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The Role of the Avoidance Canon in the Roberts Court and the Implications of Its Inconsistent Application in the Court's Decisions

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NOTES

THE ROLE OF THE AVOIDANCE CANON IN THE ROBERTS COURT AND THE IMPLICATIONS OF ITS INCONSISTENT APPLICATION IN THE COURT'S DECISIONS

INTRODUCTION

Many have praised Chief Justice Roberts and the Roberts Court for its judicial minimalism,[1] and have noted the Roberts Court's tendency to shape constitutional law at a gradual pace.[2] One of the tools the Roberts Court has used to achieve this result is the avoidance canon, which dictates that a court should "adopt one of several plausible interpretations of a statute to avoid deciding a tough constitutional question."[3] The Roberts Court has invoked this doctrine in many of

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[1] *See, e.g.*, Hans Bader, Free Enterprise Fund v. PCAOB*: Narrow Separation-of-Powers Ruling Illustrates That the Supreme Court Is Not "Pro-Business"*, 2010 CATO SUP. CT. REV. 269, 269 ("Chief Justice John Roberts has often been depicted as an advocate of narrow rulings and a judicial philosophy of minimalism."); Randall T. Adams, Note, *Recent Development:* Northwest Austin Municipal Utility District Number One v. Holder, 45 HARV. C.R.-C.L. L. REV. 135, 135 (2010) (noting a canon of decisions by the Roberts Court "that might be fairly characterized as 'minimalist'").

[2] *See, e.g.*, Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 223 ("If the agenda of the Roberts Court is major change in constitutional law, the calculation may be that medicine usually goes down more palatably when in small doses."); Robert Barnes, *Roberts Court Moves Right, But with a Measured Step*, WASH. POST, Apr. 20, 2007, at A3 (noting that the Court will move in gradual shifts, "rather than by declaring bold breaks with the past").

[3] Hasen, *supra* note 2, at 181–182.

its decisions, including in high-profile decisions such as *Northwest Austin Municipal Utility District Number One v. Holder* ("*NAMUDNO*").[4] During the October 2009 term, however, the Court's decisions in *Citizens United v. Federal Election Commission*[5] and *Free Enterprise Fund v. Public Company Accounting Oversight Board*[6] tested the minimalist reputation of the Roberts Court when it decided the constitutionality of the statutes at issue in both cases rather than employing the avoidance canon. Richard Hasen has labeled the practice whereby "the Court . . . eschew[s] a plausible statutory interpretation to decide a difficult constitutional question" as "anti-avoidance."[7] These three recent decisions show that, while it may be that traditionally "few doctrines are more familiar and predictable than the Supreme Court's practice of avoiding decision of constitutional questions,"[8] the Roberts Court's use of the avoidance canon has been anything but consistent.

This Note seeks to explain the Roberts Court's application of the avoidance canon and to understand how these decisions affect the validity and legitimacy of the avoidance canon and of the Court itself. Part I gives context to the avoidance canon by examining the canon's history, its justifications, and its criticisms. Part II looks at the role of the avoidance canon in three of the Court's opinions. Part II.A assesses *NAMUDNO* and the implausible statutory interpretation the Court adopted to avoid deciding the constitutionality of section 5 of the Voting Rights Act of 1965. After discussing *NAMUDNO*, this Note will turn to cases where the Court decided the constitutionality of a statute rather than using the avoidance canon. In particular, Part II.B discusses *Citizens United* and the Court's decision to order re-argument of the case as well as its subsequent decision to overrule precedent. Part II.B also focuses on the interplay between Chief Justice Roberts's concurring opinion and Justice Stevens's dissent. Part II.C assesses *Free Enterprise Fund* and the majority's decision to read a for-cause removal requirement into the statute governing the removal of SEC Commissioners in order to hold that the Sarbanes-Oxley Act's "dual" for-cause limitation contravened separation of powers. Finally, Part III concludes that it is impossible to reconcile the Court's different approaches to the canon and argues that the

[4] 129 S. Ct. 2504, 2513 (2009).

[5] 130 S. Ct. 876, 889 (2010).

[6] 130 S. Ct. 3138, 3147 (2010).

[7] Hasen, *supra* note 2, at 182.

[8] James A. Gardner, *The Ambiguity of Legal Dreams: A Communitarian Defense of Judicial Restraint*, 71 N.C. L. REV. 805, 809 (1993).

inconsistent application of the avoidance canon has damaged the doctrine itself and has put its own legitimacy in jeopardy.

I. BACKGROUND ON THE AVOIDANCE CANON

A. History of the Canon and Its Evolution

The avoidance canon is a substantive canon. While many legal scholars have traced its history to before *Marbury v. Madison*,[9] the standard citation for the canon is Justice Brandeis' concurring opinion in *Ashwander v. Tennessee Valley Authority*.[10] In *Ashwander*, Justice Brandeis summarized seven rules that the Court had implemented in "passing upon a large part of all the constitutional questions pressed upon it for decision"[11]:

> 1. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding . . .
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> 2. The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' . . .
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> 3. The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'
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> 4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . .
>
> 5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. . . .
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> 6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.

[9] 5 U.S. (1 Cranch) 137 (1803); *see also* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948 n.13 (1997) (noting that the Court invoked a version of the avoidance canon in Mossman v. Higginson, 4 U.S. (4 Dall.) 12 (1800)).

[10] 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). Brandeis's explanation of the canon has been called "the most significant formulation of the avoidance doctrine." Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1012 (1994).

[11] *Id.* at 346.

> 7. '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 principal that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.[12]

From these seven rules, Adrian Vermeule extracted three major categories of avoidance.[13] The first category is "procedural avoidance," which suggests that "courts should order the issues for adjudication, or the rules that determine the forum in which a case should proceed, with an eye to obviating the need to render constitutional rulings on the merits."[14] The second category is "classical avoidance," and the third category is "modern avoidance."[15] The last two categories are different from procedural avoidance in that they affect the judicial construction of a statute.[16] The "classical avoidance" approach directs that "'as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [the Court's] plain duty is to adopt that which will save the Act.'"[17] In contrast, the "modern avoidance" approach provides that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[18] The major difference between classical and modern avoidance, therefore, "is in the level of constitutional concern needed to trigger the rule" since modern avoidance allows "serious but potentially unavailing constitutional objections to dictate statutory meaning."[19] It is important to keep in mind that, even though the Court has claimed that constitutional avoidance has been applied for so long that its use is beyond debate, many scholars have questioned the reasons for its use.[20]

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[12] *Ashwander*, 297 U.S. at 346–48 (Brandeis, J., concurring) (citations omitted).

[13] *See* Vermeule, *supra* note 9, at 1948–49 (describing the three categories).

[14] *Id.* at 1948.

[15] *Id.* at 1949.

[16] *Id.* at 1949. (describing the difference between the two types of avoidance).

[17] *Id.* (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring) (alteration in original)).

[18] *Id.* (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

[19] Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1203 (2006).

[20] *See* Lawrence C. Marshall, *Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation*, 66 CHI.-KENT L. REV. 481, 484 (1990) ("[I]t is worthwhile to consider how well the canon reflects actual congressional awareness of constitutional issues and what kind of constitutional culture it helps create within the halls of Congress.").

B. Justification for and Criticisms of the Avoidance Canon

1. Justifications for the Canon

Many scholars have emphasized different justifications for the avoidance canon and have long debated its usefulness in constitutional law.[21] While the justifications for the canon are often stated differently, the main arguments in favor of its use are the promotion of federalism and the separation of powers, the limitations of the judiciary, and the importance of constitutional adjudication.[22] In contrast, critics of the canon emphasize that modern avoidance can actually conflict with legislative intent and that the canon often does not prevent the unnecessary creation of constitutional law.[23]

The first justification for the avoidance canon is that the courts should avoid unnecessary questions to maintain the integrity of federalism and the separation of powers. Therefore, "to the extent Congress or a state is charged with authority in a particular substantive area, courts should carefully ensure the ability of these actors to interpret the Constitution in their work by not foreclosing options."[24] Essentially, this argument for the canon is that courts should respect, rather than invalidate, another branches' constitutional determination.[25]

The second justification for the avoidance canon is that it is necessary due to the limitations of the judiciary and the perceived fragility of its legitimacy. Justice Brandeis wrote his concurrence in *Ashwander* as a response to the judicial activism of the Court of the *Lochner* era, and his opinion reflected contemporary fears that the Court's credibility was at stake.[26] The canon insulates the Court from

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[21] *Compare* Brian C. Murchison, *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases*, 30 GA. L. REV. 85, 94 (1995) (arguing that the avoidance canon "provides a framework for staking judicial ground and exercising independent judgment in complex encounters with precedent and the balance of politics"), *with* Lisa A. Kloppenberg, *Does Avoiding Constitutional Questions Promote Judicial Independence?*, 56 CASE W. RES. L. REV. 1031, 1036 (2006) [hereinafter *Judicial Independence?*] (noting that "[t]he costs of avoiding constitutional questions are borne too often by the poor and marginalized in our society, those most in need of help securing protections for their constitutional rights and civil liberties").

[22] *See* Kloppenberg, *supra* note 10, at 1035–54 (analyzing six justifications for the doctrine).

[23] *See* Morrison, *supra* note 19, at 1209–10 (highlighting the two most common criticisms of the canon).

[24] *Judicial Independence?*, *supra* note 21, at 1033.

[25] *See id.* ("Judicial review that invalidates another [branch's] constitutional work should be a last resort . . . .").

[26] *See id.* at 1033–34 (noting that "[t]he *Ashwander* formulation arose in part as a response to the activism of the . . . Supreme Court of the *Lochner* era" and that the fears associated with this "animate the general avoidance doctrine . . . ").

Brandeis' concerns by enabling "the judiciary to render unpopular decisions cautiously, rather than suddenly or haphazardly, [which] preserves judicial credibility and increases public acceptance of Court decisions."[27]

The final justification for the avoidance canon is the "paramount importance of constitutional adjudication in our system."[28] This concept relies on the perception that the Court's ability to decide constitutional rights may be the Court's biggest responsibility and most important power.[29] Constitutional adjudication is central and crucial to the judiciary because, when a court decides a statutory or procedural issue, the result may have an effect on a large number of individuals or on the operations of an administrative agency.[30]

While many scholars have examined the justifications for the rules, Richard Hasen came up with three theories that draw on these justifications to explain why a Court will decide to invoke constitutional avoidance. The three theories are the "fruitful dialogue," "political legitimacy," and "political calculus" theories.[31] As Hasen notes, it is impossible to know which of these theories is correct, and it is possible that more than one theory may come in to play in any given case.[32] Nevertheless, these explanations are helpful to provide some framework to understand when and why the Court invokes constitutional avoidance.

The fruitful dialogue rationalization "posits that the Court will use constitutional avoidance only when doing so would further a dialogue with Congress that has a realistic chance of actually avoiding constitutional problems through redrafting."[33] This assumes that if the Court avoids deciding the constitutionality of a statute, then it should be a signal for Congress to fix that statute.[34] Hasen's second explanation, the political legitimacy theory, posits that when the Court fears that a constitutional decision would harm its legitimacy, it will use the avoidance canon to maintain that legitimacy.[35] This explanation seems to come in to play most frequently when the issue

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[27] Kloppenberg, *supra* note 10, at 1044.

[28] *Id.* at 1046 (quoting Rescue Army v. Mun. Court, 331 U.S. 549, 571 (1947)) (internal quotation marks omitted).

[29] *See id.* ("The Court sometimes claims that the ability to declare constitutional rights is the most important power the federal judiciary wields.").

[30] *See id.* ("[M]any individual rights depend on administrative and statutory claims.").

[31] *See* Hasen, *supra* note 2, at 183–84 (explaining the three theories).

[32] *Id.* at 184.

[33] *Id.* at 183.

[34] *See id.* ("On this reading, [a statute gets] 'remanded' to Congress because Congress may fix it in ways that do not violate the Constitution . . . .").

[35] *Id.*

at hand is controversial, such as abortion or race relations.[36] The third and final explanation is the political calculus theory, which hypothesizes that the Court will use constitutional avoidance "to soften public and Congressional resistance to the Court's movement of the law in a direction that the Court prefers as a matter of policy."[37] According to this theory, the Court is able to lay the groundwork for a constitutional pronouncement by invoking the avoidance canon and then use its power to decide when is it is appropriate to make the constitutional decision.[38]

2. Criticisms of the Canon

Even though constitutional avoidance is a widely-accepted canon, it is not without its critics. One of the main criticisms of the canon is that modern avoidance frequently conflicts with the intent of Congress.[39] Courts often think about and approach constitutional questions in a very different way than Congress.[40] When a court decides to avoid a constitutional question, it often interprets the statute "in ways that its drafters did not anticipate, and, constitutional questions aside, in ways that its drafters may not have preferred."[41] Lawrence Marshall indicates that the extreme version of this criticism occurs when a court ignores the plain language of the statute and legislative intent to avoid a constitutional issue.[42] Therefore, for those who believe that the federal judiciary should interpret Congress's intent whenever possible, the canon can be extremely problematic because of the leeway courts take with statutory interpretation when invoking it.[43]

The second criticism of the avoidance canon is that it does not prevent the unnecessary creation of constitutional law; instead, it can lead to the over enforcement of the Constitution.[44] Judge Richard Posner, a major critic of the doctrine, contends that avoidance creates

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[36] *See id.* (referring to cases in which the Court used the avoidance canon to avoid controversial issues involving race relations).

[37] *Id.* at 183–84.

[38] *See id.* at 184 (applying the political calculus theory to *NAMUDNO* and *Citizens United*).

[39] *See* Morrison, *supra* note 19, at 1209 (identifying two criticisms of modern avoidance).

[40] *See* Marshall, *supra* note 20, at 489 (noting the difference in values between Congress and the Court).

[41] Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 74.

[42] Marshall, *supra* note 20, at 484.

[43] *See id.* at 486 ("If one believes that the judiciary's role . . . is to implement Congress' constitutionally valid choices . . . then the specter of superconstitutional bending of statutes is quite problematic.").

[44] *See* Morrison, *supra* note 19, at 1210 (continuing the discussion of the two criticisms of modern avoidance).

a "judge-made constitutional 'penumbra' that basically has the same 'prohibitory effect'" as the Constitution.[45] Other critics point out that when a court uses the avoidance canon, it engages in the constitutional issue "enough to supplant its otherwise preferred construction of the statute."[46] Basically, a court that wants to avoid a constitutional question has to (1) consider the argument to decide if it should avoid and (2) ignore the interpretation of the statute that is probably correct, which is almost akin to finding that interpretation of the statute unconstitutional.[47] Therefore, "[t]he fact that another, different version of the statute survives does not change the reality that, in the form that the court would otherwise have applied it in that case, the statute has effectively been held invalid."[48] This can lead to the distortion of legislative intent in more cases than it would if the Court just decided all of the constitutional questions in every case.[49]

It is important to keep in mind that when a court invokes the avoidance canon, it only avoids "some or all of the constitutional questions argued" and does not avoid "all decision on the merits of the case."[50] The Court, however, "has not invoked the avoidance doctrine consistently. It alternatively employs—or ignores—avoidance to achieve particular substantive outcomes."[51] The Roberts Court is not immune from this criticism. The Roberts Court has mentioned the avoidance canon in thirteen cases from January 2006 to June 2009.[52] Additionally, the Court's use of anti-avoidance in *Citizens United*[53] and *Free Enterprise Fund*[54] has brought the canon to the forefront of discussion once again. Regardless of whether one thinks the avoidance canon should have a role in the Court's decision making, the fact is that the Court invokes it frequently and that its use signals a Court that is looking to shape law and policy.[55]

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

[46] Morrison, *supra* note 19, at 1210.

[47] *See* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judiciary Review*, 78 TEX. L. REV. 1549, 1582 (2000) (identifying the two components of avoidance).

[48] *Id.*

[49] *See* Morrison, *supra* note 19, at 1210 ("[C]ourts applying the canon actually over enforce the Constitution.").

[50] Gerald Gunther, *The Subtle Vices of the 'Passive Virtues'—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 16 (1964).

[51] LISA A. KLOPPENBERG, PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF THE LAW 1 (2001).

[52] Hasen, *supra* note 2, at 192.

[53] Citizens United v. FEC, 130 S. Ct. 876, 917–19 (2010) (Roberts, J., concurring); *id.* at 936–38 (Stevens, J., dissenting).

[54] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3184 (2010) (Breyer, J., dissenting).

[55] *See* Hasen, *supra* note 2, at 189 ("[T]here seems to be consensus that the canon's use

II. THE ROBERTS COURT'S APPROACH TO THE AVOIDANCE CANON IN *NAMUDNO*, *CITIZENS UNITED*, AND *FREE ENTERPRISE FUND*

The Roberts Court's decisions in *NAMUDNO*, *Citizens United*, and *Free Enterprise Fund* represent three distinct approaches to the avoidance canon and illustrate three different views on the role it should play in the Court's jurisprudence. In *NAMUDNO*, the Court enthusiastically invoked the canon and avoided deciding the constitutionality of the controversial section 5 of the Voting Rights Act ("VRA").[56] However, even though the Court claimed that avoiding unnecessary constitutional decisions was its "usual practice"[57] in *NAMUDNO*, the majority declined to invoke the canon in *Citizens United*.[58] Instead, despite the dissent's insistence to the contrary,[59] the majority held that the case could not be decided on narrow statutory grounds and proceeded to strike down the statute and to overrule two of its previous decisions.[60] Similarly, the Court did not employ the avoidance canon in *Free Enterprise Fund*, but took yet another approach to constitutional avoidance. Even though the only reference to the canon was in Justice Breyer's dissent,[61] the structure of the Court's opinion and its interpretation of the statute suggest that it ignored the canon and struck down the statute at issue to avoid overruling *Humphrey's Executor v. United States*[62] and *Morrison v. Olson*.[63]

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signals a Court that is actively engaged in shaping law and policy, not acting modestly.").

[56] *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2508 (2009) (noting that the Court's "usual practice is to avoid the unnecessary resolution of constitutional questions" and thus the Court "[did] not reach the constitutionality of [section] 5").

[57] *Id.*

[58] *See Citizens United*, 130 S. Ct. at 892 ("Though it is true that the Court should construe statutes as necessary to avoid constitutional questions, the series of steps suggested would be difficult to take in view of the language of the statute.").

[59] *See id.* at 936–37 (Stevens, J., dissenting) ("It is all the more distressing that our colleagues have manufactured a facial challenge, because the parties have advanced numerous ways to resolve the case that would facilitate electioneering by nonprofit advocacy corporations such as Citizens United, without toppling statutes and precedents.").

[60] *Id.* at 913 (majority opinion).

[61] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3184 (2010) (Breyer, J., dissenting) ("The Court then, by assumption, reads *into* the statute books a 'for cause removal' phrase that does not appear in the relevant statute and which Congress probably did not intend to write. And it does so in order to strike down, not to uphold, another statute. This is not a statutory construction that seeks to avoid a constitutional question, but its opposite.").

[62] 295 U.S. 602, 631 (1935) (holding that "[w]hether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office . . .").

[63] 487 U.S. 654, 670–77 (1988) (upholding the Independent Counsel Act as constitutional).

A. Northwest Austin Municipal Utility District Number One v. Holder

1. History of the Voting Rights Act

Section 5 of the VRA,[64] the statute at issue in *NAMUDNO*, is considered one of the most effective pieces of civil rights legislation.[65] Section 5 was enacted under the Fifteenth Amendment, which guarantees that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[66] Expounding on this idea, the VRA seeks to ensure that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United State to vote on account of race or color . . . ."[67]

Section 5 of the VRA requires "covered jurisdictions" to get preclearance from the Attorney General or a declaratory judgment from a three-judge district court in Washington, D.C., before they can change any aspect of their voting practices, procedures, or qualifications.[68] The covered jurisdictions under the VRA are the parts of the country that have a history of voter discrimination,[69] since the overall purpose of section 5 is "to prevent state and local governments with a history of discrimination against racial minorities from changing their voting rules without first proving that such changes would have neither a discriminatory purpose nor effect."[70] To obtain preclearance, the covered jurisdiction must show that the

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[64] 42 U.S.C. § 1973 (2006).

[65] *See* Barbara Arnwine, *Voting Rights at a Crossroads: Return to the Past or an Opportunity for the Future?*, 29 SEATTLE U. L. REV. 301, 308 (2005) (quotations and citations omitted) ("Indeed, during the reauthorization hearings of 1982, Congress hailed the Voting Rights Act as one of the most important civil rights bills passed by Congress and recognized it as the most effective tool to protect the right to vote.").

[66] U.S. CONST. amend. XV, § 1.

[67] 42 U.S.C. § 1973(a) (2006).

[68] *See id.* § 1973c (2006) (providing that jurisdictions who wish to enact a "voting qualification or prerequisite to voting" may seek a declaratory judgment "that such qualification . . . neither has the purpose nor will have the effect of denying or abridging the right to vote . . .").

[69] *See id.* § 1973b(b):

> The [VRA's prohibition on voting tests or devices] shall apply to any State or in any political subdivision of a State which . . . maintained on November 1, 1964, any test or device, and with respect to which . . . the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

[70] Hasen, *supra* note 2, at 196.

purpose of the change is nondiscriminatory and that it will not "diminish[] the ability of any citizens . . . to elect their preferred candidates . . . " on account of their race.[71] Although section 5 is broad, there is a seldom-used "bailout" provision found in section 4(a) for states and "political subdivisions" seeking exemption from the preclearance requirement.[72] Section 14(c)(2) of the VRA defines a political subdivision as a parish, county, or "any subdivision of a State which conducts registration for voting."[73] The question of whether section 14(c)(2)'s limited definition of a political subdivision applied to section 4(a)'s bailout provision was the crux of the Court's decision in *NAMUDNO*.[74]

Sections 4 and 5 of the VRA were supposed to be temporary provisions and were expected to be in effect for only five years when Congress passed the VRA.[75] Congress reauthorized the VRA, however, for five years in 1970, for seven years in 1975, and for twenty-five years in 1982. In 2006, Congress passed the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, which extended section 5's coverage for another twenty-five years.[76] Although the VRA has been the topic of a lot of litigation, politically it has not been in jeopardy.[77] The 2006 extension of the VRA passed the House of Representatives by a vote of 390-33 with nine abstentions and passed the Senate by a vote of 98-0 with two abstentions.[78] Given the politically-sensitive nature of the VRA and Congress's lack of an incentive to take a close look at the intricacies of the legislation, it "did not change the coverage formula that determines which jurisdictions must engage in preclearance," nor did it "consider ways

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[71] 42 U.S.C. § 1973c(b) (2006); *see also* Hasen, *supra* note 2, at 195–96 (footnote omitted) ("Section 5 of the VRA requires that 'covered jurisdictions' obtain preclearance . . . before making any changes in voting practices . . . . For each one, the covered jurisdiction must demonstrate that the change . . . will not make the affected minority groups worse off.").

[72] *Id.* § 1973b(a)(1) (2006) (describing the process required to receive a bailout).

[73] *Id.* § 1973*l*(c)(2).

[74] Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2513–16 (2009) (discussing the definition of "political subdivision" under section14(c)(2) and holding that it does not apply to the term "political subdivision" in section 4(a)).

[75] *Id.* at 2510 ("As enacted, [sections] 4 and 5 of the Voting Rights Act were temporary provisions. They were expected to be in effect for only five years.").

[76] *Id.* ("Most recently, in 2006, Congress extended [section] 5 for yet another 25 years.").

[77] *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 182 (1980) (affirming the District Court's rejection of city's challenge to the 1982 renewal of the preclearance provision of the VRA); South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966) (contesting whether Congress had "exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States").

[78] Govtrack.us, http://www.govtrack.us/congress/bill.xpd?bill=h109-9 (last visited Nov. 7, 2011).

to make it easier for jurisdictions" to get bailout coverage when it passed the 2006 extension.[79]

2. Background of NAMUDNO *and the Decisions in the Lower Courts*

Shortly after the 2006 reauthorization of the VRA, Northwest Austin Municipal Utility District Number One ("District") brought a suit in the United States District Court for the District of Columbia.[80] The District was created to deliver city services to residents in Travis County, Texas, and had a board of five members who are elected to staggered terms of four years.[81] The District did not register voters; its elections were run by Travis County for administrative reasons.[82] Nevertheless, the District was subject to the preclearance requirement of section 5 since it is located in Texas, even though there is no evidence that it had ever discriminated on the basis of race.[83] In its lawsuit, the District sought to challenge the constitutionality of the preclearance provision of section 5 or, in the alternative, to seek bailout coverage as a "political subdivision" covered by section 4(a) of the VRA.[84] In a unanimous opinion written by Judge David Tatel,[85] the three-judge district court panel rejected both of the District's arguments and granted the Attorney General's motion for summary judgment.[86]

The District conceded that it was not a "political subdivision" as defined in section 14(c)(2)[87] since it did not register its own voters, but it argued that it qualified as a "political subdivision" in the ordinary meaning of that term since it is an "undisputed subunit of Texas."[88] To substantiate its argument, the District relied on *United States v. Board of Commissioners of Sheffield, Alabama*,[89] in which the Supreme Court held that "once a state has been designated for coverage, section 5's preclearance requirement applies to all political units within it regardless of whether the units qualify as section

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[79] Hasen, *supra* note 2, at 197.

[80] Nw. Austin Mun. Util. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221, 223 (D.D.C. 2008), *rev'd and remanded by* 129 S. Ct. 2504 (2009).

[81] Nw. Austin Mun. Utility Dist. No. One v. Holder, 129 S. Ct. 2504, 2510 (2009).

[82] *Id.*

[83] *Id.*

[84] *NAMUDNO*, 573 F. Supp. 2d at 223.

[85] *Id.*

[86] *Id.* at 283.

[87] Section 14(c)(2) defines "political subdivisions" to mean "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, then term shall include any other subdivision of a State which conducts registration for voting." 42 U.S.C. § 1973*l*(c)(2) (2006).

[88] *NAMUDNO*, 573 F. Supp. 2d at 231.

[89] 435 U.S. 110 (1978).

14(c)(2) political subdivisions."[90] The District contended that, when Congress passed the 1982 amendments to the VRA to expand bailout eligibility to political subdivisions within formally covered jurisdictions under section 4(a), Congress had the *Sheffield* interpretation in mind.[91] Ultimately, the court rejected this argument for a number of reasons, including that the District's definition would make the amended statute surplusage,[92] and that *Sheffield* related to section 5 preclearance rather than section 4(a) bailout.[93]

To resolve the question regarding the constitutionality of section 5, the court had to determine whether to review the statute under the rationality test of *South Carolina v. Katzenbach*[94] or whether it should apply the *City of Boerne v. Flores* congruence and proportionality test, which is a much stricter standard.[95] Under the *Katzenbach*'s rationality test, because Congress has "full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting,"[96] as long as Congress employs rational means to reach this goal, its actions are constitutional.[97] In contrast, under the *City of Boerne* test, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[98] Ultimately, the district court concluded that the extension of the VRA was constitutional under both standards,[99] even

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[90] *Id.* at 122; *see also NAMUDNO*, 573 F. Supp. 2d at 232 (citing *Sheffield*, 435 U.S. at 122).

[91] *NAMUDNO*, 573 F. Supp. 2d at 232.

[92] *Id.* ("Under the District's interpretation, this language would be surplusage.").

[93] *Id.* at 234 ("As we explained above, *Sheffield* relates to section 5 preclearance, not section 4(a) bailout.").

[94] 383 U.S. 301, 324 (1966) (holding that "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting").

[95] *See* City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (holding that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end").

[96] *Katzenbach*, 383 U.S. at 326.

[97] *Id.* at 324 ("As against the reserved power of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."). The rational basis test used in *Katzenbach* derives from the test set forth in *McCullough v. Maryland*, which states: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819); *see Katzenbach*, 383 U.S. at 326 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421).

[98] *City of Boerne*, 521 U.S. at 520.

[99] Nw. Austin Mun. Util. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221, 279 (D.D.C. 2008), *rev'd and remanded by* 129 S. Ct. 2504 (2009) ("[G]iven Congress's broad authority to fashion remedial measures to combat racial discrimination in voting, we decline to second-guess its decision to renew coverage and bailout provisions upheld in *Katzenbach* and *City of Rome* and discussed with approval in the *City of Boerne* cases.").

if the court thought that the *Katzenbach* test was the more appropriate test for this case.[100]

In the wake of the district court's opinion, "voting rights experts believed that the statutory bailout argument had no chance when [the district court's decision] was appealed to the Supreme Court. Instead, it seemed unavoidable that the Court would address the constitutionality of the extension of section 5."[101]

3. NAMUDNO *and a Lack of Logic: The Avoidance Canon in* NAMUDNO

During oral argument, while the liberal members of the Court focused on the District's bailout argument, the conservative members of the Court focused on the constitutionality of section 5.[102] Justice Kennedy's questions about the scope of section 5's coverage were particularly extensive. He asked seventeen questions at oral argument, most of which questioned Congress's approach in renewing the VRA.[103] At one point, Justice Kennedy said, "[There] is a great disparity in treatment, and the government of the United States is saying that our states must be treated differently," and emphasized that "[the government has] a very substantial burden if [it is] going to make that case."[104] Given the tone of the oral arguments, most Court spectators thought that the Court, in a split decision, was going to strike down section 5.[105] Many were surprised, therefore, when the Court invoked the avoidance canon as an alternative to deciding the

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[100] *See id.* at 241–46 (discussing why the *Katzenbach* test is more appropriate for the case than the *City of Boerne* test).

[101] Hasen, *supra* note 2, at 201–02.

[102] *Id.* at 202 (footnote omitted) ("At oral argument, Justice Souter pushed the bailout argument, but the conservative members of the Court, led by the Chief Justice, focused instead on the constitutional questions and severely criticized section 5.").

[103] Adam Liptak, *Skepticism at Court on Validity of Vote Law*, N.Y. TIMES, Apr. 29, 2009, at A16 ("Justice Anthony M. Kennedy, whose vote is likely to be crucial, was a vigorous participant in the argument, asking 17 questions that were almost consistently hostile to the approach Congress had taken to renewing the act in 2006.").

[104] Transcript of Oral Argument at 34–35, Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504 (2009) (No. 08–322), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-322.pdf.

[105] *See* Liptak, *supra* note 103 (noting that section 5 "[was] at substantial risk of being struck down as unconstitutional"); Dahlia Lithwick, *Spoonfuls of Sugar: Americans' Continued Love Affair with the John Roberts Court*, SLATE (Sept. 26, 2009), http://www.slate.com/articles/news_and_politics/jurisprudence/2009/09/spoonfuls_of_sugar.html (noting that most people "widely expected" a decision striking down section 5 of the VRA).

constitutionality of section 5.[106] Justice Thomas was the lone dissenter.[107]

Chief Justice Roberts, who wrote the Court's opinion, opened the discussion by stating that the Court's "usual practice is to avoid the unnecessary resolution of constitutional questions"[108] and that "[i]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case."[109] Even though the Court made it clear that it was invoking the avoidance canon, it still proceeded to raise doubts about the constitutionality of section 5.

Chief Justice Roberts laid out his concerns about section 5 of the VRA in a very straightforward manner. While he noted the historic context of the VRA and its accomplishments,[110] he quickly voiced his doubt, noting that the conditions under which the statute passed "have unquestionably improved" and that "[t]hings have changed in the South."[111] He also raised federalism concerns about the statute and reminded the parties that section 5, "which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial 'federalism costs,'"[112] and that "[t]hese federalism costs have caused Members of [the] Court to express serious misgivings about the constitutionality of [section] 5."[113] In fact, in his dissent, Justice Thomas cited some of these same concerns as reasons why section 5 is unconstitutional.[114] Even though Chief Justice Roberts stated his concerns about section 5, he invoked the avoidance doctrine and decided the case on narrower statutory grounds.

In deciding *NAMUDNO*, the Court did not address the district court's constitutional analysis of section 5. The Court, however,

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[106] Hasen, *supra* note 2, at 203 ("In a surprising and relatively short opinion, however, the Court on an 8–1 vote decided *NAMUDNO* on statutory grounds, ruling that the utility district was entitled to bail out.").

[107] Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2517 (2009) (Thomas, J., dissenting).

[108] *Id.* at 2508 (majority opinion).

[109] *Id.* at 2513 (quoting Escambia County v. McMillan, 466 U.S. 48, 51 (1984) (per curiam)).

[110] *Id.* at 2511 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 313 (1966)) ("The historic accomplishments of the Voting Rights Act are undeniable. When it was first passed, unconstitutional discrimination was rampant and the 'registration of voting-age whites ran roughly 50 percentage points or more ahead' of black registration in many covered States.").

[111] *Id.*

[112] *Id.* (quoting Lopez v. Monterey County, 525 U.S. 266, 282 (1999)).

[113] *Id.* (citations omitted).

[114] *See id.* at 2525 (Thomas, J., dissenting) ("The lack of sufficient evidence that the covered jurisdictions currently engage in the type of discrimination that underlay the enactment of [section] 5 undermines any basis for retaining it.").

reversed the district court's decision that the District did not qualify for bailout because section 14(c)(2)'s definition of "political subdivision" applied to section 4(a) and the District did not qualify under this narrow definition. Instead, the Court held that "the [VRA] permits all political subdivisions, including the district in this case, to seek relief from its preclearance requirements."[115] However, even though the Court went through "a superficial textual analysis of the bailout question," it did not discuss the statutory analysis of the district court.[116] Rather, the Court opened its discussion of the bailout provision by conceding that "[t]here is no dispute that the district is a political subdivision of the State of Texas in the ordinary sense of the term"[117] and adding that, in this case, "specific precedent, the structure of the [VRA], and the underlying constitutional concerns compel a broader reading of the bailout provision."[118]

Ultimately, the Court relied on *Sheffield*[119] and *Dougherty County Board of Education v. White*[120] to support its decision that section 14(c)(2)'s definition of "political subdivision" did not cover the meaning of the "political subdivision" in section 4(a). In *Sheffield*, the Court noted that the definition of "political subdivision" under section 14(c)(2) "was intended to operate only for purposes of determining which political unit in nondesignated States [could] be separately designated for coverage under [section] 4(b)."[121] Additionally, in *White*, where a school board tried to argue that it did not fall within the purview of section 5 because it did not meet the definition of a "political subdivision" in section 14(c)(2), the Court noted that "once a State has been designated for coverage, [section] 14(c)(2)'s definition of political subdivision has no 'operative significance in determining the reach of [section] 5.'"[122] Ultimately, these two cases supported the Court's conclusion that section 14(c)(2)'s definition of "political subdivision" did not affect the District's ability to seek a bailout under section 4(a).[123]

To further advance its position, the Court referred to Congress's 1982 amendments to the VRA, which "expressly provide[d] that

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[115] *Id.* at 2516–17 (majority opinion).

[116] Hasen, *supra* note 2, at 204.

[117] *NAMUDNO*, 129 S. Ct. at 2513.

[118] *Id.* at 2514.

[119] 435 U.S. 110 (1978). See *supra* Part II.A.2 for a discussion about the dicta in *Sheffield*.

[120] 439 U.S. 32, 46 (1978) (holding that a county school board is a political subdivision within the purview of the Voting Rights Act when it "clearly has the power to affect candidate participation in . . . elections," because to hold otherwise in such a situation "would serve no purpose consonant with the objectives of the federal statutory scheme").

[121] *Sheffield*, 435 U.S. at 128–29.

[122] *White*, 439 U.S. at 44 (quoting *Sheffield*, 435 U.S. at 126).

[123] *NAMUDNO*, 129 S. Ct. at 2516–17.

bailout was also available to 'political subdivisions' in a covered State . . . ."[124] This meant that "Congress decided that a jurisdiction covered because it was within a covered State need not remain covered as long as the State did."[125] This interpretation of the 1982 amendments opened the door for the Court to hold that all political subdivisions subject to section 5's preclearance requirements, and not just those covered by the definition of "political subdivision" in section 14(c)(2), were eligible to file a bailout suit under section 4(a).[126]

4. The Effect of Implausible Statutory Interpretations on the Avoidance Canon

The statutory analysis in *NAMUDNO* has struck many as counterintuitive and illogical. Indeed, Hasen described the Court's construction of the statute as "an implausible reading . . . that appeared contrary to textual analysis, congressional intent, and administrative interpretation."[127] Another commentator noted that the real story from *NAMUDNO* is "how [the Court] strained the text of the statute and the intent of Congress in order to reach its desired conclusion."[128] These criticisms of the Court's opinion in *NAMUDNO* bring to light the problems with the Court's logic and illustrate the negative impact this decision had on the Court and on the canon.

It is possible that, given the politically charged nature of the VRA, the Court was not ready to, or did not have the votes to, strike down section 5. By avoiding the issue, however, it still was able to engage in a discussion with Congress and the public in general about the problems it perceived with the VRA.[129] This is not the problem with the Court's opinion. The problem is that the statutory argument in *NAMUDNO* was so poorly reasoned that it seemed as though Court was trying to figure out a way in which the District could get a bailout without deciding the constitutionality of section 5 and without having to face the political uproar that would inevitably ensue if it struck down the statute. While the canon can help the Court to avoid "a fullblown constitutional pronouncement that would harm its legitimacy" and to "soften public and Congressional resistance to the

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[124] *Id.* at 2515.

[125] *Id.*

[126] *Id.* at 2516.

[127] Hasen, *supra* note 2, at 182–83.

[128] Luis Fuentes-Rohwer, *Understanding the Paradoxical Case of the Voting Rights Act*, 36 FLA. ST. U. L. REV. 697, 746 (2009).

[129] *See* Murchison, *supra* note 21, at 113 (noting that the avoidance canon can facilitate "judicial conversation" about problems the judges encounter in their decisions).

Court's movement of the law in a direction that the Court prefers as a matter of policy," the canon does not, and should not, give the Court latitude to adopt an unreasonable or implausible statutory interpretation.[130]

When the Court adopts an implausible statutory interpretation, as it did *NAMUDNO*, it may create future problems, as it invites further litigation and significantly complicates the Court's jurisprudence on the issue. Unsound reasoning and flawed logic can also hurt the Court's legitimacy as it is much less persuasive and it raises questions about the lengths the Court is willing to go to create a consensus or to reach its desired outcome. If the Court does wish to use avoidance, it should not sacrifice good judgment and well-reasoned decisions.

The Court's flawed reasoning in *NAMUDNO* also hurts the avoidance canon because it stretches the canon beyond its scope as "a tool for choosing between competing plausible interpretations of a statutory text."[131] Accepting the common criticism that the Court's statutory interpretation was not plausible,[132] the Court appears to have stretched the boundaries of the doctrine. If there is no plausible statutory interpretation, rather than manufacturing an implausible interpretation, the Court should decide the constitutional question at issue. The Court should not lean on the avoidance canon to give its opinion a façade of reasonableness and legitimacy when it is actually violating one of the important principles of the canon.

B. Citizens United v. Federal Election Commission

1. Background on the Bipartisan Campaign Reform Act of 2002 and the Court's Decisions Leading up to Citizens United

Congress has been concerned about regulating who may fund political campaign ads for a long time. In 1974, Congress passed amendments to the Federal Election Campaign Act ("FECA"), which barred corporations and unions from spending money on certain election activities, but still allowed them to set up political committees to finance campaigns.[133] During the 1990s, however, people began to question the effectiveness of FECA because of a corporation's ability to evade the statute by producing advertisements that seemed to influence federal elections, but that avoided words that

[130] Hasen, *supra* note 2, at 183–84.

[131] Clark v. Martinez, 543 U.S. 371, 381 (2005).

[132] *See supra* notes 129–30 and accompanying text.

[133] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93–443, 88 Stat. 1263 (1974).

would constitute "express advocacy."[134] Due in part to these abuses, section 203 of the Bipartisan Campaign Reform Act of 2002 ("BCRA") created a category of "electioneering communications" and provided that any corporation that spent money to create these communications had to disclose who funded the projects.[135] The BCRA defined an electioneering communication as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is aired within thirty days of a primary election or sixty days of a general election.[136]

Multiple plaintiffs have challenged the constitutionality of FECA, the BCRA, and other similar state statutes. Prior to *Citizens United*, *Austin v. Michigan Chamber of Commerce*[137] was the leading case about the constitutionality of a statute that limited a corporation's ability to spend money in an election. The statute at issue in *Austin* was a Michigan statute that "prohibit[ed] corporations from making contributions and independent expenditures in connection with state candidate elections."[138] In a 6-3 decision,[139] the Court held that the statute's limits on corporate spending on "express advocacy" did not violate the First Amendment because the statute was supported by the compelling government interest of preventing political corruption and the statute was narrowly tailored to that purpose.[140]

While *Austin* dealt with a state statute, it affected the Court's subsequent decisions involving federal restraints on corporate spending in political campaigns. In *McConnell v. Federal Election Commission*,[141] the plaintiffs challenged section 203 of the BCRA. In its decision, the Court relied on *Austin* to uphold the constitutionality of restrictions on corporate spending in federal elections. The Court reiterated that it has "repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas'"[142] and that Congress could limit the advertisements at issue since they were "the functional equivalent of express

[134] Hasen, *supra* note 2, at 207.

[135] Bipartisan Campaign Reform Act of 2002, Pub L. No. 107–155, 116 Stat. 81, 91 (2002).

[136] 2 U.S.C. § 434(f)(3)(A) (2006).

[137] 494 U.S. 652 (1990).

[138] *Id.* at 655.

[139] Justice Marshall delivered the opinion of the Court in which Chief Justice Rehnquist and Justices Brennan, White, Blackmun, and Stevens joined. Justices Scalia, Kennedy and O'Connor dissented. *Id.* at 654.

[140] *Id.* at 659–61.

[141] 540 U.S. 93, 102 (2003).

[142] *Id.* at 205 (quoting *Austin*, 494 U.S. at 660).

advocacy."[143] While the Court took consistent approaches in *McConnell* and *Austin*, its decision in *Wisconsin Right to Life v. Federal Election Commission*[144] signaled that trouble loomed ahead for limitations on corporate independent expenditures for electioneering communications.

In *Wisconsin Right to Life*, the Court faced yet another challenge to section 203 of the BCRA. The case involved a corporate-funded broadcast advertisement that mentioned Senators Feingold and Kohl's positions on judicial filibusters, which was to be aired shortly before the primary elections.[145] In a 5-4 decision, the Court noted that the First Amendment required it "to err on the side of protecting political speech rather than suppressing it" and held that section 203 was unconstitutional as applied to the ads in the case since the advertisements at issue were not the "functional equivalent" of express campaign speech.[146] This decision marked a shift in the Court's approach to the BCRA, and shortly after the decision *Citizens United* provided the Court with another opportunity to consider the constitutionality of the BCRA.

2. The Origin of Citizens United *and its Path to the Supreme Court*

In 2008, Citizens United, "a nonprofit ideological corporation (but one that took some for-profit corporate funding)," produced a documentary called *Hillary: The Movie*.[147] The documentary mentioned then-Senator Hillary Clinton by name and included interviews with people who were critical of her.[148] While the documentary did come out in theaters, the trouble started when Citizens United wanted to broadcast the documentary on cable television through a video-on-demand service within thirty days of the 2008 primary elections.[149] Citizens United, however, "feared . . . that both the film and the ads would be covered by [section 203's] ban on corporate-funded independent expenditures, thus subjecting the corporation to civil and criminal penalties."[150] Accordingly, Citizens United sought declaratory and injunctive relief against the Federal Election Commission ("FEC"), arguing that certain

[143] *Id.* at 206.
[144] 551 U.S. 449 (2007)
[145] *Id.* at 458–59.
[146] *Id.* at 457.
[147] Hasen, *supra* note 2, at 210.
[148] Citizens United v. FEC, 130 S. Ct. 876, 887 (2010).
[149] *Id.* at 888.
[150] *Id.*

provisions of the BCRA were unconstitutional, including section 203, as applied to its documentary.[151]

The three-judge court in the United States District Court for the District of Columbia denied Citizens United's motion for a preliminary injunction and granted the FEC's motion for summary judgment.[152] The court held that section 203 was both facially constitutional under *McConnell* and constitutional as applied to *Hillary*.[153] In reaching this conclusion, the court emphasized that the content of *Hillary* was "susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her."[154]

3. Re-Argument and the Majority's Reasoning: The Overruling of Austin v. Michigan State Chamber of Commerce *and* McConnell v. Federal Election Commission

Citizens United appealed the district court's decisions and, in March 2009, argued its case before the Supreme Court. However, the Court announced it would rehear the case in September 2009 and asked for supplemental briefing on the facial validity of section 203 and on whether the Court should overrule either *Austin*, *McConnell*, or both.[155] Just over four months later, "a bitterly divided"[156] Court announced, in a sweeping 5-4 decision, that section 203's restrictions on corporate independent expenditures were unconstitutional and overruled *Austin* and *McConnell*.[157]

Before Justice Kennedy, who wrote for the majority, reached the question of the constitutionality of section 203 and the validity of *Austin* and *McConnell*, he took time to explain why the Court could not decide the case on narrower statutory grounds. The Court rejected Citizens United's argument that *Hillary* did not fall under the definition of an electioneering communication since the documentary would most likely be seen only by one household and not more than

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[151] *Id.*

[152] Citizens United v. FEC, 530 F. Supp. 2d 274, 275 (D.D.C. 2008), *rev'd and remanded by* 130 S. Ct. 876 (2010).

[153] *Id.* at 280.

[154] *Id.* at 279.

[155] Hasen, *supra* note 2, at 212.

[156] Adam Liptak, *Justices, 5–4, Reject Corporate Spending Limit*, N.Y. TIMES, Jan. 22, 2010, at A1. Citizens United also challenged the BCRA's disclaimer and disclosure requirements as applied to *Hillary* and to the ads for the movie. The Court held that the BCRA's disclaimer and disclosure requirements still applied to ads and the documentary as "there [had] been no showing that, as applied in this case, [those] requirements would impose a chill on speech of expression." Citizens United v. FEC, 130 S. Ct. 876, 916 (2010).

[157] *Citizens United*, 130 S. Ct. at 913.

50,000 people as the statute required.[158] To the contrary, the Court found that the number of viewers the statute requires is determined by the number of cable subscribers in the pertinent area, which in this case well exceeded the 50,000-person requirement.[159] The Court also rejected Citizens United's argument that section 203 did not apply to *Hillary* under *Wisconsin Right to Life*, because "there [was] no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator Clinton" and, therefore, the documentary qualified "as the functional equivalent of express advocacy."[160] Citizens United argued, thirdly, that the statute should not apply to movies broadcast through video-on-demand since "this delivery system has a lower risk of distorting the political process than do television ads."[161] This argument did not persuade the Court as it noted that "any effort by the Judiciary to decide which means of communications are to be preferred . . . would raise questions as to the court's own lawful authority."[162] Finally, the Court refused to carve out an exception for nonprofit corporate political speech funded "overwhelmingly by individuals" since it would require an in-depth, "case-by-case determination[] to verify whether political speech is banned."[163]

After rejecting Citizens United's statutory arguments, the Court explained that it could not "resolve this case on a narrower ground without chilling political speech . . . that is central to the meaning and purpose of the First Amendment."[164] Accordingly, the Court felt that it had to reconsider the Court's decisions in *Austin* and *McConnell* and the constitutionality of section 203's expenditure ban.[165] The Court premised this bold decision to revisit precedent and decide the constitutionality of the statute at issue by emphasizing that "[i]t is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications."[166] And, with that, the same Court that seemed so reluctant to address the constitutionality of section 5 of the VRA in *NAMUDNO* and that enthusiastically endorsed the avoidance canon, proceeded to ignore the avoidance canon and to rewrite the Court's approach to corporate campaign spending.

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[158] *Id.* at 888–89.
[159] *Id.* at 889.
[160] *Id.* at 890.
[161] *Id.*
[162] *Id.*
[163] *Id.* at 891–92.
[164] *Id.* at 892.
[165] *Id.* at 893–94.
[166] *Id.* at 892.

The Court first considered the validity of *Austin* and noted two conflicting lines of precedent. One of these lines, which includes cases such as *Buckley v. Valeo*[167] and *First National Bank v. Bellotti*,[168] "forbid[s] restrictions on political speech based on the speaker's corporate identity"; in contrast, the *Austin* line of cases permits these types of restrictions.[169] Ultimately, the Court decided that the *Buckley* and *Bellotti* line of cases adopted the correct approach to the First Amendment and overruled *Austin*, noting that "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."[170] The Court did not stop after overruling *Austin*; it proceeded to overrule the section of *McConnell* that upheld section 203 because the *McConnell* Court relied on *Austin* "to uphold a greater restriction on speech than the restriction upheld in *Austin*."[171]

4. Dueling Opinions: Justice Roberts's Concurrence and Justice Stevens's Dissent

All opinions have weaknesses, including the Court's opinion in *Citizens United*, but Justice Stevens's dissent and Chief Justice Roberts's concurrence exacerbated the opinion's flaws. While Justice Stevens disagreed with the majority's approach on a number of grounds, one of his major contentions was the Court's disregard for the avoidance canon. He outlined various approaches the Court could have taken, such as deciding the case on narrow statutory grounds and holding that a documentary shown through video-on-demand did not qualify as an "electioneering communication" under the BCRA.[172] In Justice Stevens's mind, by bypassing these narrower grounds, the Court transgressed a '"cardinal' principle of the judicial process: '[I]f it is not necessary to decide more, it is necessary not to decide

[167] 424 U.S. 1, 58 (1976) (striking down the expenditure ban in the Federal Election Campaign Act of 1971, which applied to corporations and unions).

[168] 435 U.S. 765, 784 (1978) (holding that there is "no support in the First Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation").

[169] *Citizens United*, 130 S. Ct. at 903 (noting that, whereas the "pre-*Austin* line [of cases] forb[ade] restrictions on political speech based on the speaker's identity," the "post-*Austin* line permit[ed] them").

[170] *Id.* at 913.

[171] *Id.*

[172] *Id.* at 937 (Stevens, J., dissenting); *see also id.* at 937–38 (describing three narrower approaches the majority could have adopted in *Citizens United* and noting that the "brief tour of alternative grounds . . . is meant to show that there were principled, narrower paths that a Court that was serious about judicial restraint could have taken").

more."[173] He also emphasized "[t]he elementary rule . . . that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."[174] Although he did not use *Ashwander*'s standard citation to the avoidance canon or invoke the canon by name, his dissent strongly alluded to the canon and implied that the majority's sole reason for not employing the canon was that "five Justices were unhappy with the limited nature of the case before [the Court], so they changed the case to give themselves an opportunity to change the law."[175]

Many commentators believe that the critical tone Justice Stevens's dissent prompted Chief Justice Roberts to write a concurring opinion.[176] Chief Justice Roberts's concurrence vigorously defended the majority's opinion and attempted to combat Justice Stevens's accusations of judicial activism.[177] He reaffirmed the Court's commitment to the avoidance canon[178] and emphasized its willingness to invoke the canon when appropriate by citing its decision in *NAMUDNO*.[179] Chief Justice Roberts noted, however, that the Court's approach in *Citizens United* was consistent with the avoidance canon as it addressed the statutory arguments first and did not move on to the constitutional arguments until it addressed, and rejected, Citizens United's statutory claim that section 203 did not apply to *Hillary*.[180] Although the Court decided the constitutionality of the statute, it did so because the Court should not let the "practice of avoiding unnecessary (and unnecessarily broad) constitutional holdings . . . trump[] [its] obligation faithfully to interpret the law" and because it

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[173] *Id.* at 937 (quoting PDK Labs., Inc. v. United States, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in judgment)).

[174] *Id.* (quoting Hooper v. California, 155 U.S. 648, 657 (1895)) (internal quotation marks omitted).

[175] *Id.* at 932.

[176] *See* Adam Liptak, *Justices Turn Minor Movie Case Into a Blockbuster*, N.Y. TIMES, Jan. 23, 2010, at A13 (noting that "[t]he chief justice's decision to respond separately indicated that 'he felt the sting of Stevens's dissent'"); Richard Hasen, *Chief Justice Roberts' Concurring Opinion in* Citizens United*: Two Mysteries*, ELECTION LAW BLOG (Jan. 23, 2010), http://electionlawblog.org/archives/015118.html (suggesting that Chief Justice Roberts "felt compelled to write once he saw the Justice Stevens dissent").

[177] *See Citizens United*, 130 S. Ct. at 917 (Roberts, J., concurring) ("I write separately to address the important principles of judicial restraint and *stare decisis* implicated in this case.").

[178] *See id.* at 918 (citations omitted) ("Because the stakes are so high, our standard practice is to refrain from addressing constitutional questions except when necessary to rule on particular claims before us. This policy underlies . . . our willingness to construe ambiguous statutes to avoid constitutional problems . . . .").

[179] *See id.* ("If there were a valid basis for deciding the statutory claim in Citizens United's favor (and thereby avoiding constitutional adjudication), it would be proper to do so. In deed that is precisely the approach the Court took just last Term in [*NAMUDNO*].").

[180] *See id.* ("It is only because the majority rejects Citizens United's statutory claim that it proceeds to consider the group's various constitutional arguments . . . .").

"cannot embrace a narrow ground of decision simply because it is narrow; it must also be right."[181]

5. *The Court's Flawed Approach to the Avoidance Canon in* Citizens United

There are two major flaws with the Court's opinion and approach to the avoidance canon in *Citizens United*. First, if the majority did not adhere to the avoidance canon to promote a political agenda as Justice Stevens suggested, then the Court's failure to adhere to the canon undermines its usefulness as a substantive canon. The Court seemed to go out of its way to order re-argument and to dismiss Citizens United's statutory arguments so that it could decide the constitutionality of section 203 and overrule *Austin* and *McConnell*.[182] In the process of accomplishing this desired result, the Court deliberately ignored the avoidance canon and crafted ways to dismiss valid statutory arguments. The Court's approach in *Citizens United* undermined the essence of the avoidance canon since it failed to adopt plausible statutory arguments. This type of manipulation and inconsistent use of avoidance damages the utility and value of the canon because it transforms the canon from a valid and important presumption into a random citation void of any meaningful principle.

The second flaw with the Court's approach is that, even if one thinks that the majority's decision was correct, and that the avoidance canon was not applicable, the concurring and dissenting opinions in *Citizens United* still negatively affected the value of the avoidance canon and hurt the public's perception of the Court. While dissenting justices typically point out different arguments and address some of their problems with the majority's opinion, the tone of Justice Stevens's dissent in *Citizens United* was exceedingly harsh and critical and questioned not only the majority's reasoning, but its motives and judicial philosophy as well. Chief Justice Roberts's concurring opinion likely did nothing to improve the public's perception of the Court, either, as his defensive concurrence further highlighted the ideological divide between majority and dissenting justices. While debate is healthy, excessive personal attacks against other justices and the majority's reasoning may create a public perception that the Court is a fractured institution and may cause the

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[181] *Id.* at 919.

[182] *See id.* at 938 (Stevens, J., dissenting) ("The only thing preventing the majority from affirming the District Court, or adopting a narrower ground that would retain *Austin*, is its disdain for *Austin*."); *id.* at 941–42 ("In the end, the Court's rejection of *Austin* and *McConnell* comes down to nothing more than its disagreement with their results.").

public to question the validity of the Court's decisions. This type of infighting exposes the weaknesses of the avoidance canon. The justices' debate about the canon showed just how susceptible it is to various interpretations. The debate also highlights that, like other substantive canons, the avoidance canon can be easily manipulated as its application is dependent on the justices' judicial and political views. By revealing the discretionary nature of the canon, the Court diminishes its persuasiveness, and, as a consequence, decreases its usefulness.

C. Free Enterprise Fund v. Public Company Accounting Oversight Board

1. A Look at the Court's Removal Power Jurisprudence

Article II of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America."[183] At the time the first executive departments were created, the prevailing view was that "the executive power included a power to oversee executive officers through removal" since it was "a traditional executive power" that was not expressly taken away from the President.[184] Nevertheless, Congress began to pass statutes that limited the President's power to remove various categories of officers, and it was left up to the Court to decide which types of limitations were permissible.

In the first major case regarding the removal of executive officers, *Myers v. United States*,[185] the Court contemplated the constitutionality of a statute limiting the President's power to remove a postmaster. The Court struck down the statute, explaining that it was essential that the President have the power to remove "those for whom he cannot continue to be responsible."[186] As Justice Breyer noted in his dissent in *Free Enterprise Fund*, the *Myers* decision "cast serious doubt on the constitutionality of all 'for cause' removal provisions . . . ."[187]

Nine years after *Myers*, the Court decided *Humphrey's Executor v. United States*.[188] In *Humphrey's Executor*, the Court addressed the constitutionality of a statute providing that the President could only

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[183] U.S. CONST. art. II, § 1, cl. 1.

[184] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3152 (2010).

[185] 272 U.S. 52 (1926).

[186] *Id.* at 117.

[187] *Free Enter. Fund*, 130 S. Ct. at 3183 (Breyer, J., dissenting); see *infra* Part II.C.4 for a discussion of how the *Myers* decision can explain the absence of a "for cause" provision in the statute creating the SEC.

[188] 295 U.S. 602 (1935).

remove members of the Federal Trade Commission ("FTC") during their seven-year terms for "inefficiency, neglect of duty, or malfeasance in office."[189] Rather than gravitating towards its reasoning in *Myers*, the Court in *Humphrey's Executor* sought to distinguish the facts at issue from those in *Myers*. The Court reasoned that the FTC performed a "quasi-legislative and quasi-judicial" function rather than the executive function that the postmaster served in *Myers*; therefore, Congress could require it to act independently from the executive branch.[190] Given this distinction, the Court upheld the removal provision, holding that Congress had the power to "fix the period during which [the members of the FTC could] continue in office, and to forbid their removal except for cause in the meantime."[191]

Decades after *Humphrey's Executor*, the Court decided *Morrison v. Olson*,[192] which concerned the Ethics in Government Act.[193] This Act permitted a special court to appoint an independent counsel to investigate and prosecute alleged federal criminal activities of high executive officers.[194] The independent counsel, however, could be removed by the Attorney General only "for good cause."[195] In a 7-1 decision,[196] the Court sustained the statute.[197] In its opinion, the Court noted that, because the Attorney General is under the direct control of the President, "[t]his [was] not a case in which the power to remove an executive official [had] been completely stripped from the President . . . ."[198] Additionally, because the independent counsel could be terminated for cause, "the Executive, through the Attorney General, retain[ed] ample authority to assure that the counsel [was] competently performing his or her statutory responsibilities . . . ."[199]

While the Court did not address the validity of its decision in *Morrison* or its other decisions involving the removal power in *Free Enterprise Fund* because "[t]he parties [did] not ask [them] to reexamine any of [those] precedents," these decisions establish the framework in which the Court was operating.[200] Additionally, these

[189] *Id.* at 620 (internal quotation marks omitted).

[190] *Id.* at 629.

[191] *Id.*

[192] 487 U.S. 654 (1988).

[193] Pub. L. No. 95–521, 92 Stat. 1867 (1978) (codified at 28 U.S.C. § 591 *et. seq.* (2006)).

[194] *Morrison*, 487 U.S. at 660 (citation omitted)..

[195] *Id.* at 663 (citation omitted)..

[196] *Id.* at 658.

[197] Justice Scalia wrote a dissenting opinion in which no other justices joined and Justice Kennedy took no part in the decision. *Id.* at 697 (Scalia, J., dissenting).

[198] *Id.* at 692 (majority opinion).

[199] *Id.*

[200] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3147 (2010).

decisions may help to explain why the Court ignored the avoidance canon and decided the constitutionality of the statute at issue.

2. The Creation and Function of the Public Company Accounting Oversight Board

In the wake of the Enron and WorldCom accounting scandals, Congress passed the Sarbanes-Oxley Act of 2002,[201] which sought to reform corporate America and its accounting practices.[202] As part of the Sarbanes-Oxley Act, Congress created the Public Company Accounting Oversight Board ("Board") "to oversee the audit of public companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports."[203] This broad grant of power enabled the Board to "regulate every detail of an accounting firm's practice, including hiring and professional development, promotion, supervision of audit work, the acceptance of new business and the continuation of old, internal inspection procedures, [and] professional ethics rules . . . ."[204]

The Securities and Exchange Commission ("SEC") appoints the five members of the Board for five-year terms "after consultation with the Chairman of the Board of Governors of the Federal Reserve and the Secretary of the Treasury . . . "; vacancies are filled by the same process.[205] When the Sarbanes-Oxley Act was adopted, the Board members could be removed only by the SEC and only for good cause: committing willful violations of the Act, abusing their authority, or unreasonably failing to enforce compliance with rules or professional standards.[206] Furthermore, the SEC benefitted from far-reaching oversight powers of the Board.[207] However, this system of for-cause removal changed with the Court's decision in *Free Enterprise Fund*.

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[201] Pub. L. No. 107–204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28 and 29 U.S.C.).

[202] *See* Floyd Norris & Adam Liptak, *Court Backs Accounting Regulator*, N.Y. TIMES, June 29, 2010, at B1 (noting that "the Sarbanes-Oxley Act . . . sought to reform corporate America after the Enron and WorldCom accounting scandals").

[203] 15 U.S.C. § 7211(a) (2006).

[204] *Free Enter. Fund*, 130 S. Ct. at 3148.

[205] 15 U.S.C. § 7211(e)(1), (e)(4)(A), (e)(5)(A).

[206] 15 U.S.C. § 7217(d)(3).

[207] *See, e.g.*, 15 U.S.C. § 7217(b)(2) ("[n]o rule of the board shall become effective without prior approval of the Commission . . . .").

3. The Origins of Free Enterprise Fund and the Decisions by the Lower Courts

In 2004, the Board inspected Beckstead & Watts, LLP, a small Nevada accounting firm. The Board decided that there were some deficiencies with its auditing procedures and began a formal investigation.[208] Subsequently, Beckstead & Watts and Free Enterprise Fund[209] brought suit in the United States District Court for the District of Columbia arguing that the Board was unconstitutional.[210]

The plaintiffs set forth two main arguments. First, they contended that the Board's structure violated the Appointments Clause, which "empowers the President to appoint 'Officers of the United States,' while allowing Congress to vest the appointment of 'inferior Officers' in the President, Courts of Law, or Heads of Departments."[211] They argued that the members of the Board were not inferior officers because they were not supervised regularly by principal officers who report directly to the President and, therefore, the members of the Board had to be appointed by the President.[212] In the alternative, the plaintiffs alleged that, even if the members of the Board were inferior officers, the SEC could not appoint them because it is not a "Department," and the appointment power had to be vested in the SEC chair rather than the entire SEC.[213] Second, the plaintiffs asserted that the Sarbanes-Oxley Act "contravened the separation of powers by conferring wide-ranging executive power on Board members without subjecting them to Presidential control."[214] The district court granted the Board's motion for summary judgment, and, in a 2-1 decision,[215] the United States Court of Appeals for the District of Columbia Circuit affirmed the district court's decision.[216]

The Court of Appeals focused on the structure of removal, as well as that Board members could only be removed by the SEC for good cause and that, in turn, the SEC's Commissioners could only be

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[208] *Free Enter. Fund*, 130 S. Ct. at 3149.

[209] Free Enterprise Fund is a nonprofit organization that supports economic growth and limited government. Beckstead & Watts is a member of the Free Enterprise Fund. *Leading Cases*, 124 HARV. L. REV. 179, 290 (2010).

[210] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., Civil Action No. 06–0217 (JR), 2007 WL 891675, at *1 (D.D.C. Mar. 21, 2007), *aff'd,* 537 F.3d 667 (D.C. Cir. 2008), *aff'd in part, rev'd in part and remanded*, 130 S. Ct. 3138 (2010).

[211] *Id.* at *4 (citing U.S. CONST. art. II, § 2, cl. 2).

[212] *Id.*

[213] *Id.*

[214] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3149 (2010).

[215] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 668 (D.C. Cir. 2008) *aff'd in part, rev'd in part and remanded,* 130 S. Ct. 3138 (2010).

[216] *Id.* at 685.

removed by the President for good cause.[217] It stated that this "double for-cause limitation on removal" was "a question of first impression" since neither the Court of Appeals nor the Supreme Court had "considered a situation where a restriction on removal pass[ed] through two levels of control."[218] Ultimately, however, the court held that, despite the double for-cause limitation, the removal structure "[did] not strip the President of sufficient power to influence the Board and thus [did] not contravene separation of powers. . . ."[219] While the Supreme Court reversed the appellate court in a 5-4 decision,[220] it did utilize the Court of Appeals' focus on double for-cause limitation on removal as grounds for distinguishing *Free Enterprise Fund* from existing precedent and as a means to strike down the removal provision in the statute.

4. The Court's Decision and the Debate Surrounding the Avoidance Canon in Free Enterprise Fund

Chief Justice Roberts, writing for the Court, opened his opinion with a brief overview of *Myers*, *Humphrey's Executor*, and *Morrison*, but quickly distinguished these cases from the fact pattern in *Free Enterprise Fund*. Roberts adopted the appellate court's determination that this situation was one of first impression for the Court as it involved a removal restriction that passed through two levels of control whereas the Court's previous decisions involved a removal restriction with only one level of control.[221] For the Court, this "added layer of tenure protection [made] a difference."[222] Ultimately, because the Act "subvert[ed] the President's ability to ensure that the laws [were] faithfully executed,"[223] the Court held that this dual for-cause limitation structure was "contrary to Article II's vesting of the executive power in the President"[224] and "contraven[ed] the Constitution's separation of powers."[225] The details of the Court's

[217] *Id.* at 668–69.

[218] *Id.* at 679.

[219] *Id.* at 669.

[220] Justices Roberts, Scalia, Kennedy, Thomas, and Alito joined the opinion of the Court. Justice Breyer filed a dissenting opinion, in which Justices Stevens, Ginsburg, and Sotomayor joined. *Free Enter. Fund*, 130 S. Ct. at 3146.

[221] *See id.* at 3147 ("We are asked . . . to consider a new situation not yet encountered by the Court. The question is whether these separate layers of protection may be combined."); *id.* at 3153 (quoting *Free Enter. Fund*, 537 F.3d at 679) ("*Morrison* did not . . . address the consequences of more than one level of good-cause tenure-leaving the issue, as both the court and dissent below recognized, a 'question of first impression' in this Court.").

[222] *Id.* at 3153.

[223] *Id.* at 3155.

[224] *Id.* at 3147.

[225] *Id.* at 3151.

analysis are irrelevant for the purposes of an analysis of the avoidance canon, as Chief Justice Roberts did not mention the avoidance canon in his opinion. Justice Breyer's dissent, however, briefly alluded to the role that avoidance could have played in the Court's decision.

While Justice Breyer's dissent focused on the various problems he perceived in the majority's opinion,[226] he questioned how the Court could "simply *assume*" that the SEC Commissioners were removable only for cause.[227] The majority assumed that SEC Commissioners could only be removed for cause because the statute establishing the SEC is *completely silent* on the question of removal.[228] Justice Breyer noted that the statute's silence on removal was intentional as Congress created the SEC in the nine-year period between *Myers* and *Humphrey's Executor*, when there was "doubt on the constitutionality of all 'for cause' removal provisions" and "at a time when, under [the] Court's precedents, it would have been *unconstitutional* to make the Commissioners removable only for cause."[229] Ultimately, Justice Breyer concluded that the majority read a for-cause removal requirement into the statute "to strike down, not to uphold, another statute,"[230] which "is not a statutory construction that seeks to avoid a constitutional question, but its opposite."[231] Although Justice Breyer's reference to the avoidance canon is brief, it raises questions about why the Court read a for-cause requirement into the statute and determined the constitutionality of the statute at issue, rather than invoking the avoidance canon.

5. The Function and Influence of Constitutional Avoidance in Free Enterprise Fund

The operation, and influence, of the avoidance canon in *Free Enterprise Fund* is not as obvious as in other cases since the Court appears to have not adhered to the canon to avoid overruling precedent. Since *Morrison*, the composition of the Court has changed dramatically. Only Justices Kennedy and Scalia were members of the

[226] *See id.* at 3170 (Breyer, J., dissenting) (noting that the Court "should decide the constitutional question in light of the provision's practical functioning in context"); *see also id.* at 3171 (emphasis in original) (arguing that "the Court fails to show why *two* layers of 'for cause' protection – Layer One insulating the commissioners from the President, and Layer Two insulating the Board from the Commissioners—impose any more serious limitation upon the *President's* power than *one* layer").

[227] *Id.* at 3182 (emphasis in original).

[228] *Id.* at 3182–83.

[229] *Id.* at 3183 (emphasis in original).

[230] *Id.* at 3184.

[231] *Id.* (citing Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 500 (1979)).

Morrison Court; Justice Kennedy took no part in the decision[232] and Justice Scalia wrote the dissenting opinion.[233] It seems as though the Court's ideology about the separation of powers and the scope of executive power has changed since *Morrison*. Perhaps the key to why the Court framed the issue in *Free Enterprise Fund* as one involving two levels of for-cause removal was because the majority wanted to strike down the statute and to expand the executive branch's power, but also wanted to *avoid* overruling *Morrison*. Without the presence of two levels of for-cause removal, the facts in *Free Enterprise Fund* closely resembled those of *Morrison*. Therefore, when the court of appeals framed the removal provision in *Free Enterprise Fund* as having two levels of for-cause removal, the majority latched onto that idea as a way of distinguishing the case before them from the *Morrison* line of cases. This enabled the majority to achieve its goal of striking down the statute while avoiding conflict with existing precedent.[234]

Justice Breyer's dissent drew attention to the Court's questionable decision to read a for-cause removal requirement into the statute creating the SEC and its unwillingness to employ the avoidance doctrine.[235] Justice Breyer has the right to raise his concerns and his viewpoint is persuasive, but his opinion is yet another example of a dissenting Justice highlighting the avoidance canon to further his or her own position and to criticize the majority. This sort of criticism underscores the discretionary nature of the canon. While it is widely understood that the canon is a persuasive rather than mandatory principle, drawing excessive attention to this fact diminishes the public's perception of the validity of the canon and the persuasiveness of the Court's future citations to it.

Perhaps the most troubling aspect of the Court's opinion was the majority's decision to read a for-cause removal requirement into the statute creating the SEC. The Court adopted an arguably incorrect statutory interpretation that ignored the plain language of the statute and Congress's intent to strike down this statute. If the principles

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[232] Morrison v. Olson, 487 U.S. 654, 658 (1988).

[233] *Id.* at 697 (Scalia, J., dissenting).

[234] Even though the Court did not adhere to the avoidance canon in this case or in *Citizens United*, the Court's approach in the two cases seems to conflict since one avoided overruling precedent and the other did not. Maybe one explanation for the difference in these approaches is that in *Citizens United*, it is likely that if the Court did not strike down the statute or overrule *Austin* or *McConnell* that another plaintiff would have filed a suit. In contrast, *Free Enterprise Fund* covers a more limited set of circumstances that cannot be challenged as easily.

[235] *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3184 (2010) (Breyer, J., dissenting) (criticizing the majority for reading the "for cause" requirement into the statute "that does not appear in the relevant statute and which Congress probably did not intend to write").

behind the avoidance canon do not support a court's decision to adopt an implausible statutory interpretation to *uphold* a statute, then the Court's use of an implausible statutory interpretation to strike down a statute is even more troubling. The Court basically chose not to adhere to the avoidance canon to disregard the intent of one branch of government and to give another branch more power. This decision certainly undermines the Roberts Court's minimalist reputation and raises serious concerns about the authority of the majority's reasoning and the justices' desire to push a particular agenda.

III. THE BIG PICTURE: ASSESSING THE IMPACT OF *NAMUDNO*, *CITIZENS UNITED*, AND *FREE ENTERPRISE FUND* ON THE AVOIDANCE CANON AND ON THE COURT ITSELF

The Roberts Court's use of the avoidance canon has been anything but consistent. In practical terms, the outcomes of the cases and the reasons that the Court applied the avoidance canon inconsistently may be a result of what was at issue in each case. While *NAMUDNO* dealt with the controversial issue of section 5 of the Voting Rights Act, neither *Citizens United* nor *Free Enterprise Fund* dealt with similar controversial issues. Given the less controversial nature of these cases, perhaps the conservative members of the Court felt more comfortable pushing the envelope and refusing to adhere to the avoidance canon to accomplish its ideological goals. Or, maybe *Citizens United* and *Free Enterprise Fund* turned out differently because in those cases Justice Kennedy, the Court's current swing vote, was willing to vote with the conservative members of the Court, whereas he was reluctant to do so in *NAMUDNO*. Regardless of the reasons these cases turned out differently, the Court's disparate approaches to the avoidance canon in each case, the way in which the justices wrote the opinions, and the increasingly flawed reasoning of these decisions have broad implications for the canon, its future legitimacy, and the public's perception of the Court.

The Court's differing approaches to constitutional avoidance in *NAMUDNO*, *Citizens United*, and *Free Enterprise Fund* reveal the threat not only to the legitimacy of the avoidance canon, but also to the reputation of the Court. While the Court claimed that constitutional avoidance was its "usual practice" in *NAMUDNO*,[236] it proceeded to give a cursory treatment to the canon in *Citizens United* and *Free Enterprise Fund*. The Court seems to vigorously defend and support the canon one minute, but gives superficial reasons for not

[236] Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2508 (2009).

applying the canon in a specific case, or ignores the canon altogether the next minute. Chief Justice Roberts claims that the members of the Court are united in their allegiance to the avoidance canon,[237] but *Citizens United* and *Free Enterprise Fund* suggest otherwise. The mixed messages these decisions send about the canon cause it to suffer because it conveys the perception that the justices' personal ideologies are driving the decisions rather than the facts of a given case. These contradictory statements about, and approaches to, the canon cannot continue if the Court wants to preserve the canon's legitimacy. While the canon may be discretionary, it cannot continue to be meaningful and persuasive if the justices constantly change the way in which it applies, or if they deliberately ignore it to promote their own agendas. Additionally, if the justices continue to use flawed reasoning and fail to adhere to the avoidance canon to promote a political agenda, the Roberts Court will lose its reputation as a minimalist court, if it has not done so already.

CONCLUSION

Although the decisions in *NAMUDNO*, *Citizens United*, and *Free Enterprise Fund* each address the avoidance canon in different contexts and each damages the canon in a distinct way, when these decisions are read together it is apparent that the Court is bringing constitutional avoidance back into the spotlight and is pushing the outer limits of the canon. The Court's treatment of the canon in these opinions has diminished the canon's persuasiveness and has damaged the legitimacy of the Court. The Justices, therefore, should evaluate whether they value the canon, reconsider the canon's role in the Court's jurisprudence, and think about the message that the Court sends when it employs the avoidance canon in inconsistent and implausible ways. If the Court values the avoidance canon and its own minimalist reputation, it should proceed with caution the next time it invokes or ignores the doctrine.

MOLLY MCQUILLEN[†]

[237] *See* Citizens United v. FEC, 130 S. Ct. 876, 918 (2010) (Roberts, C.J., concurring) (noting that, when stakes in a particular case are high, the Court's "standard practice is to refrain from addressing constitutional questions except when necessary to rule on particular claims . . . ").

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