

BOSTON COLLEGE LAW REVIEW

VOLUME XXXV

SEPTEMBER 1994

NUMBER 5

AVOIDING CONSTITUTIONAL QUESTIONS†

LISA A. KLOPPENBERG*

I. RECENT CONSTRUCTION OF THE LAST RESORT RULE . . .	1106
II. HISTORICAL DEVELOPMENT OF THE AVOIDANCE	
DOCTRINE	1011
A. <i>The Avoidance Doctrine in Ashwander</i>	1012
1. The Plurality's Decision	1013
2. The Reasoning of the Concurrence	1014
3. "The practice in constitutional cases"	1015
a. <i>Rules Related to Article III Requirements</i>	1018
b. <i>Rules Reflecting Largely Prudential Concerns</i>	1023
B. <i>The "Last Resort Rule"</i>	1025
1. The First Application	1025
2. Brandeis' Second Application of the "Last Resort	
Rule"	1027
III. IMPLEMENTATION OF THE LAST RESORT RULE	1027
IV. JUSTIFICATIONS FOR THE LAST RESORT RULE	1035
A. <i>A "Delicate" and "Final" Function</i>	1036
B. <i>The Judiciary's Limitations</i>	1042
C. <i>The Importance of Constitutional Adjudication</i>	1046

† Copyright © 1994, Lisa A. Kloppenberg.

* Assistant Professor of Law, University of Oregon School of Law; B.A. University of Southern California, 1984; J.D., University of Southern California, 1987. The author would like to thank Erwin Chemerinsky, Richard Craswell, Dave Frohnmayer, Leslie Harris, Maury Holland, James O'Fallon, Margaret Paris, Judith Resnik, David Schuman, and Mark Zunich for suggestions on an earlier draft of this Article. Lee Brunz and Sara Conley provided excellent research and editorial assistance. The research was made possible by a New Faculty Award from the University of Oregon.

D. <i>Separation of Powers and Respect for Other Branches</i>	1047
E. <i>Federalism</i>	1055
1. <i>Pullman Abstention</i>	1055
2. <i>The Adequate and Independent State Ground Doctrine</i>	1061
V. <i>CONCLUSION</i>	1065

The "last resort rule" dictates that a federal court should refuse to rule on a constitutional issue if the case can be resolved on a nonconstitutional basis.¹ The United States Supreme Court recently avoided a classic opportunity to apply the rule in *Zobrest v. Catalina Foothills School District*.² Instead, the Court decided a controversial Establishment Clause issue without exploring other possible grounds for its decision.³ The *Zobrest* decision highlights the divergence among the Justices as to whether the Court should regard the last resort rule as an absolute dictate or a discretionary maxim. The lack of coherent standards for applying the rule has resulted in accusations of manipulation. The dissenters in *Zobrest*, for example, charge that the majority casts aside proper judicial restraint in its zeal to reach the Establishment Clause issue.⁴ But whoever is correct on the rule in *Zobrest*, and even if the Court properly reached the Establishment Clause issue, *Zobrest* may have heightened opportunities for litigants to manipulate the rule in the future.

Courts and scholars have failed to focus on the criteria for the last resort rule; this essay fills that gap. This Article explores the justifications for the general avoidance doctrine and its component, the last resort rule. The avoidance of unnecessary constitutional decisions, urged as early as 1833 by John Marshall,⁵ has been explained by concerns regarding federal courts' credibility, the final and delicate nature of judicial review, and the paramount importance of constitutional adjudication. After exploring those justifications, this essay concludes that several are less weighty. Prudential concerns for maintaining appropri-

¹ When a federal court is faced with a choice of ruling on a statutory, regulatory or constitutional basis, the Supreme Court has instructed the lower court to decide the federal constitutional issue only as a last resort. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."). For further elucidation of the avoidance doctrine and its seven components, including the last resort rule, see *infra* Section II.

² 113 S. Ct. 2462 (1993).

³ *Id.* at 2469.

⁴ *Id.* at 2469-70.

⁵ *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558).

ate separation of powers and respect for other governmental actors, however, justify retaining a flexible last resort rule.

This essay concludes that as long as judicial review does not implicate voiding legislative or executive action, a federal court should readily dismiss the prudential guidance of the last resort rule. In contrast, a court confronted with the argument that it should void legislative or executive action because of constitutional interpretation should generally resolve the case subconstitutionally by use of the last resort rule. While a court would not offend the separation of powers principle by deciding the constitutional issue, the application of the last resort rule suggested in this essay allows a court to serve the interest of sharing the constitutional interpretive power with the other branches.

Circumstances may arise, however, when a court should reach the constitutionality of a statute even though nonconstitutional grounds remain. For example, a court should reject the last resort rule if non-majority rights could only be effectively redressed by reaching the constitutional ground of decision in a particular case even if the constitutional ruling requires invalidating legislative or executive action. Federalism concerns dictate a similar application of the last resort rule in order to afford appropriate deference to state law development and state court decisions. This Article concludes that while *Pullman* abstention⁶ is an inappropriate application of the rule, at least one branch of the adequate and independent state ground doctrine demonstrates appropriate use of the rule.

Section I of this Article identifies the disagreement within the Supreme Court as to application of the last resort rule and demonstrates the contemporary relevance of the rule by examining *Zobrest*. Section II provides historical background by focusing on *Ashwander v. Tennessee Valley Authority*, in which Justice Louis D. Brandeis identified seven components of the avoidance doctrine.⁷ The section demon-

⁶ *Pullman* abstention is discussed *infra* at notes 231–44 and accompanying text.

⁷ *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 298, 346–48 (1936). The avoidance doctrine flows from the familiar canon of judicial self-restraint, and is intertwined with the debate over the proper scope of federal judicial review and the allocation of power among the three branches of the federal government and the states. It is also premised on the “delicacy” and “finality” of judicial review of legislation for constitutionality, concerns regarding the credibility of the federal courts, and the “paramount importance of constitutional adjudication in our system.” *Rescue Army v. Municipal Court of L.A.*, 331 U.S. 549, 571 (1947) (reciting a non-exhaustive list of grounds supporting the avoidance doctrine); see also Paul A. Freund, *Introduction to ALEXANDER M. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS xvii* (1957) (Judicial self-restraint is premised on an “awareness of the limits of human capacity, the fallibility of judgment, the need for diffusion of power and responsibility, the indispensability of husbanding what powers one has, of keeping within bounds if action is not to outrun wisdom.”). The persuasive force of these grounds for application of the last resort rule will be explored in Section IV *infra*.

strates the significant overlap between the avoidance doctrine and other jurisdictional or justiciability barriers. The avoidance doctrine reflects such other justiciability doctrines as standing and ripeness, and permeates jurisdictional doctrines such as *Pullman* abstention and the adequate and independent state ground doctrine. The Article singles out the last resort rule as a logically distinct portion of the avoidance doctrine which deserves its own critical examination because it can serve as a separate bar to constitutional adjudication. Section III reviews problems evident in implementation of the last resort rule. Finally, the Article analyzes the justifications for the last resort rule in order to delineate in Section IV when federal constitutional questions should be decided only as a last resort.

I. RECENT CONSTRUCTION OF THE LAST RESORT RULE

In *Zobrest v. Catalina Foothills School District*, a deaf child and his parents sued an Arizona school district because the district refused to provide a sign language interpreter for the child after he transferred from a public school to a parochial school.⁸ Plaintiffs challenged the refusal to provide an interpreter on a variety of constitutional and statutory grounds,⁹ including the federal Individuals with Disabilities Education Act ("IDEA"),¹⁰ its Arizona counterpart,¹¹ an IDEA regulation,¹² the Arizona Constitution,¹³ and the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution.¹⁴

Plaintiffs unsuccessfully sought relief from a federal district court, which concluded that state provision of an interpreter at the parochial school "would likely offend the Establishment Clause."¹⁵ The Court of Appeals for the Ninth Circuit affirmed solely on the Establishment Clause ground.¹⁶ In a 5-4 decision, the Supreme Court reached the same issue, but reversed on the merits, finding that if it provided an interpreter the school district would not violate the Establishment Clause.¹⁷ The Court held only that the Establishment Clause does not

⁸ 113 S. Ct. 2462, 2464 (1993).

⁹ *Id.* at 2464-65.

¹⁰ 20 U.S.C. §§ 1400-1485 (1988).

¹¹ ARIZ. REV. STAT. ANN. §§ 15-761 to -772 (1991 & Supp. 1993).

¹² 34 C.F.R. § 76.532(a)(1) (1992).

¹³ ARIZ. CONST. art. II, § 12.

¹⁴ U.S. CONST. amend. I.

¹⁵ *Zobrest*, 113 S. Ct. at 2464.

¹⁶ *Zobrest v. California Foothills Sch. Dist.*, 963 F.2d 1190, 1196 (9th Cir. 1992).

¹⁷ *Zobrest*, 113 S. Ct. at 2465-69. Although the deaf child had completed his high school education by the time the Supreme Court faced this issue, the controversy was not moot because

bar the school district from furnishing an interpreter in a parochial school.¹⁸ Lower federal courts will now have to determine whether the *Zobrests* are entitled to reimbursement for the interpreter's expenses. The school district may ultimately prevail if the lower courts find that, although the school district was not barred from furnishing an interpreter, it was also not *required* to furnish an interpreter for the *Zobrest* child.¹⁹

In arguing its case before the lower courts, the school district raised other defenses in addition to the Establishment Clause bar. The district argued that the provision of an interpreter violated the Arizona Constitution, was not required by federal statute (IDEA) or regulation, and was, in fact, precluded under a federal funding regulation promulgated under the IDEA.²⁰ The Court declined to address these "unrelated" issues because the parties pressed only the federal constitutional issue at both the appellate level and the summary judgment stage of the district court proceedings.²¹ The majority opinion, written by Chief Justice Rehnquist, recognized the validity of the "prudential rule of avoiding constitutional questions";²² however, it acknowledged that the Court, on appeal, is presented with the "entire case," including "non-constitutional questions actually decided by the lower court as well as nonconstitutional grounds presented to, but not passed on by the lower court."²³

In the *Zobrest* litigation, however, the Court found it significant that only the First Amendment questions—rather than nonconstitutional grounds—were "*pressed*" before the Ninth Circuit and that, even before the district court, "the parties chose to litigate the case on the federal constitutional issues alone."²⁴ The Court concluded: "Given this posture of the case, we think the prudential rule of avoiding constitutional questions has *no application*. The fact that there may be buried in the record a nonconstitutional ground for decision is not by itself enough to invoke this rule."²⁵ The Court then proceeded directly to

his parents sought reimbursement for the cost of hiring a private interpreter while the child attended parochial school. *Id.* at 2464 n.3.

¹⁸ *Id.* at 2469.

¹⁹ *Id.* at 2470 (Blackmun, J., dissenting).

²⁰ *Id.* at 2464–65.

²¹ *Id.* at 2465–66.

²² *Zobrest*, 113 S. Ct. at 2465–66.

²³ *Id.* (quoting *United States v. Locke*, 471 U.S. 84, 92 (1985)).

²⁴ *Id.*

²⁵ *Id.* at 2466 (emphasis added). The dissent takes issue with this characterization of the record, finding that weighty nonconstitutional grounds had been raised by the parties, not "buried" in the record. *Id.* at 2471 (Blackmun, J., dissenting).

the First Amendment issue, without considering any other grounds for the decision.²⁶

The four dissenters—Justices Blackmun, O'Connor, Souter and Stevens—accused the *Zobrest* majority of “unnecessarily address[ing] an important constitutional issue, [and] disregarding longstanding principles of constitutional adjudication.”²⁷ The dissent argued that resolution of the constitutional issue was not necessary because the Court could have remanded the case for consideration of alternative grounds of resolution.²⁸ The lower courts then could have construed the IDEA so as not to require an interpreter for a parochial student so long as the school district provided an interpreter in a public school which the child could attend. The majority, however, merely held that governmental provision of an interpreter did not establish religion and that the Establishment Clause did not bar provision of an interpreter.²⁹ In further proceedings, the lower courts may determine—despite the Supreme Court’s Establishment Clause ruling—that the IDEA does not *require* provision of an interpreter in a parochial school when one is available in a public school in the district.³⁰

The parties deliberately did not brief or argue the “weighty” non-constitutional issues because, according to the dissent, they wanted a ruling on the Establishment Clause question.³¹ The dissenters would have heeded the avoidance doctrine by vacating and remanding the case for consideration of the nonconstitutional questions, despite the parties’ failure to brief these issues: “The obligation to avoid unnecessary adjudication of constitutional questions does not depend upon the parties’ litigation strategy, but rather is a ‘self-imposed limitation on the exercise of this Court’s jurisdiction [that] has an importance to the institution that transcends the significance of particular contro-

²⁶ *Id.* at 2466.

²⁷ *Zobrest*, 113 S. Ct. at 2469 (Blackmun, J., dissenting). Justice Souter joined the dissent in its entirety. Justices O'Connor and Stevens joined the dissent in its discussion of the avoidance doctrine, but not on the First Amendment issue. Justices O'Connor and Stevens would have vacated the earlier decision and remanded the case to the Ninth Circuit for consideration of the statutory and regulatory issues that might “moot” the constitutional issue. *Id.* at 2475 (O'Connor, J., dissenting).

²⁸ *Id.* at 2470 (Blackmun, J., dissenting). For instance, an IDEA regulation prohibited use of federal funds for “[r]eligious worship, instruction or proselytization.” *Id.* at 2465 n.7. In addition, article II, § 12 of the Arizona Constitution, on which respondents relied, bars public funding for “any religious worship, exercise, or instruction, or to the support of any religious establishment.” *Id.* at 2470 & n.1 (Blackmun, J., dissenting).

²⁹ *Id.* at 2469. Note that the Court did not conclude that the IDEA requires an interpreter to be provided. See *supra* text accompanying notes 18–19.

³⁰ *Zobrest*, 113 S. Ct. at 2470 (Blackmun, J., dissenting).

³¹ *Id.* at 2471 (Blackmun, J., dissenting).

versies.’”³² The dissent asserted that the avoidance doctrine is the most “deeply rooted” doctrine of constitutional adjudication.³³ The doctrine amounts to a “fundamental rule of judicial restraint,” which has received the sanction of time and experience.³⁴ The dissent imbued the avoidance doctrine with constitutional weight by relying on earlier Supreme Court precedent relating the avoidance doctrine to the case or controversy requirement.³⁵ The dissenters also likened it to the “policy against entertaining political questions.”³⁶ Despite those constitutional linkages, however, the avoidance doctrine is most commonly classified as a prudential rule of judicial self-restraint.³⁷

By refusing to apply the avoidance doctrine—or more specifically, one of its components, the last resort rule—the Court in *Zobrest* appears to have transferred to litigants the ability to control whether a federal court decides constitutional issues. Granted, litigants—as masters of their complaints—can always control outcomes to some extent by limiting their claims during a suit. The dissent, however, accused the parties in *Zobrest* of “seeking what amount[ed] to an advisory opinion” by using litigation strategy to shape a controversy which could not normally be adjudicated by the Court.³⁸ This is an overstatement:

³² *Id.* (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294 (1982)).

³³ *Id.* at 2469–70 (quoting *Specter Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)).

³⁴ *Id.* at 2470 (Blackmun, J., dissenting) (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. World Eng'g, P.C.*, 467 U.S. 138, 157 (1984)); see also Freund, *Introduction to BICKEL*, *supra* note 7, at xv, xvii (calling the principle of avoiding unnecessary constitutional decisions part of Justice Brandeis' “canon of judicial self-restraint”).

³⁵ *Rescue Army v. Municipal Court of L.A.*, 331 U.S. 549, 570 (1947). The Court in *Rescue Army* recognized that “often the line between applying the [avoidance] policy or the [case or controversy] rule is very thin.” *Id.* at 570–71; see also *id.* at 571 n.37 (citing cases where the avoidance doctrine was applied “to avoid the necessity of deciding a case or controversy jurisdictional question, when constitutional issues were at stake on the merits”).

³⁶ *Id.* at 570. Even where justiciability and other jurisdictional requirements are met, federal courts sometimes refuse to rule on certain allegations of governmental misconduct under the political question doctrine. It is not entirely clear whether the doctrine, in all of its manifestations, is constitutionally required. See *Powell v. McCormack*, 395 U.S. 486 (1969); Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97 (1988); Terrance Sandalow, *Comments on Powell v. McCormack*, 17 UCLA L. REV. 164 (1969); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); see also *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1514 (D.C. Cir. 1984) (en banc) (political question doctrine can serve as “a tempting refuge from the adjudication of difficult constitutional claims”).

³⁷ See, e.g., *Zobrest*, 113 S. Ct. at 2466; *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

³⁸ *Zobrest*, 113 S. Ct. at 2471 (Blackmun, J., dissenting). Federal courts cannot issue decisions in hypothetical controversies; a real dispute between truly adverse litigants, which can be redressed by the court, is necessary to the “case or controversy” requirement of Article III. *Flast v.*

the litigants in *Zobrest* met the requirement of a real dispute between adverse parties, even though both sides sought resolution of the constitutional issue.³⁹

In addition, to avoid rendering an advisory opinion, the federal court decision must have some effect on the outcome of the dispute.⁴⁰ It is not immediately clear what *practical* effect the Court's Establishment Clause precedent in favor of the *Zobrests* will have on the outcome of the dispute. If the lower federal courts conclude that the *Zobrest's* action is nevertheless barred on statutory grounds, the Court's decision will have no practical effect on the concrete controversy.⁴¹ On the other hand, if we assume that the parties' true concern only extended to the Establishment Clause, the Court's ruling in *Zobrest* might end the concrete dispute. In other words, if the school district was willing to pay for an interpreter in the religious school as long as

Cohen, 392 U.S. 83, 94-97 (1968); see ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 43 (1989) (ban on advisory opinions preserves separation of powers by "keeping the courts out of the legislative process").

Thus, in 1793, the initial members of the Supreme Court refused to issue an opinion in response to President Washington's request for legal advice regarding a potential, future dispute. 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486-89 (Johnston ed., 1891); see PAUL M. BATOR, ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, 65-70 (3d ed. 1988); see also Robert A. Katzmann, *The Underlying Concerns*, in *JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY* 10 (Robert A. Katzmann ed., 1988) (discussing essays of Frank M. Coffin, Maeva Marcus and Emily Field Van Tassel, in *JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY*).

Previously, at the Constitutional Convention, proposals to create a Council of Revision "composed of the President and members of the national judiciary" to review proposed congressional legislation for constitutionality were rejected. CHEMERINSKY, *supra*, at 6-7; see also Frank M. Coffin, *The Federalist No. 86: On Relations Between the Judiciary and Congress*, in *JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY*, *supra*, at 25; Maeva Marcus & Emily Field Van Tassel, *Judges and Legislators in the New Federal System, 1789-1800*, in *JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY*, *supra*, at 35-42 (discussing the federal judiciary's concern with avoiding prejudgment of political issues that might come before the judiciary later within a case or controversy).

³⁹ The requirement of a real, live dispute between adverse parties, in order to avoid an advisory opinion, is also reflected in the standing doctrine's injury requirement and the justiciability doctrines of ripeness and mootness. CHEMERINSKY, *supra* note 38, at 45; see also Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979).

⁴⁰ CHEMERINSKY, *supra* note 38, at 45 (requires a "substantial likelihood that a federal court decision in favor of a claimant will bring about some change or have some effect"). Professor Chemerinsky notes that this requirement is similar to both the standing doctrine's "redressability" component and the doctrine of mootness, and cites the difficulty of applying the redressability requirement in particular circumstances. *Id.* at 46, 63-71.

⁴¹ This uncertain practical effect on the parties is in stark contrast to the perceived public effect of the Court's constitutional ruling. Public reaction to the Court's decision was swift and widespread. See, e.g., EUGENE REGISTER-GUARD, June 24, 1993 (lead editorial) (calling decision the "most interesting—and troubling—of the term"); David G. Savage, *Court O.K.s Tax Money Use in Church School*, L.A. TIMES, June 19, 1993, at A1; *Raising Church-State Questions*, BOSTON GLOBE, June 27, 1993, at 72.

the Establishment Clause did not bar the funding, the decision would end the dispute.

Alternatively, if the Court had decided that the Establishment Clause *barred* public provision of an interpreter at a parochial school, the effect of the Court's decision on the outcome of the dispute would have been clear: the dispute between the litigants would have ended. Thus, the dissenters may overstate the case when they charge that the *Zobrest* opinion constitutes an unconstitutional advisory opinion. The advisory opinion bar does not preclude eager litigants from presenting a concrete Establishment Clause dispute to a federal court for judicial determination. Instead, it precludes federal courts from giving legal advice on hypothetical questions which other branches of government may freely ignore.⁴²

Although *Zobrest* did not amount to an advisory opinion, the Court's resolution of the Establishment Clause issue, while nonconstitutional grounds remained, violated an absolute last resort rule. Even when other hurdles are cleared, the last resort rule can function as an independent bar to constitutional adjudication. The last resort rule requires an additional inquiry: whether a federal court should avoid deciding the constitutional issue and remand for consideration of nonconstitutional grounds or confront and decide the constitutional issue, as the Court did in *Zobrest*. The next Section separates the last resort rule from the avoidance doctrine's other components to provide guidance concerning its appropriate application.

II. HISTORICAL DEVELOPMENT OF THE AVOIDANCE DOCTRINE

This Section examines the historical development of the avoidance doctrine and its components to clarify how the last resort rule is distinct from other components, but overlaps in terms of general justifications for avoiding unnecessary constitutional decisions. This Section demonstrates that the last resort rule is a significant component of the doctrine because it can serve as an independent barrier to constitutional adjudication. Additionally, by exploring the relationship between components of the avoidance doctrine and other justiciability doctrines, this Section underscores the prudential nature of the last resort rule. Finally, by highlighting the context surrounding the doc-

⁴² See, e.g., *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) (declaring that it would be a violation of separation of powers principle for Supreme Court justices to *recommend* to the Secretary of War what amount of benefits should be paid to a veteran if Secretary could refuse to follow Court's recommendation); *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) (holding that the Court has no jurisdiction to give the President a ruling on administrative decisions concerning international air routes if the President can disregard or modify the Court's ruling).

trine's primary formulation, this Section supports the conclusions developed in Section IV regarding the rule's appropriate use.

A. *The Avoidance Doctrine in Ashwander*⁴³

Justice Louis D. Brandeis' concurring opinion in *Ashwander v. Tennessee Valley Authority* provides the most significant formulation of the avoidance doctrine.⁴⁴ The Brandeis formulation had no effect on the outcome of the case because the Justice concurred in the plurality's judgment, and the plurality considered and decided the properly presented constitutional issues. Nevertheless, the Brandeis concurrence represents the primary legacy of *Ashwander*.⁴⁵

⁴³I refer to it as a "doctrine," as do the dissenters in *Zobrest*. Justices Brandeis (in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936)), Frankfurter (in *Poe v. Ullman*, 367 U.S. 497 (1961)) and Rutledge (in *Rescue Army v. Municipal Court of L.A.*, 331 U.S. 549 (1947)) call it a "policy."

⁴⁴297 U.S. 288 (1936).

The *Ashwander* concurring opinion is generally and justly regarded as the crowning statement of one of the truly major themes in Brandeis' judicial work: the conviction that the Court must take the utmost pains to avoid precipitate decision of constitutional issues, and that it must above all decide such issues only when it is absolutely unable otherwise to dispose of a case properly before it.

BICKEL, *supra* note 7, at 2-3; see also ERWIN CHEMERINSKY, *INTERPRETING THE CONSTITUTION* 87 (1987); CHEMERINSKY, *supra* note 38, at 42; PHILIPPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* 307-08 n.41 (1984).

⁴⁵Justice Stevens has called the *Ashwander* concurrence "one of the most respected opinions ever written by a Member of this Court." *Delaware v. Van Arsdall*, 475 U.S. 673, 693 (1986) (Stevens, J., dissenting). Brandeis, a leader of the progressive movement prior to his judicial appointment, offered a broad framing of the avoidance doctrine. The doctrine was adopted heartily by Felix Frankfurter, who was attacked as too "liberal" while a Harvard scholar and an active supporter of New Deal programs. See HELEN SHIRLEY THOMAS, *FELIX FRANKFURTER: SCHOLAR ON THE BENCH* 19-20 (1960); MELVIN I. UROFSKY, *FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES* 20-22 (1991). This tool of judicial restraint espoused by "liberals" was in large part inspired by the response of Brandeis and Frankfurter to the activist "conservative" Court of the 1930's, which struck down legislation as infringing on freedom of contract and other doctrines such as substantive due process. Joseph P. Lash, *Introduction to FROM THE DIARIES OF FELIX FRANKFURTER* 57-58 (Joseph P. Lash ed., 1975) [hereinafter *FRANKFURTER DIARIES*]. In recent years, we more frequently have seen doctrines of judicial restraint criticized when used by "conservative" jurists. See, e.g., Gerald M. Gallivan, *Supreme Court Jurisdiction and the Wyoming Constitution: Justice v. Judicial Restraint*, 20 LAND & WATER L. REV. 159 (1985); Steven M. Kahaner, *Separation of Powers and the Standing Doctrine: The Unwarranted Use of Judicial Restraint*, 56 GEO. WASH. L. REV. 1074 (1988); Christopher A. Crain, Note, *Judicial Restraint and the Non-Decision in Webster v. Reprod. Health Servs.*, 13 HARV. J.L. & PUB. POL'Y 263 (1990); see also Linda Greenhouse, *The Supreme Court: A Sense of Judicial Limits*, N.Y. TIMES, July 22, 1993, at A1 (referring to the Ginsburg nomination and noting surprise at a "liberal" jurist espousing techniques of judicial restraint).

1. The Plurality's Decision

In *Ashwander*, the Supreme Court faced a challenge to the constitutionality of a congressional program of development of the Wilson Dam.⁴⁶ The plaintiffs, preferred stockholders of the Alabama Power Company, had unsuccessfully protested to the corporation about its contracts with the Tennessee Valley Authority ("TVA"). Plaintiffs then brought suit against the corporation, the TVA, and others alleging breach of contract and advancing a broad constitutional challenge to the governmental program.⁴⁷ The plurality did not reach the broadest constitutional questions presented by plaintiffs, but instead upheld Congress's constitutional authority to dispose of electric energy generated at the dam and validated the contracts.⁴⁸

At the outset, the plurality rejected the government's argument that the preferred stockholders did not have standing to bring the suit.⁴⁹ The plurality then considered the scope of the constitutional issue presented. The plurality found the scope "limited to the validity of the contract" between the parties, rather than extending to the broad challenge to the validity of the entire TVA program.⁵⁰ Although the plurality refused to issue an advisory opinion on plaintiffs' broader hypothetical and contingent constitutional claims, it did review the

⁴⁶ 297 U.S. 288, 315 (1936).

⁴⁷ *Id.* at 316-17. Plaintiffs argued that the federal government, through the TVA, was undertaking a "coup" which "would open every essential industry and service to direct and permanent governmental competition." *Id.* at 291-92. Plaintiffs challenged the TVA program's "validity in every respect, in its entirety, and in detail, asserting that the program and all of its essentials, the means employed to promote it, its dominant objectives, and its arbitrary methods, do not consist with the letter and spirit of the Constitution." *Id.* at 293; *see also id.* at 317.

⁴⁸ *Id.* at 339-40. The district court below did not reach plaintiffs' request for general declaratory relief, but it did annul the contract at issue, enjoin transfer of the transmission lines and auxiliary properties, and enjoin the municipal defendants from "making or performing any contracts with the [TVA] for the purchase of power." *Id.* at 317. The court of appeals reversed, finding that Congress had the constitutional authority to construct the Wilson Dam and dispose of the surplus energy thereby produced. *Id.* at 318.

⁴⁹ *Id.* at 318 ("while their stock holdings are small, they have a real interest and there is no question that the suit was brought in good faith").

⁵⁰ *Ashwander*, 297 U.S. at 324. The government urged the Court to construe the constitutional issue narrowly. *Id.* at 310-11. The Court agreed: "The pronouncements, policies and program of the [TVA] and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining." *Id.* at 324.

The single dissenter, however, would have considered plaintiffs' allegation that, "while pretending to act within their powers to improve navigation, the United States, through corporate agencies, are really seeking to accomplish what they have no right to undertake--the business of developing, distributing and selling electric power." *Id.* at 357 (McReynolds, J., dissenting). After evaluating the evidence presented in support of that allegation, he found that the trial court's ruling should be affirmed. *Id.* at 372.

constitutionality of the legislation insofar as the plaintiffs had presented facts of a legitimate "case or controversy."⁵¹ Based on the concrete dispute before the Court, the plurality concluded that Congress had war and commerce power authority to construct the Wilson Dam.⁵² The plurality also found that the disposal of the electric energy generated pursuant to the provisions of the contracts at issue was lawful.⁵³ Thus, the judgment in *Ashwander*, in which Justice Brandeis concurred, ultimately did not avoid a constitutional issue.

2. The Reasoning of the Concurrence

Justices Cardozo, Roberts and Stone joined the Brandeis concurrence. The concurring Justices would have affirmed the court of appeals' judgment "without passing on it," although they agreed with the plurality's conclusion on the constitutional issues it reached.⁵⁴ The court of appeals had decided, like the plurality, that Congress had the constitutional authority to construct the Wilson Dam and dispose of the surplus energy thereby produced.⁵⁵ The concurrence, however, would have affirmed this judgment without reaching the merits because of other infirmities in plaintiffs' case.⁵⁶

Brandeis primarily objected to plaintiffs' standing.⁵⁷ His concurrence disagreed with the plurality's conclusion that the preferred stockholders could bring the action because they had already voiced their complaints to the corporation without success. Brandeis concluded

⁵¹ *Id.* at 325. The government claimed that the shareholders' complaints were "premature," "hypothetical" and "speculative" because some portions of the constitutional challenge were based on future, contingent acts. *Id.* at 313-14. The plurality agreed:

[P]laintiffs had no right to demand that the directors should start a litigation to obtain a general declaration of the unconstitutionality of the [TVA] in all its bearings or a decision of abstract questions as to the right of the [TVA] and of the Alabama Power Company in possible contingencies.

Id. at 325; see *supra* notes 38-42 and accompanying text for a discussion of the ban on advisory opinions.

⁵² *Ashwander*, 297 U.S. at 326-30.

⁵³ *Id.* at 330-40 (construing U.S. CONST. art. IV, § 3).

⁵⁴ *Id.* at 341. The Court also thought that the district court should have dismissed the case. *Id.*

⁵⁵ *Id.* at 318.

⁵⁶ *Id.* at 341.

⁵⁷ *Ashwander*, 297 U.S. at 341; see also ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 119-21 (2d ed. 1986) (calling Brandeis' primary concern in *Ashwander* one of standing). This standing concern is nearly identical to Brandeis' primary objection to jurisdiction in the draft *Atherton Mills v. Johnson*, 259 U.S. 13 (1922), opinion. See *infra* notes 76 and 149 for discussion of *Atherton Mills*. Heated debate over appropriate access to the courts for those asserting corporate interests was reflected in several cases during the 1936 term. Felix Frankfurter and Adrian S. Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 HARV. L. REV. 577 (1938).

that plaintiffs had no "right to interfere" in corporate governance under the substantive law, and because the stockholders could allege no injury which the substantive law recognized, they lacked standing to bring suit.⁵⁸

The concurrence then raised an equity bar to the requested relief. The preferred stockholders could not show the "irreparable injury" to their property rights necessary to obtain relief in equity.⁵⁹ Plaintiffs had only a limited interest in the corporation and the district court had made no finding that the proposed transactions with the TVA endangered their property interests.⁶⁰

Brandeis also examined other potential hurdles standing between the Court and the constitutional issues. He concluded that the power company was estopped from bringing a challenge and thus its stockholders had lost any right to bring a challenge.⁶¹ Finally, according to Brandeis, even if plaintiffs had standing under the substantive law, "courts should, in the exercise of their [equitable] discretion, refuse an injunction unless the alleged invalidity is clear."⁶² Brandeis urged a presumption in favor of the validity of any legislative act until "its violation of the [C]onstitution is proved beyond all reasonable doubt."⁶³ But the particular part of the *Ashwander* concurrence that has become famous is its articulation of "[t]he practice in constitutional cases."⁶⁴ In describing that "practice," Brandeis set out a broad formulation of the avoidance doctrine.

3. "The practice in constitutional cases"

Brandeis characterized judicial review of the constitutionality of legislative acts as a grave and delicate power for use by fallible, human judges only when its use cannot conscientiously be avoided.⁶⁵ This

⁵⁸ *Ashwander*, 297 U.S. at 341-44. The concurrence attempted to distinguish prior decisions in stockholder cases where the Court had rendered decisions, *Id.* at 349-52, or, alternatively, urged that the prior cases be overruled. *Id.* at 352-53.

⁵⁹ *Id.* at 344-45.

⁶⁰ *Id.* at 345.

⁶¹ *Id.* at 353-54.

⁶² *Id.* at 354.

⁶³ *Ashwander*, 297 U.S. at 355 (quoting Justice Washington's opinion in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 212, 270 (1827)).

⁶⁴ *Id.* at 345.

⁶⁵ *Id.* Brandeis notes early in his opinion that the Supreme Court "has frequently called attention to the 'great gravity and delicacy' of its function in passing upon the validity of an act of Congress." *Id.*

Although Brandeis' concurring opinion in *Ashwander* is the primary cite for the modern formulation of the avoidance doctrine, Chief Justice John Marshall had cautioned previously that no questions of "greater delicacy" can be presented to the federal judiciary than those involving a constitutional challenge to a legislative act. *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558). He instructed that if such questions "become indispensably necessary to the

reluctance to use the power of judicial review was, according to Brandeis, predicated on the separation of powers principle that one branch must not "encroach upon the domain of another."⁶⁶ Brandeis identified two prominent limitations on the federal judicial power based on the separation principle: the "case or controversy" requirement and the rule that federal courts have no power to render advisory opinions.⁶⁷ Brandeis linked a host of justiciability doctrines, including political question and standing inquiries, to these limitations.

Brandeis recited traditional Article III jurisprudence by recognizing well-established constitutional limits on the federal judicial power. The concurrence's theme of judicial restraint is not inconsistent with the plurality's decision: a federal court should only decide an actual Article III controversy when the facts present one, and should refuse to render an advisory opinion on the entire TVA program. Brandeis then relied on the avoidance doctrine to argue that the Court should not reach the merits of the constitutional issue.

Brandeis described how the Court had developed "prudential" rules—meaning nonconstitutional, self-imposed restraints—by which to avoid "passing upon a large part of all the constitutional questions" presented to it, despite having jurisdiction to hear them.⁶⁸ He described the avoidance doctrine as consisting of a "series" of seven rules:

- 1) "The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding . . .";⁶⁹

case," they must be decided, but "if the case may be determined on other points, a just respect for the legislature requires, that the obligation of its laws should not be *unnecessarily and wantonly assailed*." *Id.* (emphasis added). In *Ex parte Randolph*, the Chief Justice, while riding circuit, considered a challenge to a congressional act which provided that treasury agents could issue warrants for military officers charged with disbursing public funds who failed to pay and settle their accounts at the Treasury Department. The court concluded that the terms of the act did not apply to an officer temporarily acting as the ship's purser due to the death of the regularly commissioned purser and granted his petition for habeas corpus. *Id.* at 242.

⁶⁶ *Ashwander*, 297 U.S. at 355. Brandeis concludes his discussion of the avoidance doctrine in *Ashwander* with this warning: "One branch of the government cannot encroach upon the domain of another, without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." *Id.* (quoting *Sinking Fund Cases*, 99 U.S. 700, 718 (1871)). For a different cast of the separation of powers principle, see generally Robert A. Katzmann, *The Underlying Concerns*, in *JUDGES AND LEGISLATORS* 14 (Robert A. Katzmann ed., 1988) (discussing separation of powers as "separated institutions sharing powers," not separate institutions"); David B. Frohnmayer, *The Separation of Powers: An Essay on the Vitality of a Constitutional Idea*, 52 OR. L. REV. 211 (1973).

⁶⁷ *Ashwander*, 297 U.S. at 345-46; see also Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 240-54 (1985); Brilmayer, *supra* note 36, at 302-03 (the avoidance principles espoused in *Ashwander* contemplate "an essentially passive judicial role").

⁶⁸ *Ashwander*, 297 U.S. at 346.

⁶⁹ *Id.*

- 2) "The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'"⁷⁰
- 3) "The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"⁷¹
- 4) The Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed.⁷²
- 5) The Court will not pass upon the constitutionality of a statute unless the plaintiff was injured by operation of the statute.⁷³
- 6) "The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits."⁷⁴
- 7) Even if "serious doubt[s]" concerning the validity of an act of Congress are raised, the Court will first ascertain "whether a construction of the statute is fairly possible by which the question may be avoided."⁷⁵

Several of these rules overlap entirely or in significant measure with well-recognized requirements that govern the federal courts through judicial interpretation of the "case or controversy" requirement of Article III. In exploring the connections between the avoidance doctrine and other justiciability doctrines, I group the seven rules into three clusters. This Article first examines the rules of the avoidance doctrine which overlap with other constitutional requirements for justiciability and jurisdiction: rules 1, 2, 3 and 5. Next, the Article considers the rules which are largely prudential: rules 6 and 7. Finally, the remainder of the Article focuses on rule 4, which I term the "last resort rule."

⁷⁰ *Id.* at 346-47 (quoting *Liverpool, N.Y. & Phila. S.S. Co. v. Emigration Comm'rs*, 113 U.S. 33, 39 (1885)). In *Liverpool*, the Court remanded a case for further factual development to avoid issuing an advisory opinion on hypothetical facts. 113 U.S. at 39.

⁷¹ *Ashwander*, 297 U.S. at 347 (quoting *Liverpool*, 113 U.S. at 39).

⁷² *Id.*; see also Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 182 (1970) ("The logic of constitutional law demands that nonconstitutional issues be disposed of first, state constitutional issues second, and federal constitutional issues last."); see discussion of comity *infra* Section IV.

⁷³ *Ashwander*, 297 U.S. at 347-48.

⁷⁴ *Id.* at 348.

⁷⁵ *Id.* (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

a. Rules Related to Article III Requirements

The first rule bars collusive suits as not proper cases or controversies under Article III. Brandeis relied on *Atherton Mills v. Johnston*, in which the Court dismissed a challenge to a congressional act regulating child labor as moot, in support of the first rule.⁷⁶ As Professor Alexander Bickel points out, however, *Atherton Mills* was "a case of quite conventional mootness, hardly apt as an illustration of judicial self-restraint in constitutional litigation."⁷⁷ Mootness, a justiciability doctrine, serves to ensure that a controversy is "live" and in need of judicial resolution.⁷⁸ For Brandeis, however, *Atherton Mills* represented the issue of collusive suits arranged to obtain fast and convenient adjudication of constitutional issues.⁷⁹ Brandeis elaborated on this concern

⁷⁶ *Atherton Mills v. Johnston*, 259 U.S. 13, 16 (1922); see BICKEL, *supra* note 7, at 3. Brandeis also cited to *Chicago & Grand Trunk R.R. v. Wellman*, 143 U.S. 339 (1892), which is described in Harlan's dissent in *Poe v. Ullman*: "the parties sought a ruling as to whether a particular passenger rate was unconstitutionally confiscatory, having stipulated all the debatable and contingent facts which otherwise might have rendered a constitutional decision unnecessary." 367 U.S. 497, 529 (1961). *Atherton Mills* presented a challenge to the Child Labor Tax Act by a father of a child employed at a mill, who alleged that his son was about to be discharged due to the impact of the tax. The father alleged that the resultant loss of his son's wages would injure him. He sought an injunction to keep the mill from discharging his son. The district court issued the injunction, finding the Act unconstitutional, and the case proceeded to the Supreme Court. *Atherton Mills*, 259 U.S. at 13-15.

⁷⁷ BICKEL, *supra* note 7, at 3.

⁷⁸ "Mootness avoids unnecessary federal court decisions, limiting the role of the judiciary and saving the courts' institutional capital for cases truly requiring decisions." CHEMERINSKY, *supra* note 38, at 110. The justifications for the doctrine, however, have been challenged. Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227 (1990); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 605 (1992) (maintaining that mootness should not be considered a constitutional doctrine, but merely a prudential rule); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973) (debunking the judicial capital argument as "assum[ing] precisely what is at issue").

⁷⁹ BICKEL, *supra* note 7, at 3. Brandeis argued in the unpublished opinion in *Atherton Mills* that the suit was merely a collusive, fictitious controversy between the parties—essentially, the child employee and employer. *Id.* at 6-7. The draft mirrors Brandeis' suspicion, articulated elsewhere, of claims for declaratory relief. See *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 274, 289 (1928) (Brandeis said declaratory relief was beyond the scope of Article III judicial power, and there was no statutory authorization for declaratory judgments at that time). The Court, in *Nashville, Chattanooga & St. L. Ry. v. Wallace*, disagreed. 288 U.S. 249, 264 (1933) (declaratory judgments are justiciable as long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy). In 1934, Congress passed the Declaratory Judgment Act, the constitutionality of which was upheld in *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 244 (1937). Despite the Declaratory Judgment Act, the avoidance doctrine still applies. *Poe v. Ullman* 367 U.S. 497, 506 (1961) (stating that the declaratory judgment procedure "does not permit litigants to invoke the power of this Court to obtain constitutional rulings in advance of necessity"); *Rescue Army v. Municipal Court of L.A.*, 331 U.S. 549, 573 n.41 (stating that discretionary element in declaratory judgment jurisdiction offers convenient instrument for making effective the avoidance doctrine).

in *Ashwander*, declaring judicial review of the constitutionality of legislative acts legitimate only as a last resort, and as a necessity in the determination of real, earnest and vital controversies between individuals.⁸⁰ It was never the thought that a party beaten in the legislature could transfer to the courts, by means of a friendly suit, an inquiry as to the constitutionality of the legislative act.⁸¹

Federal courts thereby safeguard their limited power by barring such nonadversarial, fake controversies—suits over which an Article III court has no jurisdiction.⁸² The Court has described the requirement of standing as “closely related” to the rule against entertaining friendly, collusive suits.⁸³ This first rule of avoidance also overlaps with the ripeness requirement, discussed in conjunction with the second rule.

The second rule of the avoidance doctrine mirrors the ripeness requirement in that it obliges federal courts to refrain from deciding a dispute prematurely.⁸⁴ The primary rationale for the ripeness doctrine, another justiciability doctrine arising from the case or controversy requirement, is “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.”⁸⁵ In a leading case on ripeness, *Poe v. Ullman*, the Court

⁸⁰ *Ashwander*, 297 U.S. at 346.

⁸¹ *Id.* (quoting *Chicago and Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892)); see Brilmayer, *supra* note 39, at 300 (stating that Article III’s case or controversy requirement “has traditionally been understood to include the power to resolve abstract legislative issues, including constitutional issues, but only as a necessary byproduct of the resolution of particular disputes between individuals”); Bandes, *supra* note 78.

⁸² See, e.g., BICKEL, *supra* note 7, at 1–2 (in the draft opinion of *Atherton Mills*, Brandeis pointed out that neither the employee, his father nor the mill wanted the challenged tax). In *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), decided the same term as *Ashwander*, Justice Brandeis joined Justice Cardozo’s dissent from the majority opinion, which reached the merits of a constitutional challenge to Congressional legislation regulating the coal industry in an obviously collusive suit. In *Carter Coal*, the president of a coal company sued the coal company to enjoin its compliance with the legislation and the Court found the legislation in part unconstitutional. 298 U.S. at 278–79. Justice Cardozo reasoned in dissent, quoting Brandeis in *Ashwander*, that there was no need to reach some of the constitutional issues. *Id.* at 325.

For other instances in which the Court has rejected collusive suits, see *United States v. Johnson*, 319 U.S. 302, 303–05 (1943) (action dismissed where plaintiff sued defendant at defendant’s request, and defendant financed and controlled litigation); *Muskrat v. United States*, 219 U.S. 346, 362–63 (1911) (suit between Native Americans and federal government was not justiciable merely because Congress had passed legislation authorizing suit to resolve constitutional question when their interests were not adverse).

⁸³ *Flast v. Cohen*, 392 U.S. 83, 100 (1968).

⁸⁴ *Poe v. Ullman*, 367 U.S. 497, 508–09 (1961) (dispute not ripe due to no real threat of criminal prosecution of plaintiffs under Connecticut statute regulating contraceptives); see Brilmayer, *supra* note 39; Gene R. Nichol Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153 (1987); Jonathan D. Varat, *Variable Justiciability and the Duke Power Case*, 58 TEX. L. REV. 273 (1980).

⁸⁵ *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967); see *Rescue Army v. Municipal*

relied on the avoidance doctrine to set the stage for its decision that the controversy was not ripe.⁸⁶ In *Poe*, Justice Felix Frankfurter described the *Ashwander* rules as arising from the "historically defined, limited nature and function of courts" and from the separation of powers principle.⁸⁷

Moreover, the rules recognize that adjudication within an adversary system functions best in the presence of "a lively conflict" between actively pressed antagonistic demands, making resolution of the controverted issue a practical necessity.⁸⁸ Frankfurter termed the justiciability doctrines of standing, ripeness, and mootness as merely "several manifestations . . . of the primary conception that federal judicial power is to be exercised *to strike down legislation* . . . only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action."⁸⁹ The first two rules of the avoidance doctrine are, thus, closely linked to well-recognized justiciability requirements, and serve as alternative, but not distinctive, limitations on the federal judicial power.⁹⁰

Court of L.A., 331 U.S. 549, 575-85 (1947) (dispute not ripe because an incomplete factual record rendered a constitutional decision premature).

⁸⁶ 367 U.S. 497, 498, 508-09 (1961) (the Court declined to address plaintiffs' claim that Connecticut law regulating contraceptive use and related medical advice violated Fourteenth Amendment). As the Court instructed in *Poe*, "The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity." *Id.* at 503 (quoting *Parker v. County of Los Angeles*, 338 U.S. 327, 333 (1949)). Justice Frankfurter wrote for four members of the Court, and Justice Brennan concurred in the judgment, although four justices would have reached the constitutional issue. *Id.* at 509-55. Justice Brennan's brief, pivotal opinion in *Poe* reasons that the "true controversy" was the opening of large scale birth-control clinics and that that controversy simply was not ripe on the facts because the State had made no "definite and concrete" attempt to enforce the law. Constitutional adjudication could await such factual development, he concluded. *Id.* at 509.

⁸⁷ *Id.* at 503 (Such concerns "press with special urgency in cases challenging legislative action or state judicial action as repugnant to the Constitution."); see also *United Pub. Workers v. Mitchell*, 330 U.S. 75, 104 (1947).

Frankfurter appears to have carried the torch of judicial restraint for Brandeis after the latter retired from the Supreme Court. See *United States v. CIO*, 335 U.S. 106, 124-29 (1948). Frankfurter was, in fact, deeply involved in discussing judicial restraint with Brandeis long before Frankfurter was appointed to the bench. As early as September 19, 1922, Brandeis had written a letter to Frankfurter outlining major principles of judicial restraint that would later appear in the *Ashwander* opinion. "HALF BROTHER, HALF SON": THE LETTERS OF LOUIS D. BRANDEIS TO FELIX FRANKFURTER 110 (Melvin I. Urofsky & David W. Levy eds., 1991) (hereinafter *BRANDEIS LETTERS*); see also Judith Resnik, *The Brandeis/Frankfurter Connection*, 71 CAL. L. REV. 776 (1983) (book review) (personal and political affiliations of two jurists).

⁸⁸ *Poe*, 367 U.S. at 503.

⁸⁹ *Id.* at 504 (emphasis added); see also BICKEL, *supra* note 57, at 116 (both the time lag and the "flesh-and-blood facts" of a dispute secured by standing and the requirements of a case or controversy are important to legitimating judicial review of legislative action).

⁹⁰ It is not surprising that many rules within the avoidance doctrine overlap with other

Standing, another justiciability doctrine derived from the "case or controversy" requirement, requires a litigant to allege that she has personally suffered or imminently will suffer a concrete injury, fairly traceable to the defendant's conduct, and that the court's decision will likely redress her injury.⁹¹ Standing includes both constitutional and prudential components.⁹² The third rule of the avoidance doctrine requires federal courts facing constitutional issues to rule no more broadly than the precise facts require.⁹³ This rule may reflect the

justiciability and jurisdictional rules: the doctrine is a "series of rules" reflecting the larger canon of judicial self-restraint. Such rules are frequently and perhaps necessarily overlapping. See BICKEL, *supra* note 57, at 71, 118, 125.

⁹¹ *Allen v. Wright*, 468 U.S. 737, 751 (1984); CHEMERINSKY, *supra* note 38, § 2.3. For background on the standing doctrine, see Bandes, *supra* note 78; Gene R. Nichol, *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915 (1986) (and earlier articles by Nichol cited therein); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983); Cass Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988).

⁹² After the constitutional analysis (i.e., the injury and causation analysis), federal courts perform a second inquiry as a matter of "judicial self-governance." *Singleton v. Wulff*, 428 U.S. 106, 124, 129 (1976) (Powell, J., concurring in part and dissenting in part) ("It seems wholly inappropriate, as a matter of judicial self-governance, for a court unnecessarily to decide a difficult constitutional issue in a case in which nothing more is at stake than remuneration for professional services."). The Court in *Flast v. Cohen* cites "uncertainty" surrounding justiciability doctrines due to a blending of constitutional and prudential considerations. 392 U.S. 83, 97 (1968) (quoting *Barrows v. Jackson*, 346 U.S. 249, 255 (1953)). As an example, the Court selects the *Ashwander* rules, which are prudential—"they find their source in policy, rather than purely constitutional, considerations." However, several of the cases cited by Justice Brandeis in illustrating the rules of self-governance articulated purely constitutional grounds for decision. *Id.* The Court concludes that such blending is unavoidable.

⁹³ The third rule of the avoidance doctrine was a focus of debate in the Court's controversial decision upholding the constitutionality of Missouri's abortion statute in *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989). In *Webster*, the five-member majority upheld the state's prohibition against public employees assisting in the performance of an abortion which was not necessary to save a mother's life. *Id.* at 507, 522.

In an amicus brief, the Bush administration urged the Court to overrule *Roe v. Wade*, 410 U.S. 113 (1973). See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 665-66 (1993). Justice O'Connor concurred in the Court's judgment, but refused to join the plurality's opinion to the extent it "reexamine[d] the constitutional validity of *Roe v. Wade*." *Webster*, 492 U.S. at 525 (O'Connor, J., concurring in part and concurring in the judgment) (citation to *Roe* deleted). Apparently, her refusal to join in a draft majority opinion circulated by Chief Justice Rehnquist which attacked *Roe* was critical to prevent the Court from overturning *Roe* in *Webster*. Benjamin Weiser & Bob Woodward, *The Marshall Files*, WASH. POST, May 23, 1993, at A1. O'Connor relied on the second and third rules of the avoidance doctrine to argue that the Court could affirm the constitutionality of the Missouri statute without reaching the broader constitutional issue of the validity of *Roe*. *Webster*, 492 U.S. at 525-26 (O'Connor, J., concurring in part and concurring in the judgment).

Justice Scalia urged the Court to reach the validity of *Roe* and he called O'Connor's reliance on the avoidance doctrine to evade reconsideration of *Roe* irresponsible. *Id.* at 532, 537 (Scalia, J., concurring in part and concurring in the judgment). He argued that the application of the avoidance doctrine was not in question because the Court could not avoid deciding the consti-

fact-specific focus of the standing inquiry. The fifth rule, which requires that the challenged legislation injure the plaintiff, mirrors the injury and causation components of the standing requirement.⁹⁴

Cases construing the prudential component of the standing doctrine have relied on the avoidance doctrine. Prudence gives rise to, among other doctrines, the prohibition against third-party standing.⁹⁵ One policy underlying the prohibition is the desire to avoid unnecessary constitutional adjudication.⁹⁶ The Court, in explicating the bar against third-party standing, has described Brandeis' *Ashwander* rules as "offering the standing requirement as one means by which courts avoid unnecessary constitutional adjudications."⁹⁷ A second prudential restriction is the bar against finding standing for a generalized grievance—a harm shared in substantially equal measure by all or a large group of citizens.⁹⁸ The Court has also linked this standing bar to the

tutionality of the Missouri statute. The only dispute was over the breadth of the constitutional ruling once the Court determined it would reach the merits of the constitutional issue, i.e., whether the Court should use *Roe v. Wade* as the benchmark, or something else. *Id.* at 532–33. He argued that although the third rule of the avoidance doctrine—not formulating a rule of constitutional law broader than that required by the facts of the case—"is a sound general principle, it is often departed from when good reason exists." *Id.* at 533. He concluded that good reason for departure existed in *Webster*.

The debate between Justices O'Connor and Scalia demonstrates significant disagreement among the Court as to the appropriate use of the third rule of the avoidance doctrine. Although that debate is of critical importance to the development of constitutional dialogue, this Article focuses primarily on proper application of the avoidance doctrine's fourth rule—the last resort rule—and leaves an analysis of proper use of the third rule for another day.

⁹⁴ The doctrine of standing, like the avoidance doctrine, reflects "the Art. III notion that federal courts may exercise power only 'in the last resort, as a necessity,' and only when adjudication is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process.'" *Allen*, 468 U.S. at 752 (quoting *Chicago & Grand Trunk R.R. v. Wellman*, 143 U.S. 339, 345 (1892) and *Flast v. Cohen*, 392 U.S. 83, 97 (1968)); see David Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 Wts. L. Rev. 37 (1984) (arguing that standing requirements are applied more stringently to constitutional claims).

⁹⁵ *Singleton*, 428 U.S. at 124 (Powell, J., concurring in part and dissenting in part) (citing Brandeis' discussion of the avoidance doctrine in *Ashwander*). As a general rule, a litigant can raise only her own claims, not those of another. Third party standing also implicates the basic concept of a right, which includes the power of the rightholder to choose whether to exercise that right.

⁹⁶ *Id.* at 124 n.3 (Powell, J., concurring in part and dissenting in part). A second justification for the prohibition against third-party standing is the Court's need for effective advocacy through a traditional controversy. *Id.*

⁹⁷ *Id.* at 114.

⁹⁸ See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (person injured by police "chokehold" could seek damages but had no standing to seek injunctive relief against future use of "chokehold" because he could not show sufficient likelihood of imminent personal harm and irreparable injury); *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221–27 (1974).

avoidance doctrine: the requirement of an individualized injury serves to ensure that "there is a real *need* to exercise the power of judicial review in order to protect the interests of the complaining party."⁹⁹ Indeed, the avoidance doctrine may be an early formulation of the justiciability doctrines.¹⁰⁰

Rules three and five of the avoidance doctrine thus echo concerns addressed by the constitutional and prudential limitations of standing and ripeness. In some cases, the tenets of the avoidance doctrine addressed above—rules 1, 2, 3 and 5—may serve to buttress the conclusion that a case is not justiciable, or that a case is justiciable but the court will voluntarily decline to exercise its jurisdiction for prudential reasons. The avoidance doctrine as set out in these rules functions primarily as a supplement to established doctrines of standing and ripeness. The last resort rule provides the critical, separate barrier to constitutional adjudication contained within the broader avoidance doctrine. This Article will return to clarify that rule and explore its applications after a brief review of the two remaining tenets of the avoidance doctrine.

b. *Rules Reflecting Largely Prudential Concerns*

The sixth rule of the avoidance doctrine provides that a court will not rule upon the constitutionality of a statute at the instance of one who has benefitted from the statute.¹⁰¹ In support of this rule, Brandeis cited cases in which a party waived its ability to object to a statute because the party had pursued benefits afforded under the statute in one proceeding prior to challenging the statute's constitutionality in a separate judicial proceeding.¹⁰² The Supreme Court later distinguished

⁹⁹ *Schlesinger*, 418 U.S. at 221 (emphasis added) (challenging holding of Armed Forces Reserve commissions by members of Congress under Incompatibility Clause of Article I, § 6). The Court also found the avoidance doctrine "particularly applicable" in *Schlesinger* because the litigants sought an interpretation of a constitutional provision which had not been construed by the federal courts.

¹⁰⁰ Professor Erwin Chemerinsky suggests that the justiciability doctrines differ today from Brandeis' formulation because of the Court's extensive development of them in the 1960's and 1970's. Letter dated February 24, 1994 (on file with author). Cass Sunstein claims that Justices Brandeis and Frankfurter, as progressives and New Deal enthusiasts, "developed doctrines of standing, ripeness, and reviewability largely to insulate agency decisions from judicial intervention." Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1437 (1988). Similarly, the avoidance doctrine aims at deferring to legislative and executive decisions.

¹⁰¹ *Ashwander*, 297 U.S. at 347-48.

¹⁰² See, e.g., *Wall v. Parrot Silver & Copper Co.*, 244 U.S. 407, 411-12 (party which instituted proceeding for valuation of its stock under state legislation could not afterward assert the constitutional invalidity of legislation); *Great Falls Mfg. Co. v. Attorney General*, 124 U.S. 581,

cases relying on the "estoppel to sue" doctrine as being cases in which "litigants had received or sought advantages from the statute that they wished to attack, advantages other than the mere right to sue."¹⁰³ The sixth rule may be of relatively little importance today. To the extent the estoppel principle was based on a doctrine forbidding parties from asserting inconsistent positions in judicial proceedings,¹⁰⁴ Federal Rule of Civil Procedure 8(a) now expressly allows alternative or inconsistent allegations. Moreover, broad modern principles of claim preclusion appear to address adequately the concern reflected in the cases cited for the estoppel principle.¹⁰⁵

The seventh rule of the avoidance doctrine derives from the familiar canon of statutory construction that a statute "ought not to be construed to violate the Constitution if any other possible construction remains available."¹⁰⁶ The canon and the rule are identical and, not surprisingly, often used interchangeably.¹⁰⁷ Indeed, the canon of statutory construction is grounded in large part upon the well-established practice of not reaching constitutional questions unnecessarily.¹⁰⁸ The seventh rule poses an alternative to the directive of the last resort rule. Through statutory construction rules, it may also be possible to avoid a constitutional question.¹⁰⁹

598-600 (1888) (party which commenced Court of Claims proceeding for compensation after its property was taken for public use could not separately challenge the constitutionality of the taking in federal court).

¹⁰³ See *Oklahoma v. United States Civil Service Comm.*, 330 U.S. 127, 139-40 & n.14 (1947).

¹⁰⁴ See *Leonard v. Vicksburg, S. & P. R.R.*, 198 U.S. 416, 423 (1905).

¹⁰⁵ Of course, administrative law developments in the last fifty years would also affect the current validity of this principle.

¹⁰⁶ *Rust v. Sullivan*, 111 S. Ct. 1759, 1771 (1991) (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575 (1988)). A discussion of statutory construction is beyond the scope of this Article. A classic review of the canons is presented in Karl N. Llewellyn's *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) (arguing that the canons of statutory construction provide little guidance because, for every canon, there is an equally weighty opposing canon). See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 276 (1985) (giving examples of same). A collection of intriguing Articles commemorating Llewellyn's attack on the canons and examining the reemergence of the canons in recent judicial decisions is contained in *Symposium: A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 529 (1992).

¹⁰⁷ *Rust*, 111 S. Ct. at 1788 (O'Connor, J., dissenting). Justice O'Connor also cites the second rule of the avoidance doctrine in support of her argument not to decide constitutional questions in advance of the strictest necessity. *Id.* As in *Zobrest*, she refused to join the dissenters in *Rust* who reached the merits of, and dissented from the majority on, the constitutional issues. See also *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991) (interpreting age discrimination statute so as to avoid Tenth Amendment problem).

¹⁰⁸ *United States v. Locke*, 471 U.S. 84, 92 (1984).

¹⁰⁹ See *Rust*, 111 S. Ct. at 1759.

B. The "Last Resort Rule"

Finally, this essay considers the last resort rule, a largely prudential rule which gives a federal court the power to avoid a constitutional issue in some circumstances. This rule dictates that, even if all other jurisdictional and justiciability obstacles are surmounted, federal courts still must avoid a constitutional issue if there is *any* other ground upon which to render a final judgment. Because the last resort rule can function as a distinct barrier to constitutional adjudication, it merits separate consideration.

1. The First Application

Brandeis cited two examples in *Ashwander* of the "most varied application" of the last resort rule. First, as between two potential grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will only decide the latter.¹¹⁰ To the extent the question involves statutory construction and a plausible interpretation of the statute might obviate the need for constitutional review, this example replicates the seventh rule of the avoidance doctrine discussed above. To illustrate this first application, Brandeis relied primarily on *Siler v. Louisville & Nashville Railroad Co.*¹¹¹ In *Siler*, a railroad company challenged an order by the Kentucky railroad commission setting maximum rates on commodities transported by rail within the state.¹¹² The company asserted a takings claim and a Commerce Clause claim under the United States Constitution, as well as state law claims, including a claim that the commission had exceeded its statutory authorization in making such an order.¹¹³ The Supreme Court upheld the lower federal court's order enjoining enforcement of the maximum rate order. The Court indicated, however, that the lower court should have enjoined the rate order on state law grounds, without reaching the federal constitutional grounds.¹¹⁴

The Court in *Siler* confirmed that once the lower court properly determined that it had federal question jurisdiction, the court had the right to decide either all questions or only the state law questions.¹¹⁵

¹¹⁰ *Ashwander*, 297 U.S. at 347.

¹¹¹ 213 U.S. 175 (1909).

¹¹² *Id.* at 176-77.

¹¹³ *Id.* at 177. The Court itself proceeded to review the state law claims, although Kentucky's highest court had never construed the pertinent statute. The Court concluded that the commission had exceeded its statutory authority in issuing the challenged order. *Id.* at 194-96.

¹¹⁴ *Id.* at 191.

¹¹⁵ *Id.*

The *Siler* Court stated that where a case can be decided without reference to questions arising under the federal Constitution, that course is "usually pursued and is not departed from without important reasons."¹¹⁶ The Court declared it better to decide the case with regard to the construction of the state statute, and the authority therein given to the Commission to make the order in question, rather than to unnecessarily decide the various constitutional questions appearing in the record.¹¹⁷

The *Siler* Court offered no case precedent or doctrinal ground for this policy decision. The discretionary nature of the Court's decision limits the extent to which *Siler* serves as a primary basis for an absolute last resort rule. After recognizing the lower court's authority to decide the constitutional questions, the Court decided to follow the "usual course" of avoiding such questions if questions of local law would resolve the dispute. This purely prudential formulation of the rule allows courts to dispense with the rule for "important reasons."¹¹⁸ Although Brandeis prefaced his avoidance doctrine discussion in *Ashwander* by casting the seven rules as prudential, his formulation of the last resort rule omits this "important reasons" qualification. Thus, an evaluation of the proper scope of the last resort rule requires a determination of whether the qualifying phrase should be employed, or whether the rule should be viewed as an absolute.¹¹⁹ In Section IV, this Article concludes that the last resort rule should not be regarded as an absolute, suggests guidance for future application of the rule, and requests court elucidation on use of the rule.

"*Pullman* abstention" represents the most prominent development of this initial application of the last resort rule after *Ashwander*. In Section IV.E.1, this Article rejects *Pullman* abstention as an illegitimate application of the last resort rule.

¹¹⁶ 213 U.S. at 193.

¹¹⁷ The only other case cited by Brandeis for the first application of the "last resort rule" is *Light v. United States*, 220 U.S. 523, 538 (1911), in which the Court followed the principle of avoiding a constitutional issue by ruling on an alternative ground, relying on the *Siler* formulation. Both cases involved claims that originated in federal courts seeking injunctive relief under an *Ex parte Young* theory. Those types of actions particularly troubled Justice Brandeis because they could involve intrusive federal court orders and federalism tensions.

¹¹⁸ When the Supreme Court instructs lower federal courts to follow the "last resort rule," its application appears mandatory. In applying the rule itself, however, the Court appears to view the rule as a flexible one. See *infra* Section III.

¹¹⁹ See *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The *Pullman* Court refused to follow its method of disposing of the issues in *Siler*—rather than decide the state issues itself, the Court sent the case back to the state court via abstention.

2. Brandeis' Second Application of the "Last Resort Rule"

The second application Brandeis furnished to demonstrate the last resort rule in *Ashwander* is the adequate and independent state ground doctrine: "Appeals [to the United States Supreme Court] from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground."¹²⁰ When reviewing judgments of state courts, the United States Supreme Court only reviews questions of federal law.¹²¹ The Court will decline to hear a case if an adequate and independent state ground supports the judgment of the state court.¹²² The Court reasons that, if a state ground independently supports the judgment, a decision by the Court on federal law grounds will have no effect on the outcome of the case and will amount to an advisory opinion.¹²³

In Section IV.E.2, this Article distinguishes between two branches of the adequate and independent state ground doctrine, expressing concerns regarding one application and validating the other. Before doing so, this Article in Section III traces courts' inconsistent and problematic implementation of the last resort rule since *Ashwander*.

III. IMPLEMENTATION OF THE LAST RESORT RULE

The Court, evaluating implementation of the avoidance doctrine a decade after *Ashwander*, concluded that it had worked well, both for securing individual rights and preserving an appropriate separation of powers.¹²⁴ Alexander Bickel likewise defended use of the avoidance doctrine and the other "passive virtues" by which the Court defers

¹²⁰ 297 U.S. at 347.

¹²¹ *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875). State courts are obviously not inhibited by Article III's case or controversy requirement and do not necessarily follow the last resort rule in their jurisdictional limitations. See, e.g., *DeFunis v. Odegaard*, 529 P.2d 438, 444 (Wash. 1974) (Washington court declined to follow federal rules on mootness because the case presented "a broad issue of substantial public import" appropriate to resolve merits of dispute). But see *Linde*, *supra* note 72, at 38 ("Every state supreme court, I suppose, has declared that it will not needlessly decide a case on a constitutional ground if other legal issues can dispose of the case.").

¹²² See, e.g., *Michigan v. Long*, 463 U.S. 1032 (1983) (requiring Supreme Court review unless the state court judgment makes a clear statement that the judgment relies on an adequate and independent state ground deemed sufficient to support judgment).

¹²³ See, e.g., *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("if the same judgment would be rendered by the state court after we corrected its views of federal law, our review could amount to nothing more than an advisory opinion").

¹²⁴ *Rescue Army*, 331 U.S. at 572. The Court said: "Time and experience have given [the avoidance policy] sanction. They have also verified . . . that the choice was wisely made." *Id.*

constitutional adjudication. He argued that other alternatives yield a manipulable or unprincipled system.¹²⁵ This section demonstrates, however, that the rule has not been implemented in a neutral and consistent manner so as to diminish the potential for manipulation or provide, as Bickel hoped, an effective rule of principle.¹²⁶ Moreover, the Court's construction of the rule in *Zobrest* heightens opportunities for manipulation by transferring control over its applications from judges to litigants.

The critical problem facing a judge as she implements the doctrine of avoiding unnecessary constitutional decisions is determining *which* constitutional determinations are necessary and *when* those determinations become necessary. The last resort rule should be the easiest and most straightforward of the tenets to apply. If, for example, the last resort rule is taken at face value, it dictates that it is never truly necessary to resolve a constitutional claim until all other grounds for ruling are exhausted.

The Court has declared, however, that the avoidance doctrine, in general, necessitates case by case judgment calls.¹²⁷ The Court has used an ad hoc approach in implementing the last resort rule. Four approaches to applying the rule are identified here. First, in *Zobrest*, the Court determined that the last resort rule does not apply if litigants fail to press the nonconstitutional issues.¹²⁸ Previously, the Court chose

¹²⁵ BICKEL, *supra* note 57, at 200 ("solutions based on the premise of an obligation always to decide lead to a manipulative process . . . or to the abandonment of principle and the involvement of the Court in judgments of expediency, as a second-guesser of the political institutions; or, more commonly, to both"); see also ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 121 (1975) ("legal technicalities are the stuff of law").

¹²⁶ Gerald Gunther eloquently critiqued Bickel's avoidance techniques and their potential for expedient and inconsistent implementation in Gunther, *supra* note 36. Suzanne Sherry criticized the Burger Court for selectively using avoidance techniques, such as justiciability doctrines, to avoid enforcing individual civil and criminal rights while vigorously enforcing "majoritarian" rights. Suzanne Sherry, *Issue Manipulation by the Burger Court: Saving the Community from Itself*, 70 MINN. L. REV. 611, 617-68 (1986).

¹²⁷ The Court in 1947 declared that the doctrine necessitates a case by case application. *Rescue Army*, 331 U.S. at 574 ("It is largely a question of enough or not enough, the sort of thing precisionists abhor but constitutional adjudication nevertheless constantly requires.").

¹²⁸ Of course, the Court's decision to address the constitutional issue on its merits in *Zobrest* is not an isolated example of a failure to adhere to the last resort rule. Early in the Court's history, for example, the Court established in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the federal judiciary's power to review executive branch acts and Congressional legislation for constitutionality. In *Marbury*, the Court reached the constitutional issue while declining to consider alternative constructions of Section 13 of the Judiciary Act of 1789 which would have rendered decision of the constitutional issue unnecessary. See CHEMERINSKY, *supra* note 38, at 14; ROBERT L. CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* (1989); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1; see also BICKEL, *supra* note 57, at 171-72 (citing *Marbury* as an example of a constitutional ruling when alternative, nonconstitutional

to remand numerous cases because lower federal courts had failed to consider nonconstitutional grounds of decision prior to ruling on constitutional questions.¹²⁹ The Court used this second approach of vacating and remanding despite both the litigants' failure to press the nonconstitutional issues and the inefficiency for the judiciary and the litigants of such a process. The Court even vacated and remanded when the lower courts had upheld the constitutionality of the challenged legislation.¹³⁰

The Court used this second approach in *Escambia County v. McMillan*, after the district court found that the plaintiff had suffered discrimination in violation of the Fourteenth Amendment and the Voting Rights Act.¹³¹ The appellate court affirmed the district court solely on the basis of its constitutional ruling. The parties did not brief or argue the statutory question on appeal. The Supreme Court vacated the decision and remanded the matter to the appellate court, instructing the court to consider first whether it could affirm the district court based solely on the Voting Rights Act.¹³² The Court, relying on the last resort rule, has used this second approach in cases coming to it on appeal from the highest courts of the states.¹³³

grounds existed). First, the statute in *Marbury* might have been construed to apply only to the Court's appellate jurisdiction, because no other type of jurisdiction was mentioned in the statute. Second, the statute could have been construed as only granting the Court remedial power to issue mandamus when the Court has jurisdiction. The outcome of the judgment in *Marbury* would have been the same if the Court had ruled on either statutory basis, rather than reaching the broader constitutional issues. Few question the broad impact of *Marbury*'s constitutional rulings. CHEMERINSKY, *supra* note 38, at 10; GERALD GUNTHER, CONSTITUTIONAL LAW I (12th ed. 1991); c.f. James M. O'Fallon, *Marbury*, 44 STAN. L. REV. 219 (1992).

Marbury was decided prior to the articulation of the avoidance doctrine in *Ashwander*. However, avoiding constitutional issues was not an entirely new idea. Justice Marshall, the author of *Marbury*, enunciated a proposition similar to the avoidance doctrine in *Ex Parte Randolph*, 20 F. Cas. 242 (C.C.D. Va. 1833) (No. 11,558), thirty years after *Marbury*. *Id.* at 254.

¹²⁹ See, e.g., *Escambia County v. McMillan*, 466 U.S. 48, 51-52 (1984) (vacating and remanding where parties had not briefed and appellate court had not ruled on statutory issues); *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 157-58 (1983) (vacating and remanding for review of statutory issue); *Youakim v. Miller*, 425 U.S. 231, 236-37 (1976) (vacating and remanding for consideration of statutory questions not presented to lower court); *Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U.S. 129, 136 (1946) (vacating and remanding for consideration of any non-constitutional issues which might properly dispose of the appeal).

¹³⁰ See, e.g., *Alma Motor Co.*, 329 U.S. at 135-36.

¹³¹ 466 U.S. 48, 51-52 (1984).

¹³² *Id.* at 52.

¹³³ See, e.g., *Employment Div., Dep't of Human Resources v. Smith*, 485 U.S. 660, 673 (1988) (vacating and remanding to Oregon Supreme Court for further proceedings: "Because we are uncertain about the legality of the religious use of peyote in Oregon, it is not now appropriate for us to decide whether the practice is protected by the Federal Constitution."). But see *Michigan v. Long*, 463 U.S. 1032, 1038 n.4 (1983) ("We may review a state case decided on a federal ground

In yet a third approach, when lower federal courts have failed to sufficiently consider nonconstitutional bases for a judgment, the Court has sometimes considered those bases in order to avoid an unnecessary constitutional ruling.¹³⁴ The Court in *Siler* (on which Brandeis relied heavily for the last resort rule) followed this procedure.¹³⁵ In *Siler*, the Court ultimately determined that it need not reach the constitutional questions because it first determined that the Railroad Commission's action exceeded its authority under a Kentucky statute.¹³⁶ Notably, it reached that conclusion even though the Kentucky courts had never construed the statute.¹³⁷ The *Zobrest* Court also could have considered the nonconstitutional claims itself and then reached the Establishment Clause issue, if necessary, only in the last resort.

Fourth, a federal court can decline to follow the *Siler* procedure to avoid the possibility of speculating on unclear state law issues.¹³⁸ If *Pullman* abstention is appropriate,¹³⁹ federal courts require the litigants to pursue unclear state law issues in state courts before seeking a federal constitutional ruling.¹⁴⁰ When this abstention applies, plaintiffs

even if it is clear that there was an available state ground for decision on which the state court could properly have relied.").

¹³⁴ See, e.g., *Jean v. Nelson*, 472 U.S. 846 (1985); *United States v. Locke*, 471 U.S. 84 (1985); *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981).

¹³⁵ *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175 (1909). This procedure might be less desirable than having the lower federal courts decide factual issues or initially construe the state law.

¹³⁶ *Id.* at 192-93.

¹³⁷ *Id.* at 194.

¹³⁸ See Bandes, *supra* note 78, at 242-45. There is also the possibility that the Court would be forced to reach the constitutional questions, and would have to send the state law issues back to state court, under the rule established in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 100-03 (1984). See Keith Werhan, *Pullman Abstention After Pennhurst: A Comment on Judicial Federalism*, 27 WM. & MARY L. REV. 449, 486-87 (1986) (asserting that *Pennhurst* has removed the discretionary aspect of *Pullman*, and absolutely requires bifurcation in cases situated identically to *Pullman*: "pendent state claims against state officials in federal cases that present alternative federal constitutional claims"); see also Erwin Chemerinsky, *State Sovereignty and Federal Court Power: The Eleventh Amendment After Pennhurst v. Halderman*, 12 HAST. CONST. L.Q. 643 (1985). Justice Stevens, however, has claimed that *Pennhurst* did not qualify the last resort rule, but held only that the Eleventh Amendment proscribed the award of injunctive relief for violations of state law in certain cases, thereby removing the basis for avoiding decision of federal constitutional questions in this class of cases. *Delaware v. Van Arsdall*, 475 U.S. 673, 693 n.5 (1986) (Stevens, J., dissenting).

¹³⁹ *Pullman* abstention is discussed *infra* Section IV.E.1.

¹⁴⁰ *Pullman* abstention would not have been appropriate in *Zobrest*. Construction by the Arizona courts of the Arizona Constitution would not have alleviated the need to consider plaintiffs' Establishment Clause challenge. Because the IDEA imposes substantive requirements as a matter of equal protection on all state schools, the IDEA preempts the Arizona constitution to the extent it is inconsistent. See *Salem College & Academy v. Employment Div.*, 695 P.2d 25, 29-30 (Or. 1985); see also *Smith v. Robinson*, 468 U.S. 992 (1984) (construing predecessor statute

can later return to federal court if resolution of the federal issues proves necessary.¹⁴¹ Similarly, if a state statute so provides, a federal court can certify state law issues to the state's highest court.

When the Court in *Zobrest* found the last resort rule inapplicable, it did not discuss its prior inconsistent implementation of the rule. The Court rejected the rule without formulating "important reasons" for reaching the Establishment Clause issue or explaining why the justifications for the rule could be disregarded.¹⁴² For example, the sensitive social nature of the public funding of interpreters in parochial schools might counsel hesitation in reaching the Establishment Clause.¹⁴³

Although this Article argues in Section IV that the Court appropriately rejected the last resort rule in *Zobrest* because it did not have to strike down the IDEA to reach its Establishment Clause ruling, the *Zobrest* Court did not rely on established justifications for the avoidance doctrine and last resort rule. Instead, it rejected the prudential rule in light of the litigants' failure to press the nonconstitutional issues: "Given this posture of the case, we think the prudential rule of avoiding constitutional questions has no application. The fact that there may be buried in the record a nonconstitutional ground for decision is not by itself enough to invoke this rule."¹⁴⁴ The Court also supported its rejection of the last resort rule with its technical practice of not normally considering issues which were not raised or considered by the intermediate appellate court.¹⁴⁵ Of course, such a Supreme Court prac-

to IDEA); *Straube v. Florida Union Free Sch. Dist.*, 778 F. Supp. 774, 779 (S.D.N.Y. 1991) (state law not enforceable to extent state procedures require additional steps not required in IDEA). In contrast, a state constitution can, in some areas, afford more protection than the federal constitution and not be inconsistent with its provisions. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980).

¹⁴¹ *Pullman*, 312 U.S. at 501-02.

¹⁴² The Court in *Siler* noted that constitutional questions are normally avoided absent "important reasons." 213 U.S. 175, 193. Formal adherence to a traditional maxim fails to explain and justify sufficiently. As Vicki Jackson urged in another context, it is time for "reasoned and honest disclosure of the basis for decision." Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and Sovereign Immunity*, 98 YALE L.J. 1, 7 (1988); see Julie Davies, *Pullman and Burford Abstinence: Clarifying the Roles of Federal and State Courts in Constitutional Cases*, 20 U.C. DAVIS L. REV. 1, 10 (1986).

¹⁴³ According to Justice Frankfurter, the sensitive social nature of the racial integration of sleeping cars in *Pullman* justified use of the last resort rule. In Section IV.E.1, *infra*, this Article rejects that justification.

¹⁴⁴ *Zobrest*, 113 S. Ct. at 2466. In support of this assertion, the Court cited *Board of Airport Committees v. Jews for Jesus, Inc.*, 482 U.S. 569, 572 (1987). In *Jews for Jesus*, the Court was only considering constitutional issues, however, and relied on a constitutional basis which the appellate court had not considered, but which had been before the trial court. 482 U.S. at 572, 577. Thus, the doctrine of avoiding constitutional questions was not applicable.

¹⁴⁵ *Zobrest*, 113 S. Ct. at 2466.

tice offers no guidance for the trial courts or intermediate appellate courts in applying the last resort rule.¹⁴⁶ Do lower courts have a duty to determine whether nonconstitutional grounds for decision remain? Or are they now free to ignore nonconstitutional grounds which are not pressed by the parties?

The Court's ruling in *Zobrest* also underscores the malleability of the last resort rule.¹⁴⁷ Supreme Court Justices have recently charged each other with manipulating tenets of the avoidance doctrine, including the last resort rule, in their zeal to reach the merits of a particular constitutional issue.¹⁴⁸ But perhaps it is too simplistic to characterize the Court's implementation of the last resort rule as convenient manipulation. Bickel argues that, for Brandeis at least, techniques for avoiding constitutional questions represented more than a technical bar raised to avoid the merits if doing so would inure to one's favor. Bickel cites Brandeis' unpublished opinion in *Atherton Mills*—in which he first set out the avoidance doctrine—to support his argument that Brandeis refused to reach the merits, and legitimate Congress's passage of the progressive Child Labor Tax Act, in part, because of his "rigid insistence" on jurisdictional principles such as the avoidance doctrine.¹⁴⁹

¹⁴⁶ The avoidance doctrine applies to lower federal courts as well as the Supreme Court. See *American Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989); *Escambia County v. McMillan*, 466 U.S. 48, 51–52 (1984); *Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U.S. 129, 137 (1946); see also *Carreras v. City of Anaheim*, 768 F.2d 1039, 1042–43 (9th Cir. 1985) (recognizing its duty to resolve state constitutional questions prior to federal ones); *Seals v. Quarterly County Court*, 562 F.2d 390, 392 (6th Cir. 1977). Justice Stevens notes that the Supreme Court's example affects how lower federal courts exercise their powers of limited jurisdiction. *Delaware v. Van Arsdall*, 475 U.S. 673, 692 (Stevens, J., dissenting).

It is impossible to fully examine federal courts' application of the avoidance doctrine. Courts do not always detail whether they have considered the dictate of the "last resort rule" and only passed upon federal constitutional issues after exhausting all other bases or found the rule inapplicable in a particular case. That, of course, renders my conclusions regarding historical use of the doctrine incomplete. The delineation of the problem, however, may bring attention to this failure and encourage a discussion about the doctrine's proper use.

¹⁴⁷ The inconsistent implementation of the last resort rule and the Court's failure to explain its departures from the rule might lead some persons to conclude that the rule has been manipulated in an unprincipled manner. For a similar discussion in context of the justiciability doctrines, see Brilmayer, *supra* note 39, at 298.

¹⁴⁸ See, e.g., *Zobrest*, 113 S. Ct. at 2470 (Blackmun, J., dissenting); *Rust v. Sullivan*, 111 S. Ct. 1759, 1778 (1991) (Blackmun, J., dissenting).

¹⁴⁹ In 1922, fourteen years prior to his famous concurrence in *Ashwander*, Justice Brandeis first articulated the doctrine of avoiding unnecessary constitutional issues in a draft opinion of the *Atherton Mills v. Johnston* decision—a draft which was never issued as the opinion of the Court. Several years earlier, the Supreme Court had struck down a congressional attempt to restrict child labor pursuant to the Commerce Clause in *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (invalidating 1916 Congressional act, pursuant to Commerce Clause, excluding from shipment in interstate commerce articles manufactured, in some circumstances, with child labor). Justice Brandeis and three others dissented based upon the merits of congressional power to

While Brandeis held out for his principles, the Court's membership changed, positions shifted and this important piece of New Deal legislation was declared unconstitutional.¹⁵⁰

Even if judicial manipulation is addressed, however, the Court's approach to the last resort rule in *Zobrest* increased the opportunity for manipulative use of the rule because it allows litigants to determine when it is necessary to rule on a constitutional question. By not pressing nonconstitutional claims on appeal, litigants can easily evade the last resort rule and force courts to render constitutional rulings.¹⁵¹ This can occur even when the facts of the case directly implicate regulations, statutes or state law, as in *Zobrest*. As the dissenters argued, the litigants got something resembling an advisory opinion: a declaration of their constitutional rights without a complete resolution of the controversy.¹⁵² As a result of the Court's ruling in *Zobrest*, the control over application of the last resort rule has been transferred to litigants who seek an expedient resolution of a constitutional issue which, for them, is pressing.

regulate child labor. See BICKEL, *supra* note 7, at 1. Brandeis, a leader of the progressive movement prior to his appointment to the Supreme Court, supported efforts to abolish child labor, and he vigorously dissented in *Hammer*, concluding that Congress had the power to regulate child labor under the Commerce Clause. But Brandeis quietly joined the majority when the Court declared unconstitutional another congressional attempt to regulate child labor under the taxing power in *The Child Labor Tax Case*, in 1922. *Bailey v. Drexel Furniture*, 259 U.S. 20 (1922); see BICKEL, *supra* note 7, at 2. On the same day, the Court dismissed the appeal in *Atherton Mills*—another challenge to the Child Labor Tax Act—as moot because the child laborer had reached an age at which the Act no longer applied to him. 259 U.S. at 15–16.

Bickel considered why Brandeis signed on with the majority in *The Child Labor Tax Case*, despite his vigorous dissent in *Hammer*, and argued that Brandeis' silence may have been due, at least in part, to the position he took in the unpublished *Atherton Mills* draft that unnecessary constitutional issues must be avoided. The unpublished draft opinion prepared by Brandeis indicates that a majority of the Court would have agreed in 1919 to uphold the Act, but he refused to overlook the jurisdictional difficulties and wrote a tentative opinion dismissing the suit for lack of jurisdiction. The case was not moot at that time because the Act still applied to the child laborer. The case was held over by the Court for several years and reargued after new members had joined the Court. By the time it was decided, the Court had reached a different result on the merits of the constitutional question, as evidenced by its decision in *The Child Labor Tax Case*. Thus, Bickel concluded that the delay—due in part to Brandeis' insistence on avoiding unnecessary constitutional questions—came at great cost. He argued that Brandeis may have lost on the merits due to his "rigid insistence" on jurisdictional limitations, "thus demonstrating conclusively that he was not indulging in the coinage of idle epigrams when he said: 'The most important thing we do is not doing.'" BICKEL, *supra* note 7, at 17.

¹⁵⁰ *Bailey*, 259 U.S. at 44.

¹⁵¹ This narrowing of the last resort rule is in sharp contrast to Justice Brandeis' broad formulation of the avoidance doctrine. Indeed, he was extremely concerned with collusive suits, where parties could manipulate proceedings to bring constitutional issues before the federal courts. See *supra* Section II.

¹⁵² See *supra* notes 38–42 and accompanying text.

Arguably, litigants enjoyed a great deal of control in determining what claims to present to a court prior to *Zobrest*. If a litigant chooses not to pursue her nonconstitutional claims in order to resolve a constitutional issue, courts will often, as a matter of general practice, give the litigant such autonomy as the "master of her complaint." This practice obviously creates some tension with the dictates of the last resort rule. *Zobrest* suggests that a lower federal court may refrain from asking parties to brief nonconstitutional grounds for decision if the parties only desire to press a constitutional claim. Litigants, however, will have no incentive (and certainly no duty) to selflessly evaluate the institutional concerns underlying the rule, including concerns of comity and separation of powers, in order to determine whether nonconstitutional grounds merit consideration prior to a constitutional issue. Thus, the *Zobrest* ruling deemphasizes important institutional justifications for the avoidance doctrine. It may also heighten opportunities for manipulation of the judicial function by placing the responsibility for avoiding constitutional questions through the last resort rule primarily on litigants.

The flexibility offered by the Court's implementation of the last resort rule carries with it costs in terms of stability, consistency, efficiency and respectability. The Court once defended the avoidance doctrine by speculating that the premature and abstract decision-making promoted by the opposite policy—a "policy of accelerated decision"—would render rights uncertain and insecure.¹⁵³ It is not obvious, however, that rights are more secure under a flexible system in which the Court can determine the necessity of reaching a constitutional issue in a particular case. In fact, a system in which federal courts reject the last resort rule to render more constitutional decisions may better secure federal rights. By addressing the Establishment Clause issue in *Zobrest* the Court may have provided guidance on a pressing issue to school systems nationwide. Alternatively, proliferation of federal constitutional law may lead to nonuniformity in protection of federal interests. The Supreme Court may better achieve uniformity in federal law if it addresses constitutional issues but urges the lower federal courts and state courts faced with federal constitutional questions to use avoidance techniques.¹⁵⁴

¹⁵³ *Rescue Army v. Municipal Court of L.A.*, 331 U.S. 549, 572 (1947).

¹⁵⁴ The Court has emphasized the value of creating a uniform body of federal law in *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 632 (1874), and *Michigan v. Long*, 463 U.S. 1032, 1039 (1983).

Some might defend the inconsistent implementation of the last resort rule, arguing that one benefit of a prudential doctrine is that it offers the Court the ability to depart from its earlier applications of the doctrine when the occasion demands. Such flexibility is desirable if the Court seeks to test the waters of public reaction or to let a problem simmer prior to issuing a constitutional ruling.¹⁵⁵ If such rulings are not rendered suddenly or haphazardly, reasoned Bickel,¹⁵⁶ the Court's decisions on important constitutional questions will likely find widespread acceptance because the groundwork has been carefully laid and the Court's credibility is preserved.¹⁵⁷ Although I reject such credibility concerns and other grounds as a basis for avoiding constitutional questions, a flexible notion of the last resort rule is suggested in order to address comity and separation of powers concerns. A flexible notion of necessity is desirable to allow federal courts to share their power of constitutional interpretation with the states and other federal branches.

Thus, the last resort rule has not been implemented in a manner which has diminished the potential for manipulation or provided an effective rule of principle. The *Zobrest* Court erred in transferring to litigants control over the necessity of reaching a constitutional issue. The federal courts must become involved in elucidating when the rule's justifications can be disregarded. In the next Section, this Article posits a theory of applying the last resort rule which highlights its federalism and separation of powers justifications.

IV. JUSTIFICATIONS FOR THE LAST RESORT RULE

The Supreme Court has provided six closely related justifications for the general doctrine of avoiding constitutional questions, noting their grounding in "the unique place and character . . . of judicial review of governmental action for constitutionality."¹⁵⁸ This Section

¹⁵⁵ Bickel praised techniques such as the avoidance doctrine precisely because they allow the Court to control the timing and circumstances of its ultimate constitutional pronouncements—those decisions with the greatest impact. To borrow Bickel's phrase, the Court might "reflect out loud . . . without as yet assuming responsibility" for the constitutional pronouncement. BICKEL, *supra* note 57, at 176.

¹⁵⁶ *Id.* at 240.

¹⁵⁷ *Id.*

¹⁵⁸ *Rescue Army*, 331 U.S. at 571 (Court sets forth non-exhaustive list of doctrine's foundations in case remanding California Supreme Court's decision for further proceedings); see *Delaware v. Van Arsdall*, 475 U.S. 673, 693–94 n.6 (1985) (Stevens, J., dissenting) (calling *Rescue Army* list one of the Court's most forceful expositions of avoidance doctrine).

offers an analysis of these justifications as support for the last resort rule.

A. A "Delicate" and "Final" Function

The Court has often called judicial review of legislative acts the most important and delicate of its responsibilities.¹⁵⁹ The Court's characterization of judicial review of legislative acts as a "delica[te]" function, "particularly in view of possible consequences for others stemming also from constitutional roots," fundamentally justifies the general avoidance doctrine.¹⁶⁰ An evaluation of the force of this assertion as a justification for avoiding constitutional questions must be linked to evaluation of a second justification offered for the avoidance doctrine, that such review is a "final" function. If the Court renders a final, binding conclusion as to constitutional interpretation each time it speaks on a constitutional issue, the arduous task of amending the Constitution may provide the only counter to the Court's ruling.¹⁶¹ If, however, the Court acts as more or less an equal participant with other political actors in an ongoing dialogue, those other non-judicial actors can reinterpret and reapply a constitutional provision.

The Court has declared itself the ultimate arbiter of the Constitution.¹⁶² Such broad statements raise the possibility of judicial review undermining majority rule. The "countermajoritarian difficulty," posed most notably by Bickel, asserts that "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people . . ."¹⁶³ Fed-

¹⁵⁹ See, e.g., *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345 (1936) (referencing other cases to support the claim for the "great gravity and delicacy" of this function). While Brandeis acknowledged the Court's "solemn dut[y]" to review the validity of legislative acts, he too cautioned that such "power is the ultimate and supreme function of courts." BICKEL, *supra* note 7, at 7 (unpublished *Atherton Mills* draft quoting *Chicago & Grand Trunk Ry. v. Wellman*, 143 U.S. 339, 345 (1892)); see also *Poe v. Ullman*, 367 U.S. at 497, 509 (1961) (Brennan, J., concurring in judgment) (until the true dispute regarding large scale birth-control clinics becomes ripe, "this Court may not be compelled to exercise its most delicate power of constitutional adjudication").

¹⁶⁰ *Rescue Army*, 331 U.S. at 571. The Court has only discussed the six justifications in terms referring to the general policy of avoiding unnecessary decision of constitutional questions rather than in terms of the last resort rule.

¹⁶¹ Felix Frankfurter urged that President Roosevelt delay before proposing the drastic alternative of a constitutional amendment to counter the Court's anti-New Deal rulings in the 1930's: "[H]e feared that an amendment to the Constitution would diminish the intrinsic character of a document that was intended to endure and that he profoundly believed had ample resources within its original terms to meet the changing needs of successive generations." FRANKFURTER DIARIES, *supra* note 45, at 58.

¹⁶² See, e.g., *Powell v. McCormack*, 395 U.S. 486, 549 (1969); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

¹⁶³ BICKEL, *supra* note 57, at 16-17.

eral courts' encroachment on the popular will through invalidation of legislative acts, in particular, disturbed Brandeis and Bickel.¹⁶⁴ Thus, the perception of judicial review of legislative acts as a delicate and final function is closely linked to the separation of powers principle, discussed more fully below.

Even if one accepts the countermajoritarian difficulty,¹⁶⁵ it only has force to the extent that judicial decrees are viewed as final, ultimate actions which cannot be overturned by other political actors.¹⁶⁶ In every constitutional ruling the Court announces principles which are developed as they are applied in other cases. However, those principles are not unassailably final. While a judicial decree may bind the parties to a particular controversy, it may not necessarily represent the last word on a constitutional issue.¹⁶⁷ As Bickel recognized, there is a critical difference in the precedential nature of the "general law" created by the Court in announcing a constitutional principle and the binding effect of a judicial judgment on the parties to the controversy.¹⁶⁸

Barry Friedman argues that judicial finality is "seriously overstate[d]," citing examples of nonenforcement of judicial decisions ranging from new legal challenges, to "footdragging," to outright de-

¹⁶⁴ *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 354 & n.12 (1936) (Brandeis, J., concurring) (relying on James B. Thayer's "clear mistake rule," which gives great deference to legislative decisions absent unmistakable constitutional doubt); see BICKEL, *supra* note 57, at 35. Brandeis was angered by the federal courts' thwarting of popular will through invalidation of progressive legislation. For background on the constitutional crisis surrounding the "old Court" and the New Deal, see Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

¹⁶⁵ Friedman has assailed the countermajoritarian difficulty with great force. He argues that courts are not "systematically less majoritarian than the political [branches]," and challenges the premises of the countermajoritarian difficulty by concluding that courts are engaged in an ongoing dialogue with the other branches and with the people. Through such dialogue, the Constitution is interpreted and takes on meaning. Friedman, *supra* note 93 at 586, 657; see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 62 (1980); Ackerman, *supra* note 164, at 1014-15 (listing numerous commentators who have wrestled with the countermajoritarian difficulty); Steven L. Winters, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881, 1889-90 (1991) (judges are dependent on cultural understanding which "shape and produce deeply majoritarian legal outcomes").

¹⁶⁶ See Friedman, *supra* note 93, at 588 & n.55, 616.

¹⁶⁷ Friedman calls this difference one between the particular "case" and the constitutional "issue." *Id.* at 644. The Court's decrees on the issue are the "lawsaying" function of the decision-making. *Id.* at 646; see also Ann Althouse, *Standing, In Fluffy Slippers*, 77 VA. L. REV. 1177 (1991). Bickel also illuminates this difference between the case and the principle of constitutional law necessary to a decision of the case. BICKEL, *supra* note 57, at 203, 247-48. He defines the great paradox thus: "the Court may only decide concrete cases and may not pronounce general principles at large; but it may decide a constitutional issue only on the basis of general principle. In the performance of this function . . . the Court's 'mental vision embraces distance scenes.'" *Id.* at 247 (quoting Chief Justice Hughes).

¹⁶⁸ BICKEL, *supra* note 125, at 112.

fiance.¹⁶⁹ Congress, for instance, can often respond to the Court's constitutional decisions without amending the Constitution.¹⁷⁰ For example, in light of *Zobrest*, Congress could explicitly state that the IDEA does not *require* the expenditure of public funds for interpreters in the circumstances raised by the *Zobrest* child. Moreover, the Court has revised its own constitutional positions over time,¹⁷¹ and challenges to

¹⁶⁹ Friedman, *supra* note 93, at 644–52. For example, despite the Court's claim of finality, he notes that the Court's word in *Cooper v. Aaron* was not the last word on segregation in Little Rock. *Id.* at 649. Friedman also cites continued prayer in public schools as an example of defiance. *Id.* at 608; see BICKEL, *supra* note 57, at 254–72 (discussing public and governmental reaction to school desegregation decisions of the Court); Garrett Epps, *The Littlest Rebel: James J. Kilpatrick and the Second Civil War*, 10 CONST. COMMENT. 19 (1993) (describing Southern resistance to integration of public schools after *Brown v. Board of Education*).

¹⁷⁰ See *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (observing that the 1982 amendments to Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, were specifically intended to repudiate the plurality opinion of *City of Mobile v. Bolden*, 446 U.S. 55 (1980)); see also the revised Anti-Injunction Act, 28 U.S.C. § 2283 (1948 amendment providing exception to the general prohibition in the Act, in reaction to the Court's decision in *Toucy v. New York Life Ins. Co.*, 314 U.S. 118 (1941), which was intended to specifically override the case on its facts); *Prudential Ins. v. Benjamin*, 328 U.S. 408 (1946) (affirming the validity of the McCarren Act of 1945 which had specifically been enacted to reverse the Supreme Court decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), holding the Sherman Antitrust Act of 1890 applicable to insurance companies).

In the area of federal common law, the Court has noted that a right of action that is judicially implied from a statute may be trumped by explicit Congressional action in that area. See *Franklin v. Gwinnett County Pub. Sch.*, 112 S. Ct. 1028, 1038–39 (1992) (asserting that Congress had the opportunity to change implied remedies under Title IX of the Education Amendment of 1972, 20 U.S.C. §§ 1681–88, after *Cannon v. University of Chicago*, 441 U.S. 677 (1979)); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (Court held that the procedural safeguards against Congress's impairment of state sovereignty inhered in the structure and process of congressional lawmaking itself. Thus, although the Court would not invalidate federal regulation of state action under the commerce power, Congress was free to regulate itself.). But note that Congress's ability to reverse Supreme Court decisions may be limited to issues of statutory construction and may exclude "constitutional" determinations. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989) (Justice Kennedy, speaking for the Court stated: "Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."); see Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1 (1993); Mary A. Schnabel, Comment, *The Religious Freedom Restoration Act: A Prison's Dilemma*, 29 WILLAMETTE L. REV. 323, 324 (1993) (noting that the Religious Freedom Restoration Act of 1993, § 578, 103d Cong., 1st Sess. (1993), was introduced by Congress for the specific purpose of overruling the Supreme Court's decision in *Oregon Employment Div. v. Smith*, 494 U.S. 872 (1990), which stated that a neutral law of general application burdening the free exercise of religion need not be justified by a compelling state interest).

¹⁷¹ See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2798 (1992) (describing the overruling of *Lochner v. New York*, 198 U.S. 45 (1905), by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and the rejection of the constitutional ruling in *Plessy v. Ferguson*, 163 U.S. 537 (1896), by *Brown v. Board of Education*, 347 U.S. 483 (1954)); accord, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) (explicitly overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), and extending the application of federal regulation under the Commerce Clause to state functions, regardless of the nature of those functions).

constitutional rulings via new factual or legal arguments constantly develop the principles of constitutional law.¹⁷²

Bickel might agree, in large part, with such a responsive depiction of our constitutional system. Even in his early work, he viewed our constitutional system as resourceful.¹⁷³ Later, he explicitly emphasized that a rule of constitutional law can only become effective if the people and non-judicial political actors voluntarily comply with the Court's constitutional rulings.¹⁷⁴ Bruce Ackerman has argued, citing changes in the New Deal era as an example, that the Court only engages in fundamental constitutional lawmaking—essentially amending the Constitution—with the agreement of Congress and when a national consensus has been achieved.¹⁷⁵ This description resonates with Bickel's perception of a continuing colloquy between the Court and non-judicial actors concerning constitutional principles:

The Court thus interacts with other institutions, with whom it is engaged in an endlessly renewed educational conversation. It is a conversation that takes place when statutes are construed, when jurisdiction is defined and perhaps declined . . . and also when large "constitutional issues" are decided. And it is a conversation, not a monologue.¹⁷⁶

¹⁷² Friedman, *supra* note 93, at 652 ("Over time, as a problem is lived with, the Court does not work in isolation to divine the answer that is right. It has the means to elicit partial answers and reactions from the other institutions, and to try tentative answers itself."); Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 52-53 & n.99 (1993) (describing Brandeis' progressive approach to precedent and "changed circumstances" as grounded in pragmatist thinking); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L. J. 1860, 1876 (1987) ("Rights discourse reaches temporary resting points from which new claims can be made.").

¹⁷³ BICKEL, *supra* note 57, at 117 (finality of decrees is a "matter of degree") and 235 (finality of consequences of constitutional determinations dependent on circumstances).

¹⁷⁴ BICKEL, *supra* note 125, at 111.

The general practice is to leave the enforcement of judge-made constitutional law to private initiative, and to enforce it case by case, so that no penalties attach for failure to abide by it before completion of a successful enforcement litigation. This means quite literally that no one is under any legal obligation to carry out a rule of constitutional law announced by the Supreme Court until someone else has conducted a successful litigation and obtained a decree directing him to do so.

Id.; see also *id.* at 101-02 (describing Abraham Lincoln's response to the *Dred Scott* decision as viewing it binding only on the litigants).

¹⁷⁵ Bruce A. Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 459 (1989) (arguing that "the New Deal Democrats amended the Constitution by provoking a complex constitutional dialogue between the voters at large and the institutions of the national government"); Ackerman, *supra* note 164. See generally BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

¹⁷⁶ BICKEL, *supra* note 125, at 111.

The public response to the Court's pronouncements on constitutional issues also affects the Court's ability to have the final say on an issue.¹⁷⁷

Thus, many would agree that our system is responsive and that the finality of a federal court's constitutional pronouncements may be highly contingent. But the finality concern underlying the avoidance doctrine may be based on more than a claim that a constitutional amendment might be necessary to respond to some rulings by the Court. It might be grounded in the fear that judicial action *forecloses* response by the other branches and the people themselves—or at least makes such response less likely and less authoritative. At an extreme, the concern might be put thus: "[The] tendency of a common and easy resort to this great function [of judicial review] . . . is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility."¹⁷⁸

It is difficult to gauge the extent that judicial activity dwarfs the non-judicial political capacity. The Court's decision in *Roe v. Wade*, for example, might be characterized as ruling more broadly than necessary on a constitutional issue. Justice Ruth Bader Ginsburg has argued that "[a] less encompassing *Roe* . . . might have served to reduce rather than to fuel controversy."¹⁷⁹ On the other hand, the Court's decision may have stirred up a sense of moral responsibility and encouraged more political participation among certain groups. For example, opponents of *Roe* have unsuccessfully proposed legislation in Congress to remove federal courts' jurisdiction over abortion cases. Such a reaction

¹⁷⁷ For a wonderful description of constitutional law as a dialogue involving many actors, replete with specific examples, see LOUIS FISHER, *CONSTITUTIONAL DIALOGUES* (1988); see also BICKEL, *supra* note 57, at 235 (recognizing the resourcefulness of non-Court actors in our system to control the consequences of some constitutional decisions); PHILIP BOBBITT, *CONSTITUTIONAL FATE* 5 (1982) (many actors interpret the Constitution); Friedman, *supra* note 93, at 682 ("The problem with the countermajoritarian difficulty is that it *overstates* the role of courts and thus understates society's responsibility."); Frohnmayer, *supra* note 66 (urging other branches, particularly the legislature, to accept their responsibility in a system of shared powers); Van Alstyne, *supra* note 128 (asserting that the Supreme Court is not the only expositor of Constitution).

¹⁷⁸ BICKEL, *supra* note 57, at 147 (quoting J.B. THAYER, *JOHN MARSHALL* 106-07 (1901)).

¹⁷⁹ Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199 (1992). For another critique of *Roe* reflecting another aspect of the avoidance principle, see Richard A. Posner, *What Has Pragmatism to Offer Law?*, in *PRAGMATISM IN LAW AND SOCIETY* 29 (Michael Brint & William Weaver eds., 1991).

On a pragmatic view, the error of *Roe v. Wade* is not that it read the Constitution wrong, but that it prematurely nationalized an issue best left to simmer longer at the state and local level until a consensus based on experience with a variety of approaches to abortion emerged. Posner, *supra*, at 42.

may be desirable, even if it brings with it some hostility toward the Court.

As long as other actors are able to respond to federal courts' decrees, including those of the Supreme Court, the courts' decrees are less final. If non-judicial actors (at the state and federal levels) possess the ability to participate in the constitutional dialogue, but choose not to, judicial decision making is, likewise, a less delicate function. They do not foreclose the ability of others to act. At times, judicial decisions might even spur responsive constitutional development. A Supreme Court decision about the meaning of a right guarantee is not necessarily "final" with respect to citizens of states with the same or similar state guarantees if the decision fuels responsive activity at a state constitutional level.¹⁸⁰

Some might respond that stability in the law is undermined if our system is too responsive, if the Supreme Court's constitutional decisions are not viewed as sufficiently final. But strict adherence to the last resort rule due to finality concerns would not greatly promote stability in constitutional law. Constitutional interpretation is not a fixed and certain enterprise. Constitutional law is constantly developing: being reinterpreted by lower federal courts and state courts as new factual challenges are presented, being developed as legislatures enact slightly different laws and as executive officials promulgate new regulations. Moreover, the Supreme Court, with its discretionary certiorari policies, faces only a small portion of the constitutional questions raised in litigation today. The federal circuits may have differing constitutional pronouncements on the same issue for a considerable period of time.¹⁸¹ Stability—in terms of a uniform body of law—is not today, and perhaps has never been, a prominent feature of federal constitutional law. If judicial pronouncements of constitutional principles are viewed as helpful in guiding development of constitutional law, strict adherence by the lower federal courts to the last resort rule should be rejected.¹⁸²

¹⁸⁰The Supreme Court has explicitly stated that a state may "adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (citing *Cooper v. California*, 386 U.S. 58, 62 (1967)).

¹⁸¹Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1161 (1993) ("[D]ifferent courts can and will reach different conclusions about the meaning of such constitutional values. Agreement is no more to be expected of courts than of individuals.").

¹⁸²Today, with the Supreme Court's discretionary certiorari policies, the last resort rule may most often be of concern in the lower federal courts.

Thus, two important justifications for the avoidance doctrine in general, and the last resort rule in particular—the delicacy and finality of the function of judicial review—have less force in our dialogic system. One of the most serious concerns raised by the first two justifications for the last resort rule is that it might take a constitutional amendment to alter a court's pronouncement on a constitutional issue. If the court's ruling, however, does not foreclose participation in the constitutional dialogue by non-judicial actors, the court should disregard the last resort rule.¹⁸³ For example, if a court recognizes that a right also exists in a state constitution, the court should be less concerned with construing the parallel federal provision.

The second serious concern raised by these two justifications is the idea that judicial review is more dangerous or invasive when it involves invalidating legislative acts, and that courts, therefore, should exercise particular caution when judicial review may involve invalidating a legislative act. This distinction is discussed more fully with the separation of powers concern below.

B. *The Judiciary's Limitations*

The avoidance doctrine is also premised on "the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement."¹⁸⁴ Additionally, federal courts are vulnerable to the extent their jurisdiction and the work of their judges are subject to control by the other branches.¹⁸⁵ Proponents of avoidance techniques such as the last resort rule believe that the federal judiciary must exercise its powers cautiously to conserve the fragile credibility of the least dangerous branch.¹⁸⁶ Brandeis recog-

¹⁸³ This suggestion is similar to the one offered by Lea Brilmayer in her classic article on justiciability stating that cases which will have less precedential effect should give judges less pause in implementing the case or controversy requirement. See Brilmayer, *supra* note 39, at 316-17.

¹⁸⁴ *Rescue Army v. Municipal Court of L.A.*, 331 U.S. 549, 571 (1947).

¹⁸⁵ Avoiding constitutional adjudication, in which the Court might irritate Congress by striking down statutes, protects the Court from congressional retaliation in the form of frequently proposed limits on federal jurisdiction. Congress can contribute to increased federal judicial workload, attempt to "pack" the court, and, in general, make life miserable for federal judges. See CHEMERINSKY, *supra* note 38, at 146-51; FRANKFURTER DIARIES, *supra* note 45, at 86 (Justice Jackson noted that the Court "is subject to being stripped of jurisdiction or smothered with additional justices"); Louis L. Jaffee, *Mr. Justice Jackson*, 68 HARV. L. REV. 940 (1955) (interview with Justice Jackson including comments on Court's vulnerability).

¹⁸⁶ BICKEL, *supra* note 57, at 201-68; CHEMERINSKY, *supra* note 38, at 39 (influential scholars "contend that federal courts generally depend on the other branches to voluntarily comply with judicial orders and that such acquiescence depends on the judiciary's credibility") (citing BICKEL, *supra* note 57 and JESSEE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 55-59 (1980)); see also Daniel O. Conkle, *The Legitimacy of Judicial Review in Individual Rights*

nized the "vehement" popular protest against the judiciary's review of congressional acts.¹⁸⁷ In a 1922 letter to Felix Frankfurter, Brandeis warned that to protect itself from prevailing discontent, the Supreme Court must exercise restraint by, among other things, "refusing to pass on constitutional questions if the case can be disposed of on any other."¹⁸⁸ Scholarship and public opinion of the 1920's and 1930's reflected the prevailing discontent with many Court decisions, and Brandeis believed that only with the strictest self-restraint could the Court avoid aggravating the discontent and undermining the legitimacy of the federal courts.¹⁸⁹

Cases: *Michael Perry's Constitutional Theory and Beyond*, 69 MINN. L. REV. 587, 588 (1985). One of the basic underpinnings of judicial restraint is the concept of husbanding judicial resources to preserve the federal judiciary's credibility: "The indispensability of husbanding what powers one had, of keeping within bounds if action is not to outrun wisdom." Freund, *Introduction to BICKEL*, *supra* note 7, at xvii.

¹⁸⁷ In the draft opinion of *Atherton Mills*, Justice Brandeis wrote:

For nearly a century and a quarter Federal courts, as an incident to deciding cases rightfully before them, have necessarily exercised at times the solemn duty of declaring acts of Congress void. But the long continued, uninterrupted exercise of this power has not sufficed to silence the doubt originally expressed whether the framers of the Constitution intended to confer it. On the contrary, the popular protest against its exercise has never been as vehement, nor has it ever secured the support of so many political thinkers and writers, as in the last decade. At a time like the present, when the fundamental principles upon which our institutions rest are being seriously questioned, those who have faith in their wisdom and desire to preserve them unimpaired, can best uphold the Constitution by careful observance of the limitations which it imposes.

BICKEL, *supra* note 7, at 13 (quoting draft opinion).

¹⁸⁸ Justice Brandeis lists four doctrines of judicial restraint:

1. In refraining from all constitutional dicta.
2. In refusing to consider a constitutional question except in "cases" or "controversies"—"initiated according to the regular course of judicial procedure."
3. In refusing to pass on constitutional questions if the case can be disposed of on any other.
4. In refusing to hold an act void unless it clearly exceeds the powers conferred, etc.

Letter from Louis D. Brandeis to Felix Frankfurter (Sept. 19, 1922), *reprinted in* BRANDEIS LETTERS, *supra* note 87, at 110; *see* BICKEL, *supra* note 57, at 112 (for Brandeis, the "mediating techniques of not doing" were the most important thing the Court did).

¹⁸⁹ BICKEL, *supra* note 57, at 45-46 (citing the turbulent reaction to Court decisions in the 1930's); CHERMERINSKY, *supra* note 44, at 135. In response to the *Child Labor Tax Case*, 259 U.S. 20 (1922) (discussed *supra* note 149), Senator Robert M. La Follette, in a speech to the American Federation of Labor on June 14, 1922, "proposed a constitutional amendment that would have prohibited lower federal courts from invalidating legislation and would have allowed the Congress to override a Court decree regarding specific legislation simply by repassing the measure." BRANDEIS LETTERS, *supra* note 87, at 104 n.5. The desire to restrain the Court was echoed by academics such as Raymond Buell who recommended that any decision by the Court to invalidate legislation should be made by a two-thirds majority. Raymond Leslie Buell, *Reforming the Supreme Court*, 114 NATION 714 (June 14, 1992).

In 1947, evaluating the avoidance doctrine generally, the Supreme Court speculated that to pursue another policy—a policy of “accelerated decision”—“might have put an end to, or seriously impaired, the distinctively American institution of judicial review.”¹⁹⁰ The Court continued: “It is not without significance for the [avoidance] policy’s validity that the periods when the power [of judicial review of legislative acts] has been exercised most readily and broadly have been the ones in which this Court and the institution of judicial review had their stormiest experiences.”¹⁹¹

Ackerman notes that Bickel’s countermajoritarian difficulty “recalls the Old Court’s long, and ultimately futile, judicial struggle against the New Deal.”¹⁹² By using the last resort rule frequently, the Court can live with a constitutional problem and let a solution simmer until widespread acceptance is at hand.¹⁹³ Bickel argued that the avoidance doctrine, by allowing the judiciary to render unpopular decisions cautiously, rather than suddenly or haphazardly, preserves judicial credibility and increases public acceptance of Court decisions.¹⁹⁴ The last resort rule allows judges to determine when widespread acceptance is at hand or when more simmering is necessary.

But even if a judge is correct in her assessment that the public is not ready to accept an unpopular opinion, how long can a court justifiably avoid a constitutional problem by use of the last resort rule? Some scholars argue that preserving credibility or political capital should not concern the judicial branch.¹⁹⁵ Arguably, in addition to the

¹⁹⁰ *Rescue Army v. Municipal Court of L.A.*, 331 U.S. 549, 572 (1947).

¹⁹¹ *Id.* at 572 n.38.

¹⁹² Ackerman, *supra* note 164, at 1015. In 1935, the Court “invalidated the National Recovery Act, plunging the nation into a major constitutional confrontation.” Joseph Lash, *Introduction to FRANKFURTER DIARIES*, *supra* note 45, at 57. Frankfurter advised Franklin Delano Roosevelt to postpone directly attacking the Court on that decision until “other issues ‘accumulate popular grievances against the Court.’” *Id.*

¹⁹³ Through technical devices such as the avoidance doctrine, the Court could control when it interprets the Constitution in order to ensure a receptive reaction from the public and “majoritarian” branches and afford “the necessary leeway to expedient accommodation.” BICKEL, *supra* note 57, at 111–98 (“The Passive Virtues” chapter). The means for accomplishing these goals were a variety of doctrines Bickel described as “the passive virtues.” *Id.*; see also Friedman, *supra* note 93, at 681.

¹⁹⁴ BICKEL, *supra* note 57, at 240; BICKEL, *supra* note 125, at 26, 106, 110 and 120. Some who call themselves neopragmatists might agree that precipitate social change is dangerous. See, e.g., Posner, *supra* note 106, at 41–42.

¹⁹⁵ CHEMERINSKY, *supra* note 44, at 133–38; CHEMERINSKY, *supra* note 38, at 39 n.5 (“conserving judicial credibility should not be a primary objective in constitutional interpretation”); LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* viii (2d ed. 1987); Lino A. Graglia, *Do Judges Have a Policy-Making Role in the American System of Government?*, 17 HARV. J.L. & PUB. POL’Y 119, 129 (1994).

duty to hear cases properly before them, federal courts have a duty to render an unpopular decision when adherence to the Constitution so demands.¹⁹⁶ The last resort rule, however, does not require a court to refuse to decide a case; it requires a refusal to resolve the case on a constitutional ground. As argued when considering the separation principle below, decisions of certain issues, particularly those involving non-majoritarian rights, may never find widespread acceptance. In fact, decision by a federal court on constitutional grounds may be necessary to foster acceptance of such rights. For example, unanimous constitutional interpretation by the Supreme Court and respectful tones in opinions are two methods of addressing viability concerns.¹⁹⁷ In any event, the dilemma of determining the appropriate moment for avoiding constitutional decision cannot always depend on waiting for a right time or receptive audience.

Even the initial assertion that judicial credibility is fragile is not without dissenters. Two hundred years of history have disproved "predictions of doom—that society could not accept a government where judges had discretion to choose constitutional values," including values involved in sensitive social issues such as desegregation and abortion.¹⁹⁸ Rather than fragile, judicial credibility can just as persuasively be characterized as robust, and the Supreme Court arguably has reached a historically unparalleled level of stature and importance.¹⁹⁹ Of course, others might counter that the robust state of the Court's credibility derives from past prudence.

At a minimum, support for the last resort rule based on the judiciary's limited credibility should be questioned. Although it is

¹⁹⁶ See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 131–49 (1977) (judicial review vindicates the rights of unpopular minorities). While recognizing that justiciability doctrines serve important goals, such as addressing separation of powers concerns, conserving judicial resources, improving decisionmaking and promoting fairness, costs are attached. "[I]t is at least equally important that the doctrines not prevent the federal courts from performing their essential function in upholding the Constitution of the United States and preventing and redressing violations of federal laws." CHEMERINSKY, *supra* note 38, at 40.

¹⁹⁷ See *Brown v. Board of Educ.*, 347 U.S. 483 (1954). See generally Ginsburg, *supra* note 179.

¹⁹⁸ CHEMERINSKY, *supra* note 44, at 133–34. Chemerinsky contends that the legitimacy argument "assumes that the people believe judicial decisions are entirely formalistic, with the Court reasoning from clear constitutional premises to determinate conclusions." He concludes that society is sophisticated enough to realize, particularly in light of controversial decisions such as *Brown v. Board of Education*, 349 U.S. 294 (1955), and *Roe v. Wade*, 410 U.S. 113 (1973), that the Constitution is not merely being mechanically applied by the courts.

¹⁹⁹ CHEMERINSKY, *supra* note 44; *id.* at 135 (discussing Roosevelt Court packing plan); John J. Gibbons, Keynote Address, 56 N.Y.U. L. REV. 260, 271 (1981) ("The historical record suggests . . . judicial review is in fact quite robust."); Friedman, *supra* note 93, at 624–25 (citing, among other indicators, public interest in Court decisions and its makeup).

difficult to gauge the judiciary's credibility and viability empirically, historical developments indicate that we do not need to take as sacred assertions that the judiciary's credibility and viability are fragile.²⁰⁰ No link between avoiding decision of constitutional questions and judicial fragility has been proven. For example, imagine the reaction if *Brown* had been decided on a plausible non-constitutional ground. Suppose a federal funding statute could have been interpreted to require any state accepting federal aid to end public school segregation. If the Court required integration in the statutory rather than constitutional bases, it seems unlikely that the public reaction would focus on the ground for decision rather than the bottom-line integration outcome.

C. *The Importance of Constitutional Adjudication*

Another justification for the avoidance doctrine is the "paramount importance of constitutional adjudication in our system."²⁰¹ This justification overlaps to some extent with the delicate and final nature of the constitutional function, discussed above. But it also implicates the role of constitutional rights.

The Court sometimes claims that the ability to declare constitutional rights is the most important power the federal judiciary wields. But many individual rights depend on administrative and statutory claims. Justice Antonin Scalia has argued that not "every constitutional claim is ipso facto more worthy, and every statutory claim less worthy, of judicial review."²⁰² A decision by a court clarifying a statutory or procedural entitlement to relief may have a tremendous effect on a great number of individuals, or on the workings of an administrative agency.²⁰³

Skeptics might counter, however, that judicial interpretation of constitutional provisions is more critical because Congress can correct or more easily alter a court's nonconstitutional ruling. For example, if the Court implies a private cause of action for damages in a congres-

²⁰⁰ CHEMERINSKY, *supra* note 44, at 134.

²⁰¹ *Rescue Army v. Municipal Court of L.A.*, 331 U.S. 549, 571 (1947).

²⁰² *Webster v. Doe*, 486 U.S. 592 (1988) (Scalia, J., dissenting) (employee of Central Intelligence Agency sought review under the Administrative Procedure Act of his dismissal alleging constitutional and other violations; Court concluded that Congress did not intend to preclude judicial review of colorable constitutional challenges). Justice Scalia hypothesizes: "A citizen would much rather have his statutory entitlement correctly acknowledged after a constitutionally inadequate hearing, than have it incorrectly denied after a proceeding that fulfills all the requirements of the Due Process Clause." *Id.* at 618.

²⁰³ The litigation involving the Northern Spotted Owl demonstrates this effect. *See, e.g., Seattle Audubon Society v. Espy*, 998 F.2d 699 (9th Cir. 1993).

sional statute, Congress can clarify or revise the statute to preclude such relief. Congress may need to address a constitutional ruling through the more cumbersome "supermajoritarian" process of amending the Constitution. However, as noted earlier, Congress and other non-judicial actors in our system have numerous ways to respond to judicial decisions: to revise legislation, or to distinguish or develop the Court's pronouncements on constitutional issues through new legal challenges. Similarly, rights claims can sometimes more successfully be litigated under state constitutions.

Even if all agree that deciding constitutional issues is the most important function of federal courts, or at least one of the primary functions of federal courts,²⁰⁴ it does not follow that the courts should avoid such a responsibility. On the contrary, the importance of such issues (considered alone) might dictate a heightened duty to decide constitutional questions.²⁰⁵

Thus, I reject application of the last resort rule based on concerns about the federal courts' credibility and the delicate, final and important nature of constitutional adjudication. Even if those justifications persuaded previously, they have less force in our modern constitutional system. Instead, the final two justifications for the last resort rule, discussed next, counsel in favor of retaining a flexible version of the rule.

D. *Separation of Powers and Respect for Other Branches*

The most forceful justifications for the avoidance doctrine are "the necessity, if government is to function constitutionally, for each [branch] to keep within its power, including the courts"²⁰⁶ and "the consideration due to the judgment of other repositories of constitutional power

²⁰⁴ See Bandes, *supra* note 78, at 319 ("the most important goal of Article III is to preserve the Court as primary guardian of the Constitution"); see also MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 1 & n.2 (1980); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 42–44 (1979); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1265 (1961).

²⁰⁵ Justice Douglas, dissenting from the Court's refusal to hold the dispute regarding Connecticut's law banning contraceptive use ripe in *Poe v. Ullman*, 367 U.S. 497, 513 (1961) argued: "A sick wife, a concerned husband, a conscientious doctor seek a dignified, discrete [sic], orderly answer to the critical problem confronting them. . . . They are entitled to an answer to their predicament here and now." BICKEL, *supra* note 57, at 127 (citing Solicitor General James M. Beck's opinion that it was "a citizen's right to have any constitutional issue ultimately decided by the Supreme Court, 'as the final conscience of the Nation in such matters.'"). Scholars have debated extensively the problem of reconciling the duty of federal courts to decide cases properly before them with techniques such as the abstention doctrines. The commentators cited *supra* at note 204 discuss this issue, as does Professor Bandes, cited *supra* at note 78.

²⁰⁶ *Rescue Army*, 331 U.S. at 571. Separation of powers entails separate institutions sharing

concerning the scope of their authority."²⁰⁷ These justifications are grounded in the separation of powers principle in a constitutional and prudential sense. This analysis assumes that the federal courts will continue to adhere to established constraints flowing from the "case and controversy" requirement, including the justiciability and political question doctrines. The last resort rule is an additional, prudential restraint influenced by both the separation principle and the prudential matter of appropriate respect for the other federal branches.

Concerns based on the separation principle and comity are complex and elusive to apply in a manner that is not purely reflexive. The remainder of this Article offers a formulation for applying the rule which takes into account these tensions. Retaining a prudential version of the last resort rule is necessary to afford respect for the states and other branches, and in order to share with them the power of constitutional interpretation and development.

As Brandeis acknowledged, a judge must "shrink" from exercising such power only where she can do so in a manner consistent with her duty and official oath. A federal judge's oath requires her to uphold the Constitution, and to decide cases properly before her, and over which Congress has properly given the court jurisdiction.²⁰⁸ In addition to the avoidance doctrine, certain abstention doctrines dictate that deferral or avoidance of a decision is sometimes appropriate even when a federal court has jurisdiction over a case. Some scholars argue that the duty to hear cases properly before the federal courts is defeated by such doctrines, and that declining to exercise jurisdiction given by Congress itself violates the separation of powers doctrine.²⁰⁹

necessarily overlapping powers. See BICKEL, *supra* note 57, at 261 (governmental functions "cannot and need not be rigidly compartmentalized"); RICHARD E. NEUSTADT, *PRESIDENTIAL POWER, THE POLITICS OF LEADERSHIP* (1960); Frohnmayer, *supra* note 60.

²⁰⁷ *Rescue Army*, 331 U.S. at 571.

²⁰⁸ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (the federal judiciary has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the [C]onstitution."). *But see* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (criticizing "reflexive invocation" of the dictum in *Cohens*). The Court has recognized that the abstention doctrines, including *Pullman* abstention—an important application of the last resort rule—are "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188–89 (1959); *see also* *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 31–32 (1959) (Brennan, J., dissenting) (Court disregarded "imperative duty . . . [imposed by Congress under jurisdiction statutes] . . . to render prompt justice").

²⁰⁹ Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984); *cf.* Michael Wells, *Why Professor Redish is Wrong About Abstention*, 19 GA. L. REV. 1097 (1985).

The last resort rule, however, does not require a court to refuse to hear a case; it requires a refusal to resolve the case on a constitutional ground. Thus, the question becomes whether resolving a case on a constitutional ground when nonconstitutional grounds are available offends the separation of powers principle or affords insufficient respect to other branches. Some might argue that a court, in exercising the federal judicial power to strike down (or even sustain) statutes on a constitutional ground, impermissibly encroaches on the legislature. In this view, any expansion of the judicial power implies less power for the other branches.²¹⁰

I shall use the early Bickel approach to outline an argument for a more or less absolute last resort rule,²¹¹ and then examine how Brandeis appeared to view constraints imposed by the separation principle and respect for other authorities. Finally, I shall address the argument that declining to resolve the case on a constitutional ground through application of the last resort rule violates the separation of powers principle in that a court fails to exercise its rightful power and fulfill its duty whenever it avoids resolving a constitutional question.

Bickel argued that even when the Court construes the Constitution to legitimate legislative action, it affects the functions of the other branches. As an example, Bickel cited the controversy brewing in the 1950's and 1960's over the constitutionality of federal aid to parochial

²¹⁰ Expansion of access to judicial determination through construction of justiciability and jurisdictional doctrines is frequently perceived as a shift of power. See *Flast v. Cohen*, 392 U.S. 83, 130 (1968) (Harlan, J., dissenting) (emphasis added):

It seems to me clear that public actions, whatever the constitutional provisions on which they are premised, may involve important hazards for the continued effectiveness of the federal judiciary. *Although I believe such actions to be within the jurisdiction conferred upon the federal courts by Article III of the Constitution, there surely can be little doubt that they strain the judicial function and press to the limit judicial authority.* There is every reason to fear that unrestricted public actions might well alter the allocation of authority among the three branches of the Federal Government.

U.S. v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring) (footnotes omitted): Relaxation of standing requirements is directly related to the expansion of judicial power. It seems to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government. I also believe that repeated and essentially head-on confrontations between the lifetenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches.

²¹¹ I am taking some liberty in characterizing the views of Bickel, since he did not address the last resort rule in depth.

schools. If the Court were to intervene and declare such aid constitutional, he argued, the outcome of the political controversy surely would be affected or even determined by the Court's decision.²¹² Of course, the Court did so intervene when it refused to apply the last resort rule in *Zobrest*. To what extent the Court's ruling will affect or determine the outcome of the political controversy remains to be seen. But Bickel did not conclude that such intervention would clearly violate the separation of powers principle. Instead, he endorsed self-imposed restraints, such as the last resort rule, as a virtue. When the Court clearly indicates that it will not reach the constitutionality of the legislative action, the other branches can operate relatively free from countermajoritarian influence.²¹³ Bickel's view, based primarily on the prudential justification of affording the other branches due respect, supports a fairly literal or absolute last resort rule in order to avoid potential undue intervention, even by sustaining legislative action on constitutional grounds.

Despite his broad language in *Ashwander* about avoiding constitutional questions and broad language elsewhere concerning judicial restraint ("The most important thing we do is in 'not doing'"),²¹⁴ Brandeis appeared to take a less than expansive stance in applying the last resort rule. Brandeis appeared most concerned about "encroachment" on the functions of other branches, and thus urged caution most strenuously when courts reviewed the constitutionality of congressional acts.²¹⁵ Two years after *Ashwander*, Brandeis ignored the last resort rule in *Erie Railroad Company v. Tompkins*.²¹⁶ The Court issued a broad constitutional pronouncement, even though it could have relied solely on nonconstitutional grounds—interpretation of the Rules of Decision Act—to reach its determination that federal courts should apply state common law in diversity cases.²¹⁷ Brandeis wrote:

²¹² BICKEL, *supra* note 57, at 130, 203 (Court's announcement of constitutional principle influences public policy as well as affects future cases).

²¹³ *Id.* at 70.

²¹⁴ BICKEL, *supra* note 7, at 17.

²¹⁵ *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345 (1936) (focusing on "power to declare a legislative enactment void"); *see id.* at 355 ("One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.") (quoting *Sinking-Fund Cases*, 99 U.S. 700, 718 (1878)); BICKEL, *supra* note 7, at 4 (Brandeis uses the same quote in his first elucidation of the avoidance doctrine in the unpublished *Atherton Mills* opinion).

²¹⁶ 304 U.S. 64 (1938).

²¹⁷ *See id.* at 90 (Reed, J., concurring, except to extent to which majority relied on "unconstitutionality of the 'course pursued' by the federal courts" under *Swift v. Tyson*). According to Justice Reed, "It seems preferable to overturn an established construction of an act of Congress, rather than, in the circumstances of this case, to interpret the Constitution." *Id.* at 92; *see* John

Thus the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, "an unconstitutional assumption of powers by the courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." In disapproving that doctrine we do not hold unconstitutional § 34 of the Federal Judiciary Act of 1789 or any other act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.²¹⁸

Brandeis did not provide any elucidation as to why he found the last resort rule inapplicable. He reached the constitutional ground even though the parties had not briefed or argued it. He apparently reasoned that the concern for federalism was not implicated by overruling *Swift*. Brandeis expressly noted that the constitutional ruling in *Erie* was necessary to counter past invasion of states' rights by the federal courts. Thus, the Court acted to afford more rights to the states, and the last resort rule gave the Court no cause to hesitate.²¹⁹ Further, Brandeis may have reasoned that refusal to apply the last resort rule did not offend the separation of powers principle because the Court did not hold a legislative act unconstitutional. Instead, separation of powers may have counselled *Erie's* limitation on federal court power to displace state law *absent* Congressional authorization for a different approach.²²⁰ The Court acted to affirm, rather than restrict, the power of Congress and the last resort rule gave the Court no cause to hesitate.

Similarly, Brandeis might approve of the Court's refusal to apply the last resort rule in *Zobrest* because the Court did not strike down legislation in issuing its ruling. Yet the Court did not compel funding for deaf interpreters and other assistants for disabled children in private schools under the Free Exercise Clause. Instead of squelching the activities of the states or other federal branches, the Court arguably afforded political decisionmakers room for response. Other actors can now decide whether to fund such assistance without fear of violating the Establishment Clause.

Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964) (rejecting arguments that the constitutional discussion in *Erie* was dictum).

²¹⁸ *Erie*, 304 U.S. at 79–80.

²¹⁹ See PETER W. LOW & JOHN CALVIN JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 278–79 (2d ed. 1989).

²²⁰ See Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1683–86 (1974); Monaghan, *supra* note 78.

I read Brandeis' refusal to apply the last resort rule in *Erie* to support a more limited formulation of the last resort rule than his broad language in *Ashwander* suggests. Brandeis' focus on the power to void legislative enactments in *Ashwander*, and the grounding of the *Ashwander* decision in the context of the struggle between the old Court and other branches of government over the New Deal, buttress my limited formulation. The last resort rule should aim primarily to avoid a direct repudiation of legislative or executive action. A court does not encroach impermissibly on the co-equal branches when it voids the action of a branch on the basis of a constitutional challenge. It should proceed with prudence, however, before doing so when nonconstitutional grounds for decision remain.

Admittedly, the concern for regarding separation of powers may vary with the context in which a court would reach a judgment on a constitutional ground. As noted above, in *Erie* the concerns were lessened because the Court's constitutional ruling invalidated only a judge-made doctrine and thus did not invade the territory of another branch or of the states. In a second category, a constitutional decision upholding, rather than invalidating legislative or executive action on constitutional grounds, is less likely to offend other political branches. Third, a decision on constitutional grounds might sometimes invalidate potential legislative or executive acts, foreclosing some power which had not yet been exercised by those actors. For example, if the Court in *Zobrest* had found that the Establishment Clause bars the public funding of interpreters in public schools, a future statute providing funding in those circumstances would be foreclosed. While separation of powers is less implicated in the *Erie* context, it is more difficult to determine whether deference always warrants avoiding the constitutional ground in the latter examples.

This analysis of Brandeis' use of the last resort rule allows courts to mediate between Bickel's overly cautious approach and a theory which posits a duty to address constitutional questions whenever presented. At the other end of the spectrum from Bickel, one could argue that declining to resolve a case on a constitutional ground violates the separation of powers principle. For example, Friedman asserts that the "entire concern with constraining judges" rests on an inaccurate description of our constitutional system framed by the countermajoritarian difficulty.²²¹ A normative theory of the role of the federal courts

²²¹ Friedman, *supra* note 93, at 638. According to Friedman, "the erroneous assumption, which pervades the countermajoritarian difficulty, is that such a thing as 'majority will' exists to legitimate decisions of the 'representative' branches." *Id.* Friedman recognizes that concerns

in the dialogic system posed by Friedman might abjure the last resort rule.²²² Alternatively, such a theory might posit that judges have a duty to fully engage in the constitutional dialogue and that the last resort rule erects an illegitimate barrier to addressing constitutional questions.²²³

Brandeis might respond that his hesitation to void legislative enactments was based in part on his awareness of the fallibility of judges:²²⁴

It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility.²²⁵

Those who posit a duty to address constitutional issues would respond that the last resort rule fails to correct the fallibility problem. By not undertaking the task of constitutional interpretation, the Court merely postpones its own task until a later case, or allows other fallible (and more politically vulnerable) actors to undertake, or refuse to undertake, that task.²²⁶ As Bickel noted, even in exercising its passive virtues of not doing, the Court nevertheless exercises the judicial power, which has its own consequences: the Court "may be permitting its previous judgments to continue to have a certain effect, or it may be allowing lower federal or state courts to engage in constitutional experimentation."²²⁷

about constraining the judiciary underlie the countermajoritarian difficulty, but asserts that sufficient constraints on judges are contained within the political surroundings in which the judiciary operates—within "our dialogic system." *Id.* at 671–80.

²²² Friedman maintains that his account is merely descriptive, not normative. He notes that the idea of dialogue encourages normative theories for use in the dialogue. *Id.* at 680.

²²³ See generally Bandes, *supra* note 78 (arguing that the role of the federal courts is to interpret and enforce federal law, particularly the Constitution).

²²⁴ Paul Freund cites Brandeis' awareness of "the limits of human capacity, the fallibility of judgment" in laying the foundations for his cautious restraint in Freund, *Introduction* to BICKEL, *supra* note 7, at xvii; see also *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final."). One justification for judicial restraint is to check the tendency of "inherent[ly] self-aggrandizing" human beings to act in matters requiring infallibility. Frank M. Coffin, *The Federalist No. 86: On Relations Between the Judiciary and Congress*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY, *supra* note 38, at 25.

²²⁵ *Ashwander*, 297 U.S. at 345 (citation omitted).

²²⁶ BICKEL, *supra* note 57, at 207. Bickel says that the Court "checks; it legitimates; or it does neither." *Id.* at 200.

²²⁷ *Id.* at 200–01. See generally Gunther, *supra* note 36.

I reject the argument that the federal courts offend the separation principle whenever they fail to address a constitutional issue. The primary constitutional responsibility of the federal courts is to resolve cases, not to reach constitutional issues. Avoiding a constitutional issue through use of the last resort rule, however, can undermine the courts' duty to be a counterweight to the more political branches when the Constitution so demands. As in *Pullman*, the Court's postponement of decision allows the allegedly unconstitutional conduct to continue until checked. The last resort rule can thus function as an improper abdication of federal courts' duty to act as a countermajoritarian force. The function of courts generally, and federal courts in particular under this view, is to be unpopular, to issue countermajoritarian decisions, to do what the law requires despite political pressure.²²⁸ Although the majoritarian branches also have a duty to uphold the Constitution,²²⁹ the federal courts, because they are more insulated from political pressure, are particularly designed for protecting the rights of minorities.²³⁰

A theory of appropriate application of a flexible last resort rule implicates value choices. Separation of powers and due respect for the other federal branches support use of the last resort rule primarily to avoid striking down legislation (and, perhaps more prevalent today, executive branch action). As long as judicial review does not implicate voiding a congressional act or executive action in a particular case, a court can readily dismiss the prudential guidance of the last resort rule. A court confronted with the possibility of voiding legislative (or executive) action because of constitutional interpretation should generally resolve the issue subconstitutionally. While the exercise of judicial review would not offend the separation principle, this approach allows a court to serve the interest of sharing the constitutional interpretive power with other branches.

Circumstances may arise, however, where a court should reach the constitutionality of the action of other branches even if nonconstitutional grounds remain. For example, even if it required invalidating legislative or executive action, a court should reject the last resort rule if it demonstrated that non-majority rights could be redressed only by reaching the constitutional ground of decision in a particular case. In

²²⁸ CHEMERINSKY, *supra* note 38, at 129 ("The argument is that a judiciary that ducks controversial issues to preserve its credibility is likely to avoid judicial review where it is needed most, to restrain highly popular, unconstitutional government action.").

²²⁹ See Brilmayer, *supra* note 39, at 304. See generally Frohnmayer, *supra* note 66.

²³⁰ The Constitution provides for independence of the judicial branch with its guarantees of life tenure during "good behavior" and no diminution in salary in Article III.

those circumstances, applying the last resort rule to avoid constitutional adjudication constitutes an abdication of federal courts' counter-majoritarian responsibility.

This formulation of the last resort rule will not satisfy those who conclude that any failure to face a constitutional issue constitutes a derogation of constitutional duty. It will, however, mediate between that concern and overly zealous application of the last resort rule based on justifications which have less force in the modern constitutional climate, while safeguarding the ability of courts to protect minorities from some majoritarian decisionmaking. Although the states and the other branches may not readily accept or appreciate the courts' sharing of the power of constitutional interpretation, the recognition by courts of others' ability to participate will invite other voices and enrich the dialogue.

Federalism concerns dictate a similar application of the last resort rule.

E. *Federalism*

In addition to maintaining appropriate power relations among the national branches, the final two justifications for the avoidance doctrine also encompass federalism concerns. Federal courts must defer appropriately to the powers retained by states and their courts. This comity concern implicates two important applications of the last resort rule: *Pullman* abstention and the adequate and independent state ground doctrine.

1. *Pullman* Abstention

In *Railroad Commission of Texas v. Pullman Co.*, the Texas Railroad Commission issued an order requiring that white Pullman conductors, not black Pullman porters, operate sleeping cars.²³¹ Several railroad companies, and the intervening Pullman porters, challenged the order as unauthorized by state law and unconstitutional under the Equal Protection, Due Process and Commerce Clauses of the federal Constitution. The Court acknowledged that the "complaint of the Pullman porters undoubtedly tendered a substantial constitutional issue."²³² But the Court avoided the issue by abstaining from decision. Justice Frankfurter wrote:

²³¹ 312 U.S. 496, 498 (1941).

²³² *Id.*

[The equal protection issue] is more than substantial. It touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open. Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy.²³³

If the Texas Commission had acted beyond the scope of its authority, the order would be declared invalid under Texas law and no court would need to reach the equal protection issue. Finding the state law unclear, the Court balked at "making a tentative answer" regarding Texas law which the Texas Supreme Court could displace the next day.²³⁴ So the Court handed the politically explosive case to the state court for resolution of state law issues.

Today, if a federal court were presented with a case identical to *Pullman* and the parties chose not to press the nonconstitutional claims, the court, relying on *Zobrest*, could reach the equal protection claim. Relying on *Siler*, the court could decide the state law issues itself; or, alternatively, it could apply *Pullman* abstention.²³⁵ The Court in *Pullman* used abstention both to avoid wasting federal resources on a "tentative" state law decision and to avoid the "friction of a premature constitutional adjudication."²³⁶ Abstention furthered harmony between state and federal courts "without the need of rigorous congressional restriction of those powers."²³⁷ This Section rejects efficiency and fear

²³³ *Id.* "The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court." *Id.* at 500. Note that this occurs whenever federal courts decide state law issues, whether under the *Siler* method, the *Erie* regime, or with supplemental jurisdiction.

²³⁴ The Court in *Pullman* remanded the case, with instructions for the lower federal court to retain jurisdiction, and instructed the parties to file a suit in the Texas courts on the state law issues. *Id.* at 501-02.

²³⁵ Abstention is only warranted in "exceptional circumstances." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813-17 (1976) (describing different types of abstention and the circumstances warranting their application). Scholars have catalogued the inconsistent application of *Pullman* abstention and questioned its justifications. Davies, *supra* note 142; Martha A. Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974).

²³⁶ *Pullman*, 312 U.S. at 500-01 ("These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary."). *But see* Field, *supra* note 235, at 1078 (discussing "reopener" provisions—possibility of modification led Justice Frankfurter to fear in *Pullman* that a federal ruling on the state issue would be "tentative"—because the federal court could later revise ruling if state law subsequently decided differently in state court).

²³⁷ *Pullman*, 312 U.S. at 501. "Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies. . . ." *Id.* at 500.

of friction as legitimate grounds for applying *Pullman* abstention and concludes that courts should not apply the last resort rule when similar cases arise in the future.

When courts abstain under *Pullman*, litigants can eventually return to a federal court—where plaintiff commenced the litigation—if resolution of the federal constitutional claim is necessary after consideration of other grounds for disposal of the case. Under *Pullman* abstention, the claims of the litigants are either resolved without constitutional adjudication or constitutional adjudication is deferred.²³⁸ The federal court could dispose of the case on nonconstitutional grounds with more efficiency for the litigants and the two court systems if it followed the *Siler* route. Of course, efficiency is only gained when the case can be disposed of on the state law ground. If the litigation returns eventually to federal court, and the federal court must overrule the state court on constitutional grounds, inefficiency and friction are increased.²³⁹

Alternatively, the Court could have avoided ruling on the state law issue entirely in *Pullman* by addressing the equal protection claim. It may have been more efficient for the Court to rule that even if the Texas statute was construed to afford the commission power to enact such a regulation, the statute and the regulation violated the United States Constitution. Moreover, the avoidance of the constitutional question by either federal or state court in a first litigation may increase long-term judicial inefficiency because any issue deferred will likely arise in later litigation.

The Court justified abstention in *Pullman* primarily because of the “sensitive social nature” of the integration issue, an issue on which a ruling from the Court in favor of the porters would not have met with widespread majority acceptance in 1943.²⁴⁰ Alternatively, the Court could have affirmed segregationist principles if it upheld the order.

But see CHEMERINSKY, *supra* note 38, at 594 (“In fact, where Congress desired federal court abstention it enacted particular statutes such as . . . the Anti-Injunction Act, the Tax Injunction Act, and the Johnson Act.”).

²³⁸ Thus, *Pullman* abstention may be viewed as less problematic in terms of assuring federal rights than other forms of abstention, where there is no final resort to a federal court for federal claims. With *Burford* abstention, a federal court completely defers to related state court litigation. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (Justice Frankfurter, author of the Court’s opinion in *Pullman*, vehemently dissented in *Burford*).

²³⁹ Field, *supra* note 235, at 1081–82.

²⁴⁰ Judith Resnik, *Rereading “The Federal Courts”: Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021, 1038–39 (1994) (discussing the racial, gender and class assumptions underlying the Court’s definition of the problem as a “sensitive social issue”).

The Court deemed the public interest best served by a deferred, delayed resolution of the equal protection issue. This fear of friction is closely linked to the Court's concern with its credibility and finding majority acceptance for its decisions, and is greatly exaggerated in a responsive system of constitutional dialogue.²⁴¹ Moreover, as argued above, decisions of certain constitutional issues, particularly those involving minority rights, may never find widespread acceptance, and action by the federal courts may be necessary to foster acceptance of such rights. From a post-*Brown* perspective, the *Pullman* litigants suffered from the Railroad Commission's racist policy while they awaited the Texas court's decision on state law matters.²⁴² Such delay causes not only prolonged harm if the conduct is found unconstitutional,²⁴³ but the Court fails to give guidance on critical constitutional questions. The delay also increases the expense of challenging the conduct, with litigants generally bearing their own costs.²⁴⁴ The Court countenanced this delay although it recognized that the porters' claim was substantial.

Additionally, the Court may have misperceived the public interest in *Pullman*. Abstention disserves a public interest in earlier and more frequent court participation in constitutional dialogue.²⁴⁵ The Court,

²⁴¹ See *supra* Sections IV.A-B addressing finality and legitimacy concerns.

²⁴² See Michael Wells, *Preliminary Injunctions and Abstention: Some Problems in Federalism*, 63 CORNELL L. REV. 65 (1977). Both the minority *Pullman* porters and the railroads were presumably subject to the unconstitutional conduct.

²⁴³ The countermajoritarian role of the federal courts dictates a duty to address exactly those types of questions speedily in order to protect effectively the rights of minorities. See *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 436 (1964) (Douglas, J., concurring) ("Time has a particularly noxious effect on explosive civil rights questions, where the problem only festers as grievances pile high and the law takes its slow, expensive pace to decide in years what should be decided promptly.").

²⁴⁴ See *England*, 375 U.S. at 425 (Douglas, J., concurring).

Some litigants have long purses. Many, however, can hardly afford one lawsuit, let alone two. Shuttling the parties between state and federal tribunals is a sure way of defeating the ends of justice. The pursuit of justice is not an academic exercise. There are no foundations to finance the resolution of nice state law questions involved in federal court litigation. The parties are entitled—absent unique and rare situations—to adjudication of their rights in the tribunals which Congress has empowered to act.

Id. (Douglas, J., concurring) (quoting his own dissenting opinion in *Clay v. Sun Ins. Office*, 363 U.S. 207, 228 (1960)); see also Field, *supra* note 223, at 599-602.

²⁴⁵ In *DeFunis v. Odegaard*, Justice Brennan dissented from dismissal as moot of a challenge to a university's affirmative action policy by a white male who was denied admission to the University of Washington Law School:

[I]n endeavoring to dispose of this case as moot, the Court clearly disserves the public interest. The constitutional issues which are avoided today concern vast numbers of people, organizations, and colleges and universities . . . Few constitutional questions in recent history have stirred as much debate, and they will not disappear. They must inevitably return to the federal courts and ultimately again to this Court . . . Although the Court should, of course, avoid unnecessary consti-

for example, may assure federal rights via constitutional interpretation.²⁴⁶ Of course, those who place a high value on majority acceptance and avoiding friction would agree that by the time the equal protection issue deferred in *Pullman* surfaced again, the country was more accepting of the result. Bickel argued that letting a constitutional problem "simmer" yields a better decision, reasoning that the Court's consideration of a number of cases demonstrating the problem, "may have a cumulative effect on the judicial mind as well as on public and professional opinion."²⁴⁷ We can argue, for example, whether the *Brown v. Board of Education* decision was better because it was informed by previous litigation. Many would agree that while the public was more prepared for the Court's decision in 1954, *Brown* still did not meet with widespread acceptance. If the Court had found an equal protection violation in *Pullman*, resistance to desegregation might have been even more fervent and extended than it has been. On the other hand, an equal protection ruling in 1943 may have sped school integration and obviated the need for *Brown*.

Scholars have questioned whether allocating power among state and federal courts through *Pullman* abstention promotes harmony.²⁴⁸ Overburdened state courts might not always appreciate deferral of controversial cases from the often less busy federal courts.²⁴⁹ The other comity rationale for abstention in *Pullman* was to further harmony between state and federal courts "without the need of rigorous congressional restriction of those powers."²⁵⁰ In cases where *Pullman* abstention might apply, state and federal court jurisdiction is concurrent. The litigants first chose the federal forum, and Congress and/or the

tutional questions, we should not transform principles of avoidance of constitutional decisions into devices for sidestepping resolution of difficult cases.

416 U.S. 312, 350 (1974) (Brennan, J., dissenting). The controversial issue did, of course, return to the Supreme Court several years later in *Regents of the University of California v. Baake*, 438 U.S. 265 (1978).

²⁴⁶ For example, the Court's perhaps unnecessary decision of a constitutional question in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, served an interest in assuring certainty of rights and enabling the private development of nuclear power. 438 U.S. 59 (1978). Likewise, because the Court did not invalidate legislation, it can be argued that separation of powers concerns were not greatly implicated.

²⁴⁷ BICKEL, *supra* note 57, at 176.

²⁴⁸ See CHEMERINSKY, *supra* note 38, at 596; Field, *supra* note 235, at 1090.

²⁴⁹ Judicial efficiency does not appear directly in the Supreme Court's justifications of the avoidance doctrine. Whether *Pullman* abstention increases efficiency depends on whether resolution of the state law issue obviates the need for a federal law ruling and, even if only the state law issue is decided, whether it takes fewer resources initially to resolve that issue than the federal law issue. The Texas court in *Pullman*, for example, might not have appreciated the Court conserving its resources and the lower federal courts' resources while adding to the workload of the state court.

²⁵⁰ *Pullman*, 312 U.S. at 501.

states approved the availability of that choice with their jurisdictional statutes. When a federal court shuttles the case to the state system it undercuts legislative intent. Unless Congress alters the diversity jurisdiction statute, the federal courts have the duty to hear many state law questions, and discretion to decide state law issues under the supplemental jurisdiction statute.²⁵¹ To the extent that the Court justified abstention in *Pullman* in order to allow the Texas Supreme Court, rather than a federal court, to decide the case, it failed to follow the directive of Congress in refusing to abolish diversity and supplemental jurisdiction.²⁵² If federal court decision of state law causes undue federalism concerns, Congress can restrict federal jurisdiction over the state law issues or require federal courts to follow state statutes providing for certification of state law questions to state courts.²⁵³

Moreover, the factual context of the *Pullman* litigation demonstrates why the federal courts must sometimes refuse to follow the last resort rule. Even if abstention promoted harmony among state and federal courts, that harmony must be weighed against the harm in refusing to decide the equal protection challenge. A result favorable to the porters and the railroad—admittedly an uncertain proposition in 1943—might have sped desegregation.²⁵⁴ As with the separation of powers concern, federal courts need not hesitate to face a constitutional issue based on federalism concerns unless judicial review might require a court to invalidate state legislative or executive action. When the need to invalidate state action to uphold the federal Constitution arises, the efficiency rationale and the concern for judicial credibility do not sufficiently justify abstention. Congressional revision of jurisdiction comity can address these concerns. Federal court examination of the constitutional question in *Pullman* was necessary to ensure that decision of the federal constitutional claims of minorities was not unduly postponed. The Court's refusal to hear the equal protection claim as a prudential matter evidences the majoritarian bias inherent in the caution of the last resort rule. An equal protection decision by

²⁵¹ Congress could amend or abolish the diversity and/or supplemental jurisdiction of the lower federal courts. Under *Erie*, federal courts frequently rule on state questions. Many states have procedures whereby federal courts can certify novel or complex questions of state law to the state's supreme court.

²⁵² See *Redish*, *supra* note 197, at 76.

²⁵³ Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671 (1992) (espousing federalism justification for limiting diversity jurisdiction).

²⁵⁴ The Court has recognized that the avoidance doctrine requires balancing the individual interest in assurance of rights against other concerns. *Rescue Army v. Municipal Court of L.A.*, 331 U.S. 549, 571 (1947).

the Court—however it came out on the merits in 1943—would have advanced the constitutional dialogue.

2. The Adequate and Independent State Ground Doctrine

In contrast to *Pullman* abstention, one branch of the adequate and independent state ground doctrine constitutes appropriate application of the last resort rule.²⁵⁵ The branch dealing with parallel state and federal constitutional provisions has developed in a manner that accords sufficient regard for comity interests while preserving adequate federal court review of constitutional claims. The branch of the doctrine dealing with state procedural foreclosure, however, is more problematic.

The Supreme Court is entitled to review all federal issues, including constitutional issues, on appeal from a final judgment of the highest state courts in order to preserve federal supremacy and advance uniformity in federal law.²⁵⁶ The Court will refuse to hear a case, however, if an adequate and independent state ground supports the decision. By deferring to state court decisions based on an adequate and independent state ground, the doctrine addresses Brandeis' concern of federal judicial interference with state authority. The doctrine is generally grounded in efforts to avoid advisory opinions and unnecessary constitutional rulings,²⁵⁷ and the premise of according sufficient respect to the authority of state courts.²⁵⁸ It applies only when litigation

²⁵⁵ Now that Congress has removed the Court's duty to hear cases from state courts raising federal constitutional issues or denying federal rights, we may see less frequent use of the adequate and independent state ground doctrine.

²⁵⁶ See *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938) (ensuring uniformity of federal law and promoting protection of federal rights justify Supreme Court review of federal law issues on appeal from state courts). The finality requirement for review of cases from state courts is likewise premised in part on avoiding unnecessary constitutional questions. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (basis for the 28 U.S.C. § 1257 finality rule was that it prevented the Court from passing on constitutional issues that may be dissipated by the final outcome of a case, thereby helping to keep undesirable federal-state conflicts to a minimum). *Contra Southland Corp. v. Keating*, 465 U.S. 1, 6 (1984) ("Without immediate review of the California holding by this Court there may be no opportunity to pass on the federal issue and as a result 'there would remain in effect the unreviewed decision of the State Supreme Court' holding that the California statute does not conflict with the Federal Arbitration Act.").

²⁵⁷ *Michigan v. Long*, 463 U.S. 1032, 1071 (1983) (Stevens, J., dissenting) (avoidance doctrine also supports practice of remanding a case to state court for clarification of whether judgment rests on an adequate and independent state ground) ("We do not sit to expound our understanding of the Constitution to interested listeners in the legal community; we sit to resolve disputes. If it is not apparent that our views would affect the outcome of a particular case, we cannot presume to interfere."); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936); see also *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion . . .").

²⁵⁸ While Supreme Court review of federal issues promotes protection of federal rights and

begins in state courts rather than the lower federal courts. This could be because of a desire to proceed in state court or because Congress has limited the jurisdiction of the lower federal courts.²⁵⁹

The first branch of the doctrine commonly applies where state and federal constitutional provisions are implicated. Critics argue that state courts can use the doctrine to insulate their judgments from Supreme Court review and that protection from state courts is sometimes necessary.²⁶⁰ However, because the federal Constitution imposes a floor beneath which states' rights-protection cannot fall, the only state decisions that can be insulated from federal review are decisions in which the state court is more rights-generous than is required by the federal Constitution. In other words, a state court decision, based on state law grounds, denying a rights-claimant relief that he or she claims under the federal Constitution, is not an adequate state ground under this branch of the doctrine.²⁶¹ The Court retains the ability to determine if the state ground is *truly* adequate and independent of federal law.

Indeed, the Court's present application of this branch of the doctrine presumes that the state court relied on federal law unless the state court plainly bases its decision on a bona fide adequate and independent state ground. This approach has been criticized as advancing the Court's power at the expense of state courts and departing from the time-honored practice of reserving decision on federal constitutional issues.²⁶² State courts can protect against this presumption,

uniformity in federal law, state judges have the primary responsibility for developing state law. *Long*, 463 U.S. at 1040-41. It is unclear whether the doctrine is merely a prudential restraint or a constitutional limitation. Compare Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291 (1986) (doctrine is federal procedural common law and can be modified) with *Fay v. Noia*, 372 U.S. 391, 448-76 (1963) (Harlan, J., dissenting) (the Court would exceed its powers under Article III to determine federal questions if nonfederal questions were adequate to sustain the judgment).

²⁵⁹ For example, Congress has limited the jurisdiction of lower federal courts by leaving criminal prosecutions largely to the states.

²⁶⁰ See generally Matasar & Bruch, *supra* note 258. See also Linde, *supra* note 72, at 381-82; David A. Logan, *Judicial Federalism in the Court of History*, 66 OR. L. REV. 453 (1988).

²⁶¹ The Supreme Court must examine whether the state court's denial of federal constitutional protection, albeit on non-federal grounds, "rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not thus be evaded." *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540 (1930); see *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100, 107-09 (1938) (state law determination did not constitute an adequate and independent state ground because it would have made Contract Clause of federal constitution a "dead letter"; after making the federal law pronouncement in favor of plaintiff, Court nevertheless remanded for state court to determine whether plaintiff had used wrong procedure under state law to bring her claim).

²⁶² Justice Stevens has eloquently catalogued criticism of this presumption of Supreme Court

however, by not relying on federal constitutional law arguments or precedent.²⁶³ State law could thus, in some circumstances, develop differently from federal law as a response to federal constitutional rulings.²⁶⁴ An active Supreme Court, one that reaches for constitutional issues, might stimulate state supreme courts to find independent and adequate state grounds for their rulings and thereby promote constitutional dialogue at the state level.

The application of the adequate and independent state ground doctrine in cases involving state procedural foreclosure is more troublesome. In such instances, failure to adhere to a state procedural rule is often deemed an adequate basis to avoid Supreme Court review of a federal constitutional claim.²⁶⁵ State procedural law is thus allowed to frustrate federal constitutional rights because of the decision to respect state procedural rules.²⁶⁶

The second major criticism of the adequate and independent state ground doctrine is that it contributes to inaccuracy and inconsistency

appellate jurisdiction absent a clear statement of an adequate and independent state basis for the judgment. *Delaware v. Van Arsdall*, 475 U.S. 673, 690-701 (1986) (Stevens, J., dissenting) (critiquing the clear statement rule of *Long*). Justice Stevens argued that this presumption contravenes the "avoidance principle" because, in applying the presumption, the Court will decide federal issues at times when a state issue was not clearly decided. *Id.* at 691-94. Stevens commends the practice of state courts first considering, and preferring, state grounds of decision. *Id.* at 701-08 (citing, among many examples, *State v. Kennedy*, 666 P.2d 1316, 1323 (Or. 1983)). Prior to the presumption, the Court would often remand cases to state courts for clarification of the record on state law issues prior to deciding any federal constitutional issue. *Long*, 463 U.S. at 1038-39 (Court notes that it has, among other things, dismissed, vacated or continued state cases for clarification of the nature of the state court decisions); see, e.g., *Rescue Army v. Municipal Court of L.A.*, 331 U.S. 549 (1947) (ambiguous record and complex state law issue remanded to state court for state law clarification).

²⁶³ Hans Linde argues that the text of the Fourteenth Amendment requires courts to examine state law first. Until a claimant's right has been fully adjudicated under state law—including state constitutional law—the state has not denied her the claimed right. In his analysis, there simply is no federal question until the state court judgment denies the right. Linde, *supra* note 72. See Hans A. Linde, *The Bill of Rights: A Documentary History by Bernard Shwartz*, 52 OR. L. REV. 325 (1973) (book review) for an argument that lower federal courts also should inquire into state constitutional guarantees when plaintiffs attack state action on federal constitutional grounds. Critics of this position argue that the state denies the right at the time of the allegedly unconstitutional action itself rather than at the moment that judicial vindication fails. A rich dialogue urges state constitutional development. See, e.g., Scott H. Bice, Anderson and the Adequate State Ground, 45 S. CAL. L. REV. 750 (1972); Peter J. Galie & Lawrence P. Galie, *State Constitutional Guarantees and Supreme Court Review: Justice Marshall's Proposal in Oregon v. Hass*, 82 DICK. L. REV. 273 (1978); Kahn, *supra* note 181; David Schuman, *The Right to a Remedy*, 65 TEMP. L.Q. 1197 (1992).

²⁶⁴ See cases cited in note 180 *supra*.

²⁶⁵ *Henry v. Mississippi*, 379 U.S. 443, 449-53 (1965); *Williams v. Georgia*, 349 U.S. 375, 389-91 (1955).

²⁶⁶ *Henry*, 379 U.S. at 453-57 (Black, J., dissenting).

in federal law because state courts' erroneous interpretations of federal law remain on the books as long as the judgment is supported by an adequate and independent state ground.²⁶⁷ The state court's rulings on federal law, however, arguably amount to no more than dicta because those rulings do not provide the basis for the judgment. The Supreme Court might promote uniformity by addressing constitutional claims even when a judgment is supported by adequate and independent state grounds. The ability of the Court, however, to promote uniformity effectively is questionable in our large nation.²⁶⁸ In any event, uniformity may not always be desirable. The constitutional dialogue may be advanced by a multiplicity of pronouncements from state and federal courts on federal constitutional law.²⁶⁹

Like *Pullman* abstention, the adequate and independent state ground doctrine may disrupt and delay the vindication of federal rights, and make litigation of federal rights less efficient because of prolonged state proceedings and federal review.²⁷⁰ These concerns are less troubling in this context because the litigation begins in state court. Either that choice is voluntary and litigants could avoid the adequate and independent state ground doctrine by going to federal court initially, or that initial choice is restricted by congressional jurisdictional allocations and deference to state law in particular areas. Congress can alter such allocations in light of restrictions imposed by the adequate and independent state ground doctrine. Of course, it is unlikely that Congress will take significant criminal prosecution responsibilities away from the states because of the problems posed by the procedural foreclosure branch of the doctrine. Congress no longer requires the Court to review state decisions denying federal rights, and state courts are largely left with the responsibility for protecting federal rights. Instead, the Court should revise its prudential rule of last resort by determining that procedural grounds which foreclose federal review

²⁶⁷ See Matasar & Bruch, *supra* note 258, at 1314-15.

²⁶⁸ Further, critics argue that the clear statement rule in *Michigan v. Long* does not assist in providing uniformity for federal law. 463 U.S. 1032, 1070 (1983) (Stevens, J., dissenting) ("need for uniformity in federal law" is truly an ungovernable engine").

²⁶⁹ Congress, in conferring concurrent jurisdiction for many federal claims, may indicate that state courts are just as competent as federal courts at protecting federal rights. Commentators have debated parity concerns extensively. See, e.g., Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988) (reviewing literature on parity); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

²⁷⁰ *Henry*, 379 U.S. at 455-57 (Black, J., dissenting); see Terrance Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187, 206-07.

of federal claims are inadequate. By deeming procedural grounds inadequate, the Court avoids the advisory opinion problem.

Because the Supreme Court may ultimately review state decisions denying relief under the federal Constitution based on parallel state constitutional grounds, the first branch of the doctrine is a more easily justified application of the last resort rule.

V. CONCLUSION

Federal and state courts are often presented with both federal and state law claims in a single case. This can occur when a federal court, for example, exercises diversity or supplemental jurisdiction. Similarly, courts often face federal statutory, regulatory or federal common law claims in conjunction with constitutional claims. Courts should not reflexively heed the maxim that federal constitutional grounds should be avoided whenever possible. Instead, appropriate application of the last resort rule requires that judicial discretion be guided primarily by considerations of separation of powers and comity. As long as judicial review does not implicate voiding legislative or executive action, a federal court should not use the last resort rule to avoid a constitutional issue. A court confronted with the possibility of voiding legislative (or executive) action because of constitutional interpretation, however, should generally resolve the case subconstitutionally by use of the last resort rule. This approach allows a court to choose to share the constitutional interpretive power with other branches. Nevertheless, if it is necessary for a court to invalidate legislative or executive action in order to fulfill its critical function of protecting non-majority rights, the court should disregard the prudential guidance of the last resort rule.

For example, a court might refuse to apply the last resort rule when parties seek to clarify a highly contentious issue of public importance and no invalidation of legislative or executive action is required. In *Zobrest*, public school districts, states, the United States, private schools, disabled children and their families were interested in the Establishment Clause principles announced by the Court. The Court concluded that the Constitution allowed, rather than prohibited, governmental conduct. The Court did not invalidate congressional legislation with its decision. Accordingly, Congress can respond by clarifying what the IDEA requires and other political actors can determine whether they are willing to fund assistance for disabled children in private schools. Thus, the Court was appropriately less constrained in addressing the constitutional issue.

Similarly, federalism concerns justify flexible use of the last resort rule. At least one branch of the adequate and independent state ground doctrine appropriately defers to state courts' development of state law and congressional control of jurisdiction.

The *Pullman* decision, on the other hand, demonstrates why the federal courts must sometimes refuse to follow the last resort rule despite comity concerns. Whatever the outcome of a 1943 equal protection decision, it would have enhanced the constitutional dialogue.

Courts may evaluate separation of powers and comity concerns differently, or find other justifications for the last resort rule more persuasive. Whatever their value choices, courts should offer reasoned explanations of necessity. If a court relies on the last resort rule to avoid a constitutional issue, it should do so expressly and explain its decision. This will signal to other federal branches, the states and the public that, although the court has the power to decide this issue, it has declined to do so for prudential reasons. If a court reaches a constitutional issue when nonconstitutional grounds remain, it should similarly explain why that action was appropriate. The court should clarify that, for example, separation of powers or comity concerns were not greatly implicated, or the court needed to find legislation unconstitutional in order to protect minority rights. This should serve to invite others to explore opportunities for responding to the decision and encourage them to partake in the constitutional conversation.