

The Constitutional Avoidance Doctrine: Judicial Minimalism (Part 1 of 3)

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The Constitutional Avoidance Doctrine is a set of rules the Supreme Court has developed to guide federal courts in disposing of cases that raise constitutional questions in order to minimize tensions that arise when an unelected federal judiciary sets aside laws enacted by Congress or state legislatures. Under the Constitutional Avoidance Doctrine, federal courts should interpret the Constitution only when it is a “strict necessity.” In a concurring opinion in *Ashwander v. Tennessee Valley Authority*, Justice Louis Brandeis identified seven rules comprising the Constitutional Avoidance Doctrine: (1) the Rule Against Feigned or Collusive Lawsuits; (2) Ripeness; (3) Judicial Minimalism; (4) the Last Resort Rule; (5) Standing and Mootness; (6) Constitutional Estoppel; and (7) the Constitutional-Doubt Canon. Rules (1), (2), (5), and (6) inform *whether* a court can hear a case (i.e., whether it is justiciable), while Rules (3), (4), and (7) inform *how* a court should address constitutional questions in cases before it. This Legal Sidebar Post on Judicial Minimalism is the first of three that look at this latter set of rules. 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.

Providing substantive guidance on how courts should address constitutional questions, judicial minimalism instructs courts not to “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.” Instead, a court should limit its rulings to the facts of the case before it and avoid establishing broad precedents. By applying judicial minimalism, courts may forestall ruling on politically contentious constitutional issues, thereby allowing elected legislatures further opportunities to craft political resolutions. In addition, by drafting opinions narrowly, Justices may find it easier to build consensus in the Court by reducing the scope of issues to which they must agree.

When employing judicial minimalism, courts frequently pass over questions of constitutional import to focus more narrowly on issues specific to the case. For instance, in *Liverpool, N.Y. & Philadelphia Steam-Ship v. Commissioners on Emigration*, a steamship corporation organized under the laws of Great Britain sued the New York Commissioners of Emigration seeking the recovery of money the corporation had paid for bringing emigrants to the United States. The state laws that authorized the commissioners to collect money from the steamship company had been struck down as unconstitutional state regulation of foreign commerce. However, the defendant commission argued that an Act of Congress barred the plaintiff’s recovery of damages. The Court was asked whether Congress could (1) ratify state laws that were

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previously struck down as unconstitutional state regulation of foreign commerce, or (2) bar claims for damages that the unconstitutional state laws caused. Noting that the case presented questions as to “the constitutionality of the act of congress” that were “of very grave importance,” the Court held it was “constrained to reverse the judgment, without deciding any of them.” In reaching this decision, the Court observed it was bound by two rules: “one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is applied.” Focusing on the case’s record, the Court found it incomplete and remanded the case for a new trial to determine the missing facts.

Later in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Supreme Court passed over complex constitutional issues to resolve the case on narrower constitutional grounds specific to its facts. In *Masterpiece Cakeshop*, the question before the Court was whether a Colorado civil rights statute, which protected gay persons from being discriminated against when procuring goods and services, violated the First Amendment by requiring a baker to create a wedding cake for a same-sex couple. The baker viewed creating the cake to be an expressive artistic statement, and the civil rights statute as compelling him to use his artistry to express a message endorsing same-sex marriage despite his “sincere religious beliefs and convictions” to the contrary. Recognizing the conundrum presented by the case, the Court commented that while “religious and philosophical objections [to same-sex marriage] are protected, it is a general rule that such objections do not allow business owners . . . to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.” The Court, however, also explained the baker’s view that requiring him to create the cake amounted to forcing him to make an artistic expressive statement contrary to his religious beliefs.

In a decision written by Justice Anthony Kennedy, the Court adopted a judicial minimalist approach. Instead of addressing the constitutional questions raised by the interplay of the Colorado civil rights statute and the baker’s First Amendment [free exercise](#) and [free speech](#) rights, the Court found that, during hearings before the Colorado Civil Rights Commission, several commissioners denigrated the baker’s religious beliefs, thereby violating his free exercise rights. Finding that “the Commission’s hostility was inconsistent with the First Amendment’s guarantee that our laws be applied in a manner that is neutral toward religion,” the Court ruled in favor of the baker. The Court emphasized, however, the limited application of *Masterpiece Cakeshop* to other cases, stating:

The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.

A variation on judicial minimalism is the practice of “assuming but not deciding” a constitutional issue. In these decisions, the Court foregoes resolving an underlying constitutional question in favor of treating the constitutional question as resolved for the limited purpose of deciding the case before it. Such an approach enables the Court to resolve the dispute at issue without determining the underlying constitutional question. For instance, in *National Aeronautics & Space Administration (NASA) v. Nelson*, the Court chose to “assume, without deciding,” that the Constitution protects an individual’s “interest in avoiding disclosure of personal matters.” Based on this assumption, the Court found that NASA’s background checks did not violate the “assumed” constitutionally protected right to informational privacy.

Using judicial minimalism, courts can resolve disputes while limiting the precedential effect of their decisions. Additional information on this topic can be found in the [Constitution of the United States of America, Analysis and Interpretation](#) and CRS Report R43706, *The Doctrine of Constitutional Avoidance: A Legal Overview*.

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