does not implicate constitutional issues); Merrill, *supra* note 74, at 1032 (criticizing mandatory deference model's concept of implied delegation). In a decision reached shortly after *Rust*, the Court's division over its commitment to *Roe* is reflected even as it reaffirms some core of *Roe*. *See* Planned Parenthood v. Casey, 505 U.S. 833, 845-46 (1992) (reaffirming *Roe*, yet upholding constitutionality of Pennsylvania abortion laws).

[235] *See* Marshall, *supra* note 28, at 491 (explaining that *Rust* Court relied on statute's

O'Connor argued, Congress was not afforded a sufficient opportunity to clarify its intent — to force the constitutional question.[236] And clarification was appropriate because Congress had repeatedly failed to modify Title X to prohibit abortion counseling prior to enactment of the regulations. Thus, this is one of the few cases where the agency-executive-congressional interaction on this divisive political issue could justify a broader avoidance canon. Nonetheless, the Court intervened in the political controversy in *Rust*, supporting an end-run around Congress's repeated rejections of Title X amendments and shifting power to the executive branch and the agency. The broad approach to the avoidance canon arguably should have been used to "remand" the issue to Congress for further explication of intent and constitutional deliberation.[237]

Finally, *Rust* demonstrates the difficulties implicit in the application of the avoidance canon in the context of administrative law cases governed by the *Chevron* doctrine.[238] Professor Thomas Merrill sees the multiple canons of statutory construction as "a potentially important qualification of the *Chevron* framework," affording courts some flexibility in terms of deference to agency action.[239] In particular, he demonstrates that the Court applied

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ambiguous language to invoke *Chevron* deference which served to displace avoidance canon). Although Professor Marshall is not a great fan of the canon, he argues that it might be useful in limited circumstances. For example, "if two competing constructions are truly of relatively equal plausibility then the goal of avoiding a difficult constitutional issue is as good a reason as any, and a better reason than most, for choosing one interpretation over another." *Id.* Marshall concludes that although *Rust* fits within that situation, the Court refused to apply the avoidance canon there. *Id.*

[236] Rust v. Sullivan, 500 U.S. 173, 224 (1991) (O'Connor, J., dissenting).

[237] *Id.*

[238] Two labor cases also raise interesting examples of the Court's use of the avoidance canon to trump the *Chevron* doctrine in the First Amendment context. Shortly before *Rust*, the Court in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988), refused to defer to a NLRB construction of the National Labor Relations Act. The agency's construction raised free speech issues relating to union handbilling activities at a shopping mall. *Id.* at 575-76. The Court stated that courts should not defer to agency interpretations (even reasonable ones) which pose serious constitutional questions assuming another reasonable interpretation of the statute is possible. *Id.* at 575-77. Similarly, the Court in *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), construed the same Act to deny the NLRB's jurisdiction over lay faculty at parochial schools, absent a clear expression of congressional intent, because such jurisdiction would implicate the religion clauses of the First Amendment. *Id.* at 507.

[239] Merrill, *supra* note 74, at 988. Merrill suggested that although the status of the

the canon of avoiding serious constitutional doubts to "trump" the *Chevron* doctrine in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*,[240] when an agency interpretation of a statute raised "serious constitutional questions" implicating free speech rights.[241] In *Edward J. DeBartolo*, rather than simply interpreting the statute to determine whether it was ambiguous under the first step of *Chevron*,[242] the Court asked whether it could avoid serious constitutional doubts by interpreting the statute to avoid the agency's questionable interpretation of the statute.[243] Merrill contrasts the *Edward J. DeBartolo* Court's use of the broad, "serious doubts" formulation of the canon with the *Rust* Court's invocation of the canon's narrow approach. Merrill suggests that *Rust* "arguably can be read as limiting the [avoidance] canon to cases in which the agency interpretation *would be* unconstitutional, as opposed to merely raising a 'serious question' of constitutionality."[244]

Merrill's discussion of *Edward J. DeBartolo* and *Rust* is helpful to illuminate the clash between these two judicial self-abnegation (i.e., deference) techniques. But rather than reformulating the canon, a more apt description of the *Rust* decision is that the Court chose the narrow approach to the canon over the broad approach. The Court returned subsequently to the broad approach of the canon in *X-Citement Video*. Therefore, the narrow formulation in *Rust* may just be an indicator of the canon's malleability. The Court's manipulation of the canon is evidenced by its failure to apply a single version of the canon consistently

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multiple canons is unclear under the *Chevron* framework, the canons and his theory of "executive precedent" may provide some flexibility for dealing with *Chevron*'s mandated all-or-nothing form of deference to administrative agencies. *See id.* at 988-89, 1023 (suggesting that certain canons of construction may trump *Chevron* doctrine); *cf.* Sunstein, *supra* note 20, at 2113 (arguing that *Chevron* itself be treated as canon).

[240] 485 U.S. 568 (1988).

[241] *Id.* at 588. "[T]he Court in effect held that the result suggested by *Chevron* was trumped by the result suggested by the canon . . . . [T]he Court used the canon to oust the *Chevron* framework altogether." Merrill, *supra* note 74, at 988; *see also supra* text accompanying notes 198-201 (suggesting that certain canons of statutory construction may trump *Chevron* doctrine if necessary to avoid constitutional doubts).

[242] *See supra* note 194 (discussing *Chevron*'s method of statutory interpretation).

[243] *Edward J. DeBartolo*, 485 U.S. at 577.

[244] *Id.* at 577 n.87. Three Justices found that the agency interpretation in *Rust* was unconstitutional; this established for Merrill that it raised "serious constitutional doubts." Merrill, *supra* note 74, at 989.

where a statute is ambiguous and one interpretation poses a serious constitutional question.[245]

Although the Court addressed the regulation's constitutionality, *Rust* is one of those rare cases in which avoidance was appropriate for several reasons. First, the Court deferred to a recent agency interpretation that appeared to directly contravene the intent of Congress and a longstanding prior agency interpretation. Second, the regulations were the Executive's end-run around Congress to further a political agenda which had failed in Congress; their promulgation implicates serious separation of powers concerns. Finally, by applying the canon, the Court would reinforce its own constitutional interpretations and effectuate the apparent intent of Congress until Congress forces the constitutional question by pushing the limits of constitutionality.

In contrast, the Court has applied the canon frequently in the First Amendment context when the costs of avoidance were greater than those in *Rust*. The next Part considers cases involving criminal prosecutions under the Smith Act[246] and the Federal Registration of Lobbying Act.[247] These cases demonstrate the problems of avoidance and inconsistent approaches to the canon. The analyses of these cases delineates further factors that courts should consider in determining whether avoidance is appropriate.

IV. THE FIRST AMENDMENT, AVOIDANCE, AND THE COMMUNIST THREAT

This Part explores two sets of cases in which the Supreme Court avoided constitutional questions raised by significant encroachments on political speech and association rights of

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[245] Despite the Court's rhetoric about the wisdom and prudence of the canon, it has ignored the canon in other situations. *See, e.g.*, Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79-80 (1938) (disapproving avoidance doctrine to reach constitutional question); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179-80 (1803) (establishing Court's duty to interpret and uphold Constitution, although it could have simply construed congressional act); ESKRIDGE, *supra* note 5, at 287 (discussing Court's inconsistent approach to canon).

[246] *See infra* Part IV.A (discussing Dennis v. United States, 341 U.S. 494 (1951) and Yates v. United States, 354 U.S. 298 (1957), *overruled on other grounds by* Burks v. United States, 437 U.S. 1 (1978)).

[247] *See infra* Part IV.C (discussing United States v. Rumely, 345 U.S. 41 (1953) and United States v. Harriss, 347 U.S. 612 (1954)).

minority political groups in the 1950s. The volatile political environment and precarious position of the Court during this time clearly influenced the Court's approach to these cases.[248] In several of these cases, the Court avoided a direct confrontation with Congress through use of the canon.[249] Nonetheless, this Article questions whether the Court's avoidance was appropriate and whether that avoidance promoted or restrained the evolution of and dialogue about the scope of First Amendment protection.

The costs of avoidance in this unstable and sensitive context were high, for political speech is most vulnerable during times of war or threat from foreign nations and political movements. At such times, the non-majoritarian Court should explicitly define constitutional limits to prevent encroachment by the majoritarian branches. Nonetheless, through its use of the avoidance canon in free speech cases in the 1950s, the Court failed to protect targeted groups from majoritarian incursions on speech rights and failed to define clear constitutional boundaries.

The Court's use of the avoidance canon during this period contributed to confusion and uncertainty in First Amendment law.[250] By "tiptoeing" around speech incursions with the avoidance canon rather than directly condemning them, the Court impoverished us as a polity. By using the avoidance canon as a back door, the Court was less than intellectually honest in its constitutional adjudication. The Court, as well as other constitutional actors, has the duty to engage in the difficult, politically

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[248] *See* DAVID CAUTE, THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER 157 (1978) ("More than seventy bills were introduced into the 84th Congress to curb the powers of the Court. So furious was the backlash that during the first session of the 85th Congress . . . 101 anti civil-liberties bills were introduced, compared with only eight designed to reinforce civil liberties"); Kreimer, *supra* note 234, at 23-24 n.62 (explaining confrontation between 1958 Congress and Supreme Court regarding Court's power to construe statutes to preempt state regulation and Court's power over internal security issues).

[249] Kreimer, *supra* note 234 at 23-24. Professor Kreimer argues that the Court could have conceivably achieved greater protection of civil liberties "by couching libertarian results in less controversial values that could mobilize broader support." *Id.*

[250] *Dennis*, 341 U.S. at 505. For example, although the Court greatly extended protection of political speech in *Yates*, it did so by narrowly construing the statute and the precedent established in *Dennis*, which had recognized only minimal protections of potentially seditious speech. *Yates*, 354 U.S. at 308.

volatile and socially sensitive debate concerning how much protection the Constitution affords to dissenters in times of crisis.[251] The Communist Party and Lobbying Act cases demonstrate how the avoidance canon serves to make constitutional law in an indirect and confusing manner.

Explicit modern restrictions on freedom of speech and association originated in the Espionage and Sedition Acts of World War I.[252] These Acts subordinated freedom of expression to the social "benefits" of patriotism and willingness to sacrifice for war.[253] The Supreme Court sustained convictions of Communist and Socialist political leaders — including presidential candidate Eugene V. Debs — under these statutes, holding that if speech tended to promote bad results, it could be punished.[254] In the 1930s, the Court began to strike down state anti-sedition laws under the First and Fourteenth Amendments, for the first time ruling in favor of members of the Communist Party.[255] However, the enactment of the Smith Act[256] in 1940 marked the be-

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[251] *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496, 498 (1951) (discussing avoidance of constitutional adjudication in sensitive areas of social policy). "[S]ocietal attitudes toward speech can be counted on to expand and fold accordion-like, and to fold at the most crucial and inopportune times." William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 93 (1984).

[252] Espionage Act, ch. 30, 40 Stat. 217 (1917); Sedition Act, ch. 75, 40 Stat. 553 (1918); *see also* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE, 151-63 (discussing Court's interpretation of Espionage Act).

[253] First Amendment decisions by the Supreme Court have generally taken the view that individual rights of freedom of expression and association may in some situations be subordinated to other societal interests. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.12 (5th ed. 1995); *see, e.g.*, Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) (emphasizing that in order to suppress free speech and right to assembly, one must demonstrate reasonable grounds and imminent danger).

[254] *See* Yosal Rogat & James M. O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion — The Speech Cases*, 36 STAN. L. REV. 1349, 1368-78 (1984) (discussing Debs v. United States, 249 U.S. 211, 215-17 (1919), Frohwerk v. United States, 249 U.S. 204, 209-10 (1919), and Schenck v. United States, 249 U.S. 47, 50-53 (1919)); *see also* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 735-41 (discussing *Frohwerk*, *Schenck*, and Court's conviction of Eugene Debs under Espionage Act). In his discussion of *Debs*, Gunther cites Harry Kalven, *Professor Ernst Freund and* Debs v. United States, 40 U. CHI. L. REV. 235, 237 (1973), as reminding us that Debs's conviction was "somewhat as though George McGovern had been sent to prison for his criticism of the [Vietnam] War." Gunther, *supra*, at 739.

[255] *See* Marc Rohr, *Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era*, 28 SAN DIEGO L. REV. 1, 7-9 (1991) (citing Herndon v. Lowry, 301 U.S. 242 (1937), and De Jonge v. Oregon, 299 U.S. 353 (1937)).

[256] Smith Act, ch. 439, 54 Stat. 670 (1940) (codified as amended at 18 U.S.C. § 2385

ginning of increasing limitations on political expression and association and a shift from state to federal prosecutions of sedition.[257] With the entry of the United States into World War II, followed by the Cold War, freedom of expression was again tightly restricted.[258]

In 1951, the Supreme Court first considered the Smith Act's First Amendment ramifications and, in *Dennis v. United States*,[259] allowed broad restrictions on political speech.[260] Six years later, in *Yates v. United States*,[261] the Court used the avoidance canon to reinterpret *Dennis*, extending greater protection to political speech through statutory construction rather than by directly addressing the constitutional question of whether this speech could be restricted.[262] This shift toward a more expansive interpretation of the First Amendment succeeded in protecting some targeted groups from majoritarian incursions on free speech rights. However, in failing to reach the constitutional question in *Yates*, the Court also failed to clearly define the scope of constitutional rights.

(1996)).

[257] *See, e.g.*, Scales v. United States, 367 U.S. 203, 259 (1961) (affirming convictions of Communist Party leaders whose activities presented clear and present danger); Dennis v. United States, 341 U.S. 494, 516-17 (1951) (affirming conviction for conspiracy to organize Communist Party to teach and advocate overthrow of government by force and violence); Bary v. United States, 248 F.2d 201, 203 (10th Cir. 1957) (holding that prohibition of advocacy and teaching of overthrow of government by force and violence is constitutional because of clear and present danger even though no actual attempt to overthrow).

[258] *See* GUNTHER, *supra* note 252, at 348 (describing America's attitude).

> During the [First World War], persecution of dissidents was perhaps to be expected, although Hand had condemned it even then, but the greater hysteria that gripped the nation in the postwar years was far more troubling. All over the country, strikes and bombing made many Americans imagine that the shadow of the Russian Revolution was lurking on domestic soil and that the 'Red Menace' should be countered.

Id. Gunther then quoted a letter from Hand in which he stated the "merry sport of Red-baiting goes on . . . . [T]he skies have a rather sinister appearance." *Id.* at 348-49 (quoting letter from Learned Hand, district judge, to Oliver Holmes, Supreme Court Justice, dated Nov. 25, 1919).

[259] 341 U.S. 494 (1951).

[260] *See id.* at 495-96, 516-17 (finding that political speech can be constitutionally restricted under Smith Act).

[261] 354 U.S. 298 (1957), *overruled on other grounds by* Burks v. United States, 437 U.S. 1 (1978).

[262] *Id.* at 324-27.

The *Yates* Court's failure to address the constitutional issue was particularly problematic because the Court modified but did not overrule *Dennis*.[263] As a result of the Supreme Court invoking the broad approach to the avoidance canon in *Yates*, the constitutionally permissible restrictions on free speech allowed by *Dennis* still stand. Ideally, courts should consistently reach the constitutional questions presented, thereby eliminating the problem of leaving questionable precedent on the books. However, if courts do apply the canon, they should do so consistently, so that if a statute raises a constitutional question, that question will be avoided by all courts ruling on that constitutional issue in the same or similar circumstances.

The second set of cases addressed in this Part arose under the Federal Regulation of Lobbying Act[264] and its corresponding congressional investigations. These cases reached the Court in the mid-1950s. The first case involved a challenge to a contempt of Congress citation against a socialist organization for refusing to disclose its membership list.[265] Rather than reach the First Amendment issue, the Court chose to construe the statute narrowly, holding that a committee had exceeded its delegated authority.[266] The Court's narrow construction of "lobbying activities" in this politically charged case was again used a year later in *United States v. Harriss*,[267] where the Court almost completely revised the Lobbying Act. The Court used the avoidance canon to constrain congressional activities, while avoiding direct confrontation with Congress over the Act's constitutionality. However, this narrow and distorted construction limited the scope of the Lobbying Act to the point of ineffectiveness.[268] Despite the Court's substantial reinterpretation of the Lobbying Act, the Act remained as construed in *Harriss* until 1996.[269]

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[263] *See id.* at 308 (distinguishing, but not overruling, *Dennis*).

[264] Federal Regulation of Lobbying Act, ch. 753, 60 Stat. 839 (1946) (codified as amended at 2 U.S.C. § 261 (1994)).

[265] United States v. Rumely, 345 U.S. 41, 42 (1953).

[266] *Id.* at 45-46.

[267] 347 U.S. 612 (1954).

[268] *See, e.g.*, Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right to Lobby*, 16 HARV. J.L. & PUB. POL'Y 149, 158-66, 180-82 (1993) (tracing history of lobbyists' rights).

[269] Lobbying Disclosure Act, Pub. L. No. 104-65, 109 Stat. 691 (1995).

The published statute was inconsistent with its judicially constructed "meaning" for thirty years.

A. *History of the Communist Membership and Advocacy Cases*

The Supreme Court consistently upheld convictions of American Communists for political speech and party membership under the Smith Act during World War II and the Cold War, finding no violation of First Amendment rights.[270] In interpreting the Smith Act, the Court applied a modified "clear and present danger" test[271] under which convictions were almost invariably upheld. *Dennis v. United States* directly addressed the constitutionality of the Act and is generally considered the exemplar of the broad application of this test. Six years later, in *Yates v. United States*, the Court applied the avoidance canon to retreat somewhat from *Dennis*, saying that its legislative history clearly showed that Congress "aimed [the Smith Act] at the advocacy and teaching of concrete action for forcible overthrow of the Government, and not at principles divorced from action."[272] The *Dennis-Yates* line of cases and their significance to First Amendment jurisprudence has been extensively reviewed.[273] This Part examines the Court's use of statutory con-

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[270] The Smith Act imposes fines or imprisonment up to 20 years for knowingly advocating or helping a group that advocates "the duty, necessity, desirability, or propriety of overthrowing . . . [the] government in the United States by force or violence" or for becoming a member "of any such society [or] group . . . knowing the purposes thereof . . . ." 18 U.S.C. § 2385 (1994). *See* Yates v. United States, 354 U.S. 298, 327 (1957) (stating that First Amendment was not violated), *overruled on other grounds by* Burks v. United States, 437 U.S. 1 (1978); Dennis v. United States, 341 U.S. 494, 516 (1951) (holding no violation of First Amendment because of indefiniteness).

[271] *Dennis* 341 U.S. at 509 (finding that Smith Act does not inherently violate First Amendment and that "clear and present danger" extends to both speech that advocates future overthrow of government and actions to overthrow that are clearly "doomed from the outset").

[272] *Yates*, 354 U.S. at 319-20.

[273] *See, e.g.*, Kreimer, *supra* note 234, at 22-35 (tracing development of narrowly construing statutes requiring disclosure of political activities); Sheldon L. Leader, *Free Speech and The Advocacy of Illegal Action in Law and Political Theory*, 82 COLUM. L. REV. 412, 414 (1982) (tracing distinction between advocacy of illegal action that is remote from concrete action and advocacy of illegal action that produces imminent action); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1349-50 (1983) (describing *Dennis* as both apex and turning point of Court's reliance on clear and present danger test); Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159, 1171-75 (1982) (indicating that

struction to avoid constitutional questions and considers the effects of avoidance on constitutional law's development and constitutional dialogue.

This analysis will begin with a discussion of *Masses Publishing Co. v. Patten*,[274] a trial court case from the World War I era Communist prosecutions. In *Masses*, Judge Learned Hand used the avoidance canon to construe narrowly an act similar to the Smith Act. That case illustrates the gradually developing First Amendment interpretations and the effects of avoidance in the context of politically sensitive speech. It also highlights the distinction between use of the avoidance canon by lower courts and the Supreme Court.

1. "The *Masses* Alternative"

Judge Hand's First Amendment jurisprudence and use of the canon in *Masses* are difficult to criticize. Hand extended relatively broad protection to the challenged speech, without reaching the constitutional question concerning the Act itself.[275] Thoughtful scholars praise "the *Masses* Alternative" as a precursor to the later development of a doctrine more protective of free speech than that used by the Court during World War I. They also praise Hand's use of the avoidance canon to link concerns for preserving free speech to concerns for preserving the democratic foundations of government.[276] While the *Masses* alternative did begin a fifty year long attempt to settle the law of political expression, it did so by pretending not to reach the constitutional issues involved.

Dennis changed structure of clear and present danger test and describing its consistency with *Yates*); Rohr, *supra* note 255, at 19-22 (examining *Dennis* and *Yates* as they relate to American Communists).

[274] 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).

[275] *Masses*, 244 F. at 538. Judge Hand noted that the question was solely "how far Congress after much discussion has up to the present time seen fit to exercise a power which may extend to measures not yet even considered . . . ." *Id.*

[276] *See. e.g.*, GUNTHER, *supra* note 252, at 158 (praising *Masses* both for First Amendment jurisprudence content and for Learned Hand's skill at avoiding constitutional question); Rogat & O'Fallon, *supra* note 254, at 1382-83 (stating that "just because law was to be taken seriously, as a mediation of the passions of the moment, Hand could rest his effort to protect dissent not on a constitutional ruling, but on a carefully crafted statutory interpretation").

In 1917, the Postmaster of New York notified publishers of *The Masses* that the Espionage Act would bar the July issue from the mail.[277] Judge Learned Hand, in *Masses Publishing Co. v. Patten*,[278] enjoined the Postmaster from excluding the revolutionary journal from the mails.[279] This particular issue of *The Masses* contained cartoons[280] and commentary depicting Emma Goldman and others as heroes and martyrs for their imprisonment for opposing the military draft, and praised conscientious objectors[281] — hardly what would today constitute revolutionary or seditious advocacy. Based on these materials, the Postmaster charged *The Masses* with two violations of the Espionage Act.[282]

The first violation addressed in *Masses* related to the prohibition against making "false statements with intent to interfere with the operation or success of the military . . . or to promote the success of its enemies."[283] Although Hand acknowledged that the cartoons might be harmful to the war effort, he reasoned that such potential harm was irrelevant to whether they involved a willfully false statement.[284] Since the cartoons asserted opinions that the creators no doubt believed, and Congress could not have intended to ban *all* propaganda, Hand found that the cartoons did not fall under the prohibition of the Act.[285]

The Postmaster asserted that simply "to arouse discontent and disaffection among the people with the prosecution of the war

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[277] The Espionage Act of 1917 made it an offense to mail seditious publications, defined as those that make false reports or statements with the intent to interfere with the success of the U.S. military or promote its enemies. Espionage (Barbour) Act, ch. 30, 40 Stat. 217 (1917). With more distance from the passions of war, the relatively mild nature of the challenged materials becomes apparent.

[278] 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).

[279] *Masses*, 244 F. at 543.

[280] Judge Hand's opinion describes the challenged political cartoons, which questioned the draft law, the purposes of the war, connections between Congress and business interests supporting the war efforts and the motives of the United States and allied nations. *Id.* at 541-42; *see also* GUNTHER, *supra* note 252, at 155 (providing descriptions of political cartoons at issue in *Masses*).

[281] *Masses*, 244 F. at 541; *see* Rogat & O'Fallon, *supra* note 254, at 1379 (juxtaposing Hand's position in *Masses* with that of Justice Holmes).

[282] *Masses*, 244 F. at 538.

[283] *Id.* at 539.

[284] *Id.*

[285] *Id.*

and with the draft tends to promote a mutinous and insubordinate temper among the troops." He further asserted that the newspaper violated the clause that prohibits "willfully causing insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States."[286] However, in Hand's analysis, "to interpret the word 'cause' so broadly would involve necessarily as a consequence the suppression of all hostile criticism. [Further, it would] contradict the normal assumption of democratic government."[287] Thus, while assuming that Congress may have the power to so limit dissent, "its exercise is so contrary to the use and wont of our people that *only the clearest expression of such a power justifies the conclusion that it was intended.*"[288]

Hand acknowledged the necessity of restricting speech during wartime, while emphasizing throughout his opinion the crucial distinction between direct and indirect advocacy and that tolerance of political speech is a foundation of democracy.[289] He "construe[ed] the [Act], so far as it restrains public utterance, . . . as therefore limited to the direct advocacy."[290] With this construction, Hand narrowed the question to "whether any of the challenged matter may be said to advocate resistance to the draft."[291] Hand's rhetoric thus called on democratic values — the common cultural assumptions of "our people" — without directly construing the Constitution or directly condemning Congress and those seeking to restrict mailing of *The Masses*.[292]

Commentators have praised Hand's *Masses* opinion for its symbolic import and for affording broader protection to political

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[286] *Id.*

[287] *Id.* at 539-40 (internal quotations omitted).

[288] *Id.* at 540 (emphasis added).

[289] *Id.* Judge Hand states that while "[p]olitical agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law, [it cannot be assimilated] with *direct incitement* to violent resistance" without disregarding the tolerance of free speech that exists in peacetime as a foundation of free government. *Id.* (emphasis added).

[290] *Id.* at 541.

[291] *Id.* at 540.

[292] *See* Schacter, *supra* note 65, at 648 (discussing elucidation of democratic values through statutory construction); *see also* Eskridge, *supra* note 20, at 1007-08 (indicating that through statutory construction, courts can and should develop public values).

dissenters in the midst of wartime pressures.[293] Because Hand sat in *Masses* as a trial judge construing a recent statute in 1917, his use of the avoidance canon is more defensible than the Supreme Court's avoidance in *Yates* in 1957. Both provided won-

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[293] As Gunther notes: "It was a remarkable decision — remarkable even decades later; especially remarkable given the practical and doctrinal climate of the times, so strikingly inhospitable to dissent. Radicals preaching pacifism, conscientious objection, or worse, were anathema in wartime America." Gunther, *supra* note 254, at 724 (citing ZACHARIAH CHAFEE, THIRTY-FIVE YEARS WITH FREEDOM OF SPEECH 4-7 (1952)). According to Professor Gunther, Hand carefully crafted *Masses*, conscious of its import and at some personal cost. GUNTHER, *supra* note 252, at 152. Hand was often perceived as a radical thereafter, and the clamor over the decision apparently affected his chances for elevation to the Second Circuit at that time and later to the Supreme Court. *Id.* Although Hand's usual judicial approach was heavily influenced by Thayer's rule of reason, and he had formulated something like his own avoidance doctrine, in *Masses*, Hand championed the federal judge's duty to protect unpopular minorities from constitutionally troubling incursions on political participation. *Id.* at 51, 155, 222. Hand commented about his decision in *Masses*:

> I must do the right as I see it and the thing I am most anxious about is that I shall succeed in giving a decision absolutely devoid of any such considerations [as the prospect of promotion]. There are times when the old bunk about an independent and fearless judiciary means a good deal. This is one of them; and if I have limitations of judgment, I may have to suffer for it, but I want to be sure that these are the only limitations and that I have none of character.

Id. at 155 (quoting letter from Hand to Frances A. Hand, dated July 16, 1917). Professor Murchison might praise Hand's use of the canon as a voice of judicial independence so necessary during times of political crisis. *See generally*, Murchison, *supra* note 1, at 169 (stating that judicial individualism demonstrated in use of avoidance canon amounted to modest, non-authoritative dialogue).

At the time of *Masses*, squaring the Espionage Act against the First Amendment was an issue of first impression. Because this was the first case arising under the Act, and because the Supreme Court had no precedent directly on point, Hand felt greater freedom to speak to the constitutional values implicated by the statute. GUNTHER, *supra* note 252, at 152-53. While Hand did not directly condemn the constitutionality of the Act, he protected speech more broadly than the Second Circuit believed was appropriate. *See* Masses Publ'g Co. v. Patten, 246 F. 24 (2d Cir. 1917) (reversing District Court's decision in *Masses*).

Hand also protected speech more broadly than the Supreme Court did in its subsequent cases construing the Espionage Act. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 623-24 (1919) (holding that speech against U.S. government is illegal); Debs v. United States, 249 U.S. 211, 215-17 (1919) (ruling that speech preventing recruiting is punishable); Frohwerk v. United States, 249 U.S. 204, 209-10 (1919) (holding that newspaper's conspiracy to obstruct was within Espionage Act); Schenck v. United States, 249 U.S. 47, 50-53 (1919) (ruling that evidence seized was admissible).

For *Masses*, the victory was only temporary. Hand's injunction was immediately stayed by Circuit Judge Charles Hough, 245 F. 102 (2d Cir. 1917). Thereafter, Hand's ruling was overturned by the Second Circuit in an opinion which flatly rejected his voicing of constitutional concerns. *Masses*, 246 F. 24 (2d Cir. 1917); *see also* GUNTHER, *supra* note 252, at 160-61 (discussing response to Hand's *Masses* decision).

derful rhetoric about core democratic and constitutional values, but they did not clearly establish constitutional law. But *Masses* — read in conjunction with the *Dennis-Yates* line of cases — also illustrates the costs of avoidance. Hand did not pronounce a constitutional command in *Masses*; he did not engage in "lawsaying" in the *Marbury v. Madison*[294] tradition. Instead, Hand's discussion of constitutional concerns in *Masses* created a "phantom norm" or "penumbra" which only became integrated into First Amendment doctrine much later.[295]

Although initially applying a significantly more restrictive view of First Amendment rights, the Supreme Court gradually incorporated Hand's conception of protection for political speech into its standards for determining what is a reasonable "abridgment of freedom of expression for the benefit of society."[296] Between World War I and the Court's 1969 decision in *Brandenburg v. Ohio*,[297] these standards evolved from the amorphous "bad tendency" analysis[298] to expansive interpretations of the Holmes-Brandeis "clear and present danger" test.[299] The

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[294] 5 U.S. (1 Cranch) 137 (1803).

[295] Motomura has argued in another context that avoiding constitutional questions through the canon in fact changes the constitutional analysis, thereby creating "phantom norms." Motomura, *supra* note 51, at 561.

Judge Posner calls this phenomenon a "penumbra" of constitutional law developed by the courts through the avoidance canon. Posner, *supra* note 53, at 816. Posner criticizes the "penumbra" as it extends the already "extraordinarily far-reaching" Constitution. *Id.*

> The practical effect of interpreting statutes to avoid raising constitutional questions is therefore to enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretation of the Constitution — to create a judge-made constitutional "penumbra" that has much the same prohibitory effect as the judge-made (or at least judge-amplified) Constitution itself. And we do not need that.

Id. Posner suggests that the canons promote judicial activism while giving the appearance of restraint. *Id.*

[296] NOWAK & ROTUNDA, *supra* note 253, at 957.

[297] 395 U.S. 444 (1969).

[298] *See* Gitlow v. New York, 268 U.S. 652, 668-72 (1925) (rendering clear and present danger test inapplicable and arguing that state legislature has discretion to take reasonable measures to protect public peace and safety); Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) (stating that only present danger or intent to bring about immediate evil warrants congressional legislation limiting free speech). Nowak and Rotunda note that "[d]isquieting echoes of the majority's bad tendency test [in *Abrams*] are found in *Haig v. Agee*, 453 U.S. 280 (1981)." NOWAK & ROTUNDA, *supra* note 253, at 959 n.15.

[299] *Abrams*, 250 U.S. at 624 (Holmes, J., dissenting). Justice Holmes, in his dissent, ar-

test then evolved into a more restrictive "balancing test," which assessed the seriousness of the danger threatened by the speech, discounted by its imminence.[300] In its final state, the test set forth the more speech protective principles set out in *Brandenburg*.[301]

The *Dennis-Yates* line of cases illustrates the influence of Hand's phantom norm on First Amendment standards. Although

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gued for the first time that in order to uphold a conviction for political speech a "present danger of immediate evil or an intent to bring it about" must be shown. *Id.* at 628 (Holmes, J., dissenting). *See also* Herndon v. Lowry, 301 U.S. 242, 256 (1937) (adopting clear and present danger as appropriate test); Schenk v. United States, 249 U.S. 47, 52 (1919) (asserting that circumstances are relevant to whether speech is accorded First Amendment protection); Gunther, *supra* note 254, at 735 (stating that Holmes's phrase "clear and present danger" became commonplace in Court's opinions); Hans A. Linde, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163, 1165-73 (1970) (tracing changes in "clear and present danger" test from *Dennis* and *Yates* to *Brandenburg*); Bernard Schwartz, *Justice Brennan and the* Brandenburg *Decision — A Lawgiver in Action*, 79 JUDICATURE 24, 26-27 (July-Aug. 1995) (providing overview of development of "clear and present danger" test through 1969 *Brandenburg* decision).

[300] Dennis v. United States, 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring); *see generally*, Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 912-14 (1963) (criticizing ad hoc balancing test as untenable legal doctrine).

[301] Gunther, *supra* note 254, at 754; *see also* Rogat & O'Fallon, *supra* note 254, at 1404 (discussing Justice Brandeis's linking of Hand's test in *Masses* with "imminence of serious harm" standard). According to Professor Gunther, the *Brandenburg* principle "combines the most protective ingredients of the *Masses* incitement emphasis with the most useful elements of the clear and present danger heritage." Gunther, *supra* note 254, at 754; *see also* Rogat & O'Fallon, *supra* note 254, at 1403-04 (noting that Justice Brandeis, in *Whitney v. California*, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring), "anticipates" this development and provides guidance without directly construing First Amendment). The majority in *Whitney* found no constitutional problem: "We find no repugnancy in the Syndicalism Act as applied in this case to either the due process or equal protection clauses of the Fourteenth Amendment on any of the grounds upon which its validity has been here challenged." *Whitney*, 274 U.S. at 372 (Brandeis, J., concurring). Brandeis, in his concurrence, stated that the defendant had not raised the particular First Amendment question below, so it could not be reached on appeal from the state court. *Id.* at 379 (Brandeis, J., concurring).

> She claimed below that the statute as applied to her violated the federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by the court or a jury . . . . Our power of review in this case is limited not only to the question whether a right guaranteed by the federal Constitution was denied . . . but to the particular claims duly made below, and denied.

Id. at 379-80 (Brandeis, J., concurring) (citations omitted).

incorporation of his "clear and present danger" test failed to protect Communist Party leaders in *Dennis*,[302] the post-*Dennis* Smith Act cases — particularly *Yates* in 1957 — began to resuscitate Hand's substantive *Masses* norm in a way that resulted in more protection for political dissenters.[303] In *Yates*, the Court used the avoidance canon just as Hand did in *Masses*,[304] protecting political dissidents at a quasi-constitutional level rather than by direct constitutional interpretation.[305] Although the Court held that passive Party membership is insufficient for a Smith Act conviction,[306] it did not fully incorporate Judge Hand's substantive norm into constitutional law until the *Brandenburg* decision in 1969.[307]

2. *Dennis v. United States*

In 1951, eleven top leaders of the Communist Party of the United States were convicted under the Smith Act for conspiracy to advocate the overthrow of the U.S. government.[308] In *Dennis v. United States*, the Court upheld the convictions under the conspiracy provisions of the Smith Act, reaching both the First and Fifth Amendment questions.[309] Justice Vinson, writing for the majority, directly addressed the constitutional issues and held that the challenged sections of the Smith Act did not inherently or as applied violate the Constitution because of indefiniteness.

The *Dennis* Court was reviewing another opinion by Judge Learned Hand, who was now on the Second Circuit Court of Appeals. In his opinion, Hand had held that the *Dennis* record "amply supported" the necessary finding by the jury that defendants "intended to initiate a violent revolution whenever a propi-

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[302] Gunther, *supra* note 254, at 751.

[303] *Id.* at 752-53.

[304] *See* Masses Publ'g Co. v. Patten, 244 F. 535, 537, 543 (S.D.N.Y. 1917) (discussing use of avoidance canon), *rev'd*, 246 F. 24 (2d Cir. 1917).

[305] Yates v. United States, 354 U.S. 298, 318-20 (1957), *overruled on other grounds by* Burks v. United States, 437 U.S. 1 (1978).

[306] Scales v. United States, 367 U.S. 203, 208-09 (1961).

[307] *See* Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969) (holding unconstitutional those laws which punish mere advocacy and forbid assembly to advocate particular action).

[308] Dennis v. United States, 341 U.S. 494, 495, 497 (1951).

[309] *Id.* at 502, 515-17.

tious occasion appeared."[310] The fact that Hand, the author of *Masses*, affirmed the *Dennis* convictions provides an interesting commentary on how the roles of a lower federal court judge vary with Supreme Court precedent. In *Masses*, Hand at the trial level construed a new statute without express guidance from the Court. In the decades intervening between *Masses* and *Dennis*, Hand's *Masses* decision had been explicitly reversed on appeal[311] and the Supreme Court had consistently taken a much more restrictive approach toward First Amendment protection for those prosecuted under the World War I Espionage Act.[312] Thus constrained by the Court's precedent, Hand affirmed the convictions at the intermediate appellate level in *Dennis*.[313]

In arguing their case before the Supreme Court, the *Dennis* defendants challenged the "advocacy" provision of the Smith Act as prohibiting even academic discussion of Marxism-Leninism and as being contrary to the constitutionally protected concepts of free speech.[314] The Court rejected this challenge, noting that courts have a duty to interpret federal legislation in a manner consistent with the Constitution.[315] Reviewing a series of cases arising under the Espionage Act in which the convictions were based on speech,[316] Justice Vinson deduced that the convictions could be sustained "only when the speech or publication created a 'clear and present danger' of attempting or accom-

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[310] *Id.* at 497.

[311] *See* Masses Publ'g Co. v. Patten, 246 F. 24, 25 (2d Cir. 1917) (reversing Judge Hand's trial court decision, 244 F. 535 (S.D.N.Y. 1917)).

[312] *See* Abrams v. United States, 250 U.S. 616, 619 (1919) (rejecting defense's argument that First Amendment protects printing and distributing circulars which violate Espionage Act); Debs v. United States, 249 U.S. 211, 215-16 (1919) (affirming indictment for delivering speech purporting to obstruct recruiting services in violation of Espionage Act); Frohwerk v. United States, 249 U.S. 204, 205-06 (1919) (declaring that First Amendment does not grant immunity to use of language in violation of Espionage Act); Schenk v. United States, 249 U.S. 47, 52 (1919) (denying First Amendment protection against indictment for violating Espionage Act).

[313] United States v. Dennis, 183 F.2d. 201, 212, 234 (2d. Cir. 1950), *aff'd*, 341 U.S. 494. According to Gerald Gunther, political pressures were not the major factor in this decision. GUNTHER, *supra* note 252, at 603. Hand still believed in the *Masses* formulation, but the Supreme Court had taken a different approach to the seditious speech cases. *Id.* at 604.

[314] Dennis v. United States, 341 U.S. 494, 501 (1951).

[315] *Id.*

[316] Pierce v. United States, 252 U.S. 239 (1920); Schaefer v. United States, 251 U.S. 466 (1920); *Abrams*, 250 U.S. at 616; *Debs*, 249 U.S. at 211; *Frohwerk*, 249 U.S. at 204.

plishing the prohibited crime."[317] Although this rule was largely defined by a series of Holmes and Brandeis dissents and concurrences,[318] the Court found "little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale."[319]

Reading "clear and present danger" expansively to include organizing a Communist Party and teaching Marxist-Leninist doctrine, the *Dennis* Court said, "To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straight jacket we must reply that all concepts are relative."[320] Apparently, in the Court's view, in the context of the political atmosphere of 1951, the danger of world communism made *any* associated act a "clear and present danger."

Justice Frankfurter, in his concurrence, focused on balancing the competing interests of First Amendment speech protection and the right of a government to preserve itself.[321] He reasoned that the primary decision maker in that balance is Congress, with only narrow and deferential judgments permitted by the courts.[322] On the facts in *Dennis*, Frankfurter found "ample justification" for Congress's judgment that the conspiracy before the Court was a "substantial threat to national order and securi-

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[317] *Dennis*, 341 U.S. at 505.

[318] *See* Whitney v. California, 274 U.S. 357, 376 (1919) (Brandeis, J., concurring) (stating that mere fear of serious injury is insufficient to limit speech; must have reasonable ground for believing imminent danger); *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting) (indicating that only present danger of immediate evil or intent to bring it about warrants Congress limiting speech). This test was adopted by the majority in *Herndon v. Lowry*, 301 U.S. 242, 258 (1937) (holding that power to abridge freedom of speech is exception and court must instead find reasonable apprehension of danger to organized government).

[319] *Dennis*, 341 U.S. at 507 (citations omitted).

[320] *Id.* at 508.

[321] *Id.* at 519-26 (Frankfurter, J., concurring).

[322] Justice Frankfurter noted:

> Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflection of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

Id. at 525-26 (Frankfurter, J., concurring).

ty."[323] Taking judicial notice of the international political situation, Frankfurter essentially found reasonable the judgment that "recruitment of additional members for the Party would create a substantial danger to national security."[324] Further, he distinguished forms of speech that are not in the public interest and thus "rank low" on the "scale of values" — such as the speech at issue — from forms accorded full constitutional protection.[325]

Dissenting, Justice Douglas characterized the statute as prohibiting seditious conspiracy, not organizing people to teach and actually teaching Marxist-Leninist doctrine.[326] Douglas argued that since the books themselves were legal, how could teaching them be illegal?[327] Although he noted that world communism may well constitute relevant danger, the key issue was "the strength and tactical position of petitioners and their converts in this country."[328] Justice Black also dissented, noting that because the defendants were not charged with either overt acts against or saying anything designed to overthrow the government,[329] the prosecutions were "a virulent form of prior censorship."[330]

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[323] *Id.* at 542 (Frankfurter, J., concurring).

[324] *Id.* at 547 (Frankfurter, J., concurring). For a contrasting view of the strength and immediacy of the Communist threat, see the dissenting opinions by Justices Black and Douglas in *Dennis*, 341 U.S. at 579-84 (Black J., dissenting) (questioning how teaching from books available in any library represents clear and present danger); and their concurrences in *Brandenburg v. Ohio*, 395 U.S. 444, 449-57 (1969) (Black & Douglas, JJ., concurring) (arguing that clear and present danger standard must not apply during times of peace). The opinions of Justice Harlan are consistent with this view. *See, e.g.*, Noto v. United States, 367 U.S. 290, 298 (1961) (requiring present advocacy of violence, not mere intent for future advocacy, to support conviction under membership clause of Smith Act); Scales v. United States, 367 U.S. 203, 225 (1961) (holding that Smith Act convictions require actual criminal conduct in addition to associational memberships); Yates v. United States, 354 U.S. 298, 312-13 (1957) (construing Smith Act as requiring advocacy leading to illegal action), *overruled on other grounds by* Burks v. United States, 437 U.S. 1 (1978).

[325] *Dennis*, 341 U.S. at 544-45 (Frankfurter, J., concurring).

[326] *Id.* at 582-83 (Douglas, J., dissenting).

[327] *Id.* at 583 (Douglas, J., dissenting). Justice Douglas argued that prosecutions of this sort are tantamount to "constructive treason," in which convictions for treason do not require overt acts; here, evil thoughts or intent change legal speech into illegal speech. *Id.*

[328] *Id.* at 588 (Douglas, J., dissenting).

[329] *Id.* at 579 (Black, J., dissenting). Instead, they were charged with "agree[ing] to assemble and to talk and publish certain ideas at a later date. . . . [T]hey conspired to organize the Communist Party and to use speech . . . in the future to teach and advocate the forcible overthrow of the government." *Id.*

[330] *Id.*

In directly affirming the Smith Act's constitutionality, the *Dennis* Court "restated clear and present danger in a manner draining it of most of the immediacy emphasis it had attained over the years."[331] This broad interpretation of what constitutes sufficient cause for repressing political speech had a repressive effect on radical, and even progressive, political movements. In fact, the *Dennis* convictions have been characterized as the "beginning of the end of any meaningful political presence of the Communists in America."[332] In his dissent, Justice Black attributed the convictions to societal "passions and fears" and expressed the hope that eventually the Court would "restore the First Amendment liberties to the high preferred place where they belong in a free society."[333]

Dennis had both a significant precedential effect during the subsequent decade and a stunting effect on the development of First Amendment law.[334] In fact, it is unclear whether the Court has fully restored these rights, because it has yet to directly contravene the constitutional holdings of *Dennis* and its progeny.[335] Instead, the Court reinterpreted *Dennis* and avoided the constitutional question in *Yates*, affirming *Dennis* as viable precedent.

3. *Yates v. United States*

In 1957, six years after *Dennis* and in a somewhat calmer political atmosphere, the Court applied the avoidance canon to reverse the convictions of fourteen lower echelon Communist leaders, who had been charged with conduct similar to that challenged in *Dennis*.[336] Writing for the majority, Justice Harlan

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[331] Gunther, *supra* note 254, at 751.

[332] Rohr, *supra* note 255, at 2.

[333] *Dennis*, 341 U.S. at 581 (Black, J., dissenting).

[334] Rohr, *supra* note 255, at 2.

[335] *See* Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969) (declaring test granting speech more protection without overruling *Dennis*); Yates v. United States, 354 U.S. 298, 310-12, 319, 327 (1957) (construing Smith Act narrowly to exclude certain charges against petitioners and reverse certain convictions, without reaching constitutional question), *overruled on other grounds by* Burks v. United States, 437 U.S. 1 (1978); *see generally*, Schwartz, *supra* note 299, at 27 (suggesting that convictions of *Dennis* defendants would not have occurred using today's clear and present danger standard).

[336] *Yates*, 354 U.S. at 338; *see also* Kent v. Dulles, 357 U.S. 116, 129 (1958) (invalidating administrative restrictions on passports for Communists without reaching constitutional

held that the lower courts had incorrectly interpreted *Dennis* by defining "organize" very broadly and by failing to distinguish between advocacy of "abstract doctrine and advocacy directed at promoting unlawful action."[337] The Court held that the Smith Act does not prohibit "advocacy or teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end."[338]

Harlan reviewed the legislative history of the definition of the term "organize," and concluded that "revealing guides as to the intent of Congress" were missing, so it was up to the Court to determine the meaning.[339] Applying the rule that criminal statutes be strictly construed,[340] the Court said "organize" meant only acts creating a new organization, not subsequent activities of the organization.[341] Thus, the statute of limitations precluded any further prosecutions for simply "organizing" the Communist Party.[342]

Harlan then said that the Court did not have to reach the constitutional question because its "first duty is to construe this statute."[343] At the same time, he identified potential constitutional dangers, saying that, in construing the statute, the Court "should not assume that Congress chose to disregard a constitutional danger zone so clearly marked."[344] Nor should Congress use "the words 'advocate' and 'teach' in their ordinary dictionary meanings when they had already been construed as terms of art carrying a special and limited connotation."[345] The lower court's reliance on *Dennis* was deemed misplaced because the *Dennis* jury was "properly instructed that there could be no conviction for 'advocacy in the realm of ideas,'"[346] while the *Yates*

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question).

[337] *Yates*, 354 U.S. at 320.

[338] *Id.* at 318.

[339] *Id.* at 310.

[340] Kahan, *supra* note 103, at 347.

[341] *Yates*, 354 U.S. at 310. This ruling effectively eliminated "organizing" as a basis for prosecuting Communists, as the three-year statute of limitations had run by 1948.

[342] The *Dennis* defendants had been convicted for "organizing," but those prosecutions occurred after the statutory period had expired. *Id.* at 312.

[343] *Id.* at 319.

[344] *Id.*

[345] *Id.*

[346] *Id.* at 320.

jury was not told that the Smith Act did not apply to "advocacy in the sense of preaching abstractly the forcible overthrow of the Government."[347]

Because the conspiracy charged was the same in both cases and the *Dennis* defendants were even named as co-conspirators in *Yates*, this reading of *Dennis* is incongruous.[348] The only real difference was that the perceived imminence of the threat posed by world communism now seemed more remote. As a result of the Court's ruling in *Yates*, five petitioners were released on the basis that they had not participated in any unlawful activities and had been convicted solely for being members or officers of the Communist Party.[349] The cases against the remaining nine were remanded for consideration of whether certain acts in evidence "might be considered to be the systematic teaching and advocacy of illegal action which is condemned by the statute."[350]

B. Ramifications of Avoidance in the Communist Cases

Professor Gerald Gunther praises Harlan's "judicial craftsmanship" in *Yates*.[351] However, the Court's use of the avoidance canon in *Yates* had negative ramifications. First, although the Court did not invalidate the Smith Act, "constitutional presuppositions" were read into the statute to "reinvigorate" speech pro-

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[347] *Id.* at 324.

[348] *See id.* at 344-45 (Clark, J., dissenting) (declaring that because conspiracy charged is similar to facts in *Dennis*, it required affirming conviction).

[349] *Id.* at 330-31.

[350] *Id.* at 331. On remand the government dismissed the case as to all remaining defendants. *See* Fujimoto v. United States, 251 F.2d 342, 342 (9th Cir. 1958) (noting that on remand of *Yates* government dismissed case against remaining defendants). Justice Black voted to reverse all the convictions because "the statutory provisions on which these prosecutions are based abridge freedom of speech, press and assembly in violation of the First Amendment." *Yates*, 354 U.S. at 339 (Black, J., concurring in part and dissenting in part). He described these political trials as "turgid . . . and just plain dull" and their subject matter as so prejudicial that conviction is "inevitable except in the rarest circumstances." *Id.* He concurred with the Court's interpretation of "organize" and with its determination that the jury instructions given were erroneous. *Id.* at 340 (Black, J., concurring in part and dissenting in part). However, he also found the recommended instructions constitutionally doubtful. Justice Black stated: "I believe that the First Amendment forbids Congress to punish people for talking about public affairs, whether or not such discussion incites to action, legal or illegal." *Id.* (citations omitted).

[351] Gunther, *supra* note 254, at 753.

tection and "curtail" the prosecutions.[352] The Court's constitutional reading in *Dennis* is still on the books. The Court did not adopt Judge Hand's *Masses* First Amendment protections for political speech until 1969.[353] Second, because the rights of future political dissenters were protected only at a quasi-constitutional level, the foundation of dissenters' rights was less secure and the scope of constitutional law was less certain.[354]

If the *Masses* court or the *Yates* Court had earlier said that the First Amendment *required* the distinction between advocacy of abstract doctrine and incitement to imminent unlawful action, would the development of the phantom norm into accepted constitutional law have been less gradual?[355] Some might protest that the application of the avoidance canon did not delay the development of the law, and may have even promoted it. Under this reasoning, if Hand in *Masses* had issued a clear constitutional ruling, rather than an exhortation of shared values, this ruling could have been more easily rejected by the Supreme Court. But, even without a clear ruling, the Court did reject Hand's test for decades. Advocates of the use of the avoidance canon in these cases might further express concerns about the

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[352] *Id.*

[353] *See* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam) (declaring Ohio statute which outlawed mere advocacy unconstitutional because it infringed upon protections of First Amendment).

[354] Not until *Brandenburg* did the Court find the Ohio Criminal Syndicalism Act unconstitutional, combining the clear and present danger test with the incitement requirement. *Id.* at 447; *see* Gunther, *supra* note 254, at 754 (detailing development of modern First Amendment doctrine from Learned Hand's unpublished correspondence through *Brandenburg*'s clear and present danger test with incitement). Although the *Brandenburg* Court labelled the distinction between "mere advocacy and incitement to imminent lawless action" as "established," Professor Gunther noted that this distinction was "hardly an 'established' [one]." *See Brandenburg*, 395 U.S. at 449 n.4 (stating that "Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action . . . ."); Gunther, *supra* note 254, at 754 (declaring that *Brandenburg* first espoused modern First Amendment doctrine).

[355] Zechariah Chaffee wrote to Hand about *Masses* in 1920:

> I feel more and more that it was a staggering task to solve the problem as you did at the very outset of the War, with so few precedents and in such pressure and excitement, and also that if your view had only been followed a living public opinion might have developed in this country on the ultimate purposes of the War . . . .

Gunther, *supra* note 254, at 767.

Court overruling *Dennis* only six years later in *Yates*. However, even Justice Brandeis, a frequent advocate of avoidance techniques, recognized that stare decisis has less force in constitutional interpretation.[356]

In the context of these cases, avoidance resulted in a confusing patchwork of "phantom norms" and First Amendment doctrine. A direct constitutional ruling by the Court in *Yates* would have at least provided more clarity than does the *Dennis-Yates* line. Furthermore, use of the avoidance canon in both *Masses* and *Yates* resulted in painfully slow development of clear standards to protect the speech of political dissenters.[357]

The Court's approach to precedent in *Yates* also offers a glimpse of the disjointed development of substantive standards. In *Yates*, the Court said that the lower courts had misconstrued *Dennis*. However, the *Yates* Court's interpretation of the statute was not mandated by the *Dennis* decision.[358] The *Yates* Court reinterpreted *Dennis* and, using a variation of the *Masses* incitement test,[359] found that Congress could not have intended to

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[356] *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77 (1938) (noting that if Court overruled previous interpretation of statute rather than constitutional question, Court would more likely follow precedent); Kloppenberg, *supra* note 5, at 333-34 (recognizing that stare decisis binds Court less in constitutional adjudications because Court instigates constitutional changes). By a five to four vote, the Court recently overruled its own constitutional interpretation of only six years earlier regarding Congress's ability to abrogate State sovereign immunity. *See* Seminole Tribe of Fla. v. Florida, 116 S. Ct. 1114, 1118 (1996) (overruling Court's five to four decision in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)). In *Seminole*, the majority rejected the dissenters' invitation to invoke the avoidance canon.

> We cannot press statutory construction "to the point of disingenuous evasion" even to avoid a constitutional question. We have already found the clear statement rule satisfied [for abrogation intent], and that finding renders the preference for avoiding a constitutional question inapplicable.

Seminole, 116 S. Ct. at 1124 n.9 (citations omitted). The dissenters argued that the majority could have avoided the constitutional question at several levels, including by construing the statute in harmony with *Ex parte Young*, 209 U.S. 123 (1908). *Seminole*, 116 S. Ct. at 1146 (Souter, J., dissenting).

[357] Gradualism retains the status quo. *See* Kloppenberg, *supra* note 5, at 335 (stating that "the first principle of gradualism [concerns] changing the status quo slowly so as to preserve a stable content in constitutional law"); Rogat & O'Fallon, *supra* note 254, at 1366 (discussing Holmes's Social Darwinist ideas about role of courts).

[358] Yates v. United States, 354 U.S. 298, 312-27 (1957), *overruled by* Burks v. United States, 437 U.S. 1 (1978).

[359] Gunther, *supra* note 254, at 753.

punish indirect advocacy through the Smith Act.[360] In so doing, the *Yates* Court did not use the canon to develop and reinforce its own clear precedent. Arguably, it used the avoidance canon to create new constitutional law.[361]

The Court's application of the avoidance canon in *Yates* seems motivated by two justifications. First, the Court focused on its own political vulnerability. The Court was facing congressional proposals to restrict its authority.[362] Second, the Court wanted Congress to assume more responsibility for balancing speech rights against other concerns. However, these justifications are unpersuasive because the Court remains politically viable even when it counters majoritarian views or becomes involved in what it considers sensitive social issues. Moreover, the federal courts have a duty to participate with Congress in choosing between competing pressures when the Constitution is implicated. By applying the canon, the Court in *Yates* left an ambiguous result, remanding the individual cases and expressing First Amendment concerns, but not sufficiently protecting other dissenters who might be prosecuted under the Smith Act or similar statutes.

As a practical matter, Justice Harlan's avoidance technique may have been necessary because he could obtain a majority for this narrowing construction, but not for overruling *Dennis*.[363] Further, Harlan had joined the Court shortly before he authored *Yates*.[364] His approach in *Yates* yielded some new and significant protections. First, claiming to interpret *Dennis*, Justice Harlan insisted on strict statutory standards of proof emphasizing the actual speech of the defendants — more consistent with

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[360] *Yates*, 354 U.S. at 316-27.

[361] Gunther, *supra* note 254, at 754. Similarly, Gunther notes that the Court in *Brandenburg v. Ohio*, 345 U.S. 444 (1969), was "purporting to restate, but in fact creating" a First Amendment principle. *Id.*

[362] Kreimer, *supra* note 234, at 23 n.62. According to Professor Kreimer:

> That such a confrontation was in the air should not be doubted. In 1958, Congress came within a few votes of passing a statute limiting the power of the Supreme Court to construe statutes as preempting state regulation, and removing Supreme Court appellate jurisdiction in certain internal security cases.

Id.

[363] *See* Ginsburg, *supra* note 1, at 1188-98 (noting that appellate courts need to speak with unanimity and foster consensus even if the result is only measured steps).

[364] Gunther, *supra* note 254, at 753.

the "hard," "objective," words-oriented focus of *Masses.*[365] Second, the Court's justification for avoidance was to allow Congress time to express its intention to challenge the Court's new First Amendment principle. Thus, similar to developments in the area of federal common law, the Court in a sense remanded the statute to Congress for a clear statement. Such a remand arguably reflects deference and respect to a co-equal interpreter of the Constitution and thus advances the separation of powers.[366] In using the canon, however, the Court *pretends* to be avoiding constitutional questions when it is in fact elaborating on constitutional values and "remanding" legislation.[367] Although the Court is not engaged in direct constitutional lawsaying in *Yates,* its phantom norms and extension of constitutional law's penumbra can be used in the future to "remand" another statute which violates those norms. This treatment is a pretense of deference, and in some cases may actually offend separation of powers more than a direct constitutional ruling. It is anomalous that the Court relies on deference and separation of powers to justify invoking the canon when a common result of employing the canon is to reject congressional intent.

The *Yates* Court's use of the canon is particularly troubling given its failure to overrule *Dennis.* While many argue that the *Dennis* decision is rendered harmless by subsequent changes in the law, it is still on the books. By failing to address the constitutional issues directly, the *Yates* Court allowed the decision to stand. Further, by modifying *Dennis* without overruling it, the *Yates* Court hindered constitutional dialogue. In light of the *Yates* decision, Congress would have no need to amend or repeal the legislation or to directly test the constitutional boundaries on restrictions of free speech. If the Court had consistently applied the avoidance canon, it would have either addressed or

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[365] *Id.* "In fact, *Yates* represented doctrinal evolution in a new direction, a direction in the *Masses* tradition." *Id.*

[366] *See* Rogat & O'Fallon, *supra* note 254, at 1399 (stating that "deference to the legislative judgment . . . is a subspecies of the most difficult question raised by the Supreme Court's role in the American governmental system").

[367] *See* Marshall, *supra* note 28, at 485-86 (arguing that by "remanding" legislation back to Congress by finding it unconstitutional, Court actually engages in dialogue and helps Congress have stronger voice).

failed to address the constitutional issue in both *Dennis* and *Yates*. Such consistency would have mitigated some of the difficulties presented by the *Dennis* decision.

The Lobbying Act cases also demonstrate other troublesome aspects of the canon. They make clear that invocation of the avoidance canon was a common response of the Court in cases where Communist and socialist groups were targeted in the 1950s.

C. The Lobbying Act Cases

Between the time the Court issued *Dennis* in 1951 and *Yates* in 1957, it decided two cases construing the Federal Regulation of Lobbying Act. As these cases demonstrate, the Court avoided directly confronting Congress about its investigative activities which impinged upon free speech. By this avoidance, the Court developed phantom First Amendment norms instead of reaching First Amendment issues.[368]

After years of abortive attempts to regulate lobbying,[369] interspersed with successful regulation of specific categories of lobbyists,[370] Congress passed the Federal Regulation of Lobbying Act (Lobbying Act) in 1946.[371] The Lobbying Act's passage was considered a success because a comprehensive statute placing controls on lobbying had finally been enacted.[372] However, the

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[368] In other cases, the Court focused on procedure rather than substance when limiting disclosure. *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234, 254 (1957) (finding legislative mandate inadequate for investigative activities); United States v. Rumely, 345 U.S. 41, 43 (1953) (holding that challenged disclosure exceeded committee authority); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 142-43 (1951) (Black, J., concurring) (declaring that attempts to label "Communist front organizations" violated due process).

[369] As early as 1907, Congress began introducing multiple bills proposing regulatory schemes; all were rejected or lapsed after one term. *See* Thomas, *supra* note 268, at 152 (discussing Act that Congress passed to regulate lobbying); Orval Hansen, Note, *The Federal Lobbying Act: A Reconsideration*, 21 GEO. WASH. L. REV. 585, 589 (1953) (discussing history of Lobbying Acts).

[370] *See, e.g.*, Public Utility Holding Co. Act, ch. 687, 49 Stat. 838 (1935) (codified as amended at 15 U.S.C. § 79(1)(i) (1996)) (requiring holding company lobbyists to file disclosures with Securities and Exchange Commission); Merchant Marine Act, ch. 858, 49 Stat. 1985, 2014 (1936) (codified as amended at 46 U.S.C. § 1225 (1940)) (requiring lobbyists for shipbuilding and ship-operating companies to file disclosure with Maritime Commission); Thomas, *supra* note 268, at 153-55 (mentioning requirements for lobbyists in various industries).

[371] 2 U.S.C. §§ 261-70 (repealed 1995).

[372] *See* Belle Zeller, *The Federal Regulation of Lobbying Act*, 42 AM. POL. SCI. REV. 239, 245

statute itself was notably ambiguous, and it engendered substantial criticism. Primarily, this criticism focused on First Amendment issues raised by its vague definitions of "lobbying" and "principal purpose" and its extensive accounting requirements.[373] Although it does not use the term "lobbyist," the Act applies to any person who "*directly or indirectly*, solicits, collects, or receives money or any other thing of value to be used principally to . . . influence," or "the principal purpose of which is to aid in the accomplishment of," the passage or defeat of legislation.[374] This definition potentially reaches broadly into grassroots and other activities not normally considered "lobbying."

In *United States v. Rumely*,[375] the Court used the broad approach to the canon to find that a congressional resolution raised serious doubts in light of First Amendment protection for political speech.[376] In so doing, the Court construed the Lobbying Act extremely narrowly, despite persuasive evidence that Congress intended the Act to regulate lobbying activities more broadly.[377] Subsequently, in *United States v. Harriss*,[378] the Court again invoked the broad approach to the canon to narrow the Act and constrain congressional activity.[379] In both cases, rather than explicating fully its First Amendment concerns, the Court avoided a political confrontation with Congress through phantom norms and aggressive statutory interpretation.

1. *United States v. Rumely*

The House Select Committee on Lobbying Activities ("Committee") was established in response to wide criticism of the Act, to determine how well it was working and to make recommendations for its improvement.[380] In the course of its investigation,

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(1948) (describing how Lobbying Act was applied); Note, *Improving the Legislative Process: Federal Regulation of Lobbying*, 56 YALE L.J. 304, 316-18 (1947) (discussing legislative history and structure of Lobbying Act).

[373] Note, *The Federal Lobbying Act of 1946*, 47 COLUM. L. REV. 98, 109 n.66 (1946).

[374] 2 U.S.C. § 266 (1988) (repealed 1995) (emphasis added).

[375] 345 U.S. 41 (1953).

[376] *Id.* at 42-48.

[377] *Id.* at 46.

[378] 347 U.S. 612 (1954)

[379] *Id.* at 625-26.

[380] *Rumely*, 345 U.S. at 45.

the Committee called Edward A. Rumely, Secretary of the Committee for Constitutional Government (CCG).[381] Rumely had met the organizational registration requirements under the Act, but had failed to register under section 304, which required that lobbying organizations disclose detailed information about any person contributing more than $500 for the purpose of lobbying.[382] The CCG did not accept payments greater than $490 unless the contributors specified that they be used for distribution of one or more of CCG's pamphlets. The CCG considered contributions that were to be used only for the distribution of pamphlets "sales" and did not report them under the Act.[383] The books were then sent to the contributors or to specified categories of recipients, such as libraries or "farm leaders."[384]

At the time of this investigation, CCG was a socialist organization whose basic function was the "distribution of printed material to influence legislation indirectly."[385] When Rumely refused to disclose to the Committee the names of those who made bulk purchases of CCG books, he was convicted for contempt of Congress.[386] The government argued that CCG was trying to influence legislation indirectly by sending these books to people throughout the U.S. and directly by sending them to members of Congress.[387] Justice Frankfurter, writing for the Court, rather delicately addressed the political climate in his discussion of "the penetrating and pervasive scope of the investigative power of Congress."[388] No other Justice even mentioned the ongoing

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[381] *Id.* at 42.

[382] *Id.* at 50 (Douglas, J., concurring). Those regulated must register with the Clerk of the House of Representatives and Secretary of the Senate, and make detailed disclosures about their activities and source of financing, including identification of contributors who give the lobbyist or her organization $500 or more. 2 U.S.C. § 264(a) (1988) (repealed 1995).

[383] *Rumely*, 345 U.S. at 50 (Douglas, J., concurring).

[384] *Id.* at 50-51 (Douglas, J., concurring). Justice Douglas points out that the Committee for Constitutional Government did report the name of an individual who paid for a distribution that included direct mailings to members of Congress. *Id.* at 51 n.3 (Douglas, J., concurring).

[385] *Id.* at 50 (Douglas, J., concurring).

[386] *Id.* at 42.

[387] *Id.* at 45-46.

[388] *Id.* at 43. For example, Justice Frankfurter obliquely described the CCG books as being "of a particular political tendentiousness." *Id.* at 42. *See also* Judith Resnik, *Rereading "The Federal Courts": Revising the Domain of Federal Courts Jurisprudence at the End of the Twenti-*

congressional activities such as those of the House Un-American Activities Committee or the activities of Senator Joseph McCarthy.

The Court overturned the contempt citation against Rumely for refusal to answer questions before the Committee.[389] However, rather than holding the Committee's authorizing resolution unconstitutional for lack of standards or for infringing First Amendment rights, the Court invoked the avoidance canon, finding that the congressional resolution simply did not authorize the Committee's investigation into the area in question.[390] The Court thereby extended its duty to interpret federal statutes "to reach a conclusion which will avoid serious doubt of their constitutionality"[391] to congressional resolutions.[392] However, it never elaborated on why "this duty of not needlessly projecting delicate issues for judicial pronouncement" was more applicable to resolutions than to formal legislation.[393] Perhaps the Justices presumed that formal legislation is more carefully thought out and systematic, and thus rewriting a regulation through the canon is less offensive than rewriting a statute because the regulation is one step removed from the authorizing statute. Such reasoning might be extended today to administrative agency regulations that implement a statute, but the Court failed to do this in *Rust*.[394]

Despite claims that the Court was avoiding constitutional questions in *Rumely*, Justice Frankfurter addressed First Amendment

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eth Century, 47 VAND. L. REV. 1021, 1038-41 (1994) (noting how Court's opinions — particularly *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), written by Justice Frankfurter — fail to supply readers with sufficient social and political context).

[389] *Rumely*, 345 U.S. at 42, 48 (affirming court of appeals' reversal of district court's decision, 197 F.2d 166 (D.C. App. 1952)).

[390] *Rumely*, 345 U.S. at 47-48.

[391] *Id.* at 45 (quoting Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 346 (1928)). Frankfurter, quoting previous decisions, elaborates on the canon and states that courts must construe a statute "so as to avoid doubts as to its validity," and to first find "whether a construction . . . is fairly possible by which the [constitutional] question may be avoided." *Id.* (citations omitted).

[392] *Id.* at 45 (citing Federal Trade Comm'n v. American Tobacco Co., 264 U.S. 298, 306 (1924)).

[393] *Id.* at 45-46.

[394] *See supra* notes 193-227 and accompanying text (discussing constitutional construction of Public Health Services Act Title X regulation).

concerns posed by the resolution.[395] He cited Holmes in saying that while the investigative function is not to be minimized, all apparent absolutes "in fact are limited by the neighborhood of principles of policy . . . which become strong enough to hold their own when a certain point is reached."[396] Specifically, the government's broad interpretation of the investigative scope set out in the resolution, "deriving from it the power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process" raised First Amendment concerns.[397] Frankfurter warned that if those concerns were adjudicated directly, it could have far-reaching effects on the congressional power of investigation; when the Court places constitutional limits on Congress's investigative power, it should only do so "after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits."[398] Further, he indirectly expressed concern about avoiding political pressures on the Court which would likely increase if the Court directly condemned the Committee's activities.[399]

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[395] *Rumely*, 345 U.S. at 46.

[396] *Id.* at 43-44 (citing Justice Holmes in *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908)).

[397] *Rumely*, 345 U.S. at 46. *See also id.* at 43 (recognizing reach of congressional investigative powers and questioning rights which that reach implicates).

[398] *Id.* at 46.

> Grave constitutional questions are matters properly to be decided by this Court but only when they inescapably come before us for adjudication. Until then it is our duty to abstain from marking the boundaries of congressional power or delimiting the protection guaranteed by the First Amendment. Only by such self-restraint will we avoid the mischief which has followed occasional departures from the principles we profess.

Id. at 48.

[399] Frankfurter used *Kilbourn v. Thompson*, 103 U.S. (13 Otto) 168, 199-202 (1881), to depict what can happen when the Court fails to avoid unnecessary constitutional adjudication: the Court was subject to criticism and subsequent judicial inroads. *See Rumely*, 345 U.S. at 46 (citing *Sinclair v. United States*, 279 U.S. 263, 298 (1929), which held that pertinence of question during congressional investigation is question of law, and *McGrain v. Daugherty*, 273 U.S. 135, 170-71 (1927), which presumed legislative purpose when subject matter under investigation is within Congress's jurisdiction); *see also Kilbourn*, 103 U.S. at 196 (holding that congressional power of investigation does not extend to private affairs or matters that cannot be legislated upon). The *Rumely* Court cites James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 217 (1927),

Thus, instead of looking to the definition of the restricted acts in the resolution, Frankfurter adopted the reasoning of the lower court. He avoided reaching the constitutionality of the resolution by applying the plain meaning of "lobbying in its commonly accepted sense" — "representations made *directly* to the Congress, its members, or its committees."[400] This definition did not include attempts "to saturate the thinking of the community."[401] He couched the reasons for so construing the phrase in negatives, saying, "it does no violence to the phrase 'lobbying activities' to give it a more restricted scope . . . [it] is not barred by intellectual honesty."[402] While acknowledging that its narrow definition of lobbying was "strained," Frankfurter pointed out that "words have been strained more than they need to be strained here in order to avoid that doubt"[403] in view of the avoidance canon's "wisdom and duty."[404] Here, Frankfurter urged broad use of the avoidance canon, and, by using prohibitions instead of positive directives, he set extremely wide or "outer" limits that allow the Court a great deal of latitude.[405]

Essentially, the Court avoided the constitutional question in *Rumely* by narrowly construing the enabling resolution to hold that the committee never had the authority to require Rumely

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as an example of the "weighty criticism" of *Kilbourn*. *Rumely*, 345 U.S. at 46. Professor Landis states that the Court "sharply limited . . . the breadth and extent of legislative functions" when in fact "the inquiry, placed in its proper background, should have been regarded as a normal and customary part of the legislative process." Landis, *supra*, at 214, 217. *See generally* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 307-18 (1927) (discussing Court's role in interpreting Constitution).

[400] *Rumely*, 345 U.S. at 47 (emphasis added) (quoting Rumely v. United States, 197 F.2d 166, 175 (D.C. App. 1952)).

[401] *Id.* (citing *Lobbying Direct and Indirect, 1950: Hearings Before the House Select Comm. of Lobbying Activities*, 81st Cong., 111 (1950)).

[402] *Id.*

[403] *Id.* (citing Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring)).

[404] *Id.* (citing United States v. Congress of Indus. Orgs., 335 U.S. 106, 120-22 (1948)).

[405] *Id.* at 48. Perhaps this varies by the political climate and composition of the Court. *Compare, e.g.*, United States v. Lopez, 115 S. Ct. 1624, 1631 (1995) (construing statute literally and holding it unconstitutional) *with* United States v. Bass, 404 U.S. 336, 347-51 (1971) (holding that "[t]he Court interpreted the possession component . . . to require an additional nexus to interstate commerce . . . ." and finding statute constitutional).

to disclose the disputed information.[406] However, Justice Douglas, in his concurrence, casts doubt on the validity of this reasoning. He argued that the Committee's action was well within the scope of the broad resolution.[407] Although he deemed that delegation of power unconstitutional, he viewed the majority's narrow construction of the resolution as a contradiction of its obvious terms.[408] Douglas argued that the legislative history reaffirmed this broad delegation of power.[409] Since the House clearly intended a very broad meaning of "lobbying," the Committee did not exceed its authority and the Court must reach the constitutional question.

Douglas did address the constitutional issues. In his view, the First Amendment protects criticism of the government and unorthodox views as well as uncontroversial expression.[410] If the government is permitted to require publishers to disclose who buys their books, it "is indeed the beginning of surveillance of the press."[411] That is, sanctioning this type of inquiry would have the practical effect of censorship, because people would become fearful of reading unpopular or unorthodox materials,

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[406] *Rumely*, 345 U.S. at 45-48.

[407] *Id.* at 53-56 (Douglas, J., concurring).

[408] *Id.* at 55-56 (Douglas, J., concurring). Resolution 298 states that anyone called by the committee who "refuses to answer any question pertinent to the question under inquiry" will be guilty of a misdemeanor. *Id.* at 49 n.1.

> Its history makes plain that it was intended to probe the sources of support of lobbyists registered under the [Act] . . . . The purpose of the Resolution was to investigate the operations of that Act. Not a word in the Resolution, not a word in the debate preceding its adoption suggests that the inquiry was to be delimited, restricted, or confined to particular methods of collecting money to influence legislation directly or indirectly.

Id. at 53-54 (Douglas, J., concurring).

[409] *Id.* at 55 (Douglas, J., concurring). When Rumely's contempt citation was referred back to the House for ratification, a fierce debate ensued, during which Congressman Charles Halleck argued that this kind of inquiry was not within the scope of the Resolution and that if it were it would be unconstitutional. *Id.* (citing 96 CONG. REC. 13887-88 (1950)). The Committee interpreted its mandate consistent with this broad view, specifically noting that "pamphleteering" was a lobbying activity, using CCG as an example. *Id.* at 54 (Douglas, J., concurring) (citing H.R. REP. NO. 3239, 81st Cong., 1, 3). The contempt resolution passed. *Id.* at 55 (Douglas, J., concurring). In Justice Douglas's view, this vote reaffirmed the meaning of the initial resolution, which raised serious constitutional issues. *Id.*

[410] *Id.* at 57 (Douglas, J., concurring).

[411] *Id.*

those which "the powers-that-be dislike."[412] Since the government could not directly prohibit such expression, and this kind of disclosure would do so indirectly, Congress may not do it by investigation.[413]

Rumely can be seen as a "sea change" in that for the first time the Court recognized that First Amendment values extended to lobbying activities. In response, the Court signalled a limitation on the growing reach of congressional investigations and intrusion into First Amendment rights.[414] Previously, the attitude toward lobbying and lobbyists had been condescending, if not contemptuous.[415] By voicing its constitutional concerns in *Rumely*, the Court was able to limit the scope of the Committee's investigation. Instead of addressing these concerns directly, the Court applied the avoidance canon at the expense of creating a phantom norm or extending the penumbra of the First Amendment. The Court artificially withheld an explicit affirmation of constitutional principles by its creative interpretation of congressional intent.[416] This may have been designed to save the Court from a destructive confrontation during the McCarthy era while also affording Congress one last opportunity to do the right thing. However, as the Court's next case considering the Act made clear, the Court's construction of the Act had little to do with congressional intent.

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[412] *Id.*

[413] *Id.* at 58 (Douglas, J., concurring). "Through the harassment of hearings, investigations, reports, and subpoenas government will hold a club over speech and over the press." *Id.*

[414] *Id.* at 44-48; *see also* Thomas, *supra* note 268, at 160, 161 n.87 (identifying change from previous political and judicial attitudes about lobbying and noting that when Court held that First Amendment applied to lobbying, it overruled *Trist v. Child*, 88 U.S. (21 Wall.) 441 (1874)).

[415] For example, Senator (later Justice) Black condemned lobbyists, stating:

> Contrary to tradition, against the public morals, and hostile to good government, the lobby has reached such a position of power that it threatens government itself. Its size, its power, its capacity for evil; its greed, trickery, deception and fraud condemn it to the death it deserves.

L. HARMON ZIEGLER & G. WAYNE PEAK, INTEREST GROUPS IN AMERICAN SOCIETY 35 (2d ed. 1972).

[416] *Rumely*, 345 U.S. at 44-45. The concurrence in *Rumely* provides substantial support for the fact that Congress explicitly intended that the broader meaning of "lobbying" apply, and that its members were aware of the potential constitutional issues involved. *Id.* at 54 (Douglas, J., concurring).

2. *United States v. Harriss*

One year after *Rumely*, the Court in *United States v. Harriss* upheld the Lobbying Act against First and Fourth Amendment challenges.[417] In order to do so, the Court judicially rewrote the Act, radically narrowing its application and scope under the rubric of the avoidance canon.[418] This judicial reconstruction continued to define the Act until 1996.[419] The activities at issue in *Harriss* involved agricultural prices rather than political agitation, and reporting of expenditures and defendants' activities rather than disclosure of contributors' names.[420] While volatile political issues are not as evident in *Harriss*, the dispute over the Act in *Rumely* and the direction taken by the Court in that case must not have been far from the thoughts of the Justices.

Defendants Ralph W. Moore and Robert M. Harriss were prosecuted for undisclosed expenditures, and Moore and Tom Linder for not registering as lobbyists for pay.[421] Each defendant argued that the Act was unconstitutionally vague and violated First Amendment guarantees of free speech, free press, and the right to petition the government.[422] The Court noted that the offenses were within the general class of offenses plainly included in the Act, "[a]nd if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction."[423]

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[417] United States v. Harriss, 347 U.S. 612, 624-25 (1954).

[418] *Id.* at 617-24 (citing cases to support Court's duty to construe statute so as to avoid danger of unconstitionality; including *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 407-08 (1909), and *United States v. Congress of Indus. Orgs.*, 335 U.S. 106, 120-21 (1948)).

[419] Lobbying Disclosure Act, 2 U.S.C. §§ 1601-12 (1996).

[420] *Harriss*, 347 U.S. at 613-17.

[421] *Id.* at 615-17.

[422] *Id.* at 617. Specifically, defendants alleged that:

> (1) §§ 305, 307, 308 are too vague and indefinite to meet the requirements of due process; [and]
> (2) that §§ 305 and 308 violate the First Amendment guarantees of freedom of speech, freedom of press, and the right to petition the Government; [and]
> (3) that the penalty provision of § 310(b) violates the right of the people under the First Amendment to petition the Government.

Id.

[423] *Id.* at 618 (citing *Screws v. United States*, 325 U.S. 91, 100, 105 (1945), which upheld definiteness of Civil Rights Act).

The Court relied upon *Rumely* for the meaning of the phrase "to influence directly or indirectly the passage of legislation" as used in the Act.[424] Thus, the Act was construed to cover only "lobbying in its commonly accepted sense" of *direct* communication with members of Congress on pending or proposed federal legislation.[425] The Court asserted that while avoiding constitutional issues by statutory construction, it must also avoid constructions that "seriously impair the effectiveness of the Act" in accomplishing its purpose.[426] The Court projected that at minimum Congress sought disclosure of direct lobbying efforts, and that "[i]t is likewise clear that Congress would have intended the Act to operate on this narrower basis, even if a broader application to organizations seeking to propagandize the general public were not permissible."[427] But it is difficult to see how such a radically narrow construction of the Act does not seriously impair its effectiveness.[428]

The Court held that the "principal purpose" requirement of the Act is to exclude from its scope contributions and persons who have only an *incidental* purpose of influencing legislation.[429] Rejecting the broader construction urged by the government, the Court limited coverage under the Act to those persons who solicit, collect or receive contributions, and then *only if* the "principal purpose" of such person or of such contribution is to influence legislation.[430] The Court would not accept the government's construction without a clear statement from Congress about its intention — perhaps through revision of the existing Lobbying Act.[431]

While sympathetic to the desire of the majority to save the statute, Justice Douglas dissented because "the formula adopted

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[424] *Id.* at 617, 620.

[425] *See id.* at 620 (citing *Rumely*, 345 U.S. at 47, which also construed statutory language narrowly).

[426] *Id.* at 623.

[427] *Id.* at 620-21.

[428] *See id.* at 624-25 (indicating that Lobbying Act, as narrowly construed by Court, meets constitutional definiteness requirements and does not violate First Amendment).

[429] *Id.* at 622.

[430] *Id.* at 619. This interpretation thus excludes anyone who only spends money to influence legislation. *See also id.* at 619-20 (expressing concerns that Act interferes with exercise of constitutional rights).

[431] *Id.* at 620.

to save this Act is too dangerous for use."[432] Additionally, Douglas reasoned that because the statute imposed criminal penalties, it must be sufficiently narrow and precise so as to give fair warning.[433] The majority's construction may meet that requirement, he noted, but "[t]he difficulty is that the Act has to be rewritten and words actually added and subtracted to produce that result."[434]

Douglas was also concerned that the ambiguities remaining even after the Court "rewrote" the statute would serve to chill freedom of expression.[435] He emphasized that statutes touching on First Amendment issues must be "narrowly drawn to prevent the supposed evil,"[436] and that, while at times a court may place a judicial gloss on statutes to save them from vagueness, this was not an appropriate case for doing so because the statute was so broad that it failed to provide fair notice.[437]

Justice Jackson likewise dissented in *Harriss* because the Court so radically rewrote the Act.[438] Jackson detailed how the Court deleted, changed, and expanded different elements of the Act, eliminating protection against the "more serious evil[s]" found

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[432] *Id.* at 628 (Douglas, J., dissenting).

[433] *Id.* at 629 (Douglas, J., dissenting). This theme was also part of the Court's rationale in *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994). *See* Kahan, *supra* note 103, at 351 (discussing how lenity constrains judicial interpretation of ambiguous criminal statutes); *supra* notes 94-144 and accompanying text (discussing *X-Citement Video*).

[434] *Harriss*, 347 U.S. at 629 (Douglas, J., dissenting).

[435] *Id.* at 633 (Douglas, J., dissenting). Probably in response to the dissenting opinion, Chief Justice Warren briefly addressed the potential chilling of First Amendment rights, saying that the risk of situations "in which such persons choose to remain silent because of fear of possible prosecution for failure to comply with the Act . . . is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest." *Id.* at 626.

[436] *Id.* at 632 (Douglas, J., dissenting) (quoting Cantwell v. Connecticut, 310 U.S. 296, 307 (1940)).

[437] *Id.*

[438] *Id.* at 633 (Jackson, J., dissenting). Jackson states:

> The clearest feature of this case is that it begins with an Act so mischievously vague that the Government charged with its enforcement does not understand it, for some of its important assumptions are rejected by the Court's interpretation. The clearest feature of the Court's decision is that it leaves the country under an Act which is not much like any Act passed by Congress . . . . I recall few cases in which the Court has gone so far in rewriting an Act.

Id.

in lobbyists who spend their own money;[439] he noted that six of the counts in this case involved that issue, as opposed to one count that rested on failure to report receipts.[440] In contrast to the rule of lenity,[441] Jackson believed that *true* criminal statutes should be interpreted liberally because any moral wrongness should be clear to perpetrators.[442] But here, Jackson continued, First Amendment rights are very likely impaired and there is no "moral wrongness" to provide warning; instead, lobbying involves a "novel offense" with no established bounds.[443] Therefore, instead of contorting to make the Act constitutional, Jackson suggested that the Court "should point out the defects and limitations which condemn this Act so clearly that the Court cannot sustain it as written, and *leave its rewriting to Congress.*"[444]

D. *Ramifications of Avoidance in the Lobbying Act Cases*

Justice Frankfurter's broad formulation of the avoidance canon in *Rumely* allows a court much more than the power to correct a "scrivener's error" in statutory language. It allows a court to construe a statute so as to conform to its conception of the Constitution, subject only to a court's "intellectual honesty." As *Rumely* and *Harriss* demonstrate, this allows courts to alter drastically the legislation to protect phantom constitutional norms without ever stating that the Constitution demands the statute's rewriting. These decisions may protect some litigants, but they do so without a hard-fought and decisive battle to achieve consensus about a constitutional challenge. Instead, constitutional law is developed through phantom norms, leaving constitutional

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[439] *Id.*

[440] *Id.* at 633-34 (Jackson, J., dissenting).

[441] *See* Kahan, *supra* note 103, at 346 (discussing failure of lenity in federal criminal law).

[442] *Harriss*, 347 U.S. at 634 (Jackson, J., dissenting).

[443] *Id.*; *see, e.g.*, Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952) (holding that Interstate Commerce Commission regulation is not void for vagueness); United States v. Petrillo, 332 U.S. 1, 7-8 (1947) (stating that language of Communications Act is sufficiently definite); *cf.* Jordan v. De George, 341 U.S. 223, 231-32 (1951) (stating that test for determining validity of statute is whether statute conveys sufficiently definite warning regarding conduct according to standard practices); *see generally* James C. Quarles, *Some Statutory Construction Problems and Approaches in Criminal Law*, 3 VAND. L. REV. 531, 539-43 (1950) (stating that sufficient definiteness is more crucial in criminal area than other areas).

[444] *Harriss*, 347 U.S. at 636 (Jackson, J., dissenting) (emphasis added).

law less clear and less uniform. Depending on how assertively courts employ a broad formulation of the canon like Frankfurter's in *Rumely*, the courts can be extremely creative in extending or redefining constitutional norms through the canon. While courts pretend to be avoiding constitutional questions and issuing confined decisions when they invoke the avoidance canon, they are in fact making constitutional law.[445]

Moreover, a statute narrowed by use of the canon will lose some of its effectiveness, as the dissenters charged in both *X-Citement Video*[446] and *Harriss*.[447] Legislative options will be foreclosed by phantom norms. For example, the Lobbying Act was generally perceived as ineffective after *Harriss*. Serious legislative attempts to amend the Court's narrow construction of the Act were not undertaken until the 1970s, and then without success;[448] the Act was not replaced until 1996, when a new act with stronger and broader disclosure requirements was enacted.[449] As noted by Judge Posner in his criticism of the avoidance canon, "Congress's practical ability to overrule a judicial decision misconstruing one of its statutes, given all the other matters pressing for its attention, is less today than ever before, and probably was never very great."[450] Thus, avoiding constitutional questions through the canon does not necessarily promote deference to legislatures.

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[445] *See* Marshall, *supra* note 28, at 488 (discussing fiction Court adopts by analyzing statutes as if Congress intended to avoid constitutional questions); Posner, *supra* note 53, at 816 (weighing benefits and harms of statutory interpretation canons).

[446] United States v. X-Citement Video, Inc., 115 S. Ct. 464, 473 (1994) (Scalia, J., dissenting).

[447] *Harriss*, 347 U.S. at 633 (Jackson, J., dissenting).

[448] Mary Kathryn Vanderbeck, Note, *First Amendment Constraints of the Federal Regulation of Lobbying Act*, 57 TEX. L. REV. 1219, 1224-25 (1979).

[449] Lobbying Disclosure Act, 2 U.S.C. §§ 1601-12 (1996). *See also* John F. Harris, *Law Aspiring to Shed Light on Lobbyists Leaves Some Gray Areas*, WASH. POST, Dec. 20, 1995, at A4 (discussing implications of new Lobbying Act).

> The law . . . vastly expands the number of people who must register as lobbyists and requires them to say how much they are being paid and what specific issues they are working. And unlike the old lobbying law passed in 1946, which applied only to Congress, the new law covers lobbying contacts with senior executive branch officials.

Id.

[450] Posner, *supra* note 53, at 816.

Arguably, the Court furthered speech protection by voicing constitutional concerns in the Lobbying Act cases in the mid-1950s. Those decisions may have even informed the Court's reference to similar norms in *Yates* in 1957 and indirectly stalled further prosecutions of American Communists. But in the Lobbying Act cases, the Court's reliance on fears for its own political viability or on the pretense of deference to Congress to support its avoidance of constitutional questions is unsettling and inadequate. The Lobbying Act remained as written, subject to a substantial judicial reinterpretation, and was unchanged until 1996; the Smith Act exists exactly as reenacted in 1948, although *Brandenburg* set out a First Amendment principle for evaluating the limits on speech by political dissidents.[451]

CONCLUSION

This Article argues that courts and other constitutional actors should engage in more direct discussion of the merits of constitutional issues. Courts, particularly the Supreme Court, can best accomplish this by addressing the merits of constitutional challenges rather than using the avoidance canon to speculate about potential constitutional difficulties in statutes. Despite the pretense of avoidance, courts using the canon are indirectly making constitutional law. This approach is a potentially more confusing and disjointed manner of developing constitutional principles than having courts expressly state constitutional principles and revise them over time. The canon is based upon problematic assumptions about the role of courts and the legislative process. Further, in using the canon, courts often do not defer to the majoritarian branches or advance dialogic interaction among courts and legislatures. Thus, courts should be wary of using the avoidance canon.

If courts prefer to retain the canon, one solution to improve its functioning is to apply a single approach to the canon. As shown above, the two major versions of the canon are not ap-

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[451] *Brandenburg v. Ohio*, 395 U.S. 444 (1969), dealt with the Ohio Syndicalism Act and overruled *Whitney v. California*, 274 U.S. 357 (1927); the *Brandenburg* standard would apply to any prosecutions under the Smith Act today. A similar state statute was at issue when the Court framed the doctrine of "*Younger* abstention" in *Younger v. Harris*, 401 U.S. 37 (1971).

plied consistently; instead, political choices about reaching the merits of particular issues sometimes drive the selection of the broad or narrow version. Therefore, courts, particularly the Supreme Court, should employ the narrow version in most instances. The narrow version is more limited and constrained, and fosters less avoidance than the broad, "serious doubts" version.

Based on the First Amendment cases discussed, this Article offers factors for determining whether use of the narrow version is appropriate. First, in employing the canon, a court must reflect on their role vis-a-vis other constitutional actors in statutory interpretation. Is a court's role (1) to determine as accurately as possible legislative intent; or (2) is it to articulate, develop, and promote public values by filling statutory gaps with its own conception of constitutional values? Judges use the canon in adhering to both views of valid court functions. But when a court decides to use any one of the varying formulations of the canon, this decision will affect which of these two roles the court is filling. The scrivener's error limitation and the broader reasonableness limitation on the canon reflect a concern for judicial adherence to legislative intent. In contrast, Justice Frankfurter's flexible formulation of the canon in *Rumely* allows courts to stray farther from legislative intent. If courts discuss their appropriate roles in statutory interpretation, they will better inform us when they are truly arguing over ambiguous constitutional intent and when they are using the canon to develop their own constitutional values.

A second essential factor in considering the canon's appropriateness involves thinking about how the canon and constitutional precedent interact. While cases — particularly Supreme Court cases — always have some significance beyond the immediate parties and dispute, in applying the avoidance canon, courts sometimes rely broadly on indirect precedent in new circumstances. Thus, in terms of precedent, the approach used in *X-Citement Video* (in which the Court relies on its own fairly clear, prior constitutional rulings) seems more defensible than the *Yates* approach, in which the Court recognizes a new constitutional danger that is not remotely clear from its existing precedent. Arguably, deployment of the canon in *Yates* may have been the only way to secure the majority of votes required to

protect the Communist party members, but the canon is a costly method of adjudicating constitutional claims.

Third, courts should consider whether a "quasi-constitutional" ruling sufficiently protects individual rights or other substantive constitutional concerns. Some might argue that the fundamental importance of free speech in our democracy makes this factor more relevant here than in other contexts. For example, in the Communist cases and the Lobbying Act cases, the Court failed to fulfill its role in developing constitutional law; namely to protect unpopular political dissenters from majoritarian legislative and executive judgments during a period of crisis. Courts should address this substantive and procedural interplay whenever they consider using the canon. Application of the canon — often justified as protecting the courts from political controversies — cannot be divorced from its political and social effects.

Fourth, in addition to the substantive effects of a choice to use or reject the canon, courts should consider the effects on the political controversy surrounding a particular constitutional challenge. The Court's selection (and rejection) of the narrow version of the canon in *Rust* arguably supported an end-run by the executive branch around Congress and shifted the balance of power, after Congress had repeatedly rejected a statutory amendment. Use of the more common "serious doubts" formulation of the canon to remand the issue to Congress might have resulted in a different political outcome than did the Court's decision on the merits. Similarly, when courts consider challenges to state statutes, as the Supreme Court did in *Brockett*, they should evaluate the strength of the federal and state interests, the novelty of the claim, and the activity of the state legislature and courts on the constitutional issue. This factor aims at addressing the separation of powers and federalism justifications for avoidance. Additionally, both the third and the fourth factors aim at assessing the canon's effect on long-term constitutional dialogue and development of constitutional law.

Finally, it is imperative to consider which court is undertaking the task of statutory interpretation. This Article argues that the Supreme Court should address the merits of constitutional challenges more frequently, even when a lower court could defend its use of the canon. Separation of powers concerns vary with the court that is employing the canon. Because the Supreme

Court has the ultimate role in developing constitutional law and ensuring uniformity in federal law, the lower courts might appropriately use the avoidance canon to take measured steps — interpreting the Supreme Court's precedent in new factual situations or where the statute is ambiguous. Thus, in *Masses*, when litigants challenged a new federal statute, Judge Hand's use of the canon to voice free speech concerns was more justified than the Supreme Court's use of it 40 years later in *Yates*.

Even if jurists find these factors unacceptable, they can use the catalogue of approaches to the avoidance canon identified here to recognize and explain their process of constitutional interpretation more candidly. For example, are they merely enforcing clear Supreme Court precedent when construing a statute so as to avoid serious doubt? Or are they identifying new constitutional concerns? Have they used the canon to avoid political confrontation with Congress (as in the Lobbying Act and Communist cases) or are they ignoring interbranch political struggles in considering the canon (as in *Rust*)? Such clarification would provide better signals to other constitutional interpreters about their avenues for response in advancing a dialogue about particular constitutional issues and counter the perception that only the judiciary can interpret the Constitution.