Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review

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A friend tells this story about working as an associate in a large Washington law firm: He would draft brief after brilliant brief, but the partners on the case would always try to mess up the drafts by proposing unfortunate changes. In this situation, my friend applied what he called the “tell me three times” rule. That is, when the offending language appeared on a mark-up of my friend’s draft, he would ignore it. If the partner tried again to insert the language, my friend would ignore it again. But if the partner persisted in trying to add this ill-starred material a third time, my friend would finally let him have his way. Needless to say, many unfortunate changes fell by the wayside through this process, and the firm’s briefs were often better for it.

My contribution to this Symposium concerns the canon of statutory construction that avoids constitutional doubts, and in particular, the more specific incarnation of that canon holding that statutes should be construed, where possible, to avoid the conclusion that Congress has eliminated all judicial review of a question of federal law. This canon is a lot like my friend’s “tell me three times” rule: Where Congress has attempted to do something that may intrude on constitutional values—like eliminating federal jurisdiction over certain questions arising under the habeas corpus or immigration statutes—courts resist this effort by insisting that Congress make its intent absolutely clear. This approach is an old and well-established one, and the courts have employed it liberally to moderate the effects of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)\(^1\) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).\(^2\) As the Third Circuit recently observed, “[t]he imperative to avoid a constitutional crisis that might arise were the writ of habeas corpus effectively suspended or were there no viable means for judicial review of constitutional claims necessarily affects, even if indirectly, the construction of the relevant statutory provisions.”\(^3\)

Just as the supervising partners may not have appreciated my friend’s tactics, many have criticized the canon of avoiding constitutional doubts. The most prominent critics have raised two sets of arguments: first, that the avoidance canon fails, as an empirical matter, to reflect the actual preferences of Congress concerning statutory construction of constitutionally doubtful statutes;\(^4\) and second, that narrow construction of a statute in order to avoid a constitutional doubt amounts to a constitutional decision in its own right—a decision, in fact, that frequently expands the sweep of the relevant constitutional provision beyond its legitimate

\(^3\) Liang v. INS, 206 F.3d 308, 312 (3rd Cir. 2000).
\(^4\) See, e.g., Frederick Schauer, Ashwander Revisited, 1995 SUP. CT. REV. 71, 92.
warrant.\textsuperscript{5} Such criticisms call into question the federal courts' general approach to the jurisdictional provisions of the AEDPA and the IIRIRA, which has relied on creative statutory construction—along with a heavy dose of avoidance—to sidestep a variety of longstanding constitutional conundrums potentially implicated by the new legislation.\textsuperscript{6}

My aim in this essay is to defend the avoidance canon and its use in cases under the AEDPA and IIRIRA. I do not seek to justify the avoidance rule as a descriptive canon of construction, that is, as an accurate reflection of the course that an enacting legislature would wish courts to pursue in case of constitutional doubt. Rather, I view the avoidance rule as a normative canon—a rule designed to push interpretations in directions that reflect enduring public values. The background values in avoidance cases are simply those embodied in the underlying constitutional provisions that create the constitutional "doubt." In cases under the AEDPA and IIRIRA, those values stem from Article III, the Due Process Clause, and the Suspension Clause.\textsuperscript{7}

Normative canons of statutory construction are hardly new, nor is the idea that some such canons are grounded in constitutional values.\textsuperscript{8} But the literature concerning normative canons has tended to waffle on the relationship between a normative canon and the underlying constitutional provision with which it is associated. Commentators have said, for example, that "the Constitution provides the backdrop against which statutes are written and interpreted,"\textsuperscript{9} and that some canons are "constitutionally based"\textsuperscript{10} or "reflect constitutionally inspired values."\textsuperscript{11} This ambiguity has allowed critics of normative canons to claim that they extend the underlying constitutional provision beyond its legitimate scope. Judge Posner has argued, for example, that the avoidance canon establishes a "judge-made constitutional 'penumbra' that has much the same prohibitory effect as the . . . Constitution itself."\textsuperscript{12}

\begin{thebibliography}{99}
\item See, e.g., Felker v. Turpin, 518 U.S. 651, 660-61 (1996); Liang, 206 F.3d at 321; Goncalves v. Reno, 144 F.3d 110, 122-23 (1st Cir. 1998); Henderson v. INS, 157 F.3d 106, 118-22 (2d Cir. 1998).
\item U.S. CONST. art. III, amend. V, and art. I, § 9, cl. 2, respectively.
\item See, e.g., Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 HARV. L. REV. 405, 459 (1989) [hereinafter Sunstein, Interpreting Statutes] (observing that "interpretive principles may serve substantive purposes wholly apart from statutory meaning, interpretive instructions, or the lawmaking process," and that "[i]nterpretive principles are often a product of constitutional norms").
\item Id. at 468.
\item Posner, supra note 5, at 816.
\end{thebibliography}
My response to this “penumbra” problem is to assert that a judge who construes a statute in such a way as to avoid a constitutional “doubt” is enforcing the Constitution itself—nothing more, nothing less. This is, to be sure, a different kind of “enforcement.” After all, a narrow construction of a statute designed to avoid constitutional doubts can be overcome by legislative action to clarify that the broader reading was what Congress really wanted. The avoidance canon thus makes it harder—but still not impossible—for Congress to write statutes that intrude into areas of constitutional sensitivity. We do not ordinarily think of constitutional rules as being subject to override in this way.

This intuition, however, overlooks a wide range of constitutional provisions and doctrines that impose “soft limits” on the government’s authority. Congress may not override a presidential veto—unless it can muster a two-thirds vote in each house. The government may not discriminate on the basis of race—unless it has a compelling interest and the discriminatory classification is narrowly tailored to serve that interest. The States may not discriminate against out-of-state commercial interests—unless they can persuade Congress to “ratify” or “authorize” such discrimination. These sorts of rules make clear that not all constitutional principles have a “line in the sand” quality, such that all government acts short of that line are valid and all government acts falling over that line are invalid. Rather, some constitutional principles take the form of “resistance norms”—norms that may be more or less yielding to governmental action, depending on the strength of the government’s interest, the degree of institutional support for the challenged action, or the clarity of purpose that the legislature has expressed.

I believe that the “resistance norm” idea provides the best account of the avoidance canon’s use to preserve judicial review under the AEDPA and IIRIRA. Courts construing those statutes against a background norm of judicial review are not “avoiding” a question under Article III; instead, they are enforcing Article III by demanding a clear statement of Congress’s intent before accepting a limitation on federal jurisdiction. This strategy is particularly appropriate in the context of judicial review for two reasons. First, the difficulty of drawing bright lines to circumscribe Congress’s power over federal jurisdiction is open, notorious, and longstanding.

16. See, e.g., Barry Friedman, A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction, 85 Nw. U. L. Rev. 1, 3-4 (1990) (“Almost since the ratification of the Constitution there has been serious debate concerning the scope of Congress’s control over the jurisdiction of the federal courts.”).
By employing interpretive presumptions rather than strict rules of invalidation, a resistance norm approach may take some pressure off the line-drawing exercise. Second, we have traditionally expected political safeguards to play an important role in protecting structural values such as those embodied in Article III. Resistance norms, in the form of normative clear statement rules, can enhance the operation of these political checks.

My argument proceeds in four parts. Part I identifies three sets of constitutional challenges to the jurisdiction-stripping provisions of the AEDPA and IIRIRA. Rather than confront these issues directly, many courts have instead avoided the constitutional merits by narrowly construing the new laws. Part II develops two prominent criticisms of the avoidance strategy stemming from the canon’s failure to correspond to Congress’s actual preferences and its tendency to expand the impact of constitutional provisions. I begin to respond to these criticisms in Part III, arguing that the avoidance canon should be understood as a “resistance norm” embodied in Article III and other provisions concerning judicial review. Finally, in Part IV, I develop the affirmative case for a resistance norm protecting the scope of federal judicial review from legislative incursions.

I. AEDPA, IIRIRA, and the Avoidance Canon

Public criticism of federal court decisions in any number of substantive areas has, for much of our history, brought about congressional proposals to limit the jurisdiction of the federal courts. In the early nineteenth century, proponents of states’ rights responded to the nationalizing decisions of the Marshall Court by proposing to strip the Supreme Court of its jurisdiction over state court judgments. More recent proposals have threatened to curtail federal jurisdiction over controversies involving busing, abortion, and school prayer. But despite many

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17. Cf., JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 260-379 (1980) (arguing that separation of powers disputes should generally be left to the political process). One need not accept Dean Choper’s suggestion that political safeguards should be exclusive to agree that they have a significant, or even primary, role to play. See infra notes 295-99 and accompanying text.

18. See infra notes 22-130 and accompanying text.

19. See infra notes 131-87 and accompanying text.

20. See infra notes 188-271 and accompanying text.

21. See infra notes 272-326 and accompanying text.


attempts, proposals to restrict federal jurisdiction have virtually all ended in failure.\textsuperscript{24}

Despite this lack of success, the jurisdiction-stripping issue has long been one of the most talked-about issues in federal courts scholarship.\textsuperscript{25} When the AEDPA, the IIRIRA, and certain other brainchildren of the 104th Congress burst on the scene in 1996,\textsuperscript{26} it appeared that some of the much-mooted questions concerning the limits of Congress's power over federal jurisdiction might at long last be answered.\textsuperscript{27} But a funny thing happened on the way to the courthouse, or at least once the judges actually sat down to write their opinions. The AEDPA and the IIRIRA have generally been construed, despite fairly strong textual arguments to the contrary, to retain some avenues of judicial review, and the longstanding constitutional questions about what would happen if those avenues were cut off have generally been avoided.

The avoidance strategy is a familiar one. The Supreme Court's use of the canon of constitutional avoidance pre-dates the substantive judicial review established in \textit{Marbury v. Madison}.\textsuperscript{28} The canon's use to protect rights to judicial review in habeas and immigration cases is likewise

\begin{itemize}
\item \textbf{24.} See, e.g., Richard H. Fallon et al., Hart and Wechsler's \textit{The Federal Courts and the Federal System} 351 (4th ed. 1996) [hereinafter Hart & Wechsler] (noting that "[a]t least since the 1930s, no jurisdiction-stripping bill has become law"); David Cole, \textit{Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction}, 86 Geo. L.J. 2481, 2482 (1998) (commenting that "at least since 1869, Congress's threats to curtail federal jurisdiction have been for the most part just that—empty threats"). The most important nineteenth century success was the repeal of Supreme Court jurisdiction over certain habeas corpus petitions brought to challenge the validity of Reconstruction. \textit{See Ex parte McCord}, 74 U.S. (7 Wall.) 506 (1868) (upholding the validity of the repeal under Article III's Exceptions Clause).

\item \textbf{25.} See, e.g., Gunther, supra note 22, at 897 n.9 (quoting Professor William Van Alstyne to the effect that the literature on this question was "chocking on redundancy"); \textit{but see} Louise Weinberg, \textit{The Article III Box: The Power of "Congress" to Attack the "Jurisdiction" of "Federal Courts"}, 78 Texas L. Rev. 1405, 1407 (2000) (suggesting that the focus on Congress's power is misdirected because "it is the Supreme Court . . . that is the more active agent in denials of access to courts").


\item \textbf{27.} See Cole, supra note 24, at 2482, 2483 (observing that the AEDPA, IIRIRA, and PLRA "broke the taboo on [jurisdiction-stripping] legislation," and that these statutes "make concrete virtually all the abstract issues that scholars have long debated over Congress's power to curtail federal jurisdiction").


\end{itemize}
longstanding. As the Court recognized in its most recent avoidance case, in which it construed the AEDPA not to bar applications for an original writ of habeas corpus, the Court had done exactly the same thing over a century before in *Ex parte Yerger.* Similarly, the federal courts have been using the avoidance canon to preserve judicial review in immigration cases at least since the Chinese exclusion cases in the late nineteenth century.

In this Part, I seek to pinpoint the constitutional questions that the AEDPA and the IIRIRA have raised as a prelude to asking whether it was legitimate for the courts to avoid them. These questions generally fall into three groups:

(1) Congress’s power, pursuant to Article III’s Exceptions Clause, to insulate particular aspects of the habeas corpus process from Supreme Court review;

(2) Congress’s ability to delegate judicial functions in immigration cases to a non-Article III tribunal that is not subject to effective Article III judicial review; and

(3) Congress’s ability to require a federal habeas tribunal to decide a case in a way that differs from the court’s best judgment as to the applicable law, by requiring the habeas court to deny relief where the state court’s legal rulings fall within a specified zone of reasonableness.

These questions vary across several important dimensions, including the constitutional provisions invoked, the relative clarity of the statutory provisions that give rise to the problem, and the results that the courts have reached. But two generalizations seem appropriate by way of introduction:

30. 75 U.S. (8 Wall.) 85 (1868).
32. Other important problems have been raised as well. See, e.g., *Lucidore v. New York State Div. of Parole,* 209 F.3d 107, 109 (2d Cir. 2000) (recognizing, but not reaching, the claim that application of AEDPA’s one-year statute of limitations to actual innocence claims would violate the Constitution); *In re Siggers,* 132 F.3d 333, 335-36 (6th Cir. 1997) (considering a due process challenge to time restrictions on judicial consideration of habeas petitions). But the three issues cited in the text should be sufficient to give a sense of how the avoidance canon operates in Article III cases. For another example, *compare* Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 508-09 (1999) (Souter, J., dissenting) (arguing that the avoidance canon required construing 8 U.S.C. § 1252(g) to permit judicial review of selective prosecution claims in deportation cases), *with id.* at 487-92 (majority opinion) (rejecting avoidance on the ground that selective prosecution claims are generally unavailable to aliens unlawfully in this country).
First, while the potential constitutional challenges to the AEDPA and the IIRIRA raise serious issues, they are also each subject to serious defenses; the constitutional doubts, in other words, may well be no more than that in each instance. Second, as I will discuss further in the next Part, it may be that the validity of the avoidance canon ultimately has little to do with whether a court would, in the end, be willing to strike down the statute at issue on the merits.

A. Restrictions on the Supreme Court’s Appellate Jurisdiction

The Supreme Court’s first encounter with the AEDPA was in *Felker v. Turpin,* which involved the new Act’s amendments to the rules governing habeas petitions by state prisoners. Title I of the AEDPA provides that claims presented in a second or successive habeas petition must be dismissed unless they have not been presented in a prior petition and meet certain other stringent requirements. In order to file a successive petition, the petitioner must satisfy a federal circuit court performing a “gatekeeper” function that the statutory criteria have been met. The AEDPA further provides that these “gatekeeper” decisions “shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.” In other words, where a habeas petitioner has been denied permission to file a successive petition, the AEDPA seems to cut off all Supreme Court review of his case.

Such an interpretation would implicate many of the perennial questions surrounding Congress’s power to restrict the Court’s jurisdiction. Although Article III plainly acknowledges Congress’s powers to make “exceptions” and “regulations” governing the Supreme Court’s appellate jurisdiction, controversy has long swirled around the existence and

34. Specifically, dismissal is required unless:
   (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
   (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
   (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
36. *See U.S. Const.* art. III, § 2 (providing that “the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the
nature of limits on this power. Henry Hart, for example, influentially argued that “the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan.” 37 Although Professor Hart acknowledged that the concept of the Court’s “essential role” “seems pretty indeterminate,” 38 other scholars have identified those functions more precisely as “maintaining the uniformity and supremacy of federal law.” 39 Certainly removing Supreme Court jurisdiction altogether from a broad class of habeas corpus claims might undermine the Court’s ability to police the states’ adherence to federal rights in the criminal context.

A somewhat different argument—persuasively developed by Jim Pfander in this Symposium 40—emphasizes Article III’s distinction between “supreme” and “inferior” courts. 41 Professor Pfander argues that Congress may not restrict the Supreme Court’s appellate jurisdiction in such a way as to leave the “inferior” federal courts effectively “supreme” on a particular issue of law—that is, Congress may not deprive the “supreme” Court of its supervisory authority over lower federal courts in any given class of cases. 42 The AEDPA’s provisions governing successive petitions arguably do this in both a broad and narrow sense. Those provisions appear to cut off all Supreme Court review of successive petitions that fail to meet the statutory criteria. More narrowly, the AEDPA seems to cut off Supreme Court review of the court of appeals’ gatekeeping orders concerning whether the statutory criteria have been met. On that issue, at the very least, the AEDPA appears to give the “inferior” circuit court the final—and therefore “supreme”—word.

To say that the AEDPA’s successive petition rules raise substantial constitutional questions is not, however, to say that they are unconstitutional. Many have doubted that the Court has a core of “essential

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38. Hart, supra note 37, at 1365.

39. Ratner, supra note 37, at 201-02.


41. See U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”) (emphasis added); see also U.S. CONST. art. I, § 8 (granting Congress power to “constitute Tribunals inferior to the supreme Court”) (emphasis added).

42. See Pfander, supra note 40, at 1509-12.
functions" that lie outside the reach of the Exceptions Clause. Herbert Wechsler, for example, observed that:

Federal courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of the government. They do so rather for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land. That is, at least, what Marbury v. Madison was all about.43

Other objections include the lack of any textual support for an "essential functions" limit on the Exceptions Clause; the fact that, for much of our history, the Supreme Court has lacked any jurisdiction over important categories of cases arising under federal law; and the possibility that any notion of "essential functions" may simply be too indeterminate to be useful.46 My purpose here is not to resolve this controversy, but simply to point out the necessary distance between the judgment that the AEDPA raises serious constitutional issues and the conclusion that it is unconstitutional.

The problems with the "inferior"-"supreme" argument are different in their particulars but similar in their import: the argument that a broad reading of the AEDPA would be unconstitutional is simply not a knock-

43. Herbert Wechsler, The Courts and the Constitution, 65 COLUM. L. REV. 1001, 1006 (1965) (footnote omitted). Note that Professor Wechsler's position that the Supreme Court's function of judicial review derives from its authority to determine the rights of the parties in a particular case, and not vice versa, need not commit one to the correspondingly narrow view that the Court's decision, once rendered, governs only the parties before it. Cf. Cooper v. Aaron, 358 U.S. 1, 17-19 (1958) (suggesting that Supreme Court decisions create rules of broad applicability that may bind nonparties to the case). One might argue, for example, that the Court's decisions in cases within its jurisdiction create broadly applicable rules of federal common law, see Daniel A. Farber, The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited, 1982 U. ILL. L. REV. 387, without depending on any strong notion that the Court must be able to issue such decisions in any particular class of cases.

44. See Gunther, supra note 22, at 903 (stating that "there is simply no 'essential functions' limit on the face of the exceptions clause").

45. See, e.g., HART & WECHSLER, supra note 24, at 367 (noting "the significant gaps in Supreme Court jurisdiction left by the provisions of the Judiciary Act of 1789—especially the lack of jurisdiction to review state court decisions upholding claims of federal right"); Daniel J. Meltzer, The History and Structure of Article III, 138 U. PA. L. REV. 1569, 1585-86 (1990) (same); Gunther, supra note 22, at 906-07 (same).

46. See, e.g., Martin H. Redish, Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination, 27 U. ILL. L. REV. 400, 406 (1982) (complaining that Professor Hart "provided absolutely no indication of exactly what Supreme Court functions were to be deemed 'essential,' [or] how anyone was to answer that question"); Hart, supra note 37, at 1365 (admitting, through the other half of the dialogic persona, that the "essential functions" idea "seems pretty indeterminate to me"); see also Gunther, supra note 22, at 908 (concluding that "[m]uch of the 'essential functions' theory . . . confus[es] wisdom and constitutionality, confusing what Congress ought not to do with what it cannot do").
down proposition. Professor Pfander appears to confine his argument to the context of limits on Supreme Court authority to review decisions reached by the lower federal courts.\textsuperscript{47} Certainly, it is hard to argue that the Court is "supreme" in Professor Pfander's sense vis a vis state courts; after all, the Court lacks appellate jurisdiction over state courts in important classes of cases,\textsuperscript{48} and its power to issue supervisory writs to state tribunals is more limited than in the federal context.\textsuperscript{49} But Article III seems to use "supreme" to describe the Supreme Court's relationship to both the state courts and the lower federal courts; it would be odd for the term to have different meanings in these two contexts. This disparity would be especially strange in light of the Framers' expectation that the state courts were to be the "primary guarantors of constitutional rights."\textsuperscript{50}

Even if we accept the limitation to the "inferior" federal courts, Professor Pfander's argument is hardly conclusive. The subordinancy definition of "inferior" is not the only one; the term may sensibly be read to

\textsuperscript{47} See, e.g., Pfander, supra note 40, at 1441 (focusing on "the constitutional relationship among federal courts") (emphasis added).

\textsuperscript{48} For much of our history, the Supreme Court lacked power to review state court decisions upholding claims of federal right. See HART & WECHSLER, supra note 24, at 493. The Court continues to lack jurisdiction where the state court's judgment is supported by an adequate and independent state ground. See Michigan v. Long, 463 U.S. 1032, 1037-44 (1983); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 635 (1874).

\textsuperscript{49} There was doubt for much of our history whether this power existed at all, which suggests that the power cannot have been integral to the original understanding of "supreme" in this context. See, e.g., In re Blake, 175 U.S. 114 (1899) (holding that a writ of mandamus was unavailable); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 362, 366 (1816) (Johnson, J., concurring) (suggesting that the Court was disabled from "issuing compulsory process to the state courts"). Professor Pfander readily concedes that "the Framers may have had doubts about the power of the Supreme Court to exercise general powers of superintendence over the state court system." Pfander, supra note 40, at 1457. It is now clear that the Supreme Court may issue supervisory writs to enforce its mandate in earlier decisions in the same case. See 16B CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 4018, at 271 (1996); United States ex rel. Moody v. Court of Common Pleas of Philadelphia County, 1995 U.S. Dist. LEXIS 17897, at *7 n.5 (E.D. Pa. Nov. 24, 1995) (asserting that "[t]he only time an extraordinary writ may issue against a state court is when the matter has been within the jurisdiction of the federal court and the state court has disobeyed an order of the federal court," and collecting cases that illustrate this rule). But this power—exercised by definition within cases where statutory appellate jurisdiction already exists—hardly proves that Article III mandates supervisory authority over state courts even in the face of a legislative attempt to cut back on statutory jurisdiction. Cf. WRIGHT, ET AL., supra, at 275 (observing that concerns that broader use of supervisory writs "could effectively destroy many of the statutory limits on the Court's jurisdiction . . . doubtless account for the fact that the writs have not been put to any such use"). Even where writs have been sought against a state court to enforce the Supreme Court's prior ruling in a case, the Court has generally not elected to issue a writ. See, e.g., Deen v. Hickman, 358 U.S. 57 (1958) (assuming that the power to issue a writ of mandamus to a state tribunal existed, but electing to trust the state court to comply with the Court's underlying decision voluntarily). As Professor Wright has observed, "clear answers [about the scope of the Court's power] may remain unnecessary because of practical avoidance." WRIGHT, ET AL., supra, at 275.

\textsuperscript{50} Hart, supra note 37, at 1401.
mean "of less importance, value or merit" rather than "one who is bound to obey another." The lower federal courts might thus be "inferior" simply because they are less famous, have less posh offices, or, more to the point, because they almost always are subject to review by a higher court. The "almost" in the last sentence does not necessarily create an unconstitutional situation. Professor Pfander, of course, anticipates some of these counter-arguments, and it is not my aim here to conclusively resolve the issue. Rather, I simply want to suggest that at the end of the day, the constitutional "doubt" surrounding the AEDPA might turn out to be surmountable.

In any event, the Supreme Court's decision in Felker resolved none of these questions. Felker held that the statute did not affect the traditional right to file an original petition in the Supreme Court, thereby construing the overall habeas scheme to preserve some form of Supreme Court review. In this sense, Felker was essentially a replay of Ex Parte Yerger, which had likewise held just over 125 years before that a congressional attempt to strip the Supreme Court of its appellate jurisdiction in habeas cases repealed only a recently enacted jurisdictional provision without affecting the Court's preexisting authority, embodied in the first Judiciary Act, to entertain "original" habeas petitions. By

51. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1158 (1986).
52. BLACK'S LAW DICTIONARY 778 (6th ed. 1990). Samuel Johnson's famous dictionary—in use at the time of the Framing—included both meanings for "inferior." See SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) (defining "inferiour" to mean both "[l]ower in place, . . . station, . . . rank of life, . . . value or excellency," and "subordinate"). In Morrison v. Olson, 487 U.S. 654, 719-23 (1988) (Scalia, J., dissenting), the Court rejected Justice Scalia's argument that "inferior" must mean "subordinate" in the context of Article II's Appointments Clause. See U.S. CONST. art. II, § 2, cl. 2 (distinguishing between principal officers—who must be nominated by the President and confirmed by the Senate—and "inferior" officers). Instead, the Court employed a four-part test for "inferiority" which might fairly be said to go to the general status, prestige, and authority of the officer rather than his susceptibility to the command of a "superior" in each and every function. See Morrison, 487 U.S. at 671-72. I do not contend that the Court's use of "inferior" in this way dictates a similar analysis in the context of Article III. See Adrian Vermeule & Ernest A. Young, Hercules, Herbert, and Amar: The Trouble with Intratextualism, 113 HARV. L. REV. 730, 754-56 (2000) (criticizing the assumption that "inferior" must necessarily mean the same thing in Article II and Article III). But Morrison does demonstrate that more than one meaning for "inferior" is fairly conceivable.
53. But see The In Places: Favorite Spots for Hiding Out from Winter, BOSTON GLOBE, Jan. 27, 2000, available in LEXIS, News Library, Boston Globe File (describing the luxurious new federal courthouse in Boston as one of the city's "in" places).
54. See Pfander, supra note 40, at 1458-60, 1462-63 (recognizing that "inferior" could refer to the more limited geographical jurisdiction of the lower courts, in comparison with the national jurisdiction of the "supreme" court).
56. 75 U.S. (8 Wall.) 85 (1868).
57. See id. at 105 (holding that the Act of 1867 did not repeal the Supreme Court's power to hear original habeas petitions because it contained "no repealing words" and "[r]epeals by implication are not favored"). Yerger was decided in the same year as Ex parte McCord, 74 U.S. (7 Wall.) 506 (1868), which appeared to acknowledge a broad power in Congress to make "exception" to the...
doing the same thing in *Felker*—that is, by construing the AEDPA’s successive petition provisions *not* to bar the Court from entertaining a petition for an original writ of habeas corpus under 28 U.S.C. § 2241—*the Court avoided any “plausible argument that the [AEDPA] has deprived this Court of appellate jurisdiction in violation of Article III, section 2.”*59

Although *Felker* determined that Congress had not barred Supreme Court review of the merits of a successive habeas petitioner’s claim, the AEDPA does arguably bar all review of a decision by a court of appeals in its “gatekeeper” capacity. Justice Souter’s concurrence in *Felker* noted that this aspect of the AEDPA could become significant, particularly “if the courts of appeals adopted divergent interpretations of the gatekeeper standard.”60 This scenario directly implicates Professor Pfander’s point that the “inferior” station of lower federal courts requires that Supreme Court review be available to resolve such conflicts.61 Both Justice Souter’s and Justice Stevens’s concurrences, however, suggested a number of ways in which a gatekeeper decision might remain subject to some form of Supreme Court review.62 The Court thus left this question, too, for another day.

The *Felker* Court did not mention the avoidance canon explicitly. Instead, the Court relied on another familiar canon—that against repeal of prior statutes by implication.63 Because the AEDPA did not mention the

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58. As the Court explained in *Felker*, § 2241 is the direct descendant of section 14 of the Judiciary Act of 1789, which the Court relied upon in *Yerger*. See *Felker*, 518 U.S. at 659 & n.1. Section 2241 provides that “[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.” 28 U.S.C. § 2241 (1994).

59. *Felker*, 518 U.S. at 662. The Court considered and rejected a claim that the AEDPA “suspended” the writ of habeas corpus in violation of the Suspension Clause. See id. at 663-64; U.S. Const. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”). Given that the challenged provisions of the AEDPA deal only with *successive* petitions and do not cut off the privilege of the writ entirely even in such cases, see *Felker*, 518 U.S. at 664, the Suspension Clause argument was considerably weaker than if that Clause had been applied to some of the other provisions of the AEDPA (not to mention the IIRIRA) considered in the next sections. See infra text accompanying notes 81-83.

60. 518 U.S. at 667 (Souter, J., concurring).

61. See Pfander, *supra* note 40, at 1509.

62. See *Felker*, 518 U.S. at 666 (Stevens, J., concurring) (finding three instances where the Court would retain jurisdiction to review a court of appeals’ gatekeeper decision: (1) if the Court retains jurisdiction to review the appellate court’s order pursuant to the All Writs Act; (2) if the appellate court enters an appropriate interlocutory order, it may provide the Court an opportunity to review the proposed disposition of a motion for leave to file a second or successive habeas application; and (3) if in exercising its habeas corpus jurisdiction the Court considers earlier gatekeeper orders to inform its judgment, the Court may perform the functional equivalent of direct review); id. at 667 (Souter, J., concurring) (arguing that the court retains appellate jurisdiction through “certified questions from courts of appeals,” the issuance of “appropriate writs in aid of another exercise of appellate jurisdiction,” the Court’s “procedure for petitions for extraordinary writs,” and the Court’s “authority to entertain original petitions for writs of habeas corpus”).

63. See *Felker*, 518 U.S. at 660-61. On the canon against repeals by implication, see generally
Court's power to hear an original writ under section 2241, the Court reasoned, it would not find such a repeal to be implicit in the statute. But the no-implied-repeals canon played precisely the same functional role in *Felker* that the avoidance canon would have had if it been invoked: Each operated, or would have operated, to allow the Court to bypass the issue of the limits of Congress's power over the Court's jurisdiction by reading the AEDPA as not to eliminate that jurisdiction for any significant class of cases. And it seems likely that the Court's use of the no-implied-repeals canon was motivated—at least in part—by constitutional concerns.

B. Elimination of Judicial Review in Immigration Cases

The most litigated questions arising out of the AEDPA and the IIRIRA—and perhaps the most serious questions on the merits—stem from provisions purporting to restrict judicial review of deportation orders in immigration cases. Prior to 1996, the Immigration and Nationality Act (INA) had provided aliens with direct judicial review of deportation orders in the federal courts of appeals, while also preserving the right to habeas corpus review in federal district court. Section 401(e) of the AEDPA eliminated the habeas review provision, and section 440(a) provided that "[a]ny final order of deportation against an alien who is deportable by reason of having committed a criminal offense [within an enumerated category] shall not be subject to review by any court."

The IIRIRA, which was enacted just a few months after the AEDPA, went even further in shutting off judicial review of deportation orders.

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*Morton v. Mancari*, 417 U.S. 535, 550 (1974) ("In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and the later statute are irreconcilable."); *David L. Shapiro, Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. Rev. 921, 941-59 (1992) (evaluating the canon against implied repeals in the context of related rules favoring statutory continuity).

64. *See Felker*, 518 U.S. at 661.

65. Since jurisdiction-stripping by definition acts to take away jurisdiction that had existed before, the no-implied-repeals canon should always be available in these cases as an alternative to constitutional avoidance. *See also Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 105 (1869) (likewise relying on the rule disfavoring implied repeals).

66. *See Goncalves v. Reno*, 144 F.3d 110, 119-20 (1st Cir. 1998) (suggesting that, in *Yerger*, the Court "refused to read an act of Congress as impliedly impairing habeas corpus jurisdiction in light of its constitutionally protected status").


70. *See generally Neuman, supra note 31, at 963-69 (discussing the overall effects wrought by the passage of the AEDPA and the IIRIRA); Lenni B. Benson, Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings, 29 CONN. L. Rev. 1411, 1412 (1997) (explaining that the IIRIRA "contains a multitude of individual statutory provisions that Congress
The IIRIRA repealed the old INA review regime in its entirety, including the AEDPA amendments. The most drastic limitations on judicial review involved provisions concerning criminal aliens, for which the IIRIRA's new regime contained both transitional and permanent rules. The transitional rules—which are of interest because most of the decided cases as of this writing fall within them rather than the permanent rules—provide that "there shall be no appeal permitted in the case of an alien who is admissible or deportable by reason of having committed [certain criminal offenses]." The permanent rules tighten this language further, stating that "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal" relating to criminal aliens. Other jurisdiction-limiting provisions of the IIRIRA fall more broadly on aliens removable for reasons other than a criminal offense. The new Act creates an informal "expedited removal" procedure for arriving non-resident aliens who lack valid documents or aliens whom the immigration officer finds have committed immigration fraud. Another provision limits judicial review of the Attorney General's decision to withhold certain forms of discretionary relief—traditionally a critical category of immigration litigation. Finally, the IIRIRA provides that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." The statutory innovations introduced by the AEDPA and the IIRIRA have given rise to constitutional challenges relying on a variety of different theories. Some scholars and litigants have relied primarily on Article III:

independently designated to expedite, curtail, or eliminate whatever remains of judicial review [of deportation orders]."


72. The transitional rules govern aliens who were in deportation proceedings before April 1, 1997, and whose final deportation order was entered more than thirty days after September 30, 1996. See IIRIRA, Pub. L. No. 104-208 § 309(c)(1), (4), 110 Stat. 3009-625 to -626 (1996).


74. 8 U.S.C. § 1252(a)(2)(C) (Supp. IV 1998). For a recent decision construing the permanent rules under IIRIRA, see Liang v. INS, 206 F.3d 308, 316-23 (3rd Cir. 2000).

75. See id. § 1225(b)(1) (providing for removal without further hearing or review); see also 8 U.S.C. §§ 1252(a)(2)(A), (e)(2) (limiting judicial review of expedited removal proceedings to inquiry regarding whether the petitioner (1) is an alien, (2) was ordered removed under § 1225(b)(1), or (3) was previously admitted as a permanent resident, refugee, or asylee).

76. See id. § 1252(a)(2)(B); see also Neuman, supra note 31, at 1054 n.546 (noting that "the majority of deportation hearings have involved applications for discretionary relief, not disputes over deportability").

77. 8 U.S.C. § 1252(g) (Supp. IV 1998). This provision is also made applicable "notwithstanding any other provision of law." Id.
Daniel Meltzer, for example, has argued that Article III "stands generally for the proposition that if Congress assigns matters to federal rather than state tribunals, those tribunals must either be, or at least be subject to review in, tribunals outside the control of the political branches—which usually means by Article III courts." 78 By placing aliens entirely in the hands of federal executive tribunals and cutting off all Article III review in important classes of immigration cases, the AEDPA and the IIRIRA arguably offend this norm. 79

Some litigants have grounded a similar argument in the Due Process Clause, contending that "deportation deprives [an alien] of a constitutionally protected liberty interest, and that the Due Process Clause thus guarantees him certain procedural protections, including judicial review." 80 Others have relied on the Suspension Clause of Article I, which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." 81 Based on the text and history of this provision, Gerald Neuman has concluded that "the habeas corpus guarantee retains its central importance as a protection against abuse of executive power, and that courts must once again preserve their authority to evaluate the lawfulness of executive detention, even in the context of alien removal." 82

Finally, some have urged a combination of the two provisions. David Cole, for example, has argued that "the Suspension Clause and the Due Process Clause, read together, impose a fundamental limit on Congress's control of federal jurisdiction: Congress may not authorize the executive to hold someone in detention without guaranteeing access to a court to test the legality of that detention." 83

Despite their strengths, each of these constitutional theories—the Due Process Clause, Article III, and the Suspension Clause—are subject to

79. See, e.g., Pak v. Reno, 196 F.3d 666, 673 (6th Cir. 1999) (raising this concern); Goncalves v. Reno, 144 F.3d 110, 122 (1st Cir. 1998) (same).
80. Kolster v. INS, 101 F.3d 785, 790 (1st Cir. 1996) (describing the alien's argument); see also Cole, supra note 24, at 2489-90 ("[B]ecause removal [of aliens] entails a substantial deprivation of liberty, denial of a federal forum to review a constitutional challenge to removal would violate due process.").
81. U.S. Const. art. I, § 9, cl. 2.
82. Neuman, supra note 31, at 963; see also Cole, supra note 24, at 2495 (arguing that the Suspension Clause "guarantees judicial review of federal executive detention"). The Ninth Circuit accepted a similar Suspension Clause argument in Magana-Pizano v. INS, 152 F.3d 1213, 1220 (9th Cir.), as amended, 159 F.3d 1217 (9th Cir. 1998) (holding that 8 U.S.C. § 1252(g) was unconstitutional to the extent that it eliminated all judicial review of executive deportation). That decision was vacated by the Supreme Court, see INS v. Magana-Pizano, 526 U.S. 1001 (1999), and the Ninth Circuit subsequently obviated the constitutional holding by adopting a narrower construction of the statute, see Magano-Pizano v. INS, 200 F.3d 603, 609 (9th Cir. 1999).
83. Cole, supra note 24, at 2495.
serious counter-arguments. It is not at all obvious that due process requires a federal judicial forum, or indeed any judicial forum at all. As Professor Meltzer has observed, the Madisonian Compromise by which the Constitution left Congress discretion as to whether to create lower federal courts at all necessarily presumed that most federal judicial business could have been assigned instead to state courts. And since state judges frequently lack tenure and salary protection, "federal administrative adjudication is not necessarily more questionable under the Due Process Clause than is state court adjudication." Finally, the "plenary powers" doctrine holding that aliens are entitled to very few substantive constitutional protections in the immigration context poses a serious problem for the due process claim. As Professor Meltzer puts it, "[t]here is an oddity to providing that aliens, though bereft of substantive constitutional protection, possess undiluted rights to judicial review" guaranteed by the Due Process Clause.

The Article III theory likewise encounters formidable objections. The most important stems from the "public rights" doctrine, which holds that Congress may assign certain sorts of controversies to executive tribunals for determination without judicial involvement. Although the decisions defining the limits of the "public rights" category are notoriously imprecise, immigration has long been considered a paradigm example of that category. Critics of the public rights doctrine have suggested that

84. See Meltzer, supra note 78, at 2566 (asserting that "Congress, not having any obligation to create lower federal courts, need not vest them with habeas corpus jurisdiction, and hence that the Suspension Clause precludes Congress merely from restricting state courts' habeas corpus jurisdiction"). On the Madisonian Compromise, see generally HART & WECHSLER, supra note 24, at 7-9.

85. Meltzer, supra note 78, at 2569.


87. Meltzer, supra note 78, at 2578. See also Max-George v. Reno, 205 F.3d 194, 201-02 (5th Cir. 2000) (citing the plenary powers doctrine in rejecting a Suspension Clause challenge to the IIRIRA).

88. See, e.g., Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 227, 238 (1856) ("[T]here are matters, involving public rights, ... which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."); see generally HART & WECHSLER, supra note 24, at 395-96 (outlining the doctrine of public rights, its historical development, and some of the issues central to its application).

89. See, e.g., Crowell v. Benson, 285 U.S. 22, 51 (1932) (citing immigration as one of several "familiar illustrations" of public rights cases); Richard H. Fallon, Jr., Of Legislative Courts, Administrative Agencies, and Article III, 101 HARV. L. REV. 915, 967 (1988) ("Apparently because of the longstanding assumption that the executive and legislative branches possess plenary power over immigration issues, the surrounding body of law falls within the public rights category."); Stephen H. Legomsky, Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process,
the doctrine no longer "has intelligible contours" in light of recent decisions\(^90\) and may, in fact, exempt from Article III precisely the wrong sorts of cases.\(^91\) Nonetheless, the Court appeared to breathe new life into the public rights doctrine in its most recent foray into this area,\(^92\) and Justice Scalia has gone so far as to describe its implications as a "central feature of the Constitution."\(^93\)

Finally, the Suspension Clause argument, while perhaps the strongest position against the statutory innovations of the AEDPA and the IIRIRA, is not without problems. The "public rights" objection must be considered here as well,\(^94\) although Gerald Neuman has argued that the public rights exception to Article III should not be read as extending into Suspension Clause situations in which physical detention, as opposed to deprivation of material benefits, is at issue.\(^95\) Professor Neuman's argument has considerable force, especially in light of the historical importance of habeas corpus as a remedy for executive detention, but Neuman implicitly acknowledges that the Court has never explicitly recognized a limitation of the public rights doctrine to cases not involving physical detention.\(^96\) It also seems possible that the present Court might read the benefit sought by

\(^{71}\) IOWA L. REV. 1297, 1396 (1986) (observing that immigration cases properly fall within the public rights category).

\(^{90}\) Meltzer, supra note 78, at 2571; see also Erwin Chemerinsky, Ending the Marathon: It is Time to Overrule Northern Pipeline, 65 AM. BANKR. L.J. 311, 321-22 (1991) (noting the difficult line-drawing issues arising from the Court's recent "public rights" decisions).

\(^{91}\) See, e.g., Chemerinsky, supra note 90, at 314-15 (arguing that "an independent judiciary is most essential in a dispute between the government and a private citizen"); Meltzer, supra note 78, at 2572 (noting "the basic normative objection that Article III review is likely to be more, not less, important in cases to which the government is a party, which form the core of any such doctrine"); see also Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 68 n.20 (1982) (plurality opinion) (acknowledging the logical force of this point). For a more general criticism of the public rights doctrine, see Richard B. Saphire & Michael E. Solimine, Shoring Up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era, 68 B.U. L. REV. 85, 120 (1988) (concluding that "the public rights doctrine cannot be justified on originalist grounds, and... deficiencies with the Court's articulation of the doctrine should be unresponsive to Article III values and an obstacle to the pragmatic flexibility Congress must have to create non-Article III tribunals").

\(^{92}\) See Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989); see also Neuman, supra note 31, at 1029 (describing Granfinanciera as the "reinvigoration of the public rights doctrine").

\(^{93}\) Granfinanciera, 492 U.S. at 70 (Scalia, J., concurring in part and concurring in the judgment).

\(^{94}\) See Meltzer, supra note 78, at 2571 (noting the difficulty of arguing "that the Suspension Clause precludes Congress from establishing a system that leaves immigration matters entirely to executive determination, despite the existence of a line of [public rights] cases under Article III that seems to indicate that Congress constitutionally may do just that").

\(^{95}\) See Neuman, supra note 31, at 1027-32 (claiming that the idea that the public rights doctrine "eliminates the need for habeas inquiry into the lawfulness of detention... would misconceive both the present scope of the public rights doctrine and its historical origins").

\(^{96}\) See id. at 1027 (recognizing that "the Supreme Court has continued to identify immigration cases as another sphere in which the public rights doctrine operates"); see also Richard H. Fallon, Jr., Applying the Suspension Clause to Immigration Cases, 98 COLUM. L. REV. 1068, 1084-86 (1998) (arguing that the relevant cases can be read more narrowly than Professor Neuman would read them).
the alien—admission to the United States or permission to remain there—as the
determinative consideration for the public rights inquiry, rather than the
physical detention incident to removal. If that is the case, then it is much
easier to assimilate immigration matters to other creatures of legislative
grace that fall within the public rights category.  

Once again, my purpose here is not to conclusively resolve these
issues, but rather to suggest that the constitutional attacks on the AEDPA
and the IIRIRA are not slam dunks. Nevertheless, many lower courts have
taken these arguments seriously enough to avoid them—that is, they have
construed the various provisions of the AEDPA and the IIRIRA in such a
way as to preserve some means of judicial review, thereby obviating the
constitutional challenges. In Sandoval v. Reno, for example, the
Third Circuit held that the AEDPA's mandate that certain deportation
orders are "not subject to review by any court" did not bar review via the
writ of habeas corpus. In so holding, the court noted that it was
avoiding "serious constitutional problems" under the Suspension Clause
which would arise if the habeas and immigration statutes were read to
preclude habeas review as well as review under the Administrative
Procedure Act. In many cases, the Government has chosen to concede
the availability of judicial review for some claims outright, in order to
avoid the constitutional issues that would otherwise arise.

97. Another potential difficulty for the Suspension Clause argument is that it may guarantee, at
most, a right to a state judicial forum for judicial review of detention incident to the removal of aliens.
Professor Melzer has argued that "Congress, not having any obligation to create lower federal courts,
nor vest them with habeas corpus jurisdiction, and hence . . . the Suspension Clause precludes
Congress merely from restricting state court habeas corpus jurisdiction." Melzer, supra note 78, at
2566; see also id. at 2566-67 (acknowledging that this view requires a reconsideration of Tarble's Case,
80 U.S. (13 Wall.) 397 (1872), which held that state courts may not issue writs of habeas corpus to
federal officers). The IIRIRA—which strips both federal and state courts of jurisdiction in the relevant
categories of cases—would still be unconstitutional on this reading, but Congress would be free to
rewrite the statute to permit only state court review. See id. at 2567.

98. But see Hall v. INS, 167 F.3d 852 (4th Cir. 1999) (rejecting the due process argument on the
merits); Boston-Bollers v. INS, 106 F.3d 352 (11th Cir. 1997) (rejecting the due process and Article
III arguments on the merits).

99. 166 F.3d 225 (3d Cir. 1999).

100. Id. at 235 (construing AEDPA § 440(a) and IIRIRA § 309(c)(4)(G)).

101. Id. at 237; see also Flores-Miramontes v. INS, No. 98-70924, 2000 U.S. App. LEXIS 9165,
at *27-28 (9th Cir. May 9, 2000) (construing IIRIRA's permanent rules to permit habeas review in
order to avoid Suspension Clause problems); Liang v. INS, 206 F.3d 308, 321 (3d Cir. 2000) (same);
Pak v. Reno, 196 F.3d 666 (6th Cir. 1999) (construing the IIRIRA not to repeal habeas jurisdiction
in order to avoid both Suspension Clause and Article III problems); Goncalves v. Reno, 144 F.3d 110,
122-23 (1st Cir. 1998) (same); Henderson v. INS, 157 F.3d 106, 118-22 (2d Cir. 1998) (construing
the scope of habeas review permitted under IIRIRA to conform to the constitutional minimum).

102. See, e.g., Kolster v. INS, 101 F.3d 785, 790 (1st Cir. 1996) (noting that the INS has
conceded the availability of habeas corpus review in order to avoid raising a constitutional question
regarding jurisdiction to review final deportation orders); see also Liang, 206 F.3d at 322 (noting the
Government's concession, in order to avoid constitutional problems, that some forms of review would
be available on a petition for review); Jurado-Gutierrez v. Greene, 190 F.3d 1135, 1144 n.4 (10th Cir.
1999) (noting government's concession that some forms of habeas review are available).
The potential counters to the Article III, Suspension Clause, and Due Process theories discussed above suggest that the Government’s concessions, as well as the Court’s creative constructions of the relevant statutes, may have been unwarranted. Had the courts reached the merits of these constitutional challenges, they might well have upheld even a broad version of the AEDPA and IIRIRA. These cases thus highlight the critical role played by the avoidance canon in preserving judicial review.

The strength of the avoidance canon’s influence is likely to be tested in the next round of IIRIRA litigation. Most of the prior cases have concerned the transitional rules, which the overwhelming majority of circuits have construed to preserve review by habeas corpus.\(^{103}\) The next round of cases will require construction of IIRIRA’s permanent rules, which contain arguably clearer restrictions on judicial review.\(^{104}\) These next cases—which are just beginning to percolate through the courts of appeals\(^{105}\)—will thus reveal the extent of the courts’ willingness to aggressively construe statutory text in order to avoid constitutional doubts about more comprehensive restrictions on judicial review.

C. **Defence to State Court Decisions of Law**

A very different sort of problem arises from the AEDPA’s effort to reshape the standard for habeas relief on collateral review of state criminal convictions. Prior to 1996, the general rule had been that state prisoners were entitled to relitigate federal constitutional claims on federal habeas review, even when those claims had received a full and fair hearing in state court.\(^ {106}\) The primary exception to this rule was that, absent certain deficiencies in the state court proceedings, 28 U.S.C. § 2254(d) required that state court findings of historical fact were to be presumed correct by the federal court.\(^ {107}\) On questions of law and the application of law to fact, however, federal courts engaged in de novo review.\(^ {108}\)

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103. *See Liang* at 315-16 (collecting cases construing the transitional rules).

104. *See supra* notes 72-74 and accompanying text; *Requena-Rodriguez v. Pasquereill, 190 F.3d 299, 305-06* (5th Cir. 1999) (holding that the transitional rules did not foreclose habeas review, but suggesting that the permanent rules were much more explicit and might require a different result).

105. As of this writing, the Fifth and Eleventh Circuits have held that the permanent rules bar all judicial review via habeas corpus for cases involving criminal aliens under 8 U.S.C. § 1252(a)(2)(C), *see Max-George v. Reno, 205 F.3d 194, 199* (5th Cir. 2000); *Richardson v. Reno, 180 F.3d 1311, 1315* (11th Cir. 1999), while the Third and Ninth Circuits have reached the opposite conclusion, *see Liang v. INS, 206 F.3d 308, 317* (3rd Cir. 2000); *Flores-Miramontes v. INS, No. 98-70924, 2000 U.S. App. LEXIS 9165, at *9-14* (9th Cir. May 9, 2000).


107. *See 28 U.S.C. § 2254(d) (1994) (providing that “the burden shall rest upon the [petitioner] to establish by convincing evidence” that the factual determination by the State court was erroneous); see also HART & WECHSLER, *supra* note 24, at 1372-73 (discussing the pre-1996 regime and its “complicated burden of proof”).*

108. *See HART & WECHSLER, *supra* note 24, at 1375. The Court has had considerable difficulty distinguishing in practice between historical fact questions and law application, or “mixed” questions.*
The AEDPA replaced the old section 2254(d) with the following provision:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.\(^\text{109}\)

There has been substantial disagreement among courts and commentators over what section 2254(d)'s new language means.\(^\text{110}\) The principal controversy has concerned whether section 2254(d)(1) requires a federal court to accord "deference" to state court determinations on purely legal questions and/or "mixed" questions concerning the application of law to fact.\(^\text{111}\) The Seventh Circuit, for example, has held that while section 2254(d)(1) requires de novo review of pure legal questions, review of "mixed questions" must be more deferential: "when the dispute lies not in

\(^{109}\) See, e.g., id.; 1 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 20.3 (3d ed. 1998).


\(^{111}\) Judge Easterbrook has objected to the use of the word "deference" in describing the impact of § 2254(d), apparently because of that word's status as a term of art in federal administrative law. See Lindh v. Murphy, 96 F.3d 856, 868 (7th Cir. 1996) (en banc) (contrasting § 2254(d) with "deference" under the Chevron doctrine, rev'd on other grounds, 521 U.S. 320 (1997). As Mr. Scheidegger has pointed out, however, the Seventh Circuit's actual standard adopted in Lindh "is exactly what the proponents of the AEDPA meant by 'deference.'" Scheidegger, supra note 110, at 945. In any event, the particular terminology is not critical.

A second controversy, which has so far provoked less actual litigation, concerns the validity of section 2254(d)(1)'s confinement of the legal basis for relief to "clearly established law, as determined by the Supreme Court of the United States." (emphasis added)Some have objected to the italicized limitation on the ground that it appears to strip the lower federal courts of their authority to develop the law. See Lindh, 96 F.3d at 887 (Ripple, J., dissenting) (arguing that "the statute denies the lower courts' power to 'say what the law is'") (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). For an interesting analysis of this issue, see Evan Caminker, Allocating the Judicial Power in a "Unified Judiciary," 78 TEXAS L. REV.1513, 1539-47 (2000).
the meaning of the Constitution, but in its application to a particular set of facts . . . section 2254(d)(1) restricts the grant of collateral relief to cases in which the state’s decision reflects "an unreasonable application of" the law." 112 Other courts and commentators have rejected this interpretation as a matter of statutory construction. 113

This statutory debate has been influenced—at least in some courts114—by the claim that any requirement of deference to state court resolution of "legal" or "mixed" questions would be unconstitutional. James Liebman and William Ryan have laid out the most elaborate version of this argument, based on a comprehensive re-interpretation of the drafting history of Article III itself. Based on that history, Liebman and Ryan develop a "qualitative" view of the "judicial power" vested in the federal courts by Article III. That power, they conclude, must include "five crucial qualities":

112. *Lindh*, 96 F.3d at 870. The Supreme Court subsequently rejected the Seventh Circuit's holding in *Lindh* that the AEDPA applied retroactively to habeas petitions filed prior to the statute's effective date. *See Lindh v. Murphy*, 521 U.S. 320, 336-37 (1997). The Court did not address the court of appeals' interpretation of the standard imposed under § 2254(d)(1). *See generally ibid.*

The Fifth and Eleventh Circuits have followed the Seventh's lead in interpreting § 2254(d)(1). *See Neeley v. Nagle, 138 F.3d 917, 923-24 (11th Cir. 1998) (requiring individual review on issues of pure law in noting that "by its very language, 'unreasonable application' refers to mixed questions of law and fact" and adopting a legal test with substantial deference to the state's court's understanding); Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir. 1996), *overruled on other grounds by United States v. Carter*, 117 F.3d 262 (5th Cir. 1997) (fashioning a standard of review for mixed law and fact issues that defines "unreasonable application" as an application of law to facts about which "reasonable jurists considering the question would be of one view that the state court ruling was incorrect"). The Fourth Circuit has partially adopted the Seventh Circuit's approach. *See Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998) (adopting the "reasonable jurists would all agree" standard for questions of both law and fact, thereby rejecting the Seventh Circuit's de novo standard for questions of pure law).

113. *See, e.g.*, O'Brien v. Dubois, 145 F.3d 16, 22 (1st Cir. 1998) (rejecting what it describes as the "bifurcated standard"); Berryman v. Morton, 100 F.3d 1089, 1104-05 (3d Cir. 1996) (considering rhetorically that the AEDPA established a more deferential standard of review, but ultimately resting on a "not fairly supported by the record standard"); Baylor v. Estelle, 94 F.3d 1321, 1325 (9th Cir. 1996) (implying that the AEDPA did not change its standard of review); Ayala v. Speckard, 89 F.3d 91, 92, 97 (2d Cir. 1996) (arguing that even if the AEDPA established a new standard the analysis still yields the same result); James S. Liebman & William F. Ryan, "*Some E ffectual Power*: The Quantity and Quality of Decisionmaking Required of Article III Courts, 98 COLUM. L. REV. 696, 869-73 (1998) (critiquing the Seventh's Circuit's reasoning); Yackle, supra note 110, at 384 (recognizing that the statute distinguishes between questions of law and mixed questions of law and fact, and concluding that "[e]ither way, federal habeas corpus relief is available . . . [Section] 2254(d) establishes no general rule of deference to 'reasonable' state court decisions of questions of federal law or on mixed questions of law and fact").

114. Although the courts of appeals have divided over the proper interpretation of § 2254(d) as a statutory matter, I have found only one court taking the narrower view that has invoked the canon of constitutional avoidance. *See O'Brien v. Dubois*, 145 F.3d 16, 21 (1st Cir. 1998) (arguing that a concern that the "AEDPA may intrude impermissibly upon the federal courts' Article III power . . . is enough in itself to warrant favoring some other, equally plausible interpretation").
(1) independent decision of (2) every—and the entire—question affecting the normative scope of supreme law (3) based on the whole supreme law; (4) finality of decision, subject only to reversal by a superior court in the Article III hierarchy; and (5) a capacity to effectuate the court’s judgment in the case and in precedentially controlled cases.\textsuperscript{115}

Liebman and Ryan thus argue that the preexisting literature concerning Congress’s control over federal court jurisdiction has wrongly focused on the scope or “quantity” of federal jurisdiction that Congress must confer on the federal courts, rather than on the qualitative decisionmaking processes that Article III requires whenever federal jurisdiction has been granted.\textsuperscript{116}

The deferential view of section 2254(d)(1) adopted by some courts conflicts with this understanding of “judicial power.” Requiring a federal habeas court actually to accept an incorrect state court ruling on a mixed question as long as that ruling is not “unreasonable” would violate the “independence” aspect of the judicial power.\textsuperscript{117} If the deferential view were instead understood as simply denying a remedy whenever the state court’s decision is reasonable, that interpretation would violate the “effectualness” requirement of Article III.\textsuperscript{118} Either way, a narrower, non-deferential reading of section 2254(d)(1) is preferable because it avoids these problems.\textsuperscript{119}

Despite its many virtues, the Liebman and Ryan argument has been described as “bristl[ing] with difficulties.”\textsuperscript{120} As Kent Scheidegger has argued, section 2254(d) is a modified preclusion rule, barring relitigation of issues decided previously by a state court unless that court’s resolution of the issues was plainly wrong.\textsuperscript{121} As such, section 2254(d) arguably falls within two different areas of broad congressional power: the power to control the preclusive effect of state court judgments in federal court,

\textsuperscript{115} Liebman & Ryan, supra note 113, at 884.

\textsuperscript{116} See id. at 768-69 (stating that “the focus of Article III was not the frequency but the breadth of appeals”).

\textsuperscript{117} See id. at 874.

\textsuperscript{118} See id. at 875.

\textsuperscript{119} See id. at 873. The petitioner in Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996) (en banc), rev’d on other grounds, 521 U.S. 320 (1997), raised an additional allegation that the Suspension Clause forbade contraction of the scope of federal habeas corpus review for state prisoners. Judge Easterbrook rejected this claim on the ground that “[t]he power thus enshrined [in the Suspension Clause] did not include the ability to reexamine judgments rendered by courts possessing jurisdiction.” Id. at 867. Given historical evidence that the founding generation perceived state courts to be “adequate fora for protecting federal rights,” Judge Easterbrook concluded that “[c]ollateral review of [state court] judgments accordingly is subject to legislative control.” Id. at 867-68.

\textsuperscript{120} See HART & WECHSLER 1999 SUPP., supra note 110, at 173 n.b.

\textsuperscript{121} See Scheidegger, supra note 110, at 891-92.
exemplified by the Full Faith and Credit Act;\textsuperscript{122} and the power to limit remedies against state official action, as illustrated by the Anti-Injunction Act.\textsuperscript{123} Liebman and Ryan advance answers to these arguments,\textsuperscript{124} and it is not my purpose to resolve this debate here. Rather, I simply suggest that section 2254(d) shares the same constitutional status as the other provisions of the AEDPA and IIRIRA considered here: It is constitutionally problematic, but might well be upheld if the relevant constitutional challenges were to be resolved.

The Supreme Court considered section 2254(d) last term in Williams \textit{v.} Taylor.\textsuperscript{125} Justice O'Connor, writing for five Justices on this issue, held that so long as a state court applies the correct legal standard to a mixed question, a federal habeas court must accept the state court's ruling so long as it is not "unreasonable."\textsuperscript{126} Although the majority did not elaborate much on the meaning of "unreasonable," it rejected Justice Stevens's arguments against any deference to state court rulings on mixed questions.\textsuperscript{127} "[T]he most important point," Justice O'Connor said, "is that an \textit{unreasonable} application of federal law is different from an \textit{incorrect} application of federal law."\textsuperscript{128}

Arguing against the majority's reading, Justice Stevens expressly invoked a clear statement rule disfavoring constitutionally-suspect alterations in the judicial power:

\textsuperscript{122} See 28 U.S.C. § 1738 (1994) (providing that state "Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken"); \textit{see generally} Scheidegger, \textit{supra} note 110, at 911-17 (discussing Congress's power over the preclusive effect of state court judgments).

\textsuperscript{123} See 28 U.S.C. § 2283 (1994) (providing that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments"); \textit{see generally} Scheidegger, \textit{supra} note 110, at 917-27 (discussing Congress's power over remedies); \textit{Lindh}, 96 F.3d at 870 ("Section 2254(d)(1) as we read it does no more than regulate relief. It tells federal courts: Hands off, unless the judgment in place is based on an error grave enough to be called 'unreasonable.'"); \textit{but see id.} at 888-89 (Ripple, J., dissenting) (rejecting this view). These rejoinders to the Liebman and Ryan argument may be more relevant and persuasive in the habeas corpus context than elsewhere, given habeas's central concern with state court judgments and limits on federal remedial power. \textit{See generally} Jordan Steiker, \textit{Habeas Exceptionalism}, 78 TEXAS L. REV. 1703 (2000) (arguing that the Liebman and Ryan theory of "qualitative limits" on Congress's power over the federal courts may not comport with the unique character of habeas law).

\textsuperscript{124} See Liebman & Ryan, \textit{supra} note 113, at 876-84.

\textsuperscript{125} 120 S. Ct. 1495 (2000).

\textsuperscript{126} \textit{Id.} at 1522 (O'Connor, J.).

\textsuperscript{127} \textit{See id.} at 1518. Justice O'Connor's majority opinion also rejected, however, the Fourth Circuit's view that § 2254(d)'s "unreasonable application" language means that the state court's decision must be accepted unless "reasonable jurists would all agree" in accepting it. \textit{Id.} at 1521 (quoting Green \textit{v.} French, 143 F.3d 865, 870 (4th Cir. 1998)).

\textsuperscript{128} \textit{Id.} at 1522.
[It is 'emphatically the province and duty' of [Article III] judges to 'say what the law is.' Marbury v. Madison, 1 Cranch 137, 177 (1803). At the core of this power is the federal courts' independent responsibility—indeed, from its coequal branches in the Federal Government, and independent from the separate authority of the several States—to interpret federal law. A construction of AEDPA that would require the federal courts to cede this authority to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution. If Congress had intended to require such an important change in the exercise of our jurisdiction, we believe it would have spoken with much greater clarity than is found in the text of AEDPA.129

The majority, on the other hand, did not address the constitutional issues, presumably because the Court had expressly denied certiorari on the constitutional question presented in Williams's petition.130 That decision effectively bifurcated the constitutional and statutory issues, effectively foreclosing the majority's use of the avoidance canon. The opinions in the case nonetheless highlight the important role which the avoidance canon can play in the Article III context.

II. The Critique of the Avoidance Canon

The avoidance canon is frequently praised as a form of judicial restraint that avoids unnecessary constitutional decisions and, as a result, confrontations between the courts and the political branches.131 "[Q]uestioning the doctrine of construction to avoid constitutional doubts," Judge Henry Friendly said, "is rather like challenging Holy Writ."132 But question it Judge Friendly did,133 and his critique has found powerful allies in recent years.134

129. Id. at 1505 (opinion of Stevens, J.). Justices Souter, Ginsburg, and Breyer joined Justice Stevens's opinion on this issue.

130. See Williams v. Taylor, 119 S. Ct. 1050 (1999). Despite the Court's action, an amicus brief filed by a group of academics raised and discussed the constitutional question. See Brief for Amici Lance G. Banning et al. at 4, available in 1999 WL 446427, Williams v. Taylor, 119 S. Ct. 1050 (1999) (No. 98-8384) (urging that the Court "should reject [the Fourth Circuit's] interpretation of AEDPA . . . and thus avoid having to address the constitutionality of the AEDPA itself").

131. See, e.g., Cass R. Sunstein, Interpreting Statutes, supra note 8, at 468-69 (enumerating the benefits of the avoidance canon); Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 180-83 (1962) (praising techniques of statutory construction which require the legislature to speak clearly if it wishes a statute to intrude into constitutionally sensitive areas).


133. See id. at 211-13 (urging that the canon of constitutional avoidance "be confined to cases where the doubt is exceedingly real").

134. See Friendly, supra note 132.
We might usefully divide the most frequent criticisms of the canon into two general sets of arguments. The "empirical" critique rejects the common claim that Congress would generally prefer courts to shy away from constitutionally troubling interpretations of statutes rather than run the risk of having those statutes invalidated. The canon thus cannot be justified on the ground that the avoiding court is simply doing what Congress would have wanted it to do. The "penumbra" problem suggests that by allowing the avoidance canon to influence statutory interpretation even in cases where a constitutional challenge—if reached—might ultimately be rejected, the canon actually broadens the impact of constitutional provisions beyond their legitimate warrant. Moreover, 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.

I consider each of these critiques in the present Part. By way of facilitating that consideration, however, I first seek to clarify the circumstances in which application of the avoidance canon may make an actual difference in the decision of individual cases.

A. The Avoidance Canon and When It Matters

It is useful at the outset to distinguish between several closely related but conceptually distinct principles of statutory construction, all of which sometimes march under the banner of "avoiding constitutional questions." Each of these principles has important roots in Justice Brandeis's concurrence in Ashwander v. Tennessee Valley Authority,135 in which Brandeis emphasized the "great gravity and delicacy of [the Court's] function in passing upon the validity of an act of Congress" and the need for the Court to avoid unnecessary confrontations with the political branches.136 In addition to principles of justiciability and jurisdiction,137 Brandeis offered two distinct principles of avoidance:

(1) "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other

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135. 297 U.S. 288 (1936); see also Delaware v. Van Arsdall, 475 U.S. 673, 693 (1986) (Stevens, J., dissenting) (describing the Ashwander concurrence as "one of the most respected opinions ever written by a Member of this Court"); Brian C. Murchison, Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases, 30 GA. L. REV. 85, 94-111 (1995) (discussing the Ashwander concurrence).

136. Ashwander, 297 U.S. at 343 (Brandeis, J., concurring) (quoting Ex parte Garland, 71 U.S. (4 Wall.) 333, 382 (1866)). See also Posner, supra note 134, at 815 (1983) ("Construing legislation to avoid constitutional questions, as well as to avoid actual nullification, is thus one of those buffering devices, much discussed by the late Alexander Bickel, by which the frictions created by the institution of judicial review are minimized.").

137. See generally Lisa A. Kloppenberg, Avoiding Constitutional Questions, 35 B.C. L. REV. 1003, 1018.24 (1994) (discussing the principles of the avoidance doctrine found in Brandeis's opinion).
ground upon which the case may be disposed of."138

(2) "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."139

The first of these principles is what Lisa Kloppenberg has called the "last resort" rule: Federal courts should decide constitutional issues only as a "last resort," if there is no other ground upon which to rest the judgment.140 The last resort rule does not affect how any particular issue in the case should be decided once its merits are reached; rather, it holds only that "courts should order the issues for adjudication . . . with an eye to obviating the need to render constitutional rulings on the merits."141 For this reason, Adrian Vermeule has described this principle as "procedural avoidance."142 In this article, I put aside the last resort version of constitutional avoidance. Although the last resort rule has not been wholly uncontroversial,143 it has not played a prominent role in the cases concerning congressional control over federal jurisdiction.

Those cases have instead emphasized the second Ashwander principle, which does go to the decision of particular issues on the merits by dictating a rule of statutory construction. The rule holds that statutes should be construed in such a way as to avoid constitutional difficulties.144 Although Brandeis did not further differentiate this principle in Ashwander, the rule has taken two distinct forms in our jurisprudence. The older of the two, which Professor Vermeule calls "classical avoidance,"145 states 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."146 "Modern avoidance," by

138. 297 U.S. at 347 (Brandeis, J., concurring).
139. Id. at 348.
140. See Kloppenberg, Avoiding Constitutional Questions, supra note 137, at 1025 (citing Siler v. Louisville & Nashville Railroad Co., 213 U.S. 175 (1909), as support for the proposition that if a case can be disposed of without reaching the constitutional claim the court will usually refuse to resolve the constitutional issue).
142. Id. For an example of procedural avoidance under the AEDPA, see Lucidoire v. New York State Div. of Parole, 209 F.3d 107, 109 (2d Cir. 2000) (avoiding the question whether the Constitution requires an exception to the AEDPA's one-year statute of limitations where the petitioner claims actual innocence, by determining that the petitioner before the court had no valid actual innocence claim).
143. See, e.g., Kloppenberg, Avoiding Constitutional Questions, supra note 137, at 1065 (concluding that the last resort rule should be applied more narrowly than it is now).
144. See Ashwander, 297 U.S. at 348 (Brandeis, J., concurring).
146. Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring); see also FRIENDLY, supra note 132, at 210 ("[I]f one permissible reading [of a statute] will be constitutional and another
contrast, extends the rule to cover those cases in which the statute at issue might be unconstitutional.\textsuperscript{147} The most frequently-cited formula thus provides that “[w]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”\textsuperscript{148}

In exploring the implications of these latter two avoidance doctrines, and developing the difference between them, it will help to be more precise about the set of cases in which the doctrines may be applied. The first point here is that all agree that Congress's intended construction governs where that intent is clear.\textsuperscript{149} The avoidance canon thus comes up only when there is doubt, not about the statute's constitutionality, but about what the statute means in the first place.\textsuperscript{150} This is, of course, true of statutory interpretation canons generally,\textsuperscript{151} but the presence of a second

\textsuperscript{147} Vermeule, supra note 28, at 1949 (claiming that modern avoidance eventually supplanted classical avoidance). Lisa Kloppenberg has similarly distinguished between a “broad” and “narrow” version of the avoidance canon, corresponding to Professor Vermule’s “modern” and “classical” categories, respectively. See Lisa A. Kloppenberg, Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns, 30 U.C. DAVIS L. REV. 1, 10-11 (1996) [hereinafter Kloppenberg, Free Speech Concerns].


\textsuperscript{149} See, e.g., Miller v. French, No. 99-224, 2000 U.S. LEXIS 4296, at * 25 (June 19, 2000) ("[T]he canon of constitutional doubt permits us to avoid [constitutional] questions only where the saving construction is not 'plainly contrary to the intent of Congress.'") (quoting Edward J. DeBartolo Corp., 485 U.S. at 575); Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 212 (1998) (noting that "the doctrine of constitutional doubt . . . enters in only 'where a statute is susceptible of two constructions'") (quoting United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)); Benjamin v. Jacobson, 124 F.3d 162, 177 (2d Cir. 1997) (Calabresi, J.) ("We cannot, of course, read statutes against their clear meaning, even to save them."); cf. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress."). But see Blodgett, 275 U.S. at 148 (Holmes, J., concurring) (noting that "[w]ords have been strained . . . in order to avoid [a constitutional] doubt"); United States v. Rumely, 345 U.S. 41, 47 (1953) (approving such "straining").

\textsuperscript{150} See, e.g., Max-George v. Reno, 205 F.3d 194, 198-99 (5th Cir. 2000) (acknowledging a presumption that "Congress must be explicit if it wishes to repeal habeas jurisdiction," but finding that the IIRIRA’s permanent rules spoke with sufficient clarity to satisfy this standard).

\textsuperscript{151} See, e.g., Garrett v. United States, 471 U.S. 773, 779 (1985) (holding that "the Blockburger
kind of "doubt" in the avoidance cases—this time about the constitutionality of the statute if read a particular way—can sometimes obscure this basic point.

That said, it is important to remember that statutory clarity is emphatically a question of degree. This raises two significant points. First, the importance of any given canon or rule of construction will be, to a considerable extent, a function of the willingness of courts to find that statutes are "unclear." This is an issue of broad application in statutory construction, and it is largely outside the scope of this essay. The second point, which is more central to this essay, is that even within the class of cases which we are willing to designate as "unclear," the available evidence of statutory meaning will generally point more strongly in one direction than another. As Frederick Schauer has observed,

It is hard to imagine a case in which, constitutional considerations aside, there would be two identically plausible interpretations, such that, constitutional considerations again aside, the rational judge would be reduced to something akin to tossing a coin. In almost any case we can imagine, the constitution-free principles of statutory interpretation will likely favor one result over another. In other words, even 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.

Professor Schauer's observation that there are very few "ties" in statutory construction helps clarify the set of cases in which the avoidance canon will actually matter. Where the statute leans in the direction of the construction that avoids a constitutional problem, application of the avoidance canon simply strengthens a conclusion that would have been reached on other grounds. Avoidance has "bite," therefore, only in that

presumption [disfavoring interpretations of criminal statutes mandating multiple punishments for closely related conduct] must of course yield to a plainly expressed contrary view on the part of Congress"; Daniel A. Farber, Statutory Interpretation and Legislative Supremacy, 78 GEO. L. J. 281, 292 (1989) (stating that "[w]hen statutory language and legislative intent are unambiguous, courts may not take action to the contrary"); Sunstein, Interpreting Statutes, supra note 8, at 437 (recognizing, in the course of a defense of canons of interpretation, that "where there is neither interpretive doubt nor constitutional objection, the judgment of the electorally accountable branch should prevail"); but see William N. Eskridge, Jr., Spinning Legislative Supremacy, 78 GEO. L. J. 319, 331-33 (1989) [hereinafter Eskridge, Legislative Supremacy] (questioning this view).

152. Cf. Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 DUKE L.J. 511, 521 ("One who finds more often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds less often that the triggering requirement for Chevron deference exists. It is thus relatively rare that Chevron will require me to accept an interpretation which . . . I would not personally adopt.").

153. Schauer, supra note 4, at 83.
set of cases where ordinary sources of statutory meaning would have led the court to come out the other way had the canon not been applied. As Justice Scalia has explained,

The doctrine of constitutional doubt does not require that the problem-avoiding construction be the preferable one—the one the Court would adopt in any event. Such a standard would deprive the doctrine of all function. "Adopt the interpretation that avoids the constitutional doubt if that is the right one" produces precisely the same result as "adopt the right interpretation." Rather, the doctrine of constitutional doubt comes into play when the statute is "susceptible of" the problem-avoiding interpretation—when that interpretation is reasonable, though not necessarily the best.  

The "cases that are worth worrying about," in other words, are those in which "the Ashwander principle supplants what would otherwise have been the result, and does so in the service of . . . avoiding the constitutional question."  

This point—that the avoidance canon supplants an otherwise-preferable reading of the statute in all cases in which it makes a difference—is true of both "classical" and "modern" avoidance. Where these two versions differ is in the extent of the constitutional "difficulty" that triggers invocation of the canon. As noted above, avoidance cases always involve two kinds of doubt: doubt about Congress's intent as embodied in the statute itself, and doubt about whether a given reading of the statute would be constitutional if that is actually what Congress intended. Under "classical" avoidance, this second kind of "doubt" is a misnomer; the avoidance canon is triggered only if the court is sure that its otherwise-preferred statutory reading is unconstitutional, and another reading—plausible, but less-preferred under traditional criteria—is available that would avoid invalidity.  

Under the modern avoidance doctrine, by contrast, a "doubt" need only be a "doubt." If an otherwise-preferred construction of a statute would raise "serious constitutional problems," the court will choose

154. Almendarez-Torres v. United States, 523 U.S. 224, 270 (1998) (Scalia, J., dissenting) (citations omitted); see also Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 477 (1957) (Frankfurter, J., dissenting) (observing that the avoidance canon "is normally invoked to narrow what would otherwise be the natural but constitutionally dubious scope of the language") (emphasis added); Benjamin v. Jacobson, 124 F.3d 162, 2d Cir. 1997) (Calabresi, J.) ("[W]here, as here, two plausible readings are presented, we are bound to accept the reading that avoids constitutional doubts. Indeed, this would be so even if the plainly constitutional construction were less plausible than the one we have before us . . . .").

155. Schauer, supra note 4, at 87.

156. Vermeule, supra note 28, at 1949 (citing the triggering of the avoidance canon only when the preferred statutory reading is unconstitutional as the main difference between classical and modern avoidance).

a different reading that avoids those problems. The critical point is that the courts need not decide as a preliminary step to adopting the less problematic construction that the first reading would be unconstitutional. In some cases, presumably, going through with the constitutional inquiry would result in upholding the statute.\textsuperscript{158} Hence, "[t]he real force of modern avoidance is that it avoids constitutional questions even when the question would have been answered by rejecting the constitutional claim."\textsuperscript{159}

We might also think of this distinction in terms reminiscent of the last resort doctrine, as having to do with the proper ordering of issues for judicial decision. The classical avoider must resolve the constitutionality of the preferred statutory reading first; if that reading is unconstitutional, he must then ask whether another plausible reading of the statute is available to avoid that result. Hence, as Professor Vermeule has pointed out, "[c]lassical avoidance does not avoid, but in fact decides, a constitutional question."\textsuperscript{160} The proponent of modern avoidance, on the other hand, takes only a quick look at the constitutional issue raised by his preferred reading of the statute. If that issue looks dicey, the court will immediately look for a less problematic reading without ever definitively resolving the constitutional question. Indeed, the modern avoider may never even choose which possible reading of the statute he would prefer based on the traditional, "constitution-free" tools of statutory construction; instead, he might eliminate all those proposed readings which seem constitutionally problematic at the outset and simply adopt whatever reading is left.

Litigation under the AEDPA and the IIRIRA has been dominated by the modern version of the avoidance canon. Perhaps precisely because the questions surrounding Congress’s control over federal court jurisdiction have been so long discussed but so little litigated,\textsuperscript{161} those questions have taken on the aspect of a forbidding thicket into which none but the most intrepid judges have sought to venture. When the path marked by the new

\textsuperscript{158} See Vermeule, supra note 28, at 1960 (observing that "[t]he case law is 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"). For a prominent example cited by Professor Vermeule, compare NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 505-06 (1979) (construing the National Labor Relations Act to avoid the question of whether the Free Exercise Clause permits application of general labor laws to sectarian schools with regard to their lay employees' union activities), with Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 303-06 (1985) (holding that the Free Exercise Clause permits application of the Fair Labor Standards Act to workers who have religious objections to receiving wages).

\textsuperscript{159} Vermeule, supra note 28, at 1960 (emphasis in original).

\textsuperscript{160} Id. at 1959.

\textsuperscript{161} See supra notes 141-43 and accompanying text; see also Adrian Vermeule, The Judicial Power in the State (and Federal) Courts, 2000 SUP. CT. REV. (forthcoming) (discussing the dearth of federal decisions on Congress’s power).
statutes threatens to tread too close, courts generally have gestured toward the thicket, then found another way around. In the sections that follow I focus on those critiques of the avoidance canon directed at the modern version of the canon—that is, the version that would avoid a constitutional question without first resolving it.

B. The Empirical Problem

The first set of criticisms focuses upon the avoidance canon's uneasy relationship with congressional intent. The avoidance canon is sometimes defended in terms of its supposed correlation with that intent.162 Judge Friendly doubted, however, "that the legislature would prefer a narrow construction which does not raise constitutional doubts to a broader one which does raise them."163 This point is especially compelling once one recognizes that the avoidance canon actually makes a difference only in those cases where the best evidence of Congress's intent apart from the canon points toward the broader, more constitutionally problematic construction.164

Moreover, a rational legislator familiar with both the modern and classical versions of avoidance—the latter of which survives under the modern rubric of "severability"165—might have little use for the former.

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162. See, e.g., Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 466 (1989) ("[W]e are loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils"); Sunstein, Interpreting Statutes, supra note 8, at 469 (asserting that one of the avoidance canon's functions is to follow Congress's "implicit interpretive instructions" by "respond[ing] to Congress' probable preference for validation over invalidation"); James J. Brudney, Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?, 93 Mich. L. Rev. 1, 79 (1994) ("[L]egislators should be regarded as reasonably aware of the existence of potential constitutional conflicts. . . . and reasonably responsible in not wanting to enact an unconstitutional law"); see also Vermeule, supra note 28, at 1961 (observing that "[m]odern avoidance presumes that Congress wishes to refrain from pressing the constitutional limits of its power").

163. FRIENDLY, supra note 132, at 210; see also Schauer, supra note 5, at 92 ("[T]here is no evidence whatsoever that members of Congress are risk-averse about the possibility that legislation they believe to be wise policy will be invalidated by the courts."); Kloppenberg, supra note 147, at 19 n.53 (1996) (calling the assumption that Congress understands and tries to work within constitutional boundaries "questionable in light of the multiple factors animating legislation and the complexity of the legislative process").

164. See supra notes 149-51 and accompanying text; see also Schauer, supra note 4, at 74 ("[I]n interpreting statutes so as to avoid 'unnecessary' constitutional decisions, the Court frequently interprets a statute in ways that its drafters did not anticipate, and, constitutional questions aside, in ways that its drafters may not have preferred."); Lawrence C. Marshall, Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation, 66 Chi.-Kent L. Rev. 481, 489 (1990) ("If Congress was conscious of constitutional difficulties, yet opted to erect a statute that seemingly tested the constitutional limitations, Congress would want its enactment tested for constitutionality, not for a determination of whether it raises a difficult constitutional question."") (emphasis in original).

165. See Vermeule, supra note 28, at 1950-51 (noting that "courts presume that the constitutionally valid applications of statutes should be severed from any constitutionally invalid
"[T]here is always the chance," Judge Friendly pointed out, "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 . . . ." The availability of classical avoidance as a fallback to weed out actually unconstitutional readings, moreover, would seem to minimize the likelihood that even legislators concerned about not transgressing constitutional limits would need "to err on the side of fundamental liberties." These criticisms surely undermine fidelity to congressional intent as an argument for the avoidance canon. One might deny the further point that the canon actually undermines congressional intent by pointing out that Congress is always free to reinstate—by speaking clearly—the more aggressive constitutional reading if that is what it really wants. But a holding that constitutional doubts compel a narrow statutory construction has a "go ahead, make my day" quality to it, and Congress might reasonably conclude that reenactment of the broader reading would only result in invalidation on the merits. If the Court's constitutional doubts are ultimately misplaced, and the Court would have upheld the broader construction if it had not avoided the question, then one can plausibly contend that Congress has been over-deterred from exercising the full scope of its legitimate power.

This over-deterrence point foreshadows the next criticism, which focuses on the avoidance canon's tendency to "overenforce" the constitutional provisions involved in each case, without the corresponding care that ordinarily goes into constitutional decisionmaking in cases where the court forthrightly acknowledges that such decisionmaking is taking place.

C. The Penumbra Problem

The second set of criticisms sees the canon as disingenuous and lazy. On this view, invoking the canon requires a substantive constitutional decision even while the court denies that any such decision has taken

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166. FRIENDLY, supra note 132, at 210.
168. But see Kloppenberg, Free Speech Concerns, supra note 147, at 17-20 (criticizing the notion that the avoidance canon fosters congressional response to and dialogue with the Court).
169. See id. at 19 ("Legislative reluctance to respond to the canon may foster the common perception that the Supreme Court has the 'last word' in the constitutional dialogue.").
170. See Schauer, supra note 4, at 88.
Professor Schauer has thus observed that the determination whether a serious constitutional question exists "is itself a confrontation with the very issue that [the avoidance canon] seeks to avoid." To be sure, there is an important difference between deciding that a constitutional argument is nontrivial and actually deciding that issue on the merits. Nevertheless, a court bent on "avoiding" a constitutional question must: (a) consider the argument in order to determine whether it is sufficiently serious to avoid, and (b) refuse to give effect to the most-likely-correct version of the statute at issue, just as if that version of the statute had been struck for unconstitutionality. The fact that another, different version of the statute survives does not change the reality that, in the form that the court would otherwise have applied it in that case, the statute has effectively been held invalid.

Moreover, at least some proportion of "doubtful" constitutional questions would presumably be resolved by upholding the statute in question. For this reason, resort to the avoidance canon thwarts Congress's intent in a larger set of cases than would a practice of deciding all constitutional questions on the merits. Judge Posner has thus argued that the avoidance canon creates a "judge-made constitutional 'penumbra' that has much the same prohibitory effect as the . . . Constitution itself."

Judge Posner's "penumbra" problem may be particularly pronounced when the avoidance canon is employed in order to put off exploring the limits imposed by Article III on Congress's power over federal courts. Simply put, those limits—at least in terms of hard and fast rules requiring invalidation of congressional encroachments on judicial functions—may be few and far between. Use of the avoidance canon in this area may

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171. See Kloppong, Free Speech Concerns, supra note 147, at 16-17 (arguing that "when they invoke the [avoidance] canon, courts do develop constitutional law").

172. Schauer, supra note 4, at 87.

173. See Vermeule, supra note 28, at 1956 n.66 (calling the difference "fundamental"). Professor Vermeule points out that courts frequently have to make a similar distinction when they decide whether a presently recognized constitutional principle was "clearly established" at an earlier time for purposes of a qualified immunity defense, or when they ask whether a plaintiff has a sufficient likelihood of success on the merits to secure a preliminary injunction. See id. On qualified immunity, see, for example, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); on preliminary injunctions, see, for example, Ayres v. City of Chicago, 125 F.3d 1010, 1014 (7th Cir. 1997) (Posner, J.).

174. See Vermeule, supra note 9, at 1959 (explaining that classical avoidance is triggered only if a court faces two possible interpretations of a statute, one of which is constitutional and one of which is invalid, and in deciding between them "[the] court must necessarily determine that a statute of such-and-such meaning—the meaning that the saving construct would avoid—would be unconstitutional").

175. See id. at 1960-61 ("The real force of modern avoidance is that it avoids constitutional questions even when the question would have been answered by rejecting the constitutional claim. . . . [M]odern avoidance operates to cut off potentially valid statutory applications.").

176. See Posner, supra note 5, at 816.

177. See, e.g., Gunther, supra note 22, at 920 (concluding that Congress generally has broad power to restrict federal jurisdiction).
thus rely on what Hiroshi Motomura has called "phantom constitutional norms"—that is, norms that would not actually be enforced by a court if push came to shove on the merits of the constitutional issue.178

A related point concerns the consequences for judicial craftsmanship when the avoiding court denies that it is actually engaged in constitutional decisionmaking. Most courts explicitly engaged in judicial review tend to be fairly solemn about the enterprise. It is customary to cite the deference and respect owed to the coordinate branches of government, as well as the awful responsibility of interposing the court's own judgment against the will of the democratically elected legislature.179 And although it would be exceptionally difficult to verify this assertion empirically, it would hardly be implausible to suggest that this solemnity permeates the court's actual consideration of the merits of the constitutional claim. Where a court purports to be "avoiding" the constitutional question, however, that question is frequently given much shorter shrift.180 The court, in other words, can do a much sloppier job of constitutional decisionmaking than it would do if it faced the constitutional issue directly.181 The result, according to Schauer, is "to produce in reality the supposedly disfavored outcome of constitutional adjudication without the safeguard of reasoned elaboration that we associate with the exercise of that power."182

Some of the avoidance cases decided under the AEDPA and the IIRIRA bear these criticisms out. In Sandoval v. Reno,183 for example, the Third Circuit invoked the avoidance canon in holding that the IIRIRA did not divest the federal courts of habeas jurisdiction to review the

178. See Motomura, supra note 86, at 565 (arguing that statutory interpretation in immigration cases is frequently driven by "phantom constitutional norms" that would not hold if courts were to decide the cases on their constitutional merits).

179. See, e.g., United States Dep't of Labor v. Triplet, 494 U.S. 715, 721 (1990) (noting the "heavy presumption of constitutionality to which a 'carefully considered decision of a coequal and representative branch of our government' is entitled"); Rostker v. Goldberg, 453 U.S. 57, 64 (1981) (collecting numerous authorities for the proposition that Congress, especially in the context of its authority over national defense and military affairs, must be given deference); Blodgett v. Holden, 275 U.S. 142, 147-48 (1927) (Holmes, J., concurring in the judgement) ("[T]o declare an Act of Congress unconstitutional ... is the gravest and most delicate duty that this Court is called on to perform.").

180. See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575-76 (1988) (devoting only two paragraphs to the constitutional issue); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501-04 (1979) (devoting only three pages to the constitutional issue). I do not mean to suggest that the constitutional arguments advanced in these cases were incorrect—only that they were sketchier than one might have expected had the Court actually had to resolve those claims on their merits.

181. See Schauer, supra note 4, at 89-90 ("[I]f a court persists in the illusion that it is not making a decision even when it is doing something that has the effect of a decision, then the decision it actually makes will be unsupported by the kinds of public reasons that we have come to expect in constitutional cases.").

182. Id. at 90. See also Kloppenberg, Free Speech Concerns, supra note 147, at 23 (arguing that "use of the canon yields changes in constitutional law without the protection of reasoned elaboration and without the Court taking responsibility for directly addressing constitutional questions").
detention of aliens in executive custody. The only specific constitutional provision invoked by the court of appeals was the Suspension Clause, and the court's consideration of that Clause consisted of a single paragraph that addressed none of the arguments and counter-arguments discussed previously. It seems safe to say that, had the court been tasked with actually deciding the Suspension Clause issue, its discussion would not have been so sketchy.

The Sandoval opinion also illustrates a second and related phenomenon: the tendency of avoidance judgments in particular constitutional areas to crystallize into general rules of construction. The court of appeals placed its primary reliance not on the need to avoid the Suspension Clause problem, but rather on a plain statement rule concerning the preservation of judicial review:

Read together, McCardle, Yerger, and Felker establish the propositions that courts should not lightly presume that a congressional enactment containing general language effects a repeal of a jurisdictional statute, and, consequently, that only a plain statement of congressional intent to remove a particular statutory grant of jurisdiction will suffice.

As I have suggested, this canon preserving judicial review may ultimately be traced to avoidance concerns. But the Article III "problems" discussed above are nothing if not contextual; their resolution necessarily turns on the extent of the inroads that Congress has made on the judicial power, the alternative forms of review that are available, the nature of the right being adjudicated, etc. It thus seems inappropriate to invoke a blanket canon disfavoring jurisdictional repeals without asking how these sorts of Article III concerns might be implicated in any given case.

In the next two Parts I ask whether such a blanket rule favoring the preservation of judicial review can be defended on other grounds. I suggest that while the preservation of judicial review frequently takes place under the banner of "avoidance" in these cases, the courts are actually applying a substantive constitutional principle favoring review. In this sense, both the penumbra and empirical criticisms of the avoidance canon

184. See id. at 237 (noting that its reading of the statute "comports with our obligation to read statutes to avoid serious constitutional problems").

185. See id.; supra notes 81-83, 91-94 and accompanying text (considering the strengths and weaknesses of the Suspension Clause claim in this context); see also Flores-Miramontes v. INS, No. 98-70924, 2000 U.S. App. LEXIS 9165, at *27-28 (9th Cir. May 9, 2000) (invoking the avoidance canon but devoting a single paragraph to the petitioner's constitutional claim under the Suspension Clause).

186. 166 F.3d at 232; see also Magana-Pizano v. INS, 200 F.3d 603, 609 (9th Cir. 1999) (applying a clear statement rule disfavoring congressional limits on federal jurisdiction, without mentioning constitutional concerns); Bowrin v. INS, 194 F.3d 483, 489 (4th Cir. 1999) (same).

are quite correct: Courts are engaged in constitutional adjudication when they “avoid” questions about Congress’s power over federal jurisdiction, and it is quite possible that Congress itself might not approve. I argue, however, that neither conclusion renders “clear statement rules” favoring judicial review illegitimate. Rather, such rules are the best way—and perhaps the only way—of giving voice to constitutional norms that are real, not phantoms, and that are generally left underenforced by more conventional types of doctrines.

III. Re-Constituting (and Re-Constitutionalizing) the Avoidance Canon

As I have suggested, my response to the criticisms leveled at the avoidance canon by Judges Friendly and Posner, Professor Schauer, and others, is one of confession and avoidance. When a court applies the avoidance canon to reject the court’s otherwise-preferred reading of a statute in favor of a construction that is less constitutionally dubious, the court has made a constitutional decision. My claim, however, is that such a decision is not only perfectly legitimate, but a useful mechanism for realizing important constitutional values.

The discussion in this part tracks the two primary criticisms of the avoidance canon. In section A, I dismiss the “empirical” criticism by situating the avoidance canon in a large category of statutory construction rules that are designed not to reflect what Congress might have wanted under particular conditions, but rather to give voice to certain normative values. I then discuss the ways in which those values are brought to bear in cases involving a constitutional “doubt.” Section B turns to the “penumbra” problem by frankly conceding that the normative values supporting the avoidance canon are constitutional in nature, and that those constitutional values are frequently enforced in avoidance cases in ways that go considerably beyond the generally recognized scope of the underlying constitutional provisions. We see this phenomenon as “overenforcement” of the Constitution, however, only because we suffer from an overly narrow view of the ways in which constitutional provisions can limit governmental action. I argue that our constitutional practice should recognize, and has recognized implicitly, the concept of “resistance norms”—that is, constitutional rules that raise obstacles to particular governmental actions without barring those actions entirely. Section C addresses some additional objections to this approach.

A. Normative Canons and the Right Kind of Constitutional “Doubt”

The empirical criticism of the avoidance canon questions whether Congress would really prefer that courts adopt “safe” (but presumably less
accurate) constructions of federal statutes in order to avoid any risk of invalidation. 189 If the assumption that Congress is risk averse is empirically false, the critics argue, then courts applying the avoidance canon have failed to correctly ascertain and implement Congress’s intent. But this criticism rests on an assumption of its own. It presumes that the avoidance canon is essentially “descriptive” in nature—that is, that the canon must be justified in terms of its ability to reflect “what the legislature must have meant, or probably meant, by employing particular statutory language.” 190

The problem with this assumption is that the statutory interpretation literature has long acknowledged that many canons are “substantive” or “normative” rather than directed toward mirroring Congress’s actual intent. 191 Such canons may reflect all sorts of different values. In the federalism area, for example, the Court has constructed a number of “clear statement” rules that protect values of state autonomy from incursions by the federal government. 192 The “rule of lenity,” requiring that ambiguous criminal statutes be construed in favor of the accused, protects due process values of fair notice. 193 The presumption against repeals of prior

189. See supra text accompanying notes 162-70.
191. See, e.g., Daniel B. Rodriguez, The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences, 45 VAND. L. REV. 743, 749 (1992) (stating that “normative canons may or may not coincide with legislators’ values or intentions”); Ross, supra note 190, at 563 (claiming that normative canons are judicial creations which are driven by policy objectives rather than congressional intent). Some canons pursue both descriptive and normative functions at once. See id. at 563 n.12 (discussing the rule that “appropriations measures will be presumed not to amend substantive statutes”).
192. See, e.g., Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (embracing a clear statement rule disfavoring federal regulation of certain internal operations of state governments); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985) (creating a clear statement rule disfavoring congressional attempts to abrogate state sovereign immunity); Pennhurst v. State Sch. & Hosp., 451 U.S. 1, 17 (1981) (holding that conditions on federal grants must be clearly stated); see generally Eskridge & Frickey, supra note 10, at 599-611 (discussing the federalism clear statement rules). At least one structurally similar rule favors national uniformity over state autonomy. See South-Central Timber Dev., Inc. v. Wunnick, 467 U.S. 82, 91 (1984) (stating that Congress is presumed not to have authorized state actions that violate the dormant Commerce Clause absent a clear statement to the contrary).
193. See, e.g., Evans v. United States, 504 U.S. 255, 289 (1992); Chapman v. United States, 500 U.S. 453, 463-64 (1991); United States v. Bass, 404 U.S. 336, 348 (1971); see also Sunstein, Nondelegation Canons, supra note 148, at 352 (observing that “[t]he rule of lenity is inspired by the due process constraint on conviction pursuant to open-ended or vague statutes,” and that “[w]hile it is not itself a constitutional mandate, it is rooted in a constitutional principle.”).
statutes by implication, by contrast, has been characterized as embodying
more general values of conservatism and continuity in the law.\textsuperscript{194}

As one might expect, normative canons are not uncontroversial. Stephen Ross, for example, has suggested that "normative canons require
careful consideration" because they "clearly reflect judicial, not
congressional, policy concerns."\textsuperscript{195} The key point for present purposes,
however, is that criticisms based on the failure of a normative canon to
reflect Congress's own intent fundamentally mistake the canon's objective.
Judges applying such a canon are not attempting to serve as Congress's
"agent";\textsuperscript{196} instead, they are using the enterprise of statutory construction
as a means of furthering values external to the legislative process itself.

If judges applying the canon of constitutional avoidance are pursuing
normative values rather than legislative intent, then what values are they
pursuing? One possible answer would be that structural values of inter-
branch comity favor minimizing the number of occasions in which federal
courts adjudicate the constitutionality of federal statutes or regulations.\textsuperscript{197}
But this answer is foreclosed by the recognition that a court's preferral of
an otherwise less persuasive construction of a statute on avoidance grounds
is itself a constitutional decision.\textsuperscript{198} The more persuasive response, in
my view, is that the avoidance canon protects the substantive constitutional
values embodied in the provision that creates the constitutional
"doubt."\textsuperscript{199} If a particular statutory construction is rejected on the
ground that it might violate the Free Speech Clause, for example,\textsuperscript{200} then
in that instance the avoidance canon has protected the values underlying
that clause. Similarly, when courts construe the AEDPA and the IIRIRA
narrowly on avoidance grounds, they are generally protecting the values
embodied in Article III, the Suspension and Due Process Clauses, or some
combination of those provisions.

\textsuperscript{194} See Shapiro, supra note 63, at 937.
\textsuperscript{195} Ross, supra note 190, at 563 (emphasis added); see also Rodriguez, supra note 191, at 744
(observing that the "substantive form of canonical construction raises a . . . central concern . . . that
judicial policymaking through the guise of statutory interpretation is illegitimate"); cf. Nicholas S.
Zeppos, Judicial Candor and Statutory Interpretation, 78 GEO. L.J. 389-90 (1989) ("As much as in
constitutional interpretation, judicial interpretation of statutes raises a problem of legitimacy, i.e.,
justification for unelected and unrepresentative judges making law in a representative democracy.").
\textsuperscript{196} Cf. Ross, supra note 190, at 563 ("A judge deploying a descriptive canon is attempting to
act as an agent to effectuate congressional intent.").
\textsuperscript{197} See, e.g., Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 345 (1936) (Brandeis, J.,
concurring) (noting that the Court "has restricted exercise" of judicial review in light of "'the great
gravity and delicacy' of its function in passing upon the validity of an act of Congress"); Blair v.
United States, 250 U.S. 273, 279 (1919) ("Considerations of propriety, as well as long-established
practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless
obliged to do so in the proper performance of our judicial function. . . .").
\textsuperscript{198} See supra notes 171-74 and accompanying text.
\textsuperscript{199} See Sunstein, Interpreting Statutes, supra note 8, at 459 (observing that the avoidance canon
"vindicates constitutionally grounded substantive values").
This sort of answer to the empirical criticism of the avoidance canon threatens to deliver the canon into the hands of the “penumbra” criticism. After all, if we reject all “doubtful” constructions of statutes, we will presumably have protected the constitutional values underlying those doubts even in some cases where the doubt would have been resolved against those values if the constitutional issue had been adjudicated.²⁰¹ Although a complete response to the penumbra problem must wait until section B below, the beginnings of an answer arise out of more careful consideration of the way in which the values embodied in a normative canon enter into the decision of actual cases.

We might imagine two distinct forms of uncertainty about the proper interpretation of a statute:

First, there are interpretive questions which a court might believe are susceptible to a “right answer,” but which the court sees as “close” enough for reasonable minds to differ.²⁰² This sort of doubt is familiar from the doctrine of qualified immunity for officers sued under 42 U.S.C. § 1983; such an officer may escape liability for his wrong interpretation of the governing constitutional law, so long as his view was reasonable in light of the settled precedents.²⁰³ Similarly, under the rule of *Teague v. Lane,*²⁰⁴ the Court has denied habeas corpus relief to state prisoners who bring claims under federal constitutional rules that were not “clearly established” at the time that their convictions became final on direct review. In both the qualified immunity and *Teague* contexts, the uncertainty about the governing constitutional rule is analogous to uncertainty about the meaning of a statute in statutory construction cases. The very notion that a particular interpretation of the governing law might be correct but not “clearly established” enough to warrant relief indicates that the result in these cases is driven not by a “right answer” to the legal question at issue but rather by a default rule designed to govern in “doubtful” cases.²⁰⁵

²⁰¹. See supra notes 171-76 and accompanying text.

²⁰². See, e.g., Ronald Dworkin, *No Right Answer?* in *Law, Morality, and Society: Essays in Honor of H.L.A. Hart* 58, 76-84 (P. Hocker & J. Raz. eds., 1977) (acknowledging that, in some cases, reasonable lawyers will disagree, but denying that this means that such questions lack “right answers”).

²⁰³. See, e.g., Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that government officers are immune as long as they have not transgressed “clearly established statutory or constitutional rights of which a reasonable person would have known”).


²⁰⁵. The Williams Court seems to have imposed a similar default rule in habeas under § 2254(d). See *Williams v. Taylor,* 120 S. Ct. 1495, 1521-22 (O'Connor, J.) (2000); Larry W. Yackle, *The Figure in the Carpet,* 78 Texas L. Rev. 1731, 1751 (2000) (concluding, in light of *Williams,* that “[t]he 'unreasonable application' clause does contemplate . . . that a state court application of law to fact can be 'incorrect' (as a federal habeas court independently sees the matter), but still not 'unreasonable'”).
Second, there are cases where the statutory language is simply not completely determinate, so that no "right answer" can be derived from the text. Other traditional legal sources such as legislative history and statutory purpose may further limit the interpretations that are available, but those sources may not yield a single determinate answer either. Although some might argue that a judge's choice of interpretations within the constraints imposed by these traditional sources is wholly discretionary, others have contended that "right answers" may be had even in these situations by factoring in more basic principles and policies of the law which guide the judge to a determinate resolution.

The important point to emphasize, I think, is that in the first situation the court isn't really looking for a "right answer" to the statutory question; the judge is instead seeking a close answer to the statutory question which will obviate the necessity to decide the constitutional issue (about which the judge may also be doubtful). The second situation, by contrast, invites the use of a normative canon, or background principle, as part of the right answer to the statutory question.

One could imagine a version of the avoidance canon that operated in the first sense: When a constitutional question was "close enough" to raise serious doubts, courts would avoid the troublesome construction as a prophylactic means of protecting the underlying constitutional values at stake. Such a version of the avoidance canon would indeed be open to the penumbral critics' charge of "overprotection." The constitutional value would be protected even in cases in which the "right answer" to the constitutional question would require that the statute be upheld. Such "overprotection" is in the very nature of a prophylactic rule.

206. See, e.g., HANS Kelsen, THE PURE THEORY OF LAW 351-52 (Max Knight, trans., Univ. of Cal. Press 1978) (1960) (arguing that "the law to be applied constitutes only a frame within which several applications are possible" and "there is no criterion by which one possibility within the frame is preferable to another").

207. See generally Ronald Dworkin, Hard Cases, 88 HARV. L. REV. 1057 (1975). One can accept Dworkin's belief in the possibility of right answers, as well as his view that broad background principles are a component of such answers, without accepting his overall account of legal reasoning. See Vermeule & Young, supra note 52, at 730-31, 759-62 (criticizing aspects of Dworkin's approach as unrealistic for actual human judges).

208. Cf. Vermeule, supra note 28, at 1956 n.66 (observing that "[t]he difference between deciding that a claim is nontrivial and actually deciding that claim on the merits is a fundamental one that underpins legal doctrines as varied as qualified immunity . . . and the standard for preliminary injunctive relief").

209. See Dworkin, No Right Answer?, supra note 202, at 68 (describing the use of canons of construction to supply the right answers where statutory text is vague).

210. See Posner, supra note 5, at 816.

Analogizing the function of normative canons to *Teague* and qualified immunity seems inappropriate, however, for reasons quite apart from the penumbra problem. *Teague* and qualified immunity are both doctrines about the remedial authority of federal courts.²¹² For policy reasons—largely concerning the implausibility of deterring government officers or state courts from violating constitutional norms that are not “clearly established”—federal courts choose to withhold certain kinds of relief under section 1983 or the habeas statute.²¹³ Whether or not these policy reasons are good ones, it seems clear that they are not easily generalized to all cases where a normative canon influences a court’s choice of a particular construction of a statute. Indeed, the decision to withhold relief under *Teague* or the qualified immunity doctrine may be tolerable precisely because that decision ordinarily does not affect the prospective interpretation of the underlying constitutional rule; a decision to adopt a particular statutory construction based on a normative canon, by contrast, does dictate the meaning of the statute to be applied in future cases.²¹⁴

Normative canons seem far more defensible if they are viewed as resolving interpretive doubts in the second sense that I have discussed—that is, if the normative principle embodied in the canon is considered to be part of the “right answer” to the statute’s meaning rather than a default rule to be imposed in the absence of such an answer.²¹⁵ When construing an ambiguous statute to determine whether Congress has abrogated the states’ sovereign immunity, for instance, the background principle that the states are ordinarily immune from suit is one of the sources of authority that the Court should employ in resolving the ambiguity.²¹⁶ “[T]he

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²¹⁴ The application of *Teague* or qualified immunity can affect the development of the underlying substantive principles by postponing resolution of important questions. For this reason, the courts have sometimes adopted rules requiring the underlying issue to be decided first, before addressing the question whether the plaintiff or petitioner is entitled to relief. Compare *County of Sacramento v. Lewis*, 523 U.S. 833, 842 n.5 (1998) (holding that federal courts should decide whether a § 1983 plaintiff’s claim implicates a constitutional right before asking whether that right was “clearly established” for purposes of qualified immunity), *with Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (stating that a federal habeas court must ask whether a petitioner’s claim implicates a “new” rule—and is therefore barred by *Teague*—before addressing the claim on the merits). See generally John M.M. Greabe, *Mirabile Dictuunt!: The Case for “Unnecessary” Constitutional Rulings in Civil Rights Damages Actions*, 74 Notre Dame L. Rev. 403 (1999) (addressing this issue).

²¹⁵ See, e.g., Sunstein, *Interpreting Statutes*, supra note 8, at 411 n.21 (suggesting that “the dichotomy between interpretation that rests on fidelity to text and interpretation that is based on extratextual values greatly oversimplifies the problem and is in important respects a false one”); Shapiro, *supra* note 63, at 925 (“The interpretive guides and canons that have played the most significant role in the process of construction are those that aid in reading statutes against the entire background of existing customs, practices, rights, and obligations.”).

Constitution,” Judge Friendly recognized, “is itself a datum in the interpretation of a statute; ‘construction should go in the direction of constitutional policy.’”

Normative canons thus become another source of statutory meaning, not materially different from legislative history or judicial precedents.

This way of framing the impact of a normative canon undermines an important premise of the penumbra criticism. That criticism, as advanced by Judge Posner, Professor Schauer, and others, assumes that, in the cases in which it matters, the avoidance canon causes a court to choose a construction of an ambiguous statute that is different from the construction that the court would have otherwise preferred. I hope I have demonstrated, however, that the critics’ conception of an “otherwise preferred”—or “constitution-free,” to use Professor Schauer’s phrase—reading is artificial. Why, after all, should statutory construction be “constitution-free”? Such an approach categorically excludes a source of statutory meaning which is no less legitimate than other “principles and policies” which frequently enter into interpretation.

The use of such principles and policies is inevitable in statutory construction, given the limited determinacy of statutory text. As Cass Sunstein has argued:

The meaning of a statute inevitably depends on the precepts with which interpreters approach its text. Statutes do not have pre-interpretive meanings, and the process of interpretation requires courts to draw on background principles. These principles are usually not “in” any authoritative enactment but instead are drawn from the particular context and, more generally, from the legal culture.

217. 

218. See Schauer, supra note 4, at 83.

219. Cf. Sunstein, Interpreting Statutes, supra note 8, at 504 (decrying the “common error” of “treat[ing] interpretive principles as the illegitimate intrusion of discretionary policy judgments into ‘ordinary’ interpretation”).

220. Id. at 411. See also id. at 440 n.124 (collecting citations discussing “the central role that canons of construction have played in statutory interpretation throughout the history of Anglo-American law”). The problem of statutory indeterminacy worsens when the particular problem before a court diverges from the concerns that motivated the enacting legislature, and this gap may widen over time. See Eskridge, Legislative Supremacy, supra note 151, at 323-27; Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 529 (1947) (“The intrinsic difficulties of language and the emergence after enactment of situations not anticipated . . . reveal doubts and ambiguities, that compel judicial construction.”); see also William M. Landes & Richard A. Posner, The Independent Judiciary in an Interest-Group Perspective, 18 J. L. & ECON. 875, 879 (1975) (“[T]he limits of human foresight, the ambiguities of language, and the high cost of legislative deliberation combine to assure that most legislation will be enacted in a seriously incomplete form, with many areas of uncertainty left
Moreover, Professor Dworkin contends that the use of such principles is a critical means of harmonizing our positive law with our constitutional and moral commitments.221 While the avoidance canon’s critics might nonetheless reject any recourse to background principles outside the narrow confines of text, legislative history, and precedent, such rejection would require a broader argument than those critics have made so far.

My conclusion that the substantive constitutional values protected by the avoidance canon are inseparable from a court’s search for statutory meaning suggests an important criticism of the Supreme Court’s recent decision in Williams v. Taylor.222 As I noted previously,223 Williams construed the AEDPA’s amendment to section 2254(d) of the federal habeas statute to require some unspecified level of deference to state court decisions involving mixed questions of law and fact.224 The Court’s 5-4 division suggests that the statutory construction question was a close one,225 and substantial constitutional arguments had been raised against the majority’s reading.226 Nonetheless, the majority refused to address the constitutionality of its reading or to apply the avoidance canon to reach a different result. Indeed, the Court had previously expressly declined to grant certiorari on the constitutional issue.227

I have no wish to take a firm position on whether the majority’s reading was ultimately correct, but its approach to the question seems unsound. To the extent that constitutional background principles—like the value of independent judicial judgment reflected in Article III—inform statutory interpretation, the majority undermined its statutory analysis by artificially excluding these considerations. In essence, Justice O’Connor attempted to construct Professor Schauer’s “constitution-free” reading228 of section 2254(d). And although the Court’s decision presumably leaves the constitutionality of its reading open for consideration in a future case,229 the Williams opinion will likely distort the Court’s ability to

221. See, e.g., Ronald Dworkin, LAW’S EMPIRE 166 (1986) (“The integrity of a community’s conception of fairness requires that the political principles necessary to justify the legislature’s assumed authority be given full effect in deciding what a statute it has enacted means.”).
222. 120 S. Ct. 1495 (2000).
223. See supra notes 127-28 and accompanying text.
224. See Williams, 120 S. Ct. at 1522 (O’Connor, J.) (“Under § 2254(d)(1)’s ‘unreasonable application’ clause . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.”).
225. See id. at 1503-11 (opinion of Stevens, J.) (rejecting the majority’s construction).
226. See id. at 1504-05; Liebman & Ryan, supra note 115, at 873-84; see also supra notes 114-24 and accompanying text (summarizing these arguments).
228. See Schauer, supra note 4, at 83; supra notes 218-21 and accompanying text (rejecting the idea of a “constitution-free” reading).
229. See Steiker, supra note 123, at 1705-06 (concluding that Williams “technically leaves open
consider that issue when it arises. That is because some constitutional values are best enforced through doctrinal tools that act in the context of statutory construction. Use of these tools—which I call “resistance norms”—will be foreclosed in any future challenge to section 2254(d)’s constitutionality, because that future case will have to take section 2254(d)’s statutory meaning as a given. I develop the idea of “resistance norms” in the next section.

B. The Avoidance Canon as a “Resistance Norm”

In the preceding section, I argued that the avoidance canon is best understood as a normative canon of construction protecting a particular substantive value rather than attempting to discern and implement the intent of Congress. I also argued that the value promoted by the avoidance canon is not a general principle of interbranch comity, but rather the value embodied in whatever constitutional provision creates the underlying constitutional “doubt” that is being avoided. Finally, I suggested that normative canons—like the avoidance rule—should not be seen as default rules that operate in the absence of a “right answer” to a question of interpretation, but rather as part of the background principles and policies of the law that form part of the right answer. The constitutional values protected by the avoidance canon are themselves sources of authority that should shape the interpretation of ambiguous statutes.

In this section, I deal with a more basic aspect of the “penumbra” argument. As I have discussed previously, the avoidance canon has “bite” only in those cases where (1) the court chooses a less constitutionally-problematic reading of a statute over the reading it would otherwise have chosen, but (2) the court would not have struck down the “preferred” reading had it actually reached the constitutional issue.230 I argued in the last section that the notion of an “otherwise preferred” or “constitution-free” reading is artificial, since that reading would by definition have failed to take into account constitutional values which are legitimate sources of authority in statutory construction.231 The avoidance canon’s critics might well respond to this argument by insisting that the force of those constitutional values is confined to those cases in which the “otherwise preferred” reading would in fact be struck down; hence, those values are simply irrelevant if that reading would have been sustained had the constitutional question been reached. The force of a constitutional value, in

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230. See supra notes 157-59 and accompanying text.
231. See supra text accompanying notes 218-21.
other words, is exhausted by the set of cases in which that value would require invalidation of a conflicting statute.\textsuperscript{232}

This position rests on a particular view of judicial review: A court interprets a given constitutional provision or set of provisions to yield a single constitutional "line" that the government may not cross. Every governmental action on the "good" side of the line is unqualifiedly valid; every governmental action on the "bad" side must be struck down. The courts are supreme with respect to government activity on the "bad" side, and their decisions may be overruled only by higher judicial authority or constitutional amendment. On the "good" side, by contrast, the political branches have plenary authority and courts have no legitimate business other than to validate what the political branches have done.

This model, which we might call the "binary" model, is surely the most familiar model of judicial review.\textsuperscript{233} My point here, however, is to suggest that it is not the only one. More than this, I submit that we already recognize—all the time—what I call "resistance norms": constitutional norms that may be more or less yielding to governmental action, depending on the circumstances.\textsuperscript{234} These sorts of limits on governmental action are quite different from what we might call "invalidation norms" that characterize a binary approach. Under a regime of invalidation norms, governmental action is perfectly unproblematic even though it pushes right up to the constitutional limit; that limit, however, amounts to an inflexible line beyond which any government action is barred. Resistance norms, by contrast, function as a "soft limit" which may be more or less yielding depending on the circumstances.

While the "resistance norm" terminology is unfamiliar, the phenomenon it describes should not be. Norms that are enforced through balancing tests—though they are not the only form of resistance norms—have this character. The same norm may be vindicated in one case, yet yield in another to which it is equally applicable, depending simply on the

\textsuperscript{232} For a related discussion of when a particular application of a constitutional value might "exhaust" that value's force, see Lawrence Gene Sager, \textit{Fair Measure: The Legal Status of Underenforced Constitutional Norms}, 91 HARV. L. REV. 1212, 1213-14 (1978). According to Professor Sager, "[e]nventional analysis" assumes that "the scope of a constitutional norm is . . . coterminous with the scope of its judicial enforcement" through invalidation of conflicting governmental actions. \textit{Id.} at 1220.

\textsuperscript{233} \textit{See, e.g.}, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("[T]he theory of every such government [based on a written constitution] must be, that an act of the legislature, repugnant to the constitution, is void.").

\textsuperscript{234} \textit{See, e.g.}, Motomura, \textit{supra} note 86, at 561 (recognizing that "constitutional norms usually manifest themselves in our law both directly and indirectly"); J. Harvie Wilkinson III, \textit{Toward a Jurisprudence of Presumptions}, 67 N.Y.U. L. REV. 907, 907 (1992) ("There are few absolute principles in law. Those principles that appear to be absolute are, in reality, presumptions which may be overcome in appropriate circumstances.").
strength of the government’s countervailing interest. For example, the Commerce Clause has been held to embody a structural norm barring states from discriminating against or burdening the flow of interstate commerce.235 Although the antidiscrimination principle generally functions as an invalidation norm, the “burden” principle is surely a “soft limit”: States may regulate in a way that incidentally burdens interstate commerce “unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”236 There is, in other words, no single constitutional “line” that may not be crossed. Rather, the extent to which states may burden interstate commerce depends on other aspects of the situation—in particular, upon the strength of the state’s justification for imposing the burden.237

Other examples of soft limits on government authority imposed by balancing tests abound in virtually every area of constitutional law.238 This is not, however, simply the familiar rules-versus-standards debate dressed in new clothing.239 To be sure, some resistance norms take the form of standards; balancing tests are the primary example. But my category of resistance norms is capacious enough to take in quite different forms of limits as well. A second sort of resistance norm, for instance, is implemented through super-majority requirements set forth in the constitutional text. The norm of executive authority to block legislation is preserved through Article I’s requirement that a Presidential veto may be overridden only by a two-thirds vote of both houses of Congress.240 Likewise, Article V preserves a norm of constitutional continuity by


237. Even under the antidiscrimination rule, the constitutional “limit” is not unresponsive to the particulars of the situation. In Maine v. Taylor, 477 U.S. 131, 148 (1986), for example, the Court found that a state law survived scrutiny under the anti-discrimination principle’s “virtually per se rule of invalidity,” because the State’s policy justification for the discrimination was strong and could not be served in any non-discriminatory way. See also infra text accompanying note 256 (noting cases suggesting that strict equal protection scrutiny for racial classifications is not always “fatal in fact”); Wilkinson, supra note 234, at 916 (arguing that the strict rule forbidding abridgment of the freedom of speech “is in reality no more than a powerful presumptive principle,” susceptible to override in appropriate circumstances).


imposing daunting obstacles to constitutional amendment. In both instances, the Constitution does not wholly forbid incursions on these norms—it just makes those incursions harder.241

I view normative canons of statutory construction as a different sort of vehicle for resistance norms. As Daniel Rodriguez has observed, "[s]tatutory interpretation is a more incremental, and less rigid, form of judicial decisionmaking than constitutional interpretation. Hence, canonical construction implements important values with less disruption to the political and legislative processes."242 Normative canons function much like super-majority requirements by making it harder—but not impossible—to achieve certain legislative goals that are in tension with the canon's underlying value.243 Congress may still achieve these goals, but it must speak clearly in order to do so.244

To see how the avoidance canon might function as a resistance norm in the jurisdiction-stripping context, we might look to Professor

241. Perhaps the closest analogy to my use of resistance norms here derives from the Court's Eleventh Amendment jurisprudence. The Court has recognized a constitutional principle of state sovereign immunity that generally bars efforts to subject states to liability for money damages. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 72-73 (1996). Nonetheless, Congress can override a State's Eleventh Amendment immunity when Congress acts (1) pursuant to its power to enforce the Fourteenth Amendment and (2) expresses its intent to abrogate state sovereign immunity with unmistakable clarity. See, e.g., Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 240 (1985); Fizpatrick v. Bitzer, 427 U.S. 445 (1976); see generally Ernest A. Young, State Sovereign Immunity and the Future of Federalism, 1999 SUP. CT. REV. 1, 7-12 [hereinafter Young, State Sovereign Immunity] (summarizing the doctrine). In such cases, state sovereign immunity functions as a resistance norm which makes congressional action more difficult, but does not prohibit it altogether. I am reluctant to rely too heavily on this example, however, because I view state sovereign immunity as having non-constitutional status outside the narrow confines of the Eleventh Amendment's text, see Seminole Tribe, 517 U.S. at 100-85 (Souter, J., dissenting), and because I view the basis of the Fourteenth Amendment abrogation power as somewhat more complex than the description above. See Young, State Sovereign Immunity, supra, at 11.

242. Rodriguez, supra note 191, at 744. See also Motomura, supra note 86, at 561 (commenting that the indirect use of constitutional norms in statutory construction is "a less intuitive but equally correct use of the term 'constitutional'").

243. See, e.g., DOUGLAS T. LAYCOCK, MODERN AMERICAN REMEDIES 462 (1994) (describing the clear statement rules disfavoring abrogation of sovereign immunity as "an obstacle course designed to ensure that legislatures rarely succeed in imposing liability on either states or the United States").

244. It would be wrong to overstate the likelihood of Congress's revisiting the issue following a narrowing construction of a statute by a court. Legislative inertia or conflict avoidance may lend strong weight to whatever construction the court reaches. See Schacter, supra note 11, at 605 (arguing that, in most instances, "legislators have a strong incentive to avoid taking up a question that has been provisionally settled by a court and have little incentive to spend precious political capital vindicating the claim 'real' intention of the prior legislature that enacted the law"). Nonetheless, congressional override does happen. See William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 YALE L.J. 331, 334 (1991) (concluding that the empirical rate of legislative reversal is higher than previously thought). Even in these cases, however, legislative override is unlikely to return the statute to the status quo ante. See JERRY L. MASHAW, GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 103 (1997) (arguing that the judiciary's initial interpretation will, in these circumstances, have "rearranged the status quo and thus reconfigured the structure of subsequent legislative bargaining").
Rodriguez's analysis of the related presumption in administrative law favoring judicial review of agency action. This presumption embodies a norm of judicial review. Although Congress is conceded to have the power to create exceptions to that norm, the presumption effectively increases the costs of such action. As Rodriguez explains:

To be sure, Congress is the final judge of when review is precluded; but the presumption of reviewability ensures that legislators must expend greater than normal costs to rebut this presumption and thus to exercise their final collective judgment. As with other costs borne by legislators attempting to reach agreement over statutory policies, these costs may have the effect of changing the final bargain.

The effect of the presumption is that supporters of administrative nonreviewability in Congress must expend the time, effort, and political capital necessary squarely to confront the jurisdictional issue and formulate the needed clear statement of congressional intent. In some instances, as Rodriguez points out, supporters of restrictions on review may not be able to surmount this additional obstacle. But because the preservation-of-judicial-review principle is not an "invalidation norm," Congress is free to override it if the legislators can summon the necessary support to enact a clear restriction on judicial power.

The avoidance canon performs a similar office in the jurisdiction-stripping cases. The habeas and immigration reforms in the AEDPA and the IIRIRA represent the culmination of a long, arduous process of legislative debate and compromise. In such situations, ambiguity can be an important means of compromise; legislators may find themselves incapable of resolving a particularly contentious issue, so they put the question off by avoiding any precise resolution of the problem in the statutory language. Larry Yackle thus suggests that proponents of

247. See Brudney, supra note 162, at 30 ("The alternative of adding these details to text increases the possibility for delay and obstruction even though the details themselves would command overwhelming support. This is because every provision, clause, or word of a statute can become the focus of additional amendments or procedurally based attacks from a small but sufficiently determined minority.").
248. See Rodriguez, supra note 191, at 747; Schacter, supra note 11, at 646 ("Applied across the range of cases... a methodology that demands exacting textual clarity is an effective way to narrow the scope of legislation, for statutes will seldom clear a bar set so high.").
249. See Rodriguez, supra note 191, at 747.
250. See, e.g., Note, Rewriting the Great Writ: Standards of Review for Habeas Corpus under the New 28 U.S.C. § 2254, 110 Harv. L. Rev. 1868, 1868 (1997) ("As an amalgam of various drafts that Congress debated for almost forty years and cobbled together in response to political events, the AEDPA trumpets its complex history: many provisions are obscure and conflict with one another.").
sweeping restrictions on federal court review of state court convictions under section 2254(d) ultimately lacked the votes to clearly achieve their goals.\textsuperscript{252} The resulting statutory compromise, however, is sufficiently ambiguous to permit both expansive and restrictive readings.\textsuperscript{253} Applying the avoidance canon in these circumstances protects the constitutional values associated with non-deferential Article III review by ensuring that Congress can restrict those values only if the proponents of such restrictions can amass sufficient political support to enact clear restrictions. Proponents of the measure cannot achieve the same result by arguing after the fact that an ambiguous compromise measure actually imposes similar limits on judicial authority.\textsuperscript{254}

Thinking of the avoidance canon as a resistance norm takes much of the steam out of the standard critiques of the avoidance canon. Once we acknowledge the normative thrust of the canon, the canon's failure to reflect Congress's actual interpretive preferences becomes irrelevant.\textsuperscript{255} The penumbra criticism likewise loses much of its power if we concede resistance norms to be a valid means of realizing constitutional values. The Equal Protection Clause's prohibition on racial discrimination, for example, did not become a "penumbral" rule simply because the Court has suggested that certain racial distinctions could survive equal protection scrutiny if the government's supporting interests were sufficiently compelling.\textsuperscript{256} Rather, the rule against discrimination remains "constitutional" in nature, even though it is not absolute. Likewise, when

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\textsuperscript{252} See Yackle, supra note 110, at 383-84.
\textsuperscript{253} Compare id. at 384 (reading § 2254(d) to "retain the federal courts' conventional function"), with Lindh v. Murphy, 96 F.3d 856, 865 (7th Cir. 1996) (en banc), rev'd on other grounds, 521 U.S. 320 (1997) (reading the same provision to require expanded deference to state court decisions). See also supra notes 106-13 and accompanying text (discussing the debate over § 2254(d)).
\textsuperscript{254} Proponents might also achieve their original purpose by overriding a Court's narrow construction of the statute through subsequent legislation. But the political costs of such action are substantial. See Brudney, supra note 162, at 16-17.
\textsuperscript{255} See Rodriguez, supra note 191, at 749 ("These normative concerns may or may not coincide with legislators' values or intentions. In any case, it does not matter, since the canons are grounded in values and principles extrinsic to the purposes of a particular statute or the preferences of legislators at various points in time.").
\textsuperscript{256} See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (plurality opinion) (suggesting that strict scrutiny need not be "failing in fact" in affirmative action cases). While one might argue that the rule against racial discrimination should be a strict invalidation norm—either because affirmative action should always be unconstitutional, or because "benign" classifications should simply not count as racial discrimination—it seems unlikely that such an argument would rest on the claim that anything other than an invalidation norm in this context would simply not be "constitutional" in nature.
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a court holds that a given jurisdictional statute does not take away a traditional kind of federal judicial authority because Congress has not mandated that result with sufficient clarity, the court is enforcing Article III—nothing more, nothing less. And the fact that Congress might override this limit on its power by legislating more clearly does not transform the court’s action into a sub-constitutional holding.

C. Three Objections

Before asking whether the avoidance canon makes sense as a substantive interpretation of Article III, I want to consider three more general objections to the idea of resistance norms. These potential objections are, first, that candidly acknowledging the use of normative canons of construction might undermine important judicial values; second, that courts lack any legitimate power to impose substantive norms through statutory interpretation; and third, that in any event this is not a function which the courts possess the institutional competence to do well. These potential objections are drawn from the general literature on normative canons of constructions. As I hope to demonstrate in this section, these objections lose their force once certain canons are understood as resistance norms of constitutional law.

Acknowledging that application of the avoidance canon involves a constitutional decision rather than an attempt to track Congress’s wishes would go a long way toward enhancing judicial candor in statutory interpretation. The value of candor itself, however, is not controversial. Nicholas Zeppos has argued that, in the sphere of statutory interpretation, candid acknowledgements that courts are going beyond the scope of the enacting legislature’s original intent can undermine important judicial values. Such candor, according to Zeppos, may decrease predictability in the law, undermine the judiciary’s checking function, and jeopardize the critical perception that courts are performing a different function from the legislators themselves.

Whatever the general merits of Professor Zeppos’s attack on judicial candor in statutory interpretation, I find it unpersuasive in the context of normative canons that function as constitutional resistance norms. Zeppos’s critique focuses on theories of “dynamic” statutory interpretation

257. See, e.g., Sunstein, Interpreting Statutes, supra note 8, at 462 (suggesting that self-consciously articulating the background principles that guide interpretation “will significantly increase the candor and clarity of interpretation”). On the value of candor, see generally David L. Shapiro, In Defense of Judicial Candor, 100 HARV. L. REV. 731 (1987).
259. See id. at 402-03 (predictability), 395-98 (checking function), 386 (distinctiveness of the judicial function).
that allow judges to "update" statutes based on current societal needs.\textsuperscript{260} It is easy to see how recourse to these sorts of "needs"—realized in the form of general policy or moral judgments—could undermine predictability or the sense that judges are performing a different function than legislators. Similarly, if courts are formulating the same sorts of policy judgments as administrative agencies, then one would expect the judgments of the agency to prevail under current doctrines of administrative law.\textsuperscript{261} But this is not what a court does when it applies a resistance norm to reject an "otherwise-preferred" construction of a statute. I have argued that resistance norms are no less a form of constitutional doctrine than invalidation norms; generalized norms of morality or good policy have no more place under the former than the latter. Moreover, one of the advantages of resistance norms is to regularize the application of constitutional values by avoiding uncertain attempts to draw lines of invalidation.\textsuperscript{262}

Candid acknowledgment that the constitutional adjudication is occurring addresses a further aspect of the penumbra criticism—the suggestion that courts engaged in "avoidance" may not observe the usual obligations of judicial craftsmanship.\textsuperscript{263} This problem, which may not be so pronounced in the broader class of statutory construction cases that Professor Zeppos addresses, lends a particular urgency to the value of candor in avoidance cases. Where courts candidly shoulder the "awesome responsibility of constitutional adjudication,"\textsuperscript{264} one would expect a greater degree of precision in the identification of the constitutional "doubt" and the evaluation of its seriousness. Such precision is likely not only to improve the overall quality of the court's analysis, but also to deflect criticism that the avoidance canon is being used in a political manner to justify results that could not be defended if they were candidly acknowledged.\textsuperscript{265}

The other two objections fail for similar reasons. One might well ask, as a general manner, whether the use of normative canons "unwisely licenses judges to use the power to interpret as the power to govern, and thus to decide unilaterally where basic political commitments should

\textsuperscript{260} See id. at 360-62 (choosing as the principal target the role of candor in the work of Guido Calabresi and William Eskridge).


\textsuperscript{262} See infra text accompanying notes 275-94.

\textsuperscript{263} See supra text accompanying notes 179-85.

\textsuperscript{264} Fortson v. Toombs, 379 U.S. 621, 631 (1965); see also McCullouch v. Maryland, 17 U.S. (4 Wheat.) 316, 400 (1819) (acknowledging the "awesome responsibility" involved in the decision of constitutional questions).

\textsuperscript{265} See, e.g., Kloppeenberg, Free Speech Concerns, supra note 147, at 7 (suggesting that "the Court allows political considerations to influence its application of the [avoidance] canon").
My argument here, however, is confined to normative canons that can be understood as means for implementing explicit constitutional commitments—such as Article III’s commitment to independent judicial review. The “power” objection thus collapses, in this narrower context, into the broader debate about the “countermajoritarian” aspects of judicial review generally. The Constitution’s provisions generally do not articulate precise directions for their own enforcement; nothing in the Equal Protection Clause’s text, for example, purports to lay out a three-tiered standard of review for different sorts of governmental classifications. When a court decides that a particular constitutional norm ought to be enforced through a “clear statement” rule of statutory construction, its action is no more creative or illegitimate than if it instead decides to protect that norm through strict scrutiny of the statute’s validity.

This observation should dispose of the “competence” objection as well. Some broad proposals for the use of normative canons might call for judgments outside the normal realm of judicial expertise; Professor Sunstein’s recommended canons, for example, include canons “intended to counteract failures in social and economic regulation.” But fashioning doctrines to implement constitutional requirements lies at the heart of the judiciary’s traditional function. One might still object that use of resistance norms in particular contexts will strain the limits of judicial competence, but there is no reason to presume as a categorical matter that such an approach will raise more difficulties than other kinds of enforcement mechanisms. The “clear statement” version of the delegation doctrine, for example, is surely no more difficult to apply than the invalidation norm employed in Schechter Poultry; in the next section, I will suggest that resistance norms may even ease these sorts of difficulties in some cases.

266. Schacter, supra note 11, at 650. Professor Schacter goes on to reject this criticism, in part on the ground that normative approaches to statutory construction “can themselves be understood as based, at least in part, in the Constitution.” Id. at 651.


268. See Schacter, supra note 11, at 650 (describing the “‘competence’ argument,” which “stresses the limitations of the judicial office by positing that judges lack the authority, skills, and resources to develop and deploy” certain kinds of normative canons).

269. Sunstein, Interpreting Statutes, supra note 8, at 476. Since these failures arise from “a failure to understand the systemic effects of regulation or to coordinate statutes regulating the same area,” id., Professor Sunstein’s canons would appear to require a fairly impressive degree of regulatory expertise on the part of the interpreting judge.

IV. The Case for Resisting Encroachments on Judicial Review

One more question remains. So far I have dealt with issues of interpretive theory: Are resistance norms legitimate in principle? If they are, does the avoidance canon's use in the jurisdiction-stripping cases take a form which can be understood in those terms? But even if we are satisfied on these points, we still face a question of substantive constitutional interpretation: Should Article III, or the Suspension or Due Process Clauses, be interpreted as embodying resistance norms that can be enforced through the avoidance canon? This question forms the focus of this Part. Answering it, however, requires me to begin by identifying the sorts of constitutional provisions and values which might be better protected by resistance norms than invalidation rules.

We must reject one possible justification for the avoidance canon at the outset, I think. Professor Rodriguez has suggested that “courts have the right to craft their own rules of statutory interpretation regardless of congressional action”—presumably as a matter of inherent powers over the basic incidents of the judicial function. But if the avoidance canon in this context is really enforcing substantive constitutional values embodied in Article III and related provisions, then it must be justified as a matter of substantive constitutional law. I undertake that task in this Part.

272. Rodriguez, supra note 191, at 750.

273. See also Schacter, supra note 11, at 652 n.308 (suggesting that “canons of construction of any type—constitutional or otherwise—can be justified in separation of powers terms as inherent or ancillary aspects of a court’s interpretive and lawmaking power under Article III”).

274. While I do not have space to develop the point here, I suspect that “inherent powers” could justify descriptive canons but not normative ones. The inherent powers doctrine recognizes that “[c]ourts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities.” Degen v. United States, 517 U.S. 820, 823 (1996). Consistent with this emphasis on protecting the court’s proceedings and judgments, inherent powers are generally employed to “formulate procedural rules not specifically required by the Constitution or the Congress.” Carlisle v. United States, 517 U.S. 416, 425-26 (1996) (emphasis added) (quoting United States v. Hastings, 461 U.S. 491, 505 (1983)). See, e.g., Calderon v. Thompson, 523 U.S. 538, 549 (1998) (noting that “the courts of appeals are recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion”); Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991) (recognizing an inherent power to sanction litigants); Landis v. North American Co., 299 U.S. 248, 254-55 (1936) (“The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”). It might be possible to assimilate descriptive canons to these other examples of inherent powers on the ground that such tools are arguably necessary to any effort to approach interpretation in an organized and efficient way. But to the extent that normative canons are less interpretive tools than substantive constitutional limits on legislative authority, they must be justified in terms of their underlying constitutional values.

A related point is that, to the extent that normative canons are rules of substantive constitutional law, they cannot be altered or eliminated as a general matter—as opposed to overridden in individual instances—by Congress. Compare Carlisle, 517 U.S. at 426 (Souter, J., concurring) (noting that the products of inherent judicial power can ordinarily be changed by legislative action). This point, too, must await elaboration in another place. For a contrary (but tentative) conclusion, see Sunstein, Mandated Canon, supra note 148, at 226-27.
A. When are Resistance Norms Appropriate?

As I have suggested, doctrines taking the form of resistance norms can be found in many different areas of constitutional law. Nonetheless, I believe it is possible to identify certain areas in which resistance norms can play a particularly important role. Those areas have two primary characteristics: They are plagued by line-drawing problems that make development of invalidation norms difficult, and they are fields in which we can expect political safeguards to play the primary role in protecting the underlying constitutional values. Other factors may, of course, reinforce or undermine the case for resistance norms in particular areas.

The line-drawing problem is endemic to many areas of constitutional law, and it has generated an extensive literature concerning the relative merits of “rules” and “standards.” Although many standards are themselves a form of resistance norm, my focus here is on developing the case for other forms, such as normative canons of statutory construction. The critique of standard-based decisionmaking is familiar: The discretion afforded by standards makes future legal results less predictable and leaves room for unelected judges to follow their own subjective preferences to reach desired results. Although my own view is that standards will nonetheless be superior to rules in many areas, it seems safe to suggest that the liabilities of both rules and standards will loom large in a substantial set of cases.

Such cases—in which, for one reason or another, neither rules nor standards provide a viable means of protecting constitutional values—have frequently led to what Lawrence Sager has described as “underenforcement” of constitutional norms. According to Professor Sager, underenforced norms do not furnish a ready basis for invalidating governmental action, either because they exist in an area where it is particularly difficult for courts to draw enforceable lines, or because invalidation would require difficult factual judgments that courts are not well positioned to make. Although Sager draws his primary examples

275. See, e.g., sources cited in note 239 supra. As I have suggested, however, flexible standards are only one form of resistance norms. See supra note 239-40 and accompanying text.

276. See, e.g., FRIEDRICH A. VON HAYEK, THE ROAD TO SERFDOM 72 (1944) (arguing that rules “make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge”); Scalia, supra note 240, at 1179-80 (arguing that only rules can effectively constrain judges).


278. See Sager, supra note 232, at 1213 (arguing that “underenforcement” of Constitutional provisions can occur when the Supreme Court limits these provisions to the scope of the federal courts’ enforcement power, rather than allowing them to reach their full conceptual boundaries).

279. See id. at 1217; see also Motomura, supra note 86, at 563 (noting that underenforcement poses significant “institutional constraints” on the judiciary’s capacity to implement the Constitution).
from individual rights jurisprudence, it also seems fair to characterize many aspects of the structural Constitution as "underenforced" in this way. 280 With only a few exceptions, the Court has shied away from enforcing meaningful limits on Congress's Commerce Power. 281 Similarly, the difficulty of drawing workable lines has led the Court to largely abandon attempts to limit Congress's delegation of power to the executive branch. 282

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280. See, e.g., MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 6 (1995) (arguing that the Supreme Court has underenforced structural values).

281. See, e.g., Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) (abandoning the attempt to limit federal regulation of state governmental functions, based largely on the difficulty of drawing enforceable lines). Although recent federalism decisions indicate some resurgence of the Court's willingness to enforce federalism limitations on the power of the national government, federalism may well still be an underenforced norm. For cases enforcing federalism limitations on the national government, see, for example, Printz v. United States, 521 U.S. 898 (1997) (holding that the Brady Handgun Violence Prevention Act violated the Court's "anti-commandeering" principles); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding that the Indian Gaming Regulatory Act contravened the Eleventh Amendment); United States v. Lopez, 514 U.S. 549 (1995) (finding that the Gun-Free School Zone Act of 1990 exceeded Congress's authority under the Commerce Clause). Most of these decisions have imposed relatively narrow constraints on the means available to Congress when it exercises its power. See, e.g., Printz, 521 U.S. at 931 (forbidding commandeering of state executive officials); Seminole Tribe, 517 U.S. at 57-65 (forbidding abrogation of state sovereign immunity from private lawsuits); see also Young, State Sovereign Immunity, supra note 239, at 50-65 (arguing that the sovereign immunity decisions, in particular, do not meaningfully advance the constitutional values of federalism). The Court's decision in Lopez limiting the reach of the Commerce Power comes closer to addressing the underenforcement problem, but the jury is still out on whether Lopez heralds a full-scale revitalization of the idea of limited powers. See, e.g., Daniel J. Meltzer, The Seminole Decision and State Sovereign Immunity, 1986 SUP. CT. REV. 1, 63 (characterizing Lopez as a "warning shot across [Congress's] bow" rather than a recommitment to aggressive judicial enforcement of the Commerce Clause); Young, State Sovereign Immunity, supra note 241, at 51 n.232, 75-76 (observing that cases to be decided in the Court's 1999 term should shed considerable light on Lopez's lasting significance). Two cases decided just as this Article goes to press indicate that Lopez may herald a more lasting trend. See United States v. Morrison, 120 S. Ct. 1740 (2000) (holding that the Violence Against Women Act exceeded Congress's powers under the Commerce Clause and § 5 of the Fourteenth Amendment); United States v. Jones, No. 99-5739, 2000 U.S. LEXIS 3426, * 1 (May 22, 2000) (construing the federal arson statute not to cover residential property in order to avoid Commerce Clause concerns).

282. See, e.g., Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) (concluding that the nondelegation doctrine is "not an element readily enforceable by the courts"); Sunstein, Nondelegation Canons, supra note 148, at 321 (arguing that "[b]ecause the relevant questions are ones of degree, the nondelegation doctrine could not be administered in anything like a rule-bound way"); Richard B. Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1667, 1697 (1975) ("Given such subjective standards, and the controversial character of decisions on whether to invalidate legislative delegations, such decisions will almost inevitably appear partisan, and might often be so."). As in the federalism area, recent decisions may indicate some renewed willingness to enforce the nondelegation doctrine. Some commentators have suggested that the Court's decision in Clinton v. New York, 524 U.S. 417 (1998), stripping down the presidential line item veto, is best described as a nondelegation holding. See, e.g., David Epstein and Sharyn O'Halloran, The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach, 20 CARDozo L.
In each of these areas, however, the Court has chosen to remedy the lack of strong, invalidation-type limits on Congress’s power by crafting normative canons of statutory construction. Just six years after the Court had abandoned its effort to invalidate attempts by Congress to regulate core functions of state government, the Court adopted a “clear statement” rule of construction which shielded those functions from regulation absent “unmistakably clear” statutory language. Similarly, the Court has protected the separation of powers values underlying the nondelegation doctrine through a parallel rule favoring narrow constructions of congressional delegations of power to administrative agencies. The various clear statement rules in these areas vary significantly in the rigor with which they are enforced, but they share a similar basic framework: Structural norms which, for one reason or

REV. 947, 948 (1999); see also Lisa Schultz Bressman, Schechter Poultry at the Millenium: A Delegation Doctrine for the Administrative State, 109 YALE L.J. 1399 (2000) (advancing a nondelegation account of AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999)). And the D.C. Circuit recently issued an important ruling which employed a sort of nondelegation rationale. See American Trucking Ass’ns v. United States EPA, 195 F.3d 4 (D.C. Cir. 1999), cert. granted, 2000 U.S. LEXIS 3577 (May 22, 2000). But these steps are substantially more tentative than those that the Court has taken in the federalism area.

283. See generally Cass R. Sunstein, Law and Administration After Chevron, 90 COLUM. L. REV. 2071, 2112 (1990) (suggesting that “clear statement principles help to promote fidelity to constitutional norms that, while having a solid constitutional pedigree, are judicially underenforced”); Motomura, supra note 86, at 563 (describing how underenforced constitutional norms may be vindicated through statutory construction).


286. See Industrial Union Dep’t v. American Petroleum Inst., 448 U.S. 607, 645-46 (1980) (plurality opinion) (interpreting the Occupational Safety and Health Act narrowly to avoid nondelegation concerns); National Cable Television Ass’n v. United States, 415 U.S. 336, 341-43 (1974) (reading narrowly an act authorizing each federal agency to set a fee for the agency’s services in order to avoid nondelegation concerns); see generally Sunstein, Nondelegation Canons, supra note 148, at 337-40 (defending the use of normative canons of construction to compensate for the general underenforcement of the nondelegation norm). Professor Sunstein’s “nondelegation canons” are, however, generally much narrower than a general rule that statutory delegations should be narrowly construed. See, e.g., id., at 340-41.

287. The rule disfavoring congressional abrogation of state sovereign immunity is very rigorous, see LAYCOCK, supra note 243, at 462 (observing that the Court has enforced this rule “with extraordinary ferocity”), while the “presumption against preemption” of state law is frequently overridden or ignored. See, e.g., AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 378 n.6 (1999) (summarily rejecting application of the presumption to the 1996 Telecommunications Act’s allocation of rulemaking authority over local telephone markets); Young, State Sovereign Immunity, supra note 246, at 20-21 (discussing Iowa Utilities Bd.).
another, rarely serve as a basis for invalidating federal legislation are nonetheless protected through rules of statutory construction that effectively steer statutes away from constitutionally-sensitive areas. Congress is free to override these rules, of course, but must go to the additional effort of making its intent to do so clear in the language of the statute.

One reason that the normative canon form of resistance norm is well suited for use in these areas is that it tends to minimize the importance of line-drawing. With invalidation norms, the boundary or trigger is all-important because every governmental action on one side will be valid, and every action on the other will be struck down. A resistance norm, on the other hand, simply raises the cost of any congressional encroachment within a particular area of constitutional sensitivity—e.g., broad delegations of legislative authority to agencies, or regulation of the core functions of state governments—while definitively barring none. As Judge Posner’s “penumbra” terminology suggests, this treatment has the effect of broadening the operative reach of a constitutional value beyond the scope that value would have if it applied strictly through an invalidation norm.288 But this broadening comes in conjunction with a reduction in the consequences of holding that constitutional values are implicated. Congress must tread more carefully in areas of constitutional sensitivity, but it is not banned from entering altogether. And if we think the constitutional norm was underenforced in the first place, some broadening of its scope should not trouble us.289

To be sure, some boundary is necessary to trigger application of the interpretive presumption. In the delegation cases a court must determine when a delegation of authority to an agency is sufficiently broad to trigger the rule that such delegations should be narrowly construed.290 Similarly, a court applying the Gregory clear statement rule291 must identify the “traditional state functions” to be protected.292 These judgments

288. See supra notes 150-52 and accompanying text.

289. See Sunstein, Interpreting Statutes, supra note 8, at 469 (noting that “Judge Posner’s [penumbra] objection becomes less forceful . . . in light of the fact that constitutional norms are often underenforced”). Use of the avoidance canon to realize underenforced constitutional norms obviates one prominent criticism of the canon: that federal courts using the canon are shirking their fundamental responsibility to develop and enforce constitutional principles. See, e.g., Kloppe, Free Speech Concerns, supra note 147, at 12-13 (advancing the criticism). While one might still wish for more aggressive means of enforcing these norms, enforcement through the avoidance canon surely beats no enforcement at all. And there is no obvious reason that pursuing such a “second best” strategy would foreclose other avenues.

290. See Industrial Union, 448 U.S. at 645.


292. Although the Court did not make this point explicit in Gregory, it seems implicit in the majority’s reasoning. See Gregory, 501 U.S. at 478 (White, J., dissenting in part, concurring in part, and concurring in the judgment) (stating that the majority rule directly contravened the Court’s decision
necessarily entail the same sort of subjective decisionmaking that got the nondelegation and National League of Cities doctrines into trouble in the first place. But that kind of ambiguity in defining the relevant boundaries is more tolerable when Congress can override the Court’s judgment. In other words, we can afford to be less precise in setting the trigger because less turns on it.

The areas in which the normative canon form of resistance norm has been substituted for strong invalidation norms share an additional characteristic beyond the difficulty of drawing enforceable lines. As I have suggested, this form of constitutional rule shows up most frequently in those areas—for example, separation of powers and federalism—where political safeguards have played a primary role. Jesse Choper has famously argued that both separation of powers and federalism questions should be nonjusticiable because political checks are adequate to protect these constitutional values without judicial intervention.

The Court adopted this approach to federalism issues in Garcia v. San Antonio Metropolitan Transit Authority. And while I agree with the Garcia dissenters—and the current Court majority—that such a “political safeguards” approach can never be the exclusive means of protecting federalism, it seems equally clear that process federalism has

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293. See, e.g., Garcia, 469 U.S. at 537-44 (rejecting the National League of Cities doctrine on the ground that the Court had been unable to define “traditional state functions” in a consistent, principled manner); Gregory, 501 U.S. at 493 (Blackmun, J., dissenting) (criticizing Gregory’s clear statement rule for raising the same problem).

294. Cf. Sunstein, Interpreting Statutes, supra note 8, at 469 (arguing that the “aggressive construction of questionable but not invalid statutes . . . is a less intrusive way of vindicating [underenforced constitutional] norms”). The more difficult “trigger” issue is defining when a statute is sufficiently ambiguous to require recourse to canons or background principles at all. See Kloppenberg, Free Speech Concerns, supra note 147, at 12 (“The Court has neither determined how much ambiguity is required to apply the canon, nor has it suggested guidelines, factors or circumstances to include in an ambiguity analysis.”); Zeppos, supra note 195, at 387-93 (suggesting that the concept of statutory ambiguity may be difficult to confine). I doubt I can provide a good answer to that difficulty here. It is important to recognize, however, that this is a problem that arises in many areas of the law. See, e.g., Sunstein, Interpreting Statutes, supra note 8, at 465 (suggesting that application of almost any canon of construction should be limited to cases where the meaning of the text is ambiguous in some way). There is, in other words, no escape from the need to develop a workable way of identifying statutory ambiguity.

295. See Choper, supra note 17, at 260-379.


significant potential as a viable means of enforcing significant constraints
on federal power. As28 So, too, with separation of powers and the protec-
tion of the federal judiciary. The Court has appropriately declined to adopt
Dean Choper’s recommendation that separation of powers disputes be
remitted entirely to the political process.29 But that wise refusal to rely
exclusively on political checks should not blind us to the significant
potential of process-based limitations in this context.

Normative canons facilitate the operation of political checks.30 In
Gregory, for example, Justice O’Connor wrote that

[I]nasmuch as this Court in Garcia has left primarily to the political
process the protection of the States against intrusive exercises of
Congress’ Commerce Clause powers, we must be absolutely certain
that Congress intended such an exercise. “[T]o give the state-
displacing weight of federal law to mere congressional ambiguity
would evade the very procedure for lawmakers on which Garcia
relied to protect states’ interests.”31

Clear statement rules thus enhance political checks in two related ways.
First, they make clear to all participants in a political process the
constitutional values that are at stake, by highlighting the aspects of
proposed legislation that implicate those values.32 This increased
salience may well increase opposition to proposed legislation, both by
providing those opposed to it on other grounds with an additional argument
and, perhaps, by mobilizing additional opposition based on the consti-
tutional values themselves. Legislators do, after all, have their own
obligation to interpret the Constitution and uphold constitutional values,
and clear statement rules may prompt the “sober second thought” that this
obligation entails.33

Second, such rules add to the hurdles that any legislation must pass,
by increasing the political costs that proponents must incur in order to

298. See Young, State Sovereign Immunity, supra note 241 at 21-25, 39-42.
299. See, e.g., Garcia, 469 U.S. at 567 n.12 (Powell, J., dissenting) (noting that the “political
safeguards” arguments would have supported contrary results in prior separation of powers cases, but
that the Court had instead held the separation of powers to be judicially enforceable).
300. See Sunstein, Nondelegation Canons, supra note 148, at 339 (observing that clear statement
rules are “a modern incarnation of the Framers’ basic project of linking individual rights and interests
with institutional design”).
301. Gregory, 501 U.S. at 464 (quoting Laurence Tribe, American Constitutional Law §
6-25, at 480 (2d ed. 1988) (emphasis in original)).
such as legislation affecting the federal balance, the requirement of clear statement assures that the
legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial
decision.”).
303. See, e.g., Sager, supra note 232, at 1227 (arguing that “government officials have a legal
obligation to obey an underenforced constitutional norm which extends beyond its interpretation by the
federal judiciary to the full dimensions of the concept which the norm embodies”).
achieve their objectives. Although the literature on “political safeguards” for constitutional values has focused on the political representation of interests opposed to incursions on those values, the ultimate political safeguard may be the procedural gauntlet that any legislative proposal must run and the concomitant difficulty of overcoming legislative inertia. To the extent that a clear statement rule requires modifications to existing legislation or amendments to proposals within this process, or undermines efforts to compromise on contested issues through vague language, the rule may make this legislative gauntlet far more difficult to run.

B. Resisting Encroachments on Judicial Review

Having outlined the circumstances in which the normative canon form of resistance norms may be most valuable for safeguarding constitutional values, I can finally sketch an argument for thinking about the avoidance canon in those terms. My argument here is confined—as befits this Symposium—to the avoidance canon’s use in cases disfavoring incursions on the power of judicial review, although I suspect similar arguments could be made in other areas in which the avoidance canon plays a prominent role. In any event, my argument is that when a court construes a statute to avoid finding a restriction on the federal judicial power, that court is enforcing the substantive commands of Article III (or the Suspension or Due Process Clauses) and properly so.

The judicial power vested in the federal courts by Article III is a prime candidate for protection through resistance norms, for precisely the reasons I discussed in the previous section. Line-drawing problems are pervasive in this area. Consider Professor Hart’s “essential functions” argument against undue restriction of federal court jurisdiction. While

304. See supra notes 250-54 and accompanying text.
306. See, e.g., Bradford R. Clark, Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after Erie, 145 U. PA. L. REV. 1459, 1484-85 (1997) (discussing constitutional restrictions on the federal lawmakers power); Young, State Sovereign Immunity, supra note 241, at 25 (arguing that “the framework of rules governing which actors in the national government are empowered to make law” is one of the most important, and frequently overlooked, political checks on incursions on state autonomy); I’m Just a Bill, in Schoolhouse Rock! (America Rock 25th Anniversary ed. 1995) (video) (chronicling the legislative gauntlet imposed by Article I).
307. Cf. Rodriguez, supra note 191, at 771 (“Those who would structure methods of statutory interpretation in order to impose certain costs on legislators also should understand that a possible outcome is stalemate and inertia.”).
308. See Hart, supra note 37, at 1365; see also Ratner, supra note 37, at 160-67 (arguing that the appellate jurisdiction of the Supreme Court is the constitutional implementation of the Supremacy Clause because it ensures national consistency in interpretation of federal law by all courts and provides judicial supervision of the operation of federal laws over conflicting state laws).
many would agree that Congress may not constitutionally take away *all* of the Supreme Court's appellate jurisdiction, it is exceptionally difficult to draw coherent lines defining the "essential" functions that Congress may not take away.\textsuperscript{309} To abandon the effort, however, and conclude that Congress's power is plenary surely "underenforces" Article III's mandate that *some* "judicial Power"\textsuperscript{310}—however defined—be vested in the federal courts.

Similar problems arise with respect to Congress's power to refer judicial business to legislative courts, such as tribunals of the Immigration and Naturalization Service. Here, the Court's primary effort to draw enforceable lines—the "public rights" doctrine—has generated considerable confusion and may end up protecting the judicial power in precisely the wrong set of cases.\textsuperscript{311} A balancing approach, on the other hand, raises problems of its own. Justice O'Connor took the balancing route in *Commodity Futures Trading Commission v. Schor*,\textsuperscript{312} suggesting that courts should weigh "[t]he extent which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts" against "[t]he origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III."\textsuperscript{313} In dissent, Justice Brennan argued against weighing "[t]he legislative interest in convenience and efficiency . . . against the competing interest in judicial independence."\textsuperscript{314} Justice Brennan opposed such a balancing test because the pragmatic interests of convenience and efficiency are "[i]mmediate, concrete, and easily understood," whereas the benefit of judicial independence is "[a]lmost entirely prophylactic, and thus often seem[s] remote and not worth the cost in any single case."\textsuperscript{315} A balancing test, in other words, may systematically lead to underenforcement of the values underlying Article III.

The avoidance canon, viewed as a resistance norm, addresses these respective inadequacies of bright-line rulemaking and balancing tests as means for implementing the values associated with Article III. It is not insurmountably difficult to identify a general class of cases implicating these values—say, statutes involving the withdrawal of all Supreme Court appellate jurisdiction over a particular issue, or cases transferring judicial business to a legislative court with no possibility of judicial review. One

\textsuperscript{309} See *supra* note 46.

\textsuperscript{310} U.S. Const. art. III, § 1.

\textsuperscript{311} See *supra* text accompanying note 91.

\textsuperscript{312} 478 U.S. 833 (1986).

\textsuperscript{313} *Id.* at 851.

\textsuperscript{314} *Id.* at 863 (Brennan, J., dissenting).

\textsuperscript{315} *Id.*
can then apply the avoidance canon to all such statutes, without further attempting to define which aspects of Supreme Court jurisdiction are "essential functions" or to differentiate among which cases may or may not be assigned to legislative courts. Instead, Article III values are enforced by raising the political costs to proponents of enacting jurisdiction-limiting legislation, without ultimately barring such legislation in the event that Congress is willing to speak clearly. In other words, the avoidance canon minimizes the importance of line drawing by making less turn on it, while at the same time avoiding the risk that Article III values will be systematically balanced away.\textsuperscript{316}

Similarly, the avoidance canon respects and builds upon the primary role of political safeguards in the separation of powers context. Statutes like the AEDPA and the IIRIRA are immensely complicated propositions, often arising out of years of proposals and counterproposals, with none but the most interested members of Congress having a clear idea of all the ultimate bill's implications.\textsuperscript{317} Requiring a clear statement of Congress's intent to restrict federal jurisdiction effectively flags those provisions of a legislative proposal that implicate Article III values, thereby increasing the likelihood that the political process will actually focus on the structural principles at stake. Moreover, erecting this additional legislative hurdle will most likely, over the years, decrease the net number of jurisdiction-limiting provisions that make it through the legislative gauntlet.

It is worth noting that in the jurisdiction-limiting context the avoidance canon fills in for a critical weakness in the political safeguards that ordinarily prevent incursions of one branch upon another. The primary political constraint on jurisdiction-limiting is probably Congress's need for enforcement courts; that is, Congress generally cannot ensure enforcement of its legislative mandates without providing a federal judicial forum where violators of those mandates can be prosecuted.\textsuperscript{318} In this sense,

\textsuperscript{316} Richard Fallon has arguably pursued a similar goal by arguing that Article III always requires federal appellate review of issues decided by legislative courts. See Fallon, supra note 89 at 917-18, 937, 941-42 (proposing an "appellate review" theory that recognizes the role of non-Article III federal tribunals, but provides for review of their decisions by Article III courts to safeguard the values of separation of powers, fairness, and judicial integrity). Professor Fallon avoids some difficult line-drawing problems by insisting that Article III is always implicated when judicial business is referred to legislative courts. See id. at 918 (arguing that appellate review of the judgments of legislative courts is necessary to satisfy the requirements of Article III). He compensates for this expansion of Article III's reach, however, by relaxing its force to require only appellate review, rather than a judicial decision in the first instance. See id. at 917 (accepting that Congress should retain the discretion to determine whether non-Article III bodies should be used for initial determinations). In the end, however, Fallon's approach is more aggressive than the avoidance canon because it would always invalidate regimes-like the broad reading of IIRIRA—that fail to provide some form of judicial review.

\textsuperscript{317} See, e.g., David G. Savage, Anti-Terrorism Legislation Wins Approval in House, L.A. TIMES, Apr. 19, 1996, at A16 (describing some of the political dynamics swirling around the AEDPA).

\textsuperscript{318} See John F. Manning, Textualism as a Nondelegation Doctrine, 47 COLUM. L. REV. 673, 673-74 (1997) ("[F]ew commentators embrace judicial invalidation in>Court's Constitutional Avoidance
Congress’s ability to deprive the federal courts of jurisdiction over various issues arising under federal law is frequently self-limiting: if Congress chooses not to vest the federal courts with jurisdiction over a particular area of federal law, it must forego judicial enforcement entirely, or entrust such enforcement to state courts over which it lacks significant control.

The problem with this political check is that the advent of the modern administrative state has alleviated Congress’s dilemma substantially. Now Congress has a third and highly attractive option: vest enforcement authority in an administrative agency that is at least arguably more efficient and more easily controlled than the federal judiciary. We thus might justify the creation of a judicial check on jurisdiction-limiting legislation, in the form of the avoidance rule, as an aspect of “translation” necessary to maintain fidelity to the original constitutional balance in an era of changed institutional circumstances.

The development of modern administrative enforcement bureaucracies itself signals a fundamental shift in the constitutional separation of powers—one that has never been entirely reconciled with basic constitutional principle. The idea of “translation” is that, when such fundamental shifts occur, the courts may need to engage in doctrinal innovation simply to protect the original presuppositions of the constitutional scheme in the new institutional landscape. It would thus be surprising if the original role of the Article III judiciary could be maintained without some form of doctrinal adjustment to the new realities of the administrative state. Certainly the development of a resistance norm favoring preservation of traditionally-available forms of judicial review is a relatively mild form of adjustment.

This idea is hardly new. In administrative law, the federal courts have long required a clear statement of Congress’s intent before finding that agency action is not subject to judicial review. Although this

and historically effective forum for the implementation of its laws.”); Hart, supra note 37, at 1372-73 (discussing the role of enforcement courts and the constitutional constraints that come into play when Congress confines jurisdiction to enforce federal law).


320. See generally Lawrence Lessig, Fidelity in Translation, 71 TEXAS L. REV. 1165 (1993) (arguing that changed readings of constitutional text will sometimes be the only way to maintain fidelity to the text, if the text’s underlying presuppositions have changed).

321. See Lawrence Lessig, Translating Federalism: United States v. Lopez, 1996 SUP. CT. REV. 125, 134 (arguing that courts must “devise tools” in order to “restore an original balance”); see also Lessig, Fidelity in Translation, supra note 320, at 1228 (discussing clear statement rules in the federalism context as a tool of translation).

presumption is partially grounded in the legislative intent behind the Administrative Procedure Act, it also reflects constitutional concerns. These concerns include both specific invocations of the need to avoid difficult Article III questions that would be raised if judicial review were unavailable, as well as the more general need to accommodate the administrative state to the original constitutional structure. The presumption of reviewability, like the broader presumptions used to protect judicial review outside the administrative context, thus substitutes new political checks for similar forces that may have been undermined by other changes in our governmental arrangements. Far from being a radical expansion of judicial power, development of these kinds of resistance norms serves the fundamentally conservative function of maintaining the traditional balance of government in an evolving institutional context.

V. Conclusion

The importance of a constitutional principle does not necessarily correspond to the ease of enforcing that principle through an invalidation norm. That has been particularly true of the principles that make up the structural Constitution—most importantly, for present purposes, the principles surrounding Article III’s independent federal judiciary. As one can see from the debate currently raging over the constitutionality of various jurisdiction-limiting provisions of the AEDPA and the IIRIRA, the ability of courts to fashion workable doctrines that absolutely protect a “core” of Article III jurisdiction remains very much in doubt.

In this essay, I have investigated a different strategy for protecting the constitutional values underlying Article III—the construction of ambiguous provisions in statutes like the AEDPA and the IIRIRA to avoid the consti-
tutional "doubts" raised by encroachments on the federal judiciary. Although this has been the strategy of choice for lower courts construing these statutes, the avoidance canon has come under steadily increasing fire from students of statutory construction. My defense of the avoidance canon in the Article III context has largely accepted many of the most common criticisms: Avoidance of constitutional doubt is not necessarily what Congress would prefer if asked, and it does amount to a decision on the constitutional merits. Rather than deny these realities, I have argued that in some contexts—including Article III—this is a perfectly legitimate and even advantageous way to enforce the Constitution.

The concern remains, of course, that constitutional avoidance is powerless to stop a Congress that acts radically—yet clearly—to undermine the Article III judiciary. That strategy is not necessarily inconsistent, however, with also recognizing a core of Article III that is not subject to diminution no matter how clearly Congress expresses its intent. Resistance norms provide some degree of protection, however, even if we fail to define a more strongly-protected core with sufficient precision. In any event, the success thus far of the lower courts in preserving some form of judicial review through statutory construction of the AEDPA and the IIRIRA suggests that the promise of strategies stopping short of invalidation should not be overlooked.