
Avoiding Constitutional Cases

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Abstract

Why does the Supreme Court avoid deciding cases it accepts for review? In this article, I contend that the Court uses procedural access doctrines such as standing, ripeness, and mootness to sidestep constitutional cases when confronted with certain internal and external pressures. Using data from 1946 to 2001, the results suggest that the Court utilizes procedural tools to dismiss constitutional cases when preference heterogeneity on the Court increases and when the justices are confronted with issues about which groups feel strongly and are deeply divided. Although the Court does not appear to be influenced by the threat of political opposition, it is more reluctant to resolve disputes when members of Congress file an amicus brief. The results offer a first glimpse into how often the Court invokes the “passive virtues.” They also have implications for our understanding of agenda setting, decision-making in access cases, and normative constitutional theory.

Keywords

Supreme Court, Congress, judicial review, justiciability, amicus brief, agenda setting

Introduction

In 2002, a Ninth Circuit Court of Appeals panel declared the statutory insertion of “under God” into the Pledge of Allegiance unconstitutional and prohibited public school teachers from leading voluntary recitations of the Pledge.¹

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The response was unrelenting: President Bush called the decision “ridiculous”; Senate party leaders Tom Daschle (Democrat) and Trent Lott (Republican) referred to it as “just nuts” and “stupid” respectively; the Senate passed a resolution 99-0 urging the Supreme Court to reverse, and the public overwhelmingly disapproved of the decision.² The Supreme Court agreed to hear the case, but ultimately avoided the constitutional question by ruling that Michael Newdow, a noncustodial parent, lacked standing to sue on his daughter’s behalf (*Elk Grove v. Newdow*, 2004).

Why does the Supreme Court avoid deciding cases it accepts for review? *Newdow* posed a contentious constitutional question that affected diffuse interests—precisely the type of case the Court seems likely to decide. Deciding important cases helps ensure maintenance of the Court’s institutional legitimacy (Provine, 1980) and allows the justices to translate their policy preferences into law while making efficient use of scarce docket space (Caldeira & Wright, 1988). Nonetheless, there is an established tradition in modern constitutional theory touting the benefits of using procedural tools to avoid deciding constitutional cases (see, for example, Bickel, 1986; Burt, 1992; Devins, 1999; Devins & Meese, 2005; Sunstein, 1999). There is also widespread agreement that the Court regularly engages in this practice (see, for example, Bickel, 1986; Stearns, 2000; Sunstein, 1999; see also Kloppenberg, 2001). Yet we lack a comprehensive theoretical account of the conditions that lead the Court to utilize procedural tools to sidestep constitutional disputes. Commentators sometimes note that these tools are invoked to circumvent “difficult” cases (e.g., Bickel, 1986; Kloppenberg, 2001; Pacelle, 2002), but to the extent nearly all of the Court’s constitutional cases are difficult in some sense (Posner, 2005), this explanation offers little guidance for understanding this important aspect of judicial behavior. Moreover, aside from a series of anecdotes, we lack any firm sense of how often the Court uses procedural tools to avoid deciding constitutional cases.³

In this article, I contend that the Court uses procedural access doctrines such as standing, ripeness, and mootness to avoid deciding constitutional cases when confronted with a variety of internal and external pressures.⁴ Internal pressures arise with increased preference heterogeneity among the justices. Heterogeneous judges encounter more difficulty forging agreement on the design of legal rules (e.g., Clark, 2009a; Epstein, Friedman, & Staudt, 2008; Maltzman, Spriggs, & Wahlbeck, 2000) and are less able to insulate themselves from political blowback (Epstein, Segal, & Victor, 2002). Confronted with increased “decision costs” (Sunstein, 1999), sidestepping substantive rulings buys the Court time while allowing more information about the policy environment to surface.

Even absent these internal pressures, however, the use of procedural tools to avoid settling constitutional questions may be profitable for the Court as a way to manage its relationship with other political actors (see Staton & Vanberg, 2008). The Court is necessarily sensitive about its exercise of judicial review (Clark, 2009b), and using procedural tools to delay or avoid constitutional questions can be a useful way to enhance democratic deliberation (Sunstein, 1999) and give the elected branches an opportunity to participate in the debate over how best to resolve important disputes (Bickel, 1986). According to Alexander Bickel, the ensuing “colloquy” is essential for “stengthen[ing] the Court’s hand in gaining acceptance for its principles” (Bickel, 1986, p. 116).

Using data from 1946-2001, I examine the effects of these internal and external pressures on the likelihood of the Court dismissing constitutional cases on procedural grounds. During these years, the Court invoked justiciability doctrines to dismiss about 3% of its constitutional cases. Moreover, I find robust evidence that the Court utilizes procedural tools to avoid resolving constitutional questions as preference heterogeneity among the justices increases and when the Court is confronted with issues about which groups feel strongly and are deeply divided. Although the Court does not appear to be influenced by the threat of political opposition, it is more reluctant to resolve disputes when members of Congress participate by filing an *amicus curiae*—or “friend of the court”—brief.

The results offer several contributions to our understanding of judicial behavior. First, they confirm that the Court regularly uses procedural tools to sidestep constitutional cases. Second, they offer a sense of when the Court is likely to do so. Furthermore, although seminal work on agenda setting suggests the Court is more likely to agree to hear important cases that impact diffuse interests (Caldeira & Wright, 1988; Caldeira, Wright, & Zorn, 1999; Perry, 1991), the results presented here suggest an important caveat: Although the Court is more likely to accept these cases for review, it also sometimes dismisses them without reaching a decision on the merits. The results also speak to an important limitation in the empirical literature on court access, which focuses almost exclusively on the ideological determinants of these decisions (e.g., Pierce, 1999; Rathjen & Spaeth, 1979; Rowland & Todd, 1991; see also Segal & Spaeth, 2002). Procedural access doctrines offer justices more than another opportunity to implement their policy preferences. As threshold requirements for review, these doctrines are tools that can be used to avoid deciding separate merits issues. To my knowledge, this is the first effort to distinguish empirically between cases where justiciability is the sole merits issue and those where it is invoked to dismiss a separate merits question.

The results also have important implications for normative constitutional theory. When Chief Justice John Marshall cemented the Court's authority to exercise judicial review in *Marbury v. Madison* (1803), he laid the foundation for a concern that has become "the central obsession of modern constitutional scholarship" (Friedman, 1998, p. 334). This concern—or what Bickel (1986) called the "countermajoritarian difficulty"—centers on reconciling the exercise of a judicial veto by unelected judges in a democratic system of government. As part of an effort to justify the Court's place atop the constitutional landscape, Bickel urged the justices to make regular use of the "passive virtues"—an array of procedural tools such as standing, ripeness, and mootness—to avoid resolving constitutional disputes. More recently, proponents of "judicial minimalism" have urged the Court to do the same as part of a larger project calling for judges to do as little as possible to resolve the issues before them, leaving highly contested questions for another day (e.g., Devins, 1999; Devins & Meese, 2005; Sunstein, 1999; see also Burt, 1992). Without empirical foundations, these normative projects are of limited use as organizing frameworks for understanding the exercise of judicial review.

Justiciability and Avoidance

Justiciability doctrines are a set of threshold requirements for determining whether cases are properly before the federal courts. The justiciability canons—which include standing, ripeness, mootness, advisory opinions, and the political question doctrine—pose related procedural hurdles for litigants to clear before courts will hear their cases (Chemerinsky, 2003). Federal courts created these doctrines (Ferejohn & Kramer, 2002), but their jurisprudential foundation rests primarily in Article III's "cases" and "controversies" requirement.⁵ The central idea is that if a case is not ripe, for example, it does not properly fall within the class of "cases" and "controversies" federal courts are constitutionally entitled to decide. Policy justifications for these doctrines include conserving scarce judicial resources, promoting informed decision-making by restricting access to affected parties (Landes & Posner, 1994), ensuring a representative judicial process (Brilmayer, 1979), frustrating attempts by litigants to manipulate the path of law (Stearns, 2000), and limiting the judicial role in a system of separated powers (Scalia, 1983).

The existing empirical literature on justiciability primarily examines the attitudinal component of these decisions. The standard narrative suggests that conservative (liberal) judges are more likely to restrict (grant) access in justiciability cases, and empirical support for this narrative spans the federal judicial hierarchy (Cross, 2007; Kaheny, 2010; Pierce, 1999; Rathjen & Spaeth, 1979;

Rowland & Todd, 1991; Staudt, 2004; see also Segal & Spaeth, 2002).⁶ Ideology also influences the substantive effect of justiciability decisions (Cross, 2007; Rathjen & Spaeth, 1983). Liberal (conservative) circuit court judges, for example, are more (less) likely to grant standing to plaintiffs representing environmental interests (Pierce, 1999). This research is essential for understanding justiciability decisions, but it is incomplete insofar as procedural access doctrines offer justices more than another opportunity to implement their policy preferences. As threshold requirements for review, they are tools that can be used to manipulate the agenda (Epstein & Shvetsova, 2002; Stearns, 2000).

In his seminal book *The Least Dangerous Branch*, Alexander Bickel (1986) urged the Supreme Court to use justiciability doctrines and other “passive virtues” to put off deciding difficult cases until the underlying issues had sufficiently matured. Through the “marvelous mystery of time,” the Court acquires important information about the policy environment that ultimately leads to better judgments:

A sound judicial instinct will generally favor deflecting the problem in one or more initial cases, for there is much to be gained from letting it simmer, so that a mounting number of incidents exemplifying it may have a cumulative effect on the judicial mind as well as on public and professional opinion. (Bickel, 1986, p. 166)

Moreover, buying additional time “cushions the clash between the Court and any given legislative majority and strengthens the Court’s hand in gaining acceptance for its principles” (Bickel, 1986, p. 116). For Bickel, the Court is best situated to make definitive constitutional pronouncements. Nonetheless, harkening back to Alexander Hamilton’s assertion in *Federalist* 78 that the judiciary “is in continual jeopardy of being overpowered . . . by its co-ordinate branches” (Rossiter, 1999, p. 434), Bickel recognized that the Court’s judgments must pass some minimal threshold of acceptability in a system of separated powers. Utilizing the passive virtues allows the Court to enter into a “Socratic colloquy with the other institutions of government” on policy contours while allowing the underlying legal issues to mature (Bickel, 1986, pp. 70-71).

The Court’s decision in *Poe* (1961) illustrates its use of the passive virtues. In *Poe v. Ullman*, the Court considered the constitutionality of Connecticut statutes that prohibited the use of contraceptives and made it illegal for doctors to give medical advice regarding their use. Although the plaintiffs, three married individuals and a doctor, feared prosecution under the statutes, the Court dismissed the challenges as unripe because of a lack of prior

enforcement. In dissent, Justice Harlan argued that the Court's holding did "violence to established concepts of justiciability" (pp. 522-523). Another 4 years passed before the Court returned to the issue in the landmark case *Griswold v. Connecticut* (1965), which struck down the Connecticut statutes and established a constitutional right to privacy.

Why did the Court go out of its way to avoid deciding the pressing constitutional issue presented in *Poe*? In the early 1960s, women were increasingly relying on contraceptives to facilitate planned pregnancies, which in turn increased their educational and employment opportunities (Kloppenber, 2001, p. 192). Nonetheless, birth control was a highly contentious issue—so much so that the married plaintiffs in *Poe* demanded anonymity before moving forward with the case (Kloppenber, 2001, p. 194). Although no one had been charged under the Connecticut statutes, they had been reenacted twice between 1940 and the Court's decision in *Poe*. Furthermore, several attempts to repeal the laws were defeated in the state legislature. In short, the controversy reflected a "deadlock of wills" (Bickel, 1986, p. 147). But it is precisely this sort of "deadlock of wills" that we have come to expect the Supreme Court to resolve. In the next section, I develop a theoretical story to help explain when the Court is likely to invoke procedural rules to avoid deciding constitutional cases.

Deciding Not to Decide

Why does the Supreme Court put off deciding cases it accepts for review? This behavior is puzzling given the Court's incentive to decide important disputes as a way to maintain its institutional prestige (Provine, 1980) and make efficient use of scarce docket space (Caldeira & Wright, 1988). In this section, I argue that the Court is more likely to use procedural access doctrines such as standing, ripeness, and mootness to avoid resolving constitutional disputes when faced with a variety of internal and external pressures. The key internal pressure is due to preference heterogeneity among the justices, which increases decision costs. Even absent this internal pressure, however, I argue that the Court has an incentive to sidestep cases as a way to manage its relationship with other political actors (see Staton & Vanberg, 2008).

Preference Heterogeneity

Political actors must often overcome substantial transaction costs to implement policy, and forging agreement over outcomes becomes more difficult as preferences within a group diverge. In Congress, for example, preference heterogeneity increases gridlock (Binder, 1999). Although gridlock is not a

concern for courts, judges with heterogeneous preferences on collegial courts do have increased difficulty agreeing on the design of legal rules. As Sunstein (1999, p. 4) notes, forging agreement “may be especially hard to do . . . on a multimember court, consisting of diverse people who disagree on a great deal.” The notion that preference heterogeneity makes forging agreement more difficult enjoys strong support in the empirical institutions literature. In addition to work on Congress, there is a growing literature suggesting that preference heterogeneity has a limiting effect on the Supreme Court’s output. Authors writing for diverse majority coalitions, for example, bargain more over opinion content (Maltzman, Spriggs, & Wahlbeck, 2000), and fractured coalitions are less likely to produce “consequential” decisions (Epstein, Friedman, & Staudt, 2008; Staudt, Friedman, & Epstein, 2008). From a macro perspective, Court-level heterogeneity increases the incidence of dissents and the number of judgments held together by minimum winning coalitions (Clark, 2009a). Heterogeneous courts are also more likely to substitute constitutional for statutory cases on the agenda when confronted with a hostile Congress to avoid the higher risk of overrides that presumably accompanies fractured decisions (Epstein, Segal, & Victor, 2002). All of this suggests that utilizing the passive virtues to avoid resolving disputes may be a welcome path for the Court as preference heterogeneity increases.

Building on these results, I argue that heterogeneous courts are more likely to dismiss cases accepted for review without reaching decisions on the merits. Delaying or avoiding constitutional disputes may be appealing to a fractured Court for a number of reasons. First, heterogeneous justices might find the costs of negotiating a resolution too high, preferring instead to put off a decision and focus their energy on other tasks. Furthermore, as with the decision to substitute constitutional for statutory cases, there may be benefits to delaying or avoiding cases when the Court cannot produce judgments that are resistant to political pressure. Justices on fractured courts also have reason to be particularly concerned with the formation of ideologically distant winning coalitions. By raising procedural concerns, a minority bloc might shift the focus of a case away from the merits and split the existing winning coalition. William Riker coined the term “heresthetics” to describe this sort of political manipulation (e.g., Riker, 1986), and Epstein & Shvetsova (2002) contend that Chief Justice Burger used heresthetics—for example, invoking mootness—at conference to avoid losing on the merits.

Preference Heterogeneity Hypothesis: The Court will be more likely to use procedural tools to avoid deciding constitutional cases as preference heterogeneity among the justices increases.

Opinion Environment

Using procedural tools to avoid resolving constitutional disputes can also be a useful technique for distancing the Court from divisive issues that prompt intense political reactions. As Cass Sunstein (1999, p. 5) has noted, passive decision-making often “makes a good deal of sense when the Court is dealing with a constitutional issue of high complexity about which many people feel deeply and on which the nation is divided.” Delaying or avoiding the resolution of these disputes helps reduce the prospect of what Sunstein (1999, p. 49) calls “error costs,” or “the costs of mistaken judgments.” But why should justices care about mistaken judgments? The standard account of judicial behavior posits that justices are motivated primarily by a desire to implement their policy preferences (Segal & Spaeth, 2002). To implement these preferences, however, justices must take care to proceed with caution in the face of uncertainty. Mistaken judgments leave the Court vulnerable to threats of political retaliation, noncompliance, and losses to its institutional legitimacy. Delaying or avoiding certain disputes may allow the Court to sidestep these threats while promoting democratic deliberation and experimentation regarding the optimal design of legal rules.

The Court’s decision in *Dred Scott v. Sandford* (1856), striking down the Missouri Compromise and ruling that freed slaves were not citizens under Article III, is perhaps the paradigmatic example of how the passive virtues could have been invoked to avoid disastrous results. At conference, the Court agreed to resolve the dispute without reaching the two issues that would ultimately push the nation to the brink of Civil War (Schwartz, 1993, p. 113). Had it stayed the course, *Dred Scott* would have long since been forgotten; instead, it remains one of the most reviled decisions in the Court’s history. Another prominent example is *Bush v. Gore* (2000), which might have been avoided by dismissing the case for lack of standing, as not yet ripe for review, or as a nonjusticiable political question (Chemerinsky, 2001).

Other cases illustrate how the Court can at least temporarily stay out of disputes that generate intensely divided opinion. *Poe v. Ullman* (1961), discussed earlier, is one example. Another is *DeFunis v. Odegaard* (1974): In *DeFunis*, the Court dismissed an early affirmative action case involving a challenge to the University of Washington School of Law’s policy of admitting some underrepresented minorities with lower undergraduate grades and standardized test scores over more numerically qualified white applicants. The Court, over Justice Brennan’s objection that the majority was “straining to rid itself of th[e] dispute,” held that the question was moot given that the plaintiff was in his final year at the law school after a district court ordered that he be admitted

pending a resolution in the case. The Court returned to the question 4 years later, issuing its landmark decision in *Regents of the University of California v. Bakke* (1978). This sequence of events fits with Bickel's suggestion that the Court should let highly charged issues simmer rather than wade into them too quickly and risk political unrest. The additional time also allows the Court to design legal rules with more confidence in an effort to avoid the consequences that come along with mistaken judgments.

Opinion Environment Hypothesis: The Court will be more likely to use procedural tools to avoid deciding constitutional cases when confronted with a case about which groups feel strongly and are deeply divided.

Deferring to the Elected Branches

The passive virtues and minimalism projects are animated by a desire to promote an interbranch colloquy (Peters & Devins, 2005). For Bickel, this colloquy was essential for ensuring the acceptability of the Court's decisions when it ultimately assumed its proper role atop the constitutional landscape. For Sunstein, colloquy is important insofar as it gives the elected branches opportunity and flexibility to participate in the advancement and resolution of important disputes—a notion consistent with the view that the elected branches have an important role to play in constitutional interpretation (see, for example, Pickerill, 2004; Currie, 1999; Whittington, 2007).⁷ Notwithstanding alternative justifications for promoting this interbranch colloquy, proponents of both projects generally agree that it is essential for the Court to leave room for the elected branches to maneuver—and the passive virtues offer the Court an opportunity to create this room. Thus the passive virtues “mark the point at which the Court gives the electoral institutions their head and itself stays out of politics” (Bickel, 1986, p. 132). All of this suggests that the Court should be more likely to utilize procedural tools to set aside a constitutional dispute when the elected branches take a special interest in its resolution.

Political Involvement Hypothesis: The Court will be more likely to use procedural tools to avoid deciding constitutional cases when the elected branches signal an interest in a case by taking part in the proceedings.

In addition to allowing the elected branches room to maneuver within the constitutional landscape, the Court must be prudent when issuing decisions

in a hostile political climate. This is thought to be especially true in statutory cases where Congress may override the Court's decisions (see, for example, Bergara, Richman, & Spiller, 2003; Gely & Spiller, 1990; but see Segal, 1997). Although the conventional wisdom is that the Court is on safer ground when it enters "constitutional mode" (Epstein, Segal, & Victor, 2002, p. 402), where the transaction costs of overriding a decision are higher, there is evidence that Congress sometimes moves to reverse or otherwise thwart the effect of the Court's constitutional rulings (Clark, 2009b; Meernik & Ignagni, 1997; Pickerill, 2004). Thus, as Pickerill (2004, p. 31) concludes in his work on congressional responses to constitutional rulings, "while judicial review can be a roadblock to legislation, it is often more of a speed bump or detour." As Alexander Hamilton noted in *Federalist* 78, the Court "has no influence over . . . the sword" (Rossiter, 1999, p. 433) and thus must be mindful too of the president's preferences given his importance in ensuring implementation of its rulings. Indeed, there is evidence that the Court acts strategically in its constitutional rulings in response to the president's preferences (Epstein, Knight, & Martin, 2001; Martin, 2006). More generally, the Court depends on political support to ensure compliance and promote social and political reform (Rosenberg, 1991). Given these realities, the passive virtues offer the Court a way to work around the prospect of political threat (Peters & Devins, 2005, p. 64; Sunstein, 1999, p. 54).

Political Opposition Hypothesis: The Court will be more likely to use procedural tools to avoid deciding constitutional cases as the threat of political opposition increases.

Data and Measurement

Dependent Variable

The dependent variable is an indicator scored 1 when the Court dismisses a constitutional case on justiciability grounds and 0 otherwise.⁸ To create this variable, I first selected cases coded by Spaeth (2007) as having addressed a justiciability question.⁹ I then examined the merit briefs in each case to distinguish between two types of cases: those where the Court granted certiorari solely to consider a justiciability question and those with a merits question the Court dismissed on justiciability grounds.¹⁰ The existing literature examining decision-making trends in justiciability cases does not distinguish between these two types of cases, but they are potentially quite different. The former are merits disputes like any other. In *Allen v. Wright* (1984), for example, the

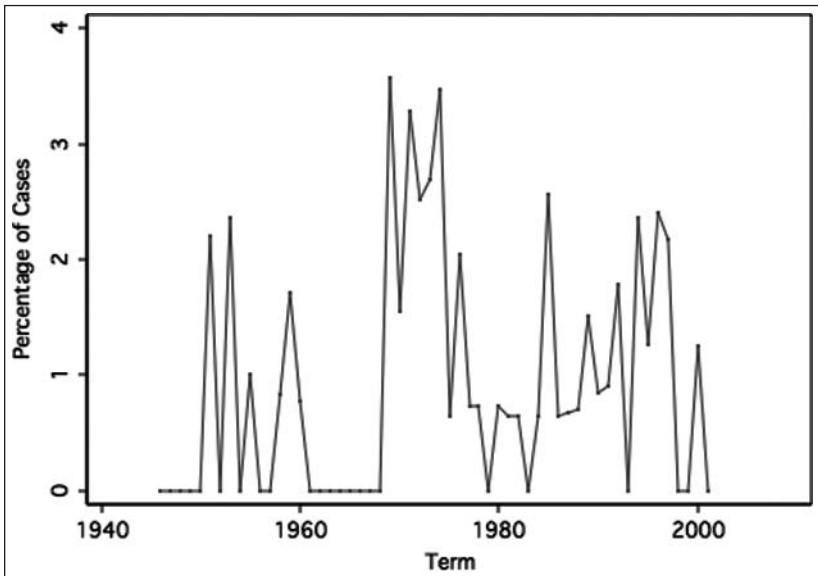


Figure 1. Constitutional cases dismissed on justiciability grounds

Court granted certiorari to determine whether the parents of black school children could sue the IRS for allegedly enabling racially discriminatory private schools to obtain tax-exempt status. *Poe* and *DeFunis*, on the other hand, are examples of the Court sidestepping a separate merits question by dismissing the case on justiciability grounds.¹¹

Figure 1 plots the percentage of constitutional cases dismissed on justiciability grounds from 1946 to 2001, a period that covers part of the Vinson, Warren, Burger, and Rehnquist courts. During this period, the Court dismissed about 3% of its constitutional cases on justiciability grounds. The number of dismissals per term range from 0 to 5. Although the total number of dismissals does not seem high, each occurrence has important implications for the development of law. Closing access in one case, for example, can affect an entire class of prospective litigants. The Court's decision in *Newdow*, for example, made it more difficult for noncustodial parents to sue on behalf of their children (see Chemerinsky, 2004). Furthermore, these dismissals can impose substantial costs on stakeholders, leaving them uncertain about their legal obligations until a new case winds its way through the lower courts. In *DaimlerChrysler Corp. v. Cuno* (2006), for example, the Court agreed to decide whether Ohio violated the Commerce Clause by giving businesses tax

incentives to expand their manufacturing operations within the state. Rather than settle the constitutional question, however, the Court dismissed the case for lack of standing. This resulted in new litigation and prolonged uncertainty among states and businesses as to the constitutionality of these tax incentive programs.¹²

Explanatory Variables

Testing the hypotheses developed above requires operationalizing several key concepts: preference heterogeneity, politically charged and divisive issues, political involvement by Congress and the president, and the threat of political opposition. Conceptually, preference heterogeneity arises when courts “consist of diverse people who disagree on a great deal” (Sunstein, 1999, p. 4). This increasing heterogeneity makes it more difficult for the justices to forge policy agreements, which should increase the likelihood of the Court dismissing a case on justiciability grounds. I capture preference heterogeneity by calculating the standard deviation of the justices’ ideal points in a given term using Martin & Quinn’s (2002) dynamic ideal point estimates.

Measuring the opinion environment is not as straightforward. Sunstein notes that the Court is likely to invoke the passive virtues when it deals with issues “about which many people feel deeply and on which the nation is divided” (Sunstein, 1999, p. 5). Thus, conceptually, the Court should be interested in both the intensity and division of opinion on a particular issue. To capture both dimensions, I use a strategy similar to Bartels (2005) and adopt a measure akin to the one introduced by Thompson, Zanna, & Griffin (1995) to study ambivalence in public opinion. The measure is calculated according to the following formula: $[(P + R) - |P - R|]$, where P and R represent the respective number of amicus briefs filed in support of the petitioner and respondent in a case. The total number of briefs captures the intensity of opinion, and subtracting out the absolute value of the difference in the number of amicus briefs for each side accounts for the divisiveness of the issue.¹³ Accounting for divisiveness ensures, for example, that two cases with 10 total briefs—one where each supports the petitioner, the other where they are evenly split between the parties—are not treated the same. Conceptually, these cases reflect very different opinion environments, and the latter is more consistent with the conditions thought to underlie more frequent use of the passive virtues (Bickel, 1986; Peters & Devins, 2005; Sunstein, 1999). Because of the increase in amicus filings over time (Kearney & Merrill, 2000), I follow standard practice and use term specific *z* scores.¹⁴

I include several measures of political involvement. Although solicitors general serve a number of constituencies (Pacelle, 2003), they are for the most part agents of the president (Bailey, Kamoie, & Maltzman, 2005). Thus, to capture the interest of the president, I include two indicator variables scored 1 for solicitor general involvement and 0 otherwise—the first capturing participation in oral argument, the second as amicus. Members of Congress also participate in Supreme Court cases by filing amicus briefs (McLauchlan, 2005; Solberg & Heberlig, 2004). To capture congressional involvement, I include an indicator variable scored 1 for cases where at least one member of Congress submitted an amicus brief and 0 otherwise.¹⁵

The threat of political opposition is captured by taking the absolute value of the difference in ideal points between (a) the Court and Congress and (b) the Court and the president using Epstein et al.'s (2007) Judicial Common Space scores.¹⁶ The ideal points for Congress and the president are NOMINATE Common Space scores (Poole & Rosenthal, 1997; Poole, 1998), which rely on legislators who served in both chambers, presidents who served in Congress, and recorded presidential vote intentions for bridge points to develop institutional scores that are located on a common dimension. Epstein et al. (2007) then map the Court onto this space by bridging nominations made by presidents who were free, because of the absence of Congressional constraint, to nominate justices at their ideal point.

Control Variables

A number of control variables are included in the models to account for potentially confounding effects. As noted previously, the empirical literature on justiciability suggests that conservative (liberal) judges are more likely to restrict (grant) access in justiciability cases. Thus, as the Court becomes more conservative, we may expect it to dismiss more cases on justiciability grounds. To the extent deciding justiciability questions offers justices another opportunity to implement their policy preferences regarding access, it is important to account for the effect of ideology. I capture the ideological location of the median justice with Martin & Quinn's (2002) dynamic ideal point estimates.

The Court may be more reluctant to decide cases when there is less than a full Court. To account for this possibility, I include an indicator variable scored 1 for cases decided by less than nine justices and 0 otherwise. I control for case salience with the commonly used indicator of front-page coverage of a decision by the *New York Times* the day after being handed down

Table 1. Dismissing Constitutional Cases on Justiciability Grounds

Variable	1946-2001		1954-2001	
	Est.	SE	Est.	SE
Preference heterogeneity	1.07***	(0.41)	1.36***	(0.44)
Opinion environment	0.18***	(0.07)	0.15**	(0.07)
SG party	0.30	(0.29)	0.30	(0.32)
SG brief	0.20	(0.39)	0.31	(0.39)
Congress brief	1.60***	(0.55)	1.80***	(0.54)
Congress divergence	-1.92	(1.71)	-1.42	(1.87)
President divergence			-0.15	(1.03)
Court conservatism	3.43***	(1.28)	2.63**	(1.20)
Partial court	0.45*	(0.32)	0.50*	(0.32)
Case salience	-2.22***	(0.65)	-2.38***	(0.77)
Liberal decision	0.26	(0.29)	0.42*	(0.30)
Intercept	-6.04***	(1.09)	-6.88***	(1.32)
N	2207		1990	
Log likelihood	-257.55		-236.40	

Abbreviations: Est, Estimate; SG, Solicitor General.

Note: Robust standard errors clustered by term in parentheses.

* $p < .10$, one-tailed. ** $p < .05$. *** $p < .01$.

(Epstein & Segal, 2000).¹⁷ Last, I include an indicator variable scored 1 for cases when the Court is reviewing a liberal lower court decision and 0 otherwise.

Estimation and Results

Table 1 shows the results from logistic regression analyses of the Court dismissing constitutional cases on justiciability grounds.¹⁸ The first set of results, which cover the Court's 1947-2001 terms, does not include the measure of divergence between the Court and president because of the absence of data on presidential ideal points before 1954. The second set of results adds this variable and includes the Court's 1954-2001 terms. The results are similar across models, so I focus primarily on the full-sample model except to discuss the presidential divergence variable. Overall, the model fit is good. It is a substantial improvement over the null model ($\chi^2 = 87.19, p < .001$), and the area under the ROC curve, which conveys the percentage of correct classifications from a random draw of 0,1 pairs on the dependent variable is .77.¹⁹

The results in Table 1 show consistent support for the preference heterogeneity and opinion environment hypotheses. As the level of preference heterogeneity on the Court increases, it is more likely to dismiss constitutional cases on justiciability grounds. Furthermore, the magnitude of the effect is substantial: for a one standard deviation increase in preference heterogeneity, the odds of a constitutional case being dismissed on justiciability grounds are about 1.6 times greater. The extant literature suggests that preference heterogeneity has a limiting effect on the Court's opinions, making it more difficult for the justices to produce "consequential cases" (Epstein, Friedman, & Staudt, 2008; Staudt, Friedman, & Epstein, 2008) and increasing the number of dissents (Clark 2009a). The results here suggest that higher levels of preference heterogeneity also make it less likely that the Court will decide a constitutional case on the merits.

The Court is also more likely to utilize the passive virtues when confronted with a constitutional question that generates intense and divided opinion.²⁰ For a one standard deviation increase in the opinion environment variable, the odds of a constitutional case being dismissed on justiciability grounds are about 1.3 times greater. These results lend support to the opinion environment hypothesis and raise new questions about the Court's behavior in cases that affect diffuse interests. One of the seminal results in the agenda setting literature is that the Court is more likely to accept cases for review that have wide-ranging effects (Caldeira & Wright, 1988; Caldeira, Wright, & Zorn, 1999; Perry, 1991). The results here do not bring these findings into question given that relatively few cases are dismissed on justiciability grounds, but they do add the important caveat that the Court is also more likely to dismiss these cases without reaching a decision on the merits.

The Court is no more likely to dismiss a constitutional case on justiciability grounds when the solicitor general participates in oral arguments or as amicus. Furthermore, the joint effect for both variables is statistically indistinguishable from zero ($\chi^2 = 1.09, p = .58$). When members of Congress file an amicus brief in constitutional cases, however, the Court is more likely to dismiss on justiciability grounds. Substantively, the odds of dismissing a constitutional case increases by a factor of about 5 when members of Congress file an amicus brief. This suggests that the Court is more cautious about wading into disputes in which members of Congress take a special interest. This result is consistent with the idea that the passive virtues can be used to generate a colloquy between the coordinate branches.

The degree of discord between the Court and either Congress or the president has no effect on the likelihood of the Court dismissing constitutional

cases on justiciability grounds.²¹ Furthermore, the joint effect for both variables is statistically indistinguishable from zero ($\chi^2 = 0.63, p = .73$). I also fit models interacting the distance measures with the participation indicators to examine whether the threat of political opposition matters more when Congress or the president has shown a particular interest in a case through direct participation. These variables were statistically indistinguishable from zero and reduced the overall model fit. Overall, then, these results suggest that the threat of political retaliation does not affect the likelihood of dismissing constitutional cases on justiciability grounds. However, this does not necessarily mean that the Court does not use the passive virtues to insulate itself from a hostile Congress or president. It may be that the Court strategically refuses to grant certiorari in cases that are likely to generate hostile responses from ideologically distant coordinate branches.

Turning to the control variables, the Court is more likely to dismiss constitutional cases on justiciability grounds as the median justice becomes more conservative.²² Substantively, a one standard deviation increase in the median justice's conservatism increases the odds of a constitutional case being dismissed on justiciability grounds by a factor of about 1.6. This result is not surprising since it is well known that conservative courts are more likely to close access all else equal. This result also suggests that not all invocations of the passive virtues are strategic. Rather, in some cases a majority of the Court is likely to be interested in deciding justiciability questions in a way that restricts access.

Unexpectedly, salient constitutional cases are less likely to be dismissed on justiciability grounds. This result can be interpreted two ways. First, it may be that the Court is simply less likely to dismiss newsworthy cases. Another possible explanation is that the standard measure of case salience—a front page story about a decision in the *New York Times* the day after it is handed down—is ill suited for this analysis. Although the measure is generally accepted as a contemporaneous indicator of case salience (e.g., Epstein & Segal, 2000; Epstein, Friedman, & Staudt, 2008; Staudt, Friedman, & Epstein, 2008), perhaps justiciability rulings are simply unlikely to make the front page due to their rather technical nature regardless of the importance of the underlying dispute. When the Court dismissed a constitutional challenge to the Line Item Veto Act on standing grounds in *Raines v. Byrd* (1997), for example, there was no front page story on the decision; when the Court later struck down the Act in *Clinton v. City of New York* (1998), however, a front page story on the decision followed. A look at the data reveals that only *Poe* and *DeFunis* made the front page among cases that were dismissed on justiciability grounds in this sample.²³

The Court is more likely to dismiss constitutional cases on justiciability grounds when there are less than nine justices sitting. Substantively, the odds of dismissing a constitutional case increases by a factor of about 1.5 when fewer than nine justices are sitting. This suggests that the Court is more cautious about deciding constitutional cases when it is not at full strength. Cases reviewing liberal lower court decisions were no more likely to be dismissed on justiciability grounds in the full sample. In the partial sample, however, they were more likely to lead to dismissals.

Robustness

In this section, I present the results from several robustness checks. There is a possibility that the Court's propensity to reach justiciability questions is in part a function of the chief justice's leadership. For example, contrary to common perception, Taggart & DeZee (1985) find that the Burger Court was no more likely to restrict access than the Warren Court, and suggest that the common perception is likely due to the fact that the Court was more likely to decide access questions under Burger's leadership. Epstein & Shvetsova (2002), meanwhile, suggest that Burger may have urged the Court to dismiss cases on justiciability grounds as a heresthetic maneuver to avoid losing on the merits. Similarly, Stearns (2000) suggests that the Burger Court may have been especially likely to manipulate justiciability doctrines to avoid deciding certain cases. To test for chief justice effects, I fit a model with indicator variables for each chief justice in the full sample (i.e., Vinson, Warren, and Rehnquist), excluding Burger as the baseline. Model 1 in Table 2 displays the results. The courts under Vinson, Warren, and Rehnquist were no more or less likely to dismiss constitutional cases on justiciability grounds than the Burger Court. Moreover, the theoretically relevant explanatory variables perform similarly. This is an interesting result in that it suggests, contrary to conventional wisdom, that the Court was no more likely to dismiss constitutional cases on justiciability grounds under Burger, controlling for the other explanatory variables in the model.

I also fit models accounting for unobserved heterogeneity across terms, natural courts, and issue areas. Hausman tests indicated that the estimates from random-effects specifications are consistent for these data, so results from random- rather than fixed-effects models are displayed in Models 2, 3, and 4 respectively in Table 2. The results are substantively similar to those presented in Table 1, and each of the theoretically interesting variables that were statistically significant in the primary models remain so after controlling for the unobserved heterogeneity across terms, natural courts, and issue areas. Overall, these

Table 2. Robustness

Variable	1	2	3	4
Preference heterogeneity	0.76* (0.58)	1.04*** (0.35)	1.01*** (0.37)	1.33*** (0.49)
Opinion environment	0.18*** (0.07)	0.18*** (0.07)	0.18*** (0.07)	0.21** (0.11)
SG party	0.30 (0.29)	0.30 (0.31)	0.30 (0.31)	0.57 (0.50)
SG brief	0.24 (0.40)	0.21 (0.37)	0.22 (0.37)	0.65 (0.56)
Congress brief	1.78*** (0.56)	1.62*** (0.47)	1.63*** (0.47)	1.04* (0.73)
Congress divergence	-1.58 (1.77)	-1.91 (1.77)	-1.94 (1.79)	-4.13 (2.87)
President divergence				
Court conservatism	4.59*** (1.58)	3.50** (1.64)	3.44** (1.65)	4.04* (2.56)
Partial court	0.39 (0.33)	0.44* (0.32)	0.44* (0.32)	0.88* (0.51)
Case salience	-2.15*** (0.65)	-2.12*** (0.57)	-2.13*** (0.57)	-1.14* (0.67)
Liberal decision	0.30 (0.30)	0.27 (0.27)	0.28 (0.27)	0.03 (0.42)
Vinson	-0.65 (1.17)			
Warren	0.15 (0.48)			
Rehnquist	-0.52 (0.33)			
ρ		0.01 (0.01)	0.01 (0.02)	0.73 (0.12)
Intercept	-5.33*** (1.48)	-6.02*** (0.84)	-5.91*** (0.88)	-7.78*** (1.14)
N	2207	2207	2207	2207
Log likelihood	-256.32	-257.65	-257.59	-107.43

Note: Robust standard errors clustered by term in parentheses. Model 1 includes indicator variables for chief justices with Chief Justice Burger as the baseline; Model 2 includes term random effects; Model 3 includes natural court random effects; and Model 4 includes issue area random effects.

* $p < .10$, one-tailed. ** $p < .05$. *** $p < .01$.

additional analyses offer reassurance that the results presented in Table 1 are robust across model specifications.

Conclusion

The proper scope of the Court's use of judicial review has long been a subject of debate. At the heart of this debate lies what Bickel (1986) called the "countermajoritarian difficulty," or the notion that use of the judicial veto by unelected judges must proceed with caution in a democratic system of government. At the same time, however, "[f]requently the Court has entered as an independent actor into major conflicts where dominant lawmaking coalitions are either unwilling or unable to act in a concerted, decisive manner" (McCann, 1999, pp. 69-70). Commentators have suggested that what allows the Court to maintain this balance in part is the practice of sidestepping constitutional disputes when doing so would enhance democratic deliberation and promote a colloquy between the branches that ultimately helps ensure compliance when controversial disputes are settled (Bickel, 1986; Sunstein, 1999). Among the more talked about techniques for sidestepping constitutional disputes is the use of procedural access tools to dismiss cases that are already on the Court's agenda (see, for example, Bickel, 1986; Burt, 1992; Devins, 1999; Devins & Meese, 2005; Sunstein, 1999). Notwithstanding the widespread perception that the Court regularly invokes procedural access tools to sidestep constitutional disputes (see, for example, Bickel, 1986; Stearns, 2000; Sunstein, 1999; see also Kloppenberg, 2001), we lack a comprehensive understanding of the determinants that lead the Court to engage in this practice. We also lack a sense of how often the Court utilizes these "passive virtues."

Using data from 1946 to 2001, I find that the Court invoked justiciability concerns to avoid deciding about 3% of its constitutional cases. I also find robust evidence that the Court is more likely to utilize these avoidance techniques when the justices have heterogeneous preferences and are dealing with issues about which groups feel strongly and are deeply divided. Although the threat of political opposition does not seem to influence whether the Court invokes justiciability concerns to avoid deciding constitutional cases, the Court is less likely to decide a case when members of Congress file an amicus brief.

In addition to contributing to our understanding of the Court's use of judicial review, the results have implications for studies of agenda setting. One of the most consistent findings in the literature on agenda setting is that the Court is more likely to grant certiorari on important disputes that affect diffuse

interests (Caldeira & Wright, 1988; Caldeira, Wright, & Zorn, 1999; Perry, 1991). However, the results presented here offer an important caveat: At least with respect to constitutional cases, although the Court may be more likely to agree to hear these types of cases, they also sometimes dismiss them without reaching a decision on the merits.

Another implication concerns the literature on court access. The empirical work on justiciability centers primarily on unpacking the ideological trends in decision making on access questions (Cross, 2007; Pierce 1999; Rathjen & Spaeth, 1979; Rowland & Todd, 1991). None of the existing work, however, distinguishes between cases where a justiciability question is the sole issue before the Court on review and those where it is accompanied by a separate merits question. This may be an important distinction given the potentially strategic nature of the second type of case. If an access vote is potentially cast as part of an effort to avoid a separate merits question, it may be useful to treat that vote differently when exploring the effect of, say, ideological preferences on voting in access cases. Distinguishing these cases in future work may shed new light on judicial behavior in this area while also helping to explain why justiciability jurisprudence appears to be riddled with inconsistencies (Siegel, 2007).

Future work would also benefit from further exploring the influence of law on access decisions (Cross, 2007; Kaheny, 2010; Staudt, 2004). Although I have focused on avoidance as a goal in this article, many justiciability decisions are undoubtedly driven by straightforward applications of the law. Moreover, dismissals may sometimes reflect efforts by the justices to shape the judicial agenda or influence underlying disputes (Rathjen & Spaeth, 1983). Justices also have a variety of other avoidance strategies at their disposal. For example, they can decide cases on statutory rather than constitutional grounds (Spiller & Spitzer, 1992), employ vague language in their opinions (Staton & Vanberg, 2008), and utilize standards rather than rules (e.g., Ehrlich & Posner, 1974; Jacobi & Tiller, 2007; Kaplow, 1992). Developing a more nuanced picture of decision making in this area will help to broaden our understanding of judicial behavior and the tools judges use to make policy and interact with the political environment.

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Notes

1. See *Newdow v. United States Congress* (2002a). The panel subsequently amended its initial ruling, removing the part declaring the federal statute unconstitutional. See *Newdow v. United States Congress* (2002b).
2. For a review of the political response, see Gey (2003). A poll conducted by Gallup from June 28 to 30, 2002 showed that 84% of respondents disagreed with the decision. The poll was accessed via iPoll.
3. Another interesting question is why the Court agrees to decide these cases in the first place given its discretionary docket. There are several possible explanations. First, genuine justiciability concerns may not arise until after certiorari is granted. Second, signaling intent to decide a case may be a useful way to alleviate external pressure to grant certiorari when the justices are not yet ready to settle a dispute. Given that only four voters are needed to grant certiorari, five justices might join to sidestep a case brought to the Court by the other four justices. Other possible explanations include shifting majorities and strategic maneuvering to split existing winning coalitions. Although data limitations make studying these propositions difficult, I hope to do so in future work. Focusing on the dismissal of accepted cases is an important first step, however, given the widespread discussion of this practice.
4. Standing refers to a plaintiff's ability to show sufficient harm to qualify for legal redress; ripeness asks whether the harm has been sufficiently realized (and is not merely contingent on future events); and mootness ensures that any potential resolution will have an actual effect (i.e., that the dispute has not otherwise been settled).
5. The Court roots some of its justiciability jurisprudence in a pragmatic understanding of "judicial administration" (Chemerinsky, 2003, p. 44). Congress can override these prudential limits, which include restrictions on third party standing, since they are not derived from the Constitution. Some justiciability doctrines have constitutional and prudential bases (see, for example, Lee, 1992; Nichol, 1987).

6. In related research, Braman (2006) presents experimental evidence that decision makers are sometimes unable to separate their opinion on the merits from judgments about standing.
7. Thus an important difference between the two projects is that Sunstein's minimalist approach puts less faith in judges and more in democratic institutions (Sunstein, 1999, pp. 266-268, n. 5).
8. Including all cases may overestimate the number of explicit justiciability judgments the justices make. Furthermore, some of these will be "easy cases" that do not pose a substantial justiciability concern (Cross, 2005, n. 54). Limiting the analysis to cases where a justiciability concern is explicitly raised, however, would introduce selection bias by including fewer judgments than are actually made, an unrepresentative sample of access denials, and perhaps only the most controversial judgments (see Staudt, 2004). There are certainly cases that pose justiciability concerns that the Court does not address (e.g., Breau, 2006; Chemerinsky, 2001). Furthermore, although the Court does not typically address questions that are not briefed (Epstein, Segal, & Johnson, 1996), justiciability questions are threshold issues that require the Court's attention even if the parties do not raise concerns. This lends support to the assumption that the Court makes a justiciability decision in each case, even if the answer is easy. Including all cases also introduces additional noise into the data, which biases the results against uncovering evidence for the hypotheses.
9. Issue areas = 731 and 801-811. I also examined cases that were "dismissed as improvidently granted" (DIGs) for evidence that a justiciability concern was the reason for dismissal, but no clear instances were uncovered.
10. In some instances, both an access question and a separate merits question are briefed. Although decisions denying access in these cases are also merits decisions (as are access decisions in cases where the issue is not briefed), I treat them as dismissing a separate merits question because this is how they are often treated by the press and in the literature (e.g., Newdow, 2004).
11. Cases like *Allen*, where the sole merits question before the Court is a justiciability issue, are excluded from the analysis.
12. *DaimlerChrysler* alone had about US\$280 million dollars at stake in its deal with Ohio.
13. The measure created by Thompson, Zanna, & Griffin (1995) to capture ambivalence takes the average intensity by dividing the first expression in the equation by two. Mathematically, taking the average allows the absolute value of the difference to more acutely affect the intensity term. This makes theoretical sense when studying ambivalence where the key component is the similarity in positive and negative reactions rather than the total number of reactions. Here, however, there

is no theoretical justification for taking the average. Nonetheless, the results are similar using either measure.

14. Amicus brief data comes from Collins (2008).
15. Data from 1946 to 1997 come from Epstein et al. (2007). I updated these data through 2001 using LexisNexis.
16. Congress's ideal point is calculated using the midpoint between the House and Senate's ideal points.
17. This variable is correlated with the opinion environment variable at 0.26.
18. Logistic regression can underestimate the probability of an event occurring when the event under consideration occurs only rarely. Because of the rare occurrence of 1s in these data, I fit additional models using the rare events correction developed by King & Zeng (2001a, 2001b). The results are similar. I present the traditional logit results to facilitate postestimation analysis.
19. Areas range from .50 to 1 (perfect prediction). A ROC curve can also be thought of as estimating how the likelihood of correctly predicting a 1 is traded off against the likelihood of correctly predicting a 0 (King & Zeng, 2001c).
20. To detect any high-leverage data points, I examined Pregibon (1981) influence statistics, which capture differences in the coefficient vector because of the deletion of each data point similar to Cook's distance in the linear regression case. Three cases stood out as potential high-leverage outliers. Results from a model fit on the full sample excluding these cases were similar.
There is also a concern that the results for the opinion environment variable are spurious. After all, it may be that there are more amicus briefs filed in these cases because there are more issues to address: an underlying merits dispute and a justiciability question. To address this concern, I randomly sampled 10 cases coded 1 on the dependent variable (about 16% of the 1s) and read each amicus brief to determine whether and to what extent the briefs addressed the justiciability concern on which the Court ultimately rested its decision. Out of 48 amicus briefs, only 4 substantially focused on a justiciability issue. Three other briefs mentioned a justiciability issue; none of these focused on justiciability, however, and one mentioned it only briefly in a footnote. About 85% of the briefs did not address justiciability. Overall, it appears there is little concern that the results on the opinion environment variable are due to more amicus briefs being filed in these cases.
21. I also fit models including alternative measures of political opposition. First, I included a variable marking periods where both houses of Congress and the president were controlled by a different party than the one that controlled the Court (using party of the appointing president). This variable was statistically indistinguishable from zero. Second, I included an interaction term between the congress divergence and president divergence variables. This variable was statistically

- indistinguishable from zero, and a plot revealed that the marginal effect of a one standard deviation increase in congress divergence on the probability of the Court dismissing a constitutional case on justiciability grounds was statistically indistinguishable from zero across the range of president divergence values.
22. Using the ideal points created by Segal & Cover (1989), which are exogenous estimates of ideology derived from content analyzing newspaper editorials leading up to a justice's confirmation, yields conflicting results. The two measures diverge because the Segal-Cover estimates are fixed over time and because the expected ideology of some justices as described by newspapers turned out to be inaccurate. The other results are consistent using either measure.
 23. As a check on the results, I attempted to fit a model using another commonly used measure of salience—inclusion in the CQ Press list of important decisions. However, none of the cases dismissed on justiciability grounds in this sample are included in CQ's list.

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