COMMENTS

HOW MANY AVOIDANCE CANONS ARE THERE AFTER *CLARK V. MARTINEZ*?

Gilbert Lee[*]

INTRODUCTION

Karl Llewellyn famously observed that, for every canon of statutory construction, another canon points in the opposite direction.[1] Dueling canons potentially invite judicial manipulation of statutes, as judges can simply pluck a desired canon to support a desired reading of a statute.

But can this problem occur even when judges are deciding whether or not to invoke only one canon in a given case? Surprisingly, in the case of the avoidance canon, it can. After the Supreme Court's recent ruling in *Clark v. Martinez*,[2] three different interpretive methods now fall under the umbrella of "the avoidance canon." In any particular case, each counsels different outcomes, facilitating potential judicial sleight of hand whenever judges putatively invoke "the avoidance canon."

To highlight this problem, suppose Congress enacts the following statute:

> The federal government's termination of an employee of an agency is unlawful, unless:
>
> (I) the employee has been convicted of a felony; or

---

* J.D. Candidate, 2008, University of Pennsylvania Law School; A.B., Princeton University. I would like to thank Professors Matthew Adler, Theodore Ruger, and Catherine Struve for their immensely helpful comments. I also wish to thank B. Dax Grossman and Michael Boyle for their suggestions. And I would like to thank the staff of the *University of Pennsylvania Journal of Constitutional Law* for their editing assistance. Any remaining errors are mine alone.

1 Examples include: "If language is plain and unambiguous it must be given effect," yet an opposing canon states, "[n]ot when literal interpretation would . . . thwart manifest purpose." Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 403 (1950).

2 543 U.S. 371 (2005).

(2) because of the employee's sexual orientation, termination is determined to be advisable in the interests of the United States.

Suppose that Jones, an unpaid college intern working for the State Department, is convicted of a felony and then terminated. The different versions of the avoidance canon that have emerged provide different answers as to whether Jones can challenge his termination under the statute.

Call the earliest version, set forth by Justice Brandeis, the "Serious Constitutional Doubts Canon":

> "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."[3]

Under this Canon, Jones's case is straightforward. Under the natural reading of the statute, Jones is certainly an "employee," and termination due to a felony conviction is constitutionally uncontroversial. Without "serious constitutional doubts" present, the Serious Constitutional Doubts Canon counsels against deviating from the natural reading of the statute.

Call a second version, later articulated by Chief Justice Burger, the "Clear Affirmative Intention Canon":

> The Court must avoid "serious constitutional questions,"[4] unless "the affirmative intention of the Congress clearly expressed"[5] mandates reaching these questions.

Jones's case also appears to be reasonably straightforward under this Canon. Assuming termination of felons does not raise "serious constitutional questions," a judge need not determine whether Congress clearly intended to raise these questions. Thus, similar to the Serious Constitutional Doubts Canon, the Clear Affirmative Intention Canon also counsels against searching for a different construction of the statute, even if for somewhat different reasons.

But Jones's case becomes vastly more complicated under the most recent version of the avoidance canon. Call this formulation, ushered in by Justice Scalia in the 2005 Term's *Clark v. Martinez* decision,[6] the "Lowest Common Denominator Canon":

---

3 Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (internal quotation marks omitted) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

4 NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 501 (1979).

5 *Id.*

6 543 U.S. at 371.

> "[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court."[7]

Justice Scalia's justification for this Canon provides the "Lowest Common Denominator" moniker: "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."[8]

Jones's case becomes more complicated precisely because he is not the lowest common denominator. Instead, Jones might point at Smith, a hypothetical litigant who is also an unpaid college intern working for the State Department. Smith, however, is terminated after the State Department determines that his homosexuality poses a threat to national security.[9]

But unlike Jones, Smith's termination under the statute does pose apparent constitutional doubts. Termination because of sexual orientation triggers some level of heightened scrutiny, even if the precise level is unclear.[10] Some terminations determined to be "advisable in the interests of the United States" might satisfy this level of scrutiny, but some almost certainly do not.

Under the Lowest Common Denominator Canon, the constitutional doubts in Smith's case dictate searching for other plausible statutory interpretations that avoid these problems. One solution is to interpret the term "employee" narrowly, excluding unpaid college interns.[11] Doing so preserves within the statute's coverage a core set

---

7 *Id.* at 380–81.

8 *Id.* at 380 (emphasis added).

9 These facts are similar to those of *Webster v. Doe*, 486 U.S. 592 (1988), where the Director of the Central Intelligence Agency terminated a homosexual employee under a statute allowing the Director, "in his discretion," to terminate any employee "whenever he shall deem such termination necessary or advisable in the interests of the United States . . . ." *See id.* at 594 (internal quotation marks omitted).

10 *See generally* Lawrence v. Texas, 539 U.S. 558, 564 (2003) (holding that the criminal prohibition of homosexual sodomy violates the Fourteenth Amendment's guarantee of liberty); Romer v. Evans, 517 U.S. 620, 626 (1996) (holding that a state constitutional amendment preventing governmental action to protect homosexuals from discrimination violated the Equal Protection Clause).

11 In fact, much controversy exists over when to classify volunteers as bona fide employees. *See generally, e.g.*, Martha J. Schoonover et al., *Immigration Law: Basics and More*, 10 A.L.I. – A.B.A. CONTINUING LEGAL EDUC. 1, 9 (2006) (noting that the Immigration and Naturali-

of employees (e.g., high-level, at-will agency officials), where termination of homosexuals might still satisfy constitutional scrutiny.

Excluding Smith through this alternative construction also dictates excluding Jones, even though Jones's felony conviction poses no constitutional problems, and Congress's intent to cover Jones's termination is evident. This outcome exposes the following crucial distinction: of the three versions of the avoidance canon, only the Lowest Common Denominator Canon dictates reading Jones out of the statute, despite the obvious lack of constitutional problems regarding his termination.

This cleavage of the avoidance canon into three interpretive methods was hardly foreseeable. After all, the canon fundamentally derives from a single, age-old principle of judicial restraint—that courts should avoid deciding constitutional issues unless necessary. As Justice Brandeis famously stated, "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."[12] The marriage of this judicial restraint principle and the avoidance canon explains the canon's intuitive appeal[13] and long-standing usage by the Supreme Court.[14] Thus, the Court has declared that the canon "has for so long been applied by this Court that it is beyond debate."[15] And other commentators have described the avoidance canon as "[p]robably the most important of the constitutionally based canons . . . ."[16]

---

zation Service promulgated a regulation exempting volunteers from the Immigration Reform and Control Act of 1986's definition of "employees").

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

13 *See, e.g.*, WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 349 (2000) [hereinafter ESKRIDGE, JR. ET AL., LEGISLATION] (noting the "strong superficial appeal" of the avoidance canon).

14 *See, e.g.*, Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 14 (1800) (interpreting the Judiciary Act of 1789 narrowly, as statutes must "receive a construction, consistent with the constitution"); *cf.* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.) ("It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights . . . further than is warranted by the law of nations as understood in this country.").

15 Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1968).

16 William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 599 (1992).

If anything, the trifurcation of the avoidance canon is ironic, given the recent trend towards textualism[17] and its accompanying criticism that the canon, "in the hands of lazy or willful judges might provide little barrier to truly implausible attributions of statutory meaning."[18] After all, the Lowest Common Denominator Canon is also the only formulation that dictates reading Jones out of the statute, despite the statute's plain text.

This Comment argues that the Lowest Common Denominator Canon creates an avoidance canon "grab bag," where—as demonstrated in the Jones example—judges can resort to different formulations of the canon to justify both adherence to, and departure from, the natural reading of virtually any statute. Part I surveys the normative justifications for, and criticisms of, the avoidance canon, concluding that general agreement exists concerning the need to protect against overaggressive use of the canon. Proceeding on the assumption that overaggressive use of the canon is undesirable, Part II compares the susceptibility of the three canons to overaggressive usage. This Part argues that, by using statutory ambiguity as a "trigger" for potential avoidance canon usage, the Lowest Common Denominator Canon is the most susceptible to overaggressive usage, as courts can perceive ambiguity in virtually any statute. Part III assesses the continuing vitality of all three Canons in the lower courts, concluding that the shortcomings of the Lowest Common Denominator Canon have resulted in a state of disarray where the three Canons have been deployed in unpredictable ways.

I. WHY HAVE THE AVOIDANCE CANON?

A. The Justifications for the Avoidance Canon

Textual canons of statutory interpretation (e.g., "interpret a general term to be similar to more specific terms in a series")[19] are typi-

17 *See generally* ESKRIDGE, JR. ET AL., LEGISLATION, *supra* note 13, at 223–36 (discussing the rise of textualist theories including Justice Scalia's so-called "new textualism"); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006) (discussing the end of the textualist revolution and the convergence of textualist views with other moderate theories of statutory interpretation); Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347 (2005) (exploring the distinctions between textualism and other theories of statutory interpretation, such as intentionalism).

18 ESKRIDGE, JR. ET AL., LEGISLATION, *supra* note 13, at 350.

19 *Id.* at 375.

cally thought of as "guidelines for evaluating linguistic or syntactic meaning."[20]

The avoidance canon, however, is a substantive canon of interpretation.[21] Substantive canons are distinct from textual canons, as the former "are rooted in broader policy or value judgments"[22] and "attempt to harmonize statutory meaning with policies rooted in the common law . . . or the Constitution."[23] The justifications for the avoidance canon, then, typically focus on the underlying values the canon serves.[24]

According to conventional accounts, the avoidance canon serves judicial restraint values.[25] Central to these values is respect for legislative supremacy and the corresponding fear that "judicial review is a counter-majoritarian force in our system."[26] When Congress enacts a statute, its members, who swear to uphold the Constitution, are presumed to be legislating within constitutional limits.[27] Invalidating a statute, on the other hand, defeats legislative will and "is the gravest and most delicate duty that this Court is called on to perform."[28] The avoidance canon allows courts to refrain from striking down statutes

---

20 *Id.* at 329.

21 *Id.* at 348.

22 *Id.* at 330.

23 *Id.*

24 *See, e.g.*, Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1202 (2006) (aiming to "identify those values" the avoidance canon "operates in service of").

25 *See generally id.* at 1202–08 (chronicling such accounts).

26 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (2d ed., Yale Univ. Press 1986) (1962). Some would go even further, claiming that the countermajoritarian nature of judicial review derives from its lack of clear constitutional authorization. *See, e.g.*, Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 71–72.

27 *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 191 (1991) ("This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations." (citing FTC v. Am. Tobacco Co., 264 U.S. 298, 305–07 (1924))). Some commentators note that this presumption does not extend to the belief that Congress also intends to avoid serious constitutional doubts when legislating. *See, e.g.*, Morrison, *supra* note 24, at 1207 (contending that "the most historically accurate account of the move from classical avoidance to the judicial restraint theory of modern avoidance does not include a presumption of congressional intent to avoid constitutional doubts"). *But cf.* Clark v. Martinez, 543 U.S. 371, 381 (2005) (describing the avoidance canon as "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts").

28 Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring in the judgment of an equally divided Court).

full stop, functioning as "a means of giving effect to congressional intent, not of subverting it."[29]

Additionally, by enabling the judiciary to avert inherently difficult constitutional issues when possible, the avoidance canon serves another pragmatic dimension of judicial restraint.[30] Constitutional adjudication is frequently difficult, requiring "elaborate doctrines and tests that go well beyond anything that can be mechanically gleaned from constitutional text."[31] Unnecessary constitutional adjudication risks ossifying ill-thought-out standards that legislatures and even federal courts are hard pressed to undo. These concerns help situate the avoidance canon among more familiar judicial restraint principles, such as standing doctrines[32] and narrow holdings to decide cases.[33]

Distinct from the judicial restraint theories above, more recent justifications for the avoidance canon focus on what Trevor Morrison calls "constitutional enforcement" values.[34] Under this theory, the judiciary "giv[es] voice to constitutional norms that are real, not phantoms, and that are generally left underenforced by more conventional types of doctrines."[35] Thus, usage of the canon "raise[s] ob-

---

29 *Martinez*, 543 U.S. at 382; *see also* INS v. St. Cyr, 533 U.S. 289, 336 (2001) (Scalia, J., dissenting) ("The doctrine of constitutional doubt is meant to effectuate, not to subvert, congressional intent, by giving *ambiguous* provisions a meaning that will avoid constitutional peril, and that will conform with Congress's presumed intent not to enact measures of dubious validity.").

30 *See* ESKRIDGE, JR. ET AL., LEGISLATION, *supra* note 13, at 348 ("Even if judicial review is considered a well-settled and legitimate practice, the Court's constitutional decisions raise several practical legal process issues relating to the comparative institutional competence of courts and legislatures.").

31 *Id.* at 349.

32 *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345–46 (1936) (Brandeis, J., concurring) ("The Court has . . . restricted exercise of [judicial review] by rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies; and that they have no power to give advisory opinions."); *see also* Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 847 (2005) ("One of the oldest principles of constitutional adjudication is that federal courts will decide only those constitutional questions that are necessary to the resolution of cases or controversies. This principle provides a key justification for judicial review and underlies much of the law of justiciability.").

33 *See Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring) ("The Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." (internal quotation marks omitted)).

34 Morrison, *supra* note 24, at 1212.

35 Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1585 (2000); *see also* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 286 (1994) (describing the avoidance canon as a "subconstitutional way to enforce 'underenforced' constitutional norms").

stacles to particular governmental actions without barring those actions entirely,"[36] ultimately "forc[ing] legislators to reflect and deliberate before plunging into constitutionally sensitive issues."[37] When viewed this way, the avoidance canon amounts to a "clear statement principle,"[38] closely resembling the Clear Affirmative Intention Canon.[39]

Constitutional enforcement justifications also emerged in response to the canon's main criticisms, that the canon facilitates creative readings of statutes and fails to serve its underlying judicial restraint values. Constitutional enforcement justifications attempt to insulate the canon from these criticisms, reasoning that "if the aim of avoidance is to protect constitutional values . . . then its failure to track congressional intent is largely irrelevant."[40] This Comment now turns to criticisms of the avoidance canon.

B. The Criticisms of the Avoidance Canon

Because the avoidance canon only makes a difference when a court uses it to deviate from the otherwise-preferred reading of a statute,[41] criticisms of the avoidance canon center on lack of fidelity to a statute's plain meaning. By deviating from a statute's natural reading, "the Court . . . interprets a statute in ways that its drafters did not anticipate, and, constitutional questions aside, in ways that its drafters may not have preferred."[42] Even more cynically, the avoidance canon potentially becomes "a slippery requirement that in the hands of lazy or willful judges might provide little barrier to truly implausible attributions of statutory meaning."[43]

---

36 Young, *supra* note 35, at 1585.

37 ESKRIDGE, JR., *supra* note 35, at 286.

38 STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 327 (6th ed. 2006). For a more detailed discussion of the distinction between the avoidance canon and clear statement rules, see *infra* note 139.

39 *See supra* text accompanying notes 4–5.

40 Morrison, *supra* note 25, at 1212–13.

41 *See* Schauer, *supra* note 26, at 83 ("In almost any case we can imagine, the constitution-free principles of statutory interpretation will likely favor one result over another."); *see also* Young, *supra* note 35, at 1577 ("[E]ven statutes that are sufficiently unclear to trigger the avoidance canon will have a 'lean' to them—a meaning which would be more persuasive than the alternatives if no further considerations were introduced.").

42 Schauer, *supra* note 26, at 74.

43 ESKRIDGE, JR. ET AL., LEGISLATION, *supra* note 13, at 350. *See generally* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005) (using an empirical study to contend that liberal Justices' usage of all textual and substantive canons correlates with liberal outcomes and vice versa for conservative Justices).

Moreover, legislators might even prefer that courts address the constitutional merits of their statutes. Congress, after all, typically inserts severability clauses, allowing for constitutionally valid provisions to be severed from invalid provisions.[44] Consistent with this view, Judge Friendly argued that:

> [T]here is always the chance . . . that the doubts will be settled favorably, and if they are not, the conceded rule of construing to avoid unconstitutionality will come into operation and save the day. People in such a heads-I-win, tails-you-lose position do not readily sacrifice it . . . .[45]

Thus, legislators might prefer that courts confront constitutional issues head on, especially when courts still have the option of interpreting the statute differently if the natural reading *actually* violates the Constitution.[46] This criticism flourishes in light of case law "rife with constitutional questions that the Court has avoided by construction, only later to hold, when forced to confront the question under a different statute, that the constitutional claim should not prevail."[47]

A final group of criticisms focuses less on respect for legislative intent and more on judicial craft, maintaining that the canon overprotects constitutional norms through unnecessary making of constitutional law.[48] Judge Posner has argued that the avoidance canon

---

44 *E.g.*, Young, *supra* note 35, at 1580.

45 Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *reprinted in* HENRY J. FRIENDLY, BENCHMARKS 196, 210 (1967).

46 This argument implicates a distinction between the three formulations of the canon and a fourth version, "classical avoidance," which predates the three variants discussed here. *See, e.g.*, Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997) (distinguishing between "classical avoidance" and "modern avoidance"). Classical avoidance provides that "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [a court's] plain duty is to adopt that which will save the Act." Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring in the judgment of an equally divided Court). The difference between classical avoidance and its three modern variants lies in whether the statutory construction at issue is actually unconstitutional or merely poses some risk of unconstitutionality. *See* Morrison, *supra* note 24, at 1203. Because commentators generally agree that the Supreme Court shifted away from classical avoidance early in the twentieth century, *see, e.g.*, *id.* at 1204 (citing United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366 (1909)), this Comment will focus only on the three modern formulations of the avoidance canon.

47 Vermeule, *supra* note 46, at 1960; *see also* RICHARD POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 284–85 (1985) (arguing that use of the canon prevents potentially constitutional readings of a statute, as the otherwise-preferred reading might ultimately withstand constitutional scrutiny).

48 *See* Schauer, *supra* note 26, at 87 ("[T]he Court will [use the avoidance canon to] supplant the otherwise-best result only when it believes that there is a serious or substantial constitutional question involved. Yet this determination is itself a confrontation with the very issue that *Ashwander* seeks to avoid.").

creates a "judge-made constitutional 'penumbra' that has much the same prohibitory effect as the . . . Constitution itself."[49] A practical consequence of overprotection is potentially sloppy judicial analysis of constitutional issues, muddying the waters when a later court must address these same heretofore-avoided issues.[50]

With these critiques in mind, critics have clamored for wholesale abandonment of the avoidance canon,[51] a goal which—if the Lowest Common Denominator Canon is any indication—will not come to fruition. Instead, these criticisms have resulted in the following uneasy compromise: an ongoing tug of war between avoidance of constitutional issues and fidelity to congressional intent.[52] The Court's rhetoric bears this point out in the oft-quoted admonition that "[w]e cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question."[53] This Comment assumes the desirability of charting a middle course between avoidance of constitutional issues and fidelity to legislative intent, and evaluates each of the three variants of the avoidance canon in light of this criterion.

II. THE THREE AVOIDANCE CANONS

Canons of statutory interpretation are often treated as weapons to be deployed in wars over competing interpretations of a statute.[54]

---

49 Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983).

50 *See* ESKRIDGE, JR. ET AL., LEGISLATION, *supra* note 13, at 351 ("Indeed, perhaps the only practical difference between invalidating the statute as unconstitutional and imaginatively interpreting it canonically is that in the latter instance the court may well do a slipshod job of constitutional analysis, failing to think through the constitutional issues because, after all, it is supposedly avoiding them."). Ernest Young has suggested two examples of constitutional analysis "sketchier than one might have expected had the Court actually had to resolve those claims on the merits." Young, *supra* note 35, at 1583 n.180 (citing the two paragraphs of constitutional analysis in Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575–76 (1988), and the three pages of constitutional analysis in NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 501–04 (1979)).

51 *E.g.*, Emily Sherwin, *Rules and Judicial Review*, 6 LEGAL THEORY 299, 321 (2000).

52 Recall that one core argument in favor of the avoidance canon is the ability to honor legislative intent, at least in part, without having to invalidate a statute in its entirety. *See supra* notes 27–29 and accompanying text.

53 *See, e.g.*, Miller v. French, 530 U.S. 327, 341 (2000) (quoting United States v. Locke, 471 U.S. 84, 96 (1985) (quoting George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933) (Cardozo, J.))).

54 *See* ESKRIDGE, JR. ET AL., LEGISLATION, *supra* note 13, at 348 ("Does the U.S. Supreme Court or state high courts deploy *lucid* canons, or are their weapons *loose* canons instead?").

Consistent with this theme, each of the three Canons presents different opportunities for judicial manipulation, despite their largely similar language. This Part compares each Canon's susceptibility to judicial manipulation by: (1) breaking each Canon down into a series of different questions courts must answer in determining whether to invoke a particular Canon; and (2) assessing the extent to which these individual questions invite potential judicial manipulation.

A. The Serious Constitutional Doubts Canon

The earliest of the three Canons, the Serious Constitutional Doubts Canon, is ultimately the simplest for courts to use. Recall that this formulation counsels that:

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.[55]

The analytical structure of this Canon contains the following implicit questions:

(1) Does the otherwise-preferred reading of a statute (i.e., the reading supported by the constitution-free principles of statutory interpretation) raise "serious constitutional doubts" when applied to the facts of the instant case?[56] If not, a court may stop here; the court may address the merits of whatever non-serious constitutional doubts are presented by the preferred reading of the statute.

(2) But if the otherwise-preferred reading of a statute raises "serious constitutional doubts," is an alternative, saving construction of the statute "fairly possible"? If the alternative interpretation is "fairly possible," then a court may adopt this alternative interpretation. If not, the court must assess the constitutionality of the preferred reading of the statute, as applied to the facts of the case.[57]

---

55 Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (internal quotation marks omitted) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

56 Question (1)'s inquiry would be different in the case of a facial challenge. In a typical facial challenge, a court would have to resolve whether the otherwise-preferred reading of a statute raised "serious constitutional doubts," where "no set of circumstances exists under which" this interpretation would be valid. *Cf., e.g.*, United States v. Salerno, 481 U.S. 739, 745 (1987).

57 One might wonder whether these two questions are commutative, i.e., whether one might refuse to invoke the avoidance canon without evaluating the level of constitutional doubts at play by concluding that, at any rate, alternative readings of the statute are not "fairly

These implicit questions create two opportunities for overaggressive use of the avoidance canon, as courts may either: (1) overstate the seriousness of the constitutional doubts at play; or (2) resort to "truly implausible attributions of statutory meaning"[58] that are not "fairly possible" in an effort to avoid "serious constitutional doubts." This Subpart addresses the extent to which each is problematic.

1. "Serious Constitutional Doubts"

Assessing the severity of constitutional doubts is, at minimum, an inherently judgment-call-driven exercise. At worst, it is a license for judicial disingenuousness. But despite well-chronicled fears that the avoidance canon leads to strained readings of statutes,[59] the most controversial avoidance canon cases involved situations where the Court actually downplayed the severity of the constitutional doubts at play. Thus, the Court did *not* use the avoidance canon when perhaps it could have. Two examples in this vein are *Rust v. Sullivan*[60] and *Almendarez-Torres v. United States*.[61]

In *Rust*, the statute provided funding for family planning services, but not for "programs where abortion is a method of family planning."[62] Under this statute, the Department of Health and Human Services promulgated regulations prohibiting funding of programs that advocated abortion or counseled pregnant mothers about abortion.[63] Here, the avoidance canon issue was whether these regulations raised sufficiently serious constitutional doubts, so as not to be permissible constructions of the funding statute.[64]

---

possible." The Supreme Court has treated these questions as commutative, at least in situations where the constitutional doubts did not appear to be serious. *See infra* note 81 and accompanying text.

58 ESKRIDGE, JR. ET AL., LEGISLATION, *supra* note 13, at 350.

59 *See supra* notes 41-43 and accompanying text.

60 500 U.S. 173 (1991).

61 523 U.S. 224 (1998).

62 *Rust*, 500 U.S. at 178 (quoting 42 U.S.C. § 300a-6).

63 *See id.* at 179–80 (noting that the regulations expressly excluded "pregnancy care (including obstetric or prenatal care)," and mandated that programs must refer pregnant clients by "furnishing a list of available providers that promote the welfare of mother and unborn child").

64 *Id.* at 183. Because the case concerns an administrative agency's interpretation of an organic statute, *Rust* raises the additional complication of deference to agency interpretations. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). These added complications are largely beyond the scope of this Comment. For a more detailed analysis of these issues, see generally, for example, Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005). A second complication in *Rust*'s avoidance canon analysis

When appraising the level of constitutional doubts involved, Chief Justice Rehnquist, writing for a five-Justice majority, concluded: "While we do not think that the constitutional arguments . . . are without some force . . . . [T]he regulations . . . do not raise the sort of 'grave and doubtful constitutional questions,' that would lead us to assume Congress did not intend to authorize their issuance."[65] The Court then addressed the merits of the constitutional challenges, concluding that the statute did not constitute impermissible viewpoint discrimination under the First Amendment; the government simply chose not to subsidize activity relating to the exercise of a fundamental right.[66] Similarly, the statute did not raise serious doubts regarding Fifth Amendment due process concerns, as "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[67]

Where the Chief Justice saw little constitutional doubt, all four dissenting Justices invoked the Serious Constitutional Doubts Canon to conclude that the regulations were an impermissible construction of the funding statute. Justice O'Connor wrote: "In these cases, we need only tell the Secretary that his regulations are not a reasonable interpretation of the statute . . . . If we rule solely on statutory grounds, Congress retains the power to force the constitutional question by legislating more explicitly."[68] Before engaging the constitutional arguments on the merits,[69] Justice Blackmun wrote: "[The majority's] facile response to the intractable problem the Court addresses today is disingenuous at best. Whether or not one believes that these regulations are valid, it avoids reality to contend that they do not give rise to serious constitutional questions."[70] These acute disagreements demonstrate that the main flashpoint in applying the

---

is the fact that it is evaluating a facial challenge. *See Rust*, 500 U.S. at 183 (citing United States v. Salerno, 481 U.S. 739, 745 (1987)); *see also supra* note 56.

65 *Rust*, 500 U.S. at 191 (quoting United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909)).

66 *See id.* at 193.

67 *Id.* at 201 (internal quotation marks omitted) (quoting Webster v. Reprod. Health Servs., 492 U.S. 490, 507 (1989)).

68 *Id.* at 224 (O'Connor, J., dissenting).

69 *See generally id.* at 207–20 (Blackmun, J., dissenting) (arguing that the regulations violated both the First and Fifth Amendments).

70 *Id.* at 205.

Serious Constitutional Doubts Canon is determining what in fact counts as serious constitutional doubts.[71]

Similarly dramatic conflicts resurfaced in *Almendarez-Torres v. United States*.[72] Here, the Court addressed a statute concerning once-deported aliens illegally found in the United States. Whether an alien's initial "deportation was subsequent to a conviction for commission of an aggravated felony"[73] determines whether his maximum term of imprisonment is twenty years or only two years.[74] The issue in this case was whether this provision defined a separate criminal offense, which an indictment must mention, or whether this provision is a penalty provision that authorizes an enhanced sentence if the offender happens to have been convicted of an aggravated felony.[75] Concluding that the statute is a penalty provision that authorizes increased sentences, the Court upheld Almendarez-Torres's sentence of eighty-five months' imprisonment, even though his indictment did not mention earlier aggravated felony convictions.[76]

Notably, the Court dismissed calls to interpret the statute as setting forth a separate crime, reasoning that the statute did "not lead a majority gravely to doubt that the statute is constitutional."[77] As in *Rust*, the issue of serious constitutional doubts produced a 5-4 split here.

Striking, though, was the vigorous dissent of Justice Scalia, once a member of the *Rust* majority,[78] who now believed that serious consti-

---

71 *See, e.g.*, Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 793, 872–73 (1997) ("Until these debates *are* resolved, the scope of the 'serious constitutional doubts' doctrine will remain unclear. Rather than resolve the uncertainty, *Rust* only deepens it."). *But cf.* Clark v. Martinez, 543 U.S. 371, 400 (2005) (Thomas, J., dissenting) (contending that, if anything, a "disturbing number" of cases exist where the Court "applied the canon of constitutional doubt to statutes that were on their face clear" (citing Pub. Citizen v. Dept. of Justice, 491 U.S. 440, 481–82 (1989) (Kennedy, J., concurring in judgment), and Lowe v. SEC, 472 U.S. 181, 212–13 (1985) (White, J., concurring in result))).

72 523 U.S. 224 (1998).

73 *Id.* at 226 (internal quotation marks omitted) (quoting 8 U.S.C. § 1326(b)(2)).

74 *Id.*

75 *Id.*

76 *Id.* at 226–27.

77 *Id.* at 239 (citing, *inter alia*, Rust v. Sullivan, 500 U.S. 173, 190–91 (1991)).

78 Some commentators view Justice Scalia's position here as ironic. *See, e.g.*, ESKRIDGE, JR. ET AL., LEGISLATION, *supra* note 13, at 350 ("Even Justice Scalia—whom one would expect to be dubious about any canon encouraging a court to deviate from the best textual reading of a statute—recently chided the majority of his colleagues for refusing to apply the canon because they believed . . . the statute [was] not sufficiently ambiguous."). This irony is perhaps heightened by the increased likelihood of Justice Scalia's Lowest Com-

tutional doubts existed. Justice Scalia argued that if a conviction need not be included in a criminal indictment, a judge—and not a jury—could find that the alien had an aggravated felony conviction. Allowing drastically increased sentences without allowing for the right to jury trial potentially violates due process, warranting a search for an alternative construction of the statute.[79]

Rust and *Almendarez-Torres* exemplify the judgment calls inherent in courts' application of Question (1) of the Serious Constitutional Doubts Canon. If anything, these cases demonstrate that the Court is more likely to understate the level of constitutional doubts in close cases. Thus, despite concerns that judges use the avoidance canon as a pretext for manipulating the readings of statutes, *Rust* and *Almendarez-Torres* are noteworthy instances where the Court refrained from using the avoidance canon, even though it plausibly could have.

2. *"Fairly Possible" Alternative Statutory Interpretations*

Potential underusage of the avoidance canon also surfaces when assessing Question (2), whether an alternative reading, which does not raise serious constitutional doubts, is "fairly possible." An examination of the Court's jurisprudence on this question yields two observations.

First, when the Court finds that a statute's constitutional doubts are not sufficiently serious, the Court also tends to find that an alternate reading of the statute is not fairly possible. In *Almendarez-Torres*, the majority and minority disagreed on both the level of constitutional doubts at play, and whether alternative readings were fairly possible.[80]

Second, when petitioners raise constitutional challenges to a statute, the Court sometimes disposes of its avoidance canon analysis without appraising the seriousness of the constitutional doubts at play. Instead, the Court simply concludes that, at any rate, an alternate construction of the statute is not fairly possible before reaching the merits of the constitutional issues.[81]

---

mon Denominator Canon resulting in departures from the natural reading of a statute. *See infra* Part II.C.3.

79 *Almendarez-Torres*, 523 U.S. at 251 (Scalia, J., dissenting).

80 *See id.* at 238 (majority opinion) ("[T]he statute must be genuinely susceptible to two constructions after, and not before, its complexities are unraveled. . . . Unlike the dissent, we do not believe these conditions are met in the present case.").

81 *See* United States v. Monsanto, 491 U.S. 600, 611 (1989) (disposing of the petitioner's avoidance canon argument in one paragraph by concluding that "[h]ere, the language is

The Serious Constitutional Doubts Canon contains two implicit questions. If anything, these questions have functioned as barriers limiting avoidance canon usage, particularly when other Justices regarded the preferred interpretation as posing serious constitutional doubts or even as being outright unconstitutional. Less aggressive usage of the Serious Constitutional Doubts Canon lies in stark contrast to the potentially overaggressive usage of the Clear Affirmative Intention and Lowest Common Denominator Canons.

B. The Clear Affirmative Intention Canon

When compared to the Serious Constitutional Doubts Canon, the Clear Affirmative Intention Canon allows greater opportunities for judicial manipulation. These opportunities become apparent when examining the Clear Affirmative Intention Canon's analytical structure. Recall that this version states:

> The Court must avoid "serious constitutional questions,"[82] unless "the affirmative intention of the Congress clearly expressed"[83] mandates reaching these questions.

Inherent in this version are the following questions:

(1) Has Congress "clearly expressed" an "affirmative intention" to adopt an otherwise-preferred interpretation that implicates constitutional questions? If the answer is yes, the court must reach these questions.

(2) If the requisite "clear expression of an affirmative intention" to adopt the otherwise-preferred interpretation is not present, are the constitutional questions "serious?" If yes, the court must find an alternative interpretation of the statute, which does not implicate these "serious constitutional questions," and is also not "plainly contrary to the intent of Congress."[84]

Comparing these questions with those implicit in the Serious Constitutional Doubts Canon reveals two key differences.

---

clear and the statute comprehensive"); *see also* United States v. Locke, 471 U.S. 84, 96 (1985) (disposing of an avoidance canon issue in one sentence: "We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question" (quoting George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933) (Cardozo, J.))).

82 NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 501 (1979).

83 *Id.*

84 Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (citing *Catholic Bishop*, 440 U.S. at 499–501, 504). It is worth noting that *Catholic Bishop* does not itself employ the "plainly contrary" language.

First, Question (2) of the Clear Affirmative Intention Canon merely requires "serious constitutional *questions*," whereas Question (1) of the Serious Constitutional Doubts Canon requires "serious constitutional *doubts*." On its face, this slight distinction lowers the threshold for using the avoidance canon.[85]

Second, and more importantly, the initial "triggers" for when a statute might be eligible for avoidance canon treatment are fundamentally different in kind. The Serious Constitutional Doubts Canon typically begins with an examination of the level of constitutional doubts at play. But the Clear Affirmative Intention Canon begins with an examination of the level of clarity in the statute instead. By requiring a clear affirmative intention, this Canon begins to resemble an "extraordinarily strong presumption, amounting to a clear statement rule . . . ."[86] After all, rarely do statutes demonstrate a clear affirmative intention,[87] rendering almost any statute eligible for avoidance canon treatment.

A case in point is the statute in *National Labor Relations Board v. Catholic Bishop of Chicago*,[88] the case setting forth the Clear Affirmative Intention Canon. Here, the Court contemplated the constitutionality of a statute, providing the Board jurisdiction over

> any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.[89]

Before the Court were two related questions: (1) does the statute's definition of "employer" confer jurisdiction over church-operated schools, attended by both religious and secular students; and (2) if such jurisdiction exists, does the statute violate the First Amend-

---

85 *See* ESKRIDGE, JR. ET AL., LEGISLATION, *supra* note 13, at 354 ("If a 'serious constitutional question' is merely one that gives headaches to law students (even if it has a relatively clear answer if thought through carefully), this canon could be invoked in many cases even though the constitutionality of the statute, fairly interpreted, is not in much doubt.").

86 *Id.*

87 *See id.* ("More important, a search for an 'affirmative intention of the Congress clearly expressed' seems to be satisfied only by express statutory language or crystal-clear legislative history.").

88 440 U.S. at 490.

89 *Id.* at 511 (Brennan, J., dissenting) (quoting 29 U.S.C. § 152(2)).

ment's Religion Clauses by mandating that these schools engage in collective bargaining with teacher unions?[90]

Using the Clear Affirmative Intention Canon, the Court avoided the second question by holding that the statute's definition of "employer" did not cover church-operated schools, even though none of the statute's eight expressly defined exceptions involved schools at all. And the Court found "no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act,"[91] even though—under familiar principles of *expressio unius*[92]—failure to exempt these schools suggested Congress's intent not to exclude them. (One might suppose that Congress could have demonstrated a clear affirmative intention by unusually defining "employees" as: "Any person acting as an agent of an employer, *including church-operated schools*, but not including any of the following exceptions.")

By contrast, Justice Brennan's dissent accused the majority of disregarding the limitations of the Serious Constitutional Doubts Canon, thereby distorting the labor statute beyond recognition.[93] Because the statute in no way mentioned exempting church-operated schools, reading in such an exemption anyway is not a "fairly possible" interpretation of the statute, as the older Canon requires.[94] Under Justice Brennan's analysis, the Court had no choice but to address the constitutionality of the statute's application to church-operated schools.[95]

The conflict in *Catholic Bishop* illustrates the key contrast between the Serious Constitutional Doubts and Clear Affirmative Intention Canons: rather than using a statute's clarity to forestall attempts to manipulate it—as the Serious Constitutional Doubts Canon's "fairly possible" limitation does—the Clear Affirmative Intention Canon demands manipulation in the absence of crystal clarity. If fidelity to legislative intent is important, the statutory text is supposed to "act[]

90 *Id.* at 491, 495 (majority opinion).

91 *Id.* at 504.

92 *See, e.g.*, Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) (noting that "the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.").

93 *See generally Catholic Bishop*, 440 U.S. at 509–18 (Brennan, J., dissenting).

94 *See, e.g., supra* text accompanying note 3.

95 *See Catholic Bishop*, 440 U.S. at 518 (Brennan, J., dissenting) ("Under my view that the [statute] includes within its coverage lay teachers employed by church-operated schools, the constitutional questions presented would have to be reached.").

as a brake against wholesale judicial dismemberment of congressional enactments."[96] It is not to lie in wait as an almost-always-ready trigger countenancing judicial manipulation of its language.

This problem exists despite the requirement that alternative constructions not be "plainly contrary to the intent of Congress,"[97] a limitation noticeably more elastic than the Serious Constitutional Doubts Canon's "fairly possible" constructions limitation.[98] Ultimately, the differences between the Serious Constitutional Doubts and Clear Affirmative Intention Canons show why the latter provides greater opportunities for judicial manipulation of statutes in the name of constitutional avoidance.

Perhaps for this reason, the vitality of the Clear Affirmative Intention Canon has waned in the Supreme Court. Since *Catholic Bishop*, the Supreme Court's rare allusions to the Clear Affirmative Intention Canon are vague and do not cite *Catholic Bishop*'s requirement of an "affirmative intention of the Congress clearly expressed."[99] Although the Clear Affirmative Intention Canon's usage by the Supreme Court has faded, its lessons are instructive. If judicial efforts to avoid constitutional issues are to be constrained by statutory text, the trigger for the avoidance canon should not be some perceived ambiguity in a statute. Similarly, courts must carefully calibrate the level of constitutional misgivings necessary to warrant deviation from the otherwise-

---

96 *Id.* at 510–11.

97 *See supra* note 84 and accompanying text.

98 *See, e.g.*, Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 630 (1993) (invoking the Clear Affirmative Intention Canon, concluding that "[i]n these circumstances it is enough that the choice to attain coherence by obviating constitutional problems is not 'plainly contrary to the intent of Congress'" (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988))).

99 In post-*Catholic Bishop* avoidance canon cases, the Supreme Court has only twice spoken in terms of clear expressions of Congress's affirmative intent. In both cases, the Court subtly shifted away from *Catholic Bishop*'s language. *See* INS v. St. Cyr, 533 U.S. 289, 299 (2001) ("First, as a general matter, when a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." (citing Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. at 568, 575 (1988))); *see also DeBartolo*, 485 U.S. at 575, 583–84 ("invo[king] the *Catholic Bishop* rule," yet only citing *Catholic Bishop* for the proposition that the avoidance canon will be used "unless such construction is plainly contrary to the intent of Congress" (citing *Catholic Bishop*, 440 U.S. at 499–501)). But the constitutional avoidance principles of the Clear Affirmative Intention Canon do appear to linger in the Court's discussion of other clear statement rules. *See, e.g.*, McConnell v. Fed. Election Comm'n, 540 U.S. 93, 192 (2003) ("In short, the concept of express advocacy and the concomitant class of magic words were born of an effort to avoid constitutional infirmities." (citing *Catholic Bishop*, 440 U.S. at 500)).

preferred reading of a statute. If the Clear Affirmative Intention Canon exhibits both of these failings, the Lowest Common Denominator Canon does so in even more pronounced ways.

C. *The Lowest Common Denominator Canon*

1. *Background on the Lowest Common Denominator Canon*

The story behind the Lowest Common Denominator Canon begins not in *Clark v. Martinez*,[100] but in an earlier case, *Zadvydas v. Davis*.[101] In *Zadvydas*, the Court interpreted an immigration removal statute. If the government failed to remove an alien within a ninety-day removal period, the statute allows that the alien "may be detained beyond the removal period . . . ."[102]

The precise issue in *Zadvydas* was whether to read in an implied restriction that would limit post-removal detention to only a reasonable period.[103] Concluding that indefinite detention of the petitioners—admitted, but removable aliens—would "raise a serious constitutional problem" under the Fifth Amendment's Due Process Clause, the Court did read in a reasonableness limitation.[104]

Although the immigrants in *Zadvydas* were admitted aliens, the immigrants in *Martinez* were not.[105] The *Martinez* dissenters thought that immigrants "who have not yet gained initial admission to this country . . . would present a very different question."[106] Justice Scalia conceded that "[i]t is indeed different from the question decided in *Zadvydas*, but because the statutory text provides for no distinction between admitted and nonadmitted aliens, we find that it results in the same answer."[107] Thus, despite the lack of serious constitutional doubts with respect to indefinite detention of not-yet-admitted aliens, the statute's implicit reasonableness limitation applied to both groups. *Zadvydas*, then, had already considered the "lowest common denominator," but *Martinez* was bound by the same result.[108]

---

100 543 U.S. 371 (2005).

101 533 U.S. 678 (2001).

102 *Id.* at 682 (internal quotation marks omitted).

103 *See id.* ("[W]e must decide whether this post-removal-period statute authorized the Attorney General to detain a removable alien *indefinitely* beyond the removal period or only for a period *reasonably necessary* to secure the alien's removal.").

104 *Id.* at 689.

105 *See Martinez*, 543 U.S. at 373.

106 *Id.* at 388 (Thomas, J., dissenting) (internal quotation marks omitted).

107 *Id.* at 379 (majority opinion).

108 *Id.* at 380.

But instead of relying solely on the *Zadvydas* precedent, Justice Scalia supported his reading of the immigration statute by ushering in the heretofore-unarticulated Lowest Common Denominator Canon:

> "[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court."[109]

Justice Scalia explained that the Lowest Common Denominator Canon acts primarily as a tool for resolving textual ambiguity by noting that "[t]he 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; and the canon functions *as a means of choosing between them.*"[110] When making this choice, courts must be sensitive to "serious constitutional doubts"[111] in choosing "between competing plausible interpretations of a statutory text . . . ."[112] The rationale behind addressing the potential constitutional doubts a statute might create—even if these doubts do not apply in the instant case—is to forestall "the dangerous principle that judges can give the same statutory text different meanings in different cases."[113]

Ultimately, the Lowest Common Denominator Canon breaks down into the following questions:

(1) Is the statute ambiguous? If the statute is unambiguous, then a court must address the merits of whatever constitutional problems the statute presents.

(2) If the statute is ambiguous, what are the "competing plausible interpretations" of the statute?

(3) For each "plausible" interpretation of the statute, determine whether the interpretation presents "serious constitutional doubts" when applied to all possible litigants. If one "plausible" interpretation raises "serious constitutional doubts" when applied to some potential litigants, and another "plausible" interpretation raises no such doubts with respect to any po-

---

109 *Id.* at 380–81.

110 *Id.* at 385 (citing Almendarez-Torres v. United States, 523 U.S. 224, 237–38 (1998) and United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909)).

111 *Id.* at 381–82 (citing Rust v. Sullivan, 500 U.S. 173, 191 (1991) and Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1998)).

112 *Id.* at 381.

113 *Id.* at 386.

tential litigants, then a court should adopt the latter interpretation for all applications of the statute.

These questions reveal that Question (3) of the Lowest Common Denominator Canon injects an extra complication for a judge attempting to use it; unlike the Serious Constitutional Doubts and Clear Affirmative Intention Canons, the Lowest Common Denominator Canon requires an assessment of constitutional doubts posed by litigants not before the court at all.

This added complication is significant, even though the Lowest Common Denominator Canon otherwise shares notable similiarities with the Serious Constitutional Doubts Canon. Both require "serious constitutional doubts,"[114] not mere "serious constitutional questions."[115] Similarly, the Lowest Common Denominator Canon's limitation of "plausible" alternative readings seems to parallel the Serious Constitutional Doubts Canon's "fairly possible" interpretations requirement.[116] But even though these limitations ensure that the Serious Constitutional Doubts Canon is less susceptible to judicial manipulation than is the Clear Affirmative Intention Canon,[117] they nonetheless fail to insulate the Lowest Common Denominator Canon from judicial manipulation.

2. *The Lowest Common Denominator Canon in Action*

The Lowest Common Denominator's susceptibility to judicial manipulation arises principally because it incorporates the Clear Affirmative Intention Canon's same flaw: the "triggers" for both are rooted in a statute's perceived lack of clarity, not in the seriousness of doubts inherent in the preferred interpretation of the statute.

This triggering effect arises in the earlier-discussed hypothetical congressional statute:

> The federal government's termination of an employee of an agency is unlawful, unless:
> (1) the employee has been convicted of a felony; or
> (2) because of the employee's sexual orientation, termination is determined to be advisable in the interests of the United States.

---

114 *See supra* Part II.A.1. and text accompanying note 111.

115 *See supra* note 82 and accompanying text.

116 *See supra* text accompanying note 3 and Part II.A.2.

117 *See supra* Part II.B.

Jones and a hypothetical litigant, Smith, were unpaid college interns working for the State Department, wishing to challenge their terminations under the statute. Jones is terminated after a felony conviction, but Smith is terminated after the State Department concludes that his homosexuality poses a threat to national security.

This statute illustrates how the Serious Constitutional Doubts and Lowest Common Denominator Canons function as drastically different interpretive methods. Under the Serious Constitutional Doubts Canon, Jones's case is easy; Jones certainly falls within the ambit of the preferred reading of the statute, and his termination is constitutionally uncontroversial. A straightforward application of the Serious Constitutional Doubts Canon is consistent with Congress's likely intention for Jones to be terminable.

But under the Lowest Common Denominator Canon, Jones's case becomes dramatically more difficult. This is because the Lowest Common Denominator Canon is styled as a tool for resolving statutory ambiguity whenever the ambiguity arises in a statute the application of which could be unconstitutional as to some possible litigants. Jones can therefore proceed simply by pointing out the ambiguity in the statute—for example, the term "employee" has many definitions[118]—forcing a court to break the tie by using the Lowest Common Denominator Canon.[119] To resolve this statutory ambiguity, a court would therefore have to examine whether the statute's application to other hypothetical litigants raises "serious constitutional doubts," making that application the "lowest common denominator."[120]

Thus, Smith, the hypothetical litigant, now influences judicial interpretation of the statute. Because Smith's termination likely presents serious constitutional doubts, a court applying the Lowest Common Denominator Canon would interpret the term "employee" narrowly in order to exclude unpaid college interns such as Smith.[121]

---

118 In fact, much commentary has focused on the definition of "employee." *See generally* Mathew G. Simon, *Not All Illnesses Are Treated Equally—Does a Disability Benefits Plan Violate the ADA by Providing Less Generous Long-Term Benefits for Mentally Disabled Employees than for Physically Disabled Employees?*, 8 U. PA. J. LAB. & EMP. L. 943, 946–58 (2006) (comparing various courts' definitions of "employee" under Titles I and VII of the Americans With Disabilities Act).

119 *See supra* text accompanying notes 110-13.

120 *See* Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 339 (2005) (describing the Lowest Common Denominator Canon as a "particular textualist rule of statutory construction . . . so strong that it *must* always apply; courts lack power to deviate from it").

121 *See supra* note 11 and accompanying text.

This example demonstrates that for any statute of the form, "*X* is lawful only if *A* or *B*," the Lowest Common Denominator Canon allows for deviation from a preferred interpretation of the statute, even though the statute is plainly constitutional as applied to one of the two alternatives, *A* or *B*.

3. Judicial Manipulation and the Costs and Benefits of the Lowest Common Denominator Canon

The Jones and Smith example tests our intuitions about the desirability of interpreting one litigant, who poses no constitutional problems, out of a statute just because of the constitutional problems posed by another hypothetical litigant. But some might say that this example simply begs the question; even if the adoption of a saving construction appears undesirable in this instance, perhaps the Lowest Common Denominator Canon has other benefits that outweigh its costs. This is wrong.

The principal benefit of the Lowest Common Denominator Canon—uniformity of statutory interpretation—is exaggerated. Initially, Justice Scalia makes a compelling case for the canon, arguing that it is necessary to avoid "render[ing] every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case."[122]

But on closer examination, the need for interpretive uniformity is hardly evident. For example, the Court has interpreted 42 U.S.C. § 1983's provision, "[e]very person who, under color of any statute,"[123] differently depending on the context. Thus, state officers acting in an official capacity are not "persons" under § 1983 when being sued for money damages, yet are "persons" when sued for injunctive relief.[124] The same is true in everyday language; the same word in a given sentence does not always have to have a single definition (e.g., "Melissa left the party in tears and a Ford Pinto."). Thus, interpretive uniformity, though apparently desirable, turns out not to be a necessity.

But even if interpretive uniformity is always desirable, it comes with significant costs under the Lowest Common Denominator Canon. These highly related costs, which I address in turn, are: (1)

---

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

123 42 U.S.C. § 1983 (2000).

124 *See* Siegel, *supra* note 120, at 361 (discussing Will v. Mich. Dept. of State Police, 491 U.S. 58 (1989)).

facilitation of judicial manipulation of statutes; (2) the sheer difficulty of using the Lowest Common Denominator Canon; and (3) separation-of-powers harms.

The first and most significant cost of the Lowest Common Denominator Canon is the potential for unnecessary deviation from the preferred reading of a statute. This results from the key difference between the Serious Constitutional Doubts Canon and the Lowest Common Denominator Canon: If the otherwise-preferred reading of a statute does not raise "serious constitutional doubts" when applied to a litigant, only under the Serious Constitutional Doubts Canon does this finding end the issue. But under the Lowest Common Denominator Canon, the ambiguity of the statute simply triggers further examination into whether the statute's application to hypothetical litigants raises serious constitutional doubts. As the Jones and Smith example shows, this further examination is the gateway to potential departure from the natural reading of the statute.

In this respect, the Lowest Common Denominator Canon replicates the main failing of the Clear Affirmative Intention Canon: just as few statutes exhibit a clear intent to implicate constitutional issues,[125] few statutes are truly unambiguous. And judges may always argue that a statute is ambiguous, as statutes are subject to the inherent limitations of language.[126] Thus, the Lowest Common Denominator Canon's main failing is that *every* statute is potentially subject to judicial manipulation.

In addition to the triggering effect of statutory ambiguity, the Canon's other interpretive difficulties impede its usefulness to judges. For one thing, application of the Lowest Common Denominator Canon never actually requires a judge to determine what the natural reading of a statute is; a judge's use of "ordinary textual analysis" need only extend far enough to show that the statute is "susceptible of more than one construction."[127] After that, all "competing plausible interpretations"[128] of a statute stand in equipoise, paving the way for the Lowest Common Denominator Canon's usage. Thus, the

125 *See supra* notes 86–87 and accompanying text.

126 *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 126 (2d ed. 1994) (arguing that because of language's inherent "open-textured" quality, "[c]anons of 'interpretation' cannot eliminate, though they can diminish, these uncertainties; for these canons are themselves general rules for the use of language, and make use of general terms which themselves require interpretation").

127 *Martinez*, 543 U.S. at 384.

128 *Id.* at 381.

Canon does not rely on the primacy of the preferred interpretation of a statute.

Ignoring the primacy of the preferred interpretation has consequences. No longer anchored to the preferred interpretation as a reference point for their analysis, judges must instead conceptualize all constitutional challenges posed by all potential applications of all "plausible" interpretations of a statute. This requires judges to have vivid, yet accurate, imaginations, since a judge confronted with Jones's case must conceive of Smith's case, regardless of whether Smith is a litigant or not. It is easier for a judge to interpret the statute in light of Smith's case, if Smith happens to be the first litigant.[129]

These difficulties strongly resemble the difficulties that plague broad facial challenges. Comparative institutional competence, for example, is one of the main arguments advanced against broad facial challenges. Congress and the President have comparably greater expertise in evaluating the constitutionality of a particular item of legislation and "may well support a bill that has numerous constitutional applications, even if they can imagine unconstitutional applications, and surely may support a bill even though they acknowledge that it might have as-yet-unimagined unconstitutional applications."[130] Courts, on the other hand, "specialize in unbundling. It is precisely where their comparative competence lies. They do not vote on, sign, or veto a bill as a whole, but rather enter judgments resolving individual cases."[131] By requiring judges to consider as-yet-unimagined unconstitutional applications, the Lowest Common Denominator Canon also reaches beyond the judiciary's comparative competence in resolving individual cases. The sheer difficulty of using the Canon impedes its usefulness and, in so doing, upsets the separation-of-powers balance among the three branches of government.

Furthermore, other separation-of-powers costs derive from the Lowest Common Denominator Canon. In addition to placing the judiciary outside its area of institutional competence, the Canon also

---

129 One potential rationale behind the Lowest Common Denominator Canon is to reduce the extent to which the order of litigants determines how a statute is interpreted. *See The Supreme Court—Leading Cases: Canon of Avoidance*, 119 HARV. L. REV. 386, 393 & n.60 (2005). Although the Lowest Common Denominator Canon does appear to reduce the effect of the order of litigated cases, this effect is still present.

130 Edward A. Hartnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 SMU L. REV. 1735, 1746 (2006). But for a contrasting view arguing that judicial rulemaking would be better served by not having to decide individual cases, see generally, for example, Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006).

131 Hartnett, *supra* note 130, at 1746.

disrupts the role that the executive branch plays in the process of constitutional avoidance[132] and statutory interpretation generally.[133] These possibilities occur even in the Jones and Smith example, if, for instance, the State Department announces a policy not to use its statutory authority to terminate gays. Executive branch enforcement, or lack thereof, creates the distinct possibility that one interpretation's serious constitutional doubts might never materialize for some potential litigants.

What the courts should do in cases of possible executive underenforcement is far from clear. At a minimum, these considerations implicate other separation-of-powers doctrines, such as justiciability doctrines (e.g., ripeness) and even the avoidance canon itself, both of which seek to avoid unnecessary constitutional adjudication.

The Lowest Common Denominator Canon's combination of potential judicial manipulation, interpretive difficulty, and separation-of-powers problems create another conceptual problem: they cumulatively undermine justifications unique to the Lowest Common Denominator Canon. Recall that, in general, the avoidance canon's justifications lie in judicial restraint[134] and constitutional enforcement values.[135] The latter evolved to defend the avoidance canon against allegations that it allows courts to deviate from congressional intent.[136]

But when Justice Scalia labeled the Lowest Common Denominator Canon a tool for resolving textual ambiguity,[137] he limited this particular Canon to only textualist and judicial restraint justifications. The Court confirmed as much in *Spector v. Norwegian Cruise Line Ltd.*[138] when it distinguished clear statement rules[139] from the Lowest

---

132 *See generally* Morrison, *supra* note 24 (discussing theories that inform the executive branch's use of the avoidance canon).

133 *See, e.g.*, Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (setting forth the now-infamous *Chevron* deference framework).

134 *See supra* text accompanying notes 25–33.

135 *See supra* text accompanying notes 34–40.

136 *See* Morrison, *supra* note 24, at 1212–13 ("First, if the aim of avoidance is to protect constitutional values by effectively 'rais[ing] the cost of any congressional encroachment within a particular area of constitutional sensitivity,' then its failure to track congressional intent is largely irrelevant." (alteration in original)); *see also* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 338 (2000) (describing the avoidance canon as one of several "nondelegation principles . . . designed to ensure that Congress decides certain contested questions on its own").

137 *See supra* text accompanying notes 110–13.

138 545 U.S. 119 (2005) (plurality opinion).

139 For a discussion of the similarities between the avoidance canon and clear statement rules, see Morrison, *supra* note 24, at 1213–16. A commonly recognized distinction be-

Common Denominator Canon. The Court noted that the latter "gives full respect to the distinction between rules for resolving textual ambiguity and implied limitations on otherwise unambiguous text."[140] This distinction helps explain why the Lowest Common Denominator Canon has been described as a "particular textualist rule of statutory construction . . . so strong that it *must* always apply; courts lack power to deviate from it."[141] Part of textualism's appeal relates to separation-of-powers considerations, for it apparently reduces the type of judicial discretion that leads to "creative" readings of statutes.[142] As a tool for resolving textual ambiguity, the Lowest Common Denominator Canon embraces similar judicial restraint underpinnings.[143]

When judged solely in terms of judicial restraint values, however, the game of using the Lowest Common Denominator Canon is not worth the candle. The Canon creates difficult decisions for judges, who may stray from the preferred reading of a statute out of laziness, out of willfulness, or even despite best efforts. These problems are magnified, since the Lowest Common Denominator Canon acts "to raise the stakes as to the initial judicial choice,"[144] binding later courts who consider other applications of the same statute.[145] And every statute, potentially fraught with perceived ambiguity, is susceptible to this treatment.

III. AVOIDING THE AVOIDANCE CANON IN THE LOWER COURTS

Although the Lowest Common Denominator Canon is flawed on its own terms, the Canon's most serious flaw is how it piles onto the

---

tween the avoidance canon and clear statement rules is that, in the latter case, Congress's use of legislative authority is concededly constitutional. However, courts impose on Congress the burden of additional deliberation when deciding to encroach on constitutional values, such as federalism. *See, e.g.*, ESKRIDGE, JR. ET AL., LEGISLATION, *supra* note 13, at 355–56.

140 *Spector*, 545 U.S. at 140.

141 Siegel, *supra* note 120, at 339.

142 *See generally* Nelson, *supra* note 17, at 374–403 (explaining textualist rationales for preferring relatively rule-like approaches to statutory interpretation).

143 Clark v. Martinez, 543 U.S. 371, 382 (2005) (arguing that the Lowest Common Denominator Canon "is thus a means of giving effect to congressional intent, not of subverting it," so that "when a litigant invokes the canon of avoidance, he is not attempting to vindicate the constitutional rights of others . . . he seeks to vindicate his own *statutory* rights").

144 Siegel, *supra* note 120, at 377.

145 *See id.* at 379 (arguing that judges can bind later courts, simply by allowing unworthy, ideological reasons to permeate their decision making at an earlier stage of the interpretive process).

preexisting landscape of avoidance canon confusion in the lower courts. Before the Lowest Common Denominator Canon ever came along, the avoidance canon was already a pastiche of similar-sounding yet ultimately discordant language.

This cacophony emerged when the Supreme Court quietly morphed the canon into two wholly different versions, the Serious Constitutional Doubts Canon and the Clear Affirmative Intention Canon. Even though the Clear Affirmative Intention Canon has had declining usage in the Supreme Court,[146] references to it persist in the lower courts.

The ready availability of both canons, however, is problematic. Whenever lower courts confront statutory interpretation issues where some level of constitutional doubts may be in play, the two canons often support different results.

Thus, when courts do not wish to invoke the avoidance canon, they cite the language of the Serious Constitutional Doubts Canon. Lower courts often mention that they must seriously "doubt" the constitutionality of the statute—not merely have "questions"—in order to depart from a statute's natural reading.[147] That said, despite the Supreme Court's grudging refusal in notable cases to characterize constitutional doubts as serious,[148] lower courts do sometimes find constitutional doubts serious enough to warrant saving constructions.[149]

---

146 *See supra* note 99 and accompanying text.

147 *See, e.g.*, Whitaker v. Thompson, 353 F.3d 947, 952 (D.C. Cir. 2004) (finding that the appellant's constitutional objections were not "so powerful as to require us to abandon" the challenged interpretation of the statute), *cert. denied*, 543 U.S. 925 (2004); Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 731 (9th Cir. 2003) ("As the Supreme Court has cautioned elsewhere, '[s]tatutes should be interpreted to avoid *serious* constitutional doubts, not to eliminate all possible contentions that the statute *might* be unconstitutional.' Thus, the doctrine of constitutional avoidance does not apply here." (alteration in original) (quoting Reno v. Flores, 507 U.S. 292, 314 n.9 (1992))), *cert. denied*, 543 U.S. 815 (2004); Am. Fed'n of Gov't. Employees v. United States, 330 F.3d 513, 519 (D.C. Cir. 2003) (cautioning that "Judge Friendly's formulation captures an important qualification to the saving-construction doctrine—namely, that the constitutional doubt must be 'real'"), *cert. denied*, 540 U.S. 1088 (2003); United States v. Garfinkel, 29 F.3d 451, 455 (8th Cir. 1994) ("Well aware that federal statutes are to be so construed as to avoid serious doubt of their constitutionality, we nevertheless will not ignore the legislative will in order to avoid constitutional adjudication." (citations and internal quotation marks omitted)).

148 *See supra* Part II.A.1.

149 *See, e.g.*, Gilmore v. California, 220 F.3d 987, 998, 1000–03 (9th Cir. 2000) (adopting a saving construction of part of the Prison Litigation Reform Act, despite explicitly recognizing that the Serious Constitutional Doubts Canon requires that "avoidance of a difficulty will not be pressed to the point of disingenuous evasion"); *see also* Waterview Mgmt. Co. v. FDIC, 105 F.3d 696, 701 (D.C. Cir. 1997) (invoking the Serious Constitutional Doubts Canon as a basis for adopting an alternate construction of a statute); United

An even-more-popular tactic for courts seeking to invoke the avoidance canon is just to resort to the language of the Clear Affirmative Intention Canon. Courts employing this Canon do not hesitate to note that mere constitutional "problems"[150] or "questions"[151] are present. And these courts also note the apparent necessity of alternate statutory readings, absent Congress's "clear" intent to implicate constitutional issues.[152]

Now, there are three avoidance canons, and all three are technically good law. But instead of cabining lower courts' ability to manipulate conflicting descriptions of the avoidance canon, the Lowest Common Denominator Canon has added to the confusion. Lower courts are confused by, on one hand, the broad applicability of the Lowest Common Denominator Canon, and on the other hand, the Court's sharp distinction between clear statement rules and the Canon as simply a tool for resolving textual ambiguity.[153]

States v. Spiropoulos, 976 F.2d 155, 167 (3d Cir. 1992) ("We avoid construing the guideline as the government suggests because, as [defendant] notes, there is serious doubt as to whether the guideline, when so construed, satisfies the requirements of due process.").

150 *See, e.g.*, James v. Meow Media, Inc., 300 F.3d 683, 695 (6th Cir. 2002) (interpreting a statute to avoid "significant constitutional problems" (citing NLRB v. Catholic Bishop of Chi., 440 U.S. 490 (1979))); *see also* Gray-Bey v. United States, 201 F.3d 866, 869 (7th Cir. 2000) (characterizing the *Catholic Bishop* rule as mandating avoidance of "constitutional problems").

151 *See, e.g.*, Neal v. Bd. of Trustees of Cal. State Univs., 198 F.3d 763, 772 (9th Cir. 1999) (rejecting a district court's interpretation of Title IX on the grounds that the suggested interpretation of the statute did not "raise[] serious constitutional questions" (internal quotation marks omitted)); *see also* Comet Enter. Ltd. v. Air-A-Plane Corp., 128 F.3d 855, 859 (4th Cir. 1997) ("A court is always well advised to construe regulations in a manner that avoids such 'serious constitutional questions.'" (citing *Catholic Bishop*, 440 U.S. at 500–01)); U.S. Shoe Corp. v. United States, 114 F.3d 1564, 1577 (Fed. Cir. 1997) (Mayer, J., dissenting) ("Indeed, courts must strive to avoid constitutional questions." (citing *Catholic Bishop*, 440 U.S. at 500–01)).

152 *See, e.g.*, Geary v. Visitation of Blessed Virgin Mary Parish Sch., 7 F.3d 324, 327 (3d Cir. 1993) (describing *Catholic Bishop* as inquiring, "is there a permissible construction of the statute that avoids that risk, or alternatively, is there a clear expression that Congress intended that the statute apply?"); *see also* United States v. Pohlot, 827 F.2d 889, 903 (3d Cir. 1987) (noting, in the context of a congressional attempt to bar evidence of mental abnormality from the issue of mens rea, that "[t]he constitutional issues are sufficiently substantial, [but] we are unwilling to create a rule of evidence that would raise them in the absence of explicit Congressional direction." (citing *Catholic Bishop*, 440 U.S. at 501)).

153 *Compare* Kelava v. Gonzales, 434 F.3d 1120, 1126 (9th Cir. 2006) (reading the Court's distinction between clear statement rules and the avoidance canon in Spector v. Norwegian Cruise Line Ltd., 540 U.S. 119 (2005), as a limitation of *Martinez*), *cert. denied*, 127 S. Ct. 43 (2006), *with* Hayden v. Pataki, 449 F.3d 305, 325 (2d Cir. 2006) (declining to read *Spector* as a limitation of *Martinez*, because *Spector* is limited only to traditionally sensitive areas, such as federalism). But some courts are now beginning to view the Lowest Common Denominator Canon as a tool for resolving statutory ambiguity. *See, e.g.*, Price v. Time, Inc., 416 F.3d 1327, 1342 (11th Cir. 2005) ("Courts employ the canon of constitutional

This initial conceptual confusion extends to confusion about the application of the Lowest Common Denominator Canon. Post-*Martinez* cases invoking the avoidance canon have clashed over whether a statute was ambiguous, without even citing *Martinez* at all.[154] Most of all, post-*Martinez* cases have ignored the "lowest common denominator" aspect of this Canon; none have yet attempted to examine a statute's potential constitutional problems through the prism of hypothetical litigants.[155]

To some, lower courts' disregard of the "lowest common denominator" aspect of this Canon is not a cause for concern. If courts do not resort to interpreting statutes through the prism of hypothetical litigants, then wholesale judicial dismemberment of statutes remains only a theoretical possibility. But if pre-*Martinez* history is any indication, conflicting formulations of the avoidance canon eventually end up as ammunition, deployed in wars over statutory interpretation. The Lowest Common Denominator Canon changes none of this and, instead, lurks as a potentially devastating weapon for turning once-easy cases into hard ones.

CONCLUSION

The three-headed hydra of avoidance canons is a far cry from the avoidance canon Justice Brandeis set forth in *Ashwander*. Like all

---

avoidance as 'a tool for choosing between competing plausible interpretations of a statutory text.' . . . Courts do not use this tool when the text of the statute is unambiguous." (citing Clark v. Martinez, 543 U.S. 371, 381 n.5 (2005))).

154 *Compare* Johnson v. Governor of Fla., 405 F.3d 1214, 1229–30 (11th Cir. 2005) (invoking the avoidance canon to adopt an alternate reading of the Voting Rights Act without citing *Martinez*), *cert. denied*, 126 S. Ct. 650 (2005), *with id.* at 1240 (Wilson, J., dissenting) (arguing that the majority's use of the avoidance canon was improper because "there is no ambiguity," and because "the 'avoidance' doctrine should not be employed as a pretext for rewriting clear statutory language").

155 *See, e.g.*, Davet v. City of Cleveland, 456 F.3d 549, 554–55 (6th Cir. 2006) (discussing the avoidance canon and *Martinez*, yet failing to mention the "lowest common denominator"); *Price*, 416 F.3d at 1342 (same); Mgmt. Ass'n for Private Programmetric Surveyors v. United States, 467 F. Supp. 2d 596, 603 n.9 (E.D. Va. 2006) (discussing *Martinez*, yet refusing to consider hypothetical challenges to potential interpretations of a statute, reasoning that "there is no difficult constitutional issue to avoid"); V.I. Auto. Rental Ass'n v. V.I. Port Auth., No. 2001-130, 2006 WL 1875893, at *5 (D.V.I. June 30, 2006) ("Because this matter is decided on the language of the statute, this Court need not address . . . constitutional arguments." (citing *Martinez*, 543 U.S. at 381–82)); *cf.* AARP v. EEOC, 390 F. Supp. 2d 437, 454 (E.D. Pa. 2005) (using the avoidance canon to reject the EEOC's interpretation of the Age Discrimination in Employment Act because it would have created serious constitutional doubts concerning the nondelegation doctrine (citing *Martinez*, 543 U.S. at 371)).

canons of statutory construction, the avoidance canon is supposed to provide stability and guidance. The added difficulty of the avoidance canon derives from separation-of-powers issues. Judges must properly balance respect for the legislative process as a whole, respect for any individual statute's expression of legislative intent, and respect for the sensitivity of constitutional adjudication and, some would say, enforcement.

But if judicial restraint is all that matters, the Lowest Common Denominator Canon fails, creating confusion in its wake. Its failure confirms the following unusual result: even in some apparently easy cases, for any given use of the avoidance canon, another use of the avoidance canon might very well point in the opposite direction.