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CONSTITUTIONAL LAW—STATUTORY INTERPRETATION—AVOIDING THE UNAVOIDABLE: THE CANON OF CONSTITUTIONAL AVOIDANCE AS APPLIED TO THE PATIENT PROTECTION AND AFFORDABLE CARE ACT.

National Federation of Independent Businesses v. Sebelius, 132 S. Ct. 2566 (2012).

I. INTRODUCTION

In upholding the Patient Protection and Affordable Care Act ("Affordable Care Act"),[1] Chief Justice Roberts seemingly invoked a well-established canon of statutory interpretation in his majority opinion: the canon of constitutional avoidance, which dictates that the Court should read a statute in order to avoid a constitutional question wherever possible. In applying the canon, however, the Chief Justice performed the rather strange step of first addressing the exact constitutional question he used the canon to avoid. This note seeks the answer to the question whether the Chief Justice properly applied the canon to the Affordable Care Act.[2] Ultimately, the note determines that the Chief Justice did not apply the avoidance canon but instead utilized a very similar method to address a situation that the avoidance canon could not.

Part II focuses on the canon itself, first looking at the historical development, then defining the canon as it currently exists, and finally looking at some recent history of the canon's use in order to ascertain the current Court's understanding of the canon before *National Federation of Independent Businesses v. Sebelius* ("*NFIB v. Sebelius*")[3] and particularly Chief Justice Roberts's ability to properly apply the canon.

In Part III, the note turns to an analysis of Chief Justice Roberts's invocation and use of the canon in *NFIB v. Sebelius*, first looking at the definition the Chief Justice gave to the canon, then to his application of the canon to the Affordable Care Act.

Part IV compares Chief Justice Roberts's application of the canon to historical applications, asking whether the Chief Justice actually avoided a constitutional issue by invoking the canon and whether the unique situation faced by the Chief Justice demanded a different type of answer than precedent provided. This section also includes a discussion of Justice Scalia's and Justice Ginsburg's opinions and their criticisms of Chief Justice Roberts's analysis.

In Part V, this note considers whether Chief Justice Roberts may have created a new canon of statutory interpretation or perhaps a variant of the avoidance canon. This possible new species of statutory interpretation may provide a guide for interpreting statutes when all possible interpretations

involve serious constitutional questions rather than the single question that the canon most often addresses.

II. THE BACKGROUND AND DEVELOPMENT OF THE AVOIDANCE CANON

As a well-established canon of statutory interpretation, the avoidance canon has a long history and has had an important impact on many Supreme Court decisions. This section of the note first briefly looks at the historic development of the canon, then analyzes the canon itself to understand its proper application. Finally, the note examines briefly a few important recent cases, particularly two cases in which the Chief Justice discussed the avoidance canon and its application, establishing the status of the avoidance canon prior to *NFIB v. Sebelius*.

A. A Brief History of the Avoidance Canon

The avoidance canon has its roots deep in the jurisprudential history of the United States.[4] The Supreme Court has noted[5] that Justice Marshall planted the seed for the canon in *Murray v. The Charming Betsy*, where the Court observed "that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[6] Even so, the Court evoked a similar idea even earlier, holding in 1800 that "the 11th section of the judiciary act can, and must, receive a construction, consistent with the constitution."[7]

The pedigree of the avoidance canon has not prevented some degree of development in the Court's construction of the canon. The Supreme Court has utilized both a classical and a modern version of the avoidance canon.[8] Justice Holmes articulated the classical version of the canon[9] when he stated that "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act."[10] The modern version of the avoidance canon owes its origin[11] to *United States ex rel. Attorney General v. Delaware & Hudson Co*.[12] The Court in *Delaware & Hudson* stated the principles of avoidance as follows:

> It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional, and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise

> and by the other of which such questions are avoided, our duty is to adopt the latter.[13]

This move toward modern avoidance seems to relate to the Court's reticence to render advisory opinions,[14] as the classical version of the avoidance canon required the Court to address the actual issue of whether a particular interpretation ran afoul of the Constitution before adopting the saving construction.[15] In opinions utilizing the classical avoidance canon, the Court would first determine that the challenged reading of a statute resulted in a constitutional violation and would then announce an interpretation of the statute that would cure the defect.[16] Such opinions certainly carry the scent of advisory opinions, as they answer the constitutional question only to then interpret the statute under consideration so as not to ask the very question previously decided.[17]

After *Delaware & Hudson*, the Court has utilized the modern avoidance canon, which Justice Brandeis famously defined in his concurrence in *Ashwander v. Tennessee Valley Authority*.[18] The Court has applied the modern avoidance canon in cases involving the construction of numerous statutes. In one such application, the Court refused to answer whether section 8(b)(4) of the National Labor Relations Act violated the First Amendment by forbidding a union's peaceful handbilling that could have negatively impacted the business of mall tenants.[19] The handbilling came as a result of a dispute between a union and a construction company hired to build a store within the same mall.[20] Rather than addressing the serious question of whether the statute violated the First Amendment, the Court instead simply decided that the statute did not forbid the handbilling—altogether avoiding the First Amendment question.[21]

The Court has also used the modern version of the canon to support a reading of a scienter requirement in a statute prohibiting the transportation and distribution of materials depicting minors engaged in sexually explicit conduct even though the statute did not explicitly refer to the violator's knowledge of the performers' age.[22] The Court even noted that the most natural reading of the statute would not have applied the scienter requirement to the section of the statute regarding the age of the persons depicted in the explicit conduct.[23] However, the Court determined that giving the language of the statute such a construction would produce absurd results that Congress could not have intended, such as a Federal Express delivery person facing liability for delivering such materials even though he had no idea what the film he delivered depicted.[24] The Court thus avoided a constitutional analysis by interpreting the existing language of the statute in a manner it admitted to be unnatural.[25]

At this point in history, the modern version of the avoidance canon has thoroughly supplanted the classical version.[26] Knowing now which canon

the Court applies in current cases, the next section will briefly examine the canon to determine the steps that the Court has followed in its application.

B. Defining the Avoidance Canon

Justice Brandeis gave the most famous explanation of the modern avoidance canon in *Ashwander v. Tennessee Valley Authority*.[27] In that opinion, Justice Brandeis enumerated several rules that the Court has used to avoid answering constitutional questions,[28] but he specifically addressed the modern avoidance canon in stating that "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."[29]

The *Ashwander* definition, however, does not include other pertinent language regarding the canon. Specifically, the Court has said that it will "construe [a] statute to avoid [constitutional] problems *unless such construction is plainly contrary to the intent of Congress*."[30] The Court has also stated that this qualification requires construing a statute as not presenting a constitutional question "if fairly possible."[31]

The Court has yet to explicitly define one aspect of the canon: the degree of doubt that must exist regarding the constitutionality of the statute sufficient to trigger the canon's application.[32] While the standard articulation of the canon requires a "serious" question, different justices have articulated a wide range of threshold doubt levels required to invoke the canon,[33] and Justice Breyer has stated that "the Court need not apply . . . the doctrine . . . where a constitutional question, while lacking an obvious answer, does not lead a majority to gravely doubt that the statute is constitutional."[34] These standards, ranging from interpretations that "would upset the constitutional balance" to those that "push the outer limits" of the constitution,[35] do not clearly indicate just how serious a question the Court will require to invoke the canon—making it difficult to analyze the invocation for its propriety.

Despite the doubtfulness of the triggering condition, the operation of the canon seems to follow a particular pattern:[36]

> 1) First determine whether the proposed interpretation poses a serious constitutional question.
>
> 2) Then determine whether a different type of inquiry can address the controversy without addressing the constitutional question.
>
> 3) Determine whether there exists a construction of the statute that will satisfy that inquiry and thus avoid the constitutional question.
>
> 4) Determine whether the proposed alternative construction is not plainly contrary to the legislative intent of Congress.

5) If steps one through four are answered in the affirmative, apply the canon to avoid the constitutional question.

These steps apply only to the modern avoidance canon. The classical formulation of the avoidance canon would have a different first step, in which the Court would determine that the interpretation of the statute would actually violate the Constitution rather than simply determining that the interpretation raises a serious question.[37]

The Supreme Court has not explicitly recognized the preliminary step of determining whether a serious constitutional question exists,[38] and the Court has not followed a rigid step by step method of applying the canon as identified. This breakdown merely serves to highlight specific inquiries that a court must make in properly applying the avoidance canon to a particular statute. These steps will provide an analytical framework for addressing Chief Justice Roberts's application of the canon in *NFIB v. Sebelius*.

C. Recent Applications of the Canon

Having established the contours of the modern avoidance canon, this note will now turn to recent uses of the canon, particularly those to which Chief Justice Roberts offered an analysis.

The Court discussed the avoidance canon in *Clark v. Martinez*, holding that a limitation placed in a previous case on the length of time that removable aliens could be held would also apply to the length of time that inadmissible aliens could be held.[39] The Court, per Justice Scalia, observed that the canon offers "a means of giving effect to congressional intent, not subverting it."[40] While the Court in *Clark* did not *per se* invoke the avoidance canon, the canon played a large role in its decision, as the limitation on holding periods that the Court addressed owed their origin to a previous case that invoked the canon.[41] The Court did note that if an interpretation "would raise a multitude of constitutional problems, the other [interpretation] should prevail—whether or not those constitutional problems pertain to the litigant before the Court."[42] This caveat does not seem to indicate that the Court meant to encourage advisory opinions, merely that in construing a statute, "a court must consider the necessary consequences of its choice."[43]

Chief Justice Roberts authored the majority opinion in a more recent case in which the outcome turned in its entirety upon the application of the avoidance canon. In *Northwest Austin Municipal Utility District Number One v. Holder* (*NAMUDNO*), a utility district sought a bailout from the requirement of section 5 of the Voting Rights Act of 1965, requiring it to seek preclearance from federal authorities before making any changes regarding the election of the district's board, alternatively arguing that the statute was unconstitutional if the district could not bailout.[44] In holding that the district could bailout under the provisions of the Voting Rights Act, the Court never

once addressed the merits of the constitutional argument, acknowledging its duty to decide the case on different grounds if possible.[45] Chief Justice Roberts applied the avoidance canon precisely in *NAMUDNO*. By simply holding that the district could bailout from the preclearance requirement, the Court never found it necessary to discuss the constitutional claims.

In *NAMUDNO*, the Court acknowledged in the first sentence of the opinion that the utility district raised a "big question" regarding the constitutionality of the statute.[46] This acknowledgment satisfies the first step of the avoidance canon's application outlined in the previous section. The Court performed the second step of the analysis by determining that it could avoid the constitutional question if the utility district qualified for the bailout, in part because the utility district had pled for the constitutional relief in the alternative.[47] In the third step of the analysis, the Court determined that if the definition of a "political subdivision" could encompass the utility district, the district could qualify for a bailout, and the Court could thereby avoid the constitutional question.[48] After determining that an interpretation existed that could avoid the constitutional question, the Court analyzed precedent and congressional intent to determine that interpreting the statute in the manner so described would not contradict the intent of Congress.[49] Finding no obstacle in interpreting the statute in a manner that would avoid addressing the constitutional question, the Court applied the alternative interpretation, whereby the utility district could qualify for a bailout from the preclearance requirement.[50] The Court could therefore avoid the constitutional question, and the statute remained undisturbed.

The *NAMUDNO* decision did have one critical flaw as regards its application of the avoidance canon, as pointed out by Richard Hasen.[51] The Chief Justice's opinion made no mention of a plausibility requirement concerning the reading that the Court applied to the statute.[52] Hasen also has much to say regarding the Court's decision to interpret the utility district as a political subdivision, noting particularly the lack of authority supporting the Court's interpretation of the statute and the weight of authority suggesting that the reading proffered by the Court seemed to result in an interpretation contrary to the intent of Congress.[53] Nevertheless, the opinion carried the day with an eight-justice majority.[54] Hasen's argument principally seeks to unveil the Court's reasons for invoking the avoidance canon; however, this note concerns only the Chief Justice's understanding of the canon and his ability to utilize it. Clearly, Chief Justice Roberts managed to apply the avoidance canon in *NAMUDNO* with aplomb. His opinion neatly tracks the outlined application of the canon from the previous section of this note.[55] Despite criticisms based on the plausibility of the interpretation and the desirability of that interpretation, the Chief Justice demonstrated in *NAMUDNO* the ability to apply the canon through a proper analytical and methodological framework.

As Professor Hasen noted, the Chief Justice approved a different tactic in his concurrence in *Citizens United v. Federal Election Commission*.[56] There, the Chief Justice explicitly rejected the dissent's suggestion of adopting a statutory construction that would have avoided addressing the First Amendment issue.[57] The Court rejected Citizens United's argument that the challenged prohibition on corporate sponsorship of political communications did not apply to a video-on-demand broadcast of its documentary film *Hillary: The Movie*, which promulgated a message against Hillary Clinton during her run for the Democratic Presidential nomination in the 2008 primary elections.[58] If the Court had interpreted the 2 U.S.C. § 441b(b)(2) as not including video-on-demand services within the definition of electioneering communications, the Court would have had no need to address the question of whether the statute violated the First Amendment.[59] Finding it meritless, however, the Chief Justice and the majority rejected the invitation to interpret the statute in such a manner.[60] The Court then rejected a proffered interpretation that would have found *Hillary: The Movie* to not qualify as "the functional equivalent of express advocacy," which would also have permitted avoiding the constitutional question.[61] Once the Court determined that no plausible reading could avoid the constitutional issue, only then did it turn to the First Amendment arguments.[62]

Whatever criticisms Professor Hasen may have regarding the disingenuousness of the Chief Justice's application of the avoidance canon,[63] Chief Justice Roberts clearly understands the use of the avoidance canon and the method of its implementation. This skillful, direct application of the canon in *NAMUDNO* and *Citizens United* provides a stark contrast to the rather odd usage applied in *NFIB v. Sebelius* —to which this note now turns.

III. CHIEF JUSTICE ROBERTS'S USE OF THE AVOIDANCE CANON IN *NFIB V. SEBELIUS*

Having established the foundational and historical context of the avoidance canon, as well as Chief Justice Roberts's skill in its use, this note now turns to an examination in *NFIB v. Sebelius* as it relates to the definition and application of the avoidance canon. Section A examines the explanation the Chief Justice gave regarding the avoidance canon, while section B looks to the application of the canon, as the Chief Justice defined it, to the language of the individual mandate.

A. The Chief Justice's Explanation of the Canon

Chief Justice Roberts engaged in a very brief explanation of the avoidance canon before conducting his analysis of the individual mandate as a tax.[64] As he explained, "a law that reads 'no vehicles in the park' might, or might not, ban bicycles in the park."[65] Further, Roberts asserted that, in

choosing between two interpretations of a statute, the Court should choose the interpretation that does not result in a violation of the Constitution.[66] In fact, Roberts also asserts that the Court need not adopt "the most natural interpretation" but need only adopt a "fairly possible one."[67]

Roberts thus explains the canon first as a matter of semantic interpretation,[68] then extends that explanation further, asserting that the Court should reach for any "fairly possible" interpretation in order to save a statute from unconstitutionality. Significantly, the Chief Justice's explanation of the canon did not describe the idea of avoiding a constitutional question but rather described interpreting a statute in such a manner as to allow it to function constitutionally.[69] The Chief Justice's analysis seems to have more in common with the classical avoidance canon than with the modern one.

The authorities cited by the Chief Justice in support of his explanation of the canon seem odd choices, as the cases almost all came prior to the development of the modern avoidance canon in *Delaware & Hudson*.[70] In fact, the Chief Justice cited to Justice Holmes's explanation of the classical avoidance canon from *Blodgett v. Holden*.[71] As noted above,[72] Roberts has previously applied the modern avoidance canon without showing any sign of a misapprehension as to its effect or operation. His explanation of the canon here, relying on case law describing the classical version of the avoidance canon as opposed to the modern version, seems very strange in light of his previously established understanding.

B. The Chief Justice's Application of the Avoidance Canon to the Affordable Care Act Mandate

The text of the relevant portions of the individual mandate, 42 U.S.C § 5000A(a), (b)(1), to which Chief Justice Roberts applied the avoidance canon, reads as follows:

> (a) Requirement to maintain minimum essential coverage. —An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.
>
> (b) Shared responsibility payment.--
>
> (1) In general.--If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty with respect to such failures in the amount determined under subsection (c).

In applying the avoidance canon to this language, the Chief Justice did not abrogate any of the effects of the statute but rather changed the charac-

terization of the Shared Responsibility Payment from a penalty to a tax.[73] In fact, he considered the predicted operations of the statute in determining that the mandate fell within the tax power.[74] Consequently, a taxpayer does not violate 42 U.S.C. § 5000A unless that taxpayer both fails to maintain coverage and fails to pay the Shared Responsibility Payment.[75]

The Chief Justice's opinion and application of the canon result in a strange anomaly regarding the effect of the interpretation on the operation of the statute. Even the authorities cited by Chief Justice Roberts in explaining his use of the avoidance canon did not result in a statute having the same practical effect, regardless of which interpretation of the statute the Court chose.[76] In contrast, the Chief Justice's application of the canon to the individual mandate results, not in a reading that allows the statute to function while restricting an unconstitutional extension, but rather has the same precise practical effect as if the Court had not applied the avoidance canon.[77] The oddness of this result did not escape commentators who criticized the Chief Justice for his invocation of the avoidance canon soon after the announcement of the decision.[78]

Chief Justice Roberts's insistence that he "would find no basis to adopt such a saving construction" without first deciding that the Commerce Clause did not authorize the mandate makes the opinion somewhat stranger.[79] This calls back to his explanation of the avoidance canon, in which he never stated that the Court should not reach a constitutional question if an interpretation existed that would allow the Court to avoid the question altogether.[80] Once again, the Chief Justice seems to refer to something more like the classical avoidance canon, which requires a determination of the initial constitutional question,[81] than the modern avoidance canon.

Ultimately, the avoidance canon has little practical effect on the individual mandate.[82] In other cases, such as those cited by Chief Justice Roberts,[83] the canon restricted the function of the statute so that it might have had an actual, demonstrably different effect depending on the Court's interpretation. The lack of any practical difference between the individual mandate before and after the application of the avoidance canon sets this case apart in the canon's history.

IV. THE CHIEF JUSTICE'S USE OF THE CANON IN HISTORICAL CONTEXT

Chief Justice Roberts applied the avoidance canon in a very unusual way. This section seeks to place that unusual method of application into the historical context of the avoidance canon, looking first, in section A, to see if the Chief Justice managed to actually avoid any constitutional issues. Section B then looks at the unusual situation faced by the Chief Justice to determine whether this new methodology had merit. Finally, section C looks to the dissenting and concurring opinions in *NFIB v. Sebelius* to address the criticisms each had for the Chief Justice's avoidance canon jurisprudence.

A. Whether Roberts Truly Avoided a Constitutional Question

One of the key provisos of a proper application of the modern avoidance canon has always been that the Court should avoid a constitutional question where possible.[84] In *NFIB v. Sebelius*, Chief Justice Roberts faced arguments for upholding the individual mandate under the Commerce Clause, the Necessary and Proper Clause, and as an exercise of Congress's power to lay taxes.[85] Faced with these interpretive alternatives, the Chief Justice determined that the mandate, while unconstitutional under the Commerce Clause and the Necessary and Proper Clause, was a constitutionally permissible tax.[86]

The avoidance canon does not provide for a case such as this. As described above, the avoidance canon rests on the idea that there exists a way to resolve the issue before the Court without resorting to constitutional questions.[87] The three possibilities presented to the Court as methods for validating the individual mandate all implicated constitutional questions. To that point, the Chief Justice, after determining that the Court could interpret the mandate as a tax, still had to address the issue of whether Congress could pass such a tax as the Shared Responsibility Payment.[88] As the Chief Justice observed, "[e]ven if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution."[89] The challengers argued that the individual mandate violated those other requirements.[90]

This presented a unique situation. Other cases in which the Court has applied the avoidance canon involved interpretations that managed to avoid altogether the addressing of a constitutional question.[91] In this case, no matter which avenue the Chief Justice selected, a constitutional question awaited.

In this peculiar instance, the avoidance canon could not have its usual operation. The canon fails at its second and third steps. No method of adjudicating the controversy in this case could avoid the simple fact that the Court had to determine the constitutionality of the individual mandate, whether under the Commerce Clause, the Necessary and Proper Clause, or as an exercise of the taxing power. The Court faced the need to avoid a constitutional question but could only do so by addressing another, equally serious, constitutional question. The Chief Justice recognized this impasse, and he devised a way to adapt old tools to a new use. This note now turns to that solution.

B. Whether the Unique Questions Before the Court Required a New Solution

As the Chief Justice could not apply the modern avoidance canon to the individual mandate, and his explanation and application seem a bit strange

to begin with, it seems that he may have adapted to the case by creating a new canon.

The uniqueness of the Chief Justice's situation required a new methodology, or, rather, a new use for an old methodology. The Chief Justice seemed to define his avoidance canon with great focus on decisions that utilized the classical avoidance canon.[92] As the Court faced three choices, each with constitutional implications, the modern avoidance canon, which focused on simply not answering the question,[93] could not help the Court come to a decision. The Chief Justice had to answer a constitutional question.

This seems the most likely reason for the Chief Justice's reliance on classical avoidance canon precedent. By applying the classical avoidance canon, the Chief Justice could make a decision; alternatively, applying the modern avoidance canon would have placed him at an impasse. Even so, one cannot properly term the Chief Justice's approach as classical avoidance canon, because even that version of the canon requires that the alternative interpretation not implicate a constitutional concern. Rather, the Chief Justice established a similar method for addressing those situations in which the Court must choose one of two or more methods of adjudicating the constitutionality of a statute—where all the choices available implicate constitutional questions.

The Chief Justice first determined the constitutional questions before him. Although the opinion does not say as much, the Chief Justice would have determined that no method of addressing the issue existed that would not avoid a constitutional question. Indeed, all the arguments presented to the Court involved constitutional questions. The Chief Justice then looked to each of his constitutional alternatives to determine whether there existed a statutory construction that would validate the statute under each respective constitutional provision. Having found such a validating construction, the Chief Justice would have then determined whether such a construction would be contrary to the intent of Congress.

This method of analysis requires that the question before the Court be unavoidably constitutional in nature but possibly constitutional under alternate constructions relying on different constitutional theories. Such an interpretive canon resulted here in a statute going largely unchanged in its actual function, a result that surely must meet with the approval of the legislators who passed the bill. Despite Justice Scalia's concerns that this construction served to rewrite the statute,[94] the resulting statute bears a closer relation to that originally passed than other statutes interpreted under the avoidance canon.[95]

The Chief Justice failed to properly apply the modern avoidance canon largely because the modern avoidance canon could not apply to the question before him. Instead, he utilized the precedent of the classical avoidance canon to craft a tool that could address exactly the situation he faced.

C. The Dissenting and Concurring Criticism of the Chief Justice's Opinion

Justice Scalia's dissent takes issue with the majority opinion's interpretation of the individual mandate as a tax, believing that "to say that the Individual Mandate merely imposes a tax is not to interpret the statute but to rewrite it."[96] Justice Scalia does not take issue with the Chief Justice's use of a modified version of the avoidance canon, as he himself states that "we must, if fairly possible, construe the provision to be a tax rather than a mandate-with-penalty."[97] Considering the unique application that the Chief Justice used, first answering a constitutional question before interpreting the individual mandate as a tax, it seems somewhat odd that the dissent would not address what appears at first blush to be an improper application of the canon.

The oddity of the Chief Justice's application of the canon did not go unnoticed, however. Justice Ginsburg, in her concurring and dissenting opinion, questions Chief Justice Roberts's holding that the individual mandate overreaches under both the Commerce Clause and the Necessary and Proper Clause while upholding it as a tax.[98] The Chief Justice responded to that question in saying that "[i]t is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question."[99]

The separate opinions approach their criticism in different ways. While the Scalia dissent agrees with the approach that the Chief Justice takes while disagreeing with the conclusion,[100] the Ginsburg opinion disagrees with the approach while supporting the conclusion.[101] Justice Ginsburg saw no reason to engage in a "Commerce Clause analysis that is not outcome determinative."[102] However, as observed above, the Court faced no way to avoid a constitutional question. With no way to avoid the question, Chief Justice Roberts first addressed the most natural reading of the statute before resorting to alternative readings.[103] Considering that dilemma, addressing the more natural reading of the statute first would allow the Court to avoid unnecessarily addressing questions that it would otherwise have no reason to decide. In this light, the Chief Justice's assertion that "[w]ithout deciding the Commerce Clause question, [he] would find no basis to adopt such a saving construction" makes significantly more sense.[104] Justice Ginsburg's suggestion that the Chief Justice engaged in an unnecessary Commerce Clause analysis mistakes outcome determinativeness for a proper avoidance of issues. In that regard, Justice Scalia's opinion seems to more fully understand the Chief Justice's method and the dilemma faced by the Court. If the Court had first analyzed the individual mandate as a tax in order to save it from an unfavorable Commerce Clause, it would have run afoul of another principle of statutory interpretation—the plain meaning rule—which requires the interpreting Court to give the words of a statute their ordinary meaning.[105] The

Chief Justice managed to avoid that issue by confronting the constitutional issues head-on with a newly adapted avoidance canon.

V. CONCLUSION

Chief Justice Roberts's opinion in *NFIB v. Sebelius* appears at first glance to apply a canon of statutory interpretation that has a pedigree extending beyond *Marbury v. Madison*. A deeper reading of the opinion reveals that the Chief Justice did not face a situation that he could adequately address using the tools at his disposal. The modern avoidance canon offers no succor to those whose only alternatives to a constitutional question are other constitutional questions, and the classical avoidance canon cannot truly apply because, similarly, once the Court answers the question of constitutional validity based on one interpretation, it cannot then select an alternative reading that does not invoke the Constitution.

The Chief Justice has provided guidance to future courts faced with the prospect of deciding whether a statute validly falls under one constitutional provision or another but where no non-constitutional grounds for a decision exist. Far from misapplying the old tools of statutory interpretation, the Chief Justice demonstrated a great talent for the innovative use of existing precedent to create solutions to new and complex problems.

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1. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of titles 5, 18, 20, 21, 25, 26, 28–31, 35, 36, and 42 of the United States Code).
2. This note does not, however, seek to defend or attack the avoidance canon. Criticism of the avoidance canon, as well as defenses of its propriety, are the subject of many other works, some cited within this note. *See, e.g.*, Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L REV. 800, 815–16 (1983); Note, *Should the Supreme Court Presume That Congress Acts Constitutionally? The Role of the Canon of Avoidance and Reliance on Early Legislative Practice in Constitutional Interpretation*, 116 HARV. L. REV. 1798 (2003). This note limits itself to the simple question of whether Chief Justice Roberts used the canon correctly.
3. 132 S. Ct. 2566 (2012).
4. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).
5. *Id.*
6. 6 U.S. (2 Cranch) 64, 118 (1804).
7. Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 14 (1800).
8. Trevor Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1202–03 (2006); Adrian Vermeule, *Saving Constructions*, 15 GEO. L.J. 1945, 1949 (1997).
9. Morrison, *supra* note 8, at 1202.
10. Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring).
11. Morrison, *supra* note 8, at 1204.

12. U.S. *ex rel.* Attorney General v. Delaware & Hudson Co., 213 U.S. 366 (1909).
13. *Id.* at 407–08 (citations omitted).
14. Morrison, *supra* note 8, at 1204–05.
15. Clark v. Martinez, 543 U.S. 371, 395–96 (2005) (Thomas, J., dissenting); Vermeule, *supra* note 7, at 1949.
16. John Copeland Nagle, *Delaware & Hudson Revisited*, 72 NOTRE DAME L. REV. 1495, 1499–1503 (1997) (providing examples and summaries of decisions of the Court applying the classical avoidance canon).
17. *Id.* at 1518.
18. 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).
19. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 570–73, 578 (1988).
20. *Id.* at 570–73, 578.
21. *Id.* at 578.
22. United States v. X-Citement Video, Inc., 513 U.S. 64, 67–68, 78 (1994).
23. *Id.* at 68–69.
24. *Id.* at 69.
25. *Id.* at 78.
26. Nagle, *supra* note 16, at 1497.
27. *Id.* at 1495.
28. Vermeule, *supra* note 8, at 1948.
29. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).
30. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (emphasis added).
31. Almendarez-Torres v. United States, 523 U.S. 224, 237 (1998) (quoting United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916)).
32. Anthony Vitarelli, Comment, *Constitutional Avoidance Step Zero*, 119 YALE L.J. 837, 841–42 (2010).
33. *Id.*
34. *Almendarez-Torres*, 523 U.S. at 239.
35. Vitarelli, *supra* note 32, at 840–42 (quoting *Gonzales v. Oregon*, 546 U.S. 243, 291 (2006) (Scalia, J., dissenting); Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)).
36. *See generally* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); *Almendarez-Torres*, 523 U.S. at 224 (1998); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 568 (1988); Vitarelli, *supra* note 32; *infra* Part II.C.. These opinions do not provide an exact breakdown of the method of analysis used for an avoidance canon problem, and the pattern described here is extrapolated from analysis of these opinions and other works.
37. Vermeule, *supra* note 8, at 1949.
38. Vitarelli, *supra* note 32, at 842.
39. Clark v. Martinez, 543 U.S. 371, 377–78 (2005).
40. *Id.* at 382.
41. *Id.* at 377.
42. *Id.* at 380–81.
43. *Id.* at 380.
44. 557 U.S. 193, 200–01 (2009).
45. *Id.* at 205.
46. *Id.* at 196.
47. *Id.* at 205–06.
48. *Id.* at 206–07.
49. *Id.* at 207–10.

50. *Nw. Austin Mun. Utility Dist. No. One*, 557 U.S. at 211.

51. Richard Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 203 (2009).

52. *Id.*

53. *Id.* at 205–06.

54. *Id.* at 203.

55. *See supra* Part II.B.

56. Richard Hasen, *Was Chief Justice Roberts Most Unprincipled in Applying the Doctrine of Constitutional Avoidance in the Health Care Case, in NAMUDNO (the Voting Rights Act Case) or in Citizens United?*, ELECTION LAW BLOG (July 11, 2012, 9:57 PM), http://electionlawblog.org.

57. Citizens United v. Federal Election Comm'n, 558 U.S. 310, 373 (2010) (Roberts, C.J., concurring).

58. *Id.* at 887–89.

59. Hasen, *supra* note 56.

60. *Citizens United*, 558 U.S. at 323.

61. *Id.* at 323–25.

62. *Id.* at 373 (Roberts, C.J., concurring).

63. Hasen, *supra* note 56.

64. NFIB v. Sebelius, 132 S. Ct. 2566, 2593–94 (2012).

65. *Id.* at 2593.

66. *Id.*

67. *Id.* at 2594.

68. I.e., whether the hypothetical statute barring vehicles in the park means in the use of the word "vehicle" to bar bicycles as well as automobiles.

69. *NFIB*, 132 S. Ct. at 2593.

70. The Chief Justice cited to *Crowell v. Benson*, 285 U.S. 22 (1932); *Blodgett v. Holden*, 275 U.S. 142 (1927); *Hooper v. California*, 155 U.S. 648 (1895); *Parsons v. Bedford*, 28 U.S. 433 (1830).

71. *NFIB*, 132 S. Ct. at 2593 (quoting *Blodgett*, 275 U.S. at 148 (Holmes, J., concurring)).

72. *See supra* Part II.C.

73. *NFIB*, 132 S. Ct. at 2601.

74. *Id.* at 2597. Chief Justice Roberts noted that Congress anticipated approximately four million people would opt to pay the penalty each year rather than purchase insurance. In considering this estimate, the Chief Justice "expect[ed] Congress to be troubled by that prospect if such conduct were unlawful." *Id.*

75. *Id.*

76. *Crowell v. Benson*, 285 U.S. 22 (1932), involved a question as to whether a statute granted final fact-finding authority to the deputy commissioner of the United States Employees' Compensation Commission for matters of jurisdiction relating to compensation claims, including the existence of an employer-employee relationship. The Court determined that the statute allowed a federal court to review the facts of employment to determine whether an award of compensation as "in accordance with the law," as the statute did not specifically provide for the finality of the deputy commissioner's determination. *Id*. at 62. *Blodgett v. Holden*, 275 U.S. 142 (1927), involved a determination of whether a new tax on inter vivos gifts made in 1924 and after applied retroactively to gifts made in 1924 prior to the enactment of the law. Justice Holmes, in his concurrence, cited by Chief Justice Roberts, found that a prospective rather than retrospective reading of the statute was reasonable. *Id.* at 148–49. *Hooper v. California*, 155 U.S. 648 (1895), involved a California statute that barred foreign insurance companies from selling policies within the state, where the defendants asserted that they procured a policy outside the state of California and that the challenged statute unconsti-

tutionally restricted the purchase of a policy outside the territory of California. The Court rejected the reading of the statute that the defendants offered, preferring a reading that only barred the sale of policies within the state and finding that the sale had occurred within California because the defendant brokers were California residents. *Id.* at 656–57. *Parsons v. Bedford*, 28 U.S. 433 (1830), required the Court to determine if a statute directing Louisiana district courts to follow the procedures of that state resulted in an unconstitutional grant of authority to the Supreme Court to reexamine facts by requiring the Court to follow Louisiana procedures. The Court determined that the general language of the statute should not be given such force as to result in such a violation. *Id.* at 448.

77. This calls to mind the words of Oliver Wendell Holmes regarding the interpretation of the law from the perspective of a bad man. As Holmes wrote:

But what does it mean to be a bad man? Mainly, and in the first place, a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money. But from his point of view, what is the difference between being fined and taxed a certain sum for doing a certain thing?

OLIVER WENDELL HOLMES, *The Path of the Law*, *in* THE PATH OF THE LAW AND THE COMMON LAW 1, 6–7 (Kaplan Publ'g 2009).

78. Richard Hasen, *A Few Thoughts on the Chief Justice and Healthcare Decision from SCOTUS*, ELECTION LAW BLOG (June 28, 2012, 9:13 AM), http://electionlawblog.org; Nicholas Rosenkranz, *Roberts Was Wrong to Apply the Canon of Constitutional Avoidance to the Mandate*, SCOTUSREPORT (July 11, 2012, 8:36 AM), http://www.scotusreport.com.

79. *NFIB*, 132 S. Ct. at 2600-01.

80. *Id.* at 2593.

81. Vermeule, *supra* note 8, at 1949.

82. The Chief Justice did acknowledge that those who choose to pay the penalty rather than acquire health insurance would be in compliance with the law, rather than being "outlaws," *NFIB*, 132 S. Ct. at 2597, and, while this might be of some comfort to those who would not wish to be branded as such for non-compliance with the mandate, the overall practical effect is still that the taxpayer must either buy insurance or pay the government.

83. *See supra* note 74.

84. Almendarez-Torres v. United States, 523 U.S. 224, 237 (1998).

85. *NFIB*, 132 S. Ct. at 2584.

86. *Id.* at 2591–93, 2600.

87. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

88. *NFIB*, 132 S. Ct. at 2598.

89. *Id.*

90. *Id.*

91. *See supra* note 76 and accompanying text; *supra* Part II.A.; *supra* Part II.C.

92. *See supra* Part III.A.

93. Vermeule, *supra* note 8, at 1949.

94. *NFIB*, 132 S. Ct. at 2655 (Scalia, J., dissenting).

95. Rosenkranz, *supra* note 78.

96. *NFIB*, 132 S. Ct. at 2655 (Scalia, J., dissenting).

97. *Id.* at 2651.

98. *Id.* at 2629 n.12 (Ginsburg, J., concurring and dissenting).

99. *Id.* at 2600.

100. *Id.* at 2651 (Scalia, J., dissenting).

101. *Id.* at 2629 n.12 (Ginsburg, J., concurring and dissenting).

102. *NFIB*, 132 S. Ct. at 2629 n.12 (Ginsburg, J., concurring and dissenting).

103. *Id.* at 2600.

104. *Id.* at 2601.

105. 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46:1 (7th ed. 2007).

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