The Controversial Canon: Constitutional Avoidance and Constitutional Decisionmaking

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Abstract: At the intersection of constitutional and statutory decisionmaking is the canon of constitutional avoidance. When faced with a constitutionally dubious statute, a constitutional court may interpret the statute in a way that avoids constitutional problems. The canon of constitutional avoidance has generated worldwide controversy, with critics accusing courts of attempting to rewrite statutes and avoid public scrutiny. Despite the controversy, however, there is little empirical understanding as to how constitutional courts systematically use this interpretative canon. Relying on both legal and political science scholarship, I derive a series of hypotheses about the use of avoidance by constitutional courts. I test these hypotheses on a set of U.S. Supreme Court constitutional decisions over the post-war period. The analysis reveals that the Court's uses constitutional avoidance is driven by both jurisprudential and political concerns.

Introduction

The passage of the Affordable Care Act, the landmark legislation of the Obama administration that overhauled the American healthcare system, caused intense and immediate backlash from its many critics. Included in the many efforts to stymie the law was a series of lawsuits challenging its constitutionality, the most salient of which culminated in the case *National Federation of Independent Business v. Sebelius* (2012). The most pressing question of the case was whether the statute's individual mandate, which required virtually all persons in the U.S. to purchase health insurance, was under Congress' authority in Article I of the Constitution. While the Obama administration argued that the mandate was well within the government's powers to regulate commerce in the healthcare industry given the substantial problems within the industry, opponents argued that the mandate greatly exceeded the limits of the Commerce Clause and, if upheld on those grounds, would represent a gross threat to the liberty of individual Americans.

The Court eventually found that mandates, as a general matter, exceeded Congress' authority under the Commerce Clause. But the individual mandate was interpreted by the Court to be a constitutional exercise of taxing powers, given the financial penalties for non-compliance, short-circuiting the analysis of the constitutionality of mandates. This statutory interpretation was immediately controversial. Critics complained that the interpretation contradicted public understanding of the provision when the statute was being considered by Congress, with Obama famously arguing in a 2009 interview that "to say that you've got to take a responsibility to get health insurance is absolutely not a tax" (Stephanopoulos 2009). Further, critics lambasted the Court for interpreting the mandate as a tax when considering its constitutionality but not

interpreting the mandate as a tax when considering its interaction with the Tax Anti-Injunction Act.

The interpretation of the individual mandate as a tax rather than a mandate highlights the importance of constitutional avoidance in constitutional decisionmaking. Constitutional courts worldwide use the statutory canon of constitutional avoidance, by which constitutionally dubious statutes are interpreted so that they avoid constitutional issues. This constitutionally driven mode of statutory interpretation has driven a significant amount of controversy among legal academics, with critics decrying it as judicial activism and constitutional law in disguise (Slack 2006). Even among its defenders, it is readily conceded that avoidance strongly influences constitutional law (Fish 2015). But while there has been much debate over the use of constitutional avoidance, there has yet to be a positive analysis of its use. This is concerning, as a strong normative debate should be grounded in empirical reality.

This paper analyzes the systematic determinants of constitutional avoidance and its influence on constitutional law. I begin by elaborating on the differences in statutory and constitutional decisionmaking. I next examine the history and legal scholarship on the canon of constitutional avoidance. I proceed to develop a series of hypotheses about the determinants of avoidance grounded in both positive and legal theory. I then test these hypotheses on U.S. Supreme Court constitutional decisions on important federal statutes from 1949-2011. The analysis reveals that the Court's uses constitutional avoidance is driven by both jurisprudential and political concerns.

Constitutional and Statutory Decisionmaking

Many national high courts double as constitutional courts, meaning that they have to engage in both statutory and constitutional decisionmaking. While the same set of judges might

make decisions on both fronts, the jurisprudential underpinnings of those decisions are quite different. In statutory decisionmaking, the legality of government action is grounded in the text of relevant statutory provisions. Given that the ultimate authority for statutes in democracies are elected officials, courts interpret statutory provisions as agents of those officials. In contrast, the legality of government action in constitutional decisionmaking is found in a country's constitution. Given that constitutions are not generally ratified or amended by a simple majority of elected officials, constitutions are often viewed as deriving their authority from citizens themselves.

There are noted similarities between the two decisionmaking processes. The ideology of judges influences the outcomes of both constitutional and statutory decisions (Segal and Spaeth 2002). Judges, like all political elites, have preferences over policy outcomes. Given that both statutory and constitutional decisions can have important policy consequences, it is natural to assume that ideological preferences over policy outcomes will affect their decisions in both types of cases. Indeed, there is strong empirical evidence showing a relationship between ideology and decisionmaking in both statutory and constitutional cases, even when scholars explicitly consider the possibility of different decisionmaking processes for the two types of decisions (Clark 2011, Marshall, Curry, and Pacelle 2014).

The preferences of elected officials also influences the outcomes of both statutory and constitutional decisions. Perhaps the most influential articulation of the influence of elected officials on statutory decision-making is Marks' separation of powers model (2015). Marks explained why the U.S. Congress would tolerate a statutory Supreme Court decision inconsistent with its preferences. If the pivotal actors in the policy-making process, such as the median member of the House, the median member of the Senate, and the president, share the same

interpretation of a particular statutory provision, then they will respond to an unfavorable statutory decision by passing a statute containing said interpretation. Looking down the game tree, the Court would anticipate this reaction and adopt this desirable interpretation so that it is not statutorily overruled.[1] But if a single pivotal member has a different preferred interpretation of the statute, the Court is free to choose a statutory interpretation it prefers so long as it is not too extreme.

While originally developed for statutory decisionmaking, the separation of powers model was quickly applied to constitutional decisionmaking. While statutory decisions can be overruled by elected officials through ordinary legislation, constitutional decisions can only be overruled through constitutional amendments; this is a much more difficult process. However, elected officials can influence constitutional decisions by threatening to punish the court. In the U.S., for example, Congress and the president can punish the Supreme Court by ignoring or circumventing decisions (Epstein and Knight 1998, Meernik and Ignagni 1997), starving the Court of resources like support staff and salary increases (Ura and Wohlfarth 2010), limiting the amount of discretion the Court has in determining its docket (Harvey 2013), and pursuing constitutional changes that would damage a constitutional court or even impeach the justices (Whittington 2009). Given this possibility of reprisal, judges are constrained to respect the preferences of elected officials even in constitutional cases.

[1] Courts are assumed to not want their decisions statutorily overturned, including the desire to save face and the desire to not waste time issuing decisions that will only be in effect for a short time.

Evidence for the separation of powers model in U.S. Supreme Court decisionmaking is decidedly mixed, both in studies that directly test the predictions of the model and in studies that attempt to find more general evidence that constitutional courts are influenced by the preferences of elected officials. Some scholars find evidence that the Court responds to the preferences of elected officials in both statutory and constitutional cases (Spiller and Gely 1992, Bergara, Richman, and Spiller 2003). Others find no evidence of such a relationship in either case (Segal 1997, Segal, Westerland, and Lindquist 2011). Some studies find that the Court responds to the preferences of elected officials in only statutory cases (Marshall, Curry, and Pacelle 2014) or only in constitutional ones (Martin 2006). Clark (2010) finds that the Court responds to court-curbing measures in both statutory and constitutional cases, while Marshall and his coauthors find that the Court only responds to such threats in constitutional cases (Marshall, Curry, and Pacelle 2014). Yet despite the mixed empirical evidence, the theoretical story remains clear: there are plausible reasons why the preferences of elected officials would influence both statutory and constitutional decisionmaking.

There are also some notable differences to constitutional and statutory decisionmaking. In constitutional cases, courts are very attentive to its independence from the elected branches. As mentioned earlier, elected officials have a variety of court-curbing tools to punish undesirable decisions. Unlike the ordinary legislation used to overturn statutory decisions, however, court-curbing can be politically costly for elected officials. When constitutional courts are popular, as they often are in modern democracies (Gibson, Caldeira, and Baird 1998), this can insulate courts from reprisals and allow them to independently make decisions according to their own preferences. This relationship is moderated, however, by the transparency of the political environment (Vanberg 2001, Staton 2006). If the public is not attentive to a court's activities,

then elected officials have no incentive to respect judicial independence. Even enduringly popular courts, then, must be attentive to the saliency of their activities when striking down statutes.

Constitutional Avoidance: The Controversial Canon

At the intersection of constitutional and statutory law is constitutional avoidance, an interpretive canon for construing statutes so as to avoid constitutional complications. Despite the controversy over constitutional avoidance, the phrase itself has a muddled meaning due to it being used to describe a variety of activities over the past couple of centuries. In his concurrence in *Ashwander v. Tennessee Valley Authority* (1936), Justice Brandeis catalogued seven different rules the Court may use to avoid constitutional questions. Modern scholars have categorized constitutional avoidance into a trichotomy: procedural avoidance, classic avoidance, and modern avoidance (Vermeule 1997). I will now discuss them in turn.

Procedural avoidance looks to avoid constitutional rulings by disposing of cases prior to reaching the merits of a constitutional question. The Court may decide that a case is not justiciable or that the case may be resolved on purely statutory grounds; in these instances, the Court avoids making a constitutional decision. In what many scholars describe as the first act of "constitutional avoidance", Chief Justice John Marshall employed procedural avoidance while riding the circuit in *Ex Parte Randolph* (1833). Robert Randolph, a disgraced former lieutenant in the U.S. Navy, attacked sitting President Andrew Jackson in Washington D.C. and fled to Virginia. When he could not be extradited to face these crimes, as the attack violated local law, he was arrested and detained by federal officers in accordance to a congressional act that allowed for the detainment of public officials who failed to render their accounts of public funds. In a writ of habeas corpus, Randolph and his lawyers argued that his detention violated the

Constitution. But rather than relying on constitutional grounds for his decision, Marshall decided that the congressional act did not apply to military officers like Randolph and thus released him on statutory, rather than constitutional, grounds. His succinct justification for this procedural avoidance is almost universally accepted among scholars:

> "No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of a legislative act. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other points, a just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed."

In the second form of constitutional avoidance, dubbed classical avoidance in the literature, the Court interprets ambiguous statutes in a way that avoids the necessity of striking a statute as unconstitutional. *National Federation of Independent Businesses v. Sebelius* is a notable example of classic avoidance, as the Court ruled if the individual mandate a tax, which was constitutional, rather than a simple mandate, which was unconstitutional. Classic avoidance contrasts from procedural avoidance in that there is no prior method for avoiding a constitutional decision. Rather, classic avoidance is a canon of statutory interpretation that guides the interpretation of ambiguous statutes after reaching a constitutional issue.

The third form of avoidance, modern avoidance, is strikingly similar to classical avoidance: the Court will interpret an ambiguous statute to avoid making a constitutional decision. Rather than explicitly labelling certain statutory interpretations as unconstitutional, however, the Court will merely say that such interpretations are "problematic"; to avoid deciding difficult constitutional questions, then, the Court will choose a statutory interpretation that avoids these problems. The Court used such an interpretation in *Shepard v. United States* (2005).

Reginald Shepard plead guilty to unlawful possession for a firearm, which at the time had a maximum sentence of just over three years. Subsequent to this plea, Congress raised the penalty for repeated criminal offenders to a minimum of fifteen years; the government subsequently claimed that such a penalty must be applied to Shepard. Shepard argued against this increased sentence, as prior crimes were never discussed in his plea deal and thus the subsequent punishment would infringe upon his Sixth Amendment right to a trial by jury. Rather than deciding upon this constitutional question, however, the Court ruled that the new statute did not apply to Shepard because the prior convictions were not mentioned in his plea deal; this statutory interpretation was used to "avoid serious risks of unconstitutionality." This modern avoidance stands in contrast to the classical avoidance used by Justice Thomas' concurrence in this case, in which he states that applying the statute to Shepard "would not give rise to constitutional doubt... It would give rise to constitutional error."

Each of these three forms of avoidance are unique and should be given their due scholarly attention (Durchslag 2006). Yet most legal scholarship has focused on classic and modern avoidance at the exclusion of procedural avoidance (Young 2000, Fish 2015). This likely has to do with the way classic and modern avoidance influence constitutional law, as most scholars recognize the latter two as shaping the boundaries of constitutional government action even if it does not make an explicit constitutional decision. Procedural avoidance, on the other hand, largely leaves constitutional law unchanged. Political science takes a very similar approach to constitutional avoidance, as Whittington (2019) excludes procedural avoidance cases from his dataset on judicial review while including cases of classic and modern avoidance. For the remainder of the paper, then, I will focus on classic and modern avoidance and use the phrase "constitutional avoidance" is to refer to these two alone.

While discussions of constitutional avoidance in legal scholarship largely focuses on its use by the United States Supreme Court, avoidance is by no means an American phenomenon (Fish 2015). The Canadian Supreme Court, in a process called "reading down", also reinterprets unconstitutional laws in addition to striking statutes as unconstitutional. In New Zealand, a country without the traditional form of judicial review, courts are authorized by the New Zealand Bill of Rights Act 1990 to interpret ambiguous statutes in such a way as to be consistent that act (though it cannot strike laws that are inconsistent with it). A similar process also exists in the United Kingdom with its Human Rights Act 1998. Thus while constitutional avoidance began with American judicial review, it is now a doctrine that is applied in a similar fashion worldwide.

Why might the U.S. Supreme Court, and others like it, employ constitutional avoidance rather than striking a statute? Early proponents of avoidance doctrine argued that it was a necessary for judicial deference (Bickel 1986, Sunstein 1989). Striking down laws as unconstitutional is necessarily a countermajoritarian function in terms of the duly elected legislators who enacted the statute. Avoiding invalidation, supporters argue, minimizes interbranch conflict by prioritizing Congress' preference for its statutes to be upheld while maintaining the institution's legitimacy for resolving legal disputes.

Critics lambaste constitutional avoidance as invalidation in disguise (Barnett 1949, Vermeule 1997, Scheef 2002, Slack 2006). Classic avoidance is rarely required as statutes are rarely ambiguous enough to require its use. Further, decisions that rely on classic avoidance are de facto decisions of constitutional law as they delineate what government actions are and are not constitutional. To interpret a statute in a constitutional light is functionally the same as striking a law as applied to a certain set of circumstances (Fish 2015) or severing unconstitutional provisions from a statute (Vermeule 1997). Far from a unique view, even some

who largely defend the use of constitutional avoidance admit that it is a form of constitutional decisionmaking (Durchslag 2006, Fish 2015).

Several scholars argue that there are unique drawbacks to classic avoidance rather than simply striking down statutes. The Court is the recognized authority for deciding the meaning of the Constitution, but is not the recognized authority for deciding the meaning of statutes; that authority either falls to Congress itself or the agencies it empowers (Slack 2006, Walker 2012). Constitutional avoidance allows the Court to enter into the realm of statutory interpretation and ground its interpretation of a statute on considerations outside of the statute itself; such a process violates the separation of powers. And while explicit invalidations of statutes earns scrutiny from both the public and the legislature, thus serving as a democratic check upon an important constitutional power, constitutional avoidance helps courts evade the political spotlight and subsequently write lower quality opinions (Young 2000, Katyal and Schmidt 2014).

While the above criticisms are largely geared towards classic avoidance, modern avoidance also experiences many of the same criticisms. Like classic avoidance, decisions using modern avoidance avoid public scrutiny and the benefits that come with such scrutiny. While modern avoidance does not explicitly declare what government actions would or would not be constitutional, highlighting constitutionally problematic areas chills congressional actions and results in de facto declaration of constitutional law (Young 2000). Further, interpreting statutes to avoid constitutional questions ducks the Court's responsibility to hear constitutional cases and needlessly frustrates legislatures, requiring them to choose between the costly process of passing new legislation or allowing a court to usurp its role as the creator of law (Slack 2006). Game-theoretic analysis suggests that exact reenactment of constitutionally questionable statutes is

unlikely due to the gridlock between pivotal policymakers over crafting a response (Marshaw 1997).

More recent defenses of avoidance doctrine recognize that avoidance decisions are constitutional law decisions and argue that there are benefits to the approach (Durchslag 2006, Fish 2015). Avoidance may trigger a constitutional dialogue between the branches of government, leading to a coordinate construction of the Constitution (see Meernik and Ignagni 1997). Avoidance doctrine can be employed on polarizing issues as a means of narrowly ruling when a constitutional decision might yield a confusing and unstable precedent. Further, Congress may prefer a ruling that results in a dubious, but constitutional, statutory interpretation to a ruling that invalidates legislation.

Empirical Theories of Constitutional Avoidance

Much of the legal scholarship surrounding constitutional avoidance is normative theory, criticizing the Court's use of constitutional avoidance and how it should alter its behavior in the future. An appreciable amount of this scholarship is also empirical theory, giving explanation to when and why the Court uses constitutional avoidance as opposed to simply invalidating a statute. These empirical theories are alternatively given as either standalone explanations of why the Court uses avoidance or may be embedded into normative arguments. I seek to complement current understanding of constitutional avoidance in two regards: by incorporating insights from political science scholarship and by transforming theory into testable hypotheses.

The most basic theory of constitutional avoidance takes its legal justification at face value. The Court uses constitutional avoidance when a statutory provision is ambiguous and multiple interpretations are plausible. Ex ante, it is difficult to predict whether the Court will find a given statutory provision will be ambiguous or not. That being said, statutory provisions are

nested within statutes, which are themselves nested within issue areas. Importantly, not all issues areas are equally straightforward; a statute concerning abortion, for example, will be easier to understand than a statute modifying the operation of the Social Security Administration. Given this relationship, then, it seems reasonable that the Court will use constitutional avoidance when reviewing statutes concerning complex issues areas. This leads to a clear hypothesis:

> *Statute Complexity Hypothesis*: As a statute is increasingly complex, the Court is more likely to employ constitutional avoidance in a decision on the statute's constitutionality. Constitutional avoidance may also have legal determinants beyond its core rationale.

Such a hypothesis stands in contrast to the typical explanation of statute complexity and judicial review. Vanberg (2001) shows that the German Constitutional Court is more likely to strike a statute when it concerns a simple subject matter than a complex one. Because statutes that are easy to understand are more politically salient, a constitutional court can feel more confident striking a statute because the institution's enduring political popularity can help fend off backlash from other branches of government. Given that legal scholarship on constitutional avoidance views it as a form of invalidation of a statute, there appears to be a contradiction between the legal justification for constitutional avoidance and the practical effects of constitutional avoidance.

Such a contradiction can be resolved, however, by asserting that constitutional avoidance can be a substitute for invalidation. Vande Kamp (n. d.) argues that the complexity of a statute serves as a moderator between the Court's ideological predisposition to striking a statute and actually striking a statute. When a statute is easy to understand, there is a strong relationship between the Court's ideological leanings and its final ruling because the ruling will be more salient and the public will be attentive to both the ruling and the government's responses to it.

When a statute is difficult to understand, however, that relationship disappears. If constitutional avoidance is a substitute for invalidation, it again could have an inverse relationship. When a statute is complex, there may be a strong relationship between the Court's ideological leanings and its final ruling; that relationship should, then, disappear as a statute becomes easier to understand. This leads to another conditional hypothesis:

> *Conditional Statute Complexity Hypothesis*: There is a positive relationship between the ideological preferences of the Court towards not finding a statute constitutional and the probability that the Court use constitutional avoidance. This relationship is conditioned by the complexity of a statute, with increasing complexity leading to a more positive relationship.

Scholars have long recognized that constitutional avoidance may be more attractive to employ in certain areas of constitutional law than in others (Bernard 1951). This recognition parallels how the Court might employ other tools of constitutional decisionmaking, such as severability (Vande Kamp n.d.) and as applied invalidations (Lindquist and Corley 2011). In particular, scholars have identified two areas of constitutional law where avoidance may be particularly salient: due process and the freedom of speech.

Statutes can be challenged on due process grounds when there is not procedural or substantive fairness in the government actions authorized by that statute. Within the Constitution, there are two due process clauses: the Fifth Amendment clause governing federal action and the Fourteenth amendment clause governing state action. Within due process considerations is the idea of vagueness: if a statute is so vague that an ordinary person could not comprehend it, then its use to deny the life, liberty, or property of a person is unconstitutional. Unconstitutional vagueness is closely related to constitutional avoidance (Bernard 1951). If a statute is challenged

as unconstitutionally vague, it is also likely to have multiple, plausible statutory interpretations. The multiple interpretations may include a constitutionally permissible interpretation, in which case the Court may employ constitutional avoidance rather than ruling a statute is unconstitutionally vague. This leads to a clear hypotheses:

Due Process Hypothesis: the Court should be more likely to employ constitutional avoidance when a statute is challenged on due process grounds.

Constitutional avoidance may also be used to avoid confrontation with Congress (Hasen 2009). As described earlier, there is a strong incentive for constitutional courts to respect the preferences of elected officials; if the Court invalidates a favored statute, it may face retaliation. To circumvent this outcome while still achieving a favorable policy outcome, then, the Court may employ constitutional avoidance as a substitute to striking a statute. There are a number of reasons why the Court might think this outcome will avoid court-curbing. The lower political salience of these decisions might fall under the radar of legislators and the public. Even if it does not, the more deferential tone of these decisions might short-circuit attempts at retaliation.

Political Calculus Hypothesis: As a statute enjoys greater political support among elected officials, the Court is more likely to employ constitutional avoidance in a decision on the statute's constitutionality.

There is no reason to believe, however, that the political preferences of elected officials towards a statute will result in an additive relationship. Vande Kamp (n.d.) finds that the political preferences of elected officials moderate the relationship between the Court's ideological predisposition to striking a statute and actually striking a statute. When elected officials do not support a statute, there is a strong relationship between the Court's ideological leanings and its final ruling; when elected officials do support a statute that relationship disappears. Given that

constitutional avoidance may be a substitute for invalidation when elected officials support a statute under review, an inverse of this previous relationship may exist: there may be a weak relationship between the Court's ideological predisposition to invalidate when elected officials support a statute, but that relationship becomes stronger as elected officials increasingly support a statute. This leads to an additional hypothesis:

> *Conditional Political Calculus Hypothesis*: There is a positive relationship between the ideological preferences of the Court towards not finding a statute constitutional and the probability that the Court use constitutional avoidance. This relationship is conditioned by the support a statute enjoys among elected officials, with greater levels of support leading to a more positive relationship.

Research Design

An empirical understanding of how constitutional avoidance is employed is necessary for robust normative debates; one cannot criticize how the Court is using avoidance if one does not understand how the Court is employing it. Yet the depth of theory about when the Court uses constitutional avoidance, there is surprisingly little empirical evidence attempting to validate those theories. While theories abound in the literature, they are usually based on an anecdotal reading of the law. No systematic, empirical account of the use of constitutional avoidance doctrine exists. As a byproduct, there has also not been a quantitative examination of constitutional avoidance.

In order to both test the above hypotheses and deepen scholarly understanding of constitutional avoidance, I need to analyze a set of constitutional court decisions that employ constitutional avoidance with some frequency. Decisions from the U.S. Supreme Court provides an excellent test case for two reasons. First, the vast majority of legal scholarship on

constitutional avoidance approaches analyzes U.S. Supreme Court decisions, making it the most natural extension of the current literature. Second, there is a wealth of quantitative information on U.S. Supreme Court decisions available that does not have a parallel in other contexts. For these reasons, I analyze a subset of U.S. Supreme Court decisions from 1949-2011.

Rather than solely focusing on U.S. Supreme Court decisions, however, this analysis draws on a statute-centered approach of previous studies (Hall and Ura 2015, Harvey and Friedman 2006, 2009). The study of judicial review inevitably leads to studying court decisions. Studying U.S. Supreme Court decisions in presence of a discretionary docket, however, can lead to a selection bias as strategic interactions may happen at the certiorari stage. This can negatively impact our ability to make inferences, meaning we must go beyond simply looking at decisions and look at the statutes which the decisions are about. Thus, the unit of observation in this analysis are federal statutes. Of course, there are difficulties with looking at all federal statutes. Collection of the data is prohibitively costly and would thus limit analysis to a small time period. As a middle ground, I analyze a subset of statutes enacted between 1951 and 2011. The subset is whether a law is landmark legislation, as defined by Mayhew's "Sweep 1" process (2005), for a total of 357 laws in the dataset.

To identify whether the Court decided on the constitutionality of a statute, I consult both the Supreme Court Database (Spaeth et al 2016) and the Judicial Review of Congress Database (Whittington 2019). Each database was searched for cases where the Court decided on the constitutionality of one of the important statutes. When using the Supreme Court Database, only cases in which the Court used judicial review on a federal statute are examined. All cases were hand-coded as to which statute a case focused on, even those cases that had specific references to statutes in their data. Cases in which the Court was asked to decide on the constitutionality of a

statute but used procedural avoidance instead were excluded, including cases that were not justiciable. This search resulted in 227 cases on important federal statutes, including 65 where the Court invalidated at least one provision of a statute and 14 in which the Court relied on classic or modern avoidance to interpret a statute in a constitutional manner.

Are constitutional avoidance decisions really constitutional law in disguise, as many scholars argue? To answer this question, I looked at the primary dissenting opinions in the 14 cases where the majority decided a case using constitutional avoidance. I coded whether the dissenting justices opposed the use of constitutional avoidance in favor of directly engaging the constitutionality of a statutory interpretation disfavored by the majority and, if so, how the justices wanted to rule. If constitutional avoidance is simply an indirect means of constitutional decisionmaking, then dissents will complain about the Court's use of constitutional avoidance and prefer the constitutionally problematic statutory interpretation. If avoidance is an indirect means of invalidating a statute, then the dissent will find that the statutory interpretation disfavored by the majority to be constitutional. The results of this simple analysis are in Table 1.

Table 1: Dissent Content in Cases Decided Using Constitutional Avoidance

Category	Count
Prefer "problematic" interpretation and would find it constitutional	8
Prefer "problematic" interpretation	2
No Dissent; Unanimous Decision	3
Other	1

In the majority of cases, the dissent believed that the constitutionally problematic interpretation was the correct one and that this interpretation was constitutional. The remaining cases broke down into three categories of relatively equal size: the dissent preferred the disfavored statutory interpretation but thought it inappropriate to give a constitutional decision in a dissent, the dissent did not clearly relate to the statutory construction at issue in the case, and a

dissent did not exist because the case was unanimous. Given that a supermajority of dissents wanted to rule on the constitutionality of the disfavored statutory interpretation, it seems clear constitutional avoidance is an indirect means of deciding constitutional law. Further, it also seems clear that constitutional avoidance is an indirect means of invalidating a statute given that a majority of cases had dissents that would have ruled a disfavored statutory interpretation constitutional.

In order to test the hypothesis previously advanced while taking into account sample selection bias, the model used in this analysis is a Heckman multinomial probit model. The first stage is a model of the Court's decision to decide the constitutionality of an important statute in a given year. The second stage is a model of the Court's decision to invalidate, in part or in whole, the statute on constitutional grounds. Because the Court has many different options when ruling on the constitutionality of a particular section of a statute – constitutional, unconstitutional, constitutional avoidance – the second stage must be a multinomial probit model with three possible outcomes. I estimate the model using the cmp package developed for Stata by Roodman (2011). The comparison group is a statute that is ruled unconstitutional, as most discussion on when the Court uses constitutional avoidance compares its use to simply striking a statute. In order to both help with model convergence and control for duration dependence, I include cubic polynomials of years since the statute was enacted or the Court previously decided its constitutionality (Carter and Signorino 2010). Standard errors are clustered by statute as the Court often decides multiple cases on a given statute, leading to correlated observations (Box-Steffensmeier and Zorn 2002).

In 22 instances, there were two cases decided on a single statute in a single year. Given this unusual data structure for a duration model, two different approaches were used. The first

approach, which is reported in the replication materials, simply included the case decided earliest in the year and dropped the latter case. This approach preserves the statute-year structure of the data while excluding cases in an arbitrary manner. While this approach may bring some comfort to readers, the coming analysis does not rely on a statute-year panel structure. As a drawback, however, it increases inefficiency because it discards observations and may even bias inferences if the date of the decision is somehow correlated with the dependent variable.

As an alternative to this approach, I devise a method for including all observations that purposefully breaks the statute-year observation set-up in the data. For every statute-year that saw the Court decide on the constitutionality of a statute, a duplicate observation was created that was coded as not being subject to a challenge and in which the years since the statute was enacted or previously decided upon was set to zero. For a statute-year with multiple cases, only one duplicated observation was created. These additional represent the time after the Court has decided on a case but before the end of the year. Because they represent a subset of time rather than an entire year, they can accommodate more than one case being decided in a given year by simply inserting a later case in between earlier case and this duplicate observation. The results from this approach are reported in the paper; the substantive inferences from the two approaches, however, are virtually identical.

There are a number of independent variables necessary to test the hypotheses advanced. The Court may employ constitutional avoidance in some areas of law but not others. Vagueness doctrine suggests that the Court is more likely to employ constitutional avoidance when a statute is challenge on due process grounds. Therefore, I include a couple of dummy variables measuring whether a due process or freedom of speech challenge was brought against the law

under review in the second stage of my analysis. A 1 indicates that such a challenge was leveled against the statute, while a 0 indicates it was not.

The Court may take into account the preferences of key elected officials when deciding whether to use constitutional avoidance. I adopt a measure in the literature that estimates whether the current pivotal policymakers support or oppose a given statute under review (Segal, Westerland, and Lindquist 2011, Hall and Ura 2015). I collect the original roll call votes for each public law from VoteView (Lewis et al 2017). Using logit, I then regress these roll call votes on the Common Space Score of Members of Congress and the president (Poole 1998). Using the resulting model coefficients, I can then predict the probability that a future elected official supports a law using their Common Space Score. Note that for those laws passed unanimously or via voice votes in both chambers, there is no variation to run regression models. In these instances, the predicted support for all future officials is 1.

I then identify pivotal actors in the policymaking process, relying on the insights of Krehbiel (1998), and record the minimum level of predicted support to a statute from any of the pivotal actors. I test three different pivot models: the floor median model, the Senate filibuster model, and the party gatekeeping model. Each of these models are outlined in more detail in Hall and Ura (2015). The resulting measure gives the probability that the most hostile pivotal actor supports the law based on their ideology, as measured by Common Space scores. This variable is included in both stages of the analysis. While the hypotheses presented here only make predictions for the decision stage, Hall and Ura (2015) have shown how this variable also effects the certiorari stage.

The Court may also employ constitutional avoidance when deciding on a complex statute. In order to measure statutory complexity, I adapt Vanberg's (2001) complexity measure

to this analysis. It is a dummy variable with any statute whose subject matter primarily dealt with economic regulation, state-mandated social insurance, civil servant compensation, taxation, federal budget issues, or campaign finance is coded as complex and given a 1. All others are coded as straightforward and given a 0. These complex issue areas "tend to involve technical regulatory questions" and are thus crucial to this analysis. This variable is included in both stages of the analysis, as Vande Kamp (n.d.) finds that the Court is more likely to accept challenges to the constitutionality of complex statutes as opposed to straightforward ones.

Finally, a number of theories suggest that the Court's ideological predisposition to not find a statute constitutional influences its decision to employ constitutional avoidance. To measure this phenomena, I use a combination of Bailey's (2013) ideal point estimates of justices' ideology and the direction of the decision classification from the Supreme Court Database. If striking a statute was consistent with the median member of the court's ideological predisposition, then the observation is assigned the absolute value of the median member's ideal point. If not, then the observation is assigned the negative of the absolute value of the median member's ideal point. All cases where the ideological implications of a decision were unclear were coded as zero. Given both the legal scholarship describing constitutional avoidance as an indirect means of striking a statute and my own findings after reading the dissents of cases employing constitutional avoidance, a decision in which the Court employs constitutional avoidance counts as a decision in which the Court strikes a statute for the purposes of this variable. This results in a measure of the court's attitudes towards the case where positive values indicate the court is ideologically opposed to finding a statute constitutional and negative values indicate the court is ideologically inclined to striking or employing constitutional avoidance.

This variable is included in the second stage of the analysis, at first as a control variable but then as a multiplicative interaction with other variables in the model.

Analysis

I estimate two different models for this analysis: one in which all of the covariates are additive and another that includes multiplicative interactions between some of the variables of interest. The results of the additive model are presented in Table 1. The first column contains the comparison between a statute being ruled as constitutional and being ruled as unconstitutional. Neither the complexity nor the pivotal policymaker variables are statistically significant, a finding consistent with previous studies (Vande Kamp n.d.). In contrast, the coefficient for the Due Process clause variable is statistically significant: a statute challenged on due process grounds is, on average, 13% more likely to be found constitutional rather than unconstitutional compared to statutes that are not challenged on such grounds.

Importantly, court ideology is a robust and relatively stable predictor of whether the court will strike down a statute: a one-unit increase in the court's ideological predisposition to not find a statute constitutional results in roughly 26% decrease in the probability of the statute being ruled constitutional on average.[2] To help illustrate this example, Justice O'Connor retired in 2005 as the median justice on the Court. Her replacement, Justice Alito, was decidedly more conservative: on the Bailey ideal point scale, his first ideal point measure in 2006 was roughly one unit larger than O'Connor's in 2005. Thus if Alito had become the median justice after replacing O'Connor, the Court would be 20% more likely to strike down liberal statutes and uphold conservative statutes.8 This finding comports well with the literature, showing that ideology influences whether the Court will strike a statute (Segal and Spaeth 2002).

[2] All reported average marginal effects are computed using STATA's margins command.

Table 2: Heckman Multinomial Probit Model of Decision to Invalidate an Important Federal Statute, 1949-2011

	Constitutional	Constitutional Avoidance
Due Process	0.57*	0.18
Challenge	(0.26)	(0.41)
Freedom of Speech	0.60	-0.42
Challenge	(0.31)	(0.48)
Support of Pivotal	0.59	2.66*
Policymaker	(0.61)	(1.05)
Statute Complexity	-0.44	-0.67
	(0.27)	(0.35)
Court's Ideological	0.89*	-0.06
Predisposition to	(0.35)	(0.59)
Strike		
Constant	-0.96	-3.33*
	(0.87)	(1.28)
Rho	0.45	0.18
	(0.36)	(0.39)
N Stage 2	224	
N Stage 1	11,852	

*p<0.05, **p<0.01, two-tailed tests
Comparison group is Unconstitutional
Robust Standard Errors Clustered by Statute are in Parentheses
Only Stage 2 Estimates are Shown to Conserve Space
Table shows Floor Median Model; additional models in the replication materials

Looking now at the second column that compares the Court using constitutional avoidance to the Court ruling a statute unconstitutional, almost all of the variables fail to reach statistical significance. A few of these variables are also incorrectly signed, including the statute complexity and freedom of speech variables. These results cast doubt on the Due Process Hypothesis and the Statute Complexity Hypothesis. In addition, the Court's ideological predisposition to strike also fails to reach statistical significance.

In contrast, the variable measuring the support of the pivotal policymaker is positive and statistically significant. When the pivotal policymaker moves from completing opposing a statute under review to completely supporting it, this results in a 15% increase in the probability of the

Court using constitutional avoidance as opposed to finding a statute unconstitutional. This finding appears no matter which measure of pivotal policymaker support is used, as shown in the replication materials. These findings, then, provide support for the Political Calculus Hypothesis

Turning now to test the conditional hypotheses, Table 3 contains the results for a new model that now includes multiplicative interactions. By looking at the first column, one can see many of the same relationships. Statutes challenged on due process grounds are still more likely to be found constitutional, while the Court's ideological predisposition again influences the decision the Court will make. This time, however, the interaction term between statute complexity and the Court's ideological predisposition is also statistically significant. This indicates that statute complexity moderates the influence of the Court's ideological predispositions on its decision to find a statute constitutional or unconstitutional. When a statute is relatively simple to understand, a one-unit increase in the Court's ideological predisposition to strike results, on average, in a 32% decrease of the Court finding a statute constitutional instead of unconstitutional. When a statute is complex, however, that result drops to a mere 7% decrease. This evidence is consistent with a similar finding by Vande Kamp (n.d.).

Table 3: Heckman Multinomial Probit Model of Decision to Invalidate an Important Federal Statute, with multiplicative interactions, 1949-2011

	Constitutional	Constitutional Avoidance
Due Process	0.66*	0.31
Challenge	(0.29)	(0.42)
Freedom of Speech	-0.57	-0.29
Challenge	(0.32)	(0.46)
Court's Ideological	-2.11*	-3.40
Predisposition to	(0.87)	(2.84)
Strike		
Support of Pivotal	0.40	2.45*
Policymaker	(0.63)	(1.11)
Support *	0.66	2.64
Court's Ideology	(1.47)	(3.61)
Statute Complexity	-0.50	-0.67*
	(0.27)	(0.35)

Statute Complexity	1.54*	2.50*
* Court's Ideology	(0.77)	(1.19)
Constant	-0.59	-2.77*
	(0.93)	(1.27)
Rho	0.38	0.04
	(0.35)	(0.36)
N Stage 2	224	
N Stage 1	11,852	

*p<0.05, **p<0.01, one-tailed tests used for hypothesized relationships
Comparison group is Unconstitutional
Robust Standard Errors Clustered by Statute are in Parentheses
Only Stage 2 Estimates are Shown to Conserve Space
Table shows Floor Median Model; additional models in the replication materials

Interestingly, however, is that neither of the pivotal support variables are statistically significant. Such a finding stands in contrast to Vande Kamp (n.d.), which found that the support of a pivotal policymaker for a statute served as a moderator between the Court's ideological predisposition to strike and the Court's decision to strike a statute. It is unclear why this finding discrepancy exists; perhaps it is due to the inclusion of multiple terms interacted with the Court's ideological predisposition. This discrepancy should be of interest to future scholars.

Moving now to the second column of Table 3, there is again a noticeable lack of statistically significant variables. The two legal variables are not statistically significant, as is the constitutive term of the Court's ideological predisposition to striking. And while the pivotal policymaker variable is statistically significant, its interaction with the Court's ideological predisposition is not. Therefore, I fail to find evidence for the Conditional Political Calculus Hypothesis.

In contrast, both the constitutive term for statute complexity and its interaction with the Court's ideological predisposition are statistically significant; this provides evidence for the Conditional Statute Complexity Hypothesis. When a statute is relatively simple, a one-unit increase in the Court's ideological predisposition to not find a statute unconstitutional results in a

7% decrease in the probability of the Court employing constitutional avoidance rather than striking a statute. When a statute is complex, however, the same one-unit increase results in a 13% increase in probability.

Finally, a word about selection effects. While previous scholars have used Heckman selection models, they usually do not report the results of whether selection bias was actually found (Hall and Ura 2015, Harvey and Friedman 2009). In the two models presented here, the rho parameter – or the parameter that takes into account sample selection bias - is not statistically significant for either choice. This indicates that there are no detectable selection effects in the data, though selection effects could still exist (Rainey 2014). Even still, this lack of a result casts some doubt on the worry some scholars have about statistical models of Supreme Court cases. It is impossible, of course, to come to a firm conclusion after only a single test. Scholars employing Heckman models in the future should report on the results.

Conclusion

This study analyzes constitutional avoidance and how it relates to constitutional decisionmaking. Constitutional avoidance is a form a de facto constitutional invalidation, as displayed by the dissents in cases decided using the canon. Further, constitutional avoidance appears to be a substitute for constitutional invalidation when legal and political circumstances exist to encourage its use. When the Court is ideologically inclined to strike a statute, it will choose to employ avoidance when a statute is in a complex issue area. Further, the Court is more likely to employ avoidance rather than invalidation when that statute enjoys consistently high support among pivotal elected officials.

How do these findings interact with criticisms of the Court's use of constitutional avoidance? Most legal scholars agree that constitutional avoidance is a subtle form of

constitutional decisionmaking, even though it is a canon of statutory interpretation. They are right. The dissents in constitutional avoidance cases overwhelmingly prefer constitutionally problematic interpretations, and the majority of dissents do not find such interpretations problematic in the first place. Many legal scholars fear that the Court will use it when Congress cannot mount a response to a decision, usurping the role of the legislature through its activisim. This study, however, finds otherwise: the Court uses constitutional avoidance when Congress uniformly supports a statute. Thus, some criticism appears overblown. Indeed, an absence of congressional response to such decisions may be explained by congressional acceptance rather than congressional gridlock.

This study is not without limitations. There is concern about the generalizability of the findings, given that the research design focuses on statutes that are regarded as important. But the focus on important statutes excludes statutes with moderate to minor importance. In these cases, it is entirely possible that the results would differ and would be an interesting avenue for future research.

Additionally, this study does not consider forms of procedural avoidance like justiciability. This was done because classic and modern forms of avoidance influence constitutional law to a much greater degree and are therefore more controversial. But there is also a sizable legal scholarship on these questions (Albert 1978, Kloppenburg 2006) with an accompanying gap in empirical analysis. Future scholarship should consider when the Court uses procedural avoidance instead of directly adjudicating constitutional questions.

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