Comparative Avoidance

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Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 **Duke L.J.** 1 (2016).

I'll start this essay just as Erin Delaney starts her article—with a shout-out to Alexander Bickel. In *The Least Dangerous Branch*, Bickel extolled the "passive virtues"—deciding not to decide the merits of contentious constitutional issues—in order to preserve the Supreme Court's institutional legitimacy in the face of the judicial branch's "counter-majoritarian difficulty." Strategic avoidance, the argument goes, can enable further dialogue over such issues, allowing resolution through the political branches rather than through judicial intervention.

As it turns out, the United States is not the only place where the judicial branch holds the title of least dangerous. So it is not surprising that other systems have developed devices by which judicial institutions avoid conflict with coordinate branches of government or with popular opinion more generally. As Delaney puts it: "Avoidance is everywhere." To be clear, Delaney's article takes no position on whether this sort of strategic avoidance is normatively desirable or whether courts do, in fact, enhance their legitimacy when they engage in such avoidance. But she argues that this assumption appears to influence the behavior of courts across the globe. Her focus in this article is on strategic avoidance by the Supreme Court of the United States (SCOTUS), the European Court of Human Rights (ECtHR), the Constitutional Court of South Africa (CCSA), and the Supreme Court of Canada (SCC).

Delaney's analysis of these systems emphasizes two variables that affect how avoidance operates. The first is timing: when during the course of a case does the court make the avoidance decision? *Ex ante* avoidance occurs before the court weighs in on the substantive merits of a particular issue. *In medio* avoidance occurs in the midst of the court's consideration of the case, after the arguments on the merits have been aired but without directly deciding the merits. And *ex post* avoidance occurs at the remedies phase, after the court has rendered a decision on the merits. The second variable is candor: how openly does the court admit that it is engaging in strategic avoidance? Delaney provides a brief but insightful summary of the costs and benefits of judicial candor, emphasizing the core values of public reason-giving and trust while acknowledging the pragmatic, strategic, and normative considerations that might counsel toward less candor rather than more.

Delaney's discussion of SCOTUS targets its *ex ante* methods of avoidance—justiciability doctrines (standing, ripeness, and mootness), as well as the Court's unique agenda-setting prerogatives that come with the certiorari process. She recognizes, however, that the Court also relies on *in medio* avoidance (including constitutional avoidance, deference doctrines, and governmental immunities) and *ex post* avoidance (such as the Court's "all deliberate speed" remedial instruction in *Brown II*). With respect to candor, Delaney argues that the Court's *ex ante* avoidance methods score quite low. Certiorari denials (as well as DIGs, which dismiss a prior cert grant as "improvidently granted") are typically accompanied by no explanation at all. In addition, justiciability doctrines (which Bickel might have viewed as paradigmatic tools of strategic avoidance) have developed into independent areas of constitutional law. Delaney uses the Court's decision in *Hollingsworth v. Perry*—in which the majority found a lack of Article III standing and therefore did not decide whether bans on same-sex marriage were constitutional—to illustrate how difficult it is to tell whether a particular decision was strategic avoidance or simply "a sincere holding on the standing issue."

Delaney then turns to the ECtHR, which has jurisdiction over claims by individuals seeking to enforce rights provided by the European Convention on Human Rights. For the ECtHR, *ex ante* avoidance methods are not generally available because of mandatory jurisdiction. Accordingly, the primary avoidance method is the *in medio* "margin of appreciation." This doctrine—although lacking textual support in the Convention itself—gives nations a "margin" within

which their regulations will avoid judicial second-guessing. The ECtHR is quite candid with respect to the avoidance function the margin of appreciation performs in the European system. It is only when there is consensus regarding the content of a particular right that the ECtHR will find laws flouting that consensus to exceed the margin of appreciation.

Finally, Delaney details how the CCSA and the SCC rely on *ex post* methods of avoidance. Like the ECtHR, both courts lack the sort of *ex ante* tools that are commonly used by SCOTUS. Instead, avoidance comes by limiting or delaying the remedies that will be imposed in the event of a counter-majoritarian ruling. The CCSA is constitutionally required to "declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency," but the Constitution also grants it the ability to suspend or delay such a declaration of invalidity—and the CCSA has invoked this authority frequently. Canada's Constitution Act similarly mandates that laws found to be inconsistent with the Constitution "have no force or effect" to the extent of the inconsistency. Although the Act does not explicitly allow the SCC to delay that invalidity in the event of such a finding, delayed declarations of invalidity and legislative remands have become preferred remedies in the Canadian system. As with their European counterparts, the South African and Canadian avoidance tools score well in terms of candor. By ruling on the merits of constitutional claims without ordering a remedy to correct violations, these courts are overtly "self-effacing" about their own "judicial weakness."

Delaney recognizes that, ultimately, the key normative question is which approaches to timing and candor are most effective in accomplishing the institutional goals that strategic avoidance purports to serve. Although she does not provide a comprehensive proposal, she makes a number of important observations. For example, one downside of the *ex ante* avoidance methods employed by SCOTUS is that the Court is largely left on the sidelines when it comes to the dialogue that avoidance is supposed to facilitate. As Delaney puts it, the Supreme Court "can only eavesdrop." The foreign courts' *in medio* and *ex post* avoidance methods allow those courts to participate more directly in that dialogue. However, those methods carry with them the risk that the political branches will openly reject the judiciary's position regarding the very rights that the courts have been tasked with enforcing.

The global export of Bickelian passive virtues is unlikely to bring the U.S. trade deficit into balance. But it does provide a rich opportunity for exploring comparative-law perspectives on a topic that has long fascinated federal courts scholars. I hope Delaney's article is just the beginning.

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