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SUBSTANTIVE CANONS AND FAITHFUL AGENCY

AMY CONEY BARRETT*

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INTRODUCTION

Federal courts have long employed substantive canons of construction to interpret federal statutes. Some substantive canons express a rule of thumb for choosing between equally plausible interpretations of ambiguous text. The rule of lenity is often described this way: it directs that courts interpret ambiguous penal statutes in favor of the defendant. Other canons are more aggressive, permitting a court to forgo a statute's most natural interpretation in

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favor of a less plausible one more protective of a particular value. For example, a court will strain the text of a statute to avoid deciding a serious constitutional question, and absent a clear statement, it will not interpret an otherwise unqualified statute to subject either the federal government or the states to suit. While courts and commentators sometimes seek to rationalize these and other substantive canons as proxies for congressional intent, it is generally recognized that substantive canons advance policies independent of those expressed in the statute.

The courts' adoption of more aggressive substantive canons poses no problem of authority for dynamic statutory interpreters, who conceive of courts as the cooperative partners of Congress and treat the protection of social values as part of the courts' task in statutory interpretation. It poses a significant problem of authority, however, for textualists, who understand courts to be the faithful agents of Congress. A court applying a canon to strain statutory text uses something other than the legislative will as its interpretive lodestar, and in so doing, it acts as something other than a faithful agent. The application of substantive canons, therefore, is at apparent odds with the central premise from which textualism proceeds. Textualists occasionally note this tension.[1] Nonetheless, they continue to accept substantive canons, and no one has examined whether substantive canons can be reconciled with a theory of statutory interpretation animated by a strong commitment to legislative supremacy.

This Article seeks to answer that question. Part I describes faithful agency, substantive canons, and why the two are in tension. Part II contributes to the important historical debate about the principle of legislative supremacy with a systematic study of the way that eighteenth and nineteenth century federal courts applied substantive canons. Prior historical work has focused on the question whether early federal courts believed "the judicial Power" to include a broad equitable authority to alter statutory text.[2] Defending the principle of faithful agency, textualists have argued that early federal courts initially asserted, but ultimately abandoned, a claim to such power as their understanding of the constitutional structure sharpened. That argument is compelling, but incomplete. My research shows that even while disavowing a broad equitable authority to contradict statutory text, early federal courts asserted a narrower power to strain it through the application of substantive canons. Indeed, throughout the eighteenth and nineteenth centuries, federal

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[1] *See infra* notes 74-75 and accompanying text.

[2] *Compare generally* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990 (2001) (amassing historical evidence designed to convince even originalists that "the judicial Power" includes the power of equitable interpretation), *with* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) (interpreting history to support the argument that federal courts are Congress's faithful agents, not its cooperative partners).

courts both created and applied canons that permitted them to exchange the most natural reading of a statute for a bearable one more protective of a judicially specified value. To the extent that they did so, the historical record suggests that early federal courts understood the norm of faithful agency to be qualified in ways that textualists have not acknowledged.

The next two Parts of the Article study whether a qualified norm of faithful agency is consistent with the constitutional structure. Part III begins by rejecting an argument that textualists have advanced to reconcile substantive canons with the Constitution. Textualists have suggested that, in the modern landscape, those principles that we call substantive canons are a closed set of background assumptions justified by their sheer longevity. Many of the substantive canons in use today began as judicial policy choices, but, the argument goes, courts have used them for so long that they are now part of the way that lawyers think about language. Judges can legitimately rely on these once-substantive canons because the canons are now effectively linguistic, but they cannot add new canons to the set. Part III concludes that this explanation is insufficient. If the theory is that federal courts once possessed the power to develop substantive canons, there is no reason to believe that they lost that power as time progressed. If the theory is that federal courts acted outside the bounds of their authority in adopting these canons, then faithful agents must explain their continued reliance upon them. Moreover, the fact that courts historically asserted the authority to make these interpretive policy choices is equally consistent with the proposition that such authority is included within "the judicial Power"[3] as with the proposition that the authority is a historical anomaly.

Part IV considers how the structural principles that otherwise constrain the exercise of the judicial power might constrain the application of substantive canons. It begins with the baseline principle that a substantive canon can never be applied to overcome the plain language of a statute. It then turns to a more nuanced problem: the application of canons to reject the most natural interpretation of a statute in favor of a less plausible one that advances a particular value. Insofar as any canon respects the outer limits of statutory language, it is less problematic than those approaches to statutory interpretation – namely, equitable interpretation and the absurdity doctrine – that permit deviation from plain statutory text. But insofar as any canon permits a departure from a text's most natural meaning, that departure must be reconciled with the constitutional structure. Part IV argues that to the extent a canon is constitutionally inspired, its application does not necessarily conflict with the structural norms that constrain judges from engaging in broad, equitable interpretation. Instead of pursuing undifferentiated social values – however sound and desirable they may be – constitutionally inspired canons draw from an identifiable, closed set of norms. As such, their effect on the legislative bargain is more predictable than the application of open-ended

[3] U.S. CONST. art. III, § 1.

doctrines like equitable interpretation and absurdity. Moreover, the connection of such canons to the Constitution provides a potential justification for their deviation from the norm of faithful agency. When a conflict exists between a statute and the Constitution, federal courts are obliged to side with the Constitution, rendering the exercise of judicial review itself a significant exception to the norm of faithful agency. Part IV tentatively concludes that the power of judicial review carries with it a subsidiary power to push – though not force – statutory language in directions that better accommodate constitutional values.

I. FAITHFUL AGENCY AND SUBSTANTIVE CANONS

A. *The Norm of Faithful Agency*

The view that federal courts function as the faithful agents of Congress is a conventional one. Throughout most of the twentieth century, participants in debates about statutory interpretation largely subscribed to it; the disputes centered around how best to implement it. The rival theories in this regard were – and remain – purposivism and textualism. Purposivism, the classical approach to statutory interpretation, claims that a judge should be faithful to Congress's presumed intent rather than to the statutory text when the two appear to diverge.[4] Textualism, by contrast, maintains that the statutory text is the only reliable indication of congressional intent. The defining tenet of textualism is the belief that it is impossible to know whether Congress would have drafted the statute differently if it had anticipated the situation before the court. The legislative process is path-dependent and riddled with compromise.[5] A statute's language may be at odds with its broad purpose

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[4] *See, e.g.*, United States v. Amer. Trucking Ass'n, 310 U.S. 534, 543 (1940) (asserting that when applying a statute's plain meaning would yield a result "'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words" (quoting Ozawa v. United States, 260 U.S. 178, 194 (1922))); Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) ("It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers."); Richard A. Posner, *Statutory Interpretation – in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) ("The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar.").

[5] A bill must compete for space and priority on the congressional agenda. It must navigate numerous "vetogates," including committee votes, the threat of Senate filibuster, and the threat of presidential veto. Passage through each of these points requires both strategic choice and compromise. For example, a bill's sponsors – and perhaps even a majority of either or both the House and the Senate – may want the text expressly to include or exclude certain applications, but deciding whether to propose amendments is a strategic choice. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2409 (2003); *see also* Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public*

because proponents accept less than they want in order to secure the bill's passage. The language may appear awkward because competing factions agree "to split the difference between competing principles."[6] To respect the deals that are inevitably struck along the way, the outcome of this complex process – the statutory text – must control. A judge who reshapes statutory language to alleviate its awkwardness risks undoing the very bargains that made the statute's passage possible.[7]

Yet as stated above, this disagreement between textualists and purposivists is about the role of congressional intent in statutory interpretation, not about the principle that federal courts must function as Congress's faithful agents. Toward the end of the twentieth century, the scholarly debate shifted as dynamic statutory interpreters challenged this basic premise.[8] They argued that while courts owe legislatures respect, they are more than its faithful agents. Courts, like legislators, represent "We the People."[9] As such, dynamists claimed that courts are empowered – indeed obligated – to enrich statutory law by bringing it into better accord with contemporary public values, even when doing so requires a court to expand or contract the reach of unambiguous statutory text.[10] Dynamic statutory interpretation resembles purposivism insofar as it sanctions departures from statutory text; it differs

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Choice Perspective, 107 HARV. L. REV. 1328, 1346-47 (1994) (asserting that statutes "reflect the outcome of a bargaining process among factions (and their representatives)").

[6] Manning, *supra* note 5, at 2411.

[7] The textualist unwillingness to set aside concrete text in the service of abstract intention has several logical consequences. One of the most notable is the rejection of legislative history. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990). Legislative history is most often consulted as persuasive evidence of the legislature's subjective intent, and because textualists discount such intent, they have little use for legislative history. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 29 (1997); *cf.* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997) (arguing that the treatment of legislative history as authoritative violates the constitutional prohibition on self-delegation). Another consequence is textualism's rejection of the absurdity doctrine, which rests on the premise that Congress could not have intended a statute to apply in ways that contradict widely held social values. As Manning has argued, application of the absurdity doctrine is inconsistent with the intent-skepticism that lies at the foundation of modern textualism. *See* Manning, *supra* note 5, at 2417-19.

[8] *See* Manning, *supra* note 2, at 10-26 (describing evolution of statutory interpretation debate from one about the role of congressional intent to one about the force of the norm of faithful agency).

[9] Eskridge, *supra* note 2, at 992 ("In my view, Article III judges interpreting statutes are both agents carrying out directives laid down by the legislature and partners in the enterprise of law elaboration, for they (like the legislature) are ultimately agents of 'We the People.'").

[10] For a sampling of commentators urging this position, see generally, for example, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); RONALD DWORKIN, LAW'S EMPIRE (1986); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541 (1988).

from purposivism, however, insofar as it roots such departures in an expansive theory of judicial power rather than in assumptions about congressional intent. Dynamic statutory interpretation stands in sharper contrast to textualism, which eschews departures from plain text altogether. Perhaps as a result, the dynamic approach to the judicial role has garnered the particular attention of textualists, who have been the most vocal defenders of the view that the Constitution imposes a strong norm of legislative supremacy. Indeed, the debate between textualists and dynamists about the strength of that norm is a critical one in recent scholarship.[11]

From a textualist point of view, the most significant evidence that dynamists have offered in support of this claim is historical. Textualists in statutory interpretation tend to be originalists in constitutional interpretation.[12] Meeting textualists on their own turf, William Eskridge has argued that the original understanding of "the judicial Power" supports the dynamic conception of federal judges as Congress's cooperative partners rather than its faithful agents. English and early American courts, both state and federal, practiced equitable interpretation, which permitted courts to depart from the clear text of a statute when the court thought that equity would be better served by so doing.[13] Eskridge argues that this evidence ought to convince even originalists that an equitable power to alter statutory text is part of "the judicial Power" conferred by Article III.[14]

John Manning, the most prominent academic textualist, has acknowledged the force of this historical evidence, but argued that it ultimately fails to support the "cooperative partner" conception of the judicial role. He agrees that English courts claimed the power to implement the "equity of a statute" rather than its text,[15] and that American judges, steeped in the English legal tradition, initially claimed similar power. But in the years following the

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[11] *See supra* note 2 and accompanying text.

[12] Manning, *supra* note 2, at 26 & n.110.

[13] Eskridge, *supra* note 2, at 995-96 (describing how English judges extended, narrowed, and voided statutes in the exercise of this equitable power); *id.* at 999-1009; *id.* at 1009-40, 1058-84 (setting forth detailed evidence of early American practice in both state and federal courts); *see also id.* at 996 n.22 (explaining that "[t]he English doctrine of *lequity de lestatut*" did not originate in English law, but traces its lineage back even further to Roman law). Eskridge also draws support for his thesis from the ratification debates of 1788 and 1789. *Id.* at 1040-58.

[14] *Id.* at 992, 997; *see also* William N. Eskridge, *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1522-32 (1998); Popkin, *supra* note 10, at 585; Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1095 (1998) ("The 'judicial power,' as it would have been understood by those framing the Constitution, included, as part of its power to construe statutes, some power to maintain coherence in the law, which is, inescapably, a law making function . . . .").

[15] Manning, *supra* note 2, at 29 ("[T]he equity of the statute represented a deeply entrenched doctrine of judicial power in England, making it a possible source for understanding the meaning of 'the judicial Power of the United States.'"); *id.* at 29-36.

founding, Manning argues, federal courts largely abandoned the English practice because of its inconsistency with the way that the United States Constitution distributes governmental power.[16] Manning focuses on two features of the Constitution that render this ancient equitable power incompatible with the "judicial Power of the United States": (1) separation of powers and (2) bicameralism and presentment.[17] With respect to separation of powers, Manning points out that the United States, rejecting English tradition, "self-consciously separated the judicial from the legislative power and, in so doing, sought to differentiate sharply the functions performed by these two distinct branches."[18] Manning claims that this separation was designed to "limit[] official discretion and promot[e] the rule of law," two objectives that would be undermined by according judges the power to vary statutory outcomes on a case-by-case basis.[19] With respect to bicameralism and presentment, Manning says that "it is surely doubtful that one would adopt a highly elaborate system for enacting law if judges had broad independent authority to add to or subtract from the results of that process."[20] Moreover, he observes, bicameralism and presentment enable political minorities to extract compromise from the majority. Permitting judges to alter statutory language risks undoing that compromise, thereby undercutting the power that the constitutional process accords political minorities.[21] In sum, as Manning interprets the historical record, federal courts, after some initial fits and starts,

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[16] *Id.* at 57; *id.* at 79 ("[F]ederal courts sometimes applied the equity of the statute as late as the mid-nineteenth century, but . . . the Supreme Court had taken a decisive turn toward the faithful agent theory as early as the Marshall Court."); *see also* John Choon Yoo, Note, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L.J. 1607, 1615 (1992) (arguing, similarly, that the early judiciary was divided on the question of equitable interpretation, and that the Marshall Court resolved the issue by rejecting the practice as inconsistent with the "new constitutional order").

[17] Manning, *supra* note 2, at 58-78.

[18] *Id.* at 57.

[19] *Id.* Consider that when the judiciary makes case-by-case exceptions, Congress saves the political cost of making exceptions in the text of the statute. In *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440 (1989), for example, the Court held that it would be absurd to interpret the Federal Advisory Committee Act as applying to the American Bar Association ("ABA"). In so doing, the Court saved Congress the cost of expressly excluding a politically powerful group like the ABA from the statute. This undermines legislative accountability: "Congress . . . reap[s] the benefits of passing tough, general laws without fully internalizing the consequences of framing laws in unqualified terms." Manning, *supra* note 5, at 2437.

[20] Manning, *supra* note 2, at 57.

[21] *Id.* at 57-58; *see also* Manning, *supra* note 5, at 2438 (arguing that disrupting the legislative bargain undermines the power of political minorities to "demand compromise as the price of assent").

embraced the norm of faithful agency as an essential feature of the American constitutional structure.[22]

I am persuaded by Manning's argument that the principle of legislative supremacy restrains federal courts from expanding and contracting unambiguous statutes to account for diffuse social values. At the same time, it is unclear how the principle of faithful agency can be reconciled with substantive canons of statutory construction, which textualists – like all interpreters – readily apply. Such canons pose no problem of authority for dynamic statutory interpreters, who understand the judicial role to encompass the power to adjust statutory language to protect public values.[23] Because the very point of a substantive canon is to protect a public value, sometimes at the expense of a statute's best reading, substantive canons fit easily into the dynamic framework.[24] The case for substantive canons is more difficult for textualists,[25] who maintain that federal judges, as Congress's honest agents, must apply statutes as they are written, not improve upon them.[26] A judge

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[22] This is a description of the textualist position on faithful agency rather than the full debate. For the dynamist response to these arguments, see Eskridge, *supra* note 2, at 1088-105.

[23] William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 321 n.9 (1989) ("Conceptualizing the court's role in statutory interpretation as a protector of public values goes beyond legal process theory to the extent it encourages courts to engage in creating norms.").

[24] The question for a dynamic statutory interpreter is not whether federal courts have the authority to adopt substantive canons, but rather which canons they should adopt. *See, e.g.*, William N. Eskridge, Jr. & Philip Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 596-98 (1992) (critiquing Court's choice of certain substantive canons); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 505, 507-08 (proposing canons that would promote deliberative democratic government).

[25] The case for substantive canons is also difficult for purposivists, because they too reject the proposition that a judge can deviate from Congress's intent based on her own assessment of desirable public policy. I focus here on textualists for two reasons. First, they have offered the fullest defense of the norm of faithful agency, a defense that I find persuasive. Second, the tension between faithful agency and substantive canons is more evident for textualists, because the application of substantive canons is the only circumstance in which they are willing to depart from the most natural meaning of a statute. Recall that purposivists are willing to depart from the plain meaning of a statute when they believe that Congress would have wanted them to do so. *See supra* note 4 and accompanying text.

[26] Frank H. Easterbrook, *The Supreme Court 1983 Term: Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984) (arguing that democratic principles, as well as the constitutional separation of powers, mandate that judges function as the "honest agents of the political branches"); *see also* SCALIA, *supra* note 7 at 9-10, 22-23 (arguing that democratic principles compel judges to be the legislature's faithful agents); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 63 (1994) (arguing that the exercise of expansive judicial power in the

applying substantive canons often does more than implement the statute as written; she often improves upon it by shading it to account for policies external to the statute. Thus, while application of substantive canons is a natural outgrowth of dynamic statutory interpretation, it is an apparent deviation from textualism. As a result, textualists are harder pressed than their dynamic counterparts to explain their acceptance of substantive canons. The next two Sections explain how canons work and why they challenge the textualist commitment to legislative supremacy.

B. *The Canons*

Canons of interpretation are rules of construction that courts apply in the interpretation of statutes. They are traditionally classified as either linguistic or substantive.[27] Linguistic canons apply rules of syntax to statutes. "Inclusio unius est exclusio alterius," which means "inclusion of the one is exclusion of the other," is a standard example.[28] Linguistic canons pose no challenge to the principle of legislative supremacy because their very purpose is to decipher the legislature's intent.[29]

Substantive canons, by contrast, can challenge legislative supremacy insofar as their purpose is to promote policies external to a statute. Some canons serve simply as tie breakers between two equally plausible interpretations of a statute. The rule of lenity, for example, is typically described this way: it

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interpretation of statutes "is objectionable on grounds of democratic theory as well as on grounds of predictability").

[27] Some commentators employ different terminology to capture the same concept. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term: Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 68 (1994) (referring to "textual," "referential," and "substantive" canons); Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329, 356 (2007) (book review) (adopting distinction between "descriptive" tools used in "the search for a statute's intended meaning" and "normative canons" reflecting values derived from "our Constitution or other aspects of our legal traditions").

[28] Other examples are "the rule against surplusage" (a statute should not be interpreted in a way that will render a word superfluous), "in pari materia" (words must be construed in the context of the whole statute), the presumption that identical words in a statute have identical meaning, and the rule that words ought to be given their common meaning unless they are terms of art.

[29] That is not to say that linguistic canons are always successful in that pursuit. Some claim that linguistic canons do not accurately describe patterns of language and grammar. *See, e.g.*, William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 676 (1999) ("Although [inclusio unius] is one of the most frequently invoked linguistic canons, it strikes me as an unreliable rule of thumb about the ordinary use of language."). If one could demonstrate, through empirical research or otherwise, that Congress does not write statutes against the backdrop of these supposedly shared conventions, the rationale for their existence would evaporate. Linguistic canons are designed to effectuate legislative intent, and if they do so poorly, there is no reason to employ them.

instructs courts to resolve ambiguities in criminal statutes in favor of the criminal defendant.[30] Other canons are more aggressive, directing a judge to forgo the most plausible interpretation of a statute in favor of one in better accord with some policy objective. Standard examples of canons functioning this way include the rule that where one interpretation of a statute raises a serious constitutional question, the court should adopt any other plausible interpretation of the statute (avoidance)[31] and the rule that where one interpretation of a statute would compromise the international obligations of the United States, the court should adopt any other plausible interpretation (the *Charming Betsy* canon).[32] Canons in this category are often expressed as "clear statement rules" that require a court to interpret a statute to avoid a particular result unless Congress speaks explicitly to accomplish it.[33] For example, absent a clear statement to the contrary, the Court will not interpret a statute to waive the federal government's immunity from suit,[34] to abrogate a state's sovereign immunity from suit in federal court,[35] to regulate "core state

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[30] *See, e.g.*, United States v. Santos, 128 S. Ct. 2020, 2025 (2008). Sometimes, however, the rule of lenity is described as a rule of narrow construction, permitting a court to adopt a less plausible but bearable construction that criminalizes less conduct. *See* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 582 (1990) (lamenting lenity's conflict with legislative supremacy insofar as it requires a judge to adopt "not the most plausible meaning [a criminal statute's] language reasonably conveys, but the meaning that renders the least conduct unlawful – or perhaps the meaning that renders merely *less* conduct unlawful").

[31] *See, e.g.*, Jean v. Nelson, 472 U.S. 846, 854 (1985) (opining that courts should avoid an interpretation that would provoke a serious constitutional question unless doing so would "press statutory construction 'to the point of disingenuous evasion'" (quoting United States v. Locke, 471 U.S. 84, 96 (1985))); NLRB v. Catholic Bishop, 440 U.S. 490, 507 (1979) (holding that the Court would adopt any other plausible interpretation of a statute "in the absence of a clear expression of Congress' intent" to provoke consideration of "difficult and sensitive" First Amendment questions).

[32] *See, e.g.*, Weinberger v. Rossi, 456 U.S. 25, 32 (1982) (invoking canon that "'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains'" (quoting Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804))). Some consider *Charming Betsy* a precursor to the avoidance doctrine. *See, e.g.*, Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 73 n.9. Because, however, these canons protect distinct norms and have developed separately in the cases, I treat them separately here.

[33] Part IV explains that canons like avoidance and *Charming Betsy* function in the same way as clear statement rules even though they are not given that label.

[34] *See, e.g.*, United States v. Nordic Vill., Inc., 503 U.S. 30, 33, 35 (1992); Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990).

[35] *See, e.g.*, Blatchford v. Native Village of Noatak, 501 U.S. 775, 786 (1991).

functions,"[36] to abrogate Indian treaty rights,[37] to abrogate the inherent power of a federal court,[38] or to apply retroactively.[39]

It is difficult to isolate a single policy objective behind any substantive canon, for a canon's purpose often lies in the eyes of the beholder. For example, the rule of lenity is most frequently characterized as one pursuing fairness to the criminal defendant, but it is also characterized as one designed to ensure that Congress, not the judiciary, is the branch to criminalize conduct.[40] *Charming Betsy* is another example. It is most frequently characterized as a principle designed to respect international law,[41] but it is also described as a rule designed to protect the political branches' authority over foreign affairs.[42] The purpose of a canon can also be stated at a high level of generality. For example, David Shapiro has famously argued that all canons reflect a preference for continuity over change insofar as they "increase the likelihood that a statute will not change existing arrangements . . . unless the legislature – the politically accountable body – has faced the problem and decided that change is appropriate."[43] Eskridge has posited that all canons can

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[36] *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 464 (1991).

[37] *See, e.g.*, South Dakota v. Bourland, 508 U.S. 679, 686-87 (1993).

[38] *See, e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 47-48 (1991); Link v. Wabash R.R., 370 U.S. 626, 630-32 (1962). The Court has applied a similar rule to statutes that infringe upon executive authority. *See, e.g.*, Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988) ("[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.").

[39] Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 384 (2005).

[40] *Cf.* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 911 (2004). In *United States v. Santos*, Justice Scalia, writing for the Court, identified a cluster of concerns, both constitutional and extraconstitutional, underlying lenity. 128 S. Ct. 2020, 2025 (2008) ("This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.").

[41] Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 495-97 (1998) (describing this argument without subscribing to it).

[42] *Id.* at 526 (arguing that *Charming Betsy* protects the principle that "the political branches should decide when and how the United States violates international law"); *see also* Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 63-64 (2009) (arguing that the *Charming Betsy* canon honors the fact that "the Constitution allocates to the political branches, not courts, the powers to recognize foreign nations and to risk bilateral conflict with such nations by interfering with their perfect rights").

[43] David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 944 (1992); *see also* Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1422 (2005) (describing canons as "buffering devices" designed

be justified on rule of law grounds to the extent that they make the law more predictable and objective.[44] The relevance of a canon's purpose to its legitimacy is a matter to which I will return in Part IV. For now, the important point is that substantive canons serve a variety of purposes, all of which are external to the statute before the court.[45]

The distinction between linguistic and substantive canons is not always crisp, for canons that ostensibly advance substantive values are sometimes rationalized as functionally linguistic. It is easy to see a faithful agent's motivation for making this move: linguistic canons, which pose no challenge to legislative supremacy, are preferable to substantive canons, which do. With just such a concern in mind, Justice Scalia has suggested:

> Some of the rules, perhaps, can be considered merely an exaggerated statement of what normal, no-thumb-on-the-scales interpretation would produce anyway. For example, since congressional elimination of state sovereign immunity is such an extraordinary act, one would normally expect it to be explicitly decreed rather than offhandedly implied – so something like a "clear statement" rule is merely normal interpretation. And the same, perhaps, with waiver of sovereign immunity.[46]

Similar explanations have been offered for many of the substantive canons. Avoidance, for example, has been justified on the ground that Congress does not usually intend for its statutes to provoke serious constitutional questions,[47] and some have justified *Charming Betsy* on the ground that Congress intends its statutes to honor customary international law.[48]

Yet attempts to classify canons such as lenity, avoidance, and the clear statement rules as linguistic have been largely rejected.[49] Indeed, even those who advance arguments in favor of linguistic treatment do so only half-heartedly. For example, Justice Scalia's suggestion that clear statement rules

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less to enforce the values associated with any particular canon than to avoid "unnecessary interbranch and intergovernmental friction").

[44] *See* Eskridge, *supra* note 29, at 678-82.

[45] I am concerned here with the interpretation of statutes by federal courts, and I put aside the questions that arise when members of the executive branch interpret statutes.

[46] SCALIA, *supra* note 7, at 29.

[47] Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397, 446 (2005).

[48] *See supra* note 41 and accompanying text.

[49] *See, e.g.*, Bradley, *supra* note 41, at 507, 517-18; Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 545 (1983) ("The 'clear statement' principle usually fails as a useful tool of construction because it cannot demonstrate why the legislature would have wanted the court to hesitate just because the subject matter of the law is 'sensitive.' Likely it thinks that making hard decisions in sensitive areas is what courts are for."); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1586 (2000).

reflect the ordinary use of language comes at the end of a long passage characterizing them as "dice-loading rules" that pose "a lot of trouble" for the "honest textualist."[50] As Eskridge has observed, "Most of the substantive canons are hard if not impossible to defend on ordinary-use-of-language or this-is-what-the-legislature-would-want grounds."[51] These criticisms notwithstanding, the argument that substantive canons capture what ordinary language means or what Congress would want surfaces repeatedly in the cases and literature. The temptation to rationalize ostensibly substantive canons on this ground almost surely reflects discomfort with the application of substantive canons in a legal climate where a strong vision of legislative supremacy is the dominant view.

C. *The Tension Between Substantive Canons and Faithful Agency*

Textualists routinely bring canons to bear on the interpretation of statutes. They are probably the biggest proponents of linguistic canons.[52] Textualists, however, also embrace substantive canons, which, rather than capturing ordinary language patterns, often require judges to depart from a statute's most natural interpretation.[53] That is not to say that textualists accept all canons of this sort. For example, they reject the canons that statutes in derogation of the

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[50] *See, e.g.*, SCALIA, *supra* note 7, at 27-29.

[51] Eskridge, *supra* note 29, at 682. State legislatures have sometimes been quite clear that canons do not represent what they would want. Numerous state legislatures have passed statutes attempting to do away with the rule of lenity, but the highest courts in those states have continued to apply the rule anyway. *See* Price, *supra* note 40, at 902; *cf.* John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 834 ("The legislative supremacy concern becomes even greater when Congress routinely displays less concern for the value that courts are so eager to protect with a clear statement rule.").

[52] *See, e.g.*, SCALIA, *supra* note 7, at 25-27 (praising linguistic canons as common-sense formulations). Because linguistic canons are rules of thumb about how English speakers use language, textualists find them valuable to the project of determining how a statutory provision would be understood by a skilled user of the language.

[53] Stare decisis can cause similar conflicts with faithful agency: federal courts permit the institutional interest in stability to trump the obligation of faithful agency every time that they employ stare decisis to adhere to a prior erroneous interpretation of a statute. This conflict would be eliminated if courts abandoned their current rule giving statutory decisions "super strong" stare decisis effect in favor of a weaker presumption that prior interpretations are valid if they are reasonable. *See generally* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011 (2003) (arguing that the application of a strict rule of stare decisis in any case is in significant tension with the constitutional guarantee of due process); Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317 (2005) (arguing that "super strong" statutory stare decisis is unwarranted particularly when applied by the courts of appeals).

common law should be narrowly construed,[54] that remedial statutes should be broadly construed,[55] and that express preemption provisions should be narrowly construed.[56] But textualists embrace avoidance,[57] the rule of lenity,[58] *Charming Betsy*,[59] clear statement sovereign immunity rules,[60] clear statement federalism rules,[61] the Indian canon,[62] the presumption against extraterritorial

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[54] SCALIA, *supra* note 7, at 29 ("The rule that statutes in derogation of the common law will be narrowly construed seems like a sheer judicial power-grab.").

[55] *Id.* at 28 (rejecting the canon that remedial statutes are to be broadly construed as one used "to devastating effect").

[56] Altria Group, Inc. v. Good, 129 S. Ct. 538, 558 (2008) (Thomas, J., dissenting); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 544-48 (1992) (Scalia, J., dissenting) (arguing that the presumption against preemption has no place in the construction of an express preemption clause).

[57] *See, e.g.*, Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 345-46 (1998) (Thomas, J.) (accepting canon); *id.* at 356 (Scalia, J., concurring in the judgment); Almendarez-Torres v. United States, 523 U.S. 224, 270 (1998) (Scalia, J., dissenting) ("The doctrine of constitutional doubt does not require that the problem-avoiding construction be the *preferable* one," for that "would deprive the doctrine of all function").

[58] *See, e.g.*, United States v. Santos, 128 S. Ct. 2020, 2025 (2008) (Scalia, J.) (endorsing and applying rule of lenity); Pasquantino v. United States, 544 U.S. 349, 382 (2005) (Thomas, J.) ("We have long held that, when confronted with 'two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.'" (quoting McNally v. United States, 483 U.S. 350, 359-60 (1987))).

[59] *See, e.g.*, F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 176 (2004) (Scalia, J., with Thomas, J., concurring in the judgment) (endorsing "the principle that statutes should be read in accord with the customary deference to the application of foreign countries' laws within their own territories"); Hartford Fire Ins. Co. v. California, 509 U.S. 764, 814-21 (1993) (Scalia, J., dissenting) (endorsing and applying the *Charming Betsy* canon).

[60] *See, e.g.*, United States v. Williams, 514 U.S. 527, 541 (1995) (Scalia, J., concurring) ("I acknowledge the rule requiring clear statement of waivers of sovereign immunity and I agree that the rule applies even to determination of the scope of explicit waivers."); United States v. Nordic Vill., Inc., 503 U.S. 30, 35 (1992) (Scalia, J.) (applying canon to hold that the Bankruptcy Code does not waive the sovereign immunity of the United States from an action seeking monetary relief in bankruptcy); Blatchford v. Native Village of Noatak, 501 U.S. 775, 786 (1991) (Scalia, J.) (applying the canon to hold that a statute granting federal jurisdiction over suits brought by Indian tribes did not abrogate the states' sovereign immunity from suit).

[61] *See, e.g.*, Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 128 S. Ct. 2326, 2336-38 (2008) (Thomas, J.) (maintaining that Congress's intent must be clearly expressed before the Court will interpret a federal statute to exempt a debtor from state taxation); BFP v. Resolution Trust Corp., 511 U.S. 531, 544 (1994) (Scalia, J.) (refusing to interpret a statute "[t]o displace traditional state regulation" unless Congress's intent to do so was clear from the statute).

[62] *See, e.g.*, South Dakota v. Bourland, 508 U.S. 679, 686-87 (1993) (Thomas, J.) (asserting that the Court will not interpret a statute to abrogate the treaty rights of Indians

application of the law,[63] and the presumption against retroactivity.[64] Textualists also read statutes against certain background assumptions that function much like substantive canons: they read mens rea requirements and common law defenses into "otherwise unqualified criminal statutes" and they assume that all federal statutes of limitation, even if unqualified, are subject to equitable tolling.[65]

Substantive canons are in no tension with faithful agency insofar as they are used as tie breakers between equally plausible interpretations of a statute. Textualists have no difficulty taking policy into account when language is ambiguous. Statutory ambiguity is essentially a delegation of policymaking authority to the governmental actor charged with interpreting a statute.[66] When Congress has delegated resolution of statutory ambiguity to the courts, it is no violation of the obligation of faithful agency for a court to exercise the discretion that Congress has given it.[67] In this situation, a judge applying a canon like lenity to implement unclear text is not deviating from her best understanding of Congress's instructions; the best understanding of Congress's instructions is that Congress left the problem to her. There is no reason that judges should be foreclosed from relying on extra-statutory policies like fairness to the accused in exercising their discretion.

Substantive canons are in significant tension with textualism, however, insofar as their application can require a judge to adopt something other than

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unless "Congress clearly express[es] its intent to do so"); County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992) (Scalia, J.) ("When we are faced with . . . two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" (quoting Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985)) (alteration in the original)).

[63] *See, e.g.*, Small v. United States, 544 U.S. 385, 399 (2005) (Thomas, J., dissenting); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in the judgment).

[64] Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 946 (1997) (Thomas, J.) (applying this "time honored presumption"); Landgraf v. USI Film Prods., 511 U.S. 244, 286 (1994) (Scalia, J., concurring in the judgment) ("I of course agree with the Court that there exists a judicial presumption, of great antiquity, that a legislative enactment affecting substantive rights does not apply retroactively absent *clear statement* to the contrary."); Diaz v. Shallbetter, 984 F.2d 850, 853 (7th Cir. 1993) (Easterbrook, J.) (applying canon to preclude "retroactive change of a time limit" that would alter the rules for pending cases).

[65] Manning, *supra* note 5, at 2465-67.

[66] *Cf.* Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 843-44 (1984) (treating statutory ambiguity as a delegation of gap-filling authority to an administrative agency).

[67] *Cf.* Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) ("[A] certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine – up to a point – how small or large that degree shall be.").

the most textually plausible meaning of a statute.[68] Textualists cannot justify the application of substantive canons on the ground that they represent what Congress would have wanted, because the foundation of modern textualism is its insistence that congressional intent is unknowable.[69] And while textualists do not believe that language should be pushed for any meaning it can bear,[70] many substantive canons require judges to do just that. A judge applying a substantive canon often exchanges the best interpretation of a statutory provision for a merely bearable one. In doing so, 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.[71]

Judges who depart from the most textually plausible interpretation of statutory language function as something other than faithful agents of Congress. Depending on the purpose served by a particular canon, a judge might function as a promoter of constitutional values (as she may in applying the federalism canons), a protector of international law (as she may in applying the *Charming Betsy* canon), or as a guardian of fairness (as she may in applying the rule of lenity). But whatever role she assumes, it is not that of the faithful agent. Her loyalty runs not only to Congress, but also to the values that the particular substantive canon seeks to promote.

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[68] Because this Article focuses on the federal courts' role as faithful agents of Congress, it does not consider the distinct issues raised by the federal courts' application of substantive canons in the interpretation of state statutes. *Cf.* William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 836 n.14 (2001) (questioning whether federal courts have the authority to apply the avoidance canon in the interpretation of state statutes).

[69] *See supra* notes 5-7 and accompanying text.

[70] SCALIA, *supra* note 7, at 23 ("A text should not be construed strictly, and it should not be construed leniently; rather, it should be construed reasonably, to include all that it fairly means."). Justice Scalia's dissent in *Smith v. United States*, 508 U.S. 223 (1993), is an example of the textualist approach to language. There, Justice Scalia protested that a statutory prohibition on "us[ing] a firearm" did not apply to a defendant who uses a firearm for any purpose, including trading an unloaded firearm for drugs. While the dictionary definition of "use" would permit this broad reading, Justice Scalia argued that the word should be read in context rather than pushed for any meaning it could bear. He said that, understood in context, the statute prohibited using a gun as it is normally used: as a weapon. *Id.* at 241-42 (Scalia, J., dissenting); *see also* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 61 (1988) ("Meaning comes from the ring the words would have had to a skilled user of words at the time, thinking about the same problem.").

[71] *Cf.* Manning, *supra* note 2, at 124 ("If textualists believe, moreover, that statutes mean what a reasonable person would conventionally understand them to mean, then applying a less natural (though still plausible) interpretation is arguably unfaithful to the legislative instructions contained in the statute.").

Substantive canons push textualists to think harder about the judicial role in statutory interpretation.[72] Why are judges authorized to employ any substantive canon?[73] Assuming they possess such power, why are they authorized to employ some canons (like avoidance) but not others (like construing remedial statutes broadly)? If the Constitution, properly interpreted, dictates that a judge's only role in statutory interpretation is to implement congressional commands, then textualists should conclude that substantive canons are inconsistent with the constitutional structure and discard them. Alternatively, if the Constitution leaves room for judges, in certain circumstances, to function as something other than Congress's faithful agents, then textualists must identify the constitutional basis of this power and explain why it permits the application of some canons but not others.

Thus far, textualists have noted the problem but reserved it. For example, Manning has expressed appreciation for the way in which avoidance and clear statement rules "mitigate the textualists' strict focus on the conventional meaning of the enacted text," but he has simultaneously acknowledged that "it is unclear how comfortably they fit with the most basic textualist assumptions."[74] Justice Scalia is more openly skeptical. He laments:

> But whether these dice-loading rules are bad or good, there is also the question of where the courts get the authority to impose them. Can we really just decree that we will interpret the laws that Congress passes to mean more or less than what they fairly say? I doubt it.[75]

The remainder of this Article examines whether this doubt is warranted.

II. SUBSTANTIVE CANONS IN HISTORY

History has been a focal point in the debate about faithful agency. Dynamists have argued that early federal courts, following the practice of their English forebears, exercised a broad equitable power to expand and contract the reach of otherwise plain statutory text. Textualists have responded that early federal courts broke from the English practice and embraced the norm of

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[72] As discussed above, the application of substantive canons poses a similar dilemma for purposivists. *See supra* note 25.

[73] *Cf.* Bradley, *supra* note 41, at 484 (asking, with respect to *Charming Betsy*, "[*W*]*hy* U.S. courts try to construe statutes to avoid inconsistencies with international law. Where do they get the authority to apply such a rule? And why this rule and not others – for example, a rule that federal statutes should be construed so as not to be inconsistent with French law, or Talmudic law, or Plato's 'Laws'?"); Nagle, *supra* note 51, at 804 (observing that the Court has explained neither the "source of its power to establish clear statement rules" nor "the source of its power to announce any rules of statutory interpretation").

[74] Manning, *supra* note 2, at 125; *see also id.* at 123.

[75] SCALIA, *supra* note 7, at 28-29; *see also id.* at 28; *cf.* Eskridge, *supra* note 2, at 1088 ("From a new textualist perspective the malleability and evolution of the canons ought to be alarming.").

faithful agency.[76] As stated in Part I, I find the latter account of the history more persuasive. Yet historical work remains. Even while disavowing a broad authority to disregard statutory text, early federal courts may have asserted a narrower authority to shade it through the application of substantive canons. The question whether they did so is an important one. Federal judges plainly assert such authority today, even while simultaneously and overwhelmingly characterizing themselves as Congress's faithful agents. If early federal judges behaved similarly, that is evidence that our judicial system has long tolerated the uneasy relationship between substantive canons and legislative supremacy – a matter of interest not only to those inclined to weigh history heavily in constitutional interpretation, but for all who value the insights that tradition can provide in that enterprise.[77]

This Part contributes to the historical debate about legislative supremacy and judicial power with a systematic study of the way that early generations of judges deployed substantive canons. It is important to be clear at the outset that this Part does not aim to describe the original public meaning of "the judicial Power" as it related to statutory interpretation in 1787. Previous historical work has uncovered no evidence that there was any settled view about acceptable norms of interpretation at the time of the Constitution's ratification.[78] Nor was the scope of the judicial power to interpret statutes settled immediately after federal courts opened their doors. Federal dockets were small and federal statutes were few. The relationship between the federal courts and Congress in matters of statutory interpretation was one worked out over time as judges "liquidated" the meaning of the open-ended term "the judicial Power."[79] The prior studies of faithful agency upon which I build have not limited themselves to the period before 1800,[80] and I do not do so here. Instead, I focus on the period between 1789 and 1840 – a sufficient amount of time for patterns to develop with respect to norms of statutory interpretation.

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[76] *See supra* note 17 and accompanying text.

[77] *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (Frankfurter, J., concurring) ("It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.").

[78] John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1670-71 (2001) ("[N]either Professor Eskridge nor I have been able to find significant discussion of the norms of interpretation in the ratifying conventions as such. . . . The hard reality is that neither the framers nor the ratifiers systematically addressed, much less decisively resolved, the question of appropriate interpretive norms.").

[79] *See* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 521 (2003) (arguing that the founders "did not consider the Constitution's meaning to be fully settled at the moment it was written," but that they expected subsequent interpreters to settle its meaning).

[80] *See* Manning, *supra* note 2, at 89-102 (tracing the Marshall Court's invocations of faithful agency and the equity of the statute); Yoo, *supra* note 16, at 1615-29.

A description of my methodology follows. I read every case decided during this period by any federal court in which the court applied any kind of canon of interpretation.[81] In addition to reading the cases, I consulted pre-founding English and post-founding American treatises on statutory interpretation to determine how canons were perceived outside of the courts. After reading the materials, I chose to focus on six canons: the rule of lenity, *Charming Betsy*, avoidance, the presumption against retroactivity, the sovereign immunity clear statement rules, and the Indian canon.[82] I chose these canons for several reasons: they figure prominently in modern debates about statutory interpretation; they are among the canons that textualists embrace; and they are among the canons identified by federal judges during the first fifty years of the Republic.[83] Some of the substantive canons discussed in this Part surfaced in the early nineteenth century but evolved over time, either by shifting in formulation, being applied to new situations, or becoming significantly more entrenched in the legal system.[84] To better understand the canons as courts apply them today, I traced them, where relevant, beyond 1840 to determine when they took their current form.

The historical record reveals that federal courts willingly applied substantive canons. Many of these canons, like the "equity of the statute" doctrine they ultimately abandoned, had their roots in the English common law. In contrast to what happened to the equity of the statute doctrine, however, federal courts did not retreat from substantive canons. On the contrary, they not only transplanted canons from the English common law, but also adopted new ones to deal with challenges faced by the young nation. While there were debates

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[81] I did not include state cases in this study because state constitutions often distribute power differently than does the United States Constitution, making the behavior of state judges a less reliable gauge of the scope of federal judicial power.

[82] For the sake of completeness, the end of Section A briefly describes other substantive canons commonly discussed today that appear in the federal reporters between 1789 and 1840. *See infra* Part II.A.7.

[83] I have deliberately omitted the absurdity doctrine and the "equity of the statute" doctrine from this historical survey, given the exhaustive study of those doctrines already undertaken by others. *See* sources cited *supra* notes 2, 47. Because my project concerns substantive canons, I also put to one side the many cases during this period in which federal courts employed linguistic canons.

[84] For example, the *Charming Betsy* canon surfaced in the early 1800s but was not applied with any regularity until the twentieth century. *See infra* Part II.A.2. The avoidance canon surfaced in the 1800s, most clearly in the opinions of Justice Story, but was not solidified in the interpretive lexicon until the late nineteenth century. *See infra* Part II.A.3. The Indian canon emerged in the interpretation of treaties and did not shift to the statutory context until the late nineteenth century. *See infra* Part II.A.6. The basic principle that the sovereign is exempt from its own statutes is of ancient origin, but was not applied to waivers and abrogations of sovereign immunity until the twentieth century. *See infra* Part II.A.5. Of the six canons discussed, the rule of lenity and the presumption against retroactivity have remained the most consistent over time. *See infra* Parts II.A.1, II.A.4.

about the legitimacy of the practice of equitable interpretation, there were none about the legitimacy of deploying substantive canons. All parties – the courts, those who argued before them, and informed observers – assumed that courts could and should employ substantive canons to assist their interpretation of federal statutes.

To be sure, the historical acceptance of substantive canons does not settle the question of their legitimacy. There are ambiguities in the record, and in any event, while history can inform the resolution of constitutional questions, it does not by itself decide them. One must also consider whether the use of substantive canons is consistent with the constitutional structure.[85] That said, history casts valuable light on the problem of substantive canons, for their long pedigree makes it difficult to dismiss their use as fundamentally inconsistent with the limits that the Constitution imposes upon the exercise of judicial power.

Section A of this Part recounts how early federal courts employed an array of substantive canons, and continued to do so even after a sharpened understanding of the constitutional structure caused them largely to abandon the practice of equitable interpretation. Section B explores some of the implications of the historical evidence for the textualist approach to substantive canons.

A. *Stories of Well-Known Substantive Canons*

This Section traces the history of six substantive canons in the post-founding era: the rule of lenity, *Charming Betsy*, avoidance, the presumption against retroactivity, the sovereign immunity clear statement rules, and the Indian canon. It identifies the origin of each; the extent to which early federal courts applied it; the rationale, if any, they identified for it; and the degree to which courts used it to deviate from what they otherwise characterized as the best interpretation of the text.

1. Lenity

The maxim that penal statutes should be narrowly construed is one of the oldest canons of interpretation. It appears, for example, in the sixteenth century treatise *A Discourse upon the Exposicion and Understandinge of Statutes*, a book described by its editor as "the earliest treatise yet brought to light on the interpretation of statutes in England."[86] Penal statutes should be

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[85] *See infra* Part III.

[86] Samuel E. Thorne, *Preface* to A DISCOURSE UPON THE EXPOSICION AND UNDERSTANDINGE OF STATUTES, at v (Samuel E. Thorne ed., Lawbook Exchange, Ltd. 2003) (1942) [hereinafter DISCOURSE]. The Thorne edition is based upon two copies written early in Queen Elizabeth's reign, which extended from 1558 until 1603. According to Thorne, "the history of statutory interpretation begins in the sixteenth century, after the Year Books had come to a close and the great outburst of legislation that marks the reign of Henry VIII had been concluded." Samuel E. Thorne, *Introduction* to DISCOURSE, *supra*, at

construed strictly, the *Discourse* explains, "for the lawe alwaies favoureth hym that goeth to wracke, nor it will not pulle him on his nose that is on his knees."[87] As this explanation reveals, the rule of lenity was not grounded in any fiction about Parliament's presumed intent; rather, it was unabashedly grounded in a policy of tenderness for the accused. In fact, lenity is commonly acknowledged to have been a mechanism that English judges employed to counter the brutality of then-existing criminal law.[88] Blackstone explains the way the maxim was used to thwart Parliament:

> [B]y the statute . . . stealing sheep, *or other cattle*, was made felony without benefit of clergy. But these general words, "or other cattle," being looked upon as much too loose to create a capital offence, the act was held to extend to nothing but mere sheep. And therefore, in the next sessions, it was found necessary to make another statute . . . extending the former to bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs, by name.[89]

Insofar as judges applied the rule of lenity to relieve defendants from harsh punishments that Parliament clearly intended to impose, the rule was in significant tension with parliamentary supremacy. Nonetheless, the rule became an entrenched part of the English approach to statutory interpretation.

Schooled in the English tradition, American judges applied the principle of lenity from the start.[90] Federal judges cited it as early as 1794,[91] and as federal dockets increased, so did references to lenity.[92] Notably, the courts did not

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3. He claims that the *Discourse* was written prior to 1571, and probably prior to 1567, when the separation of judicial and parliamentary power was bringing the problem of statutory interpretation into focus. "This short tract," he claims, "thus represents perhaps the earliest attempt to deal with a difficulty that was then presenting itself only vaguely but was to become increasingly sharper and more troublesome – the preservation of a balance between parliamentary authority and the administration of justice." *Id.* at 11.

[87] DISCOURSE, *supra* note 86, at 154-55.

[88] *See* Price, *supra* note 40, at 897 (recounting lenity's origins); *see also* G.A. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES § 329, at 452 (Jersey City, N.J., Frederick D. Linn & Co. 1888).

[89] 1 WILLIAM BLACKSTONE, COMMENTARIES *88.

[90] Indeed, a review of early federal case law leaves one with the distinct impression that lenity was the most commonly applied substantive canon of construction. My searches yielded far more cases applying the rule of lenity than any other canon.

[91] The earliest case invoking the doctrine of lenity appears to be *Bray v. The Atalanta*, 4 F. Cas. 37, 38 (D.S.C. 1794) (No. 1819) ("[I]t is a penal law and must be construed strictly.").

[92] The rule was applied not only to criminal statutes, but also to civil statutes considered penal by virtue of their stiff penalties. For example, the rule of lenity was routinely applied to forfeiture statutes. *E.g.*, Schooner Paulina's Cargo v. United States, 11 U.S. (7 Cranch) 52, 67-68 (1812); Shipp v. Miller's Heirs, 15 U.S. (2 Wheat.) 316, 325 (1817); Carver v. Astor, 29 U.S. (4 Pet.) 1, 92-93 (1830); Ronkendorff v. Taylor's Lessee, 29 U.S. (4 Pet.) 349, 357, 359 (1830); United States v. Eighty-Four Boxes of Sugar, 32 U.S. (7 Pet.) 453,

generally justify lenity with reference to presumed legislative intent – i.e., they did not claim to be applying lenity because they believed that Congress would have wanted them to do so.[93] Instead, they justified lenity as had their English forebears: on grounds of fairness to the accused.[94] Justice Livingston, riding circuit, explained one aspect of this policy:

> For although ignorance of the existence of a law be no excuse for its violation, yet if this ignorance be the consequence of an ambiguous or obscure phraseology, some indulgence is due to it. It should be a principle of every criminal code, and certainly belongs to ours, that no person be adjudged guilty of an offence unless it be created and promulgated in terms which leave no reasonable doubt of their meaning.[95]

Fairness, in other words, demands that the accused be on clear notice of what the law proscribes.

While early federal courts embraced the rule of lenity, they were nonetheless at pains to identify its limits. As Chief Justice Marshall put it:

> The maxim, that penal laws are to be construed strictly, has never been understood, by me at least, to imply, that the intention of the legislature, as manifested by their words, is to be overruled; but that in cases where the intention is not distinctly perceived, where, without violence to the words or apparent meaning of the act, it may be construed to embrace or exclude a particular case, where the mind balances and hesitates between the two constructions, the more restricted construction ought to prevail;

462-63 (1833); The Enterprise, 8 F. Cas. 732, 734 (Livingston, Circuit Justice, C.C.D.N.Y. 1810) (No. 4499); Six Hundred and Fifty-One Chests of Tea v. United States, 22 F. Cas. 253, 257 (Thompson, Circuit Justice, C.C.S.D.N.Y. 1826) (No. 12,916); United States v. Open Boat, 27 F. Cas. 354, 356 (Story, Circuit Justice, C.C.D. Me. 1829) (No. 15,968); Swift v. The Happy Return, 23 F. Cas. 560, 561 (D. Pa. 1799) (No. 13,697); Knagg v. Goldsmith, 14 F. Cas. 740, 742 (E.D. Pa. 1831) (No. 7872); *see also* ENDLICH, *supra* note 88, § 331, at 456 ("It is immaterial, for the purpose of the application of the rule of strict construction, whether the proceeding prescribed for the enforcement of the penal law be criminal or civil.").

[93] For an exception, see *Schooner Paulina's Cargo*, 11 U.S. (7 Cranch) at 67-68 ("What follows [in the statute] is expressed with some confusion and would not seem to constitute the most essential part of the sentence. It cannot be believed that the legislature could intend to inflict so heavy a forfeiture under such cloudy and ambiguous terms.").

[94] *See, e.g.*, United States v. Mann, 26 F. Cas. 1153, 1157 (Story, Circuit Justice, C.C.D.N.H. 1812) (No. 15,718); United States v. Wilson, 28 F. Cas. 699, 709 (Baldwin, Circuit Justice, C.C.E.D. Pa. 1830) (No. 16,730) ("[The rule of lenity] is founded on the tenderness of the law for the rights of individuals . . . ."). For the suggestion that lenity also serves to reinforce the constitutional separation of powers, see *infra* note 103.

[95] *The Enterprise*, 8 F. Cas. at 734; *see also* United States v. Thirty-One Boxes, etc., 28 F. Cas. 56, 59 (S.D.N.Y. 1833) (No. 16,465a) ("It is believed no sound administration of penal law can permit a range so unlimited and hazardous to language of a very equivocal import.").

> especially in cases where the act to be punished is in itself indifferent, and is rendered culpable only by positive law.[96]

This insistence upon legislative supremacy is a constant refrain in the case law regarding the canon. Courts repeatedly emphasized that lenity could never overcome the ordinary meaning of a statute;[97] on the contrary, the principle applied only in the event of ambiguity.[98] Moreover, saying that ambiguity justified the application of lenity did not mean that a court had recourse to the rule whenever a narrower interpretation was plausible. Over and over again, courts stressed that they were obliged to choose the best, not the narrowest, interpretation of a statute.[99] The upshot is that although lenity was almost

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[96] The Adventure, 1 F. Cas. 202, 204 (Marshall, Circuit Justice, C.C.D. Va. 1812) (No. 93).

[97] *Ronkendorff*, 29 U.S. (4 Pet.) at 361; The Hawke, 26 F. Cas. 233, 234-35 (D.S.C. 1794) (No. 15,331); *The Enterprise*, 8 F. Cas. at 734 ("When the sense of a penal statute is obvious, consequences are to be disregarded; but if doubtful, they are to have their weight in its interpretation."); *Wilson*, 28 F. Cas. at 709; The Nymph, 18 F. Cas. 506, 508 (Story, Circuit Justice, C.C.D. Me. 1834) (No. 10,388).

[98] United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95-96 (1820); *see also* Prescott v. Nevers, 19 F. Cas. 1286, 1288-89 (Story, Circuit Justice, C.C.D. Me. 1827) (No. 11,390) (applying lenity to choose between two interpretations, "one of which satisfies the terms, and stops at the obvious mischief provided against, and the other goes to an extent, which may involve innocent parties in its penalties"); United States v. Shackford, 27 F. Cas. 1038, 1039 (Story, Circuit Justice, C.C.D. Me. 1830) (No. 16,232) (asserting that when "either of the two constructions may be adopted, and each tallies with the language, and interferes with no known policy of the act, that ought to be adopted which is most liberal to the citizen, and burthens him with the least restraints").

[99] United States v. Palmer, 16 U.S. (3 Wheat.) 610, 628-29 (1818) (refusing to apply lenity when the best construction of the statute included the offense, even though the defendant's proposed narrower construction was grammatically possible); The Emily, 22 U.S. (9 Wheat.) 381, 388 (1824) ("In construing a statute, penal as well as others, we must look to the object in view, and never adopt an interpretation that will defeat its own purpose, if it will admit of any other reasonable construction."); Am. Fur Co. v. United States, 27 U.S. (2 Pet.) 358, 367 (1829) (maintaining that lenity does not justify the adoption of the most lenient interpretation the language will bear, for "even penal laws . . . ought not be construed so strictly as to defeat the obvious intention of the legislature"); United States v. Bailey, 34 U.S. (9 Pet.) 238, 256 (1835) (choosing the best construction of a statute over a narrower, plausible one); The Industry, 13 F. Cas. 35, 36 (Story, Circuit Justice, C.C.D. Mass. 1812) (No. 7028) (refusing to apply lenity where narrow construction was a plausible, but not the best, interpretation of a statute); United States v. Hare, 26 F. Cas. 148, 156 (C.C.D. Md. 1818) (No. 15,304) (maintaining that even in the face of ambiguity, when lenity applies, it cannot be applied to undermine the statutory scheme); United States v. Moulton, 27 F. Cas. 11, 14 (Story, Circuit Justice, C.C.D. Mass. 1830) (No. 15,827) ("The natural sense of the terms of the act ought to be adopted unless the context affords clear proof of some more restrictive application of them."); United States v. Winn, 28 F. Cas. 733, 734 (Story, Circuit Justice, C.C.D. Mass. 1838) (No. 16,740) ("The most restricted sense, then, is not as a matter of course to be adopted as the true sense of the statute, unless

surely the most frequently discussed canon during the first fifty years of the federal courts, its use did not often change the result of a case.[100]

This vehement insistence on the importance of legislative intent to the interpretation of even penal statutes likely reflects an attempt on the part of early federal courts to distance themselves from lenity's rebellious reputation. While lenity began as an open effort on the part of English courts to curb parliamentary harshness, the courts of the United States denied such ambition. In *United States v. Wiltberger*, the Court explained that while common law courts may have subverted legislative intent in the interests of lenity, federal courts took a different view:

> It is said, that notwithstanding [the rule of lenity], the intention of the law maker must govern in the construction of penal, as well as other statutes. This is true. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction.[101]

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it best harmonizes with the context, and stands best with the words and with the mischiefs to be remedied by the enactment."); The Harriet, 11 F. Cas. 588, 589 (Story, Circuit Justice, C.C.D. Me. 1840) (No. 6099) (maintaining that lenity did not justify the court in choosing the narrower, though plausible, interpretation over the best interpretation).

[100] Writing in 1857, Theodore Sedgwick observed that the rule of lenity

> has in modern times been so modified and explained away, as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment; the courts refusing on the one hand to extend the punishment to cases which are not clearly embraced in them, and on the other, equally refusing by any mere verbal nicety, forced construction, or equitable interpretation, to exonerate parties plainly within their scope.

THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 326 (New York, J.S. Voorhies 1857).

[101] United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95-96 (1820). Consider also the argument of the United States in *United States v. Moulton*:

> In the United States, where the laws are not written in blood, and where the people are governed by a mild and merciful system established by themselves, there has been less disposition in the courts than in England, to favour fanciful constructions of penal statutes enabling offenders to elude justice. . . . In the supreme court of the United States, as well as in this court, it has been declared, that though penal laws are to be construed strictly, they are not to be construed so as to defeat the obvious intention of the legislature.

In other words, the principle of lenity had been modified to render its use consistent with faithful agency. In fact, some courts characterized lenity as a tool for curbing themselves, rather than as a tool for curbing Congress. As some judges told it, the point of lenity was to prevent courts from expanding penal statutes beyond their terms to further the statute's apparent purpose. "[W]hile it is said that penal statutes are to receive a strict construction," Justice Livingston explained, "nothing more is meant than that they shall not, by what may be thought their spirit or equity, be extended to offences other than those which are specially and clearly described and provided for."[102] The

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27 F. Cas. at 13. Justice Story, who decided the case on circuit, accepted the United States' argument, emphasizing that

> [C]ourts of law, in cases of capital felonies, have been very astute, perhaps unjustifiably so, to escape from the literal meaning of the words, and to create conjectural exceptions. Such a proceeding, if it may be properly allowed in cases affecting life, is wholly inapplicable to cases of mere misdemeanors, and to other cases not capital.

Id. at 14; *see also* United States v. Chaloner, 25 F. Cas. 392, 393 (D. Me. 1831) (No. 14,777).

[102] *The Enterprise*, 8 F. Cas. at 734; *see also* Schooner Paulina's Cargo v. United States, 11 U.S. (7 Cranch) 52, 61 (1812) (maintaining that while courts must effect legislative intention in construing penal statutes, they may not extend the reach of a penal statute "for the purpose of effecting legislative intention"); *Wiltberger*, 18 U.S. (5 Wheat.) at 96 ("It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."); United States v. Morris, 39 U.S. (14 Pet.) 464, 475 (1840); United States v. Mann, 26 F. Cas. 1153, 1157 (Story, Circuit Justice, C.C.D.N.H. 1812) (No. 15,718) ("We cannot assume a jurisdiction to moderate the promulgated sentence of the legislature, neither ought we to increase its severity by enlarging doubtful expressions."); United States v. Open Boat, 27 F. Cas. 354, 357 (Story, Circuit Justice, C.C.D. Me. 1829) (No. 15,968) (asserting that lenity prevents courts from usurping legislative authority by extending a penal statute to encompass crimes within its mischief but outside of its text); *Wilson*, 28 F. Cas. at 709 (explaining that lenity does not defeat legislative intent, but it does prevent a court from extending the law to encompass crimes within the mischief, but beyond the provisions, of a law); *The Nymph*, 18 F. Cas. at 507 (claiming that lenity constrains a court from "enlarg[ing] penal statutes by implication," but does not permit a court "to fritter [legislative intent] upon metaphysical niceties"); *Winn*, 28 F. Cas. at 734 (describing the "true and sober sense" of lenity as meaning not that the narrower construction always prevails, but that "penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport"); Taber v. United States, 23 F. Cas. 611, 613 (Story, Circuit Justice, C.C.D. Mass. 1839) (No. 13,722) (applying the doctrine in order to construe the meaning of "a vessel bound on a foreign voyage"). *But see* United States v. Fairclough, 25 F. Cas. 1037, 1039 (Washington, Circuit Justice, C.C.E.D. Pa. 1823) (No. 15,068) (holding that a court could depart from the literal meaning of a penal statute "when the evident intention of the legislature is different from the literal import of the words employed to express it in").

initial motivation for the rule of lenity was turned on its head as federal courts applied the rule to reinforce, not undermine, the separation of powers.[103]

2. *Charming Betsy*

In *Murray v. Charming Betsy*, John Marshall famously stated that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[104] Marshall applied that principle to a federal statute rendering subject to forfeiture "[a]ny vessel owned, hired, or employed . . . by any person residing within the *United States*, or by any citizen thereof residing elsewhere" that, inter alia, was "voluntarily carried . . . or permitted to proceed to any port within the *French* Republic."[105] The question was whether this statute applied to Jared Shattuck, an American citizen who had spent almost his entire life on Danish soil and who had taken an oath of allegiance to the king of Denmark.[106] Marshall observed that, while the statute applied to American citizens, it applied only to citizens "under [the United States'] protection."[107] Even if he retained his citizenship, Shattuck had relinquished the protection of the United States by swearing allegiance to the Danish king.[108] Presumably in part because extension of the act to persons in Shattuck's position would "affect neutral commerce, further than is warranted by the law of nations,"[109] the Court held Shattuck exempt from the act.[110] The opinion was careful to emphasize, however, that the best reading of the statutory language supported the result.[111]

Although this rule of interpretation is popularly known as the *Charming Betsy* canon, that case was actually not the first to articulate it. At least two earlier federal cases stated the same rule. In the 1800 case *Jones v. Walker*, Chief Justice Jay, riding circuit, argued that it would be "contrary to the laws and practice of civilized nations" to construe a Virginia statute to prohibit British subjects from bringing suit in the courts of Virginia even after the United States and Britain were at peace, and he would not so construe the act if a construction "more consonant to reason and the usage of nations can be

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[103] *Wilson*, 28 F. Cas. at 709 (describing lenity as rooted both in tenderness to the accused and the principle that "it is the legislature and not the court which is to define a crime and ordain the punishment").

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

[105] *Id.* at 118-19.

[106] *Id.* at 65-66.

[107] *Id.* at 118.

[108] *Id.* at 120.

[109] *Id.* at 118.

[110] *Id.* at 120.

[111] *Id.* ("Indeed the very expressions of the act would seem to exclude a person under the circumstances of Jared Shattuck. He is not a person under the protection of the *United States*.").

found."[112] Fortunately for Jay, what he described as "a very obvious" construction consistent with both the statute's text and the law of nations was available.[113] In *Talbot v. Seeman*, decided in 1801, Marshall presaged his own *Charming Betsy* opinion, maintaining that "the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law."[114] *Talbot* is significant because the canon's application in that case, unlike its application in *Jones* or *Charming Betsy*, required the Court to strain against the statutory language.

Talbot was an American captain who recaptured a Hamburgh vessel from French control and claimed that he was entitled to one-half the value of the ship and cargo under a federal statute regulating the salvage payable on ships owned by, inter alia, "citizens or subjects of any nation in amity with the United States, re-taken from the enemy."[115] Because America was at war with France but at peace with Hamburgh, Talbot argued that the situation was squarely within the statute, and Marshall agreed that "[t]he words of the act would certainly admit of this construction."[116] The owners of the vessel protested that their country was at peace with France and that the statute should be limited to the recapture of vessels belonging to a nation engaged with the United States against a *common* enemy.[117] Chief Justice Marshall's opinion for the Court adopted the latter construction because, among other considerations, it rendered the statute consistent with the law of nations, pursuant to which "a neutral is generally to be restored without salvage."[118] Marshall observed:

> The expression used is *the enemy*. A vessel re-taken from the enemy. The enemy of whom? The court thinks it not unreasonable to answer, of both parties. By this construction the act of congress will never violate

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[112] Jones v. Walker, 13 F. Cas. 1059, 1064 (Jay, Circuit Justice, C.C.D. Va. 1800) (No. 7507). *Jones* is different from the other cases discussed in this subsection because the federal court was construing a *state* statute. Even in that context, however, the law of nations canon might be deployed to promote substantive values like the law of nations itself or the role of the political branches of the *federal* government in determining when to breach it.

[113] *Id.* Jay held that British subjects were not altogether precluded from bringing suit in Virginia courts; rather, they were precluded from recovering on debts that they had fraudulently assigned to citizens during the war. This construction "left British subjects precisely under the same, and no other disabilities, than the laws of war and nations had already placed them – the object of the act being only to provide against the evils of fraudulent and collusive assignments." *Id.*

[114] Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 43 (1801).

[115] *Id.*

[116] *Id.*

[117] *Id.* (reasoning that if the statute did not apply, then Talbot was entitled to the lower rate of salvage authorized by the law of nations).

[118] *Id.*

> those principles which we believe, and which it is our duty to believe, the legislature of the United States will always hold sacred.[119]

The Court effectively read the phrase "the enemy" as if it said "their enemy" – a plausible, but not necessarily the most natural, reading of the language. *Talbot*, therefore, is a case in which the "law of nations" canon appears to have influenced, and perhaps even driven, the result.[120]

Unlike the rule of lenity, the *Charming Betsy* canon seems to be an American creation. The only pre-1800 case articulating the rule is *Rutgers v. Waddington*, a well-known 1784 case in which the New York Mayor's Court "construed a state trespass statute [so] as to avoid a conflict with the Treaty of Paris and the law of nations."[121] The rule does not appear to derive from England, as the earliest English cases clearly stating the maxim post-date *Charming Betsy*.[122] To be sure, because the law of nations was considered to be part of the common law, *Charming Betsy* could be rationalized as a specific

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[119] *Id.* at 44.

[120] The same is true of Chief Justice Marshall's opinion for the Court in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), where he read an otherwise unqualified jurisdictional grant impliedly to exempt public ships of war belonging to countries at peace with the United States. Marshall argued that "until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise." *Id.* at 146. It is important to emphasize, however, that when a statute was susceptible to no other interpretation other than one conflicting with the law of nations, the Court considered itself bound to enforce the statute as written. *See* The Schooner Adeline, 13 U.S. (9 Cranch) 244, 287 (1815) (enforcing a statute departing from the law of nations because "the statute is expressed in clear and unambiguous terms"); The Marianna Flora, 24 U.S. (11 Wheat.) 1, 39-40 (1826) (maintaining that "whatever may be the responsibility incurred by the nation to foreign powers, in executing such laws, there can be no doubt that Courts of justice are bound to obey and administer them").

[121] *See* Bradley, *supra* note 41, at 487 (hypothesizing that Marshall may have had *Rutgers* in mind when he decided *Charming Betsy*). In *Rutgers*, the court said that "[t]he repeal of the law of nations, or any interference with it, could not have been in contemplation, in our opinion, when the Legislature passed this statute; and we think ourselves bound to exempt that law from its operation." 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 417 (Julius Goebel ed., 1964).

[122] Bradley, *supra* note 41, at 487-88. The absence of the canon in English treatises addressing statutory interpretation indicates its absence from English practice. Neither the sixteenth century *Discourse* nor Blackstone's *Commentaries* (either in his list of interpretive maxims or in his chapter devoted to the law of nations) mentions anything resembling the rule applied in *Charming Betsy*. *See* 1 BLACKSTONE, *supra* note 89, at *58-92; DISCOURSE, *supra* note 86. Nor is the canon discussed in Giles Jacob's dictionary. 6 GILES JACOB & T.E. TOMLINS, LAW-DICTIONARY: EXPLAINING THE RISE, PROGRESS, AND PRESENT STATE, OF THE ENGLISH LAW 118-23 (Philadelphia, P. Byrne 1811) (devoting a significant section to statutory interpretation). Jacob published the first edition of this book in 1729, and the book was frequently republished thereafter. The 1811 Philadelphia edition is the first American edition.

application of the general maxim that "statutes are to be construed, if possible, not to override the common law."[123] The early American cases, however, do not associate the law of nations canon with the more general common law maxim, nor do the pre-founding English sources discuss the application of the common law maxim to the law of nations.[124] Understood in context, the canon was an innovation upon existing interpretive practice occasioned by the international situation then confronting the young nation.[125] This conclusion is underscored by the fact that *Charming Betsy* has taken on an existence entirely independent of the more general maxim on which it may be modeled.

Neither Jay in *Jones* nor Marshall in *Talbot* and *Charming Betsy* was entirely clear about the canon's rationale. In particular, neither specified whether the canon is supposed to approximate what Congress would have wanted or whether it is designed to further desirable policy. On the one hand, both invoked the language of faithful agency insofar as they cast the canon as a means of effecting legislative intent. As Marshall put it in *Talbot*, avoiding conflict with the law of nations protects "those principles which we believe, and which it is our duty to believe, the legislature of the United States will always hold sacred."[126] On the other hand, even *Talbot* itself seems driven as much by the prudence of avoiding conflict with the law of nations as with discerning what the legislature intended. For example, rather than stating that the court should always presume that Congress intended to be consistent with the law of nations, Marshall announced the maxim by asserting that "it has been urged, and we think with great force, that the law of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations."[127] The emphasis, then, is on the importance of judicial restraint, whether out of respect for the law of nations itself or for the role of the political branches in deciding whether to breach it. The assumption about what Congress would want is almost an afterthought.[128] The bottom line is that these early treatments of the law of nations canon reflect the

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[123] Bradley, *supra* note 41, at 488; *see also id.* at 488 n.44 (describing the argument that the canon might instead derive from the maxim "that the legislature does not intend to exceed its jurisdiction").

[124] *See supra* note 122.

[125] *See* Frederick C. Leiner, *The* Charming Betsy *and the Marshall Court*, 45 AM. J. LEGAL HIST. 1, 18 (2001) ("To the Marshall court, the importance of the *Charming Betsy* case was not the rule of construction generations of lawyers have come to cite . . . but the reinforcement of international law norms at a time when a militarily weak neutral nation with extensive mercantile interests at stake desperately wanted the law respected.").

[126] Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 43-44 (1801); *see also* Jones v. Walker, 13 F. Cas. 1059, 1064 (Jay, Circuit Justice, C.C.D. Va. 1800) (No. 7507) (asserting that "[i]t would be odious to presume that the design of the [Virginia] act" was in conflict with the law of nations).

[127] *Talbot*, 5 U.S. (1 Cranch) at 43.

[128] *Id.* at 44.

same ambivalence about classifying a canon as substantive or linguistic that we see in statutory interpretation discussions today.[129]

The *Charming Betsy* doctrine did not become deeply entrenched in American law the moment Marshall announced it. On the contrary, searches of the federal case law between 1789 and 1840 yield few cases articulating the principle.[130] It was not discussed in nineteenth century treatises that addressed statutory interpretation.[131] Its elusiveness in the eighteenth and nineteenth century case law is consistent with Roger Alford's claim that the canon did not "come into its own" until the 1950s.[132]

3. Avoidance

John Nagle has traced two versions of the avoidance canon in the case law: the "unconstitutionality" canon and the "doubts" canon.[133] The unconstitutionality canon maintains that when one interpretation of a statute would render it unconstitutional, the court should adopt any plausible interpretation that would save it.[134] The doubts canon maintains that when one interpretation of a statute would raise a serious constitutional question, the court should adopt any plausible interpretation of the statute that would avoid

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[129] *See supra* notes 46-51 and accompanying text.

[130] I found only two cases other than those described above: *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) and *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 39-40 (1826). *See supra* note 120.

[131] Nor did James Wilson mention the doctrine in his discourse on the law of nations. 1 JAMES WILSON, THE WORKS OF JAMES WILSON 148-67 (Robert Green McCloskey ed., Belknap Press 1967) (1804). Story's *Conflict of Laws* does not mention the maxim. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, ESPECIALLY IN REGARD TO MARRIAGES, WILLS, SUCCESSIONS, AND JUDGMENTS (Boston, Hilliard, Grey, and Co. 1834). Near the end of the nineteenth century, some treatises were reporting the maxim. *See, e.g.*, ENDLICH, *supra* note 88, § 174, at 239. Henry Campbell Black refers to the principle that "[i]n case of doubt, a statute should be so construed as to harmonize and agree with the rules and principles of international law, and to respect rights and obligations secured by treaties, rather than to violate them." HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 106-07 (2d ed. 1911). Black does not, however, cite *Charming Betsy*; he focused more on treaties.

[132] Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of* Charming Betsy, 67 OHIO ST. L.J. 1339, 1352 (2006). And even while the canon has "come into its own," modern federal courts apply it less often than canons like lenity and avoidance. Alford, for example, says that "the Supreme Court has expressly relied upon the *Charming Betsy* doctrine in approximately a dozen cases in the last one hundred years." *Id.* at 1353. That statistic, however, may be more a function of the frequency with which federal courts interpret statutes arguably infringing upon international law than a measure of judicial devotion to the canon.

[133] John Copeland Nagle, Delaware & Hudson *Revisited*, 72 NOTRE DAME L. REV. 1495, 1496 (1997).

[134] *Id.* at 1496.

that question.[135] The unconstitutionality canon has the longer pedigree; as I will detail below, the canon seems to have emerged in 1814 and matured by the late nineteenth century. The doubts canon surfaced more recently; Nagle identifies the 1909 decision *United States v. Delaware & Hudson*[136] as its genesis and Justice Brandeis's 1936 concurrence in *Ashwander v. TVA*[137] as the opinion that popularized it.[138]

Unsurprisingly, the avoidance canon developed alongside the power of judicial review. As courts solidified this power, they gave assurances that they would exercise it only when they had no alternative. Because the avoidance canon is a consequence of judicial review, it, like *Charming Betsy*, is more an American creation than an English hand-me-down. To be sure, antecedents of the avoidance canon do exist in the English common law. For example, Charles Viner's treatise on English law, first published sometime between 1742 and 1757, provides that "[w]ords of a statute ought not to be interpreted to *destroy natural justice*."[139] Insofar as English courts occasionally – most notoriously, in *Bonham's Case* – asserted the power to void acts of parliament on the ground that they were inconsistent with natural justice, one might consider this maxim a forerunner of modern avoidance.[140] But in a system with neither a written constitution nor an entrenched tradition of judicial review, there was little need for a canon of interpretation instructing judges to construe statutes so as to avoid striking them down for inconsistency with the nation's constitutive law. The avoidance canon was fashioned by American courts to cope with the power they possessed as a consequence of the newly adopted United States Constitution.[141]

It is important to emphasize that not all early pronouncements that courts should avoid judicial review articulate a canon of statutory interpretation. Consider Justice Chase's observation in 1796:

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[135] *Id.* at 1496-97.

[136] 213 U.S. 366 (1909).

[137] 297 U.S. 288, 348 (1936) (Brandeis, J. concurring).

[138] Nagle, *supra* note 133, at 1497 (citing *Ashwander*, 297 U.S. 288).

[139] 19 CHARLES VINER, GENERAL ABRIDGMENT OF LAW AND EQUITY, ALPHABETICALLY DIGESTED UNDER PROPER TITLES; WITH NOTES AND REFERENCES TO THE WHOLE 528 (London, 1793) (1744). Indeed, at some level, any maxim instructing a court to avoid an undesirable interpretation of a statute might be thought a forerunner of the avoidance canon. For example, courts were instructed to avoid interpretations that rendered a statute absurd or retroactive. FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES; AND THEIR RULES OF CONSTRUCTION 80 (Philadelphia, John S. Littell 1835). But while such canons illustrate a common interpretive technique of avoiding the undesirable, none is an effort to avoid the particular undesirable consequence, namely conflict with the Constitution, with which the avoidance canon is concerned.

[140] Bonham's Case, (1610) 8 Co. Rep. 133 b, 77 Eng. Rep. 646, 652 (K.B.).

[141] *Cf.* ENDLICH, *supra* note 88, § 178, at 246 (describing avoidance canon as "[a] presumption of much importance in this country, but, of course unknown in England, where the courts cannot question the authority of Parliament, or assign any limits to its power").

> As I do not think the tax on carriages is a *direct* tax, it is unnecessary, *at this time*, for me to determine, whether the court *constitutionally* possesses the power to declare an act of Congress *void*, on the ground of its being made contrary to, or in violation of, the constitution; but if the court have such power, I am free to declare, that I will never exercise it, *but in a very clear case.*[142]

A "very clear case" might mean when a statute is susceptible to none but the unconstitutional interpretation, when the Constitution is susceptible to no other interpretation but the one condemning the statute, or both. In any event, the explanation is as much a theory of constitutional as statutory interpretation. Explanations similar to Justice Chase's abound in the early cases.[143] Indeed, the "very clear case" rationale is the most common formulation of the general proposition that courts should avoid striking down statutes for unconstitutionality.

It appears to have been Justice Story who first and most clearly articulated avoidance as a canon of statutory interpretation. The earliest statement of the canon appears to be in a case decided on circuit in 1814 involving a potential conflict between a New Hampshire statute and the New Hampshire Constitution.[144] He said: "But there is a construction, which although not

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[142] Hylton v. United States, 3 U.S. (3 Dall.) 171, 175 (1796).

[143] *See, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798) ("[A]s the authority to declare [a statute] void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case."); Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 19 (1800) (Paterson, J.) ("[T]o authorise this court to pronounce any law to be void, it must be a clear, unequivocal breach of the constitution; not a doubtful and argumentative implication."); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810) ("But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."); Ogden v. Saunders, 25 U.S. (2 Wheat.) 213, 294 (1827) (Thompson, J.) (articulating a "clear conflict" rule); Adams v. Storey, 1 F. Cas. 141, 142 (Livingston, Circuit Justice, C.C.D.N.Y. 1817) (No. 66) ("If, then, by any fair and reasonable interpretation, where the case is at all doubtful, the law can be reconciled with the constitution, it ought to be done, and a contrary course pursued only, where the incompatibility is so great as to render it extremely difficult to give the latter effect, without violating some provision of the former."); Bonaparte v. Camden & A.R. Co., 3 F. Cas. 821, 827-28 (Baldwin, Circuit Justice, C.C.D.N.J. 1830) (No. 1617) (requiring a "clear conviction" that the law in question is in conflict with the constitution of the state); United States v. The William, 28 F. Cas. 614, 616-20 (D. Mass 1808) (No. 16,700) (defending the power of judicial review, but providing that it ought to be exercised to hold a law void only in cases of exceedingly clear conflict).

[144] Soc'y for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 769 (Story, Circuit Justice, C.C.D.N.H. 1814) (No. 13,156). There are earlier cases that, while not stating the avoidance canon directly, do generally caution that courts should, where possible, construe statutes to be consistent with the Constitution. *See, e.g.*, Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 14 (1800) ("[T]he 11th section of the judiciary act can, and

favored by the exact letter, may yet well stand with the general scope of the statute, and give it a constitutional character. . . . In deference to the legislature, this construction ought to be adopted, if by law it may."[145] Over a decade later, Justice Story wrote opinions reflecting the same reasoning. In *United States v. Coombs*, he said that if "a just interpretation of the terms" reveals that Congress has exceeded its authority, the Court must hold the statute unconstitutional.[146] But where,

> the section admits of two interpretations, one of which brings it within, and the other presses it beyond the constitutional authority of congress, it will become our duty to adopt the former construction; because a presumption never ought to be indulged, that congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the Court by language altogether unambiguous.[147]

Both of these opinions illustrate Justice Story's belief that while a court may not twist the text beyond what it will bear, [148] a judge ought to eschew the best,

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must, receive a construction, consistent with the constitution."); *see also* United States v. Schooner Betsey and Charlotte, and Her Cargo, 8 U.S. (4 Cranch) 443, 448 (1808) (argument of counsel) ("The 9th section of the judiciary act is to be construed with a reference to the meaning of those expressions in the constitution; and if it cannot, consistently with the force of its terms, be reconciled with the constitution, it must yield to the superior obligation of that instrument.").

[145] *Wheeler*, 22 F. Cas. at 769.

[146] United States v. Coombs, 37 U.S. (12 Pet.) 72, 75 (1838).

[147] *Id.* at 76; *see also* Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 448-49 (1830) ("No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution."); *Ex parte* Randolph, 20 F. Cas. 242, 254 (Marshall, Circuit Justice, C.C.D. Va. 1833) ("No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of a legislative act. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other points, a just respect for the legislature requires, that the obligation of its laws should not be unnecessarily and wantonly assailed.").

[148] The Court similarly emphasized that the plain meaning controls when it applied the English maxim, *see supra* note 139, that statutes should be construed so as to avoid injustice. For example, in *Evans v. Jordan*, Chief Justice Marshall opined:

> That an act ought so to be construed as to avoid gross injustice, if such construction be compatible with the words of the law, will not be controverted; but this principle is never to be carried so far as to thwart that scheme of policy which the legislature has the power to adopt. To that department is confided, without revision, the power of deciding on the justice as well as wisdom of measures relative to subjects on which they have the constitutional power to act. Wherever, then, their language admits of no doubt, their plain and obvious intent must prevail.

8 F. Cas. 872, 873 (Marshall, Circuit Justice, C.C.D. Va. 1813) (No. 4564). When the case went before the Supreme Court on appeal, Justice Washington wrote an opinion similarly expressing the view that it was beyond the power of the Court to alter the plain language of the statute, however just such an alteration might be. Evans v. Jordan, 13 U.S. (9 Cranch)

but unconstitutional interpretation in favor of a less plausible, but constitutional one. The opinions also reflect the general belief that Congress would prefer that a court adopt a saving construction.[149] In both respects, avoidance differs from lenity, which neither permitted a court to deviate from the best construction of statutory language nor purported to justify itself with reference to presumed legislative intent.[150]

The trajectory of the avoidance canon in nineteenth century legal treatises tracks the case law. The canon is not discussed in the earliest treatises that American lawyers consulted for guidance in statutory interpretation.[151] Just as Justice Story appears to have been the vehicle for the canon's entry into the case law, he appears to have been the vehicle for its entry into secondary sources. The canon is memorialized in his *Commentaries to the Constitution*, first published in 1833,[152] and it appears in legal treatises published thereafter.[153] By the end of the nineteenth century, the avoidance canon – at

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199, 202-04 (1815); *see also* Minge v. Gilmour, 17 F. Cas. 440, 444 (Iredell, Circuit Justice, C.C.D.N.C. 1798) (No. 9631) (arguing that a court should construe an act consistently with natural justice, "but, if the words are too plain to admit of more than one construction, and the provisions be not inconsistent with any articles of the constitution, I am of opinion, for the reason I have given, that no court has authority to say the act is void because in their opinion it is not agreeable to the principles of natural justice").

[149] *See* BLACK, *supra* note 131, at 114; ENDLICH, *supra* note 88, § 178, at 246 (describing avoidance canon as rooted in legislative intent); *cf. Minge*, 17 F. Cas. at 444 (urging courts to construe acts to be consistent with natural justice, "it being most probable that, by such construction, the true design of the legislature will be pursued").

[150] *See supra* notes 96-100 and accompanying text.

[151] Because the avoidance canon was not a feature of English common law, *see supra* note 141, it obviously does not appear in commonly used eighteenth century English treatises like Blackstone, Charles Viner, and Giles Jacob. *See* BLACKSTONE, *supra* note 89; 6 JACOB & TOMLINS, *supra* note 122; VINER, *supra* note 139. As for American treatises, no discussion of avoidance appears in St. George Tucker's editorial notes to his edition of Blackstone. *See* BLACKSTONE'S COMMENTARIES, ST. GEORGE TUCKER (Philadelphia, William Young Birch & Abraham Small 1803). James Wilson's *Works* offers only a few observations on statutory interpretation, and none is directed to the principle of avoidance. WILSON, *supra* note 131. Kent's *Commentaries* contains a defense of judicial review, but no discussion of the avoidance canon. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW *243 (Boston, Little, Brown & Co. 1873).

[152] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1772 (1891) (Boston, Hilliard & Gray 1833).

[153] The 1835 American republication of the original 1831 London edition of Dwarris's widely used *Treatise on Statutes* does not include the maxim, *see* DWARRIS, *supra* note 139, but it is significant that the first American edition of the treatise, edited by Platt Potter and published in 1871, does include it. *See* FORUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES; AND THEIR RULES OF CONSTRUCTION 111 n.8 (Platt Potter ed., 1871); *see also* JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION § 90 (Boston, Little, Brown & Co. 1882); BLACK, *supra* note 131, at 110-18; ENDLICH, *supra* note 88, § 178, at 246; SEDGWICK, *supra* note 100, at 312-13.

least the "unconstitutionality" version of it – was a fixture in both case law and commentary.[154] It is notable that all of these treatise writers, like Justice Story himself, described the maxim as a means of effecting the legislature's desire that its laws be constitutional.

4. The Presumption Against Retroactivity

The presumption against the retroactive application of new liability has deep roots, appearing in venerable English sources such as Bracton, Coke, and Blackstone.[155] Distaste for retroactive laws crossed the Atlantic, and in criminal cases, the United States elevated the principle to a constitutional guarantee of freedom from ex post facto laws.[156] In the vast majority of civil cases, protection at the federal level came from the traditional statutory presumption rather than from the Constitution.[157] Federal courts affirmed the canon's validity almost immediately,[158] and it remains a settled interpretive rule today.[159]

The canon's common characterization as a presumption fits insofar as the canon sets a default answer for a question that must be answered with respect to every statute: its temporal scope.[160] That said, early federal courts did more than plug in this presumption to answer a question left open by statutory silence. Federal courts claimed that Congress would have to speak with particular clarity to achieve retroactive application. For example, they asserted that a court must interpret the words of a statute prospectively "unless they are

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[154] *See* Nagle, *supra* note 133, at 1498-99 n.17.

[155] 1 BLACKSTONE, *supra* note 89, at *46; 3 HENRICI DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 181 (George E. Woodbine ed., Samuel E. Thorne trans., Harvard Univ. Press 1968-1977) (1569), *available at* http://hlsl5.law.harvard.edu/bracton; 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 95 (London, E & R Brooke 1797). Civil law writers such as Puffendorf also endorsed the maxim. *See* SEDGWICK, *supra* note 100, at 188-89.

[156] *See* U.S. CONST. art. I, § 9, cl. 3 (forbidding Congress to pass any ex post facto law); *id.* § 10, cl. 1 (providing that no state shall "pass any . . . ex post facto Law").

[157] *Calder v. Bull* put to rest arguments that the Ex Post Facto Clauses applied to civil, as well as to criminal, cases. 3 U.S. (3 Dall.) 386, 390-91, 399-400 (1798). The only constitutional protection against ex post facto laws in civil cases comes from the Contracts Clause. U.S. CONST. art. I, § 10, cl. 1 (forbidding any state to pass a "Law impairing the Obligation of Contracts").

[158] For what appear to be the two earliest references to the rule, see *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (asserting in dicta that "a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties"), and *Ogden v. Witherspoon*, 18 F. Cas. 618, 619 (Marshall, Circuit Justice, C.C.D.N.C. 1802) (No. 10,461).

[159] *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 287-88, 290-94 (1994) (Scalia, J., concurring).

[160] *Cf.* Reynolds v. M'Arthur, 27 U.S. (2 Pet.) 417, 434-35 (1829) (identifying the temporal scope of a statute as a threshold question to its application).

so clear, strong, and imperative, that no other meaning can be annexed to them"[161] or "unless [the law] contained express words to that purpose."[162] In this respect, the canon functions more like a clear statement rule, which lays down a strong presumption that Congress must overcome. It is difficult to say how far early federal courts were willing to push statutory language to escape a retroactive interpretation. It is worth observing, though, that federal courts issued their strongest statements about the canon in cases in which they did not actually apply it.[163] In cases in which they actually applied the canon, courts relied as much on the language of the statute as on the canon in explaining the result.[164]

Federal courts discussing the presumption in the first fifty years of the Republic did not identify a rationale for it. On the one hand, courts may have treated the canon as a proxy for legislative intent insofar as they assumed it to be a background principle against which Congress legislated – it was, after all, an ancient maxim. In this vein, consider Justice Story's characterization of the

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[161] United States v. Heth, 7 U.S. (3 Cranch) 399, 413 (1806) (Paterson, J.).

[162] *Id.* at 414 (Cushing, J.); *see also Schooner Peggy*, 5 U.S. (1 Cranch) at 110 (asserting that a court should "struggle hard" against a retroactive interpretation); Prince v. United States, 19 F. Cas. 1331, 1332 (Story, Circuit Justice, C.C.D. Mass. 1814) (No. 11,425) ("It is a general rule, that statutes are to be construed to operate in futuro, unless from the language a retrospective effect be clearly intended."); Blanchard v. Sprague, 3 F. Cas. 648, 650 (Story, Circuit Justice, C.C.D. Mass. 1839) (No. 1518) (opining that "[retroactive] interpretation is never adopted without absolute necessity; and courts of justice always lean to a more benign construction").

[163] *See Schooner Peggy*, 5 U.S. (1 Cranch) at 110 (implying that the canon counsels a court to deviate from the best interpretation to avoid retroactivity, but holding the canon inapplicable to the present case); *Witherspoon*, 18 F. Cas. at 619 ("I will not say at this time that a retrospective law may not be made; but if its retrospective view be not clearly expressed, construction ought not to aid it. That however is not the objection to this act."); *Blanchard*, 3 F. Cas. at 650 (insisting that a retroactive interpretation should "never [be] adopted without absolute necessity," but holding that retroactive application was not at issue in that case); *see also* Watson v. Mercer, 33 U.S. (8 Pet.) 88, 105, 110 (1834) (refusing to address counsel's argument that the canon requires prospective interpretation "even when [a statute's] language would have borne a different construction" and holding itself bound by state court interpretation).

[164] *See, e.g.*, *Heth*, 7 U.S. (3 Cranch) at 409 (Johnson, J.) (indicating that even apart from the canon, words of the act "point to a future operation"); *id.* at 411 (Washington, J.) (interpreting the act prospectively in reliance only upon language with no reference to the canon); *id.* at 413 (Paterson, J.) (treating the canon as a tie breaker for ambiguous language); *id.* at 414 (Cushing, J.) (describing prospective application as the "general and true intent" of the statute); *see also Reynolds*, 27 U.S. (2 Pet.) at 434-35 (acknowledging the canon but determining that "the language of the statute is entirely prospective"); *Prince*, 19 F. Cas. at 1332 (Story, J.) (applying canon, but also emphasizing that "there is nothing in the wording of this act, which points to a retrospective operation, and the whole intent may be satisfied by restraining it to future cases").

canon as taking words "in the sense which they naturally bear on their face."[165] On the other hand, some explained the rule as a judicial effort to temper laws "objectionable in principle and unjust in practice."[166] Even in the unlikely event that early federal courts had a relatively uniform understanding of why they were applying the canon, the evidence is too scant to justify any conclusion as to what that rationale was.

5. The Sovereign Immunity Clear Statement Rules

Justice Iredell's opinion in *Chisholm v. Georgia*[167] contains an early expression of the canon requiring a clear statement before interpreting a federal law (in that case, the Constitution) to override state sovereign immunity. In considering whether Article III authorizes federal courts to entertain citizen suits against the states, Justice Iredell asserted that "nothing but express words, or an insurmountable implication (neither of which I consider, can be found in this case) would authorise the deduction of so high a power."[168] Two of the other opinions in *Chisholm* seem implicitly to acknowledge the principle insofar as each found the necessary "clear expression" in Article III.[169] The

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[165] 3 STORY, *supra* note 152, § 401, n.a. Indeed, for Story, the prospective operation of legislation is an example of the situation where the words are so clear that "there is generally no necessity to have recourse to other means of interpretation." *Id.* § 401.

[166] SEDGWICK, *supra* note 100, at 202; *see also Watson*, 33 U.S. (8 Pet.) at 105 (argument of counsel) ("In England, where the liberty and security of the subject has no other basis to rest upon than the common law, retrospective legislation is uniformly rejected by her courts of justice."); WILLIAM P. WADE, A TREATISE ON THE OPERATION AND CONSTRUCTION OF RETROACTIVE LAWS, AS AFFECTED BY CONSTITUTIONAL LIMITATIONS AND JUDICIAL INTERPRETATIONS 40 (1880) (describing the rule as "founded upon the recognized injustice of a method of making laws by which the legislature looks backward to discover past errors to be corrected and past grievances to be remedied").

[167] 2 U.S. (2 Dall.) 419 (1793), *superseded by* U.S. CONST. amend. XI.

[168] *Id.* at 450. On the one hand, Article III might be viewed as a federal law abrogating state sovereign immunity. On the other hand, Article III might be viewed as a waiver of state sovereign immunity insofar as states might have consented to defending citizen-suits in federal court by ratifying the Constitution. Either way, modern doctrine would require a clear statement before holding a state amenable to suit in federal court.

[169] *See id.* at 464-66 (Wilson, J.) ("The next question under this head, is, – *Has* the Constitution done so? Did those people mean to exercise this, their undoubted power? These questions may be resolved, either by fair and conclusive deductions, or by direct and explicit declarations. . . . Fair and conclusive deduction, then, evinces that the *people* of the *United States did* vest this Court with jurisdiction over the State of *Georgia*. . . . But, in my opinion, this doctrine rests not upon the legitimate result of fair and conclusive deduction from the Constitution: It is confirmed, beyond all doubt, by the *direct* and *explicit declaration* of the Constitution itself."); *id.* at 467 (Cushing, J.) ("The judicial power, then, is expressly extended to '*controversies between a State and citizens of another State*.'").

remaining two made no mention of it and indeed interpreted Article III in ways that belied the canon's existence.[170]

Apart from *Chisholm*, I found no federal case decided before 1840 mentioning the canon as it applied to either state or federal sovereign immunity. And the discussion of the canon in *Chisholm* primarily involved construction of the Constitution.[171] I found no federal case addressing the question whether a generally applicable *statute* should be interpreted either to waive the sovereign immunity of the United States or abrogate the sovereign immunity of a state. The dearth of case law is not surprising, however, because such questions did not arise during that time period. As John Harrison has explained, "It was taken for granted that the sovereign could not be sued [in its own courts], so the questions that actually came up mainly involved the boundary between impermissible suits against the government and permissible suits against officers and other agents."[172] Litigants simply did not try to sue the federal government qua government, and Congress did not enact statutory waivers of sovereign immunity until the latter half of the nineteenth century.[173]

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[170] Rather than focusing on the showing necessary to overcome sovereign immunity, Justice Blair was at pains to show that legislative policy arguments could not overcome plain text. *See id.* at 451 (Blair, J.) (asserting that the argument against jurisdiction based on the potential unenforceability of the judgment might be deserving of weight in "the construction of doubtful Legislative acts, but can have no force, I think, against the clear and positive directions of an act of *Congress* and of the Constitution"). Chief Justice Jay not only failed to mention the canon, but he applied a competing principle to construe Article III broadly. *See id.* at 476 (Jay, C.J.) ("This extension of power is *remedial*, because it is to settle controversies. It is therefore, to be construed liberally. It is politic, wise, and good that, not only the controversies, in which a State is *Plaintiff*, but also those in which a State is *Defendant*, should be settled; both cases, therefore, are within the reason of the remedy; and ought to be so adjudged, unless the obvious, plain, and literal sense of the words forbid it.").

[171] *See id.* at 430. The question whether the Constitution enables private litigants to sue the states is settled by the Eleventh Amendment. *See* U.S. CONST. amend. XI. The question whether Congress possesses the power to abrogate this baseline immunity in reliance upon its Article I authority, or only in reliance upon its enforcement power under the Reconstruction Amendments, did not arise until much later. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 15 (1989) (Brennan, J., plurality opinion), *overruled by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); Fitzpatrick v. Bitzer, 427 U.S. 445, 455-56 (1976).

[172] John Harrison, *Sovereign Immunity and Congress's Enforcement Powers*, 2006 SUP. CT. REV. 353, 358. Any question about whether a state was suable in its own courts would have been discussed in state cases, and this study concerns only federal cases. State courts, however, operated on the same assumption. *Id.*

[173] The first significant statutory waiver of federal sovereign immunity occurred in 1855, when Congress created the United States Court of Claims for the adjudication of contract disputes with the federal government. Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 530-31 (2008). It was ninety more years before Congress passed the Federal Tort Claims Act, which subjected the federal government to tort liability. *Id.* at 534.

Nor did anyone at the time pay much attention to Congress's power to abrogate the sovereign immunity of a state. According to Harrison, the question "whether Congress could create a cause of action for a private person against a nonconsenting state, seems not to have arisen in the nineteenth century."[174]

That said, eighteenth and nineteenth century courts did face the question whether generally worded statutes applied to the government outside the context of sovereign immunity. In interpreting such statutes, federal courts relied upon an established maxim of English law that Blackstone described as follows:

> I shall only further remark, that the king is not bound by any act of parliament, unless he be named therein by special and particular words. The most general words that can be devised ("any person or persons, bodies politic or corporate, etc.") affect not him in the least, if they may tend to restrain or diminish any of his rights or interests.[175]

This principle by no means originated in Blackstone's time; it appears in, among other sources, Bacon's *Abridgement of the Law*, Bracton's treatise, and the sixteenth century *Discourse upon the Exposicion and Understandinge of Statutes*.[176] Writing from an American standpoint, Justice Story articulated the maxim this way: "It is a general rule in the interpretation of legislative acts not to construe them to embrace the sovereign power or government, unless expressly named or included by necessary implication."[177] Relying on this principle, federal courts held the United States exempt from statutes of limitation,[178] the jurisdictional limitations of the Judiciary Act of 1789,[179] and a

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[174] Harrison, *supra* note 172, at 358.

[175] 1 BLACKSTONE, *supra* note 89, at *262.

[176] 8 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 81-83 (Philadelphia, Thomas Davis 1845) ("[T]he king is not under the coercive power of the law . . . . The king, in regard to decency and order, cannot suffer a common recovery . . . ."); 2 BRACTON, *supra* note 155, at 33 ("[N]o writ runs against [the king]."); DISCOURSE, *supra* note 86, at 161 (arguing that "statutes that doe abridge the kynges prerogative" must be narrowly construed); *id.* at app. II ("The king is not bound when the statute is general and at the time it is made the king will have right or prerogative; he is not bound unless it is specially provided as Magna Carta . . . does not bind the king."). Appendix II of the *Discourse*, titled "When the king will be bound by statute," goes on to give a fairly detailed description of the principle. *Id.*; *see also* DWARRIS, *supra* note 139, at 50 ("The rights of the crown can never be taken away by doubtful words, or ambiguous expressions, but only by express terms.").

[177] United States v. Greene, 26 F. Cas. 33, 34 (Story, Circuit Justice, C.C.D. Me. 1827) (No. 15,258). For state cases that federal courts often cited for this same principle, see *Inhabitants of Town of Stoughton v. Baker*, 4 Mass. (3 Tyng) 522, 528 (1808) (invoking the maxim to hold that laches does not run against the state); *People v. Herkimer*, 4 Cow. 345 (N.Y. Sup. Ct. 1825) (invoking the maxim to hold that insolvent acts did not extinguish claims of the state).

[178] United States v. Hoar, 26 F. Cas. 329, 329-30 (Story, Circuit Justice, C.C.D. Mass. 1821) (No. 15,373).

[179] *Greene*, 26 F. Cas. at 34.

bankruptcy law.[180] American treatise writers, likewise, identified this sovereign exemption as an important principle of statutory interpretation.[181] Thus during the eighteenth and nineteenth centuries, the government was read out of otherwise unqualified statutes unless the text, either expressly or by "necessary implication," stated otherwise.[182]

Courts and commentators offered multiple rationales for the rule. At English common law, the rule was grounded in the sovereignty of the king, and American courts argued that the sovereign federal and state governments enjoyed this same benefit.[183] Given, however, that the sovereign prerogatives of the Crown did not pass unfiltered through the American constitutional structure,[184] other uniquely American rationales were also advanced in support of the maxim. The rule was defended upon a "policy of preserving the public rights, resources, and property from injury and loss by the negligence of public officers."[185] Justice Story insisted that "[i]ndependently of any doctrine

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[180] United States v. Hewes, 26 F. Cas. 297, 299 (E.D. Pa. 1840) (No. 15,359).

[181] DWARRIS, *supra* note 153, at 151 ("[T]he general words of a statute do not include the government or affect its rights, unless such intention be clear and indisputable, upon the face of the act."); *see also* 1 KENT, *supra* note 151, at 3; SEDGWICK, *supra* note 100, at 36 (indicating that the English rule "is recognized also in this country").

[182] *See Greene*, 26 F. Cas. at 34. It is worth emphasizing that this canon of construction was not inviolate. Summarizing exceptions recognized in the cases, Henry Campbell Black observed that the sovereign is not exempt when "neither its prerogative, rights, nor property are in question." BLACK, *supra* note 131, at 98. Thus, the Court interpreted general procedural statutes to bind the United States as litigant. *See, e.g.*, United States v. Knight, 39 U.S. (14 Pet.) 301, 315-16 (1840) ("[W]e feel satisfied, that when, as in this case, a statute which proposes only to regulate the mode of proceeding in suits, does not divest the public of any right, does not violate any principle of public policy; but on the contrary, makes provisions in accordance with the policy which the government has indicated by many acts of previous legislation . . . we shall best carry into effect the legislative intent, by construing the executions at the suit of the United States, to be embraced within the act of 1828."); Green v. United States, 76 U.S. (9 Wall.) 655, 658 (1869) (holding that an evidentiary statute binds the United States because "[w]e do not see why this rule of construction should apply to acts of legislation which lay down general rules of procedure in civil actions").

[183] *See, e.g.*, *Hoar*, 26 F. Cas. at 329-30 (identifying sovereign prerogative as a justification for the doctrine); *Greene*, 26 F. Cas. at 34; *Hewes*, 26 F. Cas. at 301; *see also* People v. Herkimer, 4 Cow. 345, 348 (N.Y. Sup. Ct. 1825) (holding that "the same rule must prevail" in New York for "the People of the state being the sovereign, have succeeded to the rights of the King").

[184] Theodore Sedgwick argued that the rule was primarily a relic of "old feudal ideas of royal dignity and prerogative" and that it should be abandoned in this country. SEDGWICK, *supra* note 100, at 36. Sedgwick was not opining about the wisdom of this rule when applied specifically to questions of sovereign immunity, for, as was described above, the rule was not applied in that context until the twentieth century. *See supra* notes 172-74 and accompanying text.

[185] SEDGWICK, *supra* note 100, at 105-06.

founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon legislative intention."[186] In other words, the government rarely intends to subject itself to its own regulations, and courts should interpret statutes accordingly.

Federal courts continued to apply this maxim throughout the nineteenth and twentieth centuries.[187] When suits in federal courts against the federal and state governments became an issue in the twentieth century, federal courts applied the canon in that context.[188] The Supreme Court held that it would only interpret a statute to waive federal sovereign immunity where the express language or necessary implication of the statute evidenced Congress's intent to

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[186] *Hoar*, 26 F. Cas. at 330; *see also Greene*, 26 F. Cas. at 34-35 (rationalizing governmental exemption based primarily on legislative intent with the maxim as a secondary consideration); *Hewes*, 26 F. Cas. at 298 ("[I]f it be the settled law, it must be presumed that congress knew it to be so, and had it on their minds in passing the act in question."). Writing early in the twentieth century, Henry Campbell Black explained it this way:

> It is said that laws are supposed to be made for the subjects or citizens of the state, not for the sovereign power. Hence, if the government is not expressly referred to in a given statute, it is presumed that it was not intended to be affected thereby, and this presumption, in any case where the rights or interests of the state would be involved, can be overcome only by clear and irresistible implications from the statute itself.

BLACK, *supra* note 131, at 94-95.

[187] *See, e.g.*, Dollar Sav. Bank v. United States, 86 U.S. (19 Wall.) 227, 239 (1873) (applying the maxim to hold that a statutory limitation on remedies did not apply to the United States); United States v. Herron, 87 U.S. (20 Wall.) 251, 261 (1873) (applying the maxim to hold that discharge under the Bankruptcy Act did not extinguish the federal government's ability to collect taxes owed); United States v. Nashville, Chattanooga & St. Louis Ry. Co., 118 U.S. 120, 125 (1886) (applying the maxim to hold that the statute of limitations did not run against the federal government); United States v. Am. Bell Tel. Co., 159 U.S. 548, 554 (1895) (applying the maxim to hold that a limitation on the Court's appellate jurisdiction did not apply when the United States is the petitioner); United States v. United Mine Workers, 330 U.S. 258, 273 (1947) (applying the maxim to hold that a provision of the Norris-LaGuardia Act divesting federal courts of jurisdiction to issue injunctions in a specified class of cases did not apply to the United States).

[188] *See* 3 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 62:01 (Chicago, Callaghan & Co. 1891) (identifying the modern sovereign immunity clear statement rule, as applied to both waivers and abrogations, as a specific application of the old English maxim exempting the government from generally applicable statutes). Students of English statutory interpretation have observed that English courts have similarly applied the old maxim to the relatively new problem of interpreting statutory waivers of sovereign immunity. *See* H. Street, *The Effect of Statutes on the Rights and Liabilities of the Crown*, 7 U. TORONTO L.J. 357, 381-83 (1948). Because the Crown only began to waive its sovereign immunity in the twentieth century, it was only then that English courts began fleshing out the effect of the traditional presumption on statutes dealing with sovereign immunity. *Id.* at 357.

accomplish that result.[189] The Court held that it would interpret a state statute to waive the state's sovereign immunity only when the state legislature had been clear.[190] And the Court held that it would not interpret a federal statute to abrogate the states' sovereign immunity unless the statute's express language or necessary implication required it to do so.[191]

Given the age of the general presumption of exemption, it would be inaccurate to characterize the sovereign immunity clear statement rule as having been fashioned from whole cloth in the twentieth century. It is better understood as a conscious application of a time-honored rule of sovereign exemption to a new kind of incursion on sovereignty.[192]

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[189] *See* Schillinger v. United States, 155 U.S. 163, 166 (1894) ("Beyond the letter of such consent [to be sued] the courts may not go, no matter how beneficial they may deem, or in fact might be, their possession of a larger jurisdiction over the liabilities of the government."); Price v. United States, 174 U.S. 373, 376 (1899) (finding that the government's "liability in suit cannot be extended beyond the plain language of the statute authorizing it"); E. Transp. Co. v. United States, 272 U.S. 675, 686 (1927) ("The sovereignty of the United States raises a presumption against its suability, unless it is clearly shown; nor should a court enlarge its liability to suit conferred beyond what the language requires.").

[190] *See* Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909) (holding that interpreting a state statute to relinquish the state's property rights in a manner that essentially waived the state's sovereign immunity was warranted only in the face of "the most express language of overwhelming implication from the text" to indicate that the state intended to accomplish that result); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 54 (1944) (asserting that a state statute must contain "a clear declaration of the state's intention to submit [to being sued] to other courts than those of its own creation"); Cooper S.S. Co. v. Michigan, 194 F.2d 465, 468 (6th Cir. 1952) (claiming that "a strict rule of construction is applicable" in determining whether a state statute waives the state's immunity from suit in a particular court).

[191] *See* Employees of Dep't of Health & Welfare of Mo. v. Dep't of Pub. Health & Welfare of Mo., 411 U.S. 279, 285 (1973) (refusing to infer that a federal statute authorized suits against states where the statute's text and legislative history were silent on the point); Edelman v. Jordan, 415 U.S. 651, 674 (1974) (holding that a federal statute authorizing "suits against a general class of defendants" did not authorize suits against states); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99-100 (1984) (holding that court will not interpret a statute to abrogate a state's sovereign immunity absent "unequivocal expression" of congressional intent to accomplish that result); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985) ("[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment."); *cf.* Thebo v. Choctaw Tribe of Indians, 66 F. 372, 375-76 (8th Cir. 1895) ("The intention of congress to confer . . . jurisdiction [over the Choctaw] upon any court would have to be expressed in plain and unambiguous terms.").

[192] *See supra* note 188.

6. The Indian Canon

Philip Frickey describes the Indian canon – the maxim that statutes dealing with the Indians must be construed in their favor – as the legacy of John Marshall.[193] It is, therefore, like avoidance and *Charming Betsy*, another uniquely American invention. In *Patterson v. Jenks*, Chief Justice Marshall, interpreting a treaty between the state of Georgia and the Creek Indians, noted that in a contest between those two parties, ambiguity should be resolved in a manner "favourable to the pretension of the less powerful and less intelligent or skilful [sic] party to the compact."[194] That was the first mention of the canon, but the case that really launched it was *Worcester v. Georgia*, which interpreted a treaty between the Cherokee Indians and the United States.[195] Marshall's opinion favors the Indians in construing the treaty,[196] but it is the starker language from Justice M'Lean's concurrence that has been quoted by later cases: "The language used in treaties with the Indians should never be construed to their prejudice. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."[197]

After *Worcester*, the Indian canon lay dormant in federal case reports until the Supreme Court invoked it again thirty-four years later in *In re Kansas Indians*, where the Court applied the canon to a treaty exempting certain Miami Indian lands from taxation.[198] I found only two other nineteenth century cases invoking the canon.[199] Given the paucity of nineteenth century cases applying the canon, twentieth century courts perhaps overstated the case

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[193] Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 386 (1993).

[194] Patterson v. Jenks, 27 U.S. (2 Pet.) 216, 229 (1829). Because the dispute in that case was between two private parties claiming title under Georgia, Marshall did not actually apply the canon. *Id.*

[195] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 541 (1832). The case is famous less for its invocation of the Indian canon than for the way that both the state of Georgia and President Jackson resisted the Court's disposition of the case. *See* Amy Coney Barrett, *Introduction*, 83 NOTRE DAME L. REV. 1147, 1154-55 (2008).

[196] Unlike Justice M'Lean's opinion, Marshall's opinion contains only a short and relatively oblique discussion of the Indian canon. *Worcester*, 31 U.S. (6 Pet.) at 552-53 (construing treaty language from the perspective of "the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language"); *see also* Frickey, *supra* note 193, at 402 (commenting that Marshall "found some reason to work hard to counter the ordinary textual meaning of the fourth article" where "the principles or motivations for doing so are not evident in his discussion of the article").

[197] *Worcester*, 31 U.S. (6 Pet.) at 582 (M'Lean, J., concurring).

[198] *In re* Kansas Indians, 72 U.S. (5 Wall.) 737, 760 (1866).

[199] Choctaw Nation v. United States, 119 U.S. 1, 27-28 (1886); Jones v. Meehan, 175 U.S. 1, 11 (1899). Both of these cases invoked the canon in the context of treaty construction.

when they described the canon as "well-settled law"[200] and a "rule of construction [that] has been recognized, without exception, for more than a hundred years."[201]

The Indian canon is unique among the substantive canons discussed in this Part because it began in the treaty context as essentially a rule of contract interpretation. Insofar as it instructs courts to construe treaties in favor of the less sophisticated party to them, the rule resembles the approach that courts take in the construction of adhesion contracts.[202] What is interesting about the Indian canon for present purposes is that it jumped without discussion from the interpretation of treaties to the interpretation of statutes. Treaty making with the Indians ceased in 1871 in response to demands from the House of Representatives for a role in the making of federal Indian policy.[203] Thereafter, relations between the United States and Indian tribes were governed by statute. When courts began interpreting these statutes in the early 1900s, they assumed, without reflection, that the canon should continue to apply. For example, without considering the potential impact of the structural differences between statutes and treaties, the Circuit Court of Nevada asserted that the canon should apply to statutes dealing with Indians simply because statutes had replaced treaties as the mechanism by which Indian policy was made.[204] The Supreme Court's first application of the canon to a statute did not even acknowledge the shift from treaty to statute.[205]

That is not to say that federal courts have been wrong to apply the Indian canon to statutes.[206] The point for present purposes is not the validity of the canon, but the utility of the historical evidence for revealing the attitudes of early federal courts toward substantive canon-making. And the peculiar circumstances surrounding the emergence of this canon – particularly its grounding in treaty interpretation, where a court enforces an agreement reached by multiple parties rather than functioning solely as Congress's faithful agent – make its history of limited utility notwithstanding its presence on the list of old canons that modern courts continue to apply.

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[200] Conway v. United States, 149 F. 261, 265-66 (C.C.D. Neb. 1907).

[201] Choate v. Trapp, 224 U.S. 665, 675 (1912).

[202] Frickey, *supra* note 193, at 406-08.

[203] *Id.* at 421 n.164.

[204] *Conway*, 149 F. at 265.

[205] *Choate*, 224 U.S. at 675.

[206] Frickey has made powerful arguments as to why the "difference in form should not . . . substantially alter judicial methodology," Frickey, *supra* note 193, at 421-22, including the argument that the canon can be understood as an outgrowth of the "sovereign-to-sovereign, structural relationship" between Indian nations and the United States. *Id.* So understood, the canon might be rationalized with reference to the Constitution rather than to a contract analogy. *See infra* Part IV.C.

7. Other Canons

Between 1789 and 1840, federal courts employed more substantive canons than the six described above. For example, *Cohens v. Virginia* can be read as an early statement of the presumption against preemption.[207] There, the Court held that a federal statute regulating lotteries in the District of Columbia did not permit the sale of lottery tickets in Virginia where state law prohibited them.[208] In interpreting the statute, the Court explained:

> To interfere with the penal laws of a State . . . is a very serious measure, which Congress cannot be supposed to adopt lightly, or inconsiderately. The motives for it must be serious and weighty. It would be taken deliberately, and the intention would be clearly and unequivocally expressed. An act, such as that under consideration, ought not, we think, to be so construed as to imply this intention, unless its provisions were such as to render the construction inevitable.[209]

Cohens thus reflects an impulse to proceed cautiously when a federal statute arguably displaces a state's control of her penal laws – in modern parlance, when a federal statute arguably displaces a state's historic police power.[210] Notwithstanding *Cohens*, the presumption against preemption of state law seems not to have become an established part of the interpretive lexicon until the latter half of the nineteenth century.[211] In 1859, the Court asserted that "the repugnance or conflict should be direct and positive, so that the two acts could

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[207] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 443 (1821).

[208] *Id.* at 447.

[209] *Id.* at 443.

[210] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[211] Early cases confronting preemption analyzed the issue without discussing any special interpretive rule. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 220-21 (1824) (finding preemption without discussion of presumption); Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 138-39 (1837) (finding no preemption without discussion of presumption); *id.* at 145-46 (Thompson, J., concurring). Notably, I found no discussion of any canon applicable to questions of preemption in nineteenth century legal treatises. The canon does seem to resemble, however, the canon historically applied when a statute appears to conflict with one passed earlier by the same legislature. In that circumstance, courts applied a presumption against repeal of the earlier statute. *See, e.g.*, DWARRIS, *supra* note 139, at 54-55 & n.4. Analogously, when Congress enacts a statute that arguably displaces a state's preexisting regulatory scheme, the presumption against preemption might be understood as a presumption against supersession or repeal of that preexisting scheme. This canon disfavoring implied repeal strongly resembles the concept of field preemption in federal-state relations. *See* ENDLICH, *supra* note 88, § 241, at 320-21 ("[I]n order to constitute a repeal of a statute by implication, such later act must not only refer to the same subject, and also have the same object in view as the earlier, but it must cover the whole subject matter of the same."); *cf.* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000) (arguing that the presumption against preemption derives from the presumption against implied repeals; the Supremacy Clause functions as a non obstante provision, which, under that classic approach, instructed courts to set aside the presumption).

not be reconciled or consistently stand together" if a federal statute was to supersede state law.[212] This principle was repeated and ultimately expanded thereafter.[213]

The courts also applied a grab bag of other interpretive rules. The Supreme Court applied a presumption against the extraterritorial application of the law.[214] It opined that if a statute was ambiguous, it would defer to the executive's construction of it.[215] Courts also invoked the canon that remedial statutes should be broadly construed,[216] and at least when they were construing state statutes, courts invoked the canon that statutes in derogation of the common law should be narrowly construed.[217]

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[212] Sinnot v. Davenport, 63 U.S. (22 How.) 227, 242-43 (1859).

[213] *See, e.g.*, Reid v. Colorado, 187 U.S. 137, 148 (1902). The Court's modern cases also apply the presumption to construe even express preemption provisions narrowly. *See, e.g.*, Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518, 523 (1992). This application of the presumption is controversial. *See supra* note 56.

[214] *See, e.g.*, Bond v. Jay, 11 U.S. (7 Cranch) 350, 353 (1813) ("It is so unusual for a legislature to employ itself in framing rules which are to operate only on contracts made without their jurisdiction, between persons residing without their jurisdiction, that Courts can never be justified in putting such a construction on their words if they admit of any other interpretation which is rational and not too much strained."). The canon does not appear to have been widely applied by early nineteenth century courts. It is, however, recognized by modern courts. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("[L]egislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949))); *see also* Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 513-16 (1997); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 92-93 (1998).

[215] United States v. Vowell & M'Clean, 9 U.S. (5 Cranch) 368, 372 (1810).

[216] Ross v. Doe, 26 U.S. (1 Pet.) 655, 667 (1828); Fisher v. Consequa, 9 F. Cas. 120, 121 (Washington, Circuit Justice, C.C.D. Pa. 1809) (No. 4816); Dougherty v. Edmiston, 7 F. Cas. 962, 962 (Todd, Circuit Justice, C.C.D. Tenn. 1812) (No. 4025); Whittemore v. Cutter, 29 F. Cas. 1120, 1120 (Story, Circuit Justice, C.C.D. Mass. 1813) (No. 17,600). It is worth noting the occasions on which courts identified the plain language of a statute as a limit to the canon's application. *See, e.g.*, Denn v. Reid, 35 U.S. (10 Pet.) 524, 527 (1836); Lodge v. Lodge, 15 F. Cas. 781, 781 (Story, Circuit Justice, C.C.D. Mass. 1829).

[217] *See, e.g.*, Brown v. Barry, 3 U.S. (3 Dall.) 365, 367 (1797) (maintaining that a Virginia statute regarding the effect of a repealing act on the act first repealed, "being in derogation of the common law, is to be taken strictly"); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603, 623 (1812) (refusing to read a Virginia statute to abolish the common law "inquest of office" requirement because "the common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose"); *cf.* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 657-61 (1834) (refusing counsel's argument that the canon should apply to the construction of the Copyright Act because the majority thought there was no federal common law of copyright). While federal courts did not apply the canon to the *construction* of federal statutes, they did apply it to measure *compliance* with federal statutes. *See, e.g.*, Bell v. Morrison, 26 U.S. (1 Pet.) 351, 355

B. *The Implications of History for Textualism*

The evidence described in Section A confirms that federal courts have been developing and applying substantive canons for as long as they have been interpreting statutes. While federal courts may have debated and ultimately dropped their claim to the power of equitable interpretation, my research has uncovered no evidence that they ever even questioned their power to develop and apply specific substantive canons of interpretation.[218] Early federal courts did not maintain that any particular substantive canon could trump the plain language of a statute; on the contrary, even where a statute infringed upon an area that courts guarded with a substantive canon, courts held that the express language of the statute controlled.[219] But history validates the general proposition that the use of substantive canons has long been thought legitimate. The problem remains of determining exactly what light this history sheds on the original understanding of the scope of "the judicial Power."

Some of the history reflects what would be, even for the textualist, an uncontroversial use of substantive canons. Lenity is a particularly good example. Textualists have expressed skepticism about lenity's legitimacy on the ground that the canon permits a court to depart from a statute's most natural interpretation.[220] To the extent that textualists have indicated a belief that such departures are part of the historical tradition of lenity in America,[221] that belief is mistaken. To be sure, an effort to undermine the text was part of the tradition of lenity as applied by the English courts that invented the canon. But as Section A.1 recounts, federal courts modified the canon, emphasizing that the best interpretation of a penal statute should always trump a more lenient but less plausible one. For early courts, lenity served as a tie breaker between two equally plausible interpretations of statutory text,[222] and as Part I explaines, this use of a canon is perfectly consistent with faithful agency.

(1828) ("The authority to take testimony in [the manner permitted by the Judiciary Act of 1789], being in derogation of the rules of the common law, has always been construed strictly; and, therefore, it is necessary to establish, that all the requisites of the law have been complied with, before such testimony is admissible."); Jones v. Neale, 13 F. Cas. 995, 995-96 (C.C.D.N.C. 1796) (No. 7483) (refusing to admit testimony taken by deposition *de bene esse*, as permitted by the Judiciary Act of 1789, unless all of the requirements of the act were strictly observed, because when a statute is in derogation of the common law, "[t]o fail in one iota of the ceremonies prescribed by it is to fail in the whole").

[218] *See* Eskridge, *supra* note 2, at 1100 (asserting that his study of early interpretive practice revealed "no thinker questioning the canons as a methodology").

[219] In addition to the cases described in each section of this Part, see, for example, Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 661-62 (1829) ("Every technical rule, as to the construction or force of particular terms, must yield to the clear expression of the paramount will of the legislature.").

[220] *See* Scalia, *supra* note 30, at 582-83.

[221] *Id.*

[222] Recall too that in addition to justifying lenity on grounds of fairness to the accused, federal courts described the canon as a check upon themselves insofar as it prevented them

More troubling for the textualist are the cases in which federal courts invoked substantive canons to justify a departure from a statute's most natural reading. Courts identified an outer limit to the judicial power by disavowing the ability to adopt an interpretation that contravened the plain text. But they claimed substantial leeway to work within meanings that the statute could bear. Recall that in *Charming Betsy*, Marshall argued that "an act of Congress ought never to be construed to violate the law of nations if *any other possible construction remains*."[223] In describing the avoidance canon, Justice Story opined that to avoid an unconstitutional interpretation of a statute, a court should adopt a construction "*which although not favored by the exact letter*, may yet well stand with the general scope of the statute, and give it a constitutional character."[224] Courts applying the presumption against retroactivity explained that they would "*struggle hard*" against a retroactive interpretation,[225] refusing to adopt it "unless it contained *express words* to that purpose."[226] Courts applying the government-exemption rule read an exception into otherwise unqualified text absent a clear statement to the contrary.[227] Courts also read treaties with the Indians in favor of the Indians, rather than as Congress may have understood or intended, but the contractual origins of the Indian canon make it a less enlightening gauge of how federal courts understood the scope of their power to interpret statutes.[228]

It is unclear how seriously statements like the ones recounted above represent a qualification of the obligation of faithful agency. For one thing, the evidence is spotty. Many of these canons were only rarely applied during the first fifty years of the federal courts' existence,[229] and even when they were applied, there is no clear pattern of courts using them to deviate from the most

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from expanding penal statutes through equitable interpretation. *See supra* notes 102-03 and accompanying text. To the extent that federal courts applied the canon to this end, they applied it to reinforce, rather than undermine, their role as faithful agents.

[223] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (emphasis added); *see also* Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 43 (1801).

[224] Soc'y for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 769 (Story, Circuit Justice, C.C.D.N.H. 1814) (No. 13,156) (emphasis added).

[225] United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) (emphasis added).

[226] United States v. Heth, 7 U.S. (3 Cranch) 399, 414 (1806) (Cushing, J.) (emphasis added).

[227] *See supra* Part II.A.5.

[228] *See supra* Part II.A.6.

[229] For that matter, the fact that there were relatively few federal statutes – and that federal courts possessed no general federal question jurisdiction – means that the overall number of statutory interpretation decisions in the early federal courts is low. It was not until what Guido Calabresi describes as the late-nineteenth century "orgy of statute making" that federal courts more fully entered the business of interpreting statutes. CALABRESI, *supra* note 10, at 86. The 1875 grant of general federal question jurisdiction surely also contributed to this development.

natural interpretation of text. The *Charming Betsy* canon was invoked in only a handful of cases during this time period, and only two used the canon to justify what was arguably a departure from the best reading of the text.[230] References to the avoidance canon are similarly spare in early reporters; that canon did not crystallize until late in the nineteenth century.[231] The presumption against retroactivity was, by contrast, widely acknowledged, but the cases actually applying it, as opposed to simply describing it, did not deviate from what the courts presented as the most natural reading of the statute.[232] That leaves the clear statement sovereignty rule as the starkest example of early courts both describing and applying a maxim justifying an interpretation other than the most natural reading of the statute.[233]

Moreover, a departure from the best reading of a statute casts light on a court's understanding of its power to deviate from the obligation of faithful agency only to the extent that the court justifies the departure with reference to a policy or policies external to the statute. To the extent that any of these canons justifies a departure from text in the service of legislative intention, its application affirms rather than undercuts a strong norm of faithful agency.[234] Textualists do not maintain that early federal courts approached statutory language as would modern textualists; on the contrary, they freely admit that nineteenth century judges often took a purposivist approach to the task of deciphering acts of Congress.[235] The insights of public choice theory – stemming from mid-twentieth century work in political science and economics – have prompted textualists to challenge the proposition that focusing upon the legislature's subjective intention is the best (or even a coherent) way of discharging the judicial role as Congress's faithful agent.[236] But as Part I explains, the disagreement between textualists and traditional intentionalists

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[230] *See supra* note 120 and accompanying text.

[231] *See supra* notes 151-54 and accompanying text.

[232] *See supra* notes 163-64 and accompanying text.

[233] *See supra* Part II.A.5.

[234] *Cf.* Yoo, *supra* note 16, at 1616-18 (arguing that Chief Justice Marshall often invoked canons as a means of serving legislative intent, and that such invocations reflect his commitment to legislative supremacy).

[235] Manning explains:

> Modern textualists . . . do not, and could not, maintain that the faithful agent theory historically embraced all of the specific premises of modern textualism. Rather, textualism is premised on the idea that the faithful agent theory represents a deeply rooted general principle of judicial fidelity to legislative commands, and that modern insights about the legislative process suggest that textualism offers a superior means of *implementing* that theory.

John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1653 n.28 (2001).

[236] *See supra* notes 5-6 and accompanying text.

lies in their respective approaches to language, not in their baseline commitment to the norm of faithful agency.[237]

With the exception of the Indian canon, which counseled courts to construe statutes *against* Congress,[238] courts offered legislative intention as a justification for each of the canons that arguably authorized a departure from the statute's best reading.[239] Significantly, courts treated lenity, the canon most clearly justified on grounds other than legislative intent, as a tie breaker applicable only when two equally plausible interpretations of a statute were available. If Congress would not want to violate the Constitution or customary international law, a court arguably does no disservice to Congress by privileging its intent over its apparently ill-chosen words. Similarly, if Congress would want its legislation to be prospective and the government to be exempt from generally applicable regulations, reading statutes to accomplish those goals is an attempt to realize the legislative will. The court may be mistaken about its ability to know what Congress would want,[240] but its allegiance to legislative intent is allegiance to Congress.

Yet at the same time that courts justified these canons with reference to legislative intent, they invoked other, substantive rationales. Part I explained that the modern treatment of substantive canons reveals that a canon's purpose often lies in the eyes of the beholder,[241] and the same is true of the canon's historical treatment. The evidence suggests that the avoidance canon was couched exclusively in the language of legislative intent. But courts offered alternative rationales for *Charming Betsy* (respect for customary international law and the role of the political branches in determining whether to breach it),[242] retroactivity (mitigating harsh results),[243] and the clear statement government exemption (protecting the public from the negligence of government officials).[244] To the extent that courts departed from the most plausible reading of a statute on grounds other than legislative intent, these cases are in tension with an unqualified version of faithful agency.

In sum, the historical record clearly establishes that federal courts believed themselves empowered to deploy a substantive canon like lenity for the purpose of clarifying truly ambiguous language. It also offers support for, but does not establish, the proposition that federal courts believed themselves

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[237] *See supra* Part I.B.2.

[238] *See supra* note 202 and accompanying text.

[239] *See supra* notes 126-29 and accompanying text (*Charming Betsy*); notes 147-49 and accompanying text (avoidance); note 165 and accompanying text (retroactivity); note 186 and accompanying text (clear statement sovereignty rules).

[240] *See supra* Part I.B.2.

[241] *See supra* Part I.B.

[242] *See supra* notes 126-29 and accompanying text.

[243] *See supra* note 166 and accompanying text.

[244] *See supra* notes 183-86 and accompanying text.

empowered to deploy substantive canons to choose less plausible interpretations of statutory language to advance policy goals.

Notwithstanding the ambiguity in the record, textualists should take seriously the fact that it is suggestive of such power. Moreover, to the extent that textualists themselves apply substantive canons to forgo the best interpretation of a statute in favor of a less plausible one, the constitutional legitimacy of this practice merits a closer look. If the pursuit of legislative intention is the sole justification for these canons, then the intent-skepticism that is a hallmark of textualism would presumably be reason for textualists to abandon them. If, however, the obligation of faithful agency is qualified by a judicial power to take other policy concerns into account, then modern textualists may be justified in applying substantive canons – but in so doing, they need to explain why this qualification of faithful agency is consistent with the constitutional structure.

III. BACKGROUND ASSUMPTIONS IN A MATURE LEGAL SYSTEM

This Part briefly examines a rationale that textualists have offered as a means of reconciling the use of substantive canons with the demands of faithful agency: the proposition that substantive canons comprise a "closed set" of background assumptions against which Congress legislates. Manning has hypothesized:

> [T]o the extent that either the canon of avoidance or any particular clear statement rule is well settled, its application would perhaps follow from the textualists' practice of reading statutes in light of established background conventions. As Justice Scalia has explained, once such rules of construction "have been long indulged, they acquire a sort of prescriptive validity, since the legislature presumably has them in mind when it chooses its language."[245]

The Court often asserts that Congress legislates against the background of the canons.[246] To the extent that these canons are well-established, they are conventions with which the interpretive community of lawyers is conversant.[247] Thus, on this view, Congress's failure to spell out that a particular statute does not subject the federal government to suit does not reflect the failure of that exemption to run the legislative gamut from policy impulse to enacted law. Rather, it reflects a congressional assumption that

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[245] Manning, *supra* note 2, at 125 (quoting Scalia, *supra* note 30, at 583).

[246] McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1991); *see also* Cannon v. Univ. of Chi., 441 U.S. 677, 699 (1979) ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with . . . unusually important precedents . . . and expected its enactment to be interpreted in conformity with them.").

[247] *See* Manning, *supra* note 2, at 113 ("Using such extra-textual conventions, provided that they are firmly established, does not offend textualist premises. . . . Interpreters must apply the same set of assumptions that any 'reasonably diligent lawyer' would bring to a statute in context." (footnotes omitted)).

anyone conversant in American legal conventions would understand the government to be exempt.

Whether the canons of construction are background assumptions against which the interpretive community of lawyers reads statutes is an empirical question beyond the scope of this paper.[248] Answering it would require study of whether members of Congress, among others, perceive these norms to be embedded in the language they employ.[249] Regardless whether any of these interpretive principles can legitimately claim the status of a linguistic convention, the "background assumptions" justification is an incomplete explanation for the role of substantive canons in a system that embraces faithful agency. If the premise of the argument is that substantive canons were invalid *ab initio*, it does not explain why textualists continue to rely on them. If, on the other hand, its premise is that federal courts once possessed the power to develop substantive canons, it does not explain why that power subsequently dissipated.

Textualists acknowledge that all of these canons-cum-background assumptions represent long-ago judicial choices to advance certain substantive policies.[250] Manning offers the entrapment defense as an example: when the Supreme Court thought it unfair for authorities to punish someone whom they had enticed to violate the National Prohibition Act, the Court adopted an

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[248] For a study suggesting that legislative drafters rely less on rules of statutory interpretation than judges commonly assume, see Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 583-605 (2002).

[249] Even though this Article does not explore the empirical question, the cases suggest that textualists may have overestimated the degree to which at least some of the background assumptions they read into statutes are entrenched. For example, textualists have singled out the existence of equitable exceptions as a background assumption of every statute of limitations. Manning, *supra* note 5, at 2465-67. Yet historically, the legitimacy of such exceptions was disputed. *See, e.g.*, SEDGWICK, *supra* note 100, at 277; *see also* Sherwood v. Sutton, 21 F. Cas. 1303, 1307-08 (Story, Circuit Justice, C.C.D.N.H. 1828) (No. 12,782) (finding the weight of authority in favor of tolling the statute of limitations for fraudulent concealment, but acknowledging that American authorities were not entirely in accord on the question). DeSloovere's collection of statutory interpretation cases includes several state cases rejecting the notion that courts have the authority to create equitable exceptions to statutes of limitation. FREDERICK JOSEPH DESLOOVERE, CASES ON THE INTERPRETATION OF STATUTES 496-502 (1931); *see also, e.g.*, Reynolds v. Hennessy, 23 A. 639, 640 (R.I. 1891) ("The question whether the fraudulent concealment of the existence of a cause of action will hinder the operation of the statute of limitations is one which has been much discussed, and upon which there has been a radical difference of opinion."). If the availability of an equitable defense like fraudulent concealment was unsettled as late as the end of the nineteenth century, it is at least questionable whether the availability of that defense is an unstated premise of every limitation statute enacted today.

[250] *See* Manning, *supra* note 5, at 2466 ("[M]odern textualists unflinchingly rely on legal conventions that instruct courts, in recurrent circumstances, to supplement the bare text with established qualifications designed to advance certain substantive policies.").

entrapment defense, and that the availability of that defense has now become part of the background against which Congress legislates.[251] The same might be true of a canon like avoidance: initially adopted as a tool of judicial restraint, it is now a baseline rule understood by those conversant in the language of the law.[252] Textualists have been unclear about whether the initial adoption of canons to advance substantive policies was permissible as part of the maturing that any legal system must undergo as it develops,[253] or whether it was an unjustified exercise of judicial power.[254] But whether they are with us as legitimate exercises of a power whose time has passed or as mistakes now clothed with "prescriptive validity,"[255] textualists maintain that the canons are now a "closed set" to which judges cannot add.[256]

But why is the set closed? One explanation is that the set of substantive canons, once open, closed as the legal system matured. In other words, it may be a legitimate part of a legal system's evolution to develop substantive background norms that inform and temper the language of legislative commands, but the power to develop such norms dissipates once the legal system is mature. Why, however, would such power exist and subsequently dissipate? It seems odd that the constitutionally granted scope of judicial power would contract over time. Moreover, how would one determine when the system is sufficiently mature that the development of canons must cease? It is peculiar to conceive of Article III as containing an implicit sunset

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[251] *See id.* at 2467-68.

[252] *See* Manning, *supra* note 2, at 125 ("And, to the extent that either the canon of avoidance or any particular clear statement rule is well settled, its application would perhaps follow from the textualists' practice of reading statutes in light of established background conventions.").

[253] *Id.* at 113 ("In a developed legal system, this premise gives judges a way to supply many terms that, in a nascent system, might owe their existence to the equity of the statute. In a new legal system, for example, interpreters might rely on the equity of the statute to develop defenses to otherwise unqualified criminal or tort statutes. Modern legislatures however, pass such statutes against deeply embedded 'norms of interpretation and defense,' which frame the social understanding of such statutes, just as rules of grammar and diction do." (quoting Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1913, 1914 (1999))).

[254] This view of substantive canons is implicit in Justice Scalia's explanation of lenity as a canon justified only by its sheer antiquity. *See* Scalia, *supra* note 30, at 583 (arguing that canons like lenity are illegitimate, but claiming that "[o]nce they have been indulged, they acquire a sort of prescriptive validity, since the legislature presumably has them in mind when it chooses its language – as would be the case, for example, if the Supreme Court were to announce and regularly act upon the proposition that 'is' shall be interpreted to mean 'is not'"); *see also* Manning, *supra* note 5, at 2475 (characterizing many of the currently existing "background norms" as "hav[ing] been singled out based on the accident of prior judicial developments").

[255] Scalia, *supra* note 30, at 583.

[256] Manning, *supra* note 5, at 2474.

provision activated at some undetermined point in time. If textualists are willing to concede that the development of substantive canons was once permissible, it is difficult to see the principled argument for contending that the power subsequently disappeared.

The other, more persuasive explanation for the presence of once-substantive canons in the legal lexicon is essentially a theory of the constitutional second best. Judges may have acted outside the bounds of their authority when they adopted these presumptions in the first place,[257] but they have now become part of the way that lawyers think about statutory language. It would unsettle congressional expectations to stop reading statutes against these background norms, so courts should keep doing it. But, the argument runs, that does not justify the invention of new canons. Federal courts must hold the line where it is, enjoying the benefits of canons that mitigate the harshness of language, but not adding any more to the list.

There are two problems with this argument. As an initial matter, it is unclear why textualists would hold the line where it is rather than rolling it back. In other areas in which the Court has found entrenched interpretive practices to be illegitimate, it has applied new rules going forward, while continuing to interpret older statutes in light of old rules. For example, in *Cannon v. University of Chicago*,[258] the Court said that while it would generally apply "the strict[er] approach" to implied rights of action announced in *Cort v. Ash*, its "evaluation of congressional action in 1972 must take into account [the more generous pre-*Cort*] legal context."[259] Unless textualists view canons like avoidance and the federalism rules to be so entrenched as to be irreversible, there is no reason for them to follow a different course in this context. For example, textualists could abandon the federalism canons going forward, but continue to apply those canons to statutes passed when Congress may have relied upon those interpretive rules.

The more significant problem with this argument, though, is that it is difficult to impeach as illegitimate a practice that has persisted since the early nineteenth century. Why assume that the initial adoption of any of these canons was a mistake? If the Marshall Court thought itself empowered to adopt the *Charming Betsy* and avoidance canons, that is evidence that it believed that "the judicial Power" encompassed the authority to do so. Moreover, the practice of adopting new canons – or at least adjusting old ones

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[257] This criticism would not hold for background assumptions that pre-date the founding. For example, if, by virtue of English practice, courts understood general statutory language to exclude the sovereign, this understanding was a background assumption of our legal system from the beginning even if it began as a substantive canon in the English system.

[258] 441 U.S. 677 (1979).

[259] *Id.* at 698-99 (citing Cort v. Ash, 422 U.S. 66 (1975)); *see also* Manning, *supra* note 5, at 2474 n.318 (expressing approval of *Cannon*'s approach); *cf.* Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (Scalia, J.) (refusing to apply pre-*Cort* approach to even a statute passed when that approach prevailed).

to meet new situations – has persisted over time. For example, when statutes replaced treaties as the means by which the federal government made Indian policy, federal courts began applying the Indian canon to statutes. When Congress began to exercise its power to waive federal sovereign immunity and abrogate state sovereign immunity, the federal courts began applying the governmental exemption canon to such waivers and abrogations. That is not to say that the historical evidence compels the conclusion that federal courts have consistently believed themselves to possess such power. As explained in Part II, the founding-era evidence leaves room for doubt on this score because the cases are few and courts were unclear about the role of legislative intent in the cases they decided. But just as it does not rule in the perception of such power, neither does it rule it out. It seems as likely that canon-making has long been considered part of "the judicial Power" as that it is a historically sanctioned bad habit.

If ostensibly substantive canons cannot be explained away as linguistic background norms, the question whether "the judicial Power" includes the power to develop and apply them must be answered. The next Part turns to that task.

IV. THE JUDICIAL POWER AND SUBSTANTIVE CANONS

If federal courts possess the authority to develop and apply substantive canons, they possess it as a consequence of the "judicial Power of the United States" granted them by Article III.[260] As Part I explained, in the context of statutory interpretation, the Constitution's structure – in particular, the separation of powers and the bargaining process protected by the requirement of bicameralism and presentment – establish the outer limits of the notoriously nebulous "judicial Power." A court's power to interpret statutes as it decides cases is limited by its obligation to function as the legislature's faithful agent.

This Part considers whether the structural features that preclude federal courts from departing from clear statutory text in the service of equity similarly preclude them from departing from the most plausible interpretation of statutory text in the service of the more specific values protected by substantive canons. It tentatively concludes that the power to develop and apply substantive canons is consistent with the constitutional structure, subject to important limitations. Section A emphasizes that invocation of a specific substantive canon does not justify a departure from a statute's plain language any more than does the invocation of a more general concern for equity. Section B posits that the Constitution affords federal courts the ability to depart from the best interpretation of a statute in favor of one that is less plausible yet

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[260] U.S. CONST. art. III, § 1; *cf.* Eskridge, *supra* note 2, at 1030; Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 652 n.308 (1995) ("[C]anons of construction of *any* type – constitutional or otherwise – can be justified in separation of powers terms as inherent or ancillary aspects of a court's interpretive and lawmaking power under Article III.").

still bearable, but because this power derives from the power of judicial review, a court may exercise it only in pursuit of constitutional values. Canons promoting extraconstitutional values may be employed only as presumptions guiding the choice between equally plausible interpretations of a statute. Section C identifies some guidelines for distinguishing between constitutional and extraconstitutional canons: language-pushing canons must be tied to relatively specific constitutional norms and they must be consistent with the constitutional values they purport to promote.

A. *A Statute's Plain Language*

The bedrock principle of textualism, and the basis on which it has distinguished itself from other interpretive approaches, is its insistence that federal courts cannot contradict the plain language of a statute, whether in the service of legislative intention or in the exercise of a judicial power to render the law more just.[261] Thus, those canons that permit a court to qualify clear text run headlong into the obligation of faithful agency and are inconsistent with the constitutional structure.

The "governmental exemption" canon, which treats the sovereign as exempt from generally applicable statutes, is an example.[262] Consider the objections that textualists have raised to the exemption of particular groups from generally applicable legislation. Legislators enacting a burdensome law must choose between "explicitly exempting specific interests, revealing a politically costly form of favoritism," and "tolerat[ing] judicial application of a generally framed law" to even the legislature's favored interests.[263] Exempting such groups on a case-by-case basis "allows Congress to reap the benefits of passing tough, general laws without fully internalizing the consequences of framing those laws in unqualified terms."[264] That undercuts the discretion-limiting function of the rule of law norm as well as the bargaining required by the requirement of bicameralism and presentment. On these grounds, textualists have objected to the Court's exemption of the American Bar Association ("ABA") from the burdensome requirements of the generally worded Federal Advisory Committee Act and the exemption of ministers from a generally worded prohibition on the recruitment of foreign laborers.[265] The United

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[261] *See supra* Part I.A.

[262] This argument assumes that the canon is properly treated as substantive. *See supra* notes 46-48 and accompanying text.

[263] *See* Manning, *supra* note 5, at 2436.

[264] *Id.* at 2437.

[265] *See* Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 451, 467 (1989) (interpreting the Federal Advisory Committee Act to exclude the ABA even though the ABA satisfied the statute's definition of a "'group . . . utilized by one or more agencies in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government'" (quoting Federal Advisory Committee Act, 5 U.S.C. App. § 3(2) (1972))); Church of the Holy Trinity v. United States, 143 U.S.

States government is surely a politically powerful interest subject to legislative favoritism, and there would be a political cost to exempting the federal government from laws by which private parties and state governments must abide. Yet the governmental exemption canon relieves the United States from burdens imposed by generally applicable statutes without forcing Congress to accept that political cost. It seems no more permissible to exclude, say, debts owed the United States from the debts discharged under the Bankruptcy Act than to exclude the ABA from the category of "committees" or ministers from the category of "those who provide labor or service of any kind."[266]

The exceptions that textualists are willing to read into criminal prohibitions and statutes of limitations are similarly flawed.[267] A congressional failure to spell out criminal defenses or grounds for relief from statutes of limitation might be attributable to any number of things. The legislative process sometimes yields overinclusive statutes.[268] As Manning has explained, "legislators may sometimes craft statutory language very broadly or very narrowly to elide or avoid disagreements over specific applications."[269] The failure to include exceptions to criminal liability or statutes of limitations may be the result of compromise. It may be the result of time and space limitations on the legislative agenda. It may be the result of a congressional choice to avoid the political cost of choosing which criminal defenses to permit and which to forbid, or of subjecting powerful, frequently sued interests to suit for open-ended periods of time. Whatever the reason that a statute emerged from the legislative process in unqualified form, reading qualifications into it after the fact risks disturbing the very compromise that made its passage possible.

Canons that permit outright alterations to text are exceptional, however, for most interpretive canons honor the baseline rule that text controls. Scores of cases, both historical and modern, insist that plain language trumps a canon. Thus the Court has emphasized that the avoidance canon applies only "*in the absence of a clear expression of Congress' intent*" to provoke consideration of

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457, 458, 472 (1892) (interpreting a statute to exclude ministers from the category of those who "'perform labor or service'" (quoting Act of Feb. 26, 1885, ch. 364, 23 Stat. 332)); Manning, *supra* note 5 at 2426-27 & nn.153-54 (identifying the political costs Congress would have incurred by explicitly excluding ministers from the statute); *id.* at 2437 n.184 (criticizing *Public Citizen* on this ground).

[266] *See* United States v. Herron, 87 U.S. 251, 253, 263-64 (1873) (holding that a debt due the United States is not discharged by a certificate of bankruptcy even though the Bankruptcy Act provided that such a certificate discharged the bankrupt "from all debts, claims, liability, and demands, which were or might have been proved against his estate in bankruptcy"); *supra* note 265.

[267] Again, this critique assumes that these exceptions are properly treated as substantive. *See supra* notes 47-51 and accompanying text.

[268] For a brief description of the process considerations that drive textualism, see *supra* notes 5-6 and accompanying text.

[269] Manning, *supra* note 5, at 2409.

"difficult and sensitive" constitutional questions.[270] *Charming Betsy* does not apply when the text leaves no room for doubt about whether Congress acted contrary to the law of nations.[271] The Court will not invoke lenity unless there is a "grievous ambiguity" in the statute.[272] Unambiguous language similarly precludes the application of, among other canons, the presumption against retroactivity and the presumption against extraterritorial application of a statute.[273]

Those canons designated as clear statement rules are often thought to be particularly destructive of legislative supremacy, but even they generally observe this "plain language" limitation. By definition, such rules do not apply in the face of a "clear statement" of congressional intent to accomplish a particular result. To be sure, courts are sometimes accused of requiring Congress to use magic words to accomplish a particular result,[274] and such an

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[270] NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 507 (1979) (emphasis added); *see also* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); Jean v. Nelson, 472 U.S. 846, 854 (1985).

[271] Weinberger v. Rossi, 456 U.S. 25, 32 (1982).

[272] Chapman v. United States, 500 U.S. 453, 463 (1991).

[273] *See, e.g.*, Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) ("The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power."); Bond v. Jay, 11 U.S. (7 Cranch) 350, 353 (1813) (Marshall, J.) ("It is so unusual for a legislature to employ itself in framing rules which are to operate only on contracts made without their jurisdiction, between persons residing without their jurisdiction, that Courts can never be justified in putting such a construction on their words if they admit of any other interpretation which is rational and *not too much strained*." (emphasis added)); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) (asserting that a clearly retroactive law must control); *see also, e.g.*, Choate v. Trapp, 224 U.S. 665, 675 (1912) (asserting that "doubtful expressions" are to be resolved in favor of the Indians).

[274] *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 333-34 (2001) (Scalia, J., dissenting) (asserting that "clear statement [of congressional intent to strip habeas jurisdiction] has never meant the kind of magic words demanded by the Court today"); Dellmuth v. Muth, 491 U.S. 223, 239 (1989) (Brennan, J., dissenting) (arguing that "the Court in the Eleventh Amendment context insists on setting up ever-tighter drafting regulations that Congress must have followed . . . in order to abrogate immunity"); Library of Congress v. Shaw, 478 U.S. 310, 327 (1986) (Brennan, J., dissenting) (arguing that the majority's approach requires Congress to use a "talismanic formula" to waive sovereign immunity for interest on attorney's fees); Eskridge & Frickey, *supra* note 24, at 617 (criticizing Japan Whaling Assoc. v. Am. Cetacean Soc'y, 478 U.S. 221 (1986), as a case "transform[ing] the . . . rule permitting Congress to abrogate traditional presidential powers only through a clear statement in the statutory text into a super-strong clear statement rule requiring the statutory clear statement to target the specific issue unmistakably"). Characterization of a canon's application as a "magic words" requirement is always pejorative; the Court itself disclaims the authority to so discipline Congress. *See, e.g.*, Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 112 (1992) (Kennedy, J., concurring) ("[W]e have never required any

aggressive use of clear statement rules violates the baseline rule of legislative supremacy. But in the normal course, clear statement rules function no differently from other canons that permit a court to forsake a more natural interpretation in favor of a less natural one that protects a particular value.[275] Indeed, canons like avoidance and *Charming Betsy* can be rephrased as clear statement rules: absent a clear statement, a court will not interpret a statute to raise a serious constitutional question, and absent a clear statement, a court will not interpret a statute to abrogate customary international law.[276] The choice to denominate a canon as a "clear statement" rule is of little consequence; what matters is the effect of the canon on the statutory text.

There is no justification for departing from the plain text of a constitutional statute. But as the cases discussed in this Section illustrate, many canons operate in a grey area, respecting the outer limits of a text but not its most natural interpretation. The next Section considers the more difficult question of whether choosing a less plausible but still bearable interpretation of a statute is consistent with the constitutional structure.

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particular magic words in our express pre-emption cases."); Carlson v. Green, 446 U.S. 14, 19 n.5 (1980) (denying that its approach requires Congress to use "magic words" to render a statutory remedy exclusive of a *Bivens* action).

[275] *See, e.g.*, United States v. Nordic Vill., Inc., 503 U.S. 30 (1992) (applying rule requiring clear waivers of federal sovereign immunity when the statute "is susceptible of at least two interpretations that do *not* authorize monetary relief"); Blatchford v. Native Village of Noatak, 501 U.S. 775, 786 & n.4 (1991) (refusing to interpret general jurisdictional grant as abrogating the state's sovereign immunity from suit in federal court on grounds that language authorizing federal courts to hear "all civil actions" did not abrogate all defenses to such actions); Gregory v. Ashcroft, 501 U.S. 452, 467 (1991) (applying clear statement rule where the Age Discrimination in Employment Act left room to question whether it reached state judges).

[276] Indeed, the Court itself sometimes phrases these canons as clear statement rules. *See, e.g.*, NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 507 (1979) (holding that the Court would adopt any other plausible interpretation of a statute "in the absence of a clear expression of Congress' intent" to provoke consideration of "difficult and sensitive" First Amendment questions); Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306, 312-13 (1970) (Harlan, J., dissenting) (refusing to interpret a statute "to override the well-settled principle [of customary international law] that the law of the country whose flag a ship flies governs shipboard transactions, absent some 'clear expression' from Congress to the contrary"); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22 (1963) ("[F]or us to sanction the exercise of local sovereignty under such conditions in this 'delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed.'" (quoting Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 147 (1957))); *see also* Clark v. Martinez, 543 U.S. 371, 397 (2005) (Thomas, J., dissenting) ("[T]he rule of lenity is a constitutionally based clear statement rule.").

B. *Canons as Constitutional Implementation*

Textualists describe themselves as "enthusiasts of canons that reflect constitutionally derived values."[277] That enthusiasm does not tell the whole story, for textualists apply extraconstitutional canons as well.[278] Still, their particular attraction to constitutionally inspired canons suggests an intuition that such rules are more consistent with the principle of faithful agency than extraconstitutional canons. Textualists have made quite clear that extraconstitutional values like fairness and equity do not justify departures from the most natural reading of a statute. The connection between constitutionally inspired canons and higher law, however, makes colorable the claim that these canons moderate the baseline commitment to legislative supremacy.

Consider the way in which a canon's connection to the Constitution distinguishes it from statutory exceptions made in the name of equity: constitutionally inspired canons do not disturb the results of the legislative process in pursuit of an undifferentiated notion of fairness. As such, they are more consistent with the rule of law norm reflected in the Constitution's separation of powers than more freewheeling interpretive approaches.[279] Making exceptions either to achieve greater equity or avoid absurdity offends the rule of law norm because "[o]nce the court provisionally identifies a statute's (otherwise clear) meaning, the absurdity doctrine invites the court to make adjustments based on social values whose content and method of derivation are both unspecified ex ante."[280] Constitutionally inspired canons, by contrast, have the virtue of promoting an identifiable (and, short of constitutional amendment, closed) set of norms that have been sanctioned by a super-majority as higher law.[281] They do less violence to the legislative bargain because legislators can anticipate their potential effect on statutory interpretation and modify their language accordingly.[282] The grounding of

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[277] John F. Manning, *Legal Realism and the Canons' Revival*, 5 GREEN BAG 2d 283, 292 n.42 (2002); *see also* Manning, *supra* note 235, at 1655 ("In the realm of constitutional values, moreover, many textualists will accept a less natural (though textually plausible) interpretation of a statute in order to avoid a conflict with serious constitutional questions or, for that matter, with the policies underlying an array of constitutionally inspired clear statement rules.").

[278] *See supra* notes 57-67 and accompanying text.

[279] *See* Manning, *supra* note 5, at 2433; *supra* notes 16-22 and accompanying text.

[280] Manning, *supra* note 5, at 2471.

[281] *See* Manning, *supra* note 2, at 125 ("In any case, when judges promote constitutional values by shading statutory meaning (within a range that the statutory language will bear), their action surely has a firmer basis than the equity of the statute, which draws upon more open-ended conceptions of external moral principles."); Nagle, *supra* note 51, at 808-09 (asserting that federal courts are more justified in applying clear statement rules to promote constitutional, as opposed to extraconstitutional, values).

[282] *Cf.* Manning, *supra* note 5, at 2472 ("[I]f legislators can realistically evaluate legislative bargains ex ante only in terms of a statute's social meaning . . . then the absurdity

these canons in the Constitution thus renders their effect on statutes both more predictable and more democratically legitimate than that of open-ended doctrines like absurdity and equitable interpretation.

Moreover, a canon's grounding in the Constitution provides a potential justification for the way in which its application causes a judge to deviate somewhat from her ordinary obligation of faithful agency by departing from the most plausible interpretation of a statute. Constitutionally inspired canons might be explained as an outgrowth of the power of judicial review. Judges do not act as faithful agents of Congress in exercising judicial review; they act as faithful agents of the Constitution. In the context of judicial review, the judicial duty to enforce the Constitution entirely trumps the judicial duty to enforce legislative commands faithfully. In the context of statutory interpretation, one might reason that the judicial duty to enforce the Constitution qualifies, though it does not trump, the obligation of faithful agency. In other words, the duty to enforce the Constitution may empower a judge not only to invalidate congressional actions that violate constitutional norms, but also to resist congressional actions that threaten those norms.[283] The judge need not serve exclusively as Congress's faithful agent because she serves a higher law.

If constitutionally inspired substantive canons are legitimate, it is because courts – at least in the context of statutory interpretation – are empowered to do what Richard Fallon describes as "implementing the Constitution."[284] In

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doctrine disturbs the bargain struck through the constitutionally mandated legislative process."). To be sure, if the Court puts Congress on notice that it will apply a specific extraconstitutional canon – like, for example, the presumption against retroactivity – legislators could anticipate that canon's effect on future applications of the statute. Even if those canons are more determinate, however, the fact that they are not grounded in the Constitution limits the ability of the judiciary to rely upon them to deviate from a statute's most natural meaning for the reasons described in the remainder of this Section.

[283] *Cf.* Young, *supra* note 49, at 1594 (arguing that the traditional way of thinking about judicial review as an all-or-nothing proposition overlooks the middle ground, which Young calls "the resistance norm").

[284] RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001); *see also* Richard H. Fallon, Jr., *The Supreme Court 1996 Term: Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 61 (1997). Other scholars have advocated similar views of constitutional decision-making. *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1-19 (1999) (distinguishing between constitutional interpretation and constitutional construction in the political realm); Mitchell Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 36 (2004) (distinguishing between "constitutional meanings" and "constitutional rules"); Henry P. Monaghan, *The Supreme Court 1974 Term: Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975) (distinguishing between judicial decisions actually interpreting the demands of the Constitution and the rules of "constitutional common law" that "draw[] their inspiration and authority from, but [are] not required by, various constitutional provisions"); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes*

the context of judicial review, Fallon has rejected the proposition that the judicial role is limited to determining what the Constitution "means."[285] He argues: "Identifying the 'meaning' of the Constitution is not the Court's only function. A crucial mission of the Court is to *implement* the Constitution successfully. In service of this mission, the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution's meaning precisely."[286] On this view of constitutional decisionmaking, there need be no "conceptual identity between constitutional mandates and judicial rulings;"[287] rather, "a gap frequently, often necessarily, exists between the meaning of constitutional norms and the tests by which those norms are implemented."[288] The gap may be the result of the court's choice to underenforce a constitutional norm by developing a doctrinal test that leaves the responsibility for interpreting the meaning of that norm primarily in the hands of another branch of government.[289] The "judicially manageable standards" branch of the political question doctrine, which leaves other branches with the responsibility for drawing constitutional lines in areas not easily susceptible to judicial enforcement, is an example.[290] Or, the gap may be the result of the court's choice to overenforce a constitutional norm by developing prophylactic doctrines that go beyond constitutional meaning.[291] The *Miranda* doctrine, which inevitably excludes from evidence even some confessions freely given, is an example.[292] The essential point of Fallon's theory is that federal courts are not limited to determining whether executive or legislative action falls inside or outside the precise boundaries of constitutional meaning. They may implement the Constitution through the development of constitutional

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What the Court Does, 91 VA. L. REV. 1649, 1655-58 (2005) (describing the "decision rules" model of constitutional law).

[285] FALLON, *supra* note 284, at 43.

[286] Fallon, *supra* note 284, at 57. Fallon identifies the "rational basis" test under the Equal Protection Clause, the "actual malice" standard under the First Amendment, and the four-part test for evaluating First Amendment protection for commercial advertising as examples of implementing doctrine. FALLON, *supra* note 284, at 5.

[287] FALLON, *supra* note 284, at 39.

[288] Fallon, *supra* note 284, at 60.

[289] *Id.* at 64 ("[S]ome constitutional tests reflect an implicit judgment that it would be too costly or unworkable in practice for courts to enforce all constitutional norms to 'their full conceptual limits.'" (citing Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221 (1978))).

[290] Fallon points out that "perhaps more than any other constitutional doctrine, this one recognizes explicitly that a gap can exist between the meaning of constitutional guarantees, on the one hand, and judicially enforceable rights, on the other." Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1276 (2006).

[291] FALLON, *supra* note 284, at 6.

[292] *See* Dickerson v. United States, 530 U.S. 428, 437 (2000); FALLON, *supra* note 284, at 6; Berman, *supra* note 284, at 19-29; Monaghan, *supra* note 284, at 20.

doctrines that may over- or underenforce the norms with which they are concerned.[293]

The scholarship dealing with constitutional implementation is primarily concerned with developing a theoretical basis for the doctrinal tests that comprise so much of the law applied in the exercise of judicial review. But the framework easily describes constitutionally inspired canons as well. While such canons "draw[] their inspiration" from the Constitution,[294] they do not purport to interpret its meaning. Instead, they represent both the under- and over-enforcement of the Constitution.

Eskridge and Frickey have highlighted the role that substantive canons play in the underenforcement of constitutional norms.[295] They have observed that the Court sometimes deploys constitutional clear statement rules to protect values that it has decided not to protect vigorously through judicial review.[296] For example, the Court may underenforce the norm of federalism by leaving its protection primarily to "political safeguards,"[297] but the federalism canons compensate somewhat for that by increasing the political cost of enacting statutes that intrude upon the states.[298] Or, the Court may underenforce the First Amendment to avert confrontation with the political branches in a tense political climate, but employ the avoidance canon to make it more difficult for Congress to trample upon the rights of free speech and association.[299] Because Congress can overcome the effect of the canons by employing clear language,

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[293] Note that there are different views about whether Congress can override such doctrines. *Compare* Monaghan, *supra* note 284, at 3 (describing "constitutional common law" as "subject to amendment, modification, and even reversal by Congress"), *with* Berman, *supra* note 284, at 101-05 (arguing that such doctrines can be beyond Congress's reach), *and* Rosenkranz, *supra* note 284, at 2156 (arguing that there are limits to Congress's authority to modify or overrule constitutionally inspired substantive canons).

[294] *Cf.* Monaghan, *supra* note 284, at 3.

[295] William N. Eskridge, Jr. & Philip Frickey, *Clear Statement Rules as Quasi-Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992); *see also* Eskridge & Frickey, *supra* note 24, at 597, 631-33 (characterizing many constitutionally inspired canons as performing this function).

[296] Eskridge & Frickey, *supra* note 24, at 632-33.

[297] Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); *see also* Eskridge & Frickey, *supra* note 24, at 630-31.

[298] For example, Eskridge and Frickey observe that the Court invigorated federalism clear-statement rules "during a period in which the Court was abandoning any role in enforcing federalism values through constitutional interpretation." *See* Eskridge & Frickey, *supra* note 24, at 619. In the case of federalism values, underenforcement resulted from the Court's determination that it could not articulate judicially manageable standards to enforce guarantees like the Tenth Amendment and the Commerce Clause. *Id.* at 633.

[299] *See* Frickey, *supra* note 47, at 401 (arguing that the Court did just that during the McCarthy era).

the argument goes, protecting constitutional values through canons rather than judicial review is more protective of the political process.[300]

The fact that a canon is tied to an underenforcing doctrine of judicial review does not mean that the canon itself underenforces the relevant constitutional principle. On the contrary, a court can overprotect a norm through statutory interpretation even if it underprotects that norm through judicial review.[301] That is so because no canon purports to mirror the rule that would have been applied in an exercise of judicial review; a court applying a canon does not simply articulate what would have been a hard constitutional limit in the softer form of statutory interpretation.[302] On the contrary, the content of a constitutionally inspired canon is typically independent of the perceived conceptual limits of the underlying constitutional norm.[303] For example, the clear statement federalism rule may complement the Court's decision to underenforce the Tenth Amendment through judicial review.[304] At the same time, it may overenforce the federalism norm by increasing the costs of

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[300] *See* Eskridge & Frickey, *supra* note 24, at 631 ("[S]uper-strong clear statement rules . . . provide significant protection for constitutional norms, because they raise the costs of statutory provisions invading such norms; and ultimately such rules may even be democracy-enhancing by focusing the political process on the values enshrined in the Constitution."). *But see* Berman, *supra* note 284, at 43 n.140 (arguing, in the context of judicial review, that underenforcing doctrines are less democratic than fully enforcing doctrines to the extent that they permit state actors to override the supermajority protections of the Constitution).

[301] As Eskridge and Frickey observe, "judicial restraint at the constitutional level" does not preclude "judicial activism at the interpretive level." Eskridge & Frickey, *supra* note 24, at 621. They charge the Rehnquist Court with engaging in this sort of activism. *Id.* at 637; *see also* Berman, *supra* note 284, at 40-43 fig.2 (pointing out that norms can be simultaneously under- and overenforced).

[302] Even though the content of a canon does not purport to mimic the hard constitutional test that the court would have applied in an exercise of judicial review, the application of a canon does sometimes represent a conscious judicial choice to use interpretation to avoid invalidation. That is true of the old "unconstitutionality" version of the avoidance canon. When the most natural reading of a statute would render it unconstitutional, the court would adopt any other plausible interpretation instead. In doing so, it exchanged a hard for a soft limit on Congress. Note, however, that the court's choice to do so in no way depended on its assessment that the underlying constitutional value was underenforced.

[303] That is not to say that they would never overlap. For example, the "doubts" version of the avoidance canon may sometimes avoid constitutional interpretations and sometimes avoid unconstitutional ones, thereby functioning as an overenforcing doctrine in some cases but not others. *Miranda* reflects the same overlap in the context of judicial review: it is widely recognized to be a prophylactic doctrine, not because it always invalidates action that would otherwise be constitutional, but because it sometimes, perhaps often, captures such conduct.

[304] *See supra* note 298 and accompanying text; *see also* Nagle, *supra* note 51, at 812 (characterizing the Tenth Amendment's federalism norm as underenforced).

regulating the states in ways that the Tenth Amendment, interpreted to its full conceptual limits, would permit.

In many cases, the Court's adoption of a clear statement rule has more to do with its determination that some constitutional principle merits heightened protection than with a decision to underenforce a norm through judicial review. Consider the canon requiring a clear abrogation of state sovereign immunity. The Court has acknowledged that Congress has the power to abrogate state sovereign immunity under Section Five of the Fourteenth Amendment. At the same time, the Court's refusal to find an abrogation absent a clear congressional statement makes it more difficult for Congress to exercise power that the Constitution indisputably grants it. The Court has admitted as much. In *Dellmuth v. Muth*, the Court explained the rationale for its clear-statement abrogation rule as follows:

> To temper Congress' acknowledged powers of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure, we have applied a simple but stringent test: "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."[305]

Thus, the clear statement abrogation rule does not rest upon any doubt that Congress possesses the power to abrogate state sovereign immunity, but rather on the Court's sense that Congress should proceed carefully before exercising its "acknowledged power[]" to accomplish this result.[306]

Other canons similarly overenforce the Constitution by handicapping Congress in the exercise of powers that it legitimately possesses. The modern "doubts" version of the avoidance canon is an example. Commentators have repeatedly observed that avoiding questionable, though not necessarily unconstitutional, interpretations makes it difficult for Congress to enact policies that do not actually cross any constitutional line.[307] *Charming Betsy* and the federal sovereign immunity canons illustrate the same phenomenon. Both canons may be described as constitutionally inspired: *Charming Betsy* may be described as protecting the Constitution's allocation of foreign policymaking authority to the political branches, and the federal sovereign immunity rule can be justified as protecting the sovereignty that the federal

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[305] Dellmuth v. Muth, 491 U.S. 223, 227-28 (1989) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)). Note that Justice Scalia both joined Justice Kennedy's opinion for the Court and subsequently quoted this language approvingly in *Blatchford*. Blatchford v. Native Village of Noatak, 501 U.S. 775, 786 (1991) (quoting *Dellmuth*, 491 U.S. at 227-28).

[306] *Dellmuth*, 491 U.S. at 227.

[307] Some commend that result as a valuable means of selecting important norms for overprotection. *See, e.g.*, Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1966-69 (1997); Young, *supra* note 49, at 1594. Others condemn it as violative of legislative supremacy. *See, e.g.*, Kelley, *supra* note 68, at 846-60; Schauer, *supra* note 32, at 92-95.

government possesses by virtue of the constitutional structure. No one disputes that Congress has the authority both to abrogate the law of nations and to waive federal sovereign immunity.[308] Nonetheless, a federal court will not interpret a statute as has having done either if the court can identify any other plausible interpretation. Each of these canons may be thought to protect a constitutional value, but at the cost of making it difficult for Congress to act even where the Constitution undeniably leaves it free to do so.[309]

It is the tendency of constitutionally inspired canons to overenforce the Constitution that places them in greatest tension with the constitutional structure. In the context of judicial review, originalists – which most statutory textualists are – have emphatically rejected the proposition that federal courts may adopt doctrinal tests that overenforce the Constitution by imposing limits on state actors that go beyond those set by the document itself.[310] The dispute over the constitutional status of *Miranda* warnings is the most well-known example. In *Dickerson v. United States*,[311] Justice Scalia's fundamental disagreement with the majority was over the notion that "this Court has the power, not merely to apply the Constitution but to expand it, imposing what it regards as useful 'prophylactic' restrictions upon Congress and the States."[312] If this objection extends to overenforcing through statutory interpretation, then most, if not all, of the constitutionally inspired canons of construction would fall under its weight.

Yet overenforcing doctrines of statutory interpretation function differently from overenforcing doctrines of judicial review. Overprotection in the context of statutory interpretation is more respectful of Congress's prerogative to exert

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[308] *See, e.g.*, The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 145-46 (1812) (applying *Charming Betsy* to honor customary international law principle that "national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction," while simultaneously acknowledging that "[w]ithout doubt, the sovereign of the place is capable of destroying" this principle).

[309] *See* South Dakota v. Bourland, 508 U.S. 679, 686-87 (1993) (Thomas, J.) ("Congress has the power to abrogate Indian treaty rights, though we usually insist that it make clear its intent to do so.").

[310] *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 457-59 (1999) (Scalia, J., dissenting) (acknowledging that the Court has adopted doctrinal tests to implement, inter alia, the Takings Clause, the Confrontation Clause, and the First Amendment, but arguing that such rules are designed to enforce constitutional limits rather than set prophylactic protections).

[311] *Id.* at 432 (majority opinion) (holding that Congress may not legislatively overrule *Miranda v. Arizona*, 384 U.S. 436 (1966)); *see also* Berman, *supra* note 284, at 25-32 (describing Justice Scalia's *Dickerson* dissent as a notable rejection of the view that courts may enforce the Constitution through the adoption of prophylactic rules); Roosevelt, *supra* note 284, at 1669-70.

[312] *Dickerson*, 530 U.S. at 446 (Scalia, J., dissenting); *see also id.* ("That is an immense and frightening antidemocratic power, and it does not exist.").

the full extent of its constitutional powers insofar as it (in contrast to overenforcing doctrines of judicial review) does not wholly invalidate legislation that remains within the boundaries set by the Constitution. That is not to say that there are no constraints upon Congress's ability to override a statutory interpretation decision. A statutory misconstruction can become entrenched when one of the relevant actors – the House, Senate, or President – prefers that it stay in place.[313] That said, Congress does override statutory interpretation decisions with some frequency,[314] and even if the ability to override is somewhat compromised, Congress still has the option.[315] Indeed, in light of this difference, one could view overenforcing statutory canons as a better way of accounting for the concerns that animate overenforcing doctrines of judicial review. Prophylactic rules are a valuable tool for ensuring that political actors do not inadvertently cross constitutional lines or inadvertently exercise extraordinary constitutional powers. They go too far when they invalidate such action, for then they function as permanent constitutional constraints. But when framed as interpretive rules, they function as "stop and think" measures that discipline Congress to consider carefully the constitutional implications of its policies.[316] This discipline is relatively restrained insofar as it refrains both from permanently glossing the Constitution and from overenforcing constitutional norms at the expense of plain language. It is also relatively respectful of legislative supremacy because Congress can free itself of potentially offending interpretations by legislatively overriding them – a power it lacks in the context of overenforcing doctrines of judicial review.

To the extent that overenforcing canons of construction are legitimate, one might say that they 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. The application of canons like avoidance and the clear statement federalism rules is admittedly in tension with the structural limitations upon statutory interpretation. But so long as courts honor the plain language of a statute and act only in service of values enshrined in the Constitution, they do not act in direct conflict with the rule of law norm that prohibits departures from text in

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[313] *See* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 105 (1997).

[314] *See* William Eskridge, *Overriding Supreme Court Statutory Interpretations*, 101 YALE L.J. 331, 338 (1991) (collecting data on congressional overrides).

[315] Nagle, *supra* note 51, at 821-22 ("[T]he admittedly imperfect ability to overcome a clear statement rule presents an alternative that is not available to Congress when the Court strikes down a statute as unconstitutional.").

[316] *Cf.* Young, *supra* note 49, at 1608-09 (arguing that clear statement rules "make clear to all participants in the political process that constitutional values are at stake, by highlighting the aspects of legislation that implicate those values"; in addition, they "add to the hurdles that any legislation must pass, increasing the political costs that proponents must incur in order to achieve their objectives").

the service of undifferentiated social values. The application of substantive canons typically overenforces the Constitution. But because overenforcement in the context of statutory interpretation clips congressional prerogatives much less than overenforcement in the context of judicial review, the application of substantive canons is not in direct conflict with the limitations upon judicial review. In other words, the Constitution's structure does not definitely rule out the application of language-pushing canons, and that may leave federal courts some room to act.

To be sure, this argument is not rock solid. Constitutionally inspired canons neither impose a bar on Congress nor entirely override the product of the legislative process, but they constrain Congress more than the Constitution does. It 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.

Notwithstanding the appeal of this position, there are good reasons to reject it. The federal courts have long asserted the power to employ language-pushing substantive canons.[317] The pedigree of this practice gives it a stronger claim to legitimacy than overenforcing doctrines of judicial review, which took their place in constitutional law more recently and have yet to be openly defended by those justices willing to apply them.[318] And that pedigree is not only reason for thinking that the more expansive approach to judicial power is right, but for adhering to that approach even if it is wrong. However one might have resolved the tension between substantive canons and faithful agency as an initial matter, the practice of employing such canons has been with us for so long that the sheer force of precedent counsels against abandoning it.[319]

Substantive canons also make sense from a functional perspective. It would be a rigid approach to statutory interpretation that denied the ability of the federal courts to guard against the inadvertent congressional exercise of extraordinary constitutional powers. The messiness of the legislative process may make it impossible to discern whether the exercise of such power was part of the legislative bargain. But when constitutional values are at stake, it seems

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[317] *See supra* Part II.A.

[318] *See* Roosevelt, *supra* note 284, at 1672 (pointing out that no justice has defended the practice of over- or underenforcing the Constitution through decision rules that deviate from the Constitution's provisions).

[319] Treating the legitimacy of substantive canons as settled by stare decisis is different from treating any individual canon as a background assumption of the language employed by the interpretive community of lawyers and lawmakers. The "background assumption" argument evades the constitutional difficulty by treating the substantive canon as effectively linguistic. *See supra* Part III. The argument from stare decisis, by contrast, recognizes many canons as substantive and offers a prudential reason for tolerating them notwithstanding the constitutional difficulty they pose. Moreover, the argument I develop here is that stare decisis counsels in favor of interpreting "the judicial Power" broadly enough to encompass a limited authority to deploy substantive canons, not that longstanding acceptance is a reason for accepting any particular canon.

prudent to interpret the Constitution as flexible enough to permit federal courts to press Congress on the point.[320]

C. *The Limits of Canon-Making Power*

If the Constitution is what qualifies the obligation of faithful agency, then the obligation of faithful agency is unqualified when the values at stake are extraconstitutional. That is not to say that canons protecting extraconstitutional values are illegitimate. On the contrary, such interpretive principles are a useful way of specifying the social values that should influence judges in resolving statutory ambiguity. Assume, for example, that the rule of lenity promotes the extraconstitutional value of fairness to the criminal defendant.[321] If a statute is susceptible to multiple, equally plausible interpretations, the rule of lenity represents a consensus view that a judge should account for this value in choosing among them. But as this formulation suggests, pursuit of an extraconstitutional value does not justify forgoing the best interpretation of a statute in favor of a merely plausible one. Canons promoting such values can serve only as presumptions, tie breakers that help judges choose among competing interpretations.[322] When employed as presumptions, extraconstitutional canons are entirely consistent with the norm of faithful agency.[323] When employed, however, to stretch plain language, as, for example, the canons counseling narrow construction of statutes in derogation of the common law and broad construction of remedial statutes purport to do, they conflict with the obligation of faithful agency.[324]

The objection to this line between constitutional and extraconstitutional values is that it is illusory. As Part I explains, a canon's purpose lies in the

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[320] *See* Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 780 (1992) (emphasizing the importance of interbranch dialogue). The ways in which overprotecting canons interfere with the majority will, however, are good reasons for siding with those who argue that Congress has the power to overrule such canons when it disagrees with the Court's assessment that a particular constitutional value is worth overprotecting. *See supra* note 293.

[321] I say "assume," for lenity can be understood to protect other policies as well, including the due process value of notice. *See supra* note 40. For a discussion of the difficulty of deciding whether a canon protects constitutional or extraconstitutional values, see *infra* note 325 and accompanying text.

[322] *See* U.S. v. Santos, 128 S. Ct. 2020, 2025 (2008).

[323] *See supra* notes 30-67 and accompanying text. The Court could choose to protect constitutional values through presumptions rather than clear statement rules, and that too would be consistent with faithful agency.

[324] Note that the canon counseling narrow construction of statutes in derogation of the common law is objectionable not only because it conflicts with the structural principles that otherwise constrain statutory interpretation, but also because it cuts against the principle that legislation is hierarchically superior to common law, rather than the other way around. Canons rooted in the Constitution, by contrast, push the text to accommodate values embodied in law that is hierarchically superior to legislation.

eyes of the beholder. Lenity may have traditionally been justified as a means of protecting a general concern for fairness, but both early federal courts and modern commentators have also characterized it as a means of protecting the separation of powers by ensuring that Congress is the branch to criminalize conduct.[325] *Charming Betsy* may be most often described as protecting international law for its own sake, but it has also been justified as guarding the constitutional allocation of foreign affairs authority to the political branches. If almost any canon can be rationalized on constitutional grounds, the distinction between constitutional and extraconstitutional canons is one without a difference.

While the distinction between the two is not sharp, neither is it meaningless. At least two factors bear on the question whether a canon can properly be classified as constitutional for purposes of justifying its language-stretching effect. First, the canon must be connected to a reasonably specific constitutional value. Second, the canon must actually promote the value it purports to protect.

As to the first factor: central to the constitutional rationale for the obligation of faithful agency are the arguments that (1) ad hoc alterations to statutes violate the rule of law norm permitting exceptions to statutes only if they run the gamut of the legislative process and that (2) statutory alterations made in the name of undifferentiated social values risk undoing the legislative bargain because Congress cannot anticipate their effect on statutory applications.[326] Section B observed that both of these concerns are minimized in the context of constitutionally inspired canons insofar as they do not make exceptions to plain text and because they draw on specific values selected for protection in higher law.[327] These structural features also bear, however, on the selection of the constitutional values that a court can overprotect. The more specific the value, the more even its application will be across a range of cases – lessening the concern that a court will invoke it to tweak legislative bargains in the case-by-case fashion that the rule of law norm counsels against.[328] In addition, the more specific the value, the better Congress can anticipate its effect on a statute's subsequent interpretation.

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[325] *See supra* notes 40, 102, 103 and accompanying text. Justice Thomas has suggested that lenity may have more bite if it is constitutionally based. *See* Clark v. Martinez, 543 U.S. 371, 397-98 (2005) (Thomas, J., dissenting) (pointing out that lenity might function as a "constitutionally based *clear statement rule*" or a "nonconstitutionally based *presumption* about the interpretation of criminal statutes" (emphasis added)).

[326] *See supra* Part I.C.

[327] *See supra* Part I.B.

[328] The limitation that the avoidance canon be applied to avoid *serious* constitutional questions can be understood to respect this specificity requirement. *Cf.* Marozsan v. United States, 852 F.2d 1469, 1495 (7th Cir. 1988) (Easterbrook, J., dissenting) ("Construction to avoid unconstitutionality or a serious question, must be distinguished from revising statutes to avoid any questions at all. What with the proliferation of constitutional 'questions,' courts could do anything they pleased." (citations omitted)).

Contrast a canon protecting "fairness" and the canon requiring clear statements to abrogate state sovereign immunity. At some point, fairness rises to the level of a constitutional concern, so even a canon like absurdity has a claim to constitutional connection: it can be justified as a means of overprotecting the rationality requirement that the Constitution imposes on statutes that do not implicate suspect classes or fundamental rights.[329] "Fairness" is a nebulous value susceptible to many different interpretations and applicable across a wide range of legislation.[330] "State sovereignty," by contrast, is far more concrete, and applicable to a narrow category of legislation. Its specificity ameliorates the rule of law concern about uneven, ad hoc statutory applications. Moreover, even if Congress could not have initially predicted that the Supreme Court would deem state sovereignty to be worthy of extra protection, the articulation of the canon in the case law has put Congress on notice of how this value will affect the interpretation of its legislation. By contrast, the absurdity doctrine, even once stated in case law, cannot, by its very nature, provide Congress with that kind of clear direction.[331]

As to the second factor: the Constitution provides the most important limit on the canons that courts can apply to deviate from a statute's most natural reading. A canon cannot moderate the obligation of faithful agency unless it actually advances the constitutional value it purports to protect. The absurdity doctrine is again a good example.[332] One could cast the absurdity doctrine as constitutionally inspired by characterizing it as a means of overprotecting the norm of rationality required by the Due Process and Equal Protection Clauses. The rational basis standard of review maintains that a statute passes constitutional muster if the court can imagine *any* rational basis for it. Yet a statutory application can seem unreasonable to the court even if it would survive the rational basis test. For example, Manning points out that while applying a "no vehicles in the park" regulation to an ambulance is widely considered absurd, it would almost surely survive rational basis review. It is

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[329] *Cf.* Manning, *supra* note 5, at 2479-81.

[330] *See supra* Part I.C.

[331] Similarly, a canon designed to protect the constitutional separation of powers – a function that can be attributed to a host of canons – is probably stated at too great a level of generality to justify departures from a text's most natural meaning. *See supra* note 43 and accompanying text (describing how all canons can be conceived of as "buffering devices" between the courts and Congress). By contrast, a canon designed to protect a particular allocation of power – like the allocation of foreign affairs authority to the political branches – may be concrete enough to put Congress on notice of the way this specific constitutional concern could affect the interpretation of a statute. For a discussion of why putting Congress on notice that it will enforce a specific extraconstitutional value does not justify departure from a text's most natural interpretation, see *supra* note 282.

[332] The absurdity doctrine is objectionable on the ground that it permits outright alterations to the text of a statute. *See supra* notes 17-21 and accompanying text. Even if, however, the absurdity doctrine permitted a court to forgo a statute's most natural meaning in favor of a less plausible one, it would fail for the reasons discussed above.

rational (even if a debatable policy choice) for the legislature to prohibit all vehicles, including ambulances, as a means of protecting children from speeding vehicles.[333] Insofar as the absurdity doctrine picks off applications that the Constitution would leave intact, it can be understood as overenforcing the due process rationality requirement. It is a resistance norm that forces Congress to speak clearly if it wishes to tread close to the line of reasonableness.

Overenforcement of the rationality requirement, however, undercuts rather than advances the balance struck by the Due Process and Equal Protection Clauses.[334] Rational basis review represents more than the Court's prudential judgment that Congress is better suited than the courts to determine what the Due Process and Equal Protection Clauses require in any particular context. Rational basis review also reflects the Supreme Court's judgment that the Constitution requires the courts to defer to reasonable legislative judgments.[335] Overprotecting the rational basis norm is thus at odds with the deferential posture that the Court has interpreted the Constitution to mandate. In the context of legislation that does not implicate fundamental rights or a suspect class, faithful enforcement of the Constitution requires a court to hew as closely as possible to the norm of faithful agency by enforcing the text unadulterated by judicial tweaking.[336] The rationality requirement of the Due Process and Equal Protection Clauses is not susceptible to overenforcement because the whole point of rationality review is to emphasize that courts must defer to, not police, the legislature.

The faithful agent must evaluate whether the same is true of other substantive canons. For example, the presumption against preemption is commonly justified as protecting the norm of federalism. Some have criticized it as illegitimate, however, on the ground that the Supremacy Clause is not

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[333] Manning, *supra* note 5, at 2391.

[334] *Id.* at 2446-47 (arguing that insofar as "the absurdity doctrine permits judges to displace legislation that would easily survive rationality review, that doctrine threatens to disturb the careful balance between legislative and judicial power struck by the modern rational basis test").

[335] *See id.* at 2433. Some interpret the post-New Deal cases as underenforcing the Due Process and Equal Protection Clauses rather than enforcing those clauses to their full conceptual limits. *See, e.g.*, Sager, *supra* note 289, at 1216-18. Even if rationality review represents a prudential judgment rather than an assessment of actual constitutional constraints upon the judicial power, overenforcement of the rationality requirement undercuts that prudential calculation.

[336] Again, this is not to say that it is illegitimate for a court to rely on its own sense of reasonableness in choosing between equally plausible interpretations of a statute. *See supra* note 324 and accompanying text. It is only to say that a court would not be justified in adopting a less plausible (but bearable) interpretation of a statute in ostensible service of due process and equal protection.

biased against the exercise of federal power.[337] If the Constitution is best understood as neutral or favorable to federal preemption of state law, then a canon enforcing a supposed constitutional value reflecting the opposite bias cannot legitimately qualify the obligation of faithful agency. The same might be true of the rule requiring abrogations of state sovereign immunity to be clear. If Section Five of the Fourteenth Amendment is a narrow exception to a general rule that Congress lacks the power to abrogate state sovereign immunity, then the clear statement rule can be understood as a means of underscoring the constitutional norm that abrogations are exceptional. If, by contrast, Congress possesses broad power to abrogate state sovereign immunity under Article I, there might be less warrant for treating abrogation as an extraordinary power. One's approach to this problem (and other similar ones), then, depends upon one's view of the substantive meaning of the provision involved.

There would surely be as much disagreement about the consistency of canons with constitutional norms as there is about the underlying norms themselves. The point here is not to evaluate the compatibility of every canon purporting to be constitutionally inspired with the underlying principle it ostensibly implements. The point is simply to say that such an inquiry must be undertaken. It ought not be assumed that identifying a constitutional hook is enough to justify treating a canon as one that advances a constitutional value. While some canons satisfy this requirement, others undoubtedly do not, and the faithful agent must carefully consider the category to which a particular canon belongs.

CONCLUSION

The conflict between substantive canons and faithful agency pushes textualists to think hard about whether the judicial obligation of faithful agency is unqualified. This Article has argued that the obligation is not necessarily absolute. At least when a substantive canon promotes constitutional values, the judicial power to safeguard the Constitution can be understood to qualify the duty that otherwise flows from the principle of legislative supremacy. On this view, courts are not limited to a black-and-white, yes-or-no choice about a statute's constitutionality; they possess a limited power to push a statute in a direction that better accommodates constitutional values.

Even so, the obligation of faithful agency is modified, not overcome. A court cannot advance even a constitutional value at the expense of a statute's plain language; the proposed interpretation must be plausible. Moreover, a canon does not justify even a limited deviation from the norm of faithful

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[337] *See, e.g.*, Eskridge & Frickey, *supra* note 24, at 624 ("The supremacy clause is an exception to our basic system of federalism, rather than a foundational premise upon which the Constitution replaced the Articles of Confederation?"); *see also* Nelson, *supra* note 211, at 256 ("[T]he [Supremacy Clause] does caution against straining the meaning of a federal law to avoid a contradiction with state law.").

agency simply because it can be connected to some constitutional norm. A court must carefully consider the specificity of the norm at stake and whether deviation from the statute's best reading actually advances it. When the power is exercised within these limits, the deployment of a substantive canon does not directly clash with the structural limitations on statutory interpretation and judicial review. When statutory language implicates an important constitutional value and leaves room for an alternate interpretation, it makes sense for a court to demand greater clarity from Congress by pushing the statute in ways that its language will permit. At the same time, the limits placed upon the exercise of this power adequately accommodate the norm of legislative supremacy.

This understanding of substantive canons of statutory interpretation is consistent with historical practice, as federal courts have crafted and applied substantive canons from the very start. To be sure, the historical rationale for substantive canons was not always clear. Early federal courts sometimes described them as proxies for congressional intent and sometimes as a means of promoting policies external to the statute. Even so, their application then has something to tell us about their validity today. Nineteenth century faithful agents enriched the positive law through assumptions made about congressional commitments to shared values. That practice reflects the judgment that shared values ought to influence the interpretation of the law, occasionally in ways that require departures from a text's most natural meaning. Assumptions about legislative intent cannot justify that enterprise for a modern textualist. Nonetheless, our structural commitments leave room for it, and insofar as a substantive canon is constitutionally grounded, it shapes the text with an eye toward values that are truly shared.