

THE COMPATIBILITY OF SUBSTANTIVE CANONS AND ORIGINALISM

In recent years, the Supreme Court has developed the “major questions doctrine,”¹ an interpretive presumption that Congress must speak clearly before delegating to an agency any power of “vast economic and political significance.”² Justices³ and scholars⁴ generally consider the doctrine a substantive canon: a rule instructing judges to exchange the most natural reading of statutory language for an inferior reading that favors a desired outcome,⁵ unless the language is too clear to muddle.⁶

Given the Court’s originalist turn,⁷ one would presume that the major questions doctrine is compatible with originalism.⁸ In a recent article,⁹ Professor Michael Ramsey submits that it is, arguing that the use of the major questions doctrine and other substantive canons falls within the original meaning of the judicial power.¹⁰ Ramsey looks to early post-ratification practice,¹¹ from which he identifies four substantive canons that each limited the reach of, or “underenforce[d],” federal laws.¹² Ramsey concludes that the judicial power thus permits judges

¹ *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

² *E.g.*, *id.* at 2605 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)); *NFIB v. Dep’t of Lab.*, 142 S. Ct. 661, 665 (2022) (per curiam) (quoting *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam)). *See generally* Mila Sohoni, *The Supreme Court, 2021 Term — Comment: The Major Questions Quartet*, 136 HARV. L. REV. 262, 267–90 (2022) (tracing its development).

³ *See, e.g.*, *West Virginia v. EPA*, 142 S. Ct. at 2616 (Gorsuch, J., concurring, joined by Alito, J.); *Biden v. Nebraska*, 143 S. Ct. 2355, 2400 (2023) (Kagan, J., dissenting, joined by Sotomayor & Jackson, JJ.). Justice Barrett departs from this view. *See infra* p. 643.

⁴ Louis J. Capozzi III, *In Defense of the Major Questions Doctrine*, 100 NOTRE DAME L. REV. 509, 526 (2025).

⁵ *See* Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 517 (2023).

⁶ *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* 3, 28 (Amy Gutmann ed., new ed. 2018) (citing *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989)).

⁷ Meghan J. Ryan, *The Death of the Evolving Standards of Decency*, 51 FLA. ST. U. L. REV. 255, 259 (2024) (“For the first time ever, a majority of the Justices are originalists, and their decisions clearly reflect this.”).

⁸ Substantive canons already weather critique for enabling judicial cherry-picking. *See, e.g.*, William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 544 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* (2012)). It would invite stronger allegations of hypocrisy if judges used canons that exceeded their asserted power.

⁹ Michael D. Ramsey, *An Originalist Defense of the Major Questions Doctrine*, 76 ADMIN. L. REV. 817 (2024).

¹⁰ *See id.* at 837.

¹¹ *Id.* at 844–45 (focusing on the nineteenth century).

¹² *Id.* at 837; *see id.* at 837–44.

to develop similar underenforcement canons,¹³ including the major questions doctrine.¹⁴

Ramsey's framework falters on three levels: First, in early post-ratification practice, courts did not invent new canons, but rather applied canons already in use prior to ratification. A power to develop canons does not follow from this evidence. Second, early canons were not intended only to restrict the scope of statutes, as they were equally capable of enforcing statutes beyond their most natural reading. If a power to develop canons exists, it cannot be limited to those that underenforce statutes. Because Ramsey rationalizes his conception of judicial power as modest,¹⁵ its expansive implications are troubling. Finally, Ramsey relies almost exclusively on post-ratification practice and silence, controversial evidence in the originalist sphere.

This Note advances an alternative originalist framework: A substantive canon falls within the judicial power only if it both *predated* ratification as a clearly stated principle in judicial practice and *survived* ratification as a bounded power that respects constitutional structure. The Constitution repudiated whatever meta-lawmaking power existed to invent substantive canons in England, but incorporated nearly all extant canons into the judicial power. Substantive canons incompatible with constitutional structure, however, did not survive ratification.¹⁶ This clear statement rule for clear statement rules aligns with popular conceptions of originalism and shifts the presumption of judicial power back toward a limited role of faithful agency — a vital guardrail against the temptations of judicial overreach.

Part I of this Note evaluates Ramsey's framework, first reassessing the history and scope of early substantive canons and then identifying tensions between originalism and reliance on post-ratification practice. Part II articulates a two-part framework to discern which substantive canons are consistent with the original meaning of the judicial power. This Note concludes with skepticism toward invocation of the major questions doctrine in its substantive form by originalist jurists.

I. JUDICIAL POWER THROUGH JUDICIAL PRACTICE

To placate an originalist, use of the major questions doctrine must fall under the original meaning¹⁷ of the Article III “judicial Power.”¹⁸ Ramsey advances two contentions to support its use. First, he asserts

¹³ *Id.* at 848–49.

¹⁴ *Id.* at 854.

¹⁵ *Id.* at 825 n.40, 845, 848.

¹⁶ This is not to say that courts refrained from invoking them. *See, e.g., infra* section II.B.2, p. 641.

¹⁷ *See* *United States v. Rahimi*, 144 S. Ct. 1889, 1909 (2024) (Gorsuch, J., concurring) (“Faithful adherence to the Constitution’s original meaning may be an imperfect guide, but I can think of no more perfect one for us to follow.”).

¹⁸ U.S. CONST. art. III, § 1.

that the major questions doctrine bears a resemblance to canons developed in early post-ratification America that “underenforce[d] statutes to protect core founding-era values.”¹⁹ Second, he proposes that the unchallenged use of these early canons indicates the judicial power “includ[es] some power to develop and apply substantive canons.”²⁰ He thus extrapolates “a judicial power to develop new limiting canons such as the major questions doctrine in the modern era.”²¹ Part I addresses these contentions in turn.

A. Revisiting the Early Substantive Canons

Ramsey presents two shared features of the major questions doctrine and early canons. The Roberts Court’s major questions doctrine (1) underenforces statutes²² in order to (2) protect “a core founding-era value” of separation of powers.²³ Similarly, early judicial practice (1) invoked what Ramsey describes as “limiting canons” that narrowed federal laws to (2) preserve “important, widely shared values.”²⁴ He identifies four such canons: the presumption against violations of international law,²⁵ the presumption against civil retroactivity,²⁶ the rule of lenity,²⁷ and the presumption against judicial review.²⁸ Ramsey concludes that the major questions doctrine falls within an established “judicial power to develop substantive canons”²⁹ that “underenforce statutes to protect core founding-era values from judicial error.”³⁰

Two issues arise. First, each identified canon predated ratification, meaning their invocation cannot serve as evidence of a judicial power to develop new post-ratification canons, but merely to apply existing ones. Second, although Ramsey casts the early canons as one-way ratchets — tools that “only allowed courts to give an ambiguous text something *less* than its most plausible meaning”³¹ — three of the four canons also empowered courts to go the other way, expanding a law beyond its most natural reading. If these early canons are instructive, the judicial

¹⁹ Ramsey, *supra* note 9, at 854.

²⁰ *Id.* at 848; *accord id.* at 844 (suggesting that their “uncontroversial use . . . in the early post-ratification period” is partial evidence of their constitutionality).

²¹ *Id.* at 856.

²² *See id.* at 825–26 (noting that “substantive canons . . . may fail to treat as supreme law some applications of constitutionally enacted statutes,” *id.* at 825, and that “[t]he major questions doctrine illustrates the foregoing question of the judicial power to underenforce the law,” *id.* at 826).

²³ *Id.* at 854 (“Separation between the Executive and the Legislature is . . . a core founding-era value.”).

²⁴ *Id.* at 847.

²⁵ *Id.* at 837.

²⁶ *Id.* at 841.

²⁷ *Id.* at 843.

²⁸ *See id.* at 844.

²⁹ *Id.* at 848–49.

³⁰ *Id.* at 854.

³¹ *Id.* at 845 (emphasis added); *see also id.* (“Each canon . . . did not give a text a greater application than the text’s original meaning might justify.”).

power to develop substantive canons cannot be restricted to those that underenforce statutes, swelling the power beyond Ramsey's modest depiction.³²

I. Presumption Against Violating International Law. — Ramsey first considers “[t]he most familiar”³³ early substantive canon,³⁴ commonly referred to as the *Charming Betsy* canon.³⁵ This name derives from *Murray v. Schooner Charming Betsy*,³⁶ in which Chief Justice Marshall declared “that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”³⁷ The *Charming Betsy* canon presumes that Congress would speak clearly before violating international law.

And yet, despite its name, this presumption existed before *Charming Betsy*.³⁸ In fact, it existed before *Marbury v. Madison*³⁹ enshrined judicial review in 1803,⁴⁰ and before the Constitution was written in 1787.⁴¹ Alexander Hamilton advocated for its use in a 1784 case,⁴² securing a favorable ruling in *Rutgers v. Waddington*.⁴³ In interpreting a New York statute so as not to infringe upon international law, Chief Judge Duane (himself a delegate to the Continental Congress and an influential voice

³² Even if substantive canons are further limited to those that protect “core founding-era values,” *id.* at 854, tethering the canon-making power to this principle still permits ample judicial discretion. See *infra* notes 87–90 and accompanying text.

³³ Ramsey, *supra* note 9, at 837.

³⁴ While this Note accepts Ramsey's characterization of the canon as substantive, *id.*, others have interpreted it as merely honoring the likely intent of Congress, see Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293, 333 n.181 (2005) (“[E]very commentator to consider the *Charming Betsy* canon at length concludes that, at least to some extent, it is properly based on the presumed intentions of Congress.”).

³⁵ See, e.g., Ramsey, *supra* note 9, at 837.

³⁶ 6 U.S. (2 Cranch) 64 (1804).

³⁷ *Id.* at 118.

³⁸ See Ramsey, *supra* note 9, at 837 (“[T]he Court had applied it earlier.”); *id.* at 839 (citing *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801)); *id.* at 847 & n.151 (discussing pre-*Seeman* applications).

³⁹ 5 U.S. (1 Cranch) 137 (1803).

⁴⁰ *Id.* at 177–78.

⁴¹ See Walter F. Dodd, *The Constitution — 1787 and Today*, 20 IND. L.J. 55, 55 (1944).

⁴² See Alexander Hamilton, *Brief No. 3*, in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 345, 352 (Julius Goebel, Jr., ed., 1964) (arguing that a statute “repugnant to the law of nations” that “may however receive a construction consistent with” it must receive said construction, as “to give it this Construction is the duty of the Court”). Hamilton interwove longstanding principles on the status of international law and the conflict of laws. Compare *id.* (quoting CICERO, *De Inventione, Book II*, in DE INVENTIONE – DE OPTIMO GENERE ORATORUM – TOPICA 165, 312–13 (H.M. Hubbell trans., Harvard Univ. Press 1949) (c. 90 B.C.E.)), with Alexander Hamilton, *Brief No. 4*, in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra*, at 353, 353 (“The voluntary law of Nations is as intrinsically obligatory as the necessary law; which enjoins its observance.” (citing, inter alia, EMER DE VATTEL, THE LAW OF NATIONS 79 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1758))).

⁴³ (N.Y.C. Mayor's Ct. Aug. 27, 1784), reprinted in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 42, at 393, 417. While this case does not appear in any case reporter, a pamphlet was printed in 1784, which has been transcribed. 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 42, at 392.

among the Founders⁴⁴) asserted that “repeal of the law of nations, or any interference with it, could not have been in contemplation, in our opinion, when the Legislature passed this statute; and we think ourselves bound to exempt that law from its operation.”⁴⁵ News of *Rutgers* made its way to George Washington, who remarked that “reason seems very much in favor of the opinion given by the Court.”⁴⁶ The lower court in *Charming Betsy* took the canon from “the opinion of the *British* judges” and “the general current of opinions of civilians and writers on general law,”⁴⁷ presumably including admired jurists such as Emer de Vattel, whose writing substantially predated ratification⁴⁸ — demonstrative of the presumption’s developed status. To dispel any notion that this canon originated as post-ratification practice,⁴⁹ this Note substitutes its standard name for a descriptive alternative: the presumption against violating international law.

Further, the canon permits overenforcement of statutes. While Ramsey is correct that the Court in *Charming Betsy* (and in *Talbot v. Seeman*⁵⁰) interpreted a statute narrowly to avoid violating international law,⁵¹ the presumption would symmetrically instruct judges to interpret a statute broadly if international law required it.⁵² For instance, where the United States codifies customary international law, judges interpret statutory language to incorporate affirmative international obligations,⁵³ expanding its statutory force. Though there is some debate as to what this canon demands in the present day,⁵⁴ early iterations

⁴⁴ EDWARD P. ALEXANDER, A REVOLUTIONARY CONSERVATIVE 109–10, 203 (1938).

⁴⁵ *Rutgers v. Waddington*, in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 42, at 392, 417.

⁴⁶ Letter from George Washington to James Duane (Apr. 10, 1785), in 10 THE WRITINGS OF GEORGE WASHINGTON 448, 449 (Worthington Chauncey Ford ed., N.Y., G.P. Putnam’s Sons 1891).

⁴⁷ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 68 (1804) (quoting opinion of Peters, J. (1801)).

⁴⁸ See *supra* note 42.

⁴⁹ Ramsey asserts that “the prior historical practice is thin,” Ramsey, *supra* note 9, at 847, and that the canon “largely developed after ratification,” *id.* at 856.

⁵⁰ 5 U.S. (1 Cranch) 1 (1801).

⁵¹ Ramsey, *supra* note 9, at 838–39.

⁵² Cf. *Charming Betsy*, 6 U.S. (2 Cranch) at 68–69 (“*British* courts have gone great lengths to modify their ancient feudal law of allegiance, so as to moderate its rigor, and *adapt it to the state of the modern world . . .*” (second emphasis added) (quoting opinion of Peters, J. (1801))).

⁵³ Cf., e.g., *Samantar v. Yousuf*, 560 U.S. 305, 320 (2010) (“We have observed that a related purpose [of the Foreign Sovereign Immunities Act (FSIA)] was ‘codification of international law at the time of the FSIA’s enactment,’ and have examined the relevant common law and international practice when interpreting the Act.” (citations omitted) (quoting Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193, 199 (2007))).

⁵⁴ Contrast Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 490 (1998) (“[T]he *Charming Betsy* canon has been used primarily as a braking mechanism . . . to restrain the scope of federal enactments.”), with Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 B.U. L. REV. 1, 25 (2014) (“*Charming Betsy* self-evidently conforms to international law norms — it looks to extant international law to answer the statutory-reach question.”).

prioritized the substantive outcome — nonviolation of international law — above any underenforcement principle.⁵⁵ The presumption against violating international law thus does not fit Ramsey’s mold: It derives from pre-ratification practice, and its use might expand the most natural interpretation of a statute.

2. *Presumption Against Civil Retroactivity*. — Ramsey introduces a second canon, the presumption against civil retroactivity, with another case from the turn of the nineteenth century.⁵⁶ In *United States v. Heth*,⁵⁷ the Court delivered seriatim opinions that declined to extend a civil statute’s reach to acts that took place prior to its enactment, as the statute did not express an intent to apply retroactively.⁵⁸ Yet, just like *Charming Betsy*, *Heth* merely invoked, and did not invent, the canon.⁵⁹ Nonretroactivity stretches back further and farther, originating overseas in Roman law.⁶⁰ However, Ramsey’s underenforcement analysis here is persuasive: The presumption can be applied only to confine the scope of a statute, so it resembles a limiting canon.⁶¹

3. *Rule of Lenity*. — Ramsey next addresses the rule of lenity, which instructs courts to interpret penal statutes “strictly” to avoid overenforcement of penalties.⁶² Like the previous two canons, the rule of lenity substantially predated the Constitution, with “[m]ultitudes of cases . . . to be found” hinging on its application.⁶³ As early as 1820, Justice Marshall referred to the rule of lenity as an “ancient maxim.”⁶⁴

In a sense, the rule of lenity is unidirectional, as it can be applied only to restrict the punitive reach of a statute.⁶⁵ But, in certain situations, it may guide judges to interpret statutes expansively: The

⁵⁵ See, e.g., *supra* note 42; *Seeman*, 5 U.S. (1 Cranch) at 43 (“[T]he laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations . . .”).

⁵⁶ Ramsey, *supra* note 9, at 842.

⁵⁷ 7 U.S. (3 Cranch) 399 (1806).

⁵⁸ See, e.g., *id.* at 413 (opinion of Paterson, J.) (“Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them . . .”).

⁵⁹ See *id.* (describing nonretroactivity as a “rule”).

⁶⁰ Gerardo Brogini, *Retroactivity of Laws in the Roman Perspective*, 1 IRISH JURIST 151, 153 (1966) (tracing this interpretive canon to the Roman Republic, such that “towards the end of the second century B.C. the principle of the non-retroactivity of substantive law, whether civil or criminal, seems firmly established”).

⁶¹ Ramsey, *supra* note 9, at 845.

⁶² *Id.* at 843 (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820)) (“The rule that penal laws are to be construed strictly . . . is founded . . . on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.” (first omission in original)).

⁶³ *Pennington v. Coxe*, 6 U.S. (2 Cranch) 33, 49 (1804) (argument of counsel).

⁶⁴ *Wiltberger*, 18 U.S. (5 Wheat.) at 95; see also Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 128–29 (2010) (identifying its inclusion in a “sixteenth century treatise”).

⁶⁵ See Ramsey, *supra* note 9, at 843.

exceptions in a penal statute should be read liberally.⁶⁶ Recently, in *Pulsifer v. United States*,⁶⁷ the federal government asked the Court to hold that the rule of lenity does not apply to “ameliorative” provisions in sentencing laws.⁶⁸ The Court declined to reach that question,⁶⁹ and the dissent asserted that the rule of lenity remains appropriate in such a circumstance.⁷⁰ So while Ramsey’s characterization is a fair one at first glance — the rule of lenity consistently underenforces the main thrust of penal statutes — overenforcement of provisions within a criminal statute lingers as a possible result. Like the presumption against violating international law, the rule of lenity’s overarching aim is not to second-guess or weaken the words of Congress, but to protect a category of outcomes.

4. *Presumption Against Judicial Review.* — The final presumption raised by Ramsey is a “duty of clarity”⁷¹ that requires a heightened level of certainty before judges may invalidate unconstitutional laws.⁷² Other scholars have described this presumption as a “clear error rule.”⁷³ Like each of the canons above, it was respected prior to ratification of the federal Constitution,⁷⁴ and it has roots in English common law.⁷⁵

The presumption against judicial review unequivocally overenforces statutes. The duty of clarity restrains judges from striking down statutes

⁶⁶ See Steffen Seitz, *The Rule of Lenity and Affirmative Defenses*, 102 WASH. U. L. REV. 427, 446–48 (2024) (advancing this argument for codified justifications); cf. *Beecham v. United States*, 511 U.S. 368, 374 (1994) (declining to apply the rule of lenity to an exemption clause that was unambiguous). The Court treats exceptions within a penal statute with the same analytical scrutiny as the rest of the statute. See, e.g., *United States v. Johnson*, 529 U.S. 53, 58 (2000) (“When Congress provides exceptions in a statute, it does not follow that courts have authority to create others.”).

⁶⁷ 144 S. Ct. 718 (2024).

⁶⁸ Seitz, *supra* note 66, at 469 (quoting Brief for the United States at 45, *Pulsifer*, 144 S. Ct. 718 (No. 22-340), 2023 WL 4824957, at *45).

⁶⁹ *Pulsifer*, 144 S. Ct. at 737 n.8.

⁷⁰ See *id.* at 755 (Gorsuch, J., dissenting).

⁷¹ John O. McGinnis, *The Duty of Clarity*, 84 GEO. WASH. L. REV. 843, 857 (2016).

⁷² See Ramsey, *supra* note 9, at 844.

⁷³ See, e.g., Robert F. Nagel, *Name-Calling and the Clear Error Rule*, 88 NW. U. L. REV. 193, 200 (1993) (citing James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144, 149 (1893)); see also Cass R. Sunstein, Essay, *Thayerism*, U. CHI. L. REV. ONLINE (Feb. 19, 2024), <https://lawreview.uchicago.edu/online-archive/thayerism> [<https://perma.cc/2J7V-B75V>] (cataloging this principle within “Thayerism”).

⁷⁴ McGinnis, *supra* note 71, at 881–83 (citing *Commonwealth v. Caton*, 8 Va. (4 Call) 5, 5, 7–13 (1782)).

⁷⁵ *Id.* at 868 (“As the seventeenth-century English theorist Jeremy Taylor put it: the contradiction ‘must be manifest: for if it be doubtfull, the law retains her power; for it is in possession, and the justice of it is presumed.’” (quoting JEREMY TAYLOR, 3 DUCTOR DUBITANTIUM 411 (London, James Flesher 1660))); see also PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 309 (2008) (“The notion of manifest contradiction had developed during the Middle Ages.”). But see Derek A. Webb, *The Lost History of Judicial Restraint*, 100 NOTRE DAME L. REV. 289, 304 (2024) (describing the presumption in the late eighteenth century as merely “the tentative creed of individual jurists speaking for themselves”).

at the margins of constitutionality.⁷⁶ Ramsey creatively casts this as underenforcement of a law (the Constitution),⁷⁷ but the ultimate effect is to give ambiguous statutory language something *more* than its most plausible meaning⁷⁸ — empowering courts to expand the reach of statutes.⁷⁹

* * *

In sum, all four canons identified by Ramsey as early instantiations of the judicial power can be traced to pre-ratification practice. Thus, they do not support an inferred power to develop new canons such as the major questions doctrine, but rather a power to apply existing canons that predated ratification.⁸⁰ Ramsey posits that if canons originated in England, there must have existed an English power to develop canons,⁸¹ which the Constitution may have “carrie[d] over.”⁸² But that final proposition is an argument in search of evidence. While this Note takes the bolder view that the Constitution repudiated any canon-making power,⁸³ the practice on which Ramsey relies cannot alone support his thesis.⁸⁴

Further, three of the four canons empower judges to overenforce statutes. To extrapolate from the early canons the power exclusively to underenforce statutes to preserve any “core founding-era value” would thus be a mistake.⁸⁵ Because their force is bidirectional, such a power would have to permit both underenforcement and overenforcement of statutes,⁸⁶ eviscerating one of Ramsey’s two limiting principles. And the other criterion is hardly limiting: The search for a “core founding-era value” yields kaleidoscopic results. This holistic standard⁸⁷ mimics

⁷⁶ See Thayer, *supra* note 73, at 144 (“[A court] can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one, — so clear that it is not open to rational question.”).

⁷⁷ Ramsey, *supra* note 9, at 844.

⁷⁸ See Thayer, *supra* note 73, at 156 (observing that the clear error rule demonstrates “the clear limits of judicial power” and prevents “[t]he checking and cutting down of legislative power”).

⁷⁹ See *supra* note 31 and accompanying text.

⁸⁰ See Michael B. Rappaport, *Replacing the Major Questions Doctrine with Originalist Statutory Interpretation*, HARV. J.L. & PUB. POL’Y: PER CURIAM, Summer 2024, at 1, 6.

⁸¹ See Ramsey, *supra* note 9, at 847.

⁸² *Id.* at 856.

⁸³ See *infra* notes 144–59 and accompanying text.

⁸⁴ This is likely why he reiterates his view that the presumption against violating international law was “largely developed after ratification.” Ramsey, *supra* note 9, at 856.

⁸⁵ Indeed, Antifederalists cautioned that the judicial power would “tend to extend the legislative authority.” *E.g.*, BRUTUS NO. XII (Feb. 7, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 422, 423 (Herbert J. Storing ed., 1981).

⁸⁶ Cf. William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 999–1005 (2001) (describing ameliorative and suppletive powers in English pre-ratification practice).

⁸⁷ Ramsey clarifies that these values must have been “recognized and widely held at the founding.” Ramsey, *supra* note 9, at 853.

the framework of history-and-tradition inquiries,⁸⁸ which are plagued by allegations of indeterminacy⁸⁹ and bias.⁹⁰ Ramsey's framework would thus permit expansive judicial lawmaking, with a canon for every value⁹¹ held by a sitting judge that could pass muster as one widely shared at the Founding.⁹²

Ramsey's framework is intriguing, but the current batch of evidence guides this Note to a different conclusion. And if stronger post-ratification evidence could be found, the practice of looking past the Founding era to discern original meaning would still be troubling.

B. *Difficulties with Reliance on Post-Ratification Practice*

Even if early American cases did functionally develop substantive canons,⁹³ such practice ought to bear little on original meaning. First, jurists have yet to declare the definitive period at which constitutional meaning is set in amber. Second, scant faith should be placed in early practitioners who often disagreed and engaged in motivated reasoning. Third, declaring power based on "uncontested use"⁹⁴ requires judges to draw inferences from silence.

1. *Identifying a Brink.* — There are several "unsettled questions" concerning post-ratification practice.⁹⁵ Chief among them is at what point it ceases to be illustrative of original meaning and begins to paint an altogether new picture.⁹⁶ Eventually, practice "that long postdates ratification does not serve that [probative] function."⁹⁷ While a string of case law considers actions by the First Congress, whose members "had taken part in framing" the Constitution, as "contemporaneous and

⁸⁸ See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) ("[A]ny such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997))).

⁸⁹ See, e.g., *Vidal v. Elster*, 144 S. Ct. 1507, 1534 (2024) (Sotomayor, J., concurring in the judgment) ("[T]his back-and-forth highlights the indeterminacy of the Court's history-and-tradition inquiry, which one might aptly describe as the equivalent of entering a crowded cocktail party and looking over everyone's heads to find your friends.").

⁹⁰ See, e.g., Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism — And Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1183 (2023) ("[A]t present the standard is standardless. It is the kind of law that a Court that was made to change the law makes to change law. . . . A judge's turn to the historical record can just as easily disguise judicial discretion as constrain it.").

⁹¹ Conflicting values would likely produce conflicting canons, giving new life to Professor Karl Llewellyn's critique of "two opposing canons on almost every point." Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

⁹² Admittedly, a staunch originalist might dismiss that pragmatic concern, as originalism places truth above prudentialism. See, e.g., sources cited *infra* note 116.

⁹³ One could either accept Ramsey's characterization of the cases he cites or admit the possibility that future research may uncover additional cases.

⁹⁴ Ramsey, *supra* note 9, at 837.

⁹⁵ *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2163 (2022) (Barrett, J., concurring).

⁹⁶ See *id.*

⁹⁷ *United States v. Rahimi*, 144 S. Ct. 1889, 1924 (2024) (Barrett, J., concurring).

weighty evidence,”⁹⁸ other decisions have deemed “innovations of the mid- to late-19th-century courts . . . too late.”⁹⁹ But between these points lies jurisprudential uncertainty. In this liminal period, where Ramsey’s post-ratification references fall,¹⁰⁰ jurists might reasonably disagree on whether practice implements original meaning.

2. *Trusting the Judiciary.* — While reliance on any and all post-ratification practice should elicit trepidation, judicial practice that expanded judicial power is especially dubious. First, early actions supply contradictory evidence.¹⁰¹ Many of the early legislators, executive officials, and jurists were present at the Founding. And yet they clashed over the Constitution all the same. Those disagreements manifested in inconsistent early practice, making it impossible to inoculate every turn-of-the-century statute, enforcement action, and judicial decision from critique.¹⁰² If one asserted that judicial practice should control in cases of conflict,¹⁰³ that would imply every divergent legislative and executive interpretation of the Constitution was incorrect. But it is inconceivable that one branch always got it right. While the Court may have the power “to say what the law *is*,”¹⁰⁴ that does not mean it accurately captures what the law’s original meaning *was* — precisely why originalists are wary of precedent.¹⁰⁵ Second, if public officials acted in their own interests,¹⁰⁶ one should be highly skeptical of judicial opinions that

⁹⁸ *E.g.*, *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986) (quoting *Marsh v. Chambers*, 463 U.S. 783, 790 (1983)); *accord* *CFPB v. Cmty. Fin. Servs. Ass’n of Am., Ltd.*, 144 S. Ct. 1474, 1484 (2024); *see also* Michael Bhargava, Comment, *The First Congress Canon and the Supreme Court’s Use of History*, 94 CALIF. L. REV. 1745, 1746–47 (2006) (describing case law as establishing a “First Congress canon,” *id.* at 1746 n.13).

⁹⁹ *Bruen*, 142 S. Ct. at 2137 (quoting *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 312 (2008) (Roberts, C.J., dissenting) (“The belated innovations of the mid- to late-19th-century courts come too late to provide insight into the meaning of Article III.”) (“[B]ecause post-Civil War discussions . . . ‘took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning’” (quoting *District of Columbia v. Heller*, 554 U.S. 570, 614 (2008))); *see, e.g.*, *Samia v. United States*, 143 S. Ct. 2004, 2019 (2023) (Barrett, J., concurring in part and concurring in the judgment) (“The evidence is largely from the late 19th and early 20th centuries — far too late to inform the meaning of the Confrontation Clause.”).

¹⁰⁰ *See supra* notes 36, 50, 57 and accompanying text; *see also* Ramsey, *supra* note 9, at 842–43 (citing *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801)).

¹⁰¹ *Contrast Cmty. Fin. Servs. Ass’n of Am.*, 144 S. Ct. at 1484–86, 1489 (presenting one view), *with id.* at 1495, 1500–01 (Alito, J., dissenting) (presenting an alternative view).

¹⁰² *See generally, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (declaring James Madison’s withholding of William Marbury’s commission lawless, *id.* at 162, and invalidating a section of the Judiciary Act of 1789 as unconstitutional, *id.* at 180).

¹⁰³ Not everyone takes this view. Departmentalists, including Thomas Jefferson and James Madison, believed each branch had an independent duty “to interpret the Constitution for itself.” Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 495 (2018).

¹⁰⁴ *Marbury*, 5 U.S. (1 Cranch) at 177 (emphasis added).

¹⁰⁵ *See infra* note 116 and accompanying text.

¹⁰⁶ Scholars levy this precise critique against Chief Justice Marshall. *See, e.g.*, Richard A. Posner, *The Accidental Jurist*, NEW REPUBLIC (Dec. 17, 2001), <https://newrepublic.com/article/66017/the-accidental-jurist> [https://perma.cc/77X2-ELUP] (“Marshall’s attitude toward constitutional law was goal-oriented, manipulative, ideological, and at times politically partisan.”).

siphoned power from the other branches. Thus, even if courts developed new substantive canons soon after ratification, that practice should weigh little when deducing the original meaning of the judicial power.

3. *Listening to Silence.* — To support his framework, Ramsey invokes the “apparently uncontested use” of substantive canons in the early nineteenth century.¹⁰⁷ A few problems emerge. First, while the absence of documented conflict precludes a finding of controversy, this nonfinding does not serve as affirmative evidence that there was no controversy at all. Second, it is quite plausible the public did not have an opportunity in this period to receive and deliberate over judicial opinions and their application of canons. The early days of American court reporting were beset by “delay, expense, omission[,] and inaccuracy.”¹⁰⁸ There were multiyear gaps between publication of Alexander Dallas’s reports,¹⁰⁹ and doctrine often spread by word of mouth before it was put to paper.¹¹⁰ Contemporary accounts in the press were of little use, as they consistently missed or misstated important points.¹¹¹ If people struggled to decipher the outcomes of cases, it is hard to imagine that they were discussing and debating the intricacies of interpretive rules.¹¹²

Supposing the public both knew of and decided not to contest early use of substantive canons, it is still inappropriate to draw anything greater than the narrowest inference¹¹³: Perhaps the public believed the judicial power extended to develop these, but only these, substantive canons.¹¹⁴ Or perhaps they acquiesced because they thought the Court to be exceeding its authority, but not dangerously so. While beyond the scope of this Note, acquiescence as scholars interpret it¹¹⁵ seems in serious, perhaps irreconcilable, conflict with precedent-skeptical originalism: What’s wrong stays wrong, no matter how long.¹¹⁶ Moreover,

¹⁰⁷ Ramsey, *supra* note 9, at 837.

¹⁰⁸ Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1301 (1985).

¹⁰⁹ See *id.* at 1301.

¹¹⁰ See *id.* at 1302.

¹¹¹ See, e.g., *id.* at 1311 (describing how newspaper accounts of *Marbury* neglected to mention its now-monumental assertion of judicial review).

¹¹² Such discussion is important. Reflecting on James Madison’s theory that practice over time can liquidate constitutional meaning, Professor William Baude observes that “more than just silence” is required for liquidation: Meaning is fixed not by acquiescence, but through deliberation. William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 64 (2019). And regardless, only indeterminate text may be liquidated through successive practice. *Id.* at 13–14 (citing THE FEDERALIST NO. 37, at 225 (James Madison) (Clinton Rossiter ed., 2003)).

¹¹³ Cf. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) (“In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.”).

¹¹⁴ Cf. *infra* notes 144–59 and accompanying text.

¹¹⁵ See Bhargava, *supra* note 98, at 1782–83; Baude, *supra* note 112, at 18–19.

¹¹⁶ See Ramsey, *supra* note 9, at 830 (“A bedrock principle of originalist views of precedent is (or ought to be) that nonoriginalist precedent should not be extended.”); see, e.g., Gary Lawson, *The*

acquiescence exerts a pernicious “use it or lose it” pressure¹¹⁷ on the public to challenge every misuse of power or risk losing their rights.¹¹⁸ One must balance the benefit of civic awareness with the cost of civic anxiety.

* * *

These three concerns present serious challenges for reliance on post-ratification practice¹¹⁹ and cast doubt on the authority asserted by Ramsey of courts to develop new substantive canons. Instead of looking to post-ratification practice, this Note shifts its focus to Founding-era evidence. An alternative framework emerges from this historical inquiry.

II. AN ORIGINALIST FRAMEWORK FOR SUBSTANTIVE CANONS

Some doubt whether originalists ought to use any substantive canons at all.¹²⁰ While the far ends of originalism’s adherents are difficult to hold together,¹²¹ this Note proposes a new framework¹²² that aims to bring most on board¹²³: Substantive canons fall within the original

Constitutional Case Against Precedent, 17 HARV. J.L. & PUB. POL’Y 23, 26–28 (1994) (describing adherence to precedent as an unconstitutional abdication of the “duty . . . to say what the law is,” *id.* at 26 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added))).

¹¹⁷ Cf. *United States v. Rahimi*, 144 S. Ct. 1889, 1925 (2024) (Barrett, J., concurring) (observing that a requirement on the government to find a historical “twin” to justify a present regulation exerts this same “use it or lose it” pressure on legislative authority).

¹¹⁸ See O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897) (“[W]hat is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time?”).

¹¹⁹ Such practice may at most be corroborative, but never conclusive.

¹²⁰ See, e.g., Eidelson & Stephenson, *supra* note 5, at 562 (“[W]e doubt that almost any existing substantive canons could actually be justified on originalist grounds”); 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.”).

¹²¹ See Gary Lawson, Essay, *Equivocal Originalism*, 27 TEX. REV. L. & POL. 309, 311 (2022) (“*Originalism* is a term shrouded in ambiguity, and arguments — pro, con, or neutral — using the term are prime candidates for the fallacy of equivocation, in which words shift meaning from one part of an argument to another.”).

¹²² Another recent article briefly synthesizes similar categorizes, but instead proposes that a substantive canon must “(1) predate the founding and either (2) supplement the enforcement of constitutional structure or (3) [be] applied to texts that are ambiguous or communicate technical legal meaning.” Mark Moller, *Complete Diversity: The Origin Story*, 76 FLA. L. REV. 1221, 1226 (2024).

¹²³ Originalists disputing this Note’s historical analysis should detract from the framework’s output, not its function. Some might be drawn to then-Professor Amy Coney Barrett’s framework to validate canons that are “connected to” and “promote” a “reasonably specific constitutional value,” Barrett, *supra* note 64, at 178, but her framework is textualist, not originalist. See *id.* at 110. Moreover, scholars are skeptical that these values respect the Constitution’s compromises. See, e.g., John F. Manning, Essay, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 427–48 (2010). Others who endorse Justice Scalia’s theory of “prescriptive validity,” see Antonin Scalia, Essay, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 583 (1990), could refashion once-substantive canons as now-linguistic canons — but this reasoning could not justify these canons’ initial invocations.

meaning of the judicial power if they were observed as a clearly stated principle in pre-ratification practice and were not repudiated by the Constitution. This framework stems from two well-worn inferences. First, established rules are woven into the interpretive backdrop.¹²⁴ Thus, extant canons were incorporated into the Founders' conception of the judicial power, unless expressed otherwise. Second, the Constitution foreclosed expansive judicial lawmaking,¹²⁵ meaning the power to develop new canons — a lawmaking authority rooted in earlier practice — could not survive ratification. By setting strict thresholds and a strong negative presumption, the test functions as a clear statement rule for clear statement rules. Better still, this meta-rule puts judicial restraint¹²⁶ in the driver's seat, rather than pasted across the bumper.¹²⁷

A. The Framework

1. *Incorporation of Pre-Ratification Practice.* — When the Founders drafted the Constitution, they did not start from scratch.¹²⁸ Every constitutional provision was informed (if not determined) by background assumptions about what the language would convey.¹²⁹ These assumptions, in turn, were based on longstanding and salient practice.¹³⁰ An influential theory, original methods originalism, calls on those reading the Constitution to restrict themselves to the interpretive rules the Founders used.¹³¹ On this view, the Founders conceived and crafted the judicial power against the interpretive backdrop of pre-ratification

¹²⁴ Cf. John F. Manning, Essay, *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.”).

¹²⁵ See SCALIA, *supra* note 6, at 9–10.

¹²⁶ Judicial restraint is polysemic. Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 520–21 (2012). This Note utilizes the term to signify humility in assertions of authority, to resist the acrid impression that judges are making “grasps for power.” *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2295 (2024) (Kagan, J., dissenting).

¹²⁷ See *infra* note 207 and accompanying text.

¹²⁸ See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 27–28 (2001).

¹²⁹ See John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 760 (2009).

¹³⁰ This Note submits that a single case, if particularly noteworthy, is enough to shape assumptions. See *infra* pp. 640–41.

¹³¹ See McGinnis & Rappaport, *supra* note 129, at 758–65.

practice.¹³² It follows that the Founders understood the judicial power to presumptively include the interpretive tools they knew.¹³³

2. *A Cap on Judicial Lawmaking.* — Professors William Eskridge and John Manning have extensively debated the scope of judicial power,¹³⁴ including whether the Founders contemplated it as inclusive of equitable interpretation,¹³⁵ an atextual tradition in English courts¹³⁶ that elevated judicial reason over legislative intent in statutory interpretation.¹³⁷ Such a power would in theory permit courts to develop new canons.

The stakes here are high: If the Constitution vitiated equitable interpretation, then the weight of other Founding-era evidence¹³⁸ indicates that originalist judges should be faithful agents of Congress and adhere to textualism.¹³⁹ While such an originalist-textualist alignment is conventional¹⁴⁰ and intuitive,¹⁴¹ it poses difficulties for these judges' use of substantive canons.¹⁴² Conversely, if equitable interpretation survived

¹³² See John F. Manning, Response, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1671 (2001) (reflecting that “given the paucity of discussion [at the ratifying conventions], many [Founders] may have regarded the rules of interpretation as a mere set of background norms”); Eskridge, *supra* note 86, at 1036–37 (concluding that “[t]he strongest hypothesis is that the delegates both assumed and accepted the traditional rules and canons of statutory interpretation,” *id.* at 1036); *cf.* McGinnis & Rappaport, *supra* note 129, at 767 (detailing how “parts of the Constitution also assume the existence of interpretive rules”).

¹³³ *Cf.*, e.g., BRUTUS NO. XI (Jan. 31, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 85, at 417, 419 (“This article vests the courts with authority to give the constitution a legal construction, or to explain it according to the rules laid down for construing a law.” (citing U.S. CONST. art. III, § 2, cl. 1)). In response to a concern that judges “are empowered, to explain the constitution according to the reasoning spirit of it, without being confined to the words,” *id.*, Hamilton assured that “there is not a syllable in the plan under consideration which directly empowers the national courts to construe the laws according to the spirit of the Constitution,” THE FEDERALIST NO. 81, *supra* note 112, at 481 (Alexander Hamilton).

¹³⁴ See generally, e.g., William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509 (1998) (reviewing Scalia, *supra* note 6) (arguing, inter alia, that pre-ratification judicial practice in England incorporated equitable principles in statutory interpretation); Manning, *supra* note 128 (challenging Eskridge’s claim); Eskridge, *supra* note 86 (replying to Manning’s challenge); Manning, *supra* note 132 (responding to Eskridge’s reply).

¹³⁵ Manning, *supra* note 128, at 25–26.

¹³⁶ *Id.* at 29–32.

¹³⁷ *Id.* at 34–35. Eskridge argues that contemporary English judges maintained “ameliorative, suppletive, and avoidance powers,” of which equitable interpretation was just a subset. Eskridge, *supra* note 86, at 996 (emphases omitted). But Manning’s critique is responsive to all judicial practices that reconstructed statutes with textual abandon. Manning, *supra* note 132, at 1658.

¹³⁸ See, e.g., *infra* notes 146–59 and accompanying text.

¹³⁹ Manning, *supra* note 128, at 8.

¹⁴⁰ Amy Coney Barrett, Lecture, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 CASE W. RESV. L. REV. 855, 864 (2020) (“[I]t makes sense that statutory textualists are usually constitutional originalists.”).

¹⁴¹ *Id.* (“Originalists, like textualists, care about what people understood words to mean at the time that the law was enacted because those people had the authority to make law.”).

¹⁴² See generally Eidelson & Stephenson, *supra* note 5 (asserting methodological dissonance between textualism and substantive canons).

ratification, originalists could invent canons as they go along.¹⁴³ This debate would suggest that originalists can be either textualists or purveyors of substantive canons, but not both.¹⁴⁴

However, a middle ground exists. This Note theorizes that the Constitution placed a cap on judicial lawmaking. Interpretive principles already developed by judges were admitted as part of the judicial power, but practices that permitted judges to develop new principles — a meta-lawmaking power — were repudiated by constitutional structure. The Founders could not assign such power to the judiciary without collapsing a conscious division between the judicial and legislative powers. Thus, originalist judges must reject a canon-making power.

Eskridge and Manning agree that, while background principles informed early drafts of the Constitution, the Founders nevertheless intended to depart from certain precedents.¹⁴⁵ Manning persuasively argues that equitable interpretation is best understood as a slurry of legislative and judicial functions.¹⁴⁶ The Constitution's division of these functions across branches represents a deliberate break from such "broad judicial lawmaking powers."¹⁴⁷ While Antifederalists expressed apprehension during the ratification process that the judicial power would include equitable interpretation,¹⁴⁸ these writings were "calculated to sow apprehension"¹⁴⁹ and were quickly rebuffed by Federalist responses¹⁵⁰ — an indication that the Founders supporting ratification did not advertise the judicial power to the public as elastic or generative.¹⁵¹

Hamilton was a vocal opponent of unbridled judicial lawmaking — and his perspective is especially instructive as one of the earliest

¹⁴³ Cf. Eskridge, *supra* note 86, at 1099–102 (concluding from early practice that "textual meaning depends upon presumptions," which "can be normatively inspired," *id.* at 1099, such that "the consequences . . . for modern practice," *id.* at 1100, include "[c]reativity and normative influences" when invoking canons, *id.* at 1102). *But see* Saikrishna Bangalore Prakash, *Spirit*, 173 U. PA. L. REV. 937, 1025 (2025) ("[I]f an era did not use spirit, then we ought not use it to make sense of a legal text from that era."). This latter perspective would permit equitable interpretation of the Constitution, but not of modern statutes.

¹⁴⁴ See sources cited *supra* note 120.

¹⁴⁵ Compare Manning, *supra* note 128, at 56 (acknowledging that the Constitution "departs in important respects from . . . English government"), with Eskridge, *supra* note 86, at 1009 (reminding that the Founders "threw off English rule").

¹⁴⁶ Manning, *supra* note 128, at 43–46.

¹⁴⁷ *Id.* at 57. Eskridge argues pre-ratification state practice undermines this claim. Eskridge, *supra* note 86, at 1012–13. Manning responds that states varied in their practices and structural arrangements, inconsistent with subsequent constitutional structure. Manning, *supra* note 132, at 1660–65.

¹⁴⁸ *E.g.*, BRUTUS NO. XI, *supra* note 133, at 419; FEDERAL FARMER NO. XV (Jan. 18, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 85, at 315, 322.

¹⁴⁹ Manning, *supra* note 128, at 80–81.

¹⁵⁰ See, *e.g.*, *supra* note 133.

¹⁵¹ Manning, *supra* note 128, at 82.

scholars¹⁵² and strongest supporters¹⁵³ of judicial review.¹⁵⁴ Hamilton acknowledged that judges could, “on the pretense of a repugnancy,” prioritize their “pleasure” over the will of Congress.¹⁵⁵ But this, he reasoned, would be an abdication of their duty to provide judgment.¹⁵⁶ Instead, “[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents.”¹⁵⁷ Such rules might permit judges placing a slight thumb on the interpretive scale, but never a fist: “Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to . . . affect the order of the political system.”¹⁵⁸ Hamilton’s writing comports with a perspective that the Founders sought to confine the judicial power and prevent meta-lawmaking, but were not concerned about bounded, already-developed canons in the interpretive toolkit — encapsulated in the “strict rules and precedents” that antedate a judge’s disposition.¹⁵⁹

B. Assessing Substantive Canons

From this interpretation of the judicial power’s original meaning, substantive canons are legitimate only if they are observed in longstanding or salient pre-ratification practice and do not provide judges with unbounded lawmaking authority. Subjecting canons to this test reveals its contours.

i. Early Canons. — The four early canons identified by Ramsey satisfy the test. First, as iterated above, they each advance a clearly stated principle that predated ratification.¹⁶⁰ Ramsey accepts nonretroactivity and lenity as continuations of longstanding practice,¹⁶¹ but he contends that the presumption against violating international law lacks firm pre-ratification roots.¹⁶² If not longstanding,¹⁶³ this presumption’s early impressions are nevertheless salient. When looking to original meaning, *Rutgers* is particularly incisive, as it was argued by one of the Constitution’s key architects¹⁶⁴ and an author of the *Federalist Papers*.¹⁶⁵ And,

¹⁵² See *supra* note 42.

¹⁵³ See Eskridge, *supra* note 86, at 1030.

¹⁵⁴ While not determinative, Hamilton’s interpretation is highly probative of original meaning.

¹⁵⁵ THE FEDERALIST NO. 78, *supra* note 112, at 467 (Alexander Hamilton).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 470.

¹⁵⁸ THE FEDERALIST NO. 81, *supra* note 112, at 484 (Alexander Hamilton).

¹⁵⁹ See Eskridge, *supra* note 86, at 1056.

¹⁶⁰ See *supra* notes 38–45, 59–60, 63–64, 74–75 and accompanying text.

¹⁶¹ See Ramsey, *supra* note 9, at 847.

¹⁶² *Id.*

¹⁶³ See *supra* notes 38–42.

¹⁶⁴ See sources cited *supra* note 42 and accompanying text.

¹⁶⁵ This collection provides “especially persuasive” insight into constitutional meaning. John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1340 (1998).

unlike other judicial decisions lost to omission or obscurity,¹⁶⁶ it caught the attention of other Founders;¹⁶⁷ when it came time to draft the Constitution, they surely kept *Rutgers* in mind.¹⁶⁸

Second, whatever lawmaking authority underlies these canons is bounded: Judges can modulate interpretations only to promote a discrete endpoint, which informs the legislative process¹⁶⁹ and can be overridden through intentional drafting.¹⁷⁰ These canons thus survived ratification.

2. *Absurdity Doctrine*. — The presumption against absurd results¹⁷¹ should be left behind by originalists.¹⁷² While the canon preceded ratification,¹⁷³ its principle operates at an inordinately high level of generality and is thus “worlds apart from the relatively definite background conventions” formed by other substantive canons.¹⁷⁴ The endpoint of the absurdity doctrine is normalcy.¹⁷⁵ But normalcy is in the eye of the beholder. Thus, it more closely resembles equitable interpretation, as it neither puts Congress on notice nor establishes an objective basis on which judges may make law,¹⁷⁶ but rather affords judges unbounded lawmaking authority.

3. *Constitutional Avoidance*. — The legitimacy of constitutional avoidance depends on its form. This canon postdated the document it protects.¹⁷⁷ But its earliest iteration (the classic form¹⁷⁸) sounds in the same principle as the pre-ratification presumption against judicial review: to avoid invalidating a statute’s potentially constitutional

¹⁶⁶ See *supra* notes 107–08 and accompanying text.

¹⁶⁷ See *supra* notes 45–46 and accompanying text.

¹⁶⁸ ALEXANDER, *supra* note 44, at 164 (“[I]t is clear that the conflict of legislature and judiciary was thoroughly considered in such cases [as *Rutgers*] and that the framers of the Constitution had them in mind in working out the separation of powers found in that document.”).

¹⁶⁹ See Scalia, *supra* note 123, at 583.

¹⁷⁰ See Barrett, *supra* note 64, at 171–72.

¹⁷¹ See Andrew S. Gold, *Absurd Results, Scrivener’s Errors, and Statutory Interpretation*, 75 U. CIN. L. REV. 25, 53 (2006).

¹⁷² Here, “should” is aspirational, not predictive. Cf., e.g., SCALIA & GARNER, *supra* note 8, at 234 (endorsing absurdity doctrine); Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 12–13 (2006) (observing Justice Scalia’s departure from original meaning when it would produce “objectionable results,” *id.* at 12).

¹⁷³ John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2401 n.45 (2003) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *91).

¹⁷⁴ *Id.* at 2473.

¹⁷⁵ Or, perhaps, reasonability — hardly any more objective. See WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 45–46 (1994) (noting disagreements between Justices over what is reasonable).

¹⁷⁶ Manning, *supra* note 173, at 2475 (construing the absurdity doctrine as permitting “legislative discretion to revise the clear meaning of a statute”).

¹⁷⁷ See Barrett, *supra* note 64, at 140 (identifying its origin in 1814). *Contra* Eskridge, *supra* note 86, at 1006, 1027 (arguing that *Dr. Bonham’s Case*, (1610) 77 Eng. Rep. 646 (KB), and *Commonwealth v. Caton*, 8 Va. (4 Call) 5 (1782), exemplify principles of avoidance); see also THE FEDERALIST NO. 81, *supra* note 112, at 481 (Alexander Hamilton) (“[W]herever there is an evident opposition, the laws ought to give place to the Constitution.”).

¹⁷⁸ For a delineation, see Manning, *supra* note 123, at 414.

components.¹⁷⁹ The presumption against judicial review upholds a statute in potential conflict with the Constitution, and classic constitutional avoidance refines a statute in direct conflict with the Constitution so as to uphold it. However, the modern form of constitutional avoidance¹⁸⁰ inverts the presumption against judicial review: It underenforces statutes and overenforces the Constitution.¹⁸¹ Judges employing the modern form may undermine the supreme status of laws¹⁸² by adjusting them before concluding that they violate the Constitution, in apparent contravention of Article VI.¹⁸³ While the classic form might be fairly traceable to pre-ratification practice, the modern form is antithetical to such practice and thus falls outside the judicial power.

4. *Major Questions Doctrine*. — As indicated by the Introduction,¹⁸⁴ this presumption significantly postdated ratification.¹⁸⁵ Scholars have fashioned creative analogies in defense of the doctrine, attempting to draw authority from early presumptions against unenumerated power¹⁸⁶ and delegation of extraordinary powers in agency law.¹⁸⁷ But, even if this evidence predated ratification, and most of it does not,¹⁸⁸ one must make multiple analytical leaps to reach the major questions doctrine. No clearly stated principle supporting the doctrine preceded ratification. Attempts by the Justices¹⁸⁹ to ground the doctrine in

¹⁷⁹ See *id.*

¹⁸⁰ See *id.*

¹⁸¹ See *supra* notes 75–79 and accompanying text.

¹⁸² See Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 95 (1996) (“[I]t is hardly clear that the intrusion of judicial rewriting is any less than the intrusion of judicial invalidation.”).

¹⁸³ U.S. CONST. art. VI, cl. 2.

¹⁸⁴ See *supra* notes 1–2 and accompanying text.

¹⁸⁵ See Ramsey, *supra* note 9, at 830 (identifying roots in late nineteenth-century practice (citing, *inter alia*, *Interstate Com. Comm’n v. Cincinnati, New Orleans & Tex. Pac. Ry. Co.*, 167 U.S. 479, 499 (1897))); Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 200–01 (2023) (identifying its first use in the post–Civil War period, as courts denied state agencies the power to regulate railroads).

¹⁸⁶ *E.g.*, Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. 909, 965–67 (2024) (discussing conflict over incorporation of a national bank); Capozzi, *supra* note 4, at 548 (observing an English court’s declaration that an asserted “Power ought to be as clear as it is extensive” (quoting *Entick v. Carrington* [1765] EWHC J28 (KB), *in* T.T. Arvind & Christian R. Bursset, *A New Report of Entick v. Carrington* (1765), 110 KY. L.J. 265, 324 (2021))).

¹⁸⁷ *E.g.*, Wurman, *supra* note 186, at 968–70 (observing resonance in cases that held that general grants of power did not confer extraordinary power to agents).

¹⁸⁸ The fight over a national bank emerged after ratification, *see id.* at 965 & n.287, and the bulk of agency law analyzed by Professor Ilan Wurman developed in cases decided after 1795, *id.* at 968–71. *But see id.* at 969 (citing an English decision from 1743 that required specific authorization for an agent to pledge goods for sale as security). The language from a 1765 English decision on which Louis Capozzi relies, *see supra* note 186, only recently surfaced, Arvind & Bursset, *supra* note 186, at 268, and the contemporary reports the Founders would have read were either “obviously incomplete” or contained “internal inconsistencies,” *id.* at 267, which diminishes their trustworthiness, *see supra* note 112 and accompanying text.

¹⁸⁹ See, *e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

nebulous separation of powers principles¹⁹⁰ or a broader appeal to substantive canons writ large¹⁹¹ instead of specific Founding-era presumptions underscore that the doctrine lacks the requisite history.¹⁹² And if the canon did predate ratification, it would have been repudiated on its own reading of Article I: Grounded in the principle that the lawmaking power is reserved for Congress, the canon ironically arrogates lawmaking power to judges,¹⁹³ without any clear congressional authorization.¹⁹⁴ Perhaps these failings are why Justice Barrett categorizes the presumption as a “common sense” linguistic canon,¹⁹⁵ and assures that “if the major questions doctrine were a newly minted strong-form canon, [she] would not embrace it.”¹⁹⁶

5. *Twentieth-Century Canons.* — A subset of substantive canons are considered artifacts of the twentieth century and correspondingly fall beyond the scope of the judicial power.¹⁹⁷ The federalism canon was first iterated as a “presumption against preemption” in the 1940s,¹⁹⁸ stemming from principles developed in the 1910s,¹⁹⁹ and it subsequently proliferated into an array of “super-strong clear statement rules” in the

¹⁹⁰ Barrett, *supra* note 64, at 179 n.331; see also John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2039 (2011) (“[F]reestanding separation of powers doctrines . . . disregard precise constitutional provisions and the realities of the constitutionmaking process. . . . [O]ne cannot find in the Constitution evidence of any generalizable vision of the separation of powers . . .”).

¹⁹¹ *West Virginia v. EPA*, 142 S. Ct. at 2625 (Gorsuch, J., concurring) (“[O]ur law is full of clear-statement rules and has been since the founding.”).

¹⁹² If one deems early practice probative, a *pro*-delegation canon might be more appropriate. See Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 332–33 (2021) (“When the First Congress . . . valued flexibility and discretion, it delegated expansive legislative authority [It] delegated virtually unguided discretion on major policy questions . . . without betraying a hint of concern that doing so might violate the Constitution.”).

¹⁹³ See Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. 465, 531 (2024).

¹⁹⁴ See William N. Eskridge, Jr., *Super-Canons*, 78 VAND. L. REV. 727, 740 (2025).

¹⁹⁵ *Biden v. Nebraska*, 143 S. Ct. 2355, 2379 (2023) (Barrett, J., concurring). Recent empirical findings suggest that the public broadly does not perceive the Court’s interpretations as common sense. See generally Kevin Tobia, Daniel E. Walters & Brian Slocum, *Major Questions, Common Sense?*, 97 S. CAL. L. REV. 1153 (2024) (finding that “ordinary people lean towards textualism, but not the ‘common sense’ limitations claim at the heart of the [canon],” *id.* at 1204, and concluding that it “cannot, and should not, be defended as a valid linguistic canon capturing how ordinary readers understand delegating statutes,” *id.* at 1214).

¹⁹⁶ *Biden v. Nebraska*, 143 S. Ct. at 2377 n.2 (Barrett, J., concurring).

¹⁹⁷ If one subscribes to originalism.

¹⁹⁸ See Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 86–87 (2008) (citing, inter alia, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

¹⁹⁹ See Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 150–51 (2001).

1980s and 1990s.²⁰⁰ Scholars²⁰¹ and judges²⁰² agree that the pro-veteran canon formally emerged in the 1940s. And while “[c]ongressional intent to care for veterans has been evident since before the Founding,”²⁰³ this conviction did not manifest in an interpretive rule prior to ratification.

CONCLUSION

A demure description of clear statement rules as “limiting canons”²⁰⁴ obscures the reality that even as they (concededly often²⁰⁵) narrow statutes, they expand judicial power. If substantive canons merely functioned as tiebreakers, then they would indeed “avert potentially costly judicial errors”²⁰⁶ where the risk of error is high. Yet in practice, these canons steamroll congressional intent, empowering judicial activism through the brandishing of “get-out-of-text-free cards.”²⁰⁷ They generate more interpretive errors than they avoid.²⁰⁸ Such errors are permissible only if the textual strain is a constitutionally authorized invocation of the judicial power. Under an originalist framework, the judicial power is properly restricted to substantive canons that predated and survived ratification.

Ramsey’s article is engaging and insightful,²⁰⁹ and divergences between his and this Note’s analysis demonstrate the wide range of approaches under the originalist umbrella.²¹⁰ But ultimately, the power he draws from early judicial practice to generate new canons would sweep too broadly. None of the evidence advanced by Ramsey supports a power to develop, rather than apply, substantive canons. If such a power existed, modern judges could invent novel canons to promote their own substantive preferences, unfettered by semblances of underenforcement.²¹¹

²⁰⁰ See William N. Eskridge, Jr., & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 619 (1992).

²⁰¹ E.g., Note, *Codify Gardner*, 138 HARV. L. REV. 2093, 2100 (2025) (“It was in this era of burgeoning veterans law that the direct origin of *Gardner’s* presumption can be found in case law.” (citing *Boone v. Lightner*, 319 U.S. 561, 575 (1943); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946))).

²⁰² E.g., *Rudisill v. McDonough*, 144 S. Ct. 945, 959 (2024) (Kavanaugh, J., concurring) (“The first glimmerings of the veterans canon appeared in the 1940s.”).

²⁰³ Note, *supra* note 201, at 2098.

²⁰⁴ Ramsey, *supra* note 9, at 837.

²⁰⁵ See *supra* notes 50–51, 61, 65 and accompanying text.

²⁰⁶ Ramsey, *supra* note 9, at 846.

²⁰⁷ *West Virginia v. EPA*, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting).

²⁰⁸ Cf. Barrett, *supra* note 64, at 124 (“A judge applying a substantive canon often exchanges the best interpretation of a statutory provision for a merely bearable one.”).

²⁰⁹ The author additionally appreciates Ramsey’s encouraging feedback on earlier drafts of this Note.

²¹⁰ See Barrett, *supra* note 140, at 861 (“In short, even card-carrying originalists don’t always wind up at the same spot, and it oversimplifies originalism to expect that they always will.”).

²¹¹ Cf., e.g., *Sackett v. EPA*, 143 S. Ct. 1322, 1361 (2023) (Kagan, J., concurring in the judgment) (deriding the majority’s “pop-up clear-statement rule”).

To some, the alternative framework this Note proposes may appear excessively austere, filtering out salutary and benign canons legitimized by good reason or longstanding practice. Yet such temerity is a tenet of originalism.²¹² Enforcing the original meaning of the judicial power counsels against canonization of substantive rules that were not perceived and tacitly incorporated by the Founders. As a canon that postdates ratification and distorts constitutional structure, the major questions doctrine should, in its substantive form, be rejected by originalists.

²¹² See *supra* note 116 and accompanying text.