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Constitutional Avoidance as Interpretation and as Remedy

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CONSTITUTIONAL AVOIDANCE AS INTERPRETATION AND AS REMEDY

*Eric S. Fish**

In a number of recent landmark decisions, the Supreme Court has used the canon of constitutional avoidance to essentially rewrite laws. Formally, the avoidance canon is understood as a method for resolving interpretive ambiguities: if there are two equally plausible readings of a statute, and one of them raises constitutional concerns, judges are instructed to choose the other one. Yet in challenges to the Affordable Care Act, the Voting Rights Act, the Chemical Weapons Convention, and other major statutes, the Supreme Court has used this canon to adopt interpretations that are not plausible. Jurists, scholars, and legal commentators have criticized these decisions, claiming that they amount to unaccountable judicial lawmaking. These criticisms highlight a basic contradiction in contemporary avoidance doctrine. On the one hand, the avoidance canon is described as an interpretive rule of thumb that guides courts in discerning congressional intent. Yet on the other, the Supreme Court commonly uses the avoidance canon to create statutory meanings that conflict with Congress's intent, and does so in the name of new constitutional rules that Congress did not foresee. This is not "interpretation" in the conventional sense; it is rewriting in the service of constitutional norm enforcement.

*This Article mounts a new defense of such rewriting-as-interpretation. It does so by reframing the avoidance canon as two different judicial tools: (1) a canon of interpretation, and (2) a constitutional remedy. The latter of these—avoidance as a constitutional remedy—makes sense of courts' power to effectively rewrite statutes. A court that finds a statute unconstitutional can creatively reinterpret that statute in a way that changes its meaning in order to fix the constitutional violation, just as it can invalidate statutory language, strike down applications, and impose other kinds of remedies that change the statute's meaning. This idea is not as unusual as it may seem. Many other countries currently treat avoidance as a constitutional remedy. In the United Kingdom and New Zealand, for example, judges cannot invalidate laws, and so creative reinterpretation of statutes is the only judicial mechanism for remedying violations of constitutional rights. And in Canada, constitutional avoidance doctrine has been divided into an interpretive canon and a remedy, exactly as this Article advocates. Further, the Supreme Court of the United States has effectively treated avoidance as a remedy in two major recent decisions—*United States v. Booker *and* National Federation of Independent Business v. Sebelius*—though it did not acknowledge that it was doing so.*

Bifurcating avoidance into a canon and a remedy resolves the contradiction between avoidance as an interpretive tool and avoidance as a means of changing the law. It does so by separating out these two functions. The interpretive

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avoidance canon can be used to resolve true ambiguities through the presumption that Congress does not intend to pass statutes that conflict with preexisting constitutional rules. The reinterpretation remedy, in turn, can be used to change a statute's meaning after it has been held unconstitutional, and to do so even where the court is announcing a new constitutional rule.

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Introduction

In 2014, the Supreme Court decided that poisoning your neighbor does not violate the Chemical Weapons Convention.[1] A woman named Carol Anne Bond was prosecuted for putting arsenic on her neighbor's mail, after discovering that the neighbor was having an affair with Bond's husband.[2] The implementing legislation for the Chemical Weapons Convention forbids any person knowingly "to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon."[3] By the plain terms of this statute, Bond was guilty. However, the Court did not apply its plain terms. Invoking the doctrine of constitutional avoidance, Chief Justice John Roberts's majority opinion "interpreted" an exception into the statute providing that it did not apply to individual acts of poisoning.[4] This let the Court dodge the thorny question of whether the federal government can criminalize such acts through a treaty.

1. Bond v. United States, 134 S. Ct. 2077 (2014).

2. Dahlia Lithwick, *The Case of the Poisoned Lover*, Slate (Feb. 22, 2011, 6:34 PM), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2011/02/the_case_of_the_poisoned_lover.html [http://perma.cc/8336-SVB8].

3. Chemical Weapons Convention Implementation Act of 1998 § 201, 18 U.S.C. § 229(a)(1) (2012).

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

This reasoning should sound familiar. The year before *Bond*, Chief Justice Roberts pulled the same move in one of the most consequential judicial opinions in American history. That case, *National Federation of Independent Business v. Sebelius*, decided the constitutionality of the Affordable Care Act.[5] The question in *Sebelius* was the validity of a provision requiring individuals to either purchase health insurance or pay a fine.[6] Chief Justice Roberts cast the deciding vote, and concluded that the Commerce Clause does not empower Congress to command the purchase of health insurance.[7] However, he also found that Congress *does* have the power to tax individuals for failing to purchase health insurance.[8] Thus the constitutionality of the individual mandate turned on whether it was properly understood as a "command" or a "tax."[9] Chief Justice Roberts concluded that, while the provision was written as a command, it must be interpreted as a tax in order to make it constitutional: "[I]t is only because we have a duty to construe a statute to save it, if fairly possible, that [the mandate] can be interpreted as a tax."[10] He thus saved the mandate by changing its meaning through interpretation.

Chief Justice Roberts has adopted implausible interpretations to avoid constitutional questions in a number of other cases as well. In *Northwest Austin Municipal Utility District Number One v. Holder* (*NAMUDNO*), Roberts (joined by seven other justices) interpreted the term "political subdivision" in the Voting Rights Act to include tiny utility districts.[11] He thereby allowed such districts to escape the Voting Rights Act's "preclearance" regime, which requires covered jurisdictions to obtain permission before making any changes to voting procedures.[12] This was not a natural reading of the statute. The Voting Rights Act (VRA) explicitly defines the term "political subdivision" to mean "any county or parish,"[13] a definition that clearly excludes utility districts.[14] In *Skilling v. United States*, the Court similarly used

5. 132 S. Ct. 2566 (2012).

6. *Sebelius*, 132 S. Ct. at 2580.

7. *See id.* at 2592–93 (opinion of Roberts, C.J.). The four joint dissenters also concluded that the individual mandate was not a valid exercise of the Commerce Clause power, *see id.* at 2644–50 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting), but no majority opinion was written on this point.

8. *Id.* at 2594 (opinion of Roberts, C.J.).

9. *See id.* at 2584 (opinion of Roberts, C.J.).

10. *Id.* at 2600–01 (opinion of Roberts, C.J.).

11. 557 U.S. 193, 210–11 (2009).

12. *See NAMUDNO*, 557 U.S. at 202, 210–11.

13. 42 U.S.C. § 1973l(c)(2) (2012); *see NAMUDNO*, 557 U.S. at 206.

14. Indeed, the majority's interpretation was so implausible that commentators viewed *NAMUDNO* as signaling a strong likelihood that the VRA's preclearance regime would soon be struck down unless Congress addressed the Court's constitutional concerns. *See, e.g.*, Jonathan H. Adler, *Judicial Minimalism, the Mandate, and Mr. Roberts*, *in* The Health Care Case 171, 172–74 (Nathaniel Persily et al. eds., 2013); Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 Sup. Ct. Rev. 181, 220–21; Richard M. Re, *The Doctrine of One Last Chance*, 17 Green Bag 2d 173, 175 (2014); Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 Yale L.J. 1992, 1996 (2010); Heather Gerken, *Online VRA Symposium: Reading the Tea Leaves—The*

the avoidance canon to narrow the federal mail and wire fraud statutes.[15] One provision of those statutes defines "a scheme or artifice[ ]to defraud" as including "a scheme or artifice to deprive another of the intangible right of honest services."[16] This language is arguably so vague that defendants lack adequate notice about what conduct is criminalized. In order to avoid that constitutional vagueness problem, the Court in *Skilling* "interpreted" the statute to cover only bribes and kickback schemes.[17]

In each of these recent landmark decisions, the Roberts Court essentially "interpreted" new words into a major statute in order to avoid holding the statute unconstitutional. Members of the Court have criticized these uses of the avoidance canon, arguing that they go beyond the boundaries of permissible interpretation.[18] The late Justice Antonin Scalia called such uses of avoidance "gruesome surgery" and "result-driven antitextualism."[19] Justice Thomas has noted that "[a] disturbing number of this Court's cases have applied the canon of constitutional doubt to statutes that were on their face clear."[20] Prominent legal commentators have also been critical, calling Chief Justice Roberts's opinions "implausible"[21] and "exceedingly odd,"[22] and accusing him of "marching to a beat of his own."[23] Academics have piled on as well, with Richard Hasen suggesting that the Roberts Court is using the avoidance canon selectively to achieve conservative political results,[24] and

Uncertain Future of the Act, SCOTUSBLOG, (Sept. 11, 2012, 1:40 PM), http://www.scotusblog.com/2012/09/online-vra-symposium-reading-the-tea-leaves-the-uncertain-future-of-the-act/ [http://perma.cc/4T7X-Y6ZK]. This prediction was ultimately validated. *See* Shelby Cty., Ala. v. Holder, 133 S. Ct. 2612, 2631 (2013).

15. 130 S. Ct. 2896, 2925–35 (2010).

16. 18 U.S.C. § 1346 (2012).

17. *Skilling*, 130 S. Ct. at 2931.

18. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2676 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("The Court today decides to save a statute Congress did not write. It rules that what the statute declares to be a requirement with a penalty is instead an option subject to a tax. . . . The Court regards its strained statutory interpretation as judicial modesty. It is not. It amounts instead to a vast judicial overreaching."); *Skilling*, 130 S. Ct. at 2940 (Scalia, J., concurring in part and concurring in the judgment) ("I do not believe we have the power, in order to uphold an enactment, to rewrite it.").

19. Bond v. United States 134 S. Ct. 2077, 2095, 2097 (2014) (Scalia, J., concurring in the judgment).

20. Clark v. Martinez, 543 U.S. 371, 400 (2005) (Thomas, J., dissenting).

21. Linda Greenhouse, Op-Ed, *Down the Memory Hole*, N.Y. TIMES, Oct. 2, 2009, at A31.

22. Nicholas Quinn Rosenkranz, *Roberts Was Wrong to Apply the Canon of Constitutional Avoidance to the Mandate*, SCOTUSREPORT (July 11, 2012, 8:36 AM), https://web.archive.org/web/20131005230520/http://www.scotusreport.com/2012/07/11/roberts-was-wrong-to-apply-the-canon-of-constitutional-avoidance-to-the-mandate/ [https://perma.cc/5L5W-7LZH].

23. Damon Root, *John Roberts' Constitutional Avoidance*, REASON (June 4, 2014), http://reason.com/archives/2014/06/04/john-roberts-constitutional-avoidance [http://perma.cc/8DBV-HP7E].

24. *See* Hasen, *supra* note 14.

Neal Katyal and Thomas Schmidt proposing limits to the canon that would curb its supposed excesses.[25]

This Article takes a different view. It defends Chief Justice Roberts's signature move, and it does so by redefining that move as a constitutional remedy rather than a canon of interpretation. As these cases illustrate, there is a basic contradiction in the doctrine of constitutional avoidance. On the one hand, it is officially framed as an interpretive technique—a court presumes that the legislature does not intend to act unconstitutionally, and so it construes ambiguous statutes to avoid constitutional problems. Yet on the other, it is commonly used as a tool of constitutional enforcement, by which a court changes a statute's meaning to protect a constitutional norm. But avoidance cannot be both of these things at once. It cannot help judges determine the legislature's intent, while at the same time letting judges subvert that intent in the service of constitutional norms. To resolve this contradiction, the doctrine should be reframed as two distinct judicial tools: an interpretive canon and a constitutional remedy. The interpretive canon will function as a true aid to interpretation—it will help judges construe ambiguous statutes by assuming that Congress does not intend to violate preexisting constitutional rules. The remedy, by contrast, will allow judges to actually change a statute's meaning by creatively reinterpreting it to render it constitutionally valid, as the Roberts Court did in *Sebelius*, *NAMUDNO*, *Bond*, and *Skilling*. This type of remedy—herein labeled "remedial reinterpretation"—can only be employed after a statute is actually held unconstitutional. It is thus a less intrusive cousin of other constitutional remedies, like striking down unconstitutional applications or invalidating statutory text.

Bifurcating constitutional avoidance in this way fixes a number of enduring problems with the doctrine. First, it solves the mystery of how judges can presume that Congress does not intend to violate a constitutional rule that the Supreme Court had not yet announced at the time the law was passed.[26] The answer is that judges cannot make this presumption, because Congress could not have been aware of the rule. However judges can use remedial reinterpretation to change a law if it violates a newly announced constitutional rule. Second, bifurcation solves the dicta problem. Under the classic doctrine of avoidance, judges only avoided interpretations that would actually make the statute unconstitutional.[27] But this forced them to make constitutional holdings in dicta, because in the end they were merely construing the statute, not striking it down. Remedial reinterpretation solves this problem by forcing a judge to make a constitutional holding first, and only then letting them change the statute's meaning. Third, and more broadly, bifurcation also limits the countermajoritarian problem associated with aggressive uses of avoidance. It does so by restricting judges' ability to reinterpret statutes to only those situations where the statute has already

25. *See* Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 Harv. L. Rev. 2109 (2015).

26. *See id.* at 2122–26.

27. *See infra* notes 34–39 and accompanying text.

been held unconstitutional. In such situations, judges' power to change statutory language is at its peak—they can already strike down language, strike down applications, and even sometimes add language to fix a constitutional violation.[28] By contrast, it is far less legitimate for a judge to change a statute's meaning without having held it unconstitutional, and so the interpretive avoidance canon should be limited to situations where the statute is truly ambiguous.

This Article is divided into three Parts. Part I discusses the doctrinal and academic debate over the meaning of the avoidance canon. First, it shows that the Supreme Court's current avoidance doctrine is marked by two different conflicts. One conflict is between the so-called classic and modern avoidance canons. Under the classic canon a court only avoids interpretations that actually violate the Constitution, while under the modern canon a court also avoids interpretations that merely raise constitutional "doubts." The modern canon has been the dominant approach for the last several decades, but Chief Justice Roberts's majority opinion in *Sebelius* brought the classic canon back with a vengeance.[29] The second conflict is over how far the statute's meaning can be stretched. In one understanding of the canon, prominently defended by Justice Scalia, it is merely an interpretive tiebreaker—if there are two equally plausible readings of the statute, the avoidance canon selects the winner.[30] But in another, broader version, the canon can be used to select the less plausible interpretation if doing so avoids constitutional difficulties. Part I then surveys the scholarly debate over avoidance, showing how the canon's justifications have evolved from a Bickelian minimalist account focused on avoiding judicial review to a more activist account focused on enforcing constitutional norms.

Part II makes the case that remedial reinterpretation should be added to avoidance doctrine. It does so by explaining the logic of remedial reinterpretation, and arguing that it fits within the existing system of American constitutional review. Remedial reinterpretation involves a different kind of interpretation than that traditionally taught in legislation textbooks. Rather than discerning the statute's meaning from conventional sources like the plain text or the legislative purpose, courts use creative reasoning to actually *change* the statute's meaning. Part II defends the legitimacy of remedial reinterpretation by arguing that the power to use it follows a fortiori from federal courts' existing powers to impose constitutional remedies, for example by striking down statutory language, adding statutory language, and creating as-applied statutory exceptions. Part II then shows that remedial reinterpretation is widely used by judges in a number of foreign legal systems. In the

28. *See* Eric S. Fish, *Choosing Constitutional Remedies*, 63 UCLA L. Rev. 322, 348–51 (2016) (describing equal protection cases in which the Supreme Court has remedied an under-inclusive statute by effectively adding text).

29. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600–01 (2012) (opinion of Roberts, C.J.) ("[I]t is only because we have a duty to construe a statute to save it, if fairly possible, that [the individual mandate] can be interpreted as a tax.").

30. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 336 (2001) (Scalia, J., dissenting).

United Kingdom and New Zealand, judges lack the power to strike down statutes, and so remedial reinterpretation is the only mechanism of constitutional rights enforcement. And in Canada judges have bifurcated constitutional avoidance in precisely the way this Article advocates—it is both a constitutional remedy and a canon of interpretation. Part II closes by arguing that the Supreme Court of the United States has already effectively adopted a remedial reinterpretation framework through its decisions in *Sebelius* and *United States v. Booker*.[31] In *Sebelius*, the Court explicitly chose the less plausible interpretation of the statute in order to fix a constitutional violation, thus doing away with the fiction that it was resolving an ambiguity rather than changing the law.[32] In *Booker*, the Court treated an avoidance reading as one of several possible constitutional remedies. It ultimately rejected that avoidance reading, choosing instead to invalidate multiple provisions of the statute.[33]

Part III discusses how bifurcating the avoidance canon would work in practice. It first examines the various ways that bifurcation would benefit constitutional avoidance doctrine—by solving a number of enduring doctrinal puzzles, limiting the scope of the judge-made constitutional penumbra, and making judicial uses of avoidance more transparent. It next considers how remedial reinterpretation should be weighed against other constitutional remedies, showing the greater flexibility that treating avoidance as a remedy brings. It then explores the extent to which judges can actually change a statute's meaning through remedial reinterpretation, describing several possible limits to interpretive rewriting. Finally, it closes by showing why judges might be tempted to blur the line between avoidance as a remedy and avoidance as an interpretive canon.

I. The Dimensions of Constitutional Avoidance

There is not one single version of the avoidance canon. Rather, the doctrine of avoidance varies along two dimensions. First, it varies based on what kinds of interpretations a judge is able to avoid—those that are actually found unconstitutional or those that merely raise constitutional "doubts." Second, it varies based on how far the statutory meaning can be stretched in the name of avoidance—whether the canon is merely a tiebreaker, or actually allows judges to choose the less plausible meaning to avoid constitutional problems. This Part explores these different conceptions of the avoidance canon. It then examines the deeper justifications for these doctrinal choices by reviewing the scholarly debate over how and why judges use constitutional avoidance.

31. *Sebelius*, 132 S. Ct. 2566; United States v. Booker, 543 U.S. 220 (2005).

32. *Sebelius*, 132 S. Ct. at 2600–01 (opinion of Roberts, C.J.).

33. *Booker*, 543 U.S. at 258–65.

A. *Dimension One: Violations or Mere Doubts*

The avoidance canon has a long history, stretching back to the early days of the American republic.[34] In its original formulation—so-called classic avoidance—the canon provides that "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act."[35] This means that the reviewing court must first decide that one possible interpretation would make the statute unconstitutional, and only then can it choose a different interpretation to avoid this problem.[36] In contrast, a second formulation of the avoidance canon—so-called modern avoidance—only requires that the court have "constitutional doubts" about the disfavored reading.[37] That is, the court need not find that the avoided reading is actually unconstitutional, the court must only find that there is a good chance of it being unconstitutional. The canonical statement of this approach is found in Justice Brandeis's concurring opinion in *Ashwander v. Tennessee Valley Authority*: "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."[38] Thus a court must, before deciding the constitutional question, seek out an interpretation of the statute by which it might be avoided. This modern canon

34. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 139 (2010) ("The unconstitutionality canon has the longer pedigree . . . the canon seems to have emerged in 1814 and matured by the late nineteenth century."); William W. Berry III, *Criminal Constitutional Avoidance*, 104 J. Crim. L. & Criminology 105, 110 (2014); *see also* Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 14 (1800) ("[T]he 11th section of the judiciary act can, and must, receive a construction, consistent with the constitution.").

35. Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring).

36. *See* Clark v. Martinez, 543 U.S. 371, 395 (2005) (Thomas, J., dissenting) ("Traditionally, the avoidance canon . . . . commanded courts, when faced with two plausible constructions of a statute—one constitutional and the other unconstitutional—to choose the constitutional reading."); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 Colum. L. Rev. 1189, 1203 (2006) ("Under classical avoidance, the court must 'reach the issue whether the doubtful version of the statute is constitutional [and conclude that it is not] before adopting the construction that saves the statute from constitutional invalidity.']" (alteration in original) (quoting *Clark*, 543 U.S. at 395 (Thomas, J., dissenting))); Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945, 1949 (1997) ("The basic difference between classical and modern avoidance is that the former requires the court to determine that one plausible interpretation of the statute *would* be unconstitutional, while the latter requires only a determination that one plausible reading *might* be unconstitutional.").

37. *See* United States v. Del. & Hudson Co., 213 U.S. 366, 408 (1909) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."); John Copeland Nagle, Delaware & Hudson *Revisited*, 72 Notre Dame L. Rev. 1495, 1497 (1997) ("[C]ourts since *Delaware & Hudson* have employed the more prudential doubts canon.").

38. 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

has become the dominant approach, supplanting the classic canon in most contemporary cases.[39]

The principal justification for the shift to modern avoidance was that it prevents a court from issuing advisory opinions.[40] Justice Edward White articulated this rationale in *United States v. Delaware & Hudson Co.*, noting that "the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter" because otherwise the rule would mean "that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary"[41]—in other words, to give an advisory opinion. Justice Brandeis similarly prefaced his discussion of modern avoidance in *Ashwander* by noting that "federal courts . . . have no power to give advisory opinions."[42] The reasoning here is that since the avoidance canon is simply a guide to interpretation—helping judges discern what the statute already means, not empowering them to change the statute's meaning—any finding that the avoided interpretation is unconstitutional would be unnecessary to decide the case. If a statute is susceptible to interpretations *X* or *Y*, and *X* would be unconstitutional, the court must then choose *Y*. But once it chooses *Y*, then nothing further turns on whether interpretation *X* in fact makes the statute unconstitutional. So any holding on that question is an advisory opinion. All the court can do, then, is state in dicta that grave constitutional doubts exist. Hence the modern avoidance canon truly lets courts *avoid* deciding the constitutional issue, while the classic canon requires ruling on it. And, by logical extension, the modern canon allows courts to use avoidance even when the avoided reading would not in fact render the statute unconstitutional. This has permitted the Court to announce new constitutional rules without having to actually strike down statutes.[43] For example, in *Bond* the Court effectively changed the meaning of the Chemical Weapons Convention based on a constitutional theory that the Court has not in fact adopted—the theory that there are subject-matter limitations on the power to make treaties.[44] Similarly, in *NAMUDNO* the Court

39. *See* Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. Davis L. Rev. 1, 92 (1996) (referring to the "more common 'serious doubts' formulation"); Nagle, *supra* note 37, at 1497–98; Vermeule, *supra* note 36, at 1949 n.24 (arguing that "the twentieth-century case law overwhelmingly supports" the dominance of the modern canon).

40. *See* Morrison, *supra* note 36, at 1206–07; William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 Cornell L. Rev. 831, 840 (2001) ("Because this placed the Court in the apparent position of rendering advisory opinions on constitutional questions, it shifted to the doctrine of the modern avoidance canon in *Delaware & Hudson*.").

41. 213 U.S. at 408.

42. *Ashwander*, 297 U.S. at 345–46 (Brandeis, J., concurring).

43. *See* Katyal & Schmidt, *supra* note 25, at 2114 ("[T]he mix of modern constitutional litigation, where sophisticated litigants frame up arguments with constitutional-ish points, coupled with the avoidance doctrine, has given us a dangerous cocktail. The avoidance canon provides an opening for new doctrines, and the sophisticated litigants provide a source.").

44. Bond v. United States, 134 S. Ct. 2077, 2087–88 (2014).

changed the meaning of the Voting Rights Act based on the then-hypothetical constitutional principle of "equal sovereignty" among the states.[45] In cases such as these, there is no way to know whether the Court is actually avoiding a finding of unconstitutionality, or is instead using illusory "doubts" to change the meaning of a perfectly valid statute.

Modern avoidance is currently the prevailing approach in the Supreme Court,[46] with one quite notable exception: Chief Justice Roberts's majority opinion in *Sebelius*. In that case, Chief Justice Roberts made a doctrinal innovation: he held that the Affordable Care Act's individual mandate was properly interpreted as a command, but that it would be unconstitutional if so interpreted, and so it must instead be read as a tax.[47] Chief Justice Roberts thus sought a way to make a constitutional holding without running into the *Delaware & Hudson* advisory opinion problem. He sequenced the avoidance inquiry into three steps: (1) find the correct interpretation of the statute; (2) determine whether that interpretation is unconstitutional; (3) if the correct interpretation is unconstitutional, and another ("fairly possible" but incorrect) interpretation is constitutional, adopt the alternative interpretation.[48] This approach could be termed neoclassical avoidance. It involves finding the avoided interpretation unconstitutional, while sequencing the inquiry into discrete steps to get around the advisory-opinion problem.[49] The difficulty with this approach, however, is that since Chief Justice Roberts purports to be deciding what the statute already means (rather than changing what it means) his rejection of the unconstitutional interpretation is still

45. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009) (quoting United States v. Louisiana, 363 U.S. 1, 16 (1960)); *see also* Katyal & Schmidt, *supra* note 25, at 2133–36 (noting that this principle has since gained doctrinal traction, despite starting out as dicta).

46. *See* sources cited *supra* note 39.

47. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600–01 (2012) (opinion of Roberts, C.J.).

48. *Id.*

49. In a 2006 article, Trevor Morrison foresaw neoclassical avoidance in a prescient footnote. *See* Morrison, *supra* note 36, at 1205 n.58. Morrison drew an analogy to qualified immunity cases in which (under then-prevailing law) a court must first determine whether an officer violated a constitutional right and could only then go on to decide whether that right was clearly established. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001). However, contrary to Morrison's argument, a court does not actually make a constitutional holding if it finds that there was qualified immunity. This is because nothing turns on such a constitutional holding—the officer was not liable even if their action was unconstitutional. A finding that an officer violated a constitutional right may be a particularly powerful kind of dicta, but is not a constitutional holding unless the officer is also found liable. *See* Wilkinson *ex rel.* Wilkinson v. Russell, 182 F.3d 89, 112 (2d Cir. 1999) (Calabresi, J., concurring); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1275 (2006) (criticizing *Saucier* as "a puzzling misadventure in constitutional dictum"); *see also* Pearson v. Callahan, 555 U.S. 223, 234–35 (2009) (overturning the *Saucier* requirement, due in part to criticism that it required courts to declare new constitutional doctrine in dicta). *But see* Camreta v. Greene, 131 S. Ct. 2020, 2030 (2011) (stating in dicta that an officer prevailing in a qualified immunity case can nonetheless appeal a finding that they violated a constitutional right).

dicta.[50] As Justice Ginsburg points out in her partial concurrence, there is "no reason to undertake a Commerce Clause analysis that is not outcome determinative."[51] Nothing turns on whether or not the individual mandate is constitutionally valid under the Commerce Clause. If the Commerce Clause empowers Congress to enact commands, then the mandate is upheld as a command. If the Commerce Clause does not give Congress the power to enact commands, the mandate is upheld as a tax. Either way the mandate is upheld. There cannot be a constitutional holding on the breadth of the Commerce Clause unless the statute is actually found unconstitutional.[52]

B. *Dimension Two: Tiebreaking or Rewriting*

The second dimension along which avoidance doctrine varies is the degree to which judges engage in interpretive stretching. Under one understanding of the canon, it is merely a tiebreaker—what I call "tiebreaking avoidance." If there are two interpretations that are both plausible, then constitutional avoidance can be used to choose one over the other.[53] Under a different understanding of the canon, judges are actually permitted to select a less-accurate interpretation. That is, they can effectively change the meaning of the statute to something other than what Congress intended if doing so will avoid a constitutional problem—what I dub "rewriting avoidance."[54] The difference between tiebreaking avoidance and rewriting avoidance lies in their adherents' assumptions about the range of "plausible" interpretations. For tiebreaking avoidance, there must be a legitimate ambiguity. That is, the judicial interpreter must first determine that the statute could legitimately mean either *X* or *Y*, and can only then use the avoidance canon to decide between *X* and *Y*. The canon thus serves the same function as the baseball rule that a tie goes to the runner—it provides a default rule for unclear situations.[55] By contrast, rewriting avoidance applies in situations where the most accurate reading of the statute is *X*, while *Y* is within a range of "plausible" but inaccurate interpretations. Thus, for tiebreaking avoidance the range of potential interpretations includes only those that Congress may have intended, while for rewriting avoidance that range also includes at least some interpretations that Congress did not intend. The Supreme Court uses

50. "A dictum is an assertion in a court's opinion of a proposition of law which does not explain why the court's judgment goes in favor of the winner." Leval, *supra* note 49, at 1256.

51. *Sebelius*, 132 S. Ct. at 2629 n.12 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

52. *See supra* note 49 and accompanying text. The thesis of this Article solves that problem by recasting Roberts's avoidance interpretation as a remedy. *See infra* Section II.B.

53. *See, e.g.*, Salinas v. United States, 522 U.S. 52, 59–60 (1997).

54. *See, e.g.*, *Sebelius*, 132 S. Ct. at 2600–01 (opinion of Roberts, C.J.).

55. It is worth noting that the tie does not actually go to the runner in American Major League Baseball. Rather, the rule seems to be that there are no ties—the umpire must decide whether the baseball or the runner got to the base first. *See* Major League Baseball, Official Baseball Rules, R. 5.06(a)(1), 5.09(a)(10), (b)(6) (2015 ed.).

both of these types of avoidance, though it has not yet formally distinguished them or acknowledged that they follow different logics.

Justice Scalia was the Supreme Court's most vociferous defender of tiebreaking avoidance. In Scalia's judicial opinions, he advanced the view that the avoidance canon is a rule of thumb for discerning legislative intent. It is "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts," and "thus a means of giving effect to congressional intent, not of subverting it."[56] This view makes the avoidance canon a cousin of the absurd results canon, the presumption against retroactivity, and other interpretive canons meant to guide judges in discerning the probable legislative intent.[57] In articulating the avoidance canon's rationale this way, Justice Scalia made an empirical assumption about Congress—that its members in fact care whether their enactments are constitutionally suspect and generally intend those enactments to bear a meaning that does not approach the constitutional line. Interestingly, however, Justice Scalia rejected that very assumption as "a dubious rationale" in his scholarly writing, and he advanced a second justification for tiebreaking avoidance: that it avoids conflict between the judiciary and the legislature.[58] This makes the avoidance canon more like the rule of lenity—it breaks interpretive ties by choosing the interpretation that advances certain system values.[59] Regardless of the justification for tiebreaking avoidance, the key point is that it can only be used to resolve true ambiguities. Justice Scalia often defended tiebreaking avoidance in dissent in cases where he believed the majority stretched the statutory meaning beyond the

56. Clark v. Martinez, 543 U.S. 371, 381–82 (2005); *see also* INS v. St. Cyr, 533 U.S. 289, 336 (2001) (Scalia, J., dissenting) ("The doctrine of constitutional doubt is meant to effectuate, not to subvert, congressional intent, by giving *ambiguous* provisions a meaning that will avoid constitutional peril, and that will conform with Congress's presumed intent not to enact measures of dubious validity."); Reno v. Flores, 507 U.S. 292, 314 n.9 (1993) (Scalia, J.) (noting that avoidance is "the last refuge of many an interpretive lost cause").

57. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 234–39, 261–65 (2012).

58. *Id.* at 248 ("In the texts that it enacts, a legislature should not be presumed to be sailing close to the wind, so to speak . . . . That was perhaps the original reason for the rule . . . . But with respect to federal legislation at least—where the canon is routinely applied—that is today a dubious rationale. The modern Congress sails close to the wind all the time. Federal statutes today often all but acknowledge their questionable constitutionality."); *see also* Kelley, *supra* note 40, at 898.

59. *See* Scalia & Garner, *supra* note 57, at 296–302; *see also* United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) ("The rule that penal laws are to be construed strictly . . . . is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.").

range of plausible choices.[60] A number of other Supreme Court justices, past and present, have done the same.[61]

By contrast, it is difficult to find a Supreme Court decision that explicitly defends rewriting avoidance. The Court has often used avoidance to adopt implausible interpretations, and it has done so since well before the Roberts Court.[62] But the Court rarely announces that it is rewriting a statute under the guise of interpretation. It does, however, sometimes formulate the canon in a way that suggests it is fudging—for example, stating that "[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it,"[63] or that it need only find an interpretation that is "fairly possible."[64] Statements such

60. *See, e.g.*, *St. Cyr*, 533 U.S. at 336 (2001) (Scalia, J., dissenting); United States v. X-Citement Video, Inc., 513 U.S. 64, 80–81 (1994) (Scalia, J., dissenting); *cf.* Bond v. United States, 134 S. Ct. 2077, 2095, 2097 (2014) (Scalia, J., concurring in the judgment) (defending the use of avoidance as a tiebreaker, but noting that the majority stretched the statutory meaning beyond the range of plausible choices); Skilling v. United States, 130 S. Ct. 2896, 2940 (2010) (Scalia, J., concurring in part and concurring in the judgment) (writing separately to note that avoidance is unnecessary because the statutory language is not susceptible to two interpretations).

61. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2676 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting); Nw. Austin. Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 212 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 511, 516–18 (1979) (Brennan, J., dissenting); Welsh v. United States, 398 U.S. 333, 345 (1970) (Harlan, J., concurring in the result); Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 785–86 (1961) (Black, J., dissenting); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 144–45 (1961) (Black, J., dissenting); Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 213–14 (1960) (Black, J., dissenting); Kent v. Dulles, 357 U.S. 116, 131–32, 143 (1958) (Clark, J., dissenting); United States v. UAW, 352 U.S. 567, 596–98 (1957) (Douglas, J., dissenting).

62. *See, e.g.*, *Catholic Bishop*, 440 U.S. 490; United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971); *Welsh*, 398 U.S. 333; *Kent*, 357 U.S. 116; Watkins v. United States, 354 U.S. 178 (1957); Yates v. United States, 354 U.S. 298 (1957); United States v. Witkovich, 353 U.S. 194 (1957); *see also* Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. Pa. L. Rev. 759, 836 (1997) ("[*Catholic Bishop*] was controversial at the time it was decided and remains controversial today because the otherwise proper interpretation of the Labor Act that the Avoidance Canon defeated was not open to reasonable disagreement, as a matter of ordinary English . . . ." (footnotes omitted)); Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 Calif. L. Rev. 397, 420–25, 446 (2005) ("The judicial behavior at work in the early Warren Court's cases avoided deciding some constitutional questions only by aggressive rewriting of statutes."); Kloppenberg, *supra* note 39, at 24–39 (showing that the Court used the avoidance canon to rewrite statutes in *X-Citement Video*, 513 U.S. 64 (1994), and *Brockett v. Spokane Arcades*, 472 U.S. 491 (1985)). State courts also frequently use avoidance to rewrite statutes. *See* Stewart G. Pollock, *The Art of Judging*, 71 N.Y.U. L. Rev. 591, 600–01 (1996) (providing numerous examples of state court decisions that used the avoidance doctrine to change a statute's meaning).

63. Heckler v. Mathews, 465 U.S. 728, 741–42 (1984) (quoting Aptheker v. Sec'y of State, 378 U.S. 500, 515 (1964)).

64. *Skilling*, 130 S. Ct. 2896, 2929–30 (2010) (citing Boos v. Barry, 485 U.S. 312, 331 (1988)).

as these might be taken as tacit admissions that an avoidance interpretation may not accurately reflect Congress's intent. Yet when the Court adopts an interpretation that Congress clearly did not intend, it generally acts as though it is not changing the statutory meaning, but instead choosing between plausible alternatives.[65] There is, however, one notable recent exception: Chief Justice Roberts's opinion in *National Federation of Independent Business v. Sebelius* explicitly adopted rewriting avoidance. In that case, Chief Justice Roberts took the unique step of actually announcing that he would adopt the less plausible interpretation in order to avoid striking down the Affordable Care Act. He wrote that "the statute reads more naturally as a command to buy insurance than as a tax, and I would uphold it as a command if the Constitution allowed it," and further that "it is only because we have a duty to construe a statute to save it, if fairly possible, that [the mandate] can be interpreted as a tax."[66] *Sebelius* is thus once again a fascinating outlier. The Court has often changed a statute's meaning through the avoidance canon, but it has rarely been transparent about doing so. Where prior uses of rewriting avoidance went unannounced, the decision to rewrite the Affordable Care Act through interpretation was explicit.

C. *The Scholarly Debate over the Avoidance Canon*

There is a robust scholarly debate over whether judges using the avoidance canon are respecting the legislative branch, or are instead usurping Congress's lawmaking power. The classic defense of the canon is that it limits judicial encroachment on the legislature by preventing judges from holding laws unconstitutional. However, a number of academics have criticized the canon as actually giving judges *more* power to change laws, effectively rewriting them based on constitutional doctrines that may or may not actually be valid. This argument has in turn provoked countercritiques by defenders of the canon, who justify it on the more outcome-oriented ground that it allows judges to enforce constitutional norms. The academic justifications for avoidance have thus evolved from the classic Bickelian account of judicial minimalism to more modern theories that recognize and defend the canon's law-changing function.

The classical argument for the avoidance canon is that it is more democratic to send legislation back to Congress than to strike it down. The most influential articulation of this view comes from Alexander Bickel's *The Least Dangerous Branch*.[67] Bickel was deeply concerned with constitutional review's anti-democratic features. He argued that, in order to minimize interference with majoritarian lawmaking, judges should exercise great restraint

65. *See, e.g.*, *Bond*, 134 S. Ct. at 2090; *Skilling*, 130 S. Ct. at 2931 n.43; *NAMUDNO*, 557 U.S. at 206–07; *X-Citement Video*, 513 U.S. at 68–69; *Welsh*, 398 U.S. at 342–43.

66. *Sebelius*, 132 S. Ct. at 2600–01(opinion of Roberts, C.J.).

67. Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (2d ed. 1986).

when deciding constitutional law cases. Judges should thus, for example, dismiss constitutional cases on procedural grounds, decline to exercise jurisdiction where possible, and, if they must make a constitutional holding, do so on the narrowest possible grounds.[68] The avoidance canon is another such strategy of judicial restraint. On Bickel's account, it allows a court to send the statute back to Congress for a "second look," so that Congress can confirm whether it actually meant to approach the constitutional line before the court goes on to decide the statute's validity.[69] Avoidance thus gives the court an excuse to save the statute by not deciding the constitutional question, and gives Congress a chance to reconsider what it wants the statute to mean. Modern Bickelians have echoed this restraint-based case for avoidance. Cass Sunstein, for example, argues that the avoidance canon requires that Congress be explicit when it encroaches on constitutional rights.[70] The canon is thus, on Sunstein's reasoning, a modern successor to the nondelegation doctrine—it ensures that Congress will take political responsibility for statutes that approach the constitutional line, rather than delegating that decision to judicial or agency interpreters. Similarly, Judge Guido Calabresi understands constitutional avoidance as a mechanism of interbranch dialogue.[71] He warns that when Congress infringes on constitutional rights through unclear language it may be acting with thoughtless haste, or, perhaps, trying to hide its actions from public scrutiny.[72] The avoidance canon allows courts to send such questionable statutes back to Congress for more thorough consideration, without forcing courts to define the precise limits of Congress's power. In sum, the avoidance canon's Bickelian defenders view it as a safeguard of democratic deliberation. It lets judges refrain from invalidating statutes, while ensuring that Congress will more fully and explicitly consider whether it wants to potentially violate the Constitution.

A number of scholars have criticized this view of avoidance, arguing that the canon does not preserve democracy, but rather undermines it by empowering judges to make essentially legislative decisions.[73] These scholars

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68. *Id.* at 111–98.

69. *See id.* at 164–69, 180–83 (using *Watkins* to show how the Court will sometimes send a statute back to Congress before deciding hotly contested constitutional issues, such as determining the grounds sufficient to support denial of a passport); *see also* Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 Harv. L. Rev. 1, 34–35 (1957) ("A candid avowal that a matter the implications of which Congress failed to see is being sent back for a second reading, so to speak, is much more compatible with due respect for the peculiar powers and competences of both institutions.").

70. *See* Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court 27, 219–21 (1999); *see also* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 459, 468–69 (1989).

71. *See* Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 Harv. L. Rev. 80, 103–05, 120 (1991).

72. *Id.*

73. *See, e.g.*, Henry J. Friendly, Benchmarks 199–201 (1967); Jerry L. Mashaw, Greed, Chaos, and Governance: Using Public Choice to Improve Public Law 105 (1997); Katyal & Schmidt, *supra* note 25, at 2112; Kelley, *supra* note 40, at 834; Kloppenberg,

point out that judges who invoke the avoidance canon often change the statute's meaning to something Congress clearly did not intend. Thus the canon is less a clear-statement rule and more a means of overriding congressional choices. And worse, under the modern version of the canon, judges use it merely to evade constitutional "doubts." Judges are thus effectively rewriting statutes to avoid constitutional problems that may or may not be real,[74] and thereby enforcing what Richard Posner calls a "judge-made constitutional 'penumbra.'"[75] These problems are compounded by a troubling lack of transparency. As Henry Friendly has noted, "it is one of those rules that courts apply when they want and conveniently forget when they don't . . . ."[76] For instance, some point to the fact that the Roberts Court did not use the avoidance canon in *Citizens United v. Federal Election Commission*,[77] but did use it in *Sebelius* and other cases,[78] as evidence that the Court employs the canon opportunistically, calling a statute "ambiguous" or "clear" for outcome-driven reasons rather than interpretive ones.[79]

The canon may also disinhibit judges from making new constitutional law. Neal Katyal and Thomas Schmidt argue that because judges are not forced to actually strike down a law in the case at bar, they are more willing to go out on a limb in their constitutional theorizing and announce new

supra note 39, at 23–24; John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223, 253–60; Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 Wm. & Mary L. Rev. 827, 840 (1991); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545, 561–75 (1990); Nagle, *supra* note 37, at 1496; Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 816 (1983); Frederick Schauer, *Ashwander Revisited*, 1995 Sup. Ct. Rev. 71, 74; Harry H. Wellington, *Machinists v. Street: Statutory Interpretation and the Avoidance of Constitutional Issues*, 1961 Sup. Ct. Rev. 49.

74. *See* Kelley, *supra* note 40, at 862–63; Motomura, *supra* note 73 (pointing out "phantom constitutional norms" in the immigration context); Vermeule, *supra* note 36, at 1960–61 (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979); Int'l Ass'n of Machinists v. Street, 367 U.S. 740 (1961) as examples of cases where the Court avoided readings that it later determined were constitutionally valid).

75. Posner, *supra* note 73 at 816; *see also* United States v. Marshall, 908 F.2d 1312, 1318 (7th Cir. 1990) (Easterbrook, J.) (warning that the overuse of the avoidance canon enlarges the constitutional penumbra and construes laws out of existence).

76. Friendly, *supra* note 73, at 211.

77. 558 U.S. 310, 374–76 (2010) (Roberts, C.J., concurring) (explaining why the majority did not answer the question on pure statutory-interpretation grounds by adopting an avoidance interpretation to avoid *all* constitutional issues).

78. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600–01 (2012) (opinion of Roberts, C.J.) (upholding the Affordable Care Act's individual mandate as a tax to avoid finding it unconstitutional under the Commerce Clause); *see also supra* notes 5–23 and accompanying text.

79. *See, e.g.*, Hasen, *supra* note 14; Tonja Jacobi, *Obamacare as a Window on Judicial Strategy*, 80 Tenn. L. Rev. 763, 787–90 (2013); *cf.* Kloppenberg, *supra* note 39, at 40 ("An attempt to reconcile the broad application of the canon in *X-Citement Video* with its narrow application in *Rust* highlights how application of the avoidance canon may be driven by politics.").

constitutional doctrines.[80] This is especially problematic because the ostensible premise of avoidance—that Congress does not intend to violate the Constitution—cannot logically apply where judges create the relevant doctrine after the law is enacted. And the high degree of legislative inertia in the American political system undermines the Bickelian assertion that avoidance is simply a matter of giving the legislature a "second look." Avoidance interpretations are likely to last quite a long time, given how rarely Congress overrides the Supreme Court's statutory decisions.[81] These criticisms of avoidance have been quite influential, to the point that the canon is now widely perceived as a tool of activist lawmaking rather than judicial minimalism. As Richard Hasen notes, "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."[82]

In the last few decades, some constitutional scholars have articulated a new rationale for the avoidance canon: that it allows judges to resist majoritarian encroachment on fundamental values by using clear statement rules to hinder legislative rights restrictions.[83] In contrast to the Bickelians, these scholars recognize that the canon empowers rather than restrains judges. However they argue that such empowerment is a good thing in our system, since it lets judges preserve underenforced constitutional values without having to strike down any statutes.[84] Ernest Young labels the avoidance canon a "resistance norm," because it raises obstacles to congressional

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80. *See* Katyal & Schmidt, *supra* note 25, at 2112–14.

81. *See* Posner, *supra* note 73, at 816 ("Congress's practical ability to overrule a judicial decision misconstruing one of its statutes, given all the other matters pressing for its attention, is less today than ever before, and probably was never very great. The practical effect of interpreting statutes to avoid raising constitutional questions is therefore . . . to create a judge-made constitutional 'penumbra' that has much the same prohibitory effect as the judge-made (or at least judge-amplified) Constitution itself."); *see also* Mashaw, *supra* note 73, at 102–03; Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 Tex. L. Rev. 1317 (2014) (showing that congressional overrides of Supreme Court statutory decisions have, in the last few decades, become quite rare); Katyal & Schmidt, *supra* note 25, at 2118–19.

82. Hasen, *supra* note 14, at 189.

83. *See, e.g.*, Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 Wm. & Mary L. Rev. 1575 (2001); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007 (1989); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992); Frickey, *supra* note 62; Morrison, *supra* note 36, at 1212–16; Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 Yale L.J. 2 (2008); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 Tex. L. Rev. 1549 (2000).

84. *See generally* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978) (pointing out that federal courts often underenforce constitutional rights due to various institutional limitations, and arguing that this justifies going beyond judicial enforcement through other mechanisms).

actions approaching the constitutional line, but it does not forbid such actions entirely.[85] This gives judges a nimbleness they lack when striking statutes down. They can create a constitutional penumbra without recognizing any actual constitutional violations, and they can enforce this penumbra without formally restricting Congress's power to make laws. For example, Philip Frickey has shown that the Warren Court frequently invoked the avoidance canon in the 1950s to protect the rights of accused dissidents and subversives.[86] In using the canon thusly, the Court protected vulnerable constitutional values while limiting its interventions by "construing" the relevant statutes rather than striking them down. These scholars' defense of the avoidance canon does away with the fiction that it is a rule of thumb for determining the legislature's intent. On their account judges are not "interpreting" statutes, at least not in the conventional sense, but are instead throwing up obstacles to make it more difficult to enact constitutionally problematic laws. These scholars thus see avoidance not as a principle of interpretation, but rather as a tool of constitutional enforcement akin to remedies like invalidation.[87]

II. Creative Interpretations as Remedies

There is a basic contradiction in how we understand the avoidance canon. On the one hand, it is doctrinally framed as just one of many interpretive resources—along with text, purpose, and legislative history—that judges can draw upon to discern what the enacting legislature intended a statute to mean. But on the other hand, it is generally recognized that avoidance interpretations are sometimes outcome-oriented tools of constitutional lawmaking, through which judges change a statute's meaning in light of constitutional norms.[88] Even Justice Scalia admitted that the avoidance canon "represents judicial policy—a judgment that statutes *ought not* to tread on questionable constitutional grounds unless they do so clearly . . . ."[89] But the avoidance canon cannot serve both of these roles at once. It cannot be a means of *interpreting* the statute and at the same time a means of *changing* the statute to advance certain system goals.

To resolve that contradiction, constitutional avoidance should be understood as two different doctrinal tools: first, a canon of interpretation, and second, a constitutional remedy. Under this reframing, the interpretive canon would function as a rule of thumb to discern legislative intent—it would help judges determine the meaning of ambiguous statutes by letting them assume that Congress does not intend to violate the Constitution. Meanwhile, the remedy would empower judges to fix actual constitutional

85. Young, *supra* note 83 at 1585.

86. Frickey, *supra* note 62.

87. *Cf.* Calabresi, *supra* note 71, at 103–08 (categorizing the "second look" approach as a species of judicial review).

88. *See supra* notes 73–86 and accompanying text.

89. Scalia & Garner, *supra* note 57, at 249.

violations by adopting meanings that conflict with Congress's intentions. Thus the canon would fuse tiebreaking and modern avoidance, while the remedy would fuse rewriting and classical avoidance.

This Part unpacks and justifies this new concept of remedial reinterpretation. It first distinguishes between two different ways of interpreting a statute: the conventional methods taught in legislation textbooks (discerning the authors' intent by looking to text, context, purpose, and legislative history), and a more creative model of interpretation that empowers readers to explore new meanings that might be ascribed to the text. It then argues that American judges have the power to use this creative model of interpretation as a remedy when a statute is held unconstitutional. It does so by comparing remedial reinterpretation to other constitutional remedies, showing that remedial reinterpretation is widely used by judges in a number of foreign legal systems, including New Zealand's, the United Kingdom's, and Canada's, and arguing that the Supreme Court of the United States has basically already adopted remedial reinterpretation in two major cases—*National Federation of Independent Business v. Sebelius* and *United States v. Booker*.[90]

A. *Two Kinds of Interpretation*

In the American legal system, the conventional framework of statutory interpretation is presented as a debate.[91] Lined up on one side are the textualists, led by Judge Easterbrook and late Justice Scalia, who look only to the words of a statute and care nothing for its legislative history.[92] Lined up opposite are the purposivists, led by Henry Hart and Albert Sacks, who interpret statutes in light of their motivating goals, and who consider legislative history and other sources of evidence external to the text.[93] In the middle are more pragmatic theorists like William Eskridge and Phil Frickey, who combine these methods in syncretic fashion.[94] These various camps each emphasize different types of evidence in the search for a statute's meaning, but they all share a commitment to discerning what the statute already means. That is, they all view judges as passive interpreters trying to

90. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012); United States v. Booker, 543 U.S. 220 (2005).

91. *See* William N. Eskridge Jr. et al., Cases and Materials on Legislation and Regulation 568–641 (5th ed. 2014).

92. *See, e.g.*, Antonin Scalia, A Matter of Interpretation (Amy Gutmann ed., 1997); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv. J.L. & Pub. Pol'y 59 (1988); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621 (1990); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989).

93. *See* Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution (2005); Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 Colum. L. Rev. 242 (1998).

94. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan. L. Rev. 321 (1990).

find the most accurate reading of the statute. The statutory meaning is a buried treasure, and these theories are maps to the big red *X*.

A different, more creative model of interpretation would allow the reader of a text to take on an authorship role. While textualism and purposivism give the reader maps to a certain location, a creative model of interpretation empowers them to blaze their own trail. The reader takes a text and considers what new meanings its words might bear. They do not limit themselves to the words' conventional meanings or the apparent intentions of the authors, but instead the reader views the task of interpretation as generative and result oriented. The great poet and literary theorist Oscar Wilde articulated just such a view of interpretation in his dialogue "The Critic as Artist."[95] Wilde wrote:

> To the critic the work of art is simply a suggestion for a new work of his own, that need not necessarily bear any obvious resemblance to the thing it criticizes. The one characteristic of a beautiful form is that one can put into it whatever one wishes, and see in it whatever one chooses to see; and the Beauty, that gives to creation its universal and aesthetic element, makes the critic a creator in his turn, and whispers of a thousand different things which were not present in the mind of him who carved the statue or painted the panel or graved the gem.[96]

Of course, it would be profoundly undemocratic if judges always acted like Wilde's critic when interpreting statutes. Judges could then reinterpret the law to reach whatever result they thought desirable in the case at bar. They would effectively replace legislatures. The words of the statute would be simply a jumping off point in any particular case, or perhaps a polite suggestion from the elected branches. This is why passive models of interpretation—textualism, purposivism, and the like—dominate American jurisprudence. Creative interpretation does not fit our intuitions about the limits of the judicial role. But there are a few circumstances where creative interpretation by judges is legitimate in our constitutional system.[97] The constitutional avoidance canon is traditionally applied in one such circumstance: where a statute, when interpreted according to the conventional approach, leads to a violation of the Constitution.[98] The Constitution trumps statutes in our system, and so judges have the power to change statutes to make them consistent with the Constitution. Creative interpretation is one possible tool for creating such consistency. If the words of a statute mean *X*, but *X* is unconstitutional, then judges can creatively reinterpret the statute to

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95. Oscar Wilde, The Critic as Artist 70–71 (Green Integer Books 1997) (1888). I owe this reference to my inestimable colleague Kevin Lamb.

96. *Id.*

97. William Eskridge has argued that one such circumstance arises where a statute has become anachronistic. That is, Eskridge claims that judges should (and in fact do) construe old statutes contrary to the original legislative expectations where those expectations no longer fit the social context. *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479, 1504–05 (1987).

98. *See* Morrison, *supra* note 36, at 1202–03.

instead mean *Y*.[99] This is a much less problematic type of creative interpretation than would be a general power to change statutes' meanings through interpretation, because it is limited to contexts where a statute has been found unconstitutional. And in such contexts, the judicial power to change statutes is already at its peak.

When a judge engages in remedial reinterpretation, they creatively reinterpret the relevant statute to make it consistent with the Constitution. Such reinterpretations have a particular logic: they are oriented toward system coherence. The judge looks for a construction of the text that will make it consistent with the larger system of law in which it is embedded, even if this is not the most accurate account of the particular text's meaning when read in isolation, and even if it conflicts with the intentions of the particular text's authors. In the legal context, this means choosing an interpretation of a statute that makes it consistent with the constitutional system.

Other examples of coherence-oriented reinterpretations can be found in fan theories about film franchises. These are theories that conflict with evidence from specific films, but make sense of the films when viewed together. Consider the James Bond franchise. Agent Bond has faced off against an impressive array of geographically and temporally diverse villains. He has foiled plots hatched by a global terrorist organization, a Central American drug lord, a North Korean dictator, a mad tycoon obsessed with gold, and many other scoundrels.[100] It would be quite difficult for a single person to defeat all of these villains, not least because the films span more than five decades. Thus, according to one fan theory, "James Bond" is not a single individual, but a code name for many different British agents.[101] There is no evidence to support this theory in any particular film—at no point does James Bond reveal that there have been other James Bonds, and indeed this theory conflicts with some evidence from the films.[102] But it makes sense of the larger collection of movies by explaining how "James Bond" could have accomplished all of these feats. There is a similar fan theory about the Star Wars films. The droids C-3PO and R2-D2 are both characters in the original Star Wars trilogy, in which they help Luke Skywalker defeat Darth Vader and

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99. *Cf.* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) (establishing the rule that American laws must not be construed to conflict with international law if any other construction is possible); Rebecca Crootof, Note, *Judicious Influence: Non-Self-Executing Treaties and the* Charming Betsy *Canon*, 120 Yale L.J. 1784 (2011). One might imagine a stronger version of the *Charming Betsy* canon whereby it could be used to actually change statutes' meaning in order to make domestic law consistent with international law.

100. *See, e.g.*, Die Another Day (Eon Productions 2002); From Russia with Love (Eon Productions 1963); Goldfinger (Eon Productions 1964); License to Kill (Eon Productions 1989).

101. *James Bond is a Codename*, Wikia, http://fantheories.wikia.com/wiki/James_Bond [http://perma.cc/WW9M-5K8Q].

102. *Id.* (noting evidence against this theory, such as that James Bond goes rogue in *License to Kill* but is still called "James Bond," and that James Bond makes reference to the death of his wife in several different films).

bring peace to the galaxy. They are also present in the three Star Wars prequel films, where they are friends with the boy who later becomes Darth Vader. Yet in the original films, when they are trying to defeat Darth Vader, they never make reference to this prior friendship. The films officially deal with this problem through a scene where the droids' memory is erased at the end of the prequels.[103] But one theory holds that R2-D2 kept its memory and helped orchestrate the events of the original Star Wars films based on its prior knowledge of Darth Vader.[104] This theory conflicts with some evidence from the films. But it makes the films fit together much more logically than does the alternative theory that it is just a massive coincidence that the same droids befriended both Darth Vader and Luke. The purpose of these theories is not to discern what the creators of the movies actually had in mind when they wrote the scripts. Rather, it is to reinterpret the scripts in a way that makes them fit together in a more logical fashion.

A similar thing happens when judges creatively interpret a statute to make it consistent with the Constitution. The judges are not trying to figure out what the statute's authors actually intended to do, or discern the conventional meaning of the statute's text. Rather, they are trying to find a meaning for the statute that will fix a contradiction between the statute and larger system in which it is embedded.

B. Sebelius, Booker, *and De Facto Remedial Reinterpretation*

The concept of remedial reinterpretation also helps explain two recent landmark Supreme Court decisions: *National Federation of Independent Business v. Sebelius* and *United States v. Booker*.[105] The Court did not articulate the concept of remedial reinterpretation in either of these cases, nor did it acknowledge a difference between avoidance as a remedy and avoidance as an interpretive canon. However, the reasoning in both of these decisions only makes sense if one understands the majority to be treating constitutional avoidance as a remedy. This suggests that the Supreme Court already uses remedial reinterpretation, though it has not officially recognized that it does so.

In *Sebelius*, Chief Justice Roberts's majority opinion contained both of the elements of remedial reinterpretation: it combined rewriting avoidance and classic avoidance. Chief Justice Roberts explicitly stated that he was interpreting the challenged provision against its clear meaning—it was written as a mandate to buy health insurance, but he was reinterpreting it so that it was instead a tax for not buying health insurance. He wrote that "the statute reads more naturally as a command to buy insurance than as a tax, and I would uphold it as a command if the Constitution allowed it," and further

103. Star Wars: The Complete Saga (20th Century Fox 2011) (1977–2005).

104. *Chewbacca and R2D2: Secret Rebel Agents*, Wikia, http://fantheories.wikia.com/wiki/Star_Wars [http://perma.cc/TLY2-W4LD].

105. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012); United States v. Booker, 543 U.S. 220 (2005).

that "it is only because we have a duty to construe a statute to save it, if fairly possible, that [the mandate] can be interpreted as a tax."[106] Chief Justice Roberts also claimed to be making a precedential holding that the mandate would not have been constitutionally valid under the Commerce Clause. He wrote that "[i]t is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question," and further that "[w]ithout deciding the Commerce Clause question, I would find no basis to adopt such a saving construction."[107] Although Roberts tried to get around the advisory opinion problem by sequencing the avoidance inquiry into several stages, and claiming that he could only adopt a saving construction after "holding" the most natural reading unconstitutional, the result was merely dicta.[108] As Justice Ginsburg pointed out in her partial concurrence, Chief Justice Roberts's Commerce Clause holding is not outcome determinative, and so it cannot be a holding.[109] If the Chief Justice is using the avoidance canon simply as an interpretive principle, then the result in the case does not turn on whether the power to regulate commerce lets Congress mandate the purchase of health insurance. If the mandate is within the commerce power then it is upheld, and if the mandate is not within the commerce power then it is interpreted as a tax and also upheld. The Commerce Clause analysis is thus dicta.[110] However, treating avoidance as a *remedy* solves this problem. If avoidance is a constitutional remedy, then the majority must first decide that a mandate would be unconstitutional before going on to reinterpret the mandate as a tax. This is because a constitutional remedy can only be imposed after an actual finding of unconstitutionality. Thus, if one reads Chief Justice Roberts's majority opinion in *Sebelius* as an exercise in remedial reinterpretation, then his neoclassical avoidance move works. The Commerce Clause analysis becomes necessary to the decision and is thereby made a constitutional holding rather than merely dicta.

In *United States v. Booker*, the Supreme Court effectively treated an avoidance interpretation as a remedy. The Court held in *Booker* that the system of federal sentencing guidelines established by the Sentencing Reform Act was unconstitutional.[111] The guidelines made certain judge-found facts result in a mandatory increase in a defendant's sentence without requiring that those facts be proven to a jury.[112] This violated the Sixth Amendment

106. *Sebelius*, 132 S. Ct. at 2600–01(opinion of Roberts, C.J.); *see supra* notes 47–50 and accompanying text.

107. *Sebelius*, 132 S. Ct. at 2600–01 (opinion of Roberts, C.J.).

108. I label this approach "neoclassical" avoidance, because it tries to return to the pre–*Delaware & Hudson* classic canon in which a court must first make a constitutional holding before it can adopt an avoidance interpretation. *See supra* notes 34–36, 41–43, and accompanying text.

109. *Sebelius*, 132 S. Ct. at 2629 n.12 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

110. *See* Leval, *supra* note 49, at 1256; *supra* note 49 and accompanying text.

111. United States v. Booker, 543 U.S. 220, 232, 243 (2005).

112. *See id.* at 227.

right to a jury trial.[113] If judicial fact-finding leads to an automatic increase in sentence length, then the jury's role is circumvented. After this constitutional violation was established, however, the justices disagreed on the question of remedy. Justice Breyer wanted to strike down certain provisions of the Sentencing Reform Act so as to make the guidelines advisory.[114] This would mean that the guidelines' enhancement factors would no longer cause mandatory increases in sentences, and thus that judicial fact-finding at sentencing would no longer automatically lead to greater punishment. Instead, judges would determine the appropriate punishment according to their own views, using the guidelines only as nonbinding advice. Justice Stevens proposed a different solution. He relied upon the fact that the Sentencing Reform Act does not actually refer to "the sentencing judge," but instead only to "the court."[115] He used this fact to argue that the constitutional violation could be solved by an avoidance interpretation—the justices could interpret the words "the court" in the law to mean "the judge and the jury," and thereby prevent circumvention of the jury's fact-finding function.[116] Under Justice Stevens's proposed interpretation, the jury would have to find any facts that cause an increase in the guidelines sentence, thus solving the Sixth Amendment problem.

Since Justice Stevens's proposal was an avoidance argument, it should (under the conventional understanding of avoidance as an interpretive principle) have been considered before Justice Breyer's proposal to strike down part of the statute. This is because if Justice Stevens's interpretation was correct, then there would be no constitutional violation in the first place, so there would be nothing to remedy. If "court" in the statute means "judge and jury," then the Sixth Amendment is already satisfied. But this is not how the justices framed the choice between avoidance and invalidation. Instead they treated the proposals as alternative remedies. Each justice argued for his respective solution by trying to show that it better fit with the enacting Congress's goals in passing the Sentencing Reform Act, and that the alternative solution would conflict with the choices Congress had made.[117] They thus considered these solutions to be dueling remedial options, even though Justice Stevens's proposal was explicitly framed as an avoidance interpretation.[118] Indeed, both Justice Breyer and Justice Stevens repeatedly referred to Justice Stevens's avoidance interpretation as a "remedy" throughout their opinions in *Booker*, with Justice Breyer calling it "the dissenters' proposed

113. *Id.* at 243–44.

114. *Id.* at 258–66 (Breyer, J.).

115. *Id.* at 286 (Stevens, J., dissenting in part).

116. *Id.* ("As a textual matter, the word 'court' can certainly be read to include a judge's selection of a sentence as supported by a jury verdict—this reading is plausible either as a pure matter of statutory construction or under principles of constitutional avoidance.").

117. *Id.* at 247–49 (Breyer, J.); *id.* at 292–99 (Stevens, J., dissenting in part).

118. *Id.* at 286 (Stevens, J., dissenting in part).

remedy," and Justice Stevens calling it "my proposed remedy."[119] The majority ultimately adopted Justice Breyer's solution of making the guidelines advisory through partial invalidation and rejected Justice Stevens's avoidance interpretation. But the Court only rejected Justice Stevens's proposal after it had already found the mandatory sentencing guidelines unconstitutional in a separate majority opinion (which was authored by Justice Stevens himself).[120] The Supreme Court thus clearly treated Justice Stevens's interpretation of the words "the court" as a *remedy* to be considered only after the statute had already been held unconstitutional, and to be evaluated as an alternative to invalidation. It did not treat Justice Stevens's avoidance interpretation as an argument about what the Sentencing Reform Act already meant ex ante. The Court, without explicitly saying so, validated the doctrine of remedial reinterpretation.

C. *The Constitutionality of Remedial Reinterpretation*

When a judge finds a statute unconstitutional, they are then empowered to alter that statute in order to fix the constitutional violation. As a consequence, a judge deciding a constitutional review case gains the ability to change the challenged statute in ways they normally could not. The judge can impose one of several possible remedies. First, the judge can declare the offending statute invalid and strike it down. In *Marbury v. Madison* the Supreme Court used this power to invalidate a section of the Judiciary Act of 1789,[121] and since that decision the Court has struck down many other state and federal statutes that violated the Constitution.[122] Second, the judge can strike down an application of the law while leaving the rest of the law intact. This is called an "as-applied" invalidation—it creates an exception to the statute, so that it no longer applies in a certain category of cases. For example, in *Ayotte v. Planned Parenthood of Northern New England* the Supreme Court decided that a New Hampshire statute restricting minors' access to abortions was unconstitutional as-applied to situations where the minor needs an abortion for health reasons.[123] The Court thereby carved out an atextual exception for medically necessary abortions, while leaving the law's actual provisions intact. Third, the judge can, in some cases, effectively add

119. *See, e.g.*, *id.* at 249 (Breyer, J.) ("[W]e compare maintaining the Act as written with jury factfinding added (the dissenters' proposed remedy) to the total invalidation of the statute . . . ."); *id.* at 258 (Breyer, J.) ("Yet that is the system that the dissenters' remedy would create"); *id.* at 288 (Stevens, J., dissenting in part) ("Third, the majority argues that my remedy would make sentencing proceedings far too complex."); *id.* at 289 (Stevens, J., dissenting in part) ("And, unlike my proposed remedy, which would potentially affect only a fraction of plea bargains, the uncertainty resulting from the Court's regime change will infect the entire universe of guilty pleas which occur in 97% of all federal prosecutions.").

120. *Id.* at 245–46 (Breyer, J.).

121. 5 U.S. 137 (1803).

122. *See* 1 Otis H. Stephens, Jr. et al., American Constitutional Law 55 (6th ed. 2015).

123. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320 (2006).

language to a statute by expanding its provisions to include previously excluded cases. The Supreme Court has imposed such "leveling up" remedies to fix statutes that violate the Equal Protection Clause by unconstitutionally excluding certain groups. For example, in *Weinberger v. Wiesenfeld* the Court considered a challenge to a social security statute that provided benefits to widows with dependent children, but not to widowers.[124] The Court found that this constituted unconstitutional sex discrimination, so it expanded the benefit to widowers. This meant that the Court had to effectively add new text to the statute, since there was no way to include widowers by striking down text.[125] Courts have done the same in a number of other constitutional equality cases.[126] In short, courts in our system enjoy extensive powers to change the content of statutes in order to fix constitutional violations. They can strike down language, strike down applications, and even sometimes add language to make a statute constitutional.

Compared to these remedies, the power to creatively reinterpret a statute seems rather unobtrusive. If a judge can strike down the entire statute, strike down applications of the statute, and even expand the statute, then it would seem to follow a fortiori that the judge can also give the statute's text a new interpretation that renders it constitutional. In doing so, a court does not even have to add or invalidate language, it can just give the existing language a different meaning. And if the judge already has the quasi-legislative power to change the statute's language if it is found unconstitutional, surely the judge can also reinterpret the existing language.

Indeed, all four of these remedial categories—striking down language, striking down applications, expanding the statute, and reinterpreting the statute—amount to the same thing in practice. Judges cannot actually change the contents of the legislative code, and so when they strike down a statute it remains on the books, just as when they expand a statute or eliminate an application the actual text in the legislative code remains the same.[127] Thus with each of these types of remedy, all that the judge actually does is change the effect of the law, creating a gap between the statute's text and its operational meaning. To strike down a certain provision is to declare that that provision will be construed as having no meaning. To eliminate an application through an as-applied ruling is to declare that the statute will be construed as not applying to a certain type of case that its text clearly reaches. To expand a statute is to declare that the statute will be construed as applying more broadly than its words provide. These different remedial categories are all useful shorthands for a judge to communicate how the statute

124. 420 U.S. 636 (1975).

125. *See Weinberger*, 420 U.S. at 653; Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 Clev. St. L. Rev. 301, 302–03 (1979).

126. *See, e.g.*, Califano v. Westcott, 443 U.S. 76, 93 (1979); Frontiero v. Richardson, 411 U.S. 677 (1973); People v. Liberta, 474 N.E.2d 567, 579 (N.Y. 1984).

127. *See, e.g.*, 18 U.S.C. § 700 (2012) (establishing criminal penalties for defacing the American flag), *invalidated by* United States v. Eichman, 496 U.S. 310 (1990).

will be understood going forward. But they are not functionally diverse approaches to judicial review—they are simply different strategies for communicating the judge-made gap between the statute's text and its meaning.[128] Remedial reinterpretation does exactly the same thing: it gives the statute a new, different meaning that conflicts with the text (as interpreted through conventional methods), but that renders the statute constitutional. It is thus no different from other constitutional remedies that are widely used in our system.

D. *Foreign Models of Interpretation as Remedy*

This concept of remedial reinterpretation may seem a bit odd at first. It combines two different judicial functions—statutory interpretation and judicial review—that are usually kept separate. But the concept becomes rather less strange when one realizes that remedial reinterpretation is one of the more common forms of judicial review around the world. As Alec Stone Sweet has shown, remedial reinterpretation is widely used by European constitutional courts.[129] These courts issue what Stone Sweet calls "binding interpretations" of statutes, which provide that a statute will be considered constitutional if and only if it is interpreted as the constitutional court says. Such binding interpretations "authoritatively rewrite the legislative provisions in question, thus amending them, in that they authoritatively state exactly what the law means, and how it must be applied by judges, regardless of how legislators intended it to be applied."[130] They are a common mechanism of constitutional enforcement in Europe, to such an extent that they have at times comprised the majority of a constitutional court's decisions.[131]

Some foreign legal systems go even further and establish remedial reinterpretation as the sole mechanism of judicial review. In New Zealand, for example, there is no formal constitution, and judges lack the power to invalidate statutes.[132] There is, however, a statute called the New Zealand Bill of

128. Fish, *supra* note 28 (manuscript at 44–45) (arguing that these different remedial categories all blend together).

129. *See* Alec Stone Sweet, Governing with Judges: Constitutional Politics in Europe 71–73 (2000).

130. *Id.* at 72.

131. *See id.* ("Constitutional courts have produced a rising tide of such declarations. In France, for example, the percentage of decisions containing binding interpretations has risen from 11 per cent (1959–74), to 14.5 per cent (1974–81), to 19.5 per cent (1981–5); in 1986, 56 per cent (9/16) of the decisions the Council rendered contained them. In Italy, the same percentage rose from 15 per cent during the 1980s, to 25 per cent since 1990. . . . [M]ore than 2/3 of the decisions rendered by the [Italian Constitutional Court] on legal texts promulgated during the 1987–90 period announced binding interpretations." (citations omitted)).

132. For an account of New Zealand's constitutional structure, see N.Z. Parliamentary Library, The New Zealand Constitution (Feb. 15, 2000), http://www.parliament.nz/resource/en-nz/00PLLawRP00011/502fa2135dd16543ca15974a028ad70161b80aba [http://www.http://perma.cc/4AAY-WRGS] (noting, among other observations, that "New Zealand does not have a 'written constitution' which has the status of superior law, governing all other law and requiring procedures . . . for amendment").

Rights Act that enumerates a number of civil and political rights for New Zealanders.[133] Section 6 of the Bill of Rights Act instructs judges to interpret all other statutes in a manner that is consistent with these rights.[134] Thus under section 6, a court will first determine whether the most natural reading of the relevant statute conflicts with the Bill of Rights Act, and if it does, the court will then adopt a new interpretation that resolves the conflict. This can mean effectively rewriting the statute. For example, in *Hopkinson v. Police* the High Court of Wellington used section 6 to decide that a statute prohibiting actions that "dishonour" the flag of New Zealand did not apply to a man who burned a New Zealand flag in front of the parliament building to protest the war in Iraq.[135] The court first determined that the most natural meaning of the word "dishonour" applied to the man's conduct.[136] However, the court then held that if the statute were so interpreted it would constitute an unjustified limit on freedom of expression, and would thus conflict with the Bill of Rights Act.[137] The court therefore used section 6 of the Bill of Rights Act to reinterpret "dishonour" more narrowly, as meaning "vilify."[138] That is, it added a requirement that the defendant must do more than just burn a flag symbolically. The defendant must also express some further disparagement of the flag (though the court did not precisely define what "vilifying" the flag might consist of).[139] This is a textbook case of remedial reinterpretation. The court (1) decided on the most natural interpretation of the statute, (2) determined that that interpretation violated the Bill of Rights Act, and (3) remedied that violation by creatively reinterpreting the statute to protect the endangered right. And such remedial reinterpretation is the only mechanism of judicial rights enforcement in New Zealand, since judges cannot strike down laws.

The United Kingdom has a very similar system of reinterpretation-based judicial review.[140] In the United Kingdom, the relevant rights-creating statute is the Human Rights Act of 1998, which empowers British judges to enforce the provisions of the European Convention on Human Rights.[141]

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133. New Zealand Bill of Rights Act 1990, ss 8–27.

134. *Id.* s 6 ("Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning."). *But see id.* s 4 (prohibiting courts from explicitly repealing or declining to apply other statutes based on the grounds that they are inconsistent with the Bill of Rights Act, notwithstanding a preference for giving a meaning consistent with the Act).

135. [2004] 3 NZLR 704 (HC) at [81].

136. *Hopkinson,* 3 NZLR 704 at [39].

137. *Id.* at [77].

138. *Id.* at [81].

139. *Id.*

140. For an account of the United Kingdom's constitutional structure, see Political and Constitutional Reform Comm., House of Commons, The UK Constitution: A Summary, with Options for Reform (2015).

141. Human Rights Act 1998, c. 42, §§ 1, 8(1) (Eng.).

Much as in New Zealand, British judges lack the power to strike down statutes that conflict with protected rights.[142] Judges can, however, creatively reinterpret statutes so as to make them consistent with the Convention. Section 3 of the Human Rights Act provides: "So far as it is possible to do so . . . legislation must be read and given effect in a way which is compatible with the Convention rights."[143] As the parliamentary white paper introducing the Human Rights Act made clear, this mandate requires that judges go much further than simply resolving statutory ambiguities in favor of rights-protecting readings.[144] A judge must strain to find a reading of a statute that will not conflict with the Convention, even if that reading flatly contradicts the statute's plain text. This can mean reading words into the statute, reading words out of the statute, or otherwise self-consciously modifying the statute's meaning.[145] British judges have thus used section 3 to essentially rewrite statutes in order to make them consistent with the European Convention on Human Rights. One prominent example of such rewriting through interpretation is *Ghaidan v. Godin-Mendoza*.[146] In *Ghaidan*, the House of Lords, then the United Kingdom's highest court, invoked section 3 to interpret a statute providing tenant survivorship rights to "a person who was living with the original tenant as his or her wife or husband" as also providing such rights to unmarried homosexual partners.[147] It did so because excluding homosexual couples from the tenancy provision would have violated the Convention's prohibition on discrimination.[148] Gay marriage

142. Political and Constitutional Reform Comm., *supra* note 140, at 15.

143. Human Rights Act 1998 § 3(1).

144. Rights Brought Home: The Human Rights Bill, 1997, Cm. 3782, ¶ 2.7 ("This goes far beyond the present rule which enables the courts to take the Convention into account in resolving any ambiguity in a legislative provision. The courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so."); *see also* JoAnne Sweeny, *Creating a More Dangerous Branch: How the United Kingdom's Human Rights Act Has Empowered the Judiciary and Changed the Way the British Government Creates Law*, 21 Mich. St. Int'l L. Rev. 301, 322 (2013) ("All agree that Section 3 allows judges to be more creative when interpreting a statute and even alter the statute's wording if doing so would make the statute compatible with the European Convention on Human Rights.").

145. Ghaidan v. Godin-Mendoza [2004] UKHL 30, [32]–[33], [2004] 2 AC 557 (appeal taken from Eng.), http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040621/gha-1.htm [http://perma.cc/K4AP-9W4Y] ("[Section 3] is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation."). This aspect of the Act has been criticized as giving judges too much power. *See, e.g.*, James Allan, *Statutory Bills of Rights: You Read Words In, You Read Words Out, You Take Parliament's Clear Intention and You Shake It All About—Doin' the Sankey Hanky Panky*, *in* The Legal Protection of Human Rights: Sceptical Essays 108 (Tom Campbell et al. eds., 2011).

146. *Ghaidan*, [2004] UKHL at [32]–[33].

147. *Id.* at [4], [35].

148. *Id.* at [24] ("In my view, therefore, Mr. Godin-Mendoza makes good the first step in his argument: paragraph 2 of Schedule 1 to the Rent Act 1977, construed without reference to

did not exist in the United Kingdom at the time *Ghaidan* was decided, so the court was reinterpreting the words "wife or husband" to include people in partnerships not legally recognized as marriages. In explaining this result, Lord Nicholls of Birkenhead wrote:

> It is now generally accepted that the application of section 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may nonetheless require the legislation to be given a different meaning.[149]

The House of Lords thus explicitly recognized that by reinterpreting the words "wife or husband," it was effectively rewriting the statute to make it consistent with the Convention.

Remedial reinterpretation is not limited to systems like those in the United Kingdom and New Zealand, where weak-form judicial review is combined with explicit statutory authorization to make creative interpretations.[150] In Canada, for example, judges have the ability to reinterpret unconstitutional laws—which is labeled "reading down"—and this power is judicially created and coexists with strong-form judicial review.[151] In *Schachter v. Canada*, the Canadian Supreme Court enumerated several different remedial strategies that can be employed when a statute is found to violate the Canadian Charter of Rights and Freedoms, Canada's constitution.[152] These include striking down the statute, extending the statute to add applications that were unconstitutionally excluded, and reinterpreting the statute so that it does not conflict with the Charter (reading it down).[153] This menu is the same as that available to American judges.[154] And, while reading down is not formally recognized as a remedy in Canada, it functions exactly

section 3 of the Human Rights Act, violates his Convention right under article 14 taken together with article 8.").

149. *Id.* at [29].

150. Systems with "weak-form" judicial review do not allow judges to invalidate legislation, while systems with "strong-form" judicial review do. *See generally* Mark Tushnet, Weak Courts, Strong Rights (2008).

151. *See* Schachter v. Canada, [1992] 2 S.C.R. 679, 719–20 (Can.); Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 Colum. J. Transnat'l L. 285, 309–10 (2015) (explaining that remedial measures like reading-down can ease tension between constitutional courts and elected governments under strong-form judicial review).

152. [1992] 2 S.C.R. at 697–98, 719–20.

153. *Schachter,* [1992] 2 S.C.R. at 697–98, 719–20.

154. *See supra* Section II.B.

like one.[155] Judges in Canada may use reading down to choose interpretations that conflict with the legislature's clear intentions,[156] and Canadian judges can only employ reading down after having found the most accurate reading of the statute constitutionally invalid.[157] Thus, Canada uses both classical and rewriting avoidance in its remedial reinterpretation doctrine (much like the United Kingdom and New Zealand do). Canadian courts also adopt a separate constitutional avoidance canon that is distinct from reading down, and is treated purely as a principle of statutory interpretation. This is labeled the "Charter values" interpretive principle, and it is only applied in cases where the statute is truly ambiguous, meaning the statute "is subject to differing, but equally plausible, interpretations."[158] Canada's system thus does exactly what this Article advocates. It bifurcates constitutional avoidance into two different doctrines: (1) reading down, which treats avoidance as a constitutional remedy, and (2) a Charter values canon, which treats avoidance as a principle of statutory interpretation. The former is used to effectively rewrite statutes to make them consistent with the Charter, while the latter is used only to resolve statutory ambiguities.

These examples show that remedial reinterpretation has actually been brought into practice in other countries. Judges around the world use a combination of classic and rewriting avoidance to reinterpret statutes that violate protected rights. And they do so according to the three-step process advocated in this Article—first, the judge reads the statute according to conventional methods of interpretation; second, the judge decides that the standard interpretation violates a protected right; and third, the judge creatively reinterprets the statute to preserve that right. In the United Kingdom and New Zealand, remedial reinterpretation is the principal mechanism of judicial rights enforcement. In Canada, it exists alongside other forms of constitutional remedy and also coexists with a doctrinally distinct interpretive

155. *See* Danielle Pinard, *A Plea for Conceptual Consistency in Constitutional Remedies*, 18 Nat'l J. Const. L. 105, 108–11 (2006) (complaining that the Supreme Court of Canada's decisions create confusion about whether "reading down" is a remedy or a principle of statutory interpretation); Carol Rogerson, *The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness*, *in* Charter Litigation 233, 248 (Robert J. Sharpe ed., 1987) ("While the courts continue to describe reading down as a technique of interpretation rather than of invalidation, as a practical matter reading down is difficult to distinguish from a remedy which would operate to declare particular applications of a law unconstitutional. Reading down does require an initial determination by the court that particular applications of the statute would be unconstitutional.").

156. *E.g.*, R. v. Grant, [1993] 3 S.C.R. 223 (Can.) (reading down a statutory provision that allowed warrantless searches and doing so in a way that clearly conflicted with Parliament's intentions); Baron v. Canada, [1993] 1 S.C.R. 416, 454 (Can.) ("'Reading down' by amending the clear intent of a statutory provision may be appropriate in some cases."); Kent Roach, Constitutional Remedies in Canada ¶ 14.480 (1994) ("*Baron* indicates a new willingness to employ reading down as a remedial technique even in the face of what the court perceives as clear legislative intent.").

157. *See* Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69 102–04 (Can.); Rogerson, *supra* note 155, at 248.

158. Bell ExpressVu Ltd. P'ship v. Rex, [2002] 2 S.C.R. 559, para. 62 (Can.); *see also* Pinard, *supra* note 155, at 120–26.

avoidance canon. These foreign models suggest that remedial reinterpretation might also be added to American judges' menu of constitutional remedies.

III. Remedial Reinterpretation in Practice

This final Part explores how bifurcating constitutional avoidance would work in practice. First it shows how bifurcation solves several of the conceptual puzzles in modern avoidance doctrine, preventing judges from enforcing a penumbra of constitutional norms through statutory interpretation, and creating more transparency in how the doctrine is applied. Next, it considers when judges should use remedial reinterpretation as opposed to other constitutional remedies like invalidation, and it demonstrates the greater flexibility that treating avoidance as a remedy brings. It then explores the difficult question of just how far judges can stretch a statute's meaning when remedying a constitutional violation, proposing several limits that judges might choose from. Finally, it closes by considering the reasons why judges might want to blur the line between interpretation and remedy—for instance, in some cases, judges may wish to preserve rights by changing a law's meaning without having to make a constitutional holding.

A. *The Doctrinal Benefits of Bifurcating Avoidance*

By splitting constitutional avoidance into two different judicial tools—a canon and a remedy—we can solve a number of contradictions in the current doctrine. Indeed, at a basic level, this bifurcation makes constitutional avoidance coherent. If avoidance were only a principle of statutory interpretation, by which judges assumed that Congress does not intend to violate the Constitution, then it would not logically be able to perform some of its assigned functions. It could not, for instance, be used to change a statute's meaning by overriding Congress's clear intentions.[159] Further, it could not be used to interpret a statute in light of a rule of constitutional law that had not yet been announced by the Supreme Court—Congress could not have been aware of any such rule when the law was passed.[160] Bifurcating constitutional avoidance solves both of these problems.

After dividing up the doctrine, avoidance as an interpretive canon can be restricted to cases where the statute is truly ambiguous, that is, cases where both interpretations are fairly possible.[161] It can thereby be used as a rule of thumb to determine congressional intent, rather than a tool to subvert congressional intent. Interpretive avoidance can also be restricted so that it applies only where the constitutional rule that the court invokes has

159. *See supra* notes 68–74 and accompanying text.

160. *See supra* notes 26–27 and accompanying text.

161. Judges of course may, and frequently do, disagree about whether or not certain interpretations are fairly possible. But bifurcation of the kind advocated here would reduce the impulse to reach while interpreting a statute, because remedial reinterpretation is available as an alternative.

previously been established. This can be done by analogy to qualified immunity for government officers or deference under the Antiterrorism and Effective Death Penalty Act—two legal contexts where liability, when based on a constitutional violation, must be clearly established under preexisting law.[162] Remedial reinterpretation, in turn, can be used to enforce newly announced rules of constitutional law and to change the statute's meaning to something Congress did not intend. But it can only be used to do these things if the court makes an actual holding that the statute is unconstitutional as conventionally interpreted.

Bifurcating constitutional avoidance also prevents judges from changing a statute's meaning in cases where there is no actual violation of the Constitution. It thus avoids what Judge Posner has labeled the "judge-made constitutional 'penumbra.'"[163] Under the current doctrine, where avoidance's remedial and interpretive aspects are blended together, judges can creatively reinterpret statutes merely in order to avoid constitutional "doubts" that may ultimately be illusory.[164] They can thus rewrite laws based on phantom constitutional violations.

Splitting the doctrine into a remedy and a canon would eliminate the judge-made constitutional penumbra. When avoidance is used as a remedy, the judge has to first hold the statute unconstitutional before offering a reinterpretation. And when avoidance is used as an interpretive principle, the judge cannot change the statute's meaning but can only resolve a legitimate ambiguity. Destroying the judge-made constitutional penumbra also eliminates a problem identified by Katyal and Schmidt—that the absence of a constitutional holding could make judges more willing to go out on a limb and announce new principles of constitutional law in avoidance cases.[165] If a judge must make a constitutional holding before creatively reinterpreting a law, then the judge is held accountable for any novel constitutional theory they employ; they must actually use the theory to hold the law unconstitutional. And a judge cannot use avoidance-as-interpretation to announce a new theory, since they cannot assume that Congress was aware of the new theory when it enacted the statute. Thus, if avoidance doctrine is bifurcated, judges cannot use it as a low-consequence testing ground for novel constitutional theories.

Finally, bifurcation fixes one of the most serious problems with current avoidance doctrine—that it is not transparent. Under the current approach

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162. *See* 28 U.S.C. § 2254 (2012) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted . . . unless . . . adjudication of the [state court] claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . ."); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate 'clearly established' statutory or constitutional rights of which a reasonable person would have known.").

163. Posner, *supra* note 73, at 816.

164. *See supra* note 74 and accompanying text.

165. *See* Katyal & Schmidt, *supra* note 25, at 2114.

to avoidance, judges do not distinguish cases where they are resolving a true statutory ambiguity from cases where they are changing the statute's meaning to preserve a constitutional principle. Scholars and judges acknowledge that many cases fall into the latter category.[166] But when deciding these cases, judges generally pretend that the statute is ambiguous even if it is not.[167] This means that the choice of which statutes get rewritten in the name of avoidance and which do not is left to judges' opaque discretion. Judges do not have to articulate a principle that will distinguish the statutes they rewrite through interpretation from the statutes they strike down—they can simply state that the former were ambiguous while the latter had a clear meaning. For example, Richard Hasen has criticized the Supreme Court for applying constitutional avoidance in *NAMUDNO* but not applying it in *Citizens United*, even though there were statutory interpretations available in both those cases that would have avoided the constitutional issue.[168] The Court rejected the proffered avoidance reading in *Citizens United*, claiming it lacked a "valid basis,"[169] but in *NAMUDNO* the Court embraced a similarly implausible reading of the relevant statute.[170] The fact that the Court does not distinguish between avoidance as a canon and avoidance as a remedy permits such disparate results. When judges want to make a constitutional holding, they can claim that the statute is clear, and when they do not want to make a constitutional holding, they can claim that the statute is ambiguous. If rewriting avoidance were instead treated as a constitutional remedy, then judges would have to more transparently distinguish the cases where they change a statute's meaning from the cases where they do not. If a court adopted an admittedly inaccurate interpretation as a remedy in case one (for example, *NAMUDNO*), but rejected remedial reinterpretation in case two and instead struck down the statute (for example, *Citizens United*), it would need to articulate a principle to explain the difference in results. Precedent, and the need to distinguish cases, would make it more difficult for judges to use avoidance selectively.

B *When and How to Use Remedial Reinterpretation?*

If avoidance is treated as a constitutional remedy, it will have to be weighed against other constitutional remedies. The question thus arises: How should a judge decide which remedy to impose? Consider again the Supreme Court's dilemma in *United States v. Booker*. The Court decided that the Sentencing Reform Act was unconstitutional because it circumvented the

166. *See supra* notes 18–25, 73–79 and accompanying text.

167. *See supra* note 65.

168. Hasen, *supra* note 14.

169. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 374 (2010) (Roberts, C.J., concurring) (explaining why the majority did not adopt the avoidance interpretation).

170. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 206–11 (2009); *see* sources cited *supra* note 14 (noting that the Court adopted a clearly incorrect interpretation of the Voting Rights Act).

jury's fact-finding function, thus violating the Sixth Amendment.[171] But there were two different ways to remedy this violation. On the one hand, the Court could strike down part of the statute so as to make the sentencing guidelines nonbinding.[172] On the other, the Court could adopt an avoidance reading that would take sentencing power from judges and give it to juries.[173] How should the justices have chosen which of these remedies to impose?

I have argued elsewhere that in cases where a court has more than one way to fix a constitutional violation, it should choose the remedy that best serves the goals of the legislature that enacted the statute.[174] In other words, the court deciding on a remedy should try to figure out how the enacting legislature would have wanted to solve the constitutional violation. This is exactly what the Supreme Court did in *Booker*. Justices Stevens and Breyer each argued that their preferred remedy best vindicated the purposes of the Sentencing Reform Act, and that the alternative remedy instead undermined those purposes.[175] Thus, they each focused their analysis on the policy choices of the Congress that passed the Sentencing Reform Act, and debated the best way of preserving those choices. Ultimately, the majority determined that Justice Stevens's avoidance remedy would take the statute further from Congress's intended purposes than would Justice Breyer's partial invalidation.

This is how constitutional avoidance will work if it is treated as a remedy. Judges will consider remedial reinterpretations alongside other possible remedies, such as invalidating all or part of the statute's text, invalidating an application of the statute, or expanding the statute to fix unconstitutional discrimination. They will then choose which of these remedies to apply in the particular case. By contrast, if constitutional avoidance is treated only as a matter of statutory interpretation, then any possible avoidance reading must be rejected *before* the remedial options are considered. If the statute is constitutional, after all, then there is nothing to remedy in the first place. Treating avoidance as a remedy thus gives judges the flexibility to decide whether they want to reinterpret the statute or fix the constitutional violation in some other way. In many cases, an avoidance remedy for an unconstitutional law will do less violence to the statutory scheme than would the

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171. United States v. Booker, 543 U.S. 220 (2005).

172. *Id.* at 258–65 (Breyer, J.).

173. *Id.* at 286 (Stevens, J., dissenting in part).

174. *See* Fish, *supra* note 28 (manuscript at 4).

175. *Booker*, 543 U.S. at 265 (2005) (Breyer, J.) ("In our view, it is more consistent with Congress' likely intent in enacting the Sentencing Reform Act (1) to preserve important elements of that system while severing and excising two provisions (§§ 3553(b)(1) and 3742(e)) than (2) to maintain all provisions of the Act and engraft today's constitutional requirement onto that statutory scheme."); *id.* at 293 (Stevens, J., dissenting in part) ("Congress explicitly rejected as a model for reform the various proposals for advisory guidelines that had been introduced in past Congresses.").

alternatives.[176] This explains the doctrine's popularity with the current Supreme Court—constitutional avoidance allows the Court to tinker with a statute rather than blowing it up. But an avoidance interpretation is not always a minor change. In *Booker*, for example, Justice Stevens's proposed avoidance interpretation would have radically transformed federal sentencing law. It would have taken sentencing decisions out of judges' hands and placed them in the hands of juries and prosecutors. Treating avoidance as a remedy allows judges to weigh the consequences of avoidance in cases like *Booker*, and to opt for alternative remedies if they are more consistent with the statute's purpose.

Treating avoidance as a remedy also gives judges more flexibility in deciding how their reinterpretation of the statute will be implemented. For example, if avoidance is a remedy, it can be made nonretroactive. The court can declare that, while the statute previously meant *X*, it will instead mean *Y* going forward.[177] If avoidance were only an interpretive canon, however, this would not be logically possible: the court would have to state that the statute has always meant *Y*.[178] It could not claim that the statute only started to mean *Y* at the moment the court interpreted it. The same reasoning applies to delay. A court that uses avoidance as a constitutional remedy can delay that remedy to give the legislature time to amend the statute. In *Northern Pipeline v. Marathon Pipeline* the Supreme Court struck down the existing system of bankruptcy courts as unconstitutional, but delayed its remedy to allow Congress to enact a replacement system.[179] The Court could have done the same thing if it imposed a reinterpretation remedy. But if a court uses

176. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2593–94 (2012) (opinion of Roberts, C.J.) (the Court opted to reinterpret a provision of the statute in a way that caused no substantive changes, rather than striking the entire statute down); Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 205–06 (2009) (the Court adopted an avoidance interpretation that allowed the plaintiff to bail out of the Voting Rights Act's preclearance provision, rather than striking down that preclearance provision altogether).

177. *See, e.g.*, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87–88 (1982) (making remedy nonretroactive). The Supreme Court's remedy in *Booker* was made nonretroactive. *See* Duncan v. United States, 552 F.3d 442, 443 (6th Cir. 2009); Lloyd v. United States, 407 F.3d 608, 610 (3d Cir.), *cert. denied*, 546 U.S. 916 (2005); Guzman v. United States, 404 F.3d 139 (2d Cir.), *cert. denied*, 546 U.S. 1035 (2005). If the Court had instead made its remedy retroactive, then a huge number of federal prisoners would have been able to challenge their sentences as illegal. This raises an interesting point about Justice Stevens's proposed remedy. If the justices had held that the words "the court" in the Sentencing Reform Act were intended to mean "the jury," then all of the sentences imposed by judges under the federal guidelines would have been unlawful under the Act. This would have created the exact problem that the Court avoided by making its remedy nonretroactive.

178. *See* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.").

179. *N. Pipeline*, 458 U.S. at 88; *see also* Buckley v. Valeo, 424 U.S. 1, 144 (1976) (delaying partial invalidation of a statute by thirty days).

avoidance as an interpretive canon, then it cannot logically delay the application of its decision. Such a court is simply stating what the statute already means.

Finally, if avoidance is treated as a remedy, then it can be used in an as-applied fashion. A court can declare that a provision means *X* with respect to one group of people, but, in order to fix a constitutional violation, it means *Y* with respect to another group. Consider a recent pair of immigration decisions issued by the Supreme Court. In *Zadvydas v. Davis*, the Court adopted an avoidance interpretation of a statute that provided for the administrative detention of certain aliens.[180] Noting that indefinite detention without trial would create due process problems, the Court interpreted the statute so that aliens who had been previously admitted to the United States could only be detained for a "reasonable" period of time.[181] However, the Court explicitly declined to extend this holding to aliens who had not yet been admitted.[182] Subsequently, in *Clark v. Martinez*, a non-admitted alien argued that this atextual "reasonable time" limitation should apply to him as well.[183] The Court held that if the statute were interpreted that way for one group of aliens, it must be interpreted that way for all.[184] Justice Thomas argued in dissent that the avoidance reading in *Zadvydas* should be limited to admitted aliens since the statute only raised constitutional problems as applied to them.[185] Justice Scalia's majority opinion derided Thomas's approach, stating that it "would render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case."[186] And this is true if one views constitutional avoidance only as a method of statutory interpretation. The statute cannot logically be read to contain an implicit "reasonable time" limitation for one group of aliens but not another. But if the avoidance reading were instead a remedy that changed the statute's meaning, then it could be used in such an as-applied fashion. The Court could restrict its "reasonable time" requirement to only those aliens for whom lengthy detention is unconstitutional.[187]

180. 533 U.S. 678 (2001).

181. *Zadvydas*, 553 U.S. at 682.

182. *Id.* ("We deal here with aliens who were admitted to the United States but subsequently ordered removed. Aliens who have not yet gained initial admission to this country would present a very different question.").

183. 543 U.S. 371 (2005).

184. *Clark*, 543 U.S. at 382.

185. *Id.* at 399 (Thomas, J., dissenting) ("I simply would read ambiguous statutes to avoid as-applied constitutional doubts only if those doubts are present in the case before the Court.").

186. *Id.* at 382.

187. It is also worth noting that, if avoidance is treated as a remedy that actually changes a statute's meaning, then severability questions may arise. If a court reinterprets a statute so as to exclude certain applications, other parts of the statute could theoretically be held inseverable from these applications. Elsewhere I have argued that such inseverability determinations

C. *The Limits of Interpretive Stretching*

Remedial reinterpretation allows a court to change the meaning of an unconstitutional statute by "interpreting" that statute against the legislature's clear intentions. But how far can a court go in changing a statute's meaning? Put another way, at what point does creative interpretation stop being interpretation? This is an odd question. It seeks a line between inaccurate readings of a statute that are permissible and inaccurate readings that are impermissible. There are at least three places that such a line could be drawn.

First, one might distinguish between interpretations that are incorrect but plausible and those that are incorrect and implausible. This could be done by analogy to the *Chevron* doctrine, which instructs courts to defer to agency interpretations that are "permissible" readings of the statute.[188] A court that is imposing a reinterpretation remedy would thus be able to adopt a reading of the statute that, while not the best reading according to conventional methods of interpretation, could still be reasonably believed by a good faith interpreter. The Supreme Court's avoidance interpretation in *Sebelius* could be one example of such a "wrong but reasonable" reading.[189] The provision at issue required the purchase of health insurance, stating that "[a]n applicable individual shall . . . ensure that the individual, and any dependent of the individual . . . is covered under minimum essential coverage."[190] The majority in *Sebelius* determined that the best reading of this provision was as a mandate, not a tax, due to its imperative language.[191] But the statute also required that the relevant penalty be paid through the covered individual's annual tax returns, and it calculated the penalty in part based on the individual's taxable income.[192] This evidence could make Chief Justice Roberts's interpretation of the provision as a tax fit within a *Chevron*-style zone of reasonableness. The statute may not say "tax," but it at least seems to operate like one. By way of contrast, the Court in *NAMUDNO* interpreted the phrase "political subdivision" in a way that contradicted how that phrase was explicitly defined in the statute.[193] The Court's avoidance interpretation

should be limited to only cases where the legislature has made one part of the statute conditional on another. *See* Eric S. Fish, *Severability as Conditionality*, 64 Emory L.J. 1293 (2015).

188. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984); *see also* Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 234 (2006) ("[I]t is hardly unfamiliar for judges to think: 'wrong, but reasonable.' They might believe, for example, that a jury's verdict is incorrect but not clearly erroneous, or that some interpretations, even major ones, are hard to defend but not 'irrational.' ").

189. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012); *see also* United States v. Booker, 543 U.S. 220 (2005).

190. 26 U.S.C. § 5000A(a) (2012).

191. *Sebelius*, 132 S. Ct. at 2600–01 (opinion of Roberts, C.J.).

192. 26 U.S.C. § 5000A(b)–(c).

193. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 206–07 (2009); *see* 42 U.S.C. § 1973l(c)(2) (recodified at 52 U.S.C. § 10310(c)(2)); *supra* note 14 and accompanying text.

in *NAMUDNO* would thus likely not have qualified as wrong but reasonable.

Second, one could use the general purposes of the statute to limit the scope of creative reinterpretation. That is, one could draw the interpretive line at readings of a statute that seriously undermine that statute's goals. The British House of Lords articulated just such a principle in *Ghaidan v. Godin-Mendoza*: "The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must . . . 'go with the grain of the legislation.'"[194] Thus the limiting principle in the United Kingdom is that an interpretation must not conflict with the legislation's purpose. This means that British courts can stretch statutory meanings quite far. In *Ghaidan*, for example, the House of Lords interpreted the words "wife or husband" in a public housing law to include people in same-sex partnerships not legally recognized as marriages.[195] This fit with the thrust of the statute, which was enacted to ensure that people's spouses could inherit their apartments.[196] But the House of Lords' creative reinterpretation of the words "wife or husband" would not have worked, say, for a law specifically designed to deny rights to gay couples. A gay-friendly interpretation of those words would conflict with such a law's purpose.

Third, one could draw the line at cases of direct contradiction. Under this approach, a judge could use remedial reinterpretation to adopt any reading of a statute so long as that reading is not explicitly foreclosed in the statute's text. A court could reinterpret the statute to carve out exceptions or to expand the statute to cover new cases, but only so long as the statute's terms do not reject such interpretations. Consider once more the expansive reading of "wife or husband" in *Ghaidan*. If the statute involved in that case had contained a definitions section providing that "the terms 'wife' and 'husband' in this statute do not include people in homosexual partnerships," then the House of Lords' interpretation would have been explicitly foreclosed. Similarly, if the provision at issue in *Sebelius* had stated "this mandate to purchase health insurance shall not be interpreted as a tax," then Chief Justice Roberts's avoidance interpretation would not have been possible. If this were the rule, then a legislature that wanted to prevent a court from adopting a particular remedial reinterpretation of a statute would have to contemplate and specifically reject that interpretation when writing the statute's text. This creates a clear statement rule for the legislature. Prior to 1995, the Supreme Court of Israel employed such a clear statement rule in its decisions enforcing Israel's "Basic Law," its statutory constitution.[197] The Israeli legislature could enact a law that contradicted the Basic Law only if it

194. Ghaidan v. Godin-Mendoza [2004] UKHL 30, [33], [2004] 2 AC 557 (appeal taken from Eng.).

195. *Id.* at [4]–[24].

196. *Id.* at [4].

197. *See* CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Coop. Vill. 49(4) PD 1 (1995) (Isr.). From 1995 onward, the Basic Law has been enforced through more overt judicial review. *Id.* at 221.

did so explicitly. As Chief Justice Aharon Barak wrote, "any ordinary legislation which contradicts the provisions of the Basic Law without stating explicitly that it is doing so will not be valid."[198] This created a very strong clear statement rule. If the legislature did not specifically note that it was contradicting the Basic Law, then any new legislation that it enacted would be read narrowly so that it was made consistent with the Basic Law.[199]

D. *Blurring the Line Between Canon and Remedy*

If constitutional avoidance doctrine is split into an interpretive canon and a remedy, then judges will formally no longer be able to change the meanings of statutes without declaring them unconstitutional. The major benefit of this approach is that it limits unaccountable judicial lawmaking. Judges will no longer be able to essentially rewrite laws in the name of constitutional principles that may or may not have been violated. But there is also a cost to this clarity. In situations where a court lacks the will to declare a law unconstitutional, possibly because doing so will result in a political backlash, it will have less ability to protect imperiled rights. Philip Frickey has written about a number of avoidance decisions during the Warren Court, in which the Court creatively reinterpreted laws persecuting political dissidents. Frickey notes that "[b]y generally deciding these cases at the subconstitutional level through the rules of avoidance, the Court used techniques that might defuse political opposition while incrementally adjusting public law to better respect individual liberty."[200] There may be situations where it is better for judges to be able to protect rights by changing a statute without making a constitutional holding. Judges can thereby put the burden back on the legislature to reenact the rights-infringing aspects of the law if it truly wants them, and judges can do so without risking the political backlash that might result from holding a law unconstitutional.[201]

Bifurcating the avoidance canon takes away this option, at least formally. But of course judges can still claim to be interpreting a statute when they are in fact changing its meaning. The line between a true interpretive ambiguity and a false one is often unclear in practice, and judges can read ambiguity into unambiguous statutes. Judges do sometimes have a strategic incentive to blur the line between interpretation and lawmaking. By claiming

198. Aharon Barak, *A Constitutional Revolution: Israel's Basic Laws*, 4 Const. F. 83, 83 (1993).

199. *See* Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power*, 39 Hastings Const. L.Q. 457, 462 (2012) ("[T]his mechanism has deep roots in parliamentary sovereignty systems and is a natural development of common-law interpretation techniques, under which there is a presumption against implied repeal of fundamental rights. This presumption is overcome if the legislature uses explicit override language.").

200. Frickey, *supra* note 62, at 401.

201. *See, e.g.*, Re, *supra* note 14 (observing that the Supreme Court sometimes uses avoidance decisions to signal its intent to make a constitutional holding in the near future and to give the political branches the chance to prevent such a holding through new legislation or policies).

to merely interpret a statute, they can diffuse political opposition in cases where such opposition would rise up against a constitutional holding.[202] Such fudging may even sometimes serve important system values. Intellectual precision and logical clarity are important, even crucial, to the enterprise of judging, but they are not the only values that matter.[203] It might, in at least some extreme cases, be desirable for judges to effectively rewrite laws while pretending to exercise restraint.[204]

Conclusion

Constitutional avoidance is a legal lichen. It appears to be one organism, but it is really two. The ambition of this Article has been to reveal constitutional avoidance's dual nature. While it is formally understood as only a principle of interpretation, it should also be understood—and in some cases has actually been used—as a constitutional remedy. This new way of framing constitutional avoidance helps to make theoretical sense of the Supreme Court's aggressive use of the doctrine. It also brings logical coherence to constitutional avoidance, and clarifies the nature of courts' power to effectively change the meanings of laws by "interpreting" them.

202. *See id.* at 181; *cf.* Shai Dothan, Reputation and Judicial Tactics: A Theory of National and International Courts 46–47 (2015) (discussing various strategies for improving courts' reputations and thereby their legitimacy, including considerations of political pushback).

203. *See, e.g.*, Robert Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 Calif. L. Rev. 429, 442 (1998) ("When the Court chooses to press a particular vision of the national ethos in the face of opposition, it is rendered vulnerable to political reprisal, which can take such various forms as civil disobedience, hostile Presidential appointments, or constitutional amendments. The difficulty and necessity of navigating through such dangers is why it is said that Justices of the Supreme Court must be 'statesmen.' ").

204. *Cf.* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 183 (1980) ("That's an old debate the abolitionists had: should a judge distort the (pre-Civil War) Constitution by pretending it doesn't support slavery, or resign from the bench and fight his battles elsewhere?").