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“CONSTITUTIONAL AVOIDANCE AND ANTI-
AVOIDANCE
BY THE ROBERTS COURT”

Professor Richard L. Hasen

CONSTITUTIONAL AVOIDANCE AND ANTI-AVOIDANCE
BY THE ROBERTS COURT
RICHARD L. HASEN^{*}

INTRODUCTION

At the (apparent but not real) end of the October 2008 Supreme Court term, the Court took diametrically opposing positions in a pair of sensitive election law cases. In *Northwest Austin Municipal Utility District No. 1 v Holder (NAMUDNO)*,¹ the Court avoided deciding a thorny question about the constitutionality of a provision of the Voting Rights Act. The Court did so through a questionable application of the doctrine of “constitutional avoidance.” That doctrine (also known as the “avoidance canon”) encourages a court to adopt one of several plausible interpretations of a statute in order to avoid deciding a tough constitutional question.² In *NAMUDNO*, however, the Court—without objection from single Justice—embraced a manifestly implausible statutory interpretation to avoid the constitutional question.³

A week after *NAMUDNO* issued, the Court announced it would not be deciding a campaign finance case, *Citizens United v Federal Election Commission*,⁴ by the Court’s summer break as scheduled. Instead, the Court set the case for reargument in September (before the start of the new Court term), expressly asking the parties to brief the question whether the Court should overturn two of its precedents upholding the constitutionality of corporate spending limits in candidate elections.⁵ The constitutional issue had been abandoned by the law’s challengers in the court below and was not even

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¹ 129 S Ct 2504 (2009).

² See Part I.A (describing doctrine).

³ See Part II.A.

⁴ 129 S Ct 2893 (2009).

⁵ Id. (“This case is restored to the calendar for reargument. The parties are directed to file supplemental briefs addressing the following question: For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. §441b?”).

mentioned in the challengers' jurisdictional statement.⁶ Moreover, the constitutional question could easily be avoided through a plausible interpretation of the applicable campaign finance statute. Thus, in *Citizens United*, the Court gave itself an opportunity to apply a little-noticed (and rarely used) tool of *anti*-avoidance: the Court will eschew a plausible statutory interpretation in order to decide a difficult constitutional question.⁷ It remains to be seen whether the Court will actually decide the constitutional question when it issues its decision. But the reargument order itself was a use of the anti-avoidance tool: the Court went out of its way to make a thorny constitutional question more prominent by scheduling briefing and argument on it despite a plausible statutory escape hatch.

In both cases the Court failed to follow the usual understanding of the avoidance canon: in *NAMUDNO*, the Court applied the canon to adopt an implausible reading of a statute that appeared contrary to textual analysis, congressional intent, and administrative interpretation. In *Citizens United*, the Court failed to dispose of the case initially through a plausible reading of a statute, setting itself up to address a constitutional question head-on that was not properly presented to the Court. What explains the divergent approaches in the two cases, and what does the divergence tell us about the Roberts Court? In this Article, I describe the divergent approaches the Court took in these cases in detail and identify the evidence supporting three competing explanations for the Court's actions, ranging from the most charitable to least charitable reading of the Court's motives.

First, the *fruitful dialogue* explanation posits that the Court will use constitutional avoidance only when doing so would further a dialogue with Congress that has a realistic chance of actually avoiding constitutional problems through redrafting. On this reading, the Voting Rights Act got "remanded" to Congress because Congress may fix it in ways that do not violate the Constitution, but the corporate spending limits provision of federal campaign finance law perhaps does not deserve remand because the campaign finance laws are not constitutionally fixable.

Second, the *political legitimacy* explanation posits that the Court uses the constitutional avoidance doctrine when it fears that a full-blown constitutional pronouncement would harm its legitimacy. Some evidence supports this understanding. In the same term that the Court avoided the constitutional question in *NAMUDNO*, it used the same avoidance canon to narrowly construe a

⁶ See Part II.B.

⁷ The discovery of the anti-avoidance tool lends some credence to Llewellyn's complaint that every canon of construction has a contrary "counter-canon." Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to Be Construed*, 3 Vand L Rev (1950).

different provision of the Voting Rights Act in *Bartlett v Strickland*,⁸ and it applied constitutional avoidance (in deed if not in name) to narrowly construe Title VII of the 1964 Civil Rights Act in *Ricci v DeStefano*,⁹ the controversial New Haven firefighters case. Each of these cases involved tough questions of race relations whose resolution could harm the Court's legitimacy. In contrast, campaign finance issues are much lower salience to the public, and are less likely to arouse the passion of interest groups and perhaps the ire of Congress.

Third, the *political calculus* explanation posits that the Court uses constitutional avoidance to soften public and Congressional resistance to the Court's movement of the law in a direction that the Court prefers as a matter of policy. Under this positive political theory explanation of the Court's actions, the difference between *NAMUDNO* and *Citizens United* is simply one of timing, and the cases are not so different after all. The Court had already laid the groundwork for a deregulatory campaign finance regime through its earlier campaign finance rulings: it may now be ready to put a stake in the heart of the corporate spending limits. Under that reading, the Voting Rights Act's time of demise will come, and the public will come to expect it once the Court first raised constitutional doubts in *NAMUDNO*. The avoidance canon is just another doctrinal tool in the Court's arsenal to move constitutional law and policy in the Court's direction and at the Court's chosen speed. Like the political legitimacy argument, the political calculus argument is one about the Court's legitimacy, but it is one that views the Court as strategic in pursuing an agenda rather than as fearful.

While it is impossible to know which of these explanations is correct (and more than one may be in play for at least some of the Justices), the developments of the October 2008 term suggest that the constitutional avoidance doctrine offers broad clues about the Roberts Court and its willingness to make major changes to American constitutional law. In Part I, I briefly review justifications for and criticisms of the constitutional avoidance doctrine and survey the few decisions of the Roberts Court thus far applying the doctrine. Part II describes in greater detail the use of avoidance and anti-avoidance in *NAMUDNO* and *Citizens United*. Part III explores the competing explanations for the Roberts Court's selective use of constitutional avoidance doctrine. Whether intended or not, the use of constitutional avoidance and anti-avoidance allows the Court to control the speed and intensity of constitutional and policy change.

I.

A BRIEF SURVEY OF THE CONSTITUTIONAL AVOIDANCE DOCTRINE AND ITS USE BY THE ROBERTS COURT

⁸ 129 S Ct 1231 (2009).

⁹ 129 S Ct 2658 (2009).

A. *Justifications for, and Criticisms of, the Avoidance Canon*¹⁰

Roughly speaking, “canons” are rules of thumb or presumptions that courts use to interpret the meaning of statutes. Constitutional avoidance (or the “avoidance canon”) is a substantive canon of statutory interpretation. Substantive canons “are generally meant to reflect a judicially preferred policy position. [They] reflect judicially-based concerns, grounded in the courts’ understanding of how to treat statutory text with reference to judicially perceived constitutional priorities, pre-enactment common law practices, or specific statutorily based policies.”¹¹ Besides the avoidance canon, among the most important substantive canons are the rule of lenity (a “rule against applying punitive sanctions if there is ambiguity as to underlying criminal liability or criminal penalty”¹²) and a host of “federalism” canons protecting state sovereignty against congressional intrusion.¹³

Substantive canons stand in contrast to language canons, which “consist of predictive guidelines as to what the legislature likely meant based on its choice of certain words rather than others, or its grammatical configuration of those words in a given sentence, or the relationship between those words and text found in other parts of the same statute or in similar statutes.”¹⁴

Substantive canons are controversial.¹⁵ Eskridge and Frickey have defended them as part of an “interpretive regime” serving rule-of-law and coordination functions.¹⁶ That is, substantive canons can act as gap-filling devices

¹⁰ I do not intend here to give a full-blown examination to the avoidance canon. I rather sketch the main arguments to provide relevant context for the remainder of this Article. This section appears in similar form in Richard L. Hasen, *The Democracy Canon*, 62 Stan L Rev 69 (2009).

¹¹ James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 Vand L Rev 1, 13 (2005).

¹² William N. Eskridge, Jr., Philip P. Frickey, & Elizabeth Garrett, *Cases and Materials On Legislation: Statutes and the Creation of Public Policy* App. B 32 (West 4th ed. 2007).

¹³ Id at App. B 30-32; see also below Parts III & IV.

¹⁴ Brudney & Ditslear, 58 Vand L Rev at 12 (cited in note 11). One of the most important language canons is the *expressio unius* canon, “the expression of one thing suggests the exclusion of others.” Eskridge, Frickey, & Garrett, *Cases and Materials on Legislation* at App. B 19 (cited in note 12) (“*expressio unius est exclusio alterius*”). Justice Scalia gives this example, “What [the *expressio unius* canon] means is this: If you see a sign that says children under twelve may enter free, you should have no need to ask whether your thirteen-year-old must pay. The inclusion of the one class is an implicit exclusion of the other.” Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 25 (Princeton U Press 1997).

¹⁵ Eskridge, Frickey, & Garrett, *Cases and Materials on Legislation* at 945 (cited in note 12) (describing “intellectual warfare” over the canons).

¹⁶ William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term Foreword: Law as Equilibrium*, 108 Harv L Rev 26, 66 (1994).

that provide clarity for the law and allow courts to signal policy preferences to legislatures, which may draft around such preferences when desired.¹⁷ Eskridge further defends them as “a way for ‘public values’ drawn from the Constitution, federal statutes, and the common law to play an important role in statutory interpretation.”¹⁸

In contrast, Justice Scalia argues against substantive canons, which he characterizes as “the use of certain presumptions and rules of construction that load the dice for or against a particular result.”¹⁹ Calling substantive canons “a lot of trouble” to “the honest textualist,”²⁰ Justice Scalia describes them as indeterminate,²¹ leading to “unpredictability, if not arbitrariness” of judicial decisions. He also questions “where courts get the authority to impose them,”²² doubting whether courts can “really just decree we will interpret the laws that Congress passes to mean more or less than they fairly say.”²³

Despite these statements, Justice Scalia has approved of and repeatedly applied the avoidance canon,²⁴ as have all other current members of the Supreme Court. The avoidance canon provides that courts in appropriate circumstances should “avoid [statutory] interpretations that would render a statute unconstitutional or that would raise serious constitutional difficulties.”²⁵ Traditional supporters of the canon’s use raise three justifications.

“First, [the avoidance canon] may be a rule of thumb for ascertaining legislative intent.”²⁶ The underlying assumption is that Congress either prefers not to press the limits of the Constitution in its statutes, or it prefers a narrowed (and constitutional) version of its statutes to a statute completely stricken by Congress. This is the rationale often raised by the Supreme Court in applying the canon.²⁷

¹⁷ Id at 66-69.

¹⁸ Eskridge, Frickey, & Garrett, *Cases and Materials on Legislation* at 48 (cited in note 12).

¹⁹ Scalia, *A Matter of Interpretation* at 27 (cited in note 14).

²⁰ Id at 28.

²¹ Id (“it is virtually impossible to expect uniformity and objectivity when there is added, on one side or the other, a thumb of indeterminate weight”).

²² Scalia, *A Matter of Interpretation* at 29 (cited in note 14).

²³ Id.

²⁴ Id at 20 n.22. See also Part I.B (discussing Justice Scalia’s opinions concerning the avoidance canon).

²⁵ Eskridge, Frickey, & Garrett, *Cases and Materials on Legislation* at App. B 29 (cited in note 12). The next section describes the mechanics of the canon in greater detail.

²⁶ Id at 918 (cited in note 12).

²⁷ See for example *Rust v Sullivan*, 500 US 173, 191 (1991) (“This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations.”); *Clark v Martinez*, 543 US 371, 382 (2005) (“The canon is thus a means of giving effect to congressional intent, not of subverting it.”).

Second, the canon may provide “a low salience mechanism for giving effect to what Larry Sager calls ‘underenforced constitutional norms.’”²⁸ As Eskridge explains: “While a Court that seeks to avoid judicial activism will be reluctant to invalidate federal statutes in close cases, it might seek other ways to protect constitutional norms.” One way is through canons of statutory construction.”²⁹ Avoidance in effect remands the statute to Congress. The canon “makes it harder for Congress to enact constitutionally questionable statutes and forces legislatures to reflect and deliberate before plunging into constitutionally sensitive issues.”³⁰

Third, the canon may help “courts conserve their institutional capital,”³¹ what I term the “political legitimacy” rationale. Phil Frickey has defended the early Warren Court avoidance decisions (many involving government action against Communists³²) on legitimacy grounds, seeing avoidance as allowing “the [Warren] Court to slow down a political process that is moving too hastily and overriding human rights, but without incurring the full wrath of a political process that doesn’t like to be thwarted.”³³

Much other recent scholarship has expressed skepticism about the avoidance canon, at least as traditionally defended. Fred Schauer rejects the assumption that the avoidance canon furthers congressional intent, in the absence of any evidence that Congress would prefer a narrow interpretation of its statute to a Court actually confronting whether the statute passes constitutional muster.³⁴

²⁸ Eskridge, Frickey, & Garrett, *Cases and Materials on Legislation* at 918 (cited in note 12).

²⁹ William G. Eskridge, Jr., *Dynamic Statutory Interpretation* 286 (Harvard U Press 1994).

³⁰ *Id.*

³¹ Eskridge, Frickey, & Garrett, *Cases and Materials on Legislation* at 918 (cited in note 12).

³² See Neal Devins, *Constitutional Avoidance and the Roberts Court*, 32 U Dayton L Rev 339-40 (2007) (“During the 1956-1957 term of the Warren Court, twelve cases were decided involving Communists. The Court ruled against the government in every case, though never on constitutional grounds.”).

³³ *Id.*, citing 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 Cal L Rev 397 (2005).

³⁴ Frederick Schauer, *Ashwander Revisited*, 1995 S Ct Rev 71, 74; see also *id.* at 92-93 (“there is no evidence whatsoever that members of Congress are risk-averse about the possibility that legislation they believe to be wise policy will be invalidated by the courts. On the contrary, given the essentially political nature of the job of legislating, and given that the American political system does not penalize legislators for voting for good (in the eyes of the voters) policies that are determined by the courts to be unconstitutional, one would expect members of Congress to be anything but risk-averse. One would expect them to err on the side of assuming constitutionality under conditions of uncertainty about what the courts are likely to do.”); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 Texas L Rev 1549, 1581 (2000) (arguing that the canon might actually *undermine* congressional intent: “a holding that constitutional doubts compel a narrow statutory construction has a ‘go ahead, make

Judge Friendly worried that the canon would be applied selectively, making it “have almost as many dangers as advantages.”³⁵ Indeed, even Frickey rejects a view of the avoidance canon as tool of judicial modesty: “the avoidance canon is not so much a maxim of statutory interpretation as a tool of constitutional law...it involves judicial lawmaking not judicial restraint; the outcomes it produces are at least sometimes inconsistent with current congressional preferences; and it will not always foster a deliberative congressional response.”³⁶

Still other scholars, like Frickey, seek to rehabilitate the avoidance canon through a realist view of the Court’s power of judicial lawmaking. Ernest Young, like Frickey, believes that the avoidance canon is a tool of constitutional adjudication, not statutory construction. Young views the avoidance canon as a “resistance norm,” an intermediate constitutional rule “that raises obstacles to particular governmental actions without barring those actions entirely.”³⁷ Finally, Trevor Morrison adopts what might be called a “fence around the Torah”³⁸ defense of the canon: “the avoidance canon...guards the [constitutional] boundaries by making it more difficult for Congress even to approach them.”³⁹

In sum, though modern legislation scholars see the avoidance canon as sometimes playing an important role in Supreme Court adjudication and its relation with Congress, there seems to be consensus that the canon’s use signals a Court that is actively engaged in shaping law and policy, not acting modestly.

B. *The Scope of the Modern Avoidance Doctrine*

I turn now away from the rationale for the avoidance canon and to its mechanics. There are two main mechanical questions about when the canon

my day’ quality to it, and Congress might reasonably conclude that enactment of the broader reading would only result in invalidation on the merits”).

³⁵ Henry Friendly, *Benchmarks* 211 (U Chicago Press 1967). Judge Friendly remarked that challenging the avoidance canon “is rather like challenging the Holy Writ,” *id.* but he worried that wide use of the rule would become one of “evisceration and tergiversation.” *Id.* at 212; *see also* Lisa Kloppenberg, *Avoiding Constitutional Questions*, 35 BC L Rev 1003 (1994).

³⁶ Frickey, 93 Cal L Rev at 402 (cited in note 33).

³⁷ Young, 78 Texas L Rev at 1585 (cited in note 34).

³⁸ In Jewish religious tradition, the oral law provided additional rules to supplement the written rules in the Torah and to make sure that those written rules were not violated. “The rabbis used the metaphor of a fence around the Torah as a means of protecting the essence of Torah in the midst of the proliferation of new demands.” *Perke Avot: A Modern Commentary on Jewish Ethics* 2 (Leonard Kravitz & Kerry M. Olitzky eds. and trans., URJ Press 1993).

³⁹ Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 Colum L Rev 1189, 1217 (2006); *see also* *United States v Marshall*, 908 F2d 1312, 1318 (7th Cir 1990) (Easterbrook) (“The canon about avoiding constitutional decisions, in particular, must be used with case, for it is closer cousin to invalidation than to interpretation. It is a way to enforce the constitutional penumbra, and therefore an aspect of constitutional law proper.”).

should be invoked: first, how much constitutional doubt must there be before the canon comes into play? Second, must the statute in question be truly ambiguous before the canon comes into play?

On the first point, Adrian Vermuele has traced the transformation of the doctrine from “classical avoidance” to “modern avoidance.”⁴⁰ Under classical avoidance, a court would have to conclude that one interpretation of a statute would render the statute unconstitutional before the canon may be applied. Under modern avoidance doctrine in contrast, the canon may be applied once the court concludes that one interpretation of the statute would raise *serious doubts* as to the constitutionality of the statute. As Morrison explains, “modern avoidance departs from classical avoidance by allowing serious but potentially unavailing constitutional objections to dictate statutory meanings.”⁴¹

On the second question, the stated rule of the modern Court is that the avoidance canon only comes into play only when the statutory interpretation that avoids constitutional doubt is in fact *reasonable or plausible*:

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. “Adopt the interpretation that avoids the constitutional doubt if it is the right one” produces precisely the same result as “adopt the right interpretation.” Rather, the doctrine of constitutional doubt comes into play when the statute is “susceptible of” the problem-avoiding interpretation—when *that interpretation is reasonable, though not necessarily the best*.⁴²

As Justice Scalia put it for a majority of the Court in 2005, the canon “is a tool for choosing *between competing plausible interpretations* of a statutory text,

⁴⁰ Adrian Vermeule, *Saving Constructions*, 85 Georgetown LJ 1945, 1949 (1997).

⁴¹ Morrison, 106 Colum L Rev at 1203 (cited in note 39); see also John Nagle, *Delaware & Hudson Revisited*, 72 Notre Dame L Rev 1495 (1997) (tracing history of “doubts” canon in detail).

⁴² *Almendarez-Torres v United States*, 523 US 224, 270 (1998) (Scalia dissenting) (emphasis added and citations omitted). Though Justice Scalia wrote this as part of his dissenting opinion, on this point, the majority agreed: “[F]or the canon to apply, [t]he statute must be genuinely susceptible to two constructions after, and not before, its complexities are unraveled. Only then is the statutory construction that avoids the constitutional question a ‘fair’ one.” *Id.* at 238. The majority and dissent disagreed in the *Almendarez-Torres* case over whether the statutory language at issue pointed “significantly in one direction,” *id.*, and over whether there was “grave[] doubt” about the constitutionality of the statute under one of the interpretations. *Id.* at 239.

resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.”⁴³

Despite the formal requirement of some kind of textual ambiguity to allow for the Court to adopt one of two reasonable interpretations, Frickey explains that “for the [Warren] Court...statutory textual ambiguity is not a necessary condition for invoking the canon. Instead, what is needed is a judicial conclusion that Congress had not actively considered—and ideally, deliberated on—a matter of ‘grave importance,’ especially when that involves underenforced constitutional norms.”⁴⁴

The most recent extended Supreme Court debate over the scope of the avoidance canon occurred in 2005, during the last few months of the Rehnquist Court, in the case of *Clark v Martinez*.⁴⁵ An alien who has been found to be inadmissible into the United States ordinarily must be removed from the country within 90 days.⁴⁶ *Clark* concerned an immigration statute providing the Secretary of Homeland Security may detain an alien who has been found to be removable beyond this statutory 90-day removal period.⁴⁷ Detained aliens who had never legally been admitted into the United States challenged “the Secretary [of Homeland Security]’s authority to continue to [indefinitely] detain an inadmissible alien subject to a removal order *after* the 90-day removal period has elapsed.”⁴⁸ The *Clark* Court followed an earlier Supreme Court opinion construing the same statute to hold that aliens who had initially gained lawful entry in the U.S. presumptively could not be detained under the statute for more than six months after the 90-day removal period.⁴⁹ In *Clark*, the Court held that the same rule applied to aliens who had never gained lawful entry to the country—even though the Secretary would not necessarily violate the Constitution by holding such aliens for a period exceeding six months.

In reaching the conclusion that the six-month presumptive period applied to aliens who had never gained lawful entry into the country, the *Clark* Court applied the avoidance canon. The Court noted that the contrary interpretation of the statute urged by the government—allowing detention for more than six months—would raise serious constitutional concerns for aliens who had been lawfully been admitted into the country. “If [one of two plausible statutory constructions] would raise a multitude of constitutional problems, the other

⁴³ *Clark v Martinez*, 543 US 371, 382 (2005) (emphasis added).

⁴⁴ Frickey, 93 Cal L Rev at 460-61 (cited in note 33).

⁴⁵ 543 US 371 (2005).

⁴⁶ 8 U.S.C. § 1231(a)(1)(A)

⁴⁷ 8 USC § 1231(a)(6).

⁴⁸ *Clark*, 543 US at 372.

⁴⁹ *Zadvydas v Davis*, 533 US 678 (2001).

should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.”⁵⁰

The dissenters viewed this aspect of the Court’s ruling as an “end run around black-letter constitutional doctrine governing facial and as-applied challenges.”⁵¹ To the dissenters “an ambiguous statute should be read to avoid a constitutional doubt only if the statute is constitutionally doubtful as applied to the litigant before the court.”⁵² The dissenters argued that because the aliens before the Court in *Clark* could be held longer than six months without raising constitutional concerns, these aliens should not be able to rely upon the avoidance canon.

The majority rejected the dissent’s argument, holding that application of the avoidance canon furthered congressional intent: “when a litigant invokes the canon of avoidance, he is not attempting to vindicate the constitutional rights of others, as the dissent believes; he seeks to vindicate his own *statutory* rights.”⁵³ To the majority, the Court should presume Congress did not write a statute that would be unconstitutional in some of its applications. The majority also pointed to an administrative concern with the dissent’s contrary rule, stating that the dissent’s rule would “render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case.”⁵⁴

The Court’s interesting disagreement in *Clark* over the relationship between the avoidance canon and as-applied challenges should not obscure the Court’s unanimity on basic points related to the avoidance canon. All the Justices on the *Clark* Court accepted the avoidance canon as a legitimate tool of statutory interpretation and all believed it applied in cases there were two “plausible” interpretations of a statute, one of which raises serious constitutional doubts. (They differed only in whether those doubts had to involve the litigants before the Court.) Given this agreement on the fundamental contours of the avoidance canon, the Roberts Court has repeatedly cited to *Clark* for the black-letter of the avoidance canon.

C. *Constitutional Avoidance and the Roberts Court*

The Roberts Court has not yet had the occasion to engage in any great debates about the meaning of the avoidance canon, but the canon was mentioned

⁵⁰ *Clark*, 543 US at 380-81.

⁵¹ *Id.* at 394 (Thomas, J., dissenting).

⁵² *Id.*

⁵³ *Id.* at 382.

⁵⁴ *Id.*

in 13 cases from January 2006 to June 2009.⁵⁵ The most important discussions of the canon thus far in the Roberts Court have come in controversial cases involving abortion, the detention of unlawful enemy combatants at Guantanamo Bay, Cuba, and in race cases.

In *Gonzales v Carhart*, the Court relied on the avoidance canon to interpret a federal abortion statute not to apply to certain abortion procedures. Justice Kennedy, for the majority, first quoted an earlier Court case for the proposition that it is an “elementary rule that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.”⁵⁶ He added that the avoidance canon “in the past has fallen by the wayside when the Court confronted a statute regulating abortion. The Court at times employed an antagonistic canon of construction under which in cases involving abortion, a permissible reading of a statute [was] to be avoided at all costs.”⁵⁷ Here, as described more in Part III below, Justice Kennedy recognized the occasional Court use of the anti-avoidance tool in the abortion context.

In *Boumediene v Bush*, the Court held that it could not construe the Detainee Treatment Act of 2005, applicable to enemy combatants being held by

⁵⁵ *Gonzales v Oregon*, 546 US 243, 291-92 (2006) (Scalia dissenting) (arguing that the canon did not apply to Attorney General directive on assisted suicide); *Kansas v Marsh*, 548 US 163, 169 (2006) (describing Kansas Supreme Court’s use of the doctrine); *Hamdan v Rumsfeld*, 548 US 557, 584 n.15 (2006) (declining to decide “the manner in which the canon of constitutional avoidance should affect subsequent interpretation of the” Detainee Treatment Act); *Rita v United States*, 551 US 338 (2007) (Scalia dissenting) (criticizing majority for failure to follow *Clark v Martinez* rule); *Office of Senator Mark Dayton v Hanson*, 550 US 511, 514 (2007) (Court unanimously following *Clark* for “our established practice of interpreting statutes to avoid constitutional difficulties”); *Gonzales v Carhart*, 550 US 124, 153-54 (2007) (relying on avoidance canon to interpret federal abortion statute not to apply to certain abortion procedures); *Gonzalez v United States*, 128 S Ct 1765, 1771 (2008) (declining to apply avoidance canon because there was no serious constitutional doubt raised by one of the interpretations); *Boumediene v Bush*, 128 S Ct 2229, 2271-72 (2008) (declining to apply canon when the text and purpose require a contrary interpretation); *Pearson v Callahan*, 129 S Ct 808 821 (2008) (unanimous Court endorsing Justice Brandeis’s statement in *Ashwander v TVA*, 297 US 288, 347 (1936) that “The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of”); *Bartlett v Strickland*, 129 S Ct 1231, 1247-48 (2008) (relying on avoidance canon in declining to read section 2 of the Voting Rights Act to allow influence district claims); *Hawaii v Office of Hawaiian Affairs*, 129 S Ct 1436, 1445 (2008) (applying *Clark*’s avoidance statement to congressional resolution concerning apology to Hawaii); *Federal Communications Comm’n v Fox Television Stations, Inc.*, 129 S Ct 1800, 1811-12 (2009) (holding that avoidance canon does not apply to “limit the scope of authorized executive action”); *Northwest Austin Municipal Utility District Number One v Holder*, 129 S Ct 2504 (2009) (applying avoidance canon to section 5 of the Voting Rights Act).

⁵⁶ 550 US at 153.

⁵⁷ *Id* at 153-54 (internal quotations omitted).

the United States in Guantanamo Bay, Cuba, to give detainees at the Court of Appeals the “right to present relevant exculpatory evidence that was not presented” at an early military tribunal.⁵⁸ The Court held that in applying the avoidance canon to the DTA, “[w]e cannot ignore the text and purpose of the statute in order to save it.”⁵⁹ The majority concluded that “[t]he language of the statute, read in light of Congress’s reasons for enacting it” cannot bear the interpretation that allowed the presentation of such evidence.⁶⁰ Accordingly the Court reached the constitutional question and held the procedure in the DTA that barred detainees from presenting exculpatory evidence to the Court of Appeals was unconstitutional.

In *Bartlett v Strickland*,⁶¹ the Court applied the avoidance canon to conclude that section 2 of the Voting Rights Act did not allow plaintiffs to raise “crossover district claims,” which would have had the effect of creating more electoral districts in which members of minority groups could elect candidates of their choice.⁶² “If § 2 were interpreted to require crossover districts throughout the nation, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.”⁶³ Such an interpretation “would reverse the canon of avoidance. It invites the divisive constitutional questions that are both unnecessary and contrary to the purposes of our precedents under the Voting Rights Act.”⁶⁴ Similarly, in *NAMUDNO*, described fully in Part II below, the Court relied heavily upon the avoidance canon to reach its surprising interpretation of section 5 of the Voting Rights Act.

Finally, though the word “avoidance” does not appear in the opinions, the avoidance canon was in play the Supreme Court’s most prominent race case of the October 2008 term, *Ricci v DeStefano*.⁶⁵ In the so-called “New Haven firefighters case,” the Court held that Title VII of the Civil Rights Act of 1964 did

⁵⁸ 128 S Ct at 2271-72.

⁵⁹ Id at 2271.

⁶⁰ Id at 2274.

⁶¹ 129 S Ct 1231 (2009) (plurality).

⁶² The Court set forth the statutory question this way: “In a district that is not a majority-minority district, if a racial minority could elect its candidate of choice with support from crossover majority voters, can § 2 require the district to be drawn to accommodate this potential?” Id at 1238.

⁶³ Id at 1247 (internal quotations omitted).

⁶⁴ Id at 1248. Though not phrased in explicit avoidance terms, the issue arose in Justice Kennedy’s opinion involving a controversial Texas re-redistricting plan. *LULAC v Perry*, 548 US 399,446 (2006) (Kennedy) (plurality) (“Accordingly, the ability to aid in Frost’s election does not make the old District 24 an African-American opportunity district for purposes of § 2. If § 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.”).

⁶⁵ 129 S Ct 2658 (2009).

not allow the city to throw out the result of a test used to identify firefighters for promotion, after the test showed white candidates outperformed minority candidates. Plaintiffs claimed that throwing out the test results violated both Title VII and the Equal Protection Clause of the Fourteenth Amendment of the Constitution. The Supreme Court declined to reach the constitutional question, citing a 1984 voting rights case, *Escambia County*, stating that “normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.”⁶⁶ The Court then applied a new test for judging Title VII claims,⁶⁷ thereby avoiding the constitutional question. The *Ricci* opinion noted two more times that “we need not decide” the constitutional question in this case.⁶⁸

In his *Ricci* concurrence, Justice Scalia noted the tension between Title VII’s requirements for race-conscious employment decisions and his view of the Equal Protection Clause. “The Court’s resolution of these cases makes it unnecessary to resolve these matters today. But the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them.”⁶⁹

II.

NAMUDNO AND *CITIZENS UNITED*: AVOIDANCE AND ANTI-AVOIDANCE

Against the backdrop set forth in Part I, I now consider in detail how unusual the Court’s actions in *NAMUDNO* and *Citizens United* actually were compared to the Supreme Court’s usual constitutional avoidance cases.

A. *NAMUDNO*

In 1965, Congress enacted the Voting Rights Act.⁷⁰ Section 5 of the VRA requires that “covered jurisdictions” obtain preclearance from the federal

⁶⁶ Id, citing *Escambia County v McMillan*, 466 US 48, 52 (1984) (per curiam). *Escambia County* was an interesting case because “[t]he parties did not brief or argue the statutory question on appeal. The Supreme Court vacated the decision and remanded the matter to the appellate court, instructing the court to consider first whether it could affirm the district court based solely on the Voting Rights Act.” Kloppenberg, 35 BC L Rev at 1029 (cited in note 35).

⁶⁷ Linda Greenhouse, *Who Called Off the Charge?*, “The Breakfast Table,” *Slate*, June 29, 2009, online at <http://www.slate.com/id/2220927/entry/2221819/> (visited Sept. 1, 2009).

⁶⁸ *Ricci*, 129 S Ct at 2664, 2676.

⁶⁹ Id at 2683 (Scalia concurring).

⁷⁰ 42 USC §§ 1973–1973p (2004).

government before making any changes in voting practices or procedures,⁷¹ for changes as major as a 10-year redistricting plan or as minor as moving a polling place across the street. For each one, the covered jurisdiction must demonstrate that the change was made without a discriminatory purpose and that it will not make the affected minority groups worse off. Section 5's aim was to prevent state and local governments with a history of discrimination against racial minorities from changing their voting rules without first proving that such changes would have neither a discriminatory purpose nor effect.

Some southern states immediately challenged parts of the VRA as exceeding congressional power. In the first of these cases, *South Carolina v Katzenbach*, South Carolina challenged core provisions of the Act, including the preclearance provision.⁷² The Court rejected South Carolina's argument that the challenged provisions "exceed[ed] the powers of Congress and encroach[ed] on an area reserved to the States by the Constitution."⁷³ It held that Congress had acted appropriately under its powers granted in Section Two of the Fifteenth Amendment.⁷⁴ In so holding, the Court gave considerable deference to congressional determinations about the means necessary to "enforce" the Fifteenth Amendment.

Over the years, Congress continued to renew Section 5, adding in additional coverage areas. In 1982, Congress renewed the provision for a 25-year period, expiring in 2007. The City of Rome, Georgia challenged the renewed preclearance provision and the Court again rejected the challenge.⁷⁵ Then-Justice Rehnquist dissented, raising federalism concerns.⁷⁶

In the years since *City of Rome*, the Supreme Court underwent a federalism revolution, narrowing Congressional power over the states. Beginning with *City of Boerne v Flores*,⁷⁷ the Court has limited Congress to passing "remedial" statutes. It has rejected congressional attempts to expand the scope of constitutional rights through legislation beyond that which is "congruen[t] and proportional[]"⁷⁸ to remedy intentional unconstitutional discrimination by the states. In *Board of Trustees v Garrett*,⁷⁹ the Court indicated that it will search for an adequate *evidentiary record* to support a congressional determination that

⁷¹ Id at § 1973c.

⁷² *South Carolina v Katzenbach*, 383 US 301, 307 (1966).

⁷³ Id at 323.

⁷⁴ Id at 337.

⁷⁵ *City of Rome v United States*, 446 US 156, 187 (1980).

⁷⁶ Id at 210-15 (Rehnquist dissenting).

⁷⁷ 521 US 507, 519 (1997).

⁷⁸ Id at 520.

⁷⁹ 531 US 356, 373 n.8 (2001).

states are engaging in sufficient intentionally unconstitutional conduct so as to justify congressional regulation.

Because of these new standards, many election law scholars worried that unless Congress made changes to the existing section 5 regime, a renewed section 5 could be struck down as unconstitutional.⁸⁰ Though Congress did make some changes to section 5 when it renewed the Act in 2006, such as rejecting an earlier Supreme Court interpretation of the applicable section 5 standard in *Georgia v Ashcroft*,⁸¹ it did not make changes to two key provisions of the Act which would have updated the Act to account for changed political realities. First, Congress did not change the coverage formula for which jurisdictions must engage in preclearance. That formula used data from the 1964, 1968, or 1972 elections.⁸² Second, Congress did not consider ways to make it easier for jurisdictions that have been covered to “bail out” from coverage under the Act, such as by putting the onus on the federal government to prepare a list of jurisdictions presumptively entitled to bail out because of their good record on voting and race.⁸³ These were politically sensitive subjects, and it appears that Congress did not have any political incentive in taking a close look at these difficult race and politics questions⁸⁴ before reauthorizing section 5 for another 25 years by a wide margin.⁸⁵

⁸⁰ Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act after Tennessee v. Lane*, 66 Ohio St L J L.J. 177 (2005); Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 Colum L Rev 1710 (2005), The Continuing Need for Section 5 Pre-Clearance: Hearing before the Senate Committee on the Judiciary, 109th Cong., 2d Sess. 10 (2006) (statement of Richard H. Pildes). See generally *The Future of the Voting Rights Act* (David Epstein et al., eds., Russell Sage Foundation 2008).

⁸¹ *Georgia v Ashcroft*, 549 US 461 (2003). See 42 USCA § 1973c(b) (West Supp. 2007). For an exhaustive look at how the renewed section 5 deals with the *Georgia v. Ashcroft* precedent, see Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L J 174 (2007).

⁸² 42 USCA § 1973c(a).

⁸³ See Richard Hasen, *Pass the VRA Bailout Amendment, Roll Call*, July 11, 2006, online at <http://electionlawblog.org/archives/bailout.pdf> (visited Sept 1, 2009).

⁸⁴ Persily, 117 Yale L J 174 (cited in note 81); Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 Yale L J Pocket Pt 148 (2007), online at <http://thepocketpart.org/2007/12/10/pildes.html> (visited Sept 1, 2009).

⁸⁵ *Northwest Austin Municipal Utility District Number One v Mukasey*, 573 F Supp 2d 221, 229 (D.D.C. 2008) (three-judge court) (“in July 2006 Congress extended section 5 for an additional twenty-five years. Entitled the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, the statute, which passed overwhelmingly in both chambers (unanimously in the Senate and by 390–33 in the House), overruled several Supreme Court decisions interpreting section 5’s substantive test, but otherwise left the law virtually unchanged. 2006 Amendments, 120 Stat. at 577. President George W. Bush signed the bill into law on July 27, 2006.”).

Soon after Congress passed the renewed section 5, the Project on Fair Representation, a group ideologically opposed to section 5 as impermissible race-based legislation, backed litigation to challenge section 5 as exceeding congressional power under the Fifteenth Amendment.⁸⁶ As obscure Austin utility district, the Northwest Austin Municipal Utility District Number One, brought the challenge, which was initially heard by a three-judge federal district court in Washington D.C. Though its main argument was against the continued constitutionality of the preclearance provision of section 5, the utility district also argued it should be entitled to bail out from coverage under the Act as a “political subdivision” covered by section 5.

The three-judge court in *NAMUDNO v Mukasey*, in an exhaustive and unanimous opinion, rejected both arguments.⁸⁷ The court spent 5 pages addressing the bailout question, and then 48 pages addressing the thorny constitutional question (with the remainder of the opinion consisting of maps and appendices). For purposes of this Article, I examine only the bailout analysis.

In addressing the argument of the utility district that it should be allowed to bail out, the court began by noting that until 1982, section 4(a) of the Act “limited bailout to two types of entities (1) covered states, and (2) political subdivisions covered ‘as a separate unit.’”⁸⁸ Section 14(c)(2) of the VRA defines “political subdivision” to “mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of the state which conducts registration for voting.” “As a result, [under the pre-1982 version of section 4(a) of the VRA] only political subdivisions separately designated for coverage could seek bailout. So, for example, Texas could seek bailout as a covered state...But political subdivisions within covered states—such as Travis County, in which the District is located—could not apply for bailout despite meeting the section 14(c)(2) definition because they had never been separately designated for coverage.”⁸⁹ The court confirmed this understanding of the section 4(a) bailout

⁸⁶ See Chuck Lindell, *Star Lawyer Makes Supreme Court Splash*, *Austin-American Statesman*, July 5, 2009, online at <http://www.statesman.com/news/content/news/stories/local/2009/07/05/0705coleman.html> (visited Sept 1, 2009) (“When he has a choice of cases, [utility district lawyer Greg] Coleman said he looks for pro bono work that fits his philosophy. He took the Voting Rights Act case largely for free, with only a ‘five-figure’ contribution for expenses from the Project on Fair Representation, an advocacy group that challenges race-based government policies, Coleman said.”).

⁸⁷ *Northwest Austin Municipal Utility District Number One v Mukasey*, 573 F.Supp.2d 221 (D.D.C. 2008) (three-judge court).

⁸⁸ *Id.* at 230. Some covered jurisdictions include only parts of states, explaining the second type of entity.

⁸⁹ *Id.* at 231.

provision by citing to the Supreme Court's *City of Rome* case, in which the Court held that the city of Rome, Georgia "was ineligible to seek bailout because the coverage formula of § 4(b) ha[d] never been applied to it."⁹⁰

"In 1982, however, Congress expanded bailout eligibility to include section 14(c)(2) political subdivisions within covered states"⁹¹ by adding language to section 4(a) allowing bailout by "any political subdivision of such State..., though such determinations were not made with respect to such subdivision as a separate unit."⁹² As the court explained, "[b]y including political subdivisions within covered states even though they had not been designated for coverage 'as a separate unit,' Congress made jurisdictions like Travis County eligible to seek bailout."⁹³

The utility district in *NAMUDNO* conceded it did not qualify, like Travis County, as a "political subdivision" under section 14(c)(2) because it was not a county and it never conducted registration for voting. The utility district nonetheless argued that it constituted a "political subdivision" in the ordinary meaning of that term and therefore could bail out.⁹⁴ In support of the argument, the utility district cited to a 1978 Supreme Court case, *United States v Board of Commissioners of Sheffield Alabama*,⁹⁵ a case in which the Supreme Court held that "once a state has been designated for coverage, section 5's preclearance requirement applies to all political units within it regardless of whether the units qualify as section 14(c)(2) political subdivisions."⁹⁶ The utility district focused on dictum in *Sheffield* stating that "section 14(c)(2)'s definition 'was intended to operate only for purposes of determining which political units in nondesignated states may be separately designated for coverage under § 4(b).'"⁹⁷ The utility district argued that when Congress amended the bailout provisions of the VRA, it did so "in light of *Sheffield*'s dictum that the only purpose of section 14(c)(2)'s definition is to identify which political subunits qualify for coverage,"⁹⁸ and therefore section 14(c)(2) was no bar to the court holding it should be considered a "political subdivision" entitled to seek bailout under section 4(a).

The district court rejected this argument on numerous grounds. First, the court offered a textual analysis, stating that the utility district's definition would render the phrase in the amended statute "though [the coverage] determinations

⁹⁰ Id (citing *City of Rome*, 446 US at 167).

⁹¹ Id

⁹² 1982 Amendments § 2(b)(2), 96 Stat. at 131 (codified at 42 USC § 1973b(a)(1)).

⁹³ *Northwest Austin Municipal Utility District Number One v Mukasey*, 573 F.Supp.2d at 231.

⁹⁴ Id.

⁹⁵ 435 US 110 (1978).

⁹⁶ *Northwest Austin*, 573 F Supp 2d at 232.

⁹⁷ Id at 232.

⁹⁸ Id.

were not made with respect to such subdivision as a separate unit” as impermissible surplusage.⁹⁹ In other words, if Congress intended to allow *all* political subdivisions (and not just section 14(c)(2) subdivisions) to be eligible for bailout, it did not need to include that extra clause. “This language demonstrates that Congress intended ‘political subdivision’ to refer only to section 14(c)(2) subdivisions—that is, counties, parishes, and voter-registering subunits—since only ‘such subdivision[s]’ can be separately designated for coverage.”¹⁰⁰

The court also pointed to unambiguous statements in House and Senate Reports accompanying the 1982 amendments which “clarify that Congress intended the expanded bailout mechanism to encompass only section 14(c)(2) political subdivisions.”¹⁰¹ For example, the Senate Report states that:

Towns and cities within counties may not bailout separately. This is a logistical limit. As a practical matter, if every political subdivision were eligible to seek separate bailout, we could not expect that the Justice Department or private groups could remotely hope to monitor and to defend the bailout suits. It would be one thing for the Department and outside civil rights litigators to appear in hundreds of bailout suits. It would be quite another for them to have to face many thousands of such actions because each of the smallest political subunits could separately bail out. Few questioned the reasonableness and fairness of this cutoff in the House.¹⁰²

The district court concluded its discussion by noting that the Attorney General issued a regulation confirming that only section 14(c)(2) jurisdictions may seek bailout, and that the Supreme Court has traditionally afforded substantial deference to the Attorney General’s interpretation of section 5.¹⁰³ The court also noted that Congress was silent in 2006 when it reauthorized the Voting Rights Act in light of the practice of bailout by eleven Virginia political subdivisions that relied upon the Attorney General’s interpretation.¹⁰⁴ Congress did so despite the fact that two witnesses unsuccessfully urged Congress “to

⁹⁹ Id.

¹⁰⁰ Id.

¹⁰¹ Id at 232-33.

¹⁰² Id at 233 (citing S. Rep. No. 97-417 at 57 n. 192, U.S. Code Cong. & Admin. News 1982, p. 235 no. 192).

¹⁰³ Id.

¹⁰⁴ Id at 233-34.

expand bailout eligibility to encompass governmental units smaller than counties and parishes.”¹⁰⁵

“Given this extensive evidence of clear legislative intent—both textual and historical—we need say little about *Sheffield*.”¹⁰⁶ The court dismissed the *Sheffield* statement as dicta, and concluded that “[i]n any event, even if, as *Sheffield*’s dictum suggests, section 14(c)(2)’s definition originally operated only to identify entities eligible for coverage, the amended section 4(a)’s text and legislative history make clear that Congress used that definition in 1982 for an additional purpose: to identify those entities eligible to seek bailout.”¹⁰⁷

In light of the statutory tour de force of the district court, voting rights experts believed that the statutory bailout argument had no chance when *NAMUDNO* was appealed to the Supreme Court.¹⁰⁸ Instead, it seemed unavoidable that the Court would address the constitutionality of the renewed section 5.

At oral argument, Justice Souter pushed the bailout argument,¹⁰⁹ but the conservative members of the Court, led by the Chief Justice, focused instead on the constitutional questions and severely criticized section 5.¹¹⁰ In addition to

¹⁰⁵ Id. at 234.

¹⁰⁶ Id. at 234.

¹⁰⁷ Id. The court also rejected the utility district’s arguments that it should rely on Texas law’s definition of political subdivision, and that accepting the government’s definition of political subdivision for section 5 purposes would interfere with application of section 2 of the Act.

¹⁰⁸ See Heather Gerken, *The Supreme Court Punts on Section 5*, Balkinization, June 22, 2009, online at <http://balkin.blogspot.com/2009/06/supreme-court-punts-on-section-5.html> (visited Sept 1, 2009) (“the statutory argument is one that that almost no one (save Greg Coleman, the lawyer who argued the case and who is now entitled to be described as a mad genius) thought was particularly tenable because of prior Court opinions.”); Richard L. Hasen, *Sordid Business: Will the Supreme Court Kill the Voting Rights Act?*, *Slate*, Apr. 27, 2009, online at <http://www.slate.com/id/2216888/> (“Since there’s no good statutory loophole, the larger constitutional question seems unavoidable.”).

¹⁰⁹ Northwest Austin Municipal Utility District Number One v Holder, Oral Argument Transcript, Apr. 29, 2009, at 14, online at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-322.pdf (visited Sept 1, 2009) (“Well Mr. Coleman, this is important to me. Do you — do you acknowledge that if we find on your favor on the bailout point we need not reach the constitutional point?”).

¹¹⁰ Justice Ginsburg also offered some cogent criticisms of the statutory bailout argument, along the lines of the district court’s analysis of the issue. See for example id. at 4 (“And what do you do with a statute that has three categories — the State, political subdivision, and then there’s ‘governmental unit’? The district qualifies as a governmental unit. Why would Congress add that third category if the district came within ‘political subdivision’?”); id. at 4-5 (“the statute does use the term ‘governmental unit’ to encompass districts. And if they were also subdivisions, why would Congress need to add an additional category?”); id. at 8 (“There was a proposal [in 2006], was there not, to allow governmental units to bail out — to allow anyone who was required to preclear to bail out?”); id. at 9 (“The Department of Justice has — does it — does it not have a

asking Debo Agebile, counsel for the NAACP whether “it your position that today southerners are more likely to discriminate than northerners,”¹¹¹ the Chief Justice remarked: “Counsel, ... our decision in *City of Boerne* said that action under section 5 has to be congruent and proportional to what it’s trying to remedy. Here, as I understand it, one-twentieth of 1 percent of the submissions are not precleared. That, to me, suggests that they are sweeping far more broadly than they need to, to address the intentional discrimination under the Fifteenth Amendment.”¹¹² Once Justice Kennedy weighed in repeatedly with questions about whether preclearance undermined the sovereignty and dignity of the covered states,¹¹³ most Court watchers predicted a 5-4 decision striking down section 5 of the Act on constitutional grounds.¹¹⁴

In a surprising and relatively short opinion, however, the Court on an 8-1 vote decided *NAMUDNO* on statutory grounds, ruling that the utility district was entitled to bail out.¹¹⁵ Justice Thomas, speaking only for himself, would have held section 5 unconstitutional.¹¹⁶

The Court’s opinion, written by Chief Justice Roberts, begins by stating the avoidance canon in an interesting way that fails to mention the need for a *plausible* interpretation of a statute to avoid deciding constitutional questions.¹¹⁷ “Our usual practice is to avoid the unnecessary resolution of constitutional questions.”¹¹⁸ After 5 pages of background, the Court turned to give a detailed explanation of the serious constitutional questions raised by the case. The court noted that the “Act ... differentiates between the States, despite our historic tradition that all the States enjoy ‘equal sovereignty.’”¹¹⁹ It said a departure from this principle “requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”¹²⁰ It flagged the federalism

regulation that contradicts your reading? And hasn’t that been out there wasn’t it out there before the 2006 extension?”). Justice Ginsburg must have swallowed hard before signing the opinion of the Court.

¹¹¹ Id at 48.

¹¹² Id at 27.

¹¹³ See for example id at 34 (statement of Justice Kennedy) (“Congress has made a finding that the sovereignty of Georgia is less than the sovereign dignity of Ohio.”).

¹¹⁴ Adam Liptak, *Skepticism at Court on Validity of Vote Law*, N.Y. TIMES, Apr. 29, 2009, online at <http://www.nytimes.com/2009/04/30/us/30voting.html> (visited Sept. 1, 2009) (“A central provision of the Voting Rights Act of 1965, designed to protect minorities in states with a history of discrimination, is at substantial risk of being struck down as unconstitutional, judging from the questioning on Wednesday at the Supreme Court.”).

¹¹⁵ *Northwest Austin Municipal Utility District Number One v Holder*, 129 S Ct 2504 (2009).

¹¹⁶ Id at 2517 (Thomas concurring in part and dissenting in part).

¹¹⁷ See above Part I.B.

¹¹⁸ *NAMUDNO*, 129 S Ct at 2508.

¹¹⁹ Id at 2512.

¹²⁰ Id.

concerns and noted the danger that “[t]he evil that §5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance.”¹²¹ After noting that the coverage formula is 35 years old and possibly outdated, the Court noted that “Congress heard warnings from supporters of extending § 5 that evidence in the record did not address” differences between covered and non-covered states.¹²²

Following this discussion raising serious doubts about section 5’s constitutionality, the opinion stated that “we are keenly mindful of our institutional role. We fully appreciate that judging the Constitutionality of an Act of Congress is the ‘gravest and most delicate duty that this Court is called upon to perform.’”¹²³ Then, as in *Ricci*,¹²⁴ the Court cited *Escambia County* for the proposition that the Court will not decide a constitutional question if there is some other ground to dispose of the case.¹²⁵ Again, there was no mention of the need for a plausible interpretation of the statute.

The Court then offered a superficial textual analysis of the bailout question. The Court did not discuss the textual analysis offered by the district court. Nor did it quote from and examine the legislative history showing Congress’s unambiguous intent to limit bailout to states and political subdivisions that register voters. The Court also ignored the Department of Justice’s regulations stating that only jurisdictions that register voters may bail out, and refused to afford any deference to such regulations.

Instead, the Court began by conceding that if section 4(a) were considered in isolation, “the District Court’s approach might well be correct. But here, specific precedent, the structure of the Voting Rights Act, and the underlying constitutional concerns compel a broader reading of the statute.”¹²⁶ The Court

¹²¹ *Id.*

¹²² *Id.* The Court then noted that it was an open question whether the congruence and proportionality standard or an easier rational basis review might apply to the constitutional question. *Id.*

¹²³ *Id.* at 2512-13 (quoting *Blodgett v Holden*, 275 US 142, 147-148 (1927) (Holmes concurring)).

¹²⁴ See note 65 above.

¹²⁵ The majority and Justice Thomas then debated whether a finding on bailout for the utility district would dispose of the case. Citing a concession by the utility district, the majority concluded it would do so. See *NAMUDNO*, 129 S Ct at 2513; see also *id.* at 2517-18 (Thomas concurring in part and dissenting in part).

¹²⁶ *Id.* at 2513. The Court began the section with the statement that “‘Statutory definitions control the meaning of statutory words, of course, in the usual case. But this is an unusual case.’ *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201, 69 S.Ct. 503, 93 L.Ed. 611 (1949); see also *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 764, 69 S.Ct. 1274, 93 L.Ed. 1672 (1949); *Philko Aviation, Inc. v. Shackel*, 462 U.S. 406, 412, 103 S.Ct. 2476, 76 L.Ed.2d 678 (1983).” But those cases involved statutory readings that went against the main purposes of the statute, in a way that the interpretation of the bailout provision did not. In *Lawson*, the Court refused to construe a provision in a statute governing disability payments in a way that would

then relied upon the dicta in *Sheffield*,¹²⁷ and stated that the Court confirmed that dicta in another 1978 case.¹²⁸ The Court then appeared to concede that these dicta went against the Court's later *City of Rome* holding,¹²⁹ which seemed to foreclose the utility district's argument that it could bail out as a "political subdivision." But the Court then came up with this *deus ex machina*:

In 1982, however, Congress expressly repudiated *City of Rome* and instead embraced "piecemeal" bailout. As part of an overhaul of the bailout provision, Congress amended the Voting Rights Act to expressly provide that bailout was also available to "political subdivisions" in a covered State, "though [coverage] determinations were *not* made with respect to such subdivision as a separate unit." Voting Rights Act Amendments of 1982, 96 Stat. 131, codified at 42 U. S. C. § 1973b(a)(1) (emphasis added). In other words, Congress decided that a jurisdiction covered because it was within a covered State need not remain covered for as long as the State did. If the subdivision met the bailout requirements, it could bail out, even if the State could not. In light of these amendments, our logic for denying bailout in *City of Rome* is no longer applicable to the Voting Rights Act—if anything, that logic compels the opposite conclusion.

This paragraph is not at all supportable by the text of the statute or the legislative history.¹³⁰ There was no "express repudiation" of *City of Rome* in the

"create obvious incongruities in the language, and would destroy one of the major purposes of the second injury provision: the prevention of employer discrimination against handicapped workers. We have concluded that Congress would not have intended such a result." In *McComb*, the Court looked to legislative history to confirm the meaning of the statute. In *Shacket*, the Court refused to construe a statute to "defeat the purpose of the legislation."

¹²⁷ See notes 95-106 above.

¹²⁸ *NAMUDNO*, 129 S Ct at 2514 (citing *Dougherty County Bd. of Ed. v White*, 439 US 32 (1978)).

¹²⁹ *Id* at 2515 ("Even if that is what *City of Rome* held...").

¹³⁰ The Court ended its brief analysis by setting up a strawman argument: "The Government contends that this reading of *Sheffield* is mistaken, and that the district is subject to § 5 under our decision in *Sheffield* not because it is a 'political subdivision' but because it is a 'State.' That would mean it could bail out only if the whole State could bail out." *Id* at 2516. But that is not what the government argued. Instead, the government offered the following reading of *Sheffield*: "*Sheffield* held that, in light of the statutory structure and purposes, '§ 5's preclearance requirement for electoral changes by a covered 'State' reached all such changes made by political units in that State.'" *Ibid.*; see *Sheffield*, 435 U.S. at 127 ("[T]he reference to 'State' in § 5 includes political units within it."). Brief for Appellees at 13, online at http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-322_AppelleeFederal.pdf (visited

text of the 1982 renewal. Indeed, *City of Rome* is not mentioned in the Senate Report as being repudiated.¹³¹ Congress is not shy about mentioning statutory Supreme Court precedent it is overturning: The 1982 Senate Report is full of references to overturning *City of Mobile v Bolden*,¹³² and the 2006 text of the VRA renewal itself (not to mention the legislative history) is full of references to overturning *Georgia v Ashcroft*.¹³³ The Court pointed to no evidence in the legislative materials of an express repudiation of *City of Rome*.

Nor was there any implicit repudiation of *City of Rome*. As illustrated by the district court opinion, all of the legislative history—ignored by the Court—points in the exact contrary direction to the analysis of the Court. It could not have been clearer when both the House and Senate Report accompanying the 1982 VRA is that the “standard for bail-out is broadened to permit political subdivisions, as defined in Section 14(c)(2), in covered states to seek bailout although the state itself may remain covered.”¹³⁴ The Supreme Court’s interpretation also went against the accepted understanding of the Act, as codified in the Attorney General’s regulations.

Perhaps what is most remarkable about this statutory interpretation is the conspiracy of silence on the Court. No Justice, not even Justice Thomas in his partial dissent, objected to this analysis, which mangled Congress’s statutory intent. Justice Thomas’s only comment on the bailout point was to take the position that granting the utility district the chance to apply for bailout did not grant it the relief it sought in its complaint.¹³⁵

B. Citizens United¹³⁶

In 2002, Congress passed the Bipartisan Campaign Reform Act of 2002 (“BCRA,” more commonly referred to as “McCain-Feingold”).¹³⁷ This was the most significant federal campaign finance law since the 1974 amendments to the Federal Election Campaign Act (FECA), whose constitutionality the Supreme

Sept 1, 2009). In other words, the government argued that *Sheffield* itself read the term “State” to include political units within it; it did not argue that the utility district is a state.

¹³¹ Rick Hasen, *The Scalia Enigma in NAMUDNO*, Election Law Blog, Jun. 23, 2009, online at <http://electionlawblog.org/archives/013921.html> (visited Sept 1, 2009).

¹³² See *Thornburg v Gingles*, 478 US 30 (1986) (recounting in detail Congress’s amendment of section 2 of the VRA to account for the Supreme Court’s *City of Mobile* holding).

¹³³ See note 32 above (discussing *Georgia v Ashcroft* “fix”).

¹³⁴ *Northwest Austin Municipal Utility District Number One v Mukasey*, 573 F Supp 2d at 232-33 (citing House and Senate reports).

¹³⁵ *NAMUDNO*, 129 S Ct at 2517-18 (Thomas concurring in part and dissenting in part).

¹³⁶ The next few paragraphs are drawn from Richard L. Hasen, *Beyond Incoherence: The Roberts Court’s Deregulatory Turn in FEC v Wisconsin Right to Life*, 94 Minn L Rev 1064 (2008).

¹³⁷ Bipartisan Campaign Reform Act of 2002 § 101, 2 USC § 441i(a) (Supp. V 2007).

Court considered in *Buckley v Valeo*.¹³⁸ Although BCRA made many changes in the law, the changes most relevant for purposes of understanding this case concern BCRA's "electioneering communications" provisions.

FECA (continuing a law predating FECA) bars corporations and unions from spending general treasury funds on certain election-related activities.¹³⁹ FECA allowed corporations and unions instead to set up separate political committees (commonly referred to as PACs) to spend money on these campaigns, but it limited both the amount that could be contributed and who could be solicited to contribute to these PACs.

By the 1990s, many people viewed the FECA as ineffective, thanks to an interpretation of the statute by the Court in *Buckley*.¹⁴⁰ The *Buckley* Court held that, to avoid vagueness and overbreadth problems within FECA, its provisions should be interpreted to reach only election-related activity containing "express advocacy," such as "Vote for Smith."¹⁴¹ Individuals, corporations, and unions began running "issue ads" that appeared aimed at influencing federal elections but that escaped FECA regulation through an avoidance of words of express advocacy. Thus, individuals and entities that spent money on "Vote against Jones" ads had to disclose the sources of payment and those ads could not be paid for with corporate or union treasury funds. In contrast, there were no such limitations on ads that appeared intended to influence federal elections but that avoided the magic words of "express advocacy," such as an ad which said "Call Senator Jones and tell her what you think of her lousy vote on the stimulus bill." Spending on such ads increased dramatically in the 1990s.¹⁴²

BCRA sought to close this issue advocacy "loophole" by creating new "electioneering communications" provisions. Electioneering communications are television or radio (not print or Internet) advertisements that feature a candidate for federal election and are capable of reaching 50,000 people in the relevant electorate 30 days before a primary or 60 days before a general election. Anyone making electioneering communications over a certain dollar threshold must disclose contributions funding the ads and spending related to the ads to the FEC (BCRA § 201).¹⁴³ Corporations and unions cannot spend general treasury funds on such ads (but could pay for the ads through their PACs) (BCRA § 203).¹⁴⁴ In addition, anyone broadcasting an electioneering communication must state in the

¹³⁸ 424 US 1 (1976).

¹³⁹ 2 USC § 441b.

¹⁴⁰ See *McConnell v FEC*, 540 US 93, 126 (2003).

¹⁴¹ *Buckley*, 424 US at 44 n.51.

¹⁴² See *McConnell v FEC*, 540 US at 126-27.

¹⁴³ See Bipartisan Campaign Reform Act of 2002 § 201, 2 USC § 434(f)(1) (Supp. V 2007).

¹⁴⁴ See Bipartisan Campaign Reform Act of 2002 § 203, 2 U.S.C. § 441b(b)(2) (2000 & Supp. V 2007).

ad the person or committee funding the ad and whether it is authorized by any candidate (BCRA § 311).¹⁴⁵

The § 203 spending limit does not apply to nonprofit corporations that meet certain requirements, including that the nonprofit has a policy not to take for-profit corporate or union funding.¹⁴⁶ These groups are referred to as *MCFL* groups (named after a 1986 Supreme Court case, *FEC v Massachusetts Citizens for Life*¹⁴⁷), and they still must comply with the disclosure provisions in BCRA § 201 and § 311.

A broad coalition of plaintiffs challenged each of these BCRA provisions (along with a number of others) in *McConnell v FEC*.¹⁴⁸ By a 5-4 vote, the Supreme Court upheld BCRA § 203 against facial challenge. It reaffirmed the Court's controversial holding in *Austin v Michigan Chamber of Commerce*.¹⁴⁹ *Austin* held that corporate spending on elections could be limited because of what the Court termed the "distorting and corrosive effects" of immense aggregations of wealth accomplished with the corporate form, which could be spent on elections despite the corporation's ideas having little or no public support.¹⁵⁰ Relying on *Austin*'s upholding of corporate limits on "express advocacy," the *McConnell* Court held that the "issue ads" regulated by the electioneering communications provisions of BCRA could constitutionally be limited because most of them were the "functional equivalent of express advocacy."¹⁵¹

In *Wisconsin Right to Life v Federal Election Commission (WRTL I)*,¹⁵² the Court held that *McConnell* did not preclude an "as applied" challenge to BCRA § 203 for a corporation or union whose ads were not the "functional equivalent of express advocacy." *WRTL I* involved a corporate-funded broadcast advertising that mentioned Senator Feingold's and Senator Kohl's position on judicial filibusters, and was to be broadcast in Wisconsin during the period of Senator Feingold's reelection campaign. After remand, in which the lower court found the ads were not entitled to an exemption because they were the functional equivalent of express advocacy, the case returned to the Supreme Court.¹⁵³

¹⁴⁵ See Bipartisan Campaign Reform Act of 2002 § 311.

¹⁴⁶ *McConnell*, 540 US at 210-11.

¹⁴⁷ 479 US 238 (1986).

¹⁴⁸ 540 US 93 (2003).

¹⁴⁹ 494 US 652 (1990).

¹⁵⁰ *Id* at 660.

¹⁵¹ *McConnell*, 540 US at 206. By an 8-1 vote, the Court also upheld BCRA § 201 and § 311 against facial challenge.

¹⁵² 546 US 410 (2006).

¹⁵³ See Hasen, 94 Minn L Rev at 1076-77 (cited in note 136).

In *Wisconsin Right to Life v Federal Election Commission*, (*WRTL II*),¹⁵⁴ the Court held, on a 5-4 vote, that BCRA § 203 could not be constitutionally applied to such ads. Three Justices in the majority (Justices Kennedy, Scalia, and Thomas) held, consistent with their dissenting opinions in *McConnell*, that BCRA § 203 was unconstitutional as applied to *any* corporate advertising, stating that *McConnell* and *Austin* should be overruled.¹⁵⁵ Chief Justice Roberts and Justice Alito, in a narrower controlling opinion, did not reach the question whether *McConnell* and *Austin* should be overruled. They held instead that the only corporate-funded advertisements that BCRA could bar constitutionally were those that were the “functional equivalent of express advocacy.”¹⁵⁶

The controlling opinion held that in making the “functional equivalent” determination, the question the FEC or a court must consider is whether, without regard to context (such as the fact that the filibuster issue was one that conservatives were using to attack liberal Democrats) and without detailed discovery of the intentions of the advertisers, the advertisement was susceptible of no reasonable interpretation other than as an advertisement supporting or opposing a candidate for office.¹⁵⁷ Unless the ad was susceptible to “no reasonable interpretation” other than as an advertisement supporting or opposing the candidate, it would be unconstitutional to apply BCRA § 203 to bar corporate funding for it. The controlling opinion then held that the ad at issue in *WRTL II* was susceptible to an interpretation as something other than an ad against Senator Feingold: it did not mention Senator Feingold’s character or fitness for office, and had no other clear indicia of the functional equivalent of express advocacy. Accordingly, *WRTL* was entitled to an as-applied exemption and could pay for the ads with corporate funds.¹⁵⁸

Citizens United is a follow-on case to *WRTL II*.¹⁵⁹ *Citizens United*, a nonprofit ideological corporation (but one that took some for-profit corporate funding) produced a feature-length documentary entitled *Hillary: The Movie*. The documentary appeared in theaters and was available to order via DVD during the 2008 primary season. *Citizens United* wished to distribute the movie as well through a cable television “video-on-demand” service. In exchange for a \$1.2 million fee, a cable television operator consortium would have made the documentary available to be downloaded by cable subscribers for free “on demand” as part of an “Election 08” series. The documentary contained no express advocacy, but it did contain a great deal of negative statements about

¹⁵⁴ 127 S Ct 2652 (2007).

¹⁵⁵ See *id* at 2674-87 (Scalia, J concurring).

¹⁵⁶ *Id* at 2658-74 (principal opinion).

¹⁵⁷ *Id*.

¹⁵⁸ *Id*.

¹⁵⁹ The facts appear in *Citizens United v FEC*, 530 F Supp 2d 274 (D.D.C. 2008).

Hillary Clinton, including statements that she was a “European socialist” and not fit to be Commander-in-Chief. The FEC took the position that the documentary was the functional equivalent of express advocacy and therefore subject to BCRA § 203, meaning it was an electioneering communication that could not be paid for with corporate funds.¹⁶⁰

Pursuant to a special jurisdictional provision of BCRA,¹⁶¹ Citizens United filed suit against the FEC before a three-judge United States District Court for the District of Columbia (with direct appeal to the Supreme Court). Citizens United moved for a preliminary injunction barring enforcement of BCRA § 203 for its broadcast of the documentary through “video-on-demand.”¹⁶²

The three-judge court unanimously rejected Citizens United’s arguments.¹⁶³ The court held that under *WRTL II* the documentary was the functional equivalent of express advocacy and was therefore not entitled to an as-applied exemption: the movie could not be paid for with for-profit corporate funds.¹⁶⁴ Citizens United appealed from the denial of the preliminary injunction to the Supreme Court, which dismissed the appeal.¹⁶⁵ The case returned to the district court, which then granted summary judgment, relying on its earlier opinion on the preliminary injunction.¹⁶⁶

The Supreme Court noted probable jurisdiction and set the case for argument.¹⁶⁷ On appeal, Citizens United raised a number of arguments against the government’s position that this documentary could not be broadcast over cable television’s “video-on-demand” service because it constituted a corporate-funded “electioneering communication.” Some of the arguments were statutory;

¹⁶⁰ Citizens United also wished to broadcast some 10-second and 30-second advertisements promoting the documentary. The corporation wished to do so without complying with BCRA § 201 (requiring disclosure of funders) or § 311 (requiring the “disclaimer” stating who paid for the advertisement and that it was not approved by any candidate or committee). The FEC conceded that the advertisements (as opposed to the documentary itself) were not the “functional equivalent of express advocacy,” but it took the position that the rules of BCRA § 201 and § 203 still applied. According to the FEC, the disclosure rules were not eligible for the “as applied” exemption that the Court created for corporate *spending* in *WRTL II*. Citizens United, 530 F Supp 2d 274.

¹⁶¹ Bipartisan Campaign Reform Act of 2002 § 403, 2 USC § 437(h) (2000 & Supp. V 2007); 28 USC § 2284 (2000).

¹⁶² It also sought to bar enforcement of BCRA § 201 and § 311 disclosure requirements as to the advertisements.

¹⁶³ *Citizens United v FEC*, 530 F Supp 2d 274 (D.D.C. 2008) (three-judge court).

¹⁶⁴ As to the advertisements, the district court held that the *WRTL II* exemption did not apply to the disclosure rules, relying on language in *McConnell* broadly upholding these requirements. *Id.*

¹⁶⁵ 128 S Ct 1732 (2008).

¹⁶⁶ 2008 WL 2788753 (D.D.C. July 18, 2008).

¹⁶⁷ 129 S Ct 594 (2008)

others were constitutional.¹⁶⁸ Its narrowest argument is that the FEC regulations should not be construed to apply to “video-on-demand” cable broadcasts.¹⁶⁹ Simply put, the Court can hold that video-on-demand, which requires a cable subscriber to choose to download video for viewing, is not a “broadcast, cable or satellite communication that refers to a candidate for federal office”¹⁷⁰ as defined by BCRA.

Citizens United concedes that it did not make this argument below, but it notes that the district court passed on it and that the canon of constitutional avoidance gives the Court a reason to address this statutory question.¹⁷¹ Citizens United’s broadest argument in its merits brief is that *Austin* was wrongly decided and should be overruled; then even express advocacy by corporations in federal elections could be paid for with corporate treasury funds.¹⁷² But as to the *Austin* argument, the FEC notes that Citizens United did not raise this point below, either, and that Citizens United expressly abandoned any facial challenges in the district court.¹⁷³ The issue also was not raised in Citizen United’s jurisdictional

¹⁶⁸ Among the arguments raised is that the Court should expand the *MCFL* exemption for nonprofit corporations that take some for-profit funds, and that its documentary was not the functional equivalent of express advocacy.

¹⁶⁹ Citizens United v FEC, Brief for Appellants at 27 n.2, online at http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-205_Appellant.pdf (visited Sept 1, 2009).

¹⁷⁰ 2 USC § 434(f)(3)(A) (Supp. V 2007).

¹⁷¹ *Id.* The government disagrees that the Court should reach the question, Brief for Appellee at 24 n. 7, online at http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-205_Appellee.pdf (visited Sept 1, 2009), but the BCRA legislative sponsors (Sens. McCain and Feingold, and former Representatives Shays and Meehan) filed an amicus brief suggesting that if the Court is otherwise inclined to find for Citizens United in this case, it should do it on grounds that the FEC’s implementing regulations did not clearly apply to “video-on-demand” broadcasts. Brief Amici Curiae of Senators McCain and Feingold, and Former Representatives Shays and Meehan, online at http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-205_AppelleAmCuMcCain.pdf, at 18-19 (visited Sept 1, 2009) (“To the extent that there may be some ambiguity in the applicability of the regulations, the Court could possibly conclude that it is sufficiently doubtful that on-demand viewing of *Hillary: The Movie* would have been within the scope of the FEC’s current regulations that the Court should withhold judgment on the constitutional issue until such time as the FEC made a more specific regulatory determination to include such transmissions within the regulatory definition of electioneering communications. In no event, however, should the Court accept Citizens United’s broad constitutional arguments that would place even express advocacy beyond the bounds of regulation if it is accessed at the choice of the viewer.”).

¹⁷² Citizens United v FEC, Brief for Appellants, at 30 (cited in note 169) (“*Austin* was wrongly decided and should be overruled”).

¹⁷³ Citizens United v FEC, Tr. oral arg., Mar. 24, 2009, at 27-28, online at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-205.pdf (visited Sept 1, 2009).

statement, and the usual Court rule is that the Court will not consider issues not fairly raised therein.¹⁷⁴

The case was argued in March 2009, and media accounts suggest that the government's case seemed threatened when the Deputy Solicitor General had trouble answering a hypothetical question about the regulation of books containing "the functional equivalent of express advocacy."¹⁷⁵ Still, it was somewhat of a surprise when, on the last regular day of the Court's term in June 2009, the Court announced it would rehear the case in September. More surprising, the Court asked for supplemental briefing on the following question: "For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. §441b?"¹⁷⁶ If the Court were going to decide the case on narrow statutory grounds, such as a ruling that video-on-demand is not properly classified as an electioneering communication, reargument on the constitutional question would be unnecessary.¹⁷⁷ The order indicates a Court that is at least seriously considering the question.

C. NAMUDNO, *Citizen United*, and the Supreme Court's Usual Approach to Constitutional Avoidance

Neither *NAMUDNO* nor *Citizens United* fits comfortably in the Supreme Court's usual approach to the constitutional avoidance doctrine. *NAMUDNO* does not fit because the Court adopted an implausible interpretation of the statute. Indeed, the Court's statutory interpretation analysis was so weak that the Court failed even to respond to the contrary statutory points raised by the government and offered in detail by the district court. It is probably no surprise that in stating the avoidance principle in *NAMUDNO*, the Court did not cite the usual formulation of the rule requiring a *plausible* statutory interpretation. Instead, the Court stated more flatly that "[o]ur usual practice is to avoid the unnecessary

¹⁷⁴ *Citizens United v FEC*, Brief for Appellee, at 33-34 (cited in note 170).

¹⁷⁵ Adam Liptak, *Justices Consider Interplay Between First Amendment and Campaign Finance Laws*, N.Y. TIMES, Mar. 24, 2009, online at <http://www.nytimes.com/2009/03/25/washington/25scotus.html> (visited Sept 1, 2009); Dahlia Lithwick, *The Supreme Court Reviews Hillary: The Movie*, SLATE, Mar. 24, 2009, online at <http://www.slate.com/id/2214514/> (visited Sept 1, 2009).

¹⁷⁶ *Citizens United v FEC*, Order, 129 S Ct 2893 (2009).

¹⁷⁷ See Richard L. Hasen, *The Supreme Court Gets Ready to Turn on the Fundraising Spigot*, SLATE, Jun. 29, 2009, online at <http://www.slate.com/id/2221753/> (visited Sept 1, 2009).

resolution of constitutional questions.”¹⁷⁸ The Court then stated that “judging the Constitutionality of an Act of Congress is the ‘gravest and most delicate duty that this Court is called upon to perform.’”¹⁷⁹ Finally, the Court cited *Escambia County* for the proposition that the Court will not decide a constitutional question if there is some other ground to dispose of the case.¹⁸⁰ In practice, the Court jettisoned the requirement of a plausible statutory interpretation in *NAMUDNO* to avoid a sensitive and difficult constitutional question.

But the Court’s approach was even starker when viewed against the *Citizens United* order the Court issued just one week later. The Court undoubtedly could avoid deciding whether to overrule *Austin* and *McConnell*’s upholding of spending limits on corporations and unions through a plausible interpretation of the electioneering communication statute so as not to apply to video-on-demand. But regardless of how it ultimately decides the case, it ratcheted up the importance of the case and the rhetoric through the reargument order.

Thus, the operative question here is not simply how plausible a statutory construction must be before the avoidance canon kicks in,¹⁸¹ but why the Court adopted such an inconsistent approach. If it is true that the “usual practice” is to “avoid the unnecessary resolution of constitutional questions” and that it is the “gravest and most delicate duty” to review the constitutionality of an Act of Congress, why did the Court in *Citizens United* not conclude, as in *NAMUDNO*, *Ricci*, and *Escambia County*, that the Court will not decide the constitutional question because there is some other ground to dispose of the case? Is not avoidance especially warranted in a case in which the constitutional issue was abandoned in the trial court and not presented in the jurisdictional statement? Why did the Court not follow its usual practice in *Clark v Martinez*, to the effect that “[i]f [one of two plausible statutory constructions] would raise a multitude of constitutional problems, the other should prevail...”?¹⁸² Why did the Court instead set up an in-your-face high stakes constitutional showdown on the question—whether or not it ultimately issues a constitutional ruling on the merits?

III.

¹⁷⁸ *NAMUDNO*, 129 S Ct at 2508.

¹⁷⁹ *Id* at 2513

¹⁸⁰ *See id.*

¹⁸¹ Schauer, 1995 S Ct Rev at 85 (cited in note 34) (“In reality, ‘fairly possible’ is a matter of degree, even assuming some interpretations are not fairly possible. Extending ‘no vehicles in the park’ to bicycles is more possible—less of a reach— than extending it to sleds, even though neither extension is compelled and neither is prohibited.”).

¹⁸² *Clark*, 543 US at 380-81.

UNDERSTANDING AVOIDANCE AND ANTI-AVOIDANCE
AT THE ROBERTS COURT

The contrast between the Court's treatment of *NAMUDNO* and *Citizens United* is the latest (and especially high profile) illustration of Judge Friendly's observation that the doctrine of constitutional avoidance will be selectively employed.¹⁸³ In the final part of this article, I explore three potential theories to explain the differing treatment of the two cases. With a data set of just these cases (plus the few other significant constitutional avoidance decisions of the Roberts Court), and with no inside information about the Justices' thought processes, at this point it is impossible to say which of the three theories best explains the action of the Court in these two cases. But I set out these potential theories to test against future use of the avoidance canon and the anti-avoidance canon by the Roberts Court.

Fruitful dialogue. The *fruitful dialogue* explanation posits that the Court will use constitutional avoidance only when doing so would further a dialogue with Congress that has a realistic chance of actually avoiding constitutional problems through redrafting. On this reading, the Voting Rights Act got remanded to Congress because Congress may fix the VRA in ways that do not violate the Constitution, but the corporate spending limits provision of federal campaign finance law perhaps does not deserve remand because the provisions are not constitutionally fixable.

This is the most charitable reading of the Court's contrasting orders in *NAMUDNO* and *Citizens United*. In this view, the Court would not tolerate the political avoidance that Congress exhibited during the 2006 Amendment process,¹⁸⁴ but the Voting Rights Act is just too important to throw away without giving Congress a chance to face the problems head on. In other words, the statute is so important that the Court was willing to jettison its usual rules of statutory interpretation despite the strong negative views of some members of the Court on the underlying constitutional question to give Congress one more chance to save the statute. This at least may have been the view of Justice Kennedy, and without his vote the Court would have spoken in a fractured way in this important case.

Campaign finance, in contrast, stands on different footing. The Court is already well on its way to striking down corporate spending limits as a violation of the First Amendment.¹⁸⁵ Giving Congress a chance to fix BCRA section 203

¹⁸³ See note 35 above.

¹⁸⁴ See note 84 above.

¹⁸⁵ See generally Hasen, 94 Minn L Rev at 1064 (cited in note 136).

to clarify whether or not video-on-demand counts as an electioneering communication is not going to solve the Court's fundamental problem with the *Austin* rationale for limiting corporate spending. If Congress cannot limit corporate spending even on express advocacy, then it matters little whether Congress intended to cover the "functional equivalent of express advocacy" contained in a video-on-demand documentary.

Understood this way, the Court's decision to make the issue front-and-center at a second oral argument makes sense. This anti-avoidance device—pushing the constitutional question front-and-center—can serve the penumbral "fence around the Torah" function of keeping Congress away from even *thinking* of legislating further in a protected area.

Furthermore, some members of the Court may have thought the constitutional issue needed to be addressed given that *Citizens United* came to the Court under its rare mandatory appellate jurisdiction.¹⁸⁶ The Court had been facing a flurry of mandatory appeals under BCRA, and perhaps it saw that the only way to lessen the volume of cases was through a constitutional knock-down of BCRA's foundations.

Indeed, even Justices unsure of their constitutional views going into *Citizens United* might have seen a judicial administration benefit to deciding the constitutional questions straightforwardly. Addressing constitutional questions squarely in the campaign finance area might be especially important given the incoherence and fractured nature of the Supreme Court's existing campaign finance jurisprudence.¹⁸⁷ Lower courts would certainly benefit from more guidance.

¹⁸⁶ As I detail in Richard L. Hasen, *The Supreme Court and Election Law: Judging Equality from Baker v. Carr to Bush v. Gore* 36-38 (2003), *Harper v. Virginia State Board of Elections*, 383 US 663 (1966), the Supreme Court case striking down the use of poll taxes in state elections, came to the Supreme Court under a statute mandating Supreme Court appellate jurisdiction. Internally, the case appeared headed for a 6-3 summary affirmance of the lower court's upholding of the poll tax. Justice Goldberg wrote a draft dissent for three justices, reprinted in Appendix 2 of my book. In that draft dissent, Justice Goldberg wrote in the first footnote of the differences between considering a case brought up on appeal compared to a case coming up on a writ of certiorari, whose denial says nothing about the Court's view of the merits. "However, this is an appeal, which by statute we must and do determine on the merits. Whatever[] may have been my decision as to whether or not certiorari should be granted on this issue, since his case is an appeal, I am compelled to face up to the substantial constitutional issue presented." (Citation omitted). Similarly, it may be that some Justices considering the *Citizens United* case on mandatory appeal feel compelled to face the constitutional questions, even if the questions were not raised in the jurisdictional statement and were abandoned in the court below. Of course, *NAMUDNO* too reached the Court through mandatory appellate jurisdiction, yet only Justice Thomas reached the constitutional question.

¹⁸⁷ See generally Hasen, 94 Minn L Rev 1064 (cited in note 136).

Such use of the anti-avoidance tool is not unprecedented. Perhaps the Court's refusal to apply the avoidance canon to save the Detainee Treatment Act of 2005 in *Boumediene*¹⁸⁸ was a way for the Court to warn Congress off further attempts to deny basic trial rights to Guantanamo detainees. Conservative Justices skeptical of the Court's abortion rights jurisprudence see anti-avoidance there too: construing ambiguous abortion statutes to raise constitutional problems chills new abortion-related legislation. Justice Kennedy made the point in *Gonzales v Carhart*,¹⁸⁹ but he was not the first. The idea seems to have originated with Justice White's dissent in *Thornburgh v American College of Obstetricians and Gynecologists*.¹⁹⁰ There, Justice White argued that "[t]he Court's rejection of a perfectly plausible reading of [an abortion] statute flies in the face of the principle—which until today I had thought applicable to abortion statutes as well as to other legislative enactments—that '[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality.' The Court's reading is obviously based on an entirely different principle: that in cases involving abortion, a permissible reading of a statute is to be avoided at all costs."¹⁹¹

Though the fruitful dialogue theory sounds plausible, it is not clear that it explains the actual thinking of the Justices. The explanation views the Court as bending over backwards in *NAMUDNO* to spur Congressional dialogue on the constitutionality of race-based remedies in voting, dialogue which the Congress showed in 2006 it had no interest in undertaking. From oral argument, it did not sound like members of the Court had much interest in dialogue either. Justice Scalia pointedly noted that the 2006 renewal passed 98-0 in the Senate, and on a similarly lopsided vote in the House, asking: "You know, the -- the Israeli Supreme Court, the Sanhedrin, used to have a rule that if the death penalty was pronounced unanimously, it was invalid, because there must be something wrong there. Do you ever expect -- do you ever seriously expect Congress to vote against a reextension of the Voting Rights Act? Do you really think that any incumbent would -- would vote to do that?"¹⁹²

It seems more accurate to say that the liberals, led by Justice Souter, were looking for some way to avoid an adverse ruling striking down section 5 as unconstitutional, and that the conservatives were ready to strike down Section 5.

¹⁸⁸ See note 58 above and accompanying text.

¹⁸⁹ 550 US at 153.

¹⁹⁰ 476 US 757 (1986).

¹⁹¹ Id at 812 (White dissenting) (internal citation omitted); see also id at 829 (O'Connor dissenting) (same); *Stenberg v Carhart*, 530 US 914, 977 (2000) (same).

¹⁹² *Northwest Austin Municipal Utility District Number One v Holder*, Oral Argument Transcript, Apr. 29, 2009, at 51, online at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-322.pdf (visited Sept 1, 2009).

Why everyone but Justice Thomas agreed to go along with a very weak avoidance interpretation seems driven less by a desire for dialogue with Congress than from fear¹⁹³ or strategic calculation. It is to these alternatives that I now turn.

Political legitimacy. The *political legitimacy* explanation posits that the Court uses the constitutional avoidance doctrine when it fears that full-blown constitutional pronouncement would harm its legitimacy.¹⁹⁴ Some evidence supports this understanding of *NAMUDNO* and the reargument order in *Citizens United*. During the same term that the Court avoided the constitutional issue in *NAMUDNO*, it used the same avoidance canon to narrowly construe a different provision of the Voting Rights Act in *Bartlett v Strickland*,¹⁹⁵ and it applied constitutional avoidance (in deed if not in name) to narrowly construe Title VII of the 1964 Civil Rights Act in *Ricci v DeStefano*,¹⁹⁶ the controversial New Haven firefighters case. Each of these cases involved tough questions of race relations whose resolution could harm the Court's legitimacy.¹⁹⁷ A Court fearful of

¹⁹³ As Heather Gerken observed: "The real worry for supporters of Section 5 is the possibility that the Court's liberals thought that sending a crystal clear, united message to Congress was Section 5's best hope. That is, the four Justices on the Court may have been as convinced as many commentators are that Section 5 will fall when the case returns, and they were hoping that a unanimous opinion would light a fire under Congress." *Gerken: Can Congress Take a Hint?*, Election Law Blog, Jun. 23, 2009, online at <http://electionlawblog.org/archives/013911.html> (visited Sept. 1, 2009). On the message the Court conservatives might have been sending to Congress, see Ellen Katz, *Ellen Katz: Roberts Didn't Blink*, Election Law Blog, June 24, 2009, online at <http://electionlawblog.org/archives/013926.html> (visited Sept 1, 2009) and Richard H. Pildes, *A Warning to Congress*, N.Y. Times Room for Debate Blog, June 22, 2009, online at <http://roomfordebate.blogs.nytimes.com/2009/06/22/the-battle-not-the-war-on-voting-rights/?scp=1&sq=Pildes&st=cse#richard> (visited Sept 1, 2009)..

¹⁹⁴ For some early expressions of these ideas, see Bruce Ackerman, *Section Five and the on-going canonization of the civil rights movement*, Balkinization Blog, June 22, 2009, online at <http://balkin.blogspot.com/2009/06/section-five-and-on-going-canonization.html> (visited Sept 1, 2009); Jack Balkin, *Why Has the Roberts Court Suddenly Gone Minimalist?*, Balkinization Blog, June 29, 2009, online at <http://balkin.blogspot.com/2009/06/why-has-roberts-court-gone-minimalist.html> (visited Sept 1, 2009); *Guest Post: Behind the Scenes in NAMUDNO*, Election Law Blog, June 24, 2009, online at <http://electionlawblog.org/archives/013932.html> (visited Sept 12, 2009). On the debate over whether the Roberts Court's decision in *NAMUDNO* was an act of "statesmanship," see Sam Issacharoff, *Issacharoff: On Statesmanship*, Election Law Blog, June 24, 2009, online at <http://electionlawblog.org/archives/013927.html> (visited Sept 1, 2009) and Dahlia Lithwick, *Our Judges with Attitude*, *Slate*, June 26, 2009, online at <http://www.slate.com/id/2220927/entry/2221700/> (visited Sept. 1, 2009).

¹⁹⁵ 129 S Ct 1231 (2009).

¹⁹⁶ 129 S Ct 2658 (2009).

¹⁹⁷ The *Ricci* case in particular dominated the news in the days after the opinion, especially as one of the judges on the Second Circuit panel, reversed by the Supreme Court, was then-nominee Judge Sotomayor.

Congressional or public reaction, especially with the other two branches dominated by the more liberal Democrats, just might have blinked.¹⁹⁸

In contrast, campaign finance issues are much lower salience to the public,¹⁹⁹ and are less likely to arouse the passion of interest groups and perhaps the ire of Congress. A court concerned about political legitimacy might think it has a great deal more latitude in how it deals with questions of money in politics than with fundamental questions of race relations. Under this reading, the Court can afford anti-avoidance when it comes to lower salience questions such as campaign finance, but it needs avoidance to quell the racial waters.

While that explanation seems to make sense viewing these two cases alone, it is harder to square with the use of anti-avoidance in the abortion context, which is much higher salience. Perhaps another factor is at work: how convinced the Court is that the government action is unconstitutional. This would tie together elements of legitimacy and fixability.

Political calculus. The *political calculus* explanation is that the Court uses constitutional avoidance and similar doctrines (such as the use of “as applied” constitutional challenges²⁰⁰) to soften public and Congressional resistance to the Court’s efforts to move the law in the Justices’ preferred policy direction.²⁰¹ Like the political legitimacy argument, the political calculus argument too is one about the Court’s legitimacy, but it is one that views the Court as strategically pursuing an agenda, rather than as fearfully anticipating a backlash. It advances a view of the Court, and of the Chief Justice in particular, as sophisticated and calculating. A recent portrayal of Chief Justice Roberts in a critical *New Yorker* article by Jeffrey Toobin referred to the Chief as a “stealth hard liner.”²⁰² The view also has echoes in Justice Scalia’s lament in the *WRTL*

¹⁹⁸ Rick Hasen, *Initial Thoughts on NAMUDNO: Chief Justice Roberts Blinked*, Election Law Blog, Jun. 22, 2009, online at <http://electionlawblog.org/archives/013903.html> (visited Sept 1, 2009).

¹⁹⁹ Glenn H. Utter & Ruth Ann Strickland, *Campaign and Election Reform* 192 (2d ed. ABC-CLIO, Inc. 2008) (“Americans typically have not viewed campaign finance reform as a top priority for the federal government to address”).

²⁰⁰ See Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy?: The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, 93 Minn L Rev 1644 (2009), and Joshua A. Douglas, *The Significance of the Shift Toward As-Applied Challenges in Election Law*, 37 Hofstra L Rev 635 (2009).

²⁰¹ Mark Tushnet, *How the Supreme Court’s Ruling on Ricci v. DeStefano Hints at Trouble Ahead*, Dissent, July 12, 2009, online at <http://dissentmagazine.org/online.php?id=270> (visited Sept 1, 2009).

²⁰² Jeffrey Toobin, *Annals of Law: No More Mr. Nice Guy: The Supreme Court’s Stealth Hard Liner*, *New Yorker*, May 25, 2009, online at http://www.newyorker.com/reporting/2009/05/25/090525fa_fact_toobin (visited Sept 1, 2009).

II case that the Roberts-Alito “as applied” decision on BCRA section 203 was “faux judicial restraint.”²⁰³

Under this positive political theory explanation²⁰⁴ of the Court’s actions, the difference between *NAMUDNO* and *Citizens United* is simply one of timing. The Court had already laid the groundwork for a deregulatory campaign finance regime through its earlier campaign finance rulings which exhibited some of that faux judicial restraint: it is now ready to put a stake in the heart of the corporate spending limits, if not in *Citizens United*, than in another challenge soon to come. If that reading is correct, the Voting Rights Act’s time of demise will come, and the public will come to expect it once the Court first raised constitutional doubts in *NAMUDNO*. The avoidance canon is just another doctrinal tool in the Court’s arsenal to move constitutional law and policy in the Court’s direction and at the Court’s chosen speed.

Tom Goldstein seems to take this view of the Court, seeing the conservative majority using the avoidance doctrine and similar doctrines as laying the groundwork for subsequent overruling.

I am struck in particular by the opinions of the Chief Justice that seem to lay down markers that will be followed in later generations of cases. *NAMUDNO* details constitutional objections to Section 5 of the Voting Rights Act that seem ready-made for a later decision invalidating the statute if it is not amended....

If I’m right about the direction of the case law, the Court’s methodology is striking. It is reinforcing its own legitimacy with opinions that later can be cited to demonstrate that it is not rapidly or radically changing the law. This approach may be in the starkest relief if next Term the Court cites its recent decision in *Wisconsin Right to Life* as precedent for concluding that *McConnell v. FEC* and *Austin v. Michigan* have been significantly undermined and should be overruled. The plurality and concurrence in *Wisconsin Right to Life* famously debated how aggressively the Court should go in overruling prior campaign

²⁰³ *WRTL II*, 127 S. Ct. at 2683-84 n.7 (Scalia concurring).

²⁰⁴ Positive political theory views political actors seeking to maximize their preferences within institutional constraints. For an introduction to the concept as applied to statutory interpretation and interactions between the Supreme Court and Congress (and within each institution), see Eskridge, Frickey, & Garrett, *Cases and Materials on Legislation* at 75-76 (cited in note 12). More technically sophisticated versions of PPT use game theory to model these interactions, and consider as well the role of the executive. The basic idea of PPT in the Supreme Court-Congress game is that a majority of Court Justices seeks to move statutory law in its preferred policy direction without facing overruling by the Congress through amended legislation.

finance precedent. The Chief Justice urged patience – not moving more quickly than required – and the wait may not have been long.²⁰⁵

The political calculus explanation meshes particularly well with the peculiar nature of the *NAMUDNO* statutory decision. Ordinarily when Congress considers overriding a statutory interpretation decision of the Supreme Court, doing so will restore a popular law enacted by Congress (leaving open the possibility that the Court will later strike the law down on constitutional grounds).²⁰⁶ Here, the situation is different: Congress is not going to consider overriding the Court's interpretation of the bailout provision in the Voting Rights Act; there is not much to gain by doing so (we do not know how many jurisdictions will now seek bailout that could not before) and an override could goad the Court into striking down section 5. Either Congress will do nothing—in which case the Court has laid the groundwork for invalidating section 5 in a future case—or the Congress will pass legislation watering down section 5's key provisions to please the conservatives on the Court. It is a win-win situation for a Court making strategic calculations to move the law towards its policy preferences.

* * *

As I noted, we do not have enough data from the cases to know which of these three explanations for alternating avoidance and anti-avoidance best represent reality. Likely one's views on which explanation coheres best correlates with one's views on the general motivations and sincerity of the Justices on the Supreme Court. But it is simply too early to tell, and always hazardous to generalize about the actions of a multi-member body.²⁰⁷ Some members of the Court may be concerned about its legitimacy; others may wish to engage in a dialogue; others may be acting more strategically. Perhaps the simplest explanation of the divergence in the cases is Justice Kennedy's different position in the two cases.

One test of the theories may come if Congress does nothing to amend the VRA or it amends the Voting Rights Act but not in any way that meaningfully

²⁰⁵ Tom Goldstein, *Thoughts on This Term and the Next*, SCOTUSblog, June 29, 2009, online at <http://www.scotusblog.com/wp/thoughts-on-this-term-and-the-next/> (visited Sept 1, 2009).

²⁰⁶ On the nature and frequency of statutory overrides from a positive political theory perspective, see William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale LJ 331; Pablo T. Spiller & Emerson H. Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 Int'l Rev L & Econ 503 (1996).

²⁰⁷ For a classic PPT criticism of the concept of collective congressional intent, see Kenneth Shepsle, *Congress is a "We," Not an "It": Congressional Intent as an Oxymoron*, 12 Int'l Rev L & Econ 239 (1992). As applied to courts, see Adrian Vermeule, *The Judiciary is a They Not an It: Interpretive Theory and the Fallacy of Division*, 14 J Contemp Legal Issues 549 (2005).

addresses the Court's concerns in *NAMUDNO*. A Court that does not act then to strike down the Act looks more like one motivated by fear;²⁰⁸ a Court that strikes down section 5, citing the earlier warnings in *NAMUDNO*, may fit more into the political calculus explanation. Then again, at that point a Court that seeks to encourage fruitful dialogue with Congress might simply give up on the Congress in this particular area.

CONCLUSION

The Supreme Court can choose at will to use the avoidance canon or anti-avoidance for myriad purposes.²⁰⁹ Looking at the Warren Court, Phil Frickey viewed the canon as being used to further civil liberties in a time of irrational fear of communists.²¹⁰ He suggested avoidance could come in handy for the Roberts Court too as a way of furthering civil liberties, by cutting back on Congress's overreaching in the terrorist cases.²¹¹ Writing at the beginning of the Roberts Court's term, Neal Devins disagreed with Frickey on this point, stating a belief that the Roberts Court would not likely rely much on the doctrine of constitutional avoidance.²¹² First, Devins said, Congress is less engaged in constitutional matters and less interested in dialogue than during the Warren Court era. Second, Congress does not seem poised to strike back at the Court. And third, Congress did not significantly respond during the Rehnquist Court era when the Court struck down all or part of 31 statutes on federalist grounds, so there is no reason for the Court to fear Congress.²¹³

Devins may have been wrong about the Court's interest in dialogue with Congress, at least as to those statutes, like the VRA, which might be constitutionally saved. The Court may be embarking on a new era of dialogue with Congress, at least for "fixable" statutes.

Then again, even if the Roberts Court has no interest in dialogue, or in protecting civil liberties at a time of national peril, the Court still may find good reason for selective use of avoidance and anti-avoidance. The rare use of anti-

²⁰⁸ See Ackerman (cited in note 194) ("If Roberts and Kennedy don't have the courage of their convictions now, will they really lead the charge when the Obama justices are forcefully resisting, and legal momentum is on their side?").

²⁰⁹ See Harold J. Krent, *Avoidance and Its Costs: Application of the Clear Statement Rule to Supreme Court Review of NLRB Cases*, 15 Conn L Rev 1,1 (1983) (noting the "great latitude" avoidance-like doctrines give to the Supreme Court and the ad hoc nature of some Court decisions to invoke the avoidance canon).

²¹⁰ Frickey, 93 Cal L Rev 397 (cited in note 33).

²¹¹ Id at 463-64.

²¹² Devins, 32 U Dayton L Rev at 345 (cited in note 32).

²¹³ Id.

avoidance lays down constitutional markers and builds a fence around the majority's view of proper constitutional boundaries. The avoidance canon gives the public appearance of a Court moving moderately and slowly. Notably, the headlines after *NAMUDNO* were about the Court "upholding" and "preserving" though "narrowing" the VRA,²¹⁴ not about it taking the next step towards striking the VRA down. If the agenda of the Roberts Court is major change in constitutional law, the calculation may be that medicine usually goes down more palatably when in small doses.

²¹⁴ See the headlines collected by Howard Bashman at his "How Appealing" blog on June 23, 2009, online at <http://howappealing.law.com/062309.html#034476> (visited Sept 1, 2009).