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# ARTICLES

## THE INCOMPATIBILITY OF SUBSTANTIVE CANONS AND TEXTUALISM

*Benjamin Eidelson & Matthew C. Stephenson*

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# THE INCOMPATIBILITY OF SUBSTANTIVE CANONS AND TEXTUALISM

*Benjamin Eidelson*[*] *& Matthew C. Stephenson*[**]

*A majority of the Justices today are self-described textualists. Yet even as these jurists insist that "the text of the law is the law," they appeal to "substantive" canons of construction that stretch statutory text in the direction of favored values, from federalism to restraining the administrative state. The conflict between these commitments would seem obvious — and indeed, candid textualists have long acknowledged that there is a "tension" here. But textualist theorists have also advanced several arguments to assuage or finesse that tension, and the sheer availability of those arguments has given the textualist Justices' resort to these devices a respectability that, we argue here, it does not deserve.*

*With the Justices now openly debating the compatibility of textualism and substantive canons, this Article surveys and critically assesses the assorted efforts to square this particular circle. Those strategies include (1) recharacterizing substantive canons as elements of the "background" against which Congress legislates, (2) linking them to "constitutional values," and (3) restricting their use to resolving "ambiguities." Each of those defenses, we argue, either commits textualists to jurisprudential positions they ordinarily denounce or, at best, implies such a narrow scope for substantive canons that nothing resembling their current use would survive. The Article thus concludes that textualists should either abandon their reliance on substantive canons or else concede that their textualism is not what they have often made it out to be.*

## INTRODUCTION

When judges interpret statutes, they often invoke general rules or presumptions known as "canons of construction." Commentators typically distinguish two main families of canons.[1] First, so-called "semantic" canons (also known as "linguistic" or "descriptive" canons) are generalizations about how particular linguistic constructions are used and understood by competent speakers of English.[2] According to the "last-antecedent canon," for example, when some limiting phrase follows an item in a list, it usually modifies only that immediately

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[*] Professor of Law, Harvard Law School.

[**] Henry L. Shattuck Professor of Law, Harvard Law School. For valuable comments and discussion, we thank Mitchell Berman, Ryan Doerfler, Richard Fallon, Sherif Girgis, Abbe Gluck, John Goldberg, Jonathan Gould, Mark Greenberg, Tara Grove, Emma Kaufman, Anita Krishnakumar, Daryl Levinson, Jamie Macleod, Neysun Mahboubi, John Manning, Andrei Marmor, Larry Solum, Cass Sunstein, Chris Walker, and Bill Watson, as well as participants in the Harvard Law School Faculty Workshop and the NYU Colloquium on Constitutional Theory. We also thank Thomas Nielsen and Thomas Koenig for excellent research assistance.

[1] *See, e.g.*, JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 324 (4th ed. 2021). What follows is just meant to restate the conventional wisdom; we will offer some refinements of our own in Part I, pp. 521–38.

[2] We will use the "semantic" moniker in deference to standard usage in the statutory-interpretation literature, even though many of these canons actually operate on the "pragmatic" side of the semantic/pragmatic line drawn by contemporary philosophers and linguists. *See infra* notes 42, 113.

preceding item, not others further upstream.[3] In contrast, "substantive" canons (also termed "normative" or "policy-based" canons) are nonlinguistic considerations that weigh in favor of particular legal results. Examples include the rule that ambiguities in criminal statutes are resolved in favor of the defendant (the "rule of lenity"),[4] the principle that courts should avoid interpreting statutes in ways that raise serious doubts about their constitutionality,[5] and the presumption against interpreting federal statutes to intrude on the traditional prerogatives of state governments.[6]

Judges who embrace a "textualist" approach to statutory interpretation have little difficulty reconciling their interpretive philosophy with semantic canons, at least in principle. Roughly speaking, these "canons" are just shorthand labels for ordinary inferences drawn from linguistic common sense.[7] But what about substantive canons? Whenever one of these canons does any work, it must be leading a court to a result different from the one that the same court would have reached based only on the apparent linguistic import of the text.[8] But if, as textualists hold, a court's job in a statutory case is "to apply, not amend, the work of the People's representatives,"[9] how can that ever be appropriate?

In a series of major cases over the past two years — starting with *West Virginia v. EPA*[10] — Justice Kagan has repeatedly posed precisely

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[3] *See, e.g.*, Barnhart v. Thomas, 540 U.S. 20, 26–28 (2003) (Scalia, J.); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 144–45 (2012) (labeling and discussing the canon).

[4] *See* MANNING & STEPHENSON, *supra* note 1, at 460, 466–70.

[5] *See id.* at 384–89, 395–410.

[6] *See id.* at 413–16, 423–36, 450–60.

[7] *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 26 (new ed. 2018) (describing semantic canons as "so commonsensical that, were the canons not couched in Latin, you would find it hard to believe anyone could criticize them"); Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 1020 n.209 (2017) (describing these canons as "just approximations of the usage norms of ordinary English" and noting that they are "best understood as rules of thumb, as opposed to rigid prescriptions"); *see also* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 113 (2010) ("Canons of *interpretation* are rules of thumb — they point judges and other legal actors to facts about the way language works and to reliable procedures for making inferences about linguistic meaning."). That said, "semantic" canons *do* pose a challenge for textualists when they are given more weight in interpreting a statute than their probative value with respect to its linguistic meaning can justify. *Cf.* Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1174–75 (2021) (Alito, J., concurring in the judgment) (highlighting a form of that issue). We do not focus on that particular problem here, although aspects of our analysis would naturally extend to it.

[8] *See, e.g.*, Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 89 (1996).

[9] Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718, 1726 (2017) (Gorsuch, J.).

[10] 142 S. Ct. 2587 (2022).

this challenge to her textualist colleagues.[11] *West Virginia* concerned a provision of the Clean Air Act requiring the EPA to set emission limits that are "achievable through the application of the best system of emission reduction" that satisfies certain criteria.[12] In the Clean Power Plan, the EPA had determined that the "best system of emission reduction" involved not only efficiency improvements at individual coal plants, but also substitution of cleaner energy sources for coal.[13] The EPA therefore calculated emissions limits that were premised on such "generation shifting" taking place.[14] Justice Kagan (joined by Justices Breyer and Sotomayor) thought that the statutory text clearly allowed this approach.[15] After all, she argued, "generation shifting fits comfortably within the conventional meaning of a 'system of emission reduction,'" in light of the dictionary definition of "system," the use of that term in other parts of the statute, and the Clean Air Act's overall structure and design.[16]

But while the majority conceded that "[a]s a matter of 'definitional possibilities,' generation shifting can be described as a 'system,'" it rejected that interpretation.[17] The EPA was asserting an unprecedented authority to transform the U.S. electricity sector, Chief Justice Roberts explained, and its action thus triggered the "major questions doctrine" — a canon presuming that federal statutes do not delegate extraordinary regulatory authority to agencies except through a specific statement to that effect.[18]

To Justice Kagan, this amounted to little more than an opportunistic deviation from the textualist approach that the Justices in the majority usually preach. "The current Court," she wrote, "is textualist only when being so suits it."[19] "When that method would frustrate [the Court's] broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards."[20] And in the year since *West*

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[11] *See id.* at 2641 (Kagan, J., dissenting); Sackett v. EPA, 143 S. Ct. 1322, 1360–61 (2023) (Kagan, J., concurring in the judgment); Biden v. Nebraska, 143 S. Ct. 2355, 2397, 2400 (2023) (Kagan, J., dissenting); *see also* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 670, 673, 676–77 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (objecting in another statutory case that the Court had, "[w]ithout legal basis, . . . usurp[ed] a decision that rightfully belongs to others," *id.* at 677).

[12] 42 U.S.C. § 7411(a)(1); *see* West Virginia v. EPA, 142 S. Ct. at 2601.

[13] *See* West Virginia v. EPA, 142 S. Ct. at 2603.

[14] *See id.*

[15] *See id.* at 2630 (Kagan, J., dissenting).

[16] *Id.* at 2629–31.

[17] *Id.* at 2614 (majority opinion) (first quoting FCC v. AT&T Inc., 562 U.S. 397, 407 (2011)).

[18] *See id.* (declaring that when an agency asserts unprecedented authority to issue an extraordinary rule, "the Government must . . . point to clear congressional authorization to regulate in that manner" (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))); *id.* at 2620 (Gorsuch, J., concurring) (characterizing the major questions doctrine as a "clear-statement rule" that prohibits agencies from resolving major questions without "clear congressional authorization").

[19] *Id.* at 2641 (Kagan, J., dissenting).

[20] *Id.*

*Virginia*, this indictment has become a refrain. When the Court interpreted the Clean Water Act narrowly in *Sackett v. EPA*[21] — based, in part, on a substantive canon disfavoring interpretations that would "alter the balance between federal and state power and the power of the Government over private property"[22] — Justice Kagan again charged the majority with "non-textualism."[23] So, too, when the Court rejected the Biden Administration's student loan forgiveness program in *Biden v. Nebraska*,[24] with the major questions doctrine again playing a role. Once more, the dissenters (led, again, by Justice Kagan) faulted the majority not just for getting the statutory interpretation question wrong, but for relying on a "made-up"[25] canon that "works not to better understand — but instead to trump — the scope of a legislative delegation."[26]

Justice Kagan is not the first to observe a tension between modern textualists' foundational commitments and the use of substantive canons. Over the years, several leading textualist theorists have recognized and wrestled with this problem. Justice Scalia once observed that substantive canons amount to "dice-loading rules" that pose "a lot of trouble" for "the honest textualist."[27] In an influential 2010 article, then-Professor Amy Coney Barrett similarly recognized that substantive canons are "at apparent odds with the central premise from which textualism proceeds."[28] Yet, as the Court's recent practice highlights, textualist judges have frequently deployed substantive canons anyway.[29] If anything, in fact, this tendency seems to have mounted with textualism's

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[21] 143 S. Ct. 1322 (2023).

[22] *Id.* (quoting U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1849–50 (2020)).

[23] *Id.* at 1361 (Kagan, J., concurring in the judgment).

[24] 143 S. Ct. 2355 (2023).

[25] *Id.* at 2400 (Kagan, J., dissenting).

[26] *Id.* at 2397.

[27] Scalia, *supra* note 7, at 28; *see also id.* at 27–29.

[28] Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 110 (2010). For other acknowledgments and discussions of this tension, see, among others, John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 404–05 (2010) [hereinafter Manning, *Clear Statement*]; John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 125–26 (2001) [hereinafter Manning, *Equity*]; Mitchell N. Berman, *Judge Posner's Simple Law*, 113 MICH. L. REV. 777, 792–93 (2015) (book review); Jim Chen, *Law as a Species of Language Acquisition*, 73 WASH. U. L.Q. 1263, 1303 (1995); William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1545–46 (1998) (book review); William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 537–40, 576–77 (2013) (book review); Philip P. Frickey, *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1971, 1987–92 (2005); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 259 (1992).

[29] *See* Barrett, *supra* note 28, at 121 ("Textualists, however, also embrace substantive canons, which, rather than capturing ordinary language patterns, often require judges to depart from a statute's most natural interpretation."); Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2055–56 (2017) (noting that "[s]everal of the most important canons were actually created on [Justice Scalia's] watch, including the federalism canon, the 'no elephants in mouse holes' rule, the major questions rule, and the modern-day version of the extraterritoriality canon" (footnotes omitted)).

rise in recent years. And while the major questions doctrine looms especially large at the moment,[30] the embrace of substantive canons by avowed textualists is not limited to that context (as the invocations of federalism and property-rights canons in cases such as *Sackett* confirm).[31] For that matter, Justice Gorsuch has even urged his colleagues to breathe new life into the rule of lenity.[32]

So what accounts for this disconnect? Justice Kagan's dissenting opinions offer one answer: a too-fervent commitment to an ideological agenda (more politely, to "broader goals"[33] or "policy preferences"[34]) that trumps the textualist Justices' ordinary conception of their proper role, leading them to "shelve[] the usual rules of interpretation."[35] Maybe so. But another important part of the explanation, we think, is textualist theorists' longstanding insistence that while the tension here may be real, even awkward, it is ultimately manageable within their theory's own terms. Indeed, after acknowledging the difficulty that we have described, Justice Scalia and then-Professor Barrett each went on to explain why, at the end of the day, it is probably not as acute as it appears.[36] Their arguments did not purport to save *all* substantive canons — and, until very recently, they did not make the leap from extrajudicial writings to judicial opinions. Still, the sheer existence of respectable and avowedly textualist defenses of substantive canons, together with a convenient vagueness about the scope of those defenses, has allowed textualist judges to deploy these canons with a relatively clean conscience. And now that the challenge to the integrity of this practice has been sharply posed, a new round of such defenses is emerging — including separate opinions by Justice Gorsuch[37] and Justice Barrett[38] that seem poised to play a similar legitimating role within and beyond the Court.

With the debate thus gaining steam, this Article systematically and closely assesses each of the leading efforts to square modern textualist theory with substantive canons. We take these proposed reconciliations to be of three essential types. The first line of argument — most closely

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30 In addition to the cases discussed above, see *National Federation of Independent Business v. Department of Labor*, 142 S. Ct. 661, 666 (2022), in which the Court invalidated a regulation regarding COVID-19 vaccination and testing, and *Alabama Ass'n of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485, 2489 (2021), in which the Court invalidated an eviction moratorium.

31 *See* Sackett v. EPA, 143 S. Ct. 1322, 1341–42 (2023); U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1849–50 (2020).

32 *See* Wooden v. United States, 142 S. Ct. 1063, 1081–87 (2022) (Gorsuch, J., concurring in the judgment).

33 West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting).

34 *Sackett*, 143 S. Ct. at 1360 (Kagan, J., concurring in the judgment).

35 *Id.*

36 *See infra* pp. 544–46 (describing Scalia's argument); *infra* pp. 563–64 (describing Barrett's).

37 West Virginia v. EPA, 142 S. Ct. at 2616–26 (Gorsuch, J., concurring).

38 Biden v. Nebraska, 143 S. Ct. 2355, 2376–84 (2023) (Barrett, J., concurring).

associated with Justice Scalia, but now prominently deployed by Justice Barrett as well — recharacterizes at least some "substantive" canons as background conventions that a reasonable reader would consider in discerning what a lawmaker actually meant by the enacted text.[39] A second argument — developed most fully in then-Professor Barrett's 2010 article and now embraced by Justice Gorsuch in his *West Virginia* concurrence — purports to reconcile substantive canons with textualism by grounding them in judges' higher duty to "act as faithful agents of the Constitution."[40] And a third approach — often paired with one of the other two, and endorsed by several of the Justices — suggests that textualist judges can legitimately rely on substantive canons if, but only if, the text itself provides only an ambiguous or uncertain answer.[41]

After considering each of these arguments, we conclude that substantive canons are generally just as incompatible with textualists' jurisprudential commitments as they first appear. If we are right about that, then principled textualists face a choice. They could abandon or drastically curtail the use of substantive canons. Or they could concede that important claims about those jurisprudential commitments are inaccurate and oversimplified, in ways that undermine textualists' traditional critiques of nontextualist interpretive methods.

The Article is organized as follows: Part I provides more rigorous characterizations of both "textualism" and "substantive canons," and in so doing makes the prima facie case for their fundamental incompatibility. Parts II through IV, the heart of the Article, evaluate each of the three attempts at reconciliation and conclude that none is satisfactory. Part V offers some concluding thoughts on the different paths forward for textualism that we have just described.

## I. THE PROBLEM

The basic tension between textualism and substantive canons is intuitive — sufficiently so that first-semester law students can grasp it and ask perceptive questions about how textualist judges can justify their reliance on these canons. But because both "textualism" and the idea of

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[39] *See* SCALIA & GARNER, *supra* note 3, at 30–31; Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RSRV. L. REV. 581, 583 (1989); *see also* Manning, *Equity*, *supra* note 28, at 125; John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2467–68 (2003). For Justice Barrett's effort to defend the major questions doctrine in these terms, see Biden v. Nebraska, 143 S. Ct. at 2376–84 (Barrett, J., concurring).

[40] *See* Barrett, *supra* note 28, at 169; West Virginia v. EPA, 142 S. Ct. at 2616 (Gorsuch, J., concurring) (quoting same). As we will discuss below, both Justice Barrett's article and her recent concurrence voice an ambivalence about this issue that Justice Gorsuch's concurrence, despite drawing on Barrett's article, decidedly lacks. *See infra* note 312.

[41] *See, e.g.*, Arellano v. McDonough, 143 S. Ct. 543, 552 (2023) (Barrett, J.); Sackett v. EPA, 143 S. Ct. 1322, 1367 (2023) (Kavanaugh, J., concurring in the judgment); Barrett, *supra* note 28, at 163–67; *see also Sackett*, 143 S. Ct. at 1361 (Kagan, J., concurring in the judgement) (suggesting that a "court may, on occasion, apply a clear-statement rule to deal with statutory vagueness or ambiguity").

a "substantive" canon can prove quite slippery — and because our aim here is to make the nature and extent of the conflict inescapably clear, even to those who might be inclined to resist or dismiss it — we will start by nailing down each of these notions somewhat more precisely. As we will see, laying out the essential features of "textualism" and of "substantive canons" also lays bare the conceptual roots of the contradiction between them.[42]

### *A. Textualism*

*1. The Central Idea.* — Although "modern textualism" resists easy definition, the beating heart of this interpretive philosophy has always been a normative thesis about the proper exercise of government power, at least under the U.S. Constitution.[43] That claim has both a legislature-facing aspect and a court-facing one. First, textualists believe that members of Congress (and the President) have the power to make binding law only through a constitutionally prescribed process that involves *saying publicly what that law shall be*. As Justice Scalia put it, "it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated."[44] Call

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[42] Here and throughout this Article, we draw on insights from contemporary work in the philosophy of language, but we try to present the relevant ideas in a way that will resonate with textualists on the bench and in the legal academy. To that end, we will sometimes incorporate the substance of those ideas without calling special attention to them or insisting on the technical terminology used by philosophers and linguists — terminology that is often different from, or even at odds with, common usage among lawyers and legal scholars. For example, while it will be apparent to technically minded readers that we take textualism to be concerned with what many would term "pragmatic" content (rather than "semantic" content), we will not explicitly introduce the semantic/pragmatic distinction or offer a gloss on it here. We will also acquiesce to certain imprecisions of terminology — especially with respect to terms such as "semantic," "linguistic," "ambiguous," and "meaning." Our hope is that this will enable us better to engage with our interlocutors and reach a broader audience, though we acknowledge that this approach also means that we will sometimes put certain points in ways that, for some readers, will not seem most direct, felicitous, or precise.

[43] A number of commentators have observed that "[t]extualism's adherents and nonadherents often . . . caricature and talk past one another," Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 36 (2006), and that the two camps' "differences are less categorical than either textualists or their critics generally acknowledge," Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 349 (2005). By starting with a sympathetic account of textualism's normative foundations, we hope to guard against these tendencies. This framing also reflects our judgment that whether substantive canons can be squared with the stated or official positions of "textualism" is less interesting than whether they can be squared with the considerations that give "textualism" its appeal in the first place. As Jonathan Siegel observes, "[t]here are many voices in the interpretation debate, and none of them has exclusive authority to define 'textualism.'" Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 173 (2009); *see also* Tara Leigh Grove, *The Supreme Court, 2019 Term — Comment: Which Textualism?*, 134 HARV. L. REV. 265, 279 (2020) ("Textualism turns out not to be a coherent, unified theory.").

[44] Scalia, *supra* note 7, at 17; *see* Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2208–11 (2017) (elaborating on the same point).

this the *promulgation principle*.[45] Second, textualists believe that courts are obligated to take valid statutes as they find them, rather than seeking to improve upon them in the course of giving them effect. "Congress can enact foolish statutes as well as wise ones," Justice Scalia continued, "and it is not for the courts to decide which is which and rewrite the former."[46] For, again, "[i]t is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is."[47] Call this the *fidelity principle*.[48] Taken together, the two principles hold that Congress makes law only by formally enacting texts (promulgation) and that judges ought to faithfully apply the law thereby created (fidelity).

Over the past few decades, these basic theses have been elaborated and defended in many ways. For example, an important strand of textualist thought stresses that legislation often embodies a bargained-for compromise among legislators with competing aims, and that for this reason the statutes that emerge may not entirely square with the purposes of any of the individual legislators. Requiring courts to adhere to the promulgated text, even when it seems obvious that some deviation would better serve the aims of some or all lawmakers, preserves for members of Congress the opportunity to specify a compromise that they can trust will be honored rather than revised.[49] Relatedly, this kind of fidelity leaves to Congress the higher-order choice of how to allocate institutional authority for solving a given problem: Congress can leave discretion to courts by using conspicuously open-ended, purposive language, but it can also choose to resolve a matter itself by using more

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[45] For statements of the same principle, see, for example, *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020) ("Only the written word is the law . . . ."); *United States v. Mitra*, 405 F.3d 492, 495 (7th Cir. 2005) (Easterbrook, J.) ("Legislation is an objective text approved in constitutionally prescribed ways; its scope is not limited by the cerebrations of those who voted for or signed it into law."); and Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 CASE W. RSRV. L. REV. 855, 868 (2020) ("Even if we could know that Congress's current silence on a particular statutory question meant that it wholeheartedly endorsed a court's interpretation of that statute, that approval is not the standard by which the Constitution confers legal effect."). *See also* Siegel, *supra* note 43, at 120–21 (describing a like proposition as textualism's "formalist axiom" and "prime directive").

[46] Scalia, *supra* note 7, at 20.

[47] *Id.* at 22.

[48] *See, e.g.*, Frank H. Easterbrook, *The Supreme Court, 1983 Term — Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984) ("Judges must be honest agents of the political branches."); *see also* Lawrence B. Solum, *Disaggregating* Chevron, 82 OHIO ST. L.J. 249, 265 (2021) (positing a textualist commitment, termed "The Textual Constraint Principle," that holds that "[t]he legal effect of a statute ought to be consistent with, fully expressive of, and fairly traceable to the plain meaning of the statute (subject to the constraints and modification introduced by other valid laws)" (footnotes omitted)).

[49] *See* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 63–64 (1988); John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 96–110 (2006); Doerfler, *supra* note 7, at 1039–40; *see also In re* Erickson, 815 F.2d 1090, 1094 (7th Cir. 1987) (Easterbrook, J.) ("Finding the meaning of a statute is more like calculating a vector (with direction and length) than it is like identifying which way the underlying 'values' or 'purposes' point (which has direction alone).").

determinate wording.[50] Many textualists also believe that fidelity to the promulgated text can reduce the actual or perceived role of judges' policy preferences in their decisionmaking[51] and will promote predictability and clear notice for regulated parties.[52]

But if all of this suggests that courts should faithfully interpret and apply the promulgated law — that they should show "fidelity to the text as it is written"[53] — it remains to ask what any given text, as it is written, *means*. Sophisticated textualists appreciate that a text is just an assemblage of signs, and that talk of fidelity to "the text itself" can thus only be a figure of speech; the real object of fidelity is some *content* that a text is used or understood to convey.[54] What content ought to count from a textualist point of view?[55]

Most modern textualists answer that the relevant content is what a certain kind of reasonable reader would take a lawmaker who promulgated the statute to have said (or, perhaps, to have intended to say).[56]

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[50] *See, e.g.*, Milner v. Dep't of the Navy, 562 U.S. 562, 571 n.5 (2011) ("[N]othing in FOIA either explicitly or implicitly grants courts discretion to expand (or contract) an exemption . . . . The judicial role is to enforce th[e] congressionally determined balance rather than . . . to assess case by case . . . whether disclosure interferes with good government."); Manning, *supra* note 49, at 99 ("Giving precedence to semantic context (when clear) is necessary to enable legislators to set the level of generality at which they wish to express their policies. In turn, this ability alone permits them to strike compromises that go so far and no farther."); Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 284 (7th Cir. 1990) (en banc) (Easterbrook, J., dissenting) ("But whether to have rules (flaws and all) or more flexible standards (with high costs of administration and erratic application) is a decision already made by legislation.").

[51] *See, e.g.*, Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 63 (1994); Grove, *supra* note 43, at 303–07.

[52] *See* Barrett, *supra* note 44, at 2201–05, 2208–09; Doerfler, *supra* note 7, at 1018–20.

[53] Barrett, *supra* note 45, at 856; *see also* Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 476 (1992) ("The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written.").

[54] *See, e.g.*, Easterbrook, *supra* note 51, at 61; Manning, *supra* note 49, at 75. For a helpful explication of the conceptual distinctions between a text, its meaning, and the law to which it gives rise, see Mitchell N. Berman, *The Tragedy of Justice Scalia*, 115 MICH. L. REV. 783, 786–87, 796–99 (2017) (book review).

[55] *Cf.* Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217, 241–50 (Andrei Marmor & Scott Soames eds., 2011) (arguing that there are several different communicative or linguistic contents that, if one views legislation as communication, represent candidates for a statute's contribution to the law); RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 47–82 (2018) (similar).

[56] Two clarifications are in order. First, our reference to a generic lawmaker (rather than to Congress) reflects the fact that multi-member legislatures may lack meaningful collective intentions (a point stressed by many textualists). *See* Doerfler, *supra* note 7, at 998; John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 434 (2005); *see also* Mark Greenberg, *Legal Interpretation and Natural Law*, 89 FORDHAM L. REV. 109, 117 (2020) ("A central textualist tenet, remember, is that there are no coherent and discoverable legislative intentions of the sort that would be needed to resolve controversial issues in statutory and constitutional interpretation."). When we do refer below to what "Congress" intended, readers who take that skeptical view should understand us to be speaking in something like the "fictionalist" terms elaborated by Ryan Doerfler. *See*

We will call this third commitment the *reasonable reader principle*.[57] Rendering this principle more determinate raises a number of complexities, but for now, the key point is a simple and familiar one: the communicative content that a reasonable reader would impute to the statute may differ from the legal rule that legislators actually intended to impose when they voted for the bill. Indeed, that gap is what gives textualism its bite. The classic example is *Church of the Holy Trinity v. United States*.[58] When Congress prohibited any U.S. person from bringing a foreigner into the United States "to perform labor or service of any

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Doerfler, *supra* note 7, at 983, 1022–31 (arguing that "interpreters of statutes should accept the pretense that statutes have some singular author," *id.* at 983); *see also* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1116 (2017) ("We read a statute *as if* it had been written by a sole legislator . . . ."). *But see* Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 288–94 (2019) (critiquing efforts to posit constructed or objective communicative contents for purposes of statutory interpretation).

Second, in the interest of simplicity, we will not generally distinguish between *assertive* content (or, as it is sometimes put, "what is said") and the broader category of *communicative* content, which also includes content that is implicated but not asserted. *See, e.g.*, 1 SCOTT SOAMES, *Drawing the Line Between Meaning and Implicature — And Relating Both to Assertion*, *in* PHILOSOPHICAL ESSAYS 298, 300–03 (2008); *see also* BRIAN G. SLOCUM, ORDINARY MEANING: A THEORY OF THE MOST FUNDAMENTAL PRINCIPLE OF LEGAL INTERPRETATION 148–52 (2015) (discussing contrasting views of "what is said"). Technically minded textualists who recognize this distinction tend to focus on assertive content, but many do not draw the distinction at all — and we do not think it is material to any of our arguments here — so we will simply refer to "communicative content." (For instructive discussions of the distinction in the legal context, see ANDREI MARMOR, THE LANGUAGE OF LAW 19–34 (2014); and Greenberg, *supra* note 55, at 246–48.) In addition, we will use "communicative content" in the objective sense here, *see, e.g.*, Greenberg, *supra* note 55, at 231, but we still sometimes speak of "the communicative content that a reasonable reader would impute" despite the arguable redundancy that results. All of the same substantive claims could be reformulated in terms of a subjective definition of "communicative content" instead. *Cf.* Benjamin Eidelson, *Dimensional Disparate Treatment*, 95 S. CAL. L. REV. 785, 842–44, 843 n.241 (2022) (defining "communicative content" in terms of actual communicative intentions and formulating textualism in terms of reasonably imputed communicative content).

[57] For invocations of this idea, see, for example, SCALIA & GARNER, *supra* note 3, at 16; Easterbrook, *supra* note 49, at 65; Tara Leigh Grove, *Testing Textualism's "Ordinary Meaning,"* 90 GEO. WASH. L. REV. 1053, 1066–73 (2022); Manning, *supra* note 49, at 75; and Manning, *supra* note 56, at 424. The "reasonable reader principle" can be understood as a particular specification of what we termed the "promulgation principle" above: the promulgation principle holds that Congress makes $x$ the law only by formally enacting a statute to that effect; and the reasonable reader principle specifies what makes it the case that a given statute is "to that effect" in the relevant sense. *Cf.* MARMOR, *supra* note 56, at 115–17 (positing that textualists "define the assertive content of an utterance in a given context by reference to what a reasonable hearer, sharing the relevant contextual background, would infer about the intended content of the utterance in the context of its expression," *id.* at 116); Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 2012 n.172 (2021) (proposing that the reasonable reader be understood merely as a "heuristic").

[58] 143 U.S. 457 (1892); *see, e.g.*, Scalia, *supra* note 7, at 18–23. Because we are just using the canonical textualist account of *Holy Trinity*'s wrongness as a way of bringing out modern textualism's central ideas, it does not really matter for our purposes whether the case-specific premises of that canonical analysis are right or wrong, and we thus do not consider any revisionist attempts to justify *Holy Trinity*'s result on textualist terms.

kind,"[59] some or all members of Congress might have intended to ban only the hiring of *manual* laborers from abroad. But because the statute said what it said, textualists explain, any legislators with that limited aim evidently "overlegislated."[60] The possibility that Congress employed "labor or service of any kind" in an idiosyncratic sense is ruled out by the premise that Congress was trying to communicate with a reasonable reader (or by the roughly equivalent premise that the statute's communicative content should be discerned from such a reader's point of view).[61] And given that understanding of the prohibition that Congress actually established, the fidelity principle bars a judge from rewriting the statute so as to cover only the evils that the judge thinks Congress really intended, or ought to have intended, to address.

*2. Hard Cases and "Ambiguity."* — This repudiation of *Holy Trinity*–style reasoning illustrates the essence of what John Manning terms "second-generation" textualism: "[J]udges in our system of government have a duty to enforce *clearly worded* statutes as written, even if there is reason to believe that the text may not perfectly capture the background aims or purposes that inspired their enactment."[62] To this extent, moreover, "textualism" is now largely uncontroversial.[63] But what about cases where the communicative content of the statute is not so straightforward? Read one way, formulations such as Manning's might suggest that textualism has little to say about statutes that are not

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[59] *Holy Trinity*, 143 U.S. at 458.

[60] Scalia, *supra* note 7, at 21. As Andrei Marmor observes, "[t]he move from the reasons for saying something [to] what is actually said is a matter of fact, not a logical inference; speakers, including legislatures, of course, can fail to actually say what they really should have said given their purposes or aims." MARMOR, *supra* note 56, at 32; *see also* SCOTT SOAMES, *Interpreting Legal Texts: What Is, And What Is Not, Special About the Law*, *in* 1 PHILOSOPHICAL ESSAYS 403, 416 (2008) ("There is, after all, a distinction between *what one actually says* in a given context, and *what one would say*, if one considered things more carefully.").

[61] *Cf.* LEWIS CARROLL, *Through the Looking-Glass*, *in* THE COMPLETE WORKS OF LEWIS CARROLL 208, 214 (1936) ("'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.'"); *see also* Barrett, *supra* note 44, at 2203 ("[T]extualists presume that Congress communicates with the regulated according to the conventions that the two share as skilled users of English."); Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1613 (2012) ("[Scalia:] [A]ll we can know is that they voted for a text that they presumably thought would be read the same way any reasonable English speaker would read it.").

[62] John F. Manning, Festschrift, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1290 (2010) (emphasis in original). Other illuminating discussions of textualism's evolution include Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1848–54 (2016); Molot, *supra* note 43, at 23–48; and Siegel, *supra* note 43, at 123–30.

[63] *See, e.g.*, Universal Health Servs., Inc. v. United States, 136 S. Ct. 1989, 2002 (2016) ("[P]olicy arguments cannot supersede the clear statutory text."); *see also* Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 524–25 (2018); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 114 (2012); *cf.* Fallon, *supra* note 56, at 318 (arguing that, for reasons "involving the moral legitimacy of law and the judicial role," "courts . . . should attach great and often controlling significance to broadly shared linguistic intuitions").

"clearly worded" in the first place.[64] Indeed, Manning and others have observed that "when modern textualists find a statutory text to be ambiguous, they believe that statutory purpose — if derived from sources other than the legislative history — is itself a relevant ingredient of statutory context."[65] Significantly for our purposes, such a restricted textualism might open the door for substantive canons as well, at least when the text is less than pellucid.[66]

But we do not understand the jurists and theorists most prominently associated with textualism to take the modest view suggested by the most concessive reading of these provisos. To clarify textualists' commitments, it will help to consider three different circumstances in which a statute might be deemed "unclear" or "ambiguous" and to observe how textualists characteristically approach each.

First, statutory language is sometimes "unclear" in the sense that it expresses a conspicuously vague or open-textured concept. Consider, for instance, the provision of the Patent Act that imposes liability on those who supply "a substantial portion" of the components of a patented invention for assembly abroad.[67] No reasonable reader would think that a lawmaker who gave that directive intended thereby to provide a determinate instruction as to whether liability should follow from each possible fraction. (Because any sane lawmaker would recognize that their chosen language could not do that, they could not have used that language with the intention that it would do so.) So, insofar as textualist provisos about "clarity" or "ambiguity" are meant to acknowledge the role for textually undetermined judgment in these sorts of cases, those provisos are not really qualifying textualism's core theses at all. To the contrary, textualists who draw on extratextual resources to resolve these cases of blatant underdeterminacy — a task now often denominated "construction," as distinct from "interpretation"[68] — are just being faithful textualists. They are taking the lawmaker's use of

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[64] *See* Molot, *supra* note 43, at 35 ("[E]ven the most committed textualists have openly acknowledged that text can be ambiguous, that judges must read statutes in context, and that statutory purposes merit consideration in at least some cases.").

[65] Manning, *supra* note 49, at 75–76. On the distinct grounds of textualist resistance to legislative history, see, for example, *id.* at 84 & n.52; Doerfler, *supra* note 7, at 1031–34; and Grove, *supra* note 43, at 273–74.

[66] *See* Grove, *supra* note 43, at 287 ("To the extent that a statute is ambiguous, one can perhaps justify these canons as a way of resolving the ambiguity; textualists, after all, acknowledge that many sources may be relevant to decoding an ambiguous text.").

[67] 35 U.S.C. § 271(f)(1); *see* Life Techs. Corp. v. Promega Corp., 137 S. Ct. 734 (2017).

[68] The leading contemporary expositor and proponent of this distinction is Lawrence Solum. *See, e.g.*, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013); *see also* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 3–9 (1999) (describing "construction" as operating "in the interstices of discoverable, interpretive meaning" in order to produce "legal rules"); Baude & Sachs, *supra* note 56, at 1128–32 (summarizing recent debate over the proper place of construction). For a summary of the relevant intellectual history, see Solum, *supra*, at 467–69.

blatantly indeterminate language as its own "crucial signal about the choice of means" that the lawmaker made.[69]

Second, some cases present a court with language that is apparently intended as precise, but that in fact might bear either of two (or more) meanings. *Limtiaco v. Camacho*[70] offers a good illustration.[71] That case concerned the Guam Organic Act, which caps Guam's indebtedness at ten percent of "the aggregate tax valuation of the property in Guam."[72] Did "tax valuation" here refer to the *appraised* value of property (that is, its market value) or to its *assessed* value (as determined by local tax law)?[73] In contrast to the Patent Act provision discussed above, here it seems clear that a speaker would have meant something specific by "tax valuation"; they would not have meant the words to express some general concept that might later be concretized in either of the two ways. And, tellingly, the Court's avowed textualists opted for the "assessed value" reading on the ground that it was the "most natural[]" linguistic fit — even though they agreed that the statutory term "has no established definition,"[74] and even though the dissenters (who found the case a "coin toss"[75] on the text) advanced powerful arguments that using assessed value ill served the statute's purpose.[76] In other words, the Court's textualists resolved *Limtiaco* in much the same way that they would have resolved *Holy Trinity*, even though they recognized that the linguistic import of the text in *Limtiaco* was much less clear cut.

We think this approach is characteristic of modern textualist jurists and fits naturally with their foundational commitments. By the same token, we think that *Limtiaco* and similar cases caution against overreading textualists' provisos confining the duty to follow the text's linguistic import to "clearly worded" statutes.[77] Leading textualists do not generally treat those provisos as relevant when faced with statutory language that, in their view, Congress *intended* to be determinate, even

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[69] Manning, *supra* note 62, at 1310–11; *cf.* Barrett, *supra* note 28, at 123 (suggesting that "[s]tatutory ambiguity is essentially a delegation of policymaking authority to the governmental actor charged with interpreting a statute"); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (distinguishing between cases in which "Congress intended a particular result, but was not clear about it," and those in which "Congress had no particular intent on the subject, but meant to leave its resolution to the agency").

[70] 549 U.S. 483 (2007).

[71] Jonathan Siegel has highlighted *Limtiaco* as an instructive example of textualists' formal commitments at work. *See* Siegel, *supra* note 43, at 157–61.

[72] 48 U.S.C. § 1423a.

[73] *See Limtiaco*, 549 U.S. at 485.

[74] *Id.* at 489.

[75] *Id.* at 492 (Souter, J., concurring in part and dissenting in part).

[76] *See id.* at 495–96. Because assessed value depends on the assessment rate set by local law, Guam could effectively raise any debt ceiling pegged to assessed value by simply increasing the assessment rate and reducing the tax rate to compensate — which is just what Guam did in the wake of the Court's decision. *See* Siegel, *supra* note 43, at 159–60.

[77] For a few other examples of textualist opinions that support this generalization, see *infra* note 81.

if Congress failed to express its instructions clearly.[78] Most notably, textualist interpreters do not look to Congress's substantive policy objectives for guidance in such cases — perhaps because Congress's apparent intention to speak clearly implies that it cannot be taken to have relied on any mutual understanding of those objectives to convey whatever content it intended.[79] In this sort of case, in other words, the lawmaker's worldly purposes (or other elements of "policy context"[80]) might speak to what they *should have* said, but, in light of the style of communication in which the lawmaker clearly signaled an intent to engage, those purposes cannot displace an otherwise-better candidate for what the lawmaker actually did say.[81]

Third (and finally), an intermediate kind of case presents a court with more modestly indefinite or polysemous language — language more like "vehicle" or "attorney's fee" than either "substantial" (on the one hand) or "tax valuation" (on the other). Justice Scalia's discussion of the classic "no vehicles in the park" hypothetical helpfully illustrates the prevailing textualist thinking here.[82] The judge's task in this case,

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[78] We do not mean to deny that, even in cases of this sort, textualists will look beyond a statute's text to its apparent purpose — very minimally described — if doing so will allow them to resolve what linguists would term a "lexical ambiguity." This sort of disambiguation is often so straightforward that it verges on automatic; in many cases, the relevant "word" could equally be described as a group of words that just happen to be spelled in the same way. *See, e.g.*, MARMOR, *supra* note 56, at 30, 120; *see also* SCALIA & GARNER, *supra* note 3, at 56 ("The subject matter of the document (its purpose, broadly speaking) is the context that helps to give words meaning — that might cause *draft* to mean a bank note rather than a breeze.").

[79] This line of thought is in the spirit of Manning's refrain that "if the text speaks clearly, courts must respect that signal," Manning, *supra* note 62, at 1315, but it recognizes that only Congress's apparent intention to speak clearly (not the extent of its success) could constitute a deliberate "signal" by Congress in the first place. *See also* Nelson, *supra* note 43, at 415 ("At least in the absence of other clues, textualists tend to presume that when the enacting legislature formulates a directive in relatively rule-like terms, it means that formulation to carry forward despite the possibility of unforeseen circumstances.").

[80] Manning, *supra* note 49, at 92–96.

[81] *Cf.* MARMOR, *supra* note 56, at 33 ("Legislatures are aware of the fact that they need to convey the legal content that they want to convey to a large and diverse audience, they know that the exact formulation of the law will be subject to close scrutiny by lawyers and the courts, and they know that the conversational context of the legislation is relatively opaque. Therefore, it should come as no surprise that what the law says is, much more frequently than not, exactly what the words and sentences used literally mean . . . ."). For essentially this reason, we think that the minority positions in *Bond v. United States*, 572 U.S. 844 (2014); *Yates v. United States*, 574 U.S. 528 (2015); and *King v. Burwell*, 576 U.S. 473 (2015), were probably all correct by textualist lights — data points that we offer simply to help the reader zero in on our understanding of how textualism works.

[82] *See* SCALIA & GARNER, *supra* note 3, at 36–39. We focus on Justice Scalia in the text, not to slight his coauthor, but because it is Justice Scalia's authorship that justifies our treatment of the book as a window into the thinking of leading textualists. And, to be clear, we are setting out the following analysis of the "vehicles" case by way of reconstructing textualists' thinking on their own terms; we are not endorsing the substance (or, for that matter, even the ultimate coherence) of their analysis. For a rich discussion of the example itself — "the most famous hypothetical in the common law world" — see Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1109 (2008).

he said, is to settle on "a selection from among the permissible meanings of *vehicle*."[83] Significantly, Justice Scalia thought that doing so required the judge to consider "[t]he context of the [ordinance] here at issue, which includes its *purpose* of excluding certain things from the park — presumably things that would otherwise commonly be introduced."[84] According to Justice Scalia, that purposive inference explains why "vehicles" in the sense of "substances used as mixing media" should not be deemed covered.[85] Looking to dictionaries and their own sense of colloquial usage, Scalia and his coauthor ultimately concluded that the best interpretation of "vehicle" in this context is "sizable wheeled conveyance."[86] So "airplanes, bicycles, roller skates, and toy automobiles" are allowed into the park; "ambulances, golf carts, mopeds, [and] motorcycles" are not; and Segways pose the rare close case.[87]

We take two related lessons from this discussion. First, faced with what is usually thought to be a paradigm case of uncertainty or indeterminacy, Justice Scalia maintained that textualism yields a bevy of determinate results.[88] Interpreting the park ordinance may not be "easy," he said, but "the relevant line of inquiry is pretty straightforward" and "judges who use [his] method will arrive at fairly consistent answers."[89] Second, Justice Scalia did *not* think that the uncertainty about the ordinance's contours invited or authorized a judge to consider which interpretation would better serve what he called the lawmaker's "more general" purposes, such as quiet or safety.[90] To be sure, Scalia did consider what he called the "textually apparent purpose" of the ordinance.[91] But he defined that purpose as minimally as possible, and he used it only as a guide to settling on an apt, across-the-board understanding of "vehicle."[92] He did not look to "*why* things are excluded"[93] in order to decide, on a case-by-case basis, which particular objects should be deemed "vehicles" in the relevant sense.[94]

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83 SCALIA & GARNER, *supra* note 3, at 39.

84 *Id.* at 37.

85 *Id.*

86 *Id.* (emphasis omitted).

87 *Id.* at 38.

88 *See, e.g.*, Schauer, *supra* note 82, at 1125–27 (discussing H.L.A. Hart's use of the example to show that "for many or even most rules we can, even at the time of drafting, imagine that there will be hard cases as well as easy ones," *id.* at 1126).

89 SCALIA & GARNER, *supra* note 3, at 36.

90 *Id.* at 34; *see id.* at 38–39.

91 *Id.* at 213; *see also id.* at 20 (formulating the same point in terms of "[t]he evident purpose of what a text seeks to achieve"); *id.* at 40 ("textually manifest purpose").

92 *See id.* at 33 ("[T]he purpose is to be gathered only from the text itself, consistently with the other aspects of its context."); *id.* at 34–35 (giving examples); *id.* at 56–57 (spelling out limitations on a textualist's consideration of purpose, including that "the purpose must be defined precisely, and not in a fashion that smuggles in the answer to the question before the decision-maker," *id.* at 56).

93 *Id.* at 38.

94 *See id.* at 38–39. For another helpful illustration, see Nelson, *supra* note 43, at 413–15.

Although we recognize the diversity within textualist thought, we think that Justice Scalia's approach here is representative of mainstream modern textualism and fits well with most textualists' avowed commitments.[95] Taking account of the "textually apparent purpose," but not more, makes sense if one presumes that Congress intends even readers who might not know of or agree about its larger goals to converge on a common understanding of what it has said.[96] This approach also honors the promulgation principle by refusing to collapse the objective meaning of the text with what any given interpreter thinks the legislators were really trying to do. Moreover, considering a statute's "textually apparent purpose" in discerning how a word or phrase was used does not seem to threaten legislators' ability to bargain confidently and see their decisions enforced. If anything, this sort of attention to context seems essential to reconstructing the bargain that they would have understood themselves to have struck.[97]

We do not want to overstate the point. "Textualism" can mean different things in the hands of different theorists and jurists, and some avowed textualists might reject the particular approach advocated by Justice Scalia in the "vehicle" case (or, for that matter, the approach taken in Justice Thomas's opinion for the Court in *Limtiaco*).[98] For example, Tara Leigh Grove has recently described a "flexible" brand of textualism that "authorizes interpreters to make sense of the statutory language by looking at social and policy context, normative values, and the practical consequences of a decision."[99] If that approach is accepted as a genuine form of textualism, then the view that we have in our sights might be singled out as "hard textualism" (or perhaps "formalistic

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[95] *See, e.g.*, Manning, *supra* note 49, at 91, 95–96 (suggesting, with respect to "the question of how best to attribute meaning to a text with a prima facie ambiguity," that relying on "semantic rather than policy context constitutes a superior means of fulfilling the faithful agent's duty to respect legislative supremacy").

[96] *Cf.* SCALIA & GARNER, *supra* note 3, at 19 ("Five judges are no more likely to agree than five philosophers upon the philosophy behind an Act of Parliament . . . ." (quoting PATRICK DEVLIN, THE JUDGE 15–16 (1979))). In fact, this presumed, second-order intention might give content to the otherwise-opaque notion of a "textually apparent purpose": perhaps a purpose is "textually apparent" when reasonable readers, taking the statute as addressed to reasonable readers, would recognize that apparent purpose as common knowledge. We will return to the role of such information in textualist thought (and in Justice Scalia's treatment of the "vehicle" example) when we offer our taxonomy of canons below. *See infra* p. 535.

[97] *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2378–79 (2023) (Barrett, J., concurring) (explaining that "[t]o strip a word from its context is to strip that word of its meaning" and that "[c]ontext also includes common sense").

[98] *Cf.* SCALIA & GARNER, *supra* note 3, at 16 ("In the broad sense, everyone is a textualist."); Grove, *supra* note 57, at 1066–73 (distinguishing between "formal" and "flexible" forms of textualism).

[99] Grove, *supra* note 43, at 286; *see id.* at 282–86. Grove does not endorse this approach. *See id.* at 290–91. In addition, some avowed textualists might — without incorporating all of the considerations that Grove lists — take a nonstandard view of how a reasonable reader approaches a legislative text. *See, e.g.*, Doerfler, *supra* note 7, at 997–98 (questioning "the textualist claim that, when interpreting a statute, one should prioritize so-called 'semantic context' over 'policy context'").

textualism").[100] But because we take the approach that we have described to represent the orthodox conception of textualism among most self-described textualists, particularly those on the bench, we will often refer to it simply as "textualism" as well.

Labels aside, the upshot of our discussion in this section is that, both in theory and in practice, textualists take their interpretive philosophy regularly to yield determinate answers even in hard cases (even if not in *all* such cases).[101] Textualists recognize that Congress sometimes legislates standards as well as rules, and that reading a statute with a view to its manifest purpose may be necessary to identify the content that a lawmaker intends a reasonable reader to take the text as conveying. Neither of these acknowledgments imposes a serious limitation on either the promulgation principle or the fidelity principle, however. They simply flesh out how, at least according to leading textualists, a "reasonable reader" approaches a statutory text. Even when a judge is faced with a "prima facie ambiguity,"[102] therefore, the judge's job remains to try to determine, as best as they can, how such a reasonable reader would understand the statute — a task that requires respecting the

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[100] The very "flexibility" of the philosophy that Grove describes might suggest that it is less a species of textualism than a kind of pluralism that mixes nontextualist considerations with textualist ones. *Cf.* Mitchell N. Berman & Guha Krishnamurthi, Bostock *Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 120–22 (2021) (suggesting that "[s]tatutory textualism, like standard versions of constitutional originalism, is a monistic thesis," whereas "[s]o-called purposivists are rarely monistic" and consider "original textual meaning" alongside other factors); Lawrence B. Solum, *Originalism Versus Living Constitutionalism*, 113 NW. U. L. REV. 1243, 1271 & n.106 (2019) (cataloging forms of pluralism). On the "formalistic textualism" label, see Grove, *supra* note 43, at 281–82; and Grove, *supra* note 57, at 1066–73.

[101] Consistent with that conclusion, several textualist jurists — including Justice Scalia, then-Judge Kavanaugh, and Judge Kethledge — have noted their own tendencies to find statutes "clear" more often than their nontextualist colleagues do. *See* Scalia, *supra* note 69, at 521; Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2137 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)); Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 323 (2017); *see also* Wooden v. United States, 142 S. Ct. 1063, 1075 (2022) (Kavanaugh, J., concurring) ("[I]f 'a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the [law] at issue.'" (second alteration in original) (quoting Kisor v. Wilkie, 139 S. Ct. 2400, 2448 (2019) (Kavanaugh, J., concurring in the judgment))). We recognize, however, that a significant strand of academic thought (more prominent in the constitutional context, but with purchase in statutory interpretation as well) claims a good deal less in the way of determinacy. *See, e.g.*, Lawrence B. Solum, *We Are All Originalists Now*, *in* CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 26 (2011) ("The original meaning of the Constitution goes only as far as linguistic meaning will take it. Whereof originalism cannot speak, thereof it must be silent."); *cf.* FALLON, *supra* note 55, at 139 (describing a "retreat from pretensions to determinacy" on the part of some originalists).

[102] Manning, *supra* note 49, at 92, 95; *see also id.* at 92 (suggesting that textualists "believe that a statute may have a clear semantic meaning, even if that meaning is not plain to the ordinary reader without further examination").

distinction between what Congress *actually* said and what Congress *ought* to have said in order best to advance any given substantive aim.[103]

### *B. Substantive Canons*

Although the idea of a "substantive" canon seems straightforward enough, common usage of the term has tended to run together two different ideas. On the one hand, substantive canons are often characterized as "policy-based presumptions."[104] But, on the other, it is also common to understand such canons as promoting "values external to a statute"[105] (in contrast to interpretive norms aimed at "decipher[ing] the legislature's intent"[106]). The problem is that these definitions do not necessarily come to the same thing. In fact, as we have seen already, a reader might make suppositions about the kinds of *policies* that a lawmaker is likely to pursue precisely in order to discern what the lawmaker intended the statutory *text* at hand to convey.[107]

Our purposes here require a definition that is somewhat more precise — and our account of textualism naturally suggests one.[108] For textualists, the obvious distinction to draw among putative canons is between those that are justified by their probative value with respect to a statute's *communicative content* — that is, by the light that they cast on what a reasonable reader would understand a lawmaker to have said — and those that are not.[109] We thus propose that a canon is "substantive" in the sense that is of interest here when it purports to speak

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[103] Put another way, "textualism limits the set of admissible arguments in hard cases: it confines judges to considering what a reasonable reader would have been most likely to infer that the legislature intended to assert rather than what the legislature 'really' intended to assert or which reading of the statute best advances its purpose or maximizes social welfare." Bill Watson, *Textualism, Dynamism, and the Meaning of "Sex*," 2022 CARDOZO L. REV. DE NOVO 41, 46.

[104] Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 924 (2013); *see also* MANNING & STEPHENSON, *supra* note 1, at 324 (describing such canons as "presumption[s] . . . in favor of or against a particular substantive outcome").

[105] Biden v. Nebraska, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring) (citing Barrett, *supra* note 28, at 117); *see also* Barrett, *supra* note 28, at 116 ("[T]he very point of a substantive canon is to protect a public value, sometimes at the expense of a statute's best reading."); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595–96 (1992) ("[S]ubstantive canons . . . represent value choices by the Court.").

[106] Barrett, *supra* note 28, at 117 & n.27; *see also* Baude & Sachs, *supra* note 56, at 1121.

[107] *See supra* notes 82–92 and accompanying text.

[108] We think this linkage is natural and perhaps inevitable: If canons are understood as factors or presumptions that weigh in favor of giving a statute one legal effect rather than another, then what one takes to represent an important cleavage among them will inevitably depend on what one takes to be the proper steps in determining a statute's legal effect in the first place. However, we certainly do not intend our definitions to do any contentious work in establishing the incompatibility of textualism and substantive canons. We will return to the implications of our definitions at the end of this section.

[109] *Cf.* Solum, *supra* note 48, at 290 n.105 (distinguishing between "canons of interpretation" and "canons of construction"); Baude & Sachs, *supra* note 56, at 1123–25 (proposing a related distinction "between linguistic and legal canons").

to a statute's proper legal effect in a way that is not mediated by its evidentiary bearing on what a reasonable reader would take a lawmaker to have said in enacting the statute.[110]

To make the meaning and implications of this definition clear, however, we will first need to distinguish not two categories, but four. Each of these captures one salient kind of reason why a judge might see fit to read a statute as a given canon prescribes (apart, that is, from any precedential weight held by the canon itself). Put another way, the four lines of thought that we will now distinguish amount to four different ways of justifying a canon in the first place. Because the first two of these justifications ground the canon's force in what it reveals about a statute's communicative content, they are not "substantive" in the sense that concerns us here (and so are not within the ambit of our critique). The final two types, however, *are* substantive — and, as we will see, each breaks with one of the central principles of textualism as we have described it.

*1. Inferences from Manner of Expression to Communicative Content.* — Consider, first, the assorted canons that are traditionally classified as "semantic" or "linguistic." What these canons most clearly have in common is that they speak to a statute's communicative content — to what a reasonable reader would take a statute to convey — *without* presuming anything about what the lawmaker was more or less likely to have intended the statute, once interpreted, to accomplish. That explains the widely shared sense that, as Justice Kagan once put it, these canons "formaliz[e] . . . intuitions" about "how *language* works and how the people who write things think that language works."[111] The presumption that a word or phrase bears the same meaning throughout a statute is a good example.[112] Regardless of the content that a lawmaker intends to convey, the lawmaker is (we might suppose) unlikely to express that content *in a way* that requires readers to assign different meanings to different instances of the same word. All else equal, a reasonable reader seeking to reconstruct the statute's

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[110] This formulation notably entails that the "same" canon can operate both substantively and nonsubstantively, either in different cases or even in the same case, if the *reasons for its legal force* vary in the relevant respects. The Court's suggestion in *West Virginia* that the major questions doctrine rests on "both separation of powers principles and a practical understanding of legislative intent" is an interesting example. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022); *see infra* notes 138–53, 221–33 and accompanying text.

[111] Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 36:01 (Nov. 25, 2015) (emphasis added), https://www.youtube.com/watch?v=dpEtszFToTg [https://perma.cc/5U2E-HNGL]; *see also* Kavanaugh, *supra* note 101, at 2160 n.203 (quoting same); Biden v. Nebraska, 143 S. Ct. 2355, 2376 n.1 (2023) (Barrett, J., concurring) (suggesting that "linguistic or descriptive canons," in contrast to substantive ones, "are designed to reflect grammatical rules . . . or speech patterns").

[112] *See* SCALIA & GARNER, *supra* note 3, at 170–73. Other "semantic" canons reflect other purported norms about legislative communication (or communication in general). *See, e.g.*, MARMOR, *supra* note 56, at 54–56; Berman, *supra* note 54, at 798; Doerfler, *supra* note 7, at 995.

communicative content should therefore favor interpretations that would show the statute to be consistent with this pattern. This "content-neutral" focus on how Congress is apt to express itself makes these canons safe for textualists and makes the "semantic" or "linguistic" moniker understandable (even if technically imprecise).[113]

*2. Inferences from Purpose to Communicative Content.* — Some canons trade on a richer body of contextual information than we have just described, but nonetheless remain aimed at deciphering the communicative content that a reasonable reader would take a statute to bear (rather than, say, at discerning the disposition of a case that the lawmaker would have favored). To get a fix on this intermediate category, consider again Justice Scalia's supposition that the park ordinance was supposed to exclude "vehicles" in the sense of conveyances rather than of mixing media.[114] He explained that this follows from the ordinance's apparent "*purpose* of excluding certain things from the park — presumably things that would otherwise commonly be introduced."[115] Indeed, he observed, "[t]here is no more reason to address intrusion into the park of mixing media than to address intrusion of elephants."[116] Now, we are taking as a fixed point that this reasoning is permissible from a textualist point of view. But it is plainly not true that the purpose Scalia imputed here is entirely "derived from the text, not from extrinsic sources such as . . . an assumption about the legal drafter's desires."[117] After all, a lawmaker certainly could intend to guard against a rare occurrence rather than a "common[]" one; nothing in the text favors one assumption over the other. And even granting Justice Scalia's assumption on that point, there is no basis in the text for supposing that mixing media are *not* commonly introduced into parks. So the lesson of Justice Scalia's discussion is that the textualist's reasonable reader must bring some general background knowledge — not just about language use, but also about lawmakers and even about parks — to the interpretive inquiry.

When a canon trades on that sort of information — information about what lawmakers are likely to be trying to accomplish in the world, rather than about how they are likely to express themselves in pursuing whatever worldly aims they may have — the canon is not aptly labeled

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[113] As noted earlier, in linguistic and philosophical terms, the content on which these inferences shed light is generally pragmatic, not semantic. *See, e.g.*, Doerfler, *supra* note 7, at 995; *see also supra* note 2. Throughout this Article, however, we use "semantic" in the fuzzier sense that has prevailed in the statutory interpretation literature. (In fact, what we have just offered is one way of making that fuzzier notion more precise.) For a note on our approach to technical terms in general, see *supra* note 42.

[114] *See supra* notes 82–94 and accompanying text.

[115] SCALIA & GARNER, *supra* note 3, at 37.

[116] *Id.*

[117] *Id.* at 56. For explanations of the inevitable dependence of judgments of meaning on judgments of purpose, see Doerfler, *supra* note 7, at 992–94, 996–97; and Baude & Sachs, *supra* note 56, at 1144–45.

"semantic" or "linguistic." But neither is such a canon inherently "substantive" in the sense that concerns us here, since it may aim only to decipher what the lawmaker is best understood to have said, rather than what the lawmaker *ought* to have said to best further its purposes. Such canons are compatible with textualism so long as the background information on which they trade is of the sort that the textualist's reasonable reader, rightly understood, possesses (and would take the lawmaker to have known they would possess as well).[118] The presumption against extraterritoriality is one plausible example of a canon of this kind.[119] We will return to this type of canon (and say more about that possible example) shortly, because one natural way for textualists to accommodate some canons that are traditionally thought substantive is to recast them as falling in this nonsubstantive, nonsemantic category instead.

*3. Intended Effects.* — A third type of canon — which *is* substantive — favors statutory interpretations thought to accord with Congress's usual preferences or intentions regarding the effects of the statutes it enacts. Consider, for example, the *Charming Betsy* canon, which favors interpretations of statutes that would put them on the right side of international law.[120] Under one influential conception of this canon, it "does not claim that Congress considered international law in enacting the statute, just that Congress would not have wanted to violate international law if it had considered it."[121] That is a claim about the effects that Congress would have wanted a statute to have, not a claim about what a reasonable reader would think Congress actually said (or even intended to say) in enacting the text at issue. Even if the claim undergirding the canon were true, therefore, the promulgation and reasonable reader principles would rule it out of bounds as a consideration relevant to a textualist's statutory interpretation. As Justice Scalia would put it, "we are governed by what the legislators enacted, not by the purposes they had in mind"; "[w]hen what they enacted diverges from what they intended, it is the former that controls."[122]

*4. Superimposed Values.* — Finally, a second and distinct type of substantive canon simply favors interpretations that the *court* deems more consistent with some important value, regardless of whether that fact might support a further inference that *Congress* would therefore have favored those interpretations. For instance, some interpreters might endorse the *Charming Betsy* canon on the straightforward ground

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118 *See, e.g.*, MARMOR, *supra* note 56, at 30 ("[A]ssertive content is enriched by contextual factors that are common knowledge between speaker and hearer. Only factors that parties to the conversation are aware of or take for granted can contribute to the inference of pragmatically enriched content.").

119 *See infra* p. 539.

120 Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

121 Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 495 (1998) (describing this argument).

122 Scalia & Manning, *supra* note 61, at 1612.

that compliance with international law is, in their view, a good thing. In fact, many canons appear to rest on this sort of justification, from the rule of lenity (which is often justified simply as promoting fairness)[123] to the major questions doctrine (which has been justified partly on the basis of the "separation of powers principles" that it allegedly serves).[124] When canons are justified in this way, their force is independent of whether or how much *Congress* actually values the principles at issue. Therefore, deploying a canon justified in this way would seem a blatant breach of the fidelity principle. If textualists have been clear about anything, it is that a judge's job is to give effect to the law that Congress actually made, not to improve upon it.[125]

### *C. The Problem Restated*

The upshot of our discussion thus far is straightforward: When canons are justified in the ways that warrant dubbing them "substantive," they appear flatly at odds with textualism as commonly practiced and traditionally justified. Although we think this conflict has received too little attention, we readily acknowledge that several textualists have grappled with just this concern.[126] As then-Professor Barrett summarized the problem in her 2010 article:

> Substantive canons are in significant tension with textualism . . . . [When a] judge applying a substantive canon . . . exchanges the best interpretation of a statutory provision for a merely bearable one . . . [,] she abandons not only the usual textualist practice of interpreting a statute as it is most likely to be understood by a skilled user of the language, but also the more fundamental textualist insistence that a faithful agent must adhere to the product of the legislative process, not strain its language to account for abstract intention or commonly held social values.[127]

In short, we agree.

The question then becomes whether there is any way out of this dilemma. Before turning to that question in earnest, however, we should make explicit what is probably already obvious: our definitions of textualism and of substantive canons entail that deploying a genuinely substantive canon *cannot* comport with unadulterated textualism. To be "substantive," we have suggested, just *is* to bear on something other

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[123] *See, e.g.*, SCALIA & GARNER, *supra* note 3, at 296.

[124] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022). We will consider the defense of substantive canons as "constitutionally inspired" in detail below. *See infra* Part III, pp. 558–77. For now, note that a canon that militates in favor of a *constitutional* value (such as the "separation of powers") is still militating in favor of a "superimposed" value in the sense relevant to our taxonomy: The force of the canon does not depend on the strength of any inference about Congress's intentions or preferences, let alone about the communicative content of the statute it enacted.

[125] *See, e.g.*, SCALIA & GARNER, *supra* note 3, at 57 (condemning those who would "provide the judge's answer rather than the text's answer to the question" or "decide what the statute should mean . . . rather than . . . what the text itself says").

[126] For several relevant discussions (by textualists and others), see sources cited *supra* note 28.

[127] Barrett, *supra* note 28, at 123–24.

than the meaning that a reasonable reader would impute to the text — and "textualists," we have also said, are committed precisely to the notion that judges must faithfully seek to reconstruct that meaning in statutory cases. Because we do not want to define the debate away, we have to be alert to the possibility that what is in substance a reconciliation of textualism and substantive canons will look less like a means of dissolving this conflict and more like a way of circumventing it.

And, indeed, the proposed reconciliations that we will entertain in the balance of this Article all respond to the dilemma in much that way. The first possibility, stated broadly, is that some or all of the canons that are commonly denominated "substantive" actually *do* speak to how a reasonable reader would understand what Congress said; they are thus not "substantive" in our sense at all, and textualists are within their rights to employ them. A second argument concedes the substantive quality of many substantive canons, and perhaps even their inconsistency with textualism as such, but defends many of them as legitimate *exceptions* to textualism — exceptions that are justified on constitutional grounds. And a third possible reconciliation likewise suggests that at least some substantive canons — now the "ambiguity-dependent" ones — operate outside textualism's domain. Over the next three Parts, we assess each of these possibilities in turn.

## II. "SUBSTANTIVE CANONS" AS NONSUBSTANTIVE CANONS

The idea that substantive canons could be recast in nonsubstantive terms comes in two basic forms. Both versions of the argument claim that these canons (or at least some of them) actually capture how a reasonable reader would understand the *content* of a lawmaker's communication. But they differ in why they take this to be the case — specifically, in the direction of the causal arrow that they would draw between the canons and the meaning of a lawmaker's speech. According to one story, the canons simply distill general background knowledge about how lawmakers would naturally tend to express themselves, at least when they intend to convey certain content; the canons would thus speak to a statute's communicative content *even if that statute had been enacted in a canon-free world*. According to the other account, the canons enjoy a kind of bootstrapped validity: they are probative of a statute's communicative content precisely because, and to the extent that, their very existence can be presumed to have shaped that communicative content.

Of course, these ideas are not mutually exclusive, and in practice they often come bundled together. For purposes of analysis, though, it proves important to tease them apart. We will thus take each in turn.

### *A. Canons as Guides to the "Natural" Meaning of Legal Texts*

"[T]he good textualist is not a literalist"; they understand that the meaning of a statutory text depends on what, in context, a reasonable person would think a lawmaker had said.[128] As we have already seen, moreover, the textualist's reasonable reader makes that judgment armed with the sort of background knowledge that might loosely be described as common sense. This opens the door to recasting some seemingly substantive canons as simply default inferences that a reasonable reader would draw — not about what Congress intended a statute to do (either to the world or to the law), but about what, given a commonsense understanding of Congress's aims, Congress should be understood to have said.[129]

The presumption against extraterritoriality is a possible example.[130] Statutes often say that it shall be unlawful for "any person" to perform a particular act, or that "whoever" performs the act shall be punished. Read literally, these sentences pertain equally to all people who perform the act in question, everywhere in the world. Yet it is common to interpret this language not to reach conduct outside the United States. Imposing this limitation might seem at odds with textualism — an instance of narrowing a broadly worded statute to capture only the results that, one imagines, Congress would really have favored.[131] But the application of the canon here need not be understood in that way. In ordinary speech, the practical context in which an assertion is made often tacitly restricts its domain. For example, if a store manager posts a sign that says "Everything Is On Sale," they are asserting that all of the *goods* that are *displayed in the store* are on sale — not that the cash register

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[128] Scalia, *supra* note 7, at 24.

[129] For arguments of this general kind, see, for example, *id.* at 29 ("Some of the rules, perhaps, can be considered merely an exaggerated statement of what normal, no-thumb-on-the-scales interpretation would produce anyway. For example, since congressional elimination of state sovereign immunity is such an extraordinary act, one would normally expect it to be explicitly decreed rather than offhandedly implied — so something like a 'clear statement' rule is merely normal interpretation."); and Baude & Sachs, *supra* note 56, at 1108 ("The rule against 'elephants in mouseholes' just applies our ordinary pragmatic maxims of conversation." (footnote omitted)). Given our aims here, we will note but not dwell on the question of which of these considerations are best understood to bear on assertive content (or "what is said") and which go instead to what is communicated only via an implicature. *See supra* note 56. Insofar as some may only amount to implicatures, however, their relevance depends on the further premise that total communicative content, and not merely assertive content (or what is said), bears on textualist interpretation. *See* Greenberg, *supra* note 55, at 245–48 (mapping and critiquing possible resolutions of this issue).

[130] *See* Nelson, *supra* note 43, at 390; Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 1011 & n.251 (2021).

[131] *Cf.* SCALIA & GARNER, *supra* note 3, at 101–03 (inveighing against such narrowing (in general, not in the specific context of extraterritoriality), and insisting that "[g]eneral terms are to be given their general meaning," *id.* at 101).

or the shelves are, and not that goods in other stores are either.[132] Perhaps the communicative content of a lawmaker's stipulations is similarly restricted by default to the lawmaker's territorial jurisdiction. In other words, perhaps the reasonable reader simply understands that, given what are mutually understood to be the ordinary concerns or objectives of lawmakers, this restricted context is the one "under discussion" when Congress speaks about what is allowed or forbidden.[133] Although this requires a supposition about lawmakers' typical purposes, that supposition does not seem different in kind from the assumption, noted above, that lawmakers intend to exclude from parks items that would otherwise be commonly introduced into them.[134]

Justice Barrett recently undertook to defend the major questions doctrine in parallel terms.[135] According to Justice Barrett, that doctrine is not actually a substantive canon at all, but instead simply affords due interpretive weight to a putative shared understanding (embodied in "common sense")[136] that major delegations to agencies are exceptional or anomalous. A reasonable grocery clerk, she pointed out, would not take an instruction to "buy apples" as a grant of authority to buy an unlimited number of them; the clerk would appreciate that "the grocer would have spoken more directly if she meant to authorize such an out-of-the-ordinary purchase."[137] Likewise, a reasonable reader would not take Congress as making an extravagant delegation through language that it would have known could also be taken as expressing something more routine.[138] So if a statute can be read in either of two ways, only

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[132] For discussion of similar examples, see MARMOR, *supra* note 56, at 25–26; Kent Bach, *Speaking Loosely: Sentence Nonliterality*, 25 MIDWEST STUD. PHIL. 249, 250–53 (2001); and Bray, *supra* note 130, at 1011 n.251.

[133] *See* RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2100 (2016) (pointing to the "commonsense notion that Congress generally legislates with domestic concerns in mind" (quoting Smith v. United States, 507 U.S. 197, 204 n.5 (1993))).

[134] Harder questions arise in connection with progressively more tailored forms of the extraterritoriality canon. *See generally* William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582, 1593–94 (2020) (distinguishing versions of the canon). At some point, the interpreter seems to move from a generic default assumption about the context "under discussion" to a set of judgments about the territorial scope that Congress probably anticipated or would have preferred in view of what seem likely to have been the motivating concerns of the statute at hand. *Compare* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) (noting "the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal"), *with* United States v. Bowman, 260 U.S. 94, 98 (1922) (suggesting that whether the presumption applies depends on whether it would "greatly . . . curtail the scope and usefulness of the statute" at issue).

[135] *See* Biden v. Nebraska, 143 S. Ct. 2355, 2376–84 (2023) (Barrett, J., concurring). For an academic argument to much the same effect, see Ilan Wurman, *Importance and Interpretive Questions*, 109 VA. L. REV. (forthcoming 2023) (manuscript at 35–38) (on file with the Harvard Law School Library).

[136] Biden v. Nebraska, 143 S. Ct. at 2379–80 (Barrett, J., concurring).

[137] *Id.* at 2379.

[138] *See id.* at 2380. Put in its strongest form, the idea here is not just that the anomalous is, by definition, less common, but that Congress's knowing choice to speak as it did — notwithstanding

one of which says that a major question should be resolved by an agency, then Congress's sheer failure to clarify — together with the premise that major delegations are mutually understood as improbable — favors the reading whereby Congress is *not* delegating a major issue. Schematically, this argument resembles the defense of the extraterritoriality canon that we sketched above. And like that argument, this one does not seem to differ in kind from Justice Scalia's more ad hoc resort to the premise that Congress usually tackles recurring rather than niche problems.[139]

But while there is nothing inherently improper about this way of squaring some (seemingly) substantive canons with textualism, Justice Barrett's argument illustrates how such attempts are apt to come up short. First of all, the story that one has to tell in order to vindicate a canon in nonsubstantive terms often just is not persuasive (and contrary claims then appear to mask, deliberately or not, the interpreter's appeal to their own ideas about how Congress *should* be in the habit of legislating).[140] Notwithstanding Justice Barrett's assertions, for example, we see little reason to think that "major" delegations *are* anomalous, especially in statutes specifying the authorities of a regulatory agency charged with addressing some complex and evolving problem.[141] Although Justice Barrett insists that her "baseline assumptions"[142] about how Congress empowers federal agencies are not "normative," they do appear mostly to reflect her sense of what "the Constitution's structure" contemplates — namely, a regime in which Congress "make[s] the big-time policy calls itself" — rather than even her own sense of what

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its awareness that a reasonable reader would naturally tend to favor the less surprising reading — effectively ratifies that tendency and warrants the reader in taking Congress as committed to the corresponding content. *Cf.* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (appealing to "common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency"). For a description of a similar kind of pragmatic inference in more general terms, see Stephen C. Levinson, *Three Levels of Meaning*, *in* GRAMMAR AND MEANING 90, 101 (F.R. Palmer ed., 1995).

139 *See supra* notes 114–16, 134 and accompanying text.

140 *Cf.* Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION, *supra* note 7, at 129, 132 (criticizing "wish-fulfilling" methodologies that "reduce[] [a judge] to guessing that the legislature intended what was most reasonable, which ordinarily coincides with what the judge himself thinks best").

141 Justice Kagan has made this point repeatedly. *See* Biden v. Nebraska, 143 S. Ct. at 2397 (Kagan, J., dissenting) ("Here is a fact of the matter: Congress delegates to agencies often and broadly. . . . It is hard to identify and enumerate every possible application of a statute to every possible condition years in the future. So, again, Congress delegates broadly."); West Virginia v. EPA, 142 S. Ct. 2587, 2628 (2022) (Kagan, J., dissenting) (similar); *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2255 (2001) ("From the beginning of the twentieth century onward, many statutes authorizing agency action included open-ended grants of power, leaving to the relevant agency's discretion major questions of public policy.").

142 Biden v. Nebraska, 143 S. Ct. at 2381 (Barrett, J., concurring).

Congress actually does.[143] And unless a lawmaker thought that a reasonable reader would start from the same delegation-light picture that Justice Barrett does, that lawmaker would not naturally feel under pressure to specially flag any major delegations that would be effected if the statute's terms were given their otherwise-most-natural meanings, for fear of being taken as implicitly clawing those delegations back.[144] At most, then, any interpretive inference that could be drawn on that basis would be a very weak one.[145]

The depth of the challenge here bears emphasis. In order for a textualist interpreter to be justified in drawing the sort of inference about statutory meaning that we have described, it is not enough for them to be *correct* in endorsing the premises of a given canon — for example, correct in the belief that Congress rarely makes major delegations — or even to be correct in thinking that the *lawmaker* shares their perspective on that point. What matters, really, is whether the interpreter thinks that the lawmaker knows that this same perspective is widely shared among the audience by whom they intend to be understood. Only then would a reasonable reader expect the lawmaker to take their (presumed) knowledge of some proposition into account in shaping a message to them, as the argument above imagines.[146] But, especially in the legislative context, this sort of common knowledge is hard to come by. After all, there are many propositions that many generally informed people might know (say, about the pro-business tendencies of the U.S. Congress) but that are nonetheless irrelevant to deciphering the communicative content of a statute — precisely because a reasonable reader would not think that Congress, faced with the task of communicating clearly with a diverse audience, could have counted on the reader's knowing those propositions. This is what textualists are recognizing, we take it, when they speak of a presumption "that Congress

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[143] *Id.* at 2380–81. In fact, proponents of the major questions doctrine tend to emphasize that delegations of major issues "might prove temptingly advantageous for the politicians involved," Gundy v. United States, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting), which would make it surprising if they were exceptional.

[144] Note, too, that the major-questions inference sketched above applies only when it would have been *apparent* to Congress and to reasonable readers that some interpretation *would* effect a major delegation — since that awareness is what triggers the expectation that Congress would convey that content clearly if it intended to convey it at all. Ironically, then, the potential uses of statutory authority that would have been furthest from the contemplation of the enacting Congress will often offer the *weakest* support for an inference about what a reasonable reader would have taken a statute to say. *Cf.* Eidelson, *supra* note 56, at 854 ("[G]iven how far the possibility of prohibiting sexual-orientation discrimination would have been from most legislators' minds in 1964, one would not expect a concern to *avoid* that result to have played any significant role in Congress's determination of what it would say on the topic of employment discrimination.").

[145] Of course, matters may be different once a judicially recognized "major questions doctrine" is in place. That is the issue we take up in the next section.

[146] *Cf.* Bach, *supra* note 132, at 251 n.3 ("This pragmatic information is relevant to the hearer's inference only on the supposition that the speaker is producing the utterance with the intention that the information in question be taken into account.").

communicates with the regulated *according to the conventions that the two share as skilled users of English*."[147] If that restriction is taken to suggest that the context must be (or even could be) strictly linguistic, it is overstated. But it accurately reflects that the relevant context does not extend to anybody's sectarian ideas; "common sense" is fair game only insofar as it is genuinely common.

Returning to the major-questions example, then, even if the (putative) fact that Congress rarely makes major delegations were accepted by many, it is an exceedingly unlikely candidate for an element of the shared context on which Congress could rely (or on which reasonable readers would therefore take Congress to rely) in legislative communication.[148] When you interpret a parent's instruction to a babysitter, it might well make sense to draw on your "intuition" about the "balance of power" between the two.[149] But that is only because you can trust that the parent had — and would have taken the babysitter to have had — the same intuition about the terms of the relationship that you do. For better or worse, intuitions about the terms of Congress's relationship to federal agencies, including the typical frequency and scale of delegations, vary widely — even among competent and reasonable people.[150] And if the putative fact about Congress's "habits"[151] on which Justice Barrett's argument depends is thus *not* a matter of common ground, then even a reasonable reader who *did* accept it would have to take it only as a reason for suspecting that — insofar as Congress used language that most naturally suggests a major delegation — Congress may well have failed to say what it really *should* have said to best further its own purposes.[152] For a judge bound by the fidelity principle, that may be cause for regret, but it is not a license for "rewrit[ing] the statute so that it covers only what [the court] think[s] . . . Congress really intended."[153]

Finally, we cannot help but note an astute law professor's observations about the predictable "temptation to rationalize ostensibly substantive canons" in nonsubstantive terms.[154] Even though "argument[s] that substantive canons capture what ordinary language means or what

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147 Barrett, *supra* note 44, at 2203 (emphasis added); *see* Scalia & Manning, *supra* note 61, at 1613 ("[Scalia:] [A]ll we can know is that they voted for a text that they presumably thought would be read the same way any reasonable English speaker would read it.").

148 Again, at least until the courts recognize such a canon. As noted above, we turn to that issue in the next section.

149 Biden v. Nebraska, 143 S. Ct. 2355, 2379–81 (2023) (Barrett, J., concurring).

150 *Compare supra* note 141 (describing the views of Justice Kagan and the other dissenters on this point), *with supra* note 136 and accompanying text (describing Justice Barrett's position).

151 Nelson, *supra* note 43, at 389–90 (suggesting that "[m]any of the canons used by textualists reflect observations about Congress's own habits," *id.* at 390).

152 *Cf.* MARMOR, *supra* note 56, at 31–34 ("[L]egislatures do not always succeed in saying what they should have said in light of their purposes or the objectives they intend to achieve." *Id.* at 32.).

153 Lewis v. City of Chicago, 560 U.S. 205, 215 (2010) (Scalia, J.).

154 Barrett, *supra* note 28, at 120–21.

Congress would want"[155] have "been largely rejected,"[156] then-Professor Barrett explained, they "surface[] repeatedly in the cases and literature" — a tendency that "almost surely reflects discomfort with the application of substantive canons in a legal climate where a strong vision of legislative supremacy is the dominant view."[157] We agree that the "motivation for making this move" is "easy to see."[158] And so too, we imagine, Justice Barrett might agree that we should greet with skepticism arguments that purport to salvage controversial canons by imputing to Congress (and to all "reasonable interpreter[s]") a judge's own views about what "makes eminent sense in light of our constitutional structure."[159]

### *B. Canons as Stipulated Linguistic Conventions*

All of this suggests that seemingly substantive canons rarely start out as reasonable generalizations about the communicative content of statutes. But, as we have noted, one could accept that much and still insist that, once the error of "canonizing" these canons has been made, they come to enjoy a kind of bootstrapped validity. In fact, this is probably the most developed and time-honored defense of textualists' reliance on substantive — or, from this point of view, formerly substantive — canons. As Justice Scalia put the point, when norms like the rule of lenity "have been long indulged, they acquire a sort of prescriptive validity, *since the legislature presumably has them in mind when it chooses its language*."[160] He later elaborated the same reasoning (writing together with Bryan Garner) as follows:

> It might be said that rules like these, so deeply ingrained, must be known to both drafter and reader alike so that they can be considered inseparable from the meaning of the text. A traditional and hence anticipated rule of interpretation, no less than a traditional and hence anticipated meaning of a word, imparts meaning.[161]

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155 *Id.* at 121.

156 *Id.* at 120.

157 *Id.* at 121.

158 *Id.* at 120 ("It is easy to see a faithful agent's motivation for making this move: linguistic canons, which pose no challenge to legislative supremacy, are preferable to substantive canons, which do.").

159 Biden v. Nebraska, 143 S. Ct. 2355, 2380 (2023) (Barrett, J., concurring).

160 Scalia, *supra* note 39, at 583 (emphasis added); *see also* Dodge, *supra* note 134, at 1640 ("For a textualist, the best justification for substantive canons is that 'background conventions, if sufficiently firmly established, may be considered part of the interpretive environment in which Congress acts.'" (quoting Manning, *The Absurdity Doctrine*, *supra* note 39, at 2467)); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 600 (1995) ("The canons have always coexisted uneasily with the originalist imperative, for they are created by judges and frequently embody contested substantive norms. Presumably the best case for their compatibility with legislative supremacy is the debatable proposition that they are well known to legislators and can facilitate the search for legislative intent because legislators enact laws with the canons in mind." (footnote omitted)).

161 SCALIA & GARNER, *supra* note 3, at 31; *see also* Manning, *Equity*, *supra* note 28, at 125.

Scalia illustrated the idea by positing a hypothetical scenario in which "the Supreme Court . . . announce[d] and regularly act[ed] upon the proposition that 'is' shall be interpreted to mean 'is not.'"[162] In that world, he suggested, it would be appropriate for the Court to interpret legislation as it had said it would. The reason is that if, in this hypothetical context, Congress enacts a statute containing the word "is," the content it intended to convey is more likely the one traditionally expressed (in ordinary speech) by "is not." So too, the thought goes, with substantive canons that are sufficiently entrenched to shape Congress's expressive choices.[163]

John Manning has integrated much the same thought into his larger explication and defense of "textualists' practice of reading statutes in light of established background conventions."[164] As Manning observes (and as we noted above), "[e]ven the strictest modern textualists properly emphasize that language is a social construct," and they are therefore interested not in literal meaning, but in "how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context."[165] Once one makes that move, the thinking goes, at least some substantive canons can be thought of as settled conventions that dictate how legal language is interpreted — such that a reasonable interpreter *familiar with that context* would understand statutory terms in the ways indicated by these canons, even if that is not how an ordinary reader would understand that same language in some other context.[166]

While Scalia and Manning have done the most to elaborate this idea in theoretical terms, the Court itself has sometimes gestured in this direction as well. Before bringing a substantive canon to bear, for example, the Justices will often recite that they "assume that Congress legislates against the backdrop" of the canon at issue,[167] or more broadly, that the Court "presume[s] congressional understanding of . . . [the

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162 Scalia, *supra* note 39, at 583.

163 *See id.*

164 Manning, *Equity*, *supra* note 28, at 125; *see also* Manning, *Clear Statement*, *supra* note 28, at 406 (positing that, "even if one finds unsatisfying the Court's recent efforts to tease the nonretroactivity canon from the values implicit in a variety of constitutional clauses, that canon might nonetheless reflect a deeply embedded Anglo-American legal tradition that legislation is prospective — a convention against which Congress may have legislated from the beginning of the Republic" (footnote omitted)); Manning, *The Absurdity Doctrine*, *supra* note 39, at 2465–76.

165 Manning, *The Absurdity Doctrine*, *supra* note 39, at 2392–93.

166 Although we will argue that nominally substantive canons generally cannot be rendered nonsubstantive in this way, we do not deny that there are linguistic norms specific to the context of legislation that a textualist may properly consider. To the contrary, one of us has recently argued that "the hypothetical 'ordinary reader' . . . would necessarily account for the characteristic modularity and generality of legislative communication" and thus that textualists go awry when they fail to "read[] a statute *like a law*." Eidelson, *supra* note 56, at 792; *see id.* at 845–55 (defending the Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), on this basis).

167 EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

Court's] interpretive principles."[168] In context, these pronouncements seem to be stating a rule about how the Court interprets statutes more than expressing a belief about how Congress legislates.[169] But, one way or another, they imply that the canon at issue is relevant to statutory interpretation not (or not only) as a kind of superimposed value judgment, but because the canon was part and parcel of the context that Congress *itself* would — or at least could — have considered in deciding how best to get across whatever it was that it intended to communicate.

Because this idea — which we will term the "bootstrapping argument" — has gained more traction than the last one, we will consider it in somewhat greater depth. In what follows, we first highlight several limitations on the results that the argument can deliver, and then argue that it is difficult to square with textualist premises even within its limited domain.

*1. Inherent Limitations.* — Even if we were to stipulate to the bootstrapping argument's coherence and compatibility with textualist principles, that justification is subject to a couple of important limitations. First, the bootstrapping argument would do nothing to justify the Court's positing any *new* substantive canons, or indeed the use of any canon that was not well established *at the time the relevant statutory text was enacted*.[170] That is no minor caveat. Justice Scalia may have been able to assert that a venerable canon like the rule of lenity is validated by its "sheer antiquity,"[171] but many of the canons that courts apply, and that have proved most consequential in recent years, are of recent vintage.[172] Often the Court applies substantive canons to statutes enacted before the Court had clearly articulated those canons, rendering the claim that Congress drafted the statute with a given canon in mind

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168 King v. St. Vincent's Hosp., 502 U.S. 215, 221 n.9 (1991); *see also* Young v. United States, 535 U.S. 43, 49–50 (2002) (similar); McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1991) (similar); John F. Manning, Chevron *and the Reasonable Legislator*, 128 HARV. L. REV. 457, 468 (2014) ("The Court routinely assumes that Congress enacts statutes against the backdrop of established interpretive principles.").

169 *See* Baude & Sachs, *supra* note 56, at 1103, 1124 (noting "loose talk" in this domain and suggesting the same).

170 Both Scalia and Manning concede this point. *See* Manning, *Equity*, *supra* note 28, at 125–26; Scalia, *supra* note 39, at 583.

171 Scalia, *supra* note 7, at 29.

172 *See* Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 765 (2013) ("Arguments based on tradition also are of little help to the numerous canons created in modern times. Two of the most commonly employed canons — the presumption against preemption and *Chevron* — were invented by the Supreme Court within the last century."); Berman, *supra* note 28, at 793 (faulting Scalia and Garner for seemingly approving certain canons without regard to whether they "predate the texts to which they are applied," as their "official position" would require).

absurd on its face.[173] And even in the case of statutes enacted after the Court announced the relevant canon, it is not at all clear that actual legislators are sufficiently aware of or focused on the Court's interpretive practices to craft statutes in light of them.[174] If you sent your friend a special code book to use when sending you messages, and then you learned that they didn't read it, it would make no sense to go on deciphering their meaning with reference to that lexicon rather than the standard one. So too here.[175]

Furthermore, the bootstrapping argument could justify at most *retrospective* fidelity to heretofore settled canons; it does not explain why the Court should not renounce even those canons going forward.[176] Absent such an explanation, the substantial costs of specialized communicative conventions provide a strong prima facie case for repudiating them. As leading textualists have argued, transparency and democratic accountability strongly favor giving words and phrases their ordinary meanings, not special stipulative ones.[177] (For this reason alone, if the Justices found themselves in the bizarre world where their predecessors had made "is" into legalese for "is not," they would presumably repudiate that confusing anomaly for purposes of interpreting statutes enacted in the future.) Additionally, even well-settled interpretive conventions will often make legislating in particular ways more *difficult*; indeed, that effect on the legislative process is part of the (nontextualist) case for imposing substantive canons in the first place.[178] From a textualist

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[173] *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587 (2022) (applying the recently developed "major questions doctrine" to a provision of the Clean Air Act that was last amended in 1990); Gregory v. Ashcroft, 501 U.S. 452, 460–64 (1991) (applying a recently developed clear statement rule to a statute enacted in 1974); *see also* Dellmuth v. Muth, 491 U.S. 223, 241 (1989) (Brennan, J., dissenting) (faulting the Court for "resorting to an interpretative standard that Congress could have anticipated only with the aid of a particularly effective crystal ball").

[174] *Cf.* Barrett, *supra* note 44, at 2204–05 (noting, in connection with nonsubstantive canons, that "whether the canons actually capture patterns of ordinary usage is an empirical question" and suggesting that "[i]f they do not track common usage, then the textualist rationale for using them is undermined," *id.* at 2204). For empirical evidence on legislative drafters' awareness of interpretive canons, see Gluck & Bressman, *supra* note 104. *See also* Abner J. Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627, 629 (1987) ("When I was in Congress, the only 'canons' we talked about were the ones the Pentagon bought that could not shoot straight.").

[175] *See* Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97, 99–100 (2003) ("Because the lodestar of statutory interpretation is the discernment of the statute's meaning, binding rules of interpretation of whatever sort must be ignored when an interpreter decides that the meaning of a statute differs from the constructed 'meaning' derived from the application of binding rules of construction."); *see also* Nelson, *supra* note 43, at 388 (observing that "[e]ven after being announced by the Court, some canons might be relatively poor guides to the likely intent of subsequent Congresses").

[176] As Barrett observed, "[i]n other areas in which the Court has found entrenched interpretive practices to be illegitimate, it has applied new rules going forward." Barrett, *supra* note 28, at 162.

[177] *See, e.g.*, Barrett, *supra* note 44, at 2208.

[178] *See* Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 36–42 (2008); Ernest A.

point of view, therefore, the Court presumably ought to clear out any residue left behind by judge-made, formerly substantive canons and leave it to Congress alone to specify (as through the Dictionary Act) any special interpretive conventions that it intends to employ.[179]

*2. Can Substantive Canons Be Bootstrapped?* — The domain limitations described above may be sufficient to dispose of the bootstrapping argument entirely: The set of canons for which that argument is plausible may be empty, or so limited that the argument could not sustain more than a tiny number of unusually entrenched interpretive conventions. But let us now set that point aside and ask whether, within the domain where the argument might have purchase, it is compatible with textualist principles. If a substantive canon really was well established at the time of a given statute's enactment, doesn't that context bear on the content that any given text should be understood to convey?

We see the allure of this thought, but we do not think a textualist can embrace it. To explain why, it will help to draw a familiar distinction between two kinds of canons: (a) "ambiguity-dependent" canons, such as the rule of lenity, that tell interpreters how to construe an otherwise-unclear text; and (b) "clear statement" or "implied limitation" rules, such as the presumption against abrogation of state sovereign immunity, that narrow the apparent sweep of statutory language even though that language is not "unclear" in the usual sense.[180] The bootstrapping argument fails in each of these settings for different, but related, reasons.

*(a) Ambiguity-Dependent Canons.* — Consider, first, canons that purport to resolve textual ambiguities, such as the rule of lenity or constitutional avoidance. For a concrete example, we will use *Commonwealth v. Davis*,[181] a Kentucky case that Justice Scalia and Bryan Garner offer as a paradigm of where lenity ought to apply.[182] In *Davis*, two teenagers pooled their money to buy whiskey, and one was then charged with the crime of "sell[ing], loan[ing], or giv[ing]" alcohol to a minor (the other).[183] Scalia and Garner suggest that, in light of the rule of lenity, "give" should be construed narrowly in this case — to

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Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1608 (2000); *see also* Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 139 (2005) (opinion of Kennedy, J.) (suggesting that "clear statement rules ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation").

179 *Cf.* Alexander & Prakash, *supra* note 175, at 102 (arguing that the Constitution does not "grant the federal judiciary the authority to create counterintuitive rules of interpretation that then require the Congress affirmatively to circumvent them").

180 For versions of this distinction, see, for example, Kavanaugh, *supra* note 101, at 2154–55; and Eskridge & Frickey, *supra* note 105, at 611–12. *See also Spector*, 545 U.S. at 138–41 (opinion of Kennedy, J.) (discussing "the distinction between rules for resolving textual ambiguity and implied limitations on otherwise unambiguous text," also described as "clear statement rules").

181 75 Ky. (12 Bush) 240 (1876).

182 *See* SCALIA & GARNER, *supra* note 3, at 300.

183 *Davis*, 75 Ky. at 241.

mean "bestow a gift" (which the defendant did not do), rather than "furnish, provide, or supply" (which he did).[184]

But could a court that refused to give genuinely substantive force to the rule of lenity follow this advice? We think not. Suppose the court believes that the rule of lenity is "so deeply ingrained" that it "must [have] be[en] known to" the Kentucky legislature.[185] And presume, for the moment at least, that the relevant "reasonable reader" (whose perspective the court must adopt) also knows of both the rule of lenity and the legislature's acquaintance with it.[186] Even so, that reasonable reader could hardly think that the legislature intended to convey the narrower meaning of "give" and opted to rely on the combination of ambiguity and lenity to get that content across. After all, if a lawmaker both intended to convey "bestow a gift" and realized at the time that "give" was ambiguous between that meaning and another one, why would the lawmaker not have simply opted for "bestow a gift" over "give" in the first place? It seems far more likely that the lawmaker either overlooked the ambiguity or spotted it but chose not to resolve it. Either way, surely the least likely inference is that the lawmaker gambled on a reader later deeming the statute gravely ambiguous, and thus turning to the rule of lenity, in order to arrive at the content that the lawmaker actually *did* intend all along.[187]

At least with respect to ambiguity-dependent canons, then, the bootstrapping argument is better construed differently. True, a lawmaker could not plausibly aim to communicate some specific content (such as "bestow a gift") indirectly *via* a mutual awareness of an ambiguity-dependent canon. But still, the lawmaker might reasonably be assumed to have relied upon — or, at least, acquiesced to — the *future* use of any then-established canons that the lawmaker did not disturb or override. So, for instance, the Kentucky legislature might be taken as intending to convey both some particular content (whatever it actually sought to prohibit) and also that, as per usual, the prohibition should be deemed unenforceable to the extent of any grave ambiguities in the language used to express it. In that event, a court that applied lenity would be

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184 SCALIA & GARNER, *supra* note 3, at 300.

185 *Id.* at 31. In fact, *Davis* was decided shortly after "many legislatures passed statutes abrogating the rule of strict construction," with Kentucky arguably among them. Joel S. Johnson, *Vagueness and Federal-State Relations*, 90 U. CHI. L. REV. 1565, 1580 & n.81 (2023). Scalia and Garner do not account for this fact, so we will ignore it as well.

186 *Cf. infra* notes 210–16 and accompanying text (questioning whether textualists can adopt this premise).

187 *Cf.* Mark Greenberg, *The Standard Picture and Its Discontents*, *in* 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 39, 78 (Leslie Green & Brian Leiter eds., 2011) ("It can't seriously be maintained, for example, that legislators are aware of common law practices concerning when mens rea requirements are presumed and, in light of that awareness, use statutory language without mens rea terms with the intention of imposing mens rea requirements.").

doing as it was (implicitly) told; it would not need to credit any of the substantive justifications for lenity.[188]

The problem with this alternative argument is that nothing actually supports imputing to a legislature a tacit endorsement of whatever interpretive rules it leaves undisturbed. Indeed, once we separate out the legislature's implicit endorsement of the relevant canons from the meanings of the words it used — so that we take the legislature to have intended to convey *both* some content that is expressed by those words *and* a kind of rider authorizing the employment of lenity — it becomes mysterious why we would think the statute expressed the latter content at all.[189] Rather than positing statute-specific lenity clauses (all written in "invisible ink"[190]), we should presumably say that the rule of lenity exists apart from any particular statute, and that a lawmaker who says nothing about that canon simply leaves it as it stood.[191] But then, if the rule of lenity starts out as a substantive canon at odds with textualism, it does not become part of "what the lawgiver promulgated"[192] just because the lawgiver knew about it in advance. To the contrary: What the lawmaker knew in advance — and left unchanged — is that the standing judicial practice is not fully textualist.

Given all of this, we suspect that the intuition driving the bootstrapping argument is not really that standing interpretive practices shape what a lawmaker is reasonably taken to have said — or, really, anything to do with linguistic meaning at all. Rather, the intuition is that courts should try to vindicate the expectations that lawmakers or others would justifiably have had about the effects that a statute's enactment would

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188 For an example of this sort of reasoning, see John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1333–34, 1350, 1354–55 (2018).

189 There would be an argument available here, albeit a weak one, if the lawmaker had reason to think that the standing practice of the courts was to take nonobjection as manifesting an endorsement of lenity. But, in fact, a lawmaker would have no reason to think that the courts observe such a practice — in part precisely because they would presumably appreciate that lenity is described and employed by the courts as a *substantive* canon. *See infra* notes 198–99 and accompanying text.

190 Baude & Sachs, *supra* note 56, at 1100.

191 This squares with what we imagine to be legislators' commonsense understanding of their own directives. *Cf. id.* at 1105 ("We think the linguistic model is a poor fit for how [unwritten] rules [recognizing various criminal and civil defenses] are actually understood and applied."). Suppose that we asked a legislator who supported the liquor law at issue in *Davis* what they intended to communicate by enacting it — and suppose, for the sake of argument, that the legislator was fully aware of the rule of lenity at the time. We would expect a straightforward answer — something to the effect that *selling, lending, or giving alcohol to a minor is prohibited*. By contrast, we think it is exceedingly unlikely that the answer would be that *acts falling within the unambiguous scope of the phrase "selling, lending, or giving alcohol to a minor" are prohibited*. Even assuming that legislators are familiar with a substantive canon, in other words, they would naturally view that canon as substantive — as potentially modifying the effect of their communication, not as necessarily modifying its content.

192 Scalia, *supra* note 7, at 17; *see supra* note 45 and accompanying text.

have on the law.[193] Here again, one natural response is that, even if that prescription were sound, it would not bring seemingly nontextualist norms within the fold of textualism; it would just identify a reason, akin to stare decisis, for *deviating from* textualism.[194] Indeed, the same sort of thinking would have pressed powerfully against the rise of modern textualism in the first place.[195] And while one could certainly redefine "textualism" as this line of argument requires, that change would come at steep rhetorical and argumentative costs.[196] It would mean dropping the refrain that textualism inherently privileges the communicative contents of promulgated texts (i.e., "what the text means"), and it would sap the intuitive motivation for elevating so-called "semantic" context over other context in determining a statute's legal effect — since, from this point of view, there is nothing so special about linguistic meaning, at least as far as textualism goes, to begin with.

Finally, even putting aside whether an indiscriminate rule of vindicating justified expectations could fairly be cast as "textualism," it is not clear that such a rule actually does cut in favor of sticking with lenity or similar norms.[197] Consider the Kentucky legislature again. If we are to impute to the legislature a grasp of the existing law of interpretation, including the rule of lenity, we should presumably also impute to it an awareness that lenity is a substantive canon — in particular, a canon of

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[193] *See* Berman, *supra* note 28, at 803 ("[T]here is nothing senseless or remotely paradoxical about a system of democratically adopted laws in which legal arbiters try to give effect to what changes in the law the drafters intended to accomplish, even at the expense of occasionally disregarding the meanings of promulgated texts."); JOHN GARDNER, *Legal Positivism: 5½ Myths*, *in* LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL 19, 42–47 (2012) (explaining that "[a]s long as the local norms of interpretation can be grasped by the law-makers (or by those drafting statutes or judgments on their behalf), the laws can be intentionally shaped by anticipating how they will be interpreted by others and drafting them accordingly"); *see also* Finley v. United States, 490 U.S. 545, 556 (1989) (Scalia, J.) ("What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.").

[194] *Cf.* Scalia, *supra* note 7, at 140 ("[*S*]*tare decisis* is not *part of* my originalist philosophy; it is a pragmatic *exception* to it.").

[195] For much this reason, Manning has argued that textualist judges were permitted to "retroactively dispense with most uses of legislative history in statutory interpretation" only because, and to the extent that, "th[at] prior convention contradict[ed] structural constitutional norms." Manning, *The Absurdity Doctrine*, *supra* note 39, at 2475 n.318; *see also* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 692–95 (1997) (similar).

[196] Mark Greenberg has argued in a similar vein that it "would be a major setback for the defender of [what he terms the 'standard picture'] to fall back to the position that although the legal norms contributed by statutes are *not* constituted by the ordinary linguistic contents of the statutes, this is consistent with [the 'standard picture'] because there are higher-level authoritative pronouncements, or, worse, norms with other sources, that require that statutes not be interpreted in accordance with their ordinary linguistic content." Greenberg, *supra* note 187, at 80; *see also* Greenberg, *supra* note 55, at 236–37 (similar).

[197] We offer this further argument partly in the recognition that some textualists in good standing might be willing to bite the bullets above — perhaps because they believe that constitutional objections can narrow the range of acceptable guideposts for a reasonable expectation about a statute's effect. *Cf. supra* note 195 (noting Manning's suggestions that some seemingly nontextualist interpretive conventions are disqualified only on contingent, constitutional grounds).

the "superimposed value" variety that we distinguished above — rather than a conjecture on anyone's part about what a lawmaker intended or expected.[198] Given that full context, however, the only expectation that a lawmaker could be justified in maintaining is conditional: that the prohibitions they enact will be tempered by lenity *if*, and to the extent that, the courts maintain their own policy of "tenderness for the accused"[199] — about which, remember, the lawmaker has chosen to say nothing either way. So if the promulgation and fidelity principles, rightly understood, mean that courts really have no business showing tenderness toward the accused, then we do not see how a textualist could conclude that anybody's legitimate expectations would be thwarted if courts simply modified their approach, even with respect to old statutes, accordingly.[200]

An analogy may help to underscore this point. Suppose that, at Time 1, Congress enacts some statutory cause of action that allows "any person" to bring suit in federal court. At that time, the Supreme Court's Article III case law nonetheless denies standing to most would-be plaintiffs. At Time 2, the Court liberalizes about standing to some extent. Would it make sense for a court then to hold, as a matter of statutory interpretation, that the cause of action conferred in this particular statute is restricted to those who would also have had constitutional standing at Time 1? We doubt it — and we think textualists would be especially unlikely to think as much. Yes, they would say, the ultimate legal effect of the statute now departs from what the smart money would have predicted at the time of its enactment. But — they would explain — that just reflects Congress's choice to leave any narrowing of the universe of potential plaintiffs to be done by the Court, pursuant to its Article III case law, rather than to prescribe any desired limits itself. In other words, the smart money is usually right about a statute's legal effect — but it is not always right, no matter what, just by dint of having been smart.

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198 *See, e.g.*, Wooden v. United States, 142 S. Ct. 1063, 1086–87 (2022) (Gorsuch, J., concurring in the judgment) ("The rule of lenity has a critical role to play . . . . The statute contains little guidance, and reasonable doubts about its application will arise often. When they do, they should be resolved in favor of liberty."); *see also* Barrett, *supra* note 28, at 129, 158 (noting that lenity was "unabashedly grounded in a policy of tenderness for the accused," and describing it as the traditional canon "most clearly justified on grounds other than legislative intent"). *But cf. id.* at 158 (suggesting that early American courts treated lenity "as a tie breaker applicable only when two equally plausible interpretations of a statute were available").

199 Barrett, *supra* note 28, at 129; *see* sources cited *supra* note 198.

200 Admittedly, this final argument does not apply nearly as straightforwardly to the other type of substantive canons — namely, "intended effects" canons — that we distinguished above. *See supra* section I.B.3, p. 536. Unlike with "superimposed value" canons, one could be aware of the nature of an "intended effects" canon and still maintain a justified expectation that a court will try to track a lawmaker's intentions (including by considering that the canon was in effect at the time of enactment).

*(b) Clear Statement Rules.* — Turn, then, to clear statement or implied limitation rules. When it comes to these canons, the first construal of the bootstrapping argument that we considered (and dismissed) above — the notion that the canon actually shapes what the lawmaker means in speaking as they do — is significantly more plausible. Suppose, for example, that Congress imposes liability on "any recipient of Federal assistance" who violates certain requirements.[201] If Congress chose that language knowing that courts would deem the provision not to apply to *states* that receive federal funds, then it does not seem fanciful to infer that Congress used the phrase with that same restricted meaning. In effect, we might think, the term "recipient of Federal assistance" has simply become a "term of art" with a specialized legal meaning.[202] And just as with Justice Scalia's hypothetical where "is" has come to mean "is not"[203] — the argument would go — the courts ought to gauge the statute's communicative content accordingly.

Even here, however, the same basic rejoinder applies. Assume that Congress (and others) did foresee that courts would respond to the statute at issue by carving out states. Just as with the ambiguity-dependent canons, it does not follow that Congress should be understood as *telling* courts to do this — as opposed to acquiescing to (or, for that matter, capitalizing on) the prospect that, for their own reasons, courts probably *would* do it. For all the courts can tell, in fact, the bargain struck and recorded in the text might be precisely an agreement to say that *any* recipient of federal assistance is liable while eschewing any mention of states as such. Opponents of state liability might have been willing to make that agreement not because they justifiably believed the courts would take Congress as actually saying something narrower than it did, but rather because they were optimistic that courts' nontextualist solicitude for federalism would lead them to *deviate* from the apparent content of Congress's instruction.[204]

We can illustrate the point here with an example set in a more familiar context. Imagine that two parents — you and your partner — have different hopes for when your family's dinner will start. You would like it to start at 6:30, but your partner would like it to start at 6:15. Both of you also know from experience that your child rarely cleans up until he thinks he is already supposed to be at dinner, so he is usually 15 minutes late. After some negotiation, you and your partner decide to

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[201] *Cf.* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 245–46 (1985) (quoting 29 U.S.C. § 794a(a)(2) (1982) (amended 2009)).

[202] *See, e.g.*, Morissette v. United States, 342 U.S. 246, 263 (1952); Moskal v. United States, 498 U.S. 103, 121 (1990) (Scalia, J., dissenting).

[203] *See supra* note 162 and accompanying text.

[204] *Cf.* Biden v. Nebraska, 143 S. Ct. 2355, 2376–77 (2023) (Barrett, J., concurring) (observing, with respect to canons such as "the clear-statement federalism rules," *id.* at 2376, that the "'clear statement' requirement means that the better interpretation of a statute will not necessarily prevail," *id.* at 2377).

tell your child, "dinner at 6:15." Under this plan, you are probably going to get your way (i.e., dinner at 6:30), but your partner can hold out hope that the child will actually do as he is told for once (i.e., be ready for dinner at 6:15). Now suppose that the child *does* decide that, given his role in the family, he really should try to follow his parents' instructions. That would mean trying to be ready at 6:15, not 6:30 — even if this comes as an unwelcome surprise to you (and a pleasant surprise to your partner). The same goes for a court that, having employed substantive canons (and thus deviated from the apparent communicative content of statutes) in the past, belatedly embraces the conception of its role prescribed by textualism.

Now, there is a natural response for proponents of the bootstrapping argument to offer: If the child had come to understand that when a parent says "dinner at 6:15," the parent actually *intends to convey* that dinner should start at 6:30, then dutiful compliance *would* require being ready at 6:30. But notice that (a) intending dinner to start at 6:30, and (b) meaning (or intending to communicate) that dinner should start at 6:30, are fundamentally different things.[205] When you say "dinner at 6:15," you may intend that dinner start at 6:30 (counting on the child's lateness), but you do not intend to *communicate* that start time.[206] In fact, if the child took that as your meaning, he probably would not be ready until 6:45. And while it is certainly possible for an inside joke to develop within the family such that "dinner at 6:15" *does* refer to 6:30, the key point for our purposes is that conventions of that sort require mutuality.[207] In our example, the child would not have reason to think that you meant anything nonstandard by "6:15" unless he thought that *you* thought that he would understand you in some nonstandard way. But as long as his lateness appeared to be due to his own disregard for his parents' instructions — as it would if, for instance, he explained it that way — you would have no reason to think that he actually *would* interpret you in a nonstandard way, and hence no reason to try to communicate with him in that way, leaving him no reason to take you as doing so.

The very same lack of mutuality explains why it seems doubtful that many, if any, implied limitation rules actually shape the content that Congress could be understood to intend to communicate (even to courts, let alone — as we will soon discuss — to the "reasonable reader"). Again, suppose that Congress intends to impose liability on recipients of federal funds other than states (but not on states). If Congress believed

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[205] For the classic treatment of the sense of "meaning" at issue here, see PAUL GRICE, STUDIES IN THE WAY OF WORDS 219–23 (1989).

[206] *Cf. id.* at 221 ("[I]f I utter $x$, intending (with the aid of the recognition of this intention) to induce an effect $E$, and intend this effect $E$ to lead to a further effect $F$, then insofar as the occurrence of $F$ is thought to be dependent solely on $E$, I cannot regard $F$ as in the least dependent on recognition of my intention to induce $E$.").

[207] *See id.* at 217–22.

the courts *actually think* that when Congress refers to "any recipient of Federal assistance" in the context of imposing liability, Congress intends to be taken as referring only to recipients other than states, then Congress might intend to accomplish its ultimate aim simply by means of being understood in that way. But since Congress (like the Kentucky legislature) would know that implied limitation rules are justified mainly or entirely on *substantive* grounds, we do not see why Congress would think that courts are behaving as they do only because of what the courts think Congress more likely means.

What Congress would see as part of the backdrop, in other words, is not a linguistic convention of which it could avail itself, but a "requirement," rooted in the Court's concern to protect the "usual constitutional balance between the States and the Federal Government," that "[w]hen Congress chooses to subject the States to federal jurisdiction, it must do so specifically."[208] Given that understanding on Congress's part of what the courts are doing, there would be little reason (and perhaps no room) for Congress to try to get courts to exempt states from liability by an alternative, roundabout means instead — that is, by courts' taking Congress's use of "any recipient of Federal assistance" as an effort on Congress's part to communicate that narrower meaning without saying it outright.[209] At a minimum, the description of Congress as intending to use the words in their ordinary senses, while simply expressing no view about the courts' possible departure based on a substantive canon, seems equally plausible.

Finally, if all of this seems somewhat technical, there is also a more basic and more straightforwardly normative dimension to the problem. We have been entertaining a tacit premise that Congress is engaged in a kind of dialogue with the courts, akin to the imagined dialogue

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[208] Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242–46 (1985); *accord* Biden v. Nebraska, 143 S. Ct. at 2376 (Barrett, J., concurring) (observing that "a strong-form canon counsels a court to *strain* statutory text to advance a particular value"). Congress would also notice that courts determine whether a clear statement rule is satisfied based on their judgment about what Congress clearly intended to *do*, not just what it clearly *said*. *See, e.g.*, RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2100, 2102–03 (2016); Miller v. French, 530 U.S. 327, 340–41 (2000). Indeed, even the very same statutory provision is sometimes understood to have different legal effects within the domain of a clear statement rule and beyond it. *See* Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 138–41 (2005) (opinion of Kennedy, J.); Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 352–56 (2005) (providing other relevant examples). Congress would thus understand these rules to do their work not by guiding the courts' judgment as to what Congress meant to communicate, but rather by effectively appending a general proviso to its statutes that cancels any of several disfavored legal effects except insofar as they were specifically addressed or clearly intended by Congress. *Cf. Spector*, 545 U.S. at 139 (opinion of Kennedy, J.) (giving examples of such hypothetical disclaimers).

[209] *Cf.* GRICE, *supra* note 205, at 218–19 ("*A*'s intending that the recognition [of his communicative intention] should play this part [in bringing about a result] implies . . . that he assumes that there is some chance that it will in fact play this part, that he does not regard it as a foregone conclusion that the belief will be induced in the audience whether or not the intention behind the utterance is recognized.").

between a parent and child. But textualists are largely and understandably opposed to that whole picture of the relevant communication. As we noted earlier, textualists take statutes to be addressed to the "reasonable reader" — "a skilled, objectively reasonable user of words,"[210] not a legislator or a court.[211] Indeed, Justice Scalia insisted that nearly all "legislation is an order not to the courts but to the executive or the citizenry."[212] And, as then-Professor Barrett argued, "[i]f . . . a legislative command is directed to the citizenry, it is both sensible and fair for the courts to interpret that command as its recipients would."[213] Ryan Doerfler thus observes that "because context consists of *mutually* salient information," the background that informs the communicative content of a statute will often be "limited to information of which citizens should be aware."[214] In all likelihood, that does not include the various nonnatural canons ordained by courts.[215] For courts and Congress to settle into a practice of using these norms to fix and discern legal content would thus be akin to "the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read."[216]

Even when the parties directly regulated by a statute are sophisticated, moreover, the bootstrapping argument's departure from ordinary meaning ought to make textualists uneasy — especially when it comes to implied limitation rules. Because these rules allow Congress to convey exemptions on which its members need not directly vote (and, indeed, the very existence of which need not even be acknowledged), they

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210 Easterbrook, *supra* note 49, at 65.

211 How precisely to specify the "reasonable reader" is a vexed and complicated issue, especially with respect to the degree of legal or technical expertise that the reader ought to be assumed to possess. *See, e.g.*, Barrett, *supra* note 44, at 2209; Manning, *The Absurdity Doctrine*, *supra* note 39, at 2463–64; sources cited *supra* note 57. We do not purport to do it justice here, but a natural possibility is to charge the reader with the degree of specialized knowledge that the text, read without that specialized knowledge, would signal the need to consult.

212 SCALIA & GARNER, *supra* note 3, at 138; *see* Barrett, *supra* note 44, at 2203 ("[T]extualists presume that Congress communicates with the regulated according to the conventions that the two share as skilled users of English.").

213 Barrett, *supra* note 44, at 2209; *see id.* at 2202–03.

214 Doerfler, *supra* note 7, at 1032; *see id.* at 1031–42 (elaborating the bounds of relevant context that plausibly flow from this "conversation model" of legislative communication, in contrast to a common model that resembles "eavesdropping" on a conversation among legislators). The analysis may differ for statutes addressed to narrower audiences. *See id.* at 1032 n.279, 1037; *see also* Solum, *supra* note 48, at 283 (noting that "regulatory statutes are likely to be addressed to regulatory agencies and regulated industries" and suggesting that this "will have implications for what constitutes the plain meaning of a regulatory statute").

215 *See* Doerfler, *supra* note 7, at 1036–38 ("[T]he conversation model also calls into question whether courts should pay special attention to customary legal usage. . . . The principle is particularly dubious as applied to statutes speaking to an audience that includes ordinary citizens, who are presumably — and reasonably — not well versed in Blackstone.").

216 Scalia, *supra* note 7, at 17; *see also* Barrett, *supra* note 44, at 2209 (suggesting that the fairness concern captured in Scalia's comparison here "is reason both to employ sources that capture ordinary meaning, such as usage canons and dictionaries, and to refuse to strain ordinary meaning to account for the vagaries of the legislative process").

appear at odds with the same accountability-related concerns that leading textualists have invoked in condemning judicial reliance on legislative history.[217] Congress can give every appearance of imposing some liability on *all* recipients of federal funds, for example, while actually exempting state governments.[218] If reliance on legislative history is unacceptable because it allows legislators to effectively make law while ducking tough votes, recognizing a set of counter-textual defaults that Congress can select without openly addressing the matter at all does not seem better.[219]

For all of these reasons, "substantive" canons cannot be squared with textualism by pointing to their alleged nonsubstantive, court-made offshoots. Not only would the bootstrapping argument, on its own premises, cover only a narrow domain, but even within that domain the argument does not hold up to scrutiny. To be sure, we acknowledged in the prior section that some canons traditionally deemed "substantive" might be misclassified: they might capture an inference about communicative content that is drawn from a (genuinely) commonsense understanding of the practical context in which Congress speaks.[220] (Recall our example of the presumption against extraterritoriality.) But when a canon is indeed substantive, it cannot be converted into a determinant of communicative content — a rule of legalese, as it were — simply by being "long indulged"[221] by courts. Rather, genuinely substantive canons would need to be justified, and squared with textualism, on their own, substantive terms.

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[217] In fact, when the implications of the relevant substantive canons are knowable in advance, they arguably allow legislative *self*-delegation in essentially the same sense that legislative history does. Such delegation is especially problematic, Manning argues, because it does not come at the price of any real loss of control (as open-ended delegations to courts and agencies would). *See* Manning, *Textualism as a Nondelegation Doctrine*, *supra* note 195, at 710–31. But the very point of the bootstrapping argument is that, when it comes to a decision such as whether to impose liability on states as well as other entities, Congress can use the stable legal backdrop to convey whatever choice *it* has made; the courts simply proceed as Congress, exploiting the relevant conventions, has directed. So Congress is not really ceding decisionmaking authority to courts; it has just availed itself of a less transparent channel for communicating its decisions.

[218] Drawing on Manning's account of the relevant constitutional norms, then-Professor Barrett denounced the "'governmental exemption' canon" and the practice of reading exemptions into "criminal prohibitions and statutes of limitations" on essentially these grounds. *See* Barrett, *supra* note 28, at 164–65. *But cf.* Biden v. Nebraska, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) (endorsing the treatment of "[b]ackground legal conventions" as "part of [a] statute's context" and offering the mens rea and equitable tolling presumptions, among others, as examples).

[219] *See* Manning, *Textualism as a Nondelegation Doctrine*, *supra* note 195, at 706–31; *see also* Bank One Chi., N.A. v. Midwest Bank & Tr. Co., 516 U.S. 264, 280 (1996) (Scalia, J., concurring in part and concurring in the judgment) ("[A]ssuming . . . this desire to leave details to the committees, the very first provision of the Constitution forbids it.").

[220] *See supra* section II.A, pp. 539–44.

[221] Scalia, *supra* note 39, at 583; *see supra* note 160 and accompanying text.

## III. Substantive Canons as Constitutionally Inspired Exceptions to Textualism

If substantive canons cannot be recast in nonsubstantive terms, perhaps they can still be reconciled with textualism because — and to the extent that — they derive their authority from the Constitution itself. After all, textualism is an account of how courts should discern and give effect to Congress's exercise of its lawmaking powers,[222] but Congress's lawmaking authority is limited by the Constitution — and a court's duty to faithfully enforce the texts that Congress promulgates is thus limited in the same way.[223] Substantive canons may not be fatally at odds with textualism, then, as long as they are themselves grounded in what Barrett called (in her influential 2010 article) the courts' higher obligation to "act as faithful agents of the Constitution."[224]

But grounded in that obligation how? The answer to that question is remarkably elusive, as Justice Gorsuch's rendition of this argument in *West Virginia* nicely illustrates. "Like many parallel clear-statement rules in our law," his concurring opinion declared, the major questions doctrine "operates to protect foundational constitutional guarantees."[225] He then explained:

> One of the Judiciary's most solemn duties is to ensure that acts of Congress are applied in accordance with the Constitution in the cases that come before us. To help fulfill that duty, courts have developed certain "clear-statement" rules. These rules assume that, absent a clear statement otherwise, Congress means for its laws to operate in congruence with the Constitution rather than test its bounds. In this way, these clear-statement rules help courts "act as faithful agents of the Constitution."[226]

Notice how the key claims here are expressed in terms of "accordance" and "congruence" with the Constitution — language that straddles the line between a looser notion of *harmony* and a more rigid notion of *compatibility*. That leaves the argument open to two quite different interpretations. By parsing this passage closely, we can both disentangle

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[222] *See supra* section I.A, pp. 522–33.

[223] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178–80 (1803) (holding that "a law repugnant to the constitution is void," *id.* at 180, and rejecting the proposition "that courts must close their eyes on the constitution, and see only the law," *id.* at 178).

[224] Barrett, *supra* note 28, at 169; *cf.* Biden v. Nebraska, 143 S. Ct. 2355, 2377 n.2 (2023) (Barrett, J., concurring) (observing that "many strong-form canons advance constitutional values, which heightens their claim to legitimacy," although "[w]hether the creation or application of strong-form canons exceeds the 'judicial Power' conferred by Article III" is nonetheless "a difficult question"). Although this idea received its most elaborate articulation in Barrett's article, it has cropped up in various places over many years. Discussions (not all endorsements) include Schacter, *supra* note 160, at 652 n.308; Eskridge & Frickey, *supra* note 105, at 598–611; and John F. Manning, Response, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1655 (2001).

[225] West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring).

[226] *Id.* (quoting Barrett, *supra* note 28, at 169).

these two possibilities and highlight the problematic tendency to run them together.

The first interpretation emphasizes the first sentence in this passage — the one invoking the courts' "solemn dut[y] . . . to ensure that acts of Congress are applied in accordance with the Constitution." As Justice Gorsuch surely anticipated, that reads as little more than a bromide about the judicial duty to "disregard[]" a statute when a "conflicting rule[]" imposed by the Constitution so requires.[227] If that is what Justice Gorsuch intended, then applying laws "in accordance with the Constitution" must mean denying them effect if (or to the extent that) they *violate* the Constitution. And insofar as Justice Gorsuch was saying that clear statement rules "help fulfill *that* duty,"[228] he would have to have meant that they help to ensure that courts deny effect to unconstitutional laws. Substantive canons would thus "protect foundational constitutional guarantees"[229] in the straightforward sense of reducing the actual incidence of genuine violations of those guarantees.

But the passage is also susceptible to another interpretation. The specific "way" that clear statement rules help a court discharge its duty, Justice Gorsuch said, is by presuming that Congress intends to enact laws that "*operate in congruence with* the Constitution rather than *test its bounds*."[230] That contrast implies that any law that "test[s] [the Constitution's] bounds" must not be "operat[ing] in congruence with" the Constitution — even though that law might ultimately be within Congress's constitutional power to enact. Justice Gorsuch can thus be understood as touting substantive canons as tools for promoting this demanding sort of "congruence" — in other words, as backstops or buttresses that "protect" *the values served by* "foundational constitutional guarantees" against even technically lawful encroachments. This interpretation implies that Justice Gorsuch's opening allusion to the "solemn duty" of invalidating unconstitutional laws is something of a red herring.[231] But Justice Gorsuch's choice of examples does lend support to this reading, since some of the examples disfavor legal results that, while perhaps not "congruent" with the Constitution in the sense of sharing its

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[227] *Marbury*, 5 U.S. (1 Cranch) at 178; *cf.* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 204 (2009) ("[J]udging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that this Court is called on to perform.'" (quoting Blodgett v. Holden, 275 U.S. 142, 147–48 (1927) (Holmes, J., concurring))).

[228] West Virginia v. EPA, 142 S. Ct. at 2616 (Gorsuch, J., concurring) (emphasis added).

[229] *Id.*

[230] *Id.* (emphasis added).

[231] Promoting "congruence" in the constitutional-values sense is not the same as denying effect to unconstitutional laws, so, if this interpretation is sound, then either (1) Justice Gorsuch is actually claiming in the first sentence that courts have a duty to do the former as well as the latter (while using boilerplate language to paper over the more radical part of that claim), or else (2) he is using "accordance" to mean something different from "congruence" (while exploiting their apparent synonymy to make the promotion of constitutional values seem more tightly connected to the *Marbury* duty than it actually is).

scheme of values, Congress has an undoubted power to impose.[232] And his reliance on Barrett's article cuts in this direction as well: her rendition of the case for (some) substantive canons casts them as measures to "promote[] constitutional values" and ensure that Congress does not "inadvertently exercise extraordinary constitutional powers" that it *does* possess, rather than merely as means of giving effect to the Constitution's actual requirements.[233]

For our purposes, figuring out which of these two arguments Justice Gorsuch (or Justice Barrett, or anyone else) actually intended is less important than identifying and distinguishing the arguments themselves. In fact, we suspect that Justice Gorsuch was really giving voice to both of these ideas at once, whether or not he appreciated their distinctness. More broadly, these ideas both seem to fuel the "intuition," apparently shared by many textualists, that "constitutionally inspired canons" are "more consistent with the principle of faithful agency."[234] Yet we also suspect that — as often happens in such cases — unappealing features of each idea are being obscured by the convenient presence of the other. We will thus treat the two lines of argument as distinct and take each in turn, even though this has the consequence that our presentation will diverge somewhat from the way that our interlocutors frame their own position.

### *A. Canons as Enforcing Constitutional Requirements*

As we have just explained, one strand in the defense of "constitutionally inspired" substantive canons casts them as means of averting *actual* constitutional violations. At first blush, that might seem a surprising claim. Suppose, for instance, that a federal antidiscrimination statute would most naturally be read as applying to state governments. If that application of the statute is unconstitutional, a court can simply hold as much pursuant to its power of *Marbury*-style judicial review. And if extending the statute to state governments is *not* unconstitutional, then

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[232] *See* West Virginia v. EPA, 142 S. Ct. at 2616–17 (Gorsuch, J., concurring); *infra* note 287 and accompanying text.

[233] *See* Barrett, *supra* note 28, at 174–76, 181–82. Much of Barrett's language is equivocal in the same way as Gorsuch's. *See, e.g.*, *id.* at 169 (substantive canons "resist congressional actions that *threaten* [constitutional] *norms*"); *id.* at 181 ("the judicial power to *safeguard* the Constitution"); *id.* at 177 n.324 ("[c]anons *rooted in* the Constitution"); *see also* Biden v. Nebraska, 143 S. Ct. 2355, 2377 n.2 (2023) (Barrett, J., concurring) ("many strong-form canons *advance* constitutional *values*") (all emphases added).

[234] Barrett, *supra* note 28, at 168. In a telling exchange at oral argument in the same Term as *West Virginia*, Justice Kavanaugh posited a similar conception of the place of "substantive canons" in the Court's interpretive practice. When canons do not merely resolve an ambiguity identified on nonsubstantive grounds, Justice Kavanaugh said, they "usually reflect some constitutional or quasi-constitutional value" justifying their departure from textualism's ordinary prescriptions. Transcript of Oral Argument at 62–64, Ysleta del Sur Pueblo v. Texas, 142 S. Ct. 1929 (2022) (No. 20-493); *see also* Kavanaugh, *supra* note 101, at 2156 (suggesting that "if some constitutional or quasi-constitutional value is sufficiently important that we will presume that Congress did not mean to abrogate that value, then we should require Congress to speak directly to that issue in order to overcome it").

it is difficult to see how nullifying that application — based on constitutional avoidance, a federalism canon, or the like — could possibly be justified as a means of averting a constitutional violation that does not exist.[235] The basic challenge for proponents of this first line of argument is to explain why this apparent dilemma is false.

We can think of three such explanations. First, perhaps the Constitution itself prescribes that only clear or explicit statutes can effect certain changes in the law. Second, constitutional doctrine might properly "underenforce" certain constitutional requirements, leaving a gap for substantive canons to fill. Third, the Court might believe that some mistaken constitutional doctrine should be preserved as a matter of stare decisis; then, too, a substantive canon could serve to conform a statute's legal effect to what the Court thinks the Constitution *really* requires. We will consider each of these possible justifications in turn.

*1. Constitutional Clarity Requirements.* — Perhaps some norms that are described as substantive canons of *statutory* interpretation are in fact *constitutional* rules that tie the extent of Congress's power to the clarity with which that power is exercised.[236] Consider, as a possible example, the rule that when a federal statute conditions funding to states on compliance with certain requirements, any ambiguities in those conditions are resolved in favor of the states.[237] One explanation for this rule is that, because the Constitution prohibits Congress from imposing the obligations in question on nonconsenting states, the Constitution itself renders all federal conditions ineffective except insofar as they would have been *clear* to — and thus validly consented to by — the states.[238] The rule of lenity could be justified in a similar fashion, if the Due Process Clause bars the government from punishing conduct whose criminality was insufficiently clear.[239] The major questions doctrine could be susceptible of this kind of defense as well: Just as it is unconstitutional for Congress to delegate a decision to an agency without providing an "intelligible principle," perhaps it is also unconstitutional for Congress to delegate a major question without making clear enough that it is doing so.[240]

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[235] *See* Schauer, *supra* note 8, at 94–95.

[236] *Cf.* Manning, *Clear Statement*, *supra* note 28, at 406 (bracketing "the possibility that some portion of the Constitution might *directly* require Congress to speak clearly in a particular context").

[237] *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

[238] *See id.*; *see also* Gluck, *supra* note 172, at 768 (suggesting that "*Pennhurst* is simultaneously a canon of interpretation . . . and a direct constitutional rule").

[239] *See* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 283–84 (1985); Manning, *Clear Statement*, *supra* note 28, at 406 & n.26; Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 332 (2000); *cf.* SCALIA & GARNER, *supra* note 3, at 298 (noting this possibility but rejecting it on the ground that "application of the rule of lenity, vague as it is, does not coincide with the constitutional requirement of fair notice").

[240] *See* Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari); Gundy v. United States, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting); *cf.*

Our response to this argument is twofold. First, even if there are constitutional requirements of this kind, they are not "canons" in a meaningful sense.[241] What a court is doing in enforcing such a rule is simply *invalidating* the statute at issue (or a particular application of that statute) on the grounds that the statute is not clear enough to satisfy a constitutional clarity requirement.[242] So the argument does not establish that substantive canons are compatible with textualism so much as it asserts that some rules of constitutional law have been misclassified as interpretive canons.

Second, and more importantly, those who would recharacterize a given substantive canon in this way must justify the supposed constitutional clarity requirement by the lights of their favored theory of constitutional interpretation. They cannot shirk that obligation by framing the requirement as a mere statutory canon: the premise of this defense is that the so-called "statutory canon" is in fact a bona fide rule of constitutional law.[243] Notwithstanding the illustrative examples we noted above, however, we doubt that almost any existing substantive canons could actually be justified on originalist grounds (as most textualist interpreters would require[244]). For example, while some have sought to defend a robust nondelegation doctrine in originalist terms, we know of no originalist argument that Article I's Vesting Clause permits major delegations if, but only if, the statutes that make these delegations also make especially clear that they are doing so. In fact, the text of the Constitution imposes hardly any requirements with respect to the form that legislation must take.[245] So while the argument from constitutional clarity requirements is both logically coherent and theoretically interesting, it cannot do much real work. Put another way, insofar as some claim that substantive canons serve to avert constitutional violations, they presumably mean that these canons forestall *other* constitutional

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Sunstein, *supra* note 239, at 331–37 (identifying a class of "[c]onstitutionally inspired nondelegation canons," *id.* at 331).

241 *Cf. supra* section I.B, pp. 533–37 (offering a taxonomy of canons).

242 Interestingly, if a substantive canon is actually a constitutional clarity requirement, it may follow that a court ought always to resolve the question of whether the statute is *best* read to apply to some circumstance before resorting to that so-called "canon" to resolve the case. *Cf.* Gregory v. Ashcroft, 501 U.S. 452, 479 (1991) (White, J., concurring in part, dissenting in part, and concurring in the judgment).

243 *Cf.* Schauer, *supra* note 8, at 98 (criticizing "the unwarranted assumption that by 'merely' interpreting a statute," courts that invoke constitutional avoidance "have been respectful of the prerogatives and the status of a coordinate branch of government").

244 *Cf.* Barrett, *supra* note 45, at 864 (observing that "it makes sense that statutory textualists are usually constitutional originalists" and arguing that "as with statutes, the [Constitution] can mean no more or less than that communicated by the language in which it is written"). We return to the relationship between textualism and originalism below. *See infra* notes 296–97 and accompanying text.

245 Two arguable exceptions are the prohibitions on bills of attainder and ex post facto laws. *See* U.S. CONST. art. I, § 9, cl. 3.

violations — not that the absence of a clearer statement *itself* would render some exercise of Congress's powers unconstitutional.

*2. Offsetting Underenforcement.* — Return, then, to the question of how substantive canons could help to avert actual constitutional violations when a court already has the traditional power of judicial review. At a high level, the answer would have to be that the Constitution imposes more stringent limits on Congress than the courts actually would enforce in the context of *Marbury*-style review. If that were the case, then even though "constitutionally inspired" canons might be superfluous when it comes to enforcing the constitutional *doctrine* that the Court applies in the *Marbury* context, the same canons might nonetheless vindicate the Constitution itself in at least some circumstances where that body of doctrine would not.

Building on earlier scholarship, Barrett sketched an argument of just this sort in her 2010 article.[246] As she noted, courts sometimes purposely underenforce a constitutional requirement in the context of traditional judicial review.[247] The standard justification for such underenforcement is a felt lack of what the Court generally calls "judicially manageable standards."[248] According to this familiar line of thought, a court should not deny effect to a law — even one the court thinks *is* unconstitutional — unless the court can also *explain* that conclusion with reference to a standard that satisfies certain thresholds of intelligibility, predictability, public acceptability, and the like. If courts do restrain themselves in that way, they will leave a gap between what they think the Constitution truly requires and the more modest set of requirements that they actually insist upon.[249] "Constitutionally inspired" substantive canons could then avert genuine constitutional violations by, in effect, filling in that gap — not with ironclad constitutional barriers, but with defeasible statutory interpretations.[250] This judicial practice would make it more difficult for Congress to enact certain rules and policies that, if push came to shove, the Court would permit. But, the thought goes, Congress can hardly complain about having to jump through extra

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[246] *See* Barrett, *supra* note 28, at 170–73; *see also* sources cited *infra* notes 247–50.

[247] Barrett, *supra* note 28, at 170. The classic treatment of underenforcement is Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213–28 (1978).

[248] *See generally* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006). *See also* Barrett, *supra* note 28, at 170.

[249] *See* Fallon, *supra* note 248, at 1285–97; *see also id.* at 1317 (describing this as the "permissible disparity thesis").

[250] On the connection between underenforcement and substantive canons, see, for example, Eskridge & Frickey, *supra* note 105, at 630–33; Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 446, 455–59 (2005); Sunstein, *supra* note 239, at 338–40; and Manning, *Clear Statement*, *supra* note 28, at 420–22.

hoops in order to exercise authority that Congress does not really have at all.[251]

Before we turn to the merits of this argument, note that it (like others we have considered) could only justify a fraction of the Court's existing practice. As Barrett rightly acknowledged, the Court's adoption of a clear statement rule often "has more to do with [the Court's] determination that some constitutional principle merits heightened protection than with a decision to underenforce a norm through judicial review."[252] Congress's power to preempt state law, for example, is not generally thought to result from any judicial underenforcement — yet the Court still presumes that Congress does not intend to exercise that power (and this presumption is often said to be "constitutionally inspired").[253] The same goes for Congress's power to abrogate a state's sovereign immunity when it enforces the Reconstruction Amendments, and so on.[254] To be sure, some substantive canons might operate in areas of purposeful underenforcement: the major questions doctrine, cast as a complement to assertedly underenforced limits on legislative delegations, is again a salient possibility.[255] But many plainly do not.

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[251] *See, e.g.*, Young, *supra* note 178, at 1606 ("[I]f we think the constitutional norm was underenforced in the first place, some broadening of its scope should not trouble us."). The style of argument that we describe here is related to the notion of a "compensating adjustment" (and to the broader problem of "second-best constitutionalism"). *See, e.g.*, JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 94–95 (2013); Adrian Vermeule, *Hume's Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421 (2003); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1748–62 (2005). Our sense of prevailing usage, though, is that "compensating adjustments" generally aim to maintain some *overall* equilibrium by altering one feature of the constitutional system that bears on the same balance as another mechanism — perhaps quite far afield from the first — that (in the adjuster's view) has gotten out of whack. *See, e.g.*, William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 326 (2020) ("The most famous example is the argument that we ought to compensate for the unconstitutional expansion of delegated power to agencies by upholding the otherwise unconstitutional legislative veto."); Young, *Making Federalism Doctrine*, *supra*, at 1783–84 (suggesting that "[c]ompensating adjustment . . . involves changed readings of the constitutional text and structure in response to changes in the context in which the text and structure must operate . . . [(such as] the integration of the national economy[)]"). Efforts to offset a court's own purposeful underenforcement of constitutional requirements, through interpretations that approximate the upshots of those requirements (but make them defeasible), do not fit that paradigm. We do not deny that "compensating adjustments" can be defined so as to encompass these efforts, however, and we have no real quarrel with those who might favor that possible usage.

[252] Barrett, *supra* note 28, at 173.

[253] *See id.* at 180 ("[T]he presumption against preemption is commonly justified as protecting the norm of federalism.").

[254] *See id.* at 173–74 (discussing Dellmuth v. Muth, 491 U.S. 223, 227–28 (1989)).

[255] *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2377–78 (2023) (Barrett, J., concurring) ("Some have characterized the major questions doctrine as a strong-form substantive canon designed to enforce Article I's Vesting Clause. . . . This 'clarity tax' might prevent Congress from getting too close to the nondelegation line, especially since the 'intelligible principle' test largely leaves Congress to self-police."); Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and*

Even when a substantive canon might be cast as a complement to underenforcement, moreover, there is another problem that further narrows the argument's scope — and that might render it untenable altogether, at least for a textualist. The root of the problem is that substantive canons do not (and generally cannot) operate *only* within the gap left by underenforcement. After all, the very reason for underenforcement is usually that a would-be constitutional limit cannot be specified precisely in the first place.[256] As Barrett recognized, therefore, substantive canons actually operate in much the same way as the "overenforcing" or "prophylactic" rules that courts sometimes employ to "implement" the Constitution.[257] Much as *Miranda v. Arizona*[258] tells courts to answer a more manageable question about warnings rather than the ultimate constitutional question about compulsion, substantive canons offset underenforcement only by telling courts to answer a *different question* from the question that the Constitution itself asks.[259] And just as *Miranda* therefore requires the exclusion of some fully voluntary confessions, these substantive canons necessarily instruct courts to deny effect to the law that Congress made — or, at least, the law that a textualist would take Congress to have made — in some cases in which even the true, undiluted meaning of the Constitution permits Congress's choice. For example, the Court has adopted a strong presumption against reading a statute to regulate in a domain traditionally left to the states, and this rule is sometimes defended as a complement to the Court's purported forbearance from enforcing the true limits on the commerce power (or the mirror-image protection for states' rights in the Tenth Amendment).[260] But even if that is the canon's purpose, nobody contends that "the commerce power is wholly devoid of congressional authority to speak on any subject of traditional state concern,"[261] so the effect of the presumption is to nullify some laws that all would agree that the Constitution *did* authorize Congress to make.

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*Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L.J.F. 693, 703 (2022) ("The major questions doctrine is a way to narrow the field in which the nondelegation doctrine remains underenforced because it, in effect, requires Congress to speak clearly if it wishes to delegate decisions of great political or economic significance to an administrative agency.").

256 *See* Manning, *Clear Statement*, *supra* note 28, at 439; Eskridge & Frickey, *supra* note 105, at 633; Sunstein, *supra* note 239, at 327, 338.

257 Barrett, *supra* note 28, at 174. *See generally* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001).

258 384 U.S. 436 (1966).

259 *See* Barrett, *supra* note 28, at 174.

260 *See id.* at 172 ("For example, the clear statement federalism rule may complement the Court's decision to underenforce the Tenth Amendment through judicial review."); John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 812. For a recent and robust statement of this presumption, see *United States Forest Service v. Cowpasture River Preservation Ass'n*, 140 S. Ct. 1837, 1849–50 (2020).

261 United States v. Lopez, 514 U.S. 549, 611 (1995) (Souter, J., dissenting) (criticizing the Court's reliance on its clear statement precedents in construing the extent of Congress's commerce power).

That means that any substantive canon that is meant to offset underenforcement would need to be justified based on an assessment, presumably undertaken at the level of the particular canon, of the relative costs and benefits of under- and overenforcing the relevant constitutional requirements. Among other things, such an assessment would need to take into account the costs of requiring Congress to "override" a misinterpretation in order to exercise constitutional authority that it legitimately possessed all along — and the substantial likelihood that, for any number of reasons, Congress would fail to do so.[262] So, at a minimum, the legitimate sweep of the argument from offsetting underenforcement is further hemmed in, and justifying a "constitutionally inspired" canon in these terms would require the courts to show their work in a manner that they never have.

More fundamentally, we think the very need to resort to such a calculus reveals how awkward — really, untenable — this entire line of argument is likely to be for most textualists. One way to resist the objection that substantive canons necessarily go *beyond* the Constitution's requirements — and that they therefore nullify valid statutes — is to resist the baseline of a "Constitution-free" or "otherwise preferred" statutory interpretation in the first place.[263] For textualists, however, that route is unavailable: Insofar as the statute's legal effect is fixed by its communicative content, the statute's effect can only be overridden, not shaped, by a "constitutionally inspired" canon. Yet the very idea that a court may knowingly deny effect to a constitutional statute — as long as the judge-made rule pursuant to which the court acts maximizes some conception of net benefits — would strike most textualists as bizarre.[264] It may be true, as Barrett says, that this sort of nullification "clips congressional prerogatives much *less* than [does] overenforcement in the context of judicial review," because Congress remains free to enact the

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[262] For discussions of that problem, see JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 105 (1997); POSNER, *supra* note 239, at 285; Barrett, *supra* note 28, at 175; and Schauer, *supra* note 8, at 88–89. Of note, the relevant legislative politics may often shift once (1) the choice at issue is effectively severed from the larger legislative package of which it was originally a part; and (2) the Court may have threatened to invalidate the disposition of that issue that Congress would now be (re-)adopting, but without making clear whether the Court actually would invalidate it.

[263] As Ernest Young observes, a conception of statutory interpretation that charges courts with harmonizing various texts and values "effectively renders statutory and constitutional law continuous." Ernest A. Young, *The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey*, 98 CALIF. L. REV. 1371, 1384 (2010). And from that point of view, "the critics' conception of an 'otherwise preferred' . . . or 'constitution-free' . . . reading is artificial"; it "categorically excludes a source of statutory meaning which is no less legitimate than other 'principles and policies' which frequently enter into interpretation." Young, *supra* note 178, at 1591 (quoting Schauer, *supra* note 8, at 83).

[264] *Cf.* Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 815 (2022) ("If the Court's job is to obey the law, and not to maximize legal obedience, then it can't override real legal standards in the name of choosing new decision procedures.").

same rule again more clearly.[265] But the real challenge is to explain why *any* judicial "clipping" of Congress's constitutional authority is permissible. We do not see how such an intervention could be squared with the "classical conception of the judiciary, . . . especially revered by formalists, in which the court's job is to simply apply the law in cases that come before it."[266] And, at the end of the day, Justice Barrett may not either: Despite her earlier argument that "the judicial power to safeguard the Constitution can be understood to qualify the duty that otherwise flows from the principle of legislative supremacy,"[267] she declined to join Justice Gorsuch's *West Virginia* concurrence — and then flatly stated that, "if the major questions doctrine were a newly minted strong-form canon, [she] would not embrace it."[268]

*3. Concessions to Precedent.* — Still, there is a final variation on the same argumentative theme that merits separate consideration — one that might parry some of the difficulties we have just noted. Suppose that a majority of Justices believes, not that some restraint on Congress should go underenforced for lack of manageable standards, but rather that the Court's precedents have simply *erred* in recognizing some power on the part of Congress that it does not really possess. Yet suppose that the same majority believes that stare decisis (or some other felt imperative) makes overruling those precedents inappropriate. In that circumstance, applying a "constitutionally inspired" substantive canon might provide the Court with a middle option: Congress may still exercise the power that the Court's precedents mistakenly gave it, but Congress must at least do so clearly or explicitly. This argument has much in common with the argument from offsetting underenforcement; in both cases the idea is that, while the resulting canons distort the substance of Congress's lawmaking, they distort it in the direction of what the Constitution *actually* requires. But there is an important difference: the "underenforcement" that is being offset here is due not to a lack of judicially manageable standards, but to the Court's unwillingness to overrule its erroneous precedent. That means that a substantive canon that aims to bridge the resulting gap could, at least in principle, be confined to cases in which the putatively correct constitutional rule *would* invalidate the statute outright.[269] If that constraint were observed,

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[265] Barrett, *supra* note 28, at 175–76 (emphasis added).

[266] Baude, *supra* note 251, at 331. For salient examples of this conception at work, see *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1485–86 (2018) (Thomas, J., concurring); *Barr v. American Ass'n of Political Consultants*, 140 S. Ct. 2335, 2351 & n.8 (2020) (opinion of Kavanaugh, J.); and *Dickerson v. United States*, 530 U.S. 428, 457–59 (2000) (Scalia, J., dissenting).

[267] Barrett, *supra* note 28, at 181.

[268] Biden v. Nebraska, 143 S. Ct. 2355, 2377 n.2 (2023) (Barrett, J., concurring).

[269] *Cf. supra* notes 256–57 and accompanying text (noting that canons that aim to compensate for purposeful underenforcement generally cannot do this).

canons justified in this way would not commit the Court to nullifying any laws that it thinks constitutional.[270]

This precedent-centric argument for "constitutionally inspired" canons is rarely stated plainly — a fact that, as we will see, points toward some of its difficulties.[271] Nonetheless, we suspect that something like this idea does figure importantly in the real-world motivations of the textualist jurists who embrace such canons. Very often, after all, they are finding "inspiration" for the sorts of restraints on Congress that, to their chagrin, existing doctrine neglects. And while these Justices have rarely spelled out their use of substantive canons to blunt the impact of precedents that they are reluctant to overrule, some scholars have mounted or suggested more explicit defenses of specific canons in similar terms.[272]

Although we think this is probably the strongest defense of "constitutionally inspired" canons that textualists could mount, it comes with a heavy burden of justification — one that the Court has rarely, if ever, acknowledged or carried. For one thing, a satisfactory explanation for invoking this theory would have to include an explanation of why, in a given case, the balance of stare decisis considerations tips far enough in favor of an erroneous precedent that the precedent should be preserved for purposes of *Marbury*-style review, but not so far that the Court should simply take Congress's apparent invocations of that power at face value. And more fundamentally, a substantive canon could only be justified in this way if the existing constitutional doctrine is wrong and the "shadow" doctrine that one is applying instead (via the statutory canon) is right. After all, a textualist judge is justified in departing from the statute's ordinary meaning, under this theory, only because the statute, interpreted in that ordinary way, is *actually* unconstitutional. When it is justified in these terms, then, coining or invoking a substantive canon is not really a way of postponing a full reckoning with a hard constitutional question. It is just a concession that one might make

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[270] *Cf.* Lawrence B. Solum, *How* NFIB v. Sebelius *Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1, 54 (2013) ("Given that a thoroughly originalist jurisprudence is infeasible (at least in the short to medium run), some originalists endorse the idea that there can be an 'originalist second best': given the practical impossibility of the first-best originalist interpretation of the Commerce Clause, the originalist might argue for doctrines that *limit departures from original meaning* to those required by practical necessity." (emphasis added)).

[271] A cryptic passage in Justice O'Connor's opinion for the Court in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), can be read as voicing this logic. *See id.* at 464 ("We are constrained in our ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause. *See Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) . . . . But there is no need to do so if we hold that the ADEA does not apply to state judges.").

[272] *See, e.g.*, Evan D. Bernick, *Are the Indian Canons Illegitimate? A Textualist-Originalist Answer for Justice Alito*, ORIGINALISM BLOG (Mar. 28, 2022), https://originalismblog.typepad.com/the-originalism-blog/2022/03 [https://perma.cc/6AY5-GYJQ]; Mark Moller & Lawrence B. Solum, *Corporations and the Original Meaning of "Citizens" in Article III*, 72 HASTINGS L.J. 169, 227 (2020).

to stare decisis in operationalizing one's *answer* to that constitutional question.[273]

To be sure, the Court's textualists could acknowledge all of this and undertake to justify their embrace of one or another substantive canon accordingly. But that would entail forging a majority for a full-blown holding that, under the soundest interpretation of the Constitution, Congress lacks authority to enact some legal rule. Such a determination would presumably come only after adversarial briefing addressed to that merits question. And presumably the majority would need to articulate a doctrinal structure to implement its newly announced vision of the Constitution's actual requirements as well. Only then, at the last analytic moment, would the majority demote its bottom-line conclusion to a defeasible statutory interpretation in avowed deference to stare decisis.

In practice, we are not aware of any majority opinion that has ever reasoned in this fashion. And, while any explanation of that fact will inevitably be speculative, we doubt that it is an accident. First and foremost, the very same concerns that tell against overruling a precedent will usually also tell against declaring it erroneous — in a majority opinion, at least — while affording it a stare decisis lifeline. A precedent that received that treatment would surely seem marked for a future demise, perhaps after some implicit notice period had elapsed,[274] and much of the upheaval (and institutional blowback) that might be triggered by a simple overruling could thus be triggered by the majority's open proclamation of error, too. From the point of view of the Court's felt legitimacy and integrity, moreover, it is one thing to decline to *revisit* an issue due to the weight of stare decisis, but quite another to rule that the Constitution requires *X* and then go on enforcing not-*X* indefinitely anyway.[275] That is one reason why, as Barrett once observed, the "technique of assuming, and *therefore not investigating*, a precedent's validity . . . is a critical means of keeping law stable."[276]

Conceivably, the Justices could avoid these problems by reasoning in the fashion that we sketched above, but keeping that logic to themselves. That is, they could: (1) determine that a statute actually would be invalid under (what they take to be) the correct understanding of constitutional law; but then (2) forbear from announcing as much; and (3) cite a hazier,

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[273] *Cf.* Schauer, *supra* note 8, at 89 ("[B]ecause the identification of the 'potential' constitutional problem turns out for this set of cases necessarily to be dispositive, the idea that the court is avoiding a constitutional decision is illusory. It is in fact making one.").

[274] *Cf.* Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2484 (2018) (discounting reliance in part because "public-sector unions have been on notice for years regarding this Court's misgivings about *Abood*").

[275] *Cf.* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2262 (2022) ("[W]hen it comes to the interpretation of the Constitution — the 'great charter of our liberties,' which was meant 'to endure through a long lapse of ages' — we place a high value on having the matter 'settled right.'" (citations omitted) (quoting Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816))).

[276] Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1940 (2017) (emphasis added); *see id.* at 1930–31.

"constitutionally inspired" canon as justification for reaching the same result. In effect, they would then be using ill-defined substantive canons as covers for a kind of "off-the-books originalism."[277] The Justices' conspicuous obscurity about how "constitutionally inspired" canons are supposed to relate to the actual exercise of judicial review makes plausible that something like this may be afoot (even if they are not fully self-conscious about what they are doing).[278] But, in any case, there are (or would be) glaring problems with such a practice. After all, this logic requires the Justices *not* to articulate the reasons that they actually endorse as legally sufficient to warrant their decisions. That means both that those actual reasons are not exposed to public view and that the Justices are meanwhile spinning out rationales (which then come to bear legal weight) that they do not actually accept as legally sufficient.[279] Perhaps most troubling is that, by pushing underground the determination on which the Justices would really be relying — that is, the determination of a statute's *actual* constitutionality — this practice leaves the Justices to make that determination in a highly undisciplined way. They are often denied the benefit of on-point briefing, and they are freed of the obligation to answer countervailing arguments, or even to reduce their intuitions to a determinate analysis that will "write."[280]

The bottom line is that, if "constitutionally inspired" canons do help the Court to avert actual constitutional violations, they do so mainly by enabling the Court to "make constitutional law on the cheap,"[281] a pernicious form of "stealth constitutionalism."[282] If the Court were instead required to make its tacit determinations of unconstitutionality explicit, we doubt that it would ever opt for the awkward middle ground that the theory we have described represents. Yet nobody has defended a regime in which the Court routinely makes important constitutional decisions "off the books," and we doubt that anyone would. Pending such

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[277] We are grateful to Larry Solum for urging us to treat this issue in greater depth and for suggesting the "off-the-books originalism" label. (In principle, the same form of argument is available to nonoriginalists as well — but in practice and at present, it is generally originalists who would have occasion to employ it.)

[278] *See supra* notes 222–34 and accompanying text (parsing Justice Gorsuch's ambiguous treatment of the issue in *West Virginia*).

[279] On the general obligation of judicial candor or sincerity, see, for example, Richard H. Fallon, Jr., *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265 (2017); Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987 (2008); and David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987).

[280] *Cf.* RUTH BADER GINSBURG, MY OWN WORDS 211–12 (2016) ("An opinion writer may find that the conference position, in whole or in part, 'won't write,' so the writer ends up on a different track."). Similar concerns have been raised with respect to both constitutional avoidance, *see* Schauer, *supra* note 8, at 90, and so-called "stealth overruling," *see* Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 33–40, 56–62 (2010).

[281] Manning, *Clear Statement*, *supra* note 28, at 449.

[282] William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term — Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 85 (1994).

a defense, then, we take the theoretical possibility of substantive canons that are justified as concessions to stare decisis (and hence are compatible with textualism) to be a theoretical possibility and nothing more.

### *B. Canons as Promoting Constitutional Values*

What, then, of the alternative formulation of the "constitutional inspiration" argument that we distinguished at the outset of this Part?[283] Recall that this second variant of the argument casts the same canons as efforts to advance certain constitutional *values* by disfavoring interpretations that would encroach on them, even though Congress would in no sense *violate* the Constitution by legislating in those disfavored ways. Despite Justice Gorsuch's blurring of this line in *West Virginia*, the two arguments are quite distinct: they envision substantive canons "operat[ing] to protect foundational constitutional guarantees"[284] in fundamentally different senses of those words.[285] And when the opaque rhetoric is stripped away, both then-Professor Barrett's article and Justice Gorsuch's concurrence *do* seem to rely on the promotion of constitutionally favored values as a distinct justification for substantive canons. For her part, Barrett casts substantive canons partly as "'stop and think' measures" that ensure that Congress does not "inadvertently cross constitutional lines *or inadvertently exercise extraordinary constitutional powers*," and she deems this judicial check on Congress's use of its conceded authority potentially justifiable in part because the courts are "act[ing] only in service of *values* enshrined in the Constitution."[286] And while Justice Gorsuch's language is more ambiguous, his account of how "clear-statement rules" serve as "corollar[ies]" of "constitutional rules" ultimately trades on the same idea, whether wittingly or not.[287]

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[283] *See supra* notes 222–34 and accompanying text.

[284] West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring).

[285] *See supra* notes 230–33 and accompanying text.

[286] Barrett, *supra* note 28, at 175 (emphasis added). Interestingly, Justice Gorsuch quotes only the first half of this disjunctive phrase in his *West Virginia* opinion. *See* West Virginia v. EPA, 142 S. Ct. at 2620 (Gorsuch, J., concurring). One might infer that he is uncomfortable expressly endorsing substantive canons as tools for checking Congress's use of powers that it does possess.

[287] West Virginia v. EPA, 142 S. Ct. at 2619 (Gorsuch, J., concurring). Justice Gorsuch's treatment of his lead example — the presumption against retroactivity — makes this especially clear. He reasons in two steps: (1) "[t]he Constitution prohibits Congress from passing laws imposing various types of retroactive liability," such as liability to criminal punishment; (2) "[c]onsistent with this rule," the Court has long presumed that, by default, federal statutes do not impose retroactive liability at all. *Id.* at 2616. But because that presumption sweeps far more broadly than the actual constitutional prohibitions do (as the case cited by Justice Gorsuch, *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), notes expressly, *see id.* at 267–68), the presumption is "consistent with" (or a "corollary" of) the relevant prohibitions only in the sense of arguably furthering the same *values* that the prohibitions are taken to serve where they do apply. More generally, Justice Gorsuch's account of the major questions doctrine is shot through with claims about the values (or "interests") it purportedly serves, including "self-government, equality, fair notice, federalism, and the separation of powers." West Virginia v. EPA, 142 S. Ct. at 2620 (Gorsuch, J., concurring).

If we put all methodological commitments to the side for a moment, it is easy to see the appeal of accounting for constitutional values in statutory interpretation in this way. What Ernest Young has termed the "binary" model of judicial review — where a court enforces some set of "lines" that the government may not cross — is inevitably somewhat artificial.[288] The substantive concerns that justify various constitutional limits are usually not dichotomous; they often phase in over some range, gaining strength in proportion with whatever circumstances implicate them in the first place. At some point in that range — when the facts fall within the "penumbra"[289] of a constitutional guarantee, one might say — it could make sense to give effect to Congress's apparent decision if, but only if, a court is especially certain that Congress intended that result, or has not evaded political accountability for choosing it, or values it highly enough to pay an extra price for it.[290] "Constitutionally inspired" substantive canons can thus be understood as "resistance norms" that, as Young explains, "mak[e] it harder — but not impossible — to achieve certain legislative goals that are in tension with the canon's underlying value," and these norms, in turn, can be defended as valuable features of a system of judicial review.[291]

But, of course, there is a reason that Justice Gorsuch did not make this argument forthrightly in *West Virginia*: as a textualist and originalist, he expressly rejects the premises from which it proceeds. As Justice Gorsuch stressed in a recent Fourth Amendment dissent (joined by Justices Thomas and Alito), he believes that the Court is "tasked only with applying the Constitution's terms"; the Justices "have no authority to posit penumbras of 'privacy' and 'personal security' and devise whatever rules [they] think might best serve the Amendment's 'essence.'"[292] "The Fourth Amendment allows this Court to protect against specific governmental actions," he explained, "and that is the limit of our license."[293] Indeed, Justice Gorsuch clearly relishes deriding opposing positions as resting on "some penumbra emanating somewhere," in contrast to a rule stated in some authoritative text.[294] So it would be quite

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288 Young, *supra* note 178, at 1594.

289 Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

290 *See, e.g.*, Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 HARV. L. REV. 1, 27–28 (1957); Stephenson, *supra* note 178, at 36–42; Young, *supra* note 178, at 1591–98. In effect, such a system would have some of the virtues of the rule, observed in some constitutional systems, that the legislature may override rights protections, but must do so expressly. *See, e.g.*, Canadian Charter of Rights and Freedoms § 33, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

291 Young, *supra* note 178, at 1596; *see id.* at 1585–613; sources cited *supra* note 290.

292 Torres v. Madrid, 141 S. Ct. 989, 1016 (2021) (Gorsuch, J., dissenting).

293 *Id.*

294 Transcript of Oral Argument at 54, Collins v. Yellen, 141 S. Ct. 1761 (2021) (No. 19-422); *see also* Transcript of Oral Argument at 17, BP P.L.C. v. Mayor of Balt., 141 S. Ct. 1532 (2021) (No. 19-1189) ("I'm not sure I understand . . . where this authority to dismiss for lack of jurisdiction,

something for him to openly assert the authority to deny effect to the law that (under textualist premises) Congress actually made, in the name of furthering some value that "underl[ies]" or is "embodied in"[295] a constitutional provision that is, strictly speaking, inapplicable.

Lest we seem to be picking on Justice Gorsuch, it bears emphasis that the basic incompatibility here is closely tied to the core commitments of textualism itself. As Justice Scalia, Justice Barrett, and John Manning have all argued, "the Constitution is, at its base, democratically enacted written law," and textualists thus ought to "approach[] the Constitution like any other legal text."[296] Just as "[a textualist] hews closely to the rules embedded in the enacted text," Barrett has explained, "an originalist submits to the precise compromise reflected in the text of the Constitution."[297] From this point of view, the Constitution does not grant any legal status to "federalism" or the "separation of powers" as such; the Constitution simply imposes a suite of legal rules that allocate authority between different governmental entities in particular ways (and that might have been intended by their proponents to advance those abstract values to some degree).[298] Whether or not this view is sound as a general matter, we agree with these leading textualists that their textualism appears to commit them to it. But then how can Barrett claim that, when substantive canons "reflect constitutionally derived values," they "promot[e] . . . norms that have been sanctioned by a super-majority as higher law"?[299] To the contrary: what the canons promote has *not* been sanctioned as higher law, and, as we demonstrated above, what has been sanctioned as higher law — the Constitution's actual requirements — the canons do not promote. Thus, as Caleb Nelson asks: "Why should the policy behind the Constitution's specific

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frivolous arguments . . . what penumbra it emanates from?"); Transcript of Oral Argument at 61, Torres v. Tex. Dep't of Pub. Safety, 142 S. Ct. 2455 (2022) (No. 20-603) ("I understand the textual commitments in the Fourteenth Amendment, but, here, we're being asked to adopt a view of implicit penumbras . . . .").

[295] Young, *supra* note 178, at 1590, 1596.

[296] Barrett, *supra* note 45, at 862; *see id.* at 861–65; Scalia, *supra* note 7, at 37–38; Manning, *Clear Statement*, *supra* note 28, at 427–40.

[297] Barrett, *supra* note 45, at 864–65 (alteration in original) (quoting John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1665 (2004)); *see id.* at 865 ("That is how judges approach legal text, and the Constitution is no exception.").

[298] Manning has defended this view across several contexts. *See, e.g.*, John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2008 (2009) [hereinafter Manning, *Federalism*] ("When judges enforce freestanding 'federalism,' they ignore the . . . bargains and tradeoffs that made their way into the document."); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2039 (2011) ("[A]bstracting from particular clauses to freestanding separation of powers doctrines . . . disregard[s] precise constitutional provisions and the realities of the constitutionmaking process."); Manning, *Clear Statement*, *supra* note 28, at 433–40.

[299] Barrett, *supra* note 28, at 168.

protections of federalism spill over to justify special rules of statutory construction that are nowhere intimated in the Constitution itself?"[300]

In fact, this quintessentially textualist line of thought might make even *non*textualists uneasy about efforts to justify substantive canons by tying them to "constitutional values." As Manning has argued especially forcefully, the relevant values in this context are almost always in tension with one another, and efforts to promote one or another of them thus inevitably favor *one side* of a compromise or trade-off at the expense of the other.[301] In *West Virginia*, for example, Justice Gorsuch emphasized that "the framers deliberately sought to make lawmaking difficult" in order to "ensure that any new laws would enjoy wide social acceptance [and] profit from input by an array of different perspectives."[302] The major questions doctrine, he reasoned, protects those objectives.[303] But, as Chief Justice Marshall famously observed, the Constitution also reflects a determination to subject Congress's exercise of its powers to "no other limits than are prescribed in the constitution," and thus to "rely solely" on the political checks inherent in "representative government[]" to protect against most possible abuses.[304] If one takes the Constitution to "value" the broad discretion it affords to the political branches, handicapping Congress is *never* an unqualified good from the perspective of "constitutional values."[305] At a minimum, therefore, justifying a substantive canon in these terms requires determining how *different* values ought to be prioritized relative to one another in the context at hand. And that, in turn, calls for a weighing of either our own values or those reflected in our constitutional practice — an exercise that is probably only obscured and rendered less accountable when it is portrayed as an effort to enforce normative judgments already somehow embedded in the Constitution itself.[306]

Whether we are right about that or not, much the same point explains why Barrett's own prescription for identifying the canons with a valid claim to "constitutional inspiration," advanced in her 2010 article, cannot succeed within textualist parameters.[307] In order for a canon to

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300 Nelson, *supra* note 43, at 397 n.149; *see id.* ("The fact that the Constitution protects federalism in other ways is no answer; especially for textualists, the *limits* on those protections (including the fact that the Constitution by hypothesis does let Congress expose the states to certain kinds of suits) are no less noteworthy than the protections themselves.").

301 *See* Manning, *Clear Statement*, *supra* note 28, at 427–28; *supra* note 298.

302 West Virginia v. EPA, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring).

303 *See id.* at 2618–19.

304 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824) (Marshall, C.J.).

305 *Cf.* SCALIA & GARNER, *supra* note 3, at 57 ("[T]he limitations of a text — what a text chooses *not* to do — are as much a part of its 'purpose' as its affirmative dispositions."); Manning, *Federalism*, *supra* note 298, at 2057 (concluding that "the 'spirit' underlying the document as a whole cuts in more than one direction" on the balance between state and national power).

306 *Cf.* DAVID A. STRAUSS, THE LIVING CONSTITUTION 45–46 (2010) (faulting originalism, at least in some forms, as "an invitation to be disingenuous," *id.* at 45).

307 *See* Barrett, *supra* note 28, at 179–81.

be legitimate, she suggested, the Constitution must be "best understood" as "biased" against the same exercises of power that the canon resists.[308] So, for example, the federalism canons could not qualify a textualist's ordinary obligation of faithful agency "[i]f the Constitution is best understood as neutral or favorable to federal preemption of state law," rather than as inclined against it.[309] But perhaps textualists' most forceful insight — and, in any event, one of their basic commitments — is that when lawmakers negotiate a compromise among conflicting values, the question whether the resulting text is "biased" in a given direction lacks a meaningful answer. Indeed, Barrett's claim that the validity of constitutionally inspired canons "depends upon one's view of the *substantive meaning* of the [constitutional] provision involved" cannot be squared with textualists' understanding of what legal language means.[310] The "substantive meaning" of the Supremacy Clause, a committed textualist would say, is simply that federal law preempts inconsistent state law; its meaning does not incorporate anyone's real or imagined enthusiasm or reluctance about the power that the clause confers. And that leaves interpreters with no basis for concluding that, in resisting some exercise of federal power, they would be going with the grain of the Constitution rather than against it. From a textualist's point of view, the Constitution has no grain at all.

### *C. A Note on Historical Conceptions of the Judicial Power*

Textualists have one final card to play. In a striking passage in the same article, Barrett forthrightly acknowledged that because "[c]onstitutionally inspired canons . . . constrain Congress more than the Constitution does," they are "in tension with the structural limitations upon statutory interpretation," and that her defense of them thus could not be "rock solid."[311] In fact, she said, "[i]t would be reasonable, and as a formal matter, perhaps more satisfying, to take the position that overenforcing canons of construction exceed the limits of judicial power."[312] So far, so good. Yet she then pointed out that "[t]he federal

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[308] *Id.* at 181; *see id.* at 180–81. We focus here on the criterion that Barrett identifies as "the most important limit on the canons that courts can apply to deviate from a statute's most natural reading." *Id.* at 179. She also argues separately that "the canon must be connected to a *reasonably specific* constitutional value." *Id.* at 178 (emphasis added).

[309] *Id.* at 181.

[310] *Id.* (emphasis added).

[311] *Id.* at 175–76; *accord* Biden v. Nebraska, 143 S. Ct. 2355, 2377 n.2 (2023) (Barrett, J., concurring) ("Whether the creation or application of strong-form canons exceeds the 'judicial Power' conferred by Article III is a difficult question. . . . [E]ven assuming that the federal courts have not overstepped by adopting such canons in the past, I am wary of adopting new ones . . . .").

[312] Barrett, *supra* note 28, at 176; *see id.* at 112, 163 (describing Barrett's conclusion that a limited "power to develop and apply substantive canons is consistent with the constitutional structure" as "tentative[]"); *id.* at 175 (suggesting that "overenforcing canons of construction . . . exploit open space in the constitutional structure: they have some basis in the judicial power and are not squarely

courts have long asserted the power to employ language-pushing substantive canons," and she concluded that this venerable "pedigree" favored construing the Article III "judicial Power" as including the power to create and apply such canons.[313] "If the Marshall Court thought itself empowered to adopt the *Charming Betsy* and avoidance canons," she reasoned, "that is evidence that it believed that 'the judicial Power' encompassed the authority to do so."[314] Along the same lines, Justice Gorsuch's *West Virginia* concurrence asserted that the Court had acted permissibly because "our law is full of clear-statement rules and has been since the founding."[315]

There are two problems with this appeal to historical practice. The first follows directly from our earlier point about the sheer impossibility, from a textualist's point of view, of interpreting the Constitution as expressing a residual favoritism toward some of its provisions (or the values they serve) over others.[316] Even if the Constitution *authorizes* the use of substantive canons to further penumbral rights or limitations, a textualist judge will simply have no way to *exercise* that authority. It is telling in this regard that Barrett failed to give a single example of a canon that, in her considered judgment, actually *is* rendered legitimate by its alignment with the Constitution's normative thrust; she said only that "such an inquiry must be undertaken."[317] If that inquiry is undertaken within textualist parameters, we do not see how it could ever bear fruit.[318]

Second, the appeal to historical practice cannot shore up Barrett's position if the reason that courts have long employed substantive canons is that the courts *have long operated from premises that textualism repudiates*. In that event, past practice would lend support to substantive canons only because, and to the extent that, it undercuts textualism itself. And, indeed, Barrett's historical study of canons of construction in the early Republic shows that these interpretive norms were justified largely on grounds that are flatly at odds with modern textualism.[319] We fail to see why one would take from this history the lesson that

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foreclosed by the important structural limitations that otherwise cabin that power"). Although Justice Gorsuch's *West Virginia* concurrence draws on and seems to align itself with Justice Barrett's article, it notably lacks any similar tentativeness. *See supra* pp. 558–60.

313 Barrett, *supra* note 28, at 176.

314 *Id.* at 162; *accord* Biden v. Nebraska, 143 S. Ct. at 2377 n.2 (Barrett, J., concurring).

315 West Virginia v. EPA, 142 S. Ct. 2587, 2625 (2022) (Gorsuch, J., concurring).

316 *See supra* p. 575.

317 Barrett, *supra* note 28, at 181.

318 The point here is akin to Judge Bork's famous "ink blot" theory of the Ninth Amendment. *See Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 249 (1987) (statement of Judge Robert H. Bork).

319 *See* Barrett, *supra* note 28, at 125–59. Barrett observes that courts both "offered legislative *intention* as a justification for each of the canons that arguably authorized a departure from the statute's best reading" and also "offered alternative rationales" for the same canons, ranging from "respect for customary international law" to "mitigating harsh results." *Id.* at 158 (emphasis added).

"formulating and applying substantive canons is a permissible exercise of the judicial power," as opposed to, say, "favoring statutory interpretations that further widely shared societal values is a permissible exercise of the judicial power."

In the end, even Barrett seemed to place relatively little stock in the historical practice on which she relied. The canon-making power that she found in early cases, after all, was not conditioned on identifying "constitutional inspiration" for a given canon.[320] Yet she still would throw overboard all canons that place "extraconstitutional values" above "the best interpretation of a statute"; despite their historical pedigree, she reasoned, these canons are not compatible with the textualist conception of faithful agency.[321] As we have explained, the so-called "constitutionally inspired" canons are *also* squarely at odds with that conception. There is no reason why history should trump the merits in one context but not the other.

## IV. SUBSTANTIVE CANONS AS LAST RESORTS

We now turn to the third and final family of explanations as to why some substantive canons might be consistent with textualism's core commitments. Broadly speaking, the idea here is that substantive canons are permissible only when a judge has first tried and failed to resolve a question based on the statute's communicative content alone. This claim, too, is susceptible of multiple interpretations. In one form, it addresses cases in which the statute's communicative content, although expressed clearly, simply does not prescribe a determinate resolution of the case at hand. In another, more consequential form, the argument qualifies the fidelity principle by authorizing judges to make interpretive close calls on substantive grounds.[322]

We will unpack and assess these possibilities in turn, but we first note an important limitation that pertains equally to both. Substantive

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[320] Incidentally, Barrett's evidence shows Justice Gorsuch's renditions of the origin stories of the canons that he discusses to be remarkably misleading in this regard. His lead example, the presumption against retroactivity, is illustrative. *See supra* note 287. According to Justice Gorsuch, the Constitution prohibits certain kinds of retroactivity, and, "[c]onsistent with this rule," courts have long presumed that Congress has not imposed other kinds of retroactivity either. *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring). But Barrett found that early courts and commentators actually understood the presumption against retroactivity "as a proxy for legislative intent" (in light of the legislature's presumed observance of this "ancient maxim" that long predated the Constitution), or else as "a judicial effort to temper laws 'objectionable in principle and unjust in practice.'" Barrett, *supra* note 28, at 143–45 (quoting THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 202 (New York, John S. Voorhies 1857)).

[321] Barrett, *supra* note 28, at 177.

[322] Marmor observes that "[s]tatutory interpretation is called for when there is some plausible doubt about what the law says or about how what it does say would settle the case at hand." MARMOR, *supra* note 56, at 109. In effect, we are considering the same two scenarios (in reverse order).

canons are often applied in cases where, but for the canon, the proper textualist resolution of the case *would* be clear. This is especially common in cases involving "clear statement" or "implied limitation" rules, at least where they function as such. To return to one of our earlier examples, we very much doubt that it is indeterminate or uncertain whether, as a matter of ordinary meaning, states that receive federal funds would be counted as "recipient[s] of Federal assistance."[323] To take another example, we think the Court's stated rationale for invalidating the Biden Administration's vaccine-or-test requirement would collapse under this approach as well, though the explanation (like the statutory text) is admittedly more complex.[324] In short, even if one of the arguments we will now consider were valid, this would not vindicate a sizable swath of existing practice.

### *A. Construction*

As we noted in our opening discussion of textualism and "ambiguity," judges often face cases for which lawmakers could not have thought they had prescribed any determinate resolution at all.[325] This sort of legal incompleteness arises largely because, even when the statutory communication is perfectly successful, the concepts successfully expressed are vague, in the sense that they admit of borderline cases,[326] or "open-textured," in the sense that they comprise multiple dimensions that lack common units.[327] A statute that assigns consequences to "neglect," "violence," or "safety," for example, cannot possibly convey a complete mapping from all possibly relevant states of the world to the consequences that they are supposed to have.[328] As a result, a judge faced with a statutory case involving one of these concepts will often have more work to do, even once all of the "interpretation" — in the

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[323] *Cf.* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 245–46 (1985); *see supra* notes 201–08 and accompanying text. Strictly speaking, of course, the textualist's question is not what any given phrase means but what a reasonable reader would take to be conveyed by the utterance in which it is used. *See supra* notes 128–34 and accompanying text (offering examples of where those come apart).

[324] *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 665 (2022) (per curiam) (addressing only "whether the Act *plainly* authorizes the Secretary's mandate" and concluding that it does not, essentially without regard to the apparent linguistic import of the operative provision (emphasis added)); *cf. id.* at 673 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("The Court does not dispute that the statutory terms just discussed, read in the ordinary way, authorize this Standard.").

[325] *See supra* notes 67–69 and accompanying text.

[326] For leading discussions of vagueness in the legal context, see HRAFN ASGEIRSSON, THE NATURE AND VALUE OF VAGUENESS IN THE LAW (2020); and TIMOTHY A.O. ENDICOTT, VAGUENESS IN LAW (2000).

[327] *See* ASGEIRSSON, *supra* note 326, at 44–46 (discussing incommensurate multidimensionality); ENDICOTT, *supra* note 326, at 42–44 (same); *see also* Lawrence B. Solum & Cass R. Sunstein, Chevron *as Construction*, 105 CORNELL L. REV. 1465, 1473 & n.38 (2020) (suggesting a similar usage of "open-textured"). On the distinct circumstance of irreducible ambiguity, see *infra* note 329.

[328] For extended and instructive discussions of "neglect" as a paradigm case, see ASGEIRSSON, *supra* note 326, at 45–58; and Timothy Endicott, *The Value of Vagueness*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW, *supra* note 55, at 14, 18–26.

sense of recovering the content encoded by language — is done. This work, as earlier noted, is often denominated as the distinct task of "construction."[329]

Because textualism can neither guide nor constrain that inherently nontextual work, it follows straightforwardly that a judge's commitment to textualism would not prevent them from turning to substantive canons to carry it out. In fact, *any* norm or consideration that a judge might take into account at the construction stage would qualify as "substantive" in our sense, since it could not be casting further light on the statute's already-known communicative content.[330] Still, we think the necessity of looking beyond the text when making judgments within such a "construction zone"[331] does not actually create much of an opening for textualists to employ substantive canons as conventionally understood.

For one thing, we have struggled to identify any real-world cases employing a substantive canon to guide the application (or necessary elaboration) of the content that, on nonsubstantive grounds, Congress is taken to have expressed. That makes sense: canons generally take the form of priority rules (roughly, "prefer interpretations (or norms) that have property *X* over those that have property *Y*"), and the drawing of a line in a continuous spectrum — as one must in settling what is "reasonable," "substantial," or the like — does not frame that sort of choice in the first place. To be sure, courts sometimes invoke implied limitation rules to lop off some applications of textually expressed concepts. A court might hold, for instance, that an agency's general authority to impose "reasonable" requirements is not sufficient to authorize rules that intrude on state authority in particular ways. But the Court also imposes such limitations when the concepts at issue are *not* vague or open-textured in any relevant respect.[332] By all appearances, then, what the

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[329] *See supra* notes 67–69 and accompanying text. "Construction" is often said to be required in cases of "irreducible ambiguity" as well — that is, when a word or phrase has multiple senses and the operative one is not indicated by the context. *E.g.*, Solum, *supra* note 68, at 469–70. We have no objection to that terminological choice as such. But for our purposes, at least, we take the problem posed in such cases to be importantly distinct: it arises when a court fails to determine what the statutory text *means* (or, put in objective terms, when the text fails to have a determinate meaning). For the very reasons that the "interpretation-construction" distinction so helpfully highlights, that sort of problem differs from the problem of how to give the (successfully) communicated content its due legal effect, which is the problem we take up here. *Cf. id.* at 481–82, 495–99 (advocating a "two moments model of interpretation and construction," *id.* at 495, and explaining its utility for "avoid[ing] . . . conceptual confusion," *id.* at 482). We then turn to uncertainty about the statute's communicative content in the next section.

[330] *See supra* section I.B, pp. 533–37. The question would remain whether all such considerations are aptly described, at some level of generality, as "canons."

[331] Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 5 (2015).

[332] *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 689 (2001) (construing a statute providing that certain noncitizens "may be detained" and explaining that, in light of constitutional avoidance, "we

Court is doing when it deploys substantive canons of this sort is not answering the question that it takes to be framed by the textually expressed concept (such as, "Is imposing this particular requirement reasonable?"), but rather imposing an extrinsic restriction on the statute's invocation of that concept, one at odds with the unrestricted content expressed by the text. The necessity of construction does not license that sort of subtraction any more than it would license the addition of applications wholly outside the statute's communicative content.

Indeed, in virtually all cases, when the Court employs substantive canons, it treats them as bearing on what Congress should be deemed to have said — which is precisely the territory also claimed by genuine textual interpretation. Often, some word in the statute is polysemous, and the question is in which sense (or with what subset of its semantic range) Congress used that word.[333] *West Virginia v. EPA* is again a salient example.[334] When Congress referred to the "best system of emission reduction," did it mean a "system" in the more concrete sense of a technology or apparatus, or did it mean any "system" in the broad sense of "an organized and coordinated method; a procedure"?[335] On its face, that is a question about the statute's communicative content (hence the dueling definitions); it is not a question about what some particular content that the statute clearly conveyed should be understood to entail with respect to generation-shifting.[336] So the Justices who invoked the major questions doctrine here (and understood it as a substantive canon in our sense) were not using it to flesh out the implications of the statute's known communicative content, but to supplant that content (whatever it might have been) with a legally imputed one. In this case as in

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read an implicit limitation into the statute before us"); NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 504 (1979) (similarly carving church-operated schools out of the definition of "employer" in the National Labor Relations Act, 29 U.S.C. §§ 151–169).

333 *See* MARMOR, *supra* note 56, at 121–25. For several examples of interpretive disputes arising from polysemy (i.e., from the fact that a word has multiple senses that are closely related), see Watson, *supra* note 103, at 45–46.

334 Another apt example is *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988), where the Court favored a comparatively narrow definition of "coercion" that was "not foreclosed either by the language of the [statute] or its legislative history," *id.* at 588, and "that obviate[d] deciding whether a congressional prohibition of handbilling on the facts of this case would violate the First Amendment," *id.* at 578.

335 *Compare* West Virginia v. EPA, 142 S. Ct. at 2614, *with id.* at 2630 (Kagan, J., dissenting). We bracket the fact that the major questions doctrine was used here as a clear statement rule, rather than as an ambiguity-dependent canon.

336 *See* MARMOR, *supra* note 56, at 125 ("Speakers (talking literally, that is, without irony or metaphor) are normally free to use a polysemous word to designate any particular subset within the semantic range of the word they use, and communication succeeds when the hearer can grasp the intended extension."); *cf.* John O. McGinnis & Michael B. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 NOTRE DAME L. REV. 919, 945–47 (2021) (arguing that "construction zones" are smaller than many believe, in part because language that is thought to be vague is often merely polysemous and thus potentially amenable to disambiguation).

nearly all others, then, the canon was not being deployed within a "construction zone" (at least of the sort that we described above) at all.[337]

Of course, the fact that substantive canons are not used as aids to translating communicative content into legal effect does not mean that they could not be used in that way.[338] And as we have said, *something* substantive is bound to happen in these cases regardless. For present purposes, therefore, our main point is simply that the inevitability of some textually ungoverned judgments in these cases should not be mistaken as supporting textualists' current practice of employing substantive canons. Still, it bears noting that the case for using anything like the existing crop of substantive canons as construction tools would not be clear-cut. We doubt that this hodgepodge of judge-made, off-the-rack normative principles would fare better in a textualist's evaluative ranking of such tools than, say, trying to resolve a matter in a way that furthers the objectives that a provision was apparently designed to serve,[339] or, when possible, simply deferring to the judgments of politically accountable decisionmakers.[340] In any case, the problem of giving legal effect to clearly expressed but underdeterminate content is not really where the action is when it comes to substantive canons today.

### *B. Managing Uncertainty*

The more important question, then, is whether resorting to substantive canons can be justified in cases where the very *communicative content* of a statute is uncertain. We noted early on a difficulty for this kind of argument: for understandable reasons, textualists do not abandon their textualism merely because a case is "hard" or presents a "prima

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[337] Regarding our usage of this term and the separate possibility of irreducible ambiguity, see *supra* note 329.

[338] An important possible exception is *Chevron* deference, which can be understood as a substantive canon and is routinely applied to matters of construction. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); *see* Solum & Sunstein, *supra* note 327, at 1477 (suggesting that there is a "large category of cases that involve *Chevron* as Construction"). We note, though, that *Chevron* is an unusual substantive canon in that it only addresses the allocation of decisionmaking authority. Indeed, it aims to *reduce* the role played by judges' "substantive" judgments in determining a statute's legal effects, and it was long embraced by textualists in part for that reason. *See* Ryan D. Doerfler, *Late-Stage Textualism*, 2021 SUP. CT. REV. 267, 294–95 (2022).

[339] *Cf.* RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 8–15 (2021) (advancing an account of "good-faith construction" based on "the original spirit of the text," *id.* at 15). This approach would adhere to a form of the fidelity principle, although not (as would be impossible for any approach to construction) the promulgation principle. Still, we appreciate that a case for more canon-like construction tools could be made by appeal to other values of special concern for many textualists, especially a preference for "rule-based decisionmaking." Nelson, *supra* note 43, at 394; *see id.* at 394–95 (pointing in the direction of such an argument).

[340] *See* Doerfler, *supra* note 338, at 293 ("[W]hile [early] textualist writers conceded that judicial discretion was, to some degree, unavoidable, the presumption within our constitutional scheme was, again, that such discretion rests with more democratically accountable actors.").

facie ambiguity."[341] Still, perhaps there comes a point where the textual evidence is *so* nearly balanced that even a committed textualist could reasonably look elsewhere. In this spirit, Caleb Nelson suggests that "[i]n cases of genuine ambiguity (that is, cases in which our primary interpretive tools have simply identified a range of possible meanings, *none of which is significantly more likely than the others to reflect the enacting legislature's intent*), the textualists' general view of legislative supremacy does not rule out reliance upon normative canons."[342]

As Nelson recognizes, this formulation "conceals some difficult questions."[343] Most importantly, "[h]ow big a gap must exist between the leading interpretation and the next most likely alternative for the Court to say that the statute permits only one [interpretation]?"[344] On the one hand, if substantive canons were confined to cases that textualist judges experience as genuine "ties," there would arguably be nothing nontextualist about resorting to them — but such cases of perfectly matched arguments are so unusual as to be practically irrelevant.[345] On the other hand, if the text yields to substantive canons whenever multiple interpretations are *plausible*, textualism will turn out to mean relatively little in hard cases after all. Indeed, as then-Professor Barrett argued, *any* departure from what the judge takes to be the likelier candidate for the statute's communicative content would seem to "conflict with the obligation of faithful agency" (at least unless the canon at issue serves a "constitutional value").[346]

Formally, we think that Barrett is probably right about this (apart from the "constitutional values" proviso, that is), but the question remains whether textualists could reasonably *moderate* their approach, consistent with the values animating their textualism, to rely on substantive canons at least in very close cases. The thought here would be that, at least when two alternatives entail nearly equal risks of error, one ought to minimize *expected error costs* instead. For example, mistakenly deciding that an agency *does* have the power to take some major action might seem much worse than mistakenly deciding that it does *not* have

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341 *See supra* section I.A, pp. 522–33; *see also* Kavanaugh, *supra* note 101, at 2144–45 ("[J]udges should strive to find the best reading of the statute. . . . To be sure, determining the best reading of the statute is not always easy. But we have tools to perform the task . . . .").

342 Nelson, *supra* note 43, at 395 (emphasis added); *see also* Manning, *Clear Statement*, *supra* note 28, at 424 (suggesting that "the requirements of legislative supremacy are satisfied as long as the court ensures that the agency has not transgressed the 'unambiguously expressed intent of Congress'" (quoting *Chevron*, 467 U.S. at 843)).

343 Nelson, *supra* note 43, at 396.

344 *Id.*

345 *See* Schauer, *supra* note 8, at 83; *cf.* SCALIA & GARNER, *supra* note 3, at 134–35 (discussing one possible example of such a case, involving a shared proper name).

346 Barrett, *supra* note 28, at 177. When a constitutional value is at stake, Barrett says, a judge need only "respect[] the outer limits of a text[,] . . . not its most natural interpretation." *Id.* at 167. We considered and rejected Barrett's argument concerning canons that further "constitutional values" above. *Supra* Part III, pp. 558–77.

that power. In that event, a court might "play it safe" by holding the action unauthorized, even if this means modestly increasing the chance of an incorrect decision.[347]

This sort of thinking is familiar and appealing in other domains of life. Suppose the commander of an artillery unit stationed at a tense international border receives a garbled radio communication from headquarters, which either said to fire on the enemy positions across the border or said to hold her fire, despite recent provocations.[348] After listening to the distorted message carefully, the commander concludes there is a 51% chance that headquarters ordered her to open fire, and a 49% chance that headquarters ordered her to hold her fire. But the commander knows that mistakenly opening fire will start an avoidable war, while mistakenly holding fire will have only a minor adverse effect on her side's strategic position. Even if the commander cares exclusively about serving as the faithful agent of her generals, she might properly decide not to open fire in this scenario. Though a dutiful soldier, she also applies a kind of ambiguity-dependent substantive canon: Do not take action that will start a war unless the orders to do so are clear and unmistakable.

But any textualist who sought to justify their resort to substantive canons on these grounds would face daunting obstacles — and we doubt that their textualism would remain recognizable at the end of the journey. The first problem is who gets to decide what constitutes "playing it safe." In general, an agent might treat errors in one direction as much worse either because of a conjecture about what the *principal* values or because of her *own* values. (In our example, the artillery commander might reasonably presume that her superiors view the costs of erroneously starting a war as greater than the costs of a delay in opening fire, or she might hold her fire until she gets clearer orders because *she* holds that view.) Under textualists' conception of the judicial role, it is hard to see how the judge's (or even the judiciary's) *own* normative judgments about error costs — reflected in substantive canons of the "superimposed value" variety — could properly form the basis of their decisions. Who empowered Article III courts to decide, say, that mistakenly upholding the Clean Power Plan (thereby aggrandizing the federal bureaucracy) would be worse than mistakenly invalidating it (thereby interfering with efforts to thwart a global catastrophe)? Moreover, the question is particularly awkward for courts because, in either scenario, the main determinant of the "error costs" will be the costs (or benefits) of the result itself, not any costs specific to having

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[347] *Cf.* Ryan D. Doerfler, *How Clear Is "Clear"?*, 109 VA. L. REV. 651, 673–75, 678 (2023) (suggesting that constitutional avoidance and other interpretive norms take account of error costs in a similar way).

[348] *Cf.* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RSRV. L. REV. 179, 189–90 (1986) (offering a similar hypothetical).

brought it about mistakenly. Indeed, the balance of expected costs could favor an interpretation that almost certainly does *not* capture the statute's communicative content, for the simple reason that this content was a very bad idea.

In light of all this, the relevant benchmark would probably have to be the enacting Congress's (imputed) valuations of different mistakes, rather than the court's own. In principle at least, substantive canons could perhaps be reglossed as entrenched generalizations about that issue. For example, the *Charming Betsy* canon would be justified (from this perspective) if Congress generally prefers that, when courts lack confidence in *any* proposed interpretation of a statute, they prioritize not misinterpreting it in a way that violates international law. We are skeptical that this way of thinking can be squared with widespread textualist premises about the nature of multi-member legislatures, however.[349] (What does it mean to say, apart from any text enacted by Congress, that Congress "generally prefers" one thing or another? How could textualists square a practice of allowing these unenacted preferences of legislators to shape a statute's legal effect with the promulgation principle?) Because existing substantive canons were not developed or justified with this function in mind, moreover, there is no particular reason to see them as well-suited to that task.

Even apart from all of that, we expect that textualists would find this line of thought hard to accept because of the standardless discretion it affords to courts and the unpredictability it would inject into the lawmaking process as a result. The judgment of whether a statute is "ambiguous" is notoriously difficult to regiment or discipline — yet, with these error-cost canons in effect, it would become a ticket to flipping the apparent meaning of a statutory text.[350] Meanwhile, legislators seeking to bargain over matters of policy would face a complex and imbalanced set of incentives: nobody could rely on the expectation that courts would adhere to what even the courts themselves thought the words more likely expressed; moreover, savvy proponents of some outcomes would know that even language that tips modestly in the *other* direction would (probably) actually be construed in their favor, yet ordinary citizens presumably would not.[351]

None of this amounts to a deductive argument that nobody claiming the mantle of textualism could possibly afford substantive canons any role as tools for managing uncertainty about a statute's communicative

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[349] *See supra* note 56.

[350] *See, e.g.*, Kavanaugh, *supra* note 101, at 2137–39 ("No case or canon of interpretation says that my 65–35 approach or my colleagues' 90–10 or 55–45 approach is the correct one (or even a better one). Of course, even if my colleagues and I could agree on 65–35, for example, as the appropriate trigger, we would still have to figure out whether the text in question surmounts that 65–35 threshold.").

[351] *Cf. supra* note 219 and accompanying text (discussing textualist concerns regarding legislative history).

content.[352] But we think it is fair to say that the thrust of such a move would be contrary to the vision of judging and of statutory interpretation that has animated modern textualism thus far, and we do not see how this line of argument could vindicate either the present use of substantive canons or anything much resembling it.

## V. IMPLICATIONS AND CONCLUSION

We began our analysis by highlighting what appears to be a fundamental incompatibility between the tenets of textualism — or at least the "hard" textualism to which a majority of the Court officially subscribes — and the use of substantive canons to resolve statutory cases. That tension, though sometimes ignored or obscured, is straightforward: If substantive canons are justified, it is for reasons that textualists otherwise rule out of bounds.[353] These canons might illuminate what Congress *would* or *should* have said if only it had foreseen certain circumstances — for example, a conflict with international law, or the prospect that the Clean Air Act could be used to transform the electricity sector — that Congress actually failed to anticipate.[354] Or the canons might push the law in the direction of values and policies — from lenity to federalism — that the courts deem worth promoting even if Congress cares little for them.[355] Either way, these substantive canons are flatly at odds with textualists' insistence that "[o]nly the written word is the law"[356] and that judges ought to enforce the statutes that Congress actually enacted.[357]

Although we have tried to put the conflict especially sharply and precisely, this is not really news. Yet the contradiction is usually framed as a "tension" or cause for "discomfort" — a kind of awkward fit that might yet be managed through one or more theoretical maneuvers.[358] The main contribution of this Article has been to provide a thorough and — we hope — fair evaluation of each of those efforts to date. What that analysis shows, we submit, is that the jury is not really out on this question: None of the proposed reconciliations can justify anything like the current practice among the Court's textualist Justices. In a few instances, to be sure, we have identified conceivable justifications that could square at least some kind of substantive canon with textualism. But in each of these cases, the potential justification identifies a mere

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[352] *Cf.* Doerfler, *supra* note 347, at 662–69, 694–99 (developing an account of various interpretive rules as means of "uncertainty management," *id.* at 668).

[353] *See supra* sections I.B–C, pp. 533–38.

[354] *See supra* notes 120–22 and accompanying text.

[355] *See supra* notes 123–25 and accompanying text.

[356] Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020).

[357] *See supra* section I.A, pp. 522–33.

[358] Barrett, *supra* note 28, at 121; *cf.* Manning, *Equity*, *supra* note 28, at 125 ("[I]t is unclear how comfortably they fit with the most basic textualist assumptions."); Scalia, *supra* note 7, at 28 (stating that substantive canons pose "a lot of trouble").

possibility space, with little reason to think that it is occupied (let alone as crowded as vindicating current practice would require). In fact, the justifications that appear most coherent — such as the argument for using canons to moderate the effect of stare decisis, or to guide "construction" in the absence of textual constraint — are ones that have received little defense, perhaps because these arguments would justify few existing canons and would entail other commitments that many textualists would find unattractive.

How might a self-identified textualist jurist (or scholar) reply to our critique? One possibility, of course, is that there is a flaw in one or more of our arguments, or that we have overlooked a potential reconciliation. We would be happy if textualist theorists took this Article as a friendly but pointed challenge to offer a rebuttal. Another possibility is that the handful of possible arguments we acknowledge as coherent might be explicitly embraced and expanded to cover a broader domain. As we have just noted, however, we are dubious that most textualists would go this route. The only remaining possibility, and the one we view as most likely, is that a principled textualist would need to concede the contradiction. Having made that concession, textualists would then be faced with two options.

First, they might abandon substantive canons, or at least restrict their use to the very narrow set of circumstances in which one of the justifications we have considered can actually be sustained. In other words, a principled textualist might respond to the challenge that Justice Kagan posed in her recent dissents — that her colleagues have taken to using substantive canons as "get-out-of-text-free cards" — with contrition. They might commit to relegating substantive canons to the dustbin of history, just as they largely succeeded in doing with legislative history. This approach not only would preserve textualism's philosophical purity by purging it of an embarrassing inconsistency, but might meaningfully advance the values that make textualism attractive to many in the first place.

For many textualists, however, preserving textualism's integrity in that way would come at too steep a cost. Realistically, textualist judges would lose a valuable tool for furthering a favored vision of the law. As we have noted, substantive canons appear particularly attractive as a way of simulating the constitutional limits — say, in the name of federalism and nondelegation — that many jurists and scholars think are given short shrift by current constitutional doctrine.[359] Furthermore, while existing statutory precedents decided partly on the basis of

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[359] *See supra* section III.A.3, pp. 567–71. In addition, as Justices Scalia, Barrett, Gorsuch, and numerous other textualists have all argued, substantive canons — in one form or another — have been part of the federal courts' jurisprudence from the earliest days of the Republic, making their wholesale abandonment unlikely. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2625 (2022) (Gorsuch, J., concurring); Scalia, *supra* note 7, at 29; Barrett, *supra* note 28, at 163.

substantive canons would presumably survive on stare decisis grounds, suddenly ditching the whole collection of substantive canons would be a substantial disruption. For both principled and other reasons, therefore, even if interring substantive canons would be a salutary change, it seems unlikely.

Barring such a change, the remaining course would be to acknowledge that textualism as practiced is a good deal less pure and more complicated than textualism as advertised. If avowed textualists give weight to substantive canons, they are *already* pluralists about statutory interpretation; they do not actually think that "[t]he text of the law is the law"[360] or that "[f]idelity to the law means fidelity to the text as it is written."[361] And once that is brought to the surface and conceded, the question of what ought to figure in the pluralist mix, and why, is squarely posed.[362] Perhaps courts ought to apply substantive canons that reflect the normative aspirations of the majority of the political community as it exists today, whatever those might be, rather than those of generations (or judges) past. Or perhaps courts should give more weight to what, with the benefit of "policy context" and all, it seems likely that a given statute's proponents intended it to do.[363] Our point here is not to advocate any particular reforms to statutory interpretation. But we think that if textualists maintain their attachment to substantive canons — notwithstanding those canons' evident incompatibility with textualism — they have opened the door for a wide-ranging discussion of what other nontextualist considerations courts ought to entertain as well.

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[360] Kavanaugh, *supra* note 101, at 2118.

[361] Barrett, *supra* note 45, at 856.

[362] To be sure, some might turn at this stage not to a straightforward normative inquiry ("what, in principle, should statutory interpretation take into account?"), but to a higher-order *legal* question ("what considerations do more basic norms of our legal system validate as proper ones to take into account?"). That is the gist of the approach advanced by William Baude and Stephen Sachs. *See, e.g.*, William Baude, *The 2023 Scalia Lecture: Beyond Textualism?*, 46 HARV. J.L. & PUB. POL'Y (forthcoming 2023) (manuscript at 7–8), https://ssrn.com/abstract=4464561 [https://perma.cc/ZZ5B-HGD7]; Baude & Sachs, *supra* note 56, at 1096–97, 1127. Even if one takes this approach, however, there may be relatively few questions about interpretive method for which the "law of interpretation" provides a legally determinate answer, *see generally* Mark Greenberg, Response, *What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. F. 105, 115–17 (2017); Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323, 1352–55, 1371–84 (2017) — and at that point (whenever it comes) the question of what courts *ought* to consider becomes unavoidable.

[363] *Cf.* Doerfler, *supra* note 7, at 997–98, 1024 (arguing that "[t]extualists sometimes unreasonably restrict context to so-called 'semantic context,'" *id.* at 1024).