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James A. Gardner

ESSAY

THE AMBIGUITY OF LEGAL DREAMS: A COMMUNITARIAN DEFENSE OF JUDICIAL RESTRAINT

JAMES A. GARDNER*

Our courts serve two functions: they resolve disputes between adversaries, and they tell us what the law is. The United States Supreme Court, however, has long recognized a family of doctrines curbing the second function, prescribing judicial restraint: a court should avoid addressing a constitutional issue if a case can be decided on any other grounds; a court should not decide any issue not necessary to the resolution of a case. These self-imposed limitations on courts' power have been justified on diverse grounds, including theories of judicial economy and the countermajoritarian nature of judicial review. In this Essay, Professor James A. Gardner rejects these justifications and argues that courts should not tell us what the law is in many instances simply because a culturally diverse nation may be better off not knowing. By preserving the ambiguity in the law, courts enable multiple views to co-exist, thereby allowing our diverse society to accept a single system of law.

Happy is the hearing man; unhappy the speaking man. As long as I hear truth, I am bathed by a beautiful element, and am not conscious of any limits to my nature. The suggestions are thousandfold that I hear and see. The waters of the great deep have ingress and egress to the soul. But if I speak, I define, I confine, and am less. . . . Silence is a solvent that destroys personality, and gives us leave to be great and universal.

—Ralph Waldo Emerson[1]

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* Associate Professor of Law, Western New England College School of Law. B.A. 1980, Yale University; J.D. 1984, University of Chicago. Thanks to Lise Gelernter and Jay Mootz for helpful suggestions and comments on a previous draft, and to Western New England College School of Law and Dean Howard Kalodner for providing financial support.

1. Ralph Waldo Emerson, *Intellect, in* ESSAYS: FIRST AND SECOND SERIES 187, 196 (1990).

I. INTRODUCTION

The law is a relentless creator of certainty. Every human being inhabits a moral universe of exquisite ambiguity, full of broad values, general principles, vague credos. The law stalks these uncertainties and annihilates them; it takes the majestic generalities by which we purport to lead our lives and systematically, unceremoniously, makes them concrete.

Do we value our privacy? Then the law tells us that a police officer's removal of *this* object from *this* piece of furniture in *this* house after observing *these* activities violates that cherished privacy. Do we hope to encourage individuals to act on their reasonable expectations in private dealings? Then the law tells us that saying *these* words to *this* person after *this* exchange of correspondence gives rise to contractual liability.

Its specificity is both the attraction and repulsion of law. Law's specificity is attractive because it requires those who confront the law to take a stand. One cannot wrap oneself in abstract principles and hope to get far in the businesslike bustle of the legal realm. The law demands of its practitioners precision. It's no good to say, for example, that a case should be decided justly; one must specify the just solution: "Is it, then, counsel, the husband or the wife who should get the dinette set?" And there is no place here for delicacy or hedging, no place for fence-sitting, because one must say who wins and who loses in a specific case.

Furthermore, by forcing its practitioners to take a stand, the law forces them to take a risk. In law, one must put up or shut up, and putting up means specifying one's position concretely. But specifying a position opens it to easy scrutiny, and such scrutiny can be brutally—and satisfyingly—iconoclastic, puncturing the most abstruse or inflated conceits: "Aha! So *that's* your notion of justice, is it?"

But the law's relentless scrutiny, its constant testing of the minute ways in which broad principles play out, can also be tiresome, leveling, petty. Abstract ideals elevate human life; they give us something to aspire to, something to motivate us to live lives of meaning, grace, elegance. From this point of view the law can be a pestering nag distracting us not merely from the achievement but from the very contemplation of our most cherished dreams. As Socrates discovered, the self-appointed gadfly who reveals too many weaknesses and inconsistencies in society's self-understanding may be severely punished, and who can say that such punishment is never deserved?

It is an article of faith in our society that we need law, and one reason why we need it is precisely because of its capacity to reduce our abstract principles of self-governance to a level of specificity sufficient to

resolve disputes among our citizens. Yet we also need those same abstract ideals, and we need them at a level of generality sufficient to command the continued fealty of an exceedingly diverse citizenry. Law itself thus sits at a sort of fulcrum in which societal tensions pull it in opposite directions in the service of competing, but equally necessary, social goals.

In this essay, I want to explore one way in which our courts have attempted to strike a balance between these two aspects of law, the cultivation of the specific and banal, and the veneration of the abstract and majestic. The area that I wish to examine is the way in which courts decide when a case is "over"—that adjudication and judicial explication of the law should cease, and that the court's job is done.

Adjudication is a one-way trip from the general to the specific. When a court adjudicates a legal claim, it identifies relevant broad principles of law and applies those principles to a concrete set of facts. To resolve a legal question is thus to proclaim: "Here is what the law means." In our society, the primary function of courts is to make such proclamations; their one and only product is legal meaning, and it is a product eagerly sought by a litigious American public.

And yet, in certain clearly defined instances, our courts refrain from dispensing legal meaning to clamorous consumers. In these circumstances, courts seem almost to be deliberately preserving the ambiguity of the law, as though legal meaning were something that ought to be rather carefully rationed. This restraint occurs primarily in two instances, one narrow and the other broad. The narrow instance involves the judicial doctrine of avoiding decision of constitutional questions. In cases in which the doctrine applies, a court typically will resolve statutory or other sub-constitutional issues and then stop, leaving unresolved a constitutional question raised and argued by the parties.

The more general instance of judicial preservation of legal ambiguity, which includes many instances of the avoidance of constitutional questions, occurs whenever a court declines to resolve any question raised by the parties once a dispositive issue has been adjudicated. For example, if a court finds that a particular item of income is deductible under one provision of the Internal Revenue Code, it will not decide whether the income is also deductible under two or three other provisions identified by the taxpayer. If a law is held to violate a plaintiff's First Amendment rights, a court will not decide whether the plaintiff's right to equal protection also was infringed. In a tort case, if the court decides that the defendant owed the plaintiff no duty, it will not also decide whether the defendant caused the plaintiff's injury. In each of these cases, a court faced with a demand for elaboration of the law declines to do so.

Why in these cases are courts unwilling to elaborate on the law? Why do they decline to resolve questions about the Constitution or lower-order law to which they have never provided definitive answers, and to which litigants have requested answers? I shall argue in the following sections that the judicial practice of confining adjudication to the bare minimum necessary to resolve a particular dispute is, at bottom, a strategy of social inclusion that is highly desirable in a society as diverse as the contemporary United States.

Every legal case—and this is especially true of constitutional cases—presents by definition a clash not only of litigation positions, but of visions of society. Every time a court rules on a question presented by the parties, it affirms the social vision of one party and repudiates the vision of the other.[2] Such a repudiation can be deeply alienating because it constitutes a rejection of the loser's understanding of the way in which society's goals, values, and beliefs are embodied in its Constitution and laws—a rejection, in other words, of the loser's understanding of what society ultimately is. Adjudication is a blunt instrument; it does not repair rifts in the social fabric by conciliation and dialogue, but by smashing one side into conformity with the other.[3] Judicial avoidance of adjudication is a form of judicial restraint that minimizes the alienating effects of adjudication by directing courts to decide only those questions that must be decided to resolve overt conflicts among society's members.

My argument proceeds as follows. In Part II, I introduce the judicial doctrines of avoidance and necessity. In Part III, I consider and reject four traditional justifications for these doctrines, including the notion, long associated with the late Alexander Bickel, that federal courts should avoid constitutional adjudication because it is undemocratic and therefore constitutionally suspect. Part IV introduces two competing models of adjudication: the dispute resolution and expository models. The dispute resolution model is closely allied with, although it does not exhaust, the avoidance and necessity doctrines. This correspondence, however, does not itself justify the doctrines, but merely shifts the level of required justification from the rules of adjudication to the underlying model of adjudication. In this respect, the propriety of the dispute resolution model has been powerfully challenged in recent years by propo-

2. This process is laid out with great clarity in Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

3. The violent aspects of adjudication are explored in depth in Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1609-18 (1986) [hereinafter Cover, *Violence and the Word*]; Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815, 817-21 (1986); and Cover, *supra* note 2, at 40-44, 48-53. For a critical response, see Richard K. Sherwin, *Law, Violence, and Illiberal Belief*, 78 GEO. L.J. 1785 (1990).

nents of the expository model such as Professors Susan Bandes and Girardeau Spann.

Finally, in Part V, I set out a communitarian defense of the type of judicial restraint exemplified by the avoidance doctrine, the necessity doctrine, and the dispute resolution model of adjudication. As I have already indicated, I argue that such judicial restraint can be understood to rest on a normative preference for constitutional and legal ambiguity, which minimizes the chances of irrevocably alienating segments of society. The avoidance and necessity doctrines and the dispute resolution model of adjudication are therefore strategies of social inclusion.

II. AVOIDANCE AND NECESSITY IN ADJUDICATION

A. Avoidance of Constitutional Questions

In the volatile world of constitutional adjudication, few doctrines are more familiar and predictable than the Supreme Court's practice of avoiding decision of constitutional questions.[4] The Court's aversion to constitutional adjudication has found expression in a family of related principles. As a general matter, the Court has said that it will not "decide questions of a constitutional nature unless absolutely necessary to a decision of the case."[5] For the most part, this means that the Court will not decide a constitutional issue "if there is also present some other ground upon which the case may be disposed of."[6] Typically, this "other ground" is statutory,[7] although other alternatives, such as agency regulations,[8] will also suffice.

The Court's reluctance to decide constitutional issues has carried over into its practice of statutory construction: When the constitutionality of a statute is in question, the Court "will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided."[9] Finally, if forced to decide a constitutional question, the Court will take steps to minimize the extent of its constitutional adjudication by refusing to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be ap-

4. Although this discussion focuses on the practices and holdings of the United States Supreme Court, it should be understood to apply to lower federal courts and to any state courts that follow similar practices.

5. Burton v. United States, 196 U.S. 283, 295 (1905).

6. Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

7. King v. Smith, 392 U.S. 309, 334 (1968) (Douglas, J., concurring).

8. *See* Rust v. Sullivan, 111 S. Ct. 1759, 1771 (1991); Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 866 (1984); *see also infra* note 19 (discussing court's use of agency regulations to avoid constitutional issues).

9. Crowell v. Benson, 285 U.S. 22, 62 (1932).

plied."[10] For the sake of simplicity, I shall refer to these doctrines collectively as the "avoidance doctrine."

According to the Supreme Court, the avoidance doctrine is "a cardinal principle" of constitutional adjudication.[11] These are strong words, and yet it is far from intuitively clear why the avoidance doctrine occupies such a central place in constitutional jurisprudence. Indeed, in many respects the doctrine seems quite bizarre and counterintuitive.

The Constitution is our highest and most fundamental order of law. What so exalts the Constitution is its pedigree: it is the direct act of the sovereign people. According to the conventions of American constitutionalism, the Constitution is understood to embody the people's most basic decisions concerning the scope of governmental powers and individual rights, and to comprise a set of instructions from the people to their governmental agents.[12] It is a charter that defines a way of life.

But if the Constitution is really a document of such power and importance to our society, what could possibly be better than for the Court to expound its meaning—to explain in detail, and on every possible occasion, the nature of the decisions and instructions of the sovereign people? Every such decision would illuminate the one true, narrow constitutional path upon which the government legitimately may tread. Indeed, many view the Court's primary function to be the enforcement of critical constitutional norms against other branches of government, a function it cannot perform without construing the Constitution.[13]

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10. Liverpool, N.Y. & P.S.S. Co. v. Emigration Comm'rs, 113 U.S. 33, 39 (1885).

11. *Crowell*, 285 U.S. at 62.

12. The essence of constitutionalism is perhaps best captured in Chief Justice Marshall's famous phrase: "[W]e must never forget that it is *a constitution* we are expounding." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819). Marshall's dictum, which capsulizes the notion that the Constitution is a set of instructions from the sovereign people to their governmental agents, *id.* at 404-05, stands in a tradition that runs back through the Court's earliest cases, Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 456-58, 471-72 (1793); to the constitutional text, U.S. CONST. pmbl.; to the Declaration of Independence; to Locke, JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (C. Macpherson ed., 1980) (1690), and runs forward up to the present, *see, e.g.*, Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam) (The United States is "a republic where the people are sovereign."). The classic historical works in this tradition are CARL BECKER, THE DECLARATION OF INDEPENDENCE (1922); ANDREW C. MCLAUGHLIN, THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM (1932); and LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1955). More recent works that reaffirm this approach in the face of challenges from republican revisionism include MORTON WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION (1978); FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985); THOMAS PANGLE, THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE (1988); and THE REVIVAL OF CONSTITUTIONALISM (James W. Muller ed., 1988).

13. *E.g.*, Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 281-82 (1990); Owen M. Fiss, *The Supreme Court, 1978 Term —Foreword: The Forms of Justice*, 93 HARV. L. REV.

For a court in a constitutional democracy to seek to avoid construing the Constitution thus seems not a virtue, but a perverse vice. The Court's avoidance of constitutional issues keeps the Constitution shrouded in mystery when it, more than any other text in our legal system, ought to be made transparent. It is almost as though the Court, like some kind of oracle, consults the constitutional gods only with the greatest reluctance because their messages can contain bad news as well as good. As we shall shortly see, this analogy is an apt one.

B. Necessity in Ordinary Adjudication

As with constitutional issues, courts resolve ordinary legal claims under a rule of necessity: They decide legal questions only when "necessary" to resolution of the case.[14] For example, in a case whose outcome depends upon the existence of a contract, if the court determines that no valid offer was ever made it will not ordinarily go on to decide whether the alleged contract was supported by consideration. Similarly, in a case under the Freedom of Information Act, if the court determines that the government properly refused to disclose a document because the information in it was exempt from disclosure under the Act's national security exemption, the court will not generally go on to decide whether the withholding was also proper under the exemptions covering attorney-client privilege or ongoing criminal investigations.[15] In cases like these, resolution of subsequent issues is not thought to be necessary because a party's entitlement to relief has already been settled. I shall call this practice the "necessity doctrine."

As with the avoidance of constitutional adjudication, we may ask of the necessity doctrine: Why should courts avoid explaining the law in cases properly before them, and in which the parties have requested legal guidance? Just as adjudication of constitutional issues reveals the meaning of the Constitution, so adjudication of sub-constitutional issues

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1, 5-17 (1979); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 634 (1992); Girardeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 632-47 (1983); *see also* Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1370-71 (1973) (describing the Court today as having a "special function" to enforce the Constitution).

14. From the Court's most recent term, see Patterson v. Shumate, 112 S. Ct. 2242, 2250 (1992) (holding that debtor's interest may be excluded from bankruptcy estate under one provision of Code and that Court need not reach issue of exemption under another provision); INS v. Doherty, 112 S. Ct. 719, 724 (1992) (because Court found Attorney General did not abuse discretion on two decisions, Court did not need to reach a third decision); Ardestani v. INS, 112 S. Ct. 515, 521 (1991) (because Equal Access to Justice Act did not apply in circumstances presented, Court did not need to reach issue of preclusive effect of another statute).

15. *See* 5 U.S.C. §§ 552(b)(1), (5), (7) (1988).

reveals the meaning of lower-order law. Knowledge of the meaning of the law and the ways in which it applies is valuable; it helps us conform our conduct to the requirements of the law, thereby maximizing our ability to plan our actions and successfully carry them out, and minimizing our chances of inadvertently taking actions that collide with authoritative social norms. Moreover, knowledge of the meaning of ordinary law seems, if anything, more practically useful than knowledge of the Constitution. After all, we act in ways that implicate the law every day, but we face questions that implicate our fundamental values only rarely. Why, then, do courts deny society the guidance and other benefits that maximal exposition of the law might provide?

III. FOUR TRADITIONAL JUSTIFICATIONS THAT FAIL

The proposition I wish to defend in Part V is that the avoidance and necessity doctrines flow from a general normative judicial aversion to exposition of the law; that is, courts seem to recognize tacitly that the clarification of the law through adjudication has significant social costs that should be minimized when possible, and the avoidance and necessity doctrines help the courts balance the costs and benefits of adjudication in a socially responsible way. This thesis is somewhat unorthodox, and if I am to defend it successfully, I must first confront and refute any independent justifications for this family of doctrines.

There are only two traditional explanations of judicial behavior that could account for both the avoidance and necessity doctrines in nearly all their manifestations: (1) judicial economy, and (2) the hierarchical analytic requirements of legal reasoning. Neither of these justifications is persuasive. There are also two additional analyses that have been advanced to justify certain aspects of the constitutional avoidance doctrine alone: (3) the "gravity and delicacy" of judicial review, and (4) the text of Article III. These explanations, although not entirely without force, ultimately fail as well.

A. Judicial Economy

It has been suggested that the Court's avoidance of constitutional adjudication is justifiable on grounds of judicial economy.[16] The judicial economy argument could take two possible forms. First, it might be argued that statutory issues are simply easier and faster to decide than con-

16. *See, e.g.*, R. Lea Brilmayer, *State Forfeiture Rules and Federal Review of State Criminal Convictions*, 49 U. CHI. L. REV. 741, 747 n.22 (1982) ("Constitutional questions are to be avoided because constitutional adjudication is a scarce and important resource."); *accord* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 587-88 (1985).

stitutional ones. Judicial economy is thus served by substituting the easier issue for the harder one whenever possible. This rationale seems highly unlikely. Some statutory issues can be extraordinarily complex and time-consuming, especially when the statutory scheme is complicated or when extensive review of legislative history is required. Conversely, some constitutional questions have obvious answers and can be decided with a minimum of effort.[17] Even if, in the aggregate, resolution of statutory issues consumed fewer judicial resources than resolution of constitutional issues, it is hard to see why the Court would impose a rule requiring consideration of statutory issues first in all circumstances. If the Court's motivation were judicial economy, a more sensible practice would be to decide the easier issue, whatever it might happen to be in a particular case. Moreover, the avoidance doctrine may actually undermine judicial economy in many cases by requiring the Court to plow fruitlessly through non-dispositive statutory issues in order to reach a dispositive constitutional question.

A second and somewhat stronger argument is that the avoidance doctrine serves judicial economy by providing a stopping point for the Court's adjudication in any multiple issue case: Once a sub-constitutional issue is found dispositive, the Court does not then *go on* to consider the constitutional issues. Even here, though, it is far from clear that the avoidance doctrine promotes judicial economy, especially in the long run. First, once the Court has a case before it, judicial economy may best be served by adjudication of all questions presented by the parties. Every time the Court takes up a new case it must expend considerable effort familiarizing itself with numerous contextual matters: the facts, the pleadings, the equities, the parties' briefs and arguments, the procedural posture of the case, the decisions below, the potential consequences of possible rulings, and many other factors. These costs are invested fully whether the Court decides one issue or all issues. In these circumstances, the avoidance doctrine promotes judicial economy only if constitutional questions avoided in one case never crop up in later cases; if they do, then the Court must invest in learning the context of two cases instead of one, and still must decide the constitutional issue it avoided in the first case.

On the other hand, issues deferred in legal conflicts have a tendency to "go away" over time, either due to changing circumstances, settlement, or the shifting interests of the parties. It might be that constitutional issues avoided in one case "go away" more often than they recur in subsequent cases, and the avoidance doctrine promotes judicial economy in the aggregate. There are, however, good reasons to be skeptical of this

17. *See* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985).

conclusion, especially from the perspective of the entire federal court system. Even if the Supreme Court itself is rarely forced to confront constitutional issues it has previously avoided, it seems inevitable that, at least in a very large number of cases, the avoided issue will merely be shunted into the lower federal courts. There, the Supreme Court decision serves as a virtual blueprint showing litigants how to frame the issue so as to force a constitutional ruling; as a result, the avoided question may be raised successfully as an issue of first impression not merely in one federal court, but in many. The Supreme Court's savings may thus represent a false economy for the federal court system as a whole.

This may even be the case when the precise issue avoided by the Court does not arise later in any court. Supreme Court rulings on any issue do double duty in our system: They not only resolve disputes between litigants before the Court, but they provide significant guidance to lower courts concerning a wide variety of issues for which the Court's ruling may turn out to have precedential or persuasive value. Many of the precedential aspects of Court rulings are unforeseen at the time of the ruling. Thus, it may well be that any Supreme Court ruling at all on any subject ends up saving substantial time and effort for the federal court system as a whole (and state courts when they decide federal issues) by virtue of the guidance such rulings provide to lower courts.[18] At the very least, these considerations suggest that the Court's avoidance doctrines are poorly framed to serve judicial economy. A better set of rules would require the Court to take account of factors such as the likelihood that a constitutional question will recur, and the guidance value of a constitutional ruling. Only if these factors favored avoidance of the constitutional question on judicial economy grounds would the Court refrain from going beyond statutory and regulatory issues.

The judicial economy argument is no more persuasive when applied to the necessity doctrine in sub-constitutional law. Courts invest just as many resources in learning the context of a statutory or common-law case as they do in constitutional cases, an investment that is lost when the court stops adjudicating before resolving all the issues raised by the parties. Moreover, the guidance provided by these additional rulings, particularly when issued by appellate courts, can be just as useful to lower courts, lawyers, and future potential litigants as would be rulings on constitutional issues. If anything, the guidance value of judicial decisions in such cases is probably greater than in constitutional cases; avoided common law and statutory questions are probably more likely to

18. *See* Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1096-1100 (1987).

recur than avoided constitutional ones because ordinary law affects many more people in many more of their daily actions than does constitutional law, and the same problem is therefore likely to arise with some frequency.

B. Analytic Hierarchy

Federal courts display a strikingly consistent pattern of considering legal issues in order from the "lowest" level of law to the "highest." As we have seen, courts avoid constitutional questions in favor of statutory ones, but they also often avoid statutory questions as well if the case can be resolved at the level of administrative regulations or adjudications.[19] This practice raises the possibility that there might be some sort of legal analytical hierarchy requiring courts as a matter of decisional logic to reach constitutional questions only after preliminary, lower-order issues have been considered. Perhaps a constitutional violation cannot occur in an analytically meaningful sense if the challenged governmental action violates a statute or some other lower order of law.[20] For example, one might say that when the action of a government agency violates a statute, the action was unauthorized from the outset; an agency action unauthorized by law cannot violate the Constitution because it never really "existed" in the contemplation of the Constitution. Only when the lower-order law provides some basis for the challenged action does the action exist from the perspective of the higher-order law. If not, the constitutional question is analytically moot and cannot be decided.

If there is some such regime of legal metaphysics guiding the judicial practice of advancing systematically through the legal hierarchy, it is quite arbitrary. One could just as easily imagine a regime in which

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19. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), institutionalized this practice by creating a structure for judicial review of agency regulations that accords great deference to agencies' interpretations of their own statutes, thereby making it unlikely that a court will strike down agency regulations as inconsistent with the statutes. *Id.* at 844-45. Federal courts also often avoid reaching statutory issues by applying the doctrine that agencies must follow their own regulations, *see* United States v. Nixon, 418 U.S. 683, 694-96 (1974), or by remanding regulations or adjudicatory decisions on the basis of curable procedural errors. *See* Administrative Procedure Act, 5 U.S.C. §§ 551-706 (1988).

20. Professor Hans Linde has used just such reasoning as the basis for his argument that state courts must consider claims raised under state constitutions before proceeding to adjudicate federal constitutional claims under the Fourteenth Amendment. Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 181-87 (1970). The Fourteenth Amendment bars states from depriving individuals of life, liberty, or property without due process. Linde argues that such a deprivation at the hands of the state cannot have occurred, as a logical matter, until the state court has determined that state constitutional law provides no ultimate recourse for the complaining party. Only after state law has been shown to deny the plaintiff all relief can a federal due process claim logically arise. *Id.* at 133.

courts proceed directly to the constitutional question. Why quibble, the court might say, over the consistency of this action with some statute or other—what we have here is a constitutional violation, so we know this governmental action cannot stand. Nothing about statutory law makes it analytically antecedent to constitutional law; indeed, it is possible to imagine a legal regime in which there is no statutory law at all, but only constitutional law. In such a regime all legal questions would be constitutional questions, and all such questions could be decided by courts without any preliminary analysis.

A somewhat more intuitively appealing claim for the existence of an analytic hierarchy can be made for certain instances of the necessity doctrine. Consider the example of the contract case given above. If a court determines that no valid offer was made, it will not ordinarily go on to decide whether the offer was accepted, or whether the "contract" was supported by consideration. Here, the court's stopping point seems more of a genuine logical necessity: If there were no offer, then an acceptance seems a logical impossibility; if no acceptance could have occurred, then there could not have been a contract for which consideration would have been necessary. The structure of contract law itself seems to create an analytic hierarchy that not only requires resolution of certain questions before others, but makes questions and answers further along in the analysis meaningless when addressed out of order.

This impression, however, is misleading. First, the course of adjudication need not be dictated by perceptions of logical necessity. For example, courts not infrequently resolve cases by "assuming without deciding" that certain logical prerequisites to further adjudication have been satisfied.[21] Thus, a court may assume without deciding that an offer was made and accepted in order to resolve the case on the ground of lack of consideration. This common practice shows that any legal analytical hierarchy is far more flexible than it appears.

Second, and more fundamentally, the impression of logical necessity that underlies the concept of an analytic hierarchy rests on a false sense of correspondence between legal analysis and the physical world. We are tempted to think of offers and acceptances as physical artifacts that stand in a certain relation to one another, so that trying to talk about an acceptance when there has been no offer is like trying to drive from Connecticut to New Jersey without passing through New York—it can't be done. But, of course, the nature of offers and acceptances is not determined by some reality "out there," but by legal categories, established by

21. *E.g.*, Connecticut v. Doehr, 111 S. Ct. 2105, 2114 n.5 (1991); Norfolk & W. Ry. v. American Train Dispatchers, 111 S. Ct. 1156, 1163 (1991).

convention, the boundaries of which can be manipulated to suit social needs such as efficient adjudication.[22] Indeed, the judicial practice of "assuming without deciding" shows that courts do not always view their function as determining the state of reality—the "facts"—but that they sometimes feel justified in making hypothetical or even counterfactual assumptions in order to achieve the adjudicatory goals they are by convention charged with accomplishing.

A slightly different possibility is that the notions of analytic hierarchy and logical necessity in adjudication derive their appeal not from metaphysical assumptions about reality, but from conventional assumptions about rationality. Even conceding that what counts as rational is itself a matter of convention,[23] we nevertheless hold certain views as a society about what constitutes rational decision making, and the concept of an analytic hierarchy, it might be argued, grows out of these views. The problem with this explanation is that the concept of rationality, by itself, is incapable of dictating the type of legal reasoning methodology represented by an analytic hierarchy.

The prevailing concept of rationality examines means and ends; a course of action is generally held to be rational if it will result in the achievement of an end that the actor wishes to achieve.[24] Consequently, what counts as rational legal analysis is legal analysis that proceeds in a way that helps the decision maker, such as a court, achieve a goal it wants to achieve. Thus it will not be the case that a court deciding contractual liability must consider the question of offer before acceptance unless it must do so in order to achieve some required objective.

But what objectives are courts required to achieve? The content of such objectives also is specified by convention, but the conventions are those of the legal system and not those of rationality itself. If the court's goal, for example, were to resolve all outstanding legal questions in every

22. The argument made here, of course, is based on aspects of postmodernist philosophy that have by now thoroughly infiltrated academic legal analysis. Among the most influential works to make the leap from other areas are THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970); RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979); ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (2d ed. 1984). For a recent capsule summary of postmodernism, see Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 269-79 (1992).

23. ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988).

24. *Id.* at 304; JOHN RAWLS, A THEORY OF JUSTICE § 25, at 142-50 (1971). The Supreme Court also adheres to this definition of rationality in its familiar "rational basis" test in the due process and equal protection areas. Under the test, the Court examines whether the means employed (for example, a restriction on liberty or a legislative classification) are related to the achievement of the legislative end. *E.g.*, Frontiero v. Richardson, 411 U.S. 677, 683 (1973) ("Under 'traditional' equal protection analysis, a legislative classification must be sustained unless it . . . bears no rational relationship to a legitimate government interest.").

dispute, then the invocation of an analytic hierarchy would itself be irrational because it would thwart achievement of the goal. Only if the goal of a court engaged in adjudication is to resolve a case *without* deciding all outstanding legal questions does the necessity doctrine make sense. But this merely shows that the possibility of an analytic hierarchy in legal reasoning can only arise from an independent belief in the undesirability of courts deciding more than the minimum number of legal issues necessary to resolve the dispute between the parties. It is thus our notions of proper adjudication that structure our beliefs about legal reasoning, and not the other way around.

If we are to get to the bottom of the avoidance and necessity doctrines, it seems, we must confront and evaluate society's normative beliefs about the features of "proper" adjudication. Part IV undertakes such an examination, and we shall see there that the traditional dispute resolution model of adjudication provides just the sort of normative foundation upon which to build hierarchies of legal reasoning like those discussed above. Before turning to these models of adjudication, however, I want to explore two additional explanations that have been advanced narrowly as justifications for the judicial practice of avoiding constitutional questions. These explanations, it turns out, lead to exactly the same place: the dispute resolution model of adjudication.

C. *"Gravity and Delicacy"*

1. The Argument From Consequences

By any measure, the most commonplace and widely accepted explanation of the avoidance doctrine focuses on the adverse consequences of judicial review. According to this view, the avoidance doctrine is a straightforward attempt by the Court to minimize judicial invalidation of federal statutes: If the Court does not consider constitutional questions it cannot invalidate congressional law. Of course, this explanation requires further justification—why should the Court wish to avoid invalidating unconstitutional federal laws, something that seems to be its *raison d'etre*?[25]

The standard answer to this question is that courts should avoid striking down statutes because courts are neither democratic nor accountable, whereas legislatures are both[26]—in Alexander Bickel's famil-

25. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-80 (1803).

26. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (1986); LEARNED HAND, THE BILL OF RIGHTS 73-74 (1958); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407, 468 (1989); Michael Wells, *Preliminary Injunctions and Abstention: Some Problems in Federalism*, 63 CORNELL L. REV. 65, 68 (1977).

iar phrase, judicial review presents a "counter-majoritarian difficulty."[27] According to this view, the unavoidably anti-democratic aspect of judicial review threatens democratic self-rule, which is the ultimate source of governmental legitimacy and authority; the creation of such threats, the argument goes, is an evil to be avoided when at all possible.[28]

This view accords well with the Court's own statements concerning the avoidance doctrine. In his oft-cited concurrence in *Ashwander v. Tennessee Valley Authority*,[29] Justice Brandeis claimed that the various doctrines by which the Court avoids adjudicating constitutional issues are justified by what he called "the 'great gravity and delicacy' of [the Court's] function in passing upon the validity of an act of Congress."[30] The Court elaborated further in *Rescue Army v. Municipal Court*:[31]

> The policy's ultimate foundations . . . lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality. They are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; . . . withal in the paramount importance of constitutional adjudication in our system.[32]

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27. BICKEL, *supra* note 26, at 16.

28. Some have suggested that the avoidance doctrine is necessary in order to preserve interbranch comity: The avoidance doctrine minimizes judicial review, which avoids the governmental discord that inevitably accompanies judicial invalidation of statutes. Samuel Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed "Human Life" Legislation*, 68 VA. L. REV. 333, 393 (1982); Sunstein, *supra* note 26, at 469; Wells, *supra* note 26, at 68; *see also* BICKEL, *supra* note 26, at 116 (noting importance of actual impact of judicial decisions on society's settled expectations). But most of those who formulate the problem in terms of comity seem to rely ultimately on the counter-majoritarian problem; the real problem with judicial-legislative conflict is not discord, but the particular form that it takes when a democratically unaccountable branch invalidates the action of an accountable one. The one exception may be Justice Felix Frankfurter, who sometimes seemed to view the preservation of governmental harmony as a manifestation of "judicial statesmanship" valuable in itself. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 595 (1952) (Frankfurter, J., concurring) ("[C]lashes between different branches of the government should be avoided if a [non-constitutional] legal ground of less explosive potentialities is properly available. Constitutional adjudications are apt by exposing differences to exacerbate them."); Gary J. Jacobsohn, *Felix Frankfurter and the Ambiguities of Judicial Statesmanship*, 49 N.Y.U. L. REV. 1, 38 (1974).

29. 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

30. *Id.* at 345 (Brandeis, J., concurring).

31. 331 U.S. 549 (1947).

32. *Id.* at 571.

Although this passage is opaque, its grab bag of concerns seems to express just about the same types of reservations about judicial review as those expressed by Bickel—namely, that judicial review is an institutionally sensitive function best avoided because of its potentially disruptive consequences.

Whether expressed as a "counter-majoritarian difficulty" or as the "gravity and delicacy" of the judicial function, the potential adverse consequences of judicial review cannot justify the avoidance doctrine in its contemporary form. This is because the consequences of judicial review that are thought to be harmful—interbranch discord and the displacement of majoritarian legislation by politically unaccountable judges—occur only if the Court *invalidates* federal legislation; such consequences do not occur at all if the Court *upholds* federal law against constitutional attack.

As a result, any adverse consequences of judicial review can justify at most a rule designed to minimize judicial invalidation of legislation. We already have such a rule in our constitutional jurisprudence: the rule of judicial deference to Congress. According to this rule, all federal legislation bears a strong presumption of constitutionality.[33] This presumption tips the balance in judicial review in favor of upholding the challenged law, thereby reducing, in an amount proportional to the degree of deference, the number of instances in which the Court invalidates federal statutes.

Now it is certainly possible to think that the Court is not deferential enough, that it consequently strikes down too many statutes, and that this practice unduly stresses the legitimacy of democratic self-governance. But the solution to this problem is not to avoid constitutional adjudication altogether, as the avoidance doctrine requires, but simply to show increased deference by strengthening the presumption of constitutionality.[34] Indeed, the only basis for concluding that the adverse consequences of judicial review justify a rule of outright avoidance of constitutional adjudication is if the consequences of the Court's *upholding* federal law are somehow just as bad as the consequences of its *invalidating* such law. Alexander Bickel himself, perhaps alone among

33. *See, e.g.*, Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 319-20 (1985); United States v. National Dairy Prods. Corp., 372 U.S. 29, 32 (1963); United States v. Di Re, 332 U.S. 581, 585 (1948).

34. For example, James Bradley Thayer, in his influential article on judicial review, argued that courts should not set aside statutes unless they were unconstitutional "beyond a reasonable doubt." James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 146 (1893).

constitutional scholars, held this view, which is reason enough to examine it. Bickel's view, however, turns out to be unpersuasive.

2. Bickel's Rejection of Constitutionalism

According to Bickel, a judicial ruling that a statute is constitutional[35] represents "a significant intervention in the political process, different in degree only from the sort of intervention marked by a declaration of unconstitutionality."[36] A ruling of constitutionality, he says, announces the Court's judgment that a particular measure is "consistent with the principles whose integrity the Court is charged with maintaining"[37]—that is, with the enduring principles embodied in the Constitution. Due to the Court's prestige and symbolic role, such a ruling confers on the approved legislation a certain legitimacy that it might lack in the absence of any judicial pronouncement at all. The Court's legitimating power, Bickel claims, can "entrench and solidify measures" that might otherwise have been "tentative,"[38] and the Court's prestige can thereby "generate consent and may impart permanence"; at the least, the judicial imprimatur can place a "potent quietus . . . on . . . once hotly contested issues."[39]

Bickel's position is vulnerable in two ways. First, he overstates the impact of judicial validation on the political process. The primary political struggle over legislation occurs in Congress, not the courts. Because the courts can review only legislation that actually has been approved by Congress, all legislation that undergoes judicial review already has been adjudged by the political process to be wise, or at least worth enacting, and quite possibly constitutional as well[40]—it has already been politically legitimated. Any additional legitimation conferred by judicial validation of the measure occurs late and at the margin, and therefore adds comparatively little to the law's legitimacy. Further, as Professor Gunther has pointed out in his potent response to Bickel, the public is highly unlikely to distinguish between a law that survives judicial review because it is validated and one that survives because the constitutional challenge is

35. Bickel preferred the more technically correct formulation of "not unconstitutional." BICKEL, *supra* note 26, at 129. I use the more familiar word "constitutional" in order to avoid confusion.

36. *Id.* at 129.

37. *Id.*

38. *Id.*

39. *Id.* at 129-30.

40. At least this is the ideal. *See* Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587 (1975).

never reached.[41] Indeed, one might say that judicial refusal to invalidate a law, for any reason at all, has virtually no political impact since its ultimate effect is to leave the law entirely within the political realm where it can be repealed at any time, and where it must necessarily be defended on political grounds.

Second, and more fundamentally, even if Bickel's estimate of the political impact of judicial legitimation is accurate, it seems odd that he should view this effect as a problem to be avoided. When the Court upholds a law there is no interbranch tension and no counter-majoritarian displacement of the national will. What appears to disturb Bickel is the prospect of *any* non-trivial political reverberations of judicial action. But why should this be something to worry about? Here, Bickel's position can only be understood in the context of his overall constitutional philosophy, which takes for its model of democratic self-government a pure form of contemporaneous majoritarianism.

Bickel's central argument, the one that implicitly drives virtually all his other conclusions in *The Least Dangerous Branch*, begins from the premise that the United States is a democracy. In a democracy, the people rule themselves through majoritarian institutions like legislatures. Federal courts are not majoritarian institutions because federal judges are not selected by or accountable to the people. Judicial review thus consists of undemocratic bodies overruling the actions of democratic bodies. This makes judicial review "a deviant institution in a democratic society."[42]

The great problem with Bickel's position is not the logic of his argument, but the soundness of his initial premise. In the first place, the United States government is not a democracy—it is whatever the Constitution makes it: It is what it is. If Bickel thinks that the constitutional establishment of judicial review is enough by itself to disqualify the United States from the appellation "democracy"—and to this might be added many other features, such as the electoral college and the original

41. Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 7-8 (1964).

42. BICKEL, *supra* note 26, at 128. For recent criticism of Bickel's approach and formulation of the problem, see Bruce A. Ackerman, *The Storrs Lecture: Discovering the Constitution*, 93 YALE L.J. 1013, 1013-16 (1984); David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1 (1990); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1531-33 (1990); Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1, 7-18 (1989); Martin H. Redish, *Political Consensus, Constitutional Formulae, and the Rationale for Judicial Review*, 88 MICH. L. REV. 1340, 1346-49 (1990); *see also* Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952) (arguing that judicial review is both necessary and democratic).

election of Senators by state legislatures[43]—then he is entitled to criticize the constitutional scheme for creating an insufficiently democratic form of government. But he is hardly entitled to make the circular argument that any specific "undemocratic" constitutional institution is presumptively illegitimate on the ground that the Constitution establishes a democracy. If the Constitution creates an institution then it is legitimate—period.

Bickel's evaluation of the legitimacy of judicial review against an external standard of democracy rather than against the contours of the Constitution itself reveals an even deeper flaw in his position: It is radically inconsistent with the American tradition of constitutionalism. Constitutionalism holds, in brief, that the adoption of a constitution is a direct act of the people in their sovereign capacity; the resulting document then embodies the fundamental law of the polity that created it.[44] A critical feature of this tradition is the distinctly Lockean notion that what confers legitimacy on a constitutional government is the consent of the people in creating and adopting the constitution under which the government operates.[45] Thus, we do not ask whether we think a particular feature of constitutional government is legitimate; rather, it is legitimate by definition because it is a part of the scheme of constitutional governance created by the people. That is what *Marbury v. Madison*[46] stands for.

Bickel, by contrast, begins his analysis by distancing himself from *Marbury*.[47] But although he criticizes Justice Marshall's legal reasoning, Bickel rejects *Marbury* most decisively when he chooses to measure the legitimacy of constitutional provisions by reference to some abstract standard of democracy external to the Constitution itself.[48] The fact that the people have agreed, for whatever reasons, to live under a government in which judicial review plays a prominent role is not enough to legitimize it in Bickel's view.

The root cause of Bickel's rejection of constitutionalism seems to be

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43. U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII, § 1; *id.* art. II, § 1, cl. 2.

44. *See supra* note 12 and accompanying text.

45. *See generally* James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 200-12 (1990) (contending that the Constitution reflects Locke's theory of popular sovereignty).

46. 5 U.S. (1 Cranch) 137 (1803).

47. BICKEL, *supra* note 26, at 2-16.

48. *See id.* at 29-33. For another reason why this might be a poor tactic, see W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167, 183-87 (1955) (arguing that democracy is an essentially contested concept, that is, a concept the meaning of which can never be the subject of general societal agreement).

his skepticism toward the type of political theorizing that constitutionalism represents. For example, he concedes that the historical record strongly supports the view that the Framers intended the federal courts "to pass on the constitutionality of actions of the Congress and the President"[49]—in other words, that judicial review was meant to be part of the constitutional scheme. Yet he then immediately denies that this is sufficient to legitimate judicial review. For Bickel, "ultimately, we must justify [judicial review] as a choice in our own time."[50] Jefferson, Madison, Hamilton, Wilson, and many other founders held that governmental legitimacy comes from the "consent of the governed."[51] For Bickel, in contrast, legitimacy does not precede the institution of government, but follows it: "[L]egitimacy," he says, "comes to a regime that is felt to be good."[52] These comments, especially when taken in light of Bickel's overall philosophy of judicial prudence,[53] seem to ally Bickel closely with David Hume, who rejected Locke and other natural law theorists on the ground that the ultimate source of governmental legitimacy was not some sort of timeless natural law privilege derived from consent, but rather the historically contingent "opinion" of the citizenry.[54]

Yet even from the perspective of Humean skepticism, Bickel is still wrong to think that judicial review needs a special defense—that its legitimacy cannot be established merely by showing that it is part of the constitutional scheme. This is because Bickel gravely underestimates the degree to which current public opinion accepts the long American tradition of constitutionalism that derives from *Marbury*, and indirectly from Locke. Americans truly *believe* that they have inalienable rights as a

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49. BICKEL, *supra* note 26, at 15.

50. *Id.* at 16. For an account of how the details of the original understanding of the Constitution can be deemed to be the object of current consent, see James A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 B.U. L. REV. 1, 13-20 (1991).

51. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). *See also* THE FEDERALIST No. 22, at 110 (Alexander Hamilton) (Max Beloff ed., 1987) ("The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE."); *id.*, No. 49, at 257 (James Madison or Alexander Hamilton) ("[T]he people are the only legitimate fountain of power."); JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 82, 189 (Adrienne Koch ed., 1966) (same).

52. BICKEL, *supra* note 26, at 29. Bickel's view also bears a family resemblance to the notion of "hypothetical consent." *See* Hanna Pitkin, *Obligation and Consent—I*, 59 AM. POL. SCI. REV. 990, 996-97 (1965).

53. *See* Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985).

54. David Hume, *Of the First Principles of Government*, *in* HUME'S MORAL AND POLITICAL PHILOSOPHY 307 (Henry Aiken ed., 1948). For a comparable analysis of Bickel's position, see Kronman, *supra* note 53, at 1600-05.

matter of natural law;[55] that their consent is necessary to confer legitimacy on the government; and that the current government, the Supreme Court included, commands virtually universal assent.[56] Thus, if legitimacy is based on opinion, our government is legitimate; the institution of judicial review is part of this package and it too is legitimate in the public mind. To use Bickel's phrase, our government truly is "felt to be good."[57]

Consequently, to accept the American tradition of constitutionalism, whether as a matter of philosophical naturalism or as an empirical description of contemporary political belief or social narrative, is to reject Bickel's view that the political repercussions of judicial actions are necessarily bad—so bad, in fact, as to justify judicial inaction. Indeed, the American tradition of constitutionalism is incompatible with Bickel's view that judicial review is properly characterized as "countermajoritarian" or that it poses any kind of "difficulty" at all. In any event, the consequences of judicial review cannot justify the avoidance doctrine because courts need not avoid constitutional adjudication altogether in order to avoid invalidating legislation, and because the political fallout of judicial validation of legislation is not itself a problem that needs avoiding.[58]

D. The Constitutional Text

A final and less ambitious justification for the avoidance doctrine holds that it is simply required by the text of Article III. This justification is less ambitious because it does not purport to explain why constitutional adjudication should be disfavored as compared to adjudication of other types of issues; rather, it purports to explain only why a federal court cannot go on to adjudicate the remaining issues in a case once it

55. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

56. The recent overthrowing of regimes across Eastern Europe and the former Soviet Union has probably only reinforced the belief in the West that government without the consent of the governed is morally unjust and politically illegitimate.

57. For a fascinating peek into the Court's views on this question, see Planned Parenthood v. Casey, 112 S. Ct. 2791, 2800-01 (1992).

58. Obviously, the "gravity and delicacy" explanation is completely inapplicable in common-law and statutory adjudication. The type of institutional considerations that concern Bickel are irrelevant where courts are merely interpreting democratically enacted statutes or applying the common law. In these situations, courts are performing the essence of the judicial function; they are doing precisely what courts were created to do. Furthermore, ordinary adjudication can in no way trespass on the institutional prerogatives of the legislature; if the legislature does not like what the courts have done, the legislature can reverse the courts by enacting new legislation. Finally, much of the nation's common-law adjudication is performed by state judges who are elected, thus eliminating any possible institutional accountability problem.

has decided any dispositive issue.[59] The Article III explanation of this phenomenon holds that once a dispositive issue has been decided the court ceases to have jurisdiction over the action because it is no longer a "case" or "controversy" within the meaning of Article III.[60] Thus, if a case has been resolved on statutory grounds, the court cannot go on to address a constitutional issue because the court is no longer confronted with a "case," and any further ruling would be a forbidden advisory opinion.[61]

The Court indeed has committed itself rather strongly to this principle. According to the Court, the avoidance doctrine is not a prudential or housekeeping doctrine developed by the Court for its own self-governance, but rather a "cardinal principle"[62] that embodies "one of the rules basic to the federal system."[63] Indeed, the doctrine is "more deeply rooted than any other in the process of constitutional adjudication."[64] Thus, the avoidance doctrine does not arise from the practicalities of the Court's workload, but is compelled by the Court's constitutional jurisprudence.

Although the Article III explanation has the advantage of tying one aspect of the avoidance doctrine directly to the language of the constitutional text, it is incomplete: It fails to explain why a case stops being a "case" within the meaning of Article III simply because a statutory resolution has been reached. If the parties have briefed and argued a constitutional issue and that issue is still pending, why must the Constitution treat the controversy as dead simply because some other sub-constitutional issue has been decided? Unfortunately, at this point the Court's explanations of its own behavior tend to devolve into conclusory assertions. For example, as the Court has said on more than one occasion: "It is not the habit of this Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."[65] But what

59. Article III obviously has no relevance to state courts, which perform the nation's common-law adjudication and most of its statutory adjudication as well. Indeed, because state courts, unlike federal courts, are typically courts of general jurisdiction, *see* Aldinger v. Howard, 427 U.S. 1, 15 (1976); Scott v. Sandford, 60 U.S. (19 How.) 393, 401-02 (1857), they need not operate under any jurisdictional bar, such as the ban on advisory opinions, that might be thought to require federal courts to use the necessity model.

60. *See* U.S. CONST. art. III, § 2.

61. *See* Rescue Army v. Municipal Court, 331 U.S. 549, 570 (1947); *see, e.g.*, GERALD GUNTHER, CONSTITUTIONAL LAW 1593-96 (12th ed. 1991); *cf.* Hayburn's Case, 2 U.S. (2 Dall.) 409, 409-10 (1792) (addressing scope of judicial power and requirements of case).

62. Crowell v. Benson, 285 U.S. 22, 62 (1932).

63. *Rescue Army*, 331 U.S. at 570.

64. *Id.* at 570 n.34.

65. Burton v. United States, 196 U.S. 283, 295 (1905); *see, e.g.*, *Rescue Army*, 331 U.S. at 569; Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

is a "case" such that the decision of one question can be "absolutely necessary," and the decision of some other question not only unnecessary, but unconstitutional?

It seems clear that the Court's justifications of the avoidance doctrine rest on some unarticulated notions of what a case is, and of what it means for a court to adjudicate a case. I now turn to these issues.

IV. DISPUTE RESOLUTION AND JUDICIAL RESTRAINT

A. Two Models of Adjudication

1. The Two Models

Court observers generally identify two competing models of the adjudicatory process. According to the traditional *dispute resolution* model, the purpose of federal court adjudication is first and foremost to resolve disputes between litigants. The court's function is thus to decide only those issues necessary to resolve the dispute;[66] its "duty is to consider the whole case to the extent, and only to the extent, requisite in order to decide what . . . to do."[67] The dispute resolution model thus instructs courts to adjudicate to the minimum extent necessary; it is an institutionalized form of judicial restraint.

In contrast, according to the *expository* or *public law* model the primary purpose of adjudication is not to resolve private disputes, but to explicate the law, and the Constitution in particular. Under this model, the court's principal function is to elucidate legal and constitutional norms and to resolve difficult questions of constitutional interpretation for the purpose of providing guidance to society.[68] The expository model is often associated with judicial activism because a court operating according to this model is not constrained by any duty to minimize the amount of adjudication it performs in any given case.

Critics of the Court's adjudicatory practices often speak as though dispute resolution and legal exposition are entirely distinct and mutually exclusive activities between which the Court must choose. In fact, the two activities are closely related and inevitably overlap to a considerable

66. Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771, 773; *accord* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-83 (1976); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 357 (1978); Spann, *supra* note 13, at 588.

67. Collier, *supra* note 66, at 773-74 (quoting EUGENE WAMBAUGH, THE STUDY OF CASES 9 (2d ed. 1894)).

68. Bandes, *supra* note 13, at 281-82; Spann, *supra* note 13, at 592-93; *see also* Chayes, *supra* note 66 (setting out contemporary model of public law litigation and noting departure from traditional judicial role of private dispute resolution).

extent; courts cannot resolve disputes without expounding the law, nor can they meaningfully expound the law in the absence of a legal dispute.

2. Dispute Resolution and Exposition

Courts cannot avoid expounding the law even when their primary goal is the resolution of a legal dispute. As Chief Justice Marshall pointed out long ago, "Those who apply the rule to particular cases, must of necessity expound and interpret that rule."[69] In other words, because adjudication consists of the application of law to fact, adjudication cannot proceed without some articulation of the legal rule to be applied. Thus, not even the most basic aspects of dispute resolution can be undertaken without some sort of exposition of the law.

To this it might be replied that although Marshall's statement may be true of legal reasoning, articulation of the law is not essential to the actual adjudicatory practices of courts. For example, a court can resolve disputes simply by identifying a winner—"judgment for the plaintiff"—without ever saying anything about the content of the applicable law. This objection might have some force were it not for our conventions of stare decisis. Under the rules of stare decisis, courts expound the law in part simply by holding for one party or the other; moreover, the doctrine of stare decisis holds that a court's deeds are more reliable indicators of the content of the law than are the court's words.[70] Thus, courts cannot avoid "expounding" the law when they resolve disputes because legal exposition is as much imposed by subsequent interpreters of judicial actions as it is created by self-conscious judicial explanations.

Even if this were not the case, the possibility that courts might try to limit their exposition of the law by issuing only cryptic, one-line decisions is more or less ruled out by the realities of judging in our society. We rely on courts to resolve certain types of disputes, and often these disputes involve significant social controversies. But because courts have no physical powers to enforce their rulings, they must rely in the long run on maintaining obedience to their authority through other means. The primary tool available to courts to preserve their status and authority is persuasion—persuasion of litigants, persuasion of other governmental institutions, and, most importantly, persuasion of the public. In order to persuade, courts have no real choice but openly to explain and justify their rulings. Nothing could seem more arbitrary to the general public than a series of adjudications that does no more than name a winner and a loser; a court that seriously attempted this course would find its polit-

69. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

70. Collier, *supra* note 66, at 785-86.

ical capital quickly exhausted. Thus, at least in our system of government, courts must as a practical matter supplement their dispute resolution with legal exposition.

Finally, the relatively recent advent of the declaratory judgment action[71] has further obscured the distinction between dispute resolution and exposition. A declaratory judgment proceeding is clearly an example of dispute resolution—two parties with opposing interests come before the court and argue over their respective entitlement to relief under the law. Yet, strangely, the relief sought by the parties is itself legal exposition. In such cases, there can be no escape from the judicial need to expound the law.

3. Exposition and Dispute Resolution

Just as courts must expound the law as an incident to resolving disputes, so must they resolve disputes in order meaningfully to expound the law. First, legal exposition requires a factual setting to be meaningful. A court simply cannot clarify abstract legal rules by elaborating them abstractly; at some point, the court must demonstrate the application of the rules if it is to provide concrete guidance to those who wish to understand the law. As the philosopher Hans-Georg Gadamer has written: "Application does not mean first understanding a given universal in itself and then afterward applying it to a concrete case. It [application] *is* the very understanding of the universal—the text—itself."[72] In other words, the meaning of a legal rule cannot be determined independent of its application; rather, the meaning of a rule arises from the ways in which it is applied.

The Court has incorporated just this type of reasoning into its jurisprudence in such jurisdictional and prudential doctrines as standing, ripeness, and mootness. For example, the Court has said explicitly that

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71. 28 U.S.C. §§ 2201-2202 (1988).

72. HANS-GEORG GADAMER, TRUTH AND METHOD 341 (2d Eng. ed., 1989) (emphasis added). Gadamer bases this conclusion on what he views as

> an essential tension between the fixed text . . . on the one hand and, on the other, the sense arrived at by applying it at the concrete moment of interpretation . . . . A law does not exist in order to be understood historically, but to be concretized in its legal validity by being interpreted. . . . This implies that the text, . . . if it is to be understood properly—i.e., according to the claim it makes—must be understood at every moment, in every concrete situation, in a new and different way. Understanding here is always application.

Id. at 309. Consequently, it is impossible to "understand" a law in the conventional sense without conceptualizing specific applications of the law: "[E]very law is in a necessary tension with concrete action, in that it is general and hence cannot contain practical reality in its full concreteness." *Id.* at 318. Rather, the meaning of the law consists precisely in and arises from the ways in which it is applied.

" '[f]or adjudication of constitutional issues, "concrete legal issues, presented in actual cases, not abstractions," are requisite.' "[73] This requirement "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."[74]

Second, even if abstract judicial elaboration of laws in a factual vacuum were capable of clarifying the law, it is nevertheless clear that the idea of a court that does nothing but expound the law is incompatible with our notions of what it is to be a court. In our system of government, courts are passive—they do not seek out cases but must wait for cases to be brought before them. If the primary purpose of adjudication were exposition of the law, this judicial passivity would make no sense. A truly expository judiciary would need to be free to identify and expound those areas of the law most in need of exposition; the judiciary would not be limited arbitrarily to expounding whatever areas of the law some litigant happened to present for adjudication.

Third, as a practical matter it is no more open to our courts to adopt a practice of pure expository adjudication than it is to adopt a practice of pure dispute resolution. Courts in our society derive at least part of their authority from the fact that they do resolve disputes, and that they do so in a way that is reasonably satisfactory to the majority of citizens. Our courts are institutions that settle arguments, reward the deserving, and punish evil—they are dispensers of distributive justice. But no court can play this important social role, and maintain the respect and authority that go with it, unless the court has real disputes to resolve among real people. Thus, if courts are to maintain their social authority and prestige, they cannot very well sacrifice their role as dispute resolvers in favor of a more limited and less socially prominent role as legal expositors.[75]

B. Necessary and Unnecessary Adjudication

In light of the foregoing discussion, the avoidance and necessity doc-

73. Golden v. Zwickler, 394 U.S. 103, 108 (1969) (mootness) (quoting United Public Workers v. Mitchell, 330 U.S. 75, 89 (1947) (quoting Electric Bond & Share Co. v. SEC, 303 U.S. 419, 443 (1938))).

74. Valley Forge Christian College v. Americans United For Separation of Church and State, 454 U.S. 464, 472 (1982) (standing); *see also* Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967) (stating that the "basic rationale" of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements").

75. The difference between a court that resolved disputes and one that merely expounded the law would be like the difference between courts and law professors; the latter are expositors without being dispute resolvers, which makes them socially marginal and relatively powerless.

trines make sense only if courts understand their primary function to be resolving disputes. If the job of a court were primarily to expound the law, then it could hardly be unnecessary or undesirable for the court to consider constitutional, statutory, or common-law questions raised by the parties. Just the opposite would be the case: The more issues the court decided the more law it could expound, so the court would presumably be eager to decide all legal issues, including constitutional questions, even after it had decided any sub-constitutional issues.

Conversely, from the perspective of a dispute resolution model of adjudication, the notion of necessary and unnecessary adjudication makes perfect sense; once a dispute is resolved by some judicial ruling, the court's function has been discharged, and it has no reason, and possibly no authority, to continue the adjudicatory process. In our legal system, what makes a dispute into a legal case is not simply the disagreement of the parties, but their request for specific relief that a court is capable of granting.[76] The court thus decides legal questions not because the court or the parties want answers, but because such decisions are the means by which the court determines whether some party is entitled to the requested relief. Once a court has determined that some legal principle requires that the requested relief be granted or denied, the dispute has been resolved and decision of further questions becomes unnecessary. Similarly, decision of legal questions is necessary until the parties' entitlement to relief is definitively resolved—the court cannot stop adjudicating until it has done its job, yet it need not continue adjudicating after its work is done.

C. *Why Not Exposition?*

Even if some aspects[77] of the avoidance and necessity doctrines can be explained by the dispute resolution model of adjudication, our inquiry has merely shifted to a different level. The question remains: Why should dispute resolution be the primary function of the courts? Why should courts forgo exposition of the Constitution and laws when presented by litigants with the opportunity to do so? Or, to return to the Supreme Court's explanation of the avoidance doctrine, why should we

76. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 751 (1984) (in order to have standing under Article III, litigant's injury must be redressable by judicial action); FED. R. CIV. P. 12(b)(6) (requiring dismissal of cases which fail to state a claim upon which relief can be granted).

77. Judicial acceptance of the dispute resolution model explains the necessity doctrine fully. It also explains the aspect of the avoidance doctrine that requires courts to stop adjudicating after resolving a statutory issue in a case in which constitutional issues are also raised. The model, however, still does not explain why courts should prefer to decide a case on statutory rather than constitutional grounds if either would suffice. The explanation offered in Part V accounts for this aspect as well.

think that Article III forbids federal courts to expound the Constitution except incidentally in the course of resolving disputes, and only when no statutory resolution is available?

These questions take on even greater urgency in light of a relatively recent series of direct challenges to the legitimacy of the dispute resolution model. A number of scholars have argued explicitly and vigorously for abandonment of the dispute resolution model in the context of constitutional adjudication.[78] They contend that federal adjudication is best understood and best justified as a form of constitutional exposition, and that Article III jurisdictional doctrines should be revised to reflect this more appropriate judicial role.

For example, in a recent article Susan Bandes criticizes the Court's jurisdictional rulings as resting on an unarticulated model of private rights.[79] A more appropriate model for assessing the proper constitutional boundaries of an Article III "case," she argues, recognizes that "the best, highest and most sensible role for the federal courts is interpreting and enforcing the Constitution."[80] Because the Constitution "is the most important source of rights," the Court's primary job should be "to resolve difficult questions of constitutional interpretation."[81] Bandes does not view a judiciary dedicated to constitutional exposition as inconsistent with the idea of a judiciary dedicated to doing justice; indeed, she argues that the expository model will achieve greater justice because "justice comes, not from individual participation [in a case], but from the process of giving meaning to constitutional values."[82] As a result, federal adjudication should be conducted so as to give preference to resolution of questions involving "ideological constitutional interests" over questions involving "property or pecuniary interests."[83] Although Bandes focuses on the impact of her theory for jurisdictional doctrines such as pendent jurisdiction, mootness and standing, it seems clear that her position would also require revision of the avoidance doctrine.

78. Bandes, *supra* note 13, at 282; Fiss, *supra* note 13, at 44; Don B. Kates & William T. Barker, *Mootness in Judicial Proceedings: Toward a Coherent Theory*, 62 CAL. L. REV. 1385, 1429-31 (1974); Lee, *supra* note 13, at 634; Spann, *supra* note 13; *see also* Strauss, *supra* note 18, at 117 (arguing that the limited number of cases the Supreme Court is capable of reviewing requires the Court to stress exposition for guidance purposes over simple dispute resolution).

79. Bandes, *supra* note 13, at 282-83.

80. *Id.* at 282.

81. *Id.* at 284. Bandes also advances the more pragmatic arguments that the federal courts have in the last century taken on the primary role of constitutional adjudicators, and that they have developed expertise in the area. *Id.* at 281-82. These developments, whether intended or not, make constitutional adjudication the most efficient use of federal judicial resources. *Id.* at 282.

82. *Id.* at 287.

83. *Id.* at 289.

Girardeau Spann has staked out an even stronger position in favor of an expository model of adjudication. According to Spann, the dispute resolution approach is a "charade"[84] that obscures the most important function of the judiciary, which is "to give meaning to the law."[85] The Constitution, Spann points out, is the repository of society's fundamental values.[86] Judicial construction of the Constitution thus plays a critically important social role: "When courts expound constitutional provisions, they restate society's fundamental values in concrete, understandable terms, enabling individuals and institutions to incorporate those values into their conduct."[87] Thus, constitutional interpretation by the courts not only "advises us of the meaning of our fundamental values,"[88] but more importantly tells us "how to conform our behavior to our fundamental values."[89] For these reasons, Spann views constitutional adjudication as something to be embraced rather than avoided, and he advocates restructuring the Court's justiciability doctrines to permit federal courts more freely to confront pressing constitutional questions.

I agree with Bandes and Spann that constitutional adjudication necessarily gives meaning to constitutional values, and I am sympathetic to their view that it is better for us as a society to know more rather than less about our fundamental values and how they apply to our conduct. Nevertheless, I shall argue in Part V that there are good reasons to think that constitutional adjudication is a *bad* thing because of the very attribute for which Bandes and Spann praise it—its capacity to illuminate the meaning of our abstract constitutional values by making them concrete. I shall further argue that the avoidance and necessity doctrines, and by implication the dispute resolution model of adjudication with which they are closely allied, can be usefully conceived as deliberate judicial attempts to preserve the ambiguity of fundamental legal and constitutional values, a strategy that fosters the highly desirable goal of social inclusion.

V. THE PRESERVATION OF CONSTITUTIONAL AND LEGAL AMBIGUITY

A. The Pluralistic Society

The United States is today a highly pluralistic society, and it is so at least partly by design. In conscious opposition to anti-Federalist concep-

84. Spann, *supra* note 13, at 585.
85. *Id.* at 660.
86. *Id.* at 598-99.
87. *Id.* at 598.
88. *Id.* at 586.
89. *Id.* at 585.

tions of community,[90] Madison and the Federalists set out to create a large republic that would be as inclusive as possible, one that would count among its citizens the widest possible variety of groups and individuals.[91] The Framers deliberately sought a diverse citizenry in order to bring within the American nation and political system "a greater variety of parties and interests."[92] The presence of these diverse interests under the same roof, according to Madison, would make it less likely that any single faction could bend the national political system to its will, a feature that would help preserve the liberties of all.[93]

Yet even Madison could not have envisioned the cultural diversity of the contemporary United States. Although it has wavered at times, the long-term national commitment to tolerance and inclusion has allowed many different home-grown groups to arise and flourish, and an astonishingly broad array of racial, ethnic and religious groups from all over the world have made the United States their home. As a result, Madison's vision has been realized more completely than he could have imagined: The United States has become a community of communities, each having not only distinct political interests, but often widely differing moral views, values and traditions.

Madison, of course, felt that this sort of diversity would create political tensions at a national level that would hinder majoritarian tyranny. Yet these political tensions represent in a sense only the tip of the iceberg. As the republican-minded anti-Federalists intimated, a community of communities necessarily contains internal tensions on a much more fundamental level than that of political policy preferences.[94]

To say that a group of individuals is a "community" is to say, in part, that the group's members view themselves as sharing some important traits or traditions[95]—they "tell a shared story in a shared language."[96] But the story a community tells is a particular kind of story: It is a story about the group—who they are, what it is that makes them who they are, and how things came to be that way. Because it identifies

90. For an overview of anti-federalist views, see Symposium, *Roads Not Taken: Undercurrents of Republican Thinking in Modern Constitutional Theory*, 84 NW. U. L. REV. 1 (1990); Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

91. THE FEDERALIST No. 10 (James Madison).

92. *Id.* at 47.

93. *Id.*

94. *See, e.g.*, Wilson C. McWilliams, *The Anti-Federalists, Representation, and Party*, 84 NW. U. L. REV. 12, 27-28 (1989).

95. KENNETH L. KARST, BELONGING TO AMERICA 28-31 (1989); Robert A. Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455, 456 (1984); Kahn, *supra* note 42.

96. JAMES B. WHITE, HERACLES' BOW 172 (1985).

the traditions that define and constitute the community, such a story is inclusive: It allows individuals to know how and why they belong. Yet, by the same token, such a story is also necessarily exclusive. A group cannot include its own members without excluding non-members; it cannot identify traditions or personal characteristics that make community membership meaningful unless the lack of those same properties also provides a basis for excluding others.

The United States, then, necessarily comprehends more than a collection of political interest groups: It comprehends a set of distinct narrative communities, each of which sees itself, at least in some respects, as materially different from the others. This arrangement creates the potential for social conflict not merely in the daily interplay of political forces in the national arena, as the Federalists foresaw, but at the much more fundamental level of identity itself. Conflict may thus arise not merely because different communities hold different political views, but because the groups see themselves as so different at some basic constitutive level that they lack the capacity to share a viewpoint on politically important subjects. The real problem, in other words, is not that you and I hold different views on abortion or capital punishment or the invasion of Panama; the real problem is that deep down we are simply different kinds of people.

The possibility of discord at the level of community identity means that building a nation around diversity courts a certain risk—the risk that some communities under the national umbrella will come to see themselves not merely as different from the others, but as fundamentally incompatible. Groups that think of themselves in these terms may feel that they have little reason to participate in or to remain members of the larger national community.[97] When it comes to nation-building, diversity is therefore a dangerous game: A nation must be diverse enough to create the tensions necessary to preserve political freedom, but it must not be so diverse that these tensions cause it to fly apart.

American society, although it sometimes seems ready to burst at the seams, appears to have negotiated this narrow path with tolerable success over the years. Somehow, a multitude of exceedingly diverse narrative communities has remained linked into something that we can reasonably describe as a "society." How has this coherence been maintained? Certainly, the Constitution has played an important role in holding the center against the socially centrifugal forces of American diversity.

97. The principal American experience with this phenomenon remains the Civil War. *See* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 827 (1992).

B. The Constitutional Constant

One of the core tenets of American constitutionalism holds that the Constitution reflects the identity of the American people; they made it and consented to live under it, so the document is necessarily infused with their values.[98] As a result, the Constitution is commonly understood to be a unique and privileged reification of the fundamental values of American society. It is thought to come as close as any writing can to capturing the essence of the national identity and spirit because it says who we are and how we wish to live our lives.

The widespread popular acceptance of the Constitution's claim to embody society's fundamental values gives it an unusual sort of power: rather than simply passively mirroring society's values, the Constitution shapes them as well. Because the Constitution defines a certain community that holds certain values, individuals who think of themselves as part of that community must share those values to some significant degree. Being or becoming a member of the society that lives under the Constitution thus means something quite different from simply imposing personally held values on the document; it means also accepting as one's own the values already inhering in the document.

In many ways, to be an "American" means quite explicitly to profess a belief in the Constitution, or at least in the ideals it purports to represent. Aliens seeking citizenship through the naturalization process are required to take an oath to support and defend the Constitution in order to gain official recognition as members of American society.[99] Our public officials at all levels of government take a similar oath as a prerequisite to holding public office.[100] Urging the violent overthrow of the Constitution can in certain circumstances be made a crime.[101] In its various manifestations, this dynamic transforms the Constitution into an interactive symbol of nationhood that not only reflects the values of the citizenry, but also helps define those values, and the national identity which they in part constitute.[102]

If the Constitution plays this role in shaping the identity of individuals, it does so also for the identity of social sub-groups. As I mentioned

98. *Id.* at 768-70, 823-26.

99. 8 U.S.C.A. § 1448(a) (West Supp. 1992).

100. U.S. CONST. art. IV, cl. 3.

101. Dennis v. United States, 341 U.S. 494, 516-17 (1951); *see also* Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969) (modifying *Dennis* standard for cases involving subversive advocacy).

102. *See* KARST, *supra* note 95; MICHAEL G. KAMMEN, SOVEREIGNTY AND LIBERTY: CONSTITUTIONAL DISCOURSE IN AMERICAN CULTURE (1988); MICHAEL G. KAMMEN, A MACHINE THAT WOULD GO OF ITSELF (1986); WHITE, *supra* note 96.

earlier, what defines any community is a narrative identity that distinguishes the group's members from others. But what defines a community as part of the larger *American* society is a particular type of narrative identity, one that includes among its elements the community's affirmation of the values and ideals embodied in the Constitution. The Constitution is thus one of the few constants in the stories that diverse American narrative communities tell about themselves. No matter what their differences, the various communities all must affirm and adopt the Constitution to some significant degree if they are fairly to consider themselves members of American society, and to be so considered by society at large.[103] In the Madisonian pluralism of American society, this belief in the Constitution is a common thread that helps bind the many diverse American communities to one another. No matter how distinct in moral or political outlooks American communities may become, their common tie to the Constitution helps hold them together in a single, politically functional society.

C. *The Bonds of Constitutional Ambiguity*

If the picture I have painted is correct, then the centrifugal dangers of Madisonian pluralism are inversely proportional to the strength of the ties binding American communities to the Constitution. When the various communities are able enthusiastically to affirm the values embodied in the Constitution, the likelihood of social disintegration is low. Conversely, when a community comes to view the Constitution and its values as incompatible with the community's narrative identity, the danger increases that the community will see itself as distinct not only from other American communities, but from American society as a whole.

Superficially, the bonds between actual American communities and the Constitution seem relatively strong. That American society in all its diversity has cohered for so long and continues to cohere today suggests that belief in the Constitution among American communities is firm, durable, and widespread. Moreover, it is evident that a large number of very different groups openly embrace the United States Constitution and profess belief in the fundamental values and ideals it purports to embody. Nevertheless, this kind of agreement on the fundamentals—the kind of agreement that cuts across the extremely diverse fabric of Madisonian America—is probably much weaker than at first appears. Further, the type of affirmation of the Constitution that any particular narrative com-

103. What counts as an affirmation may vary from group to group, but each group must make an affirmation sufficient under its own criteria to bind it to membership in the society.

munity is capable of making may be much more limited than superficial social agreement indicates.

When an American narrative community affirms its belief in the Constitution, exactly what beliefs does it affirm? One way to answer this question is to examine the beliefs a community is *required* to hold for it to be in a position to affirm the Constitution as consistent with its own beliefs. What beliefs and values, then, does the Constitution demand of its adherents? Or, to put the question more bluntly, what beliefs and values are required of an American?

The Constitution, I think, is rather plain in this department. To be an American is to believe in "Justice," the maintenance of "domestic Tranquility," the "promot[ion of] the general Welfare," and the "Blessings of Liberty."[104] It is to believe in the freedoms of religion, speech, and the press;[105] the right to be free from unreasonable searches and seizures;[106] and the rights to equal protection and due process of law.[107] To be an American is to be against slavery[108] and cruel and unusual punishment,[109] and for jury trials[110] and the system of checks and balances.[111] All these things and many others are deeply imbedded in our lore, and to deny any one of them is to place oneself dramatically outside the society's traditions and its larger narrative identity. It ought to be no surprise, then, that Americans from all manner of diverse communities profess a belief in these values with a consistency that must approach unanimity.

On the other hand, the values embodied in the Constitution are couched at such a high level of generality that it seems almost impossible to reject them. Can anyone seriously be *against* justice and liberty? John Marshall wrote that it was in the nature of a constitution to mark only the "great outlines" of the scheme of governance because a document that actually spelled out all the particulars for every exigency "could scarcely be embraced by the human mind."[112] But if the Constitution's generality was necessary as a matter of practical draftsmanship, it also made the document into one that almost anyone could believe in. The Constitution's ambiguity makes its values easy to affirm and easy to inte-

104. U.S. CONST. pmbl.
105. *Id.* amend. I.
106. *Id.* amend. IV.
107. *Id.* amend. XIV.
108. *Id.* amend. XIII.
109. *Id.* amend. VIII.
110. *Id.* amend. VII.
111. *Id.* arts. I, II, III.
112. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

grate into almost any story that an American narrative community could tell about itself.

But just because people can agree that justice and liberty are positive values and should be fostered by the government does not mean that they agree on the content of these abstractions or on the proper route to their achievement. The legal meaning of constitutional terms lies in their application in particular legal circumstances, and it would be fanciful to think that every one of the diverse American communities agreed on the proper application of every constitutional term in every possible situation. Many of the terms in the Constitution are what Gallie called "essentially contested concepts"—concepts the meaning of which society is inherently unable to agree upon.[113] Even if it is not literally the case, for example, that one person's liberty is another's slavery,[114] it is clear that people and communities—*American* people and communities—can disagree violently over what society's professed commitment to liberty and other values requires in a wide variety of particular circumstances. Is a commitment to liberty inconsistent with the punishment of homosexual conduct?[115] Is the free exercise of religion denied by criminalizing the use of peyote in religious ceremonies?[116] May a society that embraces freedom of speech punish consistent with its principles those who burn the flag?[117] These are the types of applications of abstract constitutional terms that reveal disagreement among those who might otherwise think themselves in accord.

It is one of the paradoxes of our society that people can profess to share fundamental values and concerns, can genuinely believe in the concordance of their views, can act as though there were consensus, can go for long periods without ever uncovering a shred of evidence to suggest the possibility of disagreement—and can still turn out on closer examination to share very little other than the use of the same abstract word to describe their opinions.[118] The Constitution's ambiguity allows it to

113. Gallie, *supra* note 48, at 168, 183-87.

114. *Cf.* Cohen v. California, 403 U.S. 15, 25 (1971) (stating that in the realm of free speech, "one man's vulgarity is another's lyric").

115. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

116. Employment Div. v. Smith, 494 U.S. 872 (1990).

117. United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989).

118. The paradox dissolves when we consider that the notion of a "difference" is a flexible one. Since no two things are exactly alike in all respects, the concepts of similarity and difference are not fixed by their objects, but are relative to the contexts in which they are employed by their users. As a general proposition, we notice differences only when the quality differentiated is relevant to some purpose we wish to achieve or activity we wish to pursue. *See, e.g.*, MARTHA MINOW, MAKING ALL THE DIFFERENCE 49-78, 110-14 (1990); IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 98-99, 171 (1990). Thus, it is not surprising that

mask potentially serious discord by fostering an illusion of consensus.[119]

Although the image of the Constitution as conjurer or smoke screen may be discomfiting, the document's sleight of hand has some important practical benefits for American society. First, the illusion of consensus on the meaning of society's fundamental values makes it much easier for diverse groups with diverse viewpoints to live together in harmony. Disputes over constitutional values can be especially acrimonious because they may implicate intimate aspects of national and personal identity. Quite simply, the greater the extent to which people think that they and their neighbors agree on who they collectively are and how they ought to live their lives, the less likely it is that intractable and possibly unnecessary[120] disputes will break out.

Second, the Constitution's ambiguity allows it to command the allegiance of highly diverse groups and individuals—a far more diverse set of potential adherents than it could attract if the meaning of its vague generalities were spelled out with greater specificity. It is easy enough for all manner of communities to affirm their allegiance to a document that on its face protects equality and liberty. But there are many communities that would find it much more difficult to affirm a constitution that explic-

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differences in the ways that Americans understand the Constitution should be invisible until some specific conflict arises to the resolution of which the differences are relevant.

119. There is another sense in which consensus is always an illusion:

> Submission to a consensus is always accompanied to some extent by the imposition of one's views on the consensus to which we submit. Every time we use a word in speaking and writing we both comply with usage and at the same time somewhat modify the existing usage; every time I select a programme on the radio I modify a little the balance of current cultural valuations; even when I make my purchase at current prices I slightly modify the whole price system. Indeed, whenever I submit to a current consensus, I inevitably modify its teaching; for I submit to what I myself think it teaches and by joining the consensus on these terms I affect its content.

MICHAEL POLANYI, PERSONAL KNOWLEDGE 208 (1962). I refer here, though, to a type of disagreement far less subtle than the one described by Polanyi.

120. I do not mean to suggest that all disputes over the contours of national identity are unnecessary; some are obviously necessary, even vital, when they require resolution in order to guide national action on important moral and political issues. But not all disputes bear on such questions, and when an issue is merely academic—when its resolution will not lead to society's *action* on a particular problem that must be confronted—such squabbles may be unnecessary, and even destructive. Differences are only relevant insofar as they relate to the pursuit of some purpose, *see supra* note 118, and the search for differences unrelated to important purposes may itself lead to the development of purposes for which the difference is relevant in order to justify the importance attached to the difference so identified. One of the hallmarks of racial, ethnic, gender, and other stereotypes is that they identify distinctions that make no difference for any purpose that society might ordinarily pursue. Rather, such stereotypes are usually invoked to justify the practice of separation, which is then justified in a circular manner by pointing to the differences said to require it. *See* MINOW, *supra* note 118, at 50-51; T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1085-86 (1991).

itly barred all remedial racial quotas, or that demanded official recognition of gay and lesbian marriages.

These two factors suggest that constitutional ambiguity is in a sense a formula for social inclusion. It permits as many different groups as possible to feel themselves capable of embracing and identifying with the Constitution and its values; that is, it facilitates their becoming and remaining part of the larger American society. Further, once groups are made to feel as though they belong, constitutional ambiguity hinders the types of disputes that, by revealing underlying disagreements over the details of moral and political values, could make constituent American communities feel different and therefore alienated from society at large. While it might be going too far to say that constitutional ambiguity is essential to the success of a system of Madisonian republicanism based on diversity and inclusiveness, it is certainly the case that constitutional ambiguity helps such a system to function effectively.[121]

D. Adjudication and Alienation

It should by now be clear, I hope, why constitutional adjudication might be thought of as something worth avoiding. Every constitutional case or issue is, by definition, a dispute over the meaning of the Constitution. The dispute, moreover, is one between two acknowledged members of society—it is a new and highly visible crack in the facade of societal unanimity concerning the meaning of constitutional values.

Furthermore, precisely because each of the disputants is a member of American society, and therefore has personally affirmed the Constitution and the values it embodies, each disputant has an equally fair claim to authoritative knowledge of the document's meaning. Indeed, the disputants' willingness to affirm the Constitution might well be based in part on what they respectively understand the document to mean in the circumstances of the lawsuit to which they are parties. Certainly the fact that the conflict between the parties ended up in court shows that the parties consider the conflict an important one.

That this conflict takes the form of a lawsuit significantly raises the stakes. A lawsuit is more than a forum for airing grievances and disagreement—it is a forum for resolving them. But adjudication does not resolve disagreements over the meaning of the Constitution by discussion and dialogue, by seeking a new consensus; instead it resolves disagree-

121. Philip Bobbitt sees a similar advantage in what he calls the different "modalities" of constitutional interpretation: "The multiplicity of incommensurable modalities . . . allows different groups in America to claim the Constitution as their own in the face of reasoned but adverse interpretations." PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 158 (1991).

ments by backing the claim of one party and by crushing the claim of the other through application of the coercive power of the state.[122] Consequently, any adjudication of a legal claim about the meaning of the Constitution always results in the confirmation of one party's understanding of the Constitution and the rejection of the other's. To one party, the state says: "You're right; this is what the Constitution means." To the other, the state says: "You're wrong. The Constitution doesn't mean this—and it never did."

For the winner, a victory in a constitutional case represents a satisfying confirmation of the winner's understanding of American society and its values, and a strengthening of the bonds between the winner's community and the larger society. For the loser, however, the result is something else. To lose a lawsuit in this way—to be told authoritatively that one's understanding of the nation's fundamental values, on a matter of great personal significance, is flawed—can only be a deeply socially alienating experience, both for the individual loser and for the community of which he or she is a member and for whom he or she may indirectly speak. The rejection of a constitutional claim sends a distinctly unpleasant message to the unsuccessful claimant: It says that the claimant was ignorant of the true nature of American fundamental values, and that the nation is not quite what the claimant thought it to be. In serious cases, where the position advocated by the claimant is deeply felt and the object of a strong personal or communal commitment, an adjudicatory rejection can not implausibly be understood to reveal significant differences between the values, and hence the identities, of the loser's community and the dominant society.

In every case, such a rejection inevitably weakens to some extent the ties that bind the loser's community to the Constitution. In extreme cases, a rejection or a series of rejections might be enough to alienate the community entirely from society at large. If a large enough segment of society, or a great number of small segments, comes to feel such alienation, the prospects for a successful Madisonian pluralism may dim. Presumably, something like this has happened or is happening in several countries whose diversity has recently proved difficult to manage—for example, the Commonwealth of Independent States, the former Yugoslavia, India, Iraq, and even Canada.

E. Avoidance and Inclusion

The avoidance doctrine requires courts to avoid constitutional adjudication when it is possible to do so within the parameters of the judicial

122. Cover, *Violence and the Word*, *supra* note 3, at 1601.

dispute resolution function. In so doing, the doctrine also causes courts to avoid unnecessarily alienating segments of society who may view the outcome of the adjudication as revealing significant and possibly unpleasant truths about society at large and their relation to it.

The avoidance doctrine, of course, does not eliminate disputes among American communities over the meaning of the Constitution; such disputes inevitably will arise from time to time, and every constitutional count in every lawsuit by definition frames such a dispute. Nor does judicial avoidance of constitutional issues change the views of any of the parties concerning the merits of their positions. The real benefit of avoidance is that it permits those holding differing views of the meaning of the Constitution to continue to do so even after the case is over.[123] Groups that are able to adhere to their vision of the Constitution, even after an unfavorable sub-constitutional ruling, are groups that can continue to think of themselves as part of American society. And groups that can think of themselves as part of society, even though they may hold an idiosyncratic view of the Constitution, are far more likely to be stable and productive members of the larger American community.

F. Legal Ambiguity and Freedom

If the avoidance doctrine can be justified by the socially inclusive effects of judicial restraint, the necessity doctrine applicable in ordinary adjudication by operation of the dispute resolution model can be similarly justified. Specifically, the minimization of judicial exposition of statutory, common, or any other kind of law serves to perpetuate a socially useful sensation of freedom that enhances feelings of social belonging.

1. Actions and Narrative

In virtually every aspect of life the bottom line is action. What must

123. Advocates of extreme textual indeterminacy such as deconstructionists or adherents of the Critical Legal Studies movement might object here that the avoidance doctrine does not play any particularly special role in preserving constitutional beliefs because it is always possible to maintain a preferred view of the meaning of a text like the Constitution no matter what courts may decide—from any seemingly bad doctrinal configuration there is always an interpretive escape route. I think this response is wrong for two reasons. First, for reasons much too lengthy to go into here, I reject the radical indeterminacy thesis in favor of its more modest competitors such as legal hermeneutics. *See* GADAMER, *supra* note 72; *see also* RONALD DWORKIN, LAW'S EMPIRE 78-83 (1986) (explaining difference between "internal skepticism" and "external skepticism"). Second, even those who profess some theory of radical textual indeterminacy can hardly dispute that the holders of an interpretive belief are the masters of their own interpretation. It follows that if a community views a constitutional ruling by the Supreme Court as a repudiation of its own values, no one can tell it that it is wrong because some other interpretation of the ruling is possible.

we do? What should we do? What would we like to do? What can we do? These are the questions that confront us every day. Most people decide such questions by considering a complex mix of factors. Unavoidably, many of these factors are inward-looking; they might include evaluation of personal and family goals, moral and political beliefs, and other aspects of personal identity. And because individuals are inevitably members of some community and necessarily act in a concrete social setting, they also generally must consider a variety of more outward-looking factors. These factors might include the goals and values of society, the impact of the contemplated action on others both within and without the community, and the nature of the individual's relationship to the community and any larger society.

But these deliberations concerning actions take place in a very specific context. I noted earlier that individuals and communities have narrative identities. These narratives tell a story about who we are, what makes us who we are, and how we got to be that way. Such stories define similarities and differences between us and various others and explain our relationship, as groups and individuals, to society.

Actions are often an integral part of the "plot" of a narrative identity; my story is not only about who I am, but what I do—and who I am can often be defined or revealed in terms of what I do.[124] I might be the person who enlisted in the military when my country needed me, or the person who evaded military service as a matter of conscience; I might be the person who left a good job to spend more time with my family, or the person who took a good job and raised myself up by my bootstraps. In these and countless other cases, the action itself is an important focus of the interpretive work done by the narrative.

Because an action can be a central, defining aspect of personal or communal identity, choosing one's actions can amount to plotting one's life story. Accordingly, important actions, especially when they have been chosen after careful deliberation, inevitably reflect the actor's views of self, community, society, and the relations among them. This feature of contemplative action has implications for law and the way law is perceived.

2. Law as Constraint

For most individuals, lower-order law is first and foremost a form of

124. In the words of Paul Ricoeur, "faire et en faisant se faire" [make (or do) and in the making (or doing), make oneself]. PAUL RICOEUR, WORK AND THE WORD, *reprinted in* EXISTENTIAL PHENOMENOLOGY AND POLITICAL THEORY: A READER 36, 38 (Hwa Yol Jung ed., 1972). I am indebted to my colleague Jay Mootz for this reference. *Accord* HANNAH ARENDT, THE HUMAN CONDITION 181-87 (1958).

constraint. In the most obvious sense, law is a constraint on action; it specifies what you can and cannot do, or it restricts the ways in which you may accomplish particular objectives. To a somewhat lesser extent, by restricting what you can do the law also restricts what you can be. In many ways, we are what we do; our actions reveal our identity, and our identity manifests itself through actions that are consistent with our character. In some cases, an individual's identity may be so intimately bound up with the performance of certain actions that to forbid the actions is tantamount to forbidding the identity. For example, many historical attempts to proscribe the performance of various religious rites have been motivated less by a desire to suppress the rites themselves than by a desire to destroy the religious identity of those who wished to perform the rites.[125]

The individual or community subject to law inevitably perceives these constraints on action and identity as constraints on freedom; those who live under any law are free neither to do nor to be entirely what they want. The less law a society promulgates, the greater the range of freedom of action and identity for individuals and communities; more law, in contrast, increases the constraints and reduces these freedoms.[126]

3. Ambiguity as Freedom

Every judicial ruling increases the reach of law in our society. Each decision takes a general legal rule or principle and demonstrates its application in a set of concrete circumstances. Adjudication thereby increases our understanding of the meaning of the law and clarifies its potential effect on actions that we may contemplate undertaking. The rules of stare decisis and the conventions according persuasive authority to certain non-binding precedents further expand the reach of any judicial decision to encompass applications potentially far removed from the context of the original holding. Like a stone thrown into a pond, a judi-

125. For numerous examples of this phenomenon, see PAUL JOHNSON, A HISTORY OF THE JEWS 25, 162-66, 206-08, 224-28, 475-99, 512-13, 569-71 (1987).

126. Not every member of society need experience law as a constraint. Some, for example, may so fully share the beliefs, values and practices of the legislative majority that their personal choices of conduct would almost never include actions that the laws proscribe. Such people may be largely unaware of the law because it does not affect their ability to act in any appreciable way. Ironically, those who experience the law as alienating are probably far more likely already to perceive themselves to be somewhat outside the social mainstream because they hold slightly different values and beliefs—the same such values and beliefs that lead them in the first place to wish to take actions that the law forbids. In our diverse, Madisonian society, the constraining and alienating effects of law thus fall most heavily on those communities that have the weakest ties to the society at large.

cial ruling produces a legal wave-front that quickly expands far beyond the bounds of the original disturbance.

Every law is a potential constraint, and adjudication takes an inchoate constraint and makes it real; adjudication thereby increases the scope of authoritative legal constraints to which members of society may feel themselves subjected. These legal constraints have the potential to reduce the perception of freedom experienced by society's members when such constraints prevent individuals and communities from doing what or being whom they desire. Because the perception of constraints on personal freedoms can be alienating, each adjudication has at least some potential to alienate some segment of society.

The avoidance of adjudication, on the other hand, preserves legal ambiguity, thereby minimizing the scope of legal constraints that may be felt by society members. It leaves potential constraints merely potential, which in turn leaves individuals and narrative communities free to view the law as presenting no obstacle to the performance of actions they wish to take. Legal ambiguity thus confers a unique sort of "meta-freedom," the freedom to believe, however wrongly, that the law is benign, that it blesses us and our community by blessing the actions we propose, or need, to undertake.

Like ambiguity in constitutional law, ambiguity in ordinary law is conducive to social inclusion. The more we can believe that our own carefully considered plans of action are sanctioned by the law, the more we can believe that we ourselves understand and share the goals and values of society, and are consequently full and responsible society members. Furthermore, legal ambiguity permits groups with differing values to hold such beliefs about the same law even when their views of the law are actually inconsistent; the ambiguity of the law makes it a potential element of many stories with many possible plots.

Adjudication destroys the manifold benignity of law by authoritatively choosing one meaning from the field of potential meanings. And those whose meanings are repudiated are themselves repudiated to a certain extent. It is just such repudiations that have the capacity to create resentment and alienation between individuals or communities and society at large. Thus, the judicial practice of ending adjudication at the earliest possible moment, through adherence to the dispute resolution model, reduces alienation and prevents the premature deterioration of the conditions that make possible the broadest degree of social inclusion.

VI. CONCLUSION

James Madison long ago observed that no community, however ho-

mogeneous its members, could be free from disagreements.[127] In a nation whose citizens are as diverse as those of the contemporary United States, disagreements are all the more likely; the republic was designed to be large and diverse partly in order to invite such disagreements. In such a volatile environment, it should come as no surprise that vehement conflicts may often arise among citizens, and that resolution of these conflicts may require invocation of the decisive power of the state in a legal forum.

But the application of judicial power necessary to prevent the disputants from harming each other and the rest of society has more subtle effects on the relationship between the winner, the loser, and the state. The loser of a case is in a sense repudiated by society; his or her vision of society and its values and laws is pronounced wrong-headed, flawed. Especially when the case concerns the Constitution, such a pronouncement can be deeply alienating; it says that the unsuccessful party did not fully understand, and therefore does not fully share, the values of the nation as a whole. For a nation built on diversity, the alienation of any segment of society can be risky. A group that perceives itself to have been shown the door may just step out.

When we dream of law, we dream of *our* law—we dream of a society that embraces us for who and what we are. But not everyone's dreams can come true, nor can any society afford for long to treat all dreams with equal reverence. As Robert Cover observed, a world that attempted to do so would be anarchic and violent, so an "imperial mode of world maintenance" that dashes the dreams of some is a necessary evil.[128]

If the establishment of judicial power is a nod to the unpleasant necessity of imperial dream destruction, the various conventions of judicial restraint that direct courts to minimize the amount of constitutional and ordinary adjudication they perform are nods to the inevitability and even desirability of legal dreaming. The minimization of adjudication worked by the dispute resolution model and the avoidance and necessity doctrines is thus, in a sense, merciful: It allows those who do not stand directly at the center of a diverse society to continue to hope and believe that society holds some place for them.

127. THE FEDERALIST No. 10, at 52, 55 (James Madison) (Max Beloff ed., 1987).

128. Cover, *supra* note 2, at 16.