



AMERICAN CONSTITUTIONALISM
 VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

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Chapter 8: The New Deal/Great Society Era – Judicial Power and Constitutional Authority

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)

The Alabama Power Company, a private company, agreed to sell various properties to the Tennessee Valley Authority, a federal agency, which would be used to generate electric power in the lower Tennessee Valley. Several stockholders of the Alabama Power Company brought a lawsuit, asking the federal judiciary to issue an injunction forbidding either party from executing the contract on the ground that the federal government had no constitutional authority to engage in the “manufacture and distribution of electricity.” Chief Justice Hughes’s majority opinion declared that while stockholder had standing to raise the constitutional issue, the federal government had the constitutional power to make the contract in dispute. Chief Justice Hughes indicated that the federal government was not constitutionally authorized to engage in commercial enterprises. Nevertheless, he concluded, Congress could sell electricity that came into existence as a consequence of an exercise of admittedly constitutional power. Because the Wilson Dam was a constitutional exercise of both the war power and commerce power (in particular, the need to improve navigation on the Tennessee River), the federal government had the right to sell any electricity incidentally created when pursuing those ends.

*Justice Louis Brandeis agreed with the result but insisted that the justices should have ruled that the stockholders lacked standing to bring the lawsuit. The law of standing in stockholder cases, Brandeis believed, gave courts discretion over whether to adjudicate on the merits the kind of lawsuit brought in Ashwander. Given that Ashwander raised important constitutional questions, the justices should have chosen not to exercise jurisdiction. Justice Louis Brandeis’s list of judicial techniques for avoiding constitutional adjudication influenced many proponents of judicial restraint, most notably Felix Frankfurter and Alexander Bickel. Much of Alexander Bickel’s influential book, *The Most Dangerous Branch: The Supreme Court at the Bar of Politics*, was devoted to demonstrating how the justices could employ Brandeis’s suggestions, which Bickel labeled “the passive virtues,” when avoiding constitutional questions. Ashwander provided lessons in how to avoid constitutional conflicts with the other branches of government, not by deferring to them or upholding statutes but by refusing to rule on constitutional issues.*

As you read Brandeis’s concurring opinion in Ashwander, consider both the best justification for judicial decisions avoiding constitutional questions and whether these avoidance strategies tend to be employed only by justices who doubt their capacity to win on the merits. Are some avoidance strategies more rooted in the constitution than others?

JUSTICE BRANDEIS, concurring.

“Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.” *Blair v. United States* (1919).

I do not disagree with the conclusion on the constitutional question announced by the Chief Justice; but, in my opinion, the judgment of the Circuit Court of Appeals should be affirmed without passing upon it. The Government has insisted throughout the litigation that the plaintiffs have no standing to challenge the validity of the legislation. . . . Upon the findings made by the District Court, [the Circuit Court] should have dismissed the bill.



[The next section explains why Brandeis believed that Ashwander had no clear right to standing under federal law. He emphasized in particular there was insufficient evidence that the stockholders of the Alabama Power Company had shown the degree of injury necessary to obtain an injunction against the execution of the disputed contract.]

... The practice in constitutional cases. The fact that it would be convenient for the parties and the public to have promptly decided whether the legislation assailed is valid, cannot justify a departure from these settled rules of corporate law and established principles of equity practice. On the contrary, the fact that such is the nature of the enquiry proposed should deepen the reluctance of courts to entertain the stockholder's suit. "It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility." ...

...
The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:

1. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." ...

2. The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it." ... "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton v. United States* (1906).

3. The Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, N. Y. & P. S. S. Co. v. Emigration Commissioners* (1885). .

4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if 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, the Court will decide only the latter. ... Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground. ...

5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. ... Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal or property right. Thus, the challenge by a public official interested only in the performance of his official duty will not be entertained. ... In *Fairchild v. Hughes* (1922), the Court affirmed the dismissal of a suit brought by a citizen who sought to have the Nineteenth Amendment declared unconstitutional. In *Massachusetts v. Mellon* (1923), the challenge of the federal Maternity Act was not entertained although made by the Commonwealth on behalf of all its citizens.

6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits. ...

7. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson* (1932). ...

...
Even where by the substantive law stockholders have a standing to challenge the validity of legislation under which the management of a corporation is acting, courts should, in the exercise of their discretion, refuse an injunction unless the alleged invalidity is clear. This would seem to follow as a corollary of the long established presumption in favor of the constitutionality of a statute.



.....
Mr. Chief Justice Marshall said, in *Dartmouth College v. Woodward* (1819): "On more than one occasion, this Court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared, that, in no doubtful case, would it pronounce a legislative act to be contrary to the constitution."

The challenge of the power of the Tennessee Valley Authority rests wholly upon the claim that the act of Congress which authorized the contract is unconstitutional. As the opinions of this Court and of the Circuit Court of Appeals show, that claim was not a matter "beyond peradventure clear." . . . As was said in *United States v. Interstate Commerce Comm'n* (1935): "Where the matter is not beyond peradventure clear we have invariably refused the writ [of mandamus], even though the question were one of law as to the extent of the statutory power of an administrative officer or body." *A fortiori* this rule should have been applied here where the power challenged is that of Congress under the Constitution.