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Legal Sidebar

The Modes of Constitutional Analysis: The Constitutional Avoidance Doctrine (Part 9)

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This Legal Sidebar Post is the last in a nine-part series that discusses certain "methods" or "modes" of analysis that the Supreme Court has used to interpret provisions of the Constitution. This ninth essay provides an overview of the Constitutional Avoidance Doctrine, which is a set of rules the Supreme Court has developed to guide federal court dispositions of cases that raise constitutional questions. Because the Constitutional Avoidance Doctrine informs how the Court is likely to resolve disputes involving the constitutionality of laws, understanding the Constitutional Avoidance Doctrine may assist Congress in its legislative activities. (Additional background on this topic is available in the *Constitution of the United States of America, Analysis and Interpretation*, CRS Report R45129, *Modes of Constitutional Interpretation*, and CRS Report R43706, *The Doctrine of Constitutional Avoidance: A Legal Overview*.)

The fundamental principle of the Constitutional Avoidance Doctrine is that federal courts should interpret the Constitution only when it is a "strict necessity." The reason for this is threefold: first, because the Constitution is the supreme law of the land, its interpretation has broad implications; second, an unelected Supreme Court exercising judicial review to countermand actions by an elected Congress or state legislatures is in tension with principles of democracy and majority-rule; and third, because the Supreme Court's authority depends, as a practical matter, on the Executive Branch enforcing and the people accepting its rulings, the Court must be careful not to squander public goodwill by issuing ill-considered opinions. In his concurring opinion in *Ashwander v. Tennessee Valley Authority*, Justice Louis Brandeis summarized the Constitutional Avoidance Doctrine as consisting of seven rules:

1. ***The Rule against Feigned or Collusive Lawsuits***. Parties to a case must be adverse to each other. Justice Brandeis stated: "The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals.'" This rule corresponds to the adversity requirement discussed here.
2. ***Ripeness***. Courts should not resolve constitutional questions prematurely. As Justice Brandeis wrote: "The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it'" and "'[i]t is not the habit of the Court to decide

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questions of a constitutional nature unless absolutely necessary to a decision of the case.'" Ripeness is discussed in greater detail here.

3. ***Judicial Minimalism***. Courts should decide questions of constitutional law narrowly. Justice Brandeis stated: "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.'"
4. ***The Last Resort Rule***. If possible, a court should resolve a case on nonconstitutional grounds instead of resolving it on constitutional grounds. Explaining this rule, Justice Brandeis stated: "The Court will not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed . . . . [I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." He further added: "Appeals 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."
5. ***Standing and Mootness***. For a case to be justiciable, the complainant should suffer an actual injury; as Justice Brandeis noted: "The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation." Standing and mootness are discussed here and here.
6. ***Constitutional Estoppel***. A party cannot challenge a law's constitutionality when he enjoys the benefits of such a law. Justice Brandeis stated: "The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits." The Court also discussed this principle in *Fahey v. Mallonee*.
7. ***The Constitutional-Doubt Canon***. Courts should construe statutes to be constitutional if such a construction is plausible. Explaining this guideline, Justice Brandeis noted: "'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'"

Rules 1, 2, 5, and 6—the Rule Against Feigned or Collusive Lawsuits, Ripeness, Standing and Mootness, and Constitutional Estoppel—inform whether a federal court should hear a case that has met the minimum Article III case-or-controversy requirements for a federal court to have jurisdiction. As such, these four rules provide a further threshold that a case must clear for a federal court to hear it. By comparison, Rules 3, 4, and 7—Judicial Minimalism, the Last Resort Rule, and the Constitutional-Doubt Canon—address how a federal court should approach a constitutional question in a case before it. Subsequent Legal Sidebar Posts will examine these latter three rules in greater detail.

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