

The Incompatibility of Substantive Canons and Textualism

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ABSTRACT

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.

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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 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 relatively 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

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.

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 27, 91.

³ See *Barnhart v. Thomas*, 540 U.S. 20, 27–28 (2003) (Scalia, J.); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 144–45 (2012).

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

⁵ See *id.* at 384–413.

⁶ See *id.* at 413–60.

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* 3, 26 (Amy Gutmann ed., 1997) (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

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?

Last Term, Justice Kagan posed precisely this challenge to her textualist colleagues in her dissenting opinion in *West Virginia v. EPA*.¹⁰ *West Virginia* concerned the method that the EPA had used in its Clean Power Plan to set carbon dioxide emissions limits for coal-fired power plants. Under the relevant provision of the Clean Air Act, the EPA is supposed to set an emission limit that is "achievable through the application of the best system of emission reduction" that satisfies certain criteria.¹¹ 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 substituting cleaner energy sources for coal. The EPA therefore calculated emissions limits that were premised on such "generation shifting" taking place.

Justice Kagan thought that the statutory text clearly allowed this. 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.¹² But although Chief Justice Roberts' majority opinion conceded that "[a]s a matter of definitional possibilities, generation shifting can be described as a 'system,'" the Court held that the statutory language still did not authorize the Clean Power Plan.¹³ The EPA was asserting an unprecedented authority to transform the U.S. electricity sector, the majority explained, and its action thus triggered the "major

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."). "Semantic" canons *do* pose a challenge for textualists when they are given more weight than their probative value with respect to the linguistic meaning of a given statute supports. 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.

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

¹⁰ 142 S. Ct. 2587 (2022).

¹¹ 42 U.S.C. § 7411.

¹² 142 S. Ct. at 2630 (Kagan, J., dissenting).

¹³ 142 S. Ct. at 2614 (majority opinion) (internal citation and quotation marks omitted).

questions doctrine”—a substantive canon presuming that federal statutes do not delegate “extraordinary” regulatory authority to agencies except through a specific statement to that effect.¹⁴ To Justice Kagan, this amounted to little more than an opportunistic deviation from the textualist approach that the Justices in the majority preach in other contexts. “The current Court,” she wrote, “is only textualist when being so suits it. 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.”¹⁵

Justice Kagan is not the first to observe a tension between modern textualists’ foundational commitments and the use of substantive canons. In fact, several leading textualist theorists have recognized and wrestled with this problem. Justice Scalia, for example, once observed that substantive canons amount to “dice-loading rules” that pose “a lot of trouble” for “the honest textualist.”¹⁶ Then-Professor, now-Justice Amy Coney Barrett similarly recognized that substantive canons are “at apparent odds with the central premise from which textualism proceeds.”¹⁷ Yet textualist judges frequently deploy substantive canons anyway; *West Virginia* is not unusual in that respect.¹⁸ In addition to the other recent cases deploying the major questions

¹⁴ 142 S. Ct. at 2614 (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” (internal citation and quotation marks omitted)); *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”).

¹⁵ *Id.* at 2625 (Kagan, J., dissenting).

¹⁶ Scalia, *supra* note 7, at 28; *see also id.* at 27–29.

¹⁷ 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 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); 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); William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531 (2103) (book review); Philip P. Frickey, *Interpretive Regime Change*, 38 LOYOLA 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).

¹⁸ *See* Barrett, *supra* note 17, at 121–23; Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 762 (2013); 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). *But cf.* Anita

doctrine,¹⁹ the Court has reaffirmed its demand that Congress “enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power.”²⁰ And, interestingly, Justice Gorsuch has recently urged his colleagues to breathe new life into the rule of lenity as well.²¹

What accounts for this disconnect? An important part of the explanation, we think, is textualist theorists’ insistence that while the tension here may be real, even awkward, it is ultimately manageable within the theory’s own terms. In fact, both Justice Scalia and Justice Barrett addressed the issue mostly by way of explaining why, at the end of the day, the problem is probably not as acute as it appears.²² Their arguments did not purport to save *all* substantive canons, and—until Justice Gorsuch’s effort to defend the majority’s approach in *West Virginia*—they did not make the leap from extrajudicial musings to judicial opinions.²³ Still, the sheer existence of respectable textualist defenses of substantive canons, together with a convenient vagueness about their scope, has allowed textualist judges to deploy these canons with a relatively clean conscience—and probably helped to stave off the debate that is now breaking out within the Court as well.

With the question now finally poised to receive the attention it deserves, this Article systematically assesses each of the leading efforts to square modern textualist theory with substantive canons. We take these proposed reconciliations to be of three types. The first line of argument, most prominently voiced by Justice Scalia, 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.²⁴ A second

S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825 (2017) (suggesting that, at least between 2006 and 2012, substantive canons were employed less frequently than commentators sometimes suggest).

¹⁹ See *Nat’l Federation of Indep. Bus. v. Dep’t of Labor*, 142 S. Ct. 661 (2022) (invalidating OSHA regulation regarding COVID-19 vaccination and testing); *Alabama Ass’n of Realtors v. Dep’t of Health & Human Servs.*, 141 S. Ct. 2485 (2021) (invalidating CDC eviction moratorium).

²⁰ *United States Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837, 1849–50 (2020).

²¹ See *Wooden v. United States*, 142 S. Ct. 1063, 1081–86 (2022) (Gorsuch, J., concurring in the judgment).

²² See *infra* Parts II, III.

²³ See *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring).

²⁴ See SCALIA & GARNER, *supra* note 3, at 31; Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 583 (1990); Manning, *Equity*, *supra* note 17, at 125; John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2467–68 (2003).

argument—developed most fully in Justice Barrett’s 2010 article and 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.”²⁵ Finally, a third approach—often paired with one of the other two—suggests that textualist judges can legitimately rely on substantive canons if, but only if, the text itself provides only an ambiguous or uncertain answer.²⁶

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 to promote favored values. Or they could concede that important claims about those jurisprudential commitments are inaccurate and oversimplified, in ways that undermine textualists’ traditional critiques of non-textualist 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 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.²⁷

²⁵ See Barrett, *supra* note 17, at 169; *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring).

²⁶ See, e.g., Barrett, *supra* note 17, at 163–67.

²⁷ Here and throughout this Article, we draw on insights from contemporary work in the

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.²⁸ 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 law-giver meant, rather than by what the lawgiver promulgated.”²⁹ Call this 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.

²⁸ A number of commentators have observed that “[t]extualism’s adherents and non-adherents 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, *Which Textualism?*, 134 HARV. L. REV. 265, 279 (2020) (“Textualism turns out not to be a coherent, unified theory.”).

²⁹ 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).

promulgation principle.³⁰ 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.”³¹ 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.”³² Call this the *fidelity principle*.³³ 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.³⁴ Relatedly, this kind of fidelity leaves to Congress the higher-order choice of how

³⁰ 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. RES. L. REV. 855, 856 (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 28, at 120 (describing a like proposition as textualism’s “formalist axiom” and “prime directive”).

³¹ SCALIA, *supra* note 7, at 20.

³² *Id.* at 22.

³³ 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, 265–66 (2021) (positing a “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)).

³⁴ See Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 68–69 (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 *Matter of Erickson*, 815 F.2d 1090, 1094 (7th Cir. 1987) (Easterbrook, J.)

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 determinate wording.³⁵ Many textualists also believe that fidelity to the promulgated text can reduce the actual or perceived role of judges' policy preferences in their decision-making³⁶ and will promote predictability and clear notice for regulated parties.³⁷

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”³⁸—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.³⁹ What content ought to count from a textualist point of view?⁴⁰

Most modern textualists answer that the relevant content is what a certain

(“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).”).

³⁵ See, e.g., *Milner v. Dep’t of Navy*, 562 U.S. 562, 572 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 34, 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 Const. Workers Pension Fund v. Brown*, 897 F.2d 275, 284 (7th Cir. 1990) (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.”).

³⁶ 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 28, at 303–07.

³⁷ See Barrett, *supra* note 7, at 2201–04; Doerfler, *supra* note 7, at 1018–20.

³⁸ Barrett, *supra* note 30, 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.”).

³⁹ See, e.g., Easterbrook, *supra* note 36, at 61; Manning, *supra* note 35, 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).

⁴⁰ Cf. Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 241–50 (Andrei Marmor & Scott Somes 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).

kind of reasonable reader would take a lawmaker who promulgated the statute to have said (or, perhaps, to have intended to say).⁴¹ We will call this third commitment the *reasonable reader principle*.⁴² Rendering this principle

⁴¹ 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 Doerfler, *supra* note 7, at 983, 1022–1031 (arguing that “interpreters of statutes should accept the pretense that statutes have some singular author”); 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., SCOTT SOAMES, *Drawing the Line between Meaning and Implicature—and Relating Both to Assertion*, in 1 PHILOSOPHICAL ESSAYS 298, 300–303 (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 40, at 246–48.) In addition, we will use “communicative content” in the objective sense here, see, e.g., Greenberg, *supra* note 40, 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 notion of communicative content instead. Cf. Benjamin Eidelson, *Dimensional Disparate Treatment*, 95 S. CAL. L. REV. 785, 842–44 & n.241 (2022) (formulating textualism in those terms).

⁴² For invocations of this idea, see, for example, SCALIA & GARNER, *supra* note 3, at 16; Easterbrook, *supra* note 34, at 65; Tara Leigh Grove, *Testing Textualism’s “Ordinary Meaning,”* 90 G.W. L. REV. 1053, 1066–73 (2022); Manning, *supra* note 34, at 75; and Manning, *supra* note 41, 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 41, at 115–17 (positing that textualists “define the assertive content of an utterance in a given context by reference to what

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*.⁴³ When Congress prohibited any U.S. person from bringing a foreigner into the United States “to perform labor or service of any kind,” 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.”⁴⁴ 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).⁴⁵ 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.

a reasonable hearer, sharing the relevant contextual background, would infer about the intended content of the utterance in the context of its expression”); Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 2012 n. 173 (2021) (proposing that the reasonable reader be understood merely as a “heuristic”).

⁴³ 143 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.

⁴⁴ *Id.* 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 41, 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.”).

⁴⁵ Cf. LEWIS CARROLL, THROUGH THE LOOKING GLASS, in THE COMPLETE WORKS OF LEWIS CARROLL 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 37, at 2203 (“textualists presume that Congress communicates with the regulated according to the conventions that the two share as skilled users of English”); Antonin Scalia and 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.”).

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.”⁴⁶ To this extent, moreover, “textualism” is now largely uncontroversial.⁴⁷ 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 “clearly worded” in the first place.⁴⁸ Indeed, Manning and others have observed that “[w]hen modern textualists find a statutory text to be ambiguous, they believe that statutory purpose—if derived from sources other than legislative history—is itself a relevant ingredient of statutory context.”⁴⁹ 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.⁵⁰

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

⁴⁶ John F. Manning, Festschrift, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1311 (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 28, at 23–48; and Siegel, *supra* note 28, at 123–30.

⁴⁷ 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; cf. Fallon, *supra* note 41, 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”).

⁴⁸ See Molot, *supra* note 28, 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.”).

⁴⁹ Manning, *supra* note 35, 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; Grove, *supra* note 28, at 273–74.

⁵⁰ See Grove, *supra* note 28, 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.”).

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.⁵¹ 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 under-determinacy—a task now often denominated “construction,” as distinct from “interpretation”⁵²—are just being faithful textualists. They are taking the lawmaker’s use of blatantly indeterminate language as its own “crucial signal about the choice of means” that the lawmaker made.⁵³

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* offers a good illustration.⁵⁴ That case concerned the Guam Organic Act, which caps Guam’s indebtedness at ten percent of “the

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

⁵² The leading contemporary expositor and proponent of this distinction is Larry 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 41, at 1128–32 (summarizing recent debate over the proper place of construction). Solum summarizes the relevant intellectual history in Solum, *supra*, at 467–69.

⁵³ Manning, *supra* note 46, at 1310–11; cf. Barrett, *supra* note 17, 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”).

⁵⁴ 549 U.S. 483 (2007). Jonathan Siegel has highlighted *Limtiaco* as an instructive example of textualists’ formal commitments at work. See Siegel, *supra* note 28, at 157–61.

aggregate tax valuation of the property in Guam.”⁵⁵ 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)? In contrast to the Patent Act provision discussed above, here it seems clear that a conscientious lawmaker 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 this reading was the “most natural” linguistic fit—even though they agreed that the statutory term “has no established definition,” and even though the dissenters (who found the case a “coin toss” on the text) advanced powerful arguments that using assessed value ill-served the statute’s purpose.⁵⁶ 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 over-reading textualists’ provisos confining the duty to follow the text’s linguistic import to “clearly worded” statutes.⁵⁷ 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 if Congress actually failed to express its instructions clearly.⁵⁸ 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

⁵⁵ 48 U.S.C. § 1423a.

⁵⁶ 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 28, at 159–60.

⁵⁷ For a few other examples of textualist opinions that support this generalization, see *infra* note 61.

⁵⁸ 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 41, 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.”).

get whatever content it intended across.⁵⁹ In this sort of case, in other words, the lawmaker's worldly purposes (or other elements of "policy context"⁶⁰) 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 they actually did say.⁶¹

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.⁶² The judge’s task, he said, was to settle on “a selection from among the permissible meanings of *vehicle*.”⁶³ Significantly, he 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.”⁶⁴ According to Scalia, that purposive inference explains why “vehicles” in the sense of “substances used as mixing media” should not be deemed covered.⁶⁵

⁵⁹ 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 46, 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 28, 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.”).

⁶⁰ Manning, *supra* note 34, at 92–96.

⁶¹ *Cf.* MARMOR, *supra* note 41, 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 dissenters 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.

⁶² *See* SCALIA & GARNER, *supra* note 3, at 36–39. To be clear, we are elaborating Scalia and Garner’s analysis of the 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 (2008).

⁶³ SCALIA & GARNER, *supra* note 3, at 39.

⁶⁴ *Id.* at 37.

⁶⁵ *Id.*

Looking to dictionaries and his own sense of colloquial usage, Scalia ultimately concluded that the best interpretation of “vehicle” in this context is “sizable wheeled conveyance.”⁶⁶ 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.⁶⁷

We take two related lessons from this discussion. First, faced with what is usually thought to be a paradigm of uncertainty or indeterminacy, Justice Scalia maintained that textualism yields a bevy of determinate results.⁶⁸ Interpreting the park ordinance may not be “easy,” he said, but “the relevant line of inquiry is pretty straightforward” and “judges who use [Justice Scalia’s textualist] method will arrive at fairly consistent answers.”⁶⁹ 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.⁷⁰ To be sure, Scalia did consider what he called the “textually apparent purpose” of the ordinance.⁷¹ 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.”⁷² He did not look to “*why* things are excluded” in order to decide, on a case-by-case basis, which particular objects should be deemed “vehicles” in the relevant sense.⁷³

Although we recognize the diversity within textualist thought, we think that Justice Scalia’s approach here is again representative of mainstream modern textualism and fits with most textualists’ avowed commitments.⁷⁴

⁶⁶ *Id.* (emphasis omitted).

⁶⁷ *Id.* at 37–38.

⁶⁸ See, e.g., Schauer, *supra* note 62, 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”).

⁶⁹ SCALIA & GARNER, *supra* note 3, at 36.

⁷⁰ *Id.* at 34; see *id.* at 38–39.

⁷¹ *Id.* at 213; see also *id.* at 20 (formulating the same point in terms of “the evident purpose of what a text seeks to achieve”); *id.* at 40 (“textually manifest purpose”).

⁷² See *id.* at 33 (“[T]he purpose is to be gathered only from 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”).

⁷³ See *id.* at 38–39. For another helpful illustration, see Nelson, *supra* note 28, at 413–15.

⁷⁴ See, e.g., Manning, *supra* note 34, 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”).

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.⁷⁵ 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.

We do not want to overstate the point: “textualism” can certainly 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*).⁷⁶ For example, Tara 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.”⁷⁷ 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 textualism”).⁷⁸ But because we take the approach that we

⁷⁵ 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* 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 Scalia’s treatment of the “vehicle” example) when we offer our taxonomy of canons below. See *infra* notes 92–95 and accompanying text.

⁷⁶ Cf. SCALIA & GARNER, *supra* note 3, at 16 (“In the broad sense, everyone is a textualist.”); Grove, *supra* note 28, at 1066–73 (distinguishing between “formal” and “flexible” forms of textualism).

⁷⁷ Grove, *supra* note 28, 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’”).

⁷⁸ 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 non-textualist considerations

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, in both theory and practice, textualists take their interpretive philosophy regularly to yield determinate answers even in hard cases (even if not in *all* such cases).⁷⁹ 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,”⁸⁰ 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 distinction between what Congress *actually* said and what Congress *ought* to have said in order best to advance any given substantive aim.⁸¹

with textualist ones. Cf. Mitchell N. Berman & Guha Krishnamurthi, *Bostock Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 120–21 (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 28, at 281–82; and Grove, *supra* note 42, at 1066–73.

⁷⁹ 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 non-textualist colleagues do. See Scalia, *supra* note 53, at 521; Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2137 (2016) (book review); Raymond Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 323 (2017). 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 (2010) (“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 40, at 139 (describing a “retreat from pretensions to determinacy” on the part of some originalists).

⁸⁰ Manning, *supra* note 34, 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”).

⁸¹ Put another way, “textualism limits the set of admissible arguments in hard cases: it

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, it is typical to describe substantive canons as “policy-based presumptions.”⁸² But, on the other, it is also common to understand such canons as promoting objectives “external to the statute”⁸³ (in contrast to interpretive norms aimed at “decipher[ing] the legislature’s intent”).⁸⁴ 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.⁸⁵

Our purposes here require a definition that is somewhat more precise—and our account of textualism naturally suggests one.⁸⁶ For textualists, after all, 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.⁸⁷

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.

⁸² 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 (“presumption[s] . . . in favor of or against a particular substantive outcome”).

⁸³ Barrett *supra* note 17, at 182 (emphasis added); see also *id.* at 116 (“the 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) (“substantive canons . . . represent value choices by the Court”).

⁸⁴ *Id.* at 117 & n.27; see also Baude & Sachs, *supra* note 41, at 1121.

⁸⁵ See *supra* notes 62–72 and accompanying text.

⁸⁶ 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.

⁸⁷ Cf. Solum, *supra* note 33, at 290 n.105 (distinguishing between “canons of interpretation” and “canons of construction”); Baude & Sachs, *supra* note 41, at 1123–25 (proposing a related distinction “between linguistic and legal canons”).

We thus propose that a canon is “substantive” in the sense that is of interest here when it purports to speak to a statute’s proper legal effect in a way that is not mediated by its evidentiary bearing (if any) on what a reasonable reader would take a lawmaker to have said in enacting the statute.⁸⁸

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 the canons themselves. 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 will see, each breaks with one of the central principles that animates textualism as we have sketched and motivated it above.

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 mostly clearly have in common, we think, 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.”⁸⁹ The presumption that a word or phrase bears the same meaning throughout a statute is a good example.⁹⁰ 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

⁸⁸ This formulation notably entails that the “same” canon can operate both substantively and non-substantively, 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 113–121, 182–190 and accompanying text.

⁸⁹ Elena Kagan, The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg>, at 35:42; accord Kavanaugh, *supra* note 79, at 2160 n.203 (quoting same).

⁹⁰ See SCALIA & GARNER, *supra* note 24, at 170–73. Other “semantic” canons reflect other purported norms about legislative communication (or communication in general). See, e.g., MARMOR, *supra* note 44, at 54–56; Berman, *supra* note 39, at 798; Doerfler, *supra* note 7, at 995.

meanings to different instances of the same word. And, all else equal, a reasonable reader seeking to reconstruct the communicative content should therefore favor interpretations that would show the statute to be consistent with this pattern over those that would not. 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).⁹¹

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.⁹² 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.”⁹³ Indeed, he observed, “there is no more reason to address intrusion into the park of mixing media than to address intrusion of elephants.”⁹⁴ 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 that Scalia imputed here is entirely “derived from the text, not from extrinsic sources such as . . . an assumption about the legal drafter’s desires.”⁹⁵ After all, a lawmaker certainly could intend to guard against what they regard as a rare occurrence, rather than a “common[]” one; nothing in the text favors one assumption over the other. And even granting 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 Scalia’s discussion is that the textualist’s reasonable

⁹¹ As noted earlier (*supra* note 2), 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. 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.) See also *supra* note 27 (explaining our approach to technical terms in general).

⁹² See *supra* notes 62–73 and accompanying text.

⁹³ SCALIA & GARNER, *supra* note 3, at 37.

⁹⁴ *Id.*

⁹⁵ *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 41, at 1144–45.

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—it is not aptly labeled “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).⁹⁶ The presumption against extraterritoriality is one plausible example of this kind.⁹⁷ We will return to canons of this type (and say more about that possible example) shortly, as one natural way for textualists to accommodate some canons that are traditionally thought substantive is to recast them as falling in this non-substantive, non-semantic category instead.

3. *Intended Effects* — A third type of canon—which *is* substantive—favors statutory interpretations thought to accord with Congress’s standing 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.⁹⁸ 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.”⁹⁹ That is a claim about the effects that Congress would have wanted a statute to have, not one 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

⁹⁶ See, e.g., MARMOR, *supra* note 41, 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.”).

⁹⁷ See *infra* text accompanying notes 108–109.

⁹⁸ *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

⁹⁹ See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 495–96 (1998) (describing this argument).

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."¹⁰⁰

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 that compliance with international law is, at least 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)¹⁰¹ to the major questions doctrine (which has been justified partly on the basis of the "separation of powers principles" that it allegedly serves).¹⁰² When canons are justified in this way, their force is independent of whether *Congress* actually values the principles at issue as it should. As a result, deploying canons for these reasons 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.¹⁰³

C. *The Challenge Restated*

The upshot of our discussion thus far is straightforward: When canons are justified as generalizations about Congress's unexpressed intentions or preferences—or, alternatively, as simply means of furthering judicially approved values—they appear squarely 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

¹⁰⁰ Scalia & Manning, *supra* note 45, at 1612.

¹⁰¹ See, e.g., SCALIA & GARNER, *supra* note 24, at 296.

¹⁰² See *West Virginia*, 142 S. Ct. at 2609. We will consider the defense of substantive canons as "constitutionally inspired" in detail below. See *infra* Part III. 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.

¹⁰³ 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").

with just this concern.¹⁰⁴ 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.¹⁰⁵

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 largely guarantee that deploying a *bona fide* substantive canon cannot comport with unadulterated textualism. To be “substantive,” we have suggested, just *is* to bear on something other 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

¹⁰⁴ For several relevant discussions (by textualists and others), see sources cited *supra* note 17.

¹⁰⁵ Barrett, *supra* note 17, at 123–24.

of them as legitimate *exceptions* to textualism justified on broadly constitutional grounds. And a third line of thought 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 NON-SUBSTANTIVE CANONS

The idea that substantive canons could be recast in non-substantive 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 naturally would and do 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;”¹⁰⁶ they understand that the meaning of a statutory text depends on what, in context, a reasonable person would think a lawmaker had said. 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 the law), but about what, given a commonsense understanding of Congress’s aims, it

¹⁰⁶ SCALIA, *supra* note 7, at 24.

should actually be understood to have said.¹⁰⁷

The presumption against extraterritoriality is a possible example.¹⁰⁸ 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 acts 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.¹⁰⁹ 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 or the shelves are, and not that goods in other stores are either.¹¹⁰ 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

¹⁰⁷ 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.”); Baude & Sachs, *supra* note 41, at 1108 (“The rule against ‘elephants in mouseholes’ just applies our ordinary pragmatic maxims of conversation.”). 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 41. 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 40, at 245–48 (mapping and critiquing possible resolutions of this issue).

¹⁰⁸ See Nelson, *supra* note 28, at 390; Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 1011 & n.251 (2021); see also Kevin Tobia & Brian Slocum, *The Interpretation of Law*, <https://ssrn.com/abstract=4186956> (manuscript at 30–35) (reporting survey evidence suggesting that some respondents apply an intuitive presumption against extraterritoriality).

¹⁰⁹ Cf. SCALIA & GARNER, *supra* note 3, at 101–03 (inveighing against such narrowing, outside the context of extraterritoriality, and insisting that “general terms are to be given their general meaning”).

¹¹⁰ For discussion of similar examples, see MARMOR, *supra* note 41, at 25–26; Kent Bach, *Speaking Loosely: Sentence Nonliterality*, 25 MIDWEST STUD. PHIL. 249, 250–53 (2001); and Bray, *supra* note 108, at 1011.

one “under discussion” when Congress speaks about what is allowed or forbidden.¹¹¹ 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.¹¹²

Depending on how it is formulated, the major questions doctrine could perhaps be defended in parallel terms. Understood one way, this canon rests on a putative shared understanding that “major” delegations to agencies are exceptional or anomalous. All else equal, a reasonable reader would not take Congress as saying something anomalous through language that it would have known could also be taken as expressing something more routine.¹¹³ So if a statute can be read in either of two ways, only 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* saying that. And the putative mutual understanding that drives this inference bears at least a family resemblance to the premise that Congress usually concerns itself only with domestic conditions (or usually tackles recurring rather than niche problems), which suggests that this line of thought might be compatible with textualism in the same way as those.

We do not see anything inherently improper about this way of squaring some (seemingly) substantive canons with textualism—but two points suggest that it will succeed, at best, only very rarely. The first point is highlighted

¹¹¹ See *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2100 (2016) (pointing to the “commonsense notion that Congress generally legislates with domestic concerns in mind”).

¹¹² Harder questions arise in connection with progressively more tailored forms of the extraterritoriality canon. See generally William S. Dodge, *The 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).

¹¹³ The idea here would be not just that the anomalous is, by definition, less common, but that Congress’s knowing choice to speak as it did—notwithstanding 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. Stephen C. Levinson, *Three Levels of Meaning*, in *GRAMMAR AND MEANING* 90, 101 (F.R. Palmer ed., 1995) (describing a similar pragmatic inference).

by our discussion of the major questions doctrine just now: Very often, the story that one would have to tell in order to vindicate a canon in non-substantive terms is simply unpersuasive. We see no particular reason to think that “major” delegations *are* anomalous, for instance, especially in statutes specifying the authorities of a regulatory agency charged with addressing some complex and evolving problem.¹¹⁴ But unless a lawmaker thought reasonable readers subscribed to that unsupported premise, the lawmaker would not naturally feel themselves under pressure to flag any such delegations that they can foresee could be effected by a statute’s general terms, on pain of being taken as implicitly clawing those delegations back.¹¹⁵ So, at most, any interpretive inference that could be drawn here would be a very weak one.¹¹⁶

The second point builds on the first. In order for a reader to be justified in drawing the sort of inference about statutory meaning that we have described, it is not enough for the reader *personally* to accept the premises of a given canon. The reader must also think that the lawmaker *knows* that they—and everyone else whom the lawmaker intends to address—all share this perspective. Only then would a reader expect the lawmaker to actually take readers’ (presumed) knowledge of that proposition into account in shaping its message to them, as the argument above imagines.¹¹⁷ But, especially in the legislative context, this sort of common knowledge is hard to come by.

¹¹⁴ Cf. *West Virginia v. EPA*, 142 S. Ct. 2587, 2628 (2022) (Kagan, J., dissenting) (“A key reason Congress makes broad delegations like Section 111 is so an agency can respond, appropriately and commensurately, to new and big problems. Congress knows what it doesn’t and can’t know when it drafts a statute . . .”). It is not clear that proponents of the major questions doctrine even disagree, as a descriptive matter, that such delegations are reasonably common; after all, they 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).

¹¹⁵ 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.

¹¹⁶ 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 43, 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.”).

¹¹⁷ Cf. Bach, *supra* note 110, 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.”).

After all, there are many propositions that most 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 their knowing those propositions.¹¹⁸ The same goes here. Returning to the major-questions example, even if the (putative) fact that Congress rarely makes major delegations were known by many, it is a dubious 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.¹¹⁹ And if this putative fact about Congress’s “habits” does not figure in that context,¹²⁰ 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.¹²¹ For a judge bound by the fidelity principle, as we have seen, 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.”¹²²

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. And, 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

¹¹⁸ This is what textualists are recognizing, we take it, when they speak of a presumption “that Congress communicates with the regulated *according to the conventions that the two share as skilled users of English*,” Barrett, *supra* note 37, at 2203 (emphasis added), or the like, see Scalia & Manning, *supra* note 45, at 1613 (similar).

¹¹⁹ Again, at least until the courts recognize such a canon. As noted above, we turn to that issue in the next section.

¹²⁰ Nelson, *supra* note 28, at 389–93 (suggesting that “[m]any of the canons used by textualists reflect observations about Congress’s own habits”).

¹²¹ Cf. MARMOR, *supra* note 41, 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.”).

¹²² *Lewis v. Chicago*, 560 U.S. 205, 215 (2010) (Scalia, J.).

sort of prescriptive validity, *since the legislature presumably has them in mind when it chooses its language.*"¹²³ 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.¹²⁴

Scalia once 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.'"¹²⁵ 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.

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."¹²⁶ As Manning observes (and as we

¹²³ Scalia, *supra* note 24, at 583 (emphasis added); *see also* Dodge, *supra* note 112, 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, *supra* note 24, at 2467)); Jane Schacter, *Metademocracy*, 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.").

¹²⁴ SCALIA & GARNER, *supra* note 24, at 31. *See also* Manning, *Equity*, *supra* note 17, at 125.

¹²⁵ Scalia, *supra* note 24, at 583.

¹²⁶ Manning, *Equity*, *supra* note 17, at 125; *see also* Manning, *Clear Statement*, *supra* note 17, 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"); Manning, *supra* note 24, at 2465-75.

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.”¹²⁷ 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 the way that an ordinary reader would understand that same language in some other context.¹²⁸

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,¹²⁹ or more broadly, that the Court “presume[s] congressional understanding of . . . [the Court’s] interpretive principles.”¹³⁰ In context, these statements seem to be stating a rule about how the Court interprets statutes more than expressing a belief about how Congress legislates.¹³¹ 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—what we will term the “bootstrapping argument”—has gained more traction than the last one, we will consider it in somewhat

¹²⁷ Manning, *supra* note 24, at 2392–93.

¹²⁸ Although we will argue that nominally substantive canons generally cannot be rendered non-substantive 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 43, 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).

¹²⁹ *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).

¹³⁰ *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. 416, 468 (2014) (“The Court routinely assumes that Congress enacts statutes against the backdrop of established interpretive principles.”).

¹³¹ *See* Baude & Sachs, *supra* note 41, at 1103, 1124 (noting “loose talk” in this domain and suggesting the same).

greater depth. In what follows, we first highlight several limitations on the results that the argument can deliver, and then argue that it difficult to square with textualist premises even within its limited domain.

1. Inherent Limitations

First, note that the bootstrapping argument, even if fully satisfactory on its own terms, 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*.¹³² That is no minor caveat. Justice Scalia may be able to assert that a venerable canon like the rule of lenity is validated by its "sheer antiquity,"¹³³ but many of the canons that courts apply, and that have proved most consequential in recent years, are of recent vintage.¹³⁴ 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 absurd on its face.¹³⁵ 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.¹³⁶ 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

¹³² Both Scalia and Manning concede this point. See Manning, *Equity*, *supra* note 17, at 125–26; Scalia, *supra* note 24, at 583.

¹³³ Scalia, *supra* note 7, at 29.

¹³⁴ See Gluck, *supra* note 18, at 765 ("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."); Mitchell N. Berman, *Judge Posner's Simple Law*, 113 MICH. L. REV. 777, 792–93 (2015) (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).

¹³⁵ See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (applying the recently developed "major questions doctrine" to the Clean Air Act, last amended in 1990); *Gregory v. Ashcroft* (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").

¹³⁶ Cf. Barrett, *supra* note 37, at 2204–05 (noting, in connection with non-substantive 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"). For empirical evidence on legislative drafters' awareness of interpretive canons, see Gluck & Bressman, *supra* note 82. See also Abner J. Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627, 629 (1987) ("When I was in

no sense to go on deciphering their meaning with reference to that lexicon rather than the standard one. So too here.¹³⁷

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.¹³⁸ 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.¹³⁹ (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 (non-textualist) case for imposing substantive canons in the first place.¹⁴⁰ From a textualist point of view, therefore, the Court presumably ought to clear out any semantic 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.¹⁴¹

Congress, the only ‘canons’ we talked about were the ones the Pentagon bought that could not shoot straight.”).

¹³⁷ 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 28, at 389 (observing that “[e]ven after being announced by the Court, some canons might be relatively poor guides to the likely intent of subsequent Congresses”).

¹³⁸ As Justice 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 17, at 162.

¹³⁹ See, e.g., Barrett, *supra* note 29, at 2208.

¹⁴⁰ 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. 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) (plurality opinion) (suggesting that “clear statement rules ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation”).

¹⁴¹ Cf. Alexander & Prakash, *supra* note 137, at 102–03 (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”).

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 for now we will 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.¹⁴² 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*, a Kentucky case where Scalia and Garner argue that lenity ought to apply.¹⁴³ In that case, two teenagers pooled their money to buy whiskey, and one was then charged with the crime of "sell[ing], lend[ing], or giv[ing]" alcohol to a minor (the other).¹⁴⁴ Scalia and Garner suggest that the rule of lenity favors construing "give" narrowly in this case—to mean "bestow a gift" (which the defendant did not do), rather than "furnish, provide, or supply" (which he did).

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"

¹⁴² For versions of this distinction, see, for example, Kavanaugh, *supra* note 79, at 2154–55; and Eskridge & Frickey, *supra* note 83, at 611–12. See also Spector, 545 U.S. at 138–41 (discussing "the distinction between rules for resolving textual ambiguity and implied limitations on otherwise unambiguous text," also described as "clear statement rules").

¹⁴³ 75 Ky. 240 (1876); see SCALIA & GARNER, *supra* note 24, at 300.

¹⁴⁴ *Davis*, 75 Ky. at 241.

the Kentucky legislature.¹⁴⁵ And presume, for the moment at least, that the relevant “reasonable reader” knows of both the rule of lenity and the legislature’s acquaintance with it as well.¹⁴⁶ Even so, a 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 actually foresaw 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 try to resolve it. Either way, surely the least likely inference is that the lawmaker gambled on a reader later deeming the statute grievously ambiguous, and thus turning to the rule of lenity, in order to arrive at the content that the lawmaker actually *did* intend all along.¹⁴⁷

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 it did not disturb. So, for instance, the Kentucky legislature might be taken as conveying both the content of the relevant prohibition (whatever it took that to be) and also that, as per usual, this prohibition should be deemed unenforceable to the extent of any grave ambiguities in the language used to express it. And if that were indeed what the legislature communicated by enacting the statute, then a court that applied lenity would be doing as it was told; it would not need to credit any of the substantive justifications for lenity.¹⁴⁸

The problem with this argument is that nothing actually supports imputing to a legislature a tacit endorsement of whatever interpretive rules it leaves

¹⁴⁵ Scalia, *supra* note 24, at 583.

¹⁴⁶ Cf. *infra* notes 168–174 and accompanying text (questioning whether textualists can adopt this premise).

¹⁴⁷ Cf. Mark Greenberg, *The Standard Picture and Its Discontents*, in OXFORD STUDIES IN PHILOSOPHY OF LAW VOL. 1, at 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.”).

¹⁴⁸ For an example of this sort of reasoning, see John O. McGinnis & Michael B. Rapaport, *The Constitution and the Language of Law*, 59 WM. & MARY L. REV. 1321, 1333–34, 1350, 1354–55 (2018).

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 conveyed *both* the content ordinarily 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.¹⁴⁹ Rather than positing statute-specific lenity clauses (all written in “invisible ink”¹⁵⁰), we should presumably say that the rule of lenity exists apart from any particular statute, and that a lawmaker who says nothing about it simply leaves it as it stood.¹⁵¹ But then, if the rule of lenity starts out as a substantive canon at odds with textualism—as we take it to be, at least when it is used as any more than a genuine tie-breaker—it does not become part of “what the lawgiver promulgated”¹⁵² 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 less than 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. The intuition is that courts should try to vindicate the expectations that lawmakers or others would justifiably have had about the effects that the enactment of the statute in question would have on the

¹⁴⁹ 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 were to take non-objection 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 158–159 and accompanying text.

¹⁵⁰ Baude & Sachs, *supra* note 41, at 1100.

¹⁵¹ 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 extension 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.

¹⁵² SCALIA, *supra* note 7, at 17; see *supra* note 30 and accompanying text.

law.¹⁵³ Here again, one natural response is that, even if that were true, it would not bring seemingly non-textualist norms within the fold of textualism: It would just identify a reason, akin to *stare decisis*, for *deviating from* textualism.¹⁵⁴ Indeed, the same sort of thinking would have pressed powerfully against the rise of modern textualism in the first place.¹⁵⁵ And while one could certainly redefine “textualism” as this line of argument requires, that change would come at steep rhetorical and argumentative costs.¹⁵⁶ 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.

Putting all of that to one side, however, there is a more basic problem: textualists have not explained why vindicating lawmakers’ justified expectations even *does* cut in favor of sticking with lenity or similar norms—norms that, after all, have long been advertised as *substantive* canons.¹⁵⁷ Consider

¹⁵³ See Berman, *supra* note 134, 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* 42–47 (2012) (explaining that “[a]s long as the local norms of interpretation can be grasped by the lawmakers (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.”).

¹⁵⁴ Cf. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1175–81 (1989) (famously describing himself as a “faint-hearted” originalist).

¹⁵⁵ 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, *supra* note 24, at 2475 & n.318; see also John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 692–94 (1997) (similar).

¹⁵⁶ 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 147, at 79–80; see also Greenberg, *supra* note 40, at 236–37 (similar).

¹⁵⁷ We offer this further argument partly in the recognition that some textualists in good

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, rather than a conjecture on anyone's part about what a lawmaker intended or expected.¹⁵⁸ Given that full context, however, the only expectation that a lawmaker could be justified in maintaining is conditional: that the legal norms they enact will be tempered by lenity *if*, and to the extent that, the courts maintain their own policy of "tenderness for the accused"¹⁵⁹—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—at least not at the expense of the better account of the statute's communicative content—then we do not think a textualist can explain why anybody's legitimate expectations would be thwarted if courts modify their approach, even with respect to old statutes, accordingly.¹⁶⁰

(b) *Clear Statement Rules*. Turn, then, to clear statement or implied limitation rules. These canons differ in that the first sort of reasoning that we considered (and dismissed) above—the notion that the canon actually shapes what the lawmaker means in speaking as they do—is more plausible. Suppose, for example, that Congress imposes liability on "any recipient of Federal assistance" that violates certain requirements.¹⁶¹ If Congress chose that language knowing that courts would deem the provision not to apply to

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 155 (noting John Manning's suggestions that some seemingly non-textualist interpretive conventions are disqualified only on contingent, constitutional grounds).

¹⁵⁸ See, e.g., Barrett, *supra* note 17, at 129–30 (explaining that, from its inception, "lenity was unabashedly grounded in a policy of tenderness for the accused").

¹⁵⁹ See *supra* note 158.

¹⁶⁰ Here is another analogy that might help to underscore the 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 Court's Article III case-law nonetheless denies standing to many persons within that broad class. 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. The ultimate legal effect of the statute now departs from what the smart money would have predicted, but that just follows from Congress's choice to leave any narrowing to be done by the Court, pursuant to its Article III case-law, rather than to prescribe any desired limits itself. The smart money is not right by definition.

¹⁶¹ *Cf. Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 245–46 (1985) (quoting 29 U.S.C. § 794a(a)(2) (1982 ed.)).

states that receive federal funds, then it does not seem fanciful to infer that Congress used the phrase with that same restricted meaning. In a sense, the term “recipient of Federal assistance” has simply become, thanks to the implied limitation rule, a “term of art” with a specialized legal meaning.¹⁶² Assuming that such a transformation has occurred, this hypothetical statute appears on all fours with Justice Scalia’s hypothetical where “is” has come to mean “is not,” and the courts presumably ought to gauge the statute’s communicative content accordingly.

Here too, though, the bootstrapping argument is too quick. First, it is far from clear that implied limitation rules *do* shape the communicative content of what Congress says. Assume that Congress foresaw 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, they probably would. In fact, it might be that imposing liability on “any recipient of Federal assistance” was politically viable—and would have remained so even if this language foreseeably included states—but that neither expressly exempting states, nor expressly including them, would fly. Arguably, at least, the bargain struck and recorded in the text is then precisely an agreement to say, without further elaboration, that *any* recipient of Federal assistance is liable. 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, but rather because they were optimistic that courts’ non-textualist solicitude for federalism would lead them to *deviate* from the apparent content of Congress’s instruction.

We can illustrate the point here with a simple example set in a more familiar context. Imagine telling a child that dinner will be at 6:15—even though you intend it to start at 6:30—because you know that he never cleans up until he thinks dinner is supposed to start. You are trying to get the child to be ready for dinner at 6:30, but you are not trying to *communicate* that dinner will be at 6:30.¹⁶³ (If the child took that as your meaning, he probably would not be ready until 6:45.) Likewise, Congress need not be trying to

¹⁶² 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).

¹⁶³ See PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 221 (1989) (“[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*.”).

communicate a content that omits states just because (hypothetically) it—really, some of its members—hopes and expects the result will be that states are not held liable.

In fact, an even closer analogy might be as follows. Two parents—you and your partner—have *different* hopes for when dinner will start. You would like it to start at 6:30, but your partner would like it to start at 6:15. You both also know that your child is usually late—not because he interprets you in any nonstandard way, but because he is just not very concerned with honoring your instructions. After some negotiation, you and your partner settle on telling him, “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, for once, the child will actually do as he is told (i.e., be ready for dinner at 6:15). Now suppose that the child *does* decide that, given his role in the family, he should really try his best to do as he has been told. 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).

A proponent of the bootstrapping argument might respond that, if the child had come to understand that when a parent says “dinner at 6:15,” the parent actually *means* that dinner will start at 6:30, then dutiful compliance would require being ready at 6:30, not 6:15.¹⁶⁴ That is true—but the key point for our purposes is that conventions of the sort involved in that variant of the case require mutuality.¹⁶⁵ Here, for instance, the child would not have reason to think you meant anything nonstandard by “6:15” unless he thought that *you* thought that he would understand you in some nonstandard way. And as long as his lateness appeared to be due to his own disregard for what his parents had said—as it would be 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 same lack of mutuality explains why it seems unlikely 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

¹⁶⁴ This would follow, in other words, if the child thought that “dinner at 6:30” was actually the content that the parent intends him to *recognize* them as trying to convey (presumably via a kind of inside joke). For the classic treatment of the sense of “meaning” at issue here, see GRICE, *supra* note 163, at 219–23.

¹⁶⁵ See *id.* at 217–22.

not on states). If Congress believed 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.”¹⁶⁶ 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 their 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.¹⁶⁷ 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 on which Congress is engaged in a kind of

¹⁶⁶ *Atascadero*, 473 U.S. at 242–46. 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 v. European Community*, 579 U.S. 325, 336, 340 (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*, 545 U.S. at 138–41 (plurality opinion); 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 probably 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 (giving examples of such hypothetical disclaimers).

¹⁶⁷ Cf. GRICE, *supra* note 163, 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”).

dialogue with the courts, akin to the imagined dialogue between a parent and child. But textualists are largely and understandably opposed to that whole picture of the relevant communication. As we noted earlier, they take statutes to be addressed to the “reasonable reader”—“a skilled, objectively reasonable user of words,”¹⁶⁸ not a legislator or a court.¹⁶⁹ Indeed, Justice Scalia insisted that nearly all “legislation is an order not to the courts but to the executive or the citizenry.”¹⁷⁰ 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.”¹⁷¹ 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.”¹⁷² In all likelihood, that does not include the various non-natural canons ordained by courts.¹⁷³ 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.”¹⁷⁴

Even when the parties directly regulated by a statute are sophisticated, moreover, the bootstrapping argument’s departure from ordinary meaning

¹⁶⁸ Easterbrook, *supra* note 36, at 65.

¹⁶⁹ 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 29, at 2209; Manning, *supra* note 24, at 2463–64; sources cited *supra* note 42. 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.

¹⁷⁰ SCALIA & GARNER, *supra* note 3, at 138; *see* Barrett, *supra* note 29, at 2202 (“textualists presume that Congress communicates with the regulated according to the conventions that the two share as skilled users of English”).

¹⁷¹ *Id.* at 2209; *see id.* at 2202–03.

¹⁷² Doerfler, *supra* note 7, at 1032; *see id.* at 1033–42 (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.*; *see also* Solum, *supra* note 33, 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”).

¹⁷³ *See id.* 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.”).

¹⁷⁴ Scalia, *supra* note 7, at 17; *see* Barrett, *supra* note 29, at 2209 (“This 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.”).

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 they need not even acknowledge), they appear at odds with the same accountability-related concerns that leading textualists have invoked in condemning judicial reliance on legislative history.¹⁷⁵ Congress can give every appearance of imposing some liability on *all* recipients of federal funds, for example, while actually exempting state governments.¹⁷⁶ 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.¹⁷⁷

For all of these reasons, “substantive” canons cannot be squared with textualism by pointing to their alleged non-substantive, 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 commonsense understanding of the practical context in which Congress speaks.¹⁷⁸ (Recall our go-to 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

¹⁷⁵ 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, *supra* note 155, at 710–30. 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 decision-making authority to courts; it has just availed itself of a less transparent channel for communicating its decisions.

¹⁷⁶ Drawing on Manning’s account of the relevant constitutional norms, Justice 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 17, at 164–65.

¹⁷⁷ See Manning, *supra* note 155, at 706–731; see also *Bank One Chicago, NA v. Midwest Bank & Trust Co.*, 516 U.S. 264, 280 (1996) (Scalia, J., concurring in part and concurring in the judgement) (“[A]ssuming . . . this desire to leave details to the committees, the very first provision of the Constitution forbids it.”).

¹⁷⁸ See *supra* Part II.A.

“long indulged” by courts.¹⁷⁹ Rather, genuinely substantive canons would need to be justified, and squared with textualism, on their own, substantive terms.

III. SUBSTANTIVE CANONS AS CONSTITUTIONALLY INSPIRED EXCEPTIONS TO TEXTUALISM

If substantive canons cannot be recast in non-substantive 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 ultimately an account of how courts should discern and give effect to Congress’s exercise of its lawmaking powers.¹⁸⁰ 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.¹⁸¹ Substantive canons may not be at odds with textualism, then, as long as they are themselves grounded in what then-Professor Barrett called (in her influential 2010 article) the courts’ higher obligation to “act as faithful agents of the Constitution.”¹⁸²

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.”¹⁸³ 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

¹⁷⁹ Scalia, *supra* note 24, at 583; *see supra* note 123 and accompanying text.

¹⁸⁰ *See supra* Part I.A.

¹⁸¹ *See* *Marbury v. Madison*, 5 U.S. 137, 178–80 (1803) (holding that “a law repugnant to the constitution is void” and rejecting the proposition “that courts must close their eyes on the constitution, and see only the law”).

¹⁸² Barrett, *supra* note 17, at 169. Although this idea received its most elaborate and sophisticated articulation in Barrett’s article, it has cropped up in various places over many years. Discussions (not all endorsements) include Schachter, *supra* note 123, at 652 n.308; Eskridge & Frickey, *supra* note 83, at 598–611; and John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1655 (2001).

¹⁸³ *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring).

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.”¹⁸⁴

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 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.¹⁸⁵ 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 is saying that clear-statement rules “help fulfill *that* duty,”¹⁸⁶ he would have to mean that they help to ensure that courts deny effect to unconstitutional laws. Substantive canons would thus “protect foundational constitutional guarantees” 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 the court discharge its duty, Justice Gorsuch continues, is by presuming that Congress intends to enact laws that “*operate in congruence with the Constitution rather than test its bounds.*”¹⁸⁷ By setting up that contrast, Justice Gorsuch implies that any law that “test[s] [the Constitution’s] bounds” must not be “operat[ing] in congruence with” it (even though that law might ultimately be within Congress’s power to enact). Justice Gorsuch can thus be understood as touting substantive canons as tools

¹⁸⁴ *Id.* (quoting Barrett, *supra* note 17, at 169).

¹⁸⁵ *Marbury*, 5 U.S. at 178; *cf.* *Northwest Austin Municipal Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (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, 147–148 (1927) (Holmes, J., concurring))).

¹⁸⁶ *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring) (emphasis added).

¹⁸⁷ *Id.* (emphasis added).

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; as a matter of interpretive charity, that might be a strike against reading him this way.¹⁸⁸ But Justice Gorsuch’s choice of examples does lend support to this reading, since some of them disfavor legal results that, while perhaps not “congruent” with the Constitution, Congress has an undoubted power to impose.¹⁸⁹ And his reliance on Justice Barrett’s article cuts in this direction as well: she ultimately defends substantive canons 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.¹⁹⁰

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 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.”¹⁹¹ 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 here 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.

¹⁸⁸ 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).

¹⁸⁹ See *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring); *infra* note 238 and accompanying text.

¹⁹⁰ See Barrett, *supra* note 17, 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”).

¹⁹¹ *Id.* at 168.

Details aside, the overarching “constitutional” strategy for managing the tension between textualism and substantive canons has been gaining ground of late. Justices Barrett, Gorsuch, and Alito (the one Justice to join Gorsuch’s concurrence) are evidently all on board. And in a telling exchange at oral argument in the same Term as *West Virginia*, Justice Kavanaugh posited a similar conception of “substantive canons” as well.¹⁹² One natural explanation for the move toward this defense of substantive canons is that the bootstrapping argument suggested by Justice Scalia could not provide the license for instituting *new* canons that the Court’s recent practice requires. Both the mounting salience of the constitutional defense of substantive canons and the increasing weight that it must bear make the question of its viability especially important.

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 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.¹⁹³ The basic challenge for proponents of this first line of argument is to explain why this apparent dilemma is false. We will consider three such explanations in turn.

1. Constitutional Clarity Requirements

First, it is possible that some norms that are described as substantive canons of *statutory* interpretation are in fact *constitutional* rules that tie the extent

¹⁹² When canons do not merely resolve an ambiguity identified on “semantic” grounds, Justice Kavanaugh said, they “usually reflect some constitutional or quasi-constitutional value” justifying their departure from textualism’s ordinary prescriptions. Tr. of Oral Arg. 62–64, *Yselta del Sur Pueblo v. Texas*, No. 20–493 (U.S. 2022); see also Kavanaugh, *supra* note 79, 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”).

¹⁹³ See Schauer, *supra* note 8, at 94–95.

of Congress's power to the clarity with which that power is exercised.¹⁹⁴ 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.¹⁹⁵ One explanation for that 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.¹⁹⁶ 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.¹⁹⁷ And one might press a similar defense of the major questions doctrine: 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.¹⁹⁸

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.¹⁹⁹ 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.²⁰⁰ 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.

¹⁹⁴ Cf. Manning, *Clear Statement*, *supra* note 17, at 406 (bracketing “the possibility that some portion of the Constitution might *directly* require Congress to speak clearly in a particular context”).

¹⁹⁵ See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

¹⁹⁶ See *id.*; see also Gluck, *supra* note 18, at 768 (suggesting that “*Pennhurst* is simultaneously a canon of interpretation . . . and a direct constitutional rule”).

¹⁹⁷ See RICHARD J. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 283–84 (1985); Manning, *Clear Statement*, *supra* note 17, at 406 & n.26; Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 332 (2000); cf. SCALIA & GARNER, *supra* note 24, 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”).

¹⁹⁸ 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. Sunstein, *supra* note 197, at 331–37 (identifying a class of “[c]onstitutionally inspired nondelegation canons”).

¹⁹⁹ Cf. *supra* Part I.B (offering a taxonomy of canons).

²⁰⁰ 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., dissenting in part).

Second, and more importantly, those who would try to 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.²⁰¹ Notwithstanding the illustrative examples we noted above, we doubt that almost any existing substantive canons could actually be justified on originalist grounds (as most textualist interpreters would require).²⁰² 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. More generally, apart from a few very specific requirements, the Constitution says nothing about the form that legislation must take.²⁰³ So while the argument from constitutional clarity requirements is both logically coherent and theoretically interesting, it cannot do much real work.

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, it seems the answer would have to be that the Constitution imposes more stringent limits on Congress than the courts actually will 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 the doctrine applied in the *Marbury* context would not.

Justice Barrett sketched an argument of just this sort in her 2010 article.

²⁰¹ 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”).

²⁰² Cf. Barrett, *supra* note 310, 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 247–248 and accompanying text.

²⁰³ Cf. U.S. Const., art. I, § 9 (“No Bill of Attainder or ex post facto Law shall be passed.”).

As she noted, courts sometimes purposely *underenforce* a constitutional requirement in the context of traditional judicial review.²⁰⁴ The standard justification for such underenforcement is a felt lack of what the Court generally calls “judicially manageable standards.”²⁰⁵ 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.²⁰⁶ “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. 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 go through extra hoops in order to exercise authority that it does not really have at all.²⁰⁷

²⁰⁴ See Barrett, *supra* note 17, at 170–73. 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). On the connection between underenforcement and substantive canons, see Eskridge & Frickey, *supra* note 83, at 630–33; Sunstein, *supra* note 197, at 338–40; and Manning, *Clear Statement*, *supra* note 17, at 420–22.

²⁰⁵ See Richard H. Fallon, Jr., *Judicially Manageable Standards*, 119 HARV. L. REV. 1274 (2006); Barrett, *supra* note 17, at 170.

²⁰⁶ See Fallon, *supra* note 205, at 1285–97. Fallon describes this as the “permissible disparity thesis.” See *id.* at 1317.

²⁰⁷ See, e.g., Young, *supra* note 140, 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 (“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, *supra*, at 1783–84 (suggesting that “[c]ompensating adjustment . . . involves changed readings of the constitutional text and

Here again, however, the argument has at best a modest scope. As Justice 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."²⁰⁸ 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"). The same goes for Congress's power to abrogate a state's sovereign immunity when it enforces the Reconstruction Amendments, and so on.²⁰⁹ We do not deny that *some* substantive canons might operate in areas of purposeful underenforcement. But, much as with the effort to recast substantive canons as constitutional clarity requirements, the relevant claims about the true, pre-underenforcement meaning of the Constitution would have to be defended, not assumed. And the upshot is very likely to be that canons that compensate for underenforcement are the exception, not the rule.

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.²¹⁰ After all, the very reason for underenforcement is usually that a would-be constitutional limit cannot be specified precisely in the first place.²¹¹ As Justice Barrett recognizes, therefore, substantive canons actually operate in much the same way as the "overenforcing" or "prophylactic" rules that courts sometimes employ to "implement" the Constitution.²¹² Much as *Miranda v.*

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.

²⁰⁸ Barrett, *supra* note 17, at 173.

²⁰⁹ See *id.* at 173–74 (discussing *Dellmuth v. Muth*, 491 U.S. 223, 227–28 (1989)).

²¹⁰ As Justice Barrett candidly acknowledges, "no canon purports to mirror the rule that would have been applied in an exercise of judicial review." Barrett, *supra* note 17, at 172.

²¹¹ See Manning, *Clear Statement*, *supra* note 17, at 439; Eskridge & Frickey, *supra* note 142, at 633; Sunstein, *supra* note 197, at 327, 338.

²¹² Barrett, *supra* note 17, at 174; see RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001).

*Arizona*²¹³ 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.²¹⁴ And just as *Miranda* therefore requires the exclusion of some fully voluntary confessions, these 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).²¹⁵ But even if that is the rule’s purpose, nobody contends that “the commerce power is wholly devoid of congressional authority to speak on any subject of traditional state concern,”²¹⁶ so the effect of the presumption is to nullify some laws that all would agree that the Constitution *did* authorize Congress to make.

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 over-enforcing 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, it would simply fail to do so.²¹⁷ So, at a minimum, the legitimate sweep of the argument from

²¹³ 384 U.S. 486 (1966).

²¹⁴ See Barrett, *supra* note 17, at 174.

²¹⁵ 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.”); Nagle, *supra* note 207, at 812. For a recent and robust statement of this presumption, see *United States Forest Service v. Cowpasture River Preservation Association*, 140 S. Ct. 1837, 1850 (2020).

²¹⁶ *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).

²¹⁷ For discussions of that problem, see JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 105 (1997); POSNER, *supra* note 197, at 285; Barrett, *supra* note 17, 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

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, though, 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.²¹⁸ 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 nullified, not shaped, by a “constitutionally inspired” canon. Yet the very idea that a court may knowingly nullify 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.²¹⁹ It may be true, as Justice 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 same rule again more clearly.²²⁰ But the real challenge is to explain why *any* judicial “clipping” of Congress’s constitutional authority is permissible. We suspect it is no accident that the Court’s textualist Justices—most of whom are also originalists with a formalist conception of the “judicial Power”—have not forthrightly defended substantive canons in these arresting terms.²²¹

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.

²¹⁸ See Young, *supra* note 142, at 1591 (contending that “the critics’ conception of an ‘otherwise preferred’[] or ‘constitution-free’ . . . reading is artificial” because it “categorically excludes a source of statutory meaning which is no less legitimate than other ‘principles and policies’ which frequently enter into interpretation” (quoting Schauer, *supra* note 8, at 83)).

²¹⁹ Cf. Stephen 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.”).

²²⁰ Barrett, *supra* note 17, at 176 (emphasis added).

²²¹ Cf. Baude, *supra* note 207, at 331 (“If judicial review is a duty, not a choice, then that relieves the Court of a burden of justification. . . . This basic account of judicial review is central to a classical conception of the judiciary, one especially revered by formalists, in which the court’s job is to simply apply the law in cases that come before it.”). For salient examples of this conception at work, see *Murphy v. NCAA*, 138 S. Ct. 1461, 1485 (2018) (Thomas, J., concurring); *Barr v. American Association of Political Consultants*, 140 S.Ct. 2335, 2351 & n.8 (2020) (plurality opinion of Kavanaugh, J.); and *Dickerson v. United States*, 530 U.S. 428, 457–59 (1999) (Scalia, J., dissenting).

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 not due 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.²²² If that constraint were observed, canons justified in this way would not commit the Court to nullifying any laws that it thinks constitutional.²²³

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.²²⁴ Nonetheless, we suspect that something like this idea does figure importantly in the real-world motivations of the textualist jurists who

²²² Cf. *supra* notes 210–212 and accompanying text (noting that canons that aim to compensate for purposeful underenforcement generally cannot do this).

²²³ 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)).

²²⁴ 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

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.²²⁵

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 favors preserving an erroneous precedent for purposes of *Marbury*-style review, on the one hand, but still requiring Congress to express itself with unusual clarity, on the other. 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 this way, 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 to *stare decisis* in operationalizing one’s *answer* to that constitutional question.²²⁶

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

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.”).

²²⁵ See, e.g., Evan D. Bernick, *Are the Indian Canons Illegitimate? A Textualist-Originalist Answer for Justice Alito*, THE ORIGINALISM BLOG (Mar. 28, 2022), <https://perma.cc/SR3E-YULH>; Mark Moller & Lawrence B. Solum, *Corporations and the Original Meaning of “Citizens” in Article III*, 72 HASTINGS L.J. 169, 227 (2020).

²²⁶ 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.”).

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 involve some speculation, 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,²²⁷ 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.²²⁸ That is one reason why, as Justice Barrett once observed, "[t]he technique of assuming, and *therefore not investigating*, a precedent's validity . . . is a critical means of keeping law stable."²²⁹

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, "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."²³⁰ The Justices' conspicuous obscurity about

²²⁷ Cf. *Janus v. AFSCME*, 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*").

²²⁸ 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)).

²²⁹ Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1930–31, 1940 (2017) (emphasis added).

²³⁰ 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 non-originalists as well—but in practice and at present, it is generally originalists who would have occasion to employ it.)

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).²³¹ 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. 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.”²³²

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.”²³³ 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 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?²³⁴ Recall that

²³¹ See *supra* notes 180–191 and accompanying text (parsing Justice Gorsuch’s ambiguous treatment of the issue in *West Virginia*).

²³² Cf. RUTH BADER GINSBURG, MY OWN WORDS 212 (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.”). Like 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*, 99 GEO. L.J. 1, 33–40, 56–62 (2010).

²³³ Manning, *Clear Statement*, *supra* note 17, at 449.

²³⁴ See *supra* notes 180–191 and accompanying text.

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. As we have noted, both Justice Barrett and Justice Gorsuch interweave an argument of this kind with the last one, but the arguments are quite distinct: they envision substantive canons “operat[ing] to protect foundational constitutional guarantees”²³⁵ in fundamentally different senses of those words.²³⁶ And, when the opaque rhetoric is stripped away, both Justice Barrett and Justice Gorsuch *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 justifiable in part because the courts are “act[ing] only in service of *values* enshrined in the Constitution.”²³⁷ And while (as we discussed above) Justice Gorsuch’s explicit reasoning is ambiguous, his ensuing account of how “clear-statement rules” serve as “corrolar[ies]” of “constitutional rules” ultimately trades on the same idea, whether wittingly or not.²³⁸

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

²³⁵ *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring).

²³⁶ See *supra* notes 187–190 and accompanying text.

²³⁷ Barrett, *supra* note 17, at 175 (emphasis added). Interestingly, Justice Gorsuch quotes only the first half of this disjunctive phrase in his *West Virginia* opinion. See *West Virginia*, 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.

²³⁸ *West Virginia*, 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.

of judicial review—where a court enforces some set of “lines” that the government may not cross—is inevitably somewhat artificial.²³⁹ The substantive concerns that justify various constitutional limits are usually not dichotomous; they often phase in over some range, gaining in 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”²⁴⁰ 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.²⁴¹ “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 system of judicial review.²⁴²

But, of course, there is a reason that Justice Gorsuch, Justice Barrett, and their fellow travelers do not make this argument clearly and openly: as textualists and originalists, they expressly reject 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.’”²⁴³ “The Fourth Amendment allows this Court to protect against specific governmental actions,” he explained, “and that is the limit of our license.”²⁴⁴ Indeed, Justice Gorsuch clearly relishes deriding opposing positions as resting on “some penumbra emanating somewhere,” in contrast to a rule stated in some

²³⁹ Young, *supra* note 142, at 1594.

²⁴⁰ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

²⁴¹ 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 140; Young, *supra* note 142, 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.).

²⁴² Young, *supra* note 142, at 1596; see *id.* at 1585–1613; sources cited *supra* note 241.

²⁴³ *Torres v. Madrid*, 141 S. Ct. 989, 1016 (2021) (Gorsuch, J., dissenting, joined by Thomas and Alito, JJ.).

²⁴⁴ *Id.*

authoritative text.²⁴⁵ So it would be quite 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”²⁴⁶ a strictly inapplicable constitutional provision.

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 Dean 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.”²⁴⁷ Just as “a textualist hews closely to the rules embedded in the enacted text,” Barrett explains, “an originalist submits to the precise compromise reflected in the text of the Constitution.”²⁴⁸ From this point of view, the Constitution does not grant any legal status to “federalism” or the “separation of powers” as such; it 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).²⁴⁹ Whether or not this view is sound as a general matter, we agree with these leading textualists that their textualism probably commits them to that view. 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”?²⁵⁰ To the contrary: what the canons promote has *not* been sanctioned as higher law, and,

²⁴⁵ Tr. of Oral Argument 53, *Collins v. Mnuchin*, No. 19-422 (U.S. 2020); *see also* Tr. of Oral Argument 17, *BP P.L.C., v. Mayor and City Council of Baltimore*, No. 19-1189 (U.S. 2021) (“I’m not sure I understand . . . where this authority to dismiss for lack of jurisdiction, frivolous arguments . . . what penumbra it emanates from?”); Tr. of Oral Argument 61, *Torres v. Texas Dep’t of Public Safety*, No. 20-603 (U.S. 2022) (“I understand the textual commitments in the Fourteenth Amendment, but, here, we’re being asked to adopt a view of implicit penumbras . . .”).

²⁴⁶ Young, *supra* note 142, at 1596.

²⁴⁷ Barrett, *supra* note 310, at 862; *see id.* at 861–65; Scalia, *supra* note 7, at 37–38; Manning, *supra* note 17, 427–40.

²⁴⁸ Barrett, *supra* note 310, at 863–64 (citing John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1665 (2004)); *see id.* (“That is how judges approach legal text, and the Constitution is no exception.”).

²⁴⁹ 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) (“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 17, at 433–40.

²⁵⁰ Barrett, *supra* note 17, at 168.

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 protections of federalism spill over to justify special rules of statutory construction that are nowhere intimated in the Constitution itself?”²⁵¹

In fact, this quintessentially textualist line of thought should probably 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.²⁵² 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.”²⁵³ The major questions doctrine, he reasoned, protects those objectives.²⁵⁴ But, as Chief Justice Marshall famously observed, the Constitution also reflects a determination to subject Congress’s exercise of its powers to “no limitations other 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.²⁵⁵ 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.”²⁵⁶ 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

²⁵¹ Nelson, *supra* note 28, 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.”).

²⁵² *See* Manning, *supra* note 17, at 427–28; *supra* note 249.

²⁵³ *West Virginia*, 142 S. Ct. at 2618 (Gorsuch, J., concurring).

²⁵⁴ *See id.* at 2618–19.

²⁵⁵ *Gibbons v. Ogden*, 22 U.S. 1, 197 (1824) (Marshall, C.J.).

²⁵⁶ *Cf.* SCALIA & GARNER, *supra* note 3, at 57 (“The 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 249, 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).

itself.²⁵⁷

Whether we are right about that or not, much the same point explains why Justice Barrett's own prescription for identifying the canons with a valid claim to "constitutional inspiration" cannot succeed within textualist parameters.²⁵⁸ In order for a canon to be legitimate, she suggests, the Constitution must be "best understood" as "biased" against the same exercises of power that the canon resists.²⁵⁹ 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.²⁶⁰ 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, Justice 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.²⁶¹ 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 Justice Barrett's article, she forthrightly acknowledged that because "[c]onstitutionally inspired canons . . . constrain Congress more than the Constitution does,"

²⁵⁷ Cf. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 45–46 (2010) (faulting originalism, at least in some forms, as "an invitation to be disingenuous").

²⁵⁸ See Barrett, *supra* note 17, at 179–81. 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 178–79.

²⁵⁹ *Id.* at 180–81.

²⁶⁰ *Id.* at 181.

²⁶¹ *Id.* (emphasis added).

they are “in tension with the structural limitations upon statutory interpretation,” and that her defense of them thus could not be “rock solid.”²⁶² 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.”²⁶³ So far, so good. Yet she then pointed out that “[t]he federal 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. “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.”²⁶⁴ And so, for Justice Barrett, the historical roots of canon-making clinched at least the tentative case for “thinking that the more expansive approach to judicial power is right.”²⁶⁵ 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.”²⁶⁶

This appeal to historical practice fails for two distinct reasons. 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. Even if the Constitution *authorizes* substantive canon-making 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 Justice Barrett fails 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 says only that “such an inquiry must be undertaken.”²⁶⁷ If that inquiry is undertaken within textualist parameters, we do not see how it could ever bear fruit.

²⁶² *Id.* at 175–76.

²⁶³ *Id.* at 176; *see id.* at 112, 163 (describing Barrett’s conclusion 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 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.

²⁶⁴ *Id.* at 163. At the same time, Justice Barrett disavows any “aim to describe the original public meaning of ‘the judicial Power’ as it related to statutory interpretation in 1787.” *Id.* at 125. She casts the matter instead as one of “liquidation.” *Id.*

²⁶⁵ *Id.* at 176.

²⁶⁶ *West Virginia*, 142 S. Ct. at 2625 (Gorsuch, J., concurring).

²⁶⁷ Barrett, *supra* note 17, at 181.

Second, the appeal to historical practice cannot shore up Justice 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, Justice 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.²⁶⁸ We fail to see why one would take from this history the lesson that "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 Justice Barrett places relatively little stock in the historical practice on which she relies. The canon-making power that she finds in early cases, after all, was not conditioned on identifying "constitutional inspiration" for a given canon.²⁶⁹ Yet she still throws overboard all canons that further "extraconstitutional values"; despite their historical pedigree, she reasons, they are not compatible with the textualist conception of faithful agency.²⁷⁰ 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 content

²⁶⁸ See Barrett, *supra* note 17, 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).

²⁶⁹ Incidentally, Barrett's evidence shows Justice Gorsuch's renditions of the origin stories of the canons that he discusses (*see, e.g., supra* note 189) to be remarkably misleading in this regard. There are few if any suggestions that the Constitution was thought to have anything to do with the courts' use of substantive canons. See Barrett, *supra* note 17, at 125–59.

²⁷⁰ *Id.* at 177.

expressed by the statute, 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.²⁷¹

We will unpack and assess these possibilities in turn, but we first note an important limitation that pertains equally to both. In short, substantive 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 “recipients of federal funds.”²⁷² To take another example, the Court’s stated rationale for invalidating OSHA’s vaccine-or-test requirement would collapse under this approach as well.²⁷³ 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 a lawmaker could not have thought they had prescribed any determinate resolution at all.²⁷⁴ This sort of legal incompleteness arises largely because, even when the statutory communication is perfectly successful, the concepts successfully expressed are often vague, in the sense that they admit of borderline cases,²⁷⁵ or “open-textured,” in the

²⁷¹ Andrei 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 41, at 109. In effect, we are considering the same two scenarios (in reverse order).

²⁷² See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 245–46 (1985); *supra* notes 161–166 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 they are used. See *supra* notes 106–112 and accompanying text (offering examples of where those come apart).

²⁷³ See *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022) (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, and Kagan, JJ., dissenting) (“The Court does not dispute that the statutory terms just discussed, read in the ordinary way, authorize this Standard.”).

²⁷⁴ See *supra* notes 51–53 and accompanying text.

²⁷⁵ For leading discussions 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).

sense that they comprise multiple dimensions that lack common units.²⁷⁶ 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.²⁷⁷ 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 sense of recovering the content encoded by language—is done. This work, as earlier noted, is often denominated as the distinct task of “construction.”²⁷⁸

Because textualism can neither guide nor constrain that inherently non-textual 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.²⁷⁹ Still, we think the necessity of looking beyond the text when making judgments within such a “construction zone”²⁸⁰ 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 salient cases employing

²⁷⁶ See ASGEIRSSON, *supra* note 275, at 44–46 (discussing incommensurate multidimensionality); ENDICOTT, *supra* note 275, at 28 (same); see also Lawrence B. Solum & Cass R. Sunstein, *Chevron as Construction*, 105 CORNELL L. REV. 1465, 1473 & n.38 (suggesting a similar usage of “open-textured”). On the distinct circumstance of irreducible ambiguity, see *infra* note 278.

²⁷⁷ For extended and instructive discussions of “neglect” as a paradigm case, see ASGEIRSSON, *supra* note 275, at 45–58; and ENDICOTT, *supra* note 275, at 24–42.

²⁷⁸ See *supra* notes 51–53 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 52, 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” and explaining its utility for “avoid[ing] conceptual confusion”). We then turn to uncertainty about the statute’s communicative content in the next section.

²⁷⁹ See *supra* Part I.B. The question would remain whether all such considerations are aptly described, at some level of generality, as “canons.”

²⁸⁰ Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 5 (2015).

any of the familiar substantive canons to guide the application (or necessary elaboration) of the content that, on non-substantive grounds, Congress is taken to have expressed. That makes sense: those canons would usually be of little help in such a construction zone, because they 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, the Court sometimes invokes implied limitation rules to lop off some applications of textually expressed concepts. It 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.²⁸¹ By all appearances, then, what the 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.²⁸² *West Virginia v. EPA* is again a salient example.²⁸³ When Congress referred

²⁸¹ 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 read an implicit limitation into the statute before us”); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979) (similarly carving church-operated schools out of the definition of “employer” in the National Labor Relations Act).

²⁸² See MARMOR, *supra* note 41, at 121–25. For several examples of statutory-interpretation disputes arising from polysemy (i.e., from the fact that a word has multiple senses that are closely related), see Watson, *supra* note 81, at 45–46.

²⁸³ 142 S. Ct. 2587 (2022). 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” 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.

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”?²⁸⁴ 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.²⁸⁵ 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 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.²⁸⁶

Of course, the fact that familiar substantive canons are not used as aids to translating communicative content into legal effect does not mean that they could not possibly be.²⁸⁷ 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 for purposes of construction would not be clear-cut. We doubt that the hodgepodge of judge-

²⁸⁴ Compare *West Virginia*, 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.

²⁸⁵ See MARMOR, *supra* note 41, 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).

²⁸⁶ Regarding our usage of this term and the separate possibility of irreducible ambiguity, see *supra* note 278.

²⁸⁷ An important possible exception is *Chevron* deference, which can be understood as a substantive canon and is routinely applied to matters of construction. See Solum & Sunstein, *supra* note 276, 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 decision-making 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*, 2022 SUP. CT. REV. 267, 294–95.

made, normative principles would fare better in a textualist's evaluative ranking of construction tools than, say, trying to resolve a matter in a way that furthers the objectives that a provision was apparently designed to serve,²⁸⁸ or, when possible, simply deferring to the judgments of politically accountable decisionmakers.²⁸⁹ In any case, the problem of giving legal effect to clearly expressed but under-determinate 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 facie ambiguity.”²⁹⁰ Still, perhaps there comes a point where the textual evidence is *so* nearly balanced that even a committed textualist could reasonably and legitimately 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.”²⁹¹

²⁸⁸ Cf. RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE 14TH AMENDMENT: ITS LETTER AND SPIRIT 8-15 (2021) (advancing an account of “good-faith construction” based on “the original spirit of the text”). 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 28, at 394; *see id.* at 394–95 (pointing in the direction of such an argument).

²⁸⁹ *See* Doerfler, *supra* note 287, at 20 (noting that “while [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”).

²⁹⁰ *See supra* Part I.A; *see also* Kavanaugh, *supra* note 79, 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 . . .”).

²⁹¹ Nelson, *supra* note 28, at 394 (emphasis added); *see also* Manning, *supra* note 17, 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 U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984))).

As Nelson recognizes, this formulation “conceals some difficult questions.”²⁹² 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]?”²⁹³ On the one hand, if substantive canons were confined to cases of genuine equipoise, there would arguably be nothing non-textualist about resorting to them—but such interpretive “ties” are so unusual as to be practically irrelevant.²⁹⁴ 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 Justice 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, that is, unless the canon at issue serves a “constitutional value”).²⁹⁵

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 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.²⁹⁶

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 to hold her fire,

²⁹² Nelson, *supra* note 28, at 396.

²⁹³ *Id.*

²⁹⁴ 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).

²⁹⁵ Barrett, *supra* note 17, 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.

²⁹⁶ Cf. Ryan D. Doerfler, *Going Clear* (manuscript at 23–24, 27), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3053&context=faculty_scholarship (suggesting that constitutional avoidance and other interpretive norms take account of error costs in a similar way).

despite recent provocations.²⁹⁷ 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 only 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: Don't take action that will start a war unless the orders to do so are clear and unmistakable.

Could textualists justify resorting to substantive canons on these grounds? Not without great difficulty, we think. 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* wants or values or because of her *own* preferences or 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 simply be the costs (or benefits) of the result itself, not any costs specific to having 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. And, in principle at least, substantive canons could perhaps be re-glossed as entrenched generalizations about that issue. For example, the

²⁹⁷ Cf. Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189–90 (1986) (offering a similar hypothetical).

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.²⁹⁸ (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 swallow because of the standardless discretion it affords to courts and the sheer 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.²⁹⁹ 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; and 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.³⁰⁰

None of this amounts to a deductive argument that textualists could not possibly afford substantive canons some role as tools for managing uncertainty about a statute’s communicative content.³⁰¹ 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

²⁹⁸ See *supra* note 41.

²⁹⁹ See, e.g., Kavanaugh, *supra* note 79, 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. . .”).

³⁰⁰ Cf. *supra* note 177 and accompanying text (discussing textualist concerns regarding legislative history).

³⁰¹ Cf. Doerfler, *supra* note 296, at 12–19, 34–58 (developing an account of various interpretive rules as means of “uncertainty-management”).

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 the very reasons that textualists otherwise rule out of bounds.³⁰² 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.³⁰³ 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.³⁰⁴ Either way, these substantive canons are flatly at odds with textualists’ insistence that “[o]nly the written word is the law”³⁰⁵ and that judges ought to enforce the statutes that Congress actually enacted.³⁰⁶

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.³⁰⁷ 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 possibility space, with little reason to think that it is occupied (let alone as crowded as vindicating current practice would require). In

³⁰² See *supra* Parts I.B–C.

³⁰³ See *supra* notes 98–100 and accompanying text.

³⁰⁴ See *supra* notes 101–103 and accompanying text.

³⁰⁵ *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020).

³⁰⁶ See *supra* Part I.A.

³⁰⁷ Barrett, *supra* note 17, at 121; cf. Manning, *Equity*, *supra* note 17, at 125 (“it is unclear how comfortably they fit with the most basic textualist assumptions”); Scalia, *supra* note 7, at 28 (substantive canons pose “a lot of trouble”).

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 *West Virginia* dissent—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 one thinks present doctrine gives short shrift.³⁰⁸ Furthermore, while existing statutory precedents decided partly on the basis of

³⁰⁸ See *supra* Section III.B.3. 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*, 142 S. Ct. at 2625 (Gorsuch, J., concurring); Scalia, *supra* note 7, at 28; Barrett, *supra* note 17, 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”³⁰⁹ or that “[f]idelity to the law means fidelity to the text as it is written.”³¹⁰ And once that is brought to the surface and conceded, the question of what ought to figure in the pluralist mix, and why, takes on a different cast. 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.³¹¹ 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 non-textualist considerations courts ought to entertain as well.

³⁰⁹ Kavanaugh, *supra* note 79, at 2118.

³¹⁰ Barrett, *supra* note 38, at 856.

³¹¹ *Cf.* Doerfler, *supra* note 7, at 997–98, 1024 (arguing that “[t]extualists sometimes unreasonably restrict context to so-called ‘semantic context’”).