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I. Introduction

The constitutional avoidance doctrine is a canon of construction dictating that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to adopt the latter."[1] Although the avoidance doctrine is nearly a century old, the Supreme Court's recent reliance on it to avoid making unnecessary constitutional rulings suggests its revival in American courts.[2] In its recent decision in *Zadvydas v. Davis*,[3] the Supreme Court relied on the avoidance doctrine in interpreting an immigration statute involving the Attorney General's power to detain immigrants that the Immigration and Naturalization Service (INS) had ordered deported.[4] Accord-

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1. Jones v. United States, 526 U.S. 227, 239 (1999) (quoting United States *ex rel.* Att'y Gen. v. Del. Hudson Co., 213 U.S. 366, 408 (1909)).

2. *See* Erwin Chemerinksy, *Raising Constitutional Doubts*, TRIAL, Jan. 2002, at 68, 70 (concluding that Supreme Court's continued use of avoidance doctrine will likely result in lower courts attributing it great weight).

3. 533 U.S. 678 (2001).

4. *See* Zadvydas v. Davis, 533 U.S. 678, 682 (2001) (construing immigration statute to contain "reasonable time" limitation in order to avoid constitutional questions). *Zadvydas* involved a resident alien, Kestutis Zadvydas, who was born of Lithuanian parents in a displaced persons camp in Germany in 1948. *Id.* at 684. After a court convicted him of a felony and he served his sentence, the Attorney General ordered Zadvydas deported. *Id.* When no country would accept Zadvydas, the Attorney General relied on an immigration statute that involved the post-removal period for deportees that she claimed allowed INS to hold Zadvydas in custody until his deportation. *Id.* at 682-84. The issue the Court faced was whether the post-removal statute authorized the Attorney General to detain a removable alien indefinitely beyond the removable period or only for a period reasonably necessary to effect the alien's removal. *Id.* at 682. The Court read a reasonable time limitation of six months into the statute and held that at the expiration of six months, the immigrant is allowed to show that there is no significant

ing to the Government's reading of the statute, the statute allowed for indefinite detention – an interpretation that set off constitutional alarm bells for the Court's majority, for they believed that indefinite detention of aliens might violate the Fifth Amendment's Due Process Clause.[5] But rather than address that concern directly, the Court interpreted the statute to contain a reasonable time limitation, which permitted the Court to avoid deciding the constitutionality of detaining undeportable aliens indefinitely.[6] Justice Anthony Kennedy responded to the majority's reliance on the doctrine by saying that the Court "commit[ted] its own grave constitutional error" and had written "a statutory amendment of its own" that was in "obvious disregard of congressional intent."[7] Justice Kennedy's dissent also suggested that the Court's interpretation was particularly noxious in a case involving immigration matters because Congress enjoys "considerable authority over immigration matters."[8] According to Justice Kennedy, the Court's ruling amounted to a "systematic dislocation of the balance of powers."[9]

The Court's interpretation of the immigration statute at issue in *Zadvydas*[10] is now especially timely, given the September 11, 2001 terrorist attacks on American soil and the congressional response to those attacks.[11] Many groups, especially the media and various civil rights organizations, have criticized the laws passed by Congress that give the government broad power to pursue terrorists through surveillance, search warrants, and detention.[12]

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likelihood of his removal in the reasonably foreseeable future. *Id.* at 701. The government then must rebut the immigrant's showing. *Id.* The Court noted that this presumption does not mean that the government must release every alien not removed after six months; rather, an alien can be held in confinement until the government determines that there is no significant likelihood of the alien's removal in the reasonably foreseeable future. *Id.*

5. *See id.* at 690 (noting that statute permitting indefinite detention of aliens would raise "a serious constitutional problem").

6. *Id.* at 692.

7. *Id.* at 705 (Kennedy J., dissenting).

8. *Id.* at 711 (Kennedy J., dissenting).

9. *Id.* at 705 (Kennedy J., dissenting).

10. *See* 8 U.S.C. § 1231(a)(6) (2000) ("An alien ordered removed who is inadmissible . . . [or] removable or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision . . . ."); *see also Zadvydas*, 533 U.S. at 682 (citing immigration statute).

11. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (authorizing new law enforcement measures to combat terrorism).

12. *See* J. M. Lawrence, *War on Terrorism: Anti-Terror Laws in Place: Feds Urgently Implement Crackdown*, BOSTON HERALD, Oct. 27, 2001, at 5 (stating that ACLU chapters plan to monitor implementation of new antiterrorism laws to ensure government's respect for civil

Furthermore, Attorney General John Ashcroft's approval of an emergency rule that allows the government to monitor conversations between suspected terrorists and their attorneys[13] has incensed the same groups, which will likely challenge the rule as a violation of the Sixth Amendment right to assistance of counsel.[14]

These measures raise important questions about how much deference courts should give Congress and the executive as they examine these and other post-September 11 legislative and regulatory provisions. In particular, what role will the constitutional avoidance doctrine play as courts confront the difficult task of interpreting new immigration statutes? Will courts heed Justice Kennedy's insistence that the political branches enjoy "primacy in foreign affairs"[15] and interpret the statutes in such a way as to respect the wishes of a government that is struggling to respond to a new threat? Or will the courts follow the direction of Justice Breyer's majority opinion in *Zadvydas* by "read[ing] significant limitations into other immigration statutes in order to avoid their constitutional invalidation"?[16]

This Note explores the judiciary's interpretation of immigration law statutes, focusing on judges' reliance on the constitutional avoidance doctrine as a means of construing statutes in this area of law. The Note argues that the avoidance doctrine continues to be an indispensable tool of statutory construction for judges, within the context of both mainstream public law and immigration law.[17] Part II examines the use of the avoidance doctrine in the *Zadvydas* case and recounts the history of the doctrine in American courts.[18] Part III evaluates the critiques of the avoidance doctrine by leading scholars and jurists, including a discussion of *Playing It Safe*,[19] a recent book by Dean

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rights); Bruce Fein, *Trust . . . But Verify*, WASH. TIMES, Oct. 30, 2001, at A16 (suggesting that new antiterrorism laws will lead to targeted scrutiny of unpopular minority groups).

13. *See* National Security; Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062 (Oct. 31, 2001) (to be codified at 28 C.F.R. pt. 500 and pt. 501) (proposing interim rule authorizing Bureau of Prisons to monitor communications between attorneys and inmates to deter acts of terrorism).

14. *See* U.S. CONST. amend. VI (stating that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense"); George Lardner, Jr., *U.S. Will Monitor Calls to Lawyers; Rule on Detainees Called 'Terrifying,'* WASH. POST, Nov. 9, 2001, at A1 (reporting criminal defense lawyer's promise that rule would be challenged in court "at first opportunity").

15. *See Zadvydas*, 533 U.S. at 725 (Kennedy, J., dissenting) (arguing that political branches have primary role in foreign affairs).

16. *Id.* at 689.

17. *See infra* Parts V and Part VI (discussing value of constitutional avoidance doctrine).

18. *See infra* Part II (discussing use of avoidance doctrine in *Zadvydas* and other cases).

19. *See* LISA A. KLOPPENBERG, PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF THE LAW 277 (2001) (suggesting that by

Lisa A. Kloppenberg that argues that the Court should reduce its reliance on the doctrine because the doctrine stifles the development of constitutional law.[20] Part IV analyzes the "plenary power" doctrine by which Congress has traditionally enjoyed broad deference in crafting immigration policy and examines how courts have slowly chipped away at that doctrine.[21] Part V explores how the avoidance doctrine can promote dialogue within the branches of government and how, in the *Zadvydas* decision, such communication enriched public debate, advanced the separation of powers principle, and promoted democratic governance.[22] This Note concludes that courts should not abandon the avoidance doctrine, but should use it in circumstances where it preserves Congress's legislative supremacy as the Constitution envisions.[23]

II. The Avoidance Doctrine

A. Zadvydas v. Davis

In 1948, Kestutis Zadvydas was born in a displaced persons camp in Germany.[24] The son of Lithuanian parents, Zadvydas immigrated with his family to the United States when he was eight.[25] Zadvydas eventually fell into a life of crime, and authorities convicted him of cocaine possession.[26] Zadvydas served two years of his sentence before being paroled, whereupon the INS took custody of Zadvydas and initiated deportation proceedings.[27] In 1994, the INS ordered Zadvydas deported, but it could not find a country to accept him.[28] Attorney General Janet Reno ordered Zadvydas held in INS custody beyond the normal removal period of ninety days, relying on a statute that stated that aliens ordered deported "may be detained beyond the removal period."[29] Zadvydas then filed a petition for a writ of habeas corpus challenging his continued detention.[30]

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reducing reliance on avoidance doctrine, Supreme Court could fulfill its constitutional duty to offer guidance on meaning of Constitution).

20. *See infra* Part III (evaluating criticisms of avoidance doctrine).

21. *See infra* Part IV (juxtaposing plenary power and constitutional avoidance doctrines).

22. *See infra* Part V (discussing inherent democratic values of avoidance doctrine).

23. *See infra* Part VI (suggesting that avoidance doctrine preserves balance of power envisioned under Constitution).

24. *Zadvydas*, 533 U.S. at 684.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 682; *see supra* note 10 (quoting statute upon which Attorney General relied to detain Zadvydas).

30. *Zadvydas*, 533 U.S. at 684-85.

When Zadvydas's habeas petition reached the Supreme Court, Justice Breyer, writing for the majority, stated that although the Court could read the statute to imply that the INS had authority to detain deportable aliens indefinitely, such a construction raised serious doubt as to the statute's constitutionality.[31] The Court then chose to construe the statute in a manner that was "fairly possible" and yet permitted the Court to avoid the constitutional question.[32] The Court read an "implicit limitation" into the statute, interpreting its language to restrict post-detention custody to a "period reasonably necessary to bring about that alien's removal from the United States."[33] The Court hinted that it might uphold permanent detention as constitutional if the detention provision applied more narrowly to groups such as "suspected terrorists," but noted that such was not the case in *Zadvydas* because the statute applied "broadly to aliens ordered removed for many and various reasons, including tourist visa violations."[34] Revisiting the same point later in the opinion, the Court stated: "Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."[35] Similarly, the Court rejected the Government's contention that because Congress had "plenary power" to create immigration law, courts should defer to the discretion of the executive and legislative branches in this area.[36]

Justice Kennedy was clear to point out in his dissent that his quarrel was not with the judicial doctrine of constitutional avoidance itself.[37] Rather, he believed that the majority used the constitutional doubt rule as a vehicle – a "guise" in Justice Kennedy's words – to rewrite a statute in a way contrary to

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31. *See id.* at 690 (noting that indefinite civil detention would violate Fifth Amendment's Due Process Clause, which forbids government to "depriv[e]" any "person . . . of . . . liberty . . . without due process of Law" (quoting U.S. CONST. amend. V)).

32. *See id.* at 689 (noting that "when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided'" (quoting Crowell v. Benson, 286 U.S. 22, 62 (1932))).

33. *Id.*

34. *Id.* at 691 (noting that statute did not apply to "small segment of particularly dangerous individuals," such as "suspected terrorists").

35. *Id.* at 696.

36. *See id.* at 695-96 (underscoring that Court's holding does not deny Congress's power in admitting or removing aliens).

37. *See id.* at 705-07 (Kennedy, J., dissenting) (conceding that "[t]he constitutional question the statute presents, it must be acknowledged, may be a significant one in some later case," but in this instance, "[t]he Court . . . misunderstands the principle of constitutional avoidance which it seeks to invoke").

congressional intent.[38] Justice Kennedy agreed with the majority's contention that the statute had the potential to give the government powers that contravene the Constitution, stating that "[o]ne can accept the premise that a constitutional question is presented by the prospect of lengthy, even unending, detention in some instances."[39] However, Justice Kennedy contended that while that issue might be a "significant one in some later case," Zadvydas's situation was not such a case, and therefore the majority had mistakenly invoked the avoidance doctrine.[40] More troublesome for Justice Kennedy was the result of the Court's application of the constitutional doubt rule: a statutory construction that defeated the purpose of the Immigration and Nationality Act as a whole.[41] Justice Kennedy stated that the constitutional doubt rule "allows courts to choose among constructions which are 'fairly possible,'[42] not to 'press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.'"[43] For Justice Kennedy, the Court's interpretation of the statute was by no means a "fairly possible" interpretation, but rather a distortion that was "plainly contrary to the intent of Congress."[44]

By insisting that the majority was in effect rewriting the statute, Justice Kennedy suggested that the Court did not choose between two plausible interpretations, one of which provoked constitutional doubt, but instead *created* a "constitutional" interpretation that Congress never intended. And, as the Court has said in the past, courts should not construe statutes to avoid constitutional problems if the construction "is plainly contrary to the intent of Congress."[45] Justice Kennedy's contention raises the question whether the

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38. *See id.* at 705 (Kennedy, J., dissenting) ("In the guise of judicial restraint the Court ought not to intrude upon the other branches.").

39. *Id.* at 706 (Kennedy, J., dissenting).

40. *See id.* (Kennedy, J., dissenting) (explaining that while another case might present significant constitutional questions, that possibility should not force incorrect interpretation of statute in this case).

41. *See id.* at 706-07 (Kennedy, J., dissenting) (noting that majority's interpretation of statute to imply that detention could be no longer than reasonably necessary to effect alien's removal had no basis in Immigration and Nationality Act).

42. *Id.* at 707 (Kennedy, J., dissenting) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

43. *Id.* (Kennedy, J., dissenting) (quoting Salinas v. United States, 522 U.S. 52, 60 (1997)).

44. *Id.* (Kennedy, J., dissenting) (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994)).

45. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). In this case, the Court found that the National Labor Relations Board's construction of a statute regulating unfair labor practices was not entitled to deference. *Id.* at 575-76.

Court's use of the avoidance doctrine in this situation, with the doctrine's attendant risks of judicial distortion of legislative measures, should be particularly disfavored in immigration matters, given the discretion traditionally enjoyed by the executive and legislative branches in this field.[46]

B. Avoidance as Canon of Interpretation

In the past, courts have used "canons" of interpretation to aid in elucidating the meaning of statutes. These canons are nothing more than loose background principles that guide courts when they confront statutes.[47] Forty years ago, Professor Karl N. Llewellyn undermined the reliability of canons by distilling over two dozen "canons of construction" from judicial opinions and showing that for every canon there is an equally compelling canon containing a contrary rule.[48] Examples of "dueling canons" include the following: (1) one court warns that a statute cannot go beyond its text, whereas another states that the court must implement the statute beyond its text in order to fulfill its purpose; and (2) one court cites the rule that expression of one thing in a statute excludes another, but another court holds that statutory language can include many different situations and does not limit construction to the examples that appear in the statute.[49] While formalistic "canons" no longer pervade judicial opinions as they once did, courts still use "clear statement" principles and background understandings as guides to interpreting statutes.[50]

1. Ashwander v. TVA*: Justice Brandeis's Defense of Avoidance*

One of the surviving features of legal formalism is the continued reliance on the avoidance canon.[51] The avoidance canon has been the subject of sub-

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46. *See infra* Part IV.A (discussing Congress's traditional authority over immigration issues).

47. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 451 (1989) (stating that courts have always used "canons" or something similar to canons as background principles for interpretation).

48. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950) (concluding that attorneys must be familiar with opposing canons because, according to Llewellyn, "[s]tatutory construction still speaks a diplomatic tongue").

49. *See id.* at 401, 405 (discussing "thrust" and "parry" of competing canons).

50. *See* Sunstein, *supra* note 47, at 452-53 (noting that courts continue to use canons of construction in form of "clear statement" principles and background understandings); *see also* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 276 (1985) (stating that federal and state judges frequently invoke canons, such as plain meaning rule, wherein if language of statute is plain, it is unnecessary to construct statute).

51. *See id.* at 284-86 (explicating avoidance doctrine and then concluding that continued

stantial interest by academicians and for good reason, given that the Supreme Court has increasingly relied on it to help guide recent decisions.[52] The constitutional avoidance doctrine became a staple of statutory construction after Judge Brandeis defended it in *Ashwander v. Tennessee Valley Authority*.[53] In *Ashwander*, the issue before the Court was the constitutionality of the government's sale of its excess electricity to private customers.[54] Justice Brandeis's concurring opinion outlined the importance of the Court's avoidance of constitutional issues when at all possible in disposing of a case.[55] Justice Brandeis reiterated "a series of rules under which [the Court] has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."[56]

Once judges determine that constitutional issues might be at stake in their rulings, Brandeis's framework provides them with helpful tools for construing statutes without passing on constitutional questions. Specifically, courts should not: (1) decide constitutional issues when the case does not require it,

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popularity of canons demonstrates resilience of legal formalism).

52. *See* Chemerinksy, *supra* note 2, at 68 (noting increasing reliance by Supreme Court on avoidance doctrine to decide cases in past two years); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 833 (2001) (discovering "significant kindling of academic interest in the avoidance canon").

53. 297 U.S. 288 (1936) (plurality opinion); *see also* Kelley, *supra* note 52, at 841 (noting that Justice Brandeis defended principle that Court's avoidance of constitutional questions amounted to judicial deference to Congress and thus fostered separation of powers).

54. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 338-39 (1936) (plurality opinion) (finding it not unconstitutional for government to sell excess electric power to private power company). The plaintiff, Ashwander, sued the Tennessee Valley Authority (TVA), questioning the constitutionality of a contract that the federal government, through TVA, entered into with the Alabama Power Company for use of the latter's power lines. *Id.* at 316-17. Ashwander, a stockholder in the Alabama Power Company, challenged the government's foray into the power business as both injurious to corporate interests and invalid, arguing that it was beyond the constitutional power of the federal government to enter into the contract. *Id.* at 316. Pursuant to the contract, TVA used the power lines in order to sell excess electricity that it generated from a dam on the Tennessee River. *Id.* at 315-16. TVA sought to sell this excess power to private individuals, thereby placing TVA in direct competition with private power companies. *Id.* at 336-40. In a plurality opinion, the Court upheld the contract, stating that the electric energy generated by the dams was the equivalent of government property and that the government could dispose of its energy through sale rather than let it go to waste. *Id.* at 335-37.

55. *See id.* at 346-48 (Brandeis, J., concurring) (discussing seven principles for avoidance of constitutional questions); *see also* Brian C. Murchison, *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases*, 30 GA. L. REV. 85, 100-101 (1995) (noting that *Ashwander* concurrence evinced Justice Brandeis's "conviction that the Court must take the utmost pains to avoid precipitate decision of constitutional issues, and that it must above all decide such issues only when it is absolutely unable otherwise to dispose of a case properly before it" (quoting ALEXANDER M. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK 2-3 (1957))).

56. *Ashwander*, 297 U.S. at 346 (Brandeis, J., concurring).

(2) anticipate questions of law before it becomes necessary to decide them, (3) formulate a rule of constitutional law broader than is necessary, or (4) decide a case on constitutional grounds when it can be decided on nonconstitutional grounds.[57] Brandeis gleaned his fourth point from *Crowell v. Benson*,[58] a case that, in addition to Brandeis's *Ashwander* concurrence, courts often cite when seeking authority to justify invocation of the avoidance doctrine.[59] In *Crowell*, the Court stated that "[i]t is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided."[60]

2. *The Origins and Development of Avoidance Prior to* Ashwander

Although legal scholars typically regard the *Ashwander* and *Crowell* opinions as the foundational cases of the avoidance doctrine, the notion that courts should sidestep constitutional questions when possible can be traced back to Chief Justice John Marshall's opinion in *Murray v. Schooner Charming Betsy*.[61] In *Charming Betsy*, Marshall warned that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[62] The message in Justice Marshall's admonition and

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57. *See id.* at 346-47 (Brandeis, J., concurring) (outlining avoidance principles).

58. 285 U.S. 22 (1932).

59. *See Ashwander*, 297 U.S. at 348 (Brandeis, J., concurring) (discussing *Crowell v. Benson*, 285 U.S. 22 (1932), for proposition that courts should decide cases on nonconstitutional grounds when possible).

60. Crowell v. Benson, 285 U.S. 22, 62 (1932). *Crowell* involved an employer's attempt to deny a worker's compensation award on the grounds that the employee was not an employee at the time of his injury. *Id.* at 37. Under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (2000), the Deputy Commissioner of the United States Employees' Compensation Commission ordered the award, and the employer brought suit in district court to enjoin its enforcement. *Id.* at 36-37. The employer-complainant argued that the Act was unconstitutional in that it violated the Due Process Clause of the Fifth Amendment, the Seventh Amendment right to trial by jury, and the Fourth Amendment protection against unreasonable search and seizure. *Id.* at 37. The Court found that the challenged provisions could be construed to avoid any constitutional doubts. *Id.* at 62.

61. 6 U.S. (2 Cranch) 64 (1804); *see* Kelley, *supra* note 52, at 836-37 (noting that many believe *Charming Betsy* contained "germs" of avoidance doctrine); *see also* Cass R. Sunstein, *Not Deciding*, NEW REPUBLIC, Oct. 29, 2001, at 41, 44 (stating that avoidance doctrine reaches back to era of John Marshall).

62. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). *Charming Betsy* involved a dispute over a pirated ship, its cargo, and whether the ship's owner violated the law of the United States prohibiting commerce between the United States and France. *Id.* at 115-17. A United States Commander seized the ship, sold her cargo, and sent her back to the United States because he believed that the American-born owner of the ship, Jared Schattuck, had violated American trade laws by using the ship to trade with the island of Guadalupe. *Id.*

the avoidance principle that later followed was that courts should respect the powers and discretion of the other branches.[63] This principle of deference rests in part on Congress's supremacy in legislative matters.[64] With this recognition, the judiciary assumes "its proper role in construing statutes, which is to interpret them so as to give effect to congressional intention."[65] When the judiciary fulfills this role and sidesteps serious constitutional questions, several advantages result. First, avoidance minimizes the friction between Congress and the courts concerning the institution of judicial review.[66] Second, avoidance prevents the nullification of a congressional statute, thus saving Congress both the time necessary to amend the legislation to render the legislation constitutional and the aggravation caused by the Court's invalidation of one of its statutes.[67] Finally, judicial avoidance of constitutional questions supports the separation of powers within the federal

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The trade laws in question prohibited "the commercial intercourse between the United States and France, and the dependencies thereof." *Id.* at 118. The Court stated that a court should never construe an act of Congress to violate the law of nations or to violate neutral rights or neutral commerce. *Id.* Further, the Court stated that the Act excluded individuals such as Schattuck, who live outside the territory of United States and who have sworn allegiance to a foreign nation. *Id.* at 120.

See Ex parte Randolph, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,538) (Marshall, J.) (stating that "if the case may be determined on other points, a just respect for the legislature requires, that the obligation of its laws should not be unnecessarily and wantonly assailed"). *But see* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 448 (1996) (noting that in *Marbury v. Madison*, Chief Justice Marshall "abandoned the Federalist postulate that a law could be declared unconstitutional only when necessary to decide a case").

63. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (underscoring that courts should not construe statutes as unconstitutional unless legislature made very clear mistake); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 35 (2d ed. 1986) (stating that Thayer believed courts should not tread upon powers that belong to other branches of government).

64. *See* Kelley, *supra* note 52, at 843 ("The avoidance canon self-consciously recognizes and seeks to respect Congress's primacy in the sphere of lawmaking.").

65. NLRB v. Catholic Bishop, 440 U.S. 490, 511 (1979) (Brennan, J., dissenting).

66. *See* POSNER, *supra* note 50, at 285 (arguing that construction of legislation to avoid constitutional questions acts as buffering device that reduces friction between judicial and legislative branches); *see also* Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998) ("The doctrine seeks in part to minimize disagreement between the branches by preserving congressional enactments that might otherwise founder on constitutional objections.").

67. *See* POSNER, *supra* note 50, at 285 (asserting that because of pressing work load, Congress has little ability to amend statute found to be unconstitutional). Posner notes that if Congress leaves the statute unamended, this avoids a collision with the courts. *Id.* at 284; *see also* Sunstein, *supra* note 47, at 469 (noting that avoidance "responds to Congress's probable preference for validation over invalidation").

government because it preserves Congress's supremacy in the legislative sphere.[68]

C. United States v. Witkovich

A case similar to *Zadvydas*, and one on which the *Zadvydas* majority relied, is *United States v. Witkovich*.[69] *Witkovich* involved a statute that gave the Attorney General the authority to monitor aliens who had been ordered deported, but who remained in the country.[70] In keeping with the anti-Communist spirit of the post-World War II era, the Attorney General had interpreted his authority broadly to ensure the aliens' availability for deportation by requiring that the aliens answer questions regarding their contacts with the Communist Party.[71] The district court found that the government's questions were not relevant to the aliens' availability for deportation; furthermore, the district court concluded that the Attorney General's interpretation was unac-

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68. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 355 (1936) (Brandeis, J., concurring) ("One branch of the government cannot encroach on the domain of another without danger." (quoting The Sinking-Fund Cases, 99 U.S. 700, 718 (1878))); *see also* Kelley, *supra* note 52, at 841 (noting that in *Ashwander*, Justice Brandeis felt it essential to separation of powers doctrine that judiciary exercise judicial review only as last resort); Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 3 (1996) (arguing that when faced with constitutional challenge to statute, Court will often rule on nonconstitutional grounds rather than void statute because of separation of powers concerns); Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1015-16 (1994) (noting Brandeis's belief that separation of powers principle should make courts reluctant to exercise judicial review of legislative act's constitutionality); Sunstein, *supra* note 47, at 469 (noting that avoidance doctrine is "natural outgrowth" of separation of powers doctrine).

69. 353 U.S. 194 (1957).

70. *See* United States v. Witkovich, 353 U.S. 194, 195, 202 (1957) (construing grant of authority to Attorney General to ask aliens whatever questions he "deem[ed] fit and proper" as limited to questions "reasonably calculated" to ensure alien's continued availability for deportation). In *Witkovich*, the Attorney General interpreted a statute giving him the authority to prescribe regulations for aliens for whom a final order of deportation had been outstanding for more than six months. *Id.* at 195-96. One provision in the statute allowed the Attorney General to require aliens to provide information as the Attorney General might deem "fit and proper" to ensure the alien's continued availability for deportation. *Id.* at 195. The Attorney General interpreted the provision to give himself authority to ask probing questions regarding the alien's contacts with members of the Communist Party. *Id* at 196-97. The Court found that the Attorney General had exceeded his statutory authority because the purpose of the provision was to assure the alien's availability for deportation and these questions did not serve that purpose. *Id.* at 202.

71. *See id.* at 199 (describing Government's argument that national interest in avoiding communist activities should require alien to answer questions regarding communist relationships).

ceptable because "[t]o hold that the statute intended to give an official the unlimited right to subject a man to criminal penalties for failure to answer absolutely any question the official may decide to ask would raise very serious constitutional questions."[72] Accordingly, the district court, and ultimately the Supreme Court, relied on the avoidance doctrine to imply a "reasonableness" limitation in the Attorney General's authority to question aliens about their activities and, in so doing, steered clear of the Attorney General's constitutionally questionable interpretation of the statute.[73]

The majority decision in *Witkovich* drew noisy complaints from the dissent, not unlike those of Justice Kennedy in *Zadvydas*.[74] Justice Clark pointed out that "the power of Congress with respect to aliens is exceedingly broad"[75] and that "Congress beyond any question gave the Attorney General the authority he exercised."[76] An example of that authority, Justice Clark noted, is Congress's power to expel any noncitizen whom it finds undesirable.[77] Justice Clark considered the Attorney General's right to question aliens a necessary supplement to that authority.[78] Because the Attorney General had a congressionally extended right to question aliens about past activities, Justice Clark found no reason to invoke the avoidance doctrine.[79]

III. Disputed Value of Avoidance Doctrine

A. Undesirable Consequences and Practical Advantages of Avoidance Doctrine

The principle that directs courts to find constructions that are "fairly possible" can be problematic because, on its face, it appears to give little if any regard to the legislature's purpose in passing a statute.[80] Professor Frederick Schauer criticizes the "fairly possible" rule as equivalent to making a false

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72. *Id.* at 197-98 (quoting United States v. Witkovich, 140 F. Supp. 815, 821 (N.D. Ill. 1956)).

73. *See id.* at 199-202 (construing statute to permit Attorney General to ask aliens questions "reasonably calculated" to ensure alien's continued availability for deportation).

74. *See infra* notes 75-79 and accompanying text (describing complaints of Justice Clark).

75. *Witkovich*, 353 U.S. at 208 (Clark, J., dissenting).

76. *Id.* at 207 (Clark, J., dissenting).

77. *See id.* at 208 (Clark, J., dissenting) (discussing power of Congress regarding aliens).

78. *See id.* (Clark, J., dissenting) ("The power given [to the Attorney General] is merely supplemental to that of expulsion and is a necessary concomitant thereof. . . .").

79. *See id.* at 207 (Clark, J. dissenting) (explaining that there are no constitutional questions to avoid because Attorney General clearly has right to question past conduct).

80. *See* Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 81. (discussing how avoidance doctrine prevents courts from examining statute's legislative purpose).

choice: "It is hard to imagine a case in which . . . there would be two identically plausible interpretations, such that . . . the rational judge would be reduced to something akin to tossing a coin."[81] Schauer goes on to argue that a decision by courts to choose a construction that Congress likely did not intend comes at a significant cost, for the court is selecting a "suboptimal" alternative over more plausible competing constructions.[82] In sum, critics of this rule question the value of construing a statute in such a way that it is constitutional, but might be significantly at odds with the legislature's intent.[83]

At times, the type of statutory construction described by Professor Schauer can lead to increased friction between the separate branches of power – an ironic consequence, given that supporters of the avoidance doctrine often justify it on the grounds that it fosters separation of powers.[84] According to Justice Kennedy, the *Zadvydas* majority's construction could trigger inter-branch hostility because the Court "arrogat[ed] to the judicial branch the power to summon high officers of the executive to assess their progress in conducting some of the Nation's most sensitive negotiations with foreign powers."[85]

A survey of scholarly criticism of the constitutional avoidance doctrine reveals that Justice Kennedy is not alone in his contention that the avoidance canon is conducive to judicial usurpation of powers traditionally reserved for other branches of government.[86] Critics of the avoidance doctrine, including Judge Henry J. Friendly, often point out that it allows courts to ascribe meaning to a statute that might be contrary to the intent of the legislative body that enacted the statute.[87] Judge Friendly wrote, "It does not seem in any way obvious, as a matter of interpretation, that the legislature would prefer a narrow construction which does not raise constitutional doubts to a broader one which does raise them."[88] Similarly, Judge Richard A. Posner believes that "[t]he practical effect of interpreting statutes to avoid raising constitutional questions is . . . to enlarge the already vast reach of constitutional prohibition . . . and in

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81. *Id.* at 83.

82. *See id.* (discussing cost of avoidance doctrine).

83. *See* Kelley, *supra* note 52, at 846 (underscoring critics' point that avoidance does not necessarily respect legislative supremacy because "it is no service to Congress, no great act of deference, to construe a statute in a manner contrary to its text and history in order to avoid even confronting a constitutional doubt").

84. *See supra* note 68 (surveying various scholars who have noted connection between avoidance doctrine and separation of powers).

85. *Zadvydas*, 533 U.S. at 705 (Kennedy, J., dissenting).

86. *See* Harold J. Krent, *Avoidance and Its Costs: Application of the Clear Statement Rule to Supreme Court Review of NLRB Cases*, 15 CONN. L. REV. 209, 245 (1983) (concluding that construing statutes to avoid constitutional questions is likely to lead to "judicial policymaking").

87. *See* HENRY J. FRIENDLY, BENCHMARKS 211-12 (1967) (concluding that avoiding constitutional doubts results in evisceration and equivocation of congressional statutes).

88. *Id.* at 210.

so doing to sharpen the tensions between the legislative and judicial branches."[89]

Even as critics of the avoidance doctrine fault it for its conduciveness to judicial policymaking, they acknowledge that it restricts meddling jurists who might otherwise be tempted to rule on constitutional questions under a claim of authority pursuant to the power of judicial review. Judge Posner underscores this paradoxical point by explaining that "[c]onstruing legislation to avoid constitutional questions . . . is . . . one of those buffering devices by which the frictions created by the institution of judicial review are minimized."[90] Indeed, the Court sometimes predicates its use of the avoidance doctrine on "the final and delicate nature of judicial review."[91]

Professor Schauer believes that a court's interpretation of a statute to avoid a constitutional question is as much of a judicial intrusion on the legislature as a court's invalidation of the same statute using a construction that does not avoid the constitutional question.[92] Schauer does not accept the *Ashwander* principle that it is less troublesome for a court to give a statute an aggressive construction that might be at odds with the legislature's intent than it is to show aggression by meeting constitutional questions head on.[93] The avoidance doctrine's supposed benefits, Schauer believes, exact a high cost, for when the Court fails to confront constitutional questions, it often does not give its reasons and adopts suboptimal constructions, possibly sending the wrong message to Congress about what might be unconstitutional.[94]

B. Shelter for Timid Courts or Guarantor of Accountable Decisionmaking?

Perhaps the avoidance canon's staunchest critic is Dean Kloppenberg. Her book, *Playing It Safe*, assails the Rehnquist Court's reliance on the avoid-

89. POSNER, *supra* note 50, at 285.

90. *Id.*

91. KLOPPENBERG, *supra* note 19, at 3 (stating that Court sometimes predicates use of avoidance doctrine on judicial review, federalism, constitutional adjudication, and separation of powers principles) (citing Ashwander v. Tenn. Valley Auth., 297 U.S. 288 (1936)); *see also* Kelley, *supra* note 52, at 845 (stating that avoidance canon discourages judges from engaging in judicial review by requiring them to construct statute in constitutional fashion when possible).

92. *See* Schauer, *supra* note 80, at 74 (arguing that "it is by no means clear that a strained interpretation of a federal statute that avoids a constitutional question is any less a judicial intrusion than the judicial invalidation on constitutional grounds of a less strained interpretation of the same statute").

93. *See id.* at 80-81 (questioning *Ashwander* view that judicial aggressiveness in statutory interpretation is less troublesome than judicial aggressiveness in confronting constitutional questions).

94. *See id.* at 81-90 (discussing repercussions of *Ashwander* interpretation).

ance doctrine because, as she argues, the Court has used the doctrine to bar lawsuits seeking redress for discrimination and, consequently, has evaded its responsibility to offer guidance about the meaning of the Constitution.[95] Kloppenberg argues that the Court employs the avoidance doctrine to sidestep contentious, socially sensitive issues in constitutional law, such as racial discrimination, gender inequalities, abortion restrictions, and sexual orientation.[96] According to Kloppenberg, the Supreme Court should not shy away from confronting constitutional questions because disagreement about the meaning of the Constitution is "a healthy part of the adversarial system" and the "Court is well situated to address some of those [controversial] issues when politicians are reluctant to do so."[97]

On the other side of the equation, commentators who support the judiciary's use of the avoidance canon argue that it helps guarantee judicial minimalism rather than judicial activism. Professor Cass Sunstein, a defender of judicial minimalism, argues that use of the constitutional avoidance doctrine can reduce conflict between the different branches of government and lead to validation, rather than invalidation, of congressional statutes.[98] Additionally, minimalism promotes democracy and "reason-giving" because it ensures that important decisions are made by politicians, who are accountable to the electorate.[99] Professor William N. Eskridge, who has written extensively on the values of statutory interpretation, concludes that the constitutional avoidance canon allows the judiciary to "update" statutes by construing them to comport with society's constitutional values.[100]

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95. *See* KLOPPENBERG, *supra* note 19, at 1 (arguing that Court often uses avoidance to protect against charge of judicial activism in "socially sensitive" cases dealing with racial and ethnic discrimination, gender inequalities, abortion restrictions, sexual orientation discrimination, or environmental abuses). Kloppenberg criticized the Court's refusal in *Allen v. Wright*, 468 U.S. 737 (1984), to hear a case brought by parents of black children who claimed that IRS tax policies interfered with integrated education. *See* KLOPPENBERG, *supra* note 19, at 75-78 (discussing *Allen* decision). The Court based its refusal to hear the case on the parents' lack of standing. *Id.* at 78. Kloppenberg also faulted the Court's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996), to deny certiorari in a dispute regarding the constitutional validity of an affirmative action program at the University of Texas School of Law as a missed opportunity to fully guarantee equal protection. *See* KLOPPENBERG, *supra* note 19, at 122-31 (discussing repercussions of Court's denial of certiorari in *Hopwood*).

96. *See id.* at 1 (noting "socially sensitive" issues).

97. *Id.* at 3.

98. *See* Sunstein, *supra* note 47, at 468-69 (contending that avoidance complies with Congress's likely preference for validation over invalidation of its statutes).

99. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME 5 (1999) (arguing that by leaving open difficult constitutional questions, courts promote democratic accountability and deliberation).

100. *See* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1021 (1989) (stating that Court can update statutes by construing them to reflect society's "evolving values" in relation to Constitution).

C. Message-Sending Power of the Avoidance Doctrine

The debate about the pros and cons of the constitutional avoidance doctrine tells us little about the message-sending effect of a court's invocation of the doctrine to avoid a constitutional ruling. Thus, it is helpful to consider the practical consequences that flow from the avoidance doctrine to determine whether the doctrine promotes greater comity or greater discord between the courts and Congress. Judge Posner explains that when courts construe statutes to avoid constitutional questions, they are in fact broadening constitutional prohibitions because, given the time pressures on Congress, legislators are unlikely to overrule a judicial decision misconstruing one of their statutes.[101] Similarly, Professor Schauer has noted that avoiding constitutional questions actually leads courts down the road of deciding them because when courts invoke the avoidance doctrine, they are signaling that the avoided statutory construction raises constitutional doubts, thereby putting Congress on notice of potentially problematic constructions.[102] Once the Court alerts Congress to constructions that the Court finds dubious, Schauer argues, it would be "silly" for Congress to pass a statute that would likely face invalidation.[103] According to Judge Posner, the practical effect of avoiding constitutional questions is to create a "judge-made penumbra" around certain constitutional issues, thus permitting the judiciary to expand the reach of constitutional prohibitions.[104]

IV. Avoidance Doctrine's Role in the Development of Immigration Policy

A. The Plenary Power Doctrine: Origins and Relative Decline

An inquiry into Congress's special authority over immigration matters reveals that the judiciary's invocation of the avoidance doctrine in this legislative arena poses heightened separation of powers concerns. Congress is said to enjoy "plenary power" over immigration matters due in part to Article I, Section 8 of the Constitution, which gives Congress the authority to "establish

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101. *See* POSNER, *supra* note 50, at 285 (stating that it is unrealistic to think Congress has time to reassess statute that courts have already found constitutionally problematic).

102. *See* Schauer, *supra* note 80, at 88 (stating that when Court interprets statute to avoid constitutional problems, it is in effect sending signal to Congress that if Congress amends statute reaffirming Congress's original view and thus forces Court to decide constitutionality, statute will likely face invalidation).

103. *See id.* (noting futility of congressional action in this situation).

104. *See* Richard A. Posner, *Statutory Interpretation – in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983) (discussing "penumbra" effect); *see also* United States v. Marshall, 908 F.2d 1312, 1318 (7th Cir. 1990) (stating that avoidance doctrine is "closer cousin to invalidation than to interpretation" because it allows courts to enforce constitutional penumbras).

an uniform Rule of Naturalization."[105] The plenary power doctrine entitling Congress to special deference on immigration matters arises out of concerns for national security, territorial sovereignty, and self preservation.[106] One argument supporting judicial restraint in the face of Congress's immigration authority rests on the importance that the nation speak with one voice on matters of immigration and foreign affairs.[107] A long line of Supreme Court decisions affirms Congress's broad authority in the area of immigration law,[108] which is defined as the admission and expulsion of aliens.[109] Typically, courts fall back on the plenary power argument to bar aliens' attempts to obtain judicial review of congressional action affecting them.[110]

The special congressional authority in immigration law has led to its isolation from the fundamental constitutional norms, administrative procedure, and judicial self-assertion that define other areas of our legal system.[111] However, this trend appears to have changed. Immigration law has begun to

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105. *See* U.S. CONST. art. I, § 8, cl. 4 (outlining congressional power over naturalization).

106. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 551-52 (1990) (stating that Congress historically had power to regulate immigration free from judicial review based on these concerns) (citing Chae Chan Ping v. United States, 130 U.S. 581, 604 (1889)).

107. *See Zadvydas*, 533 U.S. at 711 (Kennedy, J., dissenting) (stating importance that nation speak with one voice in fields of immigration and foreign affairs); *see also* STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY 217 (1987) (discussing Court's past insistence on uniformity in nation's immigration laws) (citing Chae Chan Ping v. United States, 130 U.S. 581 (1889)).

108. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977) (noting that Congress has plenary power over admission of aliens); Kleindienst v. Mandel, 408 U.S. 753, 769 (1972) (noting that Congress has plenary power to make rules regulating admission and exclusion of aliens); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953) (stating that decisions to expel or exclude aliens are largely immune from judicial control); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909) (recalling that "over no conceivable subject is the legislative power of Congress more complete than it is over" admission of aliens); *see also* LEGOMSKY, *supra* note 107, at 213 (stating that Supreme Court historically rejected any judicial review of constitutionality of immigration legislation). *But see* Keller v. United States, 213 U.S. 138, 148-49 (1909) (holding that Congress had no power to enact statute providing criminal punishment for American citizen who harbored alien prostitute); Wong Wing v. United States, 163 U.S. 228, 243 (1896) (invalidating statute that imposed hard labor as punishment for violation of immigration law without providing trial to establish guilt of accused).

109. *See* Motomura, *supra* note 106, at 565 (defining immigration law).

110. *See* LEGOMSKY, *supra* note 107, at 218 (stating that until recently, aliens have been unlikely to obtain constitutional review of congressional legislation due to Court's recognition of plenary power doctrine).

111. *See* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984) (arguing that immigration law has been "radically insulated" from rest of our legal system).

recognize the rights of aliens. One scholar attributes this recognition to the emphasis that "liberal values" have placed on the universal rights of man.[112] The more likely explanation is that courts, over time, increasingly have recognized that aliens have rights issuing from the Constitution, regardless of whether their presence in the country is lawful.[113] It is therefore little wonder that recent courts – including the Supreme Court – have paid less heed to the plenary power doctrine's call for complete noninterference by the judiciary and instead have merely shown relative deference to Congress when immigration matters are at issue.[114] Specifically, courts have moved away from absolute deference to Congress in their interpretation of immigration statutes.[115] The Court's recent pronouncement in *Zadvydas* that Congress's plenary power is "subject to important constitutional limitations" bears out the proposition that Congress's plenary power is no longer a universal norm.[116]

B. An Incrementalist Approach to Immigrant Rights: Zadvydas, Yick Wo v. Hopkins, *and* Yick Wo*'s Progeny*

In *Zadvydas*, the Court relied in part on the fact that it had imposed constitutional limitations on plenary power in the past to reject the Government's argument that the Attorney General had the statutory authority to hold deportable aliens indefinitely in the interests of protecting the community.[117] The Court found that, notwithstanding Congress's plenary power, the Attorney General's reading of the provision that an alien "may be detained beyond

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112. *See id.* at 4 (arguing that new "communitarian" values, which foster belief that government should protect immigrants, should take root in tenet of liberalism that emphasizes individuals' essential and equal humanity).

113. *See* Motomura, *supra* note 106, at 584 (arguing that after *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), courts applied constitutional scrutiny to cases involving aliens' rights, including rights of aliens who were in country illegally or involuntarily).

114. *See* LEGOMSKY, *supra* note 107, at 219 (noting that plenary power doctrine is starting to "warp," as Supreme Court and lower court decisions show relative deference toward Congress regarding immigration matters as opposed to outright unwillingness to interfere). *But see* Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L. Q. 1087, 1157 (1995) (arguing that "plenary power doctrine remains the central tenet of immigration law").

115. *See* Motomura, *supra* note 106, at 547-49 (noting that courts have weakened plenary power doctrine through their interpretation of immigration statutes); *see generally* INS v. Chadha, 462 U.S. 919 (1983) (invalidating provision of Immigration and Nationality Act as unconstitutional).

116. *Zadvydas*, 533 U.S. at 695.

117. *See id.* at 689 (noting that in *United States v. Witkovich*, 353 U.S. 194 (1957), Court limited Attorney General's discretion by permitting him only to question aliens about their continued availability for deportation, and not to probe their political activities).

the removal period" indefinitely would cause serious constitutional problems, given the Fifth Amendment's Due Process Clause.[118] Specifically, the Court worried that indefinite detention of an alien might amount to a deprivation of liberty without due process of law.[119] Fearful of the statute's potential to violate the Due Process Clause, the Court felt that its duty was to avoid any interpretation allowing for indefinite detention.[120]

The use of the avoidance doctrine in *Zadvydas* is consistent with Dean Kloppenberg's thesis that the Court relies most heavily on this doctrine when "socially sensitive cases" are at stake.[121] Kloppenberg's contention is particularly salient in light of society's heightened interest in immigration matters since September 11.[122] But the complaints and frustrations leveled at the avoidance doctrine by scholars such as Kloppenberg are inapplicable to *Zadvydas*. One of Kloppenberg's chief criticisms of the avoidance doctrine is that courts' reliance on it hampers the development of constitutional law.[123] Kloppenberg further claims that courts use the avoidance doctrine to issue "narrow or piecemeal rulings" that hamper the development of law in cases dealing with race and gender discrimination.[124]

With respect to *Zadvydas*, one can imagine that proponents of clear constitutional development would like to know whether the Constitution permits the Attorney General to hold indefinitely an alien whom the INS has ordered deported – a question that bears on an alien's liberty interest and, indirectly, on whether the government may abridge certain rights on account of alienage. However, the mere fact that the *Zadvydas* Court applied the avoidance doctrine, and thereby did not reach that question, does not mean

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118. *Id.*; *see* U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .").

119. *See Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Fifth Amendment Due Process] Clause protects.").

120. *See id.* at 689 (stating Court's view that statute must be read to limit alien's post-removal detention period to time "reasonably necessary" to bring about alien's removal).

121. *See supra* notes 95-96 and accompanying text (discussing avoidance doctrine as shield for courts when controversial social issues are at stake).

122. *See Opening at INS; Wanted: Miracle Worker for Conflicting Roles*, SAN DIEGO UNION - TRIB., Aug. 20, 2002, at B6 (reporting that after September 11 terrorist attacks public and Congress were outraged at "laissez-faire immigration policy" that was in place for decades).

123. *See* KLOPPENBERG, *supra* note 19, at 276 (stating that when trial and appellate courts decline to decide constitutional questions by relying on avoidance doctrine, they retard development of constitutional law because they prevent constitutional issues from reaching Supreme Court).

124. *See id.* at 15 (discussing how avoidance doctrine constricts development of certain areas of law).

that the Court's holding will not contribute to the development of constitutional law regarding alien rights. Professor Sunstein has noted that "narrow and unambitious rulings have been central to the elaboration of constitutional rights. The modern law of free speech was built not in a year or even in a decade, but through a century of mostly incremental decisions."[125] In effect, Sunstein seems to be telling proponents of an aggressive Court to "be patient."

Sunstein's point is particularly applicable in the area of immigration law. Though it did not involve the avoidance doctrine, the well-known case *Yick Wo v. Hopkins*[126] supports the contention that a narrow ruling on constitutional rights can be a springboard for elaboration of other constitutional rights.[127] *Yick Wo* involved a facially-neutral ordinance requiring those operating wooden laundries in the city of San Francisco to obtain permits.[128] The board issuing the permits denied permits to all two hundred Chinese applicants while it granted permits to all non-Chinese applicants but one.[129] The Court found that despite their status as subjects of the Emperor of China, the laundry operators nonetheless deserved the protections of the Fourteenth Amendment's Equal Protection Clause.[130] Accordingly, the Court held that the discrimination against the aliens was illegal.[131]

The holding in *Yick Wo* that aliens were due the protections of the Fourteenth Amendment was arguably a narrow decision because the Court might

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125. Sunstein, *supra* note 61, at 44.

126. 118 U.S. 356 (1886).

127. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (finding that aliens lawfully in United States receive protections of Constitution). In *Yick Wo*, the petitioners, natives of China present in the United States but not United States citizens, sought relief before the Supreme Court after being denied a writ of habeas corpus by the California Supreme Court. *Id.* at 356-57. The city of San Francisco imprisoned the petitioners for violating a city ordinance that forbade the operation of wooden laundries without a permit. *Id.* A city board of supervisors issued the permits. *Id.* at 357. Natives of China owned approximately 240 of the 320 laundries in the city. *Id.* at 358-59. Three hundred and ten of the laundries were constructed of wood and thus within the purview of the ordinance. *Id.* at 359. The board of supervisors denied all applications by approximately 200 Chinese people for permits to operate wooden laundries. *Id.* Conversely, the board issued permits for all but one non-Chinese applicant. *Id.* The Court found that despite not being U.S. citizens, the plaintiffs were entitled to the protections of the Equal Protection Clause. *Id.* at 368-69. In regard to the ordinance, the Court found that it was facially impartial, but that it had been administered "with an evil eye and an unequal hand." *Id.* at 373-74. Consequently, the Court concluded that the application of the ordinance amounted to a denial of the equal protection of the law guaranteed by the Fourteenth Amendment. *Id.* at 374.

128. *Id.* at 357.

129. *Id.* at 358-59.

130. *See id.* at 368-69 (finding aliens protected by Equal Protection Clause).

131. *See id.* at 374 (concluding that application of ordinance denied aliens equal protection).

have gone much further by stating that aliens were entitled to the full panoply of constitutional protections. But *Yick Wo's* narrow holding was nevertheless significant because it signaled that aliens were to some extent under the constitutional umbrella.[132] In subsequent years, the Court built on the basic precept of *Yick Wo* to expand the constitutional rights of aliens. To wit, in *Wong Wing v. United States*,[133] ten years after *Yick Wo*, the Court gave aliens the full range of Fifth and Sixth Amendment protections.[134] In the 1931 case of *Russian Volunteer Fleet v. United States*,[135] the Court relied on *Yick Wo* to apply the Fifth Amendment's Takings Clause to aliens.[136]

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132. *See* Motomura, *supra* note 106, at 565 (noting that *Yick Wo* stands for principle that aliens lawfully within United States are considered to be in "constitutional fold").

133. 163 U.S. 228 (1896).

134. *See* Wong Wing v. United States, 163 U.S. 228, 238 (1896) (holding that Due Process Clause and indictment requirement entitled illegal Chinese aliens to judicial trial before they could be sentenced to hard labor for violating Congress's exclusion laws). In *Wong Wing*, the Court considered whether the Fifth and Sixth Amendments applied to aliens sentenced to hard labor. *Id.* at 233-34. A United States Customs Agent charged two Chinese citizens with being unlawfully within the United States. *Id.* at 229. The Commissioner of the Circuit Court of the United States for the Eastern District of Michigan found that the Chinese citizens were unlawfully within the United States and ordered them to be imprisoned at hard labor for sixty days, after which they would be removed to China. *Id.* On a petition for writ of habeas corpus, the Court considered the question of whether a congressional act excluding Chinese persons from the United States violated the Constitution in that one of its provisions allowed for imprisonment at hard labor without a trial by jury. *Id.* at 235. The Court acknowledged Congress's power to forbid aliens from coming within the country's borders and to expel aliens who are unlawfully within its territory. *Id.* at 237. However, the Court found that any legislation allowing for punishment of illegal aliens through hard labor must provide for a judicial trial in order to be valid. *Id.* The Court reasoned that the Due Process Clause of the Fifth Amendment and the indictment requirement of the Sixth Amendment forbade the government from holding even aliens to answer for infamous crimes when no indictment had issued from a grand jury. *Id.* at 238; *see also* Motomura, *supra* note 106, at 565-66 (noting that *Wong Wing* Court held that aliens are entitled to "full range of protections" of Fifth and Sixth Amendments).

135. 282 U.S. 481 (1931).

136. *See* Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931) (noting that because petitioner corporation was alien friend, it was entitled to Fifth Amendment protection). In *Russian Volunteer Fleet*, the Court considered whether an alien corporation, organized under the laws of a regime not recognized by the United States, could maintain a takings claim. *Id.* at 488. The United States Shipping Board Emergency Fleet Corporation had requisitioned two ship construction contracts from the petitioner, a Russian corporation. *Id.* at 486-87. The Court of Claims dismissed the corporation's claim that it was due payment of just compensation for the government's requisitioning. *Id.* at 487-88. The Court of Claims held that the corporation could not maintain its suit because the United States had not recognized the Union of Soviet Socialist Republics. *Id.* at 488. However, the Supreme Court held that the corporation was an alien friend and thus entitled to the protections of the Fifth Amendment. *Id.* at 489. Because the Fifth Amendment protects private property, the Court interpreted a congressional act providing for compensation for government-seized vessels to include property of alien friends. *Id.* at 491-92; *see also* Motomura, *supra* note 106, at 566 (noting that in *Russian Volunteer*

This line of decisions following *Yick Wo* that protected the rights of aliens did not spring from constitutional claims in admission and expulsion cases.[137] Rather, they involved the fundamental rights of aliens and individuals generally.[138] One scholar has argued that because *Yick Wo* and its progeny dealt with fundamental human rights rather than narrower admission and expulsion decisions, these cases helped lead to an eventual attenuation of the plenary power doctrine in immigration law.[139] Furthermore, *Yick Wo* and its progeny prove Professor Sunstein's underlying point that modest rulings in constitutional law build on one another and together can have a powerful cumulative effect.[140]

V. Avoidance Doctrine and the Other Branches

A. The September 11 Terrorist Attacks and Zadvydas*'s Contribution to the Debate on Immigration Policy*

The following subpart analyzes the discussion of immigration policy in Congress, American society, and the Department of Justice following the September 11, 2001 terrorist attacks and will demonstrate how the *Zadvydas* Court's decision to avoid a constitutional question resulted in a surprisingly rich, more robust debate of immigration policy. One advantage of the avoidance doctrine is that it allows judges, who are sensitive to the limitations of their own constitutional authority, to refrain from issuing a broad ruling on the nation[141] or from trenching on the province of the political branches of govern-

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Fleet, Court cited *Yick Wo* to extend protection of Takings Clause of Fifth Amendment to aliens).

137. *See* Motomura, *supra* note 106, at 566 (noting that *Yick Wo* court and its progeny took constitutional claims seriously whereas courts hearing constitutional claims in immigration law gave them "cavalier treatment").

138. *See Russian Volunteer Fleet*, 282 U.S. at 489 (holding that Takings Clause of Fifth Amendment applied to alien corporation operating in United States and from whom U.S. government requisitioned contracts for constructing ships); *Wong Wing*, 163 U.S. at 237 (holding that for statute requiring hard labor for Chinese nationals found within country to be valid, it "must provide for a judicial trial to establish the guilt of the accused"); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (stating that "[t]he fourteenth amendment to the Constitution is not confined to the protection of citizens . . . [and its] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality"); *see also* Motomura, *supra* note 106, at 565-66 (noting nonimmigration law nature of *Yick Wo* and other cases elaborating on aliens' rights).

139. *See id.* (arguing that *Yick Wo*, its offspring, and other cases dealing with individual rights helped to undermine doctrine of plenary power by "afford[ing] a measure of protection to aliens that much more closely resembles the substantive and procedural rights of individuals in mainstream public law").

140. *See supra* text accompanying note 125 (describing Sunstein's argument regarding cumulative effect of judicial incrementalism).

141. *See* Sunstein, *supra* note 61, at 44-45 ("Even if an internal consensus emerges, and

ment.[142] In some cases, courts simply will not want to act, even when they have the authority, if the ruling is likely to spark an adverse public reaction.[143] Although *Zadvydas* was decided several months before the September 11, 2001 terrorist attacks, immigration policy was nevertheless critically important to American society before the attacks, given the role of immigrants in the high-tech, agriculture, and service sectors of the economy.[144] It is not implausible to think that even prior to September 11, the Court preferred that Congress carry the burden of deciding important immigration issues, such as the government's power to detain deportable aliens indefinitely.

The Court's decision in *Zadvydas* was unquestionably a significant victory for immigrant rights in the United States.[145] While a declaration by the Court that the detention statute was unconstitutional would have been even more cause for celebration, the Court's decision to avoid the constitutional question was an acknowledgment of immigrant rights under the Fifth Amendment Due Process Clause.[146] Although this was not the first time that the Court acknowledged that immigrants enjoy constitutional protections,[147] it was eerily

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even if the Court's majority is confident that it is right, it might hesitate to impose a broad rule on the nation, for the simple reason that the nation might be reluctant to go along.").

142. *See* Motomura, *supra* note 106, at 563 (noting courts' unwillingness to "issue a constitutional command" to other branches, due to courts' sensitivity about their own institutional limitations).

143. *See* Sunstein, *supra* note 61, at 45 (noting Supreme Court's unwillingness to strike down constitutionally questionable law banning interracial marriage, in part because of adverse public reaction that might follow considering that nation was in midst of controversial school desegregation). The Court refused to strike down the statute in the 1956 case of *Naim v. Naim*, 350 U.S. 985 (1956). *See* Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 326 n.180 (1998) (stating that Court refused to strike down Virginia anti-miscegenation statute in 1956, but did so later in *Loving v. Virginia*, 388 U.S. 1 (1967)).

144. *See also* Jonathan Peterson, *Immigration Emphasis on Guest Visas Reform: A Shortage of People for Low-Wage Jobs is Forcing Administration to Rethink Its Strategy*, L.A. TIMES, Aug. 18, 2001, at A1 (reporting on United States' efforts to overhaul its immigration policy to allow Mexican immigrants to participate in temporary service-sector work programs similar to those already in place for high-tech and agricultural sectors).

145. *See* Stanley Mailman & Stephen Yale-Loehr, *As the World Turns: Immigration Law Before and After Sept. 11*, N.Y.L.J., Oct. 22, 2001, at 3 (stating that *Zadvydas* decision was favorable to immigrants).

146. *See Zadvydas*, 533 U.S. at 693 (stating that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, or permanent").

147. *See* Plyler v. Doe, 457 U.S. 202, 210 (1982) ("Aliens . . . have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."); Mathews v. Diaz, 426 U.S. 67, 77 (1976) (indicating that "even one whose presence in this country is unlawful, involuntary, or transitory is entitled to" Fifth and Fourteenth Amendments' due process protections); *see also supra* notes 132-36 and accompanying text (discussing

prophetic for the Court to invoke this principle just months prior to the September 11 terrorist attacks and the vigorous debate over immigrant rights that has followed. Indeed, the *Zadvydas* Court's statements on immigrants' rights have not gone unnoticed in lower courts in cases heard since September 11.[148] Nor was the Court's mention of terrorists as a possible exception to its holding lost on those who favor stricter immigration policy.[149] In short, the Court's decision to avoid the constitutional question in *Zadvydas* informed, but did not decide, the subsequent immigrant-rights debate – a proposition supported by the fact that both immigration proponents and national security hawks rely on the *Zadvydas* opinion to support their respective positions.[150] This type of cautious approach to socially-sensitive issues is exactly the role that the Court plays so masterfully, according to Sunstein,[151] and so frustratingly, according to Kloppenberg.[152]

Furthermore, the *Zadvydas* Court's decision to abstain from determining whether indefinite detention of aliens violated due process vindicated one of the avoidance doctrine's underlying purposes by allowing the Court to decide only the case at hand and not to decide the law for the future.[153] Given that

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judiciary's expansion of constitutional protections available to aliens).

148. *See* Hoang v. Comfort, 282 F.3d 1247, 1260 (10th Cir. 2002) (relying in part on *Zadvydas* to conclude that mandatory detention under Immigration and Nationality Act statute violated substantive due process rights of petitioners); Kim v. Ziglar, 276 F. 3d 523, 527-28 (9th Cir. 2002) (relying on *Zadvydas* in part to hold that law requiring aliens who had served criminal sentences and were awaiting deportation hearings to be held without bail was unconstitutional as applied to lawful permanent resident aliens). Counsel for the immigrant challenging the law in *Kim* stated that "[t]his decision reminds us that it is unconstitutional and counterproductive to lock people up without a hearing . . . . It is so significant that in this post-9/11 climate a court is still ready to say that there are checks and balances, that the Constitution applies." Henry Weinstein, *Appeals Panel Strikes Down No-Bail Law*, L.A. TIMES, Jan. 10, 2002, at B1.

149. *See supra* notes 34-35 and accompanying text (describing *Zadvydas* Court's mention of terrorists as possible exception); *see also* Griffin Bell, *Ashcroft Is Right to Detain Suspects in Terror Probe*, WALL ST. J., Dec. 17, 2001, at A18 (suggesting that terrorist exception in *Zadvydas* vindicated Justice Department's decision to jail suspected terrorists after September 11 attacks).

150. *See supra* notes 145-49 and accompanying text (discussing reliance on snippets of *Zadvydas* decision to support various and divergent opinions).

151. *See* Sunstein, *supra* note 61, at 45 (stating that judges often avoid deciding constitutional issues because of "salutary humility" that prevents them from deciding issues on which they are ill-prepared to decide).

152. *See* KLOPPENBERG, *supra* note 19, at 1 ("When judges avoid judicial review of the most politically and socially controversial issues, they evade their constitutional responsibility.").

153. *See* SUNSTEIN, *supra* note 99, at 42 (explaining that one strategy for using avoidance doctrine is that it allows court to decide case at bar on its facts alone without binding courts in

immigration policy soon became the central focus for lawmakers and for much of the American public after September 11,[154] the narrow decision in *Zadvydas* likely helped to create an atmosphere for a freer and fuller discussion of immigrant rights because the Court had kept open important questions relating to the extent of such rights.[155]

Sunstein has noted two major advantages of judicial minimalism, both of which arguably are on display in *Zadvydas*. One advantage, writes Sunstein, is that "certain forms of minimalism are democracy promoting, not only in the sense that they leave issues open for democratic deliberation, but also and more fundamentally in the sense that they promote reason-giving and ensure that certain important decisions are made by democratically accountable actors."[156] Justice Breyer may have referenced these same concerns in *Zadvydas* when he noted that "if Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms."[157]

Sunstein suggests that a second justification for taking the minimalist path exists "when the Court is dealing with a constitutional issue of high complexity about which many people feel deeply and on which the nation is divided."[158] In *Zadvydas*, the complex constitutional issue at stake was the liberty interest of aliens, the scope of which the Court clearly struggled with throughout the opinion, stating that "the Due Process Clause protects an alien subject to a final order of deportation, though the nature of that protection may vary."[159] The Court continued, "[w]e believe that an alien's liberty interest is, at the least, strong enough to raise a serious question as to whether . . . the Constitution permits detention that is indefinite."[160] The Court's refusal to provide a definitive rule about the scope of an alien's interest proved to be a harbinger of American society's own uncertainty about immigrants and the extent of their rights, as the debate following the terrorist attacks of September 11 aptly displayed.[161]

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future similar cases).

154. *See* Michael Collins, *Aftermath of Attacks Puts Social Legislation on Hold; Focus on Terrorism Delays Work on a Wide Range of Bills*, SEATTLE POST-INTELLIGENCER, Dec. 8, 2001, at A2 (discussing Congress's sole focus on antiterrorism legislation in period after September 11 attacks).

155. *See* SUNSTEIN, *supra* note 99, at 19 (noting that typical minimalist decisions leave "certain key questions open").

156. *Id.* at 5.

157. *Zadvydas*, 533 U.S. at 697.

158. SUNSTEIN, *supra* note 99, at 5.

159. *Zadvydas*, 533 U.S. at 693-94.

160. *Id.* at 696.

161. *See* Mary Jordan & Kevin Sullivan, *U.S. and Mexico to Resume Talks on Immigration Policy; Issue Will Be Recast as One of National Security*, WASH. POST, Nov. 15, 2001, at A40

It is often said of narrow, minimalist decisions that they are as important for what they do not say as for what they do say.[162] While minimalist-minded courts often issue narrow holdings for the sake of shifting the decisionmaking to other government actors, it is possible that a court, in issuing a painstakingly narrow ruling, can cause the opposite effect by deciding issues that it claims not to be deciding. For instance, in *Zadvydas* the Court made clear the scope of its ruling by crystallizing a single issue: "[T]he issue we address is whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States."[163] Just as clearly as the Court stated the issue it decided, the Court stated an issue it did not decide: "The question before us is not one of conferring on those admitted the right to remain against the national will or sufferance of aliens who should be removed."[164] The Court was also clear that it was not "consider[ing] terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."[165] Against the backdrop of the Court's painstakingly precise holding, I will next consider how Congress and the executive branch interpreted the Court's careful choice of language.[166]

B. Zadvydas *as Authority for Legislative and Regulatory Response to Terrorism*

1. Department of Justice Profiling

Although seemingly unimportant at the time the Court issued its opinion, the *Zadvydas* Court's disclaimers about what it did not decide would later be used to validate the Justice Department's controversial profiling of certain ethnicities,[167] INS regulations written in response to the *Zadvydas* opinion,[168]

(noting shift in public mood about admitting foreigners into United States).

162. *See* SUNSTEIN, *supra* note 99, at 3 (pointing out that courts often will go to great lengths to leave certain things unsaid in their opinions).

163. *Zadvydas*, 533 U.S. at 695.

164. *Id.* (internal quotations omitted).

165. *Id.* at 696.

166. *See infra* Part V.B (discussing reaction of executive and legislative branches to *Zadvydas* opinion).

167. *See* Email from Bryan Sierra, Public Affairs Specialist, United States Department of Justice, to Linda Newell, Reader Services Assistant, Washington and Lee University Law Library [hereinafter *DOJ* Email] (Feb. 28, 2002) (on file with the Washington and Lee Law Review) (noting Department of Justice's position that "[w]e will continue to focus investigative, intelligence-gathering and enforcement operations on individuals in the U.S. from countries with highly active al Qaeda networks to protect Americans"); Robert A. Levy, *The Nationality*

and also antiterrorism legislation that Congress passed into law following the terrorist attacks on September 11, 2001.[169] Particularly important was the Court's statement that although indefinite detention of undeportable aliens raised serious constitutional doubts, the Court did not entertain the same doubts about the government's ability to hold suspected terrorists indefinitely.[170]

In January 2002, the Justice Department identified 6,000 immigrants of Middle Eastern descent who had ignored deportation orders and deemed their arrest and removal a high priority.[171] The Department specifically targeted the Middle Eastern men out of 300,000 similarly situated immigrants because the men were from countries considered havens for Osama bin Laden's terrorist network.[172] The Justice Department's rule spelled racial profiling to some,[173] but others contended that the government has a right to treat people unequally if it has a compelling reason – here, the prevention of future terrorist acts.[174] More importantly, racial profiling typically entails the use of race "to investigate, apprehend and detain" *suspected* wrongdoers, whereas in this case the Justice Department sought to deport *known* lawbreakers.[175] Although the

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Test, NAT'L REV. ON-LINE (Jan. 14, 2002), *at* http://www.nationalreview.com/comment/comment-levy011402.shtml (last visited Apr. 19, 2002) (arguing that Department of Justice's targeting of certain ethnic groups for deportation is constitutional because targets are known lawbreakers).

168. *See* Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967, 56,973 (Nov. 14, 2001) (to be codified at 8 C.F.R. pt. 3 and pt. 241) (giving Attorney General express authority for "continued detention" of those aliens whose release "would result in serious damage to the national security or pose an imminent threat of terrorism").

169. *See* USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (enacting new antiterrorism measures).

170. *See supra* notes 34-35 and accompanying text (describing *Zadvydas* Court's mention of terrorists as possible exception).

171. *See* Dan Eggen & Cheryl W. Thompson, *U.S. Seeks Thousands of Fugitive Deportees; Middle Eastern Men Are Focus of Search*, WASH. POST, Jan. 8, 2002, at A1 (reporting that effort to round up Middle Eastern men is part of larger plan to find 300,000 "absconders" who have remained in country despite orders requiring their deportation).

172. *See DOJ Email*, *supra* note 167 (discussing Department of Justice's efforts to locate illegal aliens from countries with active al Qaeda cells); *see also* Eggen & Thompson, *supra* note 171, at A1 (noting that Justice Department is targeting men from countries with active al Qaeda cells).

173. *See id.* (reporting complaints by Arab-American and immigration advocacy groups that Bush administration, in its zeal to stamp out terrorism, is engaging in racial profiling).

174. *See* Levy, *supra* note 167 (arguing that equal protection guarantees allow government to treat people unequally if compelling interest is present and means chosen to satisfy interest are least intrusive possible).

175. *See id.* (noting that profiling is not objectionable in this case because profilers seek

Court probably did not intend it, one commentator pointed to a subtle qualification in the *Zadvydas* holding to support the government's "manhunt" of Middle Eastern men.[176] In short, the argument goes that although *Zadvydas* reaffirmed that immigrants, whether legal or illegal, receive the protections of due process, the Court explicitly stated that this right did not run so far as to guarantee an immigrant an inviolable right to remain in the country.[177]

2. *INS Rule*

The INS interim rule that implemented the *Zadvydas* opinion provides procedures for determining whether the INS can continue to detain an alien whose removal in the reasonably foreseeable future is unlikely because he poses a foreign policy, national security, or terrorism concern.[178] In essence, these regulations give the Secretary of State the authority to determine whether the release of an alien would have adverse foreign policy or national security consequences. They also allow the Attorney General to decide whether the government should detain an alien on account of national security or terrorism concerns.[179]

3. *USA PATRIOT Act*

The Justice Department and the INS were not alone in noting the terrorist exception that the Court carved out in *Zadvydas*.[180] Prior to the release of the INS regulations and just six weeks after the World Trade Center attacks, Congress passed legislation giving the government new powers to combat

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men because of their conduct, not their nationality).

176. *See id.* (justifying INS's "manhunt" of 6,000 Middle Eastern men who have ignored deportation orders by relying on *Zadvydas* Court's statement that admitted immigrants may lose right to remain in country).

177. *See id.* (noting that "there is no constitutional or statutory right for a lawbreaker to escape punishment"); *Zadvydas*, 533 U.S. at 695 ("The question before us is not one of conferring on those admitted the right to remain against the national will or sufferance of aliens who should be removed.").

178. *See* Continued Detention of Aliens Subject to Final Orders of Removal, *supra* note 168, at 56,973-74 (leaving within Secretary of State's discretion determination of whether alien poses threat of "adverse foreign policy consequences" such that alien should continue to be detained; also leaving within Attorney General's discretion determination of whether alien poses national security or terrorism threat warranting continued detention after six months of detention following removal order).

179. *See id.* (outlining authority of Secretary of State and Attorney General over aliens deemed to pose national security threat).

180. *See infra* notes 181-85 and accompanying text (discussing congressional attempt to authorize Attorney General to take severe measures to prevent would-be alien terrorists).

terrorism.[181] The debate in the Senate on the USA PATRIOT Act[182] included a reference to the *Zadvydas* Court's bow to the government's discretion in managing terrorist threats.[183] Among the new powers that Congress bestowed on the government through the USA PATRIOT Act is the power of the Attorney General to detain aliens that the INS ordered deported but for whom deportation is impossible, provided that the Attorney General "certifies" that the alien is "engaged in any . . . activity that endangers the national security of the United States."[184] Detention may continue, subject to review every six months by the Attorney General, and could become indefinite.[185]

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181. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (authorizing new law enforcement measures to combat terrorism).

182. *Id.*

183. *See* 147 CONG. REC. S11,047 (daily ed. Oct. 25, 2001) (joint memorandum of Sen. Kennedy and Sen. Brownback on the immigration provisions of the USA PATRIOT Act of 2001) (discussing *Zadvydas* Court's terrorism comment). Senators Kennedy and Brownback submitted into the record a joint memorandum that cited *Zadvydas*:

> For aliens whose removal is unlikely in the reasonably foreseeable future, the Attorney General is required to demonstrate that release of the alien will adversely affect national security or the safety of the community or any person before detention may continue beyond the removal period. Indefinite detention of aliens is permitted only in extraordinary circumstances. Zadvydas v. Davis, 121 S. Ct. 2491 (2001).

147 CONG. REC. S11,047 (daily ed. Oct. 25, 2001).

184. USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272, 351; *see also* 147 CONG. REC. S11,056 (daily ed. Oct. 25, 2001) (analysis of legislation prepared by Department of Justice that Sen. Hatch asked to be read into record) ("The legislation expands the grounds for deeming an alien inadmissible or deportable from the United States for terrorist activity, provides for the mandatory detention of aliens whom the Attorney General certifies pose a risk to the national security . . . .").

185. *See* 147 CONG. REC. S11,022 (daily ed. Oct. 25, 2001) (statement of Sen. Feingold) (describing USA PATRIOT Act's alien detention provisions). Senator Feingold stated:

> [T]he bill would nevertheless continue to permit the indefinite detention in two situations. First, immigrants who win their deportation cases may be continued to be held if the Attorney General continues to have suspicions. Second, this provision creates a deep unfairness to immigrants who are found not to be deportable for terrorism but have an immigration status violation, such as overstaying a visa.

Id.; *see also* USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272, 351 (adding to Immigration and Nationality Act new § 236A (a)(6)-(7) requiring review of deportable alien's detention every six months in order for detention based on alien's threat to national security to continue); 147 CONG. REC. S11,056 (daily ed. Oct. 25, 2001) (analysis of legislation prepared by Department of Justice that Sen. Hatch asked to be read into record) ("In the rare cases where removal is determined appropriate but is not possible, detention may continue upon a review by the Attorney General every 6 months."); Jeffrey Rosen, *Holding Pattern: Why Congress Must Stop Ashcroft's Alien Detentions*, NEW REPUBLIC, Dec. 10, 2001, at 16 (stating that some aliens have been detained for months and risk indefinite detention due

The flurry of legislative and regulatory activity seeking to cement the federal government's power over suspected terrorists as permitted in *Zadvydas* has been deemed by one commentator as "exploit[ing] [a] loophole for all it's worth."[186] Clearly, the exploitation is in part a reflection of a rattled government seeking maximum power to respond to a national security threat. However, upon reconsideration of Justice Breyer's "loophole," one wonders if he intended it to be just that.[187] Does Justice Breyer's loophole mean that terrorists should not receive the protections of the Fifth and Sixth Amendments?[188] Was he implying that courts should give the political branches "leeway" when determining whether the government may constitutionally hold aliens suspected of terrorism for an indefinite period of time?[189] Did he intend to give the government a free hand in determining who is a suspected terrorist and how long it may detain such suspects in the absence of deportation? Or should we interpret the loophole as dictum posing a constitutional question that the Court has yet to address?[190] Whatever Justice Breyer intended, it is clear that Congress and the Justice Department have interpreted his comments about suspected terrorists rather broadly and, as a consequence, have written regulations that might stand on shaky constitutional ground.[191]

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to new antiterrorism legislation passed by Congress).

186. Rosen, *supra* note 185, at 16.

187. *See supra* notes 34-35 and accompanying text (discussing *Zadyvdas* majority's terrorism exception).

188. Robert A. Levy, *Not on Our Soil*, NAT'L REV. ON-LINE (Jan. 25, 2002), *at* http://www.nationalreview.com/comment/comment-levy012502.shtml (last visited Apr. 19, 2002) (querying whether alleged international terrorists who face trial by military tribunal enjoy constitutional protection of due process and speedy, public trial). The Fifth Amendment provides, in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. The Sixth Amendment provides, in pertinent part: "[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. CONST. amend. VI.

189. *See* Rosen, *supra* note 185, at 16 (stating that Breyer's opinion stressed that government might have more leeway to detain suspected terrorists indefinitely).

190. *See* Jonathan Ringel, *Will New Anti-Terror Tools Pass Court Muster?*, LEGAL TIMES, Oct. 8, 2001, at 14 (noting Congress's attempts at crafting antiterrorism legislation in light of *Zadvydas* opinion and Justice Breyer's terrorist comment).

191. *Compare* Rosen, *supra* note 185, at 16 (stating that although congressional antiterrorism legislation and INS regulations give government "tremendous discretion," it is unlikely that Court will raise constitutional objections) *with* Stuart Taylor, Jr., *Ashcroft's 'Trust Us' Routine is Getting a Little Stale*, NAT'L J., Nov. 17, 2001, at 3569 (lampooning Attorney General John Ashcroft as "bull in the constitutional china shop" on account of Department of Justice's numerous immigrant detentions and new rules allowing government to eavesdrop on discussions between suspected terrorists and their lawyers).

If the newly promulgated INS and congressional provisions indeed provoke a constitutional controversy, then the Court's use of the avoidance doctrine in *Zadvydas* will have yielded an odd result in that by seeking to avoid one constitutional question, the Court will have indirectly precipitated others. Granted, Congress did not force the Court's hand by passing follow-up legislation after *Zadvydas* to give the Attorney General express authority to detain undeportable aliens indefinitely, as Judge Posner and Professor Schauer have observed Congress is not likely to do.[192] However, Congress did take full advantage of the *Zadvydas* dictum on terrorism by giving the Attorney General the power to detain suspected terrorists indefinitely.[193] Many have called the constitutionality of this provision into question, and if the issue is litigated, such a suit will be an unintended by-product of an opinion that sought in the first place to avoid an unnecessary constitutional ruling.[194]

Professor Sunstein has noted the paradoxical tendency of minimalist decisions to send loud messages, despite judges' self-conscious efforts to rule narrowly.[195] This phenomenon is clearly at work in *Zadvydas*, as the INS and Congress seized the majority's exclusion of suspected terrorists from its holding to write into law explicit provisions that allow the government to hold suspected alien terrorists indefinitely if they are not deportable.[196] These laws allow the federal government to treat a deportable alien whom it deems to be a suspected terrorist radically differently from a deportable alien who prompts no government suspicions of terrorist ties. Although the Attorney General must review both aliens' cases every six months to determine whether circumstances have changed to make deportation possible,[197] it is reasonable to assume that suspected terrorists will be much less likely to obtain release from detention or to be removed from the country, lest they subsequently plot terrorist acts against the United States. This is yet another acknowledged

192. *See supra* notes 101-04 and accompanying text (discussing Congress's unwillingness to force Court to decide constitutionality of issue once Court has indicated possible constitutional doubt).

193. *See supra* notes 182-85 and accompanying text (noting that *Zadvydas*'s terrorist exception was incorporated into congressional statute).

194. *Cf.* KLOPPENBERG, *supra* note 19, at 271 (opining that Rehnquist Court has developed avoidance of constitutional questions into "art form").

195. *See* SUNSTEIN, *supra* note 99, at 22 (noting that judicial opinions often are meant to be "small steps, but they are taken as large signals" by public officials).

196. *See supra* notes 181-85 and accompanying text (describing Attorney General's significant new authority to detain aliens suspected of terrorism).

197. *See* USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272, 351 (adding to Immigration and Nationality Act new § 236A (a)(6)-(7) requiring review of deportable alien's detention every six months in order for detention based on alien's threat to national security to continue).

difficulty of narrow rulings, according to Sunstein, for it sometimes allows different treatment of similarly situated people.[198] Despite the inequitable results that minimalist decisions sometimes can produce in the case of individuals, such decisions can nevertheless foster communication between different branches of government. The next section considers how the *Zadvydas* decision prompted such communication.

C. Avoidance Doctrine and the Separation of Powers

1. Congress's Implicit Acceptance of Zadvydas*'s Statutory Construction*

The legislative and regulatory changes in immigration policy after September 11 provide an important opportunity to evaluate the validity of Justice Kennedy's criticism that the *Zadyvdas* majority opinion "misunderstands" the avoidance doctrine.[199] Justice Kennedy charged that the Court's avoidance resulted in the Court writing its own statute in disregard of congressional intent,[200] caused an intrusion on the other branches of government,[201] and culminated in a "systematic dislocation in the balance of powers."[202] Reading Justice Kennedy's stark conclusions, one has the impression that Justice Kennedy believed the Court's use of avoidance had set the legislative and judicial branches on a separation of powers collision course. However, the September 11 terrorist attacks forced the issue of immigration into the spotlight so that Congress, riding on a very strong public mandate to stamp out terrorism,[203] was in a position to rebuke the Supreme Court for its statutory interpretation in *Zadvydas*. Indeed, Congress might have forced the Court to confront whether indefinite detention of deportable aliens was repugnant to the Fifth Amendment. That Congress chose not to disabuse the Court of its statutory interpretation would seemingly validate the Court's reliance on the avoidance doctrine and downplay Justice Kennedy's separation of powers concerns.

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198. *See* SUNSTEIN, *supra* note 99, at 11 (stating "narrowness may run into difficulty if it means that similarly situated people are being treated differently").

199. *See Zadvydas*, 533 U.S. at 707 (Kennedy, J., dissenting) ("The Court, it is submitted, misunderstands the principle of constitutional avoidance which it seeks to invoke.").

200. *See id.* at 705 (Kennedy, J. dissenting) (arguing that majority had written "a statutory amendment of its own" in "obvious disregard of congressional intent").

201. *See id.* (Kennedy, J., dissenting) ("In the guise of judicial restraint the Court ought not to intrude upon the other branches.").

202. *Id.* (Kennedy, J., dissenting).

203. *See* Jeffrey Rosen, *Stephen Breyer Restrains Himself: Modest Proposal*, NEW REPUBLIC, Jan. 14, 2002, at 25 (noting that September 11 attacks reminded public of government's need for broad powers to fight complicated terrorist threats).

As noted in Part III.C, Judge Posner has questioned Congress's practical ability to overrule a court's misconstruction of one of its statutes, given the time pressures on Congress.[204] After September 11, however, Congress focused almost exclusively on adopting measures to reduce the terrorist threat[205] and therefore had ample time to consider the related question of whether it would force the Supreme Court to face the constitutionality of indefinite government detention of deportable aliens. Although the circumstances were ripe, Congress declined to communicate any dissatisfaction with the Court's statutory interpretation in *Zadvydas* and, in so doing, implicitly dispelled Justice Kennedy's claim that the Court had "press[ed] statutory construction to the point of disingenuous evasion."[206]

Another of Judge Posner's observations about the avoidance doctrine is that it increases constitutional prohibitions, which he objects to because the prohibitions emanate from judges, rather than from the Constitution.[207] Judge Posner contends that such "judge-made penumbra[s]" increase friction between the judicial and legislative branches.[208] Although Judge Posner's opinion about the avoidance doctrine's tendency to cause interbranch friction likely refers to how the doctrine works in ordinary circumstances, Congress and the Justice Department have arguably embraced the *Zadvydas* opinion in their efforts to respond to the terrorist threats following September 11.[209]

Indeed, far from stirring up conflict between Congress and the Supreme Court, the *Zadvydas* opinion seems to have set the stage for a dialogue between the two branches about immigration rights in the context of Congress's attempts to adopt antiterrorism legislation. Testimony submitted at congressio-

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204. *See* POSNER, *supra* note 50, at 285 (discussing unlikelihood that Congress would redraft statute after Court's finding of constitutional doubt).

205. *See* Collins, *supra* note 154, at A2 (noting that social issues have received little attention from Congress who is "consumed" with responding to terrorist threat).

206. *Zadvydas*, 533 U.S. at 707 (Kennedy, J., dissenting) (quoting Salinas v. United States, 522 U.S. 52, 62 (1997)).

207. *See* POSNER, *supra* note 50, at 285 (discussing objections to avoidance doctrine).

208. *See id.* (arguing that constitutional avoidance doctrine exacerbates interbranch tension). Judge Posner writes:

> The practical effect of interpreting statutes to avoid raising constitutional questions is therefore to enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretations of the Constitution – to create a judge-made "penumbra" that has much the same prohibitory effect as the judge-made (or at least judge-amplified) Constitution itself – and in doing so to sharpen the tensions between the legislative and judicial branches.

Id.

209. *See supra* Part V.B (discussing citation of *Zadvydas* opinion in news articles, Senate floor debates, and INS regulations to justify new antiterrorism and immigration policies).

nal committee hearings on the government's detention policies routinely cited the *Zadvydas* Court's view that the due process rights afforded to immigrants – that ultimately caused the Court to invoke the avoidance canon to arrive at a statutory construction that was not violative of immigrants' due process rights – were the same as those afforded to regular citizens.[210] Some members of Congress appear to have noticed the *Zadvydas* Court's statements on immigrant rights. For instance, Senator John Edwards stated during a Senate floor debate that any legislation Congress adopted to fight terrorism should include due process protections for aliens detained because of national security threats.[211] That the legislation Congress ultimately passed was sensitive to aliens' due process rights[212] demonstrates that the Court's invocation of the avoidance doctrine to send an important message to Congress does not necessarily contribute to friction between the two branches. In fact, when Congress accepted the Court's statutory construction, greater comity arguably resulted because Congress vindicated the Court's decision not to make an unnecessary constitutional ruling.[213] In effect, the *Zadvydas* decision served the separation of powers principle because the Court, by avoiding a constitutional showdown,

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210. *See Immigration Detention Policy: Hearing Before the House Subcomm. on Immigration and Claims of House Comm. on the Judiciary*, 107th Cong. (2001) (statement of Margaret H. Taylor, Professor of Law, Wake Forest University School of Law) (informing Committee of *Zadvydas* Court's recent reminder that Due Process Clause extends to all persons, including aliens, within United States); *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing on Review of Military Terrorism Tribunals Before Senate Judiciary Comm.*, 107th Cong. (2001) (statement for Record of American Civil Liberties Union) (same).

211. *See* 147 CONG. REC. S10,589 (daily ed. Oct. 11, 2001) (statement of Sen. Edwards) (noting that antiterrorism legislation must provide due process protections for aliens). Senator Edwards stated:

> As Chairman Leahy and Senator Hatch have both said, this legislation is not perfect, and the House-Senate Conference may yet make improvements. For example, the Conference might clarify that, as to aliens detained as national security threats, the law will secure the due process protections and judicial review required by the Constitution and by the Supreme Court's recent decisions in *Zadvydas v. Davis* and *INS v. St. Cyr*.

147 CONG. REC. S10,589 (daily ed. Oct. 11, 2001) (statement of Sen. Edwards).

212. *See* USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272, 351 (adding to Immigration and Nationality Act new § 236A (a)(6)-(7) requiring review of deportable alien's detention every six months in order for detention based on alien's threat to national security to continue); *see also supra* notes 184-85 and accompanying text (describing indefinite detention of aliens as permitted only in extraordinary circumstances and subject to review every six months by Attorney General).

213. *See* Krent, *supra* note 86, at 209, 212-13 (noting that if Congress accepts Court's use of avoidance doctrine, Court's use of this interpretative tool will prevent unnecessary constitutional ruling).

was able to prod Congress into considering aliens' constitutional rights rather than invalidating the statute outright; this tactic left Congress's supremacy in legislative matters intact.[214]

2. A Judicial Check on the Plenary Power Doctrine

In addition to providing grounds on which to validate Congress's statute, the Court's use of the avoidance canon in *Zadvydas* further advanced the separation of powers concept by allowing the Court to question, albeit in a low-pitched manner, the plenary power doctrine. Professor Brian Murchison has noted that judges sometimes rely on the avoidance canon "to dispense with authoritative pronouncements and to reflect upon, and challenge, current norms."[215] Interestingly, much of Justice Kennedy's dissent consists of authoritative pronouncements about Congress's and the executive's special authority over foreign policy and immigration.[216] Moreover, Justice Kennedy suggested that the Court's application of the avoidance doctrine took judicial independence too far because it fundamentally undermined the long-venerated notion of Congress's plenary power in immigration matters and Congress's ability to delegate that power to the executive branch's discretion.[217]

As Professor Murchison points out, the avoidance canon allows judges to assert their independence when deciding cases "without sailing the whirling waters of the separation of powers doctrine."[218] This seems to be precisely what the *Zadvydas* majority did when it stated that its review of the government's implementation of the detention statute "must take appropriate account of the greater immigration-related expertise of the executive branch."[219] But immediately after offering this curtsy to the executive, the majority implied

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214. *See* Kelley, *supra* note 52, at 843 ("In the wake of the *Ashwander* concurrence and the New Deal repudiation of the *Lochner* era it thus became an accepted part of our separation of powers culture that legislative supremacy dictated that the Court decide constitutional questions only when there was no other alternative.").

215. Murchison, *supra* note 55, at 168.

216. *See Zadvydas*, 533 U.S. at 705-12 (Kennedy, J., dissenting) (stating that majority "commit[s] its own grave constitutional error by arrogating to the judicial branch the Power to summon high officers of the executive to assess their progress in conducting some of the Nation's most sensitive negotiations with foreign powers," that there is "an obvious necessity that the Nation speak with one voice on immigration and foreign affairs matters," and that through its decision the Court is "ventur[ing] into foreign affairs management").

217. *See id.* at 711 (Kennedy, J., dissenting) (arguing that majority is substituting its judgment for executive branch discretion to detain removable aliens, which Congress delegated to executive in exercising its plenary power over immigration matters).

218. Murchison, *supra* note 55, at 113.

219. *Zadvydas*, 533 U.S. at 700.

that its deference ran only so far and that it had a responsibility to look beyond the plenary power doctrine: "[W]e believe that courts can take appropriate account of such matters without abdicating their legal responsibility to review the lawfulness of an alien's continued detention."[220] The Court therefore imposed on the executive a process whereby after six months, a detained alien may show that the government cannot remove him in the reasonably foreseeable future and that he is thus entitled to release.[221]

The *Zadvydas* majority's use of the avoidance doctrine to exercise judicial independence in a controversy in which the political branches claim plenary power is consistent with a judicial trend to cut away at that doctrine through statutory interpretation.[222] As discussed in Part IV.A, courts have relied on phantom, rather than constitutional, norms to create constitutional doubts in immigration statutes.[223] Courts, in turn, avoid these "phantom" constitutional doubts, and in some cases they have become a way for "conscientious judges [to respond] to the perceived anachronistic character of plenary power."[224]

Consistent with the view that judges play a significant role in challenging the plenary power doctrine, Professor Peter Schuck has noted an "emergent judicial assertiveness that is both a hallmark and a necessary condition of immigration law's incipient transformation."[225] According to Schuck, judges can alleviate some of the conflict caused by the transformation of immigration law away from the plenary power doctrine by demanding "clear statement" requirements rather than resorting to constitutional rulings.[226] If the courts can walk this fine line, they will preserve the separation of powers structure, for they will "maintain their traditional concern for the protection of individual

220. *Id.*

221. *See id.* at 701 (establishing procedure by which aliens can challenge indefinite detention).

222. *See* Motomura, *supra* note 106, at 549 (stating that courts have undermined plenary power doctrine through statutory interpretation).

223. *See id.* at 564 (explaining "phantom constitutional norms"). Professor Motomura states:

> "[P]hantom constitutional norms" are "constitutional" in the sense that they, having been at least seriously entertained as a constitutional argument and in many cases actually adopted as an expressly constitutional decision in other areas of law, then carry over to immigration cases, where they are substantial enough to serve the limited function of informing interpretation of immigration statutes.

Id.

224. *Id.* at 613.

225. Schuck, *supra* note 111, at 82.

226. *See id.* at 84 (suggesting that "courts should seek relatively flexible solutions, such as 'clear statement' requirements . . . rather than finding refuge in rigid constitutional rulings").

rights and procedural fairness"[227] while acting independently to help bring immigration law "within the mainstream of our public law."[228]

VI. Conclusion

Despite criticism that the avoidance doctrine lends itself to judicial manipulation of legislative statutes – and therefore undermines Congress's primacy in lawmaking – the doctrine in fact supports Congress's legislative role in the constitutional scheme.[229] When a court relies on the avoidance doctrine to refrain from making a constitutional ruling, it responds to Congress's preference for validation over invalidation, promotes democracy by leaving open issues for deliberation, and ensures that important public policy decisions are made by lawmakers who are accountable to the public.[230] The avoidance doctrine provides judges an important device that allows them to pay proper respect to Congress's powers and discretion, thus preserving the separation of powers principle of the Constitution.[231]

These justifications for the avoidance doctrine were on full display in *Zadvydas v. Davis*. By avoiding a constitutional ruling on whether indefinite detention of deportable aliens violated the Due Process Clause, the Court signaled to Congress its concern about the constitutionality of indefinite alien detention. Congress heard the Court loud and clear, as proven by the rich debate on immigrant rights that occurred during Congress's consideration of antiterrorism legislation.[232] Moreover, the Court's decision to decline from making a constitutional ruling in *Zadyvdas* reflected the American public's own uncertainty about the extent of immigrant rights and left the ultimate decision to Congress, where the matter could receive adequate deliberation.[233] This result, Chief Justice Marshall and Justice Brandeis might argue, is desirable for it both respects Congress's legislative supremacy and confirms the Court's own task of judicial review.

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227. *Id.* at 85.

228. *Id.* at 90.

229. *See supra* Part V.A (discussing democracy-promoting aspects of constitutional avoidance doctrine).

230. *See supra* Parts III.A and V.A (discussing practical values of avoidance doctrine).

231. *See supra* Part V.C.2 (discussing judiciary's use of avoidance doctrine to inject judicial independence into controversy in which executive and legislative branches are involved).

232. *See supra* Part V.B.3 (discussing importance of *Zadvydas* opinion in context of Congress's consideration of USA PATRIOT Act).

233. *See supra* Part V.C.1 (discussing Congress's ultimate acceptance of *Zadvydas*'s statutory construction).