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## Canons, the Plenary Power Doctrine, and Immigration Law

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*Brian G. Slocum*

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# CANONS, THE PLENARY POWER DOCTRINE, AND IMMIGRATION LAW

BRIAN G. SLOCUM\*

## ABSTRACT

*There is a fundamental dichotomy in immigration law. On one hand, courts have consistently maintained that Congress has “plenary power” over immigration and reject most constitutional challenges on that basis. On the other hand, courts frequently use canons of statutory construction aggressively to help interpret immigration statutes in favor of aliens. Immigration scholars have almost exclusively focused on the plenary power doctrine. They have either ignored the important role played by canons in immigration law or have viewed canons as serving only the temporary and marginally legitimate role of substitutes for the constitutional rights not afforded aliens. In this Article, I defend canons and argue that they should be viewed as having a permanent and legitimate role in interpreting immigration provisions, even in cases where no constitutional issues are raised. I explain that part of the function of some canons is to require courts to often adopt second-best interpretations of statutes. Contrary to the claims of some scholars, these second-best interpretations do not add unpredictability to the law. While I defend the canons that courts have chosen to apply in immigration cases on normative grounds, the Court’s recent application of the canon of constitutional avoidance presents new concerns. The Court has recently transformed the canon, which requires courts to avoid serious constitutional issues through statutory interpretations, into a device that often gives aliens as a whole greater rights, at least temporarily, than would a decision that rested on constitutional grounds. The expansion of the canon of constitutional avoidance means that courts should be particularly careful when applying it to avoid unnecessarily disrupting Congress’s legislative designs.*

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## I. INTRODUCTION

Interest in United States immigration law is arguably at an all-time high, with Congress and the public discussing the fate of the undocumented in our society and immigration scholars opining on academically popular topics such as the constitutional rights of aliens or the propriety of the government’s use of immigration provisions to help fight terrorism.<sup>1</sup> Not many, however, are discussing the common judicial practice of using canons of statutory construction to interpret important immigration statutes in favor of aliens.<sup>2</sup> The Supreme Court is an enthusiastic supporter of these canons, as are lower courts. Indeed, at times the Court seems to go out of its way to assert the relevance of canons in interpreting statutes.<sup>3</sup> Taking the

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1. “Alien” is a legal term under United States immigration laws, and it refers to “any person not a citizen or national of the United States.” 8 U.S.C. § 1101(a)(3) (2000). Although the term is understandably considered by many to be pejorative, statutes, case law, and scholarly articles, which must be quoted in this Article, all refer extensively to “alien” and “alienage.” In order to avoid unnecessary confusion, the term will be used in this Article.

2. It is obviously not surprising that the general public does not discuss canons, but academics have no excuse.

3. See, e.g., *Calcano-Martinez v. INS*, 533 U.S. 348, 350 n.2 (2001) (stating that “it remains instructive that the Government acknowledges that background principles of

Court's cue, this Article makes a long-overdue defense of the role of canons of statutory construction in immigration law.

A large part of immigration scholarship has been focused on the goal of ensuring that the government treats aliens fairly.<sup>4</sup> One major barrier to this effort has been Congress's "plenary power" over immigration and the concomitant lack of constitutional protections enjoyed by aliens. Typically, although Congress's legislative power over many areas (for example, patents, interstate commerce) is described by courts as plenary, it is still subject to normal constitutional limitations.<sup>5</sup> In contrast, courts have traditionally considered the power of the federal government over immigration to be nearly unlimited and the constitutional rights of immigrants to be extremely limited—and in many cases, virtually nonexistent.<sup>6</sup>

In creating the plenary power doctrine in the late nineteenth century, the Court relied heavily on policy, reasoning that the United States' existence as a sovereign state should give it unfettered power to control immigration.<sup>7</sup> Statutory interpretation in immigration law, however, often employs a very different set of policy objectives. In contrast to the extreme deference they typically give Congress when considering, and usually rejecting, constitutional challenges to statutes, courts frequently interpret immigration statutes against the government—and often do so for policy reasons. When interpreting statutes, courts regularly apply substantive canons of statutory construction, which are policy-based directives about how statutory am-

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statutory construction and constitutional concerns must be considered in determining the scope of [the Illegal Immigration Reform and Immigrant Responsibility Act's] jurisdiction-stripping provisions").

4. As used in this Article, the term "immigration law" refers to the law governing the admission and expulsion of aliens rather than the more general law of aliens' rights and obligations, such as their tax status and eligibility for government benefits and employment. See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990).

5. See generally Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

6. See *infra* notes 114-17 and accompanying text.

7. See *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893) (asserting that the power to deport is "an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare"). See also T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 863 (1989) (stating that "the Court did not start with the text or structure of the Constitution and ask how a power to regulate immigration might be inferred. Rather, it approached the question of congressional power from the perspective of the conduct of foreign affairs."). This is not to suggest that the Court's creation of the plenary power doctrine rested on sound principles. See STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA* 195 (1987) (arguing that the Court erroneously developed the plenary power doctrine by relying on cases that concerned only the federalism question of whether Congress, as opposed to states, could exclude aliens at all).

biguity should be resolved.<sup>8</sup> These canons are underpinned by different and quite varied policies supporting their application, but they almost always direct courts to interpret statutes in favor of aliens and therefore help to ensure that aliens are treated fairly by the government.<sup>9</sup> Indeed, in many cases more than one applicable canon directs the court to construe the statute in favor of the alien.<sup>10</sup>

Possibly the most controversial of these canons is the canon of constitutional avoidance, which requires a court to adopt a plausible—but not necessarily the most persuasive—interpretation of a statute in order to avoid serious constitutional issues.<sup>11</sup> Courts have frequently used this canon in immigration cases, often in what can be described as an aggressive fashion.<sup>12</sup> Although the avoidance canon has been defended by the Court on the theory that its application is an exercise in judicial restraint, it is targeted by critics as evidence of judicial activism.<sup>13</sup> In a highly influential article written in 1990, Professor Motomura argued that the Court has used the avoidance canon improperly in immigration cases by avoiding constitutional issues that were not serious and engaging in questionable statutory interpretations.<sup>14</sup> In a recent immigration case, *Clark v. Martinez*,<sup>15</sup> the Court added a new and powerful aspect to the avoidance canon by holding that a statutory interpretation adopted by invoking the canon must be uniformly applied in subsequent cases, even if the

8. See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 818 (3d ed. 2001). Substantive canons are also sometimes referred to as “normative canons,” among other terms. See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 507 (1997). In contrast to substantive canons, “textual canons” “set forth inferences that are usually drawn from the drafter’s choice of words, their grammatical placement in sentences, and their relationship to other parts of the ‘whole’ statute.” ESKRIDGE ET AL., *supra*, at 634. The Court also applies textual canons in immigration cases, and these canons can influence the Court’s interpretation of statutes. See, e.g., *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 343 (2005) (applying “the grammatical ‘rule of the last antecedent’”) (citation omitted).

9. Interpreting an immigration statute in accordance with a substantive canon usually, but not always, benefits the alien. One case where a canon did not benefit the alien was *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), where the Court applied the presumption that acts of Congress do not have extraterritorial application unless such intent is clearly manifested. Applying the presumption supported the Court’s statutory holding that the Immigration and Nationality Act did not apply to actions taken by the Coast Guard on high seas. See *id.* at 173-74.

10. See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 297-300 (2001) (applying the avoidance canon, the presumption in favor of judicial review of administrative action, and the rule requiring a clear statement of congressional intent to repeal habeas jurisdiction).

11. See *infra* Part I.B. (describing the avoidance canon).

12. See Motomura, *supra* note 4, at 565-75 (describing immigration cases in which the canon has been applied).

13. See *infra* notes 242-43 and accompanying text (explaining how the Court views application of the canon as a means of giving effect to congressional intent).

14. See generally Motomura, *supra* note 4.

15. 543 U.S. 371 (2005).

subsequent cases do not raise any constitutional issues.<sup>16</sup> The end result of this concept, the “lowest common denominator” principle, is that aliens as a whole are afforded greater rights, at least temporarily, than they would have been granted if the statutory provision had been struck down on constitutional grounds.<sup>17</sup>

Although it is controversial and worthy of (extensive) discussion, focusing solely on the avoidance canon inaccurately suggests that the canons used in immigration cases protect only constitutional interests. To the contrary, courts often apply canons in immigration cases in order to promote non-constitutional interests. One notable example is the immigration rule of lenity, which directs courts to interpret ambiguous statutory provisions in favor of the alien regardless of whether the case involves constitutional issues.<sup>18</sup> Another canon applied without regard to constitutional issues is the presumption against retroactivity, which has been particularly relevant in immigration law in recent years due to Congress’s penchant for enacting statutes with possible retroactive effects. This canon directs courts to give a statute only prospective effect unless its text clearly provides that it should have retroactive effect.<sup>19</sup> Other canons, such as the canon requiring that federal statutes be construed, where reasonably possible, not to conflict with international law, are also applied regardless of the presence of constitutional issues.<sup>20</sup>

Over the last couple of decades, possibly due in part to the increasing importance of statutes as a source of law, there has been a renewed interest generally among scholars and courts in statutory interpretation theory and canons of statutory construction.<sup>21</sup> Despite this increased interest and the liberal use of canons by courts in immigration cases, statutory interpretation issues have not captured the attention of immigration scholars in the same way as the plenary power doctrine.<sup>22</sup> Perhaps the most notable exception to this disinter-

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16. See *infra* notes 187-90 and accompanying text.

17. See *infra* Part IV.A.

18. See *infra* Part I.A.1 (describing the immigration rule of lenity).

19. See *infra* notes 48-52 and accompanying text (describing the presumption against retroactivity).

20. See *infra* notes 53-54 and accompanying text.

21. See, e.g., Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 256 (1992) (stating that “the Justices are frequently debating statutory interpretation methodologies at a level of theory that far transcends the details of the case at hand, and that implicates the very question of the Court’s interpretive role in a democracy”); Edward J. Imwinkelried, *A More Modest Proposal than A Common Law for the Age of Statutes: Greater Reliance in Statutory Interpretation on the Concept of Interpretative Intention*, 68 ALB. L. REV. 949 (2005) (discussing the “statutorification” of American law).

22. The number of articles discussing the plenary power doctrine is staggering. The following are some well-known examples. See, e.g., Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1386-96 (1953); Louis Henkin, *The Constitution and United States Sovereignty: A*

est amongst immigration scholars was Professor Motomura's influential article in which he examined the relationship between the plenary power doctrine and how courts have interpreted immigration statutes.<sup>23</sup> He argued that, in the past, courts applied the avoidance canon improperly by using two sets of inconsistent constitutional rules in immigration cases.<sup>24</sup> One set of rules—usually mainstream constitutional rules favorable to aliens—was considered when courts interpreted statutes to avoid constitutional issues. When courts were subsequently forced to decide constitutional issues directly, however, they used a different set of rules, usually based on the plenary power doctrine, that were unfavorable to aliens. Motomura argued that the second set of rules revealed the first set to be “phantom constitutional norms.”<sup>25</sup> The end result in his view was that courts used the avoidance canon to engage in questionable statutory interpretations that indirectly undermined the plenary power doctrine.<sup>26</sup>

Motomura's solution to the problem he described was for courts to abandon the plenary power doctrine and apply mainstream constitutional rules in all immigration cases.<sup>27</sup> He believed that the Court's phantom norm decisions were part of a transitional phase and argued that “[a]s judges become more willing and able to address constitutional issues directly, rather than through [statutory decisions], they should find that they do not need to grope for these awkward and unpredictable [statutory interpretations].”<sup>28</sup> Thus, in Motomura's view, once the transition was complete, courts would no longer have the same need to apply the avoidance canon or the immigration rule of lenity, which he viewed as a canon that was similarly designed to express constitutional values.<sup>29</sup>

This Article attempts to fill a void in immigration scholarship by reevaluating and defending the legitimacy and role of canons in immigration law. In part, this Article responds to longstanding notions that canons add unpredictability to the law and should serve primar-

*Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984).

23. See Motomura, *supra* note 4.

24. See *id.* at 549 (stating that “[t]he constitutional norms that courts use when they directly decide constitutional issues in immigration cases are not the same constitutional norms that inform interpretation of immigration statutes”).

25. See *id.* at 564-75 (describing and illustrating the phantom norms theory).

26. See *id.* at 549.

27. See *id.* at 612.

28. *Id.* at 602.

29. See *id.* at 600-01. I do not mean to suggest that Professor Motomura disagreed in his article with the avoidance canon in general. Indeed, he stated that “[t]here is nothing wrong with borrowing constitutional norms to interpret statutes.” *Id.* at 564. He did, however, urge courts to decide constitutional issues directly rather than apply the avoidance canon and decide cases on statutory grounds. See *id.* at 612-13.



ily as short-term solutions to the problems presented by the plenary power doctrine. This Article also addresses important new issues that significantly affect how canons should be viewed, such as the weakening of the plenary power doctrine and the lowest common denominator principle. While this Article defends the role of canons in immigration law, it should not be interpreted as implying that the plenary power doctrine should not be abandoned or that the constitutional rights of aliens are unimportant. The elimination of the plenary power doctrine would be a welcome development in immigration law. But the role of the plenary power doctrine has been thoroughly examined. The role of canons has not. Considering the importance of canons in immigration law, it is time for this oversight to be corrected.

This Article has five parts. Part I describes why the role of canons in immigration law is a permanent one that is not tied to the existence of the plenary power doctrine. Part II explains that the problem of judicial overutilization of canons should not be confused with the legitimate role of canons in requiring courts to sometimes adopt second-best interpretations of statutes. This Part argues that these second-best interpretations, although sometimes rather aggressive, do not add unpredictability to the law. Part III explains that, due to the decline of the plenary power doctrine, courts now have more opportunities to legitimately apply the avoidance canon without relying on “phantom constitutional norms.”

Part IV explains how the new lowest common denominator principle has transformed the avoidance canon into a device that can give aliens as a whole greater rights, at least temporarily, than a decision that rests on constitutional grounds. This Part argues that while this new development should caution courts to carefully apply the avoidance canon, its influence should not be exaggerated. In many immigration cases there is a second canon, in addition to the avoidance canon, that would require a uniform interpretation even without the assistance of the lowest common denominator principle. Finally, Part V defends the canons that courts have chosen to apply in immigration cases. An immigration rule of severity, for example, might more accurately reflect congressional intent than the immigration rule of lenity. Nevertheless, the Court’s choice to apply the immigration rule of lenity, as well as other canons, rests on sound public policy, which courts have historically had the discretion to promote.

## II. THE PERMANENT STATUS OF CANONS OF STATUTORY CONSTRUCTION IN IMMIGRATION LAW

Canons of statutory construction are important in immigration law. Judicial interpretations of immigration statutes often favor aliens, and canons have played an important role in these interpreta-

tions.<sup>30</sup> Despite the fact that canons typically instruct courts to interpret immigration statutes in favor of aliens, in theory the canons should have a somewhat limited role in the interpretation of statutes. Even the strongest canon is only applicable when a statute is less than “clear,” however that term is defined.<sup>31</sup> Because they recognize that it is Congress that has the legislative power, courts generally purport to act as the “faithful agents” of Congress and interpret statutes in a way that is consistent with congressional intent.<sup>32</sup> Thus, if a court believes that the meaning of a statute is clear—that Congress has adequately expressed its intent—the court will interpret the statute accordingly.

In reality, canons often play a significant role in the interpretation of statutes. While courts may consider themselves bound by congressional intent, identifying congressional intent regarding the meaning of a specific provision is not always easy or even possible.<sup>33</sup>

30. Because substantive canons almost always direct courts to interpret statutes in favor of aliens, Karl Llewellyn’s famous critique of canons where he argued that for every canon pointing in one direction (“thrusts”) there is another canon pointing in the opposite direction (“parries”) is not relevant to immigration law, at least as regards substantive canons. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950). One frequent complication to canons resolving statutory uncertainty in favor of the alien, however, is the *Chevron* doctrine, derived from the Supreme Court’s landmark decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which requires that courts defer to reasonable agency interpretations of ambiguous statutes for which the agency has authority to administer. In many immigration cases courts have to deal with both the *Chevron* doctrine, which favors the government if applicable, and canons, which typically favor the alien. In an earlier article, I discussed the conflict between the *Chevron* doctrine and the immigration rule of lenity. See Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515 (2003).

31. The trigger for any substantive canon is something less than statutory clarity, but canons are not all triggered by the same level of uncertainty. Clear statement canons, for example, are triggered by less statutory ambiguity than are tie-breaker canons. See Slocum, *supra* note 30, at 544-46. While this distinction is valid theoretically, courts have not been precise about what constitutes ambiguity. See Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 396 (2005) (wondering “[h]ow big a gap must exist between the leading interpretation and the next most likely alternative for the Court to say that the statute permits only one construction”); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520 (noting the uncertainty in determining how much ambiguity is necessary before a statute is deemed to be ambiguous).

32. See John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419 (2005). I refer to intent in a broad, generic sense. All statutory interpretation philosophies seek in some sense, at least in part, to interpret statutes consistently with congressional intent. Even textualists seek to enact congressional intent, although the textualists disagree with intent-based philosophies about how congressional intent should be defined and how statutory interpretation should seek to enact it. See *id.* at 422-431; Nelson, *supra* note 31, at 353 (“Textualists and intentionalists alike give every indication of caring *both* about the meaning intended by the enacting legislature *and* about the need for readers to have fair notice of that meaning, as well as about some additional policy-oriented goals.”); Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427 (2005).

33. See Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 828 (1991) (stating that “attempts to link

The statutes enacted by Congress are often vague or ambiguous because Congress is unwilling and, more importantly, unable to draft statutes that clearly address every important issue that may arise regarding their application.<sup>34</sup> Thus, it is inevitable that the judiciary will rely on canons of some type to help interpret statutes.<sup>35</sup>

Most immigration scholars have failed to appreciate the important role of canons in helping to resolve inherent statutory uncertainty in a way that is beneficial to aliens. In addition, the academy's fascination with the plenary power doctrine has caused its view of canons to be distorted in two important and related ways. One distortion is the assumption that canons are primarily intended to compensate for the lack of constitutional rights enjoyed by aliens and that canons must therefore serve only to protect constitutional interests.<sup>36</sup> Professor Motomura, for example, criticizes the immigration rule of lenity as "a very awkward way to express a phantom constitutional norm" and asserts that it is an example of "overbroad generosity."<sup>37</sup> The other distortion is the theory advanced by Motomura that if the Court were to end the plenary power doctrine, there would no longer be the same

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the interpretation of statutes to the commands of an identifiable legislature are doomed"); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 603 (1995) (taking issue with the idea that "statutory meaning is necessarily created *both* by interpretation and by legislation").

34. See ESKRIDGE ET AL., *supra* note 8, at 730-31 (stating that Congress deliberately passes vague and ambiguous statutes which delegates to courts the power to "fill in all the gaps" by way of a "common law" approach); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1241 (2002) ("There is simply too much law today, governing too many subjects, for legislators to address every important policy question that might arise under their statutes.").

35. See Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 640 (1999) ("It is hard to find anyone who believes that canons of construction have no legitimate place in interpretation . . ."). The judiciary could, of course, purport to follow a rule of selecting the most persuasive statutory interpretation (without regard to canons) in all cases. Such a rule would not be helpful, however, in situations where the competing interpretations are roughly equal. Moreover, there is no evidence that, as a general matter, Congress would prefer that courts select the (usually slightly) more persuasive interpretation when doing so would be inconsistent with other important and long-standing values. See *infra* Part V (discussing the relevance of congressional intent to the selection of canons).

36. See, e.g., DAVID A. MARTIN, MAJOR ISSUES IN IMMIGRATION LAW 9 (1987), available at 1987 WL 123658 (stating that the Supreme Court fashioned "a more interventionist rule of construction" "[a]lmost as if to compensate for this constitutional deference"). I agree that part of the Court's motivation in creating and applying canons may be a desire to counteract the effects of the plenary power doctrine. I do contest, however, the idea that these canons are dependent on a lack of constitutional rights for aliens.

37. See Motomura, *supra* note 4, at 600-01. See also *id.* at 573 (stating that in *Fong Haw Tan* (the case in which the Court created the immigration rule of lenity) and other cases "the Court allowed phantom constitutional norms to guide statutory interpretation by reading statutes in favor of aliens").

need to apply canons such as the avoidance canon and the immigration rule of lenity.<sup>38</sup>

This Part argues that canons have a permanent role in immigration law that is not dependent on, or in many cases even related to, the existence of the plenary power doctrine. Section A illustrates how courts frequently apply canons in immigration cases even when no constitutional issues are raised. It also refutes Motomura's argument that the immigration rule of lenity is a canon that is designed to vindicate constitutional rights. Section B describes briefly how the avoidance canon has a permanent role in the interpretation of immigration statutes that would likely increase, rather than decrease, if the plenary power doctrine were ended.

### A. *Canons that Promote Non-Constitutional Interests*

#### 1. *The Immigration Rule of Lenity*

One of the most significant of the immigration canons that is applied regardless of whether constitutional issues are raised is the immigration rule of lenity, described by the Court as "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."<sup>39</sup> Professor Motomura is correct in observing that the immigration rule of lenity is an "awkward way to express a phantom constitutional norm" and that it represents "overbroad generosity," in the sense that it applies even when the government's interpretation of a statute does not raise any constitutional concerns.<sup>40</sup> The problem with this observation is that the immigration rule of lenity should not be viewed in such a narrow fashion.

The immigration rule of lenity directs courts to interpret ambiguous statutes in favor of aliens regardless of whether constitutional rights are at stake.<sup>41</sup> Designed by the Court to protect a vulnerable

38. See *id.* at 602 (stating that courts will "not need to grope for these awkward and unpredictable subconstitutional solutions"); *id.* at 603 ("With such changes in constitutional immigration law giving judges new freedom to address constitutional claims directly, it seems less objectionable when a court breaks the [immigration rule of lenity], which is the least precise subconstitutional solution, by refusing to read deportation statutes in favor of aliens . . .").

39. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (discussing, but not applying, the doctrine). The canon has not been completely ignored by immigration scholars. See, e.g., LEGOMSKY, *supra* note 7, at 156 (calling the immigration rule of lenity "[t]he most important rule of statutory interpretation peculiar to immigration").

40. See Motomura, *supra* note 4, at 600-01.

41. The canon has typically been described as being applicable to "deportation" provisions, but it has been applied in a broader manner, including in cases involving the interpretation of provisions applicable only to excludable aliens. See Slocum, *supra* note 30, at 523. See also Mamouzian v. Ashcroft, 390 F.3d 1129, 1136 (9th Cir. 2004) (stating that "the briefs of aliens seeking refugee status must be reviewed with lenity and any ambiguities must be resolved in their favor" in the same way that statutes are to be construed in favor of aliens).

minority, the canon is thus more similar to a canon such as the one directing courts to interpret statutes in favor of Native Americans than to the avoidance canon.<sup>42</sup> The Supreme Court explicitly created the immigration rule of lenity in 1948 in a case that did not raise constitutional concerns, *Fong Haw Tan v. Phelan*,<sup>43</sup> on the theory that “because deportation is a drastic measure and at times the equivalent of banishment or exile,” deportation provisions should be strictly construed in favor of the alien.<sup>44</sup> Courts have continued to apply the canon without regard to the presence of constitutional issues.<sup>45</sup> For example, in *INS v. Cardoza-Fonseca*,<sup>46</sup> the Court cited the canon when interpreting the “well-founded fear” standard for asylum, and in *INS v. Errico*,<sup>47</sup> the Court cited the canon when interpreting a statute that provided relief from deportation.

## 2. Other Canons

Other canons in addition to the immigration rule of lenity are often applied by courts to interpret statutes in favor of aliens in cases that do not involve any constitutional issues. Due to the frequency with which Congress enacts immigration legislation with possible retroactive effects, the presumption against retroactivity has often been considered by courts in immigration cases. Congressional enactments that operate retroactively do not violate the Constitution.<sup>48</sup>

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42. See Slocum, *supra* note 30, at 557-58; see also Philip P. Frickey, (*Native*) *American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 439-40, 445-46 (2005) (describing how Chief Justice Marshall created “powerful” canons in order to protect tribes even though Congress had plenary power over Indian affairs as a constitutional matter).

43. 333 U.S. 6 (1948).

44. *Id.* at 10. In construing an ambiguous statute which provided for the deportation of aliens convicted of certain crimes in favor of the alien, the Court stated that “since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.” *Id.*

45. See Slocum, *supra* note 30, at 521 n.23 (listing cases). The Court does not always remember the canon, however. See *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (explaining that if a statute has criminal applications, “the rule of lenity applies” to the Court’s interpretation of the statute even in immigration cases “[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context”).

46. 480 U.S. 421, 449 (1987).

47. 385 U.S. 214, 225 (1966). See also *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (citing “the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien” when interpreting a provision that repealed discretionary relief from deportation) (citation omitted); *Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422, 2429-30 (2006) (quoting the language in *St. Cyr* that refers to the immigration rule of lenity in describing the alien’s argument that the canon should be applied).

48. See *St. Cyr*, 533 U.S. at 325 n.55 (“[O]ur decision today is fully consistent with a recognition of Congress’ power to act retrospectively. We simply assert, as we have consistently done in the past, that in legislating retroactively, Congress must make its intention plain.”). But see Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97 (1998) (arguing that courts could strike down retroactive immigration provisions as a violation of due process).

The presumption against retroactivity is a demanding canon to overcome, however, and requires language that is “so clear that it could sustain only one interpretation” before a statute will be given retroactive effect.<sup>49</sup> In *INS v. St. Cyr*, for example, the Court held that provisions in the Antiterrorism and Effective Death Penalty Act of 1996<sup>50</sup> (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996<sup>51</sup> (IIRIRA) that repealed discretionary relief from deportation did not apply retroactively because the provisions lacked “a clearly expressed statement of congressional intent” that they be applied retroactively.<sup>52</sup>

Another canon particularly relevant to immigration law is the longstanding *Charming Betsy* canon, derived from the Court’s decision in *Murray v. Schooner Charming Betsy*.<sup>53</sup> The *Charming Betsy* canon requires that federal statutes be construed, where reasonably possible, not to conflict with international law.<sup>54</sup> In addition, canons such as the presumption that Congress intends judicial review of administrative action and the canon requiring a clear congressional statement before habeas corpus jurisdiction will be barred are often applied in cases that raise constitutional issues.<sup>55</sup> These canons are not limited to situations where constitutional issues are raised, however, and have also been applied in cases with no constitutional issues.<sup>56</sup>

49. *St. Cyr*, 533 U.S. at 317. Although the statute must be “clear,” the Court in a recent immigration case stated that the canon does not require that the statute contain “an express provision about temporal reach.” *Fernandez-Vargas*, 126 S. Ct. at 2430.

50. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

51. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

52. *St. Cyr*, 533 U.S. at 314. See also *Fernandez-Vargas*, 126 S. Ct. at 2422 (considering the presumption against retroactivity to be part of its analysis of the temporal scope of an IIRIRA amendment to the INA enlarging the provision allowing for reinstatement of prior removal orders but ultimately holding that Congress was sufficiently clear in expressing its intent that the statute be applied to a reentry into the United States that occurred before the effective date of IIRIRA).

53. 6 U.S. (2 Cranch) 64 (1804).

54. See, e.g., *Ma v. Reno*, 208 F.3d 815, 830 n.28 (9th Cir. 2000) (construing statute in accordance with international law and stating that the court would not presume that Congress intended to override international law “when the statute can reasonably be reconciled with the law of nations”). See also Natsu Taylor Saito, *Asserting Plenary Power over the “Other”: Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL’Y REV. 427 (2002) (arguing that immigration law should incorporate international law). But see *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 125 (2d Cir. 2005) (questioning whether the canon “can influence the construction and application of even ambiguous statutes”).

55. See, e.g., *St. Cyr*, 533 U.S. at 298-300 (citing both canons in a case that raised a constitutional issue).

56. See *infra* notes 201-05, 215 and accompanying text (describing a situation where the canon requiring a clear congressional statement before habeas jurisdiction will be barred was applied where no constitutional issues were raised); *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 63-64 (1993) (citing the presumption that Congress intends judicial review of administrative action in preserving judicial review of a challenge to a legalization program).

*B. The Canon of Constitutional Avoidance and the End of the Plenary Power Doctrine*

As described above, the Court often applies canons in immigration cases without regard to whether any constitutional issues are raised. The avoidance canon is different in the sense that its (proper) application is tied to the extent to which the plenary power doctrine allows constitutional challenges to be considered in immigration cases. The canon is implicated if the government's interpretation of a statute "would raise serious constitutional problems" and "an alternative interpretation of the statute is 'fairly possible.'"<sup>57</sup> Currently, in several areas of immigration law, the plenary power doctrine does not prevent courts from considering constitutional challenges to immigration provisions.<sup>58</sup> If the plenary power doctrine foreclosed constitutional challenges, however, there would be little legitimate role for the avoidance canon.

Although the legitimate use of the avoidance canon in immigration cases depends on the scope of the plenary power doctrine, the canon itself is not a product of the plenary power doctrine. It is a canon of general application that is not specific to immigration law. The Court considers the validity of the canon to be beyond debate and believes that applying it gives effect to congressional intent because Congress would prefer the statutory interpretation that does not raise constitutional doubts.<sup>59</sup> Ending the plenary power doctrine would therefore not render the avoidance canon unnecessary. Rather, it would expand, perhaps greatly, the potential for legitimate application of the avoidance canon because there would be more constitutional issues to avoid.<sup>60</sup> Thus, as long as courts are willing to recognize at least some constitutional constraints on Congress's power over immigration, the avoidance canon should be viewed as a permanent member of the collection of substantive canons that courts use to interpret immigration statutes.

Furthermore, those advocating for greater constitutional rights for aliens should support the permanent role of the avoidance canon rather than viewing the usefulness of the canon as being tied to the

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57. *St. Cyr.*, 533 U.S. at 299-300.

58. *See infra* Part III (describing the current scope of the plenary power doctrine and outlining areas where successful constitutional challenges can be made).

59. *See Clark v. Martinez*, 543 U.S. 371, 382 (2005). *See also infra* notes 241-49 and accompanying text (discussing whether the canon is consistent with congressional intent).

60. The avoidance canon is only applicable if a statute lacks clarity. If the constitutional rules are clear, however unlikely this may be, and Congress drafts legislation with the rules in mind, such a potential increase in the use of the avoidance canon could be diminished. *See infra* Part V.B (describing the theory that Congress legislates in light of legal constraints).

existence of the plenary power doctrine.<sup>61</sup> Even if new constitutional rights were created, constitutional rights are systematically “under-enforced” by the judiciary.<sup>62</sup> This is especially true in immigration law.<sup>63</sup> The avoidance canon helps offset the underenforcement of constitutional rights by allowing courts to vindicate constitutional principles through the narrowing of questionable but not necessarily invalid statutes.<sup>64</sup> Thus, even if aliens enjoyed greater constitutional rights, the avoidance canon would still be needed in order to protect those rights.

### III. CANONS PRODUCE BOTH SECOND-BEST INTERPRETATIONS AND PREDICTABILITY IN IMMIGRATION LAW

Canons have a permanent place in immigration law, but any defense of canons must concede that they have not always been applied properly. Often the criticism is that certain canons have been underutilized by courts in immigration cases. Both the presumption against retroactivity and the *Charming Betsy* canon have arguably not been applied in cases where application was warranted.<sup>65</sup> Other canons are likely similarly underutilized in immigration cases. Compared to clear statement rules such as the canon requiring a clear congressional statement before habeas corpus jurisdiction will be barred, underutilization is probably particularly prevalent with regard to weaker, tie-breaker canons, such as the immigration rule of lenity, that are only considered when a court finds a statute to be ambiguous at the end of its search for statutory meaning.<sup>66</sup> In cases

61. See *infra* notes 219-28 and accompanying text for further discussion of the desirability gains for aliens coming through statutory rather than constitutional decisions.

62. See Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2113 (2005) (noting that courts underenforce constitutional rights for good reasons, including “courts’ limited factfinding capacities, their weak democratic pedigree, their limited legitimacy, and their likely ineffectiveness as frequent instigators of social reform”).

63. One theory of the plenary power doctrine is that aliens have constitutional rights, but courts do not enforce them. See Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373, 377 (2004). Even if the plenary power doctrine were ended, it is uncertain that courts would vigorously recognize and enforce constitutional rights in immigration cases. See *infra* note 165.

64. See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 468-69 (1987). This function of the avoidance canon is especially powerful considering that the canon often requires courts to adopt second-best interpretations. See *infra* Part II.A.

65. See, e.g., Michael G. Heyman, *Immigration Law in the Supreme Court: The Flagging Spirit of the Law*, 28 J. LEGIS. 113, 134-37 (2002) (arguing that the Court has ignored the *Charming Betsy* canon in immigration cases); Vashti D. Van Wyke, Comment, *Retroactivity and Immigrant Crimes Since St. Cyr: Emerging Signs of Judicial Restraint*, 154 U. PA. L. REV. 741 (2006) (arguing that courts have neglected to apply the presumption against retroactivity in cases where it has been applicable).

66. See WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 341 (2000). Some canons are undoubtedly also underutilized in the sense that courts may resolve statutory uncertainty in accordance with a canon applicable under the circumstances of the case but simply not cite the canon as authority for the interpreta-



of underutilization, the solution is simple: courts should apply the canons more often. Indeed, courts should apply canons in every case where application is warranted.<sup>67</sup>

In contrast to the canons that are underutilized, the avoidance canon has been accused, most prominently by Professor Motomura, of being overutilized by courts. Motomura is correct that the canon is overutilized in immigration cases when courts apply it in order to avoid constitutional issues that are really based on phantom constitutional norms and are thus not “serious.”<sup>68</sup> In his analysis, however, Motomura goes a step further and argues that sometimes a statutory decision “can incorporate a phantom constitutional norm only by going beyond reasonable readings of a [statutory] text. Phantom-norm decisionmaking may help some aliens when a case evokes sympathy, but we cannot predict those situations.”<sup>69</sup>

Motomura’s analysis mistakenly conflates two separate aspects of the avoidance canon. The application of the canon in any given case raises two distinct issues. The issue of whether courts use the avoidance canon to evade serious (as opposed to phantom) constitutional issues must be analyzed separately from the second issue of whether courts use the canon as a tool for producing legitimate, plausible statutory interpretations. The conflation of these two issues exaggerates the overutilization of the avoidance canon and creates a false impression that the canon (and likely canons in general) inherently creates unpredictability in immigration law.<sup>70</sup>

This Part explains how the application of the avoidance canon often produces second-best interpretations. These second-best interpretations are part of the legitimate functioning of the avoidance canon and, while aggressive, cannot be viewed as examples of overutilization. This Part then argues that these interpretations, and those produced by canons generally, do not add unpredictability to immigration law.

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tion. Although such decisions may seem benign, they contribute to the perception that canons are arbitrarily applied by courts. *Cf.* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 198-99 (1985) (stating that the criminal rule of lenity “survives more as a makeweight for results that seem right on other grounds than as a consistent policy of statutory interpretation”).

67. *Cf. infra* note 107 (explaining that whether a canon is applicable requires a judgment call by the court). Eliminating the underutilization of canons would give greater validity to the theory that canons are legitimate in part because Congress has the canons in mind when statutes are drafted. *See infra* notes 97-105 and Part V.B (explaining the background rules theory of canons).

68. *See supra* notes 23-26 and accompanying text (explaining the phantom norms theory).

69. *See Motomura, supra* note 4, at 601.

70. Undoubtedly, there are other ways in which canons are overutilized. *See, e.g., infra* note 280. This Article, however, focuses primarily on the ones that are most relevant to immigration law.

A. *Jean v. Nelson and the Inherent Nature of Second-Best Interpretations*

Professor Motomura points to the Court's decision in *Jean v. Nelson*<sup>71</sup> as an example of a case where the Court went beyond a reasonable reading of the statute in order to avoid a constitutional issue that was in his view based on a phantom constitutional norm.<sup>72</sup> In *Jean*, the Court avoided the issue of whether INS parole decisions allegedly based on race and national origin violated the Constitution by holding that the relevant statutes and regulations provided for nondiscriminatory parole consideration.<sup>73</sup> Motomura believes that the *Jean* decision was based on a phantom constitutional norm because "the Court has never held an immigration classification unconstitutional on the ground that it discriminates on the basis of race or national origin."<sup>74</sup>

While Professor Motomura's criticism of *Jean* as a decision relying on a phantom constitutional norm may be well-deserved, his criticism of *Jean* as a statutory interpretation decision that incorrectly went beyond any reasonable reading of the statute is not.<sup>75</sup> The Court has recently stated that the avoidance canon's function is to "choos[e] among plausible meanings of an ambiguous statute," as opposed to a clear statement rule that "implies a special substantive limit on the application of an otherwise unambiguous mandate."<sup>76</sup> Nevertheless, applying the avoidance canon often requires a court to adopt the second-best interpretation—one that is, in the Court's words, "fairly

71. 472 U.S. 846 (1985).

72. See Motomura, *supra* note 4, at 604.

73. *Jean*, 472 U.S. at 848.

74. Motomura, *supra* note 4, at 593.

75. Part III.B questions whether *Jean* would still be a phantom norms decision if it were decided under the current version of the plenary power doctrine. It is not clear, however, that the decision in *Jean* was driven by a conclusion that the constitutional issues were serious. The Court did not state that its interpretations were made in order to avoid serious constitutional issues raised by an interpretation of the statutes and regulations that would allow for discriminatory parole decisions. Rather, the Court held that it would not consider any constitutional issues because it was obliged to resolve the case on non-constitutional grounds if possible. Courts decide cases on constitutional grounds only as a "last resort" when there are no other grounds to decide the case. See Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1574-75 (2000). Thus, a court that decides a case on statutory grounds instead of constitutional grounds is not necessarily implying that a broad interpretation of the statute in question would raise serious constitutional concerns. In contrast, a court applying the avoidance canon is necessarily holding that a broad interpretation of the statute would raise serious constitutional issues. See *id.* at 1575-76.

76. *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 141 (2005). See also *Clark v. Martinez*, 543 U.S. 371, 385 (2005) ("The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction."). It has been described as a clear statement canon by some, however. See *ESKRIDGE ET AL.*, *supra* note 8, at 599.

possible” but not the best interpretation.<sup>77</sup> The canon would not be particularly useful if it compelled a court to adopt a statutory interpretation that would avoid a serious constitutional issue only if that interpretation was the most persuasive one available.<sup>78</sup> Likewise, the canon would not be particularly useful if a court required that the two competing interpretations be equally plausible—a 50-50 toss up—before it would apply the canon.<sup>79</sup> In such a (relatively rare) case, the court could just apply a tie-breaker canon like the immigration rule of lenity.<sup>80</sup>

With the understanding that the avoidance canon sometimes requires a court to accept a second-best interpretation, the *Jean* decision can be seen as an exercise in legitimate, albeit aggressive, interpretation that is not dissimilar to other decisions by the Court involving the avoidance canon.<sup>81</sup> The parole statute at issue in *Jean* gave the Attorney General discretionary authority to parole aliens into the country for “urgent humanitarian reasons or significant public benefit” reasons, with no other explicit limitations.<sup>82</sup> As stated above, the Court believes that the avoidance canon resolves statutory ambiguity, but does not imply “limitations on otherwise unambiguous text.”<sup>83</sup> Applications of the avoidance canon and the consequent adoption of second-best interpretations, however, sometimes involve the

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77. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001); see also William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 840 (2001) (describing the Court’s long-held view that, when applying the avoidance canon, “a court should prefer a permissible, even if not an optimal, reading of the statute to which it can give effect to a pure statutory reading that it must strike down”).

78. Such an application would render the canon superfluous because the Court has a separate doctrine that requires courts to avoid deciding constitutional issues if a case can be decided on non-constitutional grounds. See *supra* note 75. See also *Almendarez-Torres v. United States*, 523 U.S. 224, 270 (1998) (Scalia, J., dissenting).

79. It is the rare case when the two competing interpretations are equally plausible. Far more often, even in cases where courts state that a statutory provision is ambiguous, one interpretation is at least slightly more persuasive than the next most persuasive interpretation (51 to 49, for example). Courts have not resolved the issue of how persuasive the second-most persuasive interpretation must be in order to label a statutory provision “ambiguous,” see *supra* note 31, but surely a statute can be considered ambiguous without the competing interpretations being equally plausible.

80. See *supra* notes 39-47 and accompanying text (discussing the immigration rule of lenity).

81. Apart from the issue of whether the court believed that it was avoiding a serious constitutional issue, see *supra* note 75, the *Jean* decision was not strictly an exercise in statutory interpretation. INS regulations provided a list of neutral criteria for the granting of parole, which the Court and the INS interpreted as prohibiting the consideration of race and national origin in the parole decisions. *Jean v. Nelson*, 472 U.S. 846, 850-51 (1985). The Court relied, at least in part, on the INS regulations in holding that racial discrimination was prohibited. See *id.* at 855. The government also argued that it did not have statutory or regulatory authority to consider race or national origin, which undoubtedly made the interpretations much easier for the Court.

82. 8 U.S.C. § 1182(d)(5)(A).

83. *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 140 (2005).

Court creating exceptions to broad statutes or drafting language to insert into the statute at issue.

One recent example of this came in *Zadvydas v. Davis*,<sup>84</sup> where the Court utilized the avoidance canon in interpreting 8 U.S.C. § 1231(a)(6), which states only that certain aliens “may be detained beyond the [90-day] removal period.”<sup>85</sup> Because the government’s interpretation of the statute raised a serious constitutional issue by allowing the government to indefinitely detain aliens who, under immigration law, are considered to have entered the country,<sup>86</sup> the Court invoked the avoidance canon.<sup>87</sup> There was no explicit limitation in the statute regarding the length of permitted detention. Nevertheless, the Court, required by the avoidance canon to adopt a “fairly possible” interpretation of the statute which would avoid the constitutional questions, “read an implicit limitation into the statute.”<sup>88</sup> The Court, “for the sake of uniform administration in the federal courts,” decided that these aliens can only be detained for a six-month period unless there is a “significant likelihood of removal in the reasonably foreseeable future.”<sup>89</sup>

As the *Jean* and *Zadvydas* decisions illustrate, the Court will create exceptions to broad statutory language in order to avoid serious constitutional questions.<sup>90</sup> These exceptions are often second-best interpretations of the statutes. Indeed, the Court in *Zadvydas* seemed to recognize that its interpretation was not necessarily the most persuasive interpretation available.<sup>91</sup> The Court placed its second-best

84. 533 U.S. 678 (2001).

85. 8 U.S.C. § 1231(a)(6).

86. These aliens are distinct from aliens who are physically within the United States but are considered under the “entry fiction” to have been stopped at the border. See *infra* notes 175-80 and accompanying text (describing the difference between the two classes).

87. *Zadvydas*, 533 U.S. at 689.

88. *Id.* The Court did make a perfunctory pass at claiming that the statute was ambiguous. See *id.* at 697 (“But while ‘may’ suggests discretion, it does not necessarily suggest unlimited discretion. In that respect the word ‘may’ is ambiguous.”). Under such a mode of interpretation, the parole statute at issue in *Jean*, which stated that the Attorney General “may . . . in his discretion parole . . . only on a case-by-case basis for urgent humanitarian reasons or significant public benefit,” is at least as ambiguous as the statute in *Zadvydas*. See 8 U.S.C. § 1182(d)(5)(A). By stating the criteria that the Attorney General should consider in determining whether to grant parole (humanitarian or public benefit reasons), the statute could reasonably be interpreted as precluding the Attorney General from denying parole in cases where humanitarian or public benefit reasons were present, but the Attorney General instead denied parole solely for reasons that were clearly contrary to the public benefit, such as racial discrimination. Such an interpretation is at least as plausible as the implied six-month limitation on the length of detention that the Court imposed in *Zadvydas*.

89. *Zadvydas*, 533 U.S. at 701.

90. Cf. *Clark v. Martinez*, 543 U.S. 371, 400 (2005) (Thomas, J., dissenting) (“A disturbing number of this Court’s cases have applied the canon of constitutional doubt to statutes that were on their face clear.”).

91. See *Zadvydas*, 533 U.S. at 689 (stating that “[t]he Government argues that the statute means what it literally says”); *Martinez*, 543 U.S. at 378 (“As the Court in *Zadvydas* recognized, the statute can be construed ‘literally’ to authorize indefinite detention . . .”).

interpretation in the context of other avoidance cases, however, asserting that it has in the past “read significant limitations into other immigration statutes in order to avoid their constitutional invalidation.”<sup>92</sup> The Court thus made clear that second-best statutory interpretations, even aggressive ones, are part of the legitimate application of the avoidance canon and thus should not be seen as overutilization of the canon.<sup>93</sup>

### B. *The Predictability of Canons*

The discussion above focused on the inherent nature of the avoidance canon as often requiring courts to adopt second-best interpretations. Second-best interpretations are not, however, exclusive to the avoidance canon. Indeed, they should be viewed as being a part of any canon stronger than a tie-breaker canon, including clear statement canons such as the canon requiring a clear congressional statement before habeas corpus jurisdiction will be barred.<sup>94</sup> For example, in the recent immigration case *Demore v. Kim*,<sup>95</sup> the Court held that it had jurisdiction to consider Kim’s habeas corpus challenge to his detention pending his removal hearing. In the Court’s view, the relevant provision, 8 U.S.C. § 1226(e), did not satisfy the “superclear statement, ‘magic words’ requirement for the congressional expression of an intent to preclude habeas review.”<sup>96</sup> Obviously, by requiring the government to meet such a difficult burden of

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92. *Zadvydas*, 533 U.S. at 689. The Court cited to its decision in *United States v. Witkovich*, 353 U.S. 194 (1957), where the Court interpreted a provision of the INA allowing the Attorney General to require aliens under supervision with a final order of deportation to give the Attorney General any information “as the Attorney General may deem fit and proper, . . . whether or not” the information was related to the supervision. *Id.* at 195. In order to avoid a serious constitutional issue, the Court limited the broad statutory language to only allow the Attorney General authority to require information “reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens whose deportation is overdue.” *Id.* at 202. The Court reasoned that “[a] restrictive meaning for what appear to be plain [statutory] words may be indicated by . . . the rule of constitutional adjudication . . . that such a restrictive meaning must be given if a broader meaning would generate constitutional doubts.” *Id.* at 199. Lower courts have made similar interpretations. See, e.g., *Shokeh v. Thompson*, 369 F.3d 865, 871-72 (5th Cir. 2004) (interpreting a statute to include a reasonableness component for the amount of bond to release an alien from detention); *Ly v. Hansen*, 351 F.3d 263, 270 (6th Cir. 2003) (interpreting 8 U.S.C. § 1226(c) to “include an implicit requirement that removal proceedings be concluded within a reasonable time”).

93. As stated above, these aggressive interpretations are independent of whether the constitutional issue being avoided is a “phantom” one. For example, the *Zadvydas* decision, which adopted a second-best statutory interpretation, was not based on a “phantom” norm. See *infra* notes 144-54 and accompanying text.

94. See *supra* note 31 (describing how canons are not all triggered by the same level of uncertainty).

95. 538 U.S. 510 (2003).

96. *Id.* at 517 (quoting *INS v. St. Cyr*, 533 U.S. 289, 327 (2001) (Scalia, J., dissenting)).

proof, the Court was willing to accept a second-best interpretation of the statute.

These second-best interpretations do not necessarily make the statutory decisions that apply canons unpredictable. If applied correctly and consistently, well-established canons can act as background rules that guide Congress by sending signals about how statutes will be interpreted.<sup>97</sup> The Court has endorsed this theory, stating in the immigration case *McNary v. Haitian Refugee Center, Inc.*,<sup>98</sup> that “[i]t is presumable that Congress legislates with knowledge of our basic rules of statutory construction.”<sup>99</sup>

The recent history of habeas corpus jurisdiction in immigration cases is a good example of the background rules theory at work. In 1996, Congress passed AEDPA and IIRIRA, which made significant changes to the judicial review provisions of the Immigration and Nationality Act (INA).<sup>100</sup> The Court in *INS v. St. Cyr* applied the avoidance canon, the presumption in favor of judicial review of administrative action, and the “the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction,” thereby rejecting the government’s argument that Congress had clearly divested courts of jurisdiction under 28 U.S.C. § 2241 over habeas corpus actions filed by criminal aliens to challenge removal orders.<sup>101</sup>

In response to the Court’s decision in *St. Cyr*, Congress passed the REAL ID Act of 2005.<sup>102</sup> Lower courts have found that the new law eliminates habeas corpus review of final removal orders by providing that petitions for review in the federal courts of appeals are the exclusive path into court.<sup>103</sup> Unlike the provisions enacted in IIRIRA, the amendments made by the REAL ID Act bear the influence of the Court’s command in *St. Cyr* that congressional repeals of habeas must be worded clearly, explicitly referencing 28 U.S.C. § 2241 “or

97. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 125 (2001); Schacter, *supra* note 33, at 600 (arguing that this is the best theory of the compatibility of canons with legislative supremacy).

98. 498 U.S. 479 (1991).

99. *Id.* at 496. It therefore followed that “given [the Court’s] well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action,” a statute precluding direct review of the decisions of the INS denying applications for Special Agricultural Workers (SAW) status would not deprive courts of considering due process challenges to the manner in which SAW provisions were administered by the INS. *Id.*

100. See generally Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963 (2000).

101. *St. Cyr*, 533 U.S. at 298-99.

102. Pub. L. No. 109-13, 119 Stat. 231 (codified at 8 U.S.C. § 1252). See also *infra* notes 222-28 and accompanying text (discussing the REAL ID Act and judicial review).

103. See, e.g., *Haider v. Gonzales*, 438 F.3d 902, 910 (8th Cir. 2006).

any other habeas corpus provision.”<sup>104</sup> Presumably Congress will be similarly explicit hereafter when it intends to preclude courts from exercising jurisdiction over habeas corpus petitions.<sup>105</sup>

While canons can add predictability to the law when used correctly, they are only as legitimate as the courts applying them. As pointed out above, it is true that courts have used canons in an inconsistent, and thus unpredictable, manner. Courts have underutilized some canons and overutilized others, such as the avoidance canon.<sup>106</sup> Even when canons are applied in good faith by courts, statutory interpretation decisions are based on the context of the case and therefore can be seen as unpredictable in the sense that the outcome, at least in close cases, cannot be known for certain before the case is decided.<sup>107</sup>

Professor Motomura argues that application of canons in immigration law has been unpredictable and that courts should instead decide cases on constitutional grounds, but any inherent unpredictability in canons should not devalue them, at least as compared to constitutional decisions. Constitutional decisions, even when the rules to be applied are clear, can be just as unpredictable as statutory decisions.<sup>108</sup> The *Nguyen v. INS*<sup>109</sup> case is a good example of how

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104. Pub. L. No. 109-13 § 106(a)(3), 119 Stat. at 311. See Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 465 (2006) (discussing the lack of similarly clear language in AEDPA and IIRIRA). Like other provisions purporting to strip courts of habeas corpus jurisdiction, the REAL ID Act is likely to be narrowly interpreted, however. See, e.g., *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075-76 (9th Cir. 2006) (interpreting the Act as not precluding habeas corpus review in cases that do not involve a final order of removal).

105. Cf. Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2210 (2002) (stating that using the avoidance canon to interpret ambiguous statutes “usefully results in more precise legislation”). Thus, while *St. Cyr* may have involved a second-best interpretation, Congress learned from the decision just how explicitly the Court requires that a statute revoking habeas corpus jurisdiction be worded. If the Court continues to apply canons consistently, and Congress continues to follow the guidance of the Court, the need for second-best interpretations would diminish.

106. See *infra* Part III (discussing the overutilization of the avoidance canon).

107. The determination of when the application of a canon is warranted is a judgment call requiring a finding that there is statutory uncertainty. See *supra* notes 31-32 and accompanying text. Even if a court finds a statutory provision to be clear and declines to apply a canon, some may disagree and accuse the court of underutilizing the canon. The proper application of canons thus relies on the good faith interpretations of judges, which are not easily categorized as involving over- or underutilization of canons. In any case, unpredictability in statutory interpretation cases undoubtedly derives more from judicial confusion regarding when to declare that a statute is ambiguous than anything inherent in canons. See *supra* notes 31, 78.

108. See, e.g., Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1381-82 (2006) (asserting that the Rehnquist Court’s “head-scratching unpredictability in many important areas of constitutional law had less to do with shifting (or moderating) philosophies on the part of the Justices and more to do with its flexible, case-by-case approach to constitutional interpretation”) (footnotes omitted).

109. 533 U.S. 53 (2001).

abandoning the plenary power doctrine would not necessarily add predictability to immigration law. In *Nguyen*, the Court purported to apply mainstream, heightened scrutiny review to an immigration provision that explicitly discriminated on the basis of gender.<sup>110</sup> Despite the weakness of the justifications for the discrimination, the Court upheld the provision.<sup>111</sup> The decision is perhaps not as surprising as it would seem. In a recent article, Professor Winkler shows that even the Court's application of the strict scrutiny standard depends heavily on context and in some areas of law does not result in invalidation in a significant percentage of cases.<sup>112</sup>

I am not attempting to prove that statutory decisions are more predictable than constitutional ones. It does seem clear, however, that canons do not add unpredictability to statutory interpretation and the law in a way that is somehow novel. Rather, unpredictability should be seen as more of a perennial concern about law in general than a concern that is specific to canons.

#### IV. THE CANON OF CONSTITUTIONAL AVOIDANCE AND THE PLENARY POWER DOCTRINE

While overutilization of the avoidance canon in immigration cases cannot be blamed on second-best statutory interpretations, the Court has overused the canon to avoid constitutional issues that later cases revealed were not serious, but, rather, were based on phantom constitutional norms.<sup>113</sup> The potential for courts to overutilize the avoidance canon in immigration cases through phantom constitutional norms reasoning will, of course, always exist. Unlike second-best interpretations, though, phantom norms decisions are not a necessary part of the application of the avoidance canon in immigration cases. Recent decisions by the Court reveal that the plenary power doctrine, while still viable, has become sufficiently weak now that the application of the avoidance canon in several areas of immigration law need not involve a phantom constitutional norm. This Part first describes the current status of the plenary power doctrine and then outlines a number of important areas in immigration law where the avoidance canon can be, and has been, legitimately applied by courts.

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110. *But see* Nina Pillard, *Plenary Power Underground in Nguyen v. INS: A Response to Professor Spiro*, 16 GEO. IMMIGR. L.J. 835, 836 (2002) (arguing that "the *Nguyen* Court was implicitly taking the immigration context into account even while it expressly denied doing so").

111. *See infra* notes 125-27 and accompanying text (discussing the decision).

112. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

113. *See supra* notes 23-26 and accompanying text.



### A. *The Status of the Plenary Power Doctrine*

In the first immigration cases, the Court seemed to assert that immigration legislation would not be subjected by courts to constitutional constraints.<sup>114</sup> Eventually, a significant exception to the plenary power doctrine emerged. This exception was applicable only to deportable aliens, those aliens who had been deemed under immigration law to have entered the United States.<sup>115</sup> For these aliens, courts limited the plenary power doctrine to substantive criteria for admission and expulsion, while applying mainstream constitutional principles to procedural matters such as deportation hearings.<sup>116</sup>

Notwithstanding the procedural due process exception for deportable aliens, and despite constant criticism from commentators, the plenary power doctrine remained largely untouched by the Supreme Court for most of the twentieth century.<sup>117</sup> By the end of the twentieth century, however, some scholars described what they viewed as a weakening of the plenary power doctrine. The diminishment of the doctrine developed through exceptions to it, such as a broadening of the due process exception, and also through a willingness of courts to subject statutes to a rational basis test instead of a complete bar to judicial review.<sup>118</sup> Some scholars even predicted the eventual demise of the plenary power doctrine.<sup>119</sup>

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114. See Aleinikoff, *supra* note 7, at 862 (stating that early cases “denied virtually any authority for the judiciary to review substantive decisions as to which classes of aliens should be entitled to enter or remain in the country”); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 926 (1995).

115. See *infra* notes 175-80 and accompanying text (describing the entry doctrine).

116. The Court in *Landon v. Plasencia*, 459 U.S. 21, 32 (1982), described the distinction between aliens who had entered the country (and thus were entitled to a hearing that comported with procedural due process) and those who had not as follows: “[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative. . . . [H]owever, once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.” Some courts have narrowed the scope of the plenary power doctrine by casting constitutional challenges as procedural rather than substantive. See generally Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992).

117. See Aleinikoff, *supra* note 7, at 865; Schuck, *supra* note 22, at 1 (stating that “[i]n a legal firmament transformed by revolutions in due process and equal protection doctrine and by a new conception of judicial role, immigration law remains the realm in which government authority is at the zenith, and individual entitlement is at the nadir”).

118. See Legomsky, *supra* note 114, at 931-37 (describing the “mild rational basis test” that had been developed by courts); Motomura, *supra* note 4, at 608 (describing how lower courts created a rational basis test).

119. See, e.g., Legomsky, *supra* note 114, at 934-37 (predicting that the plenary power doctrine will “wear away by attrition”); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002) (arguing that shifts in the international context augur the end of the plenary power doctrine).

Those predicting the end of the plenary power doctrine are certainly correct to the extent that the plenary power doctrine no longer forecloses, if it ever did, judicial review of immigration statutes.<sup>120</sup> The Court now reviews the constitutionality of governmental actions, although it has mostly done so under a lenient rational basis standard.<sup>121</sup> Similarly, lower courts consistently apply the rational basis standard to both equal protection and substantive due process challenges.<sup>122</sup> Courts have invalidated immigration provisions under the rational basis standard of review, but generally the classification invalidated has been viewed by the court as an interpretation of a statute made by the Board of Immigration Appeals or the INS rather than a classification made explicit by Congress.<sup>123</sup>

While it is well-established, at least in the lower courts, that rational basis scrutiny can be applied to immigration statutes, it is no longer clear that the plenary power doctrine always precludes the application of a more stringent standard of review when a statute infringes fundamental rights or raises equal protection concerns.<sup>124</sup> In 2001, the Court upheld an INA provision in *Nguyen v. INS* that more generously conferred birth citizenship on the out-of-wedlock children of American citizen mothers than those of American citizen fathers.<sup>125</sup> In contrast to its 1977 decision in a similar case, *Fiallo v. Bell*,<sup>126</sup> in *Nguyen* the Court purported to apply the standard equal protection analysis for gender-based classifications. The Court explicitly refused to rely on the plenary power precedents in upholding the provision, disclaiming any need to “assess the implications of state-

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120. This is true at least to the extent that the statutes regulate deportable aliens. Inadmissible aliens have traditionally been without constitutional protection, although some lower courts have questioned this doctrine. See *infra* note 136.

121. See, e.g., *Reno v. Flores*, 507 U.S. 292, 306 (1993).

122. See, e.g., *Cordes v. Gonzales*, 421 F.3d 889, 896 (9th Cir. 2005) (stating that the “disparate treatment of similarly situated aliens under the immigration laws” implicates the guarantee of equal protection”) (citing *Aguire v. INS*, 79 F.3d 315, 317 (2d Cir. 1996)); *Rojas-Reyes v. INS*, 235 F.3d 115, 123 (2d Cir. 2000) (applying the rational basis standard to a substantive due process challenge).

123. See, e.g., *Cordes*, 421 F.3d at 896 (striking down the “INS” decision” to “afford section 212(c) relief” to some permanent resident residents but not others); *Servin-Espinoza v. Ashcroft*, 309 F.3d 1193 (9th Cir. 2002) (striking down an INS policy of allowing inadmissible aliens but not deportable aliens to apply for discretionary relief from deportation); *Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001) (striking down a BIA decision not to recognize foreign expungements for simple drug possession offenses); *Garberding v. INS*, 30 F.3d 1187 (9th Cir. 1994) (striking down a BIA decision not to recognize an expungement of a state conviction).

124. Cf. *Flores-Ledezma v. Gonzales*, 415 F.3d 375, 381 (5th Cir. 2005) (applying the rational basis test because the classification did not “involve fundamental rights or a classification along suspect lines”).

125. *Nguyen v. INS*, 533 U.S. 53 (2001). The same constitutional challenge had been before the Court in *Miller v. Albright*, 523 U.S. 420 (1998), but the case was decided on the basis of standing. In dicta, however, five members of the Court indicated that the provision was unconstitutional. See *Pillard*, *supra* note 110, at 838-39.

126. 430 U.S. 787 (1977).

ments in our earlier cases regarding the wide deference afforded to Congress in the exercise of its immigration and naturalization power.<sup>127</sup> In another decision from 2001, *Zadvydas*, the Court stated that the government's exercise of its immigration power was subject to "important constitutional limitations" and applied the same due process analysis to the detention of aliens as it would to the detention of citizens.<sup>128</sup> Together, these two cases contributed to the perception, at least temporarily, that the plenary power doctrine had been substantially weakened, if not ended entirely.<sup>129</sup>

The *Zadvydas* and *Nguyen* decisions may be evidence of the further weakening of the plenary power doctrine, but the Court's recent decision in *Demore v. Kim*<sup>130</sup> establishes that the plenary power doctrine is still viable. In *Kim*, the Court held that the mandatory detention of criminal resident aliens pending their deportation hearings does not violate due process.<sup>131</sup> The Court stated that detention is "a constitutionally valid aspect of the deportation process" and used the classic plenary power reasoning that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."<sup>132</sup> The Court distinguished *Zadvydas*, implying that *Zadvydas*, unlike *Kim*, was not really an immigration case and therefore not subject to the plenary power doctrine. The potentially indefinite detention in *Zadvydas* "did not serve its purported immigration purpose" because it affected aliens for whom removal was "no longer practically attain-

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127. *Nguyen*, 533 U.S. at 72-73; see also Pillard, *supra* note 110, at 845 ("At least superficially, the *Nguyen* decision reads . . . not like a decision about immigration and naturalization, but like a conventional sex discrimination case."). One theory that would distinguish *Nguyen* from traditional immigration cases is that the plenary power doctrine is inapplicable when the case involves a claim of citizenship at birth and thus could be said to involve a citizen and not an alien. See *Nguyen*, 533 U.S. at 96-97 (O'Connor, J., dissenting); *Miller*, 523 U.S. at 480-81 (Breyer, J., dissenting).

128. *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001); see also *Demore v. Kim*, 538 U.S. 510, 553 (2003) (Souter, J., dissenting) (arguing that the Court in *Zadvydas* disagreed with the idea that "the constitutionally protected liberty interest" in avoiding physical confinement, even for aliens already ordered removed, was conceptually different from the liberty interest of citizens"); David Cole, *In Aid of Removal: Due Process Limits on Immigrant Detention*, 51 EMORY L.J. 1003, 1018 (2002) (noting that the *Zadvydas* Court "applied to immigration detention the due process principles generated in civil detention cases outside the immigration context, without any suggestion that a different due process analysis should apply"); *supra* notes 84-89 and accompanying text (describing the *Zadvydas* decision).

129. See *The Supreme Court, 2002 Term: Leading Cases: I. Constitutional Law: D. Due Process*, 117 HARV. L. REV. 287, 297 (2003) ("When the Supreme Court decided *Zadvydas* two years ago, legal scholars celebrated the case as an important step toward the abandonment of the plenary power doctrine.") [hereinafter *Leading Cases*]. Cf. T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L.J. 365, 366 (2002) (stating that the case "may represent a radical shift" but concluding that it is "unlikely to represent the death knell for the plenary power doctrine").

130. 538 U.S. 510 (2003).

131. *Id.*

132. *Id.* at 521 (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976)).

able” due to the aliens’ native countries’ refusal to accept their return.<sup>133</sup> In contrast, the detention in *Kim* “necessarily serve[d] the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings.”<sup>134</sup>

*B. The Canon of Constitutional Avoidance and “Phantom”  
Constitutional Norms*

Because the plenary power doctrine has at least some continuing vitality, in order to avoid the problem of “phantom” constitutional norms, use of the avoidance canon in immigration law must still account for the deference given the government when constitutional challenges are made. As discussed above, however, the plenary power doctrine has weakened. There is more room for legitimate use of the avoidance canon in immigration law than ever before.

Despite the continued existence of the plenary power doctrine, there are areas of constitutional concern where the rules applied to immigration provisions do not differ from those applicable to non-immigration provisions. For example, it is well-established that courts will consider procedural due process challenges by deportable aliens.<sup>135</sup> Some lower courts have held that even inadmissible aliens, those aliens deemed by the law not to have entered the country, have due process rights.<sup>136</sup> Lower courts have thus properly applied the avoidance canon in order to avoid serious due process issues, including ones involving the availability of judicial review.<sup>137</sup>

Similar to procedural due process challenges, the government does not seem to receive the benefit of the plenary power doctrine in cases involving a claim that a statute violates a structural provision of the Constitution, rather than an amendment to the Constitution. For example, in *INS v. Chadha*,<sup>138</sup> the Court declared the legislative

133. *Id.* at 527; see *Zadvydas*, 533 U.S. at 695 (suggesting that the absence of likely removal makes the detention less immigration-related and thus affects the extent to which the plenary power doctrine applies).

134. *Kim*, 538 U.S. at 528.

135. See *supra* note 116.

136. See, e.g., *Rosales-Garcia v. Holland*, 322 F.3d 386, 410 (6th Cir. 2003) (en banc) (“The fact that excludable aliens are entitled to less process . . . does not mean that they are not at all protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.”).

137. See, e.g., *United States v. Sosa*, 387 F.3d 131, 138 (2d Cir. 2004) (“We recently held that ‘a failure to advise a potential deportee of a right to seek Section 212(c) relief can, if prejudicial, be fundamentally unfair within the meaning of Section 1326(d)(3).’”) (quoting *United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004)); *Arreola-Arreola v. Ashcroft*, 383 F.3d 956, 963-64 (9th Cir. 2004) (interpreting a statute to allow for judicial review because a statute precluding judicial review “would raise serious constitutional concerns because it would potentially deprive an alien of the full and fair hearing guaranteed to him by the Constitution”).

138. 462 U.S. 919 (1983).

veto unconstitutional as a violation of the Constitution's structural requirements of bicameralism and presentment. The Court reasoned that it could review whether "Congress has chosen a constitutionally permissible means of implementing [its] power" over immigration.<sup>139</sup> Similarly, in *St. Cyr*, the Court ignored the plenary power doctrine in holding that removal of habeas corpus authority by Congress would raise serious constitutional issues involving the Suspension Clause.<sup>140</sup>

Courts have also entertained challenges to "nonsubstantive" immigration laws without according any special deference to the government. For example, in *Detroit Free Press v. Ashcroft*,<sup>141</sup> the Sixth Circuit explained that "substantive immigration laws answer the questions, 'who is allowed entry' or 'who can be deported'" in finding a First Amendment right of access to deportation proceedings.<sup>142</sup> The distinction drawn by the Sixth Circuit between substantive and non-substantive provisions may not be a valid one, however, after the Court's decision in *Demore v. Kim*, which relied on the plenary power doctrine in upholding a nonsubstantive immigration provision.<sup>143</sup>

Even in areas where the government sometimes receives deference under the plenary power doctrine, application of the avoidance canon can be legitimate. Substantive due process challenges, at least to the extent they are connected to the detention of deportable aliens,<sup>144</sup> are one such example. It could be argued that *Zadvydas* and *Kim* fit Professor Motomura's phantom constitutional norms pattern.<sup>145</sup> First, the Court in *Zadvydas* identified a serious constitutional issue raised by the possibility of indefinite detention of aliens when there is no realistic prospect of deportation. Instead of deciding the constitutional issue, the Court avoided it by applying the avoidance canon and interpreting the relevant statute narrowly.<sup>146</sup> Second, the Court in *Kim* subsequently declined to apply the constitutional norm identified in *Zadvydas* when it was forced to directly address the constitutionality of immigration detention.<sup>147</sup>

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139. *Id.* at 941.

140. *INS v. St. Cyr*, 533 U.S. 289, 300 (2001). See Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555, 562 (2002) (explaining that the plenary power doctrine played no explicit role in *St. Cyr*).

141. 303 F.3d 681, 686 n.6 (6th Cir. 2002).

142. *Id.* at 686-88 (claiming that "[t]he Supreme Court has always interpreted the Constitution meaningfully to limit non-substantive immigration laws, without granting the Government special deference").

143. See *supra* notes 130-34 and accompanying text.

144. See *infra* notes 172-94 and accompanying text (explaining the difference between inadmissible and deportable aliens and why indefinite detention of inadmissible aliens is constitutional).

145. See *supra* notes 24-26 and accompanying text (describing the pattern).

146. See *supra* notes 84-89 and accompanying text.

147. See *supra* notes 131-32 and accompanying text.

Such an interpretation of *Zadvydas* and *Kim*, while possible, is not the best interpretation of the cases. The constitutional norm identified in *Zadvydas* does not appear to be a phantom norm. *Zadvydas* was not the first case to assert that aliens have substantive due process rights that are implicated by detention. In *Reno v. Flores*,<sup>148</sup> the Court upheld regulations governing the detention of juvenile aliens but indicated that the plenary power doctrine would not protect the regulations from substantive due process review.<sup>149</sup> Moreover, the Court in *Kim* seemed to accept *Zadvydas* as constitutional precedent and attempted to distinguish rather than ignore the case.<sup>150</sup> Lower courts have likewise treated *Zadvydas* as a constitutional holding.<sup>151</sup>

Similar to *Zadvydas*, the *Kim* decision should not be interpreted as precluding substantive due process challenges to detention. Although the Court in *Kim* upheld the detention at issue in the case, it did not merely dismiss the constitutional challenge on the basis of the plenary power doctrine. Indeed, the Court subjected the statute to constitutional scrutiny, although it seemed to do so under a rational basis standard rather than a more stringent standard of review.<sup>152</sup> Lower courts have treated *Kim* as recognizing that aliens possess substantive due process rights that are implicated by detention. In *Ly v. Hansen*,<sup>153</sup> for example, the Sixth Circuit held that the detention of an alien for one and one-half years pending deportation

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148. 507 U.S. 292 (1993).

149. *Id.* at 306 (citing to the plenary power doctrine but stating, “Of course, the INS regulation must still meet the (unexacting) standard of rationally advancing some legitimate governmental purpose”). The Court held that the detention of juvenile aliens pending release to a parent or guardian did not violate substantive due process because juveniles “are always in some form of custody” and therefore have a diminished interest in absolute liberty. *Id.* at 302. Absent from the Court’s opinion was any statement that the detention at issue could not be reviewed.

150. See *Demore v. Kim*, 538 U.S. 510, 527-39 (2003).

151. See, e.g., *Khotsovvan v. Morones*, 386 F.3d 1298, 1300-01 (9th Cir. 2004) (holding that detention for ninety days under 8 U.S.C. § 1231(a)(2) does not violate due process and that the Supreme Court in *Kim* “clarified that the *Zadvydas* due process analysis applies only if a danger of indefinite detention exists and there is no significant likelihood of removal in the reasonably foreseeable future”); *Shokeh v. Thompson*, 369 F.3d 865, 871-72 (5th Cir. 2004), *vacated as moot*, 375 F.3d 351 (2004) (stating that a serious constitutional problem would arise if indefinite detention were caused by the inability to pay a bond and interpreted the statute to include a reasonableness component).

152. *Kim*, 538 U.S. at 528 (“But when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal. The evidence Congress had before it certainly supports the approach it selected even if other, hypothetical studies might have suggested different courses of actions.”); see also *Leading Cases*, *supra* note 129, at 292 n.48 (stating that the *Kim* Court’s review of the detention provision was somewhat more searching than traditional plenary power review).

153. 351 F.3d 263 (6th Cir. 2003).

proceedings was unreasonably long and violated the alien's substantive due process rights.<sup>154</sup>

Courts can also legitimately apply the avoidance canon in at least some cases involving equal protection claims. It is true that courts have generally not applied a heightened standard in cases involving equal protection claims, but it is now well-established that such claims are subject to rational basis scrutiny.<sup>155</sup> Under rational basis scrutiny, provisions that discriminate on the basis of gender or race, for example, could be seen as irrational and struck down without application of a heightened standard.<sup>156</sup>

The INS parole decisions at issue in *Jean v. Nelson* provide one possible example where discrimination based on race and national origin could be held to violate the Constitution under a rational basis standard. Recall that the Court avoided the constitutional issues in *Jean* by deciding the case on statutory grounds.<sup>157</sup> Professor Motomura argues that *Jean* was based on a phantom constitutional norm because "the Court has never held an immigration classification unconstitutional on the ground that it discriminates on the basis of race or national origin."<sup>158</sup> It is still the case that the Court has never invalidated an immigration classification on the basis of race, but *Jean* would not necessarily be a phantom norm decision if it were decided today. Courts have allowed discrimination on the basis of national origin,<sup>159</sup> but the Ninth Circuit has indicated that racial discrimination in parole decisions violates the Constitution and would not survive even a low level of constitutional scrutiny.<sup>160</sup> Thus, the Court could avoid the constitutional issues that would be raised by parole decisions based on invidious racial discrimination (as opposed to merely national origin discrimination) by holding that the relevant statutes and regulations provide for nondiscriminatory parole consideration. Such a determination would not be based on a phantom constitutional norm.<sup>161</sup>

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154. *Id.* at 269 (stating that "Congress's plenary control must still be exercised within the bounds of the Constitution").

155. *See supra* notes 121-23 and accompanying text.

156. *See* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 66-68 (1998).

157. *See supra* notes 71-83 and accompanying text (discussing the decision).

158. Motomura, *supra* note 4, at 593.

159. *See, e.g.,* *Rodriguez-Silva v. INS*, 242 F.3d 243, 248 (5th Cir. 2001) ("We hold that the equal protection principles that are implicit in the Due Process Clause of the Fifth Amendment do not in any way restrict Congress's power to use nationality or place of origin as criteria for the naturalization of aliens or for their admission to or exclusion or removal from the United States.").

160. *See* *Kwai Fun Wong v. United States*, 373 F.3d 952, 974 n.29 (9th Cir. 2004).

161. In addition, *Jean* involved actions by the Executive Branch, rather than a classification made by Congress, which may be relevant in deciding the case. *See supra* note 123 and accompanying text.

Although this Section has outlined several areas where constitutional challenges can legitimately be made in immigration cases, the plenary power doctrine is in a state of flux, and no definitive statements can be made about its future scope. Professor Legomsky's prediction that the plenary power doctrine will wear away little by little is perhaps being realized.<sup>162</sup> Based on the Court's statement in *Zadvydas* that the government's exercise of its immigration power is subject to "important constitutional limitations,"<sup>163</sup> lower courts may increasingly be inclined to apply mainstream constitutional rules in immigration cases.<sup>164</sup> Even if the plenary power doctrine is not further weakened, however, there are several major areas in immigration law where application of the avoidance canon is legitimate and appropriate and does not require the use of phantom constitutional norms.<sup>165</sup>

#### V. A NEW CONCERN: THE LOWEST COMMON DENOMINATOR PRINCIPLE

The Court's use of the avoidance canon was notable in the past because the canon was sometimes applied to avoid constitutional issues that were not serious, but the Court's recent use of the canon is notable for another reason. The Court's decision in *Clark v. Martinez*<sup>166</sup> has added a new and powerful aspect to the avoidance canon by directing that a statutory interpretation made by invoking the canon be uniformly applied in subsequent cases even when the later cases do not raise any serious constitutional issues.<sup>167</sup> The Court's

162. See Legomsky, *supra* note 114, at 934.

163. *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001).

164. The Court's decision in *Kim*, which reinforced the plenary power doctrine, would be an obvious barrier to such holdings, even though it did not disavow any of the statements in *Zadvydas*. See *supra* notes 130-34 and accompanying text (explaining the decision in *Kim*).

165. On the other hand, even if the plenary power doctrine were ended, as many immigration scholars desire, it is not clear how many more constitutional challenges to immigration statutes would be successful. For example, it seems unlikely that the Court would ever view Congress's power to regulate immigration as suspect and effectively mandate open borders or hold that aliens have a fundamental right to remain in the United States once they have entered, even if they have family members in the country. See Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 U.C. DAVIS L. REV. 701, 706 (2005). Another critically important doctrine of immigration law that would be unaffected by an end to the plenary power doctrine is the longstanding principle that deportation is not punishment, which denies important protections that criminal defendants receive, such as a right to government appointed counsel and a jury trial and prohibitions on ex post facto laws and cruel and unusual punishment. See Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000). Thus, while constitutional decisions may result in permanent rights for aliens, the scope of the rights gained from such decisions will probably always be relatively limited.

166. 543 U.S. 371 (2005).

167. See *infra* notes 187-90 and accompanying text.



creation of what it terms the “lowest common denominator” principle is new in the sense that courts in the past have often interpreted the same statutory language in different ways depending on the status of the litigant before the court.<sup>168</sup>

Although the lowest common denominator principle is related to the phantom constitutional norms problem, the two issues should not be confused.<sup>169</sup> The lowest common denominator principle is not specific to immigration law. In the Court’s view, it is a legitimate and necessary consequence of the invocation of the avoidance canon and is therefore applicable even when the issue avoided is genuine.<sup>170</sup> Indeed, the Court’s purpose in creating the lowest common denominator principle likely was not an effort to protect aliens. Professor Siegel has theorized that the lowest common denominator principle was adopted by the author of the *Martinez* decision, Justice Scalia, in an attempt to limit the judicial discretion that would be inherent were judges permitted to choose different interpretations for the same statutory language.<sup>171</sup> Thus, unlike the phantom constitutional norms problem, the issues raised by the creation of the lowest common denominator principle are particularly relevant to immigration law, but also extend beyond it.

This Part illustrates how the lowest common denominator principle can create greater rights for aliens as a whole, at least temporarily, than a decision that rests on constitutional grounds. This Part also argues that the power of the lowest common denominator principle warrants caution by courts when they apply the avoidance canon. Courts must be particularly diligent in ensuring that the constitutional issues are serious and the interpretation adopted is plausible, even if second-best.

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168. See Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339 (2005).

169. See *supra* Part III (discussing the problem of phantom constitutional norms). In his article, Professor Motomura did argue that using canons to protect constitutional interests could cause overbreadth in the sense that the statutory protections could be broader than the protections offered by constitutional decisions. He was referring to the immigration rule of lenity, not the lowest common denominator principle, however. See Motomura, *supra* note 4, at 601. As described in Part I.A, the immigration rule of lenity is not an example of overbreadth, because the canon is designed to be applied in cases of ambiguity without regard to whether constitutional issues are raised.

170. Because the Court considers the lowest common denominator principle to be part of the legitimate application of the avoidance canon, the issue is technically not one of overutilization, unlike a phantom norms decision where the avoidance canon is applied despite the trigger for application of the canon (serious constitutional issues) not having been met.

171. See Siegel, *supra* note 168, at 370-77.

A. *Statutory Decisions that Give Aliens More Rights than Constitutional Decisions*

1. *Zadvydas v. Davis and Clark v. Martinez*

The creation of the lowest common denominator principle in immigration law started with the Court's decision in *Zadvydas*.<sup>172</sup> Recall that in *Zadvydas*, the Court applied the avoidance canon in interpreting 8 U.S.C. § 1231(a)(6), which states that certain aliens "may be detained beyond the [90-day] removal period."<sup>173</sup> The Court, required by the canon to adopt a "fairly possible" interpretation of the statute that would avoid the constitutional questions raised by the detention of aliens who legally are considered to have entered the country, held that these aliens can only be detained for a six-month period unless there is a "significant likelihood of removal in the reasonably foreseeable future."<sup>174</sup> Thus, as a result of the Court's use of the avoidance canon, the holding was one of statutory construction that was driven by constitutional concerns.

What is remarkable about the decision and its aftermath is that the statutory decision in *Zadvydas* likely resulted in greater rights for aliens as a whole, at least temporarily, than if the decision had rested on constitutional grounds. Prior to 1996, there were two classes of aliens, "excludables" and "deportables." As the Court stated in *Zadvydas*, the difference between the two classes "rested upon a basic territorial distinction."<sup>175</sup> Excludable aliens, even ones who were physically present due to having been "paroled" into the country by the Attorney General, were considered under the "entry fiction" to be outside the United States and ineligible for admission or entry.<sup>176</sup> Deportable aliens, in contrast, were those who had "entered" the country, legally or otherwise.<sup>177</sup> Excludable aliens were considered to have little or no constitutional rights, while aliens who had entered the United States had greater constitutional rights.<sup>178</sup>

172. *Zadvydas v. Davis*, 533 U.S. 678 (2001).

173. 8 U.S.C. § 1231(a)(6).

174. *Zadvydas*, 533 U.S. at 689, 701.

175. *Id.* at 694.

176. 8 U.S.C. § 1231(a)(6) (1994) (repealed 1996). Like the plenary power doctrine, the "entry fiction" has long been harshly criticized, *see, e.g.*, Hart, *supra* note 22, at 1389-96, but still retains constitutional significance.

177. 8 U.S.C. § 1252 (1994) (repealed 1996); *see Alvarez-Mendez v. Stock*, 941 F.2d 956, 961 n.4 (9th Cir. 1991). The importance of having entered the United States led to significant, and often bizarre, litigation regarding whether an alien could be deemed to have made an entry. *See, e.g.*, *Rosenberg v. Fleuti*, 374 U.S. 449 (1963) (determining whether a return from a visit of a couple of hours in Mexico was an entry); *In re Ching*, 19 I. & N. Dec. 203, 206 (BIA 1984) (determining whether aliens who had escaped from custody at LAX and captured two days later in Texas had entered).

178. *See supra* note 114 and accompanying text (describing the different constitutional rights afforded the two groups of aliens).

On September 30, 1996, Congress enacted IIRIRA, which changed the terminology.<sup>179</sup> There are still separate grounds of “inadmissibility” and “deportability,” but the difference between the two grounds now turns on whether an alien has been legally “admitted” to the United States rather than whether the alien has gained “entry,” legal or otherwise.<sup>180</sup> While there are still statutory differences between inadmissible and deportable aliens, many of the provisions in the INA, including § 1231(a)(6), now apply without differentiation to both classes.

In contrast to a statute providing for the indefinite detention of deportable aliens, which the Court in *Zadvydas* indicated would at the least raise serious constitutional questions, a similar statute providing for the indefinite detention of inadmissible aliens would likely have been constitutional at the time of the decision.<sup>181</sup> In *Shaughnessy v. United States ex rel. Mezei*,<sup>182</sup> which was explicitly not revisited by the Court in *Zadvydas*, the Court held that the indefinite detention of a returning permanent resident alien did not violate due process because the alien was “treated as if stopped at the border” and thus had no due process rights at all.<sup>183</sup> Furthermore, lower courts have consistently held that provisions providing for the indefinite detention of inadmissible aliens are constitutional.<sup>184</sup>

If the Court in *Zadvydas* had interpreted 8 U.S.C. § 1231(a)(6) as giving the Attorney General the authority to detain aliens indefinitely, but that the indefinite detention of deportable aliens was unconstitutional, the provision likely would have been left partially intact. Facial challenges are disfavored by the Court, especially when the statute at issue can be applied constitutionally in some circum-

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179. In IIRIRA, Congress substituted the term “inadmissible” for “excludable” whenever the latter term appeared in the INA. IIRIRA § 308(d)(3)(A). Congress also replaced the separate exclusion and deportation proceedings with a single “removal” proceeding. 8 U.S.C. § 1229a.

180. See *Chi Thon Ngo v. INS*, 192 F.3d 390, 394 n.4 (3d Cir. 1999). Thus, unlike the old regime, some aliens who have entered the country are grouped, in the “inadmissible” category, with aliens who have not entered the country. There continues to be significant statutory as well as constitutional distinctions between aliens who have gained “admission” or “entry” to the United States and those who have not. See Aleinikoff, *supra* note 129, at 375 (noting that the Court’s opinion in *Zadvydas* reaffirms “the border/interior distinction as a constitutional matter”).

181. In this Article, I use the terms “inadmissible” and “excludable” interchangeably. In using the term inadmissible, I intend for it to be understood as synonymous with excludable, even if doing so is somewhat inaccurate, see *supra* note 179, and to only include those aliens who are deemed under immigration law to have been stopped at the border. See *Clark v. Martinez*, 543 U.S. 371, 375 n.2 (2005) (treating the terms inadmissible and excludable as being equivalent).

182. 345 U.S. 206 (1953).

183. *Id.* at 215.

184. See *infra* notes 191-92 and accompanying text.

stances and has a severability clause.<sup>185</sup> Thus, the Court likely would have struck down the statute as applied, leaving the government with the ability to apply the statute to the detention of inadmissible aliens.

The Court did not rule that § 1231(a)(6) is unconstitutional; rather, it interpreted the statute as not giving the Attorney General the authority to detain deportable aliens indefinitely.<sup>186</sup> In *Clark v. Martinez*,<sup>187</sup> the Court extended the *Zadvydas* statutory holding to include inadmissible aliens. The Court held that § 1231(a)(6) should be interpreted as imposing the same limitations on the detention of inadmissible aliens as the Court in *Zadvydas* found were applicable to the detention of deportable aliens.<sup>188</sup> The Court recognized that its interpretation of § 1231(a)(6) in *Zadvydas* was driven by the avoidance canon. It rejected the notion, however, that it needed to determine whether indefinite detention of inadmissible aliens would raise serious constitutional questions before it interpreted § 1231(a)(6) as similarly not authorizing the indefinite detention of inadmissible aliens.<sup>189</sup> Instead, the Court stated:

It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern, . . . whether or not those constitutional problems pertain to the particular litigant before the Court.<sup>190</sup>

The end result of the *Zadvydas* decision has thus been very broad. Before IIRIRA replaced the previous statutory regime with §

185. See Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 878-93 (2005). The Court has recognized that immigration provisions are to be severed when possible. See *INS v. Chadha*, 462 U.S. 919, 932 (1983) (quoting language from the INA that “[i]f any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby”).

186. See *supra* note 174 and accompanying text.

187. 543 U.S. 371 (2005).

188. See *id.* at 377-78. In dissent, Justice Thomas interpreted *Zadvydas* differently, arguing that “*Zadvydas* established a single and unchanging, if implausible, meaning of § 1231(a)(6): that the detention period authorized by § 1231(a)(6) depends not only on the circumstances surrounding a removal, but also on the type of alien ordered removed.” *Id.* at 391 (Thomas, J., dissenting).

189. See *id.* at 380-81. Significantly, the Court in *Martinez* did not claim that its interpretation of 8 U.S.C. § 1231(a)(6) in *Zadvydas* was the most persuasive interpretation available, only that the interpretation in *Zadvydas* must be applied uniformly to cases involving inadmissible aliens. See *supra* Part II.A (describing how the avoidance canon sometimes requires courts to adopt second-best interpretations).

190. *Martinez*, 543 U.S. at 380-81. See also *Xi v. INS*, 298 F.3d 832, 839 (9th Cir. 2002) (“The government has offered no authority suggesting that a litigant may not take advantage of a statutory interpretation that was guided by the principle of constitutional avoidance when that litigant’s case does not present the constitutional problem that prompted the statutory interpretation.”).

1231(a)(6), courts almost uniformly held that the Attorney General had both statutory and constitutional authority to detain inadmissible aliens indefinitely.<sup>191</sup> After the passage of IIRIRA, courts held the same.<sup>192</sup> Even after the *Zadvydas* decision, some courts held that the Attorney General retained both statutory and constitutional authority to detain inadmissible aliens indefinitely.<sup>193</sup> Due to the Court's use of the avoidance canon in *Zadvydas* and the lowest common denominator principle in *Martinez*, the Attorney General was precluded from detaining indefinitely not only deportable aliens, whose indefinite detention raises serious constitutional problems, but also inadmissible aliens, whose indefinite detention does not currently raise serious constitutional problems. As a result, the Attorney General no longer had authority to detain even inadmissible aliens who had been ordered removed well before 1996 and been subject to government detention procedures for more than twenty years.<sup>194</sup>

## 2. *INS v. St. Cyr and Its Aftermath*

The potential for the avoidance canon to give aliens greater rights than a decision striking down the statutory provision in question as unconstitutional is not, of course, limited to detention cases. The formula is simple: A court interprets a statutory provision in favor of one group of aliens through an application of the avoidance canon. The court then, pursuant to the lowest common denominator principle, uniformly applies the same interpretation in cases involving a second group of aliens even when the alternative (and often more persuasive) interpretation favoring the government would not have raised any serious constitutional questions.<sup>195</sup>

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191. See, e.g., *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1445 (9th Cir. 1995) (finding that the "overall structure" of the INA provisions relating to excludable aliens assumed that the Attorney General had authority to detain excludable aliens indefinitely); *Gisbert v. U.S. Attorney Gen.*, 988 F.2d 1437, 1448 (5th Cir. 1993) (holding that the indefinite detention of excludable aliens did not violate their substantive or procedural due process rights). One major exception was the Sixth Circuit's decision in *Rosales-Garcia v. Holland*, 238 F.3d 704 (6th Cir. 2001), in which the court held that the indefinite detention of excludable aliens violated their due process rights.

192. See, e.g., *Chi Thon Ngo v. INS*, 192 F.3d 390 (3d Cir. 1999).

193. See, e.g., *Sierra v. Romaine*, 347 F.3d 559 (3d Cir. 2003) (holding that *Zadvydas*'s temporal limitation on detention does not apply to inadmissible aliens); *Borrero v. Aljets*, 325 F.3d 1003, 1007 (8th Cir. 2003) (concluding "that *Zadvydas*'s six-month presumption of reasonableness is inapplicable to inadmissible aliens"). The Ninth Circuit, however, held that, after *Zadvydas*, the government no longer had statutory authority to indefinitely detain inadmissible aliens. See *Xi*, 298 F.3d at 837-39.

194. One of the aliens in *Martinez* arrived on the Mariel boatlift from Cuba in 1980 and was ordered removed in 1994. 543 U.S. at 374-75. See also *Benitez v. Wallis*, 402 F.3d 1133 (11th Cir. 2005) (ordering the release of a Cuban national who came to the United States on the Mariel boatlift in 1980); *Arango Marquez v. INS*, 346 F.3d 892 (9th Cir. 2003) (same).

195. Of course, if the case involving the second group of aliens reaches court first, the court would apply the lowest common denominator based on constitutional concerns in-

A similar phenomenon can also be found in *St. Cyr* and its aftermath.<sup>196</sup> Recall that in *St. Cyr* the Court held that AEDPA and IIRIRA did not divest district courts of jurisdiction pursuant to 28 U.S.C. § 2241 over habeas corpus actions filed by criminal aliens to challenge their removal orders.<sup>197</sup> In holding that habeas corpus review was still available for criminal aliens, the Court relied on the avoidance canon, because an interpretation of the statutes “that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions.”<sup>198</sup> The Court did not rely only on the avoidance canon, however. The Court also cited the “strong presumption in favor of judicial review of administrative action” and “the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction.”<sup>199</sup> Significantly, the Court noted that “Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals.”<sup>200</sup> Thus, even if the Court had held that the review provisions in AEDPA and IIRIRA unconstitutionally deprived criminal aliens of the ability to file habeas corpus petitions, the provisions would have been constitutional as applied to noncriminal aliens, who can obtain review of final orders of removal in the courts of appeals.<sup>201</sup>

Subsequent to *St. Cyr*, and without benefit of the Court’s decision in *Martinez*, some lower courts held that the Court’s decision in *St. Cyr* compelled a finding that noncriminal aliens could challenge their removal orders through habeas corpus in district court even though they, unlike criminal aliens, were able to obtain judicial review through the review provisions set forth in the INA. The Third Circuit in *Chmakov v. Blackman*<sup>202</sup> made such a holding, explicitly refusing to adopt different interpretations of the same statutory provisions depending on the status of the alien.<sup>203</sup> Similarly, the Second Circuit in *Liu v. INS*<sup>204</sup> agreed with the Third Circuit that habeas jurisdiction was not repealed for non-criminal aliens, reasoning that “*St. Cyr*

volving the first group of aliens. See *Martinez*, 543 U.S. at 724. Either way, the second group of aliens receives rights that it would not receive under a constitutional holding.

196. *INS v. St. Cyr*, 533 U.S. 289 (2001).

197. *Id.* at 299. I use the term “criminal aliens” to refer to aliens who are alleged by the government to be deportable on the basis of their criminal activities. “Noncriminal” aliens are those who are alleged to be deportable on other than criminal grounds.

198. *Id.* at 300; see also Neuman, *supra* note 100, at 1991 (describing the difficulties of resolving the Suspension Clause issue).

199. *St. Cyr*, 533 U.S. at 298.

200. See *id.* at 314 n.38. See also *id.* at 314 (noting that “[i]f it were clear that the question of law could be answered in another judicial forum, it might be permissible to accept the INS’ reading” of the statute).

201. 8 U.S.C. § 1252(a)(1) (2000).

202. 266 F.3d 210 (3d Cir. 2001).

203. *Id.* at 215.

204. 293 F.3d 36 (2d Cir. 2002).

held as a matter of statutory construction that 'habeas jurisdiction under § 2241 was not repealed by AEDPA and IIRIRA.' The Court's construction of those statutes, which does not distinguish, expressly or implicitly, between criminal and noncriminal aliens, compels our conclusion."<sup>205</sup>

*B. The Significance of the Lowest Common Denominator Principle in Immigration Law*

The decisions described above illustrate how second-best interpretations made through the avoidance canon can lead to greater rights for aliens as a whole, at least temporarily, than would a decision striking down the statute as unconstitutional on an as-applied basis. Because of the lowest common denominator principle, the avoidance canon has been transformed into an even more powerful tool for protecting aliens.<sup>206</sup> Indeed, the effects of the lowest common denominator principle are particularly strong in immigration law because of immigration law's unique classifications. It is still true that inadmissible and deportable aliens have very different constitutional rights.<sup>207</sup> Yet many immigration provisions, such as the one at issue in *Zadvydas*, are general in scope and apply to both deportable and inadmissible aliens. In addition, immigration law makes other distinctions among aliens, such as the criminal/noncriminal distinction in *St. Cyr*.<sup>208</sup> There are thus numerous potential opportunities for aliens, as a whole, to benefit from the lowest common denominator principle.<sup>209</sup>

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205. *Id.* at 40 (citations omitted); *see also* *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002) (agreeing with the Second and Third Circuits that habeas jurisdiction was not repealed for noncriminal aliens). Not all circuit courts agreed that the habeas route was still available to noncriminal aliens, however. *See, e.g., Lee v. Gonzales*, 410 F.3d 778, 784 (5th Cir. 2005) (holding that habeas jurisdiction was not available when another avenue of review was available). In his dissenting opinion in *Martinez*, Justice Thomas, pointing to the *Chmakov*, *Riley*, and *Liu* decisions, stated that "[t]he logic in allowing noncriminal aliens, who have a right to judicial review of removal decisions, to take advantage of constitutional doubt that arises from precluding any avenue of judicial review for criminal aliens . . . escapes me." *Clark v. Martinez*, 543 U.S. 371, 401 (2005) (Thomas, J., dissenting).

206. It appears that lower courts have treated the lowest common denominator principle seriously. *See, e.g., Nadarajah v. Gonzales*, 443 F.3d 1069, 1076-78 (9th Cir. 2006) (interpreting a different set of detention provisions than the one at issue in *Zadvydas* to allow detention for only a limited time, even though the alien before the court had been stopped at the border, because deportable aliens were also subject to detention under the same provisions).

207. *See supra* notes 179-84 and accompanying text.

208. *See supra* notes 195-205 and accompanying text.

209. I state that aliens, as a whole, are benefited, but to be more specific, the group likely to be assisted the most by the lowest common denominator principle are inadmissible aliens. In many cases where a court avoids a constitutional claim brought by a deportable alien, it is still likely that the constitutional challenge would not have been a serious one if it had been made by an inadmissible alien. Yet, under the lowest common denominator principle, the statutory provision must be interpreted uniformly.

Despite the undeniable power of the lowest common denominator principle in immigration law, its significance in immigration cases should not be overstated. Professor Siegel argues that the lowest common denominator principle, when combined with the avoidance canon, “rachets up the judicial interference with congressional will.”<sup>210</sup> This is true, however, only when there is no canon other than the avoidance canon that is relevant to the interpretation of the statute.

Multiple canons are often implicated in immigration cases, and in circumstances where a second canon is applicable in addition to the avoidance canon, the statutory provisions should often be interpreted uniformly without regard to the lowest common denominator principle. In cases that raise serious constitutional questions, the avoidance canon is implicated if the statutory interpretation favoring the alien is a fairly possible interpretation, while the immigration rule of lenity, for example, is implicated whenever an immigration statute is ambiguous.<sup>211</sup> Thus, if an immigration provision is ambiguous and the government’s interpretation of it would raise a serious constitutional question, both canons direct courts to interpret the statute in favor of the alien, with the immigration rule of lenity being applicable regardless of any constitutional concerns. The presumption in favor of judicial review of administrative action, the canon requiring a clear statement of congressional intent to repeal habeas jurisdiction, and the *Charming Betsy* canon can also be applicable in cases that raise serious constitutional issues.<sup>212</sup>

In *Zadvydas*, it is perhaps the case that only the avoidance canon was relevant, although the Court did state that the statutory provision in question, 8 U.S.C. § 1231(a)(6), was ambiguous.<sup>213</sup> It is possible, however, that the statutory provision was sufficiently unclear that the avoidance canon could be applied but not so ambiguous that the immigration rule of lenity, a tie-breaker canon, would have been applied to the provision absent any constitutional concerns.<sup>214</sup> In such a scenario, application of the lowest common denominator principle in *Martinez* could be viewed as truly aggressive.

210. See Siegel, *supra* note 168, at 382; see also *Chavez-Rivas v. Olsen*, 207 F. Supp. 2d 326, 334 (D.N.J. 2002) (arguing that the idea that a Supreme Court interpretation avoiding serious constitutional questions applies to every conceivable application of the statute would dramatically expand the power of the courts at the expense of Congress).

211. See *supra* notes 39-47 and accompanying text (describing the immigration rule of lenity).

212. See *supra* notes 48-56 and accompanying text (describing these canons). The presumption against retroactivity is another canon frequently used in immigration cases, although it is not often relevant in cases where constitutional issues are raised. See *supra* note 48 and accompanying text (explaining that retroactive statutes are not unconstitutional).

213. See *supra* note 88.

214. See *supra* note 31 (comparing the degree of ambiguity required to trigger the avoidance canon and the immigration rule of lenity).



The *St. Cyr* decision presents a clearer situation where more than one canon was applicable. In *St. Cyr*, the Court applied the avoidance canon and interpreted the relevant provisions as not depriving courts of habeas corpus jurisdiction with regard to petitions filed by criminal aliens.<sup>215</sup> Subsequent to *St. Cyr*, some lower courts interpreted the same provisions as not depriving courts of habeas corpus jurisdiction with regard to noncriminal aliens, even though such an interpretation would have been constitutional.<sup>216</sup> Yet in *St. Cyr*, unlike perhaps *Zadvydas*, another canon was relevant. The Court in *St. Cyr* also cited the canon requiring a clear statement of congressional intent to repeal habeas jurisdiction.<sup>217</sup> Thus, after *St. Cyr*, lower courts correctly recognized that even though the avoidance canon was not applicable, another canon was applicable and, independent of the lowest common denominator principle, required that the provisions be interpreted in favor of noncriminal aliens.<sup>218</sup>

Another reason why the significance of the lowest common denominator should not be overstated is that even when canons are used in an aggressive and unpredictable manner, judicial decisions applying canons are not as dangerous to congressional supremacy, at least in some respects, as judicial decisions that rest on constitutional grounds.<sup>219</sup> When a court ignores congressional intent and aggressively interprets a statute in favor of an alien by applying the avoidance canon, and thus does not act as a “faithful agent” of Congress, it can still be said to act with restraint by not deciding the case on constitutional grounds. Congress can overturn a court decision by amending a statute, but it cannot overturn a constitutional decision without amending the Constitution.<sup>220</sup> Consequently, many immigra-

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215. See *supra* notes 197-201 and accompanying text.

216. See *supra* notes 201-05 and accompanying text.

217. In addition, the Court cited the “strong presumption in favor of judicial review of administrative action.” *INS v. St. Cyr*, 533 U.S. 289, 298 (2001).

218. See *Chmakov v. Blackman*, 266 F.3d 210, 214 (3d Cir. 2001) (noting that, although there was no Suspension Clause problem because noncriminal aliens had another avenue of judicial review, the Court’s decision in *St. Cyr* also rested on the basis that there must be a clear statement of congressional intent to repeal habeas jurisdiction). Because of the applicability of a second canon, Justice Thomas was incorrect in his dissent in *Martinez* when he criticized lower courts for holding that habeas corpus jurisdiction still existed for noncriminal aliens subsequent to the Court’s decision in *St. Cyr*. *Clark v. Martinez*, 543 U.S. 371, 401 (2005) (Thomas, J., dissenting).

219. See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 341 (2000) (noting that canons do not create serious risks to the operation of the regulatory state because they only ensure congressional deliberation on issues of great sensitivity).

220. When the Court applies the avoidance canon, however, Congress can interpret the decision as one that creates constitutional rights and may be wary of attempting to overturn it. Lower courts may also interpret the decision as making a constitutional holding, even when doing so is not warranted. See *Motomura*, *supra* note 4, at 611.

tion commentators believe this judicial restraint comes at a price.<sup>221</sup> Because statutory decisions, as compared to constitutional decisions, can be much more readily fixed by Congress, they do not result in permanent rights for aliens.

The recent legislation targeting judicial review and the resulting litigation illustrates both the limited nature of statutory decisions as protective devices for aliens and how statutory decisions can operate as a dialectic between the courts and Congress.<sup>222</sup> In 1996, Congress passed IIRIRA and AEDPA, which purported to make significant changes to the judicial review provisions of the INA, almost all of which were hostile to aliens.<sup>223</sup> Courts generally interpreted these provisions very narrowly, including the Court in *St. Cyr* when it saved habeas corpus jurisdiction for criminal aliens.<sup>224</sup> In response to these decisions, Congress passed the REAL ID Act of 2005, generally eliminating habeas corpus jurisdiction to review final orders of removal.<sup>225</sup> Significantly, however, Congress removed many of the bars to judicial review in the federal courts of appeals that caused criminal aliens to file habeas corpus petitions in district courts in order to challenge their removal orders.<sup>226</sup> The end result is that judicial review has largely been saved for criminal aliens, which was certainly an open question after IIRIRA was passed in 1996.<sup>227</sup> Thus, while the statutory decisions by courts did not result in permanent rights for aliens, the decisions led to a dialogue between the courts and Congress that ultimately resulted in both preserved rights for aliens and more precise legislation.<sup>228</sup>

Although the effects of the lowest common denominator principle should not be overstated, it is important that the avoidance canon be applied carefully in immigration cases. Justice Thomas complains that under the “lowest common denominator principle, a statute like § 1231(a)(6) must be narrowed once and for all based on constitu-

221. See, e.g., Jose Javier Rodriguez, Recent Development, *Clark v. Martinez: Limited Statutory Construction Required by Constitutional Avoidance Offers Fragile Protection for Inadmissible Immigrants from Indefinite Detention*, 40 HARV. C.R.-C.L. L. REV. 505, 518-19 (2005).

222. Earlier in this Article I used the REAL ID Act of 2005 to illustrate the way in which canons can add predictability to the law by acting as background rules that guide Congress when it chooses statutory language. See *supra* notes 102-05 and accompanying text.

223. See generally Neuman, *supra* note 100.

224. See *supra* notes 198-98 and accompanying text.

225. See *Ishak v. Gonzales*, 422 F.3d 22, 28 (1st Cir. 2005) (describing how the “Real ID Act amended section 242 of the INA, 8 U.S.C. § 1252, to place review of all final removal orders, for both criminal and non-criminal aliens, in the courts of appeals”).

226. See Motomura, *supra* note 104, at 487.

227. See *id.* at 463.

228. See Elhauge, *supra* note 105, at 2210; Sunstein, *supra* note 219, at 331 (arguing that the presumption against retroactivity, along with other canons such as the avoidance canon, act as nondelegation canons that require sensitive issues (both constitutional and non-constitutional) to be deliberately and expressly addressed by Congress).

tional concerns that may never materialize.”<sup>229</sup> It should not seem surprising to Justice Thomas that constitutional issues that are avoided may end up being decided in favor of the government. Aggressive (but plausible) statutory interpretations are part of the legitimate application of the avoidance canon, and the nature of the canon is such that the constitutional issues are avoided, not decided.<sup>230</sup> Nevertheless, because of the lowest common denominator principle, an implausible statutory interpretation, as opposed to a plausible second-best interpretation, seems even more aggressive if the constitutional issue is not one that would have been decided in favor of the alien.

Another common complaint about the avoidance canon is that when a court chooses to avoid a constitutional question, it frequently also avoids the obligation of careful consideration and reason-giving that typically accompanies constitutional adjudication.<sup>231</sup> This criticism is particularly relevant to immigration law. Considering their history of using phantom constitutional norms when applying the avoidance canon, courts must be particularly careful in immigration cases to ensure that the constitutional issues to be avoided are indeed both real and serious.<sup>232</sup> Especially in light of the lowest common denominator principle, decisions that are too aggressive risk unnecessarily disrupting Congress’s legislative designs rather than respecting Congress, which is one of the purposes of the avoidance canon.<sup>233</sup>

## VI. THE LEGITIMACY OF THE CANONS OF STATUTORY CONSTRUCTION CHOSEN BY THE SUPREME COURT

Thus far, this Article has accepted the Court’s choices about which canons to create and apply and has dealt with various issues regarding the over- or underutilization of the canons it has chosen. It is widely accepted that the application of some type of canons is inevi-

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229. *Clark v. Martinez*, 543 U.S. 371, 397 (2005) (Thomas, J., dissenting). Of course, a statute cannot be “narrowed once and for all” by a court because Congress can always override the statutory decision. *See supra* notes 102-05 and accompanying text (describing the REAL ID Act).

230. *See supra* Part II.A (explaining that a legitimate aspect of the avoidance canon is the adoption of second-best statutory interpretations).

231. *See Young, supra* note 75, at 1574. The Court itself acknowledged in *Martinez* that it does not engage in a full constitutional analysis when it applies the avoidance canon. *See* 543 U.S. at 381.

232. Another common complaint about the avoidance canon is that it creates a “penumbra” effect which “actually broadens the impact of constitutional provisions beyond their legitimate warrant.” *Young, supra* note 75, at 1574. Similar to the phantom norms danger, if courts are careful when describing the constitutional issues that they are avoiding, and careful to avoid only serious constitutional issues, the penumbra effect should be limited, even though the statutory interpretation may be a second-best interpretation.

233. *See infra* notes 241-43 and accompanying text (describing the Court’s view that application of the avoidance canon gives effect to congressional intent).

table because statutes are frequently ambiguous due to Congress being either unable or unwilling to legislate with clarity.<sup>234</sup> Choosing which canons to create and apply, however, is a more difficult issue. For example, in cases of statutory ambiguity courts have sometimes applied the immigration rule of lenity, which directs courts to interpret ambiguities in immigration statutes in favor of aliens.<sup>235</sup> But why should courts resolve statutory ambiguity in this manner? Why should a court not instead apply an immigration rule of severity and interpret any ambiguities *against* aliens?

Although as self-styled “faithful agents” of Congress courts often justify their statutory interpretations on the basis of congressional intent, many of the canons currently applied in immigration cases are hard to defend on that basis. In fact, as this Part illustrates, some of the canons arguably run counter to congressional intent. Nevertheless, this reality does not make the canons chosen by courts illegitimate. It cannot be doubted that all of the substantive canons to some degree reflect value choices made by judges.<sup>236</sup> The goal of statutory interpretation may be aimed primarily at enforcing the intent of Congress, but an exclusive focus on congressional intent tends to obscure the fact that judicial discretion is inherent in statutory interpretation. Many judges, while still striving to uphold congressional intent, also desire to promote other values.<sup>237</sup> The values chosen by the Court to protect in immigration cases are worthy ones, especially compared to the values that would be promoted by alternative canons. This Part thus defends the immigration canons that courts have chosen despite the likelihood that they do not always reflect congressional intent.

#### A. *The Relevance of Congressional Intent*

When a statute is unclear, courts must decide whether the uncertainty is an invitation to make policy choices, through the application of canons or otherwise, or, conversely, whether they must attempt to adopt canons that will reflect probable congressional intent.<sup>238</sup> The

234. See *supra* notes 33-35 and accompanying text.

235. See *supra* notes 39-47 and accompanying text (describing the immigration rule of lenity).

236. See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595-96 (1992) (“[S]ubstantive canons are not policy neutral. They represent value choices by the Court.”); Solan, *supra* note 32, at 477 (arguing that the avoidance canon does not “substitute for intent” but rather “interact[s] with intent”).

237. See generally Steven J. Cleveland, *Judicial Discretion and Statutory Interpretation*, 57 OKLA. L. REV. 31 (2004); see also Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1404 (2005) (stating that “whatever one’s school of thought . . . judicial judgment will always creep into the equation in some form”).

238. See Nelson, *supra* note 31, at 394 (stating that “[u]nless interpreters are willing to hold . . . statutes void for vagueness, they need some way to finish the job and to pick from

choice between policy and congressional intent may be a distinction without much of a difference, though. As faithful agents, courts often justify the use of a canon on the basis that its application accurately reflects congressional intent.<sup>239</sup> Resolving the issue of which canons can be said to reflect congressional intent, however, is not easy, or perhaps even possible.<sup>240</sup>

### 1. *The Canon of Constitutional Avoidance and Congressional Intent*

Consider the avoidance canon.<sup>241</sup> In *Martinez*, Justice Scalia asserted that the canon is “a means of giving effect to congressional intent, not of subverting it.”<sup>242</sup> The theory, resting on what Justice Scalia terms a “reasonable presumption,” is that Congress intends to legislate constitutionally and would thus prefer a statutory interpretation that does not raise constitutional doubts.<sup>243</sup> Accordingly, when a statute can reasonably be interpreted in two distinct ways, one of which raises a potential constitutional issue, the less problematic reading should prevail.

Not everyone agrees, however, that application of the avoidance canon, as a general matter, renders a result faithful to congressional intent. Some have argued that the canon is hard to defend in terms of capturing Congress’s likely intent because “there is no particular reason to presume that members of Congress systematically try to avoid gray areas and to refrain from pushing their power to its limits.”<sup>244</sup> The detention provision at issue in *Zadvydas* is a good exam-

among the possible meanings that their primary interpretive tools have identified”). The choice for courts posed in the text assumes that the statutory ambiguity is not a delegation to agencies to make the policy choices, as envisioned in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See generally Slocum, *supra* note 30 (describing how the immigration rule of lenity interacts with the *Chevron* doctrine).

239. See Solan, *supra* note 32, at 430 (“[C]ourts frequently justify many of the canons of construction upon which textualists rely as good proxies for the intent of the legislature.”). But see Nelson, *supra* note 31, at 386 (“[Textualists] hesitate to argue that the best test of a canon is whether its use will minimize the gap between what interpreters understand statutes to mean and what members of the enacting legislature intended them to mean.”).

240. See Bradley, *supra* note 8, at 518 (stating that any attempt to ground canons in legislative intent encounters substantial conceptual and empirical difficulties).

241. See *supra* Part I.B (describing the avoidance canon).

242. *Clark v. Martinez*, 543 U.S. 371, 382 (2005).

243. See *id.* at 381; see also *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (“Congress . . . legislates in the light of constitutional limitations.”); 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, 1801 (2003) (noting that “[u]nder this rationale, the canon is a means of ferretting out congressional intent”).

244. Nelson, *supra* note 31, at 387. See Elhauge, *supra* note 105, at 2210 n.117 (stating that the canon cannot “generally be justified as reflecting likely legislative preferences”). Many have argued that the canon is illegitimate. See, e.g., Frank H. Easterbrook, *Do Lib-*

ple of a statute where it can be said that Congress did not intend to avoid a gray area and wanted to push its power to its constitutional limits.<sup>245</sup> Professor Aleinikoff points out that Congress had no reason to know before *Zadvydas* that its detention authority was restrained by the Constitution.<sup>246</sup> In addition, the detention provision at issue was enacted as part of a statute, IIRIRA, that was the “toughest immigration legislation adopted in half a century.”<sup>247</sup> If an interpretation of the statute giving the government power to detain even deportable (as opposed to only inadmissible) aliens indefinitely was the interpretation most likely consistent with congressional intent, it could be concluded that the application of the canon was unwarranted.<sup>248</sup> The subsequent extension of the *Zadvydas* interpretation in *Martinez* to cases involving inadmissible aliens, who likely can constitutionally be indefinitely detained, could be said to only compound the mistake.<sup>249</sup>

## 2. *The Immigration Rule of Lenity and Congressional Intent*

Similar to the avoidance canon, it is questionable whether the immigration rule of lenity reflects congressional intent.<sup>250</sup> A possible theory that the canon reflects likely congressional intent is that deportation is a severe measure and fair notice, reasonable reliance, and settled expectations (values that Congress would presumably endorse when the consequences of deportation are so great) dictate that ambiguities in immigration statutes be interpreted against the

*erals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1405-06, 1409 (2002) (calling the avoidance canon “wholly illegitimate” and “a misuse of judicial power”); Kelley, *supra* note 77, at 871 (calling for the abandonment of the avoidance canon).

245. See *supra* notes 84-89 and accompanying text (discussing the *Zadvydas* decision).

246. See Aleinikoff, *supra* note 129, at 368 (arguing that there was “nothing to suggest that Congress would not have wanted persons deemed by the Attorney General to be dangerous to be held for as long as he or she thought appropriate”). But see *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001) (stating that the Court had “reason to believe . . . that Congress previously doubted the constitutionality of detention for more than six months”).

247. Aleinikoff, *supra* note 129, at 368.

248. The Court itself did not argue that it was adopting the most persuasive interpretation of the statute. See *supra* notes 91-93 and accompanying text. Nevertheless, despite the arguments of some scholars that the avoidance canon does not reflect congressional intent, it is possible that Congress favors plausible statutory interpretations that avoid constitutional issues it was not aware of when the statute at issue was enacted. If this is true, it could be argued that Congress would prefer the result in *Zadvydas* even if it had originally intended to give the Executive Branch authority to indefinitely detain deportable aliens.

249. See *supra* notes 186-90 and accompanying text (describing the Court’s decision in *Martinez*).

250. Cf. William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 678 (1999) (stating that the criminal rule of lenity is not invoked in order to reflect the “legislative preferences”).

government, not the alien.<sup>251</sup> Throughout much of the history of immigration law, however, it would be hard to argue that Congress intended that ambiguities in immigration statutes be construed in favor of aliens. The federal government's early restrictions on immigration were motivated by racial animus, and it was not until halfway through the twentieth century that racial restrictions were eliminated from the INA.<sup>252</sup> Recent immigration legislation, while perhaps not driven by racial animus to the same extent, has been remarkably harsh.<sup>253</sup> It could certainly be argued that it is doubtful that the same Congress that enacts immigration laws that severely disadvantage aliens would intend that any ambiguities in these statutes be interpreted in favor of aliens.

The reasoning that courts use when applying the immigration rule of lenity also indicates that these courts have not necessarily invoked the canon in order to help enact congressional intent. Indeed, concern for the political vulnerability of aliens likely motivated the Court in creating and applying the immigration rule of lenity more than a desire to help enact probable congressional intent.<sup>254</sup> When the Court created the canon, it stated that it was interpreting the relevant statute narrowly "because deportation is a drastic measure and at times the equivalent of banishment or exile," not because doing so would help enact congressional intent.<sup>255</sup> The Court's concern for the vulnerability of aliens is evident in other areas of the law. While the Court has consistently upheld immigration statutes from constitutional attack, on many occasions the Supreme Court has called aliens a "discrete and insular minority" in striking down restrictions on aliens outside of immigration law.<sup>256</sup>

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251. These are values that are vindicated by the void for vagueness doctrine, which the Court has applied to deportation provisions. See *Boutilier v. INS*, 387 U.S. 118, 123-24 (1967).

252. See Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After "9/11?"*, 7 J. GENDER RACE & JUST. 315, 317-22 (2003); see also Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525 (arguing that immigration law disproportionately affects persons of color).

253. See generally Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000).

254. See William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1032-33 (1989) (explaining that the immigration rule of lenity is an effort to protect certain "discrete and insular minorities" or "Carolene groups").

255. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). The Court has consistently recognized that deportation is a serious penalty that inflicts great hardship. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (stating that "[d]eportation is always a harsh measure"); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted.").

256. See, e.g., *Bernal v. Fainter*, 467 U.S. 216, 219 n.5 (1984) (striking down a state statute that barred a resident alien from becoming a notary public and stating that

### 3. *The Presumption Against Retroactivity and Congressional Intent*

Other canons are similarly difficult to defend on the basis that Congress would want them to be applied to immigration statutes. The presumption against retroactivity may be premised on the idea that members of Congress rarely intend to establish new substantive rules for past conduct.<sup>257</sup> The Court has stated that “[b]ecause it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations.”<sup>258</sup>

Whether the application of the presumption against retroactivity does in fact reflect congressional intent in immigration cases is questionable. First, it certainly cannot be said that Congress is at all reluctant to enact immigration laws with retroactive effect.<sup>259</sup> Second, like the immigration rule of lenity, the Court’s statements suggest that its goal in applying the presumption against retroactivity is fairness rather than an attempt to help enact congressional intent. In *St. Cyr*,<sup>260</sup> for example, the Court noted that concerns about retroactive laws become more acute when they target an “unpopular group[]” and stated that “because noncitizens cannot vote, they are particularly vulnerable to adverse legislation.”<sup>261</sup> In fact, the Court

“[a]lliens as a class are a prime example of a ‘discrete and insular’ minority . . . for whom . . . heightened judicial solicitude is appropriate”) (quoting *Graham v. Richardson*, 403 U.S. 365, 372 (1971)). See also *LeClerc v. Webb*, 419 F.3d 405, 417 (5th Cir. 2005) (“Given the extent to which resident aliens are legally entrenched in American society, their inability to participate in the political process qualifies them as a ‘prime example of a discrete and insular minority for whom [] heightened judicial solicitude is appropriate.’”) (citation omitted).

257. See *Nelson*, *supra* note 31, at 390.

258. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 261, 272 (1994). See also Ronald M. Levin, “*Vacation*” at *Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 349 (2003) (noting that the Court’s motivation for the presumption against retroactivity is the unfairness involved in retroactive legislation and concern for the rule of law).

259. See, e.g., *Marcello v. Bonds*, 349 U.S. 302, 314 (1955) (holding that retroactive application of new grounds for deportation provided by the Immigration and Nationality Act of 1952 did not violate the Ex Post Facto Clause of the Fifth Amendment); *Rankine v. Reno*, 319 F.3d 93 (2d Cir. 2003) (provision repealing discretionary waivers of deportation did not have impermissible retroactive effect on aliens who had been convicted at trial for aggravated felonies prior to such repeal). See also *Nelson*, *supra* note 31, at 390-91 (stating that courts sometimes will apply the presumption against retroactivity even under circumstances in which Congress has not traditionally shied away from retroactive effects or in which the particular Congress that enacted a statute was willing to accept those effects).

260. *INS v. St. Cyr*, 533 U.S. 289 (2001).

261. *Id.* at 315 & n.39 (citing Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1626 (2000)). See also *Landgraf*, 511 U.S. at 266 (stating that “responsivity to political pressures poses a risk that [Congress] may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals”); Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281, 1293 (2002) (noting that these passages in *St. Cyr* tie the immigration rule of lenity to the



noted and rejected the government's skepticism that aliens are an unpopular group.<sup>262</sup>

### B. *Canons as Background Rules Guiding Congress*

As the above discussion illustrates, it is difficult to establish that any given canon reflects Congress's subjective intent, to the extent that such a subjective intent even exists.<sup>263</sup> Nevertheless, it is possible to argue that the canons applied in immigration cases still reflect congressional intent, albeit in a different sense. Several scholars, as well as Justice Scalia, have argued that certain canons capture congressional intent because Congress presumably has them in mind when it drafts a statute.<sup>264</sup> This concept is evidenced by the REAL ID Act. The Act specifically responded to the Court's decision in *St. Cyr*, which applied canons of construction in holding that Congress did not clearly repeal habeas corpus jurisdiction for criminal aliens, by explicitly referencing 28 U.S.C. § 2241 "or any other habeas corpus provision."<sup>265</sup>

Even if it cannot be assumed that Congress would want a canon such as the immigration rule of lenity, for example, to be applied to any given immigration statute, the immigration rule of lenity is an established canon that has been around for decades.<sup>266</sup> Congress, at least to some degree, is capable of precluding the use of canons.<sup>267</sup>

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theory expressed in the Court's decision in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), that "prejudice against discrete and insular minorities" may "call for a correspondingly more searching judicial inquiry"; Elhauge, *supra* note 105, at 2210 (interpreting *St. Cyr* as a judicial attempt to elevate the influence of a politically weak group).

262. *St. Cyr*, 533 U.S. at 315 n.39.

263. See Eben Moglen & Richard J. Pierce, Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1203, 1211 (1990) (noting that "[t]he fundamental fiction, one so broad as to escape being primarily legal at all, may be called the fiction of collective intent").

264. Justice Scalia has stated that once rules of "strict construction . . . have been long indulged, they acquire a sort of prescriptive validity, since the legislature presumably has them in mind when it chooses its language." Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 583 (1990). Many others have also argued in favor of the background rules theory. See, e.g., Manning, *supra* note 32, at 436 n.57 (arguing that canons have value not because they capture the legislature's subjective intent, but because they represent a subset of the mutually available background conventions that make communication possible); Molot, *supra* note 34, at 1319 (stating that there is value in having clear canons available to legislators when they draft statutes); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 140 (2000) ("It is more important that judges select one answer and apply it consistently over time than that they select the right answer.").

265. See *supra* notes 102-05 and accompanying text.

266. Cf. Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 29 (Amy Gutmann ed., 1997) (questioning the legitimacy of substantive canons but stating that the criminal rule of lenity is "validated by sheer antiquity").

267. See generally Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

Thus, it can be argued that if the canon is well-established at the time a statute is enacted, its application by courts to the statute is legitimate without regard to whether the canon is an accurate measure of how members of Congress themselves understood the statute.<sup>268</sup>

*C. The Value of Canons to Promote Important Public Values in Immigration Law*

While attempts have been made, such as the background rules theory described above, to defend canons on the basis that they reflect congressional intent, one cannot doubt that all of the substantive canons applied in immigration cases are, at least to some degree, underpinned by values.<sup>269</sup> Indeed, the discussion in Section A does not establish that the canons used in immigration cases reflect congressional intent, but it does illustrate that courts desire to promote other values. A presumption in *favor* of retroactivity, for example, might be a more accurate measure of congressional intent in immigration cases than a presumption against retroactivity.<sup>270</sup> Such a presumption, though, would run counter to the Court's desire, exhibited in *St. Cyr*, to protect a vulnerable minority group from unfair legislation when doing so would not explicitly run counter to congressional intent.<sup>271</sup> Similar reasons undoubtedly motivate the Court's choice of other canons, such as the decision to apply the immigration rule of lenity instead of an immigration rule of severity.<sup>272</sup>

The Court's decision to select canons such as the presumption against retroactivity and the immigration rule of lenity, instead of a presumption in favor of retroactivity and an immigration rule of severity, can thus be defended on the theory that courts should promote important public values through the creation and application of canons. One of these values, according to Professor Sunstein, is that "[i]n the face of ambiguity, courts should resolve interpretive doubts

268. See Nelson, *supra* note 31, at 386. Presumably, if the canons are clear and are consistently applied, they will ultimately help minimize the gap between the courts' interpretations of statutes and the meanings intended by members of Congress. See *id.* Whether Congress is likely to consider canons when drafting most statutes is unclear, however. See generally Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 602 (2002). The Real ID Act responded to a specific Supreme Court decision, but it is uncertain whether future legislation that does not respond to specific decisions will reflect the same careful consideration of the impact of canons on interpretation.

269. See *supra* note 236.

270. See *supra* notes 257-62 and accompanying text.

271. See *id.*

272. Certainly, the Court has motivations for its selection of canons other than a desire to protect aliens. The Court purports to apply the avoidance canon, for example, because it believes doing so reflects congressional intent. See *supra* notes 242-43 and accompanying text. The Court's aggressive use of the canon in the past in order to protect aliens, however, reveals that it also sees the canon as accomplishing much more than merely showing respect for Congress.

in favor of disadvantaged groups.”<sup>273</sup> Undoubtedly, while this theory finds support in at least some of the Court’s decisions, selecting canons on the basis of whether they favor disadvantaged groups would not appeal to all of the Justices, and the Court’s selection of canons does not have to rest on that basis. For example, Justice Scalia’s support for the idea that well-established canons are legitimate because Congress has them in mind when it drafts a statute is connected to the theory that the judiciary should promote values associated with stability in the law, which is usually achieved by interpreting statutes narrowly. Professor Shapiro, for example, has argued that the courts’ application of canons such as the presumption against retroactivity and the criminal rule of lenity helps to promote values such as predictability and continuity in statutory interpretation.<sup>274</sup>

Even dynamic statutory interpretation theories that seek to interpret statutes in light of their present societal, political, and legal context (as opposed to that prevailing at the time of a statute’s enactment) can be used in support of the canons that the Court has chosen to apply in immigration cases.<sup>275</sup> Professor Elhauge, for example, has suggested that ambiguous statutes be resolved by default rules that favor political satisfaction at the time the judicial decision is made, but if the court is unable to determine legislative preferences, it should adopt a construction aimed at spurring the legislature to take up and resolve the otherwise indeterminate statutory question.<sup>276</sup> In Professor Elhauge’s view, the avoidance canon, the immigration rule of lenity, and the presumption against retroactivity can all be defended on this basis.<sup>277</sup>

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273. See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 483-84 (1989) (pointing to the canon that ambiguities in statutes should be interpreted in favor of Indian tribes as an example); see also Cass R. Sunstein, *Principles, Not Fictions*, 57 U. CHI. L. REV. 1247, 1256-58 (1990) (arguing that interpretive regimes should rest on “principles”). Other scholars have also advocated that courts should promote public values through the application of canons. See, e.g., Eskridge, *supra* note 254, at 1032-34 (discussing how courts can interpret statutes to protect traditional “Carolene groups”); Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 768 (1992).

274. See David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 943-44, 960 (1992) (suggesting that the canons used by the Supreme Court reflect a preference for continuity). See also Tyler, *supra* note 237, at 1419, 1426 (arguing that canons such as the presumption against retroactivity help advance predictability and continuity in statutory interpretation, values which should be promoted rather than current democratic preferences or prevailing social norms); Nelson, *supra* note 31, at 391 (noting that textualists argue that canons can encourage predictability in the law).

275. See e.g., William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) (contending that statutes should “be interpreted ‘dynamically,’ that is, in light of their present societal, political, and legal context”).

276. See Elhauge, *supra* note 105; Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027 (2002).

277. See Elhauge, *supra* note 105, at 2210, 2270-72.

Regardless of the theory used to defend the canons chosen by the Court, the careful application of canons by courts in immigration cases is part of the legitimate, appropriate, and historical use of canons by courts generally.<sup>278</sup> All of the canons discussed in this Article serve important functions in helping judges resolve statutory uncertainty in a way that promotes sound public policy and protects vulnerable aliens. The benefits of abandoning the guidance of well-established canons such as the immigration rule of lenity or the presumption against retroactivity on the ground that they are not useful in interpreting statutes are dubious, while the benefits of retaining such canons are numerous.<sup>279</sup> Moreover, changing canons would undermine, at least temporarily, the value and stability of canons as background rules guiding Congress and would create difficult issues such as whether the new canons should be applied retroactively to statutes passed before their creation.<sup>280</sup>

The canons currently applied in immigration cases are not, of course, universally celebrated by scholars and courts. Some canons, particularly the avoidance canon, have been subjected to harsh criticism and calls for their abolishment.<sup>281</sup> Nevertheless, the beauty of any particular canon is a matter of taste. Whether one sees the canons currently applied in immigration cases as legitimate devices for courts to use when interpreting statutes, or as illegitimate usurpations of policymaking authority by courts, is a function of one's jurisprudential philosophy. One crucial point that cannot be debated, though, is that the Court approves of the use of the canons described in this Article and shows no signs of abandoning their use any time soon.

## VII. CONCLUSION

Substantive canons of statutory interpretation occupy an important place in the law. In immigration cases, they are especially significant because they usually direct courts to interpret statutes in favor of aliens and have the potential, through the application of the

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278. See William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1021-25, 1103 (2001) (showing that an early understanding of judicial power in the United States included an approval of canons of statutory construction).

279. Cf. Nelson, *supra* note 31, at 391 (stating that "[t]he errors caused by refusing the guidance of specific canons might well outnumber the errors generated by the oversimplifications that such canons inevitably make").

280. Cf. Robert W. Scheef, *Temporal Dynamics in Statutory Interpretation: Courts, Congress, and the Canon of Constitutional Avoidance*, 64 U. PITT. L. REV. 529, 544 (2003) (arguing that the Court's use of the avoidance canon improperly fails to take into account the temporal dynamic involved when the constitutional rule that raises the problem was established after the enactment of the statute in question).

281. See *supra* note 244.

avoidance canon, of giving aliens as a whole greater rights, even if sometimes only temporarily, than would a decision based on constitutional grounds. Despite their importance, the role of canons in immigration law has largely been either ignored or impugned by the academy. Unfortunately, the role of canons will never receive the attention lavished on the plenary power doctrine because statutory decisions do not result in permanent rights for aliens. In addition, canons will always be the subject of criticism because they do not always reflect congressional intent and are both over- and underutilized by courts. Yet, considering the relative lack of constitutional rights afforded aliens, canons are especially important devices in protecting this vulnerable part of the population. When used properly, the application of canons in immigration cases adds predictability to the law and helps to promote important public values, a phenomenon sorely lacking elsewhere in immigration law.