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 when elected officials support a statute under review and when a statute is challenge on due process grounds.

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 deliberately interpreted by the Court to be a tax, given the financial penalties for non-compliance. The Court therefore ruled the statute a constitutional exercise of taxing power, 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 statutorily interpreted so 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 assert that constitutional avoidance is an inferior substitute to constitutional invalidation used when a constitutional court is not sufficiently independent, a theoretical approach from which I develop a series of hypotheses. I then test these hypotheses on U.S. Supreme Court constitutional decisions on important federal statutes passed between 1949-2011. The analysis reveals that the Court uses constitutional avoidance when elected officials support a statute under review and when a statute is challenge on due process grounds.

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 constitutional decisions can only be formally overruled through constitutional amendments, 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 (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 in order to maintain their independence.

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[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. 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).

There are also some notable differences between constitutional and statutory decisionmaking. In constitutional cases, courts are very attentive to their independence from the elected branches; more specifically, courts are more attentive to their popularity. Courts in modern democracies often have broad support among their publics (Gibson, Caldeira, and Baird 1998, Gibson, Caldiera, and Spence 2003). This support may cause voters to abandon officials that engage in court-curbing, which in turn insulates courts from elected officials who are fearful of losing their jobs. In turn, constitutional courts are free to strike down laws (Carruba 2009). Variations in legitimacy influence the U.S. Supreme Court's decision to strike down statutes, a surprising fact given its relatively high popularity over the past few decades (Clark 2009, Merrill, Conway, and Ura 2017). Such popularity, however, does not tend to influence statutory decisionmaking.

Vanberg (2005) argues that transparency in the political environment moderates the relationship between popularity and judicial review. Public attention to a particular case makes it more difficult for elected officials to circumvent rulings. Similarly, a public that does not observe court-curbing efforts cannot publish them. Vanberg shows that the German constitutional court is

more likely to strike laws in salient cases, a finding supported by additional analysis in Mexico (Staton 2006).

Constitutional Avoidance: The Controversial Canon

At the intersection of constitutional and statutory law is constitutional avoidance, a canon for statutory interpretation that prioritizes interpretations that 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 U.S. Supreme 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. A 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", John Marshall, chief justice of the U.S. Supreme Court, 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, a 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 U.S. Supreme Court ruled that the individual mandate a tax, which was constitutional, rather than a simple mandate, which was unconstitutional. Classic avoidance differs from procedural avoidance in a couple of regards. While procedural avoidance is a general form of judicial decisionmaking, in that courts can avoid making statutory decisions using many of the same tools for avoiding constitutional ones, classic avoidance is unique to avoiding constitutional decisionmaking. Further, procedural avoidance can be employed even when the proper interpretation of relevant statutes are clear; classic avoidance, on the other hand, is purportedly only used when there are multiple, competing, plausible interpretations of a statute. Finally, procedural avoidance can be used without commenting on the constitutionality of a particular government action; classic avoidance, meanwhile, requires an explicit constitutional commentary.

The third form of avoidance, modern avoidance, is strikingly similar to classical avoidance: a 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, the court will choose a statutory interpretation that avoids these problems. The U.S. Supreme 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 that because his prior crimes were never discussed in his plea deal, subsequent punishment for them 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" to refer to these two alone.

While discussions of constitutional avoidance in legal scholarship largely focuses on its use by the U.S. 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 purposively interpret a statute in a constitutional light is functionally the same as striking a law as applied to a certain set of circumstances (Lindquist and Corley 2011, Fish 2015) or severing unconstitutional provisions from a statute (Vermeule 1997, Vande Kamp 2019). 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. Constitutional courts are the recognized authority for deciding the meaning of constitutions, but are not the recognized authority for deciding the meaning of statutes; that authority either falls to legislatures or the agencies they empowers (Slack 2006, Walker 2012). Constitutional avoidance allows a 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 a constitutional 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 (Mashaw 1997, Hasen 2009).

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 branches of government, leading to a coordinate construction of a 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, legislatures may prefer a ruling that results in a dubious, but constitutional, statutory interpretation to a ruling that invalidates legislation.

Avoidance as an Inferior Substitute for Invalidation

Much of the legal scholarship surrounding constitutional avoidance is normative theory, criticizing the U.S. Supreme Court's use of constitutional avoidance and how it should alter its behavior in the future. An appreciable amount of this scholarship is also positive theory, giving explanation to when and why constitutional courts use constitutional avoidance as opposed to simply invalidating a statute. These empirical theories are alternatively given as either standalone

explanations of why courts use avoidance or may be embedded into normative arguments. I seek to complement current understanding of constitutional avoidance by integrating legal explanations of constitutional avoidance under a unified umbrella driven by positive political theory.

I argue that constitutional avoidance is an inferior substitute for traditional judicial review. Taking legal criticisms at face value, avoidance is a form of de facto constitutional decisionmaking. But such decisions are less influential. Because avoidance is a de jure statutory decision, such decisions can be overturned by elected officials using ordinary legislation; in contrast, constitutional decisions can only be formally overturned by amending a constitution. Furthermore, decisions employing avoidance have weaker precedential value than explicit constitutional decisions because statutory decisions are formally limited to the statute under review.

Why would a court employ avoidance rather make an explicit constitutional ruling? Because that court lacks judicial independence. The exercise of judicial review is predicated upon its protection from retribution by other branches of government (Carrubba 2009, Bergara, Richman, and Spiller 2003). When independent, a court can strike down laws as it sees fit; otherwise, it must refrain from doing so or risk reprisals. The legal criticisms of avoidance suggest, however, that avoidance may serve as a middle ground between striking and upholding a law. By issuing a necessarily limited ruling, a constitutional court can halt undesirable government activity without picking a fight with elected officials.

There are a number of mechanisms by which judicial independence influences judicial review and, therefore, influences the use of avoidance. Perhaps the most important driver of judicial independence is the popularity of a court. As discussed earlier, constitutional courts are

free to strike down laws when they are popular with their publics but must be wary of backlash in the absence of popularity (Carruba 2009). In instances where a court's popularity is low, there are many reasons to believe that a court may employ constitutional avoidance (Hasen 2009). Avoidance is a much less salient means of deciding a constitutional question, even if the policy outcome in both instances is the same. If a court anticipates that a constitutional invalidation would be unpopular, then avoiding a constitutional issue in favor of a statutory decision may be the best means of achieving a particular outcome (Katyal and Schmidt 2014). This leads to a hypothesis:

Political Legitimacy Hypothesis: As a court's popularity among the public declines, the court is more likely to employ constitutional avoidance rather than invalidate a statute.

In a different vein, judicial independence is bolstered when elected officials have opposing preferences on a particular issue but hampered when there is uniformity of preferences, as best demonstrated by Marks' (2015) separation of powers model and its extensions (Bergara, Richman, and Spiller 2003). Constitutional avoidance may be used to avoid confrontation with elected officials when there is uniform support for a statute under review in order to shift policy in a favorable direction without spurring a direct confrontation with elected officials. There are multiple reasons why a court might think avoidance will avoid court-curbing. The lower political salience of these decisions might fall under the radar of legislators. Even if not, the more deferential tone of these decisions, as they can be overturned using ordinary legislation, might short-circuit attempts at retaliation. Indeed, some legal scholars view the decision to employ constitutional avoidance as a result of being constrained in a Marks' separation of powers model (Mashaw 1997, Hasen 2009). This leads to the following hypothesis:

Political Calculus Hypothesis: As a statute enjoys greater political support among elected officials, a court is more likely to employ constitutional avoidance rather than invalidate a statute.

How might the legal doctrine behind constitutional avoidance, which posits that avoidance is used when an ambiguous statute has multiple plausible interpretations, fit into this overarching narrative of judicial independence? Vanberg (2005) argues that constitutional courts are more likely to uphold the constitutionality of complex statutes relative to easy ones because such statutes are less salient to the public and, therefore, government officials are more prone to court-curbing. If one makes the assumption that more complex statutes are ambiguous to multiple interpretations – a reasonable assumption given that complexity often brings confusion as a byproduct – then complex statutes are less salient and therefore elected officials are more likely to engage in court-curbing if they are invalidated. Thus, complex statutes should be more likely to be subject to constitutional avoidance rather than invalidated outright:

Statute Complexity Hypothesis: As a statute is increasingly complex, a court is more likely to employ constitutional avoidance rather than invalidate a statute.

It is not possible, of course, to fit all legal justifications for avoidance into a framework of judicial independence. In particular, the U.S. Supreme Court has been noted to rely on avoidance more when statutes are challenged on due process grounds under the Fifth Amendment. 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. On a more general level, government actions might

also be challenged on due process grounds as arbitrary exercises of government power. Rather than invalidate statutes as unconstitutional violations of due process, the Court may decide that statutes do not authorize the arbitrary exercise of power and avoid the constitutional issue. This leads to a final hypothesis:

> Due Process Hypothesis: when a statute is challenge on due process grounds, a court is more likely to employ constitutional avoidance rather than invalidate a statute.

Research Design

An empirical understanding of how constitutional avoidance is employed is necessary for robust normative debates; one cannot criticize how a court is using avoidance if one does not understand how courts employ it. Despite the depth of theory about when constitutional courts use constitutional avoidance, there is surprisingly little empirical evidence attempting to validate those theories. While theories abound in the literature, they are usually based on a qualitative reading of the law. No systematic, quantitative account of the use of constitutional avoidance doctrine exists.

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.

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. 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 1949 and 2011. The subset is whether a law is landmark legislation, as defined by Mayhew's "Sweep 1" process (2005), for a total of 368 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.[2] 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

[2] In cases with multiple dissents, this is the dissent with the most justices joining it.

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, an unbalanced time-series cross-sectional dataset.[3] The second stage is a model of the Court's decision to find a statute constitutional, unconstitutional, or employ the doctrine of constitutional avoidance. Because this is a choice with more than two outcomes, the second stage is a multinomial probit model. I estimate this 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. All variables to be described in this analysis are included in both the first and second stage, except those variables that are specific to Court decisions rather than statutes or the extant political environment. In the first stage, I also include cubic polynomials to control for duration dependence (Carter and Signorino 2010) and to provide the necessary instrument to estimate the Heckman model. Because the Court often decides multiple cases on a given statute, observations are necessarily correlated and thus clustering is appropriate (Box-Steffensmeier and Zorn 2002). Such a modelling strategy is also consistent with prior approaches (Hall and Ura 2015).

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, I devise a method for including all observations that purposefully breaks the statute-year observation set-up in the data. For every statute-year

[3] A statute enters the dataset the year it passes.

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 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. This results in a statute having n+1 observations in a given year, where n is the number of cases about the constitutionality of that statute decided in a given year. These additional observations represent the time after the Court has decided on a case but before the end of the year.[4] Because they represent a subset of time, 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.

There are a number of independent variables necessary to test the hypotheses advanced. To measure the Court's popularity, I include a measure of the Court's popularity relative to Congress (Ura and Wohlfarth 2010, Merrill, Conway, and Ura 2017). The General Social Survey asks respondents to rate the people running different government institutions on a three-point scale, first measured in 1973.[5] My measure is the average approval for the Court minus the average support for Congress in the previous year. Because of missing data associated with this measure, I present two different models: one with its inclusion and one excluding it.

To measure elected officials' support for a statute under review, 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

[4] Such an approach is not without precedent. For a given statute, the first year it enters the data is the year it was passed and signed into law. But statutes are not passed only at the beginning of the year; rather, they are created at many different points of time. These initial observations, then, do not represent a full year but randomly represent shorter periods of time, much like these duplicate observations represent shorter periods of time.

[5] The measure has not been asked annually. In years after 1973 where the data is missing, it is imputed using the average of the two most proximate years.

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.[6] 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.[7] There are many observations near 0 and 1 in the dataset, as well as many observations in between.

To measure the complexity of a statute, I use a count of the number of pages in a statute as paginated by Lexis Nexis (Maltzman et al 2014). The shortest statute is just a page, while the longest is well over 1,000 pages. To measure due process considerations, I use a dummy variable of whether a statute is subject to a due process challenge. Statutes challenged on equal protection grounds are excluded. Of the 227 cases in the dataset, 60 were subject to due process challenges.

In addition, I include a number of control variables in the analysis. The Court's ideological predisposition to not find a statute constitutional has a strong influence on its

[6] One statute, public law number 107-40, was predicted perfectly. Coefficients could not be generated and that statute, and a single case decided on it, was excluded from the analysis.
[7] Because Common Space scores are not available for the president prior to the 83rd Congress, data are missing for these variables prior to 1953. This results in some statute-years being dropped from the analysis including two cases.

behavior and may well influence its decision to employ constitutionality. I control for the court's ideological predisposition to striking a statute by using a combination of Bailey's (2013) ideal point estimates of justices' ideology, the direction of the decision classification from the Supreme Court Database.[8] First, I identify the Court's median in a given natural court and year. Next, I determine whether striking a statute, either directly or by using avoidance, is consistent with the Court's ideological tilt. If striking a statute is 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. This results in a measure of the court's attitudes towards the case where positive values indicate the court is ideologically inclined to striking or using avoidance and negative values indicate the court is ideologically opposed to striking.

Scholars have found that the Court is more likely to invalidate statutes when challenged on free speech grounds (Lindquist and Corley 2011). In addition, scholars note a number of similarities between the Court's doctrine on the freedom of speech and vagueness doctrine (Bernard 1951). I control for freedom of speech considerations using a dummy variable of whether a statute is subject to such a challenge. Of the 227 cases in the dataset, 48 were subject to due process challenges.

Analysis

I estimate two different models for this analysis: one includes the measure of the Court's popularity and one that excludes it. The model excluding it is presented in Table 2. The first

[8] A few cases in the dataset were summary judgements and, therefore, are not present in the Supreme Court Database. This results in missing data for variables involving the Database, which I then hand code using the documentation provided with the Database.

column contains the comparison between a statute being ruled as constitutional and being ruled as unconstitutional. The pivotal policymaker, statute complexity, and due process variables all fail to reach statistical significance. In contrast, the coefficient for the freedom of speech challenges is statistically significant. The average discrete effect of a statute being challenged on free speech grounds in the sample is -15%, meaning statutes challenged on such grounds in the sample are 15% less likely to be found constitutional than those not challenged on such grounds (Hanmer and Kalkan 2013).

Table 3: Heckman Multinomial Probit Model of Decisions to Invalidate an Important Federal Statute Passed Between 1949-2011

	Constitutional	Constitutional Avoidance
Support of Pivotal	0.51	2.23**
Policymaker	(0.60)	(0.91)
Statute Complexity	0.00	-0.00
	(0.00)	(0.00)
Due Process	0.52	0.69*
Challenge	(0.29)	(0.39)
Freedom of Speech	-0.79**	-0.53
Challenge	(0.32)	(0.49)
Court's Ideological	-1.01**	-0.13
Predisposition to	(0.36)	(0.63)
Strike		
Constant	-0.79	-3.19
	(1.07)	(1.69)
Rho	0.37	0.13
	(0.39)	(0.50)
N Stage 2	224	
N Stage 1	11,852	

*p<0.05, **p<0.01, one-tailed tests for hypothesized relationships
Comparison group is Unconstitutional
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

The court ideology variable is also statistically significant, with an average marginal effect of -26%. To help illustrate the units of this independent variable, I give the example of Justice O'Connor who 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 26% less likely to strike conservative statutes and uphold liberal ones.[9] This finding comports well with the literature, showing that ideology influences whether the Court will strike a statute (Segal and Spaeth 2002).

Looking now at the second column that compares the Court using constitutional avoidance to the Court ruling a statute unconstitutional, the statute complexity, freedom of speech, and Court ideology variables all fail to reach statistical significance. The statute complexity variable is even incorrectly signed. This results casts doubt on the Statute Complexity Hypothesis. In contrast, the due process coefficient is positive and statistically significant, with an average marginal effect of 6%. This result provides support for the Due Process Hypothesis.

In addition, the variable measuring the support of the pivotal policymaker is positive and statistically significant. When the pivotal policymaker moves from completely opposing a statute under review to completely supporting it, this results in a 22% 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 provide support for the Political Calculus Hypothesis.

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[9] While Alito did not become the new Court median when O'Connor retired, the median of the Court has been known to drastically shift with a single retirement. The retirement of Justice Warren and his replacement with Justice Burger created a large shift; the retirement of Justice Kennedy and his replacement with Justice Kavanaugh will likely see a large shift.

Table 3 contains the results a model including the Court's relative popularity as a covariate. The coefficients for the preexisting variables are largely unchanged. Most of the variables fail to reach statistical significance. In the second column, both the due process and support of pivotal policymaker variables are still positive and statistically significant. Likewise, the free speech variable in the second column is still negative and statistically significant. The only change is that in the first column, the court's ideological predisposition to striking a statute now has a near zero coefficient that fails to reach statistical significance.

Table 3: Heckman Multinomial Probit Model of Decisions to Invalidate an Important Federal Statute Passed Between 1949-2011 with a Measure of the Court's Popularity

	Constitutional	Constitutional Avoidance
Court's Relative Popularity	0.22	4.76
	(2.72)	(4.04)
Support of Pivotal Policymaker	0.56	1.34*
	(0.67)	(0.72)
Statute Complexity	0.00	-0.00
	(0.00)	(0.00)
Due Process Challenge	0.78	1.22**
	(0.41)	(0.51)
Freedom of Speech Challenge	-0.80**	-0.66
	(0.34)	(0.50)
Court's Ideological Predisposition to Strike	0.01	0.20
	(0.54)	(0.69)
Constant	-1.18	-11.17
	(6.06)	(10.87)
Rho	0.35	-0.32
	(0.35)	(0.74)
N Stage 2	178	
N Stage 1	10205	

*p<0.05, **p<0.01, one-tailed tests for hypothesized relationships
Comparison group is Unconstitutional
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

Neither of the coefficients for the Court's popularity are statistically significant. In particular, the coefficient in the second column is large and positive. This stands in direct

contrast to the Political Legitimacy Hypothesis, which would suggest rising popularity will lead to a lower probability of the Court employing constitutional avoidance doctrine. Thus, this hypothesis does not have support.

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 parameters – or the parameter that takes into account sample selection bias - are not statistically significant for either choice. This indicates that there are no detectable selection effects in the data, though selection effects could still exist. 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. The Court is more likely to employ avoidance rather than invalidation when that statute enjoys consistently high support among pivotal elected officials. It is also more likely to employ this doctrine when a statute is challenged on due process grounds.

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 similarly fear that the Court will use it when Congress cannot mount a response to a decision, usurping the role of the legislature through its activism. 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 (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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