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## **ANALYZING AVOIDANCE: JUDICIAL STRATEGY IN COMPARATIVE PERSPECTIVE**

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### ABSTRACT

*Courts sometimes avoid deciding contentious issues. One prominent justification for this practice is that, by employing avoidance strategically, a court can postpone reaching decisions that might threaten its institutional viability. Avoidance creates delay, which can allow for productive dialogue with and among the political branches. That dialogue, in turn, may result in the democratic resolution of—or the evolution of popular societal consensus around—a contested question, relieving the court of its duty. Many scholars and judges assume that, by creating and deferring to this dialogue, a court can safeguard its institutional legitimacy and security.*

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*Accepting this assumption arguendo, this Article seeks to evaluate avoidance as it relates to dialogue. It identifies two key factors in the avoidance decision that might affect dialogue with the political branches: first, the timing of avoidance (i.e., when in the life cycle of a case does a high court choose to avoid); and, second, a court's candor about the decision (i.e., to what degree does a court openly acknowledge its choice to avoid). The Article draws on a series of avoidance strategies from apex courts around the world to tease out the relationships among timing, candor, and dialogue. As the first study to analyze avoidance from a comparative perspective, the Article generates a new framework for assessing avoidance by highlighting the impact of timing on the quality of dialogue, the possible unintended consequences of candor, and the critical trade-offs between avoidance and power.*

#### TABLE OF CONTENTS

Introduction .....	3
I. Analyzing Avoidance .....	7
A. Delay and Dialogue .....	7
B. The Variables of Timing and Candor .....	12
II. <i>Ex Ante</i> : Agenda Setting and Justiciability in the United States..	16
A. Certiorari and DIGs.....	17
B. Standing.....	20
III. <i>In Medio</i> : Doctrinal Innovation in Europe.....	28
A. The European Convention System .....	29
B. The Margin of Appreciation .....	34
IV. <i>Ex Post</i> : Playing with Remedies .....	43
A. The South African Remedial Power.....	44
1. <i>Irrigating the Arid Ground</i> .....	44
2. <i>Remedies and the Suspension of Invalidity</i> .....	47
B. Canadian Delayed Declarations.....	50
1. <i>The Backdrop: Standing and Notwithstanding</i> .....	50
2. <i>Remedies and Delayed Declarations of Invalidity</i> .....	55
V. Strategic Considerations in Comparative Perspective.....	58
A. Timing and the Quality of Dialogue .....	58
B. Candor and Judicial Capacity .....	62
C. Deciding to Avoid: Factors for Further Study.....	64
Conclusion.....	67

## INTRODUCTION

When Alexander Bickel wrote that the United States Supreme Court could (and should) avoid contentious issues by finding ways not to decide them,<sup>1</sup> scholars were appalled. Many argued that taking prudential considerations into account would undermine the legitimacy of the judiciary and threaten the rule of law.<sup>2</sup> How times have changed! Not only have modern political science and legal theory demonstrated that prudential considerations are likely critical to a court's legitimacy,<sup>3</sup> but courts around the world have taken the Bickelian suggestion to heart.<sup>4</sup> Avoidance is everywhere.

What might account for courts' burgeoning use of avoidance? The rise of constitutional courts and the ubiquity of rights adjudication have centered the democratic legitimacy of judicial review in the crosshairs of many political systems.<sup>5</sup> The "countermajoritarian difficulty" that Bickel identified in the United States more than fifty years ago is now a global export: What justifies unelected judges standing in opposition to the elected representatives of the legislature? It may be that the power of judicial review—including the ability to find and remedy a constitutional violation—is presupposed in some systems by the constitutional document itself, mitigating the tension. But as recent events in Hungary and Poland have demonstrated,<sup>6</sup> courts have little recourse when powerful political interests align against them.

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1. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–17 (1962); *see also* Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 49–51 (1961).

2. *See* Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 22 (1964).

3. *See infra* Part I.A.

4. *See infra* Parts III, IV.

5. *See*, for example, the discussion over the role of the new U.K. Supreme Court. Erin F. Delaney, *Judiciary Rising: Constitutional Change in the United Kingdom*, 108 NW. U. L. REV. 543, 582 (2014). Of course, the "countermajoritarian difficulty" can only be relevant in those systems in which high courts operate against a background norm of democracy and have the authority to engage in the types of review that generate politicized results. I thank Larry Helfer for reminding me of this point.

6. In late December 2015, the Polish Parliament passed a law reorganizing the Polish Constitutional Court, undermining the court's ability to serve as a check on power. *See* Editorial, *Poland's New Right-Wing Leaders Have Crossed a Line*, WASH. POST (Dec. 22, 2015), [https://www.washingtonpost.com/opinions/polands-new-right-wing-leaders-cross-a-line/2015/12/22/54d42ea4-a8d3-11e5-8058-480b572b4aae\\_story.html](https://www.washingtonpost.com/opinions/polands-new-right-wing-leaders-cross-a-line/2015/12/22/54d42ea4-a8d3-11e5-8058-480b572b4aae_story.html) [<https://perma.cc/4UOP-T2RM>].

Commentators immediately expressed fear for the future of the Polish court, drawing parallels with the experiences over the past five years in Hungary. In 2000, the Hungarian Constitutional Court was described as "one of the most powerful courts in the world." HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* 106 (2000); *see also* Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L.J. 961, 973

Strategic avoidance—postponing decision of contentious issues that might threaten a court’s institutional viability—is a way of engaging various external actors to create and secure institutional support.<sup>7</sup> Delaying a decision on substance might allow the time and space necessary for productive dialogue with (and within) the political branches to resolve the question outside of the courts. Delay may even allow for the evolution of popular consensus on the issue. The unelected judges on the court may thus be able to sidestep the difficult question, thereby safeguarding institutional legitimacy and security. In fact, courts worldwide seem to rely on the possibilities and benefits of extrajudicial political dialogue as a healing salve for their democratic deficits.<sup>8</sup> Of course, the quality and quantity of meaningful dialogue may vary.<sup>9</sup> And whether courts actually are able to protect or enhance their legitimacy through avoidance-based dialogue is an empirical question that has yet to be answered.<sup>10</sup> But many apex courts seem to operate under the assumption that dialogue provides such a benefit.<sup>11</sup>

This Article does not take a normative position on avoidance. Rather, by accepting avoidance as part of the judicial toolkit, it seeks to better understand the phenomenon and provide a new framework for its analysis. For the purposes of this Article, I assume that dialogue does enhance institutional legitimacy and security as it is often claimed to do.<sup>12</sup> Thus, taking those effects as given, the Article identifies and

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(2011) (“The Hungarian Court was one of the first to begin work and has been handing down important decisions since the early 1990s. And, having had an early start, it has been unusually successful in gaining widespread legitimacy, despite (or perhaps as a result of) striking down one third of all legislation passed between 1989 and 1995, according to one estimate.”); Istvan Pogany, *Constitutional Reform in Central and Eastern Europe: Hungary’s Transition to Democracy*, 42 INT’L & COMP. L.Q. 332, 341 (1993). Its perceived strength did not, however, insulate it from the political branches when a popular majority swept to power. Since 2010, when the nationalist FIDESZ party gained the parliamentary supermajority necessary to amend and replace Hungary’s 1989 Constitution, the Constitutional Court’s bench has been packed, its jurisdiction stripped, and its authority undermined. See *The Trajectory of Democracy—Why Hungary Matters: Hearing Before the U.S. Comm’n on Sec. & Cooperation in Eur.* (2013) (statement of Kim Lane Scheppele, Director, Program in Law & Pub. Affairs, Princeton Univ.), <https://www.csce.gov/sites/helsinkicommission.house.gov/files/Testimony%20Scheppele.pdf> [<https://perma.cc/J4H2-JVNX>].

7. See *infra* Part I. Of course, avoidance may also be used to achieve other aims, including promoting the political preferences of individual judges. See *infra* notes 67, 72.

8. See *infra* Part I.A.

9. See *infra* Part V.

10. I thank Jeff Staton for highlighting this point and trust he will discover the answer in due course.

11. See *infra* Parts III, IV.

12. See *infra* Part I.A.

assesses the variables in an avoidance decision that might contribute to the likelihood and quality of this dialogue.

In Part I, I propose two identifying factors in the avoidance decision that might affect dialogue with the political branches: the *timing* of avoidance—when in the life cycle of a case does a high court choose to avoid—and the *candor* with which that court acknowledges its choice. In terms of timing, I employ a rough measure, dividing avoidance mechanisms into three timeframes. First, at the outset of litigation, *ex ante* mechanisms of avoidance, such as agenda-setting tools and justiciability doctrines, allow apex courts to avoid hearing the merits of cases. Second, courts use a variety of doctrinal techniques in the context of the merits determinations themselves—*in medio* mechanisms—to pick and choose among substantive grounds or to sequence questions in a way to avoid deciding certain issues. Third, courts may hear and decide contentious issues but then avoid articulating a remedy, an *ex post* mechanism that can be used to “remand” issues to the political branches for input. Candor, in turn, falls along a spectrum as developed through the comparative examples in the Article. It ranges from a court’s express avoidance because of articulated institutional legitimacy reasons, to its complete refusal to decide without offering any explanation at all.<sup>13</sup>

How do the timing of and candor about an avoidance decision affect the quality and likelihood of the resulting dialogue? The heart of this Article provides a series of comparative examples to begin to tease out these relationships. The analysis also tracks possible unintended consequences of avoidance for the institutional interests of a court. I examine four jurisdictions, categorized into the three timeframes for avoidance noted above. Although of course any individual court may choose to avoid at different times in different cases, each court nevertheless operates against a backdrop of powers, norms, or historical events that makes certain timing choices more likely. With this perspective, I review the *ex ante* agenda-setting and justiciability tools used by the U.S. Supreme Court in Part II; the *in medio* doctrinal innovation of the “margin of appreciation,” developed by the European Court of Human Rights in Part III; and the *ex post* remedial constructs relied upon by the Constitutional Court of South Africa and the Supreme Court of Canada in Part IV.

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13. See *infra* Parts II–IV.

As the first study to analyze avoidance from a comparative perspective, this Article sheds light on various methods of avoidance and explores the relationships among timing, candor, and dialogue. But it does not seek to predict particular instances of avoidance; the study of this phenomenon is too new to say whether, in a given type of case, a court will choose to avoid, and whether it will do so with a particular degree of candor.<sup>14</sup> Future research can build on the empirically based advances in this Article to develop a theory of when one might expect avoidance to be used in various systems. As a start, I would emphasize that the courts addressed here have rights-adjudication responsibilities and function within diverse democratic-based systems. And in the Article's final Part, I suggest additional factors that may affect the likelihood of avoidance, including the internal institutional dynamics of a court, the judicial architecture of the legal system, and how well judges can be expected to understand and predict political threats or popular support.

Part V also clarifies the trade-offs between the different models of avoidance, and it highlights the role candor plays in the development of dialogue. In reviewing the choices made by the various courts described in Parts II–IV, it seems possible that the later and more candid the avoidance, the more likely that dialogue among the branches of government will be a meaningful conversation rather than parallel soliloquys. Of course, there are also potential unintended consequences of particularly candid avoidance.<sup>15</sup> Candor about judicial weakness may increase institutional security at the cost of institutional power. If a court is known to defer to the public's will, can it fulfill its role as the protector of minority rights or maintain the aspiration (let alone the actuality) of countermajoritarian constitutionalism?<sup>16</sup>

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14. And, of course, it is possible that some courts do not use avoidance at all—perhaps because they have not been entrusted with contentious issues to adjudicate or perhaps because they no longer need the flexibility that avoidance provides.

15. Cf. David Landau, *Aggressive Weak-Form Remedies*, 5 CONST. CT. REV. 244, 263 (2014) (discussing benefits of comparative work for “clarifying . . . trade-offs”).

16. In the United States, critics of the “rhetoric of heroic countermajoritarianism” argue that the Supreme Court has never truly been able to prevent “majoritarian overreaching.” Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 1–2 (1996); see also BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 15 (2009) (arguing that judges rarely decide “contrary to the popular will”); MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR* 207 (2013) (noting the Supreme Court's majoritarian tendencies: once public opinion has shifted in favor of a particular position, the Supreme Court “will constitutionalize the emerging consensus and suppress resisting outliers”); Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 160 (2013) (same) [hereinafter Klarman, *Windsor and Brown*]. But these criticisms often struggle to disentangle what the Court has done

Assuming that avoidance—through dialogue—enhances legitimacy, perhaps avoidance should also be assessed for its effect on a court’s retained potential for exercising that legitimacy.<sup>17</sup>

## I. ANALYZING AVOIDANCE

This Part takes a first cut at a schema for analyzing avoidance by identifying its purported benefit: *delay* allowing for *dialogue*. Although dialogue is widely touted by academics as a means of defanging the countermajoritarian difficulty and preventing backlash against a court, there is little empirical evidence demonstrating that dialogue (or delay) is actually linked to increasing or maintaining a court’s legitimacy. Nevertheless, dialogic engagement has been embraced by many courts and, for purposes of this Article, is assumed to benefit those courts. If dialogue is a goal of avoidance, it then becomes necessary to assess those factors that might impact the quality and nature of that dialogue. The Part next discusses two possible variables: the timing of the avoidance (the stage in the evolution of a case at which a high court chooses to avoid) and the candor with which that court makes its decision (how clearly the court acknowledges its strategic choice to avoid).

### A. *Delay and Dialogue*

Alexander Bickel advocated for avoidance as a mechanism of strategic consideration. His core insight was identifying the Supreme Court’s institutional need “to ensure survival and to operate efficiently.”<sup>18</sup> At the time he articulated these ideas, theorists saw

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from what it has the capacity to do. See FRIEDMAN, *supra*, at 370 (“[T]he expressions of both the hope and the threat of judicial review rest on a common supposition: that the judiciary even has the *capacity* of running contrary to the will of the majority.”); see also MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 6 (2004) (“Judges who generally reflect popular opinion are unlikely to have the inclination, and they may well lack the capacity, to defend minority rights from majoritarian invasion.”). It may be that the Supreme Court improperly deploys or otherwise fails to use the power it has acquired. But it does seek to maintain the countermajoritarian aspiration, see *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865–66 (1992) (plurality opinion), at least in appearance, even if its achievement is sometimes in doubt.

17. Cf. THEUNIS ROUX, *THE POLITICS OF PRINCIPLE* 72–111 (2013) (outlining an analytical framework for assessing legitimacy as a means to be used by courts, with varying efficacy); JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND JUDGMENTS OF THE AMERICAN PEOPLE* 158 (2009) (“Understanding how institutions acquire and spend legitimacy remains one of the most important unanswered questions for those interested in the power and influence of judicial institutions.”).

18. Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 213 (1968); cf. Barry Friedman, *The*

neutral principles of law and “rigorous standards of principled adjudication” as the only way to protect and develop institutional legitimacy.<sup>19</sup> Considering institutional capacity, political pressure, and social change was outside the scope of what it meant to be a court and to apply the legal method. But scholarship by political scientists and lawyers has since suggested that high courts do (and often must) take expediency into account, not in spite of its impact on legitimacy, but precisely because strategic considerations can promote legitimacy.<sup>20</sup>

Legitimacy is a multifaceted concept, and by disaggregating its elements, scholars have shown that both principle and pragmatism are necessary to its maintenance.<sup>21</sup> At bottom, a court’s institutional or sociological legitimacy,<sup>22</sup> determined by a mixture of compliance and enforcement in the face of substantive disagreement,<sup>23</sup> is different from

*Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 201 (2002) (describing the “Lincolnian tension” between principle and pragmatism as “the central metaphor for [Bickel’s] book”).

19. Gunther, *supra* note 2, at 22.

20. See, e.g., Vincent Blasi, *The Role of Strategic Reasoning in Constitutional Interpretation: In Defense of the Pathological Perspective*, 1986 DUKE L.J. 696, 697 (asserting that functional effectiveness is based on a series of strategic calculations).

21. For simplicity, the normative legitimacy of the law itself will be assumed, but this is another aspect of judicial legitimacy that garners attention from political theorists and lawyers alike. See Andreas Føllesdal, *The Legitimacy Deficits of the Human Rights Judiciary: Elements and Implications of a Normative Theory*, 14 THEORETICAL INQUIRIES L. 339, 345 (2013) (discussing normative legitimacy); see also Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1789, 1817–27 (2005) (discussing substantive legal legitimacy); Michael L. Wells, ‘Sociological Legitimacy’ in *Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1017–31 (2007) (discussing moral legitimacy).

22. See Fallon, *supra* note 21, at 1828 (discussing sociological legitimacy); Wells, *supra* note 21, at 1017–31 (same).

23. Because people’s willingness to accept a judgment is complicated by their own normative or cultural commitments, see Dan M. Kahan, *Cognitive Bias and the Constitution*, 88 CHI.-KENT L. REV. 367, 394 (2013) (“The distorting effect of cultural cognition on public perceptions of constitutional decision-making subverts legitimacy: . . . the enforcement of constitutional law itself multiplies the occasions in which the adherents to competing moral outlooks experience law as denigrating their cultural identities.”); Dan M. Kahan, David A. Hoffman, Donald Braman, Danieli Evans & Jeffrey J. Rachlinski, *They Saw a Protest: Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 887 (2012) (“[I]f legal decisionmakers’ own ability to weigh the proffered evidence is affected by motivated cognition, they will do a poor, or at least a suspect, job of distinguishing pretext from truth.”), they are susceptible to the pitfalls of motivated reasoning. Scholarship suggests that if an individual agrees with the outcome of a case, she may be indifferent to the reasoning. See Dan Simon & Nicholas Scourich, *Lay Judgments of Judicial Decision Making*, 8 J. EMPIRICAL LEGAL STUD. 709, 719 (2011). But if she disagrees with the decision on the merits, she may be more likely to believe it was an impermissibly politicized result regardless of the reasoning. See James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 537, 539, 546–47 (2003); cf. Albert H. Hastorf & Hadley Cantril, *They*



the legal legitimacy found in its decisions.<sup>24</sup> Some measure of each is essential.<sup>25</sup> Understanding a court's institutional legitimacy as a distinct concept gives support to the idea that judges may act to enhance or protect that legitimacy apart from (or in a manner distinguishable from) a focus on the substantive legitimacy of their opinions. Protecting institutional or sociological legitimacy is therefore "an additional goal that high court justices pursue and that affects disposition of individual cases."<sup>26</sup> Strategic legitimacy cultivation should be an expected factor in judicial decisionmaking.<sup>27</sup>

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*Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129, 132 (1954) (finding that students demonstrated unconscious bias in favor of their home school when evaluating referee decisions in a taped football game). In a world of motivated reasoning and cultural dissensus, legal legitimacy must function within a broader social legitimacy. A broader sociological or institutional legitimacy permits contingent compliance: people will comply with a decision, even when they disagree with its substance and believe it was politicized, because they believe (1) that others believe it necessary to comply and (2) that these others will comply in the future when the decision goes against them. See Føllesdal, *supra* note 21, at 350; see also Gibson, Caldeira & Spence, *supra*, at 537 (discussing "institutional loyalty, support not contingent upon satisfaction with the immediate outputs of the institution").

24. Fallon, *supra* note 21, at 1828. Legal legitimacy is the application of neutral principles of law, taking modern shape in at least four distinct jurisprudential developments: (1) the use of precedents in constructing arguments and bringing cases, see generally CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998) (constructing arguments); Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018 (1996) (same), (2) the "distinctive jurisprudential categories or doctrines" that "have influenced voting and opinion writing," see Howard Gillman, *What's Law Got to Do with It? Judicial Behaviorists Test the "Legal Model" of Judicial Decision Making*, 26 L. & SOC. INQUIRY 465, 481 (2001) (collecting sources), (3) constraints on judges based on their earlier articulations of principles, cf. Michael J. Gerhardt, *Attitudes About Attitudes*, 101 MICH. L. REV. 1733, 1760 (2003) (discussing the path dependency of precedent); see generally LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* (1992) (arguing that the strength of legal arguments has at least as much impact on judicial decisions as public opinion and Justices' political beliefs), and (4) claims of legitimacy through consistency, see Yonatan Lupu & Erik Voeten, *Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights*, 42 BRIT. J. POL. SCI. 413, 413 (2011).

25. Of course, there will always be those for whom contingent compliance to immoral results is anathema, even when the decisions are embedded in a liberal constitutional state.

26. Vuk Radmilovic, *Between Activism and Restraint: Institutional Legitimacy, Strategic Decision Making and the Supreme Court of Canada* 10 (2011) (unpublished doctoral dissertation, University of Toronto), [https://tspace.library.utoronto.ca/bitstream/1807/31908/1/Radmilovic\\_Vuk\\_201111\\_PhD\\_thesis.pdf](https://tspace.library.utoronto.ca/bitstream/1807/31908/1/Radmilovic_Vuk_201111_PhD_thesis.pdf) [<https://perma.cc/5L5K-UKLF>].

27. See Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1139 (1995) ("[I]n order for the Court to be able to justifiably compel compliance with its rulings in particular cases it must be effective enough to compel compliance with its pronouncements generally. Therefore, if the Court can protect its effectiveness through safeguarding its image, the Court ought to do so.").

Avoidance is a means of cultivating this legitimacy. A court can simply avoid deciding contentious, politically divisive issues that, by creating powerful opponents with the capacity to rein in (or oppose) the court's actions, could threaten its institutional legitimacy. The benefit of this strategy, of course, is delay: by postponing a difficult decision until popular opinion shifts or a solution can be developed through the political branches, the court would not have to take responsibility for imposing a new rule on a reluctant populace or opposing elites.

The key element in effectuating these benefits of delay is the dialogic possibility in avoiding adjudication.<sup>28</sup> Bickel himself highlighted the importance of promoting dialogue, suggesting that the Supreme Court use its rhetorical capacity to “explain the principle that is in play and praise it,” without either accepting or denying the underlying right at issue.<sup>29</sup> In this way, the Court could engage the democratic branches in the enterprise of articulating and defining national rights.<sup>30</sup>

Judicial dialogue has become the preferred response to the countermajoritarian difficulty, leading to a robust literature and recommendations for dialogic practices in courts around the world.<sup>31</sup> The contours of dialogue theory have been drawn and redrawn over the past fifty years.<sup>32</sup> And the “language of dialogue is often used to describe very different theories of cooperative constitutionalism, each embracing a different understanding of the appropriate scope of the judicial and legislative roles.”<sup>33</sup>

Efforts to use dialogue theory to justify judicial review or to explain the relationship between a court and a legislature are often

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28. Cf. Bickel, *supra* note 1, at 64 (“The Court in the *Birth Control Cases* engaged in a sort of colloquy with the political institutions, begun by way of questions and answers at the argument, stylized and brought to a Socratic conclusion in the prevailing opinion. The upshot was the framing of conditions to invite a responsible legislative decision.”).

29. *Id.* at 77.

30. See ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 177 (1970) (“Virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives.”).

31. See Kent Roach, *Dialogic Judicial Review and Its Critics*, 23 SUP. CT. L. REV. 2d 49 (2004) (summarizing the literature). *But see* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 653–57 (1993) (questioning the existence of a countermajoritarian difficulty because the Supreme Court is inherently in dialogue with the political branches and people); Friedman, *supra* note 18, at 198–200 (explaining relevant additions to academic criticism of the Court).

32. See generally Roach, *supra* note 31 (reviewing the theory).

33. Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT’L J. CONST. L. 391, 393–94 (2007).

driven by normative aims to ensure robust rights elaboration.<sup>34</sup> For example, Rosalind Dixon argues that, although the theory recognizes “limits to both judicial competence and responsiveness in the process of constitutional rights adjudication,”<sup>35</sup> it nevertheless provides a justification for judicial participation in rights elaboration. Courts, she argues, have a “greater capacity and responsibility to counter legislative blockages to the realization of constitutional rights.”<sup>36</sup> It is by countering legislative blind spots and burdens of inertia that courts contribute to “the legitimacy of the constitutional system as a whole.”<sup>37</sup>

In contrast to these outcome-oriented justifications, structural definitions of dialogue focus on institutional design. Kent Roach builds on the Canadian experience with iterative analysis of rights by courts and legislatures to argue that “dialogue” may now be understood to refer “to any constitutional design that allows rights, as contained in a bill of rights and as interpreted by the courts, to be limited or overridden by the ordinary legislation of a democratically elected legislature.”<sup>38</sup> But this institutional description provides little guidance for navigating the intersection between dialogue and the judicial role. Even in Canada, judges “have disagreed about the meaning of dialogue, with some stressing that it cannot be an excuse for an abdication of an anti-majoritarian judicial role . . . and others suggesting that it requires judges to defer when Parliament expresses reasonable disagreement with the Court’s reconciliation of individual and social interests.”<sup>39</sup>

Whether proffering outcome-driven or design-based definitions, scholars defending or advocating dialogue participate in a literature shaped by the core Bickelian assumption that dialogue can benefit a court’s institutional legitimacy.<sup>40</sup> But empirical political scientists have not yet engaged in this analysis, and some building blocks key to understanding the effectiveness of dialogue—“when and why

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34. *Id.* at 394.

35. *Id.* at 393.

36. *Id.*

37. *Id.* at 404–05.

38. Roach, *supra* note 31, at 55.

39. *Id.* at 50.

40. Critics continue to question whether “dialogue” has independent purchase such that it could provide a metric to judges for deciding hard cases. *See, e.g.*, Roach, *supra* note 31, at 51; Earl M. Maltz, *The Supreme Court and the Quality of Political Dialogue*, 5 CONST. COMMENT. 375, 386–87 (1988).

legislatures accept certain judicial decisions”<sup>41</sup>—are relatively unexplored. Further, even assuming that dialogue functions as a release valve that provides courts with leverage and space to protect their institutional and sociological legitimacy, there is not yet a sense of what kind of dialogue is best suited to that ultimate aim.

*B. The Variables of Timing and Candor*

Accepting *arguendo* that courts take strategic considerations into account and that, by allowing for dialogue, there is a purported benefit in so doing, a central question remains: How? Two key variables are at play in the mechanism of avoidance: *timing*, or when to avoid in the evolution of a case; and *candor*, or the degree to which the court openly acknowledges its strategic choice to avoid. The issue of timing has not been addressed in the literature, but this Article begins to fill this gap. Parts II–IV examine avoidance mechanisms used at different stages in the lifespan of a case and discuss how the timing of avoidance may affect the nature of the dialogue that can ensue. This Section, in turn, discusses the second major variable: candor.

The role of candor has been discussed in the context of avoidance, as Bickel himself was roundly criticized for advocating the “covert deployment” of prudential considerations.<sup>42</sup> The question presented here is whether a court should admit that it is acting strategically. Should a court acknowledge its weakness or its unwillingness to make a difficult decision? How candid should a court be about its decision to avoid?

The literature on candor suggests it has a distinct normative status in law, but it is one that is often assumed rather than explicated.<sup>43</sup> Legal scholars often assert candor’s importance without engaging in any of the moral reasoning such a claim entails—viewing it as a “self-evident truth of uncompromising importance.”<sup>44</sup> Is candor inherently desirable either as an end or as a means? Nonconsequentialist arguments are

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41. Roach, *supra* note 31, at 52.

42. Hellman, *supra* note 27, at 1123.

43. Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 400 (1989) (describing the pro-candor literature).

44. *Id.*

rarely embraced or even properly presented.<sup>45</sup> The literature mostly focuses on the harms of lying rather than truth as a moral absolute.<sup>46</sup>

Most scholars make the more pragmatic claim that deception, whether through employing legal fictions or by hiding the true rationale for a doctrinal development, “undermines the integrity of the judiciary.”<sup>47</sup> This argument rests on two core values that are thought to promote legitimacy: publicity and trust.

The principle of publicity—or public reason-giving—allows for notice, guidance, and prediction, all essential to the rule of law.<sup>48</sup> At a broad level of generality, this public reason-giving is a way of ensuring accountability,<sup>49</sup> allowing for meaningful democratic checks on power.<sup>50</sup> But accountability in the context of judicial processes is complicated, as political oversight threatens judicial independence.<sup>51</sup> Without providing a more contextualized institutional analysis, some scholars have simply agreed that candor “acts as a prophylactic; the requirement of publicity insures that the reasons on which decisions are based are at least minimally acceptable to the public.”<sup>52</sup> Minimally acceptable reason-giving, however, is not a robust conception of the rule of law.

The second value tied to candor is trust. Put simply, suspicion undermines coordination.<sup>53</sup> Without candor, the world would be one of unresolved prisoner’s dilemmas,<sup>54</sup> undermining not only the rule of law

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45. *But see* Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091, 1110 n.63 (2010) (discussing Kant’s analysis of whether truth is a moral absolute).

46. *See id.* at 1110–11; Zeppos, *supra* note 43, at 405.

47. *See, e.g.*, Zeppos, *supra* note 43, at 401.

48. *See* Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 1005–12 (2008); *see also* Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1358 (1995) (discussing notice); Cohen, *supra* note 45, at 1112–15 (discussing guidance); Zeppos, *supra* note 43, at 401 (discussing predictability).

49. *See* Idleman, *supra* note 48, at 1335–45.

50. *See* Cohen, *supra* note 45, at 1100; David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987). It is also an indication that citizens are rational actors, “capable of understanding and responding to the reasons that justify the rules by which they are governed.” Schwartzman, *supra* note 48, at 1004.

51. *See* Erin F. Delaney, *Searching for Constitutional Meaning in Institutional Design: The Debate over Judicial Appointments in the United Kingdom*, 14 INT’L J. CONST. L. 752, 753 (2016).

52. Hellman, *supra* note 27, at 1143.

53. *See* Cohen, *supra* note 45, at 1112 (discussing coordination problems); Shapiro, *supra* note 50, at 737 (“In a society that placed no special value on truthfulness, all cooperative undertakings would be difficult or impossible.”).

54. Cohen, *supra* note 45, at 1112.

but all societal organization. Even if the rationale for judicial candor were to be relaxed in certain circumstances, a background norm of truthfulness is essential, as David Shapiro rightly notes, for “deception loses its point if it is not believed.”<sup>55</sup>

Notwithstanding the strong presumption in favor of judicial candor,<sup>56</sup> there are, of course, countervailing pragmatic, strategic, and even normative interests.<sup>57</sup> Pragmatic concerns in multimember courts suggest that the benefits of achieving a majority opinion might cut in favor of some amount of opaque compromise.<sup>58</sup> In fact, majority coalition size may affect both acceptance of and compliance with a court’s decision.<sup>59</sup> In addition, a strategic account would suggest it might be acceptable to misrepresent in order to achieve another good, such as secrecy or national security.<sup>60</sup> Guido Calabresi and Philip Bobbitt have suggested that subterfuge might be warranted by the tragic nature of a clash between competing values.<sup>61</sup> Indeed, as Calabresi has separately noted, “The most important . . . kind of subterfuge is that designed to hide a fundamental value conflict,

55. Shapiro, *supra* note 50, at 737.

56. Hellman, *supra* note 27, at 1142; see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 177 (1982) (“The burden must be on those who would argue for indirection.”).

57. Many scholars also discuss the practical difficulties of operationalizing an obligation or duty of judicial candor: Scott Idleman proposes a definition of candor that requires “full disclosure of relevant information.” Idleman, *supra* note 48, at 1316. Of course, the devil is in the details—the meanings of “full,” “disclosure,” “relevant,” and even “information.” *Id.* Mathilde Cohen also discusses the challenges of imposing an internalist understanding of sincerity, requiring a “congruence between actual motives and stated reasons.” Cohen, *supra* note 45, at 1122–32.

58. See Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2311 (1999) (“Practical reasoning is an art, guided by a commitment to constructing viable solutions to problems. This entails both a commitment to compromise and to the civility of discourse.”); see also Cohen, *supra* note 45, at 1146–48 (discussing reason-giving in multimember contexts); Shapiro, *supra* note 50, at 736, 742–43 (“Surely it is not deceptive for a majority to adopt a rationale that does not go as far as some of its members are willing to go.”). But see James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment*, 58 POL. RES. Q. 187, 197 (2005) (finding little evidence for the proposition that “sharp splits in Court decisions substantially delegitimized those outcomes”).

59. See Michael F. Salamone, *Judicial Consensus and Public Opinion: Conditional Response to Supreme Court Majority Size*, 67 POL. RES. Q. 320, 332 (2014) (finding that “ex ante opponents of the Court’s policies may be persuaded to accept judicial decisions with which they disagree. The presence and dynamics of this effect, however, appear to be contingent on the salience of the policy under review,” with low salience cases getting the biggest boost from unanimity).

60. See Cohen, *supra* note 45, at 1117–19 (discussing strategic reasons in favor of secrecy and security).

61. See generally GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES (1978) (arguing that subterfuges can be used to hide value conflicts).

recognition of which would be too destructive for the particular society to accept.”<sup>62</sup> Is hiding a decision to avoid—and thereby sidestepping a fundamental value conflict—an acceptable subterfuge?

Ultimately, the arguments for and against candor are not situated in empirical analysis of the effects of candor, and it is difficult to assess the benefits or harms only as a theoretical matter. But any analysis of avoidance should closely examine how candid a court is being about the scope of its own power and its choices to use or abjure that power. Candor is likely to have an impact on the avoidance calculus by affecting the quality or quantity of dialogue. If a court is candid about avoiding an issue because of its politicized nature, the court may be able to encourage dialogue with or among the political branches on the subject. But promoting dialogue may come at a cost; candor could also serve to undermine the court’s effective authority. If a court is known to avoid politically divisive issues, it may lose its authority to decide controversial cases. The public may be reluctant to accept decisions in such cases if it has come to expect avoidance (especially if doctrinal evolution seems to *require* avoidance). If a court cannot ever decide a case in a countermajoritarian direction, can it fulfill its function? What use is its accrual of legitimacy, if it can never be expended?<sup>63</sup>

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The next three Parts explore how courts in different jurisdictions have balanced these variables of timing and candor in their efforts to delay contentious decisions. Although any individual court may rely upon any or all of the various methods of avoidance, certain courts have preferred approaches that best exemplify avoidance at a particular time in the life-cycle of a case. Part II reviews the *ex ante* mechanisms used by the U.S. Supreme Court to avoid deciding merits issues altogether. Part III looks at how the European Court of Human

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62. CALABRESI, *supra* note 56, at 172.

63. Alexis de Tocqueville observed the interplay between power and legitimacy at a time when the Supreme Court played a much smaller role in American life:

In the hands of seven federal judges rest ceaselessly the peace, the prosperity, the very existence of the Union. . . . Their power is immense; but it is a power of opinion. They are omnipotent as long as the people consent to obey the law; they can do nothing when they scorn it. Now, the power of opinion is that which is most difficult to make use of, because it is impossible to say exactly where its limits are. It is often as dangerous to fall short of them as to exceed them.

ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 142 (Harvey C. Mansfield & Delba Winthrop eds. & trans., 2000) (1835).

Rights deploys doctrinal tools *in medio* to avoid deciding certain merits issues. And Part IV discusses how the South African Constitutional Court and the Supreme Court of Canada allow the merits questions to be raised and answered but use remedies, *ex post*, to parry, delay, and engage the political branches in the matter of redress.

## II. *EX ANTE*: AGENDA SETTING AND JUSTICIABILITY IN THE UNITED STATES

The twenty-first century Supreme Court has the power and authority to declare laws unconstitutional and the sociological legitimacy to engender compliance. This judicial supremacy developed over decades with many contributing factors,<sup>64</sup> including, *inter alia*, the Court's use of a set of doctrinal and discretionary mechanisms to avoid deciding contentious constitutional questions. Noting the Court's emerging reliance on these techniques in the late 1950s and early 1960s, Alexander Bickel called them the "passive virtues."<sup>65</sup>

In Bickel's original invocation of the term, he focused on justiciability doctrines, such as standing, ripeness, and mootness.<sup>66</sup> These "virtues" allowed the Court to avoid hearing the merits of a case, *ex ante*. Of course, the Court has a wider range of avoidance tools it can deploy. Some come into play during the disposition of a case (*in medio*), such as immunity doctrines, deference doctrines, and the most obvious—the doctrine of constitutional avoidance.<sup>67</sup> And there are famous examples of remedial avoidance (*ex post*)—*Brown v. Board of Education (Brown II)*'s<sup>68</sup> "all deliberate speed" phrasing leaps to mind.

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64. See generally Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137 (2011) (discussing theories of judicial supremacy and proposing one of their own).

65. BICKEL, *supra* note 1, at 79.

66. *Id.* at 111–98.

67. Of course, the modern Supreme Court is extremely powerful, and some of these doctrines may no longer be used to avoid divisive issues in the Bickelian sense but rather to structure preferred outcomes for certain Justices over time. See, e.g., Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2112 (2015) (describing how the Court uses doctrines like generative avoidance and its rewriting power to bring forth legal change); Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control and Related Matters*, 112 COLUM. L. REV. 665, 669 (2012) ("Current doctrinal developments reflect a powerful drive to ensure that . . . the Court possess[es] wide-ranging agenda-setting freedom to determine what issues are to be . . . decided."). See generally WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964) (discussing and evaluating the judge as "policy-maker").

68. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301. An unusual American example that resonates with later *ex post* remedial approaches used in Canada and South Africa is *Northern*



This Part, however, focuses on the Court's extraordinary *ex ante* toolkit, which has only expanded since Bickel first identified the passive virtues.<sup>69</sup> The Court now controls its own agenda through its discretionary power of certiorari and its ability to dismiss cases as improvidently granted (DIG), and it still retains the flexibility to avoid merits issues by using the justiciability doctrines that Bickel highlighted years ago. The U.S. Supreme Court has an unrivaled ability to decide "whether, when and how much to adjudicate,"<sup>70</sup> marking its powerful *ex ante* avoidance techniques as exceptional in a global context.<sup>71</sup> But the Court rarely acknowledges its use of these mechanisms for avoidance purposes, opting for silence rather than a candid statement of its uncertainty or unwillingness to insert itself into a heated political debate. And it is possible that this preference for opacity may limit the Court's influence in ongoing debate.

#### A. *Certiorari and DIGs*

An observer today might remark that, given its ability to choose its cases, the Court should have little need for other avoidance techniques. Certainly, the certiorari power gives the Court tremendous agenda-setting capacity. And the most obvious way to avoid adjudicating the merits of a difficult and contentious constitutional claim is to avoid hearing it in the first place.

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*Pipeline Construction Co. v. Marathon Pipe Line Co.* There, the Supreme Court found that 28 U.S.C. § 1471, which granted broad jurisdiction to the bankruptcy courts, was unconstitutional but nevertheless stayed its judgment for four months to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication," *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1981).

69. The Supreme Court in the 1950s had limited docket control. Since that time, the Court's discretionary docket has been expanded, *see* Supreme Court Case Selections Act, Pub. L. No. 100-352 (1988), and its mandatory appellate (non-original) jurisdiction has now largely disappeared, with a few small exceptions, *see, e.g.*, 42 U.S.C. § 2000a-5 (2012) (providing for, upon the request of the Attorney General, a three-judge panel to be created to hear a case of "general public importance" under the Civil Rights Act with the Supreme Court having mandatory appellate jurisdiction); 52 U.S.C. § 10101(g) (providing for a similar process, including mandatory appellate jurisdiction in the Supreme Court, in cases under the Voting Rights Act when the Attorney General requests a "finding of a pattern or practice of discrimination"); Michael E. Solimine, *Institutional Process, Agenda Setting, and the Development of Election Law on the Supreme Court*, 68 OHIO ST. L.J. 767, 768-69 (2007) (generally discussing the direct appeal process of election law cases after adjudication by a three-judge panel).

70. Bickel, *supra* note 1, at 79; *see also* Deutsch, *supra* note 18, at 204 (noting that these doctrines, "by deciding jurisdiction, simultaneously determine the timing and impact of judicial decisions").

71. *See infra* Parts III, IV.

It seems plausible that the Justices use their discretionary power in such a strategic manner.<sup>72</sup> As an historical matter, careful statistical study of certiorari votes based on the private papers of several of the Justices has shown that “strategic voting does take place on a routine basis, though in conjunction with identifiable nonstrategic factors.”<sup>73</sup> It is often difficult to determine when strategy is in play: as H.W. Perry wrote, “[A]ll of the justices act strategically on cert. at times, and much of the time none of them acts strategically.”<sup>74</sup>

Yet, even if strategizing at the filtering stage, a Justice might miscalculate the expected positions of her colleagues or overlook a complicating element in the case. Sometimes these miscues can lead the Court to DIG. The Court can DIG an action even after briefing and oral argument, and scholarship suggests that “the Court is more likely to DIG cases raising constitutional issues,” a result “consistent with the view that the Court might prefer to avoid resolving cases on constitutional grounds, or avoid such cases altogether.”<sup>75</sup>

The notable quality of both the denial of certiorari and the DIG is the Court’s practice of providing little explanation or justification for the action. The Court is decidedly not candid about its reasoning, and this lack of candor obscures the Court’s ultimate motivations. Commentators chide the Court for this obfuscation, claiming that it has

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72. This Article focuses on strategic behavior designed to *avoid* difficult decisions. Commentators have argued that the modern Supreme Court may also engage in strategic behavior at the agenda-setting stage to *seek out* issues that motivated Justices may wish to decide. Cf. Monaghan, *supra* note 67, at 679 (“The Court seeks as much freedom as possible over what is to be finally and authoritatively decided.”).

73. Michael E. Solimine & Rafael Gely, *The Supreme Court and the DIG: An Empirical and Institutional Analysis*, 2005 WIS. L. REV. 1421, 1455–56; see also Gregory A. Caldeira, John R. Wright & Christopher J.W. Zorn, *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORGS. 549, 550 (1999) (“[J]ustices engage in sophisticated voting, defined as looking forward to the decision on the merits and acting with that potential outcome in mind, and do so in a wide range of circumstances.”).

74. H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 198 (1991); see also Robert L. Boucher, Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824, 825 (1995) (“The extent to which Supreme Court justices actually are strategic or forward looking in their certiorari votes is not at all clear. No two scholars of individual voting strategies on certiorari have taken the same position.”).

75. Solimine & Gely, *supra* note 73, at 1436; *id.* at 1456–58 (noting “anecdotal accounts of DIGging used for seemingly strategic purposes,” and discussing the Court’s decision to DIG in *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955), as arguably driven by the Court’s desire “to avoid the political heat that it might generate were it to decide the case on the merits”).

a practical impact.<sup>76</sup> For example, when “lower-court judges don’t know why the Supreme Court does what it does, they sometimes divide sharply when forced to interpret the court’s nonpronouncements.”<sup>77</sup> This uncertainty among trained legal minds is reflected and amplified in the uncertain potential for *political* dialogue.

When the Court fails to explain its refusal to hear a case, its silence leaves political actors unable to predict what future action the Court expects or will accept from them. The Court’s December 2015 decision to deny certiorari in an Illinois case, *Friedman v. City of Highland Park*,<sup>78</sup> which upheld a ban on assault weapons, provides a useful example. *Friedman* followed two rulings, *District of Columbia v. Heller*<sup>79</sup> and *McDonald v. City of Chicago*,<sup>80</sup> in which the Court interpreted the Second Amendment to ensure the right “to keep and bear arms for lawful purposes, most notably for self-defense within the home.”<sup>81</sup> In his dissent from the denial in *Friedman*, Justice Thomas, joined by Justice Scalia, excoriated the Court for refusing “to review a decision that flouts two of our Second Amendment precedents,” particularly given the Court’s “willingness to summarily reverse courts that disregard our other constitutional decisions.”<sup>82</sup>

What are observers to make of this result? The denial of certiorari came a few days after the mass shooting in San Bernardino, California. Was this just a difficult and politically fraught time to take another Second Amendment case? Or did the other Justices in the *McDonald* plurality decide not to vote to hear the case because of principled uncertainty about the extent of Second Amendment constitutional protections? Should municipalities see this as an invitation to regulate guns or as a short reprieve before the Court again takes up the Second Amendment?<sup>83</sup> Is the Court inviting dialogue or not? The lack of transparency makes it impossible to tell.

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76. See, e.g., William Baude, *The Supreme Court’s Secret Decisions*, N.Y. TIMES, Feb. 3, 2015, at A23 (arguing for transparency in the Court’s orders docket, drawing on William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015)).

77. *Id.*

78. *Friedman v. City of Highland Park*, 136 S. Ct. 447 (2015).

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

80. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

81. *Id.* at 780.

82. *Friedman*, 136 S. Ct. at 449 (Thomas, J., dissenting from the denial of certiorari).

83. See Cristian Farias, *Supreme Court Rejects Major 2nd Amendment Case, and Justice Thomas Has a Fit*, HUFFINGTON POST (Dec. 7, 2015, 10:17 AM), [http://www.huffingtonpost.com/entry/major-secondamendmentcase\\_56659b12e4b079b2818f2118](http://www.huffingtonpost.com/entry/major-secondamendmentcase_56659b12e4b079b2818f2118) [https://perma.cc/YW9N-RVMQ] (discussing ways to interpret the denial of certiorari).

### B. *Standing*

Of course, repeatedly dodging an issue at the certiorari stage or failing to calendar a case that raises a pressing question of federal law may give the impression of weakness or fear. Thus, even with docket control, the Court may nevertheless feel pressure to hear cases that could present threats to its institutional security.<sup>84</sup> Bickel argued that justiciability doctrines, such as prudential standing, offer a means of neutralizing these threats.<sup>85</sup> He advocated a discretionary “Power to Decline the Exercise of Jurisdiction Which is Given,” exercised most often (though not always) by finding disputes nonjusticiable.<sup>86</sup>

Early uses of Bickelian jurisdictional dodges were notable for appearing strategic on their face. For example, in *Naim v. Naim*,<sup>87</sup> a case before it on mandatory jurisdiction, the Court avoided deciding whether a Virginia antimiscegenation statute violated the Fourteenth Amendment.<sup>88</sup> The direction of the Court’s jurisprudence on the issue was clear and the question of principle undisputed: the law was unconstitutional.<sup>89</sup> But if the Court overturned the law, the Justices feared risking social upheaval and threatening the enforcement of

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84. These avoidance tools—certiorari, DIGs, standing, ripeness, mootness—address *timing*: when can a particular claim be heard by the Court? A decision that a party bringing the claim lacks standing does not preclude a future, properly placed litigant from bringing the same underlying claim. The underlying issue is one for the Court to decide, but not between these parties, at this time. See Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1364 (1973). These *timing*-related virtues are distinct from another often-discussed passive virtue: the political question doctrine. This doctrine is (at least ostensibly) a determination by the Court that an issue has been constitutionally delegated to another branch for decision. Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1923–24 (2015). But when the Court has decided to cede an area to the political branches, it struggles to reclaim that ground, thus making recourse to the doctrine less likely. See Note, *Political Rights as Political Questions: The Paradox of Luther v. Borden*, 100 HARV. L. REV. 1125, 1134–35 (1987) (discussing the Republican Guarantee clause).

85. BICKEL, *supra* note 1, at 111–98.

86. *Id.* at 127.

87. *Naim v. Naim*, 90 S.E.2d 849 (Va. 1956) (per curiam), *appeal dismissed*, 350 U.S. 985 (1956).

88. *Id.* at 849–50; see Bickel, *supra* note 1, at 46 n.34; see also BICKEL, *supra* note 1, at 71, 174 (stating that the Court found no difficulty in allowing the constitutional question to remain unresolved).

89. Gunther, *supra* note 2, at 23–24; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

*Brown v. Board of Education*.<sup>90</sup> The Court dismissed the case for failing to present a federal question.<sup>91</sup>

Commentators easily recognized the subterfuge: as Gerald Gunther wrote, if, as *Brown* taught, “race is a forbidden criterion, then miscegenation laws are invalid, no matter what the reaction of Southern opinion might be.”<sup>92</sup> And Herbert Wechsler considered the Court’s dismissal of the appeal as “wholly without basis in the law.”<sup>93</sup> Because of the procedural posture of the case and the Court’s obvious choice to avoid the merits, *Naim* presented the trade-off between principle and expediency in its starkest form.<sup>94</sup>

In recent cases, whether the “passive virtues” are in use is a more complicated question. First, the Court might not know the “right” answer: “The laws involved might be moving toward unconstitutionality (as our notions of basic rights changed) and yet not be invalid.”<sup>95</sup> In fact, today’s cases more often present competing or contentious claims of principle to ideologically divided Justices.<sup>96</sup>

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90. See Klarman, *Windsor and Brown*, *supra* note 16, at 147–48 (stating that Justice Frankfurter was worried about “thwarting or seriously handicapping the enforcement of [*Brown*]” (alteration in original)).

91. The Supreme Court of Virginia upheld the application of an anti-miscegenation statute to annul the marriage between a white man and a Chinese woman, concluding in its opinion that nothing “in the Fourteenth Amendment to the Constitution, or in any other provision of that great document, any words or any intendment [would] prohibit the State from enacting legislation to preserve the racial integrity of its citizens.” *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955), *vacated*, 350 U.S. 891 (1955) (per curiam). The Supreme Court had mandatory jurisdiction over the case; it vacated and remanded the case for further development of the record, in a two-sentence per curiam decision. *Naim v. Naim*, 350 U.S. 891, 891 (1955) (per curiam). On remand, the Supreme Court of Virginia concluded that it had “no provision . . . by which this court may send the cause back to the Circuit Court with directions to re-open the cause so decided, gather additional evidence and render a new decision.” *Naim*, 90 S.E.2d at 850. The Virginia court adhered to its original decision, affirming the lower court’s holding that the marriage was void. *Id.* The Supreme Court refused to recall the mandate or set the case for oral argument, instead dismissing the case on the ground that the Supreme Court of Virginia’s response “leaves the case devoid of a properly presented federal question.” *Naim v. Naim*, 350 U.S. 985, 985 (1956).

92. Gunther, *supra* note 2, at 23–24.

93. Wechsler, *supra* note 89, at 34.

94. In another example, *DeFunis v. Odegaard*, the majority opinion dismissed a contentious question of affirmative action on mootness grounds in a short per curiam decision, with blistering dissents from Justices Douglas and Brennan accusing the court of seeking to “avoid” constitutional issues. See *DeFunis v. Odegaard*, 416 U.S. 312, 350 (1974) (Brennan, J., dissenting) (“[W]e should not transform principles of avoidance of constitutional decisions into devices for sidestepping resolution of difficult cases.”).

95. CALABRESI, *supra* note 56, at 16–17.

96. For example, in equal protection doctrine, is the neutral principle driving strict scrutiny one of anti-subordination or anti-classification?

There is little sense that the Court knows and agrees on a principled result and is simply avoiding its application.

And second, straightforward jurisdictional dodges of the type in *Naim* are rare. In fact, modern justiciability doctrines, such as standing, ripeness, and mootness, complicate the assessment of strategy: there is often some debate about whether a justiciability doctrine is being used to avoid contentious issues or whether it reflects substantive and principled content on its own terms. Even Bickel acknowledged that these doctrinal means of avoiding adjudication on the merits have “significance of their own” and some “intellectual content,” and thus “none is . . . always available at will.”<sup>97</sup> This merging of principle and prudence has partly obscured the use of the passive virtues in the years since Bickel wrote.

Standing, perhaps, provides the most powerful example. Though some historians argue that it was first constructed as a prudential mechanism,<sup>98</sup> standing also resonates with the case-and-controversy requirement of Article III and has been constitutionalized over time.<sup>99</sup> Furthermore, the development of standing doctrine has produced a large and intricate jurisprudence,<sup>100</sup> one that has grown sufficiently complex to allow for principled debates on its own terms, masking possible prudential considerations.<sup>101</sup>

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97. BICKEL, *supra* note 1, at 169–70. Gunther referred to Bickel as accepting only a “minimal intellectual content that must be respected.” Gunther, *supra* note 2, at 21.

98. Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875, 891 (2008).

99. See *Massachusetts v. EPA*, 549 U.S. 497, 516–17 (2007) (explaining the constitutional limitations the case-and-controversy requirement places on federal court jurisdiction and the interplay with the standing requirement); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992) (“Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.”). See generally GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, *CONSTITUTIONAL LAW* 82–83, 85–121 (7th ed. 2011).

100. A testament to the development of standing jurisprudence can be seen in the substantial attention and space it receives in law school casebooks. See generally ROBERT V. PERCIVAL, CHRISTOPHER H. SCHROEDER, ALAN S. MILLER & JAMES P. LEAPE, *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 111–122, 1139–1160 (7th ed. 2013); MARTIN H. REDISH, SUZANNA SHERRY & JAMES E. PFANDER, *FEDERAL COURTS: CASES, COMMENTS AND QUESTIONS* 18–66 (7th ed. 2011).

101. If complexity may serve to enhance legitimacy, there is nevertheless bound to be a point when complexity begins to undermine legitimacy. See generally CHARLES DICKENS, *BLEAK HOUSE* (1853).

*Hollingsworth v. Perry*<sup>102</sup> demonstrates this shift. The case presented the controversial issue of the constitutionality of same-sex marriage—a divisive topic roiling national politics and tailor-made for a prudential dodge. And not only was the possibility of using standing to avoid the merits issue available to the Court, but standing was in fact the ground on which the Court dismissed the case.<sup>103</sup> Nevertheless, and as commentators noted,<sup>104</sup> the Court’s opinion addressing the complexity of the standing issue obscured any strategic motivation.

At the outset of the litigation, advocates for same-sex marriage worried that it was premature to bring the issue before the Supreme Court, given the national divide on the subject.<sup>105</sup> The initial suit, *Perry v. Schwarzenegger*,<sup>106</sup> was filed in federal district court in 2009 in the face of considerable dissatisfaction from various interest groups.<sup>107</sup> Plaintiffs—same-sex couples who were denied marriage licenses—challenged the constitutionality of Proposition 8, which had amended the California Constitution to ensure only opposite-sex marriages were valid.<sup>108</sup>

When state officials declined to defend the law, the district court allowed the official sponsors of Proposition 8 to intervene in their stead.<sup>109</sup> Finding for the plaintiffs, the district court enjoined state and

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102. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

103. *Id.* at 2668.

104. *See, e.g.*, Klarman, Windsor and Brown, *supra* note 16, at 145; *infra* note 121.

105. *See* Deborah L. Rhode, *Why Lawyers Become Bad Leaders*, CHRON. HIGHER EDUC. (Sept. 16, 2013), <http://chronicle.com/article/Why-Lawyers-Become-Bad-Leaders/141555> [<https://perma.cc/S4PJ-5HCP>] (“Boies and Olson pursued a high-risk strategy against the advice of groups that had the greatest expertise and stake in the outcome.”).

106. *Perry v. Schwarzenegger (Perry I)*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff’d sub nom. Perry v. Brown (Perry IV)*, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

107. *See* Jesse McKinley, *Bush v. Gore Foes Join to Fight Gay Marriage Ban*, N.Y. TIMES (May 27, 2009), <http://www.nytimes.com/2009/05/28/us/28marriage.html> [<https://perma.cc/KN9R-NJMN>] (citing Matt Coles, the ACLU’s LGBT project director, as saying, “It’s not something that didn’t occur to us . . . Federal court? Wow. Never thought of that,” and noting that Lambda Legal’s marriage project director called the lawsuit “risky and premature”); Press Release, ACLU, *Why the Ballot Box and Not the Courts Should Be the Next Step on Marriage in California* (May 27, 2009), [https://www.aclu.org/files/pdfs/lgbt/ballot\\_box\\_20090527.pdf](https://www.aclu.org/files/pdfs/lgbt/ballot_box_20090527.pdf) [<https://perma.cc/AR4T-769F>] (noting “there is a lot to lose”); *see also* Press Release, ACLU, *Make Change, Not Lawsuits* (June 10, 2008), <https://www.aclu.org/make-change-not-lawsuits-joint-advisory?redirect=cpreirect/35584> [<https://perma.cc/RE44-77EX>] (“[I]t took 17 years to undo *Bowers v. Hardwick* . . . [a]nd that was fast for the Supreme Court.”).

108. *Perry I*, 704 F. Supp. 2d at 927–28. The marriages of approximately 18,000 couples who married prior to Proposition 8 remained valid.

109. *Perry IV*, 671 F.3d at 1068.

local officers from enforcing the law, and the intervenors appealed.<sup>110</sup> After introducing the question of standing and certifying a question of state law to the California Supreme Court, the Ninth Circuit ruled that the intervenors' ability to stand in place of the state officials to defend the initiative's constitutionality was sufficient to confer Article III standing and allow them to prosecute an appeal.<sup>111</sup> The Ninth Circuit then affirmed the district court's ruling striking down Proposition 8, thus setting the stage for Supreme Court review.

As the parties were briefing the case at the Supreme Court, scholars noted the tensions it presented. At a symposium in October 2012, William Eskridge said “[u]ntil there is greater consensus, the Court ought to avoid any broad pronouncements on the merits of plaintiffs’ claim that denying marriage equality to lesbian and gay couples violates the Fourteenth Amendment.”<sup>112</sup> He suggested that the Court use the passive virtues and “dismiss the appeal as nonjusticiable: if the supporters of Proposition 8 have no constitutional standing to pursue the appeal to the Ninth Circuit or beyond, the Supreme Court could avoid any statement on the merits, which would be prudent.”<sup>113</sup>

By the time the case was argued, “escap[ing] from the exercise of jurisdiction” seemed, to some, increasingly attractive.<sup>114</sup> During oral argument, Justice Kennedy expressed his view that the “issue was in flux.” Describing the oral argument, Orin Kerr suggested Kennedy may have been “arguing that the Court shouldn’t get involved in the sense that Alex Bickel called the passive virtues—declining to rule on the issue while societal views are not yet resolved.”<sup>115</sup> Orin Kerr also sensed that the Justices were weighing whether to use “the passive virtues . . . [to wait for] ‘the political institutions [to] make their decision before the Court is required to pass judgment on its validity.’”<sup>116</sup> And during the months between oral argument and the

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110. *Id.* at 1069.

111. *Id.* at 1074.

112. William N. Eskridge, Jr., *Marriage Equality: An Idea Whose Time Is Coming . . .*, 37 N.Y.U. REV. L. & SOC. CHANGE 245, 245 (2013).

113. *Id.* at 247.

114. Bickel, *supra* note 1, at 48.

115. Orin Kerr, *The Timing of the Same-Sex Marriage Case and Bickel's Passive Virtues*, VOLOKH CONSPIRACY (Mar. 27, 2013, 12:56 AM), <http://volokh.com/2013/03/27/the-timing-of-the-same-sex-marriage-case-and-bickels-passive-virtues> [<https://perma.cc/53RD-KNLJ>].

116. *Id.* (quoting Bickel, *supra* note 1, at 60).



decision, the blogosphere was alight with references to the passive virtues.<sup>117</sup>

The circumstances surrounding the case presented a strong argument for avoiding adjudication: holding Proposition 8 constitutional would have served to legitimate a questionable law in the context of ongoing social change, with the possibility of stymying or retarding political debate on the issue. But finding Proposition 8 unconstitutional and thereby creating a nationalized right to same-sex marriage—whether on due process or equal protection grounds—could have thrust the Court into a polarized debate, possibly engendering backlash and weakening the Court.<sup>118</sup>

The Supreme Court ultimately decided that the proponents of Proposition 8 had no direct stake in the case's outcome and thus lacked Article III standing.<sup>119</sup> But the Court's doctrinal debate left only a narrow opening for claims of strategic manipulation. The majority and dissent agreed that standing could not be based on the initiative proponents' individual interests in the legislation. But they diverged on whether standing could be based on a representative interest—whether the proponents could act as representatives of the state to defend a state referendum. The majority concluded that they could not.

The issue was novel—and given that “the Court had never before ruled on this specific standing question, one cannot casually disparage the decision in the same way that commentators assailed the Court's dodge of the miscegenation issue in the 1950s.”<sup>120</sup> Indeed, scholarly commentary in this instance has been mixed.<sup>121</sup> And, more importantly,

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117. See, e.g., Michael C. Dorf, *A Federal Judge Strikes Down California's Proposition 8: Will the Ruling Ultimately Advance or Retard Civil Rights for LGBT Americans?*, FINDLAW (Aug. 9, 2010), <http://writ.news.findlaw.com/dorf/20100809.html> [<https://perma.cc/KP34-63QU>]; Michael C. Dorf, “*All Deliberate Speed*” for Same-Sex Marriage?, DORF ON LAW (June 16, 2013), <http://www.dorfonlaw.org/2013/06/all-deliberate-speed-for-same-sex.html> [<https://perma.cc/5LDS-8VPP>]; Michael C. Dorf, *Passive Virtues Versus Underenforcement in DOMA and Prop 8 Cases*, DORF ON LAW (Mar. 18, 2013), <http://www.dorfonlaw.org/2013/03/passive-virtues-versus-underenforcement.html> [<https://perma.cc/NX5W-FFYU>]; Meredith Harbach, *Perry & the Passive Virtues: A Postscript*, CONCURRING OPINIONS (Sept. 30, 2010, 7:40 PM), <http://concurringopinions.com/archives/2010/09/perry-the-passive-virtues-a-postscript.html> [<https://perma.cc/4FGB>]; Kerr, *supra* note 115.

118. Of course, whether backlash would have resulted, or whether it would have been a serious threat to the Court, are key questions which go to the issue of how courts should *expend* the legitimacy they accrue.

119. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).

120. Klarman, *Windsor and Brown*, *supra* note 16, at 145.

121. Compare David B. Cruz, “*Amorphous Federalism*” and the Supreme Court's Marriage Cases, 47 LOY. L. REV. 393, 411–17 (2010) (defending the majority opinion in *Perry*), and Suzanne

the Justices themselves seemed to struggle with the question of agency, and both the majority and dissent raised a litany of cases to support their positions. Furthermore, the voting breakdown did not present an obviously ideological story: Justices Roberts, Scalia, Kagan, Breyer, and Ginsburg formed the majority denying standing, with Justices Kennedy, Sotomayor, Alito, and Thomas in dissent.<sup>122</sup> In other words, each side's opinion appeared principled, though individual Justices may have acted strategically in reaching their individual voting decisions.

The dissent suggested that the majority was acting to avoid “entering a realm of controversy where the legal community and society at large are still formulating ideas and approaches to a most difficult subject.”<sup>123</sup> But beyond the dissent's, there were few other cries of strategic decisionmaking. There could, of course, be reasons for this paucity of complaints other than the complexity of the standing doctrine. The Court's decision created a geographically confined middle ground that may have pleased many. It neither recognized a national right to same-sex marriage nor denied that such a right could exist. And it left undisturbed the right in California, based on the district court's judgment that Proposition 8 was unconstitutional.<sup>124</sup> But even those who approved of the ultimate outcome had no reason to deny or ignore the dodge that enabled it—unless they, too, viewed the standing decision as a close question of law. It seems plausible, therefore, to accept the Court's decision in *Perry* as a sincere holding on the standing issue.

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B. Goldberg, *Article III Double-Dipping: Proposition 8's Sponsors, BLAG, and the Government's Interest*, 161 U. PA. L. REV. ONLINE 164, 166 (2013), <https://www.pennlawreview.com/online/161-U-Pa-L-Rev-Online-164.pdf> [<https://perma.cc/53QH-AK7W>] (arguing against standing for the proponents), and Andrew Kim, Note, “*Standing*” in the Way of Equality? *The Myth of Proponent Standing and the Jurisdictional Error in Perry v. Brown*, 61 AM. U. L. REV. 1867, 1868 (2012) (same), with Ryan W. Scott, *Standing to Appeal and Executive Non-Defense of Federal Law After the Marriage Cases*, 89 IND. L.J. 67, 68 (2014) (suggesting deviations from precedent by the majority in *Perry*). Some scholarly analysis is wholly unconcerned with the underlying substantive issue of same-sex marriage and more focused on the federalism implications of the standing holding and its future effect on state initiatives. See Cruz, *supra*, at 411–17 (discussing federalism implications). See generally Scott L. Kafker & David A. Russcol, *Standing at a Constitutional Divide: Redefining State and Federal Requirements for Initiatives After Hollingsworth v. Perry*, 71 WASH. & LEE L. REV. 229 (2014) (discussing initiatives).

122. *Perry*, 133 S. Ct. at 2658.

123. *Id.* at 2674 (Kennedy, J., dissenting).

124. And the Court's simultaneous decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), provided an avenue to allow the national right to unfold over time.

There is a benefit to the Court in the thickening of these justiciability doctrines: the increased opacity of the use of the passive virtues. In their initial responses to Bickel, critics of his pragmatic approach questioned the Court's ability to successfully hide its intentions. Gunther concluded that the average citizen would see little difference between the use of the passive virtues to avoid an issue (while leaving the challenged statute in place) and an adjudication on the merits finding the statute constitutional.<sup>125</sup> And, more critically, "for the informed court watcher or legal academic, the use of the 'passive virtues' may detract from the Court's perceived legitimacy," as he or she would recognize the dissembling.<sup>126</sup> In other words, much of the public would not appreciate the subtle distinction, and those who did would understand the passive virtues to be strategic behavior, "undermin[ing] the legitimacy of judicial institutions by sending a message to the public that courts are not impartial institutions."<sup>127</sup> But, and as *Perry* suggests, as justiciability doctrines become more complex, average citizens and informed court watchers alike may find the Court's decisions more principled (or more impenetrable).<sup>128</sup>

Standing's evolution does raise other questions. Standing has always presented the tension between safeguarding judicial power by limiting it to private rights and abdicating judicial responsibility for protecting public rights in a counter-majoritarian context.<sup>129</sup> And the doctrine is being more rigidly constitutionalized, with injury-in-fact, causation, and redressability as Article III requirements,<sup>130</sup> placing

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125. Gunther, *supra* note 2, at 8.

126. Hellman, *supra* note 27, at 1144 n.165.

127. Radmilovic, *supra* note 26, at 43 (emphasis omitted) (citing JEFFREY K. STATON, JUDICIAL POWER AND STRATEGIC COMMUNICATION IN MEXICO (2010)).

128. The average citizen may be more sophisticated than the average citizen sixty years ago, see Jeffery J. Mondak & Shannon Ishiyama Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 J. POL. 1114, 1121 (1997) ("[R]ecent work suggests that even decisions concerning lower salience issues attract public attention for at least a limited period of time."), as media attention to the Court has grown more nuanced and detailed in the past few decades. Note, for example, the explanation of the *Hollingsworth v. Perry* case provided by law professor Eric Segall in the *L.A. Times*. Eric Segall, Opinion, *The Prop. 8 Ruling, in Lay Person's Terms*, L.A. TIMES (June 27, 2013), <http://articles.latimes.com/2013/jun/27/opinion/la-oe-segall-prop8-explainer-20130627> [<https://perma.cc/UP25-Y6D4>].

129. See generally Martin H. Redish, *The Passive Virtues, The Counter-Majoritarian Principle, and the "Judicial-Political" Model of Constitutional Adjudication*, 22 CONN. L. REV. 647, 676 (1990) (identifying this tension and arguing that courts should adhere to "the 'private rights' model of constitutional adjudication and the justiciability doctrines which flow from it" only "to the extent they do not significantly undermine performance of the judiciary's political role of serving as an effective counter-majoritarian constitutional check on the majoritarian branches").

130. See *Allen v. Wright*, 468 U.S. 737, 751 (1984).

prudential considerations in jeopardy.<sup>131</sup> The complexity of the doctrine may obscure the Court's intentions, but its constitutionalization threatens the flexibility that served as the core benefit of this passive virtue.<sup>132</sup>

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Flexible agenda-setting tools and prudential considerations allow the Court to avoid adjudicating divisive or contentious issues—perhaps because the issues would be better solved by the political process. Bickel certainly hoped that the Court would not “resolve issues on which the political processes are in deadlock” but would “do what it can to break that deadlock, so that the political institutions may make their decision before the Court is required to pass judgment on its validity.”<sup>133</sup>

It is not clear that the passive virtues allow for this level of dialogue. There are costs to meaningful engagement in silence and dissembling. But there may be institutional benefits as well. After all, the Supreme Court has developed into the world's most powerful court, rarely limited by doctrine from adjudicating tough issues should it choose to do so. As *Bush v. Gore*<sup>134</sup> makes clear, the Supreme Court's effective authority, developed over many decades and often against a background of strategic opacity, is robust.

### III. *IN MEDIO*: DOCTRINAL INNOVATION IN EUROPE

As with the *ex ante* avoidance techniques addressed above, avoidance *in medio* is also designed to prevent a particular merits issue from being addressed without foreclosing that issue from arising in the

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131. See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387–90 (2014) (reframing the “zone of interests” prudential standing inquiry as a merits inquiry, and casting doubt on the framing of the other types of prudential standing: prohibitions on third-party standing and generalized grievances); see also Stearns, *supra* note 98, at 887 (“[T]he earlier doctrine developed in the New Deal Court comprised largely prudential constraints on judicial powers that Congress had the authority to strengthen or relax as it saw fit.”); Fred O. Smith, Jr., *Undemocratic Restraint* 64 (June 29, 2016) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2802781&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2802781&download=yes) [https://perma.cc/G5M4-23TH] (“By converting doctrines of self-restraint into constitutional barriers . . . this area of law is on an imprudent path.”).

132. Note that standing also acts as a limitation on lower courts, potentially stifling analysis and debate that could be useful to dialogic conversation on the underlying merits question.

133. Bickel, *supra* note 1, at 60.

134. *Bush v. Gore*, 531 U.S. 98 (2000).

future. *In medio* avoidance similarly serves to delay a decision on a contentious issue ostensibly to allow for societal norm evolution or for political dialogue and legislative resolution of the question. But, in contrast to the *ex ante* approaches, *in medio* avoidance occurs during the case itself, after the merits issues have been aired. The opportunity exists, therefore, for a court to opine or comment on the merits issue, weighing in on an existing debate without deciding the legal question.

This Part examines the *in medio* doctrinal approach created by the European Court of Human Rights (ECtHR): the margin of appreciation. It first explains the rights-protection system in which the ECtHR operates, noting that other mechanisms of avoidance—*ex ante* agenda setting and *ex post* remedial options—are unavailable to that court. It then turns to the margin of appreciation doctrine, outlining its use and function as an avoidance tool. The margin of appreciation raises questions about candor, the effectiveness of a dialogic solution, and the effective power of the ECtHR itself.

#### A. *The European Convention System*

In the aftermath of the Second World War, leaders from ten European countries created a new regional organization called the Council of Europe,<sup>135</sup> with a primary goal of composing a human rights charter. The result was the European Convention on Human Rights and Fundamental Freedoms (Convention),<sup>136</sup> which entered into force in 1953.<sup>137</sup> Article 1 of the Convention requires that each member state secure to everyone within its jurisdiction a set of defined rights and freedoms.<sup>138</sup> These rights are mainly civil and political rights: rights

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135. The original ten countries were Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden, and the United Kingdom.

136. The Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Convention].

137. The international law origins of the Convention system present a number of complicating factors, such as the existence of reservations to the treaty, see YUTAKA ARAI, EDWIN BLEICHRODT, CEES FLINTERMAN, AALT WILLEM HERINGA, JEROEN SCHOKKENBROEK, PIETER VAN DIJK, FRIED VAN HOOF, ARIEN VAN RIJN, BEN VERMEULEN, MARC VIERING & LEO ZWAAK, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1101–15 (Pieter van Dijk et al. eds., 4th ed. 2006), the monist/dualist nature of the application of the treaty within the member states, see *id.* at 26–28, and the right of complaint of states against other states for violating the Convention, see *id.* at 47–51.

138. Convention, *supra* note 136, art. 1. The Convention has been interpreted to require “state action.” State action can include state inaction, as “in addition to the primarily negative undertaking of a State to abstain from interference in Convention guarantees, ‘there may be positive obligations inherent’ in such guarantees.” Verein gegen Tierfabriken Schweiz v. Switzerland (No. 2), 2009-IV Eur. Ct. H.R. 57, 93 para. 79 (quoting Marckx v. Belgium, 31 Eur.

considered “essential elements of the foundation of European democracies.”<sup>139</sup>

The Convention creates a nuanced rights architecture,<sup>140</sup> which incorporates various possibilities for derogation and limitation by member states.<sup>141</sup> In the key “Personal Freedoms” articles,<sup>142</sup> the first paragraph of each provision guarantees a broad substantive right—for example, the right to privacy—often formulated in what have been described as “vague and general notions,” meant to apply in varied situations.<sup>143</sup> The second paragraph, however, provides a limitation clause. In general, these clauses state that interference with the exercise of the relevant right will only be permitted if it is in accordance with law and necessary in a democratic society in furtherance of a legitimate interest. The difficult definitional work, and ultimately the scope of the protected right, is determined through the “extra-judicial rules or values” contained in the limitation clauses.<sup>144</sup>

Alec Stone Sweet describes the Convention system as one of “constitutional justice,” not only due to its entrenchment of

Ct. H.R. (ser. A) at 14 para. 31 (1979)). Only when the member state “can be held responsible for the violation” can an individual challenge an action by another individual as a violation of Convention rights. ARAI ET AL., *supra* note 137, at 29. The applicability of the Convention to interactions between private parties, or *Drittwirkung*, is much debated, though in 2001 the European Court of Human Rights (ECtHR) concluded that it did not “consider it desirable, let alone necessary, to elaborate a general theory concerning the extent to which the Convention guarantees should be extended to relations between private individuals *inter se*.” *Verein gegen Tierfabriken v. Switzerland*, 2001-VI Eur. Ct. H.R. 243, 259 para. 46.

139. ARAI ET AL., *supra* note 137, at 5. Social rights have been incorporated through subsequent protocols, though for a variety of reasons they are rarely considered justiciable.

140. Frederick Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, in EUROPEAN AND US CONSTITUTIONALISM 51, 51 (Georg Nolte ed., 2005).

141. Article 15 provides a general right of derogation “to the extent strictly required by the exigencies of the situation” “[i]n time of war or other public emergency threatening the life of the nation.” Convention, *supra* note 136, art. 15. But derogation is not permitted under Articles 2 (right to life), 3 (freedom from torture), 4 (freedom from slavery), and 7 (no ex post facto criminal liability). *See id.* arts. 2, 3, 4, 7.

142. These articles are Articles 6 and 8 through 11 of the Convention, *supra* note 136 (protecting the right to a public trial, privacy, religion, expression, and association), Articles 1 and 3 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262 (protecting property and free elections), and Article 2 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 16, 1963, E.T.S. No. 46 (protecting free movement).

143. Eva Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 56 HEIDELBERG J. INT’L L. 240, 295 (1996).

144. *Id.* (discussing rights as “undeterminate expressions” (citing R. Sapienza, *Sul Margine d’Apprezzamento Statale nel Sistema Della Convenzione Europea dei Diritti dell’Uomo*, 74 RIVISTA DI DIRITTO INTERNAZIONALE 571, 571–614 (1991))).

fundamental rights, but also for its provision of individual access to the ECtHR for protection of those rights.<sup>145</sup> In fact, the Convention “broke new ground as the first treaty granting individuals a right of petition”<sup>146</sup>—an innovation in international agreements that suggests the Convention’s quasi-constitutional status.<sup>147</sup> The ECtHR itself has treated the Convention as having a constitutional aspect,<sup>148</sup> and the

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145. Alec Stone Sweet, *On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court 2* (Yale Faculty Scholarship Series, Paper No. 71, 2009), [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1070&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1070&context=fss_papers) [<https://perma.cc/AZW8-DMSQ>]. As initially conceived, the Convention system was ensured and maintained by the European Commission of Human Rights as well as by the European Court of Human Rights (ECtHR). The Commission decided on the admissibility of an individual complaint and reviewed the merits in the first instance. In most cases, the ECtHR would have the final merits determination. The Commission, as early as 1961, explained that “the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.” *Austria v. Italy*, App. No. 788/60, 4 Y.B. Eur. Conv. on H.R. 116, 140 (Eur. Comm’n on H.R.). In 1998, under Protocol 11, the Commission and original structure of the ECtHR were replaced by the current court, composed of Committees, Chambers, and the Grand Chamber. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 11, 1994, E.T.S. No. 155 [hereinafter Protocol 11].

146. JONAS CHRISTOFFERSEN, *FAIR BALANCE: PROPORTIONALITY, SUBSIDIARITY AND PRIMARITY IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS 14* (2009). The process now is structured by Protocol 11, which states:

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Protocol 11, *supra* note 145, art. 34. Note that in 1998, Protocol 11 eliminated the “opt-out” of compulsory jurisdiction of the court, “remov[ing] any formal obstacle to access to the Court for individuals, beyond the requirement that petitioners exhaust available domestic remedies.” Helen Keller & Alec Stone Sweet, *Assessing the Impact of the ECHR on National Legal Systems*, in *A EUROPE OF RIGHTS 677, 689* (Helen Keller & Alec Stone Sweet eds., 2008).

147. See ARAIET AL., *supra* note 137, at 51 (“It has removed the principal limitation by which the position of the individual in international law was traditionally characterised.”). On the Convention’s quasi-constitutional status, see Sir Humphrey Waldock, *The Effectiveness of the System Set Up by the European Convention on Human Rights*, 1 HUM. RTS. L.J. 1, 2 (1980) (a former judge of the ECtHR recognizing the dual nature of the Convention, in discussing “whether we are to regard the Convention primarily as a treaty or as a form of ‘constitution’”). See also Rudolf Bernhardt, *Human Rights and Judicial Review: The European Court of Human Rights*, in *HUMAN RIGHTS AND JUDICIAL REVIEW 297, 302* (David M. Beatty ed., 1994) (“Both the treaty character and the ‘constitutional’ aspect of the Convention should be seen together, but in the course of time the constitutional aspect has become predominant.”). Bernhardt was a judge at the ECtHR when he wrote this article, and subsequently became the president of the court.

148. As early as 1978, the ECtHR explained that “[u]nlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective

court performs “many of the same functions that powerful national constitutional courts do, using similar techniques, with broadly similar effects.”<sup>149</sup>

As a de facto constitutional court in charge of a quasi-constitutional system of rights protection,<sup>150</sup> the ECtHR faces considerable institutional challenges.<sup>151</sup> There are now forty-seven countries that are signatories to the Convention, and with mandatory jurisdiction,<sup>152</sup> the ECtHR has a tremendous caseload. It had 64,850 pending cases as of December 31, 2015.<sup>153</sup> Rules of admissibility have tightened over time, but so long as an applicant has exhausted her domestic remedies, access to the court remains broad.<sup>154</sup> In adjudicating disputes, the court has an extremely difficult task: it must “render retrospective justice in individual cases, . . . construct

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obligations which, in the words of the Preamble benefit from a ‘collective enforcement.’” *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 90 (1978); see *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) at 27 (1995) (describing the Convention as a “constitutional instrument of European public order”). Steven Greer describes the Convention as a constitutional order in the sphere of human rights, and suggests that the Convention addresses:

[T]hree quintessentially constitutional questions: the ‘normative question’ of *what* a given Convention right means including its relationship with other rights and with collective interests, the ‘institutional question’ of *which* institutions (judicial/non-judicial: national/European) should be responsible for providing the answer, and the ‘adjudicative question’ of *how*, i.e. by which judicial method, the normative question should be addressed.

Steven Greer, *Constitutionalizing Adjudication Under the European Convention on Human Rights*, 23 OXFORD J. LEGAL STUD. 405, 407 (2003).

149. Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 GLOBAL CONSTITUTIONALISM 53, 77 (2012).

150. See Lupu & Voeten, *supra* note 24, at 415.

151. See Kai P. Purnhagen & Emanuele Rebasti, *Judge’s Empire? Interview with Rudolf Bernhardt*, EUR. J. LEG. STUD., Autumn/Winter 2007, at 13, 16 (“[T]he general danger that international courts are still dependant [sic] on the co-operation of national governments and if an international court is pronouncing judgments which seem to be unacceptable to governments, it might well be that they are no longer willing to accept or to follow their respective judgments.”). And note that the *travaux préparatoires* indicate considerable debate about whether to create a court at all. Danny Nicol, *Original Intent and the European Convention on Human Rights*, 2005 PUB. L. 152, 164–67 (2005).

152. Protocol 14, which entered into force in June 2010, has relaxed the strictures somewhat. See CONVENTION Protocol 14. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 13, 2004, C.E.T.S No. 194.

153. EUR. COURT OF HUMAN RIGHTS, ANNUAL REPORT 2015, at 188 (2016), [https://www.echr.coe.int/Documents/Annual\\_report\\_2015\\_ENG.pdf](https://www.echr.coe.int/Documents/Annual_report_2015_ENG.pdf) [<https://perma.cc/2FST5RBM>]. For a discussion of the ECtHR’s processes, see generally Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 564–70 (2015).

154. See EUR. COURT OF HUMAN RIGHTS, PRACTICAL GUIDE ON ADMISSIBILITY CRITERIA 22–29 (2014), [https://www.echr.coe.int/Documents/Admissibility\\_guide\\_ENG.pdf](https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf) [<https://perma.cc/5HFQ-DMG4>].



Convention rights and . . . ensure their general effectiveness across Europe, prospectively,” with “command and control capacities” that are “weak, at best.”<sup>155</sup> The ECtHR lacks authority to “invalidate national legal norms judged to be incompatible with the Convention” directly,<sup>156</sup> and the Convention system lacks a powerful supranational legislature to aid the court in its efforts.<sup>157</sup>

The ECtHR’s toolkit is therefore limited to its moral authority<sup>158</sup> and its ability to order compensatory damages and other remedies.<sup>159</sup> The Committee of Ministers of the Council of Europe also encourages, and occasionally obliges, member states to engage with the court’s decisions.<sup>160</sup> At bottom, the ECtHR is reliant on the “good will and

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155. Alec Stone Sweet & Helen Keller, *The Reception of the ECHR in National Legal Orders*, in *A EUROPE OF RIGHTS* 3, 14 (Helen Keller & Alec Stone Sweet eds., 2008).

156. *Id.* at 13.

157. The Parliamentary Assembly of the Council of Europe (PACE) has no power to pass binding laws but can engage in dialogue with the governments of the member states and issue recommendations. See Føllesdal, *supra* note 21, at 344 (“[T]here are no identifiable legislative or executive bodies that serve to check and balance the international judiciary—though there are ‘multi-level’ checks and balances of contested significance.”).

158. Cf. Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights*, 15 EMORY INT’L L. REV. 391, 465 (2001) (noting that the member states “have accepted the [ECtHR] and its judgments as legitimate, binding and enforceable”).

159. Yuval Shany argues that “[o]nce the European Court started indicating more intrusive remedies, however—including individual, nonmonetary remedies (such as orders to reopen faulty legal proceedings) and general measures (such as requiring states to adopt broad legal or policy reforms), compliance rates significantly declined.” Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT’L L. 225, 263 (2012) (citation omitted). In addition, the “Council of Europe reports on execution suggest . . . that the high rates of compliance with compensation orders did not necessarily translate into good levels of primary norm compliance.” *Id.* at 264. A new remedial approach has been codified in Rule 61 of the court, EUR. COURT OF HUMAN RIGHTS, RULES OF THE COURT, R. 61 (2016), [http://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf) [<https://perma.cc/5FRF-VZJP>]. The “pilot judgment procedure” seeks to reduce the caseload of the ECtHR by identifying similar cases resulting from the same national problem, grouping them together, and then providing a pilot judgment which can be used to resolve the national problem rather than a case-by-case adjudication. See *id.* This aggregation mechanism allows the ECtHR “to identify the dysfunction under national law that is at the root of [a] violation; and to give clear indications to the Government as to how it can eliminate this dysfunction.” See EUR. COURT OF HUMAN RIGHTS, PILOT JUDGMENT PROCEDURE 1, [http://www.echr.coe.int/Documents/Pilot\\_judgment\\_procedure\\_ENG.pdf](http://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf) [<https://perma.cc/557Y-UPCZ>].

160. See, e.g., Committee of Ministers to Member States on the Verification of the Compatibility of Draft Laws, Existing Laws, and Administrative Practice with the Standards Laid Down in the European Convention on Human Rights, Recommendation CM/Rec (2004) 5 (adopted May 12, 2004), [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016805dd194](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805dd194) [<https://perma.cc/PDZ7-W9BZ>]; Committee of Ministers to Member States on the Publication and Dissemination in the Member States of the Text of the European Convention on Human Rights and of the Case-Law of the European Court of Human Rights, Recommendation

good faith of most States” to ensure that its rulings are carried into effect.<sup>161</sup> Notwithstanding this weak enforcement regime, compliance is nevertheless accepted as of critical importance for the institution’s legitimacy and effectiveness.<sup>162</sup>

*B. The Margin of Appreciation*

As the description of the Convention’s rights architecture indicates, the ECtHR is tasked with maneuvering between the aspirations of the Convention and the actualities of its member states.<sup>163</sup> It must “thread the needle between a decision that would be unprincipled . . . and one that would be sharply divisive” or, in the context of the Convention system, one that could be ignored.<sup>164</sup> The ECtHR has had to rely on its creativity in its “attempt to strike a balance between national views of human rights and the uniform

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CM/Rec (2008) 13 (adopted Dec. 18, 2002), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168063ca51> [<https://perma.cc/2BYP-S5FX>].

161. Stone Sweet & Keller, *supra* note 155, at 14; *see also* Bernhardt, *supra* note 147, at 303 (“[T]he effective application of the Convention and the smooth working of the supervisory machinery presuppose and require a spirit of cooperation and a considerable homogeneity among the participating States.”); R. St. J. Macdonald, *The Margin of Appreciation*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 83, 123 (R. St. J. Macdonald, F. Matscher & H. Petzold eds., 1993) (describing the court as resting “on the fragile foundations of the consent of the Contracting Parties”).

162. *See* Courtney Hillebrecht, *Rethinking Compliance: The Challenges and Prospects of Measuring Compliance with International Human Rights Tribunals*, 1 *J. HUM. RTS. PRAC.* 362, 362 (2009). For a further discussion of the challenges of measuring compliance, on which there is some dispute, *see* Sharanbir Grewal & Erik Voeten, *The Politics of Implementing European Court of Human Rights Judgements 1–2* (Jan. 19, 2012) (unpublished manuscript), <http://ssrn.com/abstract=1988258> [<https://perma.cc/GLL6-9HKR>] (noting differences in perceived compliance rates).

163. *See* Waldock, *supra* note 147, at 9 (describing a need “to reconcile the effective operation of the Convention with the sovereign powers and responsibilities of governments in a democracy”); *cf.* *Belgian Linguistic Case* (No. 2), 6 *Eur. Ct. H.R.* (ser. A) at 34 (1968) (“The Court cannot disregard those legal and factual features which characterise the life of the society in the State which . . . has to answer for the measure in dispute.”).

164. Eskridge, Jr., *supra* note 112, at 246 (describing the challenge faced by the U.S. Supreme Court in the same-sex marriage litigation); *see also* ELIAS KASTANAS, *UNITÉ ET DIVERSITÉ: NOTIONS AUTONOMES ET MARGE D’APPRÉCIATION DES ETATS DANS LA JURISPRUDENCE DE LA COUR EUROPÉENNE DES DROITS DE L’HOMME* 15 (1996) (“It is a Gordian knot, which the traditional methods of interpretation cannot slice.”) (author’s translation).

application of Convention values,”<sup>165</sup> and it has created a doctrine to do so: the “margin of appreciation.”<sup>166</sup>

The term “margin of appreciation” is found neither in the text of the Convention nor in the *travaux préparatoires*.<sup>167</sup> Instead, its origins lie in the French *marge d’appréciation*, an administrative law concept of discretion that is shared by many civil law jurisdictions.<sup>168</sup> The doctrine gives the member states “the freedom to act; [providing] maneuvering, breathing or ‘elbow’ room.”<sup>169</sup> This space allows for permissible variation in the application of the Convention.

Initially, the ECtHR turned to the margin concept in the face of emergency derogations from Convention rights by member states, permitted under Article 15.<sup>170</sup> A concept first deployed to navigate public emergencies—situations in which courts often are at their

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165. See YUTAKA ARAI-TAKAHASHI, *THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR* 3 (2002).

166. See *id.*; see also Donoho, *supra* note 158, at 455 (describing the margin as designed “to accommodate variations among state parties in their implementation of rights, while at the same time preserving the core ‘European’ values they reflect”). Although the Commission’s analysis has been influential in the development of the margin of appreciation doctrine, I intend to focus on the case law and development of doctrine by the ECtHR. The Commission’s case law has in large part “been incorporated or replaced by case law of the Court.” ARAI ET AL., *supra* note 137, at v; see Thomas A. O’Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, 4 HUMAN RIGHTS Q. 474, 475–76 (1982) (“[W]hile the Commission publishes an opinion as to the law of the Convention, it is the Court that is empowered to interpret and apply the Convention. The Court is not in any way bound by the opinion of the Commission; and its interpretation of the Convention has differed often from that of the Commission.” (footnotes omitted)); see also Lord Lester of Herne Hill, *Universality Versus Subsidiarity: A Reply*, 1 EUR. HUMAN RIGHTS L. REV. 73, 79–81 (1998) (providing an example of when the court and the Commission differed in their evaluations of a restriction on free speech).

167. See HOWARD CHARLES YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* 14 (1996).

168. ARAI-TAKAHASHI, *supra* note 165, at 2. In Germany the concept is termed *Ermessensspielraum*. *Id.* at 3. The French term may also be translated as “margin of assessment/appraisal/estimation.” STEVEN GREER, *THE MARGIN OF APPRECIATION: INTERPRETATION AND DISCRETION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 5 (2000).

169. YOUROW, *supra* note 167, at 13.

170. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 71 (1978) (detailing alleged violations of the Convention by the U.K. in Northern Ireland); *Lawless v. Ireland* (No. 3), 1 Eur. Ct. H.R. (ser. A) at 3 (1961) (allegation that a U.K. detention due to suspected involvement with the IRA violated the Convention); *Greece v. United Kingdom*, App. No. 176/56, 19581959 Y.B. Eur. Conv. on H.R. 174, 174–79 (Eur. Comm’n on H.R.) (detailing alleged violations of the Convention by the U.K. in Cyprus).

weakest<sup>171</sup>—the margin of appreciation soon expanded beyond the Article 15 context.

The ECtHR relied on the doctrine in one of its earliest Personal Freedoms cases, *Handyside v. United Kingdom*,<sup>172</sup> in 1976. Richard Handyside, a U.K. publisher, was convicted under the Obscene Publications Acts of 1959 and 1964 for the publication of *The Little Red Schoolbook*, which was deemed likely to deprave and corrupt its readers.<sup>173</sup> Before the ECtHR, Handyside alleged a violation of Article 10 of the Convention, protecting his freedom of expression.<sup>174</sup> In response, the United Kingdom contended that its actions fell properly within the limitations articulated in Article 10(2)—subjecting Handyside’s right to “such . . . restrictions . . . necessary in a democratic society . . . for the protection of health or morals.”<sup>175</sup>

171. Cf., e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the constitutionality of the detention of U.S. citizens in internment camps during the Second World War). In these emergency contexts, the margin appeared as a “strategy aimed at self-preservation,” Brems, *supra* note 143, at 297, and was a doctrinal recognition of the ECtHR’s weak position as a quasi-international and quasi-constitutional institution. Judge Martens has stated:

[I]n my opinion States do not enjoy a margin of appreciation as a matter of right, but as a matter of judicial self-restraint. Saying that the Court will leave a certain margin of appreciation to the States is another way of saying that the Court [is] conscious that its position as an international tribunal having to develop the law in a sensitive area calls for caution . . . .

*Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) at 23 (1990) (Martens, J., dissenting) (end note omitted); cf. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 314 (1997) (“[F]ledgling tribunals . . . may feel that their authority and legitimacy depends on not antagonizing those governments on which their power ultimately depends, and on proceeding diplomatically.”).

172. *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976).

173. *Id.* at 3–8. The book challenged social norms, including those relating to sex, drug use, and authority. See Joanna Moorhead, *The Little Red Schoolbook—Honest About Sex and the Need to Challenge Authority*, GUARDIAN (July 8, 2014, 2:34 AM), <http://www.theguardian.com/education/2014/jul/08/the-little-red-schoolbook-republished-soren-hansen> [<https://perma.cc/W6VJ-GJAY>].

174. *Handyside*, 24 Eur. Ct. H.R. (ser. A) at 11, 13. “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” Convention, *supra* note 136, art. 10(1).

175. *Handyside*, 24 Eur. Ct. H.R. (ser. A) at 13–14 (quoting Convention, *supra* note 136, art. 10(2)). Article 10(2) states:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Convention, *supra* note 136, art. 10(2).

The ECtHR did not make an independent determination of the meaning of Article 10(2) but rather deemed it within the United Kingdom's "margin of appreciation" to define the limits of public morality.<sup>176</sup> It looked for a common European definition of morals, concluding, in words that would continue to resonate in its case law, that on this issue:

[I]t is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject.<sup>177</sup>

Thus the ECtHR highlighted that consensus,<sup>178</sup> or the search for uniform conceptions within Europe, would aid it in giving content to the rights protected by the Convention and the scope of an individual nation's margin of appreciation.<sup>179</sup>

Subsequently, in applying the limitation clauses, the ECtHR has clarified that "necessary in a democratic society" means that the limitation must address a pressing social need and be proportionate to the legitimate aim pursued.<sup>180</sup> Proportionality "deals primarily with the collision of values between an individual and her society."<sup>181</sup> In other words, it identifies the outer limits of enforceable rights based on balancing the individual's interests with those of the state. The margin of appreciation doctrine often dovetails with proportionality, as it allows national states leeway in determining what may count as a

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176. *Handyside*, 24 Eur. Ct. H.R. (ser. A) at 15–19. Note the similarity to the community standards doctrine in U.S. First Amendment case law. For further discussion, see Mary Anne Case, *Community Standards and the Margin of Appreciation*, 25 HUM. RTS. L.J. 10 (2004).

177. *Handyside*, 24 Eur. Ct. H.R. (ser. A) at 23–24.

178. *Belgian Linguistic Case (No. 2)*, 6 Eur. Ct. H.R. (ser. A) (1968), a case which addressed issues of language and schooling in Belgium, is considered "the earliest use of a consensus standard by the Court in its search for a workable basis upon which to perform its supervisory function." YOUROW, *supra* note 167, at 30.

179. Even in its earliest incarnations, the consensus standard was problematic; *The Little Red Schoolhouse*, while considered obscene in England, "circulated freely throughout Europe." Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113, 138 (2005).

180. *Handyside*, 24 Eur. Ct. H.R. (ser. A) at 23–24.

181. Aaron A. Ostrovsky, *What's So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights Within Cultural Diversity and Legitimises International Human Rights Tribunals*, 1 HANSE L. REV. 47, 47 (2005).

pressing social need.<sup>182</sup> And the ECtHR often (and confusingly) melds both doctrines, “‘in the sense either that, having regard to the margin of appreciation, the impugned measure [may be] found to be proportionate (no violation) or that, even having regard to the margin of appreciation, it [could be] found to be disproportionate (violation).’”<sup>183</sup> Based on this approach, Stone Sweet has argued, “[T]he margin of appreciation has little or no autonomy; instead, the scope of deference the Court gives to States is a product itself of proportionality analysis.”<sup>184</sup> But it is perhaps more accurate to acknowledge, as do others, that “[t]he interaction between the principle of proportionality, the margin of appreciation, and the ordinary canons of interpretation remains a partial mystery.”<sup>185</sup>

Given its connection to the proportionality inquiry, the margin of appreciation doctrine has been described as a deference concept, similar to the tiers of scrutiny in the United States,<sup>186</sup> with a principled basis in federalism (or subsidiarity) concerns.<sup>187</sup> In certain cases, the use of the margin may be an expression of the ECtHR’s understanding that national authorities “are better placed to decide on politically sensitive

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182. ANDREW LEGG, *THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY* 37 (2012).

183. CHRISTOFFERSEN, *supra* note 146, at 1 (citing John Joseph Cremona, *The Proportionality Principle in the Jurisprudence of the European Court of Human Rights*, in *RECHT ZWISCHEN UMBRAUCH UND BEWAHRUNG* 323, 328 (Ulrich Beyerlin et al. eds., 1995)).

184. Stone Sweet, *supra* note 145, at 5. In fact, Stone Sweet and Keller suggest that “[t]he Court adopted proportionality as a means of ensuring that States would take qualified rights seriously, *notwithstanding* the principles of subsidiarity and margin of appreciation.” Keller & Stone Sweet, *supra* note 146, at 699 (emphasis added).

185. CHRISTOFFERSEN, *supra* note 146, at 1.

186. *See* Ostrovsky, *supra* note 181, at 47 (“[A] functional margin of appreciation is applied in the United States in the court-created rational basis test.”).

187. *See* LEGG, *supra* note 182, at 61. Subsidiarity, like federalism, is a principle of vertical power-sharing and multi-level governance, and, like federalism, is difficult to operationalize. *See* George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 344, 367 (1994). It provides that tasks should be performed by the level of government most suited to do so and decisions should be taken as closely as possible to the individual citizen, but scholars and politicians contest the relevant criteria by which that determination should be made—efficiency, effectiveness, conduciveness to local democracy or to character formation, and so forth. *See* Andreas Føllesdal, *Survey Article: Subsidiarity*, 6 J. POL. PHIL. 190, 190 (1998) (recognizing widespread support for subsidiarity but as a consensus “gained only by obfuscation”). In the Convention system, subsidiarity takes on yet another meaning, as it also encompasses the idea that the ECtHR’s protection of rights is *subsidiary* to that of the member states. *See* Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT’L L. 125, 128 (2008).

issues” within the individual member state.<sup>188</sup> The possibility that the margin of appreciation is a corollary to subsidiarity suggests a doctrine rooted in a test of comparative institutional competence,<sup>189</sup> or perhaps in questions of democratic legitimacy.<sup>190</sup>

The way in which the margin is utilized, however, undermines any claim to a robust principled approach.<sup>191</sup> In fact, the role of societal consensus—and its pragmatic connection to compliance—seems to have as much a place in the ECtHR’s deployment of the margin doctrine as subsidiarity-based deference.<sup>192</sup> The scope of deference to national authorities is often delineated by the existing European consensus—or lack thereof—on the content of individual human rights.<sup>193</sup> Thus, deference can fluctuate from right to right (or, more accurately, from limitation to limitation), and even from country to country.<sup>194</sup> In the first instance, the ECtHR is likely to allow a state limitation on a Convention right, but as the understanding of the scope and content of the right develops, later applicants may have more success.<sup>195</sup> Were comparative competence or democratic legitimacy

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188. George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. LEGAL STUD. 705, 723 (2006).

189. See Letsas, *supra* note 188, at 721; Stone Sweet & Keller, *supra* note 155, at 6.

190. Andreas von Staden suggests that the margin of appreciation may be a way to provide for democratic legitimacy of the ECtHR, by “recogniz[ing] the legitimate exercise of decision-making authority by national governments in specific contexts as an appropriate instantiation of self-government at that level and, as a result, requir[ing] international courts to exercise some deference.” Andreas von Staden, *The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review*, 10 INT’L J. CONST. L. 1023, 1023, 1039–42 (2012).

191. See Paul Martens, *Perplexity of the National Judge Faced with the Vagaries of European Consensus*, in EUR. COURT OF HUMAN RIGHTS, COUNCIL OF EUR., DIALOGUE BETWEEN JUDGES 53, 54 (2008) (“The concept, then, is sometimes positive, sometimes negative, sometimes descriptive, sometimes prescriptive, sometimes decisive, sometimes contingent.”). For a new attempt at reconciling the various usages of the margin of appreciation, see generally Oddny Mjöll Arnardóttir, *Rethinking the Two Margins of Appreciation*, 12 EUR. CONST. L. REV. 27 (2016).

192. See KANSTANT SIN DZEHTSIAROU, EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS 129–42 (2015).

193. Letsas, *supra* note 188, at 722.

194. See YOUROW, *supra* note 167, at 179 (“The scope of the allowable domestic margin of appreciation may expand or contract on a case-by-case basis, depending upon which Article, and which limitations upon rights and upon state power to restrict them, are involved.”).

195. The evolution of the rights of transsexuals provides a trenchant example. In 1986, Mark Rees, who had been born Brenda Rees, sought to change the sex designation on his birth certificate. The U.K. Registrar General refused to alter the Register of Births and Deaths, and Rees challenged this action before the ECtHR as a violation, inter alia, of Article 8, the right to respect for private and family life. The ECtHR found no violation, concluding that “the law appears to be in a transitional stage,” and therefore Britain’s decision to maintain the policy of entering the facts at time of birth into the birth records was within its margin of appreciation.

truly driving the analysis, then it would be strange to see the margin afforded to a nation narrowed over time.

Thus, rather than a doctrine of principled institutional deference, the margin of appreciation is often an exercise in prudential restraint.<sup>196</sup> “The conjunction of the margin of appreciation doctrine and the consensus inquiry . . . permits the [ECtHR] to link its decisions to the pace of change of domestic law, acknowledging the political sovereignty of respondent states while legitimizing its own decisions against them.”<sup>197</sup> It is an expressly majoritarian approach to rights articulation.<sup>198</sup> In this way, the margin functions to support the ECtHR’s institutional capacity and stability, by allowing it to avoid adjudicating the underlying rights question and to protect it from “taking sides in the resolution of genuine human rights/public interest dilemmas which are not amenable to any straightforward legal solution.”<sup>199</sup>

The margin of appreciation allows the ECtHR to avoid a final determination of the content or scope of a particular Convention right while nevertheless maintaining its supervisory function and the possibility of revisiting the question. A few structural factors aid the ECtHR in this endeavor: mandatory jurisdiction requires the ECtHR frequently to revisit rights in dispute and thus provides it with the

Rees v. United Kingdom, App. No. 9532/81, Eur. Ct. H.R. at 10 para. 37 (Oct. 17, 1986), <http://hudoc.echr.coe.int/eng?i=001-57564> [<https://perma.cc/Z48E-YHUU>] (12-3 decision). Over the following fifteen years, the ECtHR revisited the issue four times, monitoring the evolution of the law while allowing for a margin of appreciation, and by 2002, based on changing social norms, it concluded that the United Kingdom could “no longer claim that the matter falls within [its] margin of appreciation.” Christine Goodwin v. United Kingdom, App. No. 28957/95, Eur. Ct. H.R. at 27 para. 93 (July 11, 2002), <http://hudoc.echr.coe.int/eng?i=001-60596> [<https://perma.cc/7KXG-CJHH>] (unanimous decision).

196. Describing the margin as an “exercise” is perhaps the best way to refer to the concept; Steven Greer questions whether the margin “is really a ‘doctrine’ at all since it could be said to lack the minimum theoretical specificity and coherence which a viable legal doctrine requires.” GREER, *supra* note 168, at 32.

197. Helfer & Slaughter, *supra* note 171, at 317.

198. See Anatoly Kovler, Vladimiro Zagrebelsky, Lech Garlicki, Dean Spielmann, Renate Jaeger & Roderick Liddell, *The Role of Consensus in the System of the European Convention of Human Rights*, in DIALOGUE BETWEEN JUDGES, *supra* note 191, at 11, 54. Kovler, et al., note:

Consensus legitimises progress and facilitates its reception into domestic law. Consensus drives forward or, on the contrary, restrains the Court’s interpretation of the Convention. . . . [W]here there is a large degree of consensus, the government’s margin of appreciation will be severely limited. Conversely, where there is an absence of consensus, the margin of appreciation enjoyed by the national authorities will be correspondingly wide.

*Id.* (citations omitted).

199. GREER, *supra* note 168, at 33.



opportunity to monitor the evolution of European norms.<sup>200</sup> Furthermore, the ECtHR is not bound by its earlier decisions, though precedents should not be departed from “without good reason.”<sup>201</sup> In addition, the ECtHR, through dicta, can place some pressure on member states to alter their own laws and to reach consensus.<sup>202</sup>

By explicitly asking the national courts and legislatures to work in partnership with it to achieve the Convention’s goals,<sup>203</sup> the ECtHR’s deliberate and dialogic approach may serve to protect its institutional legitimacy. The variation in relative standards encourages litigation, “animat[ing] the [ECtHR’s] majoritarian activism and the dynamic of interjudicial competition that enables [the legal order] to transcend rights minimalism.”<sup>204</sup> And as Yuval Shany has written, “[C]ompliance with low-cost judgments (that is, those in which the Court has afforded member states a considerable margin of appreciation) seems to have bolstered the Court’s legitimacy capital; such capital eventually enabled the Court to issue higher-cost judgments affording member states a narrower margin of appreciation.”<sup>205</sup> This view puts a positive spin on the usual concern about the effectiveness of international courts: the danger of a “*low-aiming* court, issuing minimalist remedies, [which] may generate a high level of compliance but have little impact on the state of the world.”<sup>206</sup>

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200. See *supra* note 152 and accompanying text.

201. See *Mamatkulov v. Turkey*, App. Nos. 46827/99 and 46951/99, Eur. Ct. H.R. at 30 para. 105 (Feb. 6, 2003), <http://hudoc.echr.coe.int/eng?i=001-68183> [<https://perma.cc/A3BG-5VR7>] (“While the Court is not formally bound to follow its previous judgments, in the interests of legal certainty and foreseeability it should not depart, without good reason, from its own precedents.”). One “good reason” is “any evolving convergence as to the standards to be achieved.” *Goodwin*, App. No. 28957/95, Eur. Ct. H.R. at 21 para. 74.

202. See, e.g., *Sheffield v. United Kingdom*, App. No. 31-32/1997/815-816/1018-1019, Eur. Ct. H.R. at 17 para. 60 (July 10, 1998), <http://hudoc.echr.coe.int/eng?i=001-58212> [<https://perma.cc/X37U-MYXW>] (“[T]he Court cannot but note that despite its statements in the Rees and Cossey cases on the importance of keeping the need for appropriate legal measures in this area under review . . . . Even if it finds no breach of Article 8 in this case, the Court reiterates that this area needs to be kept under review by Contracting States.”).

203. See *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. at 40 para. 163 (June 9, 2009), <http://hudoc.echr.coe.int/eng?i=001-92945> [<https://perma.cc/YVW7-TKTX>] (asking “whether the national authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, even when they concern other States”).

204. Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 *GLOB. CONST.* 53, 79 (2012).

205. Shany, *supra* note 159, at 269–70.

206. *Id.* at 227. Even further, some argue that minimalist decisions and permissive standards may have an “erosive effect.” The Vice-President of the Hungarian Constitutional Court argues that the ECtHR’s decision in *Rekvényi v. Hungary*, 1999-III Eur. Ct. H.R. 423, in which the

Furthermore, and although the normative rule-of-law pull to comply with court decisions remains a relevant constraint for most democratic countries,<sup>207</sup> scholars have demonstrated that compliance is in large part driven by domestic constraints and rational choice.<sup>208</sup> In this light, the margin of appreciation doctrine usefully “allows for the participation of state powers in the elaboration and application of a norm,”<sup>209</sup> giving the ECtHR a way to place issues on the domestic agendas of the member states.<sup>210</sup> And “the notion of consensus . . . confers a certain legitimacy on new developments and facilitates their reception in domestic legal orders.”<sup>211</sup>

There are costs, however.<sup>212</sup> The margin of appreciation has generated considerable criticism.<sup>213</sup> The overarching and most pervasive complaint stems from the fear that the ECtHR is abdicating its judicial responsibility to provide an autonomous interpretation of

ECtHR “showed understanding for the transitional period of consolidation of democracy,” actually allowed the Hungarian court to relax its own constitutional standards. Péter Paczolay, *Consensus and Discretion: Evolution or Erosion of Human Rights Protection?*, in *DIALOGUE BETWEEN JUDGES*, *supra* note 191, at 69, 54 (quoting Judge Luzius Wildhaber, *Speech Given on the Occasion of the Opening of the Judicial Year, 20 January 2006*, in *EUR. COURT OF HUMAN RIGHTS, COUNCIL OF EUR., DIALOGUE BETWEEN JUDGES* 69, 73 (2006)).

207. Andreas von Staden, *Rational Choice Within Normative Constraints: Compliance by Liberal Democracies with the Judgments of the European Court of Human Rights* 20 (Feb. 26, 2012) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2000024](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2000024) [<https://perma.cc/G755-KRX3>].

208. See Grewal & Voeten, *supra* note 162, at 4 (attributing the decisions of political leaders of whether to implement a ECtHR ruling to political pressures from both domestic and international sources); von Staden, *supra* note 207, at 26–27 (finding, after an examination of the implementation of adverse judgments in the United Kingdom and Germany, empirical support that compliance levels were driven by rational choice).

209. KASTANAS, *supra* note 164 (author’s translation).

210. See generally Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 *INT’L ORG.* 77 (2014) (arguing that ECtHR judgments can put an issue on the domestic agenda, and using LGBT issues as an example of this power).

211. Dean Spielmann, *Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, 14 *CAMBRIDGE Y.B. EUR. LEGAL STUD.* 381, 404 (2012).

212. For further discussion, see *infra* Part V.

213. Greer, *supra* note 148, at 408 n.14 (“The critical literature on the margin of appreciation is now extensive.”); see also GREER, *supra* note 168, at 29 (“[T]he margin of appreciation is an inappropriate notion here since determining the relationship between these and other Convention rights should be a matter of autonomous judicial definition and not subject to national executive or administrative policy at all.”); Michael R. Hutchinson, *The Margin of Appreciation Doctrine in the European Court of Human Rights*, 48 *INT’L & COMP. L.Q.* 638, 649 (1999) (denying the margin serves as a “coherent jurisprudential principle”); Paul Mahoney, *Marvellous Richness of Diversity or Invidious Cultural Relativism?*, 19 *HUM. RTS. L.J.* 1, 1–2 (1998) (describing various criticisms of the margin approach).

Convention rights that imposes a uniform standard across the system.<sup>214</sup> Scholars argue that the margin has become “a substitute for coherent legal analysis of the issues at stake.”<sup>215</sup> Given the role of consensus in the margin analysis, “[t]he law of the Convention sometimes seems neither greater nor less than the consensus or lack thereof in the law and practice of the States Parties.”<sup>216</sup> And there is fragility in rights protection if it is tied to majoritarian preferences.<sup>217</sup>

#### IV. *EX POST*: PLAYING WITH REMEDIES

An American assumption that avoidance strategy is most easily deployed *ex ante* is refuted by the creative remedial constructs developed in South Africa and Canada. How any individual court chooses to construct its legitimacy will necessarily depend on history and opportunity, and as will be shown below, these two courts are more limited in their ability to squeeze off litigation at the front end and thus are more likely to hear and decide the contentious merits issues. The ultimate turn to *ex post* remedial discretion—occasionally described as “remanding to the legislature”—opens up questions of dialogue and of the relationship between remedy and the rights definition itself.

This Part first reviews why *ex ante* avoidance, particularly through justiciability doctrines, is largely unavailable in South Africa and Canada and then discusses the alternative *ex post* remedial approach used to foster dialogue. After a judicial finding of unconstitutionality, a delay in the declaration of invalidity permits the legislature to remedy the violation in the first instance. The nuances of the application of this doctrine vary in each system, including the degree of candor with which each court describes its rationale for delay (which in turn influences the possible quality and quantity of dialogue).

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214. See Greer, *supra* note 148, at 429 (“Reconciling conflicts between Convention rights is quintessentially a judicial task, permitting no genuine margin of appreciation to national non-judicial institutions at all.”).

215. Mahoney, *supra* note 213, at 1 (citing Lord Lester of Herne Hill, QC, *The European Convention on Human Rights in the New Architecture of Europe: General Report*, in PROCEEDINGS OF THE 8TH INTERNATIONAL COLLOQUY ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS 227, 236–37 (1995)); see also Brauch, *supra* note 179, at 149 (“The margin of appreciation . . . has freed the Court from having to do the real and challenging work of interpreting the meaning and contours of the rights that are protected in the Convention.”).

216. YOUROW, *supra* note 167, at 195.

217. Even in his vigorous defense of majoritarian parliamentary democracy for rights protection, Waldron must assume a highly functional democratic system, based on principles of political equality, in which all participants have an avowed commitment to rights. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1361 (2006).

A. *The South African Remedial Power*

1. *Irrigating the Arid Ground.* The history of the judiciary in apartheid South Africa is marked by disappointment: early courageous efforts by the courts to stand up to Parliament were stymied and countermeasures (court packing and jurisdiction stripping) were employed.<sup>218</sup> By the mid-1960s, parliamentary sovereignty was dominant,<sup>219</sup> and “the overall impression [was] of a judiciary . . . prepared to adopt an interpretation that w[ould] facilitate the executive’s task rather than defend the liberty of the subject and uphold the Rule of Law.”<sup>220</sup> As Justice Mahomed wrote in 1993, “the impotence of the judiciary to act visibly and effective in [the pursuit of justice], potentially imperils not only its own legitimacy, but the legitimacy of law itself in the perception of those subject to its sanction.”<sup>221</sup>

In the sweeping inhumanity of the apartheid era in South Africa, justiciability doctrines themselves played a small role, but “it was often procedural or technical barriers to litigation which prevented issues of substance from coming before the courts just as much in the express limitations on legal access.”<sup>222</sup> Standing was restricted,<sup>223</sup> and exceptions were interpreted narrowly.<sup>224</sup> By the 1980s, commentators complained that “[t]he standing requirement can be manipulated by judges who feel disinclined to hear certain cases or to decide certain issues for reasons which are not openly expressed.”<sup>225</sup> And while

218. Heinz Klug, *Historical Background*, in CONSTITUTIONAL LAW OF SOUTH AFRICA 2–3 (Chaskalson et al. eds., 1996) (discussing early cases); see also JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 280 (1978) (discussing early “courageous” decisions).

219. Klug, *supra* note 218, at 2–3 (“The passage of the 1961 Republican Constitution secured the dominance of parliamentary sovereignty.”).

220. DUGARD, *supra* note 218, at 280 (citing INT’L COMM’N OF JURISTS, EROSION OF THE RULE OF LAW IN SOUTH AFRICA, at iv (1968)).

221. Justice Ismail Mahomed, *The Impact of a Bill of Rights on Law and Practice in South Africa*, DE REBUS 460, 460–61 (June 1993).

222. Ctr. for Applied Legal Studies, *Summaries of Papers and Discussion*, in EMERGENCY LAW 12, 15 (Nicholas Haysom & Lauran Mangan eds., 1987).

223. Plaintiffs were required to show both “a personal interest in the matter and to have been adversely affected by the wrong alleged.” Cheryl Loots, *Standing, Ripeness and Mootness*, in 1 CONSTITUTIONAL LAW OF SOUTH AFRICA § 7.2 (2d ed. 2008) (citing *Bagnall v. Colonial Gov’t* (1907) 24 SC 470 (S. Afr.); *Patz v. Greene & Co.* 1907 TS 427 (S. Afr.)).

224. See generally Cheryl Loots, *Keeping Locus Standi in Chains*, 3 SAJHR 66 (1987) [hereinafter Loots, *Locus Standi*] (commenting on the judiciary’s narrow interpretation of cases which displayed a liberalized attitude toward locus standi).

225. Edwin Cameron, *Legal Standing and the Emergency*, in EMERGENCY LAW, *supra* note 222, at 61, 64; see Loots, *Locus Standi*, *supra* note 224, at 69.

relaxing standards slightly, reform initiatives did not remotely approximate the dramatic shifts seen in other common-law countries.<sup>226</sup> As one commentator noted, “[O]ur courts have had the opportunity to liberalize the standing rule . . . and have failed to do so.”<sup>227</sup>

In the transformative constitutional creation process following the collapse of the apartheid regime, issues of standing received explicit attention. In the Interim Constitution, section 7(4) was designed to prevent a restrictive approach to the enforcement of rights.<sup>228</sup> And in the Final Constitution, section 38 outlines generous standing rules for rights claims. Beyond the right to proceed in an action in one’s own interest, the section provides public-interest standing and representative standing. (In fact, these rules have begun to impact areas outside of the Bill of Rights context.<sup>229</sup>) In addition, section 34 provides the fundamental right of access to a court.<sup>230</sup> In combination, therefore, sections 38 and 34 suggest “a deliberate bias toward[] enhanced access to court.”<sup>231</sup>

The Final Constitution grants the Constitutional Court of South Africa (CCSA) jurisdiction over “constitutional matters,” and section 167(6) requires that, “when it is in the interests of justice and with leave of the Constitutional Court,” a person should be able “to bring a matter directly to the Constitutional Court[] or . . . to appeal directly to the Constitutional Court from any other court.”<sup>232</sup> The CCSA assesses leave to appeal using a two-step test, asking whether “the application raises a constitutional matter,” and whether “it is in the interests of

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226. Clive Plasket, Country Report, *Representative Standing in South African Law*, in GLOBAL CLASS ACTIONS EXCHANGE 1, 35 (2007), [http://globalclassactions.stanford.edu/sites/default/files/documents/south\\_africa\\_national\\_report.pdf](http://globalclassactions.stanford.edu/sites/default/files/documents/south_africa_national_report.pdf) [https://perma.cc/FF2D-NCKD].

227. Cheryl Loots, *Standing to Enforce Fundamental Rights*, 10 SAJHR 49, 51 (1994) [hereinafter Loots, *Standing*].

228. *Id.* at 49.

229. See *McCarthy v. Constantia Prop. Owners’ Ass’n* 1999 (4) SA 847 (C) at 855 B–E (S. Afr.) (“In the context of the present case the Constitution clearly envisages a generous regime of access to courts . . . . [T]he Bill of Rights was not only designed to introduce the culture of justification in respect of public law but intended to ensure that the exercise of private power should similarly be justified. Accordingly the carefully constructed but artificial divide between public and private law . . . can no longer be sustained in an uncritical fashion and hence unquestioned application.”); *Wildlife Soc’y of S. Afr. v. Minister of Envtl. Affairs & Tourism* 1996 (3) SA 1095 (Tk) at 1104–06 (S. Afr.).

230. S. AFR. CONST., 1996, § 34 (“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”).

231. Plasket, *supra* note 226, at 12.

232. S. AFR. CONST., 1996, § 167(6).

justice to grant leave.”<sup>233</sup> The CCSA has a capacious definition of constitutional matters; in fact, one commentator described the CCSA as having left “the jurisdictional door . . . so wide open that the Court has had to develop another way of limiting its case load.”<sup>234</sup> And in evaluating the “interests of justice,” the CCSA has created a multi-factor balancing test,<sup>235</sup> which it is willing to apply loosely.<sup>236</sup> These relaxed standing rules and expansive exercise of its jurisdiction to hear cases are mirrored in the court’s flexible and generous approaches to other justiciability doctrines, such as ripeness and mootness.<sup>237</sup>

The historical evolution of the role of the judiciary in South Africa—and of the CCSA in particular—demonstrates that *ex ante* justiciability doctrines are off the table as strategic means to avoid deciding politicized issues that might threaten the court’s institutional legitimacy.<sup>238</sup> As the CCSA said in 1996,

[A]ccess to the courts in constitutional matters should not be precluded by rules of standing developed in a different constitutional environment in which a different model of adjudication predominated. In particular, it is important that it is not only those with vested interests who should be afforded standing in constitutional challenges, where remedies may have a wide impact.<sup>239</sup>

The expansion of standing rules acknowledged the challenges people had in enforcing their rights,<sup>240</sup> as well as the chilling effects of any

233. *Ingledeu v. Fin. Servs. Bd.* 2003 (4) SA 584 (CC) at 589–90 para. 13 (S. Afr.).

234. Sebastian Seedorf, *Jurisdiction*, in 4 CONSTITUTIONAL LAW OF SOUTH AFRICA 125 (2d ed. 2008).

235. The factors relevant to this test are: “the importance of the issue raised,” “the prospects of success,” “the public interest in a determination of the constitutional issues raised,” and “the accuracy of the pleadings.” Kate Hofmeyr, *Rules and Procedure in Constitutional Matters*, in 5 CONSTITUTIONAL LAW OF SOUTH AFRICA 24–25 (2d ed. 2008).

236. *Id.* at 126 (“[The CCSA] has affirmed that it is in the interests of justice for it to consider a case even where the prospects of success are not self-evident, [or] for the benefit of the broader public or to achieve legal certainty, even though such a decision would go beyond the immediate needs of the parties.”).

237. And, as yet, the CCSA has not developed a political question doctrine. Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, 7 INT’L J. ON CONST. L. 106, 126 n.82 (2008).

238. In fact, in fulfillment of its charge to develop the goals of the Final Constitution, the CCSA could be said to have a responsibility to provide generous access. *See* S. AFR. CONST., 1996, § 39.

239. *Ferreira v. Levin NO* 1996 (1) SA 984 (CC), at 1103–04 para. 230 (S. Afr.).

240. *See* Plasket, *supra* note 226, at 43. Plasket states:

Without the means of ensuring that the protection of the law can reach those who need it most, the fundamental rights contained in the Bill of Rights would be in danger of being regarded by the majority of South Africans as empty promises or, perhaps worse,

continuing “[f]ear of the judicial process.”<sup>241</sup> Some argued that a relaxed approach would result in vexatious and frivolous litigation, but the CCSA recognized that “it may sometimes be necessary to open the floodgates in order to irrigate the arid ground below them.”<sup>242</sup>

2. *Remedies and the Suspension of Invalidity.* The CCSA’s power to strike down legislative acts as unconstitutional is provided in section 172, which states that “[w]hen deciding a constitutional matter within its power, a court . . . must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.”<sup>243</sup> And the court did not wait long to invoke its authority. In the 1995 case *State v. Makwanyane*,<sup>244</sup> the CCSA invalidated the death penalty as unconstitutional.<sup>245</sup> The CCSA’s strong statement upholding constitutional rights reminded observers of “the duty vested in the [c]ourts to interpret the Constitution and to uphold its provisions without fear or favour.”<sup>246</sup>

Politically controversial, this decision could have threatened the fledgling court, as “South Africa’s high rate of violent crime and generally conservative public attitudes on capital punishment meant that the vast majority of South Africans . . . favored the retention of the death penalty.”<sup>247</sup> But the use of the death penalty was also “closely associated with the violations and inequalities of the apartheid era,” and, as Theunis Roux explains, the political elite in the African National Congress (ANC) supported the court’s decision.<sup>248</sup> The relationship between the single party system of elites and the broader public allowed the CCSA room to make such a decisive determination.

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a charter of luxuries available to the rich and powerful to entrench still further their positions of privilege.

*Id.*

241. Loots, *Standing*, *supra* note 227, at 49.

242. *Wildlife Soc’y of S. Afr. v. Minister of Envtl. Affairs & Tourism* 1996 (3) SA 1095 (Tk), at 1106E (S. Afr.).

243. S. AFR. CONST., 1996, § 172.

244. *State v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.).

245. *Id.* at 520 para. 392.

246. Heinz Klug, *Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review*, 13 SAJHR 185, 196 (1997) (quoting *Makwanyane*, 1995 (3) SA 391 (CC) at 431 para. 88).

247. Roux, *supra* note 237, at 118.

248. *Id.* at 120. Roux argues that, given this political context, “the CCSA’s overriding concern should be to manage it[s] relationship with the political branches.” *Id.* at 111.

With such a strong opening statement of judicial power, it may seem surprising that the court delayed its declaration of invalidity in *State v. Ntuli*.<sup>249</sup> But this first exercise of remedial flexibility, authorized by section 172 of the Final Constitution, came at a moment of constitutional transition with great pressures on political actors. In *Ntuli*, the CCSA invalidated an Apartheid-era law that limited the appeal rights of convicts.<sup>250</sup> The case itself was not contentious, but the court was aware that its determination would result in a dramatic expansion of the number of cases being appealed. Devising new procedures for an improved system of justice would be necessary.<sup>251</sup> The court concluded that “[t]o choose between [such procedures], to imagine others or to recommend any falls outside our province. The decision rests with Parliament.”<sup>252</sup> The CCSA thus suspended its declaration of invalidity to allow Parliament to restructure the appeals process.

Since *Ntuli*, however, the CCSA has delayed a suspension of invalidity in thirty-four cases, partially suspended remedies in three additional cases, and granted further extensions of suspensions in at least four cases.<sup>253</sup> In some cases, the CCSA will issue interim orders to “modif[y] the law for the duration of the suspension, subject to legislative intervention.”<sup>254</sup> These orders “need not represent the Court’s considered view as to the best way to cure the unconstitutionality; [they] may be simply a workable option for the time being.”<sup>255</sup>

At one level, the recourse to remedial discretion and delayed suspensions of invalidity can be embedded in important separation-of-powers issues, particularly in light of the wide variety of socioeconomic rights adjudicated by the CCSA.<sup>256</sup> In this realm of positive rights,

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249. *State v. Ntuli*, 1996 (1) SA 1207 (CC) (S. Afr.).

250. *Id.* at 1216 para. 28.

251. *Id.* at 1216–17 para. 28.

252. *Id.* The court also recognized that “[t]he long perpetuation of an unconstitutional scheme is admittedly unfortunate. But the statute book cannot be purged suddenly of all its old elements that are now repugnant to the Constitution.” *Id.*

253. A table of relevant cases is on file with the *Duke Law Journal*.

254. ROBERT LECKEY, *BILLS OF RIGHTS IN THE COMMON LAW* 105 (2015).

255. *Id.*

256. Mark S. Kende, *The South African Constitutional Court’s Construction of Socio-Economic Rights: A Response to Critics*, 19 CONN. J. OF INT’L L. 617, 618 (2004) (noting that “[t]he unelected Court is taking a substantial risk by treating these rights as justiciable”).



judicial capacity seems more in question,<sup>257</sup> and the CCSA has a “strong preference for relying on legislative and executive measures to define the substance of these rights.”<sup>258</sup> For example, commentators have noticed that the CCSA “has more readily relied on weaker remedies where the policy issues are relatively complex and need to be built up incrementally over time.”<sup>259</sup> In fact, David Landau notes that, in these cases, an unsuspended invalidation “is likely to drive the court up against real constraints on its capacity,” raising the fear of political backlash and noncompliance.<sup>260</sup>

Suspending a declaration of invalidity in the early days of a transitional regime is certainly a pragmatic decision; in socioeconomic cases, which may have a greater claim to arguments based in separation of powers, a suspension may be pragmatic or even principled. But in some cases, the suspension of invalidity looks strategic—avoidance “motivated by an often unstated concern for preserving institutional security.”<sup>261</sup>

For example, in *Minister of Home Affairs v. Fourie*,<sup>262</sup> the CCSA was confronted with a question concerning the common-law definition of marriage and the terms of the Marriage Act, both of which excluded lesbian and gay couples.<sup>263</sup> The CCSA found such exclusion denied the applicants equal protection of the laws. But, as Roux points out, the court was also concerned about the security of the decision. At this time, public opinion in South Africa was “overwhelmingly conservative” on the issue of same-sex marriage, and there was “considerable disagreement within the ANC political elite” on “the issue of gay and lesbian equality.”<sup>264</sup> The court could rely on neither the party elites nor the people for support. As the majority opinion concluded, “It is precisely because marriage plays such a profound role in terms of the way our society regards itself, that the exclusion from

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257. Landau, *supra* note 15, at 251; *see also* Frank R. Cross, *The Error of Positive Rights*, 48 UCLA L. Rev. 857, 862 (2001) (“[R]eliance on the judicial process to promote positive rights is an unpromising strategy.”). *But see* MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008) (arguing that weak-form judicial review can engage the courts while leaving space for the legislature to participate in the constitutional interpretation of positive rights).

258. Brian Ray, *Evictions, Aspiration, and Avoidance*, 5 CONST. CT. REV. 173, 175 (2014).

259. Landau, *supra* note 15, at 244 n. 2.

260. *Id.* at 263.

261. Ray, *supra* note 258, at 176.

262. *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 535 para. 25 (S. Afr.).

263. *Id.* at 538 para. 33.

264. Roux, *supra* note 237, at 120, 122.

the common law and Marriage Act of same-sex couples is so injurious, and that the foundation for the construction of new paradigms needs to be steadily and securely laid.”<sup>265</sup> The court therefore concluded that Parliament would have one year from the date of the decision to remedy the defect in the Marriage Act.

In discussing the balance struck by the CCSA in *Fourie*, Roux suggests that, by using *ex post* dialogue, the court is able to maintain its principled position—but questions remain about “the way in which the CCSA should go about building public support for decisions of constitutional principle.”<sup>266</sup> It may be that the remedial release valve allows for the principled adjudication of the rights claim in the first instance. One challenge to this position is the concern that arguments for dialogue and “security” may “devolve into outright deference,”<sup>267</sup> leading to “a combination of weak institutional authority and expansive legislative (and executive) power that would marginalize the judicial role.”<sup>268</sup>

In a positive light, the ability to suspend declarations of invalidity can help the CCSA construct its own balance between legal and institutional legitimacy.<sup>269</sup> Indeed, some argue that the CCSA has made the right choice in “selecting only a few cases on which to expend its institutional capital,”<sup>270</sup> which has allowed it to build a “reputation for legally credible decision making.”<sup>271</sup> This recourse to remedial discretion is a serious weapon in the CCSA’s armory for self-protection; however, it comes at a certain cost. If justice delayed is justice denied, there are dangers to the CCSA’s institutional legitimacy in using the *ex post* mechanism.

## B. Canadian Delayed Declarations

1. *The Backdrop: Standing and Notwithstanding.* The Supreme Court of Canada (SCC) also operates in a historical, cultural, political,

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265. *Fourie*, 2006 (1) SA 524 (CC), at 583 para. 155.

266. Roux, *supra* note 237, at 122.

267. Ray, *supra* note 258, at 191.

268. *Id.* at 179.

269. See Holning Lau, *Comparative Perspectives on Strategic Remedial Delays*, 91 TUL. L. REV. (forthcoming 2016) (manuscript at 32–45), <http://ssrn.com/abstract=2784267> [<https://perma.cc/2PTT-LYYF>] (arguing that the CCSA’s decision to delay the remedy in *Fourie* helped mitigate backlash and enhanced the court’s legitimacy).

270. Mark S. Kende, *The Fifth Anniversary of the South African Constitutional Court: In Defense of Judicial Pragmatism*, 26 VT. L. REV. 753, 766 (2002).

271. Roux, *supra* note 237, at 137.

and constitutional context that makes *ex post*, as opposed to *ex ante*, avoidance more feasible. This Section focuses first on the flexibility with which litigants can access the SCC through generous standing rules and grant applications, as well as through the reference mechanism—access that limits opportunities for *ex ante* avoidance. It then turns to the creative constitutional provision—the notwithstanding clause—designed to allow for political review of the court’s decisions. This provision may have (unintentionally and surprisingly) encouraged the SCC to utilize *ex post* avoidance techniques.

Rooted in the developed common-law understanding of limited standing, Canadian jurisprudence took a dramatic shift in the mid-1970s, leading to what is now described as one of the “most lax” regimes in the common-law world.<sup>272</sup> The SCC first allowed public interest groups to join cases as intervenors;<sup>273</sup> then, it established broader public-interest standing in a set of opinions known as the “standing trilogy.”<sup>274</sup> The looser test asked whether the plaintiff was directly affected by the legislation in question, “or, if not, [whether] the plaintiff ha[s] a genuine interest in its validity.”<sup>275</sup> Another prong of the test—asking whether there is “another reasonable and effective way to bring the issue before the Court”<sup>276</sup>—has since been further relaxed in application.<sup>277</sup> The Canadian liberalization of standing law began

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272. IAN BRODIE, *FRIENDS OF THE COURT: THE PRIVILEGING OF INTEREST GROUP LITIGANTS IN CANADA* 27 (2002); see EMMETT MACFARLANE, *GOVERNING FROM THE BENCH: THE SUPREME COURT OF CANADA AND THE JUDICIAL ROLE* 44 (2012).

273. See *Morgentaler v. R.*, [1976] 1 S.C.R. 616, 616 (Can.) (allowing several public interest groups to intervene in a politically sensitive abortion case).

274. See MACFARLANE, *supra* note 272, at 44; FREDERICK LEE MORTON, *LAW, POLITICS AND THE JUDICIAL PROCESS IN CANADA* 289 (F. L. Morton ed., 3d ed. 2002). The cases were: *Minister of Justice v. Borowski*, [1981] 2 S.C.R. 575 (Can.) (challenging abortion laws); *Nova Scotia Bd. of Censors v. McNeil*, [1976] 2 S.C.R. 265 (Can.) (challenging film censorship laws); *Thorson v. Canada (Att’y Gen.)*, [1975] 1 S.C.R. 138 (Can.) (challenging federal bilingualism legislation).

275. *Canadian Council of Churches v. Canada (Minister of Emp’t & Immigration)*, [1992] 1 S.C.R. 236, 238 (Can.).

276. *Id.*

277. See, e.g., *Canada (Att’y Gen.) v. Downtown Eastside Sex Workers United Against Violence Soc’y*, [2012] 2 S.C.R. 524, 546 (Can.) (“Cory J. emphasized this point in *Canadian Council of Churches* where he noted that the factors to be considered in exercising this discretion should not be treated as technical requirements and that the principles governing the exercise of this discretion should be interpreted in a liberal and generous manner.”); see also Linda McKay-Panos, *Standing Up for Your Rights*, *LAWNOW* (Mar. 1, 2013), <http://www.lawnow.org/standing-up-for-your-rights> [<https://perma.cc/A4K2-Z6D9>] (noting that the relaxation of this third factor may help public interest groups who have faced difficulties establishing standing in the past).

before, but was largely developed in conjunction with, the enactment of the Charter of Rights and Freedoms in 1982 (Charter).<sup>278</sup> And this shift has helped “legislatures, judges and rights advocacy groups alike” to develop Charter rights.<sup>279</sup>

Much like the U.S. Supreme Court, the SCC has “virtually complete control over its own docket” and can pick and choose from among the applicants it grants leave to appeal.<sup>280</sup> Unlike in the United States, however, the Canadian institutional context appears to generate “role-related norms [that] have a powerful constraining effect on judicial choices regarding leave.”<sup>281</sup> The “absence of an *en banc* tradition and the use of panels complicates and adds uncertainty to the justices’ ability to act strategically.”<sup>282</sup> Furthermore, since 1995, staff lawyers, rather than law clerks, have had responsibility for writing the recommendations on leave to appeal (though law clerks may review or advise their justice). This bureaucratic shift may have “produced a stabilizing effect on the outcome of leave applications,”<sup>283</sup> limiting strategic or politicized determinations.

The combination of liberal standing rules and a more technocratic grant process for hearing cases diminishes the opportunities for *ex ante* strategic action by the SCC to protect its institutional legitimacy. Any flexibility the SCC might have is further constrained by the ability of other governmental actors themselves to use the SCC strategically through the reference procedure.

Through the reference mechanism, questions are referred to the SCC by the federal government (or on appeal from provincial governments that have asked questions of the provincial courts of appeal). The Supreme Court Act requires the SCC to hear and consider these questions,<sup>284</sup> though they are “often divorced from any

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278. See CANADIAN CHARTER OF RIGHTS AND FREEDOMS, Part I of the Constitutional Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.) [hereinafter CHARTER].

279. Ran Hirschl, *Canada’s Contribution to the Comparative Study of Rights and Judicial Review*, in THE COMPARATIVE TURN IN CANADIAN POLITICAL SCIENCE 77, 79 (Linda White et al. eds., 2008) [hereinafter Hirschl, *Canada’s Contribution*].

280. See Christopher P. Manfredi, “*Appropriate and Just in the Circumstances*”: Public Policy and the Enforcement of Rights Under the Canadian Charter of Rights and Freedoms, 27 CAN. J. POL. SCI. 435, 443 (1994). On the leave to appeal process, see MACFARLANE, *supra* note 272, at 78–89.

281. MACFARLANE, *supra* note 272, at 78.

282. *Id.* at 81 (quoting ROY B. FLEMMING, TOURNAMENT OF APPEALS: GRANTING JUDICIAL REVIEW IN CANADA 100 (2004)).

283. *Id.* at 85.

284. Supreme Court Act, R.S.C. 1985, c. 53(4).

existing dispute or firm factual foundation.”<sup>285</sup> The court “has repeatedly asserted the discretion to refuse to answer a reference question,” though “it has rarely exercised such discretion.”<sup>286</sup> In fact, it is the reference mechanism that “has plunged the Supreme Court of Canada . . . into some of the major political disputes of the day.”<sup>287</sup> In the past almost 150 years, the SCC has addressed roughly “ninety reference cases, including some of the most significant rulings in Canadian constitutional history.”<sup>288</sup>

Why doesn’t the reference mechanism itself threaten the court? Theorists argue that “[b]acklash should be more likely when [a] decision is salient enough to send a signal to an otherwise inattentive public and simple enough for the public to understand it and react unfavorably.”<sup>289</sup> But a referred question is likely to have already garnered tremendous political attention, and the mechanism may be a way for political actors to avoid a difficult decision. Of course, affirmative requests for advisory opinions from the government raise the specter of noncompliance, and, in these cases, the court must tread lightly. But the fact that political actors want the judiciary to resolve a difficult issue cuts in favor of their adhering to a deft decision from the court.<sup>290</sup> And the SCC’s carefully constructed responses are often applauded for their nuance and thoughtfulness.<sup>291</sup>

The SCC also operates against the background of a creative constitutional regime that sanctions governmental noncompliance with

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285. THOMAS A. CROMWELL, *LOCUS STANDI: A COMMENTARY ON THE LAW OF STANDING IN CANADA* 175 (1986).

286. MACFARLANE, *supra* note 272, at 88. *But see Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 701 (Can.) (declining to answer whether opposite-sex requirements established in the common law and in the civil law of Quebec were consistent with the Charter).

287. Richard Devlin, A. Wayne MacKay & Natasha Kim, *Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a “Triple P” Judiciary*, 38 ALTA L. REV. 734, 754 (2000).

288. Hirschl, *Canada’s Contribution*, *supra* note 279, at 78.

289. Nathaniel Persily, *Introduction*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 3, 12 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008).

290. *Cf.* Mark A. Graber, *The Nonmajoritarian Difficulty: Legislature Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 38–45 (1993) (detailing the occasional practice of legislative deference to the courts on controversial issues). *See generally* Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93, 97 (2008) (describing “[s]trategic political deference to the judiciary alongside politically astute judicial behavior”).

291. *See* S.T.C., Mar. 25, 2014 (B.J.C., No. 87, p. 95) (Spain) (looking to SCC Secession Reference for guidance in its own determination about the constitutionality of a referendum of self-determination in Catalonia). *See generally* Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, in GOVERNANCE IN A GLOBALIZING WORLD 253 (Joseph S. Nye, Jr. & John D. Donahue eds., 2000).

court's decisions: section 33 of the Charter, known as the notwithstanding clause.<sup>292</sup> The clause permits the federal, or a provincial, legislature to allow for the continued operation of a law, notwithstanding its incompatibility with a provision of the Charter. In effect, it functions as an override clause, allowing a legislature to reenact a law struck down by the SCC. It can also work to insulate laws from judicial review if a declaration is made at the outset that such a law may operate notwithstanding a conflict.<sup>293</sup> The time limit for either provision is five years.

It is not clear how precisely the notwithstanding clause affects the background expectations of the SCC or how it might influence strategic decisionmaking by the court. In theory, the existence of a lawful noncompliance mechanism might militate in favor of more generalized compliance by political actors.<sup>294</sup> Further, given that a legislative override is constitutional, its use might not necessarily harm the SCC's institutional legitimacy. The absence of judicial supremacy is not equivalent to judicial illegitimacy. Any individual override may have no effect on the willingness of the public, the coordinate branches, or the provincial governments to comply with other SCC decisions in the future.

At a more practical level, however, the notwithstanding power has not been used by the federal Parliament, and “some commentators discern a nascent convention that it should not be.”<sup>295</sup> Due to this fact, Adrian Vermeule classifies it as an “atrophied power”—one no longer with any teeth to bite.<sup>296</sup> Ran Hirschl cautions that to “describe it as a political ‘dead letter’ would be an exaggeration,” but he notes that there have only been “a handful of significant instances” in which the clause has been invoked.<sup>297</sup> Given its lack of use at the federal level thus far, a federal invocation of the notwithstanding clause *now* might have

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292. CHARTER, *supra* note 278, at sec. 33.

293. See generally Tsvi Kahana, *The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter*, 44 CAN. PUB. ADMIN. 255 (2001) (discussing “pre-emptive uses” of the notwithstanding mechanism).

294. There are indications that Canadian governments and executives are fairly rule abiding. See Mary Liston, *Delayed Declarations of Invalidity: Deferential Dialogue or Justice Deferred?* 18 (June 4, 2005) (unpublished manuscript) (on file with the *Duke Law Journal*) (noting that “few governments or Crown actors will risk public opprobrium for disobeying a court order”).

295. Adrian Vermeule, *The Atrophy of Constitutional Powers*, 32 OXFORD J. LEGAL STUD. 421, 425 (2012).

296. *Id.* at 423, 425.

297. Hirschl, *Canada's Contribution*, *supra* note 279, at 80.

a more dramatic and threatening impact on the court, perhaps making the SCC wary of pushing too far in rights development.

2. *Remedies and Delayed Declarations of Invalidity.* Against a markedly different backdrop of both constrained power and extensive flexibility than that of other courts, the SCC has moved to a remedial approach that encourages legislative participation in resolving thorny political issues. The timing of this move may have undercut the need for the notwithstanding clause; its lack of use may be a reflection of the SCC's ability to manage potential stressors to its relationships with the political branches.

As in South Africa, the first case in which the SCC used a delayed declaration of invalidity was one that presented a unique situation: a referred question asking whether the requirements of the Constitutional Act 1867 and the Manitoba Act 1870—to provide laws in both French and English—were mandatory.<sup>298</sup> The SCC concluded that they were mandatory, a result which threatened “all legal rights, obligations and other effects which have purportedly arisen under all Acts of the Manitoba Legislature since 1890 . . . to the extent that their validity and enforceability depends upon a regime of unconstitutional unilingual laws.”<sup>299</sup> The SCC, recognizing the danger of a legal vacuum, delayed its declaration of invalidity to give the Manitoba government time to translate, reenact, print, and publish the acts of the Manitoba Legislature.

Beyond that instance of a legal vacuum, the SCC has also found delayed declarations to be authorized when necessary to avoid a danger to the public.<sup>300</sup> The current instantiation of the doctrine, however, is largely justified on theories of comparative institutional competence.<sup>301</sup> Because Charter cases “have distributional implications for many groups, . . . the courts often have good reason to remand complex remedial issues to legislatures.”<sup>302</sup> These remedies are rarely geared toward vindicating socioeconomic rights, which the SCC

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298. *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 748 (Can.).

299. *Id.*

300. *Schacter v. Canada (Emp't & Immigration Comm'n)*, [1992] 2 S.C.R. 679, 684 (Can.) (concluding that the decision to delay a declaration of invalidity “should not turn on considerations of the role of the courts and the legislature but rather on considerations relating to the effect of an immediate declaration on the public”).

301. See Sujit Choudhry & Kent Roach, *Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies*, 21 SUP. CT. L. REV. 205, 231 (2003).

302. *Id.* at 252.

has been reluctant to find in the Charter,<sup>303</sup> so the concern about controlling the public fisc is only partly engaged. In fact, in the most recent decision delaying a declaration, *Canada (Att’y Gen.) v. Bedford*,<sup>304</sup> the SCC suggested that whether an issue “is a matter of great public concern” contributes to its decision regarding legislative remand.<sup>305</sup> This formulation seems expressly designed to aid the court in avoiding contentious political or social questions.<sup>306</sup>

Unlike in South Africa, in Canada no constitutional text authorizes delays. Section 52(1) of the Constitution Act 1982 states that, when a law is found to be inconsistent with the Constitution, it is “to the extent of the inconsistency, of no force or effect.”<sup>307</sup> The SCC’s effort to fashion a remedial dialogue with the various legislatures in Canada may have some intuitive force in the shadow of the notwithstanding clause, but it is not an explicit privilege given to the court.<sup>308</sup> Yet since the *Manitoba Language Rights Reference*,<sup>309</sup> the delayed declaration of invalidity has become the “preferred remedy in Canadian public law.”<sup>310</sup> In fact, “a majority of the Court has suspended its remedy in twenty judgments allowing challenges to legislation under the Charter,” and “more than a dozen dissenting judgments would have suspended the remedy” in other cases.<sup>311</sup>

The advantages to the SCC of legislative remand include the ability to sidestep situations that are politically fraught or likely to

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303. See *R. v. Propser*, [1994] 3 S.C.R. 236 (Can.) (“[I]t would be a very big step for this court to interpret the Charter in a manner which imposes a positive constitutional obligation on governments.”); see also Hirschl, *Canada’s Contribution*, *supra* note 279, at 84 (describing socioeconomic rights as “not protected by the charter” and “excluded from its purview by pertinent SCC jurisprudence”).

304. *Canada (Att’y Gen.) v. Bedford*, [2013] 3 S.C.R. 1102 (Can.).

305. *Id.* at 1164.

306. Cf. MACFARLANE, *supra* note 272, at 171 (describing one way of understanding suspended declarations of invalidity as being “new weapons recently added to the justices’ strategic arsenal to avoid more direct conflict or political acrimony with the other branches”).

307. Part VII of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) s. 52(1).

308. Cf. Rosalind Dixon, *The Supreme Court of Canada, Charter Dialogue, and Deference 4* (U. Chi. Pub. Law & Legal Theory, Working Paper No. 284, 2009), <http://ssrn.com/abstract=1520789> [<https://perma.cc/Y8R8-8TB7>] (discussing notwithstanding clause as “as a valuable incentive for (and a textual confirmation of the desirability of)” a dialogic approach).

309. *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 (Can.).

310. LECKEY, *supra* note 254, at 103.

311. *Id.* The use of the remedy is also prevalent in the lower courts. See Choudhry & Roach, *supra* note 301, at 228–29 (listing cases through 2003).



result in weak compliance.<sup>312</sup> But “punting” remedial issues to the legislature has some downsides.<sup>313</sup> One may be in the quality of the remedy: the individual litigant wins only a Pyrrhic victory if a prospective legislative remedy is all that is available. The claimant “can claim a moral victory for winning on the merits, but in concrete terms, receives no relief whatsoever.”<sup>314</sup> Another pitfall is in managing the period of delay itself. The decision of the SCC to delay the declaration of invalidity in *Bedford* engendered a tremendous amount of criticism.<sup>315</sup> The court had concluded that the laws prohibiting bawdy houses functioned to deprive sex workers of their constitutional rights to security of the person.<sup>316</sup> But the delayed declaration left the criminal laws in place, threatening continued criminal sanctions against sex-workers using bawdy houses, in violation of their rights. As Robert Leckey wrote, “[T]hat the sex workers should exit the courthouse as ‘victors’ while continuing to bear the brunt of laws shown to violate their fundamental rights . . . weaken[s] constitutional review in Canada.”<sup>317</sup>

A question raised by this case, therefore, is whether the SCC has properly calibrated its response to the countermajoritarian paradox: If it strays too far in a majoritarian direction (to mitigate the countermajoritarian difficulty), it may cease to have the authority to operate as the guardian of the constitution and enforce countermajoritarian rights.<sup>318</sup> When it is obvious that remedial delay is about “accommodat[ing] opposition to [a] decision,”<sup>319</sup> the court may be seen as failing to do its job. As Choudhry and Roach admonish,

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312. See Manfredi, *supra* note 280, at 447 (“One of the important themes in the literature is that effective implementation of judicial decrees often depends on whether the Court’s decision is prohibitory in nature or requires an active response on the part of state officials, with prohibitory orders more likely to be followed.”).

313. Choudhry & Roach, *supra* note 301, at 228.

314. *Id.* at 243.

315. See LECKEY, *supra* note 254, at 148.

316. Canada (Att’y Gen.) v. Bedford, [2013] 3 S.C.R. 1101, 1135–36 (Can.).

317. Robert Leckey, *Suspended Declarations of Invalidity and the Rule of Law*, U.K. CONST. L. BLOG (Mar. 12, 2014), <https://ukconstitutionallaw.org> [<https://perma.cc/3VKM-868G>].

318. Note that some argue there is less of a countermajoritarian role for the SCC in interpreting the Charter because of its open-ended articulation of rights. See Peter W. Hogg & Allison A. Bushnell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)*, 35 OSGOODE HALL L.J. 75, 82–91 (1997). See generally Dixon, *supra* note 308 (collecting sources).

319. Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 615 (1983).

“The broader purposes of the Charter are ill served when a successful Charter applicant receives no remedies.”<sup>320</sup>

## V. STRATEGIC CONSIDERATIONS IN COMPARATIVE PERSPECTIVE

Without extensive empirical research into the dynamics of each system, it is impossible to tell whether these courts have actually protected, maintained, or increased their sociological legitimacy in the legal systems in which they operate. But, assuming that avoidance and dialogue can have such a result, these comparative examples highlight the key operational questions discussed in Part I: How should dialogue be constructed? Should courts be open about the extent of their institutional weaknesses? What kind of avoidance regime best allows for judicial flexibility in the future? This Part fleshes out some of the trade-offs inherent in these choices and speculates on a few of the factors that might influence a court’s decision to avoid.

### A. *Timing and the Quality of Dialogue*

If the goal of avoidance or delay is to allow some social consensus to develop in order to “secure” a future decision, part of that calculation includes whether and how the court itself will contribute to the debate. The U.S. Supreme Court can only eavesdrop when it uses justiciability doctrines to avoid adjudication. And when it denies certiorari in a one-line order, the Court does not give others permission to engage: the political branches take risks to act in an ostensibly open substantive area without guidance or engagement. By contrast—and even as they are more candid about their weaknesses—the European, South African, and Canadian courts are also more active participants in the ongoing conversations surrounding the divisive issues that may threaten their legitimacy.

While the U.S. Supreme Court may maintain control of the issues it hears through its use of the passive virtues, it has a lesser ability to construct and monitor a dialogue with the *political* branches. Justiciability doctrines have not lent themselves to dialogue in the way Bickel might have hoped: they are determined in advance of the legal issues in the case and any commentary on the merits of the case would take the shape of an impermissible advisory opinion.

To the extent the U.S. Supreme Court is able to create a dialogue through its use of justiciability doctrines, that dialogue is among the

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320. Choudhry & Roach, *supra* note 301, at 247.

lower courts in the judicial system, which may choose to hear cases and develop approaches to the sensitive issues at hand. The “percolation” in the lower courts is one way that the Court can monitor legal developments and social responses to divisive issues. But one danger of the creeping constitutionalization of standing is to the vibrancy of this dialogue.

The other courts engage in more robust and self-conscious dialogue, but this dialogue occurs at different times: *in medio* in the ECtHR and *ex post* in the CCSA and SCC. Although all the courts have some ability to influence the dialogue, the scope and depth of that participation varies.

When using the margin of appreciation, the ECtHR will ask the national courts and legislatures to work in partnership with it to achieve the goals of the Convention.<sup>321</sup> The flexibility in the margin approach, combined with the decreased pressure to make a final determination on any individual limitation, allows the ECtHR some space to promote consensus beyond merely seeking its evidence.<sup>322</sup> The margin, a “convenient subterfuge,”<sup>323</sup> might serve as a long-term, minority-protecting “mechanism to prod nations to update their policies gradually to emerging new standards.”<sup>324</sup> And some research suggests that ECtHR judgments “influence[] some countries to adopt progressive policies earlier than they otherwise would have” as well as significantly and substantially increase the probability of policy change, even in countries that are not party to the dispute.<sup>325</sup> When it has room to maneuver, the ECtHR can serve as the moderator of the rights debate, setting the agenda and the time limit for discussion.<sup>326</sup> And it maintains the final determination. In this best light, the ECtHR “allows

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321. *See supra* note 203.

322. *Cf. YOUROW, supra* note 167, at 195 (“Is the Court merely reflecting the sum total of national law and practice within the Council of Europe family of nations, or actively shaping a hitherto non-existent European consensus?”).

323. Eyal Benvenisti, *Margin of Appreciation, Consensus and International Standards*, 33 N.Y.U. J. INT’L L. & POL. 843, 851 (1999).

324. *Id.* at 852.

325. Laurence R. Helfer & Erik Voeten, Do European Court of Human Rights Judgments Promote Legal and Policy Change? 36 (Apr. 14, 2011) (unpublished manuscript), [http://www.law.uchicago.edu/files/files/HelferVoeten.Chicago.IL\\_.Workshop.14April.2011.pdf](http://www.law.uchicago.edu/files/files/HelferVoeten.Chicago.IL_.Workshop.14April.2011.pdf) [<https://perma.cc/SS8K-5GCL>].

326. *Cf. YOUROW, supra* note 167, at 195 (“ECtHR judgments can put an issue on the domestic agenda.”).

for the participation of state powers in the elaboration and application of a norm, to better control their activity.”<sup>327</sup>

Of course, there are downsides to this approach: in areas in which no European-wide consensus seems likely (such as in religious freedom cases), the ECtHR has little ability to influence the debate.<sup>328</sup> And cajoling can take time. The slow narrowing of the margin of appreciation in the transsexual-rights cases in the United Kingdom took over 16 years,<sup>329</sup> and the British have a history of adhering to the rule of law.<sup>330</sup> Furthermore, the opportunity for dialogue with national courts may make it more difficult for the European court to fashion uniform rules, if the unique national basis for a deviation is reaffirmed by the nation’s highest courts.<sup>331</sup>

By contrast, both the Canadian and South African courts conduct their dialogue *ex post*, as the legislature is fashioning remedies for the

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327. KASTANAS, *supra* note 112, at 68 (author’s translation).

328. For example, Article 9 of the Convention, guaranteeing freedom of thought, conscience and religion, has been extensively litigated in areas of high political salience—but without a consensus on the matter there is no “benchmark enforceable by the Court.” Dimitrios Kyritsis & Stavros Tsakyrakis, *Neutrality in the Classroom*, 11 INT’L J. CONST. L. 200, 215 (2011). And the court has not sought to encourage the various European countries to work toward a shared understanding of the relationship between religious freedom and laïcité or religious establishment. In *Lautsi v. Italy*, the ECtHR concluded that Italy had considerable leeway in “design[ing] the public school environment in a way that reconciles the individual demands of religious conscience with other public goals,” thus allowing the display of crucifixes in the classroom as within the nation’s margin of appreciation. Kyritsis & Tsakyrakis, *supra*, at 216 (citing *Lautsi v. Italy*, App. No. 30814/06, Eur. Ct. H.R. (Mar. 11, 2011)). See generally Joseph Weiler, Editorial, *Lautsi: Crucifix in the Classroom Redux*, 21 EUR. J. INT’L L. 1 (2010) (critiquing the ECtHR’s decision in *Lautsi*). And recent cases on wearing the burqa in public places in France and Turkey resulted in the ECtHR finding a wide margin of appreciation for the national authorities in determining rules surrounding “the public expression of a religious belief.” *Sahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173; *S.A.S. v. France*, 2014-III Eur. Ct. H.R. 341; see Hakeem Yusuf, *S.A.S. v. France: Supporting ‘Living Together’ or Forced Assimilation*, 3 INT’L HUM. RTS. L. REV. 277, 281 (2014).

329. See *supra* note 195.

330. The United Kingdom is ranked twelfth out of all countries in the World Justice Project’s Rule of Law Index, see WORLD JUSTICE PROJECT, RULE OF LAW INDEX 6 (2015), and has a fairly strong record in responding to adverse ECtHR decisions, see Dia Anagnostou & Alina Mungiu-Pippidi, *Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter*, 25 EUR. J. INT’L L. 205, 217 (2014). One recent failing has been the U.K.’s reluctance to rethink its prisoner voting ban, judged by the ECtHR to violate the Convention. See Delaney, *supra* note 5, at 583–84 n.236.

331. See Delaney, *supra* note 5, at 587–89 (discussing the U.K. Supreme Court’s decision on the topic of hearsay evidence in *R. v. Horncastle* [2009] U.K.S.C. 14, [2010] 2 W.L.R. 47 (appeal taken from Eng.), and its effect on dialogue with the ECtHR).

rights violations the courts have adjudicated.<sup>332</sup> In both countries, the courts are often willing to give guidance,<sup>333</sup> and occasionally the SCC will “formulate a remedy that will come in effect should the legislature not enact constitutional legislation by the court’s deadline.”<sup>334</sup> This approach, however, can result in bureaucratic politicking at the legislative level.<sup>335</sup> Sometimes the SCC retains jurisdiction “to allow both the government and the successful Charter applicants to return to the Court during the period of the delay,”<sup>336</sup> but again, this does not operate automatically. In South Africa, the CCSA regularly issues interim orders, often providing some intermediary remedy during the period of delay. This “iterative approach” has benefits.<sup>337</sup> These orders begin the conversation with the legislative branch, providing “a workable option for the time being,” without delineating the court’s ultimate view on the appropriate remedy.<sup>338</sup>

Brian Ray argues that the CCSA’s strategic avoidance techniques may force the court “toward[] a position of weak institutional authority that severely constrains its capacity to act as an independent partner in developing and implementing the social rights provisions.”<sup>339</sup> Certainly, once a court has deferred to a legislative remedy, it may struggle to act as an independent partner. But should it declare right and remedy itself, a court fails to act as a partner at all. Thus, the critical question that deserves further research is how a court can be an *effective* partner: through a Canadian-style hard-stop remedy at the back end (should the legislature fail to act), or by taking a first crack at an interim solution that the legislature can alter?

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332. There may be special importance to dialogue for socioeconomic rights that may otherwise fail to be enforced at all. See Landau, *supra* note 15, at 245. See generally Dixon, *supra* note 33 (focusing on socioeconomic rights in South Africa).

333. See LECKEY, *supra* note 254, at 105.

334. Choudhry & Roach, *supra* note 301, at 233.

335. Manfredi, *supra* note 280, at 462 (noting the possibility in remedial decree litigation of bureaucratic politics playing a role: “[A]n agency that finds itself under court order to remedy constitutional violations enjoys an automatic advantage in the competitive internal game of budgetary politics”).

336. Choudhry & Roach, *supra* note 301, at 233.

337. See Landau, *supra* note 15, at 250 n.27 (citing Charles Sabel & William Simon, *Destabilizing Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1081 (2004), as “explain[ing] the benefits of an iterative approach to public law remedies”).

338. *Id.*

339. Ray, *supra* note 258, at 10.

### B. Candor and Judicial Capacity

In the brief review of the theoretical literature in Part I, arguments for candor seem best aligned with increased institutional legitimacy for a court. But the U.S. Supreme Court has been successful in constructing its legitimacy through an opaque method of avoiding substantive rulings. Indeed, it is this “covert deployment” of prudential considerations that riles critics of the passive virtues.<sup>340</sup> As his critics have noted in distress, “Bickel’s theory actually requires the Justices to lie.”<sup>341</sup> And about what? About the weakness of the Court, the potential harm to the Court of deciding a divisive case, and the constraints faced by a judicial institution with neither force nor will. In fact, when the Supreme Court has been open about its need to balance prudence and principle,<sup>342</sup> it has been roundly criticized.<sup>343</sup> This opacity has allowed the Supreme Court to accrue power mostly out of the public eye, and the approach does not directly threaten its claim to fulfill the countermajoritarian aspiration.

When an opaque result seems preferable, “it is always important, before endorsing a lack of candor in a particular situation, to consider the alternatives.”<sup>344</sup> The ECtHR’s use of the margin of appreciation provides an insight into how candid avoidance works: the margin of appreciation is an open acknowledgement of the *limits* of judicial power. As noted above, the touchstone of the margin approach is *consensus*, and the court is clear about its willingness to uphold state limitations on rights while awaiting the development of a European norm on a particular issue. This approach has dialogic benefits (discussed above), but if the ECtHR is truly constrained by consensus, it loses the capacity—both as a doctrinal matter and in terms of its institutional legitimacy—to fulfill the countermajoritarian aspiration and to serve as the protector of the minority in the face of a rights-violating majority.<sup>345</sup> This court-created constraint may become even

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340. Hellman, *supra* note 27, at 1123.

341. *Id.* at 1149.

342. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849–50 (1992) (plurality opinion).

343. *See, e.g.*, Michael S. Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1001 (2003); Chris Whitman, *Looking Back on Planned Parenthood v. Casey*, 100 MICH. L. REV. 1980, 1985–91 (2002).

344. Shapiro, *supra* note 50, at 746 (citing SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 88, 103, 188–89 (1978)).

345. *See* Martens, *supra* note 191, at 58 (“By yielding to a consensus whose absence or existence is based on the will or refusal of a majority, are the courts not granting that majority

more meaningful as European states seek to entrench the doctrine to limit the ECtHR's reach. Protocol Number 15, which is in the ratification process,<sup>346</sup> would add the concept to the Preamble of the Convention itself.<sup>347</sup>

The Canadian and South African courts' *ex post* approach is candid about aspects of judicial weakness in enforcing remedies but retains elements of the countermajoritarian aspiration. That each court will rule on the substantive legal issue allows a principled resolution of the legal claim, but arguments rooted in institutional competence can affect the amount of deference shown to the legislature or executive. The best use of these self-effacing claims is in the area of socioeconomic rights, in which the delay occasioned by a legislative remand reflects the courts' dislike for making straightforward demands on the public fisc. But when couched in broader and more general terms of institutional competence, these remedial approaches can expand far beyond the realm of positive rights, leading to an overly deferential relationship with the elected branches. Furthermore, a large mismatch between right and remedy may undermine the legal legitimacy accrued by the initial principled determination of the claim.<sup>348</sup>

The dangers inherent in the more candid approaches to institutional weakness lie in the path dependency of doctrine and in the opportunities for the strategic use of the courts' approaches by nonjudicial actors.<sup>349</sup> Analyzing comparative institutional competence

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undue rule-making power, given that their role in relation to human rights is precisely to protect members of minorities from the intolerance of the majority?"). Cf. Robert Blackburn, *Current Developments, Assessment, and Prospects*, in *FUNDAMENTAL RIGHTS IN EUROPE* 76, 81 (Robert Blackburn & Jörg Polakiewicz eds., 2001) (discussing the critique that the margin of appreciation "allows individual states to evade the standards of human rights practice shared elsewhere in Europe"); James A. Sweeney, *Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era*, 54 *INT'L & COMP. L.Q.* 459, 466 (2005).

346. Protocol No. 15 has not yet entered into force but has been ratified by twenty-four countries thus far. See COUNCIL OF EUROPE, CHART OF SIGNATURES AND RATIFICATIONS OF TREATY 213, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=213&CM=7&DF=30/09/2015&CL=ENG> [<https://perma.cc/JHY4-GKPK>].

347. See Dean Spielmann, President, Eur. Ct. of Human Rights, *Current Legal Problems Lecture: Whither the Margin of Appreciation?* (Mar. 20, 2014), [http://www.echr.coe.int/Documents/Speech\\_20140320\\_London\\_ENG.pdf](http://www.echr.coe.int/Documents/Speech_20140320_London_ENG.pdf) [<https://perma.cc/H9QT-LXAF>].

348. Kate Hofmeyr, *A Central-Case Analysis of Constitutional Remedial Power*, 125 *S. AFR. L.J.* 521, 523 (2008) ("The effect of entrenchment is instead a contingent matter that depends on the remedial approach of the courts . . .").

349. Cf. Friedman & Delaney, *supra* note 64, at 1190 (discussing the ways in which doctrine can constrain courts and structure the arguments available to litigants).

or searching for consensus creates space for other players to participate in the legitimacy game. There are benefits, but giving up complete control makes the courts vulnerable. They may find their strategies for avoiding institutional threats are being used to limit their power to fulfill their constitutional responsibilities.

*C. Deciding to Avoid: Factors for Further Study*

The snapshot of avoidance that this Article presents does not seek to identify the various factors that might influence a court's decision to use avoidance or to provide explanations for why, or when, a court might choose to navigate the issues of timing and candor in a particular way. But this final Section suggests some plausible areas for further study—including the internal institutional dynamics of a court, the judicial architecture of the legal system, and how well judges can be expected to understand and predict political threats or popular support. Disaggregating and examining these various factors might allow scholars to predict when a court could be expected to avoid.

First, the internal workings of an individual court will likely be of critical relevance to the question of when and how a court might avoid. Are the judges able to confer in advance about strategic aims? Are they in agreement? The Justices of the Warren Court were known to negotiate and communicate outside of conference.<sup>350</sup> And Bickel suggests that, in *Naim v. Naim*, the Justices all knew the correct answer as a matter of constitutional law but agreed to avoid hearing the case due to the potential political backlash if they found the state miscegenation law unconstitutional. This example suggests that the ability of a multimember court to agree on avoidance and to keep such a decision opaque might be a function of court cohesiveness and the manner in which the court conducts its internal decisionmaking procedures.

The internal processes of the ECtHR may help explain why that court has preferred the margin of appreciation approach. The judges on the ECtHR operate against a background principle of interpretation that gives “priority to rights,” requiring rights “to be

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350. See G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 164–68 (1982) (discussing efforts by Justice Frankfurter and Chief Justice Warren to negotiate for a unanimous decision in *Brown v. Board of Education* through informal lunches); Dawn Johnsen, *Justice Brennan: Legacy of a Champion*, 111 MICH. L. REV. 1151, 1159–65 (2013) (describing Brennan's “rule of five” and his efforts to build consensus on the Warren Court).



interpreted broadly and the exceptions narrowly.”<sup>351</sup> This priority principle serves as a type of ratchet, ensuring the expansion of rights over time. Judges who cohere around this background norm—as most do, due to the mechanisms of appointment and acculturation—may find it easier to use the margin of appreciation doctrine in order to push the dialogue in a particular direction.<sup>352</sup> And the mechanisms of deliberation at the ECtHR allow for discussion and deliberation before the conference takes place, permitting the reporting judge (*juge rapporteur*) to construct an opinion amenable to all.<sup>353</sup>

Another possible factor that could influence a court’s decision to avoid is the broader judicial architecture of the underlying legal system. In the European Convention system, the ECtHR’s reliance on the individual national courts for ensuring the effectiveness of its rulings complicates its enforcement power. Some of the ECtHR’s dialogue is with national courts themselves, as the European-level court attempts to learn the political limits and manage the doctrinal constructs of the national systems.<sup>354</sup> Similarly, in the United States, the Supreme Court may choose to foster dialogue within the lower federal courts, waiting until they have engaged with and ruled on contentious issues before resolving the question at the national level.<sup>355</sup> This “dialogue” can even happen after a decision, truly *ex post*, as lower courts “narrow from

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351. Greer, *supra* note 148, at 413.

352. See Nina-Louisa Arold, *The European Court of Human Rights as an Example of Convergence*, 76 NORDIC J. OF INT’L L. 305, 321 (2007) (arguing that the court “creates its own distinctive legal culture through merging diversities”); *id.* at 307–08 (noting that some judges have “extensive overseas studies and experience in international and human rights law”). *But see* Loukis G. Loucaides, *Reflections of a Former European Court of Human Rights Judge on His Experiences as a Judge*, EUROPEAN ROMA RIGHTS CENTRE (July 26, 2010), <http://www.errc.org/article/roma-rights-1-2010-implementation-of-judgments/3613/8> [https://perma.cc/H28R-SJNG] (discussing the negative consequences of appointing judges with no “background acquaintance with human rights”).

353. Cf. Mathilde Cohen, *Ex Ante Versus Ex Post Deliberations: Two Models of Judicial Deliberations in Courts of Last Resort*, 62 AM. J. COMP. L. 951, 954 (2014) (“The reporting judge’s main task is to propose a disposition and draft an opinion *before* the oral argument and conference meeting take place.”).

354. See Delaney, *supra* note 5, at 561, 575–76, 590.

355. Many Supreme Court certiorari memos discuss the need for further “percolation” in the courts of appeals, to allow an issue to be vetted by a number of other judges before rising to the Supreme Court level. See generally Zachary Wallander & Sara C. Benesh, *Clerks as Advisors: A Look at the Blackmun Papers*, 98 MARQ. L. REV. 43 (2014) (discussing this phenomenon).

below” and occasionally mitigate the harmful consequences of the Court’s errors.<sup>356</sup>

Finally, the most important factor is how well a court understands its potential threats and reserves of support—in short, whether the court is fully aware of the political dynamic in which it operates.<sup>357</sup> In South Africa, for example, the CCSA did not avoid or delay when invalidating the death penalty in *State v. Makwanyane*. The Justices understood that, although the public was opposed, elites in government supported the result, protecting the court from government-led sanctions and suggesting that any popular backlash would be contained.<sup>358</sup> In general, whether judges possess such political savvy may be a function of their previous positions and actions, their connections and networks, and the quality and diversity of media outlets.<sup>359</sup>

Assessing political dynamics could also be more or less difficult depending upon the nature of the political system. In a multiparty political system, a court may trade on diffuse support from the people to protect itself from a divided or fractious elected government. But in a one-party system, such as South Africa’s, a court may find that its primary audience consists of its coequal branches of government: the people cannot serve as a competing source of power if they do not have an opportunity to penalize elected officials for failing to support the court. In this situation, the threat of noncompliance or punitive measures comes from the coordinate branches. In a federal system, however, threats of noncompliance could also come from below, as there are many outlets for organized political opposition and even space for competing legal paradigms (subnational constitutions).<sup>360</sup>

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356. See generally Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016) (coining the phrase “narrowing from below” to describe efforts by courts of appeals to interpret Supreme Court rulings narrowly).

357. See Hirschl, *Canada’s Contribution*, *supra* note 279, at 96 (“[J]udges are not only precedent followers, framers of legal policies, or ideology-driven decision makers, but also sophisticated strategic decision makers who realize that their range of decision-making choices is constrained by the preferences and anticipated reactions of the surrounding political sphere.”).

358. See *supra* notes 244–48 and accompanying text.

359. Cf. generally Rosalind Dixon, *Constitutional Design Two Ways: Constitutional Drafters as Judges*, 57 VA. J. INT’L L. (forthcoming 2016) (highlighting the appointment of constitutional drafters as judges, noting their significant political backgrounds and connections, and exploring their efficacy in enforcing young constitutions).

360. See Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1779–86 (2005); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle*, 111 HARV. L. REV. 2180, 2219 n.181 (“[S]tates are structurally better protected from federal overreaching than any discrete group of individuals, even a political majority, because their existing organization

Here, courts may need to prioritize a positive relationship with the coequal branches of government to ensure that the executive branch is willing to enforce the court's word against the sub-national entities.<sup>361</sup>

#### CONCLUSION

This Article demonstrates that courts around the world avoid contentious aspects of cases and that avoidance can occur at various times and with varying levels of candor. These choices—timing and candor—may affect the quality and nature of dialogue that a court can have with the political branches. But the decision to avoid may come with unintended consequences. Ultimately, how a court avoids an issue may also implicate the court's own effectiveness: the institutional or sociological legitimacy that the court is seeking to maintain or increase through delay may come at the expense of the court's own scope of authority.

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facilitates political action.”). The role of elites and interest groups in fomenting backlash is relevant to this point. *See* Persily, *supra* note 289, at 3, 12.

361. Roux, *supra* note 237, at 113 (describing political scientists who “counsel courts to ensure their decisions fall within the political branches’ ‘tolerance interval’ for every case that they decide”).