



THE DOCTRINE OF ONE LAST CHANCE

Richard M. Re

CONSTITUTIONAL AVOIDANCE is an old idea, but the Roberts Court has given it a new twist. Instead of avoiding constitutional questions whenever possible, recent Supreme Court majorities have tended to engage in avoidance just once before issuing disruptive decisions. For example, the Roberts Court initially ducked constitutional challenges to central pillars of the Bipartisan Campaign Reform Act and the Voting Rights Act.¹ But when those measures came before the Court for a second time, they were both struck down as unconstitutional, despite their importance and bipartisan support.² A similar pattern of limited deferral may be visible in other recent cases, as the Roberts Court has taken a pass on its first opportunities to strike at the Affordable Care Act, affirmative action in higher education, and same-sex marriage laws.³

Richard Re is an associate at Jones Day. The views expressed herein are the author's alone, and do not necessarily represent the views of the firm with which he is associated.

¹ *Nw. Austin Municipal Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449 (2007).

² *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612 (2013); *Citizens United v. FEC*, 558 U.S. 310 (2010).

³ *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

This emerging use of constitutional avoidance might be called “the doctrine of one last chance.” Under this doctrine, the Court must signal its readiness to impose major disruptions before actually doing so. Put more colorfully, the doctrine of one last chance is avoidance on steroids, but with an expiration date. The result is a practical rule of judicial decision-making – an attempt not just to extol the dueling virtues of judicial action and restraint, but to balance them. And the balance is attractive. Here as elsewhere, there is good reason to afford notice and postpone decision before causing massive and potentially unexpected disruptions. Still, the doctrine should give us pause: by facilitating major legal change, the doctrine of one last chance converts a cornerstone principle of judicial restraint into a playbook for judicial action.

I. THE COURT OF ONE LAST CHANCE

Sometimes, the Supreme Court issues watershed decisions that have a long fuse. Take *District of Columbia v. Heller*, which surprised many observers by establishing a personal Second Amendment right to firearms.⁴ While *Heller* was clearly a seminal decision, its immediate impact was quite narrow. The local regulation at issue was a national outlier, and the Court was at pains to say that its decision would not jeopardize many settled firearms regulations.⁵ Indeed, an additional two years had to pass after *Heller* for the Court even to incorporate the Second Amendment against the States.⁶ And, roughly four years after *that*, only a handful of appellate courts have now invalidated state or local firearms regulations.⁷

Other Supreme Court decisions, by contrast, have major and instantaneous real-world consequences, such as when the Court declares unlawful a cornerstone federal law. Before issuing these decisions, the Roberts Court has tended to give the political branch-

⁴ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁵ *Id.* at 626, 629.

⁶ See *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

⁷ See, e.g., *Peruta v. County of San Diego*, No. 10-56971, 2014 U.S. App. LEXIS 2786 (9th Cir. Feb. 13, 2014).

The Doctrine of One Last Chance

es one last chance to comply with the Constitution. When first contemplating such a disruptive ruling, the Court has strained to avoid addressing the issue. But that hesitancy evaporates if and when the issue arises for a second time. This pattern is properly regarded as a feature of the Roberts Court, as it is largely (though not entirely) a product of the Chief Justice himself.

The most obvious and recent example of this trend concerned the Voting Rights Act.⁸ In *Northwest Austin Municipal Utility District No. 1 v. Holder*, the Court found a way to avoid ruling on the constitutionality of the VRA's preclearance regime while signaling that the regime was unconstitutional.⁹ The statutory interpretation adopted in *Northwest Austin* has been widely viewed as implausible, including by many of the VRA's supporters.¹⁰ The Court's message, per the Chief Justice, was widely understood: the political branches were being given one last chance to update the VRA's outdated coverage formula. So it was no surprise when the Court granted certiorari in *Shelby County, Alabama v. Holder*, despite the absence of a circuit split or any other traditional circumstance warranting Supreme Court review.¹¹ Indeed, the Chief Justice's opinion for the Court in *Shelby County* suggested that the Court's decision was inevitable given *Northwest Austin*'s warning and Congress's subsequent inaction.¹²

That pattern is also discernible in *Citizens United v. FEC*, which confidently brushed aside several ways to avoid facially invalidating key provisions of the Bipartisan Campaign Reform Act (BCRA).¹³

⁸ See Jeffrey Harris, "The Court Meant What It Said In *Northwest Austin*," SCOTUS Blog (June 25, 2013) ("As the *Shelby County* decision shows, when the Court gives the political branches one last chance to remedy a program's constitutional defects, it is probably not bluffing.").

⁹ 557 U.S. 193.

¹⁰ Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance By the Roberts Court*, 2009 SUP. CT. REV. 181 (calling the Court's statutory interpretation in *Northwest Austin* "manifestly implausible").

¹¹ 133 S. Ct. 2612.

¹² *Id.* at 2631 (explaining that *Northwest Austin*, in light of Congress's subsequent inaction, "leaves us today with no choice but to declare [VRA] § 4(b) unconstitutional").

¹³ 2 U.S.C. § 441b (2000 ed.).

Just a few years earlier, the Chief Justice had issued a relatively narrow as-applied ruling in *FEC v. Wisconsin Right to Life* precisely in order to avoid the broad rule adopted in *Citizens United*.¹⁴ Recognizing the Chief's change of heart, the *Citizens United* dissent took aim at the Chief Justice on the ground that he should have adhered to a consistent practice of avoidance in order to preserve the Act.¹⁵ But perhaps the relationship between *Wisconsin* and *Citizens United* is not one of tension so much as causation. After *Wisconsin*, experts knew that BCRA was living on borrowed time, and challengers knew to press the advantage. Moreover, the basis for decision in *Wisconsin*, as in *Northwest Austin*, was widely viewed as untenable except as a means of postponing a grander revolution in the law. Proponents of campaign finance restrictions were being given one last chance to defend their signature legislative achievement. Once that chance had been offered, the justices who had favored restraint in *Wisconsin* became less inclined to engage in avoidance.

A similar dynamic arose in *National Federation of Independent Business v. Sebelius*,¹⁶ where the Chief Justice nearly concluded that the Affordable Care Act exceeded Congress's authority.¹⁷ If the Court had struck down the Act, the President and Congress would have been caught off guard. Lawmakers had relied on many decades of permissive Commerce Clause decisions, none of which so much as mentioned the theory on which the Chief Justice relied. Yet the Act was itself unprecedented, and the Chief Justice (and four of his colleagues) agreed with the novel view advanced by the Act's challengers.¹⁸ To solve this problem, the Chief leaned heavily on the avoidance canon to preserve the statute.¹⁹ True, this solution did not signal a need for legislative action or clearly suggest that the Court might eventually get a second bite at the apple. In those respects,

¹⁴ *Wisconsin*, 551 U.S. at 481 (opinion of Roberts, C.J.).

¹⁵ *Citizens United*, 130 S. Ct. at 933 (Stevens, J., dissenting).

¹⁶ 132 S. Ct. 2566.

¹⁷ *Id.* at 2600-01 (opinion of Roberts, C.J.).

¹⁸ *See id.* at 2585-2593.

¹⁹ *See id.* at 2600-01.

The Doctrine of One Last Chance

National Federation imperfectly fits the one-last-chance paradigm. Still, the Chief's decision in *National Federation* significantly resembled his decisions in *Wisconsin* and *Northwest Austin*. In all those cases, the Court was asked to overturn major statutes on unprecedented grounds, and the Chief preserved the laws at issue through strained interpretations that, in any other context, would have been rejected out of hand.

The doctrine of one last chance is not reserved for the Chief Justice. Take the alternating series of judicial decisions and statutes that marked legal debates over the detainees held at Guantanamo. In 2004, *Rasul v. Bush* found that statutory habeas extended to Guantanamo, while suggesting that constitutional habeas might extend there as well.²⁰ That decision quickly prompted Congress to enact the Detainee Treatment Act of 2005, which purported to govern the detention of Guantanamo detainees.²¹ The Court reviewed that enactment the next year, in *Hamdan v. Rumsfeld*.²² With the Chief Justice recused, the Court seemed to fire another shot across Congress's bow by ruling that statutory habeas still extended to Guantanamo, despite Congress's apparent effort to strip federal courts of that jurisdiction. This decision was so clearly a signal to the political branches that it spawned an immediate legislative response in the form of the Military Commissions Act of 2006, which attempted to create a substitute for federal habeas procedures.²³ But, in *Boumediene v. Bush*, the Court found that Congress's newly proposed substitute was constitutionally inadequate. *Boumediene* drew extensively from *Rasul* when following through on its not-so-veiled threat to extend constitutional habeas to Guantanamo.²⁴ As Justice Souter's concurrence emphasized, *Rasul* meant that the decision in *Boumediene* was "no bolt out of the blue."²⁵

²⁰ 542 U.S. 466 (2004).

²¹ Pub. L. No. 109-148, 119 Stat. 2739.

²² *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

²³ 28 U.S.C.A. § 2241(e).

²⁴ *Boumediene v. Bush*, 553 U.S. 723, 733 (2008).

²⁵ *Id.* at 799 (Souter, J., concurring).

Or consider the Court's most recent term. In *Fisher v. University of Texas*, a five-justice majority was widely expected to reconsider a previous majority's decision in *Grutter v. Bollinger*, which had conditionally approved affirmative action in collegiate education.²⁶ Yet the *Fisher* decision ducked that important issue while signaling the need for greater judicial scrutiny of affirmative action. Notably, Justice Ginsburg dissented from the Court's opinion, perhaps in part because of her publicly expressed misgivings at having joined the admonitory majority decision in *Northwest Austin*.²⁷

For another potential example, consider the Court's even more recent decision in *Hollingsworth v. Perry*, where the Chief's majority opinion found no jurisdiction to consider whether the Constitution confers an individual right to same-sex marriage.²⁸ In a few years, that ruling, particularly when read in conjunction with *United States v. Windsor*,²⁹ may seem like a signal that proponents of heterosexual-only marriage were being given one last chance to turn back the tide of history.

II. IN PRAISE OF ONE LAST CHANCES

The doctrine of one last chance is a variant of the doctrine of constitutional avoidance. Whereas the avoidance principle classically dictates a constant willingness to avoid both constitutional holdings and the invalidation of federal statutes whenever possible,³⁰ the doctrine of one last chance decrees that the Court's willingness to avoid should vary with time. On this view, the case for avoidance is at its apex when a majority of the Court first becomes willing to

²⁶ *Fisher*, 133 S. Ct. 2411; *Grutter v. Bollinger*, 539 U.S. 306 (2003).

²⁷ 133 S. Ct. at 2433 (Ginsburg, J., dissenting); Adam Liptak, *Court Is 'One of Most Activist'*, N.Y. TIMES (Aug. 24, 2013) ("On Friday, she said she did not regret her earlier vote, as the result in the 2009 case was correct. But she said she should have distanced herself from the majority opinion's language.").

²⁸ 133 S.Ct. 2652.

²⁹ 133 S. Ct. 2675 (2013).

³⁰ *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *Parsons v. Bedford*, 28 U.S. 433, 448-49 (1830) (Story, J.); *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring).

The Doctrine of One Last Chance

reach a disruptive holding, such as to invalidate a statute. And, upon the majority's second encounter with the issue or statute, the case for avoidance is at its nadir. Thus, the doctrine of one last chance is a rule of limited postponement. This temporal rule of decision has much to recommend it.

Perhaps most importantly, giving advance notice of major decisions can mitigate reliance and transition costs. This Burkean objective is particularly important in cases where the Court is not just resolving major questions, but actually overturning settled answers to those questions. By signaling that what was once settled is now up for grabs, the Court gives both officials and private parties a chance to modify their behavior so as to mitigate the costs of potential doctrinal change. For example, the Court's habeas decisions, particularly *Rasul*, tipped off the Executive that constitutional habeas jurisdiction might lie at Guantanamo, thereby prompting it to stop sending detainees to that location.³¹ Viewed more generally, the doctrine of one last chance creates a jurisprudential rhythm that enhances predictability, both in normal times and in times of transition. During normal times, the doctrine offers reassurance that major legal changes are unlikely to happen without notice. And, in times of transition, the doctrine strongly suggests that previously signaled legal changes will in fact occur. Affected parties can plan accordingly.

Moreover, the doctrine of one last chance has advantages even when the Court doesn't ultimately follow through on signaled changes. Indeed, flagging major constitutional problems creates an opportunity for what might be termed "cooperative avoidance," whereby the Court signals a potential constitutional problem and the political branches then modify the law so as to prevent the problem from ever having to be adjudicated. The win-win result is that the Court never has to issue a disruptive and potentially divisive ruling, and the political branches never have to see important legislation invalidated or subjected to a mangled interpretation. This point assumes that, when the Court temporarily postpones decision, it can

³¹ See Warren Richie, *Next Flash Point Over Terror Detainees: Bagram Prison*, CHRISTIAN SCI. MONITOR (Feb. 12, 2009).

foster conditions necessary for the political branches to act. Unfortunately, this happy possibility does not seem to have actually occurred. For example, *Hamdan* prompted Congress to act, but *Boumediene* found Congress's intervention insufficient. And *Northwest Austin* was not enough to catalyze a legislative change in the VRA's coverage formula.

The benefits of delay can also go to changes in the Court's own composition. Like a supermajority rule, the doctrine of one last chance creates a procedural hurdle for legal change. Unlike a supermajority rule, however, the doctrine of one last chance imposes a temporal constraint. Under the doctrine, judicial majorities must be stable over a period of time before they can issue major decisions. So if a member of the original majority were to retire, that justice's replacement would be given a chance to either confirm or repudiate the proposed change. Moreover, the retirement of a member of the minority would allow the political branches to select a new justice to arrive on the Court and, perhaps, prompt a change in the majority's outlook. To date, however, no change in composition seems to have either thwarted or confirmed a threatened constitutional change. For example, the same tentative majority that decided *Wisconsin* also decided *Citizens United*, notwithstanding the arrival of Justice Sotomayor; and the same majority that decided *Northwest Austin* later decided *Shelby County*, notwithstanding the arrival of Justices Sotomayor and Kagan.

Viewed more broadly, temporarily postponing major decisions creates a window for feedback from interested groups and from experts. The Court is necessarily limited in its ability to obtain outside advice and, to a great extent, is dependent on adversarial briefing. That limited conduit of information may form an inadequate basis for issuing major decisions. The doctrine of one last chance can help raise the profile of latent issues and allow time for public and professional debate regarding their proper resolution. With regard to military detention in Guantanamo, for example, the passage of time after 9/11 may have increased the Court's and the public's confidence that the war on terror could coexist with judicial review of executive detentions: some judicial review of executive detention

The Doctrine of One Last Chance

was already occurring,³² and the costs of unregulated detention – such as the horrible events at Abu Ghraib – had become more apparent. In this way, additional time can allow more information to come into view while building confidence toward a potential decision. A similar dynamic may now be at work with regard to a national right to gay marriage. As more and more states democratically opt for homosexual marriage rights, that legal reform is rapidly becoming the unobjectionable national norm.

Finally, the doctrine of one last chance promises to enhance the Court's legitimacy as it instigates disruptive change. Nothing is easier than calling active courts activist, as dissenting justices have well learned. As a result, majorities who hope to issue major decisions have good reason to inoculate themselves against charges of inventing legal rules and thereby surprising the political branches. Giving the political branches one last chance mitigates this problem, as the Chief Justice demonstrated in *Shelby County*. After *Northwest Austin*, the decision in *Shelby County* wasn't unprecedented, or even a surprise. Indeed, the holding in *Shelby County* had been widely anticipated for years. This state of affairs dampened the rhetoric and verve of Justice Ginsburg's *Shelby County* dissent. By contrast, the Court's potential willingness to invalidate the Affordable Care Act came as quite a shock to much of the country, including most constitutional law scholars. And if the Court had actually invalidated the Act – well, one can only imagine what Justice Ginsburg's dissent would have said. With the Court's legitimacy at stake, the Chief Justice strained to preserve the law, and did.

III. AGAINST ONE LAST CHANCES

For all its advantages, the doctrine of one last chance poses a number of practical and normative problems. These difficulties all stem from the compromise of offering the political branches one last chance: the value of restraint is initially given paramount value, but only as a potential means toward later action.

³² See, e.g., *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007).

Precisely because it reduces the ultimate costs of doctrinal change, a policy of only temporary avoidance would likely increase the Court's willingness to signal constitutional problems. For example, the *Northwest Austin* Court was quite chary of invalidating the existing VRA preclearance regime. Had its feet been held to the fire, the apparent majority to invalidate the law could have disintegrated, and a new majority of the Court might simply have upheld the statute, rather than seize the first opportunity to strike at such a popular and symbolically important measure. Instead, the Chief Justice and his colleagues had the luxury of being able to issue an elaborate warning, thereby increasing the odds that they would later fulfill their threat. By creating an attractive procedure for creating substantial legal change, the doctrine of one last chance places the Court in the tantalizing position of being able to set that change in motion.

The doctrine of one last chance is also likely to encourage the Court to follow through on previously signaled doctrinal changes. This point goes to one of the most important checks on the judiciary – namely, the need to apply newly announced rules in the very cases wherein those rules are announced. In the normal case, a court has a strong interest in hewing as closely as possible to previously established law. Following that traditional course tends to minimize surprise for litigants and enhance the due process value of fair notice. By contrast, the doctrine of one last chance allows the Court to signal major decisions while postponing the decisions' consequences. In this sense, the doctrine of one last chance resembles other doctrines that facilitate nearly costless rulemaking, such as the principle of non-retroactivity in habeas adjudications and the precept that courts can announce constitutional rules while finding qualified immunity.³³ These doctrines can have the practical effect of increasing the Court's long-term willingness to embrace doctrinal change, thereby undermining judicial predictability, adjudicatory fairness, and the Court's traditionally reactive role.³⁴

³³ *Pearson v. Callahan*, 555 U.S. 223 (2009); *Teague v. Lane*, 489 U.S. 288 (1989).

³⁴ For discussion of these ideas, see, e.g., Girardeau A. Spann, *Advisory Adjudication*, 86 TUL. L. REV. 1289 (2012); Thomas Healy, *The Rise of Unnecessary Constitutional*

The Doctrine of One Last Chance

Related to its practical tendency to promote doctrinal change, the doctrine of one last chance arguably constitutes an illegitimate program for prospective lawmaking, contrary to the federal judiciary's traditionally adjudicatory role. Under longstanding if disputed notions of judicial review, the Court is thought to have authority to override the political branches only when necessary to resolve a case or controversy. That is, the Court may engage in "law-declaration" only if that activity is essential to the Court's ability to engage in "dispute-resolution."³⁵ Temporarily postponing conclusive judicial action can thus be viewed as doubly offensive. On the one hand, the first decision might afford claimants incomplete relief, while engendering implausible holdings that undermine legislative goals or actually cause harm. *Northwest Austin* and *National Federation* arguably showcase these concerns. On the other hand, the Court's second decision addressing a particular issue or statute might hurry to issue broad rulings, even when doing so remains unnecessary according to the traditional criteria of avoidance. For instance, the Court swung from the relative narrowness of *Wisconsin* toward a categorical holding in *Citizens United*, even though more restrained outcomes (such as an overbreadth ruling) could have left room for a potential legislative response. Thus, the doctrine of one last chance can easily be criticized as a kind of "faux judicial restraint,"³⁶ opportunistically striking the pose of moderation.

Giving the political branches one last chance can even be mistaken for cruder, cynical manipulations of the judicial process. This problem dovetails with the related and widespread lament that the Court manipulates its inevitably discretionary jurisdictional doctrines to avoid certain merits decisions.³⁷ Moreover, this problem can be significant even if the Court does not in fact have a cynical purpose, since the appearance of manipulation can be as harmful as

Rulings, 83 N.C. L. REV. 847 (2005).

³⁵ See generally RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 72-75 (6th ed. 2009) (describing the so-called "Dispute Resolution" and "Law Declaration" roles of the federal courts).

³⁶ *Wisconsin*, 551 U.S. at 499 n.7 (2007) (Scalia, J., concurring).

³⁷ See, e.g., Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 501 (2008).

its existence. Again consider *Northwest Austin* and *Shelby County*. When the Court punted in *Northwest Austin*, the Democratic Party had control of the Presidency, the House, and (with the help of independents) a filibuster-breaking three-fifths majority of the Senate. Thus, there was a relatively high chance that a decision invalidating the VRA's coverage provision would be met with a quick legislative response. And commentators have observed that the Court tends to avoid decisions when it anticipates legislative resistance.³⁸ By the time the Court decided *Shelby County*, however, the political situation had markedly changed: the House was by then controlled by the Republican party, while the Democrats lacked a three-fifths majority in the Senate. Thus, a legislative response – though certainly possible – had become far less likely, at least in the short term. Cynics could view this timeline not as the product of a principled legal doctrine, but rather as a strategic ploy.

Further promoting cynicism, offering the political branches one last chance can sometimes heighten rather than ameliorate inter-branch tensions. Take the military detention cases concerning Guantanamo. As noted earlier, the *Hamdan* Court invited the political branches to address the problem of protracted detention in Guantanamo,³⁹ and the Court's decision did in fact prompt a legislative response in the form of the Military Commissions Act. Yet in *Boumediene*, the Court found the Act to be inadequate and struck it down, thereby setting up the dissenting justice's charge that Congress had suffered a bait and switch.⁴⁰ This chain of events in no way proves that the *Hamdan* Court had been disingenuous when it invited legislative intervention, but it does illustrate a distinctive type of conflict that can arise when the Court gives Congress a homework assignment. Instead of cooperating to one another's mutual satisfaction, each branch might succeed only in antagonizing the other.

³⁸ See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 335-53 (1991).

³⁹ Four justices did so explicitly. See *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring).

⁴⁰ *Boumediene*, 128 S. Ct. at 2296 (Scalia, J., dissenting) (“Turns out they were just kidding.”).

The Doctrine of One Last Chance



The appeal of one last chances largely depends on one's enthusiasm for new constitutional rulemaking. If the Court is and should be engaged in a dynamic process of generating new constitutional rules, then the doctrine of one last chance is probably a modest improvement over the familiar doctrine of constitutional avoidance. As compared with the amorphous norm of avoidance whenever possible, a rule of one last chances conveys practical guidance for judicial decision-making and offers useful signals for the political branches and private parties. Yet many readers will be less sanguine about the premise that the Court either is or should be a generative source of legal change. And those who believe the Court's legitimacy stems from its adjudicatory role will be particularly unlikely to accept the disruption and cynicism occasioned by anything less than rigorous adherence to the avoidance principle.

Regardless of whether it is good or bad, the doctrine of one last chance casts the Court's professed devotion to judicial restraint in a new light. The avoidance principle is perhaps *the* paradigmatic rule of judicial modesty. And yet, when wielded by the institution it is meant to constrain, avoidance has become an important tool of judicial empowerment. By declining to resolve issues today, the Court often enhances its ability to decide those very issues tomorrow. The rhetoric of avoidance is therefore tinged with irony. Even as it recounts the somber need to avoid important questions, the Court seems to know, or hope, that its first chance to decide will not be the last.

