

tools, serving to calibrate the Fourth Amendment's guarantees to the current needs of the case and the long-term needs of the Court.

It will not be clear for some time whether Justice Sotomayor's concurrence will be a generative "mustard seed" or a fruitless "mule."<sup>110</sup> But her concurrence, like Justice Harlan's in *Katz*,<sup>111</sup> has at least the potential to become the most influential opinion from the *Jones* trio. If the Court eventually develops a doctrine that adequately implements the Fourth Amendment in an online world, it will likely follow a steady approach that respects minimalism and incrementally draws on the surplus ideas from Justice Sotomayor's concurrence in *Jones*.

### C. Fifth Amendment

1. *Miranda Custody*. — "[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law," a court must "decide only the latter."<sup>1</sup> Last Term, the Supreme Court departed from that principle in *Howes v. Fields*.<sup>2</sup> Contending that he had never received the warnings prescribed by *Miranda v. Arizona*,<sup>3</sup> an inmate challenged the use of statements he made during a jailhouse interrogation.<sup>4</sup> The Supreme Court first explained that the Antiterrorism and Effective Death Penalty Act of 1996<sup>5</sup> (AEDPA) precluded habeas relief because the state courts' rejection of his claim was not "contrary to, or . . . an unreasonable application of, clearly established Federal law, as determined by the Supreme Court."<sup>6</sup> Even though that statutory holding sufficed to dispose of the case, the Court went on to hold that the use of the inmate's statements comported with *Miranda* because the inmate's interrogation was not "custodial."<sup>7</sup> *Fields* and other cases like it signal the Court's willingness to look past avoidance principles when interpreting the constitutional provisions governing criminal investigations and adjudications. The distinctive features of constitutional criminal procedure justify that approach.

<sup>110</sup> Fallon, *supra* note 2, at 127 (predicting "a period of waiting to see whether [an extraordinary case] will prove to be a 'mustard seed' or a 'mule'" (quoting Charles Fried, *The Supreme Court, 1994 Term — Foreword: Revolutions?*, 109 HARV. L. REV. 13, 45 (1995))).

<sup>111</sup> *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

<sup>1</sup> *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

<sup>2</sup> 132 S. Ct. 1181 (2012).

<sup>3</sup> 384 U.S. 436 (1966).

<sup>4</sup> *Fields*, 132 S. Ct. at 1186.

<sup>5</sup> Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

<sup>6</sup> *Fields*, 132 S. Ct. at 1187 (quoting 28 U.S.C. § 2254(d)(1) (2006)).

<sup>7</sup> *See id.* at 1189–94.

Randall Fields was a Michigan inmate serving a sentence for disorderly conduct.<sup>8</sup> One day, a corrections officer led him from his cell to a locked conference room.<sup>9</sup> There, two armed sheriff's deputies interrogated him for five to seven hours.<sup>10</sup> Their questions concerned allegations that, before his incarceration, Fields had sexually abused a child.<sup>11</sup> The deputies told Fields that he was free to return to his cell, but they did not inform him of his right to remain silent and to consult with an attorney.<sup>12</sup> Fields eventually confessed; he then returned to his cell.<sup>13</sup>

Michigan charged Fields with criminal sexual conduct.<sup>14</sup> The state wished to introduce Fields's confession, but Fields contended that doing so would violate *Miranda*.<sup>15</sup> That case "announced a constitutional rule" designed to safeguard the Fifth Amendment privilege against self-incrimination.<sup>16</sup> Unless the object of a custodial interrogation is first told of his right to remain silent and to consult with an attorney, *Miranda*'s rule proscribes the use of his responses against him at trial.<sup>17</sup>

The trial court admitted Fields's confession nevertheless, and Fields was convicted.<sup>18</sup> The Michigan Court of Appeals affirmed. Fields was not in "custody" at the time of his interrogation, the court reasoned, so *Miranda* posed no barrier to the introduction of his confession.<sup>19</sup> The Supreme Court of Michigan denied review.<sup>20</sup>

Fields then sought a writ of habeas corpus in federal court, once again challenging the use of his un-Mirandized statement.<sup>21</sup> In order to obtain habeas relief, Fields had to clear the hurdles established by AEDPA. One of those hurdles, 28 U.S.C. § 2254(d), provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

<sup>8</sup> *Fields v. Howes*, 617 F.3d 813, 815 (6th Cir. 2010).

<sup>9</sup> *Id.*

<sup>10</sup> *Fields*, 132 S. Ct. at 1185–86.

<sup>11</sup> *Id.* at 1185.

<sup>12</sup> *See id.* at 1186.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Dickerson v. United States*, 530 U.S. 428, 440, 444 (2000).

<sup>17</sup> *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966).

<sup>18</sup> *Fields*, 132 S. Ct. at 1186.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.<sup>22</sup>

The district court held that Fields satisfied § 2254(d)(1)'s demanding criteria and awarded habeas relief.<sup>23</sup> In an opinion by Judge Polster, the Sixth Circuit affirmed.<sup>24</sup> The panel held that *Mathis v. United States*<sup>25</sup> — in which the Supreme Court applied *Miranda* to an Internal Revenue Service agent's questioning of a state prisoner<sup>26</sup> — clearly established that “a *Miranda* warning is required whenever an incarcerated individual is isolated from the general prison population and interrogated . . . about conduct occurring outside of the prison.”<sup>27</sup> Fields's interview fit this rule: he was isolated from the general population when taken to the conference room, and he was questioned about sexual conduct that occurred before his incarceration.<sup>28</sup> Therefore, the opinion explained, the Michigan courts' rejection of Fields's challenge was contrary to clearly established federal law as defined by the Supreme Court, and Fields was entitled to habeas relief.<sup>29</sup>

The Supreme Court reversed.<sup>30</sup> In an opinion by Justice Alito,<sup>31</sup> the Court began by applying § 2254(d). The Court thought it “abundantly clear that [its] precedents do not clearly establish the categorical rule on which the Court of Appeals relied.”<sup>32</sup> *Mathis*, the Court explained, “did not hold that imprisonment, in and of itself, is enough to constitute *Miranda* custody.”<sup>33</sup> That case merely held that “a prisoner who otherwise meets the requirements for *Miranda* custody is not taken outside the scope of *Miranda*” merely by virtue of his imprison-

<sup>22</sup> 28 U.S.C. § 2254(d) (2006). A state court decision is “contrary to” clearly established federal law “if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases,” or “if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a [different] result.” *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). A state court decision involves an “unreasonable application” of clearly established federal law if it “correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case.” *Id.* at 407–08. These requirements result in a “highly deferential standard for evaluating state-court rulings.” *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997).

<sup>23</sup> *Fields*, 132 S. Ct. at 1186.

<sup>24</sup> *Fields v. Howes*, 617 F.3d 813, 815 (6th Cir. 2010).

<sup>25</sup> 391 U.S. 1 (1968).

<sup>26</sup> *Id.* at 2–3.

<sup>27</sup> *Fields*, 617 F.3d at 818.

<sup>28</sup> *Id.* at 819–20.

<sup>29</sup> *Id.* at 823–24.

<sup>30</sup> *Fields*, 132 S. Ct. at 1185.

<sup>31</sup> Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Kagan joined the opinion of the Court.

<sup>32</sup> *Fields*, 132 S. Ct. at 1187.

<sup>33</sup> *Id.* at 1188.

ment.<sup>34</sup> Section 2254(d) thus prohibited habeas relief.<sup>35</sup> Fields had lost.

Although it could have stopped there, the Court pressed forward. It noted that the Sixth Circuit's categorical rule was not only "well beyond anything that is clearly established in [the Court's] prior decisions," but also "simply wrong."<sup>36</sup> First, the Court rejected the Sixth Circuit's special solicitude for prisoners, reasoning that the questioning of a prisoner "does not generally involve the shock that very often accompanies arrest."<sup>37</sup> Second, it disagreed with the Sixth Circuit's emphasis on isolation from the general prison population. Although the isolation of a *free* suspect may be coercive because it "prevent[s] family members, friends, and others . . . from providing either advice or emotional support," the isolation of an *incarcerated* suspect does not likewise "remove the prisoner from a supportive atmosphere."<sup>38</sup> Finally, the Court did not perceive any greater potential for coercion when the subject of the questioning is out-of-prison conduct.<sup>39</sup>

Having rejected the Sixth Circuit's rule, the Court set out its own approach. It noted that Fields received repeated assurances that he could leave his interrogation room, that the deputies neither "physically restrained" nor "threatened" him, and that the room was both "well-lit" and "average-sized."<sup>40</sup> In view of "all of the circumstances of the questioning," the Court concluded that Fields "was not in custody within the meaning of *Miranda*."<sup>41</sup> Having already lost under the statute, Fields lost again under the Constitution.

Justice Ginsburg, joined by Justices Breyer and Sotomayor, concurred in part and dissented in part. The Michigan state courts' resolution of Fields's claim, she agreed, was not contrary to clearly established law, so AEDPA prohibited a federal court from ordering his release.<sup>42</sup> But Justice Ginsburg dissented from the "further determination that Fields was not in custody under *Miranda*."<sup>43</sup> She observed that Fields did not invite his interview, that his questioners were armed, and that the questioning lasted "long into the night and early morning."<sup>44</sup> Had the case been before the Court on direct review ra-

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<sup>34</sup> *Id.*

<sup>35</sup> *See id.* at 1188–89.

<sup>36</sup> *Id.* at 1189.

<sup>37</sup> *Id.* at 1190–91.

<sup>38</sup> *Id.* at 1191.

<sup>39</sup> *Id.* at 1192.

<sup>40</sup> *Id.* at 1193.

<sup>41</sup> *Id.* at 1194.

<sup>42</sup> *Id.* (Ginsburg, J., concurring in part and dissenting in part).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1195.

ther than on a habeas petition, she would have held that *Miranda* precluded the introduction of his statement at trial.<sup>45</sup>

A longstanding principle of judicial restraint, known as the last-resort rule, instructs courts to prefer nonconstitutional grounds of decision to constitutional ones when possible.<sup>46</sup> In his pathmarking concurrence in *Ashwander v. Tennessee Valley Authority*,<sup>47</sup> Justice Brandeis ranked this principle among a battery of rules “under which [the Court] has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.”<sup>48</sup> The Court has described the directive to avoid constitutional questions as a “fundamental rule of judicial restraint”<sup>49</sup> and as a “doctrine more deeply rooted than any other in the process of constitutional adjudication.”<sup>50</sup> It tends to obey this suite of related commands with scrupulous care,<sup>51</sup> even to the

<sup>45</sup> *Id.* at 1194.

<sup>46</sup> See generally Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994).

<sup>47</sup> 297 U.S. 288 (1936).

<sup>48</sup> *Id.* at 346 (Brandeis, J., concurring).

<sup>49</sup> Three Affiliated Tribes v. Wold Eng'g, P.C., 467 U.S. 138, 157 (1984).

<sup>50</sup> Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944).

<sup>51</sup> The Court has thus adopted limiting constructions in order to avoid invalidating or casting doubt on statutes. See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2593–94 (2012) (opinion of Roberts, C.J.); *Skilling v. United States*, 130 S. Ct. 2896, 2928 (2010); *Bartlett v. Strickland*, 129 S. Ct. 1231, 1247 (2009) (plurality opinion).

It has disposed of cases on nonconstitutional rather than constitutional grounds. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2560 (2011); *Ricci v. DeStefano*, 129 S. Ct. 2658, 2664–65 (2009); *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 129 S. Ct. 2504, 2508 (2009).

It has decided cases on narrow constitutional grounds rather than broad ones. See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2556 (2012) (Breyer, J., concurring in the judgment); *FCC v. Fox Television Stations, Inc. (Fox II)*, 132 S. Ct. 2307, 2320 (2012); *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2792–94 (2011) (Breyer, J., concurring in the judgment).

It has disposed of cases by assuming, without deciding, that the Constitution bears a particular meaning. See, e.g., *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011); *NASA v. Nelson*, 131 S. Ct. 746, 751 (2011); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2613–15 (2010) (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 2618–19 (Breyer, J., concurring in part and concurring in the judgment); *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277, 2289 (2009) (Alito, J., concurring in part and concurring in the judgment); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009); *Kansas v. Colorado*, 129 S. Ct. 1294, 1298 (2009).

It has disfavored facial challenges. See, e.g., *Doe v. Reed*, 130 S. Ct. 2811, 2821 (2010); *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1191 (2008); *Gonzales v. Carhart*, 550 U.S. 124, 167–68 (2007).

It has distinguished or applied constitutional precedent instead of overruling it. See, e.g., *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1445–49 (2011); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3030–31 (2010) (plurality opinion); *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 592–93 (2007) (plurality opinion); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 482 (2007) (opinion of Roberts, C.J.); *Carhart*, 550 U.S. at 151–54; *Randall v. Sorrell*, 548 U.S. 230, 246–62 (2006) (plurality opinion).

It has declined to address constitutional issues until the lower courts have passed on them. See, e.g., *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430–31 (2012); *Bond v. United*

point of exerting truly heroic efforts.<sup>52</sup> Any perceived deviation from these principles typically sparks vigorous dissent.<sup>53</sup>

But this restraint is strikingly absent in cases presenting questions of constitutional criminal procedure. For instance, *Fields*'s deviation from the last-resort rule is far from unique in the Supreme Court's AEDPA docket. Some cases have reached the constitutional merits so that they need not determine whether § 2254(d) applies, inverting the ordinary instruction to decide statutory issues in order to avoid constitutional ones.<sup>54</sup> Others cannot even claim that excuse, rejecting habeas petitions on the merits even though § 2254(d) would concededly have dispatched them just as well.<sup>55</sup> These unnecessary constitutional sorties, moreover, tend not to meet with protest from any of the Justices.<sup>56</sup>

The Court's eagerness to answer questions of constitutional criminal procedure is not limited to AEDPA cases.<sup>57</sup> Nor are the casualties of this eagerness limited to the last-resort rule. For example, one rule of avoidance counsels courts faced with multiple constitutional questions to resolve only the narrowest one, if possible.<sup>58</sup> But the modern Court has often rejected criminal defendants' claims on multiple con-

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States, 131 S. Ct. 2355, 2367 (2011); *Salazar v. Buono*, 130 S. Ct. 1803, 1820–21 (2010) (opinion of Kennedy, J.); *FCC v. Fox Television Stations, Inc. (Fox I)*, 129 S. Ct. 1800, 1819 (2009).

And it has avoided deciding constitutional issues by remanding cases for consideration of nonconstitutional ones. *See, e.g.*, *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1209–11 (2012); *Beer v. United States*, 131 S. Ct. 2865, 2865–66 (2011) (mem.).

<sup>52</sup> *See, e.g.*, *NFIB*, 132 S. Ct. at 2593–94 (adopting an improbable construction of a statute); *NAMUDNO*, 129 S. Ct. at 2513–17 (same).

<sup>53</sup> *See, e.g.*, *NFIB*, 132 S. Ct. at 2629 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 2655 (joint dissent); *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2296–99 (2012) (Sotomayor, J., concurring in the judgment); *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2742 (2011) (Alito, J., concurring in the judgment); *Turner v. Rogers*, 131 S. Ct. 2507, 2524–25 (2011) (Thomas, J., dissenting); *Camreta v. Greene*, 131 S. Ct. 2020, 2036–37 (2011) (Sotomayor, J., concurring in the judgment); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3182–84 (2010) (Breyer, J., dissenting); *United States v. Stevens*, 130 S. Ct. 1577, 1593–97 (2010) (Alito, J., dissenting); *Citizens United v. FEC*, 130 S. Ct. 876, 930–38 (2010) (Stevens, J., concurring in part and dissenting in part); *Boumediene v. Bush*, 128 S. Ct. 2229, 2280–83 (2008) (Roberts, C.J., dissenting).

<sup>54</sup> *See Berghuis v. Thompkins*, 130 S. Ct. 2250, 2265 (2010) (ineffective assistance holding); *Smith v. Spisak*, 130 S. Ct. 676, 688 (2010).

<sup>55</sup> *See Cavazos v. Smith*, 132 S. Ct. 2, 7 (2011) (per curiam); *Thompkins*, 130 S. Ct. at 2264 (*Miranda* holding); *Berghuis v. Smith*, 130 S. Ct. 1382, 1393–94 (2010); *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1415 (2009); *Weeks v. Angelone*, 528 U.S. 225, 234, 237 (2000).

<sup>56</sup> *But see Thompkins*, 130 S. Ct. at 2266 (Sotomayor, J., dissenting) (chastising the Court for its “troubling” violation of “longstanding principles of judicial restraint”).

<sup>57</sup> *See, e.g.*, *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (rejecting the plaintiff's Fourth Amendment claims both on the merits *and* on qualified immunity).

<sup>58</sup> *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217 (1995) (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

stitutional grounds, even when one would suffice.<sup>59</sup> Another rule of avoidance calls upon courts to frame constitutional rules no more broadly than the precise facts of the case require.<sup>60</sup> Observance of this rule is likewise scarcely noticeable in the Court's criminal procedure jurisprudence.<sup>61</sup>

Nor is the prerogative of avoiding avoidance one the Court has reserved for itself. Its decisions authorize lower courts to determine whether a criminal defendant's constitutional rights have been violated before applying § 2254(d)(1),<sup>62</sup> the exclusionary rule,<sup>63</sup> or the harmless error rule<sup>64</sup> — even though each supplies a nonconstitutional basis for decision.<sup>65</sup> These decisions do not merely license a lower court to rule against the defendant on the constitutional merits when a nonconstitutional ground would do just as well. They also permit a lower court to rule for the defendant on the constitutional merits before *denying* him relief on a nonconstitutional ground.<sup>66</sup> The Court has thus left avoidance so far behind that it has authorized not only alternative constitutional holdings, but also the purest constitutional dicta.

True, avoidance is not utterly absent from the Supreme Court's criminal procedure decisions. The Court has, for example, avoided

<sup>59</sup> See, e.g., *Williams v. Illinois*, 132 S. Ct. 2221, 2228 (2012) (plurality opinion) (holding that the introduction of an uncontroverted statement did not violate the Confrontation Clause because the statement was nontestimonial *and* because it was not introduced for its truth); *Knowles*, 129 S. Ct. at 1420–22 (holding that a criminal defendant did not suffer ineffective assistance of counsel both because the lawyer's performance was not deficient *and* because the performance did not prejudice the defendant).

<sup>60</sup> *Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring).

<sup>61</sup> See, e.g., *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012) (holding that statutes mandating the imposition of life-without-parole sentences upon children under the age of *eighteen* violate the Eighth Amendment; the case involved only a *fourteen*-year-old); *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2398–99 (2011) (holding that a child's age is *always* relevant to whether he is in custody for *Miranda* purposes; the case involved only a child interrogated *in a school*); *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010) (holding that the imposition of life-without-parole sentences upon juveniles for nonhomicide offenses is *categorically* unconstitutional, rather than just unconstitutional as applied to the juvenile in this case); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010) (holding that defense attorneys must not only refrain from misadvising clients about the immigration consequences of conviction, but also affirmatively advise them accurately; the case involved only misadvising).

<sup>62</sup> *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003).

<sup>63</sup> *United States v. Leon*, 468 U.S. 897, 924 (1984).

<sup>64</sup> *Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 (1993); see also Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 893 (2005) (noting that although *Fretwell*'s language *mandates* addressing the constitutional question first, "lower courts seem not to be taking the Court's instruction seriously," only "occasionally follow[ing] the *Fretwell* approach").

<sup>65</sup> *Leon*, 468 U.S. at 905–06 (exclusionary rule); Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 1–5 (1994) (harmless error).

<sup>66</sup> Cf. *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009) (permitting, but not requiring, a lower court to rule for a plaintiff on the constitutional merits before denying him relief because the defendant possesses qualified immunity).

constitutional questions it perceives as close or difficult.<sup>67</sup> So too has it delayed answering questions involving new technology.<sup>68</sup> But the *Ashwander* canons are not supposed to be like the good china — locked away in a closet, brought out only on special occasions. They are meant to be *general* rules of constitutional adjudication. Decisions such as *Fields* thus demonstrate their distinctively weak application to the field of criminal procedure.

This description of the Supreme Court's practice raises the question: is this exceptional treatment of criminal procedure justified?<sup>69</sup> The answer is "Yes." To be sure, adherence to Justice Brandeis's precepts has its benefits: by avoiding conflict with the political branches, it promotes judicial legitimacy, and by avoiding the overhasty resolution of difficult questions, it reduces the commission of errors that can be corrected only by departure from precedent or the cumbersome process of constitutional amendment.<sup>70</sup> But this adherence also has its costs. Courts have a duty not only to resolve particular disputes, but also to declare law while doing so.<sup>71</sup> Avoidance impedes the fulfillment of this duty by preventing, or at least delaying, "the law's elaboration from case to case."<sup>72</sup> In most fields, the benefits outweigh the costs. But not here.

To begin with the costs, the need for legal certainty is at its zenith in the domain of criminal procedure. In most fields, the Constitution plays only an interstitial role, with federal and state legislation answering the great bulk of legal questions.<sup>73</sup> If the occasional constitutional issue remains unresolved, life goes on much as before. Not so in criminal procedure. Every search, every seizure, every interrogation, every

<sup>67</sup> See *Martinez v. Ryan*, 132 S. Ct. 1309, 1319–20 (2012) (defending an equitable holding by cataloging the difficulties of a constitutional holding); *United States v. Jones*, 132 S. Ct. 945, 954 (2012) (defending a narrow constitutional holding by pointing to the "thorny problems" raised by a broad holding).

<sup>68</sup> See *Jones*, 132 S. Ct. at 949, 954 (avoiding a broad holding concerning the Fourth Amendment's application to GPS monitoring); *City of Ontario v. Quon*, 130 S. Ct. 2619, 2630 (2010) (avoiding a broad holding concerning the Fourth Amendment's application to the government's monitoring of its employees' text messages).

<sup>69</sup> Compare Henry Paul Monaghan, Essay, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 680 (2012) ("[T]he Court has not articulated a coherent explanation or justification for its avoidance-avoiding practices . . ."), with Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) ("[T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.").

<sup>70</sup> See *Rescue Army v. Mun. Court*, 331 U.S. 549, 571 (1947).

<sup>71</sup> "It is emphatically the province *and duty* of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).

<sup>72</sup> *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

<sup>73</sup> See *Minnesota v. Carter*, 525 U.S. 83, 98 (1998) (Scalia, J., concurring) ("[M]any, indeed most, important questions are left . . . to the judgment of state and federal legislators.").



lineup, every plea bargain, and every step of every trial must comply with a byzantine constitutional code promulgated by the Supreme Court.<sup>74</sup> Routinely to shrink from interpreting this code would shroud the daily decisions of law enforcement officers in a fog of uncertainty.

Uncertainty imposes an especially severe burden on law enforcement in yet another way. Legislators have time to reflect on the constitutionality of their bills, and executive agencies their regulations. They can account for the effects of legal uncertainty when deciding how to act. But police officers do not enjoy this luxury. They must decide — on the spot, without time to contemplate the deeper mysteries of the *United States Reports* — whether the Constitution requires a warning, permits a search, or forbids an interrogation.<sup>75</sup> Avoidance therefore clashes with law enforcement officers' heightened "need to know, with certainty and beforehand," the lawfulness of their actions.<sup>76</sup>

These costs can be laid at no door but the Court's. It is the Court that has festooned the Bill of Rights with the many extratextual rules that now imprison law enforcement,<sup>77</sup> so it is the Court that bears responsibility for their want of clarity. Worse yet, the Court has justified the adoption of many of these broad directives by pointing to their supposed clarity and ease of application.<sup>78</sup> These advantages are said to outweigh the rules' undoubted costs: the hindering of the detection, conviction, and punishment of criminals.<sup>79</sup> But if the Court wishes to decree extratextual rules in order to promote clarity, the least it can do is ensure that its rules do, in fact, achieve clarity. Mechanical avoidance of constitutional questions would flout that obligation.

On the other side of the ledger, the benefits of avoidance are at their nadir. The paramount advantage of avoidance is the prevention of conflict with the majoritarian branches of government. But concerns about the delicacy of displacing democracy tend to home in on judicial review of *legislation*.<sup>80</sup> They apply with much less force to judicial review of *executive* acts.<sup>81</sup> Still less do they apply to criminal procedure cases, in which courts typically review not the orders of

<sup>74</sup> See generally Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

<sup>75</sup> See *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2416 (2011) (Alito, J., dissenting).

<sup>76</sup> *Maryland v. Shatzer*, 130 S. Ct. 1213, 1222–23 (2010).

<sup>77</sup> See generally AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 145–50 (1997); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 216–43 (2011).

<sup>78</sup> See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 468–69 (1966).

<sup>79</sup> *J.D.B.*, 131 S. Ct. at 2408–09 (Alito, J., dissenting).

<sup>80</sup> See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (opinion of Iredell, J.) (“[A]s the authority to declare [a federal or state statute] void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case.”).

<sup>81</sup> See Jeremy Waldron, Essay, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1354 (2006).

presidents or governors, but the decisions of individual police officers, prosecutors, and defense attorneys. Hardly the stuff of acrimonious interbranch conflict.

By preventing overhasty resolution of difficult constitutional questions, avoidance also guards against the commission of errors whose consequences are “comparative[ly] final[.]”<sup>82</sup> But this benefit likewise carries little weight in the criminal procedure context. The consequences of a constitutional decision *rejecting* a criminal defendant’s claim of right are reversible: Congress and state legislatures may still establish the right by statute, and state courts may still recognize it under state constitutions. So are the consequences of a constitutional decision *affirming* a criminal defendant’s claim of right: a future court may overrule that precedent. Overruling precedents would ordinarily collide with the doctrine of stare decisis, but that doctrine is at its weakest here, because people do not tend to order their affairs in reliance on rules governing criminal investigations and adjudications.<sup>83</sup>

In criminal procedure cases, therefore, the costs of avoidance often exceed the benefits. Just such a cost-benefit comparison has led the Supreme Court to carve other exclaves of constitutional adjudication out of *Ashwander*’s bailiwick, such as First Amendment overbreadth<sup>84</sup> and qualified immunity.<sup>85</sup> The Court’s implicit criminal procedure exceptionalism is equally justified.

This exceptionalism, however, has its limits. First, it does not justify ruling for criminal defendants on the constitutional merits before *denying* them relief on a nonconstitutional ground (such as § 2254(d), the good faith exception to the exclusionary rule, or harmless error). Because such a merits ruling does not explain or support the court’s judgment, it violates not only the prudential policy of avoidance, but also the more fundamental Article III rule against advisory opinions.<sup>86</sup>

And second, if a court wishes to charge into the land of constitutional adjudication under the banner of clarity, it ought to have something clear to say once it gets there. Ironically, *Fields* itself might fail this criterion. In answering the constitutional question before it, the Court applied the test “most feared by litigants who want to know

<sup>82</sup> *Rescue Army v. Mun. Court*, 331 U.S. 549, 571 (1947).

<sup>83</sup> See *Montejo v. Louisiana*, 129 S. Ct. 2079, 2089 (2009); *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); see also Akhil Reed Amar, *The Supreme Court, 1999 Term — Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 94 n.223 (2000) (“[C]riminals have few legitimate reliance interests in truth-suppressing doctrines that help them get away with their crimes.”).

<sup>84</sup> See *Broadrick v. Oklahoma*, 413 U.S. 601, 610–14 (1973).

<sup>85</sup> See *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998).

<sup>86</sup> Cf. *Camreta v. Greene*, 131 S. Ct. 2020, 2037–45 (2011) (Kennedy, J., dissenting) (discussing the constitutional and prudential problems with a court’s ruling for a plaintiff on the merits before awarding the defendant judgment on qualified immunity).

what to expect . . . : th'ol' 'totality of the circumstances' test."<sup>87</sup> Applications of this test — turning, in *Fields*, on such minutiae as the size and lighting of the interrogation room — are of little use to bench and bar. These miniscule elaborations of the law hardly justify departure from ordinary avoidance norms.

These limits aside, however, criminal procedure is special. In this field, the Court does not treat the dictates of *Ashwander* as “strict and venerable rule[s]” (as Justice Scalia once described the last-resort rule),<sup>88</sup> or even as “sound general principle[s]” (as he described the instruction to formulate constitutional holdings narrowly).<sup>89</sup> That is just as it should be.

2. *Suggestive Eyewitness Identifications.* — Since the Supreme Court first acknowledged the peculiar “vagaries of eyewitness identification” four decades ago,<sup>1</sup> eyewitness identifications have drawn fire as a uniquely unreliable form of courtroom evidence.<sup>2</sup> Susceptible to numerous psychological biases<sup>3</sup> and notoriously difficult to rebut at trial,<sup>4</sup> eyewitness testimony is a leading cause of wrongful convictions in the United States.<sup>5</sup> This past Term, in *Perry v. New Hampshire*,<sup>6</sup> the Supreme Court denied that the inherent unreliability of eyewitness testimony merits heightened due process scrutiny, holding that suggestive identifications require preliminary judicial review only if procured through circumstances arranged by the police.<sup>7</sup> While *Perry*’s holding conforms with an established state-action requirement in due process

<sup>87</sup> *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

<sup>88</sup> *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment).

<sup>89</sup> *Id.* at 533.

<sup>1</sup> *United States v. Wade*, 388 U.S. 218, 228 (1967).

<sup>2</sup> See, e.g., Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 454 (2012) (noting “a nationwide movement to reform criminal procedure” involving eyewitnesses).

<sup>3</sup> See Brief for Amicus Curiae American Psychological Association in Support of Petitioner at 8–13, *Perry v. New Hampshire*, 132 S. Ct. 716 (2012) (No. 10-8974) [hereinafter APA Amicus Brief] (noting the influence of such factors as passage of time, witness stress, duration of exposure, distance, possession of a weapon, and cross-racial bias on the accuracy of such evidence); Timothy P. O’Toole & Giovanna Shay, *Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109, 118–22 (2006) (surveying psychological research into eyewitness identifications since *Brathwaite*).

<sup>4</sup> APA Amicus Brief, *supra* note 3, at 3–4 (noting unique jury reliance on eyewitness evidence and the limits of jury instructions, expert testimony, and cross-examination in rebutting it).

<sup>5</sup> See Steven E. Clark, *Blackstone and the Balance of Eyewitness Identification Evidence*, 74 ALB. L. REV. 1105, 1106 (2011) (suggesting that eyewitness identifications figure in roughly seventy-five percent of wrongful convictions subsequently overturned due to DNA testing); Margery Malkin Koosed, *Reforming Eyewitness Identification Law and Practices to Protect the Innocent*, 42 CREIGHTON L. REV. 595, 596–99 (2009) (reviewing statistics identifying mistaken eyewitness identifications as a leading cause of wrongful convictions); O’Toole & Shay, *supra* note 3, at 110 (noting the high exoneration rates for defendants convicted using eyewitness identifications).

<sup>6</sup> 132 S. Ct. 716 (2012).

<sup>7</sup> *Id.* at 730.