2019

Passive Avoidance

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ARTICLE

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Abstract. In its nascent years, the Roberts Court quickly developed a reputation—and drew sharp criticism—for using the canon of constitutional avoidance to rewrite statutes in controversial, high-profile cases. In recent years, however, the Court seems to have taken a new turn, quietly creating exceptions or reading in statutory conditions in order to evade potentially serious constitutional problems without expressly discussing the constitutional issue or invoking the avoidance canon. In fact, the avoidance canon seems largely, and conspicuously, missing from many cases decided during the Court's most recent Terms, playing a significant role in justifying the Court's construction in only one majority opinion since 2012.

This Article examines the Roberts Court's recent shift in approach to the avoidance canon. It departs from the conventional wisdom about the Roberts Court and the avoidance canon in several important ways. First, it posits that the conventional view about the Roberts Court's aggressive use of the avoidance canon may itself have contributed to the Court's shift away from invoking the canon in recent Terms—that is, the Court may have ratcheted down its use of the canon in response to commentators' attacks against its reliance on avoidance in its early Terms. Second, this Article argues that the Roberts Court has recently adopted a passive rather than aggressive form of avoidance, in which it effectively avoids deciding controversial, unresolved constitutional questions—but without invoking avoidance, and without openly admitting to rewriting or straining the

* Mary C. Daly Professor of Law, St. John's University School of Law. I owe deep thanks for valuable insights and conversations to Aaron-Andrew Bruhl, Marc DeGirolami, Ryan Doerfler, William N. Eskridge, Jonah Gelbach, Rebecca M. Kysar, Ethan Leib, Margaret H. Lemos, Kate Levine, Nina Mendelson, Kate Shaw, and Kevin Stack. I am especially indebted to my husband, Ron Tucker, for his patience with this project. Thanks also to Dean Michael A. Simons and St. John's Law School for generous research assistance, and to participants at statutory interpretation theory seminars at the University of Pennsylvania Law School and Yale Law School for insightful discussions about earlier drafts of this Article. Kathryn Baldwin, Danielle DelGrosso, Melissa Parres, Barbara Reilly, Ashleigh Shelton, and Jennifer Thomas provided excellent research assistance, and Janet Ruiz-Kroll provided invaluable assistance with the tables. Finally, special thanks to the outstanding editors of the *Stanford Law Review* for their thoughtful comments and editorial work on this Article. All errors are my own.

statute's text. Third, and perhaps most importantly, this Article uncovers several new tools of "passive avoidance" that the Court has employed to do the work previously performed by the avoidance canon. In the end, it posits that passive avoidance may actually be a good thing—and the truest form of constitutional avoidance.

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Introduction

In its recent decision in *Yates v. United States*, the U.S. Supreme Court ruled that a fish is not a "tangible object" under a criminal statute that imposes up to twenty years in prison for any individual who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence [an] investigation."[1] In so ruling, the Court invoked numerous canons of statutory construction, dictionary definitions, legislative history, the purpose of the statute—including the mischief it was designed to reach—and even the title caption of the section at issue.[2] Conspicuously missing from this tour de force of statutory construction was the avoidance canon—or any mention of the serious constitutional vagueness concerns raised by the statute and discussed at some length at oral argument.[3]

What makes this omission especially curious is that it seems to be part of a recurring pattern and a surprising role reversal for the Roberts Court. There used to be a familiar story about the Roberts Court and the avoidance canon: When confronted with a serious constitutional challenge to a statute—particularly if the statute was one with high political visibility—the Court would not invalidate the statute, even if a majority of the Justices believed the statute to be unconstitutional.[4] Instead, the Court—often in an opinion authored by the Chief Justice—would discuss the constitutional infirmity at length and then would pivot and invoke the canon of constitutional avoidance

1. *See* 135 S. Ct. 1074, 1078-79 (2015) (plurality opinion) (quoting 18 U.S.C. § 1519); *see also id.* at 1089 (Alito, J., concurring in the judgment).

2. *See id.* at 1081-88 (plurality opinion).

3. *See, e.g.*, Transcript of Oral Argument at 5, *Yates*, 135 S. Ct. 1074 (No. 13-7451), 2014 WL 9866152 [hereinafter *Yates* Oral Argument] (Justice Kennedy: "[I]t seems to me that the test [the defendant] suggest[s] has almost more problems with vagueness . . . ."); *id.* at 17 (Justice Breyer: "But where you end up at the end of the road is that this is void for vagueness . . . .").

4. *See, e.g.*, ANDREW NOLAN, CONG. RESEARCH SERV., R43706, THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE: A LEGAL OVERVIEW 11, 15-16 (2014) (observing that the Roberts Court has "frequently" sidestepped major constitutional questions); Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1276-78 (2016) (describing how the Roberts Court dodged "thorny" constitutional questions in several early-Term cases); Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2110 (2015) ("In the last few years, the Supreme Court has resolved some of the most divisive and consequential cases before it with the same maneuver: construing statutes to avoid constitutional difficulty.").

to justify limiting the statute's reach or otherwise construing the relevant provision so as to avoid the constitutional difficulty—even if doing so required straining the statute's text.[5]

As the story suggests, in its early years, the Roberts Court developed a reputation for aggressively using the avoidance canon to rewrite statutes in several controversial, high-profile cases.[6] Most notoriously, avoidance was the hook that Chief Justice Roberts used to uphold the Affordable Care Act (ACA) in *National Federation of Independent Business v. Sebelius (NFIB)*[7] and to save (for a time) the preclearance coverage formula of the Voting Rights Act of 1965 (VRA) in *Northwest Austin Municipal Utility District No. One v. Holder*.[8] Notably, in *NFIB*, Chief Justice Roberts invoked avoidance only after making clear that the ACA did not fall within Congress's powers under either the Commerce Clause or the Necessary and Proper Clause.[9] And in *Northwest Austin*, Chief

5. Indeed, one commentator has referred to the avoidance canon pivot as Chief Justice Roberts's "signature move." *See* Fish, *supra* note 4, at 1278-79.

6. *See, e.g.*, *id.* at 1276-79; Katyal & Schmidt, *supra* note 4, at 2110-13; Damon Root, *John Roberts' Constitutional Avoidance*, REASON (June 4, 2014), https://perma.cc/DQ4D-83X3.

7. *See* 567 U.S. 519, 561-63 (2012) (opinion of Roberts, C.J.); *see also* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

   In *NFIB*, Chief Justice Roberts was the sole Justice who made the avoidance pivot; four dissenting Justices agreed that the straightforward reading of the statute was unconstitutional, *see* 567 U.S. at 649-57 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (concluding that the ACA's individual mandate exceeds Congress's power under the Commerce Clause), and the other four Justices found no constitutional infirmity but agreed with the Chief Justice that the penalty provision could be construed as a "tax," *see id.* at 589 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (arguing that the Commerce Clause authorized Congress to enact the individual mandate and that the mandate also was a proper exercise of Congress's taxing power); *see also id.* at 561-63 (opinion of Roberts, C.J.) (concluding, in a portion of the opinion joined by no other Justices, that the individual mandate must be construed as imposing a tax); *id.* at 563-74 (majority opinion) (upholding the individual mandate as a tax).

8. *See* 557 U.S. 193, 196-97 (2009); *see also* Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 4, 120 Stat. 577, 580 (codified as amended at 52 U.S.C. § 10303(a)(8) (2017)), *invalidated in part by* Shelby County v. Holder, 133 S. Ct. 2612 (2013); Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 438 (codified as amended at 52 U.S.C. § 10303).

9. In *NFIB*, Chief Justice Roberts began his analysis with a lengthy explanation of why the ACA's individual mandate exceeded Congress's constitutional authority under the Commerce Clause and the Necessary and Proper Clause, *see* 567 U.S. at 547-61 (opinion of Roberts, C.J.)—and then pivoted to uphold the provision as a tax instead, *see id.* at 563-66 (majority opinion). *See also* U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power "[t]o regulate Commerce . . . among the several States"); *id.* art. I, § 8, cl. 18 (giving Congress the power to "make all Laws which shall be necessary and proper for

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Justice Roberts's opinion for the Court invoked avoidance only after clarifying that the VRA's preclearance provision likely violated constitutional norms about treating states equally.[10]

Indeed, two things stand out about the Roberts Court's use of the avoidance canon during the period between 2006 and 2012. First, it invoked the canon regularly—in ten majority or plurality opinions and eight concurring or dissenting opinions over seven Terms, for an average of 2.6 times per Term.[11]

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carrying into Execution the foregoing Powers"). The Chief Justice's opinion acknowledged that "the statute reads more naturally as a command to buy insurance than as a tax," *NFIB*, 567 U.S. at 574 (opinion of Roberts, C.J.), but concluded that it was appropriate to read the provision as a tax in order to "save the Act," *see id.* at 562 (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)).

10. In *Northwest Austin*, the Court construed the VRA's "bailout" provision to permit covered jurisdictions, like the utility district bringing the lawsuit, to terminate their covered status. *See* 557 U.S. at 206-11; *see also* 52 U.S.C. § 10303(a)(1)(A). As discussed in Part I.A below, this was an implausible reading of the statute and was not the primary focus of the Court's opinion, which began with a lengthy discussion of the constitutional issue and turned to the statutory question only after concluding that "[t]he Act's preclearance requirements and its coverage formula raise serious constitutional questions." *See Nw. Austin*, 557 U.S. at 201-06.

11. For the majority and plurality opinions that invoked the avoidance canon, see Perry v. Perez, 565 U.S. 388, 395 (2012) (per curiam); Brown v. Plata, 563 U.S. 493, 526 (2011); Skilling v. United States, 561 U.S. 358, 405-06 (2010); *Nw. Austin*, 557 U.S. at 205-06; Hawaii v. Office of Haw. Affairs, 556 U.S. 163, 176 (2009); Bartlett v. Strickland, 556 U.S. 1, 21 (2009) (opinion of Kennedy, J.); Office of Senator Mark Dayton v. Hanson, 550 U.S. 511, 514 (2007); Gonzales v. Carhart, 550 U.S. 124, 153-54 (2007); and Rapanos v. United States, 547 U.S. 715, 738 (2006) (plurality opinion). *See also NFIB*, 567 U.S. at 563 (opinion of Roberts, C.J.) (invoking avoidance in a portion of the opinion not joined by any other Justice).

For the concurring and dissenting opinions, see Reynolds v. United States, 565 U.S. 432, 450 (2012) (Scalia, J., dissenting); Holder v. Humanitarian Law Project, 561 U.S. 1, 60 (2010) (Breyer, J., dissenting); Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573, 623 (2010) (Kennedy, J., dissenting); Citizens United v. FEC, 558 U.S. 310, 405-08, 408 n.16 (2010) (Stevens, J., concurring in part and dissenting in part); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 565-67 (2009) (Breyer, J., dissenting); Boumediene v. Bush, 553 U.S. 723, 805-06 (2008) (Roberts, C.J., dissenting); Gonzalez v. United States, 553 U.S. 242, 269 (2008) (Thomas, J., dissenting); and Kimbrough v. United States, 552 U.S. 85, 113 (2007) (Scalia, J., concurring).

These cases, listed in the Appendix below, were identified as part of a larger empirical study for which I and at least one research assistant reviewed every case decided during the Roberts Court's 2005 through 2016 Terms (beginning from January 31, 2006, when Justice Alito joined the Court) that confronted a question of statutory interpretation. Every case decided during that period was examined to determine whether it dealt with a statutory issue. Any case in which the Court's opinion contained a substantial discussion about statutory meaning was included in the study, although cases interpreting the Federal Rules of Civil Procedure were not included.

This selection methodology yielded 499 statutory cases, each of which was coded for its reliance on several different interpretive tools, including substantive canons such as the avoidance canon. The study coded as avoidance cases only those opinions in which

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More importantly, in the vast majority of those opinions, the Court (or the concurring or dissenting opinion) engaged in "significant" discussion of the constitutional difficulty at issue, or placed "primary" or "some" reliance on the canon.[12] Second, the Court (or concurring or dissenting opinion) often used the canon aggressively to adopt a construction that deviated from the statute's most natural reading, in order to elide a constitutional problem that otherwise would have required it to invalidate the statute—and it frequently was open and frank about what it was doing.[13]

Following these decisions, scholars and commentators roundly criticized the Roberts Court's use of the avoidance canon, accusing the Court of distorting the canon and engaging in disguised judicial activism. For example, one commenta-

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the Court (or a or concurring or dissenting Justice) relied on the avoidance canon; opinions in which the avoidance canon was mentioned but rejected as inapplicable were not counted.

In a similar study of the Roberts Court's statutory cases, Nina Mendelson recorded two additional cases as relying on the avoidance canon during the same time period (for a total of twenty such cases). *See* Nina A. Mendelson, Compendium of Roberts Court Constitutional Avoidance Cases (2018) (on file with author); *see also* Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71 (2018). One of these cases reflects a difference of opinion regarding whether a dissenting opinion explicitly invoked the canon, *see* Sykes v. United States, 564 U.S. 1, 33-35 (2011) (Scalia, J., dissenting) (arguing that the statute at issue is unconstitutionally vague but not explicitly invoking the avoidance canon or concept), *overruled by* Johnson v. United States, 135 S. Ct. 2551 (2015), while the other case is one that I screened out as constitutional rather than statutory and therefore did not include in my dataset, *see* United States v. Stevens, 559 U.S. 460 (2010). Mendelson also coded several additional cases that mentioned but did not apply the avoidance canon; these were not coded in my study. *See* Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation*, *supra*, at 94-95.

12. *See NFIB*, 567 U.S. at 561-63 (opinion of Roberts, C.J.) (significant discussion, primary reliance); *Reynolds*, 565 U.S. at 450 (Scalia, J., dissenting) (some discussion); *Plata*, 563 U.S. at 526 (primary reliance); *Skilling*, 561 U.S. at 405-09 (primary reliance); *Humanitarian Law Project*, 561 U.S. at 55-60 (Breyer, J., dissenting) (significant discussion); *Jerman*, 559 U.S. at 623 (Kennedy, J., dissenting) (some reliance); *Citizens United*, 558 U.S. at 405-08 (Stevens, J., concurring in part and dissenting in part) (significant discussion, primary reliance); *Nw. Austin*, 557 U.S. at 204-06 (significant discussion, primary reliance); *Office of Haw. Affairs*, 556 U.S. at 176 (primary reliance); *Bartlett*, 556 U.S. at 21-25 (opinion of Kennedy, J.) (significant discussion, some reliance); *Boumediene*, 553 U.S. at 803-08 (Roberts, C.J., dissenting) (significant discussion, primary reliance); *Office of Senator Mark Dayton*, 550 U.S. at 513-15 (some reliance); *Gonzales*, 550 U.S. at 150-54 (some reliance). For a comparison to other cases decided by the Roberts Court, see Appendix below.

13. *See, e.g.*, *NFIB*, 567 U.S. at 562 (opinion of Roberts, C.J.) ("The most straightforward reading of the mandate is that it commands individuals to purchase insurance."); *Skilling*, 561 at 405-09; *Nw. Austin*, 557 U.S. at 206-07 (acknowledging that "[t]here is no dispute that the district is a political subdivision of the State of Texas in the ordinary sense of the term"). For a detailed discussion of the Court's use of the avoidance canon in these cases, see Part I.A below.

tor charged the Court with using the avoidance canon as a "tool . . . to move constitutional law and policy in the Court's [preferred] direction."[14] Another reproached the Court for using the canon to pave the way for "disruptive" constitutional change and as a "playbook for judicial action."[15] Still others accused the Court of employing the avoidance canon to "camouflage[] acts of judicial aggression in both the constitutional and statutory spheres."[16]

In several recent cases, however, the Court seems to have taken a new turn—quietly creating exceptions or reading conditions into statutes in order to elide potentially serious constitutional problems without expressly discussing the constitutional issue or invoking the avoidance canon.[17] The Court has done so despite the fact that in each case, the constitutional issue was addressed at length in the briefs and discussed by the Justices at oral argument.[18] In those few later-Term cases in which the Court has invoked the

14. Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 184; *see also id.* at 220.

15. *See* Richard M. Re, *The Doctrine of One Last Chance*, 17 GREEN BAG 2D 173, 173-74 (2014).

16. *See* Katyal & Schmidt, *supra* note 4, at 2111-12.

17. For the cases highlighted by this Article, see King v. Burwell, 135 S. Ct. 2480 (2015); Elonis v. United States, 135 S. Ct. 2001 (2015); Yates v. United States, 135 S. Ct. 1074 (2015); Bond v. United States, 134 S. Ct. 2077 (2014); and Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013). These cases are discussed in depth in Part II.A below.

18. For discussion of the constitutional issue in *King*, see Transcript of Oral Argument at 49-50, *King*, 135 S. Ct. 2480 (No. 14-114), 2015 WL 2399405 [hereinafter *King* Oral Argument]; Brief of the Commonwealth of Virginia et al. as Amici Curiae in Support of Affirmance at 42-44, *King*, 135 S. Ct. 2480 (No. 14-114), 2015 WL 412333 [hereinafter *King* States' Brief]; and Brief of Amici Curiae Jewish Alliance for Law & Social Action (JALSA) et al. in Support of Respondents at 36-37, *King*, 135 S. Ct. 2480 (No. 14-114), 2015 WL 350366 [hereinafter *King* JALSA Brief].

For discussion of the constitutional issue in *Elonis*, see Transcript of Oral Argument at 46-47, 53-55, *Elonis*, 135 S. Ct. 2001 (No. 13-983), 2014 WL 9866158 [hereinafter *Elonis* Oral Argument]; and Brief for the Petitioner at 34-61, *Elonis*, 135 S. Ct. 2001 (No. 13-983), 2014 WL 4101234 [hereinafter *Elonis* Petitioner's Brief].

For discussion of the constitutional issue in *Yates*, see *Yates* Oral Argument, *supra* note 3, at 5, 36-37; Brief for Eighteen Criminal Law Professors as Amici Curiae in Support of Petitioner at 33-35, *Yates*, 135 S. Ct. 1074 (No. 13-7451), 2014 WL 3101373; and Brief of Petitioner at 25-28, *Yates*, 135 S. Ct. 1074 (No. 13-7451), 2014 WL 2965254 [hereinafter *Yates* Petitioner's Brief].

For discussion of the constitutional issue in *Bond*, see Transcript of Oral Argument at 30-33, 43-45, 48-49, *Bond*, 134 S. Ct. 2077 (No. 12-158), 2013 WL 6908184 [hereinafter *Bond* Oral Argument]; and Brief for Petitioner at 42-46, 54-62, *Bond*, 134 S. Ct. 2077 (No. 12-158), 2013 WL 1963862 [hereinafter *Bond* Petitioner's Brief].

For discussion of the constitutional issue in *Adoptive Couple*, see Transcript of Oral Argument at 26, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12-399), 2013 WL 6908189 [hereinafter *Adoptive Couple* Oral Argument]; and Brief for Petitioners at 43-56, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12-399), 2013 WL 633597 [hereinafter *Adoptive Couple* Petitioners' Brief].

avoidance canon, its tone and approach to the canon have changed dramatically. Only one of the decisions in the last four Terms that invoked avoidance gave the statute at issue a dubious or clearly strained reading—and that case relied primarily on a different canon of construction, mentioning avoidance only briefly.[19] Moreover, only five (of 311) statutory opinions issued by the Court since 2012 have provided a significant discussion of a constitutional issue raised by a rejected interpretation (and four of those were solo dissents or concurrences authored by Justice Thomas).[20] This is despite the fact that serious constitutional concerns were implicated in many of the statutory cases decided by the Court during this period.

This Article is the first to examine the Roberts Court's diminished reliance on the avoidance canon in recent years. It suggests that the Court has replaced express, open reliance on the avoidance canon with what I call "passive avoidance"—that is, a form of stealth constitutional avoidance that recalls Alexander Bickel's "passive virtues" of judicial decisionmaking. As discussed in detail below, Bickel famously coined the term "passive virtues" to describe judicial decisionmaking that declines to resolve cases on substantive grounds if narrower grounds are available for deciding the case.[21]

This Article proceeds in three Parts. Part I reviews the Roberts Court's prominent early use of the avoidance canon to openly air constitutional infirmities and adopt strained statutory constructions, as well as the critical commentary generated by this approach. Part II examines the Court's practice in recent Terms of interpreting statutes to avoid a constitutional difficulty that was—often extensively—briefed and discussed at oral argument, without discussing the avoidance canon in its opinion.

Finally, Part III offers a possible explanation for the Roberts Court's failure to invoke the avoidance canon expressly in several of its later-Term cases, even as it strained a statute's text to effectively avoid serious constitutional difficulties. It submits that the Court may be reacting to the spate of negative commentary that followed its prominent use of the avoidance canon in earlier Terms—that is, the Court may have entered something of an "avoidance retreat" period during which it has racheted down its use of the canon

19. *See Bond*, 134 S. Ct. at 2088-94 (relying primarily on the federalism clear statement principle).

20. For the five cases, see NLRB v. SW Gen., Inc., 137 S. Ct. 929, 946-49 (2017) (Thomas, J., concurring); McDonnell v. United States, 136 S. Ct. 2355, 2372-73 (2016); Taylor v. United States, 136 S. Ct. 2074, 2082-89 (2016) (Thomas, J., dissenting); *Adoptive Couple*, 133 S. Ct. at 2565-71 (Thomas, J., concurring); and Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2261-70 (2013) (Thomas, J., dissenting). *See also infra* Appendix.

21. *See* Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); *infra* Part III.B.

following a period of high use that created controversy and criticism.[22] As part of this retreat, the Court may be engaging in a Bickelian exercise of "passive virtues"—using narrower tools than the powerful avoidance canon in order to escape making momentous pronouncements about constitutional issues unless absolutely necessary, and thereby avoid the backlash that its earlier, open use of avoidance engendered.[23]

Part III also highlights several tools of passive avoidance that the Court has employed in recent years to avoid constitutional difficulties without explicitly invoking the avoidance canon. In lieu of procedural techniques like standing and ripeness,[24] these tools of passive avoidance include traditional statutory interpretation canons that are close cousins of avoidance—such as the rule of lenity and the federalism clear statement principle—as well as other tools, like the "mischief" rule, that help the Court defeat charges of judicial activism. Ultimately, this Article suggests that passive avoidance may be a positive development—and perhaps the truest form of constitutional avoidance.

I. The Early Roberts Court: Active Avoidance

This Part first highlights how the early Roberts Court earned a reputation for using the avoidance canon aggressively to adopt strained statutory constructions. It then chronicles the critical scholarly and journalistic response that followed the Court's early-Term use of the avoidance canon.

A. Early-Term Cases

The Appendix below lists every case decided between 2006 and 2016 in which the Roberts Court, or a member of the Roberts Court writing separately, has invoked the avoidance canon. The Appendix also notes the level of constitutional discussion engaged in by the Court or the concurring or dissenting opinion (characterizing it as either "significant," "some," or "little") and the level of reliance that the opinion placed on the avoidance canon in reaching its statutory construction (characterizing it as either "primary," "some," or "passing").

22. Such an "avoidance retreat" would not be unprecedented, as the Court similarly ratcheted down its use of the avoidance canon following a period of high use during the McCarthy Era. *See* Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 401 (2005); *infra* notes 261-72 and accompanying text.

23. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111-98 (Yale Univ. Press 1986) (1962).

24. *See* Bickel, *supra* note 21, at 42-47 (arguing that the Court employs other legal doctrines in service of narrow decisionmaking, including standing, ripeness, and the political question doctrine).

The avoidance cases from the Roberts Court's early Terms took two basic forms. The first is "modern avoidance," in which the Court explains that one interpretation of a statute poses a constitutional difficulty and then declares that the difficulty can be avoided because the statute sensibly—and perhaps even most plausibly—can be read to have an alternate meaning.[25] The Court does not insist that the rejected interpretation definitively would be unconstitutional; it simply points out that the interpretation raises "serious" or "grave" constitutional "doubts" and cites this as a reason to choose an alternate construction.[26] Modern avoidance has been so labeled in contrast to its precursor "classic avoidance," which required the Court to find that an interpretation *would be unconstitutional* before rejecting it.[27] A number of the Roberts Court's early-Term cases employed modern avoidance, and those cases, on the whole, have received little attention from scholars or commentators.[28]

The second form of avoidance reflected in the Roberts Court's early-Term cases, by contrast, is similar to classic avoidance and has garnered a great deal of critical attention.[29] In these cases, the Court has typically begun by engaging in an extended discussion of the constitutional difficulty created by a particular statutory construction. The Court then declares that, for the reasons it has elaborated, *X* reading of the statute would be (or almost certainly would be)

25. *See, e.g.*, Fish, *supra* note 4, at 1282-83 ("[S]o-called modern avoidance . . . only requires that the court have 'constitutional doubts' about the disfavored reading.").

26. *See, e.g.*, Hawaii v. Office of Haw. Affairs, 556 U.S. 163, 176 (2009) (noting that the statute "would raise grave constitutional concerns" if construed to "'cloud' Hawaii's title to its sovereign lands"); *see also* United States *ex rel.* Attorney Gen. of the U.S. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."); John Copeland Nagle, Delaware & Hudson *Revisited*, 72 NOTRE DAME L. REV. 1495, 1497 (1997) ("[C]ourts since *Delaware & Hudson* have employed the more prudential doubts canon.").

27. *See* Fish, *supra* note 4, at 1282; Nagle, *supra* note 26, at 1497-98; Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997) ("The basic difference between classical and modern avoidance is that the former requires the court to determine that one plausible interpretation of the statute *would* be unconstitutional, while the latter requires only a determination that one plausible reading *might* be unconstitutional.").

28. *See, e.g.*, *Office of Haw. Affairs*, 556 U.S. at 176; Bartlett v. Strickland, 556 U.S. 1, 21 (2009) (opinion of Kennedy, J.). For similar invocations of modern avoidance in dissenting opinions, see, for example, Reynolds v. United States, 565 U.S. 432, 450 (2012) (Scalia, J., dissenting); Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573, 623 (2010) (Kennedy, J., dissenting); and FCC v. Fox Television Stations, Inc., 556 U.S. 502, 565-67 (2009) (Breyer, J., dissenting).

    While these cases are not the focus of this Subpart, it is important to note that the Court in recent Terms has failed to invoke even this limited form of avoidance in several cases in which significant constitutional difficulties were posed and discussed in briefing and at oral argument. *See infra* Part II.A.

29. *See infra* Part I.B.

unconstitutional. Finally, it announces that in order to save the statute from constitutional infirmity, *X* construction must be rejected and *Y* construction, which reads in (or out) any parameters necessary to solve the constitutional problem, should be adopted. And voilà! The statute is rewritten but saved.

What is unique about these cases and this form of avoidance is that the Court has been fairly open about the fact that it is rewriting, or at least tweaking, the statute at issue—rather than presenting the choice before it as one between two competing, plausible interpretations, as modern avoidance dictates and as prior Courts have done.[30] Moreover, the Roberts Court has used this form of avoidance to rewrite statutes based on constitutional arguments and analyses that are novel.[31] Significantly, the principal opinion in two out of three of these "rewriting" cases was authored by Chief Justice Roberts—making this very much his (and not just his Court's) legacy.[32]

Consider the following three cases, in which the Court essentially found a constitutional infirmity and openly rewrote the relevant statute to avoid it.

1. *Northwest Austin Municipal District No. One v. Holder*

In *Northwest Austin Municipal District No. One v. Holder*, the Court construed section 5 of the VRA, which requires jurisdictions that have a history of discriminating against minority voters to obtain preclearance from the federal government before they may implement any change in voting practices or procedures.[33] The preclearance requirement in section 5 initially was set to expire after five years,[34] but Congress repeatedly renewed it—in 1970, 1975, 1982, and again in 2006.[35] Almost immediately after the 2006 renewal, a utility

30. Modern avoidance directs courts to use the avoidance canon as "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *See* Clark v. Martinez, 543 U.S. 371, 381-82 (2005); *see also* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) ("[I]f a serious doubt of unconstitutionality 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." (emphasis added) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932))).

31. *See* Katyal & Schmidt, *supra* note 4, at 2133-35, 2139-49.

32. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 561-63 (2012) (opinion of Roberts, C.J.); *id.* at 563-69 (majority opinion); Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 204-06 (2009). The majority opinion in the third case was authored by Justice Ginsburg. *See* Skilling v. United States, 561 U.S. 358 (2010).

33. *See Nw. Austin*, 557 U.S. at 198-99; *see also* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 52 U.S.C. § 10304 (2017)).

34. *See* Voting Rights Act § 4(a), 79 Stat. at 438 (codified as amended at 52 U.S.C. § 10303).

35. *See* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 314, 315 (codified as amended at 52 U.S.C. § 10303); Act of Aug. 6, 1975, Pub. L. No. 94-73, § 101, 89 Stat. 400, 400 (codified as amended at 52 U.S.C. § 10303); Voting Rights Act Amend-

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district in Austin, Texas, filed suit, claiming that it should be entitled to bailout from VRA coverage as a "political subdivision" under section 5.[36] In the alternative, it argued that the VRA's preclearance provision was unconstitutional because it exceeded Congress's powers under the Fifteenth Amendment.[37]

At oral argument, the Justices seemed troubled by the Fifteenth Amendment issue, questioning the continued validity of a preclearance coverage formula that used data from elections held in 1964, 1968, and 1972.[38] The Court ultimately issued an opinion that reflected that concern: The opinion opened with a detailed discussion of the serious constitutional questions raised by section 5, noting that the VRA "differentiates between the States, despite our historic tradition that all the States enjoy 'equal sovereignty'" and opining that "[t]he evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance."[39] But the Court then pivoted, invoking the avoidance canon and observing that "judging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that this Court is called on to perform.'"[40] "Our usual practice," it declared, "is to avoid the unnecessary resolution of constitutional questions."[41] In the end, the Court decided, by an 8-1 vote, that the utility district qualified for bailout as a "political subdivision"[42]—thus eliminating the need to decide the constitutionality of section 5's preclearance procedure. Only Justice Thomas disagreed. He authored an opinion concurring in part and dissenting in part, arguing that the constitutional question should not be avoided and that the preclearance provision should be invalidated.[43]

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ments of 1982, Pub. L. No. 97-205, § 2(a), 96 Stat. 131, 131 (codified as amended at 52 U.S.C. § 10303); Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 4, 120 Stat. 577, 580 (codified as amended at 52 U.S.C. § 10303(a)(8)), *invalidated in part by* Shelby County v. Holder, 133 S. Ct. 2612 (2013); *see also, e.g.*, Hasen, *supra* note 14, at 196.

36. *See Nw. Austin*, 557 U.S. at 200-01; *see also* 52 U.S.C. § 10303(a)(1)(A).

37. *See Nw. Austin*, 557 U.S. at 197-98, 200-01; *see also* U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race . . . ."); *id.* amend. XV, § 2 ("The Congress shall have the power to enforce this article by appropriate legislation.").

38. *See* Transcript of Oral Argument at 23-40, *Nw. Austin*, 557 U.S. 193 (No. 08-322), 2009 WL 1146055. The 1975 renewal of the VRA set November 1, 1972, as the date for measuring voter participation, *see* Act of Aug. 6, 1975, § 202, 89 Stat. at 401, but the 1982 and 2006 renewals did not update the formula.

39. *Nw. Austin*, 557 U.S. at 203 (quoting United States v. Louisiana, 363 U.S. 1, 16 (1960)).

40. *See id.* at 204-05 (quoting Blodgett v. Holden, 275 U.S. 142, 147-48 (1927) (opinion of Holmes, J.)).

41. *Id.* at 197.

42. *See id.* at 208-11.

43. *See id.* at 212 (Thomas, J., concurring in the judgment in part and dissenting in part).

The Court's reading was a stunning construction of section 5—one that required significant straining of the statute's text. The VRA explicitly defined "political subdivision" to mean "any county or parish" or, in certain cases, "any other subdivision of a State which conducts registration for voting."[44] The utility district plainly was not a "county" or a "parish," nor did it "conduct its own voter registration."[45] Moreover, the legislative history and structure of the VRA made clear that the utility district was not eligible for bailout under the statute.[46] Yet the Court concluded that the VRA's definition of "political subdivision" did not apply to the bailout provision because Congress added that provision in a 1982 amendment designed precisely to allow "piecemeal" bailout by jurisdictions that were located in covered states but lacked any history of voting discrimination.[47] As other scholars have noted, there was nothing in the text or legislative history of the 1982 amendments to support this argument, and more than a little to contradict it.[48] The Court then proceeded to conclude, unencumbered by the statutory definition, that the utility district qualified as a political subdivision of a covered state.[49] This was far from a traditional, straightforward statutory construction: The Court essentially eliminated an unhelpful definition by fiat in order to avoid deciding the constitutionality of the preclearance provision.

2. *Skilling v. United States*

In *Skilling v. United States*, the Court considered a statute that Congress enacted to override *McNally v. United States*, a Rehnquist Court decision that

44. *Id.* at 206 (majority opinion) (quoting Voting Rights Act of 1965, Pub. L. No. 89-110, § 14(c)(2), 79 Stat. 437, 445 (codified as amended at 52 U.S.C. § 10310(c)(2) (2017))).

45. *See id.*

46. *See, e.g.*, S. REP. NO. 97-417, at 57 n.192 (1982) ("Towns and cities within counties may not bailout separately. This is a logistical limit . . . . [I]f every political subdivision were eligible to seek separate bailout, we could not expect that the Justice Department or private groups could remotely hope to monitor and to defend the bailout suits.").

47. *See Nw. Austin*, 557 U.S. at 209-10; *see also* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b), 96 Stat. 131, 131-33 (codified as amended at 52 U.S.C. § 10303).

48. *See, e.g.*, Luis Fuentes-Rohwer, *Understanding the Paradoxical Case of the Voting Rights Act*, 36 FLA. ST. U. L. REV. 697, 747 (2009) (highlighting that the text and legislative history "strongly suggested" that the utility district was not a political subdivision eligible for bailout); Hasen, *supra* note 14, at 205 (explaining that the Court's reasoning was "not at all supportable by the text of the statute or the legislative history"); *The Supreme Court, 2008 Term—Leading Cases: Voting Rights Act*, 123 HARV. L. REV. 362, 367 (2009) (arguing that the legislative history of the 1982 VRA amendments demonstrates that the Court's reading was unjustified); *see also, e.g.*, S. REP. NO. 97-417, at 57 n.192; H.R. REP. NO. 97-227, at 2 (1981) (providing that only those political subdivisions separately designated for coverage are eligible for bailout).

49. *See Nw. Austin*, 557 U.S. at 206, 209-10.

had held that the mail fraud statute does not cover acts that deprive the public of the intangible right to receive honest services, such as bribery and kickback schemes.[50] *McNally* had displaced scores of lower court cases that had construed the mail and wire fraud statutes to cover precisely the kind of kickbacks at issue in the case.[51] Congress quickly overrode *McNally*, expressly providing that for purposes of the mail and wire fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[52]

Jeffrey Skilling was an Enron executive accused of investment fraud under the new honest services statute; he challenged the new law as unconstitutionally vague.[53] In an opinion authored by Justice Ginsburg, the Court "acknowledge[d] that Skilling's vagueness challenge has force" but invoked the avoidance canon, noting that "[i]t has long been our practice, however, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction."[54]

Unlike the opinion in *Northwest Austin*, the *Skilling* majority opinion did not discuss the vagueness problem at length. Instead, it merely noted that "honest-services decisions preceding *McNally* were not models of clarity or consistency," that "there was considerable disarray" regarding the statute's application to conduct other than "bribery and kickback schemes," and that the statute's broad "honest services" language thus raised serious vagueness concerns.[55]

Rather than decide the vagueness question head-on, however, the Court invoked the avoidance canon and essentially rewrote the statute. The Court first observed that the history of interactions between the Court and Congress had demonstrated that Congress intended the new statute "to refer to and incorporate the honest-services doctrine recognized in Courts of Appeals' decisions before *McNally* derailed the intangible-rights theory of fraud."[56]

50. *See* Skilling v. United States, 561 U.S. 358, 399-402 (2010); *see also* McNally v. United States, 483 U.S. 350, 356, 360-61 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346 (2017)). The Court in *McNally* had cited vagueness and federalism concerns, explaining that "[r]ather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," it would read the statute "as limited in scope to the protection of property rights." *See* 483 U.S. at 360.

51. *See* 483 U.S. at 362-63, 362 n.1, 363 n.2, 368, 376-77 (Stevens, J., dissenting).

52. *See* Anti-Drug Abuse Act § 7603(a), 102 Stat. at 4508 (codified at 18 U.S.C. § 1346).

53. *See Skilling*, 561 U.S. at 368-69, 402-03.

54. *Id.* at 405.

55. *Id.*

56. *Id.* at 404.

It then found that "the 'vast majority' of the honest-services cases [before *McNally*] involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes"—and concluded that such offenses therefore constituted the core of the honest services doctrine recognized before *McNally*.[57] In order to "preserve the statute without transgressing constitutional limitations," the Court then read the new law to criminalize *only* the bribery and kickback core of the pre-*McNally* case law, and *not* to apply to investment frauds such as the one committed by Skilling.[58] In so doing, the Court unabashedly rewrote the statute, significantly trimming its scope—from covering all "honest services" fraud to covering only bribery and kickback schemes—in order to save it from constitutional invalidation.[59] The Court in *Skilling* did not engage the constitutional issue in depth, as it had in *Northwest Austin*, but its rewrite of the statutory language was even more brazen than in *Northwest Austin*—and equally candid.

3. *National Federation of Independent Business v. Sebelius*

In *National Federation of Independent Business v. Sebelius (NFIB)*, the Court was asked to rule on the constitutionality of the ACA's individual mandate, which required individuals to purchase a health insurance policy providing a minimum level of coverage or be forced to pay a penalty to the IRS when filing their income taxes.[60] Chief Justice Roberts concluded that the mandate exceeded Congress's constitutional authority under the Commerce Clause and the Necessary and Proper Clause, engaging in an extensive discussion of these constitutional issues.[61] He then pivoted—once again invoking the avoidance canon—to uphold the mandate under Congress's taxing power. The Chief Justice openly acknowledged that "[t]he most straightforward reading of the mandate is that it commands individuals to purchase insurance," not that it taxes them for failing to do so.[62] But he also insisted that "[t]he question is not whether [the tax reading] is the most natural interpretation of the mandate, but

57. *See id.* at 404-07 (quoting United States v. Runnels, 833 F.2d 1183, 1187 (6th Cir. 1987), *rev'd en banc*, 877 F.2d 481 (6th Cir. 1989)).

58. *See id.* at 408-11.

59. *See id.* at 412 ("Interpreted to encompass only bribery and kickback schemes, § 1346 is not unconstitutionally vague.").

60. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 538-40 (2012); *see also* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501(b), 124 Stat. 119, 244-49 (2010) (codified as amended at 26 U.S.C. § 5000A (2017)).

61. *See NFIB*, 567 U.S. at 547-61 (opinion of Roberts, C.J.); *see also* U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power "[t]o regulate Commerce . . . among the several States"); *id.* art. I, § 8, cl. 18 (giving Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers").

62. *See NFIB*, 567 U.S. at 562 (opinion of Roberts, C.J.).

only whether it is a 'fairly possible' one."[63] As Chief Justice Roberts explained, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."[64] With this as the baseline, he then construed the mandate to merely "establish[] a condition—not owning health insurance—that triggers a tax," and to hold that under this reading, "the mandate is not a legal command to buy insurance."[65]

As the Court had done in *Northwest Austin* and *Skilling*, Chief Justice Roberts strained and reinterpreted the statute in order to save it from constitutional invalidation. Moreover, the Chief Justice was explicit about his strained reading, explaining that "the statute reads more naturally as a command to buy insurance than as a tax," and that "it is only because we have a duty to construe a statute to save it, if fairly possible, that [the mandate] can be interpreted as a tax."[66]

* * *

Several other cases decided during the Roberts Court's early Terms also relied openly on the avoidance canon and, in so doing, engaged in frank discussion of the relevant constitutional issues.[67] None of these cases involved

63. *Id.* at 563 (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

64. *Id.* (quoting Hooper v. California, 155 U.S. 648, 657 (1895)).

65. *Id.*

66. *Id.* at 574. Chief Justice Roberts advocated similar avoidance-based rewriting in his dissenting opinion in *Boumediene v. Bush*. *See* 553 U.S. 723, 822 (2008) (Roberts, C.J., dissenting). *Boumediene* involved provisions of the Detainee Treatment Act (DTA) and the Military Commissions Act (MCA) which prohibited alien detainees classified as enemy combatants from filing habeas corpus petitions in federal court. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635-36 (codified as amended at 28 U.S.C. § 2241(e) (2017)); Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1005(e)(1), 119 Stat. 2680, 2741-42 (codified as amended at 28 U.S.C. § 2241(e)). The majority in *Boumediene* held that the alternative procedures for reviewing detentions provided in the DTA were not "an adequate and effective substitute for habeas corpus," and thus the jurisdiction-stripping provisions in the DTA and the MCA contravened the Constitution's Suspension Clause. *See* 553 U.S. at 735-36, 771, 795; *see also* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); Detainee Treatment Act § 1005, 119 Stat. at 2740-44 (codified as amended at 28 U.S.C. § 2241).

Chief Justice Roberts's dissenting opinion, by contrast, advocated reading the DTA to include certain legal protections not specifically listed in the statute—such as an authorization for the D.C. Circuit to order prisoner release—in order to make the DTA's detention review procedures an adequate replacement for habeas corpus. *See Boumediene*, 553 U.S. at 822-24 (Roberts, C.J., dissenting). Citing the avoidance canon, he argued that "[t]o avoid constitutional infirmity, it is reasonable to imply more" legal protections. *See id.* at 822.

67. In *Gonzales v. Carhart*, for example, the Court used the avoidance canon to uphold the federal Partial-Birth Abortion Ban Act. *See* 550 U.S. 124, 132, 153-54 (2007); *see also* Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (codified at

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judicial rewriting of the statute at issue; indeed, the Court (or the concurring or dissenting opinion) in these cases characterized itself as choosing between two plausible readings of the statute.[68] But taken together with *Northwest Austin*, *Skilling*, and *NFIB*, these other, less aggressive avoidance cases demonstrate a pattern in the early Roberts Court of regular reliance on the avoidance canon and of frank discussion of the constitutional issues when invoking the canon.

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18 U.S.C. § 1531 (2017)). The statute was enacted after the Court had invalidated a Nebraska partial-birth abortion law in an earlier case on the grounds that the state statute was so broadly worded that it not only prohibited partial-birth abortions but also imposed an undue burden on a woman's ability to choose another common abortion procedure. *See* Stenberg v. Carhart, 530 U.S. 914, 921-22, 929-31 (2000). The federal Act's challengers argued that it was void for vagueness because, like the Nebraska statute, it was unclear whether it reached procedures other than the "partial birth" procedure. *See Gonzales*, 550 U.S. at 148-49. A majority of the Court interpreted the Act to cover only the "partial birth" procedure, noting numerous places in which the Act deliberately differed from the Nebraska statute and arguing that the avoidance canon "extinguishes any lingering doubt" because it requires that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *See id.* at 148-54 (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

Similarly, in *Bartlett v. Strickland*, a VRA case, the three Justices in the plurality held that interpreting the VRA to require crossover voting districts "would unnecessarily infuse race into virtually every redistricting" and cause a "substantial increase in the number of mandatory districts drawn with race as 'the predominant factor motivating the legislature's decision'"—and that this in turn would pose "serious constitutional questions." *See* 556 U.S. 1, 21-22 (2009) (opinion of Kennedy, J.) (first quoting League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399, 446 (2006) (opinion of Kennedy, J.); then quoting Miller v. Johnson, 515 U.S. 900, 916 (1995); and then quoting *LULAC*, 548 U.S. at 446 (opinion of Kennedy, J.)).

For other early-Term cases in which the Court (or the concurring or dissenting opinion) openly invoked the avoidance canon, see Reynolds v. United States, 565 U.S. 432, 450 (2012) (Scalia, J., dissenting); Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573, 623 (2010) (Kennedy, J., dissenting); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 565-67 (2009) (Breyer, J., dissenting); and Hawaii v. Office of Haw. Affairs, 556 U.S. 163, 176 (2009).

68. *See, e.g.*, *Reynolds*, 565 U.S. at 450 (Scalia, J., dissenting) ("[I]t is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." (quoting Gomez v. United States, 490 U.S. 858, 864 (1989))); *Jerman*, 559 U.S. at 623 (Kennedy, J., dissenting) (similar); *Fox*, 556 U.S. at 566 (Breyer, J., dissenting) (applying the avoidance canon to reject "a plausible but constitutionally suspect interpretation of a statute"); *Office of Haw. Affairs*, 556 U.S. at 176 (noting that the avoidance canon "is a tool for choosing between competing plausible interpretations of a statutory text" (quoting Clark v. Martinez, 543 U.S. 371, 381 (2005))); *Bartlett*, 556 U.S. at 21 (opinion of Kennedy, J.) (similar).

B. Critical Response

The early Roberts Court's penchant for employing the avoidance canon did not go unnoticed by scholars and commentators. Several newspaper and scholarly articles highlighted the Court's use of avoidance—and sharply criticized it for distorting the canon into a tool for brazenly rewriting statutes to achieve particular outcomes. Journalists and commentators in online forums, for example, reproved the Court for its aggressive use of the avoidance canon, calling its reading of the VRA in *Northwest Austin* "implausible"[69] and labeling Chief Justice Roberts's avoidance construction in *NFIB* "remarkable" and of "unprecedented uniqueness."[70] Other observers accused the Court of "stealth judicial overreach."[71]

Several scholars also attacked the Roberts Court's use of the avoidance canon in law reviews. Richard Hasen opined that the Court was using the canon "strategically" to "give[] the public appearance of . . . moving moderately and slowly" while laying the foundation for conservative constitutional change.[72] Richard Re similarly warned that in the hands of the Roberts Court, "avoidance has become an important tool of judicial empowerment" in lieu of "a cornerstone principle of judicial restraint."[73] More recently, Neal Katyal and Thomas Schmidt accused the Court of using the avoidance canon to adopt "statutory interpretations that would be unthinkable in the absence of the canon."[74] There were two strands to this scholarly criticism: (1) that the Court was overreaching by rewriting plain statutory text; and (2) that the Court was overreaching by engaging in extensive discussions of the constitutional

69. *See* Linda Greenhouse, Opinion, *Down the Memory Hole*, N.Y. TIMES (Oct. 2, 2009), https://perma.cc/69YQ-F4S8.

70. *See* Randy Barnett, *The Unprecedented Uniqueness of Chief Justice Roberts' Opinion*, VOLOKH CONSPIRACY (July 5, 2012, 5:14 PM), https://perma.cc/L8ZJ-H7XC (capitalization altered).

71. *See, e.g.*, ALL. FOR JUSTICE, THE ROBERTS COURT AND JUDICIAL OVERREACH 6-9 (2013), https://perma.cc/9FHA-3TM6.

72. *See* Hasen, *supra* note 14, at 214-23; *see also* Tonja Jacobi, *Obamacare as a Window on Judicial Strategy*, 80 TENN. L. REV. 763, 841-44 (2013) (arguing that Chief Justice Roberts's opinion in *NFIB* revealed him "to be not a humble law applier, but a keen politico-legal strategist").

73. *See* Re, *supra* note 15, at 174, 185.

74. Katyal & Schmidt, *supra* note 4, at 2116. For other critical treatments, see, for example, Ilya Shapiro, *Like Eastwood Talking to a Chair: The Good, the Bad, and the Ugly of the Obamacare Ruling*, 17 TEX. REV. L. & POL. 1, 11-12 (2012); and Molly McQuillen, Note, *The Role of the Avoidance Canon in the Roberts Court and the Implications of Its Inconsistent Application in the Court's Decisions*, 62 CASE W. RES. L. REV. 845, 846-47 (2012) ("[T]he [Court's] inconsistent application of the avoidance canon has damaged the doctrine itself and has put its own legitimacy in jeopardy.").

infirmities at issue, essentially providing advisory opinions that laid the groundwork for later constitutional challenges.[75]

Perhaps the most visible criticism of the Court's use of avoidance came from Justices who did not sign on to the majority opinions in cases such as *Northwest Austin*, *Skilling*, and *NFIB*. In particular, the joint dissent by Justices Scalia, Kennedy, Thomas, and Alito in *NFIB* excoriated the Court for misapplying the canon and distorting the statutory text:

> The Court today decides to save a statute Congress did not write. It rules that what the statute declares to be a requirement with a penalty is instead an option subject to a tax. . . .
>
> The Court regards its strained statutory interpretation as judicial modesty. It is not. It amounts instead to a vast judicial overreaching.[76]

The late Justice Scalia issued a similar invective against the majority opinion in *Skilling*, calling the Court's construction "not interpretation but invention," and chastising that he "d[id] not believe we have the power, in order to uphold an enactment, to rewrite it."[77]

It is impossible to say with certainty whether the Court, or Chief Justice Roberts in particular, was aware of the external criticisms from commentators and scholars. The Justices undoubtedly were aware of the *internal* controversy that their use of the avoidance canon stirred in *Skilling* and *NFIB*, as dissenting colleagues expressly denounced their approach. It seems probable that the Court also was at least generally aware that external commentators had criticized its use of the avoidance canon—and, indeed, some news reports have suggested that Chief Justice Roberts pays close attention to media coverage of the Court.[78]

Part III below explores the possibility that the Roberts Court's restraint toward the avoidance canon in later-Term cases such as *Yates* may be, at least in part, a reaction to such external commentary.[79] Specifically, it posits that the Court may be ratcheting down its use of the avoidance canon in order to avoid

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75. Thanks to Maggie Lemos for pointing this out.

76. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 706 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

77. Skilling v. United States, 561 U.S. 358, 422-23 (2010) (Scalia, J., concurring in part and concurring in the judgment).

78. *See* Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 2, 2012, 9:43 PM), https://perma.cc/V9Z8-E2L2 (reporting that Chief Justice Roberts "pays attention to media coverage" and is concerned about public perception of the Court).

79. *See supra* notes 1-5 and accompanying text; *infra* Parts II.A.1, III.A.

the kind of criticism that followed its prominent early use of the canon. This seems particularly plausible because there is evidence that the Court, or at least Chief Justice Roberts, employed avoidance in early-Term cases precisely in order to preserve the Court's reputation and legitimacy.

II. Recent Cases: Passive Avoidance

As elaborated in the previous Part, during its early Terms the Roberts Court openly embraced the canon of constitutional avoidance. A number of its opinions placed the constitutional difficulty created by a proposed interpretation front and center, engaging in considerable, often lengthy, discussion of the constitutional issue before ultimately rewriting the statute to avoid it. Even in those of its early-Term opinions that employed the so-called "modern" form of avoidance,[80] the Court nearly always discussed the constitutional difficulty openly and seriously—the constitutional issue was not merely mentioned as a throwaway argument.[81]

In the Court's recent Terms, by contrast, its approach to the avoidance canon has changed dramatically. Only one majority opinion in a statutory case decided between 2012 and 2017 has provided a serious discussion of the constitutional issue in the case.[82] Moreover, in only one case has the Court strained the text of the statute at issue in a way comparable to what it did in *Northwest Austin*, *Skilling*, and *NFIB*—and that case relied primarily on a

80. *See supra* text accompanying notes 25-26.

81. *See* Brown v. Plata, 563 U.S. 493, 510-12, 526 (2011); Hawaii v. Office of Haw. Affairs, 556 U.S. 163, 176 (2009); Bartlett v. Strickland, 556 U.S. 1, 21-23 (2009) (opinion of Kennedy, J.); Gonzales v. Carhart, 550 U.S. 124, 153-54 (2007).

Some dissenting opinions, however, did make only passing mention of the constitutional issue. *See* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573, 623 (2010) (Kennedy, J., dissenting); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 565-66 (2009) (Breyer, J., dissenting); Office of Senator Mark Dayton v. Hanson, 550 U.S. 511, 514 (2007).

Additionally, two of the early cases incorporated by reference lengthy constitutional discussions from other cases. *See* Perry v. Perez, 565 U.S. 388, 395 (2012) (per curiam) (referencing the "serious constitutional questions" elaborated in *Northwest Austin* (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 204 (2009))); Kimbrough v. United States, 552 U.S. 85, 112-14 (2007) (Scalia, J., concurring) (citing United States v. Booker, 543 U.S. 220 (2005)). For the constitutional discussion in *Booker*, see 543 U.S. at 230-37.

82. That case was *McDonnell v. United States*. *See* 136 S. Ct. 2355, 2372-73 (2016); *see also infra* Appendix. Three other opinions, all authored by Justice Thomas, also seriously engaged the constitutional issue—but none were joined by any other Justice. *See* Taylor v. United States, 136 S. Ct. 2074, 2082-85 (2016) (Thomas, J., dissenting); Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2566-71 (2013) (Thomas, J., concurring); Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2263-68 (2013) (Thomas, J., dissenting).

different canon of construction, mentioning avoidance only in passing.[83] This is despite the fact that serious constitutional concerns have been implicated in several of the statutory interpretation cases the Court has decided during this period—and despite the fact that those constitutional issues have been squarely discussed in the briefs as well as at oral argument.[84] For comparison's sake, in the seven-year period between 2006 and 2012, there were only two cases in which avoidance arguments raised in the briefs and discussed at oral argument were ignored in a majority opinion that adopted the reading advocated by the party invoking avoidance.[85] By contrast, in the five-year period between 2013 and 2017, there were *seven* such cases.[86]

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83. *See* Bond v. United States, 134 S. Ct. 2077, 2088-93 (2014) (relying primarily on the federalism clear statement principle).

84. *See* sources cited *supra* note 18.

85. *See* United States v. Denedo, 556 U.S. 904 (2009); Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007). As explained below, *Denedo* and *Tellabs* differ from the cases discussed in this Part. In *Denedo*, the Justices expressed skepticism about the seriousness of the constitutional difficulty at oral argument, and in *Tellabs*, the Court's opinion expressly rejected the constitutional concerns raised, eliminating any need to invoke the avoidance canon. *See infra* note 206.

86. *See* Maslenjak v. United States, 137 S. Ct. 1918 (2017); Elonis v. United States, 135 S. Ct. 2001 (2015); Yates v. United States, 135 S. Ct. 1074 (2015); T-Mobile S., LLC v. City of Roswell, 135 S. Ct. 808 (2015); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); CTS Corp. v. Waldburger, 134 S. Ct. 2175 (2014); Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013).

For discussion of the constitutional issue in *Maslenjak*, see Transcript of Oral Argument at 53-54, *Maslenjak*, 137 S. Ct. 1918 (No. 16-309), 2017 WL 1495528; Brief for Petitioner at 29-30, *Maslenjak*, 137 S. Ct. 1918 (No. 16-309), 2017 WL 818305; and Brief for the United States at 35-36, *Maslenjak*, 137 S. Ct. 1918 (No. 16-309), 2017 WL 1175619.

For discussion of the constitutional issue in *Elonis*, see *Elonis* Oral Argument, *supra* note 18, at 46-47; and *Elonis* Petitioner's Brief, *supra* note 18, at 34-61.

For discussion of the constitutional issue in *Yates*, see *Yates* Oral Argument, *supra* note 3, at 5, 36-37; and *Yates* Petitioner's Brief, *supra* note 18, at 25-28.

For discussion of the constitutional issue in *T-Mobile*, see Transcript of Oral Argument at 12, *T-Mobile*, 135 S. Ct. 808 (No. 13-975), 2014 WL 9866157; and Brief of Respondent at 25, 55-56, *T-Mobile*, 135 S. Ct. 808 (No. 13-975), 2014 WL 4101233.

For discussion of the constitutional issue in *Hobby Lobby*, see Transcript of Oral Argument at 7-10, 43, *Hobby Lobby*, 134 S. Ct. 2751 (Nos. 13-354 & 13-356), 2014 WL 1351985; and Brief for the Respondents in No. 13-356, at 32-33, *Hobby Lobby*, 134 S. Ct. 2751 (Nos. 13-354 & 13-356), 2014 WL 546900.

For discussion of the constitutional issue in *CTS Corp.*, see Transcript of Oral Argument at 15, *CTS Corp.*, 134 S. Ct. 2175 (No. 13-339), 2014 WL 1620851; Brief for the Petitioner at 37-41, *CTS Corp.*, 134 S. Ct. 2175 (No. 13-339), 2014 WL 768313; and Brief for Respondents at 38-39, *CTS Corp.*, 134 S. Ct. 2175 (No. 13-339), 2014 WL 1260425.

For discussion of the constitutional issue in *Adoptive Couple*, see *Adoptive Couple* Oral Argument, *supra* note 18, at 26; and *Adoptive Couple* Petitioners' Brief, *supra* note 18, at 43-56.

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Part II.A below highlights several cases in which the Court has conspicuously failed to mention avoidance, despite paying notable attention to it at oral argument, and despite ultimately construing the statute at issue in a manner consistent with avoidance. Part II.B below provides a brief overview of the Court's passive approach to the avoidance canon in the later-Term cases in which it *has* invoked the canon.

A. Avoiding Without Avoidance

The cases discussed below share several characteristics in common. First, in each case, the most straightforward or "plain" reading of the statute raised serious constitutional difficulties. Second, in each case, the parties' briefs clearly called attention to the constitutional difficulty, and the Justices discussed the constitutional difficulty—often at length—at oral argument. Third, in each case, the Court ultimately construed the statute in a manner that avoided the constitutional difficulty—but did so without mentioning the avoidance canon (although in one case it mentioned but did not rely on the canon).[87] In other words, the construction ultimately adopted by the Court was not the most straightforward reading of the statute and at least arguably conflicted with the statute's plain meaning, as in the early-Term cases discussed in Part I above—but the avoidance canon was not the tool the Court used to achieve its end run around the statute's text.

Instead, in all but one of the cases discussed below, the Court employed an alternative interpretive tool in lieu of constitutional avoidance—the rule of lenity, the federalism clear statement principle, or the "mischief" rule. As

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This count does not include *Bond v. United States*, because the majority opinion in *Bond* did mention the constitutional difficulties that would be created by the government's interpretation and gestured vaguely at avoidance. *See* 134 S. Ct. at 2093-94. Nor does it include *King v. Burwell*, because the avoidance argument in *King* was raised by an amicus brief and not by the parties. *See King* JALSA Brief, *supra* note 18, at 3-6; *King* States' Brief, *supra* note 18, at 42-43; *see also infra* Part II.A.5. My research assistants and I did not review amicus briefs for the other statutory cases decided during the Terms studied, so in order to ensure an apples-to-apples comparison across time periods, *King* was omitted.

87. Indeed, in two of the cases—*Yates* and *Adoptive Couple*—the Court did not so much as acknowledge the constitutional difficulty. In *Bond*, the Court did mention the avoidance canon, but only briefly, and it barely discussed the constitutional issue, *see* 134 S. Ct. at 2087-88, instead resting its construction primarily on the federalism clear statement principle, *see id.* at 2087-94, a close cousin of avoidance that requires less of a deep dive into murky constitutional questions, *see infra* Part III.B.1. Justice Scalia's concurring opinion, by contrast, would have decided the constitutional issue—and invalidated the statute. *See Bond*, 134 S. Ct. at 2094 (Scalia, J., concurring in the judgment). In *Elonis*, the Court engaged in no discussion of the constitutional issue or the avoidance canon, merely stating that it was "not necessary to consider" the issue given the Court's disposition of the case. *See Elonis*, 135 S. Ct. at 2012.

discussed below, the "mischief" rule enables the Court to claim fidelity to Congress's intent despite choosing a construction that conflicts with the statute's apparent plain meaning.[88] The rule of lenity and the federalism clear statement principle are canons based in constitutional law that can be considered part of an "avoidance penumbra,"[89] but that do not require extended discussion or resolution of the constitutional issues raised. It is possible to view such rules as essentially alternate versions of the avoidance canon, given their origins in constitutional law. However, as elaborated below, the rule of lenity and the federalism clear statement principle differ in important ways from the avoidance canon, both because they do not require serious engagement with the underlying constitutional issue or a determination of probable constitutional infirmity, and because they do not empower the Court to effectively rewrite the statutory text.[90]

1. *Yates v. United States*

As noted in the Introduction, *Yates v. United States*[91] is a case that squarely implicates the avoidance canon, and one in which we would expect to see some discussion of the need to avoid a serious vagueness problem. The case involved a commercial fisherman who caught undersized red grouper in violation of federal conservation regulations.[92] A federal agent cited Yates for the violation and instructed him to keep the undersized fish segregated from the rest of the catch until the ship returned to port.[93] Yates instead told a crew member to throw the undersized fish overboard.[94] For this offense, Yates was charged with "destroying, concealing, and covering up undersized fish to impede a federal investigation" under an evidence-tampering statute enacted as part of the Sarbanes-Oxley Act.[95] The statutory question at issue was whether a fish is a "tangible object" within the meaning of the statute, which provides criminal liability for anyone who "knowingly alters, destroys, mutilates, conceals,

88. *See infra* Part III.B.2.

89. *See infra* Part III.B.1. Many thanks to Bill Eskridge for suggesting this label.

90. *See infra* Part III.B.1.

91. 135 S. Ct. 1074.

92. *See id.* at 1078-79 (plurality opinion).

93. *See id.* at 1079.

94. *See id.* at 1080.

95. *See id.*; *see also* Corporate and Criminal Fraud Accountability Act of 2002, Pub. L. No. 107-204, tit. VIII, sec. 802, § 1519, 116 Stat. 745, 800 (codified at 18 U.S.C. § 1519 (2017)).

covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence [an] investigation."[96]

Yates's brief argued that the term "tangible object" should be read in context to encompass only objects that are used to preserve information.[97] A broader reading, he claimed, was problematic because it would create vagueness and due process problems, rendering the statute's reach so indefinite that it would permit "standardless sweep[s]"[98] that could lead to "arbitrary and discriminatory prosecutions" and deprive citizens of "fair notice" regarding the conduct that is covered under the statute.[99] Yates's brief expressly invoked the avoidance canon as well as the rule of lenity, urging the Court to limit the statute's reach.[100]

At oral argument, Justices Kennedy and Breyer both appeared troubled by the vagueness issue.[101] Several Justices also expressed concern about the related problems of overcriminalization and excessive punishment.[102] Yet while the Court ultimately ruled in favor of Yates—construing the statute at issue to

96. 18 U.S.C. § 1519; *see Yates*, 135 S. Ct. at 1078-79 (plurality opinion); *supra* text accompanying note 1.

97. *See Yates* Petitioner's Brief, *supra* note 18, at 25-28.

98. *See id.* at 26-27 (quoting Kolender v. Lawson, 461 U.S. 352, 358 (1983)).

99. *See id.* at 25-26 (quoting Skilling v. United States, 561 U.S. 358, 412 (2010)).

100. *See id.* at 25.

101. *See Yates* Oral Argument, *supra* note 3, at 5 (Justice Kennedy: "[I]t seems to me that the test you suggest has almost more problems with vagueness, more problems with determining what its boundaries are than the government's test."); *id.* at 36 (Justice Breyer: "[I]f you can't draw a line, it seems to me that the risk of arbitrary and discriminatory enforcement is a real one. And if that's a real risk, you fall within the vagueness doctrine.").

102. *See, e.g., id.* at 5 (Justice Kennedy: "[T]he argument that you make has considerable force about over criminalizing . . . ."); *id.* at 26 (Justice Scalia: "Is there any other provision of Federal law that has a lesser penalty than 20 years that could have been applied to . . . this captain throwing a fish overboard?"); *id.* at 28 (Justice Ginsburg: "[T]he code is filled with overlapping offenses. So here's a case where the one statute has a 5-year maximum, the other 20. The one that has the 5-year clearly covers the situation. Is there anything in any kind of manual in the Department of Justice that instructs U.S. attorneys what to do when there are these overlapping statutes?"); *id.* at 31 (Chief Justice Roberts: "It's an extraordinary leverage that the broadest interpretation of this statute would give Federal prosecutors."); *id.* at 50 (Justice Alito: "[T]his statute, as you read it, is capable of being applied to really trivial matters, and yet each of those would carry a potential penalty of 20 years . . . .").

cover only those tangible objects that are "used to record or preserve information"[103]—the plurality opinion puzzlingly failed to mention either the vagueness problem or the avoidance canon.[104]

This omission is particularly noteworthy because in *Johnson v. United States*, a case decided during the same Term as *Yates*, the Court held that a sentencing enhancement provision in the Armed Career Criminal Act was unconstitutionally vague.[105] *Johnson* demonstrates that vagueness in criminal statutes is a constitutional infirmity that the Roberts Court takes seriously—so the Court's failure to mention vagueness in *Yates*, even while it limited the reach of the evidence-tampering statute in a manner that eliminated the vagueness problem, is conspicuous.

In place of avoidance, the *Yates* plurality instead relied heavily on two other text-defeating interpretive tools—the "mischief" that the statute was designed to address[106] and the rule of lenity. The plurality's analysis began by

103. *See* Yates v. United States, 135 S. Ct. 1074, 1085 (2015) (plurality opinion); *see also id.* at 1089-90 (Alito, J., concurring in the judgment).

104. To be fair, there were procedural problems with the vagueness argument, as Yates had not raised the argument below. *See Yates* Oral Argument, *supra* note 3, at 17 (Justice Breyer: "[W]here you end up . . . is that this is void for vagueness, but not for any reason you have yet told us. So what am I to do with the fact, if that is a serious problem, that it has never been argued in this case?"). But the Roberts Court has been willing to overlook similar procedural problems in other cases. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 114 (2013) (noting that the Court had ordered reargument addressing a new question); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367-68 (2011) (Ginsburg, J., concurring in part and dissenting in part) (criticizing the majority for ruling on a question that "is not before the Court"); Citizens United v. FEC, 558 U.S. 310, 323 (2010) ("Citizens United raises this issue for the first time before us, but we consider the issue because 'it was addressed by the court below.'" (quoting Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 379 (1995))). Indeed, it has at times ordered additional briefing *after oral argument* to address important issues not raised by the parties *at all* in the initial briefing. *See, e.g.*, *Citizens United*, 558 U.S. at 396-98 (Stevens, J., concurring in part and dissenting in part) (arguing that the "Court should not be deciding" the constitutional question because it "was not properly brought before us").

105. *See* Johnson v. United States, 135 S. Ct. 2551, 2557 (2015); *see also* Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, tit. I, subtitle I, § 1402(b), 100 Stat. 3207, 3207-39 to -40 (codified as amended at 18 U.S.C. § 924(e)(2) (2017)).

106. The "mischief" rule dates back to a sixteenth-century decision by the English Court of Exchequer. *See* Heydon's Case (1584) 76 Eng. Rep. 637; 3 Co. Rep. 7a. The court directed:

> [T]hat for the sure and true interpretation of all statutes . . . four things are to be discerned and considered:—
>
> 1st. What was the common law before the making of the Act.
>
> 2nd. What was the *mischief* and defect for which the common law did not provide.
>
> 3rd[.] What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
>
> And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief . . . .

Id. at 638, 3 Co. Rep. at 7b (emphasis added) (footnotes omitted).

noting that the statute at issue was enacted as part of the Sarbanes-Oxley Act and was "designed to protect investors and restore trust in financial markets following the collapse of Enron."[107] It observed that prior to Sarbanes-Oxley, there was a "conspicuous omission" in the law regarding document destruction and that the provision at issue was enacted to cure that omission.[108] The plurality reasoned that "it would cut [the statute] loose from its financial-fraud mooring to hold that it encompasses any and all objects, whatever their size or significance, destroyed with obstructive intent."[109] Instead, it concluded that because "Congress trained its attention on corporate and accounting deception and cover-ups," it made sense to adopt "a matching construction" of the statute.[110] And the plurality faulted the government's construction for extending the statute "beyond the principal evil motivating its passage."[111] In other words, the plurality used the history behind the statute to establish its core coverage (document destruction)—and to argue that the application at issue in the case (destroying fish) did not fall within that core.

The *Yates* plurality also invoked the rule of lenity, arguing that in the end, "if our recourse to traditional tools of statutory construction leaves any doubt about the meaning of 'tangible object,' . . . we would invoke the rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'"[112] The rule of lenity was particularly applicable, the plurality maintained, because the government urged a reading of the statute that would expose defendants to twenty-year sentences "for tampering with *any* physical object that *might* have evidentiary value in *any* federal investigation into *any* offense, no matter whether the investigation is pending or merely contemplated, or whether the offense subject to investigation is criminal or civil."[113] Thus the rule of lenity, rather than the avoidance canon, became the plurality's vehicle for addressing the vagueness, overcriminalization, and excessive punishment problems discussed at oral argument.

Yates seems like a classic case for invoking the avoidance canon. The phrase "tangible object" is broad and appears to cover all objects that are capable of being touched, including fish. Yet a plurality of the Court tweaked the statute to avoid this reading, effectively adding the limitation "used to record or preserve information" to the statutory term "tangible object."[114] In so

107. *Yates*, 135 S. Ct. at 1079 (plurality opinion).

108. *See id.* at 1081.

109. *Id.* at 1079.

110. *Id.*

111. *See id.* at 1081.

112. *Id.* at 1088 (quoting Cleveland v. United States, 531 U.S. 12, 25 (2000)).

113. *Id.*

114. *See id.* at 1079.

doing, the plurality avoided potential overbreadth and vagueness problems highlighted by the parties' briefs and the Justices' questions at oral argument, much as it did when it construed the honest services statute in *Skilling* to cover only bribery and kickback schemes.[115] But whereas in *Skilling* the Court was open about the fact that it was trimming the statute's scope in order to avoid a vagueness problem,[116] the *Yates* plurality curtailed the statute's reach without referencing the avoidance canon or discussing the vagueness problem—and without acknowledging that it was, in effect, tweaking the statute's scope. Indeed, the *Yates* plurality characterized the "used to record or preserve information" interpretation as the one dictated by the statute's text and structure, rather than as a second-best reading adopted by the Court in order to avoid a constitutional violation.[117]

2. *Adoptive Couple v. Baby Girl*

A second later-Term case that conspicuously failed to invoke avoidance is *Adoptive Couple v. Baby Girl*.[118] *Adoptive Couple* involved the Indian Child Welfare Act (ICWA), which establishes federal standards for state court child custody proceedings that concern Indian children.[119] One provision of ICWA bars the involuntary termination of an Indian parent's rights with respect to his child absent a heightened showing that serious harm to the Indian child is likely to result from the parent's "continued custody."[120] The case raised the question whether the termination bar applies to an unwed biological father who never had custody of his child (and who had relinquished custody to the birth mother during pregnancy), but who changed his mind upon learning that a non-Indian couple was to adopt the child.[121]

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115. *See supra* Part I.A.2.

116. *See supra* text accompanying notes 57-59.

117. *See Yates*, 135 S. Ct. at 1081-87 (plurality opinion) (invoking numerous "traditional tools of statutory interpretation" to conclude that "an aggressive interpretation of 'tangible object' must be rejected").

118. 133 S. Ct. 2552 (2013).

119. *See* Pub. L. No. 95-608, tit. I, 92 Stat. 3069, 3071-75 (codified at 25 U.S.C. §§ 1911-1923 (2017)).

120. *See* 25 U.S.C. § 1912(f).

121. *See Adoptive Couple*, 133 S. Ct. at 2558-59. The birth mother and biological father ended their relationship while the mother was pregnant; at that time the father, a member of the Cherokee Nation, agreed to relinquish his parental rights. *Id.* at 2558. He provided no financial support for the birth mother or child during the pregnancy or the first four months after the baby was born. *Id.* While pregnant, the birth mother arranged to have the child adopted by a non-Indian couple; when the couple served the biological father with notice of the pending adoption, he sought custody. *See id.* at 2558-59.

Like the petitioner in *Yates*, the adoptive couple argued that construing ICWA to prevent termination of the unwed biological father's parental rights would render the statute unconstitutional.[122] The couple's brief argued that such a construction would (1) violate the Equal Protection Clause by treating Indian children differently from other children based solely on "ancestral" classification,[123] (2) conflict with the birth mother's substantive due process rights,[124] and (3) violate federalism principles by allowing the federal government to create a new class of parents and new substantive parental rights that directly conflict with state law.[125] The adoptive couple's brief squarely invoked the avoidance canon and urged the Court to adopt a different construction "if fairly possible."[126]

At oral argument, Justice Kennedy expressed concern about the constitutional tensions created by ICWA and openly wondered whether the Court would have to "rely on constitutional avoidance" and "rewrite the statute."[127] Justice Alito also specifically highlighted the federalism problems created by the statute.[128] However, as in *Yates*, the opinion ultimately issued by the Court failed to mention the avoidance canon or the federalism issue. Further, it made only one opaque reference to the equal protection issue—even though it construed the statute not to cover parents who never had custody of the child, and thereby evaded the potential constitutional problem.[129] Only Justice Thomas's solo concurrence addressed the federalism issues, invoking the avoidance canon to justify a reading that placed the father beyond the statute's coverage.[130]

Instead of avoidance, the majority opinion in *Adoptive Couple*, like the plurality opinion in *Yates*, placed heavy emphasis on the "mischief" that prompted Congress to enact ICWA. The opinion began its statutory analysis

122. *See Adoptive Couple* Petitioners' Brief, *supra* note 18, at 43-51.

123. *See id.* at 44-47.

124. *See id.* at 47-49.

125. *See id.* at 49-51.

126. *See id.* at 43 (quoting Almendarez-Torres v. United States, 523 U.S. 224, 237 (1998)); *see also* Reply Brief for Petitioners at 15-23, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12-399), 2013 WL 1411847.

127. *See Adoptive Couple* Oral Argument, *supra* note 18, at 26.

128. *See id.* at 53 (Justice Alito: "Well, family law is traditionally a State province, but your argument is that Federal law can take a traditional family law term like 'parent' and perhaps others and give it a meaning that is very different from its traditional meaning or its meaning under State law?").

129. The third-to-last sentence of the *Adoptive Couple* majority opinion did acknowledge in passing that the construction urged by the father "would raise equal protection concerns," but it argued that the "plain text" of the statute did not support that reading. *See* 133 S. Ct. at 2565.

130. *See id.* at 2565-71 (Thomas, J., concurring).

by explaining that ICWA was enacted in response to "rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes."[131] The statute's provisions, the Court observed, were designed to prevent the "wholesale removal of Indian children from their homes."[132] The Court reasoned that a child who has never lived with her Indian parent cannot be "removed" from that parent and that ICWA therefore does not prevent the termination of parental rights in such situations.[133] "[T]he primary mischief the ICWA was designed to counteract was the unwarranted *removal* of Indian children from Indian families," the Court argued.[134] But where the adoption of the Indian child is lawfully initiated by a non-Indian parent with sole custodial rights, "ICWA's primary goal of preventing the unwarranted removal of Indian children and the dissolution of Indian families is not implicated."[135]

Adoptive Couple, too, seems like a classic avoidance case. On its face, ICWA appears clearly to protect the parental rights of unwed biological fathers, including those who have never had custody of their children. The statute's definitions section explicitly defines "parent" as "any biological parent or parents of an Indian child."[136] And the provision at issue explicitly provides that "[n]o termination of parental rights may be ordered in [a child custody] proceeding in the absence of a determination . . . that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child."[137] But the Court effectively added the qualification "who currently or previously has had custody of the child" to the definition of "parent." As was pointed out in the briefs, at oral argument, and in Justice Thomas's concurring opinion, there were compelling constitutional concerns that may have justified such a statutory revision. But the Court's opinion conspicuously failed to mention them. It also failed to mention the avoidance canon, or to acknowledge that its construction in any way tweaked the antitermination provision or deviated from the provision's most straightforward reading.

131. *Id.* at 2557 (majority opinion) (quoting Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989)).

132. *See id.* (quoting *Miss. Band of Choctaw Indians*, 490 U.S. at 32).

133. *See id.* at 2560-62.

134. *Id.* at 2561.

135. *Id.*

136. 25 U.S.C. § 1903(9) (2017).

137. *Id.* § 1912(f).

3. *Bond v. United States*

Bond v. United States presented an unusual set of facts: Carol Bond sought revenge against her husband's paramour by spreading toxic chemicals on the paramour's car, mailbox, and doorknob.[138] The paramour suffered a minor chemical burn on her thumb, which she treated by rinsing with water, and was otherwise unharmed.[139] The federal government charged Bond with violating a federal statute that implements the Chemical Weapons Convention.[140] The implementing statute makes it unlawful for "any person knowingly" to "use, or threaten to use, any chemical weapon."[141]

Like the defendant in *Yates* and the adoptive parents in *Adoptive Couple*, Bond argued that there were serious constitutional problems with construing the implementing statute to cover her conduct. Specifically, Bond's brief argued that if the statute were interpreted broadly to make every malicious use of chemicals a crime—rather than just those uses that are warlike—the statute would exceed Congress's enumerated powers,[142] impinge on states' police powers,[143] and fail to qualify as a necessary and proper means of executing the federal government's treatymaking power.[144] Her brief expressly invoked the avoidance canon, urging the Court to limit the statute's reach in order to avoid triggering such constitutional infirmities.[145]

At oral argument, the Justices' questioning focused almost entirely on the constitutional issues raised by the implementing statute. Several Justices expressed concern that the government's proposed reading would violate federalism principles and give Congress too much power to use treaty implementation statutes to regulate matters it otherwise lacked power to regulate.[146]

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138. *See* Bond v. United States, 134 S. Ct. 2077, 2085 (2014).

139. *See id.*

140. *See* Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, S. TREATY DOC. NO. 103-21 (1996), 1974 U.N.T.S. 45.

141. *See* Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, div. I, sec. 201(a), § 229(a)(1), 112 Stat. 2681, 2681-866 to -867 (codified at 18 U.S.C. § 229(a)(1) (2017)).

142. *See Bond* Petitioner's Brief, *supra* note 18, at 20-23.

143. *See id.* at 24-27.

144. *See id.* at 27-38.

145. *See id.* at 42-46.

146. *See Bond* Oral Argument, *supra* note 18, at 31 (Chief Justice Roberts: "[T]he purpose of my hypothetical was [to] try to find out if there's any situation in which you believe an erosion or intrusion by the Federal government on the police power could be a constraint against an international treaty."); *id.* at 32-33 (Justice Scalia: "I think there is a big difference between just doing it through a self-executing treaty and dragging the Congress into . . . areas where it has never been before."); *id.* at 44 (Chief Justice Roberts:

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In an opinion by Chief Justice Roberts, a majority of the Court ultimately adopted the construction that Bond advocated, reading the Chemical Weapons Convention's implementing statute *not* to cover Bond's local assault on a romantic rival.[147] This time, unlike in *Adoptive Couple*, the majority opinion did mention both the avoidance canon and the constitutional issues.[148] But it did so without engaging in the kind of extended analysis that characterized its use of avoidance in early-Term cases such as *Northwest Austin* and *NFIB*.[149] Rather, the Court merely laid out the parties' opposing positions regarding Congress's power to enact criminal statutes in connection with its treaty power, and then declared that "[n]otwithstanding this debate, it is 'a well-established principle . . . that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'"[150] This formulation is not, strictly speaking, a statement of the avoidance canon, but rather a statement of a related procedural doctrine called the "last resort rule."[151]

Even if we count this as essentially an invocation of the avoidance canon, what the Court did next departed substantially from its approach in early-Term avoidance cases. That is, instead of engaging in a serious analysis of the federalism issues and concluding that the statute would indeed violate (or come close to violating) federalism principles if read to cover Bond's conduct, the Court simply observed that "Bond argues that [the statute] does not cover her

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"I just would like a fairly precise answer whether there are or are not limitations on what Congress can do with respect to the police power. If their authority is asserted under a treaty, is their . . . power to intrude upon the police power unlimited?"); *id.* at 45 (Chief Justice Roberts: "I can imagine treaties that you would say are within the treaty power, . . . but that could give rise to implementing legislation that I think would be extraordinary from the point of view of the framers and the power that it gave Congress to intrude upon State authority."); *id.* at 49 (Justice Breyer: "[Y]our position constitutionally would allow the President and the Senate . . . to do anything through a treaty that is not specifically within the prohibitions of the rights protections of the Constitution. . . . And I doubt that . . . the Framers intended to allow the President and the Senate to do anything.").

147. *See* Bond v. United States, 134 S. Ct. 2077, 2083 (2014).

148. *See id.* at 2087-88.

149. *See supra* Parts I.A.1, .3.

150. *Bond*, 134 S. Ct. at 2087 (quoting Escambia County v. McMillan, 466 U.S. 48, 51 (1984) (per curiam)).

151. *See* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1014-27 (1994) (noting that Justice Brandeis's famous concurrence in *Ashwander v. Tennessee Valley Authority* articulated both the traditional avoidance canon as well as the "last resort" rule, directing federal courts to decide constitutional issues only as a "last resort"—that is, if there is no other ground upon which to rest the judgment); *see also* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("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.").

conduct" and then turned to interpreting the statute without further discussing or resolving the constitutional issues.[152] In other words, the Court went into "ordinary statutory interpretation" mode, rather than "constitutional problem" mode. First, the Court noted that it was unlikely that the Convention's drafters, who designed the Convention in response to war crimes and acts of terrorism, "were interested in anything like Bond's common law assault."[153] Following this nod to the treaty drafters' intent, the Court invoked background principles of statutory construction governing the relationship between the federal government and the States. It reviewed several precedents applying presumptions that federal statutes generally do not intrude on state rights or functions.[154] Based on these precedents, the Court invoked the federalism clear statement principle requiring "a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States."[155] Finding no clear statement that Congress intended for the Convention's implementing statute to reach local criminal behavior, it then construed the statute not to cover Bond's conduct.[156]

The *Bond* majority opinion also relied heavily on the mischief that the Chemical Weapons Convention was designed to combat. The opinion's first few lines invoked scenes of war in which chemical weapons like mustard gas were unleashed.[157] The opinion then recounted the history of international agreements to prohibit the use of toxic chemicals, culminating in ratification of the Chemical Weapons Convention.[158] Later, when applying the federalism clear statement principle to reject a broad construction of the treaty's implementing statute, the Court returned to the mischief the statute originally was designed to address, noting that "[t]he substances that Bond used bear little

152. *See Bond*, 134 S. Ct. at 2087.

153. *See id.*

154. *See id.* at 2088-90.

155. *Id.* at 2090.

156. *See id.* at 2090-93.

157. The majority opinion opened as follows:

> The horrors of chemical warfare were vividly captured by John Singer Sargent in his 1919 painting Gassed. The nearly life-sized work depicts two lines of soldiers, blinded by mustard gas, clinging single file to orderlies guiding them to an improvised aid station. . . . The soldiers were shown staggering through piles of comrades too seriously burned to even join the procession.
>
> The painting reflects the devastation that Sargent witnessed in the aftermath of the Second Battle of Arras during World War I. That battle and others like it led to an overwhelming consensus in the international community that toxic chemicals should never again be used as weapons against human beings. Today that objective is reflected in the international Convention on Chemical Weapons . . . .

Id. at 2083.

158. *See id.* at 2083-85.

resemblance to the deadly toxins" that those who drafted and ratified the Convention sought to ban, and that "Bond's crime is worlds apart" from the kinds of attacks the Convention was meant to target.[159]

What is striking about the majority opinion in *Bond* is that although it mentioned the avoidance canon, it did not rely openly or significantly on the canon to justify its reading of the implementing statute's text. That work was instead done by the federalism clear statement principle and the mischief rule. Moreover, unlike *Northwest Austin* and *NFIB*, the majority opinion in *Bond* contained no lengthy exegesis on why the statute would be unconstitutional if interpreted according to its plain text. Indeed, it dodged the constitutional question about the scope of Congress's power to implement treaties, relying instead on a "lack of clear statement" argument and the related presumption favoring narrow construction of statutes that regulate areas ordinarily governed by state law.

Part III below suggests that this is a classic form of "passive avoidance," in which the Court uses other interpretive rules connected to constitutional principles—but that do not require the level of constitutional analysis that the avoidance canon requires—to decide cases that raise constitutional issues on narrower grounds.[160]

4. *Elonis v. United States*

Elonis v. United States involved a statute that criminalizes "any communication containing . . . any threat to injure the person of another."[161] Anthony Elonis was a disgruntled husband and employee who posted "self-styled 'rap' lyrics" on Facebook under a pseudonym.[162] The lyrics contained graphically violent language and imagery about his wife, coworkers, a kindergarten class, and state and federal law enforcement.[163] The posts were interspersed with disclaimers that the lyrics were "fictitious" and proclamations that Elonis was exercising his First Amendment rights.[164]

Elonis was eventually arrested and charged with making communications that contained threats to injure others.[165] At trial, he requested a jury instruction that "the government must prove that he intended to communicate

159. *See id.* at 2090-91.

160. *See infra* Parts III.A-.B.

161. 18 U.S.C. § 875(c) (2017); *see* Elonis v. United States, 135 S. Ct. 2001, 2004 (2015).

162. *See Elonis*, 135 S. Ct. at 2004-05.

163. *See id.* at 2004-07.

164. *See id.* at 2005-06.

165. *See id.* at 2006-07.

a true threat" in order to convict him.[166] The district court denied his request.[167] The question before the Supreme Court was "whether the statute also requires that the defendant be aware of the threatening nature of the communication, and—if not—whether the First Amendment requires such a showing."[168]

Elonis's brief argued that his Facebook posts were protected speech under the First Amendment, and that unless construed to contain a subjective intent requirement, the statute would be unconstitutional.[169] It also expressly invoked the avoidance canon, urging the Court to construe the statute to contain an intent requirement in order to avoid the free speech issue.[170] At oral argument, several of the Justices expressed concern about the statute's First Amendment implications. Justice Kagan, for example, criticized the government's proposed construction, noting that it was "not the kind of standard that we typically use in the First Amendment."[171] Justice Sotomayor similarly questioned whether "the First Amendment provide[s] an umbrella that cabins" the statute's reach, and pointed out that the Court has "been loathe to create more exceptions" that remove certain forms of speech from First Amendment protection.[172]

In the end, the Court (again in an opinion by Chief Justice Roberts) construed the statute to contain an intent requirement, as Elonis had urged.[173] Yet, as in *Yates* and *Adoptive Couple*, it did not mention constitutional avoidance or the First Amendment in so doing. Indeed, the only reference the Court made to the First Amendment came in its restatement of the question presented and in its summary comment that "[g]iven our disposition, it is not necessary to consider any First Amendment issues."[174]

Unlike the other cases discussed in this Part, however, the Court in *Elonis* did not rely on the mischief that the statute was designed to address in order to justify its statutory (re)construction. Instead, it cited the common law principles "that a defendant must be 'blameworthy in mind' before he can be found guilty" and that courts "generally 'interpret[] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms

166. *See id.* at 2007 (quoting Joint Appendix at 21, *Elonis*, 135 S. Ct. 2001 (No. 13-983), 2014 WL 4357422).

167. *Id.*

168. *Id.* at 2004.

169. *See Elonis* Petitioner's Brief, *supra* note 18, at 34-61.

170. *See id.* at 31-32.

171. *Elonis* Oral Argument, *supra* note 18, at 46.

172. *Id.* at 53.

173. *See Elonis*, 135 S. Ct. at 2011.

174. *See id.* at 2004, 2012.

does not contain them.'"[175] The Court then analogized the statute to other criminal statutes that had been construed to contain an intent or knowledge requirement.[176] This was a curious approach, however, because a number of recent Roberts Court cases had refused to construe criminal statutes to contain an intent or knowledge requirement[177]—so absent the First Amendment concerns, it is difficult to explain the decision to treat the statute at issue in *Elonis* differently. Although the *Elonis* majority opinion did not rely on the mischief rule or on constitutional law-based canons such as the rule of lenity or the federalism clear statement principle to skirt the constitutional issue—as had the Court's opinions in *Yates*, *Adoptive Couple*, and *Bond*—it too sought to tweak the statute without admitting that it was adding a limitation not found in the statute's text.[178]

Elonis, like *Yates*, *Adoptive Couple*, and *Bond*, seems like a classic case for use of the avoidance canon. The statute's plain text contained no intent requirement, but that reading posed thorny First Amendment problems. The Court, in an opinion by Chief Justice Roberts, nevertheless read an intent requirement into the statute—giving the statute something other than its most straightforward construction. And yet, unlike the opinions in the cases discussed in Part I above, the Court's opinion failed to mention avoidance, and essentially ignored the constitutional issues squarely raised in the briefs and at oral argument—relying instead on other interpretive tools.

5. *King v. Burwell*

A fifth case that further suggests that the post-2012 Roberts Court has embarked on a more subdued path in its use of constitutional avoidance is *King v. Burwell*.[179] *King*, like *NFIB*, involved the ACA, a health care reform

175. *Id.* at 2009 (alteration in original) (first quoting Morissette v. United States, 342 U.S. 246, 252 (1952); and then quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994)).

176. *See id.* at 2009-10.

177. *See, e.g.*, Loughrin v. United States, 134 S. Ct. 2384, 2387 (2014) (holding that a bank fraud statute does not require proof that the defendant intended to defraud the bank); Dean v. United States, 556 U.S. 568, 570, 577 (2009) (holding that no intent to discharge a firearm is required in order to trigger a sentencing enhancement); *see also* Rosemond v. United States, 134 S. Ct. 1240, 1246-47 (2014) (concluding that aiding and abetting liability does not require intent to facilitate all elements of the underlying crime).

178. One difference is that in *Elonis*, the tools of passive avoidance the Court used were common law precedents and other criminal statutes. In other words, rather than seek to characterize its interpretation as consistent with congressional intent (as reliance on the mischief rule suggests), the Court sought to justify its interpretation as dictated by established presumptions in criminal law.

179. 135 S. Ct. 2480 (2015).

statute designed to expand insurance coverage.[180] The ACA "requires the creation of an 'Exchange' in each State—basically, a marketplace that allows people to compare and purchase insurance plans."[181] The statute "gives each State the opportunity to establish its own Exchange, but provides that the Federal Government will establish the Exchange if the State does not."[182] The question presented in *King* was whether certain tax credits, which the Act provides to individuals who fall within a specified income range, are available in states that have a federal exchange rather than one established by the state.[183] The relevant statutory text provides that tax credits "'shall be allowed' for any 'applicable taxpayer'"[184] and that "the amount of the tax credit depends in part on whether the taxpayer has enrolled in an insurance plan through 'an Exchange established by the State'" under the ACA.[185]

The most straightforward reading of the statute's text is that the tax credits are not available for individuals who purchase insurance from an exchange that was established by the federal government, because such exchanges are not "established by the State." However, two amicus briefs suggested an avoidance argument that could have been used to save the statute from this construction.[186] They argued that if the ACA was read not to provide tax credits to individuals who purchase insurance from an exchange established by the federal government, the statute would amount to a congressional threat to send states that did not establish exchanges into insurance market failure.[187] In other words, it would amount to a congressional attempt to coerce states into establishing exchanges by threatening the destruction of their health insurance markets if they did not—and this coercion would raise serious Tenth Amendment

180. *See id.* at 2485.

181. *Id.*; *see* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1311(b)(1), 124 Stat. 119, 173 (2010) (codified at 42 U.S.C. § 18031(b)(1) (2017)).

182. *King*, 135 S. Ct. at 2485; *see* Patient Protection and Affordable Care Act § 1321(c)(1), 124 Stat. at 186 (codified at 42 U.S.C. § 18041(c)(1)).

183. *See King*, 135 S. Ct. at 2487; *see also* Patient Protection and Affordable Care Act § 1401(a), 124 Stat. at 213-19 (codified as amended at 26 U.S.C. § 36B (2017)).

184. *King*, 135 S. Ct. at 2487 (quoting 26 U.S.C. § 36B(a)).

185. *Id.* (emphasis omitted) (quoting 26 U.S.C. § 36B(c)(2)(A)(i)).

186. *See King* States' Brief, *supra* note 18, at 42-44; *King* JALSA Brief, *supra* note 18, at 36-41.

187. The tax credits enable people whose income is low enough that they would otherwise be exempt from the ACA's individual mandate to purchase insurance. *See King*, 135 S. Ct. at 2486-87. Thus, if the credits were unavailable to large swaths of low-income purchasers because they purchased insurance on a federally established exchange, those individuals would not be required to buy health insurance at all. And if the number of people purchasing insurance dropped, the cost of premiums would increase for everyone, which in turn would cause more people to stop purchasing insurance and, ultimately, would cause insurers to leave the health insurance market. *See id.* at 2485-86, 2493-94 (discussing this "death spiral" phenomenon).

concerns.[188] This was a novel, highly controversial argument and one that seemed strategically based on the impression—created by the rulings in *Northwest Austin*, *Skilling*, and *NFIB*—that the Roberts Court is favorably disposed to inventive avoidance arguments. Indeed, the principle of equal state sovereignty articulated in *Northwest Austin* and the Commerce Clause argument advanced in *NFIB* had been similarly unprecedented and controversial.[189] Based on the Court's early-Term history with the canon, many commentators thought there was a strong chance the Court might jump at the avoidance "out" once again.[190]

At oral argument, Justices Kennedy, Alito, and Sotomayor all picked up on the avoidance argument. Justice Kennedy commented, "[I]f your argument is accepted, the States are being told either create your own Exchange, or we'll send your insurance market into a death spiral."[191] He called this "a serious constitutional problem."[192] Justice Sotomayor similarly pointed out that if the Court adopted the challengers' reading, "we're going to read a statute as intruding on the Federal-State relationship, because then the States are going to be coerced into establishing their own Exchanges."[193] She noted that "if it is coercive in an unconstitutional way," the Court's practice is to "read a statute in a way where we don't impinge on the basic Federal-State relationship."[194] Even Justice Alito, who ultimately agreed with the challengers, inquired, "If we adopt [the challengers'] interpretation of this Act, is it unconstitutionally coercive?"[195]

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188. *King* States' Brief, *supra* note 18, at 42-44; *King* JALSA Brief, *supra* note 18, at 6-7.

189. *See* Katyal & Schmidt, *supra* note 4, at 2133-34 (arguing that the "equal sovereignty" doctrine relied on by the Court in *Northwest Austin* was "at best a radical transformation" of a different doctrine known as the "equal footing doctrine" that governed states' admission to the Union, "if not an outright invention"); *id.* at 2139-49 (arguing that the "antinovelty" principle invoked by the Chief Justice in *NFIB* as a basis for rejecting the government's Commerce Clause argument was a similarly unprecedented expansion of existing doctrine).

190. *See, e.g.*, Mila Sohoni, Essay, *The Problem with "Coercion Aversion": Novel Questions and the Avoidance Canon*, 32 YALE J. ON REG. ONLINE 1, 2 (2015) ("From the moment Justice Kennedy floated [the coercion argument], . . . it was clear that coercion aversion could point the way to five votes for the government."); Michael Dorf, King v. Burwell *Post-Mortem, Cont'd*, DORF ON L. (Mar. 11, 2015), https://perma.cc/3U9S-Y48Q (describing the coercion-based avoidance argument as "very powerful"); Cristian Farias, *Sotomayor May Have Saved Obamacare*, SLATE (Mar. 6, 2015, 12:04 PM), https://perma.cc/39UL-9TXJ (predicting that Chief Justice Roberts and Justice Kennedy would find the coercion-based avoidance argument convincing).

191. *King* Oral Argument, *supra* note 18, at 16.

192. *Id.*

193. *Id.* at 14.

194. *Id.* at 15.

195. *Id.* at 48.

As in *Yates*, *Adoptive Couple*, and *Elonis*, however, this interest at oral argument did not translate into even brief mention of the avoidance canon in the Court's ultimate opinion. This was despite the fact that the Court again rejected the most natural reading of the statute, instead construing the ACA to permit tax credits for individuals who purchase insurance through exchanges established by the federal government.[196]

Once again, the Court's opinion relied heavily on the mischief rule to achieve its statutory (re)construction. Notably, the opinion began by describing the "long history of failed health insurance reform" in several states, tracing the evolution of health insurance regulation since the 1990s and focusing on Massachusetts's ultimately successful system.[197] In the Court's telling, the upshot of this history lesson was that Congress watched the 1990s reform efforts play out and deliberately chose to copy Massachusetts's successful scheme. Thus, the ACA was modeled on three key Massachusetts reforms: (1) mandatory coverage and a bar against price discrimination based on current health, (2) an individual mandate, and (3) tax subsidies.[198] By adopting this "lessons learned from state experiences" narrative of the legislative process that produced the ACA, the Court read into the Act's legislative history an overarching goal of avoiding insurance market failure.[199] From there, it had little trouble choosing the statutory construction that would "avoid the type of calamitous result that Congress plainly meant to avoid."[200] Indeed, the Court's opinion ended with a tellingly mischief-focused remark: "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them."[201]

The path of avoidance resistance in *King* was different in several respects from the other cases discussed in this Part. Most notably, the avoidance argument in *King* was raised not by the parties, but by amicus briefs.[202] Further, the coercion argument relied on a novel constitutional theory[203]

196. *See* King v. Burwell, 135 S. Ct. 2480, 2495-96 (2015).

197. *See id.* at 2485-86.

198. *See id.* at 2486-87.

199. *See id.* at 2492-94 (relying on the "three major reforms" upon which Congress based the ACA to buttress the conclusion that "the statutory scheme compels us to reject [the challengers'] interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very 'death spirals' that Congress designed the Act to avoid").

200. *See id.* at 2495-96.

201. *Id.* at 2496.

202. *See supra* notes 186-88 and accompanying text; *see also* Brief for Professor Thomas W. Merrill et al. as Amici Curiae Supporting Respondents at 6-11, *King*, 135 S. Ct. 2480 (No. 14-114), 2015 WL 456257 (making a related argument based on the federalism clear statement principle).

203. *See* Sohoni, *supra* note 190, at 2-3.

rather than established rules about vagueness, federalism, or the First Amendment. Despite these differences, however, the Court's failure to mention the avoidance canon once it had been raised seems a noteworthy departure from its affinity for the canon in earlier Terms. Indeed, it is likely that amici—sophisticated law professors and attorneys—raised (some might even say concocted) the coercion argument precisely *because* of the Roberts Court's penchant in earlier Terms for employing avoidance to rewrite statutes. That the Court did not take the avoidance bait in *King*—or in the other cases described in this Part—suggests that the Court's approach to the avoidance canon has changed significantly.

* * *

Some may view the rule of lenity and the federalism clear statement principle, employed by the Court in some of its later-Term cases, as alternate versions of the avoidance canon—and therefore see the Court's moves in these cases as unexceptional, rather than illustrative of a marked change in interpretive approach. On the one hand, this view is understandable; both the rule of lenity and the federalism clear statement principle are based in constitutional law, and both steer courts away from particular statutory constructions in order to protect important constitutional principles.

But this does not, in my view, mean that the Roberts Court's move to employ these canons in lieu of avoidance was ordinary or unremarkable. As noted above, the Roberts Court showed a noteworthy affinity for the avoidance canon during its first several Terms—an affinity that was pronounced enough for several commentators to take note.[204] So the Court's shift toward abandoning avoidance and instead employing other canons—even in cases where avoidance was teed up by the parties and discussed at oral argument—seems like a meaningful shift in interpretive approach. One mark of this shift is the difference in the approaches taken by the majority in *Skilling* and the plurality in *Yates*. Both cases involved a vagueness challenge to a criminal statute that prompted arguments based in lenity and avoidance. Lenity and avoidance are not mutually exclusive canons; *Skilling* invoked both, although it relied heavily on avoidance and mentioned lenity only in passing.[205] By contrast, the *Yates* plurality relied exclusively on lenity—failing even to mention avoidance. Combined with the evidence of similar conspicuous omissions of the avoidance canon in the other later-Term cases discussed in this Part, this suggests a pattern.

Also noteworthy is that a focused search of briefs and oral argument transcripts for all statutory cases decided between 2006 and 2012 identified

204. *See supra* Part I.B.

205. *See* Skilling v. United States, 561 U.S. 358, 405-06 (2010) (discussing avoidance); *id.* at 410-11 (discussing lenity).

only two early-Term cases in which the avoidance canon was raised both in the parties' briefs and at oral argument but not ultimately mentioned in the Court's opinion.[206] By contrast, in the period between 2013 and 2017, there were seven such cases.[207] This phenomenon is consistent with this Article's

206. My research assistants and I performed targeted word searches of the parties' briefs (not including amicus briefs) and oral argument transcripts for every statutory case decided by the Roberts Court between 2006 and 2012. We found only two cases during this period in which the avoidance canon was discussed in at least one of the parties' briefs and also by the Justices at oral argument but was not mentioned in the Court's opinion. (We did not count cases in which a party's lawyer raised avoidance during oral argument but none of the Justices engaged with the argument.) The two cases were *United States v. Denedo*, 556 U.S. 904 (2009), and *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007).

Denedo presented the question whether an Article I military appellate court has jurisdiction over a writ of error *coram nobis* seeking to set aside, on ineffective assistance of counsel grounds, a guilty plea previously entered in military court. *See* 556 U.S. at 906-08. Denedo's brief argued, inter alia, that his *coram nobis* petition should be allowed "to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." Brief for the Respondent at 38, *Denedo*, 556 U.S. 904 (No. 08-267), 2009 WL 317463 (quoting Webster v. Doe, 486 U.S. 592, 603 (1988)). At oral argument, Denedo's attorney, aided by Justice Kennedy, suggested that the Court should construe the statute so as to avoid confronting the unresolved question whether the Constitution requires that individuals in Denedo's position have some available avenue of relief. *See* Transcript of Oral Argument at 29-32, *Denedo*, 556 U.S. 904 (No. 08-267), 2009 WL 772849. Chief Justice Roberts and Justice Scalia expressed skepticism about the merits of this argument, *see id.* at 31-32, which may explain why the Court's opinion ultimately did not reference the avoidance canon.

In *Tellabs*, the respondents' brief argued that the pleading standard advocated by the petitioners would violate the Seventh Amendment because it imposed a stricter standard for pleading securities fraud claims than courts impose when deciding posttrial and summary judgment motions, and thus interfered with the jury's factfinding role. *See* Brief for Respondents at 16, 39-45, *Tellabs*, 551 U.S. 308 (No. 06-484), 2007 WL 760412. At oral argument, Justices Scalia and Kennedy both inquired about the Seventh Amendment issue and suggested that the pleading standard should be construed consistently with the summary judgment and posttrial motion standard in order to avoid the constitutional question. *See* Transcript of Oral Argument at 3-4, 23-24, *Tellabs*, 551 U.S. 308 (No. 06-484), 2007 WL 967033. The Court ultimately adopted a pleading standard that *differed* from that imposed for summary judgment and posttrial motions, *see Tellabs*, 551 U.S. at 314, 328-29, and—reaching the constitutional question—explicitly held that this created no Seventh Amendment problem, *see id.* at 326-27.

As these two cases illustrate, there do not appear to be *any* cases decided in the period between 2006 and 2012 in which the Court took the constitutional concerns raised by the parties seriously *and* adopted a statutory reading that effectively avoided the constitutional issue, but in which it failed to mention the avoidance canon in its opinion.

207. *See* sources cited *supra* note 86.

anecdotal observations that the Roberts Court seemed much more willing in its early Terms than in more recent ones to invoke avoidance in its opinions when the canon was raised in the briefs and at oral argument.

Perhaps more importantly, the rule of lenity and the federalism clear statement principle differ in important ways from the avoidance canon. Unlike avoidance, neither requires the court to find a constitutional infirmity (or probable infirmity). When the Court invokes the rule of lenity, it is not saying that the statute at issue otherwise would be void for vagueness; likewise, when it invokes the federalism clear statement principle, it is not saying that the statute otherwise would intrude unconstitutionally on states' rights. The rule of lenity dictates only that if a criminal statute is ambiguous, it should be construed in the defendant's favor in order to avoid the *possibility* (not the probability or the certitude) that the defendant lacked notice that his conduct violated the statute.[208] Moreover, the rule of lenity is triggered only if the statute is *ambiguous*; it does not allow the court to rewrite or carve out exceptions from an otherwise clear statute.[209] Similarly, the federalism clear statement principle requires no serious constitutional analysis or conclusion that the federal government lacks the power to intrude on state power in the way required by the rejected statutory reading.[210] On the contrary, the canon's entire point is that the federal government *does* have the power to intrude on state authority (under, for example, the Supremacy Clause[211])—but that interpreters should be absolutely certain that the federal government intended to so intrude before reading the statute that way.[212] Moreover, the federalism

208. *See, e.g.*, Staples v. United States, 511 U.S. 600, 619 n.17 (1994) (noting that under the rule of lenity, "an ambiguous criminal statute is to be construed in favor of the accused"); United States v. Bass, 404 U.S. 336, 347 (1971) (quoting Rewis v. United States, 401 U.S. 808, 812 (1971)) (similar); *see also* United States v. Granderson, 511 U.S. 39, 54 (1994) ("[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor.").

209. *See, e.g.*, Albernaz v. United States, 450 U.S. 333, 342 (1981) ("[T]he 'touchstone' of the rule of lenity 'is statutory ambiguity.'" (quoting Bifulco v. United States, 447 U.S. 381, 387 (1980), *superseded by statute*, Anti-Drug Abuse Amendments Act of 1988, Pub. L. No. 100-690, tit. VI, § 6470(a), 102 Stat. 4312, 4377 (codified at 21 U.S.C. §§ 846, 963 (2017)))); Callanan v. United States, 364 U.S. 587, 596 (1961) (observing that the rule of lenity "only serves as an aid for resolving an ambiguity").

210. *See, e.g.*, Fowler v. United States, 563 U.S. 668, 677 (2011) (applying the federalism clear statement principle without any constitutional analysis); Altria Grp., Inc. v. Good, 555 U.S. 70, 77 (2008) (similar).

211. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .").

212. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 630-31 (1992); *see also* Gregory v. Ashcroft, 501 U.S. 452, 463-64 (1991) (acknowledging Congress's power to regulate state functions under the Commerce Clause, but noting that "we must be

footnote continued on next page

clear statement principle is available anytime a federal statute regulates an area ordinarily regulated by state law. It does not matter how extensive the federal intrusion is; the mere presence of a federal-state overlap is enough to trigger a presumption of nonintrusion.

In this sense, both the rule of lenity and the federalism clear statement principle can be viewed as a form of "avoidance lite." Each empowers the Court to avoid deciding (or engaging seriously with) controversial constitutional questions and to sidestep constitutionally problematic interpretations—and to do so without openly rewriting the statute, or at least without *admitting* to rewriting the statute. In so doing, these tools enable the Court to avoid subjecting itself to criticism for (unnecessarily) resolving controversial constitutional questions or circumventing a statute's text.

These canons share another virtue as well: They are both more directly linked to the constitutional problem at issue than is the avoidance canon. That is, where the issue at stake involves criminal liability—and particularly where vagueness is a concern—it makes more sense for the Court to invoke the rule of lenity than to summon the imprecise and nebulous avoidance canon. Similarly, where the balance of power between the federal and state governments is at issue, the federalism clear statement principle is the more appropriate canon to invoke.[213]

B. Diminished Avoidance

Another indicator of the Court's recent hesitance to invoke the avoidance canon is that only a handful of majority opinions issued since 2012—five, including *Bond*—have cited the avoidance canon.[214] Of these, only one has

absolutely certain that Congress intended [to] exercise" that power); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (acknowledging that "Congress may fix the terms on which it shall disburse federal money to the States," but holding that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously").

213. Many thanks to Kevin Stack for this point.

214. *See infra* Appendix. For a discussion of *Bond*, see Part II.A.3 above. For the other four cases, see McDonnell v. United States, 136 S. Ct. 2355, 2373 (2016); Mathis v. United States, 136 S. Ct. 2243, 2252 (2016); Paroline v. United States, 134 S. Ct. 1710, 1725-26 (2014); and Descamps v. United States, 133 S. Ct. 2276, 2287 (2013). During this same period, nine concurring or dissenting opinions—six authored by Justice Thomas—also invoked the avoidance canon. *See* Voisine v. United States, 136 S. Ct. 2272, 2290-92 (2016) (Thomas, J., dissenting); Taylor v. United States, 136 S. Ct. 2074, 2082-85 (2016) (Thomas, J., dissenting); Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2688-89 (2015) (Roberts, C.J., dissenting); Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2551 (2015) (Alito, J., dissenting); B&B Hardware, Inc. v. Hargis Indus., Inc., 135 S. Ct. 1293, 1316-18 (2015) (Thomas, J., dissenting); Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2570-71 (2013) (Thomas, J., concurring); *Descamps*, 133 S. Ct. at 2294-95 (Thomas, J., concurring in the judgment);
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engaged in serious discussion of the constitutional infirmity presented by the rejected statutory reading—and even that opinion did not rely on avoidance to adopt an alternate reading of the statute.[215] In order to provide a clearer picture of how the Roberts Court's use of the avoidance canon has shifted in recent years, this Subpart provides a brief overview of the later-Term (post-2012) Roberts Court cases that *did* invoke the avoidance canon.[216]

1. Afterthought avoidance

The one later-Term majority opinion that invoked the avoidance canon and contained significant discussion of the constitutional issues at stake is *McDonnell v. United States*.[217] *McDonnell* involved charges that Virginia Governor Robert McDonnell committed honest services fraud, as defined under the federal bribery statute.[218] Specifically, McDonnell was accused of

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Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2269-70 (2013) (Thomas, J., dissenting); *id.* at 2273 (Alito, J., dissenting); *see also infra* Appendix.

215. *See McDonnell*, 136 S. Ct. at 2373; *see also infra* notes 217-25 and accompanying text. Three of the concurring or dissenting opinions that invoked the avoidance canon during this period also engaged in significant discussion of the constitutional issue. *See Taylor*, 136 S. Ct. at 2082-85 (Thomas, J., dissenting); *Adoptive Couple*, 133 S. Ct. at 2570-71 (Thomas, J., concurring); *Inter Tribal Council*, 133 S. Ct. at 2269-70 (Thomas, J., dissenting).

216. This Subpart does not discuss, and the Appendix below does not list, cases in which the Court mentioned, but declined to apply, the avoidance canon—which was often done in order to reject an argument made in a lower court opinion or brief. There were a handful of cases like this decided during the period between 2013 and 2017; in these cases, the Court tended to find that the statute was unambiguous—so that the threshold condition for invoking the avoidance canon was missing—*and* that the constitutional question raised by the party had already been decided in an earlier case or was a "cursory" argument not properly before the Court. *See* McFadden v. United States, 135 S. Ct. 2298, 2306-07 (2015) ("Even if this statute were ambiguous, [petitioner's] argument would falter. Under our precedents, a scienter requirement in a statute 'alleviate[s] vagueness concerns' . . . ." (second alteration in original) (quoting Gonzales v. Carhart, 550 U.S. 124, 149 (2007))); Warger v. Shauers, 135 S. Ct. 521, 529 (2014) (rejecting the argument that avoidance applied because of "the clarity of both the text and history" of the federal rule of evidence in question, and because an earlier case had already resolved the constitutional question); United States v. Castleman, 134 S. Ct. 1405, 1416 (2014) ("[T]he meaning of the statute is sufficiently clear that we need not indulge [petitioner's] cursory nod to constitutional avoidance concerns."); United States v. Apel, 134 S. Ct. 1144, 1153 (2014) (declining to reach constitutional arguments that the court of appeals had not adjudicated and rejecting the attempt to "repackage" those arguments into a constitutional avoidance claim).

217. 136 S. Ct. 2355 (2016).

218. *See id.* at 2361-65. The federal bribery statute makes it a crime for "a public official or person selected to be a public official, directly or indirectly, corruptly [to] demand[], seek[], receive[], accept[], or agree[] to receive or accept anything of value . . . in return for . . . being influenced in the performance of any official act." 18 U.S.C. § 201(b)(2)(A) (2017). The term "official act" is defined by the statute as "any decision or action on any

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accepting "payments, loans, gifts, and other things of value" from a Virginia businessman and his company in exchange for arranging meetings and hosting events that put the businessman in contact with researchers at Virginia public universities—whom the businessman hoped to convince to conduct studies that would help promote his products.[219]

The Court concluded that a plain reading of the statutory text precluded a holding that the meetings, events, and other introductions made by the Governor constituted a "decision or action" on a "question, matter, cause, suit, proceeding or controversy," and that the Governor's actions therefore fell outside the ambit of the bribery statute.[220] In reaching this conclusion, the Court cited dictionary definitions, language canons such as *noscitur a sociis*, the canon against superfluity, and its own precedents.[221] It then noted, almost as an afterthought, that "[i]n addition to being inconsistent with both text and precedent, the Government's expansive interpretation of 'official act' would raise significant constitutional concerns"—and went on to describe the due process, vagueness, and federalism problems with the government's reading of the statute.[222]

Despite the Court's explicit discussion of the constitutional infirmities avoided by its chosen construction, *McDonnell* differs from the avoidance cases described in Part I above in three important ways. First, the Court's interpretation did not strain the statute; indeed, it was consistent with the statute's text and at least arguably represented the statute's most straightforward reading. Second, the Court's opinion did not place the constitutional concerns front and center, but merely offered them as a secondary justification for the Court's chosen construction. Third, the Court did not even clearly invoke the avoidance canon in its discussion—making only a vague observation that its interpretation "avoids this 'vagueness shoal'"[223] rather than reciting a classic formulation of the canon, such as that "every reasonable construction must be resorted to, in order to save a

question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." *Id.* § 201(a)(3).

219. *See McDonnell*, 136 S. Ct. at 2362-65.

220. *See id.* at 2368-72 (quoting 18 U.S.C. § 201(a)(3)).

221. *See id.*

222. *See id.* at 2372-73.

223. *Id.* at 2373 (quoting Skilling v. United States, 561 U.S. 358, 368 (2010)).

statute from unconstitutionality"[224] or that "th[e] Court will not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided."[225]

The other majority opinions issued during Terms between 2012 and 2016 that invoked avoidance similarly employed the canon only as a secondary interpretive tool. In *Paroline v. United States*, for example, the Court turned to avoidance only after discussing the statute's text, its purpose, the common law, precedent, grammar rules, and the whole act rule,[226] pointing out in passing that the reading it was rejecting "might raise questions under the Excessive Fines Clause of the Eighth Amendment" and explaining the constitutional issue in a brief aside.[227] As in *McDonnell*, the Eighth Amendment issue did not feature prominently in the Court's opinion, and was offered merely as a secondary justification for its ruling.[228] Other recent Roberts Court opinions that have invoked the avoidance canon likewise have made only minimal use of it, engaging in little discussion of the constitutional issue and relying only secondarily on the canon, or mentioning it only in passing.[229]

2. Justice Thomas

While the Court as a whole seems to have ratcheted down its use of the avoidance canon in recent Terms, Justice Thomas has been an outlier,

224. Hooper v. California, 155 U.S. 648, 657 (1895); *see also, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 153 (2007) (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

225. United States v. Clark, 445 U.S. 23, 27 (1980); *see also, e.g.*, Schneider v. Smith, 390 U.S. 17, 26-27 (1968); Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 749-50 (1961) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

226. *See* 134 S. Ct. 1710, 1718-22 (2014).

227. *Id.* at 1725-26; *see also* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed . . . .").

228. The Court's treatment of the avoidance canon and the constitutional issue in *Descamps v. United States*, 133 S. Ct. 2276 (2013), was similar to its treatment of the canon in *McDonnell* and *Paroline*. As in those cases, the Court in *Descamps* turned to avoidance only after concluding that the statute's text, its legislative history, and precedents involving similar statutes all supported the Court's chosen construction. *See id.* at 2283-89. More importantly, the Sixth Amendment concern was not the decisive factor in the Court's decision to construe the statute the way it did, but rather just one of many interpretive considerations. *See id.*

229. *See* Voisine v. United States, 136 S. Ct. 2272, 2290-91 (2016) (Thomas, J., dissenting); Mathis v. United States, 136 S. Ct. 2243, 2253 (2016); Taylor v. United States, 136 S. Ct. 2074, 2082-85 (2016) (Thomas, J., dissenting); Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2551 (2015) (Alito, J., dissenting); B&B Hardware, Inc. v. Hargis Indus., Inc., 135 S. Ct. 1293, 1316-18 (2015) (Thomas, J., dissenting).

invoking the canon in six concurring or dissenting opinions since 2012.[230] In two of these opinions, he discussed the constitutional difficulty at issue extensively, and advocated a strained, or at least less than plain, reading of the statute in order to avoid that difficulty. One of these opinions was *Adoptive Couple*, discussed above.[231] Whereas the majority opinion in *Adoptive Couple* ignored the federalism concerns created by the interplay between ICWA and state custody laws, Justice Thomas authored a concurring opinion that discussed those concerns in detail and relied heavily on the avoidance canon to justify construing ICWA not to apply to biological fathers who never had custody of their children.[232]

The other case was *Arizona v. Inter Tribal Council of Arizona, Inc.*[233] In *Inter Tribal Council*, the Court held that the National Voter Registration Act (NVRA), which requires states to "accept and use" a federal registration form, preempts Arizona state laws that require voters to present additional information when they register.[234] Justice Thomas dissented, arguing that the NVRA should be construed to require only that Arizona "accept and use" the federal form as part of its voter registration process, and to leave the state free to request any additional information it determines necessary to ensure the integrity of the voter registration process.[235] He based this construction almost entirely on the avoidance canon. At the outset of his opinion, Justice Thomas observed that the interpretations advanced by the parties "are both plausible" and then launched into a lengthy discussion about the meaning of the Constitution's Voter Qualification Clause.[236] Ultimately, he concluded that the Constitution gives states the exclusive authority to set voter qualifications and to determine whether those qualifications are satisfied—and that in order to avoid violating this Clause, the NVRA must be construed not to preempt Arizona's voter registration laws.[237]

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230. *See supra* note 214.

231. *See supra* Part II.A.2.

232. *See* Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2566-71 (2013) (Thomas, J., concurring).

233. 133 S. Ct. 2247 (2013).

234. *See id.* at 2251, 2260; *see also* National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified as amended at 39 U.S.C. §§ 3627, 3629 (2017); and 52 U.S.C. §§ 20501-20511 (2017)).

235. *See Inter Tribal Council*, 133 S. Ct. at 2262 (Thomas, J., dissenting).

236. *See id.* at 2263-68; *see also* U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen . . . by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.").

237. *See Inter Tribal Council*, 133 S. Ct. at 2270 (Thomas, J., dissenting).

Justice Thomas's opinions in *Adoptive Couple* and *Inter Tribal Council* read very much like the early Roberts Court opinions discussed in Part I above. Like those early-Term opinions, these two Justice Thomas opinions placed the constitutional issue front and center, discussed the issue at length, and relied on it as the decisive factor in determining how to construe the statute. Moreover, Justice Thomas's *Adoptive Couple* concurrence rewrote, or at least strained, the text of ICWA—effectively adding a qualification that parents must have had custody of the child in order to come within the statute's protections—in much the same way that the opinions discussed in Part I above strained or rewrote the text of the respective statutes.

Despite Justice Thomas's prominent use of the avoidance canon in a number of solo dissents and concurrences, however, the overall picture that emerges from the Roberts Court is that it seems to have ratcheted down its use of the avoidance canon over the last few Terms. That is, the Court appears to have shifted from an aggressive approach, in which it openly employed the canon to rewrite statutes, to one in which it is willing to rely on the canon only secondarily—to buttress a construction reached through other interpretive tools—and is unwilling to use the canon as a primary justification for its chosen construction. This shift is especially noteworthy in *Bond* and *Elonis*, the two later-Term cases discussed in Part II above that were authored by Chief Justice Roberts,[238] the architect of the Court's aggressive use of avoidance in nearly all of the early-Term cases.[239]

3. *Jennings v. Rodriguez*

Although decided outside the period studied, one other case bears mention for its prominent discussion of the avoidance canon—*Jennings v. Rodriguez*, decided during the 2017 Term.[240] *Jennings* involved three provisions of U.S. immigration law that authorize the detention of aliens during the course of their immigration proceedings.[241] The Ninth Circuit, citing due process concerns and relying heavily on the avoidance canon, had construed the statutes to contain an implicit six-month limit on the length of time that an alien may be detained without a bond hearing.[242] A majority of the Supreme Court rejected that avoidance-based reading, emphasizing that the avoidance canon can only be invoked to support an otherwise *plausible* statutory construction—and insisting that the lower court's construction requiring a

238. *See supra* Parts II.A.3-.4.

239. *See supra* Part I.A.

240. 138 S. Ct. 830 (2018).

241. *See id.* at 838-39; *see also* 8 U.S.C. §§ 1225(b), 1226(a), (c) (2017).

242. *See* Rodriguez v. Robbins, 804 F.3d 1060, 1078-85 (9th Cir. 2015), *rev'd sub nom. Jennings*, 138 S. Ct. 830.

bond hearing every six months was not a plausible interpretation of the relevant text.[243] Rather than decide in the first instance whether the statutes, absent the bond hearing requirement, violated the Due Process Clause, the Court remanded the case to the Ninth Circuit to decide that constitutional question.[244]

Jennings is noteworthy for a few reasons. On the one hand, the Court declined the opportunity to employ the avoidance canon, continuing its later-Term pattern of resistance to invoking avoidance and openly rewriting statutes. Further, although the Ninth Circuit's heavy reliance on the avoidance canon forced the majority to explicitly discuss the canon—rather than quietly ignore it as it did in cases like *Yates*[245]—the Court used this opportunity to beef up the threshold conditions required to invoke avoidance, limiting the canon's application not just in this case but in future cases as well. Specifically, the Court insisted that "[s]potting a constitutional issue does not give a court authority to rewrite a statute as it pleases," and emphasized that the canon permits courts only to "choos[e] between competing *plausible* interpretations of a statutory text."[246] In so doing, the Court cast itself as a passive, rather than active, judicial reviewer, one that is respectful of the legislature's work and unwilling to overstep its bounds. Moreover, in reframing the terms under which the avoidance canon should be invoked, the Court further signaled its own hesitance to use a canon it had freely embraced only a few years earlier.

On the other hand, however, the Court did not actually avoid the constitutional issue implicated in the case. Indeed, while the Court managed to avoid confronting the due process issue for the moment by remanding the case to the Ninth Circuit, that move merely punted the issue to another court; it did not resolve the case on narrower grounds or eliminate the need for the judiciary to grapple with the constitutional question raised. In fact, if the Ninth Circuit rules on remand that the immigration statutes at issue violate due process, the Court could be called on to review that decision and to squarely confront the constitutional question. In this sense, *Jennings* differs from the passive avoidance cases discussed in this Part, in which the Court bypassed entirely, rather than merely punted, serious constitutional issues.

So what explains this apparent incongruence? Why was the Court willing to adopt a potentially problematic statutory construction and send the case

243. *See Jennings*, 138 S. Ct. at 843.

244. *See id.* at 851-52. The Ninth Circuit, in turn, remanded the case to the district court for consideration of the due process issue, among others. *See* Rodriguez v. Marin, 909 F.3d 252 (9th Cir. 2018).

245. *See supra* Part II.A.1.

246. *Jennings*, 138 S. Ct. at 843 (alteration in original) (quoting Clark v. Martinez, 543 U.S. 371, 381 (2005)).

back to the lower court for direct resolution of the constitutional question, rather than find a clever, passive way to avoid engaging the constitutional question as it did in the other cases discussed in this Part? Reading between the lines, my view is that a majority of the Court in *Jennings* saw no serious constitutional problem with the immigration statutes' most straightforward reading—that is, the reading that provides no right to a bond hearing for aliens detained for more than six months pending resolution of their immigration cases.

Comments made by some of the Justices at oral argument suggest as much. Chief Justice Roberts, for example, noted that at least part of the reason for the prolonged detention of the aliens composing the relevant class is that those aliens were busy "compiling an evidentiary record to substantiate their claims" and that this self-imposed delay should be "taken into account" in evaluating the reasonableness, for due process purposes, of an alien's detention.[247] Justice Alito similarly questioned the constitutional basis for finding that an alien could not be detained for longer than six months without a bond hearing, asking, "Where does it say six months in the Constitution? Why is it six? Why isn't it seven? Why isn't it five? Why isn't it eight?"[248] Ultimately, then, *Jennings* may simply be a case in which a majority of the Court saw little reason to engage in creative avoidance of the constitutional question because it failed to find the alleged constitutional difficulty particularly thorny, complicated, or serious—and, therefore, considered the statute to be in little danger of invalidation.[249]

III. Some Theories

In the years since 2012—when Chief Justice Roberts boldly embraced the avoidance canon in *NFIB*—the Roberts Court's approach to constitutional avoidance seems to have shifted to either passive avoidance, or quiet mention—afterthought avoidance—at most. Why? This Part explores one possible explanation: The Court may be reacting to the critical commentary that followed its use of the avoidance canon in *Northwest Austin*, *NFIB*, and, to a lesser extent, *Skilling*. Out of concern for its legitimacy as an institution and a

247. *See* Transcript of Oral Argument at 46-47, *Jennings*, 138 S. Ct. 830 (No. 15-1204), 2017 WL 4882786.

248. *Id.* at 42.

249. In this sense, *Jennings* is similar to *United States v. Denedo*, 556 U.S. 904 (2009), discussed above, in which some Justices expressed skepticism at oral argument about the seriousness of the constitutional issue raised in the parties' briefs. *See supra* note 206. There, too, the opinion issued by the Court declined the invitation to invoke the avoidance canon. *See supra* note 206; *cf.* United States v. X-Citement Video, Inc., 513 U.S. 64, 86-87 (1994) (Scalia, J., dissenting) (rejecting the majority's application of the avoidance canon in part because it "raise[d] baseless constitutional doubts").

desire to quiet accusations that it is an activist Court, it may be proceeding cautiously, reluctant to rest another statutory construction squarely on the back of the avoidance canon—and especially reluctant to raise critics' ire by once again citing the canon as justification for rewriting, or at least evading, a statute's most straightforward meaning. Relatedly, the Court may be employing a "passive avoidance" approach, similar to the "passive virtues" advocated by Alexander Bickel, in resolving cases that raise serious constitutional questions. That is, the Court may be finding narrower decisional grounds than the consequential avoidance canon, when possible, in order to avoid deciding more than is necessary in a given case.

A. Avoidance Retreat

The avoidance canon is a potent tool of statutory construction. Almost more legislative than judicial in nature, it empowers judges not merely to identify a statute's meaning, but to modify that meaning, if necessary, to save the statute. Depending on one's point of view, it also can be viewed as allowing judges to choose among reasonably plausible meanings in a manner that preserves congressional intent.[250] Because the threshold determination of constitutional necessity that justifies invoking the canon is left up to judges, the canon empowers courts to improve or limit statutes, or to admonish Congress about coming close to a constitutional line, without having to take the drastic and activist step of invalidating an act of a coequal branch. In the Roberts Court, this feature led to the active use of the avoidance canon described in Part I.A above, as well as the critical commentary described in Part I.B above.

Since then, the Roberts Court has gone from a period of aggressively and openly using the avoidance canon to stake out strong constitutional stances to a period of relative nonreliance on the avoidance canon. Indeed, in the last several Terms (cases decided between late 2012 and mid-2017), the Court has either completely ignored the avoidance canon despite its obvious relevance to a case or has invoked it in a subdued manner. While it is unclear precisely what kind of feedback loop exists between the Court and public commentary,[251] and although it is difficult to point to evidence that a particular negative comment

250. *See, e.g.*, Gilbert Lee, Comment, *How Many Avoidance Canons Are There After* Clark v. Martinez, 10 U. PA. J. CONST. L. 193, 198-99 (2007) ("The avoidance canon allows courts to refrain from striking down statutes full stop, functioning as 'a means of giving effect to congressional intent, not of subverting it.'" (quoting *Clark*, 543 U.S. at 382)); *see also* INS v. St. Cyr, 533 U.S. 289, 336 (2001) (Scalia, J., dissenting) ("The doctrine of constitutional doubt is meant to effectuate, not to subvert, congressional intent . . . .").

251. *But see* Crawford, *supra* note 78 (reporting that Chief Justice Roberts "pays attention to media coverage").

influenced the Court, it seems at least possible, if not likely, that the Court's recent avoidance retreat was motivated, in part, by the widespread criticism that followed its use of the canon in earlier Terms.

This retreat in response to public criticism makes sense, moreover, because the Roberts Court's decisions to uphold statutes such as the VRA (in *Northwest Austin*) and the ACA (in *NFIB*) appear to have stemmed from a desire to preserve the Court's legitimacy as an institution.[252] That is, the Court, and particularly Chief Justice Roberts, appeared to employ avoidance in the early-Term cases discussed in Part I above *precisely* in order to uphold Congress's work product and avoid being cast as an activist, political institution.[253]

Notably, Chief Justice Roberts himself has acknowledged in public interviews that Chief Justices are likely to set aside their personal views for the good of the Court and that it is a "high priority" of his "to keep any kind of partisan divide out of the judiciary."[254] As commentators have noted, Chief Justice Roberts was "almost certainly [] aware" of significant pressure from political actors (including President Obama) and from "media outlets 'warning of damage to the [C]ourt—and to [Chief Justice] Roberts' reputation—if the Court were to strike down'" the ACA.[255] By contrast, Chief Justice Roberts's

252. This is the view that numerous commentators have taken. *See, e.g.*, Hasen, *supra* note 14, at 218 (speculating that the Court's use of avoidance in *Northwest Austin* was motivated by "fears that full-blown constitutional pronouncement would harm its legitimacy"); A.E. Dick Howard, Essay, *Out of Infancy: The Roberts Court at Seven*, 98 VA. L. REV.: IN BRIEF 76, 89 (2012) ("[T]he decision in [*NFIB*] can be seen as a considered move to protect the Court's legitimacy and to enhance its capital in the country's affairs."); Re, *supra* note 15, at 181 ("With the Court's legitimacy at stake, the Chief Justice strained to preserve the law, and did."). Indeed, news reports speculated that Chief Justice Roberts switched his vote in *NFIB* in order to win public support and enhance the legitimacy of the Court. *See, e.g.*, Crawford, *supra* note 78.

253. *See, e.g.*, John K. DiMugno, *Navigating Health Care Reform: The Supreme Court's Ruling and the Choppy Waters Ahead*, 24 CAL. INS. L. & REG. REP. 135, 136 (2012) (applauding Chief Justice Roberts's *NFIB* opinion for navigating political currents "in a manner that extricated the Court from a political firestorm that would have threatened the Court's legitimacy and institutional standing"); Jacobi, *supra* note 72, at 769 (arguing that Chief Justice Roberts's "driving concern [in *NFIB*] was credibility—the institutional legitimacy of the Court, and his own reputation and legacy"); John Cassidy, *John Roberts and Mitt Romney: Two Peas in a Pod*, NEW YORKER (June 29, 2012), https://perma.cc/8A22-LS73 (arguing that Chief Justice Roberts "preserved the Court's good name"); David L. Franklin, *Why Did Roberts Do It?*, SLATE (June 28, 2012, 3:51 PM), https://perma.cc/A77G-Y6JE (suggesting that the Court's "very legitimacy" was at stake and that Chief Justice Roberts ruled the way he did to "save" the Court); Roger Parloff, *In Defense of John Roberts*, FORTUNE (June 29, 2012), https://perma.cc/HXQ3-STC3 (lauding Chief Justice Roberts for tending to "the Court's dwindling store of credibility and perceived legitimacy").

254. Jeffrey Rosen, *Roberts's Rules*, ATLANTIC (Jan.-Feb. 2007), https://perma.cc/G588-MC9D.

255. *See* JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 12 (2017) (quoting Crawford, *supra* note 78).

vote to uphold the ACA was widely praised in the press as an act of "statesmanship"[256] and of "simple noble leadership"[257] that "place[d] the bipartisan legitimacy of the Court above his own ideological agenda"[258] and "preserve[d] the legitimacy and integrity of the Supreme Court as being above politics."[259]

Thus, when academics later turned around and labeled the Roberts Court activist for its aggressive use of the avoidance canon in *NFIB* and *Northwest Austin*, and accused it of rewriting statutes to achieve instrumentalist goals in these cases,[260] it makes sense that the Court—and particularly its legitimacy-sensitive Chief Justice—would change gears and look for a different hook on which to hang subsequent decisions. In particular, it makes sense that the post-2012 Court has avoided openly acknowledging when it is, in effect, rewriting a statute—and that it has been loath even to mention the avoidance canon in such cases. Indeed, the Court may now view it as safer to reference the avoidance canon only in passing, or as a secondary interpretive tool that corroborates an interpretation reached primarily through other tools of statutory construction.

Notably, this kind of avoidance retreat in response to critical commentary has occurred before. As scholars have noted, during the McCarthy era, the early Warren Court first ratcheted up its use of the avoidance canon for several years, then ratcheted down that use following widespread criticism of its earlier decisions.[261] Specifically, from 1953 to 1957, the Warren Court employed the avoidance canon in a series of cases involving the rights of persons accused of subversive activities.[262] In these cases, the Court typically

256. Adam Liptak, *Roberts Shows Deft Hand as Swing Vote on Health Care*, N.Y. TIMES (June 28, 2012), https://perma.cc/3KCK-5ETN.

257. Thomas L. Friedman, *Taking One for the Country*, N.Y. TIMES (June 30, 2012), https://perma.cc/9V8H-6TDK.

258. Jeffrey Rosen, *Welcome to the Roberts Court: How the Chief Justice Used Obamacare to Reveal His True Identity*, NEW REPUBLIC (June 28, 2012), https://perma.cc/EJ4F-P67V; *see also* Jeffrey Rosen, *Big Chief*, NEW REPUBLIC (July 12, 2012), https://perma.cc/NY9A-NJG2 ("[Chief Justice] Roberts set aside his ideological preference to protect the Court from a decision along party lines that would have imperiled its legitimacy.").

259. Friedman, *supra* note 257.

260. *See, e.g.*, Hasen, *supra* note 14, at 219-20, 223; Jacobi, *supra* note 72, at 842-43; Katyal & Schmidt, *supra* note 4, at 2110-12; Re, *supra* note 15, at 174-77, 185; Shapiro, *supra* note 74, at 10-11.

261. *See generally* Frickey, *supra* note 22.

262. *See, e.g.*, Yates v. United States, 354 U.S. 298, 300-02, 319 (1957) ("[O]ur first duty is to construe this statute. In doing so we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked . . . ."), *overruled in part by* Burks v. United States, 437 U.S. 1 (1978); Watkins v. United States, 354 U.S. 178, 215-16 (1957) (using the avoidance canon to skirt numerous potential constitutional violations); United States v. Witkovich, 353 U.S. 194, 194-95, 198, 201-02 (1957) (avoiding

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read the relevant statute narrowly to avoid the serious constitutional problems created by the government's investigations into, or sanctions against, persons suspected of disloyalty or Communist Party membership.[263]

Several different concerns appear to have motivated the Warren Court's ratcheting up of the use of constitutional avoidance during the period between 1953 and 1957. Some of these concerns were similar to the concerns that motivated the Roberts Court to ratchet up its use of the avoidance canon decades later, while others were different.[264] The most notable similarity was that the Warren Court, like the Roberts Court, was concerned with preserving its institutional legitimacy, and sought to avoid getting into a battle with Congress or being viewed as usurping Congress's power to investigate.[265]

Also like the Roberts Court, the Warren Court was widely criticized for its aggressive use of the avoidance canon to rewrite statutes. The criticism came from numerous quarters—the American Bar Association, several major newspapers, and especially from Congress, which threatened but never enacted several jurisdiction-stripping laws.[266] As scholars have observed, these criticisms seemed to cow some of the Court's centrist Justices, who began to back away from aggressive use of the avoidance canon and even to trim back several avoidance-based precedents.[267] After 1957, the Warren Court's use of

deciding "issues touching liberties that the Constitution safeguards"); Communist Party v. Subversive Activities Control Bd., 351 U.S. 115, 116-17, 122 (1956) (noting that the case "plainly raises constitutional questions" but "must be decided on a non-constitutional issue, if the record calls for it, without reaching constitutional problems"); Pennsylvania v. Nelson, 350 U.S. 497, 498, 509-10 (1956) (declining to decide whether "double or multiple punishment for the same overt acts directed against the United States" is unconstitutional); Peters v. Hobby, 349 U.S. 331, 334-35, 338 (1955) (holding that an agency action was in violation of an executive order so that "the constitutionality of the Order itself does not come into issue"); United States v. Rumely, 345 U.S. 41, 45 (1953) (settling on an interpretation of a congressional resolution with "special regard for the principle of constitutional adjudication which makes it decisive in the choice of fair alternatives that one construction may raise serious constitutional questions avoided by another").

263. *See, e.g.*, *Yates*, 354 U.S. at 307-12; *Witkovich*, 353 U.S. at 199-202; *Peters*, 349 U.S. at 339-48; *Rumely*, 345 U.S. at 47.

264. For example, the Warren Court, unlike the Roberts Court, sought to slow what it perceived as an ongoing assault against the constitutional rights of citizens who were being hauled before congressional committees and agency review boards. *See* Frickey, *supra* note 22, at 455-57.

265. *See id.* at 416 (arguing that in one such congressional investigation case, the Court "was using a picky legal technicality to avoid a constitutional confrontation with Congress").

266. *See id.* at 426-32; *see also* WALTER F. MURPHY, CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS 109-20 (1962); LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 85-103 (2000).

267. *See* Frickey, *supra* note 22, at 432-37 (describing how the Court "trimmed back some of its most controversial [avoidance] precedents" following widespread criticism); *see also,*

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the avoidance canon fell off considerably.[268] Indeed, the Court's occasional post-1957 avoidance cases have been described as "footnotes" to its aggressive use of avoidance in the earlier subversive activities cases[269]—a description that also would fit the Roberts Court's post-2012 avoidance cases. Thus, once congressional and public criticism undermined the Warren Court's underlying reasons for invoking the avoidance canon in the first place—that is, preservation of the Court's legitimacy—the Warren Court, like the Roberts Court, ratcheted down its use of the canon and entered a period of retreat during which it invoked the canon only minimally.

One important difference, however, between the Warren Court's and the Roberts Court's avoidance retreats is that during the Warren Court's ratcheting-down period, it issued several new opinions that trimmed back some of its most controversial avoidance precedents.[270] Further, by the mid-1960s, the Warren Court had experienced a change in personnel and thereafter simply struck down McCarthy-era statutes that sought to limit individuals' constitutional rights.[271] By contrast, the Roberts Court's ratcheting-down

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e.g., MURPHY, *supra* note 266, at 239-41. Indeed, Chief Justice Warren supposedly remarked of his colleague Justice Frankfurter that "Felix changed on Communist cases because he couldn't take criticism." Roger K. Newman, *The Warren Court and American Politics: An Impressionistic Appreciation*, 18 CONST. COMMENT. 661, 677 (2001) (reviewing POWE, *supra* note 266) (quoting the papers of Drew Pearson); *see also* POWE, *supra* note 266, at 141-42 (discussing the shift in Justice Frankfurter's jurisprudence).

268. *See* Frickey, *supra* note 22, at 430 (explaining that by the 1957 Term, the Court's use of the avoidance canon to guard against congressional abuse of political dissidents "was starting to flag").

269. *See id.* at 437-39.

270. *See, e.g.*, Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 888-90, 894-99 (1961) (narrowing *Greene v. McElroy*, 360 U.S. 474 (1959)); Barenblatt v. United States, 360 U.S. 109, 116-17, 133 (1959) (narrowing *Watkins v. United States*, 354 U.S. 178 (1957)); Uphaus v. Wyman, 360 U.S. 72, 76-77 (1959) (distinguishing *Sweezy v. New Hampshire ex rel. Wyman*, 354 U.S. 234 (1957), and *Pennsylvania v. Nelson*, 350 U.S. 497 (1956)). *But see* Scales v. United States, 367 U.S. 203, 223-30 (1961) (using avoidance aggressively to save a statute).

271. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 444-45, 449 (1969) (per curiam) (invalidating a state syndicalism statute); United States v. Robel, 389 U.S. 258, 259-61 (1967) (invalidating the prohibition against employment of Communist Party members in any defense facility); Whitehill v. Elkins, 389 U.S. 54, 55-56, 61-62 (1967) (invalidating a state's loyalty oath requirement); Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 71-73, 77-78, 81 (1965) (invalidating a requirement that Communist Party members must register); Lamont v. Postmaster Gen., 381 U.S. 301, 302-03, 305 (1965) (invalidating a statute requiring detention of Communist propaganda); Aptheker v. Sec'y of State, 378 U.S. 500, 501-02, 505 (1964) (invalidating a prohibition against providing passports to Communists); *see also* Frickey, *supra* note 22, at 437-39. *But cf.* Zemel v. Rusk, 381 U.S. 1, 3 (1965) (upholding the denial of passport validation for travel to Cuba).

period has been marked by continued avoidance of constitutional questions—across several cases in which it did not invalidate the statute or even mention the avoidance canon.[272] Rather than reverse course entirely, it has engaged in "stealth" or "passive" avoidance.

B. Bickelian Passive Virtues

Alexander Bickel introduced the concept of the "passive virtues" of judicial decisionmaking in a *Harvard Law Review* foreword summarizing the 1960 Supreme Court Term[273] and in his book *The Least Dangerous Branch*.[274] As noted above, Bickel coined the term "passive virtues" to describe a court's prudent refusal to decide cases on substantive grounds if narrower grounds exist on which the case can be resolved.[275] Bickel argued that the passive virtues are necessary because of something he termed "the counter-majoritarian difficulty"—that is, the fact that unelected judges can and do invalidate laws enacted by the people's democratically accountable representatives.[276] He identified several doctrines that could be used in service of the passive virtues, including ripeness, standing, the political question doctrine, and dismissals of appeals for lack of a substantial federal question.[277] He called these doctrines "techniques of 'not doing,' or devices for disposing of a case while avoiding judgment on the constitutional issue it raises."[278] Bickel argued that the Court uses these tools to avoid deciding big, consequential questions when narrower grounds will suffice, and he encouraged it to keep doing so—in part to protect the Court's legitimacy and its ability to adjudicate important constitutional questions when necessary.[279]

A second way to view the Roberts Court's later-Term approach to the avoidance canon is as a version of Bickel's passive virtues. In other words, in ratcheting down its use of the avoidance canon in response to critical commentary, the Court may be borrowing a page from Bickel and employing a

272. *See supra* Part II.A.

273. *See* Bickel, *supra* note 21.

274. *See* BICKEL, *supra* note 23, at 111-98.

275. *See generally id.*; Bickel, *supra* note 21.

276. *See* BICKEL, *supra* note 23, at 16-23 (capitalization altered).

277. *See* Bickel, *supra* note 21, at 42-47. The idea of dismissing appeals for want of a federal question is anachronistic given the lack of any substantial appellate jurisdiction in the modern Supreme Court.

278. BICKEL, *supra* note 23, at 169.

279. *See id.* at 116 (arguing that the standing requirement in particular "creates a time lag between legislation and adjudication" that "cushions the clash between the Court and any given legislative majority and strengthens the Court's hand in gaining acceptance for its principles"); *see also* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1681-82 (2004).

form of the passive virtues—what we might call "passive avoidance"—that allows it to avoid difficult constitutional questions through the use of narrower interpretive tools.

The next two Subparts closely examine three techniques of "passive avoidance" that the Roberts Court has employed to help it evade some of the problems generated by reliance on the avoidance canon. Part III.B.1 theorizes about the Court's use of the rule of lenity and the federalism clear statement principle, two canons based in constitutional law that can be considered part of an "avoidance penumbra" because they enable the Court to avoid deciding constitutional questions on the merits while also side-stepping some of the criticisms that have been levied against use of the avoidance canon—including that it creates advisory opinions or amounts to a judicial power grab. Part III.B.2 similarly analyzes the Roberts Court's use of the "mischief" rule in a number of its later-Term cases, suggesting that it too is a tool of "passive avoidance." As explained below, the mischief rule enables the Court to adopt a statutory construction that conflicts with the statute's apparent plain meaning—while still claiming fidelity to Congress's intent and avoiding complicated constitutional questions.[280]

1. Avoidance penumbras: lenity and federalism

As noted, Bickel's article and book extolling the "passive virtues" identified several techniques and doctrines that the Court uses to avoid deciding constitutional issues, or at least to decide cases on narrower grounds. This Subpart suggests that the Roberts Court similarly has employed a number of techniques of "passive avoidance" that go one step further, enabling it to avoid deciding thorny constitutional questions without invoking the avoidance canon and without providing what are essentially advisory opinions on unresolved constitutional questions.[281]

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280. *See infra* Part III.B.2.

281. It is important to note that this form of constitutional avoidance differs from the manner in which Bickel himself advocated that the Court employ the avoidance canon. Bickel envisioned the Court using avoidance to sidestep constitutional issues, sending them back to Congress to decide in the first instance—but doing so while admonishing Congress about the serious constitutional values at stake. *See* BICKEL, *supra* note 23, at 156-61; *see also* Robert Weisberg, Essay, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 243 (1983) (explaining that Bickel urged courts "to finesse [certain constitutional] issues through devices that would effectively 'remand' the statute to the legislature"). The Roberts Court's later-Term cases have gone one step further than this, for in declining to engage the constitutional issue—or even mention the avoidance canon—they give no admonishment to Congress to reconsider the issue.

Bickel also argued that the passive virtues contributed to the Court's legitimacy by avoiding the appearance of internal conflict within the Court itself. *See* BICKEL, *supra*

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The rule of lenity and the federalism clear statement principle, for example, can be viewed as part of an "avoidance penumbra"[282] of sorts. I use the term "penumbra" because these two canons operate like the avoidance canon in that they steer courts away from statutory constructions that implicate constitutional concerns—such as due process, vagueness, and federalism violations—but do so in a manner that allows the Court to avoid engaging the constitutional question in depth. For example, unlike the avoidance canon, which requires that the rejected reading of a statute pose "serious constitutional problems,"[283] the rule of lenity requires only that the statute be ambiguous regarding its coverage of the defendant's behavior.[284] Similarly, the federalism clear statement principle requires only the absence of clear language demonstrating that Congress intended for the statute to cover the situation at issue despite the intrusion on an area normally regulated by the states.[285]

note 23, at 112 ("Occasions for differences in result would be infinitely fewer if certain techniques of the mediating way . . . were more imaginatively utilized."); Bickel, *supra* note 21, at 41 (arguing that there would be "fewer occasions" for the Justices to disagree if the passive virtue techniques were utilized more often). That benefit of the passive virtues is not, however, similarly achieved in the passive avoidance cases. Indeed, in many of the cases discussed in Part II above, concurring or dissenting opinions discussed the contentious constitutional questions at some length, openly disagreeing with the majority opinion.

But despite their failure to mask internal judicial disagreement, the tools of passive avoidance employed by the Roberts Court in recent years offer many of the benefits that Bickel touted—they enable the Court to refrain from stepping on the toes of the democratically elected branches and to avoid issuing advisory opinions on constitutional questions the Court is not deciding. *See* BICKEL, *supra* note 23, at 114-15 (describing the Court's obligation to avoid providing advisory opinions); *id.* at 206 (observing that a benefit of the passive virtues is that they "work relatively no binding interference with the democratic process"); *see also* Bickel, *supra* note 21, at 42 (suggesting that the standing doctrine ensures that advisory opinions are avoided). They have also shielded the Court from the kind of negative commentary that followed its open, aggressive use of the avoidance canon in cases such as *Northwest Austin*, *Skilling*, and *NFIB*. *See supra* Part I.

282. *Cf.* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

283. *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); *see also, e.g.*, United States *ex rel.* Attorney Gen. of the U.S. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909); Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 87 ("[T]he Court will supplant the otherwise-best result o[n]ly when it believes that there is a serious or substantial constitutional question involved.").

284. *See supra* text accompanying note 209.

285. *See, e.g.*, Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989) ("[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985), *superseded in other part by statute*, Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845 (codified at 42 U.S.C. § 2000d-7 (2017)))).

In other words, lenity and the federalism clear statement principle operate as default presumptions that place the burden on the proponent of a constitutionally troublesome interpretation to demonstrate that the statute clearly covers the conduct at issue (in the case of lenity), or clearly evinces a congressional intent to tread on state authority (in the case of the federalism clear statement principle). The avoidance canon, on the other hand, operates as a trump card that empowers the Court to avoid following the statute's clear meaning—that is, to openly rewrite or strain the statute's meaning—in order to evade a potential constitutional violation. Both of these tools, and especially the federalism clear statement principle, certainly *can* be used to rewrite or strain the statute's meaning, but they enable the Court to do so without openly admitting that it is engaging in such rewriting or straining; instead, the Court can simply insist that the text was not clear enough to unmistakably apply to the conduct or tread on the state authority at issue.

Further, neither the rule of lenity nor the federalism clear statement principle requires the Court to resolve (or nearly resolve) the constitutional question at issue, as the avoidance canon does. When invoking lenity or the federalism clear statement principle, the Court need not decide that the statute, if read broadly, would (or probably would) violate due process or intrude on state sovereignty to a degree that is *impermissible*. Indeed, the presumption underlying the federalism clear statement principle is that federal laws *may* intrude on state powers, so long as Congress makes its intent to do so exceptionally clear in the statute's text.[286] Clarity, rather than substantive constitutional validity, is the touchstone of the principle. Similarly, the Court need not decide that a criminal statute is impermissibly vague in order to invoke the rule of lenity. It need only decide that the statute is unclear about whether the defendant's behavior is covered; that is enough for lenity to kick in and tip the scales in favor of the defendant.[287] Both canons thus operate as tiebreakers that apply whenever there is ambiguity about the scope of the statute—although the federalism clear statement principle is more potent than the rule of lenity because it applies unless the statute is *exceptionally* clear about Congress's intent to reverse the federalism norm by intruding on areas usually regulated by the states.

By contrast, when the Court invokes avoidance, it must come very close to resolving the constitutional question raised by the interpretation it is rejecting—essentially providing an advisory opinion concluding that the rejected interpretation would, or probably would, violate the Constitution.

286. *See* sources cited *supra* note 212.

287. *See, e.g.*, Staples v. United States, 511 U.S. 600, 619 n.17 (1994) (noting that under the rule of lenity, "an ambiguous criminal statute is to be construed in favor of the accused"); United States v. Granderson, 511 U.S. 39, 54 (1994) (similar); United States v. Bass, 404 U.S. 336, 347 (1971) (similar).

Even under the modern form of avoidance sometimes employed by the Court, the Court must at least conclude that there is a strong possibility that the rejected reading would violate the Constitution.[288] In contrast to the rule of lenity and the federalism clear statement principle, avoidance requires much more than a finding that the statute is ambiguous—it requires significant constitutional analysis.[289] Thus, by invoking lenity or the federalism clear statement principle instead of the avoidance canon, the Court can decide less, or rest its decision on narrower grounds, than it can when it invokes the avoidance canon.

Consider, for example, the Court's approach to the potential federalism problem in *Bond*.[290] A majority of the Court seemed to take the federalism issue presented by the case seriously. Several of the Justices discussed federalism concerns at oral argument.[291] And the opinion issued by the Court spent a full paragraph explaining that the federal government possesses only "limited powers" and that the states retain the rest—including the police power and the power to define local crimes.[292] But there were countervailing constitutional arguments supporting the government's reading of the statute as well—that the Constitution "deliberate[ly] . . . avoid[s] placing subject matter limitations on the National Government's power to make treaties," and that the Court "ha[d] never held that a statute implementing a valid treaty exceeds Congress's enumerated powers."[293] Rather than resolve this difficult constitutional question, the Court nodded toward the avoidance canon[294] and then fell back on the federalism clear statement principle to extricate itself from the potential constitutional quagmire: "We conclude that, in this curious case, we can insist on a *clear indication that Congress meant to reach* purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States."[295]

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288. *See supra* notes 25-28 and accompanying text.

289. *See* Daniel Ortner, *The Merciful Corpus: The Rule of Lenity, Ambiguity and Corpus Linguistics*, 25 B.U. PUB. INT. L.J. 101, 104 (2016) ("Applying lenity . . . requires a low threshold of ambiguity."); Phillip J. Riblett, Note, *Avoiding the Avoidance Canon: Subconstitutional Facial Challenge in* Clark v. Martinez, 19 GEO. IMMIGR. L.J. 409, 421-22 (2005) (noting that application of the avoidance canon comes "close to a straightforward constitutional analysis").

290. Bond v. United States, 134 S. Ct. 2077 (2014); *see supra* Part II.A.3.

291. *See supra* note 146 and accompanying text.

292. *See Bond*, 134 S. Ct. at 2086.

293. *See id.* at 2087.

294. *See id.* ("Notwithstanding this debate, it is 'a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'" (quoting Escambia County v. McMillan, 466 U.S. 48, 51 (1984) (per curiam))).

295. *Id.* at 2090 (emphasis added).

Despite the fact that the *Bond* majority opinion mentioned the avoidance canon and openly discussed the constitutional treaty power issue, the Court's decision was different in at least two important ways from its early-Term decisions in *Northwest Austin*, *Skilling*, and *NFIB*. First, by relying on the federalism clear statement principle rather than the avoidance canon, the Court avoided opining on whether a federal treaty-implementing statute exceeds the scope of Congress's powers if it covers local, intrastate crimes. Instead, the Court was able to merely note that regulation of criminal conduct that occurs within a state's borders is usually governed by state law, and that if the treaty-implementing statute covered such conduct, it would intrude on an area normally regulated by the states. From there, it was able to invoke the clear statement principle and insist on clarity from Congress before it would construe the statute to cover Bond's conduct, without deciding whether such intrusion is permissible in order to effectuate a treaty.

Second, because the Court stopped at this threshold point—stating that since Congress did not make clear that it intended *X* reading of the statute, and *X* reading runs into federalism issues, the Court would adopt *Y* reading instead—the *Bond* majority opinion did not have to openly admit to rewriting the statute or to adopting a reading that was not straightforward or natural. Indeed, quite the opposite—the *Bond* majority claimed that the reading it adopted was most consistent with the statute's text.[296] These are both passive virtues—avoiding saying more about the constitutional issue than is necessary, and avoiding the appearance of a judicial power grab that can accompany interpretations that openly circumvent a statute's text.

2. The "mischief" rule

A third tool of passive avoidance that the Court has employed in its later-Term cases is the "mischief"[297] rule. It makes theoretical sense that the Court would turn to this rule to fill the role previously played by the avoidance canon, for at least two reasons. First, talking about the mischief the statute was designed to address enables the Court to tie its statutory readings closely to the expectations that legislators had when they enacted the statute.[298] This is a powerful way to combat charges of judicial activism and to preserve the Court's institutional legitimacy—whether in response to accusations that it is

296. *See id.* ("[A]s a matter of natural meaning, an educated user of English would not describe Bond's crime as involving a 'chemical weapon.'" (quoting 18 U.S.C. § 229(a)(1))).

297. *See supra* note 106.

298. *Cf.* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 324 (1990) (identifying the countermajoritarian difficulty and positing that "[a]ny result not related to majoritarian expectations may seem illegitimate in a democracy").

overstepping its judicial role and effectively legislating, or as a general means of ameliorating the countermajoritarian difficulty.[299] Second, the Roberts Court, and Chief Justice Roberts in particular, has shown a tendency to pay attention to the events that motivated a statute's enactment, even in the early-Term cases in which it invoked the avoidance canon. In *Skilling*, for example, the Court interpreted the mail fraud statute to cover certain conduct precisely because the statute was enacted to override a previous judicial decision dealing with that conduct.[300] Thus, in the Roberts Court's jurisprudence, avoidance and statutory design long have gone hand in hand.

That said, the Roberts Court's use of the mischief rule rule in recent years differs in certain important respects from how the Supreme Court has traditionally employed the rule.[301] Indeed, one might describe the Roberts Court's recent approach as a repurposed, or textualized, use of the mischief rule. Like the classic mischief rule, the Roberts Court's version establishes a core problem that the statute was designed to cover and insists that the statute does not apply beyond that core. But unlike the traditional mischief rule, the Roberts Court's version grounds the statute's core meaning not just in the history that motivated its enactment, but also in linguistic aids such as dictionary definitions, the whole act rule, and language canons like *noscitur a sociis*—that is, in textualist interpretive tools. In *Yates*, for example, the plurality interpreted the statute's core meaning to encompass document destruction based largely on the evidence tampering statute's origins in the Sarbanes-Oxley Act, which was enacted in response to the document destruction and financial fraud that occurred during the Enron scandal.[302] But the Court backed up that core meaning by invoking the *noscitur a sociis* canon,[303] arguing that the list terms preceding "tangible object" in the statute—including "record" and "document"—all refer to items used to record or

299. *See supra* text accompanying note 276.

300. *See* Skilling v. United States, 561 U.S. 358, 399-402 (2010); *supra* notes 50-52 and accompanying text; *see also* Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 868-70 (2017).

301. The mischief rule traditionally has relied on legislative history to establish the evil that the statute was designed to address. For the classic example, see Church of the Holy Trinity v. United States, 143 U.S. 457, 463-64 (1892) (relying on testimony presented before congressional committees to determine the "evil which [the statute] was designed to remedy"). *See also* United States v. Carbone, 327 U.S. 633, 638-39 (1946) (relying on legislative history to establish the "evil at which the Act was directed").

302. *See* Yates v. United States, 135 S. Ct. 1074, 1081 (2015) (plurality opinion); *supra* notes 106-11 and accompanying text.

303. *Noscitur a sociis* translates from Latin as "it is known by its associates" and directs courts to give an individual word in a list a meaning consistent with the words that surround it. *See Noscitur a Sociis*, BLACK'S LAW DICTIONARY (10th ed. 2014).

preserve information,[304] and with dictionary definitions showing that the terms "mak[e] a false entry in" and "falsif[y]" normally "take as grammatical objects records, documents, or things used to record or preserve information."[305] This is a textualist twist on the traditional mischief rule.

Likewise, in *Bond*, the Court interpreted the core meaning of the Chemical Weapons Convention's implementing statute as limited to the use of chemicals in warfare or acts of terrorism, relying primarily on the fact that the Convention was prompted by concerns about war crimes and terrorism.[306] As in *Yates*, however, the Court shored up this mischief argument with dictionary definitions and an appeal to ordinary meaning—arguing that "the use of something as a 'weapon' typically connotes '[a]n instrument of offensive or defensive combat'" and that "as a matter of natural meaning, an educated user of English would not describe Bond's crime as involving a 'chemical weapon.'"[307]

Similarly, in *Adoptive Couple*, the Court argued that the core problem ICWA sought to address was the destruction of intact Indian families by child welfare agencies—and that such destruction could not occur in situations where the child's biological father never had custody of the child prior to the initiation of the adoption proceedings.[308] The Court reinforced this argument with numerous dictionary definitions, noting that the statutory term

304. *See Yates*, 135 S. Ct. at 1085 (plurality opinion) ("'Tangible object' is the last in a list of terms that begins 'any record [or] document.' The term is therefore appropriately read to refer, not to any tangible object, but specifically to the subset of tangible objects involving records and documents, *i.e.*, objects used to record or preserve information." (alteration in original) (quoting 18 U.S.C. § 1519)).

The statute at issue in *Yates* reads:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . , or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

18 U.S.C. § 1519 (2017).

305. *Yates*, 135 S. Ct. at 1086 (plurality opinion) (alterations in original).

306. *See* Bond v. United States, 134 S. Ct. 2077, 2090 (2014) ("[T]he chemicals in this case are not of the sort that an ordinary person would associate with instruments of chemical warfare. The substances that Bond used bear little resemblance to the deadly toxins that are 'of particular danger to the objectives of the Convention.'" (quoting Ian R. Kenyon, *Why We Need a Chemical Weapons Convention and an OPCW?*, *in* THE CREATION OF THE ORGANISATION FOR THE PROHIBITION OF CHEMICAL WEAPONS: A CASE STUDY IN THE BIRTH OF AN INTERGOVERNMENTAL ORGANISATION 1, 17 (Ian R. Kenyon & Daniel Feakes eds., 2007))); *supra* text accompanying notes 140-41.

307. *Bond*, 134 S. Ct. at 2090 (alteration in original) (first quoting *Weapon*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2002); and then quoting 18 U.S.C. § 229(a)(1)).

308. *See* Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2561-62 (2013); *supra* text accompanying notes 131-35.

"'continued' means '[c]arried on or kept up without cessation' or '[e]xtended in space without interruption or breach of conne[ct]ion.'"[309] The Court also employed dictionary definitions to support its construction that the statutory term "breakup" requires "[t]he discontinuance of a relationship" or "an ending as an effective entity,"[310] arguing that "when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no 'relationship' that would be 'discontinu[ed]'—and no 'effective entity' that would be 'end[ed]'—by the termination of the Indian parent's rights."[311]

In each of these cases, the Court's textualized mischief rule approach enabled it to decide the case on narrower grounds than it could have if it had used the avoidance canon, because the rule helped demonstrate that the Court's chosen construction was plausible, if not textually required. This is quite a contrast from the approach taken in *Northwest Austin*, *Skilling*, and *NFIB*, where each opinion invoking avoidance openly acknowledged that the construction it adopted was not the straightforward, natural reading of the statute.[312]

The Court's embrace of the mischief rule in recent cases may be, at least in part, a strategic move designed to counter critics' charges of judicial activism following the aggressive use of avoidance in its early-Term cases. In other words, the Roberts Court may be employing a textualized mischief rule both in order to avoid invoking the disfavored avoidance canon, and to demonstrate that the Court's statutory readings are consistent with the statutes' text and design—not judicial usurpations of the legislature's power.

A critic might counter that the alternate, constitutionally acceptable interpretations adopted in the later-Term cases simply were more textually plausible than those at issue in the early-Term cases, and that this fact accounts for the Court's emphasis on textualist canons and arguments in the later-Term

309. *See Adoptive Couple*, 133 S. Ct. at 2560 (alterations in original) (quoting *Continued*, 1 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY (21st prtg. 1981)).

310. *Id.* at 2562 (alteration in original) (first quoting *Breakup*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1992); and then quoting *Breakup*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 307)).

311. *Id.* (alterations in original).

312. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 562-63 (2012) (opinion of Roberts, C.J.) ("The most straightforward reading of the mandate is that it commands individuals to purchase insurance."); Skilling v. United States, 561 U.S. 358, 402-13 (2010) (acknowledging that the defendant's vagueness challenge "has force" and paring the statute to its core to avoid vagueness problems); Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 206-11 (2009) (acknowledging that the language of the bailout provision suggests that the utility district was not a political subdivision, but nevertheless concluding that constitutional concerns and statutory structure support a different construction).

cases. Indeed, the alternate interpretations adopted by the Court in *Northwest Austin* and *Skilling* continue to look highly implausible no matter how hard one squints at them. But the same can be said for the statutory interpretations adopted by the Court in *Yates*, *Bond*, and *King*. The Court had to strain the statutory text in these later-Term cases much as it did in its early-Term cases—to argue that a fish is not a "tangible object,"[313] that the use of toxic household chemicals to injure a romantic rival does not count as the use of a "chemical weapon,"[314] and that an "Exchange established by the State" includes exchanges established by the federal government.[315]

C. Benefits of Passive Avoidance

If the Court has been engaging in a form of passive avoidance in its recent Terms, the question arises: Is this, on balance, a good or a bad thing? This Subpart suggests that passive avoidance—avoiding constitutional questions without invoking the avoidance canon—may be a positive development in the Court's statutory jurisprudence.

Let us first consider the ways in which "passive" avoidance differs from "traditional" avoidance.[316] Traditional avoidance typically begins with an explanation that *X* interpretation of a statute would raise serious constitutional doubts or would likely violate the Constitution. It thus requires at least some discussion and analysis of the constitutional doctrine at issue. Indeed, in several of the Roberts Court's early-Term cases, ordinary avoidance involved serious, in-depth discussion of the relevant constitutional doctrine.[317] This discussion is typically followed by a liberating invocation of some version of the avoidance canon, such as: "[W]hen statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems."[318] Traditional avoidance empowers the Court to then choose

313. *See* Yates v. United States, 135 S. Ct. 1074, 1079 (2015) (plurality opinion).

314. *See* Bond v. United States, 134 S. Ct. 2077, 2087 (2014).

315. *See* King v. Burwell, 135 S. Ct. 2480, 2488, 2492-96 (2015).

316. By "traditional," I mean both the "classic" and "modern" forms of avoidance employed by the Court over the years. *See supra* text accompanying notes 25-27.

317. *See NFIB*, 567 U.S. at 548-61 (opinion of Roberts, C.J.); *Nw. Austin*, 557 U.S. at 202-04; Bartlett v. Strickland, 556 U.S. 1, 21-25 (2009) (opinion of Kennedy, J.); Office of Senator Mark Dayton v. Hanson, 550 U.S. 511, 513-15 (2007); Gonzales v. Carhart, 550 U.S. 124, 150-54 (2007); *cf. Skilling*, 561 U.S. at 408 (acknowledging without lengthy discussion that construing the statute "to proscribe a wider range of offensive conduct" would pose vagueness problems).

318. *E.g.*, Jennings v. Rodriguez, 138 S. Ct. 830, 836 (2018); *see also, e.g.*, Clark v. Martinez, 543 U.S. 371, 381 (2005) (explaining that avoidance is "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious

footnote continued on next page

Y interpretation of the statute, even while acknowledging that *X* interpretation constitutes the most "straightforward" or "natural" reading of the statute.[319]

Passive avoidance operates somewhat differently. It need not involve any constitutional analysis or discussion at all. Indeed, the Court can simply invoke the mischief that the statute was designed to remedy and rely on that mischief to define the outer limits of the statute's reach in a way that excludes the conduct that, if covered, would make the statute constitutionally problematic. In this way, the Court can avoid the potential constitutional difficulty without analyzing or even mentioning the constitutional issues at stake. This is essentially what the Court did in *Adoptive Couple*.[320] Alternately, as in *Elonis*, the Court may simply read a requirement or limitation into the statute that has the effect of avoiding the constitutional issue, without reference to the mischief rule or to the constitutional difficulty.[321]

Even where passive avoidance does involve recognition of the constitutional issues, this can be accomplished in a manner that differs noticeably from traditional avoidance. Where, for example, the Court employs the rule of lenity in lieu of traditional avoidance, it can simply state that the statute is ambiguous regarding its coverage of the defendant's conduct and proceed to resolve the ambiguity in favor of the defendant. No vagueness analysis is required. Similarly, where the federalism clear statement principle operates as the substitute for avoidance, the Court can simply explain that the federal statute regulates an area ordinarily regulated by states and can insist on absolute clarity from Congress regarding its intent to displace the states' authority. Then, finding such clarity lacking, the Court can choose an alternative construction that does not apply the federal statute to the situation at hand. No substantive analysis of the federalism concerns is required, and no rewriting of the statute is necessary—just a simple presumption that tips the scales in favor of *Y* rather than *X* interpretation.[322]

The chief difference between traditional and passive avoidance, then, is that the latter enables the Court to avoid becoming mired in complex

constitutional doubts"); United States *ex rel.* Attorney Gen. of the U.S. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.").

319. *See* sources cited *supra* note 317.

320. *See supra* note 129 and accompanying text.

321. *See supra* notes 175-78 and accompanying text.

322. *See, e.g.*, Bond v. United States, 134 S. Ct. 2077, 2088-92 (2014) (invoking the "well-established principle that 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers,'" proceeding to find no clear indication that Congress intended to cover Bond's local crime, and therefore construing the statute not to apply to her crime (quoting Gregory v. Ashcroft, 501 U.S. 452, 460 (1991))).

constitutional analyses that ultimately amount to no more than advisory opinions (since the Court is unwilling to invalidate the statute in the end). A second difference is that passive avoidance, because it essentially ignores the constitutional issue[323]—or dances around it by declaring that "ambiguity means the criminal defendant wins" or that "lack of clarity about Congress's intent to intrude on state authority means the law does not apply here"—enables the Court to avoid the appearance that it is rewriting or tweaking a clear statutory text. Both of these differences strike me as virtues of passive avoidance.

Avoiding entanglement with difficult constitutional questions unless absolutely necessary is one of the avoidance canon's underlying goals.[324] Passive avoidance seems to achieve that goal more effectively than traditional avoidance, because it allows the Court to sidestep the constitutional difficulty without engaging in significant constitutional analysis—and even, at times, without mentioning the constitutional issue at all.[325] That is, it allows the lack of clarity in the statute—as opposed to a serious constitutional difficulty—to serve as the justification for rejecting a problematic interpretation. This is an advantage over traditional avoidance—which, as critics have noted, often leads to the effective adjudication of the constitutional question the Court purports to avoid.[326]

Relatedly, passive avoidance has the benefit of preventing the Court from providing what are in effect advisory opinions on matters of constitutional law, as it essentially did in *Northwest Austin*, *Skilling*, and *NFIB*. This is a virtue for several reasons. First, it helps to preserve the Court's legitimacy because the Court does not appear to be priming the pump for innovative constitutional interpretation at a later date. By contrast, the avoidance-based construction in *Northwest Austin*, followed closely by the Court's outright invalidation of the VRA's preclearance provisions four years later in *Shelby County v. Holder*,[327] gave the impression that the Court had deliberately used the avoidance canon to lay the groundwork for novel constitutional principles that it could then understatedly adopt in a subsequent case.[328]

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323. Many lenity opinions do not even mention the vagueness and due process concerns undergirding the canon. *See, e.g.*, Abramski v. United States, 134 S. Ct. 2259, 2280-82 (2014) (Scalia, J., dissenting); Maracich v. Spears, 133 S. Ct. 2191, 2222 (2013) (Ginsburg, J., dissenting); United States v. Granderson, 511 U.S. 39, 54 (1994).

324. *See, e.g.*, William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 836 (2001) (suggesting that avoidance is an important tool for preventing "constitutional confrontation[s] between the Court and Congress").

325. This was the approach taken in *Yates* and *Elonis*. *See supra* Parts II.A.1, .4.

326. *See, e.g.*, Schauer, *supra* note 283, at 89 ("[T]here is only negligible difference between the effect of the tentative decision in an [avoidance] case and the effect of a final decision in a case that actually decides the constitutional question.").

327. *See* 133 S. Ct. 2612, 2619-20, 2627-31 (2013).

328. *See, e.g.*, Re, *supra* note 15, at 175.

Second, passive avoidance is more consistent with the rule of law. It is generally better for the Court to resolve constitutional issues in cases that squarely present them than to use a case that is itself decided on a different ground to foreshadow how the Court is likely to resolve the constitutional issue down the line.[329] The latter approach sows confusion and risks a premature decisionmaking process, especially since the Court knows that its constitutional analysis will not have any practical effect in the case before it.

Third, passive avoidance may diminish the risk that lower courts will take the Court's constitutional opining too seriously, or as tantamount to a constitutional ruling. Because classic avoidance puts the constitutional issue front and center, there is a real danger that lower courts will treat what are essentially dicta as final determinations of constitutional issues and build off those dicta in their own reasoning in subsequent cases. Passive avoidance, by contrast, avoids this kind of extensive constitutional dicta and reduces the danger that lower courts will treat the Court's premature analysis as the equivalent of a final adjudication. This is because even where the Court employs lenity or the federalism clear statement principle to passively avoid the constitutional issue, the signal it sends is not that the statute crossed a constitutional line, but rather that the statute was not clear enough about its intended scope to justify confronting the constitutional issue.

For similar reasons, passive avoidance is less likely than traditional avoidance to chill legislative action. As Frederick Schauer has explained, traditional avoidance sends a powerful signal from the Court that Congress cannot ignore; Congress thus will refrain from amending the statute in a manner that reaffirms the interpretation that the Court "avoided." As Schauer put it, "it would be quite silly for Congress to engage in this effort only to face a highly likely invalidation" once it "know[s] that . . . the Supreme Court think[s] such a statute probably unconstitutional."[330] In other words, once the Court has construed a statute to avoid *X* interpretation on the ground that *X* interpretation presents serious constitutional difficulties, it is highly improbable that Congress will turn around and amend the statute to insist that it in fact means *X*—even if *X* is actually the meaning that Congress originally intended. By contrast, when the Court employs the rule of lenity or the federalism clear statement principle to avoid the constitutional question, it is not impossible to imagine Congress subsequently amending the relevant

329. *Cf.* Katyal & Schmidt, *supra* note 4, at 2122-23 (criticizing traditional avoidance for freeing courts from the "useful discipline of facing the real ramifications" of their constitutional opinions); Re, *supra* note 15, at 182 (criticizing the Roberts Court's approach to avoidance for "signal[ing] major decisions while postponing the decisions' consequences").

330. Schauer, *supra* note 283, at 88-89.

statute to make clear that it does indeed, say, criminalize the destruction of fish[331] or cover local crimes such as spreading household chemicals on the mailbox of one's romantic rival.[332] After all, the Court has not declared the statutes' extension to fish or local crimes *unconstitutional*; it has merely ruled that the statute as currently worded *does not clearly extend* to fish or local crimes and that it is better, out of concern for vagueness and respect for federalism, to err on the side of noninclusion. In so doing, the Court has, in effect, declared that *if* Congress wishes to criminalize particular behavior or to supersede state authority in a particular field, then it must make this intent absolutely clear in the statute's text. This kind of ruling invites, rather than discourages, Congress to correct the Court's mistake, if indeed the Court misjudged the statute's intended scope.

In addition, passive avoidance may be less likely to contravene Congress's intent than is traditional avoidance. This is particularly so when the Court uses the mischief rule as a means of passive avoidance; because the mischief rule is tethered to Congress's purpose and design, it is unlikely to lead to a statutory construction that leaves out (or covers) an application that Congress clearly contemplated and intended for the statute to reach (or exclude). For instance, it seems improbable that Congress intended for the evidence-tampering statute in *Yates* (inspired by corporate fraud and enacted as part of the Sarbanes-Oxley Act) to cover the destruction of fish; indeed, an amicus brief submitted by Senator Oxley himself strongly indicated otherwise.[333] Similarly, it seems doubtful that Congress intended for the treaty-implementing statute in *Bond* to reach a spurned wife's use of household chemicals to injure her husband's paramour.[334]

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331. *See* Yates v. United States, 135 S. Ct. 1074 (2015); *supra* Part II.A.1.

332. *See* Bond v. United States, 134 S. Ct. 2077 (2014); *supra* Part II.A.3.

333. *See* Brief for the Honorable Michael Oxley as Amicus Curiae in Support of Petitioner at 21-24, *Yates*, 135 S. Ct. 1074 (No. 13-7451), 2014 WL 3101371. Oxley's brief explained that "obstruction of justice provisions are a patchwork of different rules," reflecting a deliberate congressional choice not to "impose a one-size-fits-all standard that applies to all conduct" but instead to enact separate statutes keyed to specific kinds of fraud. *Id.* at 23; *see also id.* at 21 ("[T]he government's reading of [the statute] tends to convert what was intended as a scalpel into a hatchet."); *id.* at 23 ("The legislative record shows that [the statute] was meant to serve a particular purpose, in the particular context of corporate financial fraud.").

334. It is possible that Congress intended for the statute at issue in *Adoptive Couple* to bar the termination of parental rights for Indian parents who never had custody of their children, but it is also possible that Congress simply never contemplated the statute's application to such a situation. *See supra* Part II.A.2.

Similarly, in *King*, it seems likely that Congress simply failed to anticipate the widespread use of federal rather than state exchanges to purchase health insurance, and that it therefore could not have intended to deny those enrolled on federal exchanges the tax subsidies that made the ACA work. *See, e.g.*, King v. Sebelius, 997 F. Supp. 2d 415,

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But this is not necessarily the case for the early-Term avoidance cases discussed in Part I above. Indeed, it is doubtful that Congress intended for the honest services statute at issue in *Skilling* to prohibit only bribery and kickback schemes,[335] and highly improbable that Congress intended for the political subdivision at issue in *Northwest Austin* to be exempt from the VRA's preclearance requirements.[336]

There are also notable potential drawbacks to the Court's use of passive, rather than traditional, avoidance. But the drawbacks are, in my view, containable and outweighed by the benefits. For instance, passive avoidance could be criticized for obscuring the Court's true reasons for choosing *Y* interpretation over *X* interpretation of a statute, and for silently leaving in place a statute that several Justices believe contains serious constitutional

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430-31 (E.D. Va.) ("The relevant legislative history indicates that Congress did not expect the states to turn down federal funds and fail to create and run their own Exchanges. Instead, Congress assumed that tax credits would be available nationwide because every state would set up its own Exchange."), *aff'd sub nom.* King v. Burwell, 759 F.3d 358 (4th Cir. 2014), *aff'd*, 135 S. Ct. 2480 (2015); *see also* David F. Hamilton, *Federal Courts and Partisan Conflict*, 50 IND. L. REV. 127, 135 (2016) (calling Congress's failure to list federal exchanges in the statutory phrase at issue an "obvious mistake[] in drafting").

Congress's intent regarding the intentionality of the threat prosecuted in *Elonis* is difficult to discern. There is historical and common law support for presuming an intent requirement in all criminal statutes. *See, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994) (noting that courts generally "interpret[] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them"); United States v. Balint, 258 U.S. 250, 251 (1922) ("[T]he general rule at common law was that the *scienter* was a necessary element in the indictment and proof of every crime . . . ."); 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.1, at 332-33 (2d ed. 2003). But it is also the case that legislators regularly want to appear tough on crime, *see, e.g.*, Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 957 (2013), and may prefer that criminal statutes have a broad scope.

335. *See, e.g.*, Cristina D. Lockwood, *Creating Ambiguity in the Void for Vagueness Doctrine by Avoiding a Vagueness Determination in Review of Federal Laws*, 65 SYRACUSE L. REV. 395, 430 (2015) ("[T]he Court in *Skilling* created a novel interpretation of the statute not previously adopted by any lower court and not reflective of Congress's intent to regulate activities other than bribes and kickbacks."); Donna M. Nagy, *Insider Trading, Congressional Officials, and Duties of Entrustment*, 91 B.U. L. REV. 1105, 1145-46 (2011) (explaining that Congress intended for the statute at issue to restore the "pre-*McNally*" honest services fraud doctrine and that the Court in *Skilling* gave the statute an unduly narrow construction); Harvey A. Silverglate & Monica R. Shah, *The Degradation of the "Void For Vagueness" Doctrine: Reversing Convictions While Saving the Unfathomable "Honest Services Fraud" Statute*, 2009-2010 CATO SUP. CT. REV. 201, 218-19 ("There is no support, either in case law, legislative history, or the text of the statute itself, for the [*Skilling*] majority's suggestion that Congress intended to limit the statute to bribes and kickbacks.").

336. *See* sources cited *supra* note 48.

infirmities. In criminal statutes, for example, the Court's mischief-based, veiled avoidance approach could lead to the preservation of vague statutes, with only a narrow carveout for the particular application that happened to come before the Court. This could render unclear the status of different applications of the statute that may also be void for vagueness—for example, applications that represent prosecutorial overreaches exploiting the statute's breadth.[337] Most such future applications will not be reviewed by the Supreme Court. But because the Court has not expressly said that the statute comes close to the constitutional line for impermissible vagueness, lower courts may not view the constitutional issue as seriously as they should in future cases. In other words, by employing passive avoidance, the Court could leave lower courts with inadequate guidance regarding how to proceed in the next case. This could result in inconsistent rulings across future cases, as different lower court judges make case-specific determinations about whether particular applications fall within the statute—with or without taking vagueness considerations into account, as they see fit. In the worst-case scenario, passive avoidance could lead to numerous rulings upholding convictions obtained through prosecutorial overreach if lower court judges err on the side of deferring to prosecutorial discretion in individual cases.

This potential drawback can be mitigated, however, if lower courts pay attention to the limits that the Supreme Court's statutory interpretations in passive avoidance cases do impose. The opinions in both *Yates* and *Bond*, for example, make clear that the respective statutes' reaches are limited to conduct that falls within the core mischief each statute was designed to address.[338] Such mischief-based limitations could serve as guidance to lower courts about the outer reaches of the statutes' prohibitions—at least as a matter of statutory interpretation, even if not as a matter of constitutional law.

Criticisms of the avoidance canon, both old and new, have tended to focus on two perceived problems: (1) the canon empowers judges to rewrite statutes in a manner that is inconsistent with their plain text; and (2) the canon provides judges with the opportunity to create, or lay the groundwork for,

337. *Cf., e.g.*, *supra* note 102 and accompanying text (recounting such a concern that bothered several Justices in *Yates*).

338. *See Yates*, 135 S. Ct. at 1079 (plurality opinion) ("Mindful that in Sarbanes-Oxley, Congress trained its attention on corporate and accounting deception and cover-ups, we conclude that a matching construction of [the statute] is in order: A tangible object captured by [the statute], we hold, must be one used to record or preserve information."); Bond v. United States, 134 S. Ct. 2077, 2090 (2014) ("The substances that Bond used bear little resemblance to the deadly toxins that are 'of particular danger to the objectives of the [Chemical Weapons] Convention.'" (quoting Kenyon, *supra* note 306, at 17)).

new constitutional doctrines.[339] Passive avoidance sidesteps the second problem entirely, for in giving judges a way to avoid constitutional difficulties without discussing or acknowledging those difficulties, it minimizes unnecessary (and potentially precedential) judicial opining about unresolved constitutional gray areas. Passive avoidance does not necessarily eliminate the first concern, however. Indeed, it could even empower judges to rewrite statutes with less transparency than that demanded by the traditional form of avoidance—a development that would exacerbate the countermajoritarian difficulty.

This danger, however, seems more theoretical than real. Indeed, the Roberts Court's recent passive avoidance jurisprudence suggests reason to hope that the rewriting problem may actually be mitigated, rather than amplified, through passive avoidance. Specifically, by relying on the rule of lenity and the mischief rule rather than avoidance to justify statutory readings that effectively avoid serious constitutional problems, the Court may be subjecting itself to a natural check on the judicial interpretation of statutes. The rule of lenity, after all, applies only where the statute is ambiguous; even if that ambiguity is arrived at only after considering all available interpretive tools, it provides at least some check against blatant disregard of a plain statutory text. Similarly, the mischief rule enables the Court to adopt a particular statutory construction only if that construction falls within the core mischief that Congress sought to address when it enacted the statute; in so doing, the rule makes congressional intent a guiding principle that should serve to ameliorate the countermajoritarian difficulty.

Passive avoidance may also be criticized on the ground that it fails to flag the constitutional problem raised in the case, and thereby fails to educate Congress about the constitutional lines it should steer clear of in future legislation. This criticism has some merit and weighs heaviest in cases in which the Court relies exclusively on the mischief rule to effectuate its passive avoidance. This is because the mischief rule, by itself, provides no information about constitutional boundaries or issues. For example, if the Court has serious

339. *See, e.g.*, HENRY J. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* BENCHMARKS 196, 211-12 (1967) (explaining that the avoidance canon risks judicial rewriting of statutes); Katyal & Schmidt, *supra* note 4, at 2111-12 (criticizing the avoidance canon for empowering courts both to rewrite statutes and to articulate new constitutional principles); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983) (observing that the avoidance canon "create[s] a judge-made constitutional 'penumbra' that has much the same prohibitory effect as the judge-made (or at least judge-amplified) Constitution itself"); Re, *supra* note 15 (arguing that the Roberts Court has used avoidance canon to lay the groundwork for "disruptive" constitutional rulings); Schauer, *supra* note 283 (criticizing the avoidance canon for enabling courts to interpret statutes in a manner the drafters did not intend and would not prefer).

equal protection concerns about *X* interpretation, but in construing the statute relies solely on the evil the statute was designed to remedy, Congress will never be put on notice about the Court's equal protection concerns. In cases where the Court uses lenity or the federalism clear statement principle as a tool of passive avoidance, however, this criticism carries less weight. The rule of lenity, notably, is animated by due process concerns of fair notice; the federalism clear statement principle is similarly animated by Tenth Amendment concerns. Thus, the Court's very reliance on these canons signals to Congress that the statute (or application) at issue raises due process or federalism concerns. While such loose signaling may not provide the level of clarity about constitutional limits that a more traditional avoidance analysis might provide, it similarly identifies the constitutional issue and puts Congress on notice that it should be more specific about the criminal statute's scope or its intent to intrude on state regulatory authority.

Critics might also argue that passive avoidance eliminates a useful tool that empowers the Court to protect "underenforced constitutional norms" without expending political capital or making difficult line-drawing decisions.[340] This is a fair point. In my view, however, the judicial protection of underenforced constitutional norms through statutory interpretation is itself a departure from the underlying goal of the avoidance canon—to minimize judicial interference with the work of Congress. That is, judicial use of the avoidance canon to protect underenforced constitutional norms is itself a form of judicial activism rather than restraint. For in construing a statute to mean *Y* rather than *X* because *X* interpretation—although more natural or straightforward—treads on some underenforced constitutional value, the Court deliberately rejects Congress's intended meaning in favor of a plausible but second-best meaning that it can use to deliver a constitutional lecture. So while passive avoidance may remove a useful quiver from the judiciary's bow, in so doing, it may also better serve the underlying principles of constitutional avoidance than does its traditional counterpart.

Finally, passive avoidance might be criticized on the ground that, like traditional avoidance, it distorts Congress's intent by giving the statute a different meaning or scope than legislators envisioned when they drafted it. A truly restrained Court, one might argue, would do better to adopt the meaning Congress intended and confront the constitutional question head-on—leaving it to Congress to concoct a constitutionally sound revision that is

340. *See, e.g.*, Katyal & Schmidt, *supra* note 4, at 2159-60 (arguing that the avoidance canon is a "valuable method" for enabling judicial enforcement of constitutional norms that are difficult to enforce, while still "leav[ing] the hard line-drawing and enforcement problems" to Congress, "the branch best suited to resolve them").

"close to its most-preferred position."[341] In other words, it sometimes might be better for the Court to invalidate a statute as unconstitutional than to contort it into a different statute. I am sympathetic to this concern and agree that in some cases—particularly those in which Congress's intent to cover the problematic application is clear—striking down the statute may be the better approach. My point is simply that when the Court concludes otherwise—irrespective of whether observers agree with the decision to avoid the constitutional question and uphold the statute—passive avoidance may be a better means to that end than traditional avoidance.

Conclusion

This Article has highlighted a shift, or at least a noteworthy inconsistency, in the Roberts Court's avoidance canon jurisprudence over the past twelve years. It has argued that whereas the early Roberts Court boldly invoked the canon to openly rewrite statutes whose plain meaning it found constitutionally problematic, in recent years the Court has tamped down its use of the avoidance canon—often refusing to mention the canon or the constitutional issue, and instead finding other interpretive tools through which to rewrite or reinterpret a statute whose most straightforward reading presents constitutional difficulties. This Article has offered a possible explanation for the evolution of the Court's use of avoidance, suggesting that the Court may be engaging in a deliberate retreat in response to criticism of its once-aggressive use of the canon. Throughout, this Article's aim has been to highlight the Court's unnoticed, passive use of avoidance in recent cases and to inspire deeper theoretical reflection about what motivates the Court's decision to rely—or to avoid relying—on this powerful interpretive canon. In the end, this Article suggests that passive avoidance may be a desirable judicial practice—and the truest form of constitutional avoidance.

341. *See* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 105 (1997).

Appendix
The Roberts Court's Use of the Avoidance Canon over Time, 2006-2017

Each avoidance canon opinion listed in Tables A.1 and A.2 below was evaluated to determine the level of constitutional discussion the Court engaged in when invoking the canon. An opinion was marked as containing "little discussion" if it merely mentioned a potential constitutional infirmity without providing analysis of how or why a particular interpretation might violate the Constitution. An opinion was marked as containing "some discussion" if it made more than minimal mention of the constitutional issue. Typically, these opinions explained the potential basis for the constitutional infirmity but did not evaluate the probability that the interpretation at issue would violate the Constitution. These discussions also were typically short in length (no more than one or two sentences). An opinion was coded as containing "significant discussion" if it evaluated the potential constitutional infirmity in depth and/or contained a detailed explanation of why the interpretation at issue probably would run afoul of the Constitution.

Each opinion was also evaluated for the level of reliance it placed on the canon. An opinion was coded as containing "passing reliance" if it made minimal reference to the canon, or mentioned it only as a fallback or add-on argument supporting a construction already reached through other interpretive tools. An opinion was coded as involving "some reliance" on the avoidance canon if it made more than minimal reference to the canon, but did not rely on the canon as the main justification for the construction it adopted. An opinion was coded as containing "primary reliance" if it relied primarily or heavily on the avoidance canon to justify the result reached.

Finally, each opinion was coded as "liberal," "conservative," or "unspecified." Because ideology is difficult to gauge and involves judgment calls, and in order to facilitate replicability, I imported the ideology coding used for the Spaeth Supreme Court Database[342] rather than devise my own parameters for evaluating the ideological valence of the opinion.

342. For information on this database, see *The Genesis of the Database*, WASH. U. L.: SUP. CT. DATABASE, https://perma.cc/GMN5-EC5A (archived Feb. 23, 2019). For access to datasets, see *Modern Database: 2018 Release 02*, WASH. U. L.: SUP. CT. DATABASE, https://perma.cc/S5LU-PMUZ (archived Feb. 23, 2019).

Table A.1
Early-Term Cases: 2006-2012

Case	Opinion Type	Constitutional Discussion	Reliance on Avoidance	Opinion Ideology
Rapanos v. United States[343]	Plurality	Little	Passing	Conservative
Gonzales v. Carhart[344]	Majority	Some	Some	Conservative
Office of Senator Mark Dayton v. Hanson[345]	Majority	Some (secondary)	Some	Conservative
Kimbrough v. United States[346]	Concurrence (Scalia, J.)	Little	Passing	Liberal
Gonzalez v. United States[347]	Dissent (Thomas, J.)	Some	Passing	Liberal
Boumediene v. Bush[348]	Dissent (Roberts, C.J.)	Significant	Primary (strained reading)	Conservative
Bartlett v. Strickland[349]	Plurality	Significant	Some	Conservative
Hawaii v. Office of Hawaiian Affairs[350]	Majority	Some	Primary	Unspecified
FCC v. Fox Television Stations, Inc.[351]	Dissent (Breyer, J.)	Little	Passing	Liberal

343. 547 U.S. 715 (2006).
344. 550 U.S. 124 (2007).
345. 550 U.S. 511 (2007).
346. 552 U.S. 85 (2007).
347. 553 U.S. 242 (2008).
348. 553 U.S. 723 (2008).
349. 556 U.S. 1 (2009).
350. 556 U.S. 163 (2009).
351. 556 U.S. 502 (2009).

Case	Opinion Type	Constitutional Discussion	Reliance on Avoidance	Opinion Ideology
Northwest Austin Municipal Utility District No. One v. Holder[352]	Majority	Significant	Primary (strained reading)	Liberal
Citizens United v. FEC[353]	Dissent (Stevens, J.)	Significant	Primary	Unspecified
Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.[354]	Dissent (Kennedy, J.)	Some	Some (secondary)	Conservative
Holder v. Humanitarian Law Project[355]	Dissent (Breyer, J.)	Significant	Passing	Liberal
Skilling v. United States[356]	Majority	Some	Primary (strained reading)	Conservative
Brown v. Plata[357]	Majority	Some	Primary (indirect)	Liberal
Perry v. Perez[358]	Majority	Little	Passing	Conservative
Reynolds v. United States[359]	Dissent (Scalia, J.)	Some	Passing	Conservative
National Federation of Independent Business v. Sebelius[360]	Opinion of Roberts, C.J.	Significant	Primary (strained reading)	Liberal

352. 557 U.S. 193 (2009).
353. 558 U.S. 310 (2010).
354. 559 U.S. 573 (2010).
355. 561 U.S. 1 (2010).
356. 561 U.S. 358 (2010).
357. 563 U.S. 493 (2011).
358. 565 U.S. 388 (2012).
359. 565 U.S. 432 (2012).
360. 567 U.S. 519 (2012).

Table A.2
Later-Term Cases: 2013-2017

Case	Opinion Type	Constitutional Discussion	Reliance on Avoidance	Opinion Ideology
Arizona v. Inter Tribal Council of Arizona, Inc.[361]	Dissent (Thomas, J)	Significant	Primary	Conservative
Arizona v. Inter Tribal Council of Arizona, Inc.	Dissent (Alito, J.)	Some	Some	Conservative
Descamps v. United States[362]	Majority	Little	Some	Liberal
Descamps v. United States	Concurrence (Thomas, J.)	Some	Primary	Liberal
Adoptive Couple v. Baby Girl[363]	Concurrence (Thomas, J.)	Significant	Primary	Conservative
Paroline v. United States[364]	Majority	Some	Some	Liberal
Bond v. United States[365]	Majority	Some	Some	Liberal
B&B Hardware, Inc. v. Hargis Industries, Inc.[366]	Dissent (Thomas, J.)	Some	Some (secondary)	Liberal
Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.[367]	Dissent (Alito, J.)	Little	Passing	Conservative

361. 133 S. Ct. 2247 (2013).
362. 133 S. Ct. 2276 (2013).
363. 133 S. Ct. 2552 (2013).
364. 134 S. Ct. 1710 (2014).
365. 134 S. Ct. 2077 (2014).
366. 135 S. Ct. 1293 (2015).
367. 135 S. Ct. 2507 (2015).

Case	Opinion Type	Constitutional Discussion	Reliance on Avoidance	Opinion Ideology
Arizona State Legislature v. Arizona Independent Redistricting Commission[368]	Dissent (Roberts, C.J.)	Some	Some	Conservative
Taylor v. United States[369]	Dissent (Thomas, J.)	Significant	Some	Liberal
Mathis v. United States[370]	Majority	Some	Some	Liberal
Voisine v. United States[371]	Dissent (Thomas, J.)	Some	Some	Liberal
McDonnell v. United States[372]	Majority	Significant	Some	Liberal

368. 135 S. Ct. 2652 (2015).
369. 136 S. Ct. 2074 (2016).
370. 136 S. Ct. 2243 (2016).
371. 136 S. Ct. 2272 (2016).
372. 136 S. Ct. 2355 (2016).