The Rise of Stealth Canons?

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Anita Krishnakumar, Passive Avoidance, 71 **Stan. L. Rev.** 513 (2019).

In *Passive Avoidance,* Professor Anita Krishnakumar argues that the Roberts Court has retreated in recent years from the aggressive use of the constitutional avoidance canon that dominated much of its early jurisprudence. Instead, the Court now relies on doctrines like the rule of lenity, federalism clear statement rules, and the mischief rule as alternatives to the constitutional avoidance canon, a move that she refers to as "passive avoidance."

This Article is another tour de force in a very impressive body of work. Professor Krishnakumar exhaustively tracked the Court's use of the constitutional avoidance canon, discussing its high point from 2006-2012 and subsequent decline thereafter. In a number of cases, the Court construed statutory language very broadly—and sometimes implausibly—to avoid serious constitutional questions raised by the statute. Famously, the Court relied on the constitutional avoidance canon in *National Federation of Independent Business v. Sebelius*, by construing the individual mandate in the Affordable Care Act as a tax in order to avoid the constitutional issues posed by treating it as an exercise of the commerce power.[1] The Court also invoked the canon in *Northwest Austin Municipal Utility District Number One (NAMUDNO) v. Holder*, broadly interpreting the bail out provisions of the Voting Rights Act of 1965 to avoid constitutional issues.[2] She argues that these cases, and others, triggered such backlash that the Court ultimately retreated from active use of the constitutional avoidance canon.

Professor Krishnakumar offers a compelling narrative to explain the Court's retreat from the canon. Commentators had criticized the Court's use of the canon as "activist," pushing the Court to find other, less transparent ways of achieving its goals. The turn to these alternative doctrines has been mostly beneficial. They avoid many of the criticisms that have plagued the constitutional avoidance canon, the most pointed of which accuse the Court of using the canon to issue judicial advisory opinions by opining about, but failing to resolve, the constitutionality of the statute being challenged. Neither the clear statement rule nor the lenity doctrine requires any consideration of the statute's underlying constitutionality; the assumption is that the exercise of federal power is problematic for reasons unrelated to the statute's constitutionality. Similarly, focusing on the events that motivated the passage of the statute as a reason for embracing or eschewing a particular interpretation, as the Court does with the mischief rule, keeps the statute in line with its original purposes, and thus avoids accusations that the Court is seeking to enlarge its own power by rewriting the statute. In sum, Professor Krishnakumar's view is that the use of second order doctrines to achieve goals similar to the constitutional avoidance canon has the benefit of advancing a variation of Alexander Bickel's "passive virtues" approach—one that avoids complex constitutional questions through the use of narrower interpretive techniques.

Like much of her work, this Article tells an important story in judicial decision-making. It also fits with an emerging literature that has sought to explain the stealthy ways in which the Court and individual justices resolve cases beyond issuing opinions.[3] While Professor Krishnakumar ultimately endorses the Court's use of passive avoidance, she recognizes that its reliance on alternative doctrines—which I call "stealth" canons—could also raise concerns about a lack of transparency in the Court's decision-making process. In opaquely using stealth canons to avoid constitutional questions, the Court "could be criticized for obscuring [its] true reasons for choosing Y interpretation over X interpretation of a statute, and for silently leaving in place a statute that several Justices believe contain serious constitutional infirmities." (Pp. 582-83 n.1.) She concludes, however, that the benefits outweigh the costs because these doctrines mitigate the harm from an aggressive use of the constitutional avoidance canon that has caused so many to question the Court's legitimacy.

Many readers familiar with the Court's use of the constitutional avoidance canon from 2006 to 2012 are likely to agree with Professor Krishnakumar that the benefits of using stealth canons outweigh the costs. While these doctrines may raise transparency concerns, there was also an alarming lack of transparency with the constitutional avoidance canon that suggested that the Court was motivated by considerations other than a statute's potential unconstitutionality.

In *NAMUDNO*, for example, the Court intimated at length that section 5 of the Voting Rights Act of 1965 was unconstitutional and that avoidance of the constitutional question would give Congress an opportunity to fix the statute. Yet when the Court invalidated the coverage formula of section 4(b) of the Act four years later in *Shelby County v. Holder*, the Court made it difficult to envision that any type of remedy would be appropriate. Much of its opinion was based on a post-racialism that suggested that the Act was outdated because of its federalism costs.[4] Even if Congress had been functional enough to amend sections 4(b) and 5 during the period between *NAMUDNO* and *Shelby*, it was likely in a lose-lose situation given the chasm between the Court's deference to Congress in 2009[5] and the Court's 2013 intervention to save "Our Federalism" from a threat that no longer existed.[6]

Thus, the lack of transparency and inconsistent use of the constitutional avoidance canon suggests that the switch to other, less intrusive doctrines should be a welcome one, despite the risk that these alternative doctrines will be used in a stealthy way. By highlighting the rise of these stealth canons, Professor Krishnakumar importantly and critically highlights the interpretive tools to which litigants should give more attention for this next era of judicial decision-making.

1. 567 U.S. 519 (2012).
2. 557 U.S. 193 (2009).
3. *See*, *e.g.*, Greg Goelzhauser, Silent Concurrences, 31 **Const. Comment.** 351, 353 (2016) (arguing that justices sometimes concur in opinions without explanation because of "vote switching and uncertainty about the proper disposition or legal rule, a desire to maintain a consistent voting record and withhold support for disfavored precedents, and bargaining failures over opinion language and scope"); William Baude, *Forward: The Supreme Court's Shadow Docket*, 9 **N.Y.U. J.L. & Liberty** 1 (2015) (arguing that the Court's practice of summarily reversing certain lower court decisions (but not others) and issuing stays and injunctions without explanation is a part of a "Shadow Docket" that raises questions about transparency and procedural regularity). *See also* Richard H. Fallon, Jr., *A Theory of Judicial Candor*, 117 **Colum. L. Rev.** 2265, 2272 (2017) (arguing that the "ideal" of judicial candor, as opposed to the obligation of judicial candor, would require a judge to disclose "motivating moral and policy judgments, objectively informative reason-giving, and candor in inquiry").
4. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2625 (2013) (arguing that the preclearance regime, as then constituted, was no longer warranted because "blatantly discriminatory evasions of federal decrees are rare," "minority candidates hold office at unprecedented levels," and the "tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years"). *But see id.* at 2636 ("The House and Senate Judiciary Committees held 21 hearings, heard from scores of witnesses, and received a number of investigative reports and other written documentation of continuing discrimination in covered jurisdictions. In all, the legislative record Congress compiled filled more than 15,000 pages. The compilation presents countless 'examples of flagrant racial discrimination' since the last reauthorization; Congress also brought to light systematic evidence that 'intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed.'").
5. Compare NAMUDNO v. Holder, 557 U.S. at 205 with Shelby Cnty. v. Holder, 570 U.S. at 556. In *Shelby*, the Court did not resolve the question of what standard of review applies to Congress's exercises of authority under the Fifteenth Amendment, making it difficult for Congress to legislate in this area moving forward. *See Shelby Cnty.*, 570 U.S. at 542 n.1 (stating that "*Northwest Austin* guides our review under both Amendments in this case"). *But see NAMUDNO*, 557 U.S. at 204 ("The parties do not agree on the standard to apply in deciding whether, in light of the foregoing concerns, Congress exceeded its Fifteenth Amendment enforcement power in extending the preclearance requirements…. That question has been extensively briefed in this case, but we need not resolve it. The Act's preclearance requirements and its coverage formula raise serious constitutional questions under either test.").

6. *See* Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 **Wash. L. Rev.** 379, 393 (2015) ("The *Shelby County* decision suggests that the Court is gravitating away from a broad interpretation of Congress's enforcement authority that would allow it to regulate otherwise constitutional conduct in order to deter constitutional violations."). *See also* Guy-Uriel Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 **Iowa L. Rev.** 1389, 1392-93 (2015) (arguing that proposed fixes to the VRA then under discussion "will simply increase the risk that the current Court majority further dismantles—and hastens the demise of— the remaining provisions of the Act" because "the Court no longer believes that intentional racial discrimination by state actors remains the dominant problem of democratic politics.").

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