



The Constitutional Avoidance Doctrine: The Last Resort Rule (Part 2 of 3)

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The Constitutional Avoidance Doctrine (see CRS Legal Sidebar LSB10719, *The Modes of Constitutional Analysis: The Constitutional Avoidance Doctrine (Part 9)*) is a set of rules the Supreme Court has developed to guide federal courts in disposing of cases that raise constitutional questions in order to minimize tensions that arise when an unelected federal judiciary sets aside laws enacted by Congress or state legislatures. Under the Constitutional Avoidance Doctrine, federal courts should interpret the Constitution only when it is a “strict necessity.” In a concurring opinion in *Ashwander v. Tennessee Valley Authority*, Justice Louis Brandeis identified seven rules comprising the Constitutional Avoidance Doctrine: (1) the Rule Against Feigned or Collusive Lawsuits; (2) Ripeness; (3) Judicial Minimalism; (4) the Last Resort Rule; (5) Standing and Mootness; (6) Constitutional Estoppel; and (7) the Constitutional-Doubt Canon. Rules (1), (2), (5), and (6) inform whether a court can hear a case (i.e., whether it is justiciable), while Rules (3), (4), and (7) inform how a court should address constitutional questions in cases before it. This Legal Sidebar Post on the Last Resort Rule is the second of three that look at this latter set of rules. Because the Constitutional Avoidance Doctrine informs how the Court is likely to resolve disputes involving the constitutionality of laws, understanding the Constitutional Avoidance Doctrine may assist Congress in its legislative activities.

Under the Last Resort Rule, a court should “not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed.” Accordingly, if a court can resolve a case on both constitutional and non-constitutional grounds, the court should do so on non-constitutional grounds. By applying the Last Resort Rule, the court avoids creating constitutional precedent unnecessarily, thereby giving the political process time and opportunity to resolve contentious constitutional issues.

An example of the Supreme Court’s use of the Last Resort Rule is its decision in *Bond v. United States*. In *Bond*, federal prosecutors charged Carol Bond with violating 18 U.S.C. § 229, Section 201 of the Chemical Weapons Convention Implementation Act of 1998 (CWCIA), when she caused “a minor thumb burn readily treated by rinsing with water” to her husband’s lover by applying toxic chemicals to the paramour’s car, mailbox, and door knob. Bond argued that Section 229 (1) “exceeded Congress’s enumerated powers and invaded powers reserved to the States by the Tenth Amendment” and (2) did not apply to her because “her conduct, though reprehensible, was not at all ‘warlike.’” Faced with resolving *Bond* on either statutory or constitutional grounds, the Court, relying on the Last Resort Rule, considered

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first whether it could resolve the case based on Bond's argument that Section 229 did not apply to her actions. After analyzing the CWCIA, the Court concluded that Congress did not intend for Section 229 to apply to Bond's actions.

Based on the Last Resort Rule, the Supreme Court has remanded cases involving constitutional questions to lower courts to see if the case can be resolved on statutory grounds. For example, in *Escambia County v. McMillan*, the Court remanded a case affirmed by the appellate court on constitutional grounds because, in deciding the case, the district court also found a statutory violation. The Supreme Court instructed the appellate court to determine if it could affirm the district court's decision based on the statutory rather than the constitutional ruling.

In other cases, the Court has avoided ruling on a constitutional question by deciding a case based on statutory reasons the lower court did not consider. For instance, the Court resolved *Siler v. Louisville & Nashville Railroad Co.* by ruling that the Railroad Commission violated a Kentucky statute—an issue the Kentucky state court had not considered. By reaching this conclusion, the Court avoided addressing *Siler's* constitutional questions. *Siler* concerned questions of federal and state law. While the Supreme Court interpreted the Kentucky statute in *Siler*, the Court often remands cases involving constitutional and state law issues to state courts so the state courts can first resolve state law questions. Consistent with this approach, the Supreme Court has dismissed state court appeals based on constitutional questions if state law can sustain the judgment.

Besides avoiding constitutional questions, applying the Last Resort Rule by remanding state law questions to state courts has other advantages. First, the Court avoids using its resources to decide questions where its decisions would be advisory. Second, the Court acknowledges state expertise and autonomy to interpret state laws. For instance, in *Giles v. Teasley*, the Court declined to rule on a constitutional question after ascertaining that a ruling on either of two state laws could resolve the case. The Court observed:

The doctrine that the Court will not “anticipate a question of constitutional law in advance of the necessity of deciding it” . . . is a well-settled doctrine of this Court which, because it carries a special weight in maintaining proper harmony in federal-state relations, must not yield to the claim of the relatively minor inconvenience of postponement of decision.

A third advantage of remanding state law questions to state courts is that the Court avoids having to rule on unfamiliar state law. In *Spector Motor Service v. McLaughlin*, the Court ruled that federal litigation should be held pending state court resolution of “intertwined” local law. Justice Felix Frankfurter stated:

[W]e have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law. Avoidance of such guesswork, by holding the litigation in the federal courts until definite determinations on local law are made by the state courts, merely heeds this time-honored canon of constitutional adjudication.

Accordingly, the Last Resort Rule assists the Supreme Court by forestalling the need to rule on politically contentious constitutional issues while according deference to state laws and courts. (Additional background on this topic can be found in the *Constitution of the United States of America, Analysis and Interpretation* and CRS Report R43706, *The Doctrine of Constitutional Avoidance: A Legal Overview*.)

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