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Cover Page Footnote

These comments are an extension and refinement of my spoken comments before the Legislation section at the 2006 AALS annual meeting. Thanks to Bernie Bell for organizing the section, Lisa Kloppenberg for arranging for publication of section comments, and Phil Frickey for writing an article worth commenting on. Thanks also to Matt Getty for helping me beat into shape a transcript of my spoken comments. And thanks, finally, to the *Minnesota Law Review* for allowing me to make extensive use of my essay "Should the Supreme Court Fear Congress?", 90 Minn. L. Rev. 1337 (2006), in the pages that follow.

CONSTITUTIONAL AVOIDANCE AND THE ROBERTS COURT

Neal Devins[*]

This essay will extend Phil Frickey's argument about the Warren Court's constitutional avoidance to the Roberts Court. My concern is whether the conditions which supported constitutional avoidance by the Warren Court support constitutional avoidance by today's Court. For reasons I will soon detail, the Roberts Court faces a far different Congress than the Warren Court and, as such, need not make extensive use of constitutional avoidance.

In *Getting from Joe to Gene (McCarthy)*, Phil Frickey argues that the Warren Court avoided serious conflict with Congress in the late 1950s by exercising subconstitutional avoidance.[1] In other words, the Court sought to avoid congressional backlash by refraining from declaring statutes unconstitutional. Instead, the Court sought to invalidate statutes or congressional actions based on technicalities. If Congress disagreed with the results reached by the Court, lawmakers could have taken legislative action to remedy the problem. This practice allowed the Court to maintain an opening through which it could backtrack and decide similar cases differently without reversing a constitutional decision.

In understanding the relevance of Frickey's argument to today's Court, it is useful to compare Court-Congress relations during the Warren Court of the late 1950s to those during the final years of the Rehnquist Court. From 1995-2002, the Rehnquist Court made extensive use of constitutional law to strike down all or part of 31 federal statutes. Additionally, the Court reinvigorated constitutional federalism.[2] This essay will examine two questions. The first question is whether members of Congress are serious about their independent responsibility to interpret the

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[1] Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 Cal. L. Rev. 397, 420-25 (2005).

[2] *See infra* nn. 28-29. The reinvigoration of federalism waned in the final year or two of the Rehnquist Court. *See* Linda Greenhouse, *Foreword: The Third Rehnquist Court*, in *The Rehnquist Legacy* xiii (Craig M. Bradley ed., Cambridge U. Press 2006). Nevertheless, the Court's reinvigoration of federalism was significant, as was Congress's non-reaction to that revival. *See infra* nn. 29-30 and accompanying text.

Constitution. One would expect that the more interested Congress is in constitutional values and constitutional questions, the more willing the Court would be to encourage dialogue between Congress and the Court. Along those lines, the Supreme Court should make greater use of dialogue-promoting devices such as avoidance whenever it thinks that lawmakers are sincerely interested in interpreting the Constitution. In particular, the use of avoidance allows lawmakers to respond to a Court ruling without placing Congress in the difficult position of confronting a constitutional ruling with which it might disagree based on its independent interpretation.

The second question is whether the Supreme Court should fear Congress. Specifically—Will Congress express its disapproval of unpopular Court rulings by making use of jurisdiction-stripping or other court-curbing devices? If so, the Court might be more likely to embrace avoidance rather than constitutional rulings. Unlike a constitutional ruling, avoidance allows Congress to express its disapproval of what the Court has done by rewriting legislation. Correspondingly, it gives the Court an opportunity to ease tensions with Congress by approving legislation, rather than forcing Congress to attack the Court.

In the pages that follow, I will compare Court-Congress relations in the early Warren Court era to those during the Rehnquist Court era. Following this comparison, I will argue that the Roberts Court has no reason to employ constitutional avoidance techniques. First, today's Congress is not particularly interested in constitutional questions, so there is no *good governance* reason to use constitutional avoidance. Second, though a whole raft of court-stripping proposals has been introduced in the past few years, the evidence suggests that today's Congress is not interested in striking back at the Supreme Court in that way.

I. THE WARREN COURT

In contrast to the modern Court, the early Warren Court had several good reasons to employ avoidance techniques. First, Congress was very interested in asserting its prerogatives as an independent interpreter of the Constitution. Second, the Warren Court had reason to fear that Congress was serious about court-stripping—so much so that taking a firmer position would not have helped the Court accomplish its goals.

During the 1956-1957 term of the Warren Court, twelve cases were decided involving Communists. The Court ruled against the government in every case, though never on constitutional grounds.[3] Congress loudly signaled its disapproval, coming, as Chief Justice Warren put it in his memoirs, "dangerously close" to enacting legislation that would have

[3] Lucas A. Powe, Jr., *The Warren Court and American Politics* 90-99 (Belknap Press 2000).

stripped the Court of appellate jurisdiction in five domestic security areas.[4] The Court then relented and issued decisions that limited the scope of its earlier rulings, essentially backing away from its earlier decisions in the face of these proposals.[5] As the *New York Times* put it in an editorial in 1960, "what Senator Jenner," who was the sponsor of some of these bills, "was unable to achieve in Congress, the Supreme Court has now virtually achieved on its own."[6]

The question is whether the Court was correct in using avoidance and subsequently backing away in anticipation of a congressional backlash. The answer is yes for two reasons. First, in the mid–to-late 1950s, the Court could not assume tacit lawmaker support of judicial independence. The prevailing wisdom at that time was that the Court in 1937 had saved itself from Court-packing by changing its doctrine—the so-called "switch in time that saved nine."[7] In other words, the Court could not calibrate its decision-making against the backdrop of a longstanding tradition of judicial independence. Second, Court decision-making was truly upsetting to significant factions within Congress. A very strong faction thought that domestic security required anti-Communist, anti-subversive legislation.[8] Another faction strongly disapproved of the *Brown*[9] decision. Most notably, southern lawmakers embraced a *manifesto*, in which they pledged to use all lawful means to bring about a reversal of *Brown*.[10] As Anthony Lewis put it, the purpose of the *Southern Manifesto* "was to make defiance of the Supreme Court and the Constitution socially acceptable in the South . . . ."[11] Therefore, the Court had reason to fear that a coalition of southern lawmakers and anti-Communist lawmakers would get together and would have the power to go after the Court.[12] Third, a substantial number of lawmakers thought the Court should give great weight to congressional

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[4] Earl Warren, *The Memoirs of Earl Warren* 313 (Doubleday 1977). Indeed, Congress did narrow a 1957 ruling (*Jencks v. U.S.*, 353 U.S. 657, 672 (1957) (allowing an alleged Communist to have access to all government documents touching the events and activities at issue in his trial)) by specifying that a criminal defendant can only gain access to documents involving his own statements or the statements of a witness called by the government to testify. *Act of Sept. 2, 1957*, Pub. L. No. 85-269, 71 Stat. 595 (1957) (codified as amended at 18 U.S.C. § 3500 (2000)). And while this may have only been a "watered-down measure to modify slightly one evidentiary rule used in criminal trials," Barry Friedman, *"Things Forgotten" in the Debate over Judicial Independence*, 14 Ga. St. U. L. Rev. 737, 752 (1998), Congress nonetheless used this bill to signal its willingness to enact correcting legislation.

[5] Walter F. Murphy, *Congress and the Court* 245-46 (U. Chi. Press 1962). Powe, *supra* n. 3, at 135-56.

[6] Murphy, *supra* n. 5, at 245 (quoting *A Regrettable Decision*, 109 N.Y. Times 36 (Mar. 2, 1960)).

[7] *See* William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* 154-56 (Oxford U. Press 1995).

[8] *See* Donald G. Morgan, *Congress and the Constitution: A Study of Responsibility* 246-91 (Belknap Press 1966).

[9] *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

[10] 102 Cong. Rec. 4515-16 (1956).

[11] Anthony Lewis, *Portrait of a Decade: The Second American Revolution* 39 (Bantam 1964).

[12] *See* Morgan, *supra* n. 8, at 270; Powe, *supra* n. 3, at 134.

interpretation of the Constitution.[13] In Donald Morgan's 1959 survey of members of Congress, 40% said that courts should give controlling weight to congressional interpretations of the Constitution.[14] For all these reasons, the Warren Court had good reason to fear Congress.

II. THE REHNQUIST COURT

Fast-forward to 2006 (when John Roberts became Chief Justice of the United States). There are dramatic differences between the Rehnquist-era Congress and earlier Congresses. These differences explain why lawmakers today are less interested in constitutional questions and also have incentives to launch rhetorical attacks against the courts. The defining feature of today's Congress is political polarization along ideological lines.[15] No longer are there liberal Rockefeller Republicans or conservative southern Democrats. Before the 2006 elections, if a line of ideology had been drawn in the House and Senate, all Republicans would have been to the right of all Democrats.[16] This phenomenon is fueled by party primaries, in which candidates in both the House and Senate must appeal to their respective base when running for election.[17] It is also fueled in the House of Representatives by redistricting, which typically guarantees safe seats for Republicans or Democrats.[18]

What are the consequences of this ideological polarization? One consequence is greater cohesion within the parties and a sense that the parties want to deliver a message that will resonate with their base.[19] This is

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[13] *See* Bruce G. Peabody, *Congressional Attitudes Towards Constitutional Interpretation*, in *Congress and the Constitution* 39, 44 (Neal Devins & Keith E. Whittington eds., Duke U. Press 2005).

[14] *Id.* at 48 (extrapolating survey data found in Morgan, *supra* n. 8, at 365-83). Not surprisingly, southern lawmakers disproportionately embraced this "independent constitutionalist" perspective. *See id.* at 45.

[15] For more accounting of this phenomenon, see Neal Devins, *The Academic Expert before Congress: Observations and Lessons from Bill Van Alstyne's Testimony*, 54 Duke L.J. 1525, 1526-27, 1534-45 (2005) [hereinafter Devins, *The Academic Expert*].

[16] Before the 2006 elections, all but one of the Democrats were to the left of all Republicans. The one exception was former Senator Zell Miller, a Democrat from Georgia, who was more conservative than a handful of Republican senators. *See* Voteview.com, *108th House Rank Ordering*, http://voteview.com/hou108.htm (last updated Aug. 23, 2005); Voteview.com, *108th Senate Rank Ordering*, http://voteview.com/sen108.htm (last updated Oct. 26, 2004). It is too early to tell whether and how the 2006 elections change the ideological balance in Congress. With that said, a key part of the Democratic campaign to take over Congress was the party's enlistment of centrist candidates. Robin Toner & Kate Zernike, *For Incoming Democrats, Populism Trumps Ideology*, 156 N.Y. Times 1, (Nov. 12, 2006).

[17] *See* Scott McLean, *Man in the Middle*, 155 N.Y. Times 15CT (Sept. 17, 2006) (recounting Senator Lieberman's longtime struggles with his own party, which recently resulted in his primary defeat).

[18] *See* Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 Wm. & Mary L. Rev. 415, 427-28 (2004); Jeffrey Rosen, *Center Court*, N.Y. Times Mag. 17 (June 12, 2005). The 2006 Democratic takeover of the House demonstrates that redistricting, by itself, does not guarantee victory for either party. Although most House seats are not competitive, some can be made competitive when, for example, a sitting member of Congress is forced to give up his seat in the midst of a scandal.

[19] *See generally* C. Lawrence Evans, *Committees, Leaders, and Message Politics*, in *Congress Reconsidered* 217, 219-21 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 7th ed., CQ Press 2000) (discussing the emergence of "message politics"). *See also* H.W. Perry, Jr. & L.A. Powe, Jr., *The Political Battle for the Constitution*, 21 Const. Commentary 641, 692-93 (2004) (noting that political

so-called "message politics," where the Democrats and Republicans develop distinctive, competing messages. There is also less interest in what happens to legislation after it is enacted, including Supreme Court decisions invalidating legislation. This stems from "position-taking legislation," where the focus is on making judgmental statements that are pleasing to the base, instead of producing certain results for constituents. For example, by enacting the Gun-Free School Zones Act,[20] lawmakers were able to take a position in favor of protecting children, regardless of whether the Court upheld the law.[21]

Another consequence of message politics is that lawmakers are less interested in independently interpreting the Constitution. There are several indications of this loss of interest. First, there has been a clear decline in the percentage of hearings raising significant constitutional issues. Outside of the Judiciary Committees (which have strong incentives to continue holding constitutional hearings) the number of hearings that raised significant constitutional issues declined across the board between 1970 and 2000.[22] For example, the Foreign Affairs Committee, which used to have its own expertise on constitutional questions, does not hold nearly as many constitutional hearings as it once did.[23] Second, when Congress does hold constitutional hearings, lawmakers increasingly look for witnesses who will support the preexisting views of the party that selects them.[24] Of course, hearings have never really been a bipartisan search for the truth. However, some committees used to have unified staffs, and the hearings were less of the staged press conferences that they are today.[25]

A final consequence is that there has been a dramatic change in lawmaker attitudes toward congressional interpretation of the Constitution since Morgan conducted his study of the 1959 Congress. Bruce Peabody tried to replicate the Morgan study by questioning members of Congress in 2000 using the same questionnaire that Morgan used.[26] This recent survey occurred during the height of the Rehnquist Court federalism revival.

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parties have the ability to expound their constitutional vision without needing to reach a concrete decision, and that those parties are becoming increasingly cohesive and polarized).

[20] *Gun Free School Zones Act of 1990*, Pub. L. No. 101-647, § 1702(b)(1), 104 Stat. 4845 (1991) (codified at 20 U.S.C. § 922(q)(1)(A) (1994) later repealed in 1995). The Act was overturned by *U.S. v. Lopez*, 514 U.S. 549 (1995), and reenacted as amended at 18 U.S.C. § 922(q) (2000).

[21] Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 Duke L.J. 477, 513 (2001).

[22] *See* Keith E. Whittington et al., *The Constitution and Congressional Committees: 1971-2000*, in *The Least Examined Branch: The Role of Legislatures in the Constitutional State* 396 (Richard Bauman & Tsvi Kahana eds., Cambridge U. Press 2006).

[23] *Id.*

[24] *See* Devins, *The Academic Expert*, *supra* n. 15, at 1542-44.

[25] *Id.* at 1543; *see* Roger H. Davidson & Walter J. Oleszek, *Congress and Its Members* 217 (10th ed., CQ Press 2006) ("Hearings, in brief, are often orchestrated as a form of political theater . . . .").

[26] Bruce G. Peabody, *Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes, 1959-2001*, 29 L. & Soc. Inquiry 127, 147 (2004).

Notwithstanding this revival, only 13.8% of lawmakers, as compared to 40% in the Morgan survey, thought that the Court should give controlling weight to congressional interpretations of the Constitution.[27] Correspondingly, Peabody found that 71.3% of lawmakers thought that the courts should give either limited or no weight to congressional assessments of the constitutionality of legislation.[28]

Notably, the federalism revival did not prompt any meaningful backlash in Congress. Federalism-related hearings did not increase in the 1990s as compared to other periods, and the federalism hearings that did take place were not related to Court decisions. Rather, they were about the *Contract with America*.[29] The Court's federalism revival was of no interest to Congress, at least with respect to hearings—there is virtually no mention of the federalism decisions in the Congressional Record.[30] Congress, in other words, was not interested in engaging in any kind of dialogue with the Court on these issues.

Against this backdrop, it is not surprising that today's lawmakers see court-stripping proposals on socially-divisive issues as a way to speak to their base. Like position-taking legislation, lawmakers are most interested in launching rhetorical attacks against the Court. Moreover, because there is some fear that median voters support judicial independence,[31] social conservatives do not want to risk a backlash against their agenda by pushing for the enactment of such bills.[32] Indeed, they can reach out to their base by introducing bills and making floor statements about them. Consider, for example, the proposed legislation stripping the courts of jurisdiction on same-sex marriage and the Pledge of Allegiance.[33] In 2004, the House approved these measures shortly before the November elections, at a time when the Senate never had an opportunity to consider them.[34] If Congress had been truly interested in getting that legislation approved, those bills would have been taken up earlier, and they would have made their way from the House to the Senate or the Senate would have independently considered

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[27] *Id.*
[28] *Id.*
[29] *See* Whittington et al., *supra* n. 22.
[30] *See* Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 Duke L.J. 435, 451-52 (2001).
[31] *See* Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 Am. J. Political Sci. 635, 658 (1992). For a good overview of the judicial independence literature, see Barry Friedman, *Mediated Popular Constitutionalism*, 101 Mich. L. Rev. 2596, 2624-29 (2003) (discussing, among others, Michael Klarman's work on how Warren Court decision-making on race issues prompted a political backlash).
[32] Neal Devins, *Smoke, Not Fire*, 65 Md. L. Rev. 197, 204 (2006) [hereinafter Devins, *Smoke*].
[33] *Marriage Protection Act of 2004*, H.R. 3313, 108th Cong. (July 29, 2004); *Pledge Protection Act of 2004*, H.R. 2028, 108th Cong. (Sept. 21, 2004).
[34] Devins, *Smoke*, *supra* n. 32, at 202-03. The 2004 pattern held true in 2006. The *Pledge Protection Act of 2005*, H.R. 2389, 109th Cong. (May 17, 2006) (as introduced), was not passed in the House until July, and was referred to the Senate Judiciary Committee in August (again, too late for meaningful Senate action).

them. That did not happen. Instead, social conservatives in the House wanted to send a message that would resonate with their base without risk of political backlash.

III. CONCLUSION: THE ROBERTS COURT AND CONSTITUTIONAL AVOIDANCE

What lessons should the Roberts Court glean from recent congressional attacks against the Court and from the Warren era? Should the Roberts Court make use of constitutional avoidance because it has a high opinion of Congress—that is, it believes Congress cares about the Constitution and wants to engage in meaningful constitutional dialogues? Alternatively, should it make use of constitutional avoidance because it fears that Congress is likely to strike back at constitutional rulings invalidating federal statutes? The answer is no to both questions.

First, unlike Congress in the Warren era, today's Congress is less engaged in constitutional matters and less interested in asserting its prerogative to independently interpret the Constitution.[35] Second, it does not seem that Congress is poised to strike back at the Court. Unlike the Warren Court rulings, Rehnquist Court rulings did not prompt the ire of Congress. Recent court-stripping proposals, for example, have largely focused on state[36] and lower federal court[37] rulings rather than Supreme Court decisions. This has been a distinguishing feature for most of these proposals. And, as mentioned, the rulings in which the Court reinvigorated federalism by striking down all or part of 31 statutes did not prompt any significant response from Congress.

Lawmakers do not have incentives to strip the Court of jurisdiction or otherwise engage in meaningful court-curbing practices. Though some lawmakers are interested in scoring points with their constituents by introducing anti-court legislation and making rhetorical statements about activist judges, there is little risk of Congress waging battle with the courts by enacting jurisdiction-stripping proposals.[38]

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[35] There is no reason to think that the 2006 elections will change this practice. Such a change might take place, of course, and if it does the Court will need to rethink whether it should reinvigorate constitutional avoidance.

[36] Perhaps most prominent among these were the Massachusetts gay marriage decision, *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), and the Terri Schiavo litigation. The Schiavo litigation stretched on for years, with perhaps the most important decision coming in September of 2004 when the Florida Supreme Court struck down a law that gave Governor Bush the power to reinsert Schiavo's feeding tube. *Bush v. Schiavo*, 885 So. 2d 321, 324 (Fla. 2004).

[37] These include the Ninth Circuit's invalidation of the Pledge of Allegiance, *Newdow v. U.S. Cong.*, 292 F.3d 597 (9th Cir. 2002), and a district court order requiring Alabama Chief Justice Roy Moore to remove the Ten Commandments from the state Supreme Court rotunda. *Glassroth v. Moore*, 275 F. Supp. 2d 1347, 1349 (M.D. Ala. 2003).

[38] With the 2006 Democratic takeover of Congress, today's lawmakers are even more likely to embrace the rhetoric of an "independent judiciary."

What then of the *Military Commission Act*,[39] which was Congress's response to the Roberts Court's 2006 decision in *Hamdan v. Rumsfeld*?[40] Not only did Congress authorize military commission trials of enemy combatants, but lawmakers stripped the federal courts of habeas jurisdiction, while allowing federal court review of both commission verdicts and the determination of whether a detainee is an enemy combatant.[41] This legislation, for reasons I have detailed elsewhere,[42] was not intended to be a rebuke to the Supreme Court. Lawmakers claimed to be following the Court's direction that Congress sort out whether Guantanamo detainees should be tried by military commissions or federal courts. Also, lawmakers made clear that they were not stripping the courts of their authority to hear habeas corpus claims grounded in the Constitution; instead, lawmakers argued that enemy combatants do not possess constitutional habeas rights.[43] Under this view, the only habeas protections afforded enemy combatants are the ones that Congress granted them through legislation—something that Congress could rescind. For this very reason, lawmakers made clear that the Court could conclude that enemy combatants possess constitutional habeas rights and thereby neuter the statute's prohibition of habeas filings. Bill sponsor Senator Lindsey Graham (R-S.C.) put it this way: "It is a statutory right of habeas that has been granted to enemy combatants. And if there is a constitutional right of habeas corpus given to enemy combatants, that is a totally different endeavor, and it would change in many ways what I have said."[44]

The Roberts Court, in other words, can make use of straightforward statutory interpretation techniques to negate the habeas provision of post-*Hamdan* legislation.[45] There is no need to invalidate the bill as an unconstitutional restriction on court jurisdiction. More significant for purposes of this essay, there would be no need to make explicit use of

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[39] *Military Commission Act of 2006*, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

[40] *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

[41] For a summary of bill provisions, see Martin Kady II, CQ Weekly Online, *Major Provisions of the Agreement* 2625, http://library.cqpress.com/cqweekly/weeklyreport109-000002382864 (accessed January 19, 2007); Martin Kady II, CQ Weekly Online, *Congress Clears Detainee Bill* 2624-25, http://library.cqpress.com/cqweekly/weeklyreport109-000002382860 (accessed January 19, 2007); Karen DeYoung, *Court Told it Lacks Power in Detainee Cases*, Wash. Post A18 (Oct. 20, 2006); Scott Shane & Adam Liptak, *Shifting Power to a President*, 156 N.Y. Times A1 (Sept. 30, 2006).

[42] *See* Neal Devins, *Congress, the Supreme Court, and Enemy Combatants: How Lawmakers Buoyed Judicial Supremacy by Placing Limits on Federal Court Jurisdiction*, 91 Minn. L. Rev. __ (forthcoming 2007) (copy on file with Author) [hereinafter Devins, *Congress*].

[43] *See id.*

[44] 152 Cong. Rec. S10267 (daily ed. Sept. 27, 2006). For additional discussion, see Devins, *Congress*, *supra* n. 42.

[45] This is precisely what the Supreme Court did in *Hamdan v. Rumsfeld*. In *Hamdan*, the Roberts Court claimed that it need not employ constitutional avoidance techniques when interpreting a restriction on federal court jurisdiction over enemy combatants. 126 S. Ct. at 2762-69. Specifically, the Court ruled that traditional statutory interpretation principles suggested that the restriction did not preclude Supreme Court review. *Id.* Consequently, the Court did not need to employ constitutional avoidance to steer clear of deciding whether Congress could have prohibited Supreme Court review in *Hamdan*.

constitutional avoidance techniques because of the Court's desire to avoid the constitutional question as a reason to limit the statute's reach. The Court, instead, can simply declare that the statute does not interfere with constitutional habeas, including the Court's power to sort out whether the Constitution provides habeas protections to enemy combatants. In this way, the Roberts Court can use a statutory prohibition of habeas jurisdiction as an occasion to assert its authority to define the Constitution's meaning.