Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court

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AVOIDANCE CANON

Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court

Philip P. Frickey

Had Cole Porter waited two years to write “You’re the Top,” he could have included that judicial hit, Justice Brandeis’s concurring opinion in Ashwander v. Tennessee Valley Authority, among his eclectic examples of excellence. In the pantheon of classic public law, few opinions have its “majestic,” iconic status of being “frequently cited and always approvingly.” In Ashwander, Brandeis compiled the “classic rules for . . . avoidance.” The most fundamental canon is that courts should not decide a constitutional issue if there is some plausible way to avoid it. A corollary to this rule is the familiar canon of statutory interpretation that a serious constitutional challenge to a statute should be avoided if the statute can plausibly be construed in a manner that makes the constitutional question disappear.

Alas, like Porter’s Tower of Pisa, Brandeis’s rules of avoidance may not have worn well over the years. To be sure, the Supreme Court not only continues to use the avoidance canon routinely, but even recently said that it is “beyond debate.” Yet a plethora of commentators and judges of

2. PHILIP BOBBITT, CONSTITUTIONAL FATE 64 (1982).
6. For some of the most noteworthy scholarly critiques, see JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 81-105 (1997); William N. Eskridge, Jr., Public Values in Statutory Interpretation, 137 U. PA. L. REV. 1007, 1020-22, 1066 (1989) (suggesting public values analysis as a substantive rationale for constitutional avoidance, but rejecting the invocation of public values to avoid constitutional doubts when doing so would be “inconsistent with legislative supremacy”); William K. Kelley, Avoiding Constitutional Questions as a Three-Branch Problem, 86 CORNELL L. REV. 831 (2001) (calling for the abandonment of the avoidance canon on separation of powers grounds); Lisa A. Kloppenberg, Avoiding Serious Constitutional Doubts: The Supreme Court’s Construction of Statutes
different ideological perspectives have in various ways criticized the canon or related techniques. A fundamental attack is that the avoidance canon allows a court, on the vague ground that a serious constitutional question exists, to rewrite statutes without clear limits on the revising role and without a clear demonstration that the Constitution compels rejecting the most natural interpretation of the law. Viewed with this understanding, the avoidance canon, purportedly designed to avoid the fraught business of judicial review and potential confrontations with a coordinate branch, actually amounts to a robust version of judicial review without the safeguards of reasoned elaboration of constitutional law. Indeed, the canon’s ramifications are supposedly even worse than that. The judicial power of statutory revision allowed by the canon is perhaps really legislative in character: instead of voiding the statute and returning to the status quo ante, as judicial review would do, the avoidance canon produces a judicially rewritten

__Raising Free Speech Concerns__, 30 U.C. DAVIS L. REV. 1 (1996) (criticizing the avoidance canon in free speech cases); Lisa A. Kloppenberg, __Avoiding Constitutional Questions__, 35 B.C. L. REV. 1003 (1994) (offering a critical examination of the last resort rule); John F. Manning, __The Nondelegation Doctrine as a Canon of Avoidance__, 2000 SUP. CT. REV. 223 (criticizing avoidance techniques); Hiroshi Motomura, __Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation__, 100 YALE L.J. 545, 561-75 (1990) (urging a more transparent constitutional approach to immigration law); John Copeland Nagle, __Delaware & Hudson Revisited__, 72 NOTRE DAME L. REV. 1495 (1997) (urging that the avoidance canon be narrowed); Frederick Schauer, __Ashwander Revisited__, 1995 SUP. CT. REV. 71 (criticizing the avoidance canon as disguised judicial activism); Adrian Vermeule, __Saving Constructions__, 85 GEO. L.J. 1945 (1997) (addressing the tension between the avoidance canon and severability doctrine); Harry H. Wellington, __Machinists v. Street: Statutory Interpretation and the Avoidance of Constitutional Issues__, 1961 SUP. CT. REV. 49 (criticizing application of the canon).

7. Among the judicial critics have been Hugo Black, see __Int’l Ass’n of Machinists v. Street__, 367 U.S. 740, 785-86 (1961) (Black, J., dissenting) (accusing the majority of distorting the statute to avoid reaching a constitutional question, saying that “[u]nder such circumstances I think Congress has a right to a determination of the constitutionality of the statute it passed, rather than to have the Court rewrite the statute in the name of avoiding decision of constitutional questions”); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 144-45 (1961) (Black, J., dissenting) (similar); __Clay v. Sun Ins. Office Ltd__., 363 U.S. 207, 213-14 (1960) (Black, J., dissenting) (“I believe this Court is carrying the doctrine of avoiding constitutional questions to a wholly unjustifiable extreme . . . . I believe that there are times when a constitutional question is so important that it should be decided even though judicial ingenuity would find a way to escape it. I would decide this case here and now.”); __William Douglas__, see United States v. __Int’l Union United Auto. Workers (UAW-CIO)__, 352 U.S. 567, 594 (1957) (Douglas, J., dissenting) (objecting to remanding in order to allow the district court in first instance to consider constitutional question), __Henry Friendly__, see __Henry J. Friendly, Benchmarks 211-12__ (1967) (suggesting canon endangers judicial rewriting of statutes), Richard Posner, see __Richard A. Posner, The Federal Courts: Crisis and Reform__ 285 (1985) (similar), and Antonin Scalia, see __Reno v. Flores__, 507 U.S. 292, 314 n.9 (1993) (Scalia, J.) (calling the avoidance canon “the last refuge of many an interpretive lost cause”). __But cf. Almendarez-Torres v. United States__, 523 U.S. 214, 250 (1998) (Scalia, J., dissenting) (characterizing the canon as a “‘cardinal principle’ which ‘has for so long been applied by this Court that it is beyond debate’”) (citation omitted).

8. My own work concerning the avoidance canon ranges from ambivalence, see __William N. Eskridge, Jr. & Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking__, 45 VAND. L. REV. 593 (1992), to cautious endorsement, especially in contexts where constitutional line-drawing is difficult, see __Philip P. Frickey, Interpretation on the Borderline: Constitution, Canons, Direct Democracy__, 1996 ANN. SURV. AM. L. 477.
AVOIDANCE CANON

There is another side to the story, however. This Article investigates an era, now largely forgotten, in which the rules of avoidance played an exceedingly important—and, I believe, valuable—role in shaping public law and the relationship between Congress and the Supreme Court. It examines the Warren Court of the 1950s, before it became “the Warren Court” as it is usually remembered today. With one exception, the rulings that define the constitutional legacy of the “Warren Court”—Mapp, Miranda, Baker, Reynolds, Griswold, and Loving—school prayer, and so on—all came after 1961. The memorable exception, of course, is Brown (and its early progeny, Cooper). But there was more to the 1950s than Brown: a series of cases in this decade were important precursors to many of the rulings of “the Warren Court” that are part of its constitutional legacy. These 1950s progenitors arose in a time of political hysteria about Communism that threatened to drag the Court, already vulnerable because of southern opposition to Brown, into a maelstrom of congressional reprisals that would have not merely overturned cases, but would have entrenched disturbing values into the public law and institutionally wounded the Court. By generally deciding these cases at the subconstitutional level through the rules of avoidance, the Court used techniques that might defuse political opposition while incrementally adjusting public law to better respect individual liberty. Employing avoidance also shifted the burden of overcoming legislative inertia to those opposing the Court’s understanding of public values. The canons allowed a divided and besieged set of Justices to avoid the sharpest confrontations with Congress and each other so as to preserve the Court’s stature and integrity. They also gave the Court time for the political furor to subside, for First Amendment and due process values to reemerge in the general consciousness, and for Congress and, indeed, the Court, to change composition and move past a crisis. In short, the rules of avoidance, putatively about judicial restraint and deference to political institutions, allowed the Court to play a game of high-stakes politics, to correct individual injustice in some circumstances, and to protect its independence and future autonomy.

To be sure, this is not a pretty story for any reader enamored of the view of the Court as insulated from politics and culture, dutifully finding and enforcing the best answer that emerges from Herculean legal analysis. But it is also not a story of a Court that abandons legal analysis in the pursuit of pure politics. Remarkably, the institutional moves that may appear unseemly to one who believes in a sharp disjunction between law and politics were largely the work of Justice Frankfurter (a lawyer's judge if there ever was one), Justice Harlan, and the early iteration of Chief Justice Warren; the left wing of the early Warren Court, Justices Black and Douglas, rarely played along. Though the median Justices on the Court used the rules of avoidance in strategic ways, their approach also had contemporary academic respectability, as it correlated well with the legal process approach to statutory interpretation being developed by Henry Hart and Albert Sacks, themselves hardly wild-eyed hellions, and Alexander Bickel's notions of judicial prudence in constitutional cases. This is not a story of politically motivated Justices ambitiously remaking constitutional law through broad strokes. Rather, this is a story about how thinking small rather than big, how clinging to legal technicality, and how talking descriptively while thinking normatively have their virtues—even if not all of them are passive.

I write less to illuminate a period of American public law than to use the cases as a backdrop for assessing the utility of the avoidance canon. My thesis has descriptive and normative elements. I seek to demonstrate that the avoidance canon is not so much a maxim of statutory interpretation as it is a tool of constitutional law. The canon is not easily defended on the usual descriptive grounds: it involves judicial lawmaking, not judicial restraint; the outcomes it produces are at least sometimes inconsistent with probable current congressional preferences; and it will not always foster a deliberative congressional response. My account suggests, however, that the canon may perform an invaluable normative function in public law. The canon provides a means to mediate the borderline between statutory interpretation and constitutional law, and between the judicial and legislative roles, where judicial line-drawing is especially difficult and where underenforced constitutional values are at stake. In a broader sense, the canon can mediate another borderline, that between constitutional law and constitutional culture.  

The canon can even facilitate the transition from the constitutional law and culture of one era to those of another. Most recent scholarship dealing

18. Robert Post has convincingly argued that constitutional law has not been, and cannot be, insulated from culture. See Robert C. Post, The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law, 117 HARV. L. REV. 4 (2003); see also infra text accompanying notes 327-29.

with the avoidance canon criticizes its use in individual cases and then
draws out broader criticisms of the technique. This method misses some
of the good the canon can do, which is evident when the Court’s use of the
canon is viewed not merely at a moment in time, but as a means over time.
This Article will show that the canon gave the early Warren Court a way to
bridge the law and culture of the 1950s and those of the 1960s—to get
from the repressiveness of Joe to the progressiveness of Gene McCarthy.

Although this Article is historically rooted and theoretically oriented,
it has a practical contemporary dimension as well. Since September 11,
2001, the United States has been engaged in an ambiguous war on terror-
ism. Some aspects of this context parallel the circumstances that con-
fronted the early Warren Court. In particular, our national government may
have recently taken unacceptable shortcuts around the rights of citizens and
aliens in pursuing some of its policies. The victims bear the brunt of a pub-
lic hostility reminiscent of that facing suspected Communists in the 1950s.
Similarly, our time is one in which, for a variety of reasons, bold constitu-
tional lawmaking protecting the rights of such individuals may be unlikely.
As it did just a few years ago in somewhat analogous cases about whether
habeas corpus is available to review the deportability and detention of
aliens, the Court may find it useful to return yet again to the avoidance
canon to mediate statutory or administrative harshness and constitutional
values.

This Article proceeds in three parts. Part I provides an overview of the
practice of statutory interpretation in the federal courts in the post-World
War II period and demonstrates that the avoidance canon was a critical
component of postwar legal process theory, which in turn provided a
framework for post-war statutory interpretation practice. Part II examines
the decisions of the early Warren Court in which the avoidance canon and
related legal process techniques were deployed. It shows how they ren-
dered the statutes regulating alleged subversives more compatible with
constitutional values while leaving Congress the opportunity to have a fur-
ther say on each controversy by amending the statute in question. Part III
reconsiders the utility of the avoidance canon in light of this history.

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20. See, e.g., Schauer, supra note 6, at 74-81 (discussing the canon’s use by the Court in United
States v. X-Citement Video, Inc., 513 U.S. 64 (1994)).
alien’s post-removal period detention to a period “reasonably necessary” to bring about that alien’s
removal from the United States); INS v. St. Cyr, 533 U.S. 289, 299-300 (2001) (invoking the avoidance
canon to deal with a statute’s potential conflict with the Constitution’s Suspension Clause); see also
infra text accompanying notes 378-79.
I

STATUTORY INTERPRETATION AT THE DAWN OF THE WARREN COURT:
THE LEGAL PROCESS SYNTHESIS

A. The Postwar Approach to Statutory Interpretation

In the immediate postwar period, many respected commentators viewed statutory interpretation as unformed, if not slightly scandalous. Writing in 1949, four years before Earl Warren became Chief Justice, Paul Freund stated that “the process of statutory construction has... become an aspect of political philosophy. The familiar canons and maxims of interpretation, if not paper-thin, are at all events wooden.”22 A year later, Karl Llewellyn published the most notorious of all commentary on statutory interpretation, debunking the canons as merely a list of diametrically opposed propositions deployed by advocates by reason of convention and embraced by judges as justifications for outcomes reached for other reasons.23 “Plainly,” Llewellyn wrote, “to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon.”24

Llewellyn’s skepticism about the integrity of judicial reasoning, however, was not shared by the jurists of his time. Justice Reed articulated what is perhaps the most excessively optimistic statement in all of American statutory interpretation lore: “In the interpretation of statutes,” he intoned, “the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress.”25 Unfortunately, the self-assuredness of this formulation evaporated in the Court’s next sentence, which acknowledged that “[t]here is no invariable rule for the discovery of that intention.”26 So, while easily stated, the judicial role was elusive in practice, turning on eclectic considerations of textual meaning, avoiding absurd or even unreasonable results, and implementing the purpose of the statute as revealed by such sources as legislative history.27

22. PAUL A. FREUND, ON UNDERSTANDING THE SUPREME COURT 36 (1949).
24. Id. at 401. For Llewellyn, who by this time in his career was searching for ways to legitimate law as something other than merely politics by another name, statutory interpretation was not a hopelessly ideological endeavor. He stated that statutory meaning should be derived from “[t]he good sense of the situation and a simple construction of the available language to achieve that sense, by tenable means, out of the statutory language.” Id.; see also KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 60 (1960) (writing that judge-made law could be legitimated by “Situation Sense”).
26. Id.
27. Reed continued:
   There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results,
Academic skepticism about statutory interpretation abated in the 1950s, however, at least as a theoretical matter. In their pathbreaking materials on legal process theory, Henry Hart and Albert Sacks developed an integrated methodology for statutory interpretation that captured the spirit of post-war optimism about the legal process. Their approach understood all law—including the legislature’s role in statutory creation and the administrative and judicial roles of statutory implementation and application—as a purposive endeavor designed to promote social utility. They assumed the legislature to be made up of reasonable persons pursuing reasonable purposes reasonably, and the judges interpreting statutes to be engaged in the reasoned elaboration of those purposes as they could be made to fit within the broader legal fabric. Under this view, it was simply unacceptable to conclude that a statute lacked a sensible purpose. Moreover, unless it was impossible to conclude otherwise, courts were to avoid the perspective of cynical observers who might see only short-term political compromise rather than the embrace of reasonable public policy purposes.

Although Hart and Sacks did what they could to avoid diluting purposivism with political compromise, they did impose two important side constraints. Their “concise statement” of the interpretive task was as follows:

In interpreting a statute a court should:
1. Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then
2. Interpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however, that it does not give the words either—
   (a) a meaning they will not bear, or

however, this Court has looked beyond the words to the purpose of the act. Frequently, however, when the plain meaning did not produce absurd results but merely an unreasonable one “plainly at variance with the policy of the legislation as a whole” this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no “rule of law” which forbids its use, however clear the words may appear on “superficial examination.”

Id. at 543-44 (footnote omitted). Moreover, even this approach lacked universal embrace, and in later cases Justices occasionally applied something like the old plain meaning rule, see, e.g., Mass. Bonding & Ins. Co. v. United States, 352 U.S. 128 (1956); id. at 138 (Frankfurter, J., dissenting), or quarreled whether legislative history could be used to inform statutory meaning, see, e.g., Adams v. Maryland, 347 U.S. 179, 184 (1954) (Jackson, J., concurring) (avoiding considerations of legislative intent and instead simply asking what the statute “would mean to a reasonably well-informed lawyer”); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring) (arguing that congressional floor debate should not be consulted); Robert H. Jackson, Some Problems of Statutory Interpretation, 8 F.R.D. 121 (1949) (address to the American Law Institute criticizing the use of legislative history in statutory interpretation).


29. See id. at 1374-80.
(b) a meaning which would violate any established policy of clear statement.30

By no means did Hart and Sacks invent this approach. On the contrary, by the 1950s a consensus in the academy had formed around legal process theory.31 To be sure, this consensus had not yet captured the allegiance of the judiciary as a whole at the time Hart and Sacks were writing,32 but their method fit well with early Warren Court practice. The Warren Court's general allegiance to this approach is the focus of this section of this Article.

Hart and Sacks privileged "policies of clear statement."33 They explained:

[These policies of clear statement may on occasion operate to defeat the actual, consciously held intention of particular legislators, or of the members of the legislature generally. . . . ] In other words, they constitute conditions on the effectual exercise of legislative power. But the requirement should be thought of as constitutionally imposed. The policies have been judicially developed to promote objectives of the legal system which transcend the wishes of any particular session of the legislature.34

Hart and Sacks identified two specific policies of clear statement. One was the familiar rule of lenity: "words which mark the boundary between criminal and non-criminal conduct should speak with more than ordinary clearness."35 The second policy of clear statement that "call[ed] for particular mention"36 was one that "forbids"—note the forceful formulation—"a court to understand a legislature as directing a departure from a generally prevailing principle or policy of the law unless it does so clearly."37 They continued: "This policy has special force when the departure is so great as to raise a serious question of constitutional power. This general policy lies

30. Id. at 1374.
32. Hart and Sacks bluntly acknowledged what they must have seen as a huge failing in American law:
Do not expect anybody's theory of statutory interpretation, whether it is your own or somebody else's, to be an accurate statement of what courts actually do with statutes. The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.
HART & SACKS, supra note 28, at 1169.
33. Id. at 1376.
34. Id.
35. Id. at 1376-77. This canon, and a variant applied in quasi-criminal proceedings like deportation, played an identifiable role in the Warren Court cases surveyed in the next Part.
36. Id. at 1376.
37. Id. at 1377.
behind the various presumptions referred to in discussing the attribution of purpose."

In this fashion, Hart and Sacks linked two aspects of statutory interpretation—purposivism and constitutional avoidance—that had not ordinarily been seen as related. By the 1950s, longstanding usage had legitimated the canon that judges should avoid interpreting a statute in a way that would raise a serious constitutional question when another plausible interpretation would eliminate the constitutional question. Perhaps even more important was the relatively recent endorsement of this canon in one of the most influential and well-respected judicial elaborations of the appropriate approach to constitutional litigation, Justice Brandeis's concurring opinion in *Ashwander v. Tennessee Valley Authority.*

Hart and Sacks's innovation was to integrate the canon with their more general scheme for purposive statutory interpretation, rather than as an afterthought or side constraint. For Hart and Sacks saw their background assumptions concerning the purposivism of legislatures and legislation as constitutionally informed.

To illustrate, consider how Hart and Sacks used this approach to meld purposivism with the reasoned elaboration of *constitutional* policy:

In determining the . . . purpose which ought to be attributed to a statute, . . . a court should try to put itself in imagination in the position of the legislature which enacted the measure.

The court, however, should not do this in the mood of a cynical political observer, taking account of all the short-run currents of political expedience that swirl around any legislative session.

It should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.

It should presume conclusively that these persons, whether or not entertaining concepts of reasonableness shared by the court, were trying responsibly and in good faith to discharge their constitutional powers and duties.

For Hart and Sacks, one did not first "interpret" the statute and then bend that interpretation to avoid serious constitutional questions. Rather, purposive interpretation by its very nature accomplished this feat as one process, not two.

38. *Id.*

39. The canon goes all the way back to the Marshall Court era. *See* Schauer, supra note 6, at 73 & n.9 (quoting *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,538) (Marshall, C.J., riding circuit)); Vermeule, supra note 6, at 1948 & n.13 (citing *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800)).


41. *See* supra text accompanying note 38.

42. *Hart & Sacks,* supra note 28, at 1378.
Because Hart and Sacks developed their approach in the shadow of McCarthyism, it seems likely that their assumptions were rooted in a normative scheme rather than in some sense that they accurately described the nature of real legislatures. The avoidance canon was an integral part of the whole project of purposive interpretation, entrenching the reasoned elaboration of public values within that project not merely as a matter of good policy, but as a matter of fundamental constitutional principle.

B. Legal Process Methodology and the Avoidance Canon in the Early Warren Court

The purposivism at the center of the Hart and Sacks materials was also present at the center of the early Warren Court. Although the direct influence of the Hart and Sacks work on the Court is hard to calculate, it is clear that Justices Frankfurter and Harlan, who will emerge as the key Justices in the early Warren Court’s use of the avoidance canon, “admired The Legal Process and shared its vision.” The influence of the legal process materials in legal education was substantial, especially during the Warren Court years, so that many of the law clerks, if not all the Justices,

44. Bill Eskridge and I made a similar point in a brief discussion about post-1958 Warren Court decisions. See Eskridge & Frickey, supra note 31, at cv-cvi. My task in this portion of this Article is to switch the focus to many cases decided before The Legal Process went into its 1958 tentative edition.
46. Eskridge & Frickey, supra note 31, at civ. Hart had been Frankfurter’s protege. Frankfurter chose Hart to be Justice Brandeis’s clerk. In turn, Hart picked Frankfurter’s clerks until 1957, when Frankfurter switched to Sacks. Harlan learned about The Legal Process from his law clerks, who were often from Harvard and were generally well informed about it. Id. at civ n.234.
47. See Eskridge & Frickey, supra note 31, at li.

It was the text for a popular perspectives course at the Harvard Law School for more than three decades, and dozens of other law schools offered similar courses from the materials.
would have been familiar with the Hart and Sacks work. But the truly important connection between the materials and the Warren Court is that Hart and Sacks embodied an emerging academic consensus as much as they created the elements of one.\textsuperscript{48} Thus, it is not as important to show tangible ties between their materials and what the Court did as to recognize overarching similarities between the two.\textsuperscript{49}

At the outset, it is important to understand that there were three discernable groups of Justices during Warren’s early years. Justices Black and Douglas were as close to constitutional absolutists as any Justices in history. They were confident in their constitutional views and saw little reason not to implement them directly through invalidation of legislation rather than indirectly by interpreting statutes to avoid serious constitutional questions. Justices Clark, Burton, Minton, and Reed, along with Reed’s successor, Justice Whittaker, were generally reluctant to strike down federal legislation or bend its meaning to expansive constitutional understandings.

The Justices in the middle—those who controlled the outcomes in the cases I will discuss—were the ones who often employed the legal process methodology. As Chief Justice Warren became more experienced on the Court, he often voted with Black and Douglas, but he was no absolutist and was considerably more attuned to strategic concerns. Accordingly, he was prone to use narrowing interpretation rather than constitutional invalidation when he could craft a majority for that position. Justice Brennan, who replaced Justice Minton, took a similar approach. Justices Frankfurter, Jackson, and Jackson’s successor, Justice Harlan, understood the Constitution more narrowly than Black, Douglas, Warren, and Brennan, but were comfortable using the avoidance canon and related techniques to shift statutory meaning away from constitutionally questionable outcomes.

Although the highlight of Warren’s first Term was, of course, *Brown v. Board of Education*,\textsuperscript{50} there were good examples of the legal process mentality at work in statutory interpretation even then.\textsuperscript{51} Chief among these

\textsuperscript{48} Id. at civ ("The Legal Process seized the attention of so many law professors because the materials lucidly expressed and comprehensively applied the post-World War II generation’s approach to public law.").

\textsuperscript{49} Id. ("In a general way, the Warren Court’s jurisprudence reflects the legal process philosophy, for both the Court and The Legal Process were intelligent adaptations of New Deal thinking about public law to post-World War II America.").

\textsuperscript{50} 347 U.S. 483 (1954).

\textsuperscript{51} Indeed, Warren’s first opinion for the Court, *Voris v. Eikel*, 346 U.S. 328 (1953), illustrates the pervasiveness of legal process purposivism. Warren had no patience in this case with the attempt of an employer to stand on a legal technicality as justification for denying compensation to an employee injured on the job. See id. at 332. His short opinion for the unanimous Court is legal process theory in a nutshell, embracing an expansive purposivism that understands legislation to be the product of reasonable legislators attempting to make law more humane. He called the employer’s proposed
is United States v. Five Gambling Devices, a textbook illustration of how legal process theory provides tools for narrowing statutory meaning to eliminate constitutional problems or interference with other judicially salient values.

In Five Gambling Devices, a federal criminal statute forbade shipment of gambling devices in interstate commerce and required dealers to report sales and deliveries of such devices. On their face, the reporting provisions, unlike the shipment prohibition, were not limited to sales and deliveries in interstate commerce. The lower courts dismissed the indictments of dealers who had failed to report intrastate sales by reading the interstate component of the shipment provision into the reporting requirements. Five Justices voted to affirm, but no majority coalesced on any particular ground for that ruling.

Justice Jackson, joined by Frankfurter and Minton, considered it constitutionally questionable whether Congress could require the reporting of transactions unrelated to interstate commerce. Jackson then aggressively deployed the avoidance canon and the rule of lenity to narrow the reporting requirements to interstate transactions. His extended discussion contains the elements of the legal process understanding of the utility of these canons:

The principle is old and deeply imbedded in our jurisprudence that this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative. The predominant consideration is that we should be sure Congress has intentionally put its power in issue by the legislation in question before we undertake a pronouncement which may have far-reaching consequences upon the powers of the Congress or the powers reserved to the several states. To withhold passing upon an issue of power until we are certain it is knowingly precipitated will do no great injury, for Congress, once we have recognized the question, can make its purpose explicit and thereby necessitate or avoid decision of the question. Judicial abstention is especially wholesome where we are considering a penal statute. Our policy in

understanding of the statute "indefensible." Id. The statute, he wrote, should not be understood as having a technical notice requirement because "[t]his Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." Id. at 333. Voris remains a principal case for the proposition that the statute in question, the Longshoremen's and Harbor Workers' Compensation Act, should be construed in this liberal manner. See, e.g., Dir., Office of Workers' Comp. Programs v. Perini N. River Assocs., 459 U.S. 297, 316 (1983); Bath Iron Works Corp. v. United States Dep't of Labor, 336 F. 3d 51, 57 (1st Cir. 2003).

52. 346 U.S. 441 (1953).
53. Id. at 442 (citing 64 Stat. 1134 (1951) (current version at 15 U.S.C. §§ 1171-1178 (2000)).
54. See id. 443-44 nn.2-3.
55. See id. at 442.
56. Id. at 446-47.
constitutional cases is reinforced by the long tradition and sound reasons which admonish against enlargement of criminal statutes by interpretation.

This Court does and should accord a strong presumption of constitutionality to Acts of Congress. This is not a mere polite gesture. It is a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is within their delegated power or is necessary and proper to execution of that power. The rational and practical force of the presumption is at its maximum only when it appears that the precise point in issue here has been considered by Congress and has been explicitly and deliberately resolved.57

Jackson maintained that, far from express congressional approval of the questionable interpretation, the legislative history revealed that “responsible congressional committees and leaders” had understood the bill as not reaching the acts charged in the indictment.58 Without clear congressional endorsement in statutory text or legislative history, Jackson was unwilling to tread into murky constitutional territory.

The other Justices in Five Gambling Devices split into two camps. Justices Black and Douglas concurred in the judgment, but disagreed with Jackson on the interpretive question because they did “not feel at liberty to read intrastate sales out of the Act, even if constitutional questions could thereby be avoided.”59 For Black and Douglas, the statute was unconstitutionally void for vagueness.60 This would be typical of Black and Douglas in such cases: no need to fool around with a canon of statutory interpretation when the cannon of constitutional invalidation was available. Justice Clark, joined by Chief Justice Warren, Justice Reed, and Justice Burton, agreed with Black and Douglas that the statute meant what it said, but found no constitutional infirmity with it.61

Although Jackson was not writing for a majority in Five Gambling Devices, his expression of centrist legal process ideology exemplifies the approach taken in a number of important majority opinions around the time of the early Warren Court. For example, also in his first Term, Chief

57. Id. at 448-49.
58. Id. at 449.
59. Id. at 452 (Black, J., concurring).
60. See id. at 453-54.
61. See id. at 454-63 (Clark, J., dissenting). Note the important and somewhat counterintuitive role of the canons: a majority of Justices thought the statute applied to intrastate sales; of the Justices who considered the issue of congressional power to regulate such sales, more thought the statute, as understood that way, was constitutional than thought it was unconstitutional. Yet the outcome of the case was that the statute did not apply to intrastate sales, and so construed was of course constitutional! This is a product of the Court's practice to vote on affirmance or reversal as the fundamental question and then to allow the Justices in the majority to align themselves along one or more decisional rationales. Because Jackson's rationale for affirmance was narrower than Douglas's, his rationale controlled.
Justice Warren’s opinion in *United States v. Harriss* essentially rewrote the Federal Regulation of Lobbying Act to cure perceived vagueness and First Amendment problems. Later in that Term, Warren also narrowly construed a deportation statute to provide a technical defense to deportation for an alien guilty of criminal acts, on the ground that such statutes, “[a]lthough not penal in character, . . . as a practical matter may inflict ‘the equivalent of banishment or exile,’ and should be strictly construed.” As the following Part will demonstrate, the themes evident at the outset of the Warren Court—avoidance of constitutional issues and narrow interpretation of statutes that invade core liberty interests—would serve the Court especially well in an extraordinary line of cases involving the investigation and sanctioning of alleged political subversives.

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63. As they had done in *Five Gambling Devices*, Justices Douglas and Black rejected the application of the avoidance canon and voted to strike the statute down as unconstitutional. See id. at 628-33 (Douglas, J., dissenting). Interestingly, Justice Jackson, the constitutional avoider par excellence in *Five Gambling Devices*, took essentially the same approach as Douglas and Black in *Harriss*. See id. at 633-36 (Jackson, J., dissenting). For Jackson, the apparent difference in the two cases is that the judicial rewriting in *Harriss* threatened to chill First Amendment freedoms and to result in retroactive unfairness if a later Court reconsidered the narrowing construction. Id. at 635.
64. *Barber v. Gonzales*, 347 U.S. 637, 642-43 (1954) (citation omitted). Justice Minton, joined by Justices Reed and Burton, complained in dissent that Warren violated good policy and common sense by construing the statute narrowly so as to “compel the United States to cling onto alien criminals.” Id. at 643 (Minton, J., dissenting).
65. In cases outside this domain during the years of this Article’s survey (O.T. 1953-1961), the avoidance canon and related techniques of ducking constitutional questions played less of a role. See, e.g., *Garner v. Louisiana*, 368 U.S. 157 (1961) (avoiding difficult state action question by setting aside convictions of sit-in demonstrators for insufficient evidence of breach of the peace); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961) (avoiding First Amendment question by interpreting Railway Labor Act’s authorization of union shops to prohibit a union from spending dues from an employee on a political cause to which the employee objects); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (avoiding First Amendment question by interpreting Sherman Act not to outlaw lobbying of Congress for legislation that would have negative effects upon business competitors); *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207 (1960) (avoiding due process challenge to choice-of-law decision by lower court by remanding for consideration of nonconstitutional issues); *Lee v. Madigan*, 358 U.S. 228 (1959) (construing Article of War as not authorizing trial of service member in military court for nonmilitary offense, in part because Congress should be presumed to have been attentive to the rights of citizens when crafting the Article); *United States v. Int’l Union United Auto. Workers (UAW-CIO)*, 352 U.S. 567 (1957) (stating that district court in first instance should decide First Amendment question of regulation of political speech by union); *Rice v. Sioux City Mem’l Park Cemetery*, 349 U.S. 70 (1955) (avoiding difficult state action question by dismissing certiorari as improvidently granted in light of new state statute concerning the matter); *Ass’n of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955) (plurality opinion of Frankfurter, J.) (avoiding question of whether Congress had created federal substantive law governing collective bargaining). Cf. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 460 (1957) (Frankfurter, J., dissenting) (arguing that broad federal jurisdiction and federal common lawmaking power over collective bargaining agreements recognized by the majority opinion was unconstitutional); Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957) (suggesting that the Court should have “remanded” the question to Congress). In two well-known cases, the Court treated its mandatory appellate jurisdiction as discretionary to avoid addressing sensitive constitutional issues. See *Poe v. Ullman*, 367 U.S. 497 (1961) (avoiding constitutional challenge to birth control restrictions); *Naim v. Naim*, 90 S.E.2d 849,
II
LEGAL PROCESS THEORY, THE RULES OF AVOIDANCE, AND THE POLITICAL SUBVERSION CASES

A. The Model of “Avoidance and Admonition” in “the Candid Service of Avoiding a Serious Constitutional Doubt”: United States v. Rumely

In 1951, in Dennis v. United States,66 the Vinson Court upheld the constitutionality of the Smith Act, which, among other things, prohibited advocating the overthrow of the national government by force or violence. Two years later, in United States v. Rumely,67 Justice Frankfurter used legal process theory and the avoidance canon to produce a narrowing interpretation of a congressional resolution to protect First Amendment rights of suspected subversives. Because the political-offender cases became the primary context in which the early Warren Court exercised its canonical moves of deciding cases without deciding constitutionality, and because Rumely was both a paradigmatic application of this approach and a preview of what was to come, it deserves extended attention.

Justice Frankfurter’s majority opinion described Rumely as the secretary of an organization that, “among other things, engaged in the sale of books of a particular political tendentiousness.”68 Rumely refused to disclose to the House Select Committee on Lobbying Activities the names of persons who had made bulk purchases of such books. He was convicted of violating a federal statute that criminalized the failure to provide testimony or documents “upon any matter” under congressional inquiry.69 Frankfurter first acknowledged the serious First Amendment questions at stake when congressional committees engage in sweeping inquiries concerning political expression and association.70 He also alluded to the “wide concern” that had been raised about the intrusiveness of congressional investigations.71 Then, in classic legal process fashion, Frankfurter concluded that it would be inappropriate to address the serious constitutional questions before considering whether the House resolution authorizing the committee’s inquiry appeal dismissed, 350 U.S. 985 (1956) (avoiding constitutional challenge to prohibition of interracial marriage).

67. 345 U.S. 41 (1953).
68. Id. at 42.
70. Id. at 43-44.
71. Id. at 44. Frankfurter began by quoting Woodrow Wilson’s well-known discussion of the importance of Congress’s “informing power,” but then cautioned:

President Wilson did not write in light of the history of events since he wrote; more particularly he did not write of the investigative power of Congress in the context of the First Amendment. And so, we would have to be that “blind” Court, against which Mr. Chief Justice Taft admonished in a famous passage, that does not see what “[a]ll others can see and understand,” not to know that there is wide concern, both in and out of Congress, over some aspects of the exercise of the congressional power of investigation.

Id. (citation omitted).
had in fact empowered the committee to seek the information Rumely had refused to provide. Frankfurter stressed that the avoidance canon, developed in cases involving constitutional challenges to statutes, was even more appropriate in the context of congressional resolutions, which "secure passage more casually and less responsibly, in the main, than do enactments requiring presidential approval." Similar to Justice Jackson's later opinion in *Five Gambling Devices*, Frankfurter justified the canon in part as a technique to encourage both congressional responsibility to its constitutional obligations and judicial respect for a co-equal branch. Also like Jackson in the later case, Frankfurter implemented these policies with an aggressive clear-statement requirement. "Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court," he wrote, "it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits." The policies "strongly counsel abstention from adjudication unless no choice is left." For Frankfurter, this judge-driven approach was justified "in the candid service of avoiding a serious constitutional doubt."

Measured against this stringent standard, the House resolution, which authorized the committee to investigate "lobbying activities" intended to influence the legislative process, was insufficiently clear to empower the committee to explore general attempts to affect public opinion, such as through the distribution of books. Nor could the House's discussion in contempt proceedings following Rumely's refusal to comply with the committee's request provide a post hoc ratification of more expansive committee power, as it "had the usual infirmity of post litem motam, self-serving declarations." Rumely at least implicitly embraced every legal process assumption in the soon-to-be-developed Hart and Sacks materials. First, legal process presumes that Congress consists of "reasonable persons pursuing reasonable purposes reasonably." Although investigating the nature of lobbying, commonly understood as personal contact with legislators and their staffs, was a reasonable congressional purpose, interfering with those attempting to affect mass public opinion by the distribution of books was not. Second, Hart and Sacks advise courts to avoid cynicism by ignoring

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72. *Id.* at 46.
73. See supra text accompanying notes 52-61.
74. 345 U.S. at 46.
75. *Id.* (emphasis added).
76. *Id.*
77. *Id.* at 47.
79. 345 U.S. at 48.
80. Hart & Sacks, supra note 28, at 1378.
“the short-run currents of political expedience that swirl around any legislative session” and instead fuse legislative policy with more long-standing, purposive, reasonable traditions. According to Rumely should not fall victim to legislative hysteria, especially if the legislature’s purpose is not made clear from the outset, and courts should not embrace such legislative foolishness. Finally, courts may not assume that the legislature intends to violate a longstanding policy or principle of the law, especially a constitutional one, unless the legislature is explicit. Instead, courts must assume that members “were trying responsibly and in good faith to discharge their constitutional powers and duties.”

Because Congress had not squarely authorized a constitutionally dubious inquiry, the Court assumed that the committee lacked authority to undertake one.

As a prime exemplar of legal process theory, Rumely can serve as a test case for some of the problems of that approach. There has always been a nagging form-versus-substance quality to legal process theory, a sense that judges are hiding behind technicalities to avoid revealing how their true values influence their judging. In Rumely, for example, Justice Douglas, joined by Justice Black, concluded that the House resolution was broad enough to authorize the summons of information from Rumely. Moreover, Douglas stressed that when the House debated whether to find Rumely in contempt, its members identified and debated both relevant legal questions—the scope of the committee’s authority and the constitutionality of its request—in a serious way that resulted in a close affirmative vote on both issues. For Douglas, Frankfurter’s avoidance approach was improper because it repudiated what the House clearly wanted to achieve.

Douglas then reached the constitutional issue and concluded that the inquiry violated the First Amendment.

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81. *Id.*
82. *Id.*
84. See 345 U.S. at 48-58 (Douglas, J., concurring). Douglas understood the committee’s request for information to concern where funds were coming from to support lobbying activities (in this case, book sales), such that there was more of an arguable nexus between the inquiry and the committee’s task of investigating lobbying.
85. Douglas wrote:
   Thus the House had squarely before it the meaning of its earlier Resolution. A narrower construction than the Select Committee adopted was urged upon it. Congressmen pleaded long and earnestly for the narrow construction and pointed out that, if the broader interpretation were taken, the inquiry would be trenching on the constitutional rights of citizens. I cannot say, in the face of that close consideration of the question by the House itself, that the Select Committee exceeded its authority. The House of Representatives made known its construction of the powers it had granted. If at the beginning there were any doubts as to the meaning of Resolution 298, the House removed them. The Court is repudiating what the House emphatically affirmed, when it now says that the Select Committee lacked the authority to compel respondent to answer the questions propounded.
86. *Id.* at 55-56.
87. *Id.* at 56-58.
Frankfurter, like Jackson in *Five Gambling Devices*, stressed that the avoidance canon was a prudential tool to encourage congressional responsibility and due deliberation. Yet although the congressional consideration was post hoc and arguably had an ex post facto quality that might have provided an as-applied defense to Rumely's criminal prosecution, such factors do nothing to undercut the sense that Frankfurter was using a picky legal technicality to avoid a constitutional confrontation with Congress. That said, Hart and Sacks identified a defense for such judicial conduct. Recall that they acknowledged that policies of clear statement "may on occasion operate to defeat the actual, consciously held intention of particular legislators, or of the members of the legislature generally."\(^{87}\) The justification for this, they continued, was that such policies "constitute conditions on the effectual exercise of legislative power [because they] should be thought of as constitutionally imposed. The policies have been judicially developed to promote objectives of the legal system which transcend the wishes of any particular session of the legislature."\(^{88}\)

This explicitly counter-majoritarian justification for a canon supposedly designed to avoid counter-majoritarian constitutional review is surely ironic. But despite its perhaps overly self-conscious rationalizations, legal process theory, like all legal methodology, must draw its justification from experience at least as much as logic. Employing techniques like reasoned elaboration through purposivism, comparative institutional competence, the privileging of process to substance, and devices of avoidance, legal process theory is designed to mediate the fundamental tensions of our legal system, not resolve them by substantive theory. From this perspective, what Frankfurter did "in the candid service of avoiding a serious constitutional doubt"\(^{89}\) was a passive virtue rather than a passive-aggressive vice.

Indeed, for Frankfurter's acolyte, Alexander Bickel, *Rumely* "stands as a textbook illustration of the Court's awareness and control of the implications and possibilities of its role,"\(^{90}\) and an exemplar of "avoidance and admonition."\(^{91}\) Bickel's famous article, *The Passive Virtues*,\(^{92}\) is the most prominent paean to 1950s legal process theory as applied to constitutional law.\(^{93}\) The heart of the article is based on Brandeis's notion, expressed in *Ashwander* but stated even more resolutely in his private papers, that the Court has three choices when faced with a constitutional challenge.

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87. Hart & Sacks, supra note 28, at 1376.
88. Id.
89. 345 U.S. at 47.
91. Id. at 159.
93. Bickel taught from the Hart and Sacks materials at Yale. See Eskridge & Frickey, supra note 31, at cii-ciii.
to legislation: it can strike down the law, uphold it, or do nothing. Under legal process assumptions, the first option raises the counter-majoritarian difficulty as well as the possibility of strong political reaction, and the second can make the Court appear to endorse the policy of a law that is constitutional but nonetheless malign. Brandeis went so far as to say that “[t]he most important thing we do . . . is not doing.” In Bickel’s improved version of this practice, nothing and something become fused in an approach of avoidance and admonition—a strategy of using technicalities, as in Rumely, to avoid far-reaching constitutional decisions while highlighting serious constitutional problems and attempting to improve legislative accountability.

However misleading Bickel’s term, “the passive virtues,” may have been, Rumely provided Bickel with a template for fashioning his theoretical defense of the enterprise of avoidance and admonition. Rumely also provided a model for the Warren Court when it addressed later investigations and prosecutions of alleged political subversives.

**B. The First Wave of Subversion Cases in the Warren Court**

**1. 1953-54 Terms: Explicit Incrementalism and Dr. Peters**

In the first two cases in which the Warren Court addressed sanctions imposed on alleged subversives, Chief Justice Warren joined the majority opinions denying relief. He then wrote three narrow opinions overturning convictions for contempt of Congress on the basis of procedural errors made during congressional hearings. It was not until the sixth subversion case, Peters v. Hobby, that Warren employed the avoidance strategy to write the first opinion for his Court amounting to a notable victory for an alleged political offender.

In Peters, a board reviewing agency determinations of the disloyalty of federal employees barred from further federal employment a prominent Yale medical professor who had worked as a consultant to the Public Health Service on nonclassified matters. The procedures were remarkably shoddy, even for the era: after the agency’s loyalty board had twice cleared him of any disloyalty, the review board conducted its own hearing and found him disloyal based on unsworn statements of unidentified informants...

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94. See Bickel, supra note 90, at 69.
95. Id. at 71 (quoting Brandeis without citation); ALEXANDER M. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS 17 (1967).
97. See Emspak v. United States, 349 U.S. 190 (1955) (holding witness had properly invoked privilege against self-incrimination and congressional committee had not specifically overruled the objection and required witness to answer); Bart v. United States, 349 U.S. 219 (1955) (similar); Quinn v. United States, 349 U.S. 155 (1955) (similar).
who were not available for cross-examination. The case was so dubious that the Solicitor General refused to sign the brief and appear in defense of the sanction. Those tasks fell to the Assistant Attorney General for the Civil Division, Warren Burger, who shortly thereafter was appointed to the D.C. Circuit.

Relying upon the avoidance canon, Warren's majority opinion ducked the constitutional issues raised by the doctor's counsel, Thurman Arnold and Paul Porter, by finding that the review board had no jurisdiction to undertake an investigation on its own motion. Remarkably, this argument was not raised until the Court required it to be briefed. Arnold and Porter had sought to forgo the argument to avoid giving the Court a nonconstitutional out, but their strategy failed. As Frankfurter had done in Rumely, Warren in Peters found a way to patch together a majority of Justices to avoid unfairness in the circumstances without foreclosing a response from the political branches. Yet the Court had left intact the abusive loyalty program by refusing to condemn or even address the use of "evidence" from unidentified informants. In the last analysis, Peters was for the most part only a victory for Peters and legal process theory. It was an example in which legal process theory, as it often does, took a Mick Jagger approach to public law: Thurman Arnold did not get what he wanted, but at least Dr. Peters got what he needed.

99. Id. at 335-37.
101. Powe relates these facts and states that Burger was "rewarded" with the D.C. Circuit seat. See id.
102. 349 U.S. at 338 n.6 ("The question of the Board's jurisdiction was, on request of the Court, argued and briefed.").
103. Powe reports that Arnold and Porter had intentionally avoided the jurisdictional argument because they "wished to win not only for Peters but for everyone." Powe, supra note 100, at 81.
104. Justices Black and Douglas wanted to address the constitutional challenge and resolve it against the government. See 349 U.S. at 349-50 (Black, J., concurring); id. at 350-52 (Douglas, J., concurring). Douglas contended that the construction of the Executive Order establishing the loyalty boards had been essentially resolved by the history of administrative practice, "with case after case being reviewed by the Board in the precise manner of this one." Id. at 350. He stated, "The question of construction of the Executive Order was so well settled that neither the Government nor Dr. Peters suggested the absence of authority in the Review Board to take jurisdiction of this case on its own motion." Id. Justice Reed, joined by Justice Burton, dissented on the jurisdictional question but expressed no opinion on the constitutional issues. See id. at 353 (Reed, J., dissenting).
105. Bernard Schwartz reports that Warren's opinion was based on a memorandum prepared by Frankfurter stressing the "cardinal rule controlling constitutional adjudication, that it should not reach a question of constitutional law unless absolutely necessary to decision." Bernard Schwartz, Super Chief 154 (1983) (quoting Frankfurter's memorandum).
106. See Powe, supra note 100, at 82.
2. 1955 Term: Employee Loyalty and Preemption of State Regulation

In the 1955 Term, the avoidance canon and similar techniques appeared in uneven ways in a few nationality and immigration cases, but once again their most important applications occurred in subversion cases. In Cole v. Young, Justice Harlan held for a 6-3 Court that a federal food and drug inspector suspected of Communist sympathies had been discharged in violation of the controlling federal statutes. To justify his aggressive reading of the statutes, which according to the dissent was flatly contradicted by statutory text and legislative history, Harlan invoked legal process theory. Harlan stressed that the dismissed employee held a routine, nonsensitive position and then wrote that

in view of the stigma attached to persons dismissed on loyalty grounds, the need for procedural safeguards seems even greater than in other cases, and we will not lightly assume that Congress intended to take away those safeguards in the absence of some overriding necessity, such as exists in the case of employees handling defense secrets. Justice Harlan, meet Hart and Sacks: statutory text should not be given an “unusual meaning”—one contrary to policies “judicially developed to promote the objectives of the legal system which transcend the wishes of any particular session of the legislature,” one under which the legislature would be understood “as directing a departure from a generally prevailing principle or policy of the law.”

Similarly, in Communist Party v. Subversive Activities Control Board, Justice Frankfurter invoked the avoidance canon to duck a constitutional challenge to the Subversive Activities Control Act. Frankfurter concluded that the Board should reopen the proceedings in light of subsequently discovered evidence that some of the testimony before it was

107. See Jay v. Boyd, 351 U.S. 345 (1956) (5-4 decision) (upholding denial of suspension of deportation based on confidential, undisclosed information; dissenters (Warren, Black, Frankfurter, Douglas), in various opinions, stressed that the result should not be condoned without clear evidence that Congress had understood that the process could be used in that way); United States v. Minker, 350 U.S. 179 (1956) (reading denaturalization statute narrowly to avoid harshness to citizens); Gonzales v. Landon, 350 U.S. 920 (1955) (per curiam) (reversing expatriation proceeding because burden of proof not satisfied without reaching constitutional issues raised).


109. See id. at 565-69 (Clark, J., dissenting).

110. Id. at 546-47; cf. United States v. Zucca, 351 U.S. 91, 99-100 (1956) (Warren, C.J.) (holding dismissal of denaturalization proceeding appropriate on technical procedural grounds: “The mere filing of a proceeding for denaturalization results in serious consequences to a defendant. Even if his citizenship is not cancelled, his reputation is tarnished and his standing in the community damaged. Congress recognized this danger and provided [procedural safeguards that] must not be lightly regarded.”).

111. HART & SACKS, supra note 28, at 1374-80.


perjured. Justice Clark, joined by Justices Reed and Minton, complained that the Court was avoiding the constitutional issues on "a pretext" and only delaying the ultimate resolution of the questions, since it was clear that on remand the Board would simply exclude the tainted evidence and then reaffirm its decisions. Uncharacteristically, Justices Black and Douglas silently joined Frankfurter's technical, nonconstitutional opinion rather than express their views on the constitutional infirmity of such proceedings.

In a third case in the 1955 Term, *Pennsylvania v. Nelson*, Justice Warren continued the technical campaign against the regulation of subversives that left open the possibility of response from the national political branches. Warren and five other Justices held that state sedition laws were preempted by the Smith Act and related legislation. According to Warren, the federal statutes prohibiting advocacy of the overthrow of the national government by force or violence occupied the field on a matter of central national concern and thereby left no room for state laws criminalizing the same conduct. The result was, of course, subject to change by Congress, which could simply amend the federal statutes to clarify that they were not intended to preempt state laws. Nonetheless, this outcome produced a vigorous response from Justice Reed, joined by Justices Burton and Minton, who thought it implausible, to say the least, that Congress would not want the states as allies in rooting out subversion. Indeed, Reed invoked the avoidance canon and related notions for his own purposes: because Congress had been fully aware of state sedition statutes for over a decade, "this Court should not void state legislation without a clear mandate from Congress."

3. **1956 Term: Red Monday**

The Court's protection of political offenders reached its apotheosis in the 1956 Term. As Professor Powe has noted, the Court heard the remarkable number of twelve cases involving alleged subversives—and resolved every one in favor of the accused. The Court directly employed the avoidance canon in three of the twelve cases. The first was *United States*
VOIDANCE CANON

A deportable alien had refused to answer a host of questions posed by the Justice Department regarding whether, for example, he was acquainted with certain persons, had visited certain addresses, or had contacted or was a member of certain organizations. The questions directly probed what materials he read and with whom he associated, including those he may have asked for help with his legal problems.

The statute at issue in Witkovich posed a problem for Frankfurter and his desire to invoke the canon: the Act explicitly authorized the Attorney General to require deportable aliens in Witkovich’s circumstances “to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper.” Frankfurter began by acknowledging that the language of the provision, “if read in isolation and literally, appears to confer upon the

deprived the Court of the technique of avoidance by interpretation because, of course, the Court must take state law as the state courts have understood it. In two of these cases, the Court held that it violated due process as unconstitutionally irrational for state bar examiners, on the ground of the lack of "good moral character," to refuse to admit to law practice persons who at one time were members of the Communist Party, see Schware v. Bd. of Bar Exam’rs, 353 U.S. 232 (1957), or who refused to answer questions along those lines, see Konigsberg v. State Bar, 353 U.S. 252 (1957). In the third, Sweezy v. New Hampshire, 354 U.S. 234 (1957) (plurality opinion of Warren, C.J.); id. at 255 (opinion concurring in the judgment of Frankfurter, J., joined by Harlan, J.), the Court held that a college professor’s contempt conviction for refusing to answer questions posed by the state attorney general, pursuant to a delegation of state legislative investigatory authority concerning the content of his lectures and his knowledge of the “Progressive Party” and persons associated with it, violated his First Amendment rights of academic freedom and expression.

The other six cases not clearly invoking the avoidance canon were federal, which allowed the Court to provide relief by statutory or regulatory interpretation or by the invocation of its nonconstitutional supervisory authority over the federal courts. Two cases interpreted the National Labor Relations Act to protect unions from suffering serious consequences for the crimes of their officers in filing false affidavits concerning Communist affiliation. See Amalgamated Meat Cutters v. NLRB, 352 U.S. 153 (1956) (holding that the only remedy is criminal prosecution of the offending officials); Leedom v. Int’l Union of Mine Workers, 352 U.S. 145 (1956) (same). In a third case, Service v. Dulles, 354 U.S. 363 (1957), the Court concluded that a State Department analyst had been dismissed in violation of the Department’s own regulations. Finally, three cases involved reversal of federal criminal prosecutions based on the Court’s supervisory authority. The most famous of these, Jencks v. United States, 353 U.S. 657 (1957), held that a criminal defendant was entitled to potentially exculpatory evidence in the prosecutor’s hands concerning government witnesses. The other two were Gold v. United States, 352 U.S. 985 (1957) (per curiam) (reversing judgment where FBI agent had intruded into jury privacy in case involving alleged false affidavit by labor leader concerning Communist affiliation) and Mesarosh v. United States, 352 U.S. 1 (1956) (conviction for conspiracy to violate the Smith Act tainted by false testimony of paid informer).

123. Id. at 196 n.*.
124. Some of the most noteworthy questions were as follows: “Do you subscribe to the Daily Worker?"; “[H]ave you attended any meeting of any organization other than the singing club?"; “Have you attended any meetings or lectures [at a certain auditorium]?”; “Have you attended any movies [at a particular theatre]?”; and “Have you addressed any lodges of the Slovene National Benefit Society requesting their aid in your case...?" See id.
125. Id. at 195 (quoting 68 Stat. 1232 (1954)).
Attorney General unbounded authority to require whatever information he deems desirable.” Nevertheless, Frankfurter wrote, “The Government itself shrinks from standing on the breadth of these words,” and “once the tyranny of literalness is rejected, all relevant considerations for giving a rational content to the words become operative.” Hart and Sacks could have said it no better: statutory interpretation involves a purposive search for rational policy. Frankfurter concluded that the Act as a whole and its legislative history both suggested that the provision authorized only inquiries regarding the alien’s continued availability for deportation. He then clinched the argument by invoking the avoidance canon: because supervision of such aliens “may be a lifetime problem[,] . . . issues touching liberties that the Constitution safeguards, even for an alien ‘person,’ would fairly be raised on the Government’s view of the statute.” In dissent, Justices Clark and Burton understood Congress’s authority over deportable aliens as sweeping. “We regret that the Court has used the rule of avoidance of constitutional issues to strip the Attorney General of this important power so necessary to the performance of his duty to protect our internal security,” they wrote.

The other two avoidance cases involving alleged subversives in the 1956 Term were decided on June 17, 1957, along with Service v. Dulles and Sweezy v. New Hampshire, a day that became known to the Court’s detractors as “Red Monday.” Watkins v. United States dealt with a challenge to a contempt conviction for refusing to answer questions posed by a subcommittee of the House Un-American Activities Committee concerning whether certain persons had once been members of the Communist Party. Chief Justice Warren’s majority opinion began with a long, pointed lecture to Congress about the dangers of “a new kind of congressional inquiry unknown in prior periods of American history[,] . . . involving a broad-scale intrusion into the lives and affairs of private citizens.” He then posited serious constitutional problems associated with congressional investigations intruding into individual privacy without a valid public purpose. “We have no doubt that there is no congressional power to expose for the sake of exposure,” Warren wrote, responding to Watkins’s argument that the sole purpose for the questions posed “was to bring down upon [him] and others the violence of public reaction because of their past

126. Id. at 199.
127. Id.
128. Id. at 201.
129. Id. at 209 (Clark, J., dissenting). Justice Whittaker did not participate.
130. 354 U.S. 363 (1957); see supra note 120.
131. 354 U.S. 234 (1957); see supra note 120.
132. See, e.g., Powe, supra note 100, at 93.
133. 354 U.S. 178 (1957).
134. Id. at 195.
135. Id. at 200.
beliefs, expressions and associations.” The decision, however, ended up rooted in a much narrower rationale: the House had not defined the committee’s delegated investigatory responsibilities clearly enough to allow the witness to know whether the questions posed were pertinent to the investigation the committee was allowed to undertake. “Protected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need.” Although Warren invoked the principles of avoidance to duck a range of constitutional issues, he ultimately held that the sanction of the witness violated due process on the narrow ground of the “vice of vagueness”—that he was “not accorded a fair opportunity to determine whether he was within his rights in refusing to answer.”

Of course, if the committee’s charge was to investigate Communism, which everyone understood it to be, the questions posed by the committee were certainly relevant. For Professor Powe, Watkins was based on an “entirely fictitious ground,” since surely Watkins knew what the House wanted the committee to investigate. This can be acknowledged without undermining the legal process rationale of Watkins, however. Warren used the narrow pertinency holding to shift responsibility to the House to monitor its committees under clear delegations of authority. Though the Court was in no position to consider the actual dangers of Communism to the country, much less the relevance of the questions asked of Watkins to any such dangers, it could at least call upon the House to undertake these inquiries before authorizing witch hunts and fishing expeditions by its committees. As Bickel would recognize, this amounted to applying the nondelegation doctrine, a venerable avoidance device, to internal congressional organization, while admonishing Congress about the serious constitutional values at stake.

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136. Id. at 199.
137. Pertinency was an element of the criminal statute the witness had allegedly violated. See id. at 207 (quoting 52 Stat. 942 (1938) (current version at 2 U.S.C. § 192 (2000) (criminalizing refusal to respond to “any question pertinent to the question under inquiry”)).
138. Id. at 205. The House had defined the committee’s jurisdiction as including investigations of the nature and diffusion of “un-American propaganda activities in the United States,” such as those that “attack[] the principle of the form of government as guaranteed by our Constitution,” and “all other questions in relation thereto that would aid Congress in any necessary remedial legislation.” Id. at 201-02 (quoting H.R. Res. 5, 83d Cong. (1953)). Warren wrote that “[i]t would be difficult to imagine a less explicit authorizing resolution.” Id. at 202.
139. Id. at 209 (quoting United States v. Josephson, 165 F.2d 82, 88 (2d Cir. 1947)).
140. Id. at 215.
141. Powe, supra note 100, at 96.
142. See BICKEL, supra note 90, at 157-61. Bickel wrote:

When should the Court recall the legislature to its own policy-making function? Obviously, the answer must lie in the importance of the decision left to the administrator or other official. And this is a judgment that will naturally be affected by the proximity of the area of delegated discretion to a constitutional issue. The more fundamental the issue, the nearer it is to principle, the more important it is that it be decided in the first instance by the legislature.
The other “Red Monday” avoidance decision was Justice Harlan’s opinion in *Yates v. United States.* For present purposes, the central issue in *Yates* was whether the Smith Act prohibited “advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end, so long as such advocacy or teaching [was] engaged in with evil intent.” The statutory text was expansive enough for this interpretation, as one of its provisions reached “whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States... by force or violence.” For Harlan, however, “[t]he distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action is one that has been consistently recognized” in the Court’s First Amendment opinions. He continued:

We need not, however, decide the issue before us in terms of constitutional compulsion, for our first duty is to construe this statute. In doing so we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked, or that it used the words “advocate” and “teach” in their ordinary dictionary meanings when they had already been construed as terms of art carrying a special and limited connotation.

With this statement, Harlan narrowed the earlier *Dennis* decision, understanding it to have upheld the Smith Act on the ground that the Act criminalized advocacy directed at promoting unlawful action “at a propitious time” in the future, not “mere doctrinal justification of forcible overthrow, if engaged in with the intent to accomplish overthrow.” The latter form of advocacy, “even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action to be regarded as the kind of indoctrination preparatory to action which was condemned in *Dennis.*”

*Yates* was judging at its most technical. Harlan admitted that “distinctions between advocacy or teaching of abstract doctrines, with evil intent, and that which is directed to stirring people to action, are often

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143. Id. at 161; see also id. at 188 (writing that the Court “can see to it that the political judgment of necessity is undertaken with awareness of the principle on which it impinges”).
144. Id. at 318.
146. Id. at 318.
147. Id. at 319.
148. See supra text accompanying note 66.
149. 354 U.S. at 312.
150. Id. at 351-52. Justices Black and Douglas concurred on the ground that the Smith Act was unconstitutional. Id. at 339 (Black, J., concurring in part and dissenting in part). Justice Clark, dissenting alone on this issue, could find “no resemblance between [the majority opinion] and what the respected Chief Justice wrote in *Dennis.*” Id. at 350 (Clark, J., dissenting).
subtle and difficult to grasp." Harry Kalven put it more colorfully: "[A] first acquaintance [Yates] seems a sort of Finnegans Wake of impossibly nice distinctions." Indeed, if in a statutory interpretation case the Court's "duty is to give coherence to what Congress has done within the bounds imposed by a fair reading of legislation," as Justice Frankfurter wrote in another case in the 1956 Term, Harlan's opinion in Yates (which Frankfurter joined) was an abomination. Yet while Yates may have left the Smith Act "a virtual shambles," as one member of the Court of Appeals panel reversed in Yates later grumbled, it simultaneously helped reconstruct the American system of freedom of expression while avoiding any constitutional decision. It was a masterful performance of legal process theory, all the while illuminating the submerged normativity and judicial power authorized by that approach.

4. 1957 Term: The Passport Case

Congressional objections to some of these decisions reached a fever pitch during the 1957 Term. This Congressional reaction, the subject of the next Part of this Article, may well have influenced the Court during this Term. Nonetheless, the Court deployed the avoidance canon one more time. In Kent v. Dulles, the State Department had denied passports to alleged Communists. Justice Douglas's majority opinion posited a constitutional right to foreign travel, but then avoided the question whether the passport denials violated that right by concluding that Congress had never clearly authorized the Department to withhold passports on such grounds. Four Justices in dissent thought the Court obviously wrong in this conclusion. Bickel, too, acknowledged that under "[n]ormal methods of statutory construction," Congress's policy authorizing the Department to act as it did was reasonably evident. Yet he supported the decision through an aggressive understanding of the passive virtues:

151. Id. at 326.
152. HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 211 (Jamie Kalven ed., 1988).
154. Fujimoto v. United States, 251 F.2d 342, 342 (9th Cir. 1958).
155. See infra Part II.C.
157. Walter Murphy and Scot Powe comment on how uncharacteristic it was for Douglas to use avoidance and admonition rather than constitutional invalidation. See WALTER F. MURPHY, CONGRESS AND THE COURT 188 (1962); Powe, supra note 100, at 138. In fact, Bernard Schwartz has shown that Douglas attempted to put together a majority opinion to strike down the passport regulations and only turned to the avoidance strategy when that failed. See SCHWARTZ, supra note 105, at 310-11.
158. See 357 U.S. at 130 (Clark, J., dissenting).
159. BICKEL, supra note 90, at 165.
Were freedom to travel less jealously regarded, [the "not wholly explicit" congressional policy] might have sufficed. In "the candid service of avoiding a serious constitutional doubt," it need not have, and did not. But this is a step beyond holding Congress to its responsibility for a policy decision that it has failed to make—altogether or with sufficient particularity. This was remanding to Congress for a second look—not for the necessary initial decision, but for orderly, deliberate, explicit, and formal reconsideration of a decision previously made, but made back-handedly, off-handedly, less explicitly than is desirable with respect to an issue of such grave importance.\textsuperscript{160}

One can only assume that Bickel employed this flurry of adverbs and adjectives in the normative legal process manner, as a statement of how Congress should behave when serious issues are at hand, rather than as a description of how Congress actually acts.\textsuperscript{161} In any event, as the next section discusses, the actual congressional reaction to the Court's national security decisions was less than the deliberative response Bickel envisioned, or at least hoped for.

C. Congressional Response, Judicial Retreat, and the Rise of the "Warren Court"

1. Congressional Counterattack

By 1957, hostility toward the Court was widespread. Southerners in Congress, spoiling for a fight with the Court over Brown, had forged an anti-Court alliance with other lawmakers concerned about national security.\textsuperscript{162} The loose coalition railing against the abuse of judicial power started its agitation after the 1955 Term and gained significant momentum after Red Monday.\textsuperscript{163} Additionally, the criminal procedure revolution of the Warren Court had just begun, and its decisions\textsuperscript{164} aroused opposition from police and provided more fodder for opportunistic politicians.\textsuperscript{165} The Court had also made no friends in the organized bar, which was livid with the direction of the Court in general and the bar admission decisions in particular.\textsuperscript{166} Nor did the Court have allies in the business community, which considered the Court to be hostile in labor\textsuperscript{167} and antitrust\textsuperscript{168} cases.\textsuperscript{169} State
officials considered Sweezy, Nelson and other preemption decisions as invasions of state power. The American Bar Association (ABA) failed to pass a resolution in 1957 supporting the Court, and its Committee on Communist Strategy issued a report blasting the Court during a meeting in London attended by none other than Earl Warren (who resigned from the ABA soon thereafter). Several major newspapers also attacked the Court in vitriolic terms.

With enemies like these, the Court needed some powerful friends. It had some, in the press and in Congress. Some legislators forthrightly supported the decisions protecting alleged subversives. Others understood that attacks on the Court could undermine Brown, and thus they largely swallowed their ambivalence or opposition toward the national security cases and tried to support the Court generally. President Eisenhower remained above the fray, and his few statements about the increasingly controversial Court were opaque.

Nonetheless, members of Congress engaged in an orgy of proposals countering the Court. In addition to the inevitable calls for impeachment were bills that promoted jurisdiction-stripping, contained anti-preemption measures, were designed to overturn particular decisions, gave the Senate appellate jurisdiction over the Court’s decisions, required a unanimous vote of the Justices to strike down a state law, abolished life tenure for the Justices, and purported to require that a Justice have prior judicial experience. There was also a wonderfully counter-hegemonic measure that would have required lower courts to ignore any Supreme Court decision “which conflicts with the legal principle of adhering to prior decisions and which is clearly based upon considerations other than legal.”

To some extent, of course, the Court had enabled this wave of congressional responses by using the avoidance canon and other techniques


169. See Powe, supra note 100, at 121-22.
170. Sweezy v. New Hampshire, 354 U.S. 234 (1957); for further discussion, see supra note 121.
172. Powe, supra note 100, at 99-100.
173. See, e.g., MURPHY, supra note 157, at 112-14.
174. See id. at 114.
175. See id. at 171.
176. MURPHY, supra note 157, at 201-02, 209-10.
177. See Powe, supra note 100, at 99, 128.
178. MURPHY, supra note 157, at 116.
that did not formally prevent congressional override of its decisions. But although the Court had been careful to leave open the opportunity for congressional response, the other element of the enterprise—admonition—seemed to have touched a sore point in many sectors. Moreover, the fine points of procedural or interpretive rulings versus constitutional rulings tended to be lost in the political uproar, never creating much of a safe harbor for the Court once politics came to the fore. As esteemed political scientist Walter Murphy explained, "[T]he general indirectness of the Warren Court's approach [did not] mask from jealous members of Congress the incontrovertible fact that the Justices were setting public policy in major areas of national affairs. That they were doing so more adroitly than had previous judges was an added source of irritation."

Although few of the anti-Court bills had any realistic chance of passage, there were two that came very close in 1958, and another in 1959 that received serious attention. In 1958, one anti-Court bill, the Jencks Act, was actually enacted, but its passage generated comparatively little controversy, and its impact on the Court was minimal. The other measures that received serious consideration, however, contained little pretense about their hostility toward the Court. As Justice Scalia famously said three decades later in a case involving a congressional attack upon executive, not judicial, power, "Frequently an issue of this sort will come ... clad, so to speak, in sheep's clothing ... But this wolf comes as a wolf." These "Court-ripper" bills were transparently lupine.

The House of Representatives piled on the Court. It passed bills overriding Cole, Yates, and a controversial criminal procedure decision, Mallory v. United States. It also passed H.R. 3, a remarkable anti-preemption measure that went well beyond overturning Nelson, the case holding that the Smith Act and related legislation preempted state law.

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181. *Id.*
182. Pub. L. No. 85-269, 71 Stat. 595 (1957). After various drafts and compromises, the bill that became the Jencks Act largely amounted to a codification of the Jencks decision, which allowed a criminal defendant access to potentially exculpatory evidence that the prosecutor possessed concerning government witnesses. *See* Jencks v. United States, 353 U.S. 657 (1957). It helped that the Justice Department, which was involved in the drafting and negotiating of the Act, could live with *Jencks* and only feared that without clear statutory guidance some lower-court judges would misinterpret the opinion in ways interfering with criminal investigations and prosecutions. Murphy, *supra* note 157, at 133. It also helped that the primary Senate sponsor, Joseph O'Mahoney (D-Wyoming), was a liberal who insisted that consideration of the bill be free from Court-bashing. *Id.* at 132. He was not entirely successful, but the final bill received the votes of virtually every defender of the Court in both Houses. *Id.* at 152. Murphy reports that O'Mahoney used intermediaries to ask the Justices whether they had concerns about the various Jencks bills and heard back that there was no serious problem with the one that provided the basis for the Jencks Act. *Id.* at 153. If the Act was a rebuff to the Court, it was a slight one.
185. 354 U.S. 449 (1957); *see also* Murphy, *supra* note 157, at 182.
H.R. 3 commanded that no preemption of a field of law would occur unless the federal statute in question contained an express preemption provision to that effect. It also dictated that no preemption would occur due to a conflict between federal and state law unless "there is a direct and positive conflict between an express provision of [federal law and a state law] so that the two cannot be reconciled or consistently stand together." All these measures sailed through the House by commanding majorities, indicating that the House would probably enact any anti-Court measure that could make its way through the Senate.

In the Senate, by far the most confrontational proposal was the jurisdiction-stripping measure introduced by Senator Jenner (R-Indiana) soon after Red Monday. S. 2646 would have removed the Court's appellate jurisdiction over five areas: (1) bar admissions, (2) congressional committee procedures, including contempt proceedings against witnesses, (3) the executive branch's employee loyalty program, (4) state laws concerning subversive activities, and (5) loyalty programs in educational institutions. In 1958, the bill, as extensively amended by Senator Butler (R-Maryland), made it through the Senate Judiciary Committee, and only the jurisdiction-stripping provision dealing with bar admissions remained. But Butler successfully added provisions that would have overridden the results in Watkins and Nelson and modified the decision in Yates.

In August 1958, the Senate considered the Jenner-Butler measure at the same time H.R. 3 was pending before it. A motion to table the former prevailed, but only by a 49-41 vote. The Court's supporters then made a misstep: their motion to table H.R. 3 failed 46-39. Yet in spite of calls for a final vote, a motion to adjourn until the next day passed 70-18, when a motion to recommit the bill passed by the narrowest of margins.

Was the Senate's ultimate restraint fueled by the sort of second-round legislative deliberative debate and reflection that, at least according to Bickel, comprised a key component of narrowing interpretation to avoid constitutional issues? Was it a victory of principle over politics? A better way to put it is that politics was the vehicle that protected principle, and the anti-Court bills were mostly unsuccessful for political reasons. The primary reason these bills failed to pass was that Lyndon Johnson,...
then-Senate majority leader and "master of the Senate,"\textsuperscript{193} used his bag of tricks to ensure these measures did not pass, and ultimately even some opponents of the Court deferred to him in his efforts. Principle had something to do with it, as Johnson did not support the bills on the merits.\textsuperscript{194} But he also opposed them because they were Republican measures designed to split the Democrats, because they were measures that made the Senate look bad, and because of his own burning desire to be President, which required him to demonstrate autonomy from the Southern bloc, seem "presidential" rather than petty, and maintain legitimacy in moderate and liberal circles.\textsuperscript{195}

As Congress engaged in its own passive-aggressive virtues, the Court's 1957 Term moved forward. \textit{Kent v. Dulles}, discussed earlier,\textsuperscript{196} fit the established pattern of deploying the avoidance canon to protect alleged subversives. Several other, less important cases that Term also used avoidance techniques or other technical methods to aid such persons.\textsuperscript{197} On the whole, however, the Court's legalistic campaign against the abuse of political offenders was starting to flag.

On the surface, it appears that the political turmoil had been too close for judicial comfort, at least for the Justices at the center of the Court, Frankfurter and Harlan. They had consistently been voting with Warren, Black, Douglas, and now Brennan in national security cases, controlling the outcomes through the use of narrowing interpretations rather than constitutional invalidation. Now, Frankfurter and Harlan had apparently decided that enough was enough. As Professor Powe suggests, they may have concluded that the prestige and integrity of the Court were more important than protecting a relatively few individuals with peculiar ideas.\textsuperscript{198} Frankfurter's and Harlan's voting patterns over the next few years lends credibility to Powe's assertion.

\textsuperscript{193.} See \textit{Caro}, supra note 184, at 1032-33.
\textsuperscript{194.} See id. at 1030-33.
\textsuperscript{195.} \textit{Id.; Murphy}, supra note 157, at 171, 196-223, 249, 258-61; \textit{Powe}, supra note 100, at 132; \textit{Pritchett}, \textit{supra} note 179, at 35-39, 127.
\textsuperscript{196.} See supra text accompanying notes 156-58.
\textsuperscript{197.} See \textit{Bonetti v. Rogers}, 356 U.S. 691 (1958) (Whittaker, J.) (setting aside order of deportation of former Communist based on narrow reading of statutes informed by rule of lenity); \textit{Maisenberg v. United States}, 356 U.S. 670 (1958) (setting aside denaturalization of former Communist due to insufficiency of proof that he had obtained citizenship wrongfully); \textit{Nowak v. United States}, 356 U.S. 660 (1958) (Harlan, J.) (same); \textit{Sacher v. United States}, 356 U.S. 576 (1958) (per curiam) (setting aside contempt of Congress conviction because the questions witness refused to answer were not pertinent to subject of subcommittee hearing); \textit{Harmon v. Brucker}, 355 U.S. 579 (1958) (per curiam) (avoiding constitutional question by narrowly construing authority of Secretary of Army so that he was without power to issue less-than-honorable discharge to service member based wholly on alleged pre-induction disloyal activities); \textit{Heikkinen v. United States}, 355 U.S. 273 (1958) (Whittaker, J.) (setting aside criminal prosecution of deportable alien due to insufficiency of evidence of willful failure to depart United States); \textit{Rowoldt v. Perfetto}, 355 U.S. 115 (1957) (Frankfurter, J.) (5-4 decision) (setting aside deportation order of one-time Communist because of insubstantiality of evidence).

\textsuperscript{198.} \textit{Powe}, supra note 100, at 141-42.
The 1957 Term ended on the last day of June in 1958, approximately seven weeks before Lyndon Johnson sealed the fate of S. 2646 and H.R. 3. *Kent v. Dulles*, decided on June 16, produced an immediate response from the State Department, which drafted a bill giving it sweeping authority over passports. On July 7, President Eisenhower, breaking from his pattern of taciturnity regarding congressional responses to the Court, sent a message to Congress stating, "I wish to emphasize the urgency of the legislation I have recommended. Each day and week that passes without it exposes us to great danger." Committee action commenced in the House that summer, but not in the Senate. The next year, the House overwhelmingly adopted a rather balanced bill that authorized the department to withhold passports only from persons who had been members of the Communist Party since 1951 and whose foreign travel would be harmful to national security. Yet passage in the House came too late for the Senate to act.

All in all, 1958 must go down as the high tide of attacks on the early Warren Court. Then, once again, politics altered the nature of the criticism. As a result of the 1958 midterm elections, the Congress became more liberal. Seven Republican Senators who had battled the Court, including Jenner, the primary sponsor of S. 2646, had left due to either retirement or electoral defeat. The Court controversy was not a major factor in the election, but a general national drift toward liberalism made it unlikely that congressional leaders would entertain further extreme Court-bashing. This is not to say, however, that the Court escaped criticism. In February 1959, the House of Delegates of the American Bar Association approved recommendations from its Special Committee on Communist Tactics, Strategy, and Objectives. The committee lambasted the Court for decisions that had "been severely criticized and deemed unsound by many

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199. PRITCHETT, supra note 179, at 33-34.
200. Id. at 34 (quoting President Eisenhower without citation).
201. H.R. 13760, 85th Cong. (1958); PRITCHETT, supra note 179, at 34-35.
202. See MURPHY, supra note 157, at 192, 236-37. In 1960 the Senate Judiciary Committee did report out a bill that would have denied passports to Communists, but it never was considered on the Senate floor because Senator Fulbright, chair of the Foreign Relations Committee, asserted that the bill properly belonged in his committee. See id. at 241.
203. To add insult to injury, in February, in the midst of all the turmoil, Learned Hand castigated the Court as a “third legislative chamber” and even condemned Brown as improper judicial activism in his Holmes Lectures at Harvard University. See LEARNED HAND, THE BILL OF RIGHTS 55 (1958). The lecture fueled more adverse publicity and criticism of the Court. See Powe, supra note 100, at 129-30. Just two days after Senator Johnson interred S. 2646 and H.R. 3 for the remainder of the year, the conference of the chief justices of the state supreme courts overwhelmingly adopted a resolution harshly attacking the Court for judicial activism. See Powe, supra note 100, at 139. Both events drew considerably more adverse publicity for the Court. See id. at 130, 139.
204. See MURPHY, supra note 157, at 237-38.
205. Id.
responsible authorities'' and had "encouraged an increase in Communist activities in the United States." The resolution opposed jurisdiction-stripping, but proposed legislation overriding Nelson, Yates, and the employee loyalty decisions and making it easier to deport supposed subversives.

2. The Court, Post-Yates: The Center Cannot Hold

While the ABA fulminated and members of Congress again introduced anti-Court bills (but this time with much less chance of passage), the Court trimmed back some of its most controversial precedents while quietly protecting alleged subversives on narrow, technical grounds. The three most important cases came down at the end of the Term in June 1959. The first, Barenblatt v. United States, substantially undercut Watkins. Justice Harlan, joined by Justices Frankfurter, Clark, Whittaker, and Stewart (who had replaced Justice Burton), upheld a contempt of Congress conviction based on the refusal to answer questions from a subcommittee of the House Un-American Activities Committee concerning whether the witness, a former college instructor, had been a member of the Communist Party or knew a certain person as a Party member. The facts were similar to Watkins, but Harlan portrayed this case differently. As a formal matter, Watkins was easy to distinguish, as its only holding was that the questions asked of the witness had not been demonstrated to be pertinent to the subject of the committee's investigation. Barenblatt concerned the same committee with the same delegated authority, but Harlan considered it obvious that the committee was supposed to investigate Communism, and the subcommittee had clearly stated it was looking into Communism in education. Moreover, unlike Watkins,

207. Murphy, supra note 157, at 225 (quoting an American Bar Association Committee report without citation).
208. See id. at 225-26; Pritchett, supra note 179, at 137-40.
209. For technical decisions of that nature, see Raley v. Ohio, 360 U.S. 423 (1959) (Brennan, J.) (ruling that due process violated when contempt convictions for refusing to answer questions of state legislative committee were contaminated by vague admonitions by committee about claimed privilege against self-incrimination); Vitarelli v. Seaton, 359 U.S. 535 (1959) (Harlan, J.) (ruling that dismissal of federal employee improper when department failed to follow its own procedures); Flaxer v. United States, 358 U.S. 147 (1958) (Douglas, J.) (ruling that contempt of Congress conviction tainted by ambiguity regarding when committee required witness to produce records). Cf. Scull v. Virginia ex rel. Comm. on Law Reform & Racial Activities, 359 U.S. 344 (1959) (Black, J.) (ruling that due process violated when recalcitrant witness convicted of contempt even though state legislative committee failed to show how its questions were pertinent to the subject under inquiry (case involved a group supporting school desegregation, not an allegedly subversive group)).
211. See supra text accompanying note 137.
212. See 360 U.S. at 124-25.
Barenblatt refused to answer questions about his own Party affiliation, an inquiry Harlan viewed as obviously pertinent.\textsuperscript{213} Harlan held that the inquiry did not violate the First Amendment because, under the appropriate balancing test, the government's interest in avoiding the violent overthrow of itself outweighed the witness's interests.\textsuperscript{214} The expansive dictum in \textit{Watkins} about congressional inability to expose for the sake of exposure\textsuperscript{215} was jettisoned on the ground that the Court could not investigate the motives of Congress.\textsuperscript{216} \textit{Barenblatt} demonstrates the extent to which narrow opinions of avoidance and admonition, like \textit{Watkins}, can be easily undermined without the necessity and controversy of a formal overruling.

So, too, did Harlan and Frankfurter narrow \textit{Nelson}\textsuperscript{217} and shrink \textit{Sweezy}.\textsuperscript{218} In \textit{Uphaus v. Wyman},\textsuperscript{219} they provided the crucial votes for Justice Clark's opinion (which had the same five-person majority as in \textit{Barenblatt}), upholding a contempt citation given to a witness for refusing to disclose to a state legislative investigation of subversive activities the names of persons who had attended a summer camp his organization ran. Clark distinguished \textit{Nelson} as holding only that the Smith Act preempted state laws prohibiting activities related to the violent overthrow of the \textit{federal} government; in contrast, the New Hampshire statute in \textit{Uphaus} reached sedition against the state itself.\textsuperscript{220} With \textit{Barenblatt} removing any serious First Amendment objection to such questioning in general, \textit{Sweezy} became confined to the academic freedom of professors and universities.

Finally, on the last day of the 1958 Term, the Court handed down an opinion in the old avoidance style. In \textit{Greene v. McElroy},\textsuperscript{221} the Department of Defense had revoked the security clearance of Greene, an aeronautical engineer and an employee of a government contractor. As a result, Greene lost his job and "for all practical purposes that field of endeavor [was] now closed to him."\textsuperscript{222} The government acted based on confidential reports that were never made available to Greene, who also had no opportunity to confront or cross-examine adverse witnesses or investigators. The Court set aside the security clearance revocation in a revealing 5-3-1 split.

\textsuperscript{213} See id. at 124.
\textsuperscript{214} See id. at 126-32.
\textsuperscript{215} See supra text accompanying note 135.
\textsuperscript{216} \textit{Barenblatt}, 360 U.S. at 132.
\textsuperscript{217} See supra text accompanying notes 115-19.
\textsuperscript{218} \textit{Sweezy} overturned a college professor's contempt conviction for refusing to answer questions on First Amendment grounds; see \textit{Sweezy v. New Hampshire}, 354 U.S. 234 (1957); for further discussion, see supra note 121.
\textsuperscript{219} 360 U.S. 72 (1959).
\textsuperscript{220} See id. at 76.
\textsuperscript{221} 360 U.S. 474 (1959).
\textsuperscript{222} Id. at 476.
Chief Justice Warren began with his typical lecture of admonition: the Due Process Clause protects against the unreasonable deprivation of private employment, and the defects in the proceedings raised serious constitutional questions. Citing Watkins, Kent, and Peters, Warren then avoided these questions on the ground that neither the President nor Congress had clearly delegated authority to the Department to "by-pass these traditional and well-recognized safeguards." Warren justified the technique of avoidance in strong terms reminiscent of the "political accountability" principles articulated in Rumely and Five Gambling Devices. He could not, however, keep Frankfurter, the author of Rumely, or Harlan, the author of Yates, in the fold. They merely concurred in the judgment (along with Justice Whittaker). Harlan wrote separately to say why: the constitutional issue posed was "most difficult and far-reaching" and "the Court quite properly declines to decide it in the present posture of the case," but he could not join the majority opinion because "it unnecessarily deals with the very issue it disclaims deciding." For its key centrist supporters, the technique of admonition and avoidance was now one of avoidance alone.

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223. See id. at 492-93, 496-500.
224. Id. at 500.
225. See supra text accompanying notes 57, 74-77. Warren wrote in Greene:

> Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. [Citing, e.g., Watkins.] Such decisions cannot be assumed by acquiescence or non-action. [Citing, e.g., Kent and Peters.] They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized [citing Peters], but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.

Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process. [Citing, e.g., Rumely.] These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition.

Id. at 507-08.

226. Id. at 509 (Harlan, J., concurring specially).
227. One reason Frankfurter and Harlan might have been gun-shy was the hyperbolic dissent of Justice Clark, who thought the majority was allowing private citizens access to government secrets. Clark ended his dissent:

> While the Court disclaims deciding this constitutional question, no one reading the opinion will doubt that the explicit language of its broad sweep speaks in prophecy. Let us hope that the winds may change. If they do not the present temporary debacle will turn into a rout of our internal security.

Id. at 524 (Clark, J., dissenting).
The 1958 Term ended in June 1959 on this decidedly mixed message. Later in 1959, Congress adjourned, having again failed to enact any anti-Court legislation. Murphy reports that, in addition to the somewhat more liberal nature of the Congress that year, the decisions in Barenblatt and Uphaus "helped sap the vigor of the Court attacks" and "provided a ready means by which the Court foes could execute a face-saving retreat of their own." Neither the Court's 1959 Term nor Congress's roughly parallel 1960 session produced any significant developments on domestic security. At this point, with the impending presidential election of John F. Kennedy and more liberal Congresses to come, any serious congressional campaign against the Court was kaput.

Oddly, the apparent Frankfurter-Harlan retreat continued. In two decisions that are of particular importance for present purposes, the Court continued the trend of revisiting recent avoidance precedent.

228. The House repassed H.R. 3 (the anti-preemption bill), a Mallory override, a Nelson override, and a partial Yates override, but they all died in Senate committees. See Murphy, supra note 157, at 236. As noted earlier, the House did enact a relatively moderate bill that would have undone Kent v. Dulles, but it came too late for Senate action. See id. at 236-37.

229. Id. at 238.

230. Id.

231. The Court decided four cases involving domestic security issues that Term. See Flemming v. Nestor, 363 U.S. 603 (1960) (5-4 decision) (upholding termination of Social Security benefits to deported alien); Kimm v. Rosenberg, 363 U.S. 405 (1960) (per curiam) (5-4 decision) (holding that deportable alien who refused to answer question about Communist Party affiliation was not eligible for suspension of deportation); Niukkanen v. McAlexander, 362 U.S. 390 (1960) (per curiam) (5-4 decision) (upholding deportation of alleged former Communist); Nelson v. County of Los Angeles, 362 U.S. 1 (1960) (5-3 decision) (upholding dismissal of county worker who had refused to answer questions posed by congressional subcommittee). The Court also upheld the conviction of a Soviet spy based on evidence challenged as obtained through unlawful searches. See Abel v. United States, 362 U.S. 217 (1960). Additionally, it vacated and remanded a loyalty oath case so that the state supreme court could consider a question of state law. See Nostrand v. Little, 362 U.S. 474 (1960).

232. The House passed a bill overriding Greene v. McElroy, which died in the Senate. The Senate Judiciary Committee reported out a measure providing, among other things, a partial Yates override and a Kent override, but it died when the Foreign Relations Committee asserted jurisdiction over the passport provision. See Murphy, supra note 157, at 241.

233. During the 1960 Term, the Court decided a whopping number of cases in some way involving domestic security. Two of these were small cases in which the Court unanimously protected alleged political offenders on technical grounds. See Communist Party v. Catherwood, 367 U.S. 389 (1961) (avoiding constitutional issue by concluding that a federal statute did not require excluding the Communist Party as an employer for purposes of state unemployment compensation law); Slagle v. Ohio, 366 U.S. 259 (1961) (holding that due process was violated when a state un-American activities commission seemingly acquiesced in witness's refusal to answer questions based on Fifth Amendment privilege and the witness was later convicted of contempt).

Nine of the remaining cases were decided by 5-4 votes, and all but one went against the putative subversive. In every instance, Frankfurter, Clark, Harlan, and Whittaker voted with the government, and Warren, Black, Douglas, and Brennan voted the other way. Stewart stayed with the Frankfurter group except in one of the four cases involving the continuing travails of witnesses before the House Un-American Activities Committee. The Court followed Barenblatt in United States v. Wilkinson, 365 U.S. 399 (1961), and United States v. Braden, 365 U.S. 431 (1961), in upholding contempt citations for refusing to answer questions about Communist affiliation. In both cases Justice Stewart wrote the majority opinions. Stewart then changed sides and wrote Deutch v. United States, 367 U.S. 456 (1961),
In *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, the Navy revoked the security clearance of a cook employed by a private restaurant that provided food service on the premises of the Naval Gun Factory in Washington, D.C. The cook, who received neither notice nor an opportunity to be heard, was told only that she had failed to meet security requirements. *Cafeteria Workers* required revisiting *Greene v. McElroy*, which had been decided only two years before. In *Greene*, recall that Warren had waxed philosophical about the importance of fair procedures—and had drawn a rebuke from Harlan for too much admonition, not enough avoidance—before eliding the constitutional question on the ground that it was unclear whether the Congress or the President had authorized the method used for revocation. Stewart had been the key fifth vote in *Greene*, and it was now clear that he, too, saw the precedent as simply an exercise in avoidance. Writing for the majority in *Cafeteria Workers*, Stewart first found no ground for avoidance: the President had clearly authorized a Navy commander to exclude civilians from a base in the commander's absolute discretion. He then concluded that the summary revocation was constitutional because the reason given by the Navy—security concerns—was surely rational, the private interest was insubstantial since the cook could work anywhere else and, Stewart asserted, would not be substantially inhibited from gaining reemployment by any stigma associated with her dismissal, and the public interest in governmental control over its internal affairs was assumed to be substantial.

The second case, *Scales v. United States*, involved prosecution of alleged Communists under the membership clause of the Smith Act. As he had done four years earlier in *Yates*, which dealt with a different Smith Act
provision, Harlan saved the statute by narrowly interpreting it. Again without any statutory language to support him, Harlan added an important limitation: the Smith Act outlawed only “active” membership, and did not extend beyond those members who participated in party affairs with knowledge and support of the organization’s illegal activities. As Scot Powe put it, “as Yates had construed congressional intent to preclude conviction for mere advocacy, so Scales construed it to preclude conviction for mere membership.” Ultimately, Harlan and the rest of the conservative bloc found the evidence sufficient to uphold the conviction of Scales, but not of the defendant in a companion case.

3. The Rise of the “Warren Court”

The Warren Court would have another eight years in its remarkable run. As fate would have it, however, Scales was the last major Warren Court decision to use narrow, technical interpretation to soften a domestic security regulation without constitutionally invalidating it. Much more notable were events that occurred after the 1961 Term ended: Whittaker and Frankfurter were replaced by Byron White and Arthur Goldberg. Goldberg proved to be a reliable liberal vote, now giving the Court a solid liberal majority. The liberal “Warren Court,” as most people would remember it, was thus formed.

Due to these changes in the Court’s composition, the admonition and avoidance techniques so attractive to legal process centrists and moderate conservatives were no longer necessary for cobbling together a majority to protect alleged subversives from arguably unconstitutional regulations. The liberals had five solid votes for striking down such regulations, and the reconstituted Warren Court went about this work virtually whenever it had the opportunity. Admittedly, there were still a few examples of the

239. See supra text accompanying notes 143-54.
241. Powe, supra note 100, at 152.
avoidance strategy after Goldberg joined the Warren Court that involved domestic security or other sensitive issues, but these were largely


245. For three decisions done in the old avoidance style, see Schneider v. Smith, 390 U.S. 17 (1968) (invalidating intrusive Coast Guard program screening loyalty of seamen as beyond authority delegated by Congress, but clearly intimating that program was unconstitutional in any event); Am. Comm. for Prot. of Foreign Born v. Subversive Activities Control Bd., 380 U.S. 503 (1965) (per curiam) (avoiding constitutional issues by concluding that the Board’s order requiring organization to register as Communist-front organization was based on stale record); Veterans of Abraham Lincoln Brigade v. Subversive Activities Control Bd., 380 U.S. 513 (1965) (per curiam) (same). Bernard Schwartz reports that in American Committee for the Protection of Foreign Born, supra, Justice Brennan attempted to cobble together a majority opinion reaching the constitutional issues. Because Brennan could not get a majority to support his reasoning, he instead prepared a per curiam opinion remanding the case. Justices Black, Douglas, and Harlan dissented, complaining that the Court should not use a technicality to avoid the constitutional questions. See Schwartz, supra note 105, at 560-62.

For other opinions protecting political offenders on narrow, technical grounds, see Gojack v. United States, 384 U.S. 702 (1966) (setting aside a contempt of Congress conviction because the inquiry in question was beyond the lawful scope of the subcommittee’s authority); Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963) (finding evidence insufficient to justify deportation of former Communist); Yellin v. United States, 374 U.S. 109 (1963) (excusing witness’s refusal to answer questions due to congressional subcommittee’s failure to follow its own rules about using executive session to protect witness’s privacy).

246. The Court initially used the avoidance technique when it considered federal immigration statutes that required the exclusion of aliens with “psychopathic personalities,” which had been interpreted to include gay men and lesbians. See Rosenberg v. Fleuti, 374 U.S. 449 (1963) (Goldberg, J.) (avoiding a constitutional challenge on vagueness grounds by concluding that the alien in question had not technically departed and reentered the United States and therefore had not triggered the INS’s exclusionary power). Four Justices dissented in an opinion by Clark. This was avoidance without admonition, however, as Goldberg expressed no hints on the ultimate constitutional question. Moreover, the strategy was so fact-bound in this case that it could not have put much pressure on the INS or Congress to reconsider its policy. Eventually, in Boutilier v. INS, 387 U.S. 118 (1967), Clark, for a majority that included Warren and Goldberg, held that the application of the exclusionary category was consistent with congressional intent and was constitutional. Justices Douglas, Brennan, and Fortas dissented.

To some extent, the avoidance rationale supported Hamm v. City of Rock Hill, 379 U.S. 306 (1964). In that case, the Court held that the Civil Rights Act of 1964 abated pending prosecutions against sit-in demonstrators in public accommodations. As a result, Clark’s majority opinion avoided a question that threatened to divide the Court: whether there were any constitutional limits on the exclusion of persons who sought to engage in expressive activity on private property open to the public. See id. at 310 n.3 (noting conflicting views expressed in separate opinions in Bell v. Maryland, 378 U.S. 226 (1964)).

United States v. Seeger, 380 U.S. 163 (1965), broadly interpreted the Selective Service statutes to allow conscientious-objector status to men who belonged to no organized religion and lacked any conventional belief in God, but based their objection to war on their belief in a higher or spiritual understanding. By doing so, the Court avoided having to address whether it would be constitutional to exempt from the draft only those who sincerely believed in a theistic God. Although the Court never mentioned the avoidance canon as justification, it seems clear that the Justices did not want to consider the underlying constitutional question. See Schwartz, supra note 105, at 570-72.

In addition, in Thorpe v. Housing Authority, 393 U.S. 268 (1969), the Court avoided the question of due process rights of tenants of federally assisted housing by concluding that the eviction in question violated HUD regulations.
footnotes to the Warren Court’s text of aggressive judicial review. Moreover, when Congress began in 1964 to enact important civil rights legislation, the Court not only upheld all of it against constitutional challenge, but interpreted the measures expansively. In addition, even in the face of modern legislation, the Court revived and expanded century-old civil rights statutes.

This capacious, dynamic statutory interpretation was effectively immunized against congressional reversal by the presence of now-President Lyndon Johnson’s veto power and the solid liberal majorities in Congress. More broadly, now that the controlling ideology in the political branches matched that of a majority of the Court, admonition and avoidance were both ordinarily unnecessary and insufficiently entrenching. If a federal statute seemed to offend the Constitution, the Court would strike it down rather than trim it back to a clearly constitutional domain. With this approach, the Court entrenched the constitutional value beyond congressional tinkering at a later date. Conversely, if a federal statute was on roughly the same page as the Court, the Court often used broad, purposive interpretation to extend civil rights policy well beyond what the Constitution could plausibly require. In both its constitutional and purposive modes, the Court was protected from any meaningful negative congressional reaction. Admonition and avoidance thus largely became artifacts of the 1950s.

III.

THE AVOIDANCE CANON REVISITED

In addition to illuminating an important era of public law, my examination of the history of the early Warren Court provides a broad context for


252. As one might expect, the avoidance canon did not reappear as an important aspect of federal public law until the Supreme Court became more divided ideologically in the period of the Burger Court. See, e.g., NLRB v. Catholic Bishop, 440 U.S. 490 (1979) (avoiding challenge under religion clauses to federal support of unionization of parochial school teachers).
exploring legal process theory in general and the avoidance canon in particular. Part A uses several of these decisions to illuminate basic questions about the nature of legal process theory and the uses of judicial strategy in this period. Part B addresses possible descriptive and normative justifications for the canon, so understood. Part C represents my view of the appropriate use of the canon in a variety of settings.

A. Congress and the Canon in the Early Warren Court

1. The Existence and Extent of a Judicial Retreat

Several commentators have read the post-1957 cases as a judicial retreat from the cautious campaign to protect alleged subversives from unfair and arguably unconstitutional procedures and sanctions. How clear is it, as Chief Justice Warren himself supposedly said years later, that "Felix changed on Communist cases because he couldn’t take criticism"?253

Compare Barenblatt with Watkins. Giving every word of Watkins equal weight, that case constituted a remarkable, constitutionally based criticism of Congress on several grounds: Congress’s nebulous and intolerant resolution authorizing a committee to investigate “un-American activities”; the committee’s intrusive and unscrupulous investigations of the lives of ordinary citizens, which exposed private information that subjected them to adverse publicity and even reprisals; and its caving to, and even incitement of, public hysteria about national security for crass political reasons. But when jeremiad is jettisoned, admonition is separated from avoidance, and dictum is distinguished from holding, a remarkably narrow decision remains: Watkins simply mandates that only questions pertinent to an authorized committee inquiry may be used to hold a recalcitrant witness in contempt of Congress. On this understanding, Watkins left open the possibility of the result in Barenblatt.

Nor could Barenblatt’s stingy approach to Watkins have been entirely unexpected. Frankfurter joined the opinion in Watkins, but also wrote separately to emphasize the narrow pertinency point as the proper understanding of the Court’s holding.254 Moreover, the vote in Watkins was unusual. Only Justice Clark dissented, but Justices Burton and Whittaker did not participate.255 Watkins was thus decided by only a 6-1 vote, with Frankfurter in effect announcing he was not bound by the breadth of the opinion.

Other information, not apparent to the public eye, suggested that Frankfurter and Harlan never agreed with the broad language in Watkins.

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255. Id. at 216.
Despite considerable revision by Warren of his draft opinion in light of Frankfurter’s suggestions, Frankfurter thought Watkins should have focused only on the pertinency issue.256 But Frankfurter’s unhappiness was not limited to his fastidiousness about avoiding unnecessary discussions. He was especially concerned about the repercussions of waving a bloody shirt before Congress. Frankfurter told Warren as much while also getting in his customary dig about Justice Black: “I have not a particle of doubt that were Black still in the Senate he would raise hell about this opinion. There are other Blacks still in the Senate.”257 When a draft of one of Frankfurter’s opinions in April 1958 cited Watkins—during the height of congressional attacks upon the Court—Harlan wrote back advising, “This is not a good time to highlight Watkins, although it is controlling authority.”258 In his reply, Frankfurter referred to the “god-awful Watkins opinion” and continued: “If I had my way, I wouldn’t cite Watkins. I did it out of deference to the sensibilities of those who sponsored it. I’d be glad to omit it. You know what I think of that opinion. That chicken was due to come home soon.”259

Frankfurter’s negative view of Watkins was borne out a year later in Barenblatt, when Frankfurter and Harlan joined Clark, Whittaker, and Stewart (Burton’s replacement) in expressly shrinking Watkins down to its pertinency point.260 And in Greene in the same Term, Harlan and Frankfurter openly expressed what they had been saying privately: at least in the current circumstances, the avoidance canon should not be used as a vehicle for non-germane criticisms of Congress or the executive branch.261 Frankfurter and Harlan’s behavior, then, can easily be viewed as a clear retreat in the face of congressional hostility.

Walter Murphy points out the apparent irony that the Court “retreated after the attack against it had been broken.”262 To make sense of this, Murphy speculates that “the withdrawal may have been planned rather than forced.”263 Specifically, having reminded the other branches of their constitutional responsibilities, Frankfurter and Harlan effectively signaled that nonjudicial officers bore the primary responsibility “for achieving the most

260. See Barenblatt v. United States, 360 U.S. 109, 123-25 (1959); see also supra text accompanying notes 210-16.
261. See supra text accompanying note 226.
262. Murphy, supra note 157, at 267.
263. Id.
satisfactory reconciliations between conflicting and competing rights."^{264}
Whatever the Justices' actual intent, the avoidance canon, within the larger context of legal process theory, provided a tool for accomplishing that signaling effect.

2. Legal Process Theory, Statutory "Construction," and the Canon

Dissenting in a statutory case, Justice Clark once wrote that "'statutory construction' means to me that the Court can construe statutes but not that it can construct them."^{265} Presumably the truth of this assertion was self-evident to Clark. Although never entirely forthright about this, legal process theory is premised on a different set of assumptions—ones under which the avoidance canon can take on a remarkably powerful "constructive" function.

Recall the earlier overview of the premises underlying Hart and Sacks's approach to statutory interpretation^{266}: Congress is made up of reasonable persons pursuing reasonable purposes reasonably who seek to discharge their constitutional powers in good faith. The statutes passed by Congress are purposive instruments designed to promote public values. The Court should steer clear of short-term political currents when it interprets statutes. It should assume that Congress has not intended to violate any longstanding policy or principle of the law, especially a constitutional one, unless the legislature is explicit in its intention. In doing so, it is acceptable for courts occasionally to read a statute in a manner inconsistent with the intent of the legislature because the longstanding policies and principles are justified by a higher law, the Constitution.

Although they set up this elaborate approach to statutory interpretation, Hart and Sacks provided no examples outside the criminal context in which constitutional values and statutory text or intent conflicted.^{267} I can only speculate, but my sense is that the absence of this discussion was not accidental. Their project, The Legal Process, was devoid of almost all consideration of constitutional law.^{268} Without a theory of constitutional law, or at least an approach to it, it is essentially impossible to develop guidelines for how courts should police the borderline between constitutional

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264. Id.
266. See supra text accompanying notes 28-43.
267. Hart and Sacks did provide examples and discussion of the rule of lenity in criminal cases, see Hart & Sacks, supra note 28, at 1198-1210, a policy of clear statement they endorsed and saw as constitutionally influenced, see id. at 1374, 1376-77.
268. Based on archival research and our own sense of the materials, Bill Eskridge and I have speculated that the rapid evolution of constitutional law after the last "tentative edition" was finalized in 1958—especially in ways inconsistent with the little Hart and Sacks had said on the subject—made completing the materials for publication an especially daunting and ultimately futile task. See Eskridge & Frickey, supra note 31, at xcix-ccx.
law and statutory interpretation through the avoidance canon and related policies of clear statement.

To be sure, we need not speculate about Henry Hart's approach to constitutional law. As one of the leading doctrinalists of the 1950s, Hart shared Herbert Wechsler's views about the essential function of neutral principles in constitutional law. Hart famously argued that if the Justices would just spend more time together deliberating in good faith, their decisions would be vastly improved—perhaps enough so that "first-rate lawyers" could again appreciate the Court's work.

Bickel, like Hart, thought that constitutional law, narrowly defined, had to be principled up and down the line. But perhaps unlike Hart (who so far as I know never elaborately explained his views on the question), Bickel understood that the Court could not function in the real world if required to apply a completely principled approach in all cases. The Court needed "techniques that allow leeway to expediency without abandoning principle"—in other words, the passive virtues. The avoidance canon was central to this enterprise, resolving disputes that, for one reason or another, the Court could not prudently handle in a principled fashion. The contemporary rejoinder, by a young Gerald Gunther, was that the passive virtues had subtle, unprincipled vices—that Bickel believed in 100% principle, 20% of the time. In the meantime, the reconstituted Warren Court had spun off in a new direction, with the frequent, controversial invocations of judicial review for which the Court would be known. This behavior, though perhaps virtuous, in no way could be considered passive.

269. See Bobbitt, supra note 2, at 42-47.
270. See Hart, supra note 167, at 100-01. As Phil Bobbitt later wrote, this perception of the Justices bears little resemblance to what we know about what goes on in the conference room. See Bobbitt, supra note 2, at 48-49. And as Thurman Arnold notably responded at the time, the disputes in constitutional law were as much about constitutional values as constitutional principles, and more deliberation was unlikely to improve the judicial product (a product that Arnold held in much higher esteem than Hart in the first place). See Arnold, supra note 167, at 1311-16. Arnold explained

There is no possibility that I could pool my wisdom with Professor Hart's so that the wisdom of both of us, "successfully pooled," would "transcend the wisdom of" either of us. The reason is that I do not think his wisdom is real wisdom, and I am sure that he has the same opinion of mine. To lock the two of us in a room until I came to agree with the theology of Professor Hart by the process of the "maturing" of our "collective thought" would be to impose a life sentence on both of us without due process of law.

Id. at 1312. Hart's "first-rate lawyers," Arnold added, amounted to the Wall Street partners and the ABA leaders who were responsible for many of the attacks upon the Court, some of them based on what Arnold considered its courageous decisions in cases involving alleged subversives. See id. at 1314-17.
271. See Bickel, supra note 90, at 202-03.
272. Id. at 71.
273. See id. at 156-69 (providing examples of the passive virtues).
275. See supra Part II.C.3.
The Court sped off into the heart of the 1960s, leaving the commentators behind eating the dust of the 1950s.

The contemporary debate about strategic judicial behavior, whether from a political scientist like Murphy or legal scholars like Hart, Bickel, and Gunther, was not merely academic. Besides the avoidance cases that have been already discussed, the early Warren Court provided numerous examples of strategic behavior along the lines of the passive virtues, such as the Iowa racially exclusionary cemetery case,276 Naim v. Naim,277 Poe v. Ullman,278 and the sit-in cases.279 With academic views and judicial practice this fragmented, it is not surprising that Hart and Sacks never integrated constitutional law and the avoidance canon into their materials on statutory interpretation.

And so we are left to take both the Court's opinions and the 1958 "tentative edition" of The Legal Process at face value. Read together, the cases and this commentary reveal that the avoidance canon is one handy tool, a sort of Swiss army knife for trimming excesses from public law and readjusting what remains thereafter. Many of the Court's opinions used the avoidance canon to confine statutes to domains narrower than their enacting Congresses probably intended. From better-known examples like the Yates and Scales rewritings of the Smith Act to more obscure exercises like the narrowing interpretations in Witkovich and Peters, the Court pushed the statutes in question along an evolutionary path guided by constitutional values. Hart and Sacks provided a theoretical approach fully supporting these efforts, though they never provided any concrete discussions along these lines.

What the Court did, and what Hart and Sacks theorized, was not "statutory interpretation" as it was ordinarily understood. Recall that the dominant theory of statutory interpretation that was judicially articulated in the 1950s was intentionalism.280 Whatever else these cases did, they deviated from the original expectations of the enacting Congress. Intentionalism had displaced the old plain-meaning approach that frequently appeared in cases earlier in the twentieth century.281 If anything,
these avoidance cases were even more inconsistent with this kind of literalism. Indeed, the statutes in question seemed to have plain meanings—abstract advocacy of subversion and mere membership in the Communist Party were illegal, the Secretary of State could require a deportable alien to answer any question—that the Court had circumvented. Recall Frankfurter's revealing statement in Witkovich that "once the tyranny of literalness is rejected, all relevant considerations for giving a rational content to the words become operative." On the surface, at least, Hart and Sacks did not even go that far, for they believed that a court should not give a statute a meaning that its words "will not bear." More consistent with Frankfurter's statement, however, is Hart and Sacks's view that "the proposition that words must not be given a meaning they will not bear operates almost wholly to prevent rather than to compel expansion of the scope of statutes. The meaning of words can almost always be narrowed if the context seems to call for narrowing," such as when legislative good faith and constitutional values beckon. In this sense, the supposed limitation—that the canon can only be invoked if a plausible interpretation of statutory text can be imagined to avoid the constitutional issue—potentially has little practical importance.

Indeed, consider how Justice Frankfurter spoke of the avoidance canon: "This rule of constitutional adjudication is normally invoked to narrow what would otherwise be the natural but constitutionally dubious scope of the language." What makes this passage intriguing is not the point about narrowing, which has already been made clear, but the notion that the canon is one of "constitutional adjudication" rather than "statutory interpretation." Frankfurter was careful about this usage, as revealed by a similar passage in his foundational majority opinion in Rumely. Henry Friendly thought it more accurate to call the canon a rule of "constitutional nonadjudication," but as the next section reveals, I think Frankfurter had it right, and the justifications for the canon either stand or fall on this understanding.

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283. Hart & Sacks, supra note 28, at 1374.
284. Id. at 1376.
286. See United States v. Rumely, 345 U.S. 41, 45 (1953) (calling the canon a "principle of constitutional adjudication").
287. Friendly, supra note 7, at 212 (emphasis added).
B. The Canon as Constitutional Lawmaking

1. Descriptive Justifications for the Canon

The avoidance canon has been justified in a variety of ways. Descriptively, the classic justifications for the canon are that it promotes judicial restraint by allowing judges to avoid the "delicate process of constitutional adjudication" and its concomitant counter-majoritarian difficulties; it coincides with the probable congressional intent preferring the ongoing validity of some version of the statute to invalidity as the result of judicial review; and it encourages a healthy, cooperative attitude between the Court and Congress by "remanding" issues for careful congressional deliberation consistent with the members' oath of office to uphold the Constitution, thereby illuminating the issue not only for Congress but also the Court if the issue ever returns to it. The recent literature has roundly attacked these arguments. The decisions of the early Warren Court provide concrete contexts for assessing these descriptive claims.

a. Judicial Restraint

Whatever else the canon may accomplish, it does not promote judicial restraint, at least as the term is classically understood. The judicial behavior at work in the early Warren Court's cases avoided deciding some constitutional questions only by aggressive rewriting of statutes. Thus, unlike some other passive virtues, such as dismissal for nonjusticiability, the avoidance canon does not duck a decision on the merits; it merely chooses one aggressive decision over another.

Nor does the canon really avoid constitutional questions. Instead, it privileges one constitutional inquiry—whether the constitutional issue is sufficiently serious to trigger the canon—over another—whether the statute is unconstitutional. In a meaningful sense, the privileged question is often at least as difficult and debatable as the latter, so the canon does not necessarily allow judges to avoid doing this hard work or drawing debatable lines. Explaining why the question is sufficiently serious requires courts to engage in much the same analysis as they would if they directly addressed the constitutional question, so the canon does not necessarily keep the precedents clean of language that might gum up the works in later circumstances.

289. See Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 469 (1989) (stating that the avoidance canon "responds to Congress'[s] probable preference for validation over invalidation").
290. See, e.g., supra text accompanying note 57.
291. See, e.g., Manning, supra note 6; Nagle, supra note 6; Schauer, supra note 6.
Indeed, in cases like Watkins and Greene, Chief Justice Warren's discussion of the constitutional problems seemed so forceful—even emotional—and so antagonistic to current law that one might fear congressional umbrage and lose hope for the constitutionality of a later statutory amendment attempting to override the Court’s decision. Yet, in Barenblatt and Cafeteria Workers, the Court held that the constitutional problems were not insurmountable after all. The expansive constitutional discussions in Watkins and Greene remained in the case law as, at best, seeds for future developments and, more realistically, as mostly bombast. Like the Western putdown of the foolish man who puts on airs of being a rich rancher, the opinions ended up being “big hat, no cattle.”

Frankfurter used an alternative means of triggering the canon in cases such as Witkovich: merely asserting that serious issues exist without providing much explanation. This approach avoids muddying up the case law with constitutionally rooted dictum, but at the cost of creating precedents that appear to be mere fiat. For example, in Witkovich, the dissenters were unclear just what issues Frankfurter had in mind, much less why they were sufficiently serious to trigger the Court’s statutory rewriting authority. For someone as fastidious as Frankfurter, the omission of such an explanation was unlikely to have been inadvertent. Indeed, writing soon after Witkovich, Bickel and Harry Wellington thought that, in light of the contemporary precedents acknowledging Congress’s plenary authority over aliens, an actual holding of unconstitutionality in the circumstances was highly unlikely. Bickel and Wellington colorfully used a horticultural metaphor: the right that was claimed in the case “was at best shrubbery in the constitutional foothills.”

As this discussion suggests, some applications of the avoidance canon might be even more activist than judicial review. In effect, the canon creates a penumbra around the Constitution that dooms statutes raising serious constitutional questions to creative judicial rewriting, even though, if push came to shove, courts would presumably uphold the constitutionality of at least some of these laws. In fact, in addition to Barenblatt and Cafeteria Workers, the Court’s admonitions have sometimes proved merely hortatory, as in later cases when the Court upholds a statute against the same constitutional challenge avoided by the canon in an earlier case.

293. See 353 U.S. at 207, 209 (Clark, J., dissenting).
294. Bickel & Wellington, supra note 65, at 32.
295. This criticism is commonly attributed in the modern literature to Judge Posner. See Posner, supra note 7.
296. See Vermeule, supra note 6, at 1960-61 (comparing, for example, NLRB v. Catholic Bishop, 440 U.S. 490, 505-06 (1979), with Tony & Susan Alamo Found. v. Sec’y of Labor, 471 U.S. 290 (1985)).
b. The Congressional Perspective

That the statute might ultimately survive judicial review indicates that, from a descriptive perspective, the canon may not make sense from the viewpoint of Congress. Presumably, Congress might prefer to know the limits of its power and have at least some of its controversial statutes survive intact without judicial reworking. To be sure, Congress might often prefer validity to invalidity; the half a loaf of a rewritten statute, like the Smith Act after Yates, might be more desirable to Congress than a judicial invalidation of the statute. But those are not the alternatives flowing from the avoidance canon as it has been used for almost a century: the canon authorizes rewriting in the face of a significant constitutional question, not merely in the face of judicial invalidation.²⁹⁷

The canon does "remand" the issue to Congress for potential reconsideration and thus might promote a democratic rather than judicial resolution of the problem in the long run. However, the ways in which this remand can be understood under democratic theory are debatable. The Congress to which the issue is returned is, of course, a later Congress than the one that originally enacted the statute. In this sort of repeat game, what would a clever Congress, as an institution, prefer ex ante? That the laws it passes today be honored in later years consistent with its intent unless they must be struck down as inconsistent with a future Court's vision of constitutional values? If so, the canon, as currently deployed, is highly objectionable. Alternatively, perhaps Congress would prefer that the Court reconfigure laws passed years ago based on current judicial perceptions of public values. This approach, consistent with the canon, shifts the burden of inertia in the current Congress in favor of the judicial rewriting. It requires those who, for whatever reason, prefer the earlier Congress's intent (or, for that matter, anything other than the judicial rewrite) to overcome the many "vetogates"²⁹⁸ inside Congress and obtain passage of amendatory legislation.²⁹⁹ If the Court's rewriting of the statute through application of the canon makes the statute more compatible with the current political climate or public values while leaving its core in place, members of Congress...

²⁹⁷. See Nagle, supra note 6, at 1497-98.
²⁹⁹. A fundamental problem with this or any other ex ante analysis about Congress is that Congress itself hardly ever reflectively thinks ex ante, and the issues before it are rooted in current politics. If you asked a political scientist and student of Congress what Congress would prefer ex ante, he or she is likely to say that the question cannot be answered in that sense, because, in essence, Congress is a they, not an it. See generally Kenneth A. Shepsle, Congress Is a "They," Not an "It": Legislative Intent as Oxymoron, 12 INT'L REV. L. & ECON. 239 (1992). If you ask the typical Member the questions raised in the text, the Member would find them strange. If you asked about a particular issue, such as any of the issues in the cases in the early Warren Court, a typical Member of the contemporary Congress would answer each one politically, not strategically from an ex ante perspective.
might appreciate being taken off the hook of the controversy. Then Congress has the Court to blame while getting away with doing nothing in response.

In any event, the use of the canon seems ripe for strategic judicial behavior based on the political environment at the time the Court is deciding. For example, the Court may be able to entrench its result by rewriting the statute in question in a manner that effectively renders Congress politically unlikely to override it.\footnote{For a revealing example, see Eskridge, supra note 251, at 646-49 (considering the Court’s decision in \textit{Jones v. Alfred H. Mayer Co.}, 392 U.S. 409 (1968), within the then-contemporary political context); \textit{see also} Gordon Silverstein, The Warren Court and Congress: Both Necessary—Neither Sufficient 36-37 (2004) (unpublished manuscript on file with California Law Review).} It is also unclear whether remanding to Congress can produce thoughtful deliberation on the serious constitutional issues at stake. There is a significant literature on the capacity of Congress to consider constitutional questions.\footnote{See Dan T. Coenen, \textit{A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue}, 42 WM. & MARY L. REV. 1575, 1579 (2001) and sources cited therein.} Although there is no consensus, one may suspect that, while Congress can certainly draft a bill explicit enough to force the Court to reach a constitutional question, support for or opposition to the bill will be based on policy preferences that are either unadorned by constitutional justification or that embrace such justifications as boilerplate simply because they are consistent with the politics driving the support or opposition.\footnote{See, e.g., Abner J. Mikva, \textit{How Well Does Congress Support and Defend the Constitution?}, 61 N.C. L. REV. 587, 606 (1983).} It was more politics than principle, after all, that led to Lyndon Johnson’s interment of the anti-Court bills.\footnote{See supra text accompanying notes 194-95.}

Moreover, as revealed by Congress’s responses to the controversial decisions of the early Warren Court, the issues being “remanded” will rarely come free of baggage. Members had a difficult time disentangling their views of the subversion cases from their views on \textit{Brown v. Board of Education}. Supporters of \textit{Brown} surely feared not only that the anti-Court bills concerning subversion would weaken the Court in general, but also that the new alliance between southern legislators and national security conservatives could become more permanent and more powerful, leading to more effective attacks upon the school segregation decision itself.\footnote{See \textit{Murphy}, supra note 157, at 201-02, 209-10; \textit{see also} \textit{Pritchett}, supra note 179, at 120.} To use a poker analogy, supporters of \textit{Brown} were “in for a dime, in for a dollar” with the Court. Had \textit{Brown} never been decided, it is quite possible that more legislation overturning the Court’s subversion decisions would have passed.\footnote{Of course, the legislation might also have been more moderate than the bills that were in fact considered.}
In the final analysis, even leaving aside cynical suspicions about manipulative Justices and politically driven members of Congress who freely ignore their oaths of office to uphold the Constitution, no judicial role as intrusive into Congress’s law-creation function as that licensed by the avoidance canon can be easily justified based on descriptive notions. Normative arguments for the canon, however, might tell a different story.

2. Normative Justifications for the Canon

a. The Borderline of Constitutional and Statutory Interpretation

If the descriptive analysis demonstrates anything, it is that the avoidance canon is not, strictly speaking, a rule of statutory interpretation—at least not as “statutory interpretation” is ordinarily understood. Nor is it, to use Judge Friendly’s term, a rule of constitutional nonadjudication, for it requires consideration of constitutional issues and licenses judicial modification of law in certain circumstances. Frankfurter had it right: it is a rule of constitutional adjudication.

Accordingly, the defenses for the canon, if they exist, will be largely normative in character, derived from the constitutional values that the use of the canon is attempting to protect. The prudential questions will be whether the canon in fact tends to protect such values at a sufficiently low cost to other interests and if so, whether some means of implementing the canon are superior to others. As with virtually all problems in public law, there is no objective way to carry out these inquiries.

The avoidance canon functions as an alternative to both judicial review and routine statutory interpretation, straddling the borderline between constitutional and subconstitutional law. Ernest Young has characterized the avoidance canon as a “resistance norm”—a barrier to a statutory meaning imperiling constitutional values. The barrier is not insurmountable, but it is set high enough that Congress may circumvent it only through substantial effort, namely targeted statutory language that makes its way through the constitutional requirements of bicameralism and presentment. Unless and until Congress and the President react in this fashion, the canon reworks the statute by narrowing it—trimming away those aspects that threaten constitutional values while leaving the core of the statute in place.

306. See supra text accompanying note 287.
307. See supra text accompanying note 285.
309. Bill Eskridge and I have referred to it as an aspect of “quasi-constitutional law.” See Eskridge & Frickey, supra note 8.
310. See Young, supra note 308, at 1552-53.
The normative assumptions of legal process theory as applied to statutory interpretation provide a theoretical structure for this enterprise. Through purposive statutory interpretation premised on normatively attractive assumptions about courts and Congress, statutory excess is assumed to be the result of inadvertence, and the statute is narrowed to those core purposes that are consistent with constitutional values. This approach was best summarized in a more recent case, United States v. Clark, where the Court understood the canon as counseling it to avoid serious constitutional questions if it could do so "by adopting a saving statutory construction not at odds with fundamental legislative purposes."\(^{312}\)

_Yates_ is a good example of this purposive conception of the canon.\(^{313}\) The Smith Act's expansive, non-targeted text was certainly broad enough to reach ideological advocacy that lacked a concrete plan for implementing subversion. The 1940 Congress that enacted the Smith Act may well have intended the statute to reach this far. Nevertheless, Justice Harlan's majority opinion concluded that longstanding constitutional values of freedom of expression were imperiled by this broad reading. Harlan found no explicit, targeted textual barriers to implying limitations that would move the statute out of the constitutional danger zone. Accordingly, he pushed ahead, trimming away the understanding created by general language and treating the statutory text as containing terms of art that to the constitutional lawyer would mean something narrower than they would to the layperson. The core purpose of the Smith Act—to protect the nation against active subversion—was preserved, but First Amendment values were accommodated as well.

_Witkovich_ is, if anything, an even better illustration of the normative reach of the canon because, unlike in _Yates_, the constitutional values in play were not well established at the time.\(^{314}\) The deportation statutes had general language that laypersons would understand to require a deportable alien in Witkovich's circumstances to answer _any_ question at all. Doctrinally, the constitutional question was murky. In light of precedents acknowledging Congress's plenary authority over immigration,\(^{315}\) it would have taken a bold opinion to strike down the statute in question. From a purposive perspective, however, with its generous assumptions about public officials, the language was obviously overbroad: there could be no conceivable public policy reason to allow such unfettered invasions into privacy of thought and inquiries into innocuous behavior. Thus, under legal process theory, the meaning to be attributed to the statute simply could not

\(^{311}\) _See supra_ text accompanying notes 28-43.


\(^{313}\) _See supra_ text accompanying notes 143-54.

\(^{314}\) _See supra_ text accompanying notes 24-31, 294.

be what its literal text suggested. The canon allowed Justice Frankfurter to avoid a difficult and unguided discussion of the rights of deportable aliens—language that could prove awkward (or worse) in later cases—and to trim the statute back to what he viewed as its core purpose, to make certain that officials had the information necessary to effectuate deportations.

Of course, it may well be that public policy could have supported a broader purpose: there might be other questions on different subjects that the government should have a right to raise, especially to a small group of aliens suspected of being especially threatening to national security or other important interests. If so, Congress on “remand” could fine-tune the statute with targeted language and, ideally, legislative history documenting the purposive justifications for expanding the statute beyond Frankfurter’s truncation. Unless that happened, however, Frankfurter’s mediating of constitutional values and statutory text would remain the law.

b. Provisional Judicial Review

The avoidance canon also performed a valuable theoretical function in these subversion cases by providing an intermediate alternative between statutory invalidation and validation. Various commentators have grappled with the notion of provisional judicial review, the idea that the counter-majoritarian difficulty could be mediated if courts had a means of suspending the legal effect of a constitutionally doubtful statute pending legislative reconsideration. The idea here is to avoid incurring the usual consequence of Marbury-style judicial review, under which the Court is the supreme authority on constitutional questions and its decisions on such matters are generally beyond alteration by legislation. The notion that such an approach might function well in a modern democracy committed to individual rights and equality is not far-fetched. For example, Canada’s Constitution Act of 1982 openly implements a sort of suspensive-veto approach. In the United States, however, with Marbury rooted so deeply in law and culture, the approach has been undertaken haphazardly and somewhat below the radar of most commentators and judges. However, Dan Coenen recently published a marvelous compendium of such techniques, demonstrating that their use in American law is more common than usually thought.


317. See Can. Const., pt. I. § 33 (stating that with certain exceptions, “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature . . . that the Act or a provision thereof shall operate notwithstanding a provision included in” the Charter’s rights and freedoms). For discussion of the Canadian example, see generally Vicki C. Jackson & Mark Tushnet, Comparative Constitutional Law 414-27 (1999).

318. See Coenen, supra note 301.
The avoidance canon works well as an aspect of provisional constitutional review—better, arguably, than would the suspensive-veto method. Under the usual proposal for suspensive veto, the statute is declared unconstitutional (or unenforceable, if you like) but can be revived by some sort of legislative action. If Congress never responds, there is a legal void where the statute once was. In contrast, the avoidance canon authorizes a judicial rewriting of the statute so that the statute at least supposedly continues to serve its core functions as understood by the Court. Thus, even if Congress never responds, those purposes will continue to be carried out.

From a descriptive perspective, as the immediately preceding part indicates, the enterprise in cases like *Yates* and *Witkovich* may seem fraught with peril. This is a serious kind of judicial activism—in effect, judicial amendment of legislation. The normative defense for avoidance must be that it has shown itself worth the cost. Yet in discussing the use of the avoidance canon, commentators tend to focus on a single application of the canon or to examine several historical examples of the canon’s development over time in otherwise unrelated cases. Such strategies have produced fine scholarship, to be sure, but these approaches fail to consider whether the utility of the canon might vary depending upon the constitutional values or the social circumstances in a series of related cases.

Scholarship on the avoidance canon has virtually neglected the cases of the early Warren Court, taken as a whole. In my judgment, these cases

319. See, e.g., Sandalow, supra note 316.

320. See, e.g., Manning, supra note 6 (discussing nondelegation canon, which is related to the avoidance canon, in a tobacco regulation case); Schauer, supra note 6 (discussing the use of the avoidance canon in a child pornography case); Wellington, supra note 6 (discussing the use of the avoidance canon in a labor case).

321. See, e.g., Nagle, supra note 6; Vermeule, supra note 6. In contrast, Hiroshi Motomura has examined the application of the canons of interpretation in immigration law, which protect underenforced constitutional norms, by examining a series of cases. See Motomura, supra note 6. Cf. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381 (1993) (examining Indian law canons of interpretation, which also protect underenforced values). As this discussion suggests, substantive canons that have a kinship to the avoidance canon can become so rooted in an area of public law that they become identified as specialized and worthy of extended examination across a number of precedents.

322. In all the scholarship cited in note 6, supra, the only commentator to devote anything more than passing attention to some of the early Warren Court cases is Lisa Kloppenberg. Dean Kloppenberg complains about the use of the avoidance canon in cases like *Yates* because the Court failed to overrule a bad precedent (*Dennis*), protected dissenters’ rights only at the quasi-constitutional level, slowed the expansion of First Amendment protections, and left the scope of First Amendment rights unclear. See Kloppenberg, *Avoiding Serious Constitutional Doubts*, supra note 6, at 54-78. In my view, this is a clear example of the best (as viewed in historical hindsight) being the enemy of the good. It is very doubtful that Justice Harlan could have obtained a majority in *Yates* for overruling *Dennis*, and of course such a move would have only fueled the congressional antagonism the Court was suffering at the time. Contrary to Dean Kloppenberg, I think that *Yates* fueled the expansion of First Amendment freedoms by identifying a set of values at the core of the First Amendment that within a decade the Warren Court would implement by clear constitutional rulings. See cases cited in note 244, supra. *Yates* was certainly murky, but transparency of law was not Harlan’s primary concern. See text at notes 151-
present the best normative case for the use of the canon: they represent a
thematic, sustained (albeit uneven) effort to use the canon to promote pub-
lic policy in a particular area of constitutional law—protecting the rights of
dissenters—in contexts where direct constitutional lawmaking was danger-
ous. These cases represented the best that the early Warren Court—divided
as it was ideologically, situated as it was during the Cold War—could do in
that area of constitutional law. The admonition and avoidance approach
embedded in these opinions avoided injustice where possible. Moreover,
this approach left the evolution of constitutional law fluid enough to em-
brace more protective conceptions of rights while simultaneously pushing
the law toward constitutional values. For these reasons, I agree with Harry
Kalven that Justice Harlan’s work in Yates “is a brilliant example of legal
craftsmanship and judicial statesmanship on the side of the angels.”

Formalists will, no doubt, hoot and holler at this conclusion. From
their perspective, judges are not supposed to be statesmen or stateswomen.
They are supposed to apply neutral principles regardless of societal con-
text, letting the chips fall where they may. Formalists would view
Kalven’s comment as an egregious affront to the separation of powers, for
it understands the Article III judicial power much too broadly and much
less neutrally than constitutional text, structure, and history require.

In the next section, I will briefly suggest some settings in which the
avoidance canon can be used effectively in a principled manner. But be-
yond such mediating techniques, it is largely fruitless to engage the formal-
ism/antiformalism debate in this context. Antiformalists like myself view
law as situated in the society in which we live. As Hart and Sacks sug-
gested, antiformalists see law normatively, as designed to achieve pur-
posive results fostering public values. We understand that the track
record is mixed, to say the least. But within the situatedness of law, we can
point to examples of behavior, like the early Warren Court avoidance
cases, that cannot satisfy formalism yet strike us as prudent in the circum-
stances and productive in the long run. Robert Post recently—and per-
suasively—demonstrated the reality of, and the normative case for, “an
ongoing dialectic between constitutional culture and the institutional

152, supra. In fairness, Dean Kloppenberg acknowledges such arguments in favor of Yates, see
Kloppenberg, Avoiding Serious Constitutional Doubts, supra note 6, at 75-76.
323. Kalven, supra note 152, at 222. Interestingly, despite his criticism of the passive virtues,
Gunther also praised the “judicial craftsmanship” of Yates. See Gerald Gunther, Learned Hand and the
Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 STAN. L. REV. 719, 753
(1975).
324. See, e.g., Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L.
325. See supra text accompanying notes 28-29.
326. Many of these instances are the result of strong disagreement among the judges of multi-
member courts who in the real world cannot, contrary to Hart’s vision, see supra text accompanying
note 270, use extended deliberation to produce unanimous opinions fully satisfying “first-rate lawyers.”
practices of constitutional adjudication,"\textsuperscript{327} one that produces a constitutional law that "is neither autonomous nor fixed."\textsuperscript{328} According to this understanding, which I share, "the Court must find a way to articulate constitutional law that the nation can accept as its own."\textsuperscript{329} The avoidance canon did yeoman's work in this regard for the early Warren Court. Criticisms of the canon cannot persuade without accounting for this context.

C. Some Lessons for Using the Canon in Various Settings

The normative defenses that I have discussed for the use of the avoidance canon in the early Warren Court suggest some broader conclusions about the nature of the canon and how it might be deployed in a principled manner. In this Section, I use some of the Warren Court cases as the context for a more general, prescriptive discussion.

1. Line-Drawing Problems, Underenforced Constitutional Norms, and Passive Virtues

Commentators who have considered the possible normative justifications for the avoidance canon have identified two related contexts in which its use may seem particularly appropriate.\textsuperscript{330} The first concerns cases, generally raising structural constitutional issues, in which line-drawing by the Court is especially difficult. The second involves circumstances in which courts, facing institutional impediments to the exercise of traditional judicial review, use the canon to protect what amount to "underenforced" constitutional norms. The decisions of the early Warren Court provide significant support for the use of the avoidance canon in both situations.

Consider the cases involving congressional investigations. As Bickel explained, in \textit{Rumely} (a contribution of the last Term of the Vinson Court) and \textit{Watkins} there was little doubt that the investigations were abusive, but it was unclear what courts could do.\textsuperscript{331} For Bickel (and for Frankfurter in \textit{Rumely}), the Constitution certainly applied to such investigations, but the Court was handicapped in implementing values of due process and freedom of expression and association. The problem was that Congress's "informing function," to use Woodrow Wilson's term,\textsuperscript{332} cannot be cabined to the same limits as Congress's authority to enact legislation. Or, to use Bickel's pithy phrase, "Congress must be allowed to investigate in order to

\begin{footnotes}
327. Post, \textit{supra} note 18, at 11.
328. \textit{Id}.
329. \textit{Id}.
330. See, e.g., Eskridge & Frickey, \textit{supra} note 8, at 630-46; Young, \textit{supra} note 308, at 1603-13.
331. See BICKEL, \textit{supra} note 90, at 156-69.
332. United States v. Rumely, 345 U.S. 41, 43 (1953) (quoting \textsc{Woodrow Wilson, Congressional Government} 303 (1885)).
\end{footnotes}
learn enough to know that it should not legislate.” Nor are judicially imposed procedural safeguards a fully satisfactory alternative to substantive limits: by its nature, a congressional inquiry operates outside the usual domain of “the right to an impartial judge, the right to the showing of probable cause, and the right to confrontation and cross-examination.” To be sure, judicial review is not doomed by impracticality. Some protections, such as the privilege against self-incrimination, are relatively easy to implement even in the context of a legislative investigation. But the special institutional setting calls for the use of institutional judicial tools.

The avoidance canon and related devices seem particularly helpful in this context. As Bickel argued, what the Court can do, and seemingly did do in Rumely and Watkins, is apply a kind of nondelegation doctrine to Congress and its committees. Just as the New Deal Court abandoned the nondelegation doctrine as a matter of constitutional law and more recent cases have instead applied the constitutional values rooted in it through a canon of statutory interpretation, Rumely and Watkins can be understood as resolving similar problems with congressional investigations. How much delegation to a committee is too much? The line-drawing necessary to answer this question would be incredibly difficult for judges. But not so, Bickel contended, for the chamber of Congress from which the committee draws its authority. Watkins stated that “[o]nly the legislative assembly initiating an investigation can assay the relative necessity of specific disclosures.” When “the preliminary control of the Committee exercised by the House of Representatives is slight or non-existent,” as was the case with the House Un-American Activities Committee, the committee “is allowed, in essence, to define its own authority.” By narrowly interpreting a vague House resolution in Rumely and effectively treating a resolution as too vague for contempt enforcement in Watkins, the Court attempted to correct “a wide gulf between the responsibility for the use of investigative power and the actual exercise of that power.” A more

333. BICKEL, supra note 90, at 162. Quoting James Landis, Bickel stressed that “'[n]either Congress nor the Court can predicate, prior to the event, the result of investigation.'” Id. at 163 (quoting James M. Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153, 217 (1926)). Moreover, according to Bickel, “[a]n investigation that invades what would otherwise be protected privacy or that summarily destroys an individual may be a self-serving frolic, or it may answer an urgently felt need.” Id.

334. Id.

335. See id. at 159-61.


338. See BICKEL, supra note 90, at 163.


340. Id. at 203-04.

341. Id. at 205.

342. Id.
substantive constitutional approach would have been difficult because the Court was in a poor position to make a “critical judgment” that “the House of Representatives itself has never made.”

Although Bickel only cited *Witkovich* in a footnote in his discussion of the passive virtues, it, too, fits this model, as Bickel (joined by Harry Wellington) himself explained in an earlier writing. Recall that, like *Rumely* and *Watkins*, *Witkovich* trimmed a vague, overbroad delegation to the Secretary of State to ask questions of deportable aliens in light of the constitutional issues involved. Moreover, similar to the other cases, *Witkovich* amounted to a judicial remand to Congress to consider “what on paper might have looked like severities but in practice became barbarities and asking the Congress to reconsider the necessity of going quite so far in the exercise of its undoubted power to make the nation secure against dangerous or unwanted aliens.” The Court was dealing in these cases with questions of national security (as well as issues involving immigration and foreign affairs in *Witkovich*) that were arguably beyond effective judicial assessment. Traditionally, the Court has been reluctant to second-guess the political branches in these areas. But these cases suggest that this deference is appropriate only if the democratically accountable Congress *expressly* makes decisions concerning the constitutional values at stake.

In commentary nearly two decades after Bickel wrote, Lawrence Sager provided the best normative and descriptive understanding of cases of this sort. In a nutshell, Sager argued that the Court sometimes finds itself confronted with cases in which, for institutional reasons, providing substantive constitutional review is especially difficult. In such

343. *Id.* at 206.
344. *Id.* Unsurprisingly, Bickel was critical of the retreat from *Watkins* that occurred in *Barenblatt*. See BICKEL, supra note 90, at 159. Furthermore, Bickel presented a similar analysis of the problems in *Kent v. Dulles* and *Greene v. McElroy*. See *id.* at 164-66. *Kent* is a classic nondelegation case, for it concluded that Congress had not delegated sufficiently explicit authority to the Secretary of State to authorize the constitutionally questionable act of denying passports to suspected subversives. So, too, for Bickel was *Greene*, where it was not clear that Congress had authorized the Department of Defense to revoke a security clearance without any procedural protections. Again unsurprisingly, Bickel criticized the retreat from *Greene* in *Cafeteria Workers*. See *id.* at 166-69.
346. *See Bickel & Wellington, supra* note 65, at 32-33.
347. *See supra* text accompanying notes 122-29.
348. Bickel & Wellington, *supra* note 65, at 33. Bickel & Wellington thought this “remanding function” was “justifiable on two grounds”:

First, Congress did fix its attention, almost in a state of self-hypnosis, on the needs of security and it did so in dealing with people who have no political representation and who thus fall into a special category. Second, the Court saw the provision not abstractly but after it had been put in practice and could thus note aspects of it hidden to the eye of Congress. This second will generally be true but it is of greater force here in conjunction with the first-mentioned consideration.

*Id.* at 34.
circumstances, like the legislative investigation and national security cases discussed above, constitutional norms may not be fully enforced because of institutional reasons. Accordingly, enforcing at least some measure of these norms requires judicial ingenuity along procedural and structural lines. Like Bickel, Sager endorsed techniques that "in effect constitute[] a remand" to a more appropriate decision-making body better situated than the courts to assess the competing interests at stake.

Bickel, writing earlier with Wellington, had struggled to express a similar idea. They understood Witkovich as a case in which, based both on precedent and related institutional considerations, it was unlikely that the Court would impose significant constitutional constraints. They frankly called the issues at stake in the case "penumbral constitutional questions," anticipating the critique that the avoidance canon enlarges the Constitution to include a penumbra of not-quite-constitutional rights, the questions about which may be avoided canonically. And they seemed unnerved by this:

[T]he invocation of constitutional doubts is too drastic a way of forcibly calling something to the attention of Congress. The point after all is to ask Congress for sober reconsideration, leaving to Congress the last word. To raise constitutional doubts is to inhibit future legislative action. It is to achieve an unnecessarily unsettling effect by rattling the saber of the Court’s ultimate authority. A candid avowal that a matter the implications of which Congress failed to see is being sent back for a second reading, so to speak, is much more compatible with due respect for the peculiar powers and competences of both institutions.

Yet nowhere in The Passive Virtues did Bickel express any such inhibition about the avoidance canon. The very point of avoidance and admonition was to inhibit future legislative action by rattling the sword of judicial review. Indeed, Bickel cited Rumely as a paradigmatic avoidance case for this model of cross-institutional checking. So far as I know, Bickel never explained the inconsistency.

My own sense is that Bickel and Wellington considered their approach a subconstitutional, as-applied method of encouraging Congress to take a second look at a problem causing serious policy issues, a situation in which persons without constitutional rights were being abused. Sager and

351. Bickel & Wellington, supra note 65, at 34.
352. Id. at 34-35 (footnote omitted).
353. See supra text accompanying notes 90-91. Bickel also forthrightly endorsed Watkins, see supra text accompanying note 142, Kent, see supra text accompanying notes 159-60, and Greene, see supra note 344.
and Wellington could have articulated a much better defense for *Witkovich*. A few years later, in his passive virtues analysis, Bickel seemed more comfortable with something approximating this approach, although he never clearly articulated it, much less defended it. Bickel left hanging the question whether, in the avoidance cases, the avoidance canon was really invoked “in the candid service of avoiding a serious constitutional doubt,” as Frankfurter wrote in *Rumely*. The only way to make sense of Frankfurter’s statement, it seems to me, is to accept the legitimacy of the notion of underenforced constitutional norms—that serious constitutional doubts sometimes extend to governmental actions that the courts are unlikely to invalidate as a matter of constitutional law, but that courts may nonetheless address by provisional institutional checking. Furthermore, the remand to the legislature is probably more effective when it includes both avoidance and admonition—the very saber-rattling of judicial review that Bickel and Wellington had earlier considered medicine too strong for judicial prescription on the constitutional borderline.

2. *Textual Meaning as a Barrier to Application of the Canon*

That the serious constitutional question supposedly necessary to trigger the application of the canon can involve an underenforced constitutional norm explains why the Court in these cases could invoke the canon even in circumstances, such as national security matters, in which Congress would receive wide judicial deference to its constitutional authority. Left unaddressed, however, is another supposedly essential precondition for the canon: that the alternative interpretation of the text that avoids the constitutional difficulty be plausible.

Judging by these cases, the Court was deeply divided on this criterion. However, a majority of Justices was willing to invoke the canon even when faced with what would ordinarily be viewed as an unambiguous statute. It is hard to get much clearer than the statute in *Witkovich*, which allowed the Attorney General to require the deportable alien “to give information under

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356. *See supra* text accompanying notes 90-91.

357. A typical formulation of the canon is expressed as follows:

When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 749 (1961) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).
oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper." Nonetheless, the Court, led by Frankfurter, used the canon to narrow the statute. The decision to apply the canon in Witkovich may have been aided by a related policy-based canon, the absurd-result exception to plain meaning. Once it is conceded that interpreting a statute literally would lead to an absurd result, the door is opened to using almost any relevant consideration in determining the statute’s meaning. Here, even the government conceded the statute could not be read literally. Perhaps this was to avoid some constitutional problems, or perhaps it was to avoid the unreasonableness of authorizing the government to ask personal questions not pertinent to any plausible public policy. In any event, Frankfurter was liberated by this concession: “once the tyranny of literalness is rejected, all relevant considerations for giving a rational content to the words become operative.”

Revealingly, Bickel and Wellington never questioned whether Witkovich was wrong because Frankfurter’s interpretation was not fair and plausible; their concern was whether the constitutional issue was sufficiently serious. Their implicit assumption seems to have been that, so long as “on remand” Congress could amend the statute to make clear beyond doubt that it authorized the Attorney General to have complete discretion to conduct such questioning, there was little reason to be concerned about the canon being abused by overthrowing already clear statutory language.

Bickel seemed similarly unconcerned with the Court’s loose interpretation of a clearly worded statute in Kent v. Dulles. In that case, Bickel conceded that under ordinary principles of statutory interpretation the Secretary of State would be accorded the discretion to withhold passports. Nonetheless, in his view, the “remand” to Congress “for orderly, deliberate, explicit, and formal reconsideration of a decision previously made, but made back-handedly, off-handedly, less explicitly than is desirable with respect to an issue of such grave importance” was appropriate. When Witkovich and Kent are considered together, it would appear that, for the Court as well as for Bickel, statutory textual ambiguity is not a necessary condition for invoking the canon. Instead, what is needed is a judicial conclusion that Congress had not actively considered—and, ideally, deliberated on—a matter of “grave importance,” especially when that

358. See supra note 125.
359. On this canon, see, for example, John F. Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387 (2003).
360. See supra text accompanying note 127.
362. Bickel, supra note 90, at 165.
363. Id. at 166.
involves underenforced constitutional norms.\textsuperscript{364} The point is not textual explicitness; it is whether Congress has taken explicit responsibility for the consequences of what that text provides.

3. \textit{Defending the Canon: Constitutional Law, Constitutional Culture, and Quasi-Constitutional Mediating Devices}

The avoidance canon is a powerful judicial tool. If the decisions surveyed are any indication, in some circumstances it may be invoked in the face of clear statutory language suggesting a contrary interpretation. Moreover, it protects even those values the Court is not prone to enforce by traditional judicial review, so long as Congress has not made an explicit policy judgment to the contrary after having been faced with the Court’s concrete concerns. Thus, the canon has the hybrid quality of quasi-constitutional law. It is a tool of public law on the borderline between constitutional law and subconstitutional law, and between judicial and legislative functions.

The early Warren Court cases provide documented precedential support for this aggressive technique. Nonetheless, the sheer brute judicial force involved surely raises questions about the counter-majoritarian difficulty. Can the canon possibly be justified? For formalists—who, if my account is credited, will be prone to condemn the canon—the challenge is to deal with the reality of these cases, which is that the technicalities of law can be used masterfully in a statesmanlike manner.\textsuperscript{365} For antiformalists, the challenge is to provide some principled limitations to a tool that may seem to have a virtually limitless capacity for uncabined judicial innovation. From the latter perspective, consider two defenses that, although certainly not fully developed here, are to my mind plausible.

As discussed earlier, challenges of line-drawing in the context of seemingly overbroad legislative delegations of authority seem especially

\textsuperscript{364} Legal process theory provided no obvious way out of this problem. For while Hart and Sacks explained that policies of clear statement such as the avoidance canon could almost always be used to narrow broad language, see supra text accompanying notes 283-84, they also wrote that courts should not give the text a meaning that it would not bear, \textit{Hart & Sacks, supra} note 28, at 1374. Putting the two ideas together, it seems that Hart and Sacks would consider a narrowing interpretation nearly always possible, but the reverse highly dubious.

\textsuperscript{365} Of course, formalists may simply condemn all these cases as lawless acts of aggrandizing judges. The problem with such candor in the pursuit of formalism is that it makes the approach less attractive to all but hard-core believers. Professor Manning candidly admits as much in his recent trenchant attack upon the canon counseling that courts may abandon literal statutory meaning when it produces absurd results. See Manning, \textit{supra} note 359, at 2391-92 (urging the abandonment of the canon, despite its firm entrenchment in the cases and its attractiveness as a policy matter, because it is inconsistent with true textualism). Just as Manning says that “[n]o one, of course, is for absurd results,” \textit{id.} at 2392, virtually no one (at least today) thinks even deportable aliens have lost every last scrap of their privacy (\textit{Witkovich}), for example. \textit{Cf.} Thomas C. Grey, \textit{Do We Have an Unwritten Constitution?}, 27 \textit{Stan. L. Rev.} 703 (1975) (detailing many constitutional rights, popular with the citizenry, that would be lost by a strict textual and originalist understanding of the Constitution).
amenable to mediation by the avoidance canon. The canon also seems to be a potentially effective method of at least provisionally protecting underenforced constitutional norms. Both situations can arise in the same case. For example, Wittkovich contains both problems: Congress delegated seemingly limitless discretion to the executive branch on a cluster of subjects—national security, foreign affairs, immigration, nationality—that courts have traditionally treated as largely beyond judicial review. Similarly broad discretion was involved in the legislative investigation cases (which dealt with vague delegation to a committee to conduct investigations that by their nature are not easily amenable to judicial review) and the employee loyalty cases (involving wide delegation to administrative officers in the context of national security). Even Yates has some of the same aspects: as a doctrinal matter, the Court had no working majority in agreement on how to develop and implement either rules or standards for protecting freedom of expression in the context of alleged subversion. Presumably everyone understood the polar extremes of protected dissent on the one hand and speech both advocating and very likely to produce imminent violent acts on the other. But how to construct rules or standards for intermediate circumstances was hardly self-evident from the case law or commentary, nor easily achievable for a divided Court.

The avoidance canon provided a valuable tool for addressing these concerns. Consider the alternatives. For example, striking down the delegation in Wittkovich would have rendered the statute unenforceable and might well have left the INS without explicit authority to carry out perfectly legitimate functions in the context of monitoring deportable aliens. Instead, by employing the avoidance canon to truncate the statute down to its core purposes, Frankfurter in Wittkovich left the INS empowered to carry out what appeared to be its proper functions, while holding open the opportunity for the agency to lobby Congress for broader authority if such authority was reasonable. Moreover, as suggested above, the Court was unlikely to employ judicial review in this context in any event, making the canon an especially effective method of policing the borderline between constitutional law and subconstitutional law, between judicial supremacy and decisions reversible by Congress.

Reconsider Yates as well. In retrospect, Harlan’s opinion is an important way station of doctrinal development—a bridge from judicial deference to security concerns in cases like Schenck, Abrams, and Dennis to judicial confidence in constructing a much more protective doctrinal

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366. See generally supra text accompanying notes 331-48.
367. See generally supra text accompanying notes 349-56.
regime in *Brandenburg.* Harlan wrote opaquely for a purpose: to provide a testing ground, leave open future possibilities, and attempt to avoid a congressional repudiation that would have stunted First Amendment law for much longer than the dozen years it took for *Brandenburg* to emerge.

Robert Post's provocative suggestion that "judicial authority might best be reconceived as a relationship of trust that courts forge with the American people" is, in my judgment, a fitting description of what the avoidance cases in the early Warren Court were all about. If, as Post suggests, "constitutional law emerges from an ongoing dialectic between constitutional culture and the institutional practices of constitutional adjudication," one important tool for those practices—as Frankfurter recognized, a rule of constitutional adjudication more than of statutory interpretation—is the avoidance canon. It helped the Court bridge the public law and culture of the 1950s with the public law and culture of the 1960s. In retrospect, it gave public law a way of getting from Joe to Gene McCarthy.

**CONCLUSION**

Recent critics of the avoidance canon and related techniques have focused on a few recent cases that might have been poor choices for the use of the canon or in which the canon was poorly implemented. This is not the place to assess those commentaries. It is the place, however, to suggest that in public law the proof tends to be in the pudding. The cases in the early Warren Court may be the only time in our history that the Court undertook a sustained effort, over a number of years, to use these techniques to mediate recurring challenges to the same cluster of individual rights (primarily freedom of expression and association and due process). But, of course, history tends to repeat itself.

In the current war on terrorism, like the Cold War of the 1950s, the federal courts may find themselves teetering on the brink of red-hot controversy when they adjudicate how the Constitution applies to regulations purporting to be in the service of national security. The avoidance canon may prove, yet again, to be a useful tool in mediating constitutional law and constitutional culture. Indeed, just four years ago, in a somewhat analogous situation involving whether Congress had authorized the

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373. *Id.*
374. See *supra* text accompanying notes 285-86.
376. The early Rehnquist Court used the avoidance canon and related techniques in a recurring set of cases involving structural constitutional issues, primarily federalism but also the separation of powers. See Eskridge & Frickey, *supra* note 8, at 615-29.
377. For an evocative discussion, see Young, *supra* note 308, at 1609-13.
indefinite detention of deportable aliens, the Supreme Court used the avoidance canon to soften the reach of the statute in question.\textsuperscript{378} It deployed \textit{Witkovich} as precedent to that end—a precedent that had languished virtually unused by the Court since the 1950s. In the same year, the Court also used the avoidance canon to steer away from the conclusion that Congress had removed the availability of the writ of habeas corpus to challenge deportation.\textsuperscript{379} Although the Court’s first decisions involving terrorism have not focused much on the avoidance canon,\textsuperscript{380} more cases are almost sure to come. Some will likely involve factors similar to those underlying the avoidance decisions of the early Warren Court. For example, we are likely to see more litigation involving general delegations of wide-ranging authority to the executive in a context—“war” involving enemies who fight not for a country, but for a cause—in which international law norms are murky and American constitutional law is undeveloped. As the philosopher Yogi Berra might put it, it may be \textit{deja vu} all over again for the avoidance canon at the borderline of constitutional law and statutory interpretation, of constitutional law and constitutional culture.

\textsuperscript{380} But cf. \textit{Hamdi v. Rumsfeld}, 124 S.Ct. 2633, 2671 (2004) (Scalia, J., dissenting) (stating that congressional authorization for detention of a citizen as an enemy combatant was insufficiently clear to pass muster under the canon).