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Active Avoidance: The Modern Supreme Court and Legal Change

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ARTICLES

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AND LEGAL CHANGE

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ACTIVE AVOIDANCE: THE MODERN SUPREME COURT AND LEGAL CHANGE

Neal Kumar Katyal* & Thomas P. Schmidt**

The Supreme Court in the last few years has resolved some of the most divisive and consequential cases before it by employing the same maneuver: construing statutes to avoid constitutional difficulty. Although the Court generally justifies the avoidance canon as a form of judicial restraint, these recent decisions have used the canon to camouflage acts of judicial aggression in both the statutory and constitutional spheres. In particular, the Court has adopted dubious readings of federal statutes that would have been unthinkable in the canon's absence. We call this move the "rewriting power." The canon has also been used to articulate new constitutional norms and significant breaks from settled doctrine. We call this move "generative avoidance." Both practices are facets of the broader phenomenon of "active avoidance," which is the use of the avoidance canon to usher in legal change.

This Article defines and critiques active avoidance by analyzing in detail two recent instances — Northwest Austin Municipal Utility District No. One v. Holder and National Federation of Independent Business v. Sebelius (NFIB) — as well as providing a briefer analysis of Bond v. United States. In Northwest Austin, the Court rewrote the bailout provision of the Voting Rights Act and gave birth to the "equal sovereignty" doctrine. In NFIB, the Court construed away a constitutional problem with the individual mandate and gave birth to what we call the "antinovelty doctrine": the principle that statutes without historical precedent are constitutionally suspect. The Article demonstrates that the rewriting power can have a countermajoritarian effect equal to — or even greater than — outright invalidation, because of certain features of our legislative process. And it shows how generative avoidance, by undermining some of the structural guarantors of judicial restraint, may encourage the Court to spearhead constitutional change. For these reasons, this Article sounds a cautionary note about the recent judicial temptation to use the avoidance canon. The Article concludes by offering a defense of a properly limited avoidance canon.

INTRODUCTION

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.¹ Recent Terms feature several high-profile examples. In *National Federation*

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¹ Others have discussed the use of the avoidance canon in the Roberts Court. See Neal Devins, *Constitutional Avoidance and the Roberts Court*, 32 U. DAYTON L. REV. 339 (2007); Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP.

of *Independent Business v. Sebelius*² (*NFIB*), for instance, Chief Justice Roberts first found the Affordable Care Act³ unconstitutional under the Commerce Clause, only to pivot and (largely) uphold the Act under the separate constitutional power of taxation.⁴ Upholding the Act required abandoning the “more natural[.]” reading of it, as the Chief Justice gently phrased it, but he was not troubled, invoking the Court’s “duty to construe a statute to save it.”⁵

Presumably he was so untroubled because that move has become so familiar. In another major decision in 2009, the Court (in an opinion by Chief Justice Roberts) upheld the constitutionality of Section 5 of the Voting Rights Act of 1965⁶ by construing a separate part — the so-called “bailout” provision⁷ — to permit covered jurisdictions (like the local utility that was a plaintiff in the case) to terminate their covered status.⁸ The Court justified this otherwise indefensible reading with the avoidance canon, opining along the way that the Act’s constitutionality was in doubt because of the constitutional command to treat States equally — without ever quite explaining the source or scope of that command.⁹ As we all know now, the Court used this new constitutional doctrine of state equality a few years later to gut a key part of the Voting Rights Act in *Shelby County v. Holder*.¹⁰

What happened in *Shelby County* was not an anomaly. It was, rather, a predictable consequence of the way that the canon of constitutional avoidance is being conceptualized and deployed today. Though

CT. REV. 181. Professor Neal Devins argues that the Roberts Court “need not make extensive use of constitutional avoidance,” Devins, *supra*, at 339, because Congress is “less engaged in constitutional matters” and seems less “poised to strike back at the Court” than it has been in the past, *id.* at 345. Professor Richard Hasen explores inconsistencies in the Roberts Court’s applications of the canon. Professor Richard Re has also written a short, incisive piece on the Roberts Court’s tendency to signal legal change before actually following through with it, and “active avoidance” could be seen as an instance of that broader tendency. See Richard M. Re, *The Doctrine of One Last Chance*, 17 GREEN BAG 2D 173, 182 (2014). Our focus is different from these prior efforts: we use recent avoidance decisions by the Roberts Court to assess and critique the avoidance canon more generally.

² 132 S. Ct. 2566 (2012).

³ Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

⁴ 132 S. Ct. at 2600.

⁵ *Id.*

⁶ 52 U.S.C.A. §§ 10101–10702 (West 2014) (originally enacted as Pub. L. No. 89-110, 79 Stat. 437).

⁷ *Id.* § 10303(a).

⁸ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009). Disclosure: One of the authors argued *Northwest Austin* in the Supreme Court and the health care case in the Courts of Appeals for the Fourth, Sixth, and Eleventh Circuits on behalf of the United States.

⁹ See *id.* at 203.

¹⁰ 133 S. Ct. 2612 (2013).

it originated as a “cardinal principle” of judicial self-restraint,¹¹ the so-called “avoidance” canon now camouflages acts of judicial aggression in both the constitutional and statutory spheres. This aggression comes in two forms. First, the Court has used avoidance cases to announce new rules of constitutional law and major departures from settled doctrine. We call this move “generative” avoidance. Indeed, in *NFIB*, the canon enabled the Court to launch a radical principle — that statutes without historical precedent are constitutionally suspect.¹² Second, the Court seems indifferent to whether the resulting statutory interpretations are at all plausible. The canon has thus in practice morphed into a twisted corollary: a court should not strike down a law if it can be judicially rewritten to avoid constitutional difficulty. We call this move the “rewriting power.” Generative avoidance and the rewriting power are two facets of a phenomenon that we call *active* avoidance — using the avoidance canon to usher in legal change.

Active avoidance — despite the rhetorical dressing that often clings to it — is anything but a “cardinal principle” of judicial restraint. It leads to tortured constructions of statutes that bear little resemblance to laws actually passed by the elected branches. Such judicially rewritten laws can be nearly impossible to change by legislative action. In addition, avoidance leads to — even requires — sloppy and cursory constitutional reasoning. Instead of encouraging judges to carefully limit the zone of unconstitutionality, which defines the space in which the elected branches may not operate, avoidance often leaves legislators in the dark. The avoidance canon requires only that a judge advert to some theoretical “doubt” about a law’s constitutionality, which naturally leads to vague and imprecise constitutional analysis. Further, the canon allows judges to articulate constitutional principles in a context where the real impact of those principles — the invalidation of a law — will be unfelt. The statute by definition will survive, even if in distorted form. This deferral of consequences is anomalous in a case-or-controversy legal system that (ostensibly) abhors advisory opinions; the deferral of consequences may also embolden the Court to spearhead constitutional change.

*Northwest Austin Municipal Utility District No. One v. Holder*¹³ is a prime example of both problems. Without the avoidance canon, the Court’s interpretation of the bailout provision of the Voting Rights Act was indefensible. Even with the canon, none of the litigants seriously thought that the statutory arguments had a chance — they were that weak. But the Court adopted that implausible reading nonetheless,

¹¹ *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

¹² See *infra* section II.B.2, pp. 2139–49.

¹³ 557 U.S. 193 (2009).

and in the course of doing so created a constitutional principle that has come to be called the “equal sovereignty” doctrine. The Court, however, did not have to fully ventilate and explain its new “equal sovereignty” doctrine because it was not used to invalidate the Voting Rights Act. The Court did not explain the underlying source of the principle — textual, structural, or otherwise. All the Court had to do was gesture toward a possible constitutional problem, and so it pointed to a line of cases requiring that new states be admitted to the Union on equal terms. Yet the Court never explained how or why it could ignore the fact that those cases had been expressly limited to state equality at the time the States were admitted to the Union, and did not reach their subsequent treatment. Moreover, the Court never grappled with the Reconstruction Amendments, whose purpose, in significant part, was to limit state sovereignty in the name of racial equality.

NFIB is vulnerable to similar criticisms. The Chief Justice’s pronouncements regarding the Commerce Clause did not matter at all to the outcome of the case. Invoking avoidance, the Court upheld the Act on an entirely separate ground.¹⁴ But, as in *Northwest Austin*, its digression yielded a new constitutional principle with potentially large ramifications — the Court suspended the presumption of constitutionality for statutes that lack historical precedent. This “antinoventy doctrine,” as we call it, is alien to the text, history, and structure of the Constitution. It is at odds with *McCulloch v. Maryland*.¹⁵ And it makes a strange pair with the rewriting power: the antinoventy doctrine sees newness as an argument for invalidation, yet the rewriting power results in statutes that are so unprecedented they have literally never even been enacted.

Our purpose here is not to take sides on the merits of these constitutional issues. Something more basic is afoot. The avoidance canon developed in large part to alleviate the countermajoritarian difficulty — the problem of unelected judges undoing the work of elected legislators.¹⁶ But in some circumstances the rewriting power can be even more antidemocratic than outright invalidation, by putting in place a law that Congress did not want and that, because of various inertial forces laced into our constitutional system, Congress will not be able to change.

Moreover, when avoidance is employed in a generative manner, the problems multiply. One key structural limitation on the judicial power is that constitutional reasoning is moored to a specific case. Legal

¹⁴ The Chief Justice argued that he would not have reached that alternate ground if not for his Commerce Clause holding. We explain why that explanation is unpersuasive below. See *infra* pp. 2137–38.

¹⁵ 17 U.S. (4 Wheat.) 316 (1819).

¹⁶ See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

principles are sharpened by concrete application; abstraction is curbed by context. This is one of the oldest principles of common law adjudication. Indeed, Article III's circumscription of the "judicial power" is grounded in the belief that the clash of legal arguments that are outcome determinative in a particular "Case" will generate better — and more limited — decisionmaking. But generative avoidance allows courts to evade, or at least soften, that structural limitation on the judicial power. That is because the Court does not have to fully face the impact of its constitutional reasoning when a challenged statute is ultimately upheld. The elaboration of a constitutional principle is mostly costless in that "Case."

The result is constitutional adventurism of a uniquely pernicious sort. Avoidance decisions profess a Brandeisian reticence about the judicial power, which (along with the fact that a statute is nominally upheld) allows the Court to renovate the Constitution with less visibility. The Court can thus proceed in the guise of judicial restraint. When the canon is deployed in the generative manner of *Northwest Austin* or *NFIB*, there is a mismatch between the rhetoric of restraint and the reality of constitutional aggression.

To be fair to the Court, this "aggression" is likely not self-conscious; it may be driven simply by the desire to have narrower rulings and greater unanimity — both of which are laudable goals.¹⁷ And the Justices do not just invent *ex nihilo* the constitutional doctrines that the avoidance canon beckons in. Constitutional litigators at the Court tend to look for atmospheric — ideas and facts that, while not strictly legal doctrines, may color the Court's view of a case. For many years, sophisticated litigants have been using the antinovelty concept as an atmospheric to their constitutional challenges. But now — thanks in part to the avoidance canon — the concept is leaking into the Court's constitutional doctrine. That trend leads to a more general point: the mix of modern constitutional litigation, where sophisticated litigants frame up arguments with constitutional-ish points, coupled with the avoidance doctrine, has given us a dangerous cocktail. The avoidance canon provides an opening for new doctrines, and the sophisticated litigants provide a source.

Part I of this Article dissects the avoidance canon as it is currently practiced in order to isolate its most problematic uses. Part II sharpens the focus by returning to *Northwest Austin*, *NFIB*, and last Term's

¹⁷ JEFFREY ROSEN, THE SUPREME COURT 224–25 (2007) (recounting an interview in which Chief Justice Roberts emphasized his aim to achieve more unanimous opinions); Neal K. Katyal, Op-Ed, *The Supreme Court's Powerful New Consensus*, N.Y. TIMES, June 26, 2014, <http://www.nytimes.com/2014/06/27/opinion/the-supreme-courts-powerful-new-consensus.html> [http://perma.cc/Y2N6-3AY7].

*Bond v. United States*¹⁸ as exemplars of active avoidance. Part III discusses a related question: if the avoidance canon can open the door to new constitutional principles, where do those principles come from? This Part uses the antinovelty doctrine to explore how atmospheric points of sophisticated constitutional litigants are elevated into legal doctrine. The influence that litigation choices have on the development of constitutional law is, of course, a topic broader than the avoidance canon. But the avoidance canon offers judges a unique opening to elevate atmospheric points into doctrine precisely because the new doctrine does not actually result in the invalidation of any law. Part IV turns to the prescriptive question of how avoidance should be used. It attempts to convert the normative critique of the prior Parts into practical advice.

I. AN ANATOMY OF AVOIDANCE

A. A Typology

The canon of constitutional avoidance is by now so firmly entrenched in American judicial practice that the Supreme Court has called it “beyond debate”;¹⁹ Judge Friendly once observed that to question it is “rather like challenging Holy Writ.”²⁰ The singular term “avoidance canon,” however, in fact encompasses a range of different practices. It may be that certain varieties of avoidance are as unimpeachable as the canon’s reputation would suggest, while others are far less defensible.²¹

To explore that suggestion, we first lay out a typology of avoidance. Three variables distinguish the different types: the amount of statutory

¹⁸ 134 S. Ct. 2077 (2014).

¹⁹ *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). As a descriptive matter, that claim is quite obviously false. See RICHARD H. FALLON, JR., ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 79–80 (6th ed. 2009) (describing the extensive academic debate about the avoidance canon).

²⁰ HENRY J. FRIENDLY, *BENCHMARKS* 211 (1967).

²¹ When we speak of the “avoidance canon” or “constitutional avoidance,” we refer only to the canon of statutory interpretation, that is “[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)) (internal quotation marks omitted). When we speak of the “varieties” or “types” of avoidance, we refer to the different ways in which the statutory canon has been applied. We do not refer to the other doctrines described in Justice Brandeis’s *Ashwander* concurrence, such as the practice not to “pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of,” *id.* at 347, even though those other doctrines are sometimes loosely included under the rubric of “constitutional avoidance.”

distortion introduced to “avoid” the constitutional question, the level of constitutional doubt needed to trigger the canon, and the nature of that doubt. As for the first variable: the avoidance canon, if it is doing any work in a case, will generally cause an interpreter to swerve from the “best” reading of a statute.²² That statement is intentionally agnostic about interpretive method: it applies whether the interpreter is a textualist, a purposivist, or something else (as long as one is reasonably rigorous and consistent about her method). The avoidance canon will cause some departure from whatever reading the method alone ideally entails. That space — between the best reading according to the interpreter’s ideal method and the avoidance-compelled reading — is what we mean by distortion. That space can be very small or very large, and our first variable is its extent. In a number of recent, high-profile cases that we discuss below, the space is quite large: the Court has endorsed statutory interpretations that would be unthinkable in the absence of the canon.²³ As those cases show, the canon empowers courts to abandon normal principles of statutory interpretation whenever a serious constitutional issue looms. We call this feature of avoidance the “rewriting power.”

The second variable is the level of constitutional doubt required to bring the canon into play. One form of avoidance, often called “classical” avoidance,²⁴ is triggered only in cases of *actual* unconstitutionality. To quote Justice Holmes’s formulation: “[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.”²⁵ Note that one of these two

²² See *Almendarez-Torres v. United States*, 523 U.S. 224, 270 (1998) (Scalia, J., dissenting) (“The doctrine of constitutional doubt does not require that the problem-avoiding construction be the *preferable* one — the one the Court would adopt in any event. Such a standard would deprive the doctrine of all function.”). Of course, a court *may* invoke the avoidance canon in support of a result that it would reach without the canon. But in such a case, the canon would be superfluous. The canon is significant and theoretically interesting precisely because it can displace what would otherwise be the best reading of a statute. See Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 89 (“*Ashwander* avoidance is only important in those cases in which the result is different from what the result would have been by application of a judge’s or court’s preconstitutional views about how a statute should be interpreted.”). In theory, it is possible that the canon could be used to decide between two different interpretations that are in exact equipoise, though it seems such a case would be quite rare. *Id.* at 83.

²³ It is difficult, if not impossible, to be perfectly agnostic about method when evaluating the amount of statutory distortion in these cases. When we discuss them below, we try either to show why the readings are implausible under different interpretive methods, or simply to employ a middle-of-the-road approach that would be palatable to most lawyers. See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 322 (1990) (noting the “underlying coherence in the Supreme Court’s practices of statutory interpretation”).

²⁴ See Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997).

²⁵ *Bloodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring).

“possible interpretations” must actually be “unconstitutional” in order for a court to adopt a saving construction.

This version of avoidance has been mostly superseded by “modern” avoidance.²⁶ Modern avoidance holds that constitutional *doubts* are enough to trigger the canon, without any need to adjudicate actual unconstitutionality. As the Court put it in *United States v. Delaware & Hudson Co.*²⁷ — often cited as the source of modern avoidance — “where 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.”²⁸ One supposed advantage of modern avoidance is that it makes a constitutional holding unnecessary: if the ground of decision in an avoidance case is really statutory, then the adjudication of a constitutional question could be challenged as advisory.²⁹ Whether or not that is true as a matter of Article III jurisdiction,³⁰ to avoid a direct constitutional ruling appears to be in harmony with the general attitude of reticence toward constitutional adjudication exemplified most notably by Justice Brandeis’s concurring opinion in *Ashwander v. Tennessee Valley Authority*.³¹ The modern version of the canon itself encompasses varying levels of constitutional doubt — it can (in theory, at least) be triggered by any constitutional doubt, however weak and inarticulate, or only by very grave doubts.

The third and final variable in our typology concerns the nature of the constitutional doubt (for modern avoidance) or holding (for classical avoidance) that activates the canon. On the one hand, the constitutional issue might involve the application of settled doctrines or principles to some new circumstance, with no new law being made in the process. For instance, there may be some question about whether a statute reaches a form of expression that would clearly be protected by

²⁶ Vermeule, *supra* note 24, at 1949.

²⁷ 213 U.S. 366 (1909).

²⁸ *Id.* at 408 (citing *Harriman v. Interstate Commerce Comm’n*, 211 U.S. 407 (1908)). Some think modern avoidance has a longer lineage. See John Copeland Nagle, *Delaware & Hudson Revisited*, 72 NOTRE DAME L. REV. 1495, 1510–12 (1997) (describing possible instances of the “doubts” canon preceding *Delaware & Hudson*).

²⁹ See *Delaware & Hudson*, 213 U.S. at 408 (“And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean [modern avoidance].”).

³⁰ See Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1206 n.58 (2006) (“At most . . . *Delaware & Hudson* identified the kind of ‘advisory opinions’ that courts are reluctant to provide as a matter of prudence, not the kind that they are barred from rendering as a matter of constitutional authority.”).

³¹ 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (“The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.”).

the First Amendment. Or settled doctrine might call for a balancing of interests, but it may be unclear how to strike the balance in a particular case. Both of those examples would involve the application of settled law to new circumstances. On the other hand, the canon may enable the creation of new constitutional norms, or it may allow for significant innovations of settled doctrines. When the canon is used in this latter way, we call it “generative” avoidance.³²

We are particularly interested in the first and last variables. The rewriting power and generative avoidance — together, active avoidance — are the forms of avoidance that are least justifiable under any account of the canon’s value and function, particularly when they occur together.

B. Assessing Active Avoidance

1. *The Rewriting Power.* — The first and most obvious problem with the rewriting power is that it leaves in place a law that Congress never passed and may never have wanted to pass.³³ Making matters

³² These are not hermetically sealed categories. It may not always be clear whether a doctrinal extension is merely an application of settled law or the creation of a new rule. But we still think “generative” avoidance is a useful category. First, in the mine-run of cases — such as *Northwest Austin* and *NFIB*, analyzed here — it *will* be clear which side of the line a constitutional holding falls on. Second, the distinction between a new rule and an application of an old one is already familiar to courts; whole areas of law are built upon it. For instance, in habeas law, “the retroactivity of [the Court’s] criminal procedure decisions turn[s] on whether they are novel.” *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013). When a case announces a “new rule,” the rule does not apply retroactively; when the case does not — that is, “when it is merely an application of the principle that governed a prior decision to a different set of facts” — then the rule may be available to a petitioner on collateral review. *Id.* (alterations omitted) (quoting *Teague v. Lane*, 489 U.S. 288, 307 (1989)) (internal quotation mark omitted). If that distinction is workable and useful in habeas law, it can also be workable and useful to a court considering whether it is appropriate to apply the avoidance canon.

³³ Our assessment of the rewriting power is limited to the judicial branch. We would need a different set of criteria to evaluate the practice of active avoidance by those interpreting statutes in the executive branch. *See generally* Morrison, *supra* note 30. There are, however, interesting parallels between the “rewriting power” in the Roberts Court and the aggressive positions presidential administrations have taken in interpreting a number of statutes. To take just a few examples: When U.S. forces remained in Libya past the sixty-day deadline of the War Powers Act, the Obama Administration contended they were not engaged in “hostilities” within the meaning of that law. *See Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 8–9 (2011) (statement of Harold Koh, Legal Adviser, U.S. Dep’t of State). When President Obama swapped five Guantanamo inmates for Sergeant Bowe Bergdahl, he did not provide advance notice to Congress despite a law that seemed clearly to require it. *See* National Defense Authorization Act for Fiscal Year 2014 § 1035(d), Pub. L. No. 113-66, 127 Stat. 853 (including notification requirement for all transfers or releases of Guantanamo detainees). The Administration explained that “the notification requirement should be construed not to apply to this unique set of circumstances.” Statement by NSC Spokesperson Caitlin Hayden on the NDAA and the Transfer of Taliban Detainees from Guantanamo (June 3, 2014) (on file with authors). And perhaps most infamously, the Office of Legal Counsel in the Bush Administration relied heavily on the constitutional avoidance canon in the so-called “torture memo” to say that criminal statutes prohibiting torture should be construed not to bar the use of enhanced interrogation techniques. *See* Memo-

worse, it may be impossible for Congress to undo the Court's statutory decision. The Constitution by design makes it hard to pass, repeal, or amend legislation. Under Article I, Section 7, both Houses must affirmatively vote legislation (or any amendment) up, and then the President must not veto it (or, if he does, the legislation must then receive a two-thirds majority of each House).³⁴ Within that process there are numerous chokepoints — such as congressional committees or filibusters — where a bill can become stuck. As a leading textbook has put it, a bill must navigate a number of “vetogates” to become law.³⁵

In ordinary settings, this friction is not a problem; it just means that passing a bill is pretty hard to do, by institutional design.³⁶ In the context of the rewriting power, however, this virtue becomes a vice: if the Court rewrites a statute in a way that a majority of Congress does not support, it creates a new law that is quite difficult for Congress to fix. The Constitution's architecture itself stymies the effort. If the gatekeeper at any one of the vetogates — the House of Representatives, the Senate, the President, a Senate minority capable of filibustering, a committee, even a committee chairperson — prefers the judicially rewritten law, a statutory amendment will fail. Indeed, even if every member of the House of Representatives thinks the Court's rewriting to be wrong, forty filibustering Senators — or even a single Senator chairing the committee with jurisdiction over the bill — can block a change and force the Court's new law to remain on the books, even though that law was never passed and never would have passed.³⁷ The upshot is that the rewritten statute is sticky and unlikely to go away.³⁸

randum from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, U.S. Dep't of Def., Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States, 11–12 (Mar. 14, 2003).

Constitutional concerns stemming from Article II often lurk, implicitly or explicitly, behind these interpretive moves. Assessing active avoidance in the executive branch is beyond the scope of this Article, but it strikes us as a related phenomenon and a fruitful avenue of future research. For an illuminating study of how some of these questionable interpretive moves by presidential administrations can be seen as a form of constitutional “self-help” in response to perceived congressional misdeeds, see David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 4–8, 76–80 (2014).

³⁴ U.S. CONST. art. I, § 7, cls. 2–3.

³⁵ WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION* 66–68 (4th ed. 2007).

³⁶ See, e.g., THE FEDERALIST NO. 62, at 417 (James Madison) (Jacob E. Cooke ed., 1961) (“[T]he facility and excess of law-making seem to be the diseases to which our governments are most liable . . .”); THE FEDERALIST NO. 73, *id.* at 496 (Alexander Hamilton) (“The injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.”).

³⁷ See William N. Eskridge, Jr., *Vetogates*, Chevron, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1444–46 (2008).

³⁸ See JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 105 (1997) (“[A] court misconstruing the legislature's statutes may often disempower it from implementing anything very close to the legislators' most preferred policy.”); John F. Manning, *The Nondelegation Doctrine as*

Professor William Eskridge has shown that, notwithstanding the bias toward inertia in our constitutional structures, Congress in fact “frequently overrides or modifies statutory decisions” by the Supreme Court and lower federal courts.³⁹ That historical pattern might suggest that our concern about legislative inertia is too simplistic. We do not think that is the case. First of all, for whatever reason — increased partisan polarization in Congress is at least partly to blame — congressional overrides have fallen off “dramatically” since 1998.⁴⁰ The Roberts Court, at least, cannot confidently rely on Congress to correct wayward interpretations. Second, it stands to reason that an override would be less likely to follow an avoidance decision. Constitutional issues tend to be controversial; to inject a constitutional issue into a statute (as an avoidance decision does) will only lessen the chances that a polarized Congress will coalesce around an override. As Professors Alexander Bickel and Harry Wellington once observed, “To raise constitutional doubts is to inhibit future legislative action.”⁴¹ That is not just because constitutional issues are polarizing: a rational Congress would generally be reluctant to take the time and energy required to pass a statute that a court has already signaled it might find unconstitutional.

Recent history bears this out. We have identified every majority opinion since Chief Justice Roberts joined the Court that expressly relies, at least in part, on the avoidance canon in reaching its conclusion about the meaning of a statute.⁴² Congress did not amend any of the provisions at issue in those cases in the aftermath of the Court’s decision — not one.⁴³ Meanwhile, statutory overrides as a whole have not

a Canon of Avoidance, 2000 SUP. CT. REV. 223, 255 (“[T]he avoidance canon may enshrine a result that could not have been adopted *ex ante*.”).

³⁹ William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 338 (1991).

⁴⁰ Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1340 (2014); see also Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 209 (2013).

⁴¹ Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 34 (1957).

⁴² *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013); *NFIB*, 132 S. Ct. 2566 (2012); *Skilling v. United States*, 130 S. Ct. 2896 (2010); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Office of Sen. Mark Dayton v. Hanson*, 550 U.S. 511 (2007); *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Rapanos v. United States*, 547 U.S. 715 (2006). Our definition of an avoidance case in this footnote includes some cases where the canon is “superfluous.” See *supra* note 22. And in some of these cases, it is at least disputable whether the majority in fact relied on the avoidance canon. We are casting a wide net to show that, even on a broad definition of an avoidance case, Congress has not overridden the Supreme Court.

⁴³ Congress has, at times, amended other provisions of those statutes. In *United States v. Williams*, 553 U.S. 285 (2008), the Court’s reading of the PROTECT Act did not implicate the First

been reduced to zero: every Congress from the start of the Roberts Court until 2011 overrode at least three Supreme Court decisions.⁴⁴ The data thus suggests that the rewriting power has significant anti-democratic costs.⁴⁵ That is ironic, since the avoidance canon is generally defended as a response to the countermajoritarian difficulty. In fact, avoidance often results in a rewritten law that cannot be revisited.

A stylized example will make this point clearer. Suppose the Court uses the avoidance canon to rewrite a law. Suppose also that an overwhelming majority of the legislature opposes the rewritten law. It may be, however, that those in the minority have control over one or more of the vetogates. In that case, a rewritten law with only the slimmest support in the legislature, ostensibly the branch entrusted with law-making, will nonetheless remain in place. Moreover, it may be that, if the Court had just invalidated the law, a majority of the legislature would have coalesced around a compromise version that was both constitutional and different from the judicially rewritten one. In that case, the avoidance canon would not only have put in place a new law; it would also have robbed the legislature of the chance to craft a legislative solution to a problem within the constitutional parameters laid out by the Court.⁴⁶

The rewriting power, then, may in practice have a countermajoritarian cost that *exceeds* that of outright judicial invalidation of a statute.⁴⁷ Moreover, because avoidance may be driven by mere doubt

Amendment, *id.* at 294–97, while a concurring opinion relied on the avoidance canon to narrowly construe the Act, *id.* at 307 (Stevens, J., concurring). The Act has since been revised a number of times, but the language of 18 U.S.C. § 2252A(a)(3)(B) (2012), the provision Williams violated that was at issue in the case, has not been changed. *Rapanos* involved the definition of “navigable waters” in the Clean Water Act, 33 U.S.C. § 1362(7) (2012). Again, the Act has been amended since that case, but not the definition of “navigable waters.”

⁴⁴ Christiansen & Eskridge, *supra* note 40, at 1340.

⁴⁵ We don’t have comprehensive data about overrides of avoidance-based decisions before the Roberts Court. We note, however, that only a small percentage of the congressional overrides identified in Professor Eskridge’s original study followed upon judicial decisions driven by the avoidance canon. See Eskridge, *supra* note 39, at 347 (noting that the “canons” were the primary reasoning in eighteen percent of Supreme Court decisions overridden by Congress, which means that the avoidance canon in particular would necessarily be a smaller percentage).

⁴⁶ See MASHAW, *supra* note 38, at 105. This point is a variant of the “theory of the second best”: where it is not possible to satisfy *all* the conditions necessary for a system to reach an overall optimum result, it is not always most optimal to satisfy as many of those conditions as possible. If we assume that it is generally optimal for a court to apply the legislative choices made by Congress, but that a constitutional problem makes it impossible to do that perfectly, it may in fact be more “optimal” to invalidate the law than reinterpret one provision. See generally Adrian Vermeule, *The Supreme Court 2008 Term — Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 17–23 (2009); R.G. Lipsey & R.K. Lancaster, *The General Theory of the Second Best*, 24 REV. ECON. STUD. 11 (1956).

⁴⁷ One counterargument would be that avoidance makes sense precisely because of legislative inertia. In other words, because it’s so difficult to get a law passed, the Congress that passed a bill would prefer to see its law blue-penciled rather than scrapped. The problem with that argu-

about a law's constitutionality, the law may have been rewritten even though it was perfectly constitutional. It should thus not be assumed that the rewriting power is a less drastic judicial intervention than invalidation of a statute.

We acknowledge that, to some extent, the problems with the rewriting power identified in this section will afflict all uses of avoidance. Any time a court introduces any statutory distortion, it is effectively imposing a new statute that may be impervious to a legislative override. That countermajoritarian cost may be justifiable in some circumstances, depending on the nature and gravity of both the distortion itself and the constitutional problem that causes it. For instance, where the statute approaches true ambiguity, or the statutory provision at issue is an interstitial detail that was not the real focus of legislative energy, it would be more acceptable for a court to impose its own reading to sidestep a significant constitutional problem. There is not a perfect verbal formula to guard the threshold of the avoidance canon. The important point is that courts must be sensitive to the canon's significant countermajoritarian costs, and should not accept as an article of faith that avoidance is always preferable to outright adjudication. As it is, the avoidance canon gives judges ammunition, cover, and a measure of psychological comfort when they are engaged in what every judge would probably agree in the abstract is unacceptable judicial behavior: rewriting a law.

2. *Generative Avoidance.* — Generative avoidance presents its own problems. The avoidance canon enables — even demands⁴⁸ — sloppy and cursory constitutional reasoning. One obvious reason is that the avoidance canon (in its modern form) asks a court to identify only constitutional doubt, not a definitive problem. It is thus unsurprising that an avoidance decision will lack the rigor and deliberateness of a full constitutional analysis. But there is another,

ment, we think, is that it will be true only in some circumstances. Sometimes, as in our example in the text above, *supra* p. 2121, a majority of Congress would prefer to rewrite its own constitutionally problematic law than have a court do so. And the avoidance canon has no resources to distinguish the two circumstances. There is, however, another doctrine addressing just that issue: severability. When this question comes up — should a law be blue-penciled or scrapped — the best course is for a court candidly to say when some part of it is unconstitutional without undue distortion, and then perform a severability analysis to decide whether the rest should be upheld. *See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161–62 (2010) (analyzing whether to sever a constitutional flaw from a statute). When a court uses the rewriting power, it is, in effect, implicitly assuming the outcome of the severability analysis and acting with less candor and transparency than a court that does the analysis explicitly.

⁴⁸ After all, if the Court were to analyze fully the constitutional principle that creates the “doubts,” it would subvert a core justification for avoidance — *declining* to engage in unnecessary constitutional analysis. *See NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979) (refusing to perform a full constitutional analysis in an avoidance case “as we would were we considering the constitutional issue”).

related reason, equally applicable to classical and modern avoidance, that the constitutional reasoning in an avoidance decision may be weaker: because a court can announce a constitutional principle without actually having to strike down a law, avoidance frees a court from the useful discipline of facing the real ramifications of that principle.

Put another way, the avoidance canon allows the Court to make constitutional law (and to have lower courts apply that new law) while deferring the institutional consequences of its decision.⁴⁹ If the Court is using the avoidance canon at all, it means the constitutionality of an act of Congress has been called into question.⁵⁰ Generally speaking, the most significant institutional consequence of a constitutional ruling is the invalidation of a duly enacted statute. As Justice Holmes put it, “to declare an Act of Congress unconstitutional . . . is the gravest and most delicate duty that this Court is called on to perform”;⁵¹ Chief Justice Marshall called it an “awful responsibility.”⁵² But the avoidance canon allows the Court to articulate (or at least advert to) a constitutional principle in a context where its real impact will not be felt. The Court can create constitutional law without facing its “gravest” consequence in the case at hand.

Avoidance thus frees constitutional adjudication from a key structural limitation on the judicial power. This key limitation — reflected in the case-or-controversy requirement of Article III and in the basic structure of common law adjudication — is that *reasons* are tied to *outcomes*. This relationship is a constant force for restraint in a common law system. If a common law court, for example, decides to adjust some private law doctrine, that choice must be made in a concrete dispute where the consequences of that choice are felt and apparent. The avoidance canon, however, severs reasons from outcomes because a court may give a legal rationale without having to face that rationale’s full logical consequence — invalidation of a statute. And because the judgment in an avoidance case seems to be less violent than

⁴⁹ See *Re*, *supra* note 1, at 182.

⁵⁰ It is still an open question whether a federal court should apply the avoidance canon when interpreting a state statute. Compare *Markadonatos v. Vill. of Woodridge*, 760 F.3d 545, 548–52 (7th Cir. 2014) (en banc) (Posner, J., concurring in the judgment) (applying the avoidance canon to interpret a state law), *with id.* at 553 (Easterbrook, J., concurring in the judgment) (“Only a state court can give an authoritative limiting construction to a state statute.”). See generally Abbe Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 *YALE L.J.* 1898, 1948–58 (2011).

⁵¹ *Blodgett v. Holden*, 275 U.S. 142, 147–48 (1927) (Holmes, J., concurring).

⁵² *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 400 (1819).

striking down a statute, the constitutional reasoning and its implications will receive less scrutiny.⁵³

The fusion of rationale and judgment as a structural limitation on courts is manifest in many areas of Anglo-American law. Perhaps the most obvious is the distinction between holding and dicta: only that part of the reasoning of an opinion that is necessary to the judgment is binding on future courts.⁵⁴ The common law method assures the soundness of a legal principle by tethering it to the concrete outcome of a case.⁵⁵ Courts develop a principle in a setting where its ramifications are evident. And, as a matter of precedent, the reasoning of an opinion is binding only as far as it is concretized in a case.

The same concern drives Article III standing requirements. Injury, causation, and redressability — the three bedrock requirements of standing — all ensure that law unfolds in a context where the structural sources of judicial restraint are operative. As the Court has put

⁵³ This problem of adventurism crops up in other areas of constitutional law as well. The harmless error doctrine, for instance, has long been the *bête noire* of the defense bar — a doctrine that courts cite when ruling against defendants while acknowledging that a constitutional violation occurred in prior proceedings. But it may be that in the long run the doctrine emboldens courts to provide legal protections to defendants: if courts can issue constitutional pronouncements without having to worry that a defendant will go free, they may be more lavish in making them. A similar point could be made about qualified immunity doctrine, at least where adjudication of the merits precedes the “clearly established” prong, *see* *Pearson v. Callahan*, 555 U.S. 223, 232 (2009), or about constitutional rulings regarding officer conduct that are subject to the good faith exception, *see* *Davis v. United States*, 131 S. Ct. 2419, 2427–29 (2011). *See generally* Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847 (2005). It is beyond the scope of this Article to grapple with the merits of those other classes of cases. We note, however, an important difference from the avoidance canon: the constitutional question in those other cases will generally involve whether the conduct of a single officer was constitutional in some particular factual circumstance. They do not question the constitutionality of a statute. Deciding questions of the latter type the Court has called its “gravest and most delicate duty,” whereas questions of the former type tend to be more limited and fact-bound. And because the institutional consequences for the Court tend to be greater when it is reviewing an act of Congress, the deferral of those consequences may be all the more problematic.

⁵⁴ Chief Justice Marshall explained why:

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399–400 (1821).

⁵⁵ As Oliver Wendell Holmes, Jr., once pithily put it: “It is the merit of the common law that it decides the case first and determines the principle afterwards.” *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 1 (1870). The common law method is not without its skeptics. *E.g.*, Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006). Needless to say, defending the common law method is beyond the scope of this Article. We note only that belief in the “merit” of the common law is so embedded in our legal culture and constitutional traditions that it provides a useful starting point for a critique of the avoidance canon.

it, standing doctrine “assure[s] that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.”⁵⁶ A generative avoidance decision, in contrast, may proceed without a “realistic appreciation of the consequences” of the constitutional principles it establishes.

This is not to say that avoidance decisions violate Article III in a formal sense — the Court is still adjudicating a live case.⁵⁷ And if the constitutional reasoning of an avoidance decision drives the statutory interpretation and therefore the outcome of the case, that reasoning is not technically dictum.⁵⁸ The point is that generative avoidance can produce a new constitutional principle without giving that principle its full effect. A court can lay down the legal framework for invalidating a law on constitutional grounds without having to follow through with invalidation. And because that consequence is deferred, the danger is that the Court will be less constrained in announcing the legal change. Moreover, it will almost always be possible for a skilled advocate to identify “constitutional doubt” in an interpretive culture as pluralistic as ours, so there is not much of a hermeneutic “check” on the avoidance canon trigger.⁵⁹

One might object that it is often true that a new principle will have ramifications that go far beyond an individual case, so that avoidance decisions are not all that anomalous for common law courts. For instance, the Supreme Court may announce a new constitutional principle to strike down some relatively insignificant local law, and that principle may foreshadow the invalidation of a much more significant federal law in a later case.⁶⁰ We still think generative avoidance is uniquely problematic. Even when invalidating a relatively insignificant law, the Court will be engaged in a self-conscious act of judicial review. It will therefore have to articulate a rule of constitutional law and then apply it. That articulation, in turn, will push the Court toward a more realistic and accurate apprehension of the consequences of the rule it announces. The dissent (if there is one) will be able to

⁵⁶ *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

⁵⁷ See Morrison, *supra* note 30, at 1205–06 n.58.

⁵⁸ See Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1256 (2006) (defining dictum as “an assertion in a court’s opinion of a proposition of law which does not explain why the court’s judgment goes in favor of the winner”).

⁵⁹ The development of a highly specialized and skilled Supreme Court bar, which we discuss in Part III, only exacerbates this phenomenon.

⁶⁰ For example, in *Blakely v. Washington*, 542 U.S. 296 (2004), the Court found that an application of the State of Washington’s mandatory sentencing scheme was inconsistent with the Sixth Amendment’s jury trial guarantee. *Id.* at 305. A year later, in *United States v. Booker*, 543 U.S. 220 (2005), the Court, relying on *Blakely*, struck down the provision of the Federal Sentencing Guidelines that made their application mandatory. *Id.* at 243.

explore and critique the implications of that rule, and presumably the critique will inform whether the Court adopts the rule in the first place.

A generative avoidance decision, by contrast, will be less visible because it does not itself invalidate any law.⁶¹ The prospect of public scrutiny and criticism of the decision will therefore operate as a less effective check.⁶² To the extent one values some kind of dialogue between the Supreme Court and the people in the elaboration of constitutional law, generative avoidance can “obscure[] the path of constitutional law from public view, allowing the Court to alter constitutional meaning without public supervision.”⁶³ Moreover, because the Court only has to say whether a question is sufficiently “doubtful,” and not what its answer is, it will necessarily be more vague about the new constitutional principle it implicitly endorses. That vagueness will make it harder to appreciate the ramifications of the new principle. In a sense, generative avoidance allows the Court to make constitutional law without fulfilling its *Marbury* “duty” to “say what the law is.”⁶⁴ With the avoidance canon, the Court can usher in legal change, change that will have countermajoritarian consequences (both in future invalidation and present distortion), without ever really saying clearly “what the law is.”

In short, the canon of constitutional avoidance produces decisions that are outliers in a system that demands a close connection between reasoning and outcome. That is because the articulation of a new constitutional principle is nearly costless for a court — no law is struck down as a result. The divorce of rationale and consequence can, in turn, produce decisions that break new ground without the concentration and deliberateness that normally attend constitutional innovations.

3. *The Rewriting Power, Generative Avoidance, and the Traditional Justifications for the Canon.* — How does our critique of certain forms of avoidance fit with the traditional justifications given for the canon of constitutional avoidance? Broadly speaking, there are three justifications for the canon in the literature.

The first bases the canon on a presumption about congressional intent. On this view, avoidance is a “tool” for choosing between alternative interpretations of a statute, “resting on the reasonable presumption

⁶¹ Consider the reception of *Northwest Austin*, which we discuss *infra* notes 105–108 and accompanying text.

⁶² See William H. Taft, *Criticisms of the Federal Judiciary*, 29 AM. L. REV. 641, 642 (1895) (“Nothing tends more to render judges careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subjected to the intelligent scrutiny of their fellow-men, and to their candid criticism.”).

⁶³ Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 63 (2010).

⁶⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

that Congress did not intend the alternative which raises serious constitutional doubts.”⁶⁵ That assumption has been roundly and persuasively criticized. As Judge Friendly first noted, there is no reason to presume that Congress operates only in areas free of constitutional doubt. Nor is there reason to think that Congress would prefer to see its words distorted because some federal judge harbors “doubts” about the constitutionality of its law⁶⁶: it is always possible that the judge, when pressed, will ultimately uphold the law, and, if not, “classical” avoidance can always lead to a saving construction anyway.⁶⁷ Congress may also prefer to have the constitutional question adjudicated finally so that it knows the boundaries within which it may legislate.⁶⁸

These criticisms are even more unanswerable in the context of the rewriting power and generative avoidance: the more Congress’s words have been distorted, the less likely Congress can be presumed to intend the distortion, and the newer the constitutional doctrine, the more likely it is that Congress would prefer to have the doctrine well defined. If the constitutional norm in an avoidance decision is totally new, it is even more implausible that Congress was legislating against this backdrop.

A second justification regards avoidance as a species of judicial restraint.⁶⁹ This view is most famously propounded in Justice Brandeis’s *Ashwander* opinion: because of the “great gravity and delicacy” of its function in passing upon the validity of an act of Congress,⁷⁰ the Court, as a matter of self-governance, “will shrink from exercising”⁷¹ this function except as a “last resort.”⁷² Alexander Bickel similarly justified the canon as a means to mitigate the countermajoritarian difficulty — that is, the apparent anomaly of unelected judges invalidating the work of the elected branches in a democracy.⁷³

⁶⁵ *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

⁶⁶ See FRIENDLY, *supra* note 20, at 210.

⁶⁷ *Id.*

⁶⁸ Applied to classical avoidance, the congressional-intent rationale would go as follows: it is presumed that Congress does not intend to legislate an actually unconstitutional result. But that is bottomed on the same unpersuasive empirical presumption that Congress stays in bounds; after all, a court’s invocation of the classical avoidance canon means it would otherwise interpret a congressional statute precisely to achieve an unconstitutional result. Another conceivable justification for classical avoidance could be to presume that Congress would prefer to have its statute distorted (or rewritten) rather than invalidated if it crosses the constitutional line. It seems to us that this presumption cannot be applied in gross; it requires a context-specific consideration akin to severability doctrine. See *supra* note 47.

⁶⁹ See Morrison, *supra* note 30, at 1206–08 (describing the “judicial restraint theory” of modern avoidance).

⁷⁰ *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring) (footnote omitted).

⁷¹ *Id.* (quoting 1 COOLEY, CONSTITUTIONAL LIMITATIONS 332 (8th ed. 1927)).

⁷² *Id.* at 346.

⁷³ BICKEL, *supra* note 16.

As we have already indicated, the *Ashwander* rationale is too simple. For one thing, there are circumstances when distorting a statute in the name of avoidance does more violence to congressional intent — and is therefore more countermajoritarian — than outright invalidation.⁷⁴ For another, constitutional avoidance is in fact just a *form* of constitutional adjudication, not something entirely separate.⁷⁵ If it does any real work in a case, avoidance necessarily results in some degree of statutory distortion. Avoidance is therefore a means by which the force of the Constitution — indirectly, gravitationally — thwarts congressional intent without the need for outright invalidation.

When a court considers whether to apply the canon, it is thus not choosing between *refraining* from constitutional adjudication and engaging in it. Rather, it is choosing between two different modes of constitutional adjudication. As it is, courts now dogmatically insist that avoidance is to be preferred over invalidation, generally in the name of self-restraint.⁷⁶ But we think there are circumstances in which (possible) invalidation is the preferable — even the more restrained — form of adjudication over avoidance.

That is so for two reasons. First of all, modern avoidance, because it is triggered only by doubt, can sweep more broadly than the Constitution. As Judge Posner has explained, avoidance results in “a judge-made constitutional ‘penumbra’ that has much the same prohibitory effect as the judge-made (or at least judge-amplified) Constitution itself.”⁷⁷ If direct adjudication would result in a finding of *no* constitutional violation, the more restrained act (in terms of mitigating the countermajoritarian difficulty) would be simply to uphold the law, without any distortion of congressional intent. Second, as we explained above, generative avoidance allows a court to engage in constitutional lawmaking without the structural safeguards of judicial restraint operating effectively. It can change the law but put off the consequences. The supposed restraint in a generative avoidance case is mostly illusory; although a single statute might, in some sense, have been saved from invalidation, a new constitutional principle with the potential to doom other statutes (or even the same one) has been let loose to do its work. In other words, the restraint ensured by adversary presentation of a constitutional issue in a case where it has signif-

⁷⁴ See *supra* note 46 and accompanying text.

⁷⁵ See Schauer, *supra* note 22, at 95.

⁷⁶ See, e.g., *NFIB*, 132 S. Ct. 2566, 2600 (2012) (noting the Court’s “*duty* to construe a statute to save it, if fairly possible” (emphasis added)); *United States v. Vuitch*, 402 U.S. 62, 70 (1971) (“[O]f course statutes should be construed *whenever possible* so as to uphold their constitutionality.” (emphasis added)).

⁷⁷ Richard A. Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983).

icant consequences may be more efficacious than the apparent “restraint” of declining to invalidate a law.

Returning to the traditional justifications for avoidance, a third and final one sees the canon primarily as a mode of enforcing constitutional norms by making it more difficult for Congress to overstep them. On this view, the canon is a “useful mechanism for realizing important constitutional values.”⁷⁸ The values operate as “resistance norms” — that is, “rules that raise obstacles to particular governmental actions without barring those actions entirely.”⁷⁹ This is undoubtedly an important justification for avoidance in some circumstances, but it begs the question of *when* it is an appropriate mode of enforcing constitutional norms. We will return to that issue in Part IV.

II. THREE RECENT EXAMPLES

Lest this all become too abstract, we turn to three recent, high-profile instances of the avoidance canon in action: *Northwest Austin Municipal Utility District No. One v. Holder*, in which the Court invoked avoidance in construing a provision of the Voting Rights Act; *NFIB*, in which the Chief Justice’s controlling opinion invoked avoidance as he upheld a key part of the Affordable Care Act; and *Bond v. United States*, in which the Court dodged a major challenge to the scope of the treaty power with a dubious act of interpretation.

A. Northwest Austin

Congress passed the Voting Rights Act of 1965 “to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century” after the Fifteenth Amendment was passed.⁸⁰ Section 5 of the Voting Rights Act prohibited certain jurisdictions with a history of voting discrimination from making any changes to a “standard, practice, or procedure with respect to voting” without first obtaining preclearance either from the United States Attorney General or the District Court for the District of Columbia.⁸¹ To get preclearance for such a change, a jurisdiction had to show that the change had neither the purpose nor the effect of discriminating against minority voters.⁸² The initial version of the law was in place for five years. Congress reauthorized it in 1970, 1975, and

⁷⁸ Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1585 (2000).

⁷⁹ *Id.*

⁸⁰ *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

⁸¹ 42 U.S.C. § 1973c (2012), *invalidated by* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

⁸² *Id.*

1982.⁸³ The Court upheld the constitutionality of the law after its initial passage and after each subsequent reauthorization.⁸⁴ After many months of hearings, Congress again reauthorized the law in 2006.⁸⁵ The reauthorization passed unanimously in the Senate and by a lopsided margin in the House. A few years later, the Court agreed to reconsider Section 5's constitutionality in *Northwest Austin*.

The plaintiff in *Northwest Austin* was a small municipal utility district in Texas. An elected, five-member board governed the district. Because it was located in Texas, all changes to the district's voting procedures were subject to preclearance under Section 5.⁸⁶ It filed suit seeking a declaration that it was exempt from Section 5's preclearance regime because it qualified for a bailout under Section 3 of the Voting Rights Act,⁸⁷ or, in the alternative, that the Act was unconstitutional. In the district court, Judge Tatel, citing "extensive evidence of clear legislative intent,"⁸⁸ wrote for a three-judge panel that there was "no doubt" that the district was not eligible for a bailout.⁸⁹ He then upheld the constitutionality of the Act. The Supreme Court reversed; citing its "usual practice" of "avoid[ing] the unnecessary resolution of constitutional questions," the Court held that the district qualified for a Section 3 bailout.⁹⁰

It was an archetypal instance of active avoidance.

1. *Avoiding Through Rewriting*. — First, the Court's interpretation of the statute was not plausible; it would not have stood a chance without the avoidance canon. The original 1965 version of the VRA specified only two types of jurisdictions that were eligible for a bailout: (1) designated states and (2) "political subdivision[s]" that had been separately designated for Section 5 coverage when the whole state had not been.⁹¹ Obviously, the utility district would not have qualified under that provision: it was not itself a designated state, and it resided *in* a designated state (so the second path was unavailable). The district, however, pointed to the 1982 amendments to the VRA, which

⁸³ Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314; Act of Aug. 6, 1975, Pub. L. No. 94-73, Tit. I, 89 Stat. 400; Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

⁸⁴ See *Katzenbach*, 383 U.S. at 327-28; see also *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282-85 (1999); *City of Rome v. United States*, 446 U.S. 156, 172-82 (1980); *Georgia v. United States*, 411 U.S. 526, 534-35 (1973).

⁸⁵ Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577.

⁸⁶ 42 U.S.C. § 1973c.

⁸⁷ *Id.* § 1973b(a).

⁸⁸ *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 234 (D.D.C. 2008).

⁸⁹ *Id.* at 233.

⁹⁰ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009).

⁹¹ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 438 (codified as amended at 52 U.S.C.A. § 10303(a)(1) (West 2014)).

added a new type of jurisdiction that could bail out: “any political subdivision of [a covered] State.”⁹² At first glance, that argument may appear to be plausible — except that the Act defined “political subdivision” in a way that blocked the utility district from qualifying. The Act defined the term “political subdivision” as “any county or parish” or certain other entities that “conduct[] registration for voting” when the county does not.⁹³ The district simply did not meet that definition.

Moreover, the phrase “political subdivision of [a covered] State” in the bailout provision was followed immediately by “though such [coverage] determinations were not made with respect to such subdivision as a separate unit.”⁹⁴ That latter phrase made clear that the only relevant “political subdivision[s]” were those that *could* have been made subject to preclearance under Section 4(b) — and, again, the district did not qualify.⁹⁵ The legislative history also made it clear that the definition of political subdivision just discussed applied to the 1982 amendments.⁹⁶ Moreover, the Justice Department had interpreted the provision to block bailouts for entities such as the utility district since 1987, and Congress did not take issue with that interpretation when it reauthorized the Act in 2006. In short, the text, structure, legislative history, and basic rationale of the Act plainly foreclosed the district’s interpretation that it was eligible for a bailout.

Indeed, the statutory arguments seemed so weak that they were hardly briefed; no one really thought that they had any chance of success. They received scant attention at oral argument. The bailout provision was a minor sideshow to the constitutional arguments. And yet the Court — invoking the avoidance canon — imposed that interpretation on Congress and the country.

One possible defense of this outcome would rely on “second-look” doctrines developed and defended most notably by now-Judge Guido Calabresi.⁹⁷ Perhaps the Court’s implausible statutory interpretation should be viewed as a kind of “legislative remand” intended to compel Congress to revisit a coverage formula that had become obsolete? For a number of reasons, we do not think *Northwest Austin* is defensible on these grounds.

⁹² Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 52 U.S.C.A. § 10303(a)(1)).

⁹³ 52 U.S.C.A. § 10310(c)(2).

⁹⁴ *Id.* § 10303(a)(1).

⁹⁵ *Id.* § 10303(b).

⁹⁶ See H.R. REP. NO. 97-227, at 39 (1981) (“When referring to a political subdivision this amendment refers only to counties and parishes except in those rare instances in which the county does not conduct vote[r] registration . . .”); see also S. REP. NO. 97-417, at 69 (1982) (similar).

⁹⁷ See generally GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 8–15 (1982).

First, “second-look” doctrines are aimed at a specific problem: statutory obsolescence. The theoretical basis is that an old law, supported by *past* majoritarian preferences, may no longer enjoy more popular support in the present than a judicial decision that conflicts with it. But Congress had reauthorized the Voting Rights Act only three years before *Northwest Austin*. It held twenty-one hearings, heard from dozens of witnesses, amassed a record of more than 15,000 pages, and then passed the law with overwhelming majorities in both houses.⁹⁸ It would therefore be impossible to defend *Northwest Austin* on the ground that the Court was modifying the law to bring it closer in line with present democratic wishes. The Court was directly defying Congress.

Second, Judge Calabresi’s second-look doctrines are concerned primarily with the interpretation of private law, where the legislature is always supreme. *Northwest Austin*, by contrast, created a new constitutional doctrine that was used to invalidate a statute. Moreover, as we have discussed, the very fact that avoidance decisions have some constitutional basis means that the distortions they introduce will resist a legislative response. If the purpose of a “legislative remand” is to encourage institutional dialogue, bringing in the Constitution is counterproductive. Injecting constitutional rhetoric into a statutory question can freeze rather than facilitate a congressional response, both because constitutional issues are polarizing, and because Congress would not want to invest its time and energy in a law that may soon be found unconstitutional. Judge Calabresi himself recognized that the use of the Constitution “makes legislative correction of [a court’s] mistake impossible.”⁹⁹

The aftermath of *Northwest Austin* bears this out: Congress did nothing — not so much as hold a hearing — in response to *Northwest Austin*.¹⁰⁰ And even if Congress were inclined to revamp the Voting Rights Act in response to *Northwest Austin*, the Court had provided

⁹⁸ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2636 (2013) (Ginsburg, J., dissenting).

⁹⁹ CALABRESI, *supra* note 97, at 11. Moreover, Judge Calabresi notes that the use of constitutional avoidance to force the legislature to take a second look at a possibly anachronistic law may in fact hurt the practice of judicial review more generally. First, it “will tend to spawn highly vulnerable constitutional doctrines” because the Court’s real motivation is not constitutional. *Id.* at 12. The “inevitable errors” in these doctrines may “cast doubt on judicial review even in areas where it is most appropriate and useful.” *Id.* Second, to use the Constitution merely to force the legislature to take another look at an outdated law “cheapens, indeed destroys, the crucial moral force that underlies and protects true constitutional decisions.” *Id.* Both of those criticisms would apply to *Northwest Austin*, if that decision is understood merely as the Court’s way of forcing Congress to reconsider again its support for the Voting Rights Act.

¹⁰⁰ Petition for Writ of Certiorari at 21, *Shelby Cnty.*, 133 S. Ct. 2612 (No. 12-96) (“Yet in the more than three years after *Northwest Austin*, Congress held not one hearing, proposed not one bill, and amended not one law in response to the concern that Sections 5 and 4(b) cannot be constitutionally justified based on the record compiled in 2006.”).

little guidance because it identified the constitutional issue in such vague terms. The Court thus put in place a law that never passed Congress and would almost certainly never be undone. The *Northwest Austin* opinion suffered from the straightforward antidemocratic problem with the “rewriting power” identified above.

2. *Generating Law: The Equal Sovereignty Doctrine.* — Furthermore, the constitutional basis for this distortion of the statute perfectly illustrates the kind of cursory analysis that can occur under the banner of avoidance. The crucial paragraph of the opinion reads:

The Act . . . differentiates between the States, despite our historic tradition that all the States enjoy “equal sovereignty.” *United States v. Louisiana*, 363 U.S. 1, 16 (1960) (citing *Lessee of Pollard v. Hagan*, 3 How. 212, 223 (1845)); see also *Texas v. White*, 7 Wall. 700, 725–726 (1869). Distinctions can be justified in some cases. “The doctrine of the equality of States . . . does not bar . . . remedies for *local* evils which have subsequently appeared.” *Katzenbach*, *supra*, at 328–329 (emphasis added). But a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.¹⁰¹

The invention of the “equal sovereignty” doctrine in this passage was a clear case of generative avoidance. The three cases the Chief Justice cited all dealt with the “equal footing” doctrine, which provides that new states *enter the Union* on equal terms with the other states. That doctrine was expressly limited to the conditions of admission; it had never been applied to differential treatment *after* admission to the Union, so no one thought it had any applicability to the VRA. None of the parties’ briefs even raised it. Ironically, the case that most clearly established the inapplicability of the equal sovereignty principle was *Katzenbach* itself, in the precise passage the Court’s opinion quotes: “The doctrine of the equality of States . . . does not bar [Section 5], for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.”¹⁰² The *Northwest Austin* opinion cut the italicized text with an ellipsis.

The bottom line is that the “doubt” that compelled the rewriting of the bailout provision in *Northwest Austin* was at best a radical transformation of the equal footing doctrine, if not an outright invention.¹⁰³

¹⁰¹ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

¹⁰² *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966) (emphasis added).

¹⁰³ The legal commentariat generally viewed the doctrine as an invention. For example, Judge Posner said: “[T]here is no doctrine of equal sovereignty. The opinion rests on air.” Richard A. Posner, *Supreme Court 2013: The Year in Review*, SLATE (June 26, 2013, 12:16 AM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html [http://perma.cc/U7PZ-JPPE]. And Professor Michael McConnell: “There’s no requirement in the Constitution

And yet the Court hardly defended it. The Court's creation of the equal sovereignty principle was as cursory as it was disruptive — which is different from saying that it was wrong. It raised many more questions than it answered. What justifies such a significant departure from a settled line of precedent, which had established that the equal footing doctrine applied only to state admission? Where does the equal sovereignty principle come from? Is there a textual hook, or is it just an inference from constitutional structure? If it is a structural inference, how can it be squared with the Reconstruction Amendments, which had specifically authorized massive (and unequal) federal intrusions into the States to protect the rights of newly freed slaves? None of these questions was even addressed in *Northwest Austin*. That omission could not have occurred without the avoidance canon. The Court had to do nothing more than advert to some unelaborated “doubt” about the constitutionality of the Voting Rights Act; it did not have to clearly define the source of that doubt.

A crucial aspect of this case, to us, is the fact that the Court was not forced to face the full consequences of its constitutional reasoning because it upheld the Act. Doing so meant there was no strong dissent, and the Court was free from the institutional costs and the public and academic scrutiny that always follow a statutory invalidation. In a system where judges enjoy life tenure, that kind of scrutiny is one of the most efficacious protections against judicial overreach.¹⁰⁴ But *Northwest Austin* was basically a cost-free articulation of a new constitutional principle.

Consider, for example, the coverage of the opinion in the press. The *New York Times* trumpeted: “The Supreme Court on Monday left intact one of the signature legacies of the civil rights movement, the Voting Rights Act of 1965.”¹⁰⁵ The Court “ducked” the constitutional question, the paper explained, and “instead ruled on a narrow statutory ground.”¹⁰⁶ A prominent law professor called it “the biggest act of statesmanship of the Roberts court.”¹⁰⁷ This coverage fails to convey two important points: that the statute was rewritten by judicial fiat

to treat all states the same. It might be an attractive principle, but it doesn't seem to be in the Constitution.” Nina Totenberg, *Whose Term Was It? A Look Back at the Supreme Court*, NPR (July 5, 2013, 3:35 AM), <http://www.npr.org/2013/07/05/198708325/whose-term-was-it-a-look-back-at-the-supreme-court>. See generally Zachary S. Price, *NAMUDNO's Non-Existent Principle of State Equality*, 88 N.Y.U. L. REV. ONLINE 24 (2013).

¹⁰⁴ See Taft, *supra* note 62, at 642–43.

¹⁰⁵ Adam Liptak, *Justices Retain Oversight by U.S. on Voting*, N.Y. TIMES, June 22, 2009, <http://www.nytimes.com/2009/06/23/us/23scotus.html>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

and that the Court had just minted a constitutional doctrine of equal state treatment.¹⁰⁸

One might respond that we are making too much of *Northwest Austin*, that it was just an avoidance decision and therefore did not establish anything. That notion is dispelled by *Shelby County v. Holder*, where the doctrinal seed sown in *Northwest Austin* reached full flower. The equal sovereignty doctrine took center stage. And the Court leaned heavily on its *Northwest Austin* decision: “[T]here is . . . a ‘fundamental principle of equal sovereignty’ among the States.”¹⁰⁹ Indeed, after acknowledging that the main precedent on which it relied only “concerned the admission of new States,”¹¹⁰ the Court again stated that “we made clear in *Northwest Austin*”¹¹¹ that “the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.”¹¹²

Was that really “clear” from *Northwest Austin*? Only if one abandons the conceit that constitutional avoidance is not really constitutional adjudication. Justice Ginsburg protested in dissent that *Northwest Austin* had merely raised a question, not answered it, but the majority obviously thought otherwise: *Northwest Austin* had made the “fundamental principle of equal sovereignty” clear. The Court was thus able to use the avoidance canon to effect and then mask its major doctrinal transformation: *Northwest Austin* wasn’t a big deal because it upheld that statute; *Shelby County* wasn’t a big deal because it just followed a principle established in *Northwest Austin*.

Would the Voting Rights Act have survived without the avoidance canon? That is probably an unanswerable question. But it is at least possible that, if the Court were forced to choose whether to invalidate the Voting Rights Act under the equal sovereignty doctrine in 2009, it would not have gone all the way.¹¹³ By the time *Shelby County* arrived, the change seemed less abrupt; *Northwest Austin* had made the invalidation of a hugely popular, landmark “super-statute”¹¹⁴ seem less radical and therefore, perhaps, more palatable. In any event — how-

¹⁰⁸ Perhaps that explains why Justice Ginsburg, in the same paper, declared four years later that it was a mistake to join the Chief Justice’s opinion in that case. See Adam Liptak, *Court Is “One of Most Activist,” Ginsburg Says, Vowing to Stay*, N.Y. TIMES, Aug. 24, 2013, <http://www.nytimes.com/2013/08/25/us/court-is-one-of-most-activist-ginsburg-says-vowing-to-stay.html>.

¹⁰⁹ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 2624 (emphasis added).

¹¹² *Id.*

¹¹³ See *Re*, *supra* note 1, at 182 (“Had its feet been held to the fire, the apparent majority to invalidate the law could have disintegrated, and a new majority of the Court might simply have upheld the statute, rather than seize the first opportunity to strike at such a popular and symbolically important measure.”).

¹¹⁴ See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

ever the counterfactual world without *Northwest Austin* would look — our main point concerns process: the Court should not have adopted the equal sovereignty doctrine with so little ventilation. And it could not have done so without avoidance.

Shelby County will not be the last word on equal sovereignty: Justice Benjamin Cardozo once described the “tendency of a principle to expand itself to the limit of its logic,”¹¹⁵ and federal courts will have to grapple with the logic and limits of the equal sovereignty principle for a while. Just last Term, the Court denied certiorari in a petition challenging a federal gambling law on equal sovereignty grounds. The law bans States from licensing sports-gambling schemes but exempts Nevada and three other States that already allowed sports gambling at the time the law was passed.¹¹⁶ When New Jersey tried to allow in-state sports gambling, various sports leagues and organizations sued the state in federal court for violating the federal law. In defense, New Jersey argued that the law “violates the equal sovereignty of the states by singling out Nevada for preferential treatment and allowing only that State to maintain broad state-sponsored sports gambling.”¹¹⁷ The Third Circuit, in a fairly extensive analysis, first “decline[d]”¹¹⁸ to extend the equal sovereignty doctrine to this new context, and then, just to be safe, concluded that the law would “pass[] muster” even if the doctrine did apply.¹¹⁹ The Governor of New Jersey, along with a sports-gambling association and a team of amici, sought certiorari in the Supreme Court, claiming that the “Third Circuit’s holding cannot be reconciled with the fundamental principle of equal sovereignty articulated most recently by this Court in *Shelby County v. Holder*.”¹²⁰ The Court denied the petition, but its very existence confirms that the equal sovereignty doctrine has been let loose in the lower courts and the Court may have to step in to clarify it.¹²¹

In sum, *Northwest Austin* is an exemplar of the problems with the avoidance canon. The constitutional reasoning was unsatisfying be-

¹¹⁵ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 51 (1921).

¹¹⁶ 28 U.S.C. §§ 3702, 3704(a) (2012).

¹¹⁷ *Nat’l Collegiate Athletic Ass’n v. New Jersey*, 730 F.3d 208, 237 (3d Cir. 2013).

¹¹⁸ *Id.* at 238.

¹¹⁹ *Id.* at 239.

¹²⁰ Petition for Writ of Certiorari at 4, *Christie v. Nat’l Collegiate Athletic Ass’n*, 134 S. Ct. 2866 (2014) (No. 13-967).

¹²¹ Some litigants have even suggested that it should be expanded to state discrimination in *enforcement* of a law, not just facial discrimination. *United States v. Heying* is an ongoing prosecution for marijuana distribution. No. 14-30, 2014 WL 5286155 (D. Minn. Oct. 15, 2014) (order denying motion to dismiss and motions to suppress evidence). The defendant moved to dismiss the indictment on the ground that the Government’s policy of declining to prosecute marijuana dealing in states that have legalized the drug violates equal sovereignty. *Id.* at *4–5. The district court rejected the argument, *id.* at *5, but the case suggests another potential expansion of the equal sovereignty doctrine: to the unequal administration of a facially neutral law.

cause the opinion hardly defended the equal sovereignty principle in the face of a century of precedent against it. This gap would not have been possible without the avoidance canon: if the Court had to adjudicate the equal sovereignty issue directly in *Northwest Austin*, or if a strong dissent had challenged the point, it would have been compelled to give a much fuller analysis. Moreover, the new constitutional principle propelled a substantial misreading of the statute, putting in place a bailout mechanism that Congress had never passed. And, amazingly, all of this proceeded under the guise of judicial restraint.

B. NFIB v. Sebelius

1. *Avoiding Through Rewriting.* — Chief Justice Roberts’s controlling opinion in *NFIB* is a rather strange instance of avoidance, for reasons we will discuss. But it fits the basic pattern we describe in this Article: using “avoidance” to usher in legal change. In the course of rewriting a statute to avoid a constitutional problem, the opinion birthed a significant innovation in constitutional doctrine.

The basic outlines of the controlling opinion are now familiar: the Chief Justice held that the individual mandate was unconstitutional as an exercise of Congress’s Commerce Clause authority,¹²² but then, invoking the avoidance canon,¹²³ he construed the mandate as a tax and upheld it.¹²⁴ From a methodological point of view, this move was odd for a couple of reasons.

For one thing, the Commerce Clause “holding” was unnecessary to the outcome of the case. The opinion could have simply upheld the mandate as a tax and reserved resolution of the Commerce Clause issue for a case where it was squarely presented. The Chief Justice’s own explanation for reaching the Commerce Clause question is bizarre: he said that “the statute reads more naturally as a command to buy insurance than as a tax,” thus “[w]ithout deciding the Commerce Clause question, I would find *no basis* to adopt such a saving construction.”¹²⁵ That statement simply ignores the predominant modern form of avoidance: that *doubt* is enough to trigger a saving construction.¹²⁶ The Chief Justice could just as easily have said that he had “grave doubts” about the constitutionality of the mandate under the Commerce Clause, and then adopted his saving construction. To say that he would have “no basis” for a saving construction without his

¹²² *NFIB*, 132 S. Ct. 2566, 2584–93 (2012) (opinion of Roberts, C.J.).

¹²³ *Id.* at 2593–94.

¹²⁴ *Id.* at 2594–600 (majority opinion).

¹²⁵ *Id.* at 2600–01 (opinion of Roberts, C.J.) (emphasis added).

¹²⁶ See Gillian E. Metzger & Trevor W. Morrison, *The Presumption of Constitutionality and the Individual Mandate*, in *THE HEALTH CARE CASE* 124, 134 (Nathaniel Persily et al. eds., 2013).

Commerce Clause holding is to disregard the most common version of the avoidance canon — indeed, the very same form of avoidance he himself had used for the Court in *Northwest Austin*, just two Terms before.

One might respond: the Chief Justice was just applying avoidance in its “classical” form, where the constitutional question is actually decided prior to adopting the saving construction.¹²⁷ That may, as a formal matter, be right. But it is clearly not true that, without the Commerce Clause holding, the Chief Justice would have “no basis” to adopt a “saving construction” of the mandate — modern avoidance would be the basis. And given how rare a tool classical avoidance has become in the modern judicial toolkit, one would expect at least some sort of explanation before seeing it dusted off and brandished in an opinion. In fact, *NFIB* seems a particularly unsuitable case for classical avoidance, given that it required, as a logical matter, establishing *two* separate constitutional propositions: that a mandate cannot be constitutional as a tax and that a mandate cannot be passed under the commerce power. That’s an awful lot of constitutional law to make in a decision that turns finally on the interpretation of a statute.

In any event, the Chief Justice invoked his “plain duty” to adopt an interpretation that would “save the Act.”¹²⁸ He acknowledged that the “most straightforward reading of the mandate is that it commands individuals to purchase insurance.”¹²⁹ But, he said, it is “fairly possible” to read the mandate as a tax incentive.¹³⁰ By its own terms, the Chief Justice’s opinion reconceived the mandate “penalty” as a “tax.”¹³¹ And the Chief Justice clearly believed that distinction was significant. In a sense, then, the joint dissent was right that the Court upheld a “statute Congress did not write,” and that doing so was “judicial overreaching” masquerading as “modesty.”¹³² To be sure, the Chief Justice’s approach was better than the annihilation that the dissent called for, even if it was not exactly restraint in the tradition of *Ashwander*.

This “rewrite” may not have been as obvious or severe as *Northwest Austin* — the Chief Justice’s opinion did not really change the practical operation of the Affordable Care Act. Both before and after his opinion, a citizen had a choice to purchase health insurance or pay a specified sum to the Treasury. But the Chief Justice seems to have

¹²⁷ See *supra* notes 24–25 and accompanying text.

¹²⁸ *NFIB*, 132 S. Ct. at 2593 (opinion of Roberts, C.J.) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring)) (internal quotation mark omitted).

¹²⁹ *Id.*

¹³⁰ *Id.* at 2594 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)) (internal quotation marks omitted).

¹³¹ *Id.* (internal quotation marks omitted).

¹³² *Id.* at 2676 (joint dissent).

been concerned with the law's "expressive," rather than practical, significance — that is, "whether the law expresses a view that the failure to purchase insurance is unlawful."¹³³ And if you regard that dimension of the law as significant — as the Chief Justice and the dissenters apparently did — then the controlling opinion reversed the law's apparent meaning.¹³⁴

2. *Generating Law: The Antinovelty Doctrine.* — The more problematic aspect of the Chief Justice's opinion is the highly generative excursion on the Commerce Clause, which he justified with the avoidance canon. That excursion yielded an important constitutional innovation that was entirely unnecessary to the case's bottom line. Commentary on *NFIB* has generally identified its main doctrinal contribution as the activity/inactivity distinction: Congress cannot, under the commerce power, force people into the stream of commerce in order to regulate them. We believe this distinction is only a manifestation of a deeper innovation that occurred mostly beneath the surface. We call it the antinovelty doctrine: a law without historical precedent is constitutionally suspect.

The principle that the Court must presume laws constitutional is as old as judicial review.¹³⁵ As Justice Washington put it long ago, "respect" for the "wisdom, the integrity, and the patriotism of the legislative body" compels the Court to "presume in favour of [a law's] validity, until its violation of the constitution is proved beyond all reasonable doubt."¹³⁶ That presumption is one of the bedrock principles of modern constitutional law, and, as Justice Jackson observed, it is more

¹³³ Metzger & Morrison, *supra* note 126, at 133.

¹³⁴ Our own view, for what it's worth, is that the Chief Justice could simply have rested his opinion on the Act's presumed constitutionality rather than on the avoidance canon. As the Chief Justice recognized, the practical operation of the Affordable Care Act was constitutional under the taxing power: the federal government can require a citizen to make a payment to the Treasury if she chooses not to get health insurance. The challengers' argument, at bottom, amounted to a claim that Congress did not mean to impose a "tax" because it used the word "penalty." The presumption of constitutionality rules out this fixation on labels. It entails, rather, a focus on a law's practical effects. It would be an odd way to show deference to a coequal branch of Government to strike down a law whose practical operation is entirely constitutional merely because Congress used the wrong label. *See id.* at 137. For constitutional purposes, the mandate is what it does. And if what it *does* is constitutional, the presumption of constitutionality requires that it be upheld. *See* Akhil Reed Amar, *The Lawfulness of Health-Care Reform* 8–12 (Yale Law Sch., Research Paper No. 228, 2011), <http://ssrn.com/abstract=1856506> [<http://perma.cc/6X6A-FS63>].

¹³⁵ *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810) (Marshall, C.J.) (stating that courts should not declare a law unconstitutional "on slight implication and vague conjecture," but only when "[t]he opposition between the constitution and the law [is] such that the judge feels a clear and strong conviction of their incompatibility with each other"); THE FEDERALIST NO. 78, *supra* note 36, at 465 (Alexander Hamilton) (proclaiming that courts have a duty "to declare all acts contrary to the *manifest tenor* of the constitution void" (emphasis added)).

¹³⁶ *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 270 (1827).

than a “mere polite gesture.”¹³⁷ It is “a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is within their delegated power or is necessary and proper to execution of that power.”¹³⁸ And the presumption has always had particular bite in cases involving Congress’s power to enact “economic” legislation, that is, legislation that “adjust[s] the burdens and benefits of economic life.”¹³⁹

The Affordable Care Act is a paradigmatic economic regulation. Before the Act, the uninsured would externalize the risks and costs of their health care. One purpose of the Act, and the mandate in particular, was to force the uninsured to internalize those risks and costs. In *NFIB*, then, one would expect to see the presumption of constitutionality in its strongest form. Instead, the Court displayed skepticism from the start.

At oral argument, Justice Kennedy asked the following:

Assume for the moment that this is unprecedented. This is a step beyond what our cases have allowed, the affirmative duty to act to go into commerce. If that is so, do you not have a heavy burden of justification?

I understand that we must presume laws are constitutional, but, even so, when you are changing the relation of the individual to the government in . . . what we can stipulate is, I think, a unique way, do you not have a heavy burden of justification to show authorization under the Constitution?¹⁴⁰

The premise of that question is that the presumption of constitutionality not only disappears when the law in question is “unprecedented,” but is replaced by the exact opposite presumption: the *government* bears a “heavy” burden to show that the law is constitutional. A novel law faces a presumption of *invalidity*, unless the government can overcome that heavy burden.

The Chief Justice’s controlling opinion picked up on Justice Kennedy’s question:

Congress has never attempted to rely on [the commerce] power to compel individuals not engaged in commerce to purchase an unwanted product. Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes “the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent” for Congress’s action. At the very least, we should “pause to consider the implications of

¹³⁷ *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953) (plurality opinion).

¹³⁸ *Id.*

¹³⁹ *Fed. Energy Reg. Comm’n v. Mississippi*, 456 U.S. 742, 754 (1982) (quoting *Hodel v. Indiana*, 452 U.S. 314, 323 (1981)).

¹⁴⁰ Transcript of Oral Argument at 11–12, *Dep’t of Health & Human Servs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11-398), http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf [<http://perma.cc/QSN3-VSBK>].

the Government's arguments" when confronted with such new conceptions of federal power.¹⁴¹

This paragraph was much more than a "pause"; it set the tone for the analysis and did important substantive work. It explained the Court's reflexive skepticism that the Affordable Care Act was constitutional under the Commerce Clause, even though it regulated seventeen percent of the gross domestic product and was unquestionably a reasonable response to one of the major economic issues facing the country.

Health care is also a unique kind of economic good; just about everyone will consume it at some point. As Judge Sutton observed in his opinion upholding the Act, to decline to buy health insurance is not "inactivity," as the challengers claimed. It is a choice to self-insure, a choice that imposes substantial costs on society.¹⁴² Moreover, as Judge Silberman pointed out in his opinion upholding the Act, to require an individual to buy insurance does not force him into the stream of commerce any more than a farmer is forced into the stream of commerce when he is required to purchase wheat in the market instead of growing it himself.¹⁴³ Congress had required farmers to do just that in the law upheld by the canonical case of *Wickard v. Filburn*.¹⁴⁴

The antinovelty doctrine represented by that "pause" — that unprecedented laws are constitutionally suspect — is also reflected in the basic structure of the Chief Justice's opinion. After some preliminaries, the analytical section begins: "The *Government* advances two theories for the proposition that Congress had constitutional authority to enact the individual mandate."¹⁴⁵ The first theory relied on the Commerce Clause, the second on the taxing power. As to the Commerce Clause, the Chief Justice began the first subsection: "The *Government* contends that the individual mandate is within Congress's power because the failure to purchase insurance 'has a substantial and deleterious effect on interstate commerce' by creating the cost-shifting problem."¹⁴⁶ And the second subsection: "The *Government* next contends that Congress has the power under the Necessary and Proper Clause to enact the individual mandate because the mandate is an 'integral

¹⁴¹ *NFIB*, 132 S. Ct. 2566, 2586 (2012) (opinion of Roberts, C.J.) (first quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010) (alterations in original); then quoting *United States v. Lopez*, 514 U.S. 549, 564 (1995)) (footnote omitted) (citations omitted).

¹⁴² See *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 565 (6th Cir. 2011) (Sutton, J., concurring in part), *abrogated by NFIB*, 132 S. Ct. 2566.

¹⁴³ *Seven-Sky v. Holder*, 661 F.3d 1, 17–18 (D.C. Cir. 2011), *abrogated by NFIB*, 132 S. Ct. 2566.

¹⁴⁴ 317 U.S. 111 (1942).

¹⁴⁵ *NFIB*, 132 S. Ct. at 2584 (opinion of Roberts, C.J.) (emphasis added).

¹⁴⁶ *Id.* at 2585 (quoting Brief for Petitioners (Minimum Coverage Provision) at 34, *NFIB*, 132 S. Ct. 2566 (No. 11-398)) (emphasis added).

part of a comprehensive scheme of economic regulation.”¹⁴⁷ The first subsection refutes the Government’s first contention; the second subsection refutes the second contention. The opinion concludes: “The commerce power thus does not authorize the mandate.”¹⁴⁸

The opinion’s structure subtly confirms the disappearance of the presumption of constitutionality. One consequence of the presumption is that the *challenger* bears the burden of proving that a law is unconstitutional.¹⁴⁹ The structure of the Chief Justice’s opinion evinces the opposite approach: the *Government* seemed to bear the burden of establishing the constitutionality of the law.¹⁵⁰ The logic of the opinion is: (1) the Government says the law is constitutional because of X; (2) I disagree with X; (3) therefore the law is unconstitutional. That is the reverse of the structure one would expect under the traditional presumption of constitutionality. The challengers’ arguments were never subjected to the traditional level of analytic scrutiny.

Consider, by contrast, Chief Justice Stone’s opinion in *United States v. Carolene Products Co.*,¹⁵¹ a case epitomizing the post-New Deal presumption of validity attaching to social and economic legislation. There the Court recited the applicable legal principles, summarized a previous case where legislation had been upheld against constitutional attack, and then said: “We see no persuasive reason for departing from that ruling here . . . and since none is suggested, we

¹⁴⁷ *Id.* at 2591 (quoting Brief for Petitioners (Minimum Coverage Provision) at 24, *NFIB*, 132 S. Ct. 2566 (No. 11-398)) (emphasis added).

¹⁴⁸ *Id.* at 2593.

¹⁴⁹ See *United States v. Morrison*, 529 U.S. 598, 607 (2000) (“[W]e [will] invalidate a congressional enactment only upon a *plain showing* that Congress has exceeded its constitutional bounds.” (emphasis added)). Even the Chief Justice’s opinion recites this black-letter principle. *NFIB*, 132 S. Ct. at 2579 (“Proper respect for a coordinate branch of the government’ requires that we strike down an Act of Congress only if ‘the lack of constitutional authority to pass [the] act in question is clearly demonstrated.’” (alteration in original) (quoting *United States v. Harris*, 106 U.S. 629, 635 (1883))). Of course, in certain categories of cases, a “more searching judicial inquiry” is warranted. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). But no one contended that *NFIB* fit any of those categories.

¹⁵⁰ Perhaps there is a more charitable interpretation of the structure of the Chief Justice’s opinion. One could say that its structure reflects the fact that the federal government has only enumerated powers, and therefore the Government must at least make a *prima facie* showing that its actions fall within one of those enumerated powers. There are two difficulties with this reading. First, it has never been the Government’s burden to specify the power under which it legislates; part of the traditional presumption of constitutionality is that “the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.” *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948). Second, the opinion went well beyond just requiring a *prima facie* showing from the Government — refuting the Government’s contentions was the basic task of the Chief Justice’s opinion. The tenor of the opinion evinces skepticism of the Government’s assertion of regulatory power from the start, and that skepticism is the core of what we call the antinovelty doctrine.

¹⁵¹ 304 U.S. 144 (1938).

might rest decision wholly on the presumption of constitutionality.”¹⁵² The opinion reflects both a different attitude and different allocation of burdens from *NFIB*. *Gonzales v. Raich*,¹⁵³ a more recent case in which the Court upheld a congressional act against a Commerce Clause challenge, also has the opposite structure of the Chief Justice’s health care opinion: the Court starts with the *challenger’s* arguments, explains why those arguments are untenable under the Court’s precedent,¹⁵⁴ and then affirms Congress’s authority to pass the act in question.¹⁵⁵ Perhaps one could defend the structure of the Chief Justice’s opinion as a natural outgrowth of common law adjudication. In particular, the fact that a federal law is unprecedented necessarily means (1) that it has never been blessed by a judicial decision before, and (2) that to invalidate it won’t result in the invalidation of many other similar laws. Point (1) could show why the Chief Justice subjected the Government’s arguments to scrutiny, and Point (2) could explain why it is fair to be less reluctant to invalidate an unprecedented law. We think neither of these two explanations is persuasive.

Point (1) restates the common law truism that if an issue has never been decided in the past it must be confronted as a matter of first impression. It could therefore explain *why* there was a health care case at all. But the import of the Chief Justice’s antinovelty doctrine was not that the Affordable Care Act was unprecedented and therefore its constitutionality was an open question. Rather, the antinovelty question stacked the deck: the law’s constitutionality was an open question, but the openness of the question was itself a “telling indication of a severe constitutional problem.”¹⁵⁶ Point (2) — that striking down an unprecedented law is less consequential because other existing laws will be unaffected — would not hold if the antinovelty doctrine were systemically applied. Yes, a single antinovelty decision may not result in the invalidation of a large number of federal laws, and so the federal government might not be immediately hamstrung. But if each time the federal government tried to craft a new solution to a new problem it had to face the skeptical gaze of the judiciary, the consequences for federal power would be graver than a single decision that affected a number of current laws.

Antinovelty played a big role for the joint dissenters as well. Their joint opinion has the same structure as the Chief Justice’s — the Government’s arguments are unpersuasive, therefore the law is unconstitu-

¹⁵² *Id.* at 148.

¹⁵³ 545 U.S. 1 (2005).

¹⁵⁴ *See id.* at 17–22 (citing *Wickard v. Filburn*, 317 U.S. 111 (1942)).

¹⁵⁵ *Id.* at 22.

¹⁵⁶ *NFIB*, 132 S. Ct. 2566, 2586 (2012) (opinion of Roberts, C.J.) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010)) (alteration omitted).

tional. And they repeatedly referred to the legislation as unprecedented. They did so when outlining the market for insurance,¹⁵⁷ and when they explained other ways the health crisis could be solved.¹⁵⁸ They looked to novelty in assessing the Medicaid question as well.¹⁵⁹ The very last words in the Court's set of opinions, by Justice Thomas, were: "The Government's unprecedented claim in this suit that it may regulate not only economic activity but also inactivity that substantially affects interstate commerce is a case in point."¹⁶⁰

To be fair, *NFIB* did not invent the antinovely doctrine *ex nihilo*. There were important forerunners. The question presented by one of those earlier cases — *Printz v. United States*¹⁶¹ — was whether a federal law requiring state officials to conduct background checks on gun buyers was constitutional. The Court held that requiring state officers to "administer" a "federal regulatory program" was "incompatible with our constitutional system of dual sovereignty."¹⁶² Justice Scalia's majority opinion began with "historical understanding and practice."¹⁶³ And it noted, uncontroversially, that very early legislative enactments can be "weighty" contemporaneous evidence of the Constitution's meaning.¹⁶⁴ But then Justice Scalia added his own corollary: "Conversely if, as [the challengers] contend, earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist."¹⁶⁵

That corollary did not follow from the premise: even if it is true that an early Congress *passing* a law suggests it considered the law constitutional, the fact that past Congresses did *not* pass a law could be due to any number of reasons unrelated to the law's constitutionality. Perhaps there was simply no need for the controversial device in question; perhaps there was political opposition unrelated to the device's constitutionality. Justice Scalia tried to cabin the inference by adding that the federal power would have to be "attractive."¹⁶⁶ But if one's general view is that the United States Congress tends to "draw[]

¹⁵⁷ *Id.* at 2648 (joint dissent) ("Such a definition of market participants is unprecedented, and were it to be a premise for the exercise of national power, it would have no principled limits.").

¹⁵⁸ *Id.* at 2647 ("With the present statute, by contrast, there are many ways other than this unprecedented Individual Mandate by which the regulatory scheme's goals of reducing insurance premiums and ensuring the profitability of insurers could be achieved.").

¹⁵⁹ *Id.* at 2664.

¹⁶⁰ *Id.* at 2677 (Thomas, J., dissenting).

¹⁶¹ 521 U.S. 898 (1997).

¹⁶² *Id.* at 935.

¹⁶³ *Id.* at 905.

¹⁶⁴ *Id.* (quoting *Bowsher v. Synar*, 478 U.S. 714, 723 (1986)).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

all power into its impetuous vortex,”¹⁶⁷ it is hard to imagine a variety of power that would *not* be attractive. In any event, Justice Scalia concluded that the “lack of statutes imposing obligations on the States’ executive . . . suggests an assumed *absence* of such power.”¹⁶⁸

A variety of the antinovelty doctrine then reappeared several years later in another case presenting a structural issue, *Free Enterprise Fund v. Public Company Accounting Oversight Board*.¹⁶⁹ The respondent Board (as then constituted) was composed of five members appointed by the Securities and Exchange Commission (SEC). The SEC, however, could remove Board members only for “good cause.”¹⁷⁰ The SEC Commissioners, in turn, were also removable only by the President for cause.¹⁷¹ The issue in *Free Enterprise Fund* was whether this “double for-cause” protection was consistent with the separation of powers.¹⁷²

Chief Justice Roberts, writing for the Court, concluded that it was unconstitutional. Unlike *Printz*, Chief Justice Roberts’s majority opinion in *Free Enterprise Fund* began with precedent and structural analysis. But toward the end of the opinion, quoting Judge Kavanaugh’s dissenting opinion below, the Chief Justice wrote: “Perhaps the most telling indication of the severe constitutional problem with the [Board] is the lack of historical precedent for this entity. Neither the majority opinion nor the [Board] nor the United States as intervenor has located any historical analogues for this novel structure.”¹⁷³ This statement hovered somewhere between rhetorical dressing and doctrine; it came at the end of the analysis section, and it is unlikely the case would have come out differently if it were excised.

¹⁶⁷ *Bond v. United States*, 134 S. Ct. 2077, 2094 (2014) (Scalia, J., concurring in the judgment) (quoting THE FEDERALIST NO. 48 (James Madison)) (internal quotation mark omitted).

¹⁶⁸ *Printz*, 521 U.S. at 907–08.

¹⁶⁹ 130 S. Ct. 3138.

¹⁷⁰ 15 U.S.C. § 7211(e)(6) (2012).

¹⁷¹ *Free Enter. Fund*, 130 S. Ct. at 3148.

¹⁷² *Id.* at 3149 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 697 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)).

¹⁷³ *Id.* at 3159 (quoting *Free Enter. Fund*, 537 F.3d at 699 (Kavanaugh, J., dissenting)) (internal quotation mark omitted). The only support Judge Kavanaugh offered for the principle that novelty can indicate unconstitutionality was *Bowsher v. Synar*, 478 U.S. 714 (1986). That was a case about whether the Comptroller General, who is removable only by *Congress*, could perform certain executive functions. Judge Kavanaugh quoted the Court’s observation that “[a]ppellants have referred us to no independent agency whose members are removable by the Congress . . . as is the Comptroller General.” *Free Enter. Fund*, 357 F.3d at 699 (Kavanaugh, J., dissenting) (quoting *Bowsher*, 478 U.S. at 725 n.4). The reason the Court made that observation, however, was to show that “[a]ppellants therefore are wide of the mark in arguing that an affirmance in this case requires casting doubt on the status of ‘independent’ agencies.” *Bowsher*, 478 U.S. at 725 n.4. In other words, the fact that other similarly situated officers could not be identified meant that its decision would not have far-reaching and disruptive consequences. There was no suggestion that the lack of such officers had any bearing on constitutionality.

On the other hand, taken on its own terms, it is quite a strong assertion: “[L]ack of historical precedent” can signal a “severe constitutional problem.”¹⁷⁴ That was the line Chief Justice Roberts quoted in *NFIB*.¹⁷⁵

By the time the antinovelty doctrine appeared in the health care case, then, it already had some significant support. But *NFIB* took it further in three ways. First, the mere fact that the doctrine appeared at all in the most important constitutional case of the Roberts Court is itself significant. Doctrines gain solidity by repetition, particularly in prominent cases. Second, as noted above, the antinovelty doctrine is laced into the very structure of the Chief Justice’s opinion. The opinion begins with skepticism of the Government’s argument and places the burden on the government to prove the law’s constitutionality.

The most important difference, however, is that *NFIB* involved the scope of the commerce power, where the presumption of constitutionality has had and should have the most force. Both *Free Enterprise Fund* and *Printz* involved rather arcane structural issues of first impression: whether an underling in an administrative agency can have double for-cause protection, and whether state executive officers can be impressed to administer a federal program. The presumption of constitutionality, even if nominally applicable, has never had much force in those kinds of structural cases. Neither *Printz* nor *Free Enterprise Fund* even gives the perfunctory recitation of the presumption that *NFIB* did, and Justice Scalia is on record saying that the presumption does not even apply in separation-of-powers cases.¹⁷⁶

NFIB was a very different kind of case. It involved a core provision of the most significant economic legislation since President Johnson’s Great Society programs. The case was about the scope of the federal government’s regulatory power under the Commerce Clause, where the presumption of constitutionality is at its apex.¹⁷⁷ To import the antinovelty doctrine into a case about the power of Congress to enact a major economic reform would erode the most important function of the presumption of constitutionality.

Judge Silberman, in his opinion below upholding the Affordable Care Act, saw clearly how the antinovelty arguments pressed by the law’s challengers would collide with the presumption of constitutional-

¹⁷⁴ *Free Enter. Fund.*, 130 S. Ct. at 3159 (quoting *Free Enter. Fund.*, 537 F.3d at 699 (Kavanaugh, J. dissenting)).

¹⁷⁵ *NFIB*, 132 S. Ct. 2566, 2586 (2012) (opinion of Roberts, C.J.) (quoting *Free Enter. Fund.*, 130 S. Ct. at 3159).

¹⁷⁶ *Morrison v. Olson*, 487 U.S. 654, 704–05 (1988) (Scalia, J., dissenting).

¹⁷⁷ See, e.g., *Fed. Energy Reg. Comm’n v. Mississippi*, 456 U.S. 742, 754 (1982); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

ity.¹⁷⁸ “Since [the challengers] cannot find real support for their proposed rule in either the text of the Constitution or Supreme Court precedent, they emphasize . . . the novelty of the mandate”¹⁷⁹ Citing *Free Enterprise Fund* and *Printz*, Judge Silberman noted that the novelty was “not irrelevant.”¹⁸⁰ But, he wrote, “the novelty cuts another way,” explaining: “We are obliged — and *this might well be our most important consideration* — to presume that acts of Congress are constitutional. [The challengers] have not made a clear showing to the contrary.”¹⁸¹ In other words, Judge Silberman understood that the antinovely doctrine would eviscerate the presumption. That is because the only time the presumption of constitutionality has any bite is when Congress enacts a novel solution to a novel national problem; if Congress had stuck to its old, judicially approved tools, there would be no need for a presumption. When forced to choose between the presumption of constitutionality and the antinovely doctrine, Judge Silberman chose the former, and, unsurprisingly, upheld the law.

The “most important consideration” of Judge Silberman’s opinion — the presumption — is exactly what’s lacking in the Chief Justice’s opinion. The antinovely doctrine had erased it. That expansion of the antinovely doctrine into the Commerce Clause seems to us the most radical legacy of *NFIB*.

It remains to be seen what effect it will have in lower courts, but early indications are not good. Soon after the health care case was decided, the D.C. Circuit invalidated part of the Passenger Rail Investment and Improvement Act of 2008,¹⁸² which had empowered Amtrak and the Federal Railroad Administration to develop jointly “metrics and standards” to ensure on-time train service.¹⁸³ In the course of its analysis, the court asserted that “novelty may, in certain circumstances, signal unconstitutionality.”¹⁸⁴ The court further explained that the lack of an “antecedent” is a “reason to suspect” a law or practice’s constitutionality, citing both *NFIB* and *Free Enterprise Fund*.¹⁸⁵ That sounds an awful lot like a new doctrine of constitutional law. To be sure, this D.C. Circuit case, like *Printz* and *Free Enterprise Fund*, did not directly involve the scope of the commerce power in the same way

¹⁷⁸ *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011).

¹⁷⁹ *Id.* at 18.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* (emphasis added) (citation omitted).

¹⁸² Pub. L. No. 110-432, div. B, 122 Stat. 4848, 4907–70 (codified in scattered sections of 49 U.S.C.).

¹⁸³ *Ass’n of Am. R.Rs. v. U.S. Dep’t of Transp.*, 721 F.3d 666, 669 (D.C. Cir. 2013).

¹⁸⁴ *Id.* at 673.

¹⁸⁵ *Id.*

that *NFIB* did.¹⁸⁶ But the case at least suggests that the antinovelty doctrine has grown more solid in the wake of *NFIB*.¹⁸⁷

The important point for our purposes is that this expansion of the antinovelty doctrine occurred in a case where it was immaterial. As we have explained, the Commerce Clause “holding” did not have any effect on the bottom-line judgment.¹⁸⁸ As with the equal sovereignty doctrine, the scope and underpinnings of the antinovelty doctrine are obscure. Indeed, the Court never consciously defended the doctrine, even though it is vulnerable on a number of fronts.

The antinovelty doctrine is not grounded in the text of the Constitution. It is, moreover, alien to the Constitution’s structure. The federal government was not established to meet some known and specific contingency. Rather, it was granted a number of powers in broad strokes that would enable it to adapt to economic, social, and political change.¹⁸⁹ Chief Justice Marshall explained in *McCulloch* that the Constitution is “intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs.”¹⁹⁰ To fulfill that role, the federal government must be able to act in unprecedented ways; it must craft new and effective solutions to unprecedented problems. A constitution that permits the government merely to do what it has already done before would be ineffective; it would be adapted only to the stasis, not the “crises,” of human affairs. Reflecting this in-

¹⁸⁶ Compare *id.* at 670 (interpreting the Article I Vesting Clause), and *Printz v. United States*, 521 U.S. 898, 923–24 (1997) (analyzing whether a state executive official can be commandeered to enforce a federal regulatory program), and *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151–55 (2010) (interpreting the Article II Vesting Clause and the Take Care Clause), with *NFIB*, 132 S. Ct. 2566, 2587–91 (2012) (interpreting the Commerce Clause).

¹⁸⁷ As this Article was being finalized, the Supreme Court granted certiorari and vacated the D.C. Circuit opinion in *American Railroads*. See *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225 (2015). The Court based its ruling on grounds not relevant here, saying that the lower court opinion rested on the flawed premise that Amtrak was a private, rather than a governmental, entity. And it remanded the case for the D.C. Circuit to reconsider the constitutionality of the Act. The Supreme Court did not reach any of the ultimate constitutional issues in the case, and therefore did not have occasion to review the D.C. Circuit’s “antinovelty” reasoning.

¹⁸⁸ See *supra* pp. 2137–38.

¹⁸⁹ As Alexander Hamilton put it:

Constitutions of civil Government are not to be framed upon a calculation of existing exigencies; but upon a combination of these, with the probable exigencies of ages, according to the natural and tried course of human affairs. Nothing therefore can be more fallacious, than to infer the extent of any power, proper to be lodged in the National Government, from an estimate of its immediate necessities. There ought to be a CAPACITY to provide for future contingencies, as they may happen; and, as these are illimitable in their nature, it is impossible safely to limit that capacity.

THE FEDERALIST NO. 34, *supra* note 36, at 210–11 (Alexander Hamilton).

¹⁹⁰ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819); see also *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2565 (2014) (“The Founders knew they were writing a document designed to apply to ever-changing circumstances over centuries. After all, a Constitution is ‘intended to endure for ages to come,’ and must adapt itself to a future that can only be ‘seen dimly,’ if at all.” (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 415)).

sight, *McCulloch*'s test for federal power was simple and functional: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."¹⁹¹ There is not a trace of antinovelty there.¹⁹²

Our purpose is not to debunk the antinovelty doctrine on the merits.¹⁹³ It is merely to point out how the avoidance doctrine made its development possible. The antinovelty doctrine — and specifically its expansion into Commerce Clause issues — threatens to be one of the most consequential constitutional innovations in recent memory. And yet, thanks in large part to the avoidance doctrine, the Court was not compelled to define it carefully, to defend it with any kind of rigor, or to face its full consequences. In short, just like *Northwest Austin*, *NFIB* displays the mismatch between the rhetoric of restraint and the reality of aggression that is the hallmark of recent avoidance decisions.

C. Avoiding Avoidance: *Bond v. United States*

The Court also recently avoided a significant constitutional challenge to the federal government's treaty power.¹⁹⁴ *Bond v. United States*¹⁹⁵ was, in the Chief Justice's apt phrase, a "curious case,"¹⁹⁶ about "an amateur attempt by a jilted wife to injure her husband's

¹⁹¹ *McCulloch*, 17 U.S. (4 Wheat.) at 421.

¹⁹² Justice Ginsburg made a similar point forcefully in her *NFIB* dissent. 132 S. Ct. at 2615–16, 2625 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹⁹³ One can imagine, for instance, an originalist defense of *NFIB*'s antinovelty argument. The defense would run: The New Deal cases upholding the most extravagant claims of federal power, such as *Wickard v. Filburn*, 317 U.S. 111 (1942), were wrongly decided. Because of respect for *stare decisis* or for pragmatic reasons, however, they cannot be overturned. The way to be most faithful to the original meaning of the Constitution, then, is to accept those precedents but refuse to expand them any further. The antinovelty doctrine, on this reading, could be a bulwark against the expansion of a set of questionable precedents. See Randy Barnett, "This Far and No Farther": *Baselines and the Individual Insurance Mandate*, VOLOKH CONSPIRACY (Jan. 22, 2012, 3:00 PM), <http://volokh.com/2012/01/22/this-far-and-no-farther-baselines-and-the-individual-insurance-mandate> [<http://perma.cc/Z2TA-PUST>]. That is certainly a cogent defense of the antinovelty doctrine in this context, but it would be a radical move for the Supreme Court to take. It would involve the implicit repudiation of a number of canonical New Deal precedents and a significant change in the general consensus regarding the legal significance of that era. See Lawrence B. Solum, *How NFIB v. Sebelius Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1, 51–55 (2013) (arguing that the "this far and no farther" theory would "imply the invalidation of much of the New Deal and Great Society legislation that constitutes the contemporary regulatory state" and is "radically implausible as an alternative gestalt," *id.* at 52).

¹⁹⁴ Disclosure: One of the authors was a law clerk at the Supreme Court during the 2013 Term. The following discussion relies exclusively on publicly available materials and neither reveals nor is informed by any confidential information.

¹⁹⁵ 134 S. Ct. 2077 (2014).

¹⁹⁶ *Id.* at 2090.

lover, which ended up causing only a minor thumb burn readily treated by rinsing with water.”¹⁹⁷ Though local Pennsylvania authorities declined to get involved in the spat, the federal government — “surprising[ly]”¹⁹⁸ — decided to charge Bond with violating a federal statute implementing a treaty called the Convention on Chemical Weapons, which the United States had ratified in 1997.¹⁹⁹ The question in the case was whether the statute was a necessary and proper means of executing the federal government’s unquestioned power to make treaties.²⁰⁰

*Missouri v. Holland*²⁰¹ had already answered this question in 1920. “If the treaty is valid,” Justice Holmes wrote for the Court, “there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government.”²⁰² The real issue before the Court in *Bond*, then, was whether *Holland* ought to be overruled.²⁰³ It should come as no surprise that, faced with this mighty question of constitutional structure, the Court punted. Citing its *Ashwander* obligation “not [to] decide a constitutional question if there is some other ground upon which to dispose of the case,”²⁰⁴ the Court held that the statute did not in fact cover Bond’s conduct.²⁰⁵

That interpretation of the statute was, to put it gently, “strained.”²⁰⁶ To put it with Scalian bluntness, it was “result-driven antitextualism.”²⁰⁷ The naked text could hardly have been clearer. The Chemical Weapons Convention Implementation Act of 1998²⁰⁸ makes it a crime to “use . . . any chemical weapon.”²⁰⁹ A “chemical weapon” is a “toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter.”²¹⁰ A “toxic chemical” is “any

¹⁹⁷ *Id.* at 2083.

¹⁹⁸ *Id.* at 2085.

¹⁹⁹ *Id.* at 2083.

²⁰⁰ *Id.* at 2087; *see also* U.S. CONST. art. I, § 8, cl. 18; *id.* art. II, § 2, cl. 2.

²⁰¹ 252 U.S. 416 (1920).

²⁰² *Id.* at 432.

²⁰³ *See Bond*, 134 S. Ct. at 2087.

²⁰⁴ *Id.* (quoting *Escambia Cnty. v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam)) (internal quotation mark omitted).

²⁰⁵ *Id.* at 2093.

²⁰⁶ *Markadonatos v. Vill. of Woodridge*, 760 F.3d 545, 553 (7th Cir. 2014) (en banc) (Easterbrook, J., concurring in the judgment).

²⁰⁷ *Bond*, 134 S. Ct. at 2095 (Scalia, J., concurring in the judgment); *see also* Heather K. Gerken, *The Supreme Court, 2013 Term — Comment: Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 92 (2014) (“[T]he [majority] opinion is filled with enough analytic holes that it could be dismembered by a 1L, let alone the wily Justice Scalia.”).

²⁰⁸ Pub. L. No. 105-277, 112 Stat. 2681-856 (codified as amended in scattered sections of the U.S. Code).

²⁰⁹ 18 U.S.C. § 229(a)(1) (2012).

²¹⁰ *Id.* § 229F(1)(A).

chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals.”²¹¹ As if to drive home its expansiveness unmistakably, the definition continues: “The term includes *all* such chemicals, regardless of their origin or of their method of production.”²¹² Finally, a “purpose not prohibited” is “[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity.”²¹³

The case for Bond’s prosecution seems to follow ineluctably from the text. She certainly “use[d] . . . toxic chemical[s]”: 10-chloro-10H-phenoxarsine (an arsenic-based compound) and potassium dichromate, both of which are lethal in high enough doses.²¹⁴ And her purpose — to harm her husband’s paramour — was evidently not “peaceful.”

So how did the Court wriggle free from the seemingly clear import of the text? By leaning on an interpretive presumption: “[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.”²¹⁵ In other words, when a statute is ambiguous, “it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve [the] ambiguity.”²¹⁶ The statute in *Bond* was meant to implement a treaty about chemical warfare. And the Court, sensibly enough, observed that the “global need to prevent chemical warfare does not require the Federal Government to reach into the kitchen cupboard,” so there “is no reason to suppose that Congress — in implementing the Convention on Chemical Weapons — thought otherwise.”²¹⁷

The problem with the Court’s opinion, as Justice Scalia pointed out, is the logical circularity at its core. As the Court acknowledged, the federalism presumption it invoked is available only when a statute is ambiguous. But then it explained: “In this case, the ambiguity *derives from* the improbably broad reach of the key statutory definition” and “the deeply serious consequences of adopting such a boundless reading.”²¹⁸ The *Bass* presumption says that a court should resolve statutory ambiguity in favor of a reading that does not disrupt the balance of federal and state power; the *Bond* opinion seemed to suggest that a statute can be ambiguous *because* it threatens the balance of

²¹¹ *Id.* § 229F(8)(A) (emphasis added).

²¹² *Id.* (emphasis added).

²¹³ *Id.* § 229F(7)(A).

²¹⁴ *Bond v. United States*, 134 S. Ct. 2077, 2085 (2014).

²¹⁵ *United States v. Bass*, 404 U.S. 336, 349 (1971), *cited in Bond*, 134 S. Ct. at 2089–90.

²¹⁶ *Bond*, 134 S. Ct. at 2090.

²¹⁷ *Id.* at 2093.

²¹⁸ *Id.* at 2090 (emphasis added).

federal and state power. There does not seem to be any *textual* ambiguity in the law.²¹⁹

From a textualist standpoint, then, *Bond* is hard to defend. The text seems clear, and a textualist does not generally decline to apply text because of its “improbably broad reach” or because “there is no reason to suppose that Congress” wanted the text to be as broad as it appears.²²⁰ That said, if one takes a more purposive approach to statutory interpretation, *Bond* fares better. What seems, in the end, to be driving the Court’s opinion is its apparent disbelief that Congress could have wanted to make the use of household items like detergent a federal crime, in light of the statute’s (and treaty’s) purpose to address the international problem of chemical weapons. This instinct is a variant of the well-known “mischief rule”²²¹: the “mischief” Congress was addressing in this law was the global proliferation of chemical weapons, and the episode of *Bond* and her husband’s paramour is so far removed from this “mischief” that the statute could not possibly cover it.

How do we assess *Bond*, then, as an instance of the rewriting power? The level of violence *Bond* did to the practice of statutory interpretation will depend upon one’s methodological commitments. As an instance of textualism it is hard, if not impossible, to defend. On the other hand, the animating point of the opinion may very well be right: that the Congress that passed the law — reasonable legislators pursuing reasonable purposes reasonably — did not intend to make a federal crime of *Bond*’s desperate prank. Given the textualist bent of the modern Supreme Court,²²² however, *Bond* is a good example of the Court subordinating statutory interpretation to a possible constitutional problem. It shows the alacrity with which the Court will bend a statute to avoid confronting a constitutional issue.

To us, though, the more important reason that *Bond* was not as problematic as either *Northwest Austin* or *NFIB* is that it was less generative. The key difference is that *Bond* does not purport — at least on its face — to be an “avoidance” case.²²³ Because the opinion

²¹⁹ *Bond*’s brief had proposed that the statute’s exception for “peaceful purposes” might be ambiguous enough to construe to not cover *Bond*’s conduct; the argument would be roughly that peaceful means “non-warlike,” and *Bond*’s assault, which was certainly violent, was not warlike. Brief for Petitioner at 51–52, *Bond*, 134 S. Ct. 2077 (No. 12-158), 2013 WL 1063862. The Court declined that possible road to ambiguity, and Justice Scalia expressly rejected it. *Bond*, 134 S. Ct. at 2094–95 n.2 (Scalia, J., concurring in the judgment).

²²⁰ See, e.g., *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1440 (2010) (arguing, in Justice Scalia’s words, that “what matters is the law the Legislature *did* enact” and that “[w]e cannot rewrite that to reflect our perception of legislative purpose”).

²²¹ See, e.g., *Heydon’s Case*, (1584) 76 Eng. Rep. 637 (Exch.) 638–39.

²²² Justice Breyer is the only active Justice who explicitly advocates a brand of purposivism. See STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK* 88–105 (2010).

²²³ Although the *Bond* Court does briefly cite the constitutional avoidance canon, 134 S. Ct. at 2087, the Court’s ultimate reading of the statute is rooted in a federalism clear-statement rule

did not define some specific constitutional problem it was purportedly “avoiding,” it did not really generate new substantive law. *Northwest Austin* resulted in the equal sovereignty principle, and *NFIB* created a new limit on the commerce power. But *Bond* rested only on an interpretive presumption that had been applied in many cases, and can, in theory anyway, be overridden by a clear statement by Congress. Justice Scalia may be right that the presumption was misapplied in *Bond*, but that kind of mistake should not have the same systemic impact as, say, the equal sovereignty or antinovelty doctrines.

To see what we mean, imagine that *Bond* had been constructed differently. The Court might have begun by acknowledging *Missouri v. Holland*, might have opined that Justice Holmes’s discussion was too brief to merit full stare decisis effect, might have then intoned its doubts about the continuing constitutional soundness of *Holland*, and then listed the arguments driving those doubts. It might then have construed the statute in light of those doubts. If the *Bond* challenge were to return in the future, the Court could then point to its discussion of *Holland* in *Bond* as weakening an already precarious precedent. And *Bond* could then have been used to make the overturning of *Holland* appear less radical. In that way, this counterfactual *Bond* would have been generative, eroding *Holland* and erecting a new barrier to congressional power without having to strike down a law. By sticking to an interpretive clear-statement rule rather than constitutional avoidance, however, the Court mostly avoided that pitfall.

All in all, we think *Bond* is less problematic than *Northwest Austin* and *NFIB* because it is defensible under at least some theories of statutory interpretation and lacks a generative constitutional discussion. But *Bond* does make one thing perfectly clear: the Court will bend over backward to avoid a constitutional problem, without much conscious reflection on whether this is a sound practice.

III. THE SOURCE OF NEW DOCTRINES

Avoidance is merely a means by which new constitutional doctrines may emerge; it is not itself a source of substantive constitutional law. The phenomenon of generative avoidance naturally leads to the question of *where* new constitutional doctrines come from. What, for example, is the source of antinovelty? Justice Frankfurter once described how, over a series of opinions and with “progressive distortion,” a “hint becomes a suggestion, is loosely turned into dictum and finally elevated to a decision.”²²⁴ Avoidance cases are often a step

rather than a concern that the statute would have a constitutional problem if read the Government’s way, *see id.* at 2090.

²²⁴ *United States v. Rabinowitz*, 339 U.S. 56, 75 (1950) (Frankfurter, J., dissenting).

in that process, and so they provide a good laboratory to observe the process in action.

Most investigations of Supreme Court decisionmaking naturally focus on the Justices and their individual predilections, but we want to offer a few preliminary thoughts about another entity: lawyers. Lawyers have a profound impact on what the Court actually does with a case. They frame the questions for the Court, decide what and what not to appeal, and do the bulk of the legal and other research informing a case as they write their briefs. The Court, meanwhile, is quite a small institution: the substantive legal work of the Court is done by nine Justices and thirty-six energetic neophytes, their law clerks.²²⁵ The Court simply does not have the resources to do a great deal of independent research on each case it decides. That means it will naturally come to rely on the briefing.

NFIB is a terrific example of the impact of lawyering on Supreme Court decisionmaking. The plaintiffs stressed the novelty of the federal law at every possible turn. This strategy was deployed more as a constitutional atmospheric than a strict legal argument and mirrored work done by others in different contexts, such as Salim Hamdan's challenge to the Guantanamo tribunals, a case very familiar to one of us that we discuss below. But in *NFIB* — when the avoidance canon provided an opening — the Court elevated the atmospheric into a constitutional doctrine itself, and one that could have powerful reverberations.

The same basic story — litigation choices shaping constitutional law in the Supreme Court — is surely behind other big constitutional cases. For instance, in *Griswold v. Connecticut*,²²⁶ the defendants devoted much of their ninety-six-page brief (written by Professor Thomas Emerson of Yale Law School) to fairly doctrinal arguments that the Connecticut birth-control proscription was not “reasonably related” to the “achievement” of a “proper legislative purpose.”²²⁷ However, the defendants also devoted about ten pages to the argument that the “concept of limited government has always included the idea that governmental powers stopped short of certain intrusions into the personal and intimate life of the citizen,”²²⁸ citing the First, Third, Fourth, Fifth, and Ninth Amendments.²²⁹ The brief conceded that the Constitution “nowhere refers to a right of privacy in express terms,” but ex-

²²⁵ Each retired Justice also hires a law clerk, who assists the active Justices, so the current number is actually thirty-nine. There is also a legal office that assists with miscellaneous motions and certiorari-stage issues, but is generally not involved in the merits cases.

²²⁶ 381 U.S. 479 (1965).

²²⁷ See Brief for Appellants, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 496), 1965 WL 115611, at *11–12.

²²⁸ *Id.* at *79.

²²⁹ *Id.* at *79–89. This argument built on Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 542–43, 548–49 (1961) (Harlan, J., dissenting).

plained that “various provisions of the Constitution embody separate aspects of it.”²³⁰ That, of course, helped birth the “penumbra” doctrine in *Griswold*.²³¹

Constitutional scholarship, which generally focuses on what *judges* think and do, has not consciously reflected upon how litigation choices influence the development of law and doctrine.²³² Even when it has — such as the study of how the NAACP Legal Defense Fund produced *Brown v. Board of Education*²³³ or how the Solicitor General influenced the Burger Court²³⁴ — scholars look at big institutional actors that help set the Court’s agenda.²³⁵ There are, however, more subtle impacts waged not by single actors but by far-flung litigants who may have little in common with (and may indeed even be hostile toward) each other. For example, when big challenges to federal power — from Guantanamo detentions to the Affordable Care Act — unite in a common thread of antinovelty, it grows likelier that the atmospheric will slip into doctrine.

We cannot, of course, survey all of this here. This section is more a stimulant to further research than a polished answer. We think it is appropriate to consider this issue briefly in an Article devoted primarily to the avoidance canon because the canon provides such a unique opening for the atmospheric of advocates to migrate into the U.S. Reports. Litigants generally include atmospheric to color a Justice’s perception of a case with points that are not relevant in a narrowly legal sense. When the Court writes an avoidance decision, however, those atmospheric can become the hook for the constitutional “doubt” driving the Court’s reading of the statute.

Our limited goal here is to explore how advocacy and avoidance combined to give rise to the antinovelty doctrine. To claim that a law or practice is unprecedented has long been a rhetorical tactic in the arsenal of constitutional litigators.²³⁶ Challengers to federal power in the

²³⁰ Brief for Appellants, *Griswold*, 381 U.S. 479 (No. 496), 1965 WL 115611, at *79.

²³¹ 381 U.S. at 484.

²³² One interesting though obscure exception is BENJAMIN R. TWISS, *LAWYERS AND THE CONSTITUTION* (1942), which traces the impact of the corporate bar on the development of constitutional law in the *Lochner* era.

²³³ See, e.g., MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950* (2004).

²³⁴ See, e.g., LINCOLN CAPLAN, *THE TENTH JUSTICE* (1987).

²³⁵ See, e.g., Adam Chandler, *Cert.-Stage Amicus Briefs: Who Files Them and to What Effect?*, SCOTUSBLOG (Sept. 27, 2007, 12:31 PM), <http://www.scotusblog.com/2007/09/cert-stage-amicus-briefs-who-files-them-and-to-what-effect-2> [<http://perma.cc/K6FF-QLA8>].

²³⁶ The Court observed in 1913: “[I]n almost every instance of the exercise of the [commerce] power differences are asserted from previous exercises of it and made a ground of attack.” *Hoke v. United States*, 227 U.S. 308, 320 (1913). Justice Ginsburg quoted that statement in her *NFIB* dissent and collected other instances of advocates stressing the novelty of challenged laws. 132 S.

Roberts Court have continued the pattern. For instance, the petitioner's brief in *Hamdan v. Rumsfeld*²³⁷ begins with a description of the power that the President had asserted in order to try Hamdan outside traditional civilian and military judicial systems.²³⁸ That opening, and the rest of the brief, contained five different claims about how President Bush was claiming novel and unprecedented powers.²³⁹ These themes were echoed throughout the thirty-nine amicus briefs and the oral argument.²⁴⁰

The Solicitor General, on the other side, made repeated arguments about how the President's actions were consistent with tradition. Indeed, the opening²⁴¹ and closing²⁴² lines of his oral argument emphasized that tradition was on *his* side. *Hamdan* thus involved dueling

Ct. 2566, 2625 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

²³⁷ 548 U.S. 557 (2006).

²³⁸ Brief for Petitioner at 5–6, *Hamdan*, 548 U.S. 557 (No. 05-184), 2006 WL 53988 (“Such assertions reach far beyond any war power ever conferred upon the Executive, even during declared wars. . . . In this case, the President seeks not to revive, but to invent, a new form of military jurisdiction. While military commissions have served an important role in times of war, their use has been strictly limited in light of their inherent threat to liberty and the separation of powers. Accordingly, this Court has never before recognized the legitimacy of a commission except to the extent it has been specifically authorized by Congress.”).

²³⁹ First, the President was departing from traditional fora for trying crimes — civilian courts and courts martial. Second, the President was ignoring traditional procedural rules, such as the right to be present at one's own trial. Third, the President was using the extraordinary tribunals for a novel purpose — not to try war crimes, but to try offenses of his own invention. Fourth, the tribunals were targeted in a novel fashion: whereas past tribunals had applied evenhandedly to citizens and aliens alike, President Bush's applied only to aliens. Fifth, the President was taking the novel step of trying to nullify the role of federal courts by eliminating habeas corpus rights. *Id.* at 1–8.

²⁴⁰ Here are the opening lines of the oral argument:

We ask this Court to preserve the status quo to require that the President respect time-honored limitations on military commissions. These limits, placed in articles 21 and 36 of the Uniform Code of Military Justice, require no more than that the President try offenses that are, indeed, war crimes and to conduct trials according to the minimal procedural requirements of the UCMJ and the laws of war themselves. These limits do not represent any change in the way military commissions have historically operated. Rather, they reflect Congress's authority under the Define and Punish Clause to codify limits on commissions, limits that this Court has historically enforced to avoid presidential blank checks.

Transcript of Oral Argument at 3, *Hamdan*, 548 U.S. 557 (No. 05-184), http://www.supremecourt.gov/oral_arguments/argument_transcripts/05-184.pdf [<http://perma.cc/SD7V-CXHU>].

²⁴¹ *Id.* at 36 (“The executive branch has long exercised the authority to try enemy combatants by military commissions. That authority was part and parcel of George Washington's authority as Commander in Chief of the Revolutionary Forces, as dramatically illustrated by the case of Major Andre. And that authority was incorporated into the Constitution.”).

²⁴² *Id.* at 79 (“The use of military commissions to try enemy combatants has been part and parcel of the war power for 200 years. Congress recognized it in 1916 in the Articles of War, then again, after World War II, in the UCMJ. This Court recognized it in a host of cases, not just *Quirin*, but *Yamashita*, *Eisenrager*, and, most clearly, in *Madsen*. Since that is such an important component of the law of war, something that has been part and parcel of that power from Major Andre's capture to today, there is no reason for this Court to depart from that tradition.”).

claims about which side's arguments — the detainee's or the government's — were, in fact, unprecedented. In that way, both litigants were advancing a subtle, implicit claim about novelty: the defenders of tradition had the Constitution on their side; those who were trying to alter the status quo did not.

The Court did not adopt an antinovely doctrine in *Hamdan*. It used history just as the litigants had — as an atmospheric. The Court began the merits section of its opinion by surveying past military commissions in the Revolutionary War, the Civil War, the Mexican-American War, and World War II.²⁴³ But all of those forerunners differed in important ways from *Hamdan*'s tribunal — a fact the Court mentioned repeatedly without ever quite saying that this novelty made the tribunal particularly suspect. Justice Kennedy's concurrence likewise focused on how time-tested standards would, in general, have greater fidelity to the Constitution.²⁴⁴

We have already discussed *Free Enterprise Fund v. Public Company Accounting Oversight Board*, which concerned double for-cause protection. The petitioners' brief in that case — that is, the brief challenging the constitutionality of the double for-cause arrangement — emphasized the supposed novelty of that arrangement several times.²⁴⁵ For instance: “The Act's gratuitous and unprecedented effort to immunize government power from public accountability, by creating a ‘Fifth Branch’ of government neither appointed nor removable by the President . . . violates every basic precept of separated powers.”²⁴⁶ The amicus curiae briefs contained similar claims: “[I]n its degree of insulation from presidential oversight and control, the Board is alone among all other agencies, past or present.”²⁴⁷ These claims about the supposed lack of precedent for the Board did not have substantive, doctrinal relevance to the constitutional arguments; again, they were included as atmospheric.

And that is how the Chief Justice's opinion, striking down the double for-cause arrangement, used them. The opinion stated that the parties had “identified only a handful of isolated positions in which inferior officers might be protected by two levels of good-cause ten-

²⁴³ 548 U.S. at 590–92.

²⁴⁴ *Id.* at 637 (Kennedy, J., concurring in part) (“Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.”).

²⁴⁵ The brief was authored by three experienced Supreme Court litigators — Michael Carvin (of Jones Day), Viet Dinh (of Bancroft), and Kenneth Starr.

²⁴⁶ Brief for Petitioners at 10, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) (No. 08-861), 2009 WL 2247130.

²⁴⁷ Brief for the Cato Institute et al. as Amici Curiae in Support of Petitioners at 8, *Free Enter. Fund*, 130 S. Ct. 3138 (No. 08-861), 2009 WL 2406376.

ure,”²⁴⁸ and then quoted Judge Kavanaugh’s dissent from the decision under review: “Perhaps the most telling indication of the severe constitutional problem with the [Board] is the lack of historical precedent for this entity.”²⁴⁹ The Chief Justice’s opinion discussed the novelty of the Public Company Accounting Oversight Board in the section responding to counterarguments, after the bulk of the constitutional analysis was done. Nothing important turned on it; its placement suggested that it was only rhetorical dressing.

Then, a few years later, the challengers to the Affordable Care Act launched a barrage of novelty-based arguments at the Court. In the main brief challenging the individual mandate, the antinovely rhetoric began in the first full entry of the Table of Contents: “Congress’ powers are limited and enumerated to protect individual liberty, which is threatened by the Act’s unprecedented purchase mandate.”²⁵⁰ The very first page of the brief claimed: “Never before has Congress enacted such a regulatory mandate.”²⁵¹ The first sentence of the “Summary of the Argument” section was: “The mandate imposes an extraordinary and unprecedented duty on Americans to enter into costly private contracts.”²⁵² The first sentence of the challengers’ oral argument was: “The mandate represents an unprecedented effort by Congress to compel individuals to enter commerce in order to better regulate commerce.”²⁵³ The dozens of amici echoed these claims.²⁵⁴

Given this relentless emphasis in the briefing, it is no surprise that the fact of the individual mandate’s supposed novelty showed up in the Chief Justice’s opinion (right near the beginning of his Commerce Clause analysis) and the joint dissent. But the antinovely idea did not play a subordinate or merely rhetorical role in the Chief Justice’s opinion. To the contrary, it was woven into the opinion’s logical structure. The “hint” in *Hamdan* became a “suggestion” in *Free Enterprise Fund* that was “elevated to a decision” in *NFIB*.²⁵⁵ The antinovely doctrine

²⁴⁸ *Free Enter. Fund*, 130 S. Ct. at 3159.

²⁴⁹ *Id.* (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)) (internal quotation mark omitted).

²⁵⁰ Brief for Private Respondents on the Individual Mandate at iii, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-398), 2012 WL 379586 (capitalization removed).

²⁵¹ *Id.* at 1.

²⁵² *Id.* at 7.

²⁵³ Transcript of Oral Argument, *supra* note 140, at 55.

²⁵⁴ *See, e.g.*, Brief of the Washington Legal Foundation and Constitutional Law Scholars as Amici Curiae in Support of Respondents (Individual Mandate Issue) at 32, *NFIB*, 132 S. Ct. 2566 (No. 11-398), 2012 WL 1680857. It is also no surprise that one account of the health care law and subsequent litigation is entitled *Unprecedented*. JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE (2013).

²⁵⁵ *Cf.* *United States v. Rabinowitz*, 339 U.S. 56, 75 (1950) (Frankfurter, J., dissenting) (decrying the Court’s “progressive distortion” of search-and-seizure doctrine post-*Weeks v. United States*, 232 U.S. 383 (1914)).

birthed in the health care litigation is thus an example of a heretofore unnoticed mode of constitutional change: rhetorical points, backed by language in the case law, put forward by sophisticated Supreme Court litigants, transforming into constitutional doctrine. This pattern will only grow in importance with the appearance of a specialized Supreme Court bar.

As we said at the outset, that phenomenon, as a whole, is beyond the scope of this Article. But it is linked to the avoidance canon because the canon provides a unique opening for new doctrines to appear. The constitutional analysis in an avoidance opinion receives less attention and rigor, and the Court may be emboldened to signal change when it does not have to face the consequence of that change. The Roberts Court has ushered in some important constitutional changes. Merits aside, it is important to understand and assess, from a process perspective, how that change has been achieved.

IV. CODA: "THE CANDID SERVICE OF AVOIDANCE"

We have, so far, been mostly critical of the avoidance canon. But it is not irredeemable — we think it should be limited, not jettisoned. And the typology of avoidance we laid out in Part I can help to distinguish the good from the bad. Where, after consulting all relevant materials, two readings of a statute are in equipoise, and one reading would raise serious doubts under some long-settled principle of constitutional law, no one would seriously contest that a judge should opt for the doubt-free reading. That is, of course, a stylized and unrealistic scenario. In practice, these variables will operate along sliding scales: the level of doubt and level of distortion will vary. Substantial doubt may justify a more significant distortion, less doubt may justify a less significant distortion, little doubt will not justify a major distortion, and so on.

It would be impossible to calibrate these sliding scales precisely in the abstract. Like any hard judicial task, the avoidance canon is not reducible to some mechanistic or algorithmic solution. But the distinctions and examples set out in this Article may at least yield some helpful suggestions. We have critiqued two varieties of avoidance in particular: generative avoidance, which uses the canon to articulate new constitutional doctrines, and the rewriting power, which embraces implausible readings of statutes in the misguided pursuit of judicial modesty. Of course, any responsible use of avoidance will have to avoid those pitfalls. A court should not swerve too far from the best reading of the statute because the systemic costs to democratic decisionmaking are too high, and it cannot create new constitutional law because the basic conditions ensuring the soundness of that law are not present.

Beyond that, we (along with several other scholars) think that the avoidance canon is most valuable to give life to underenforced consti-

tutional norms.²⁵⁶ We use that term in a precise sense. Certain constitutional rights may be settled but difficult to implement because of institutional limitations of the judiciary. The “slippage” between “a constitutional norm and its enforcement” in court leads to an “underenforced” norm.²⁵⁷ The constitutional principle at issue may involve intractable line-drawing problems, or it may resist crystallization as workable legal doctrine. Whatever the exact cause, the important point is that the principle is “truncated for reasons which are based not upon analysis of the constitutional concept but upon various concerns of the Court about its institutional role.”²⁵⁸

Norms that are underenforced in this manner should still “be understood to be legally valid to their full conceptual limits.”²⁵⁹ And one consequence of that proposition is that courts are justified in extending their enforcement of those norms to the extent that doing so is consistent with the institutional considerations that caused the norms to be underenforced in the first place. That conclusion brings us back to the avoidance canon. The avoidance canon is a valuable method to allow for *some* judicial enforcement of constitutional norms in the space between a norm’s “full conceptual limits” and the level of direct judicial enforcement it receives. The canon can thus breathe life into an underenforced constitutional concept.²⁶⁰ But because the decision is subject to a congressional override, the decision ultimately leaves the hard line-drawing and enforcement problems to the branch best suited to resolve them.²⁶¹

²⁵⁶ See generally Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). A number of scholars have defended the avoidance canon on a similar ground. See, e.g., WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 286 (1994); 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, 455–59 (2005); Young, *supra* note 78, at 1602–13.

²⁵⁷ Sager, *supra* note 256, at 1213 (internal quotation marks omitted).

²⁵⁸ *Id.* at 1214.

²⁵⁹ *Id.* at 1221.

²⁶⁰ Because of our definition of an “underenforced norm,” this use of avoidance does not run into the “penumbra” problem identified by Judge Posner. See Posner, *supra* note 77.

²⁶¹ Professor Eskridge has noted that the “reasons for the nonenforcement” of constitutional norms through judicial review may be “equally valid arguments for the nonenforcement of [those] norms through *statutory* interpretation.” ESKRIDGE, *supra* note 256, at 288. That is a reason for caution before enforcing any norm through avoidance. But we think there are situations where the reasons for nonenforcement though judicial review would not be “equally valid” in the avoidance context. For instance, constitutional cases often involve some sort of balancing at their core. In Equal Protection or First Amendment cases, courts must balance some classification or speech restriction against a government interest. The institutional limitation that leads to underenforcement of a right in such a case may relate to a court’s relative inability to gather all the information relevant to the balancing. And it may be that a court, after reviewing the information available to it, believes that the balance tips in favor of the right-holder but is cognizant that with perfect information the balance might tip the other way. In that sort of case, avoidance seems like a responsible mode of enforcement. The legislature, with presumably superior informational re-

We explore this justification for avoidance through the First Amendment. It may be clear that a particular statute implicates the First Amendment, but difficult in a given case for a court to balance the constitutional and governmental interests at stake. In that setting, the avoidance canon can perform an “invaluable” function as a “means to mediate the borderline between statutory interpretation and constitutional law, and between the judicial and legislative roles, where judicial line-drawing is especially difficult and where underenforced constitutional values are at stake.”²⁶² A good example is the early Warren Court’s use of avoidance — led by Justices Frankfurter and Harlan — in First Amendment cases about political subversion and communism.

For instance, in *United States v. Rumely*,²⁶³ the Court considered Congress’s power to investigate someone who sold what Justice Frankfurter’s majority opinion elliptically described as “books of a particular political tendentiousness” — that is, books with Communist leanings.²⁶⁴ That power was defined by a congressional resolution, which authorized the relevant House Committee to investigate “lobbying activities.”²⁶⁵ Rather than “delimiting the protection guaranteed by the First Amendment,”²⁶⁶ as Justices Black and Douglas called for in concurrence,²⁶⁷ the Court, “in the candid service of avoiding a serious constitutional doubt,” interpreted the resolution not to cover books intended to influence the thinking of the community, but only representations made directly to Congress.²⁶⁸

That use of avoidance was entirely appropriate. For one thing, judges are instinctively hesitant to issue decisions that could affect national security (such as a decision that would strengthen the influence of Communism in the 1950s). There are prudential reasons to tread lightly. But that means that the potential for underenforcement of constitutional rights is high, and the avoidance canon can provide a way to enforce a constitutional provision to its conceptual limits, without entirely ignoring the prudential reasons for caution in cases implicating national security. The likelihood that Congress will respond to a Court decision it disagrees with is much higher when national securi-

sources, can revisit and restrike the balance in response to the court’s decision, if the political will exists. And that process itself may generate a record to facilitate judicial review in the future. See generally Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2 (2008) (arguing that courts can “craft doctrines” to manipulate congressional action instead of “attempting to designate certain government actions . . . as permissible or impermissible,” *id.* at 4).

²⁶² Frickey, *supra* note 256, at 402.

²⁶³ 345 U.S. 41 (1953). The case is discussed in Frickey, *supra* note 256, at 413–17.

²⁶⁴ *Rumely*, 345 U.S. at 42.

²⁶⁵ H.R. Res. 298, 81st Cong. (1949).

²⁶⁶ *Rumely*, 345 U.S. at 48.

²⁶⁷ *Id.* at 56–58 (Douglas, J., concurring).

²⁶⁸ *Id.* at 47 (majority opinion).

ty is threatened, as the dialogue between the Court and Congress over the rights of Guantanamo detainees has demonstrated.²⁶⁹

In addition, the Court was not breaking new legal ground. The use of avoidance in *Rumely* was not generative, as it was in *Northwest Austin* or *NFIB*. “Surely it cannot be denied,” the Court understatedly explained, that the congressional resolution at issue — which, according to the Government, gave Congress “the power to inquire into all efforts of private individuals to influence public opinion through books and periodicals” — raised “doubts” under the First Amendment.²⁷⁰ Finally, the Court’s interpretation of the statute was “not barred by intellectual honesty.”²⁷¹ Rather, the Court observed, to give the resolution “a more restricted scope” did no “violence” to it.²⁷² The combination of these three factors — the difficulty of balancing First Amendment concerns against national security, the relative consensus regarding the underlying constitutional principles, and the lack of violence done to the statute — made this case a particularly suitable instance of avoidance.²⁷³

The rule of lenity operates in a similar manner. The rule of lenity “requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.”²⁷⁴ The rule of lenity is rooted in constitutional considerations, and so can be regarded as a particular species in the avoidance genre.²⁷⁵ To construe a statute narrowly alleviates fair-notice and void-for-vagueness concerns that might afflict an imprecise criminal statute. Lenity is generally a good use of avoidance for two reasons: First, it does not involve the creation of new doctrines of constitutional law; rather, it instantiates settled constitutional values that are rarely enforced directly. Second, the Court takes seriously the limits on its applicability. There has to be a “grievous ambiguity” in the statute.²⁷⁶ As the Court has explained, “[t]he simple existence of some statutory ambiguity . . . is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree.”²⁷⁷ “The rule of lenity applies only if, ‘after seizing everything from which aid can be

²⁶⁹ See BREYER, *supra* note 222, at 194–214.

²⁷⁰ *Rumely*, 345 U.S. at 46 (emphasis added).

²⁷¹ *Id.* at 47.

²⁷² *Id.*

²⁷³ See Robert Post, Festschrift, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319, 1321–23 (2010) (defending the “statesmanship” of these Warren Court decisions because “[j]udicial decision making is always enveloped within a larger political context that endows judicial work with legitimacy and effectiveness,” *id.* at 1322).

²⁷⁴ *United States v. Santos*, 553 U.S. 507, 514 (2008).

²⁷⁵ William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 600 (1992).

²⁷⁶ *Muscarello v. United States*, 524 U.S. 125, 139 (1998) (quoting *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994)) (internal quotation mark omitted).

²⁷⁷ *Id.* at 138.

derived,”²⁷⁸ the Court “can make ‘no more than a guess as to what Congress intended.’”²⁷⁹

In the end, our prescription is intuitive and pragmatic. First, judges should take seriously the threshold limits on the avoidance canon’s applicability. The statutory reading embraced by the judge must be, as Justice Holmes put it, “fairly possible,” and the constitutional doubt (in the absence of avoidance) must be “grave.”²⁸⁰ Though the showing required by the rule of lenity (“*grievous* ambiguity”²⁸¹) may be too demanding for the avoidance context, lenity at least shows that it is possible to be vigilant about whether a canon-colored reading is in fact plausible. Justices Frankfurter and Black — who had different judicial temperaments, to put it mildly — agreed in one case that the avoidance canon should “not be pressed to the point of disingenuous evasion,”²⁸² and that a judge should not “rewrite [a] statute in the name of avoiding decision of constitutional questions.”²⁸³ We have explained why: the rewritten statute is sticky and may prove a more serious interference with lawmaking in the democratic branches than invalidation. In the end, there is no magic formula that captures how far a judge can swerve from the best reading of a statute in the name of avoidance. The current doctrinal standard — that a reading must be “fairly possible” — is probably the best that can be done, even if it is rather tautological. Our goal here is simply to draw attention to the costs of statutory rewriting, and to insist that courts be sensitive to these costs in determining whether a canon-colored reading meets the standard.

Second, judges should not articulate new constitutional norms while purporting to avoid constitutional issues. The likelihood of constitutional analysis that is cursory, obscure, or wrong is too high. If the Court does something new in constitutional law, it owes it to lower courts and the political branches to define the new doctrine clearly and to defend the new doctrine rigorously. That is normally required by the very structure of our judicial system — the case-or-controversy requirement, the fusion of rationale and judgment. But the avoidance canon allows a judge to defer the true ramifications of her ruling.

The other side of the same coin is that judges should be scrupulous *not* to regard any constitutional discussion in a modern avoidance de-

²⁷⁸ *Reno v. Koray*, 515 U.S. 50, 65 (1995) (quoting *Smith v. United States*, 508 U.S. 223, 239 (1993)).

²⁷⁹ *Id.* (quoting *Ladner v. United States*, 358 U.S. 169, 178 (1958)).

²⁸⁰ *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916).

²⁸¹ *Muscarello*, 524 U.S. at 139 (emphasis added).

²⁸² *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 799 (1961) (Frankfurter, J., dissenting) (quoting *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933)).

²⁸³ *Id.* at 785 (Black, J., dissenting).

cision as binding precedent in a future case. Avoidance is rooted in *Ashwander* and the desire to *avoid* making new constitutional law. A court is unfaithful to that purpose when it treats the constitutional discussion in an avoidance decision as precedential.²⁸⁴

We recognize, of course, that there will be hard borderline cases — interpretations that push the boundary of what is “fairly possible” and extensions of old doctrines that hover between application and innovation. Like all hard cases, those will require judgment. Our hope is only to inform the exercise of that judgment, and to resist the uncritical assumption that avoidance is always preferable.

CONCLUSION

The Court generally defends the avoidance canon as a species of judicial restraint. But the only thing the avoidance canon “avoids” is the invalidation of a statute. Recent history makes clear that the avoidance canon does *not* avoid a constitutional decision; it is, rather, a tool of constitutional decisionmaking. When a court considers a constitutional challenge to a statute, the choice it faces is not whether to “avoid” or “engage in” constitutional adjudication; the choice is which form of constitutional adjudication is more suitable in the circumstances.

We have tried to identify the most important circumstances informing that choice. First, the rewriting power — where avoidance is embraced even though the resulting statutory interpretation is implausible — is dangerous because, like judicial review itself, it is countermajoritarian. Indeed it may even be more countermajoritarian than simply striking down a statute: at least invalidation leaves behind a blank slate upon which Congress may put in place its own solution. Avoidance may put in place a court-crafted solution that never had and never will have the support of Congress, and that may never be revisited because of the structural inertia laced into our constitutional design. Second, generative avoidance — uses of the avoidance canon that result in new constitutional doctrine or significant innovations in constitutional doctrine — is problematic because it unmoors adjudication from the traditional, structural source of judicial restraint. That source of restraint, embodied in the Article III case-or-controversy requirement, is the fusion of rationale and judgment. That fusion generally means constitutional principles develop in a context where their impact is immediate and apparent.

²⁸⁴ See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2637 n.3 (2013) (Ginsburg, J., dissenting) (“Acknowledging the existence of ‘serious constitutional questions’ does not suggest how those questions should be answered.” (quoting *id.* at 2630 (majority opinion))).

Northwest Austin suffered from both these flaws. The Court rewrote the bailout provision of the Voting Rights Act while unleashing a novel constitutional doctrine that eviscerated the same Act only a few years later. But the arrival of that new doctrine was shrouded in restraint because the Court, after all, had “avoided” striking down a law, at least for a time.

The avoidance canon should not be discarded, but it should be circumscribed. There are circumstances where the avoidance canon makes sense and does indeed function as a useful principle of restraint. In particular, it can be useful as a mode of enforcing underenforced constitutional norms. In that circumstance, the canon does not expand a constitutional principle beyond its conceptual limits and respects the institutional limits that caused the norm to be underenforced in the first place. But there are also circumstances where judges must be wary of embracing the easy but specious restraint promised by the avoidance canon, when the more restrained and responsible exercise of judicial power is just to face the hard task of deciding a constitutional question.

These suggestions are offered as invitations as much as final answers. The avoidance canon is, by now, such a deeply embedded practice in the federal courts that it will never be totally abandoned. Nor should it. But there are varieties that are particularly problematic, and *those* should be eradicated even if the practice more generally is not. Because of this variety, courts should reflect more consciously on when avoidance is actually the more responsible and restrained course. This Article aims to stimulate that sort of reflection. Given how routine and reflexive invocations of avoidance have become in the biggest constitutional cases confronting the Court, we think this project is important.