

# THE TEXTUALIST BASIS FOR SUBSTANTIVE CANONS

*Thomas MacPhee\**

## INTRODUCTION

We live in a world ruled by words. Indeed, “[i]t is the proud boast of our democracy that we have ‘a government of laws and not of men.’”<sup>1</sup> And in a government of laws, it is particularly important that we know what the law is and what the words mean. In this era of textualist domination, one might expect these fundamental issues to be well settled. But they are not.

Textualism is often described as an epistemological claim: the only way to know the law is by the meaning of its words in their full context to a reasonable interpreter at the time of their enactment. By and large, textualists all agree with that. But questions like what counts as the text’s “full context” and what makes an interpreter “reasonable” create a great deal more division. Textualists seem united on some fronts—legislative history is out, dictionaries are in—but other issues remain contentious. The use of substantive canons of construction presents one particularly pressing theoretical battlefield. Can a good textualist ever use substantive canons? If so, which ones and when?

Generally, canons of construction fall into two categories: semantic and substantive.<sup>2</sup> Semantic canons “are generalizations about how the English language is conventionally used and understood, which judges may use to ‘decode’ statutory terms.”<sup>3</sup> So, when an interpreter applies a semantic canon, he is using grammatical and syntactical clues

---

\* J.D. Notre Dame Law School, 2026; B.A., Hillsdale College, 2023. Thank you to Professor A.J. Bellia for teaching me to be a textualist and for his invaluable advice and encouragement throughout the preparation of this Note. Thank you to my excellent friends and colleagues on the *Notre Dame Law Review* for their tireless work. Thank you to my parents, without whom none of my accomplishments would be possible. All errors are my own. All glory belongs to the Lord Jesus Christ, my savior.

1 *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (quoting MASS. CONST. pt. I, art. XXX).

2 See JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 324 (4th ed. 2021).

3 *Id.*

to understand the semantic context of the statute. Substantive canons, on the other hand, are “judicial presumption[s]—maybe weak, maybe strong, maybe super-strong—in favor of or against a particular substantive outcome.”<sup>4</sup>

Much contemporary criticism suggests that reconciling textualism and substantive canons is impossible. For example, in their 2023 article *The Incompatibility of Substantive Canons and Textualism*, Benjamin Eidelson and Matthew Stephenson mount a powerful argument against textualists’ use of substantive canons. They argue that textualism’s “beating heart” is a “normative thesis” demanding courts act as the legislature’s faithful agents by searching the text for what a “reasonable reader would take a lawmaker who promulgated the statute to have said (or, perhaps, to have intended to say).”<sup>5</sup> They further argue that “[w]henever [a substantive canon] does any work, it must be leading a court to a result different from the one that the same court would have reached based only on the apparent linguistic import of the text.”<sup>6</sup> Thus, their argument concludes, substantive canons are irreconcilable with the textualist commitment to the legislative intent captured by the text’s plain meaning.<sup>7</sup>

Arguments like these are compelling, and textualists have been grappling with this tension for at least several decades.<sup>8</sup> But perhaps there is a resolution to this tension: if textualism is conceptualized as not only an epistemological but also an ontological claim—that the law *is* the text, not some legislative intention instantiated in the text—then some substantive canons of construction can be justified as helpful indicia of the legislative text’s substantive context. That is, if the law is the text itself, the hidden intentions of legislators, even if they could be known, are totally irrelevant to the task of statutory interpretation—and thus the criticism of canons for departing from what the legislature “intended” falls flat. Unlike the secret, collectivized, fictionalized intentions of the legislature, the reasonable interpreter’s understanding of the text may depend on more than the purely semantic meaning of the words themselves. Reasonable people understand texts in light of substantive values, so if a substantive canon represents a substantive

4 *Id.*

5 Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 522, 524, 522–26 (2023).

6 *Id.* at 517.

7 *Id.* at 521.

8 See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 27–28 (Amy Gutmann ed., new ed. 2018) (Justice Scalia describes substantive canons as rules “that load the dice for or against a particular result” which are “a lot of trouble” for “the honest textualist.”).

value that the reasonable person would consider in understanding the statute, then a good textualist is not only allowed to consider the canon but is obligated to do so.

In Part I, I will present the *prima facie* case for a textualist justification of substantive canons. In Section I.A, I will outline the textualist ontology of law and its implications for extratextual context. And in Section I.B, I will present Justice Barrett’s treatment of the major questions doctrine as an example of a textualist justification for a substantive canon. In doing so, I will address in more detail Eidelson and Stephenson’s critiques. Then, in Part II I will develop upon that basis by applying arguments parallel to Justice Barrett’s to justify two other substantive canons as appropriately weighing on substantive context: the rule of lenity and the federalism canon.

## I. THE PRIMA FACIE TEXTUALIST CASE FOR SUBSTANTIVE CANONS

### A. *The Ontology of Law and Extratextual Context*

“It is emphatically the province and duty of the judicial department to say what the law is.”<sup>9</sup> Chief Justice Marshall recognized this duty for our courts more than 220 years ago, and the judicial function of announcing and applying the law has been an essential aspect of our legal system ever since. “Saying what the law is” requires courts to grapple with two fundamental questions: (1) What constitutes “the law” which must be interpreted (i.e., the text? The legislature’s purpose? Its intent?) and (2) how can one know the content of the law? (i.e., what does this text mean? Or how do we know what Congress intended?) The first question—which we might call ontological—must be answered before the second—the epistemological—because we must know *what* to interpret before we can determine *how* to interpret it.

Textualism is often characterized as an epistemological claim—that the best way to know the law is by the text—but application of that general rule can vary dramatically.<sup>10</sup> Professor Grove explains this variability by dividing textualism into two camps: “formalistic textualism” and “flexible textualism.”<sup>11</sup> Grove’s formalistic textualist “emphasizes semantic context and downplays normative and consequential concerns,” whereas her flexible textualist considers more extratextual context, including “social context, normative values, and practical consequences.”<sup>12</sup> Grove argues that judges should favor formalistic

---

9 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

10 *See, e.g., Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

11 Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, 267 (2020).

12 *Id.* at 290.

textualism because it serves “powerful normative justifications” including promoting judicial constraint and legitimacy.<sup>13</sup> And like Eidelson and Stephenson, Professor Grove sees this form of textualism as incompatible with substantive canons.<sup>14</sup>

Professor Grove’s arguments are forceful, but they depend on an unstated assumption: that so-called formalistic textualism is compatible with the textualist ontology of law. A tree cannot stand without its trunk, and an epistemological theory cannot contradict its ontological foundation. Professor Grove’s rejection of canons and other extratextual context must be compatible with the ontological foundation of textualism. This begs the question: what is that foundation?

Textualism grounds the legitimacy of law (and the project of interpretation) in the comprehensibility of the text to a reasonable reader. Thus, textualism’s ontology of law is identical with its epistemology of law: the law *is* and can only be known *by* the text—or more precisely what the words of the text mean in context to a reasonable person at the time of their enactment.<sup>15</sup> The law *is* the text. Framed in the negative, the law is not some collective legislative will expressed by text, nor some united legislative intent instantiated in text. No, the law *qua* the law is the text. This metaphysical, ontological claim that the law “begins and ends with what the text says and fairly implies”<sup>16</sup> is not merely one of convenience, nor one choice among many possible alternatives. Rather, it follows necessarily from two of the fundamental premises of textualism: that collectivized legislative intent cannot exist<sup>17</sup> and that the constitutional duty of faithful agency impels courts to interpret statutes as reasonable readers would.<sup>18</sup>

It is this ontology of law that distinguishes textualism from intentionalism. Intentionalists believe that the law is the legislature’s

---

13 *Id.* at 270.

14 *Id.* at 291–92.

15 See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 16 (2012).

16 *Id.*

17 The legislature is not a single entity—it is a multimember body composed of hundreds of individuals, each of whom come to the text with unique intentions, expectations, knowledge, and understandings. See, e.g., John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424 (2005) (“Textualists, by contrast, deny that Congress has a collective will apart from the outcomes of the complex legislative process that conditions its ability to translate raw policy impulses or intentions into finished legislation.”). Thus, ontologically speaking, concepts like “legislative intent,” “expected application,” and “congressional knowledge” cannot exist. See, e.g., Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 1020 (2017) (“[C]laims about legislative intent are reliably false if taken literally.”). A person can intend something; Congress cannot.

18 See, e.g., Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2210–11 (2017).

collectivized intent—the text is merely a vessel for that higher law.<sup>19</sup> Textualists believe that the law is what the text means in context to reasonable readers.

To say that the law is the text as understood by the reasonable reader has important implications for statutory interpretation. First, textualism is not literalism. Literalism, sometimes referred to as strict constructionism, suggests that statutes should be construed literally—stripped of context—rather than according to their fair meaning.<sup>20</sup> Reasonable readers understand texts in context, so “the good textualist is not a literalist.”<sup>21</sup> As Justice Scalia put it: “Textualism should not be confused with so-called strict constructionism . . . . A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.”<sup>22</sup>

Sometimes, construing texts reasonably, rather than strictly, involves imputing ideas not explicitly included in the text. For example, textualists will read a mens rea requirement into “[a] statute creating a criminal offense whose elements are similar to those of a common-law crime” even where no mens rea requirement is textually enumerated.<sup>23</sup> This interpretation, properly understood, is not a substitution of the interpreter’s judgment for the legislature’s, but rather a reflection of the historical legal context that would be familiar to the reasonable reader:

[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.<sup>24</sup>

In other words, the textualist’s reasonable reader appropriately considers the historical and legal context surrounding words, even if that context may be unfamiliar to the average person. By doing so, textualists vindicate the true meaning of the text by going beyond the literal meaning of the words.<sup>25</sup>

Sometimes, rendering the best meaning of a statute may even require construing a statute against its literal meaning. For example, in

---

19 See *infra* notes 50–58 and accompanying text.

20 See SCALIA & GARNER, *supra* note 15, at 356.

21 Scalia, *supra* note 8, at 24.

22 *Id.* at 23.

23 SCALIA & GARNER, *supra* note 15, at 303.

24 *Morrisette v. United States*, 342 U.S. 246, 263 (1952) (holding that a criminal statute contained an implied mens rea element).

25 The same analysis supports reading terms of art differently than the average person might.

the case of scrivener's error, the apparently absurd *literal* meaning of the text differs from the meaning which the reasonable person would understand. Justice Scalia and Bryan Garner illustrate this point with a statute that provides: "[T]he winning party must pay the other side's reasonable attorney's fees."<sup>26</sup> The reasonable person would not think the legislature seriously meant to force prevailing parties to cover the loser's fees, and thus interpreting "winning" to mean "losing"—which is directly contrary to the literal meaning of the text—is not a matter of "revising the apparent meaning of the text" but rather is "giving it the meaning that it would convey to a reasonable person, who would understand that misprints had occurred."<sup>27</sup> The text's best meaning in such a circumstance rests in the extratextual mind of the reasonable reader.

Textualists also rely on extratextual ideas when applying semantic canons of construction. For example, the grammar canon, which holds that "[w]ords are to be given the meaning that proper grammar and usage would assign them," is justified by a judicial presumption "that legislators understand subject-verb agreement, noun-pronoun concord, the difference between the nominative and accusative cases, and the principles of correct English word-choice."<sup>28</sup> This presumption, though external to the text and not always accurate, is essential to understanding a statute as the reasonable reader would because the reasonable reader brings this presumption to the text.<sup>29</sup>

Indeed, most (if not all) semantic canons require reference to reasonable extratextual ideas. The presumption of consistent usage, which holds that "[a] word or phrase is presumed to bear the same meaning throughout a text," rests on an external (and perhaps unrealistic) contextual assumption: "[M]ore than most other canons, this one assumes a perfection of drafting that, as an empirical matter, is not often achieved."<sup>30</sup> So too the surplusage canon, which instructs that "[i]f possible, every word and every provision is to be given effect" assumes "legal drafters should not include words that have no effect."<sup>31</sup> Other contextual canons, like *noscitur a sociis*<sup>32</sup> and *ejusdem generis*<sup>33</sup> require interpreters to classify a text's associated words (e.g., items in a list) by their unspecified, yet "obvious and readily identifiable genus"<sup>34</sup>

---

26 SCALIA & GARNER, *supra* note 15, at 235.

27 *Id.*

28 *Id.* at 140

29 *See id.*

30 *Id.* at 170.

31 *Id.* at 174, 176.

32 *Id.* at 195.

33 *Id.* at 199.

34 *Id.*

or other “permissible meaning that makes them similar.”<sup>35</sup> What justifies these assumptions? What makes a genus readily identifiable? The answer is simple: the reasonable reader brings these ideas to the text. And so he must: applying “semantic” canons requires reference to these kinds of reasonable, extratextual ideas.

Textualists also consider a unique form of legislative intent as relevant extratextual context. A statute is a unique kind of text—it is a communication between Congress and the people bearing the force of law—and it should be read as such. The fact that Congress authored the statute affects its meaning. The “very idea of law-making institutions is that of institutions which can make the law they intend to make.”<sup>36</sup> The fact that a text is a statute justifies several extratextual assumptions, for example “one can infer that [a statute’s] author has written legislation as opposed to satire” and that “the statute’s author has written in English.”<sup>37</sup> These necessary assumptions can be justified only by reference to something like legislative intent. Thus, for the textualist, “[l]egislative intent . . . is a framework of analysis designed to satisfy the minimum conditions for meaningful communication by a multi-member body without actual intentions to judges, administrators, and the public, who all form a community of shared conventions for decoding language in context.”<sup>38</sup> Importantly, this form of legislative intent is not coterminous with what the legislature intended (if a legislature could intend anything). Rather, this hypothetical legislative intent exists only in the mind of the reasonable person. Thus, while this intent is grounded in text, it is also extratextual.

This brand of legislative intent (sometimes called fictionalized intent<sup>39</sup> or “objectified” intent<sup>40</sup>) is very limited: it “begins and ends with what the text says and fairly implies.”<sup>41</sup> Given the textualist insistence that a collectivized legislative intent cannot actually exist, consideration of objectified intent must be limited to only “the minimal intention necessarily required for legislation,” or the “minimal intention.”<sup>42</sup> Objectivized intent “does not depend on the conclusion

---

35 *Id.* at 195.

36 JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON* 275 (2009).

37 Doerfler, *supra* note 17, at 1023.

38 Manning, *supra* note 17, at 434.

39 *See* Doerfler, *supra* note 17, at 1022 (“Fictionalism about legislative intent maintains that claims about intent are best understood as involving a pretense. . . . [T]he primary motivation for fictionalism is the metaphysical concern that legislation has no author.”). Doerfler observes that “fictionalism about intent is a refinement of ‘objectified intent.’” *Id.* at 1023.

40 Scalia, *supra* note 8, at 17.

41 SCALIA & GARNER, *supra* note 15, at 16.

42 RAZ, *supra* note 36, at 287.

that a hypothetical legislative majority actually subscribed to the likely meaning that a reasonable person, conversant with the relevant conventions, would attach to the enacted text.”<sup>43</sup> “It is the *law* that governs, not the intent of the lawgiver.”<sup>44</sup> Thus, moving beyond the minimal objective intent implied by the text into speculation as to how “legislators actually think” or “appealing to the pretense of a ‘reasonable legislator’ is unnecessary.”<sup>45</sup> The textualist’s source for this objective intent is the reasonable person’s assumptions about the text: we must believe “one means what one says.”<sup>46</sup> Though the task of interpretation requires a metaphysical belief in an intention behind words, that intention is discovered only through the words read in light of the extratextual “conventions prevailing at the time.”<sup>47</sup> Thus, “[i]n the cycle of convention and intention, convention comes first.”<sup>48</sup> So, though textualists recognize that “legislation is intelligible only if it is interpreted by the legislature’s intention,” the law *qua* the law remains what the text means in context to the reasonable reader.<sup>49</sup>

This view of the law as the text can be better understood through a contrast with the ontological basis of intentionalism: that the law is the legislature’s intent. As Manning explains:

What characterizes classical intentionalism is its tendency to anthropomorphize the legislature. In important respects, intentionalists believe that a legislative command can and should be treated as one would treat the speech of an individual human actor. That is, they believe that a legislative majority can have coherent but unexpressed background intentions about its statutory utterances that can be used to clarify or even alter the significance that a reasonable person conversant with relevant social and linguistic conventions would otherwise attach to the chosen words in context.<sup>50</sup>

Unlike textualists, intentionalists will look and think beyond the text in exploring the legislative intent which begot the relevant statutory provision. For example, in *Church of the Holy Trinity v. United States*, probably the most notorious intentionalist decision in the Court’s history, the Court held that Congress’s prohibition of importation of “labor or service of any kind” did not apply to clergymen because “no purpose of action against religion can be imputed to any legislation”

---

43 Manning, *supra* note 17, at 434.

44 Scalia, *supra* note 8, at 17. “As I have said, I object to the use of legislative history on principle, since I reject intent of the legislature as the proper criterion of the law.” *Id.* at 31.

45 Doerfler, *supra* note 17, at 1023, 1026.

46 RAZ, *supra* note 36, at 287.

47 *Id.* at 286.

48 *Id.*

49 *Id.*

50 Manning, *supra* note 17, at 423–24.

in light of the United States' identity as "a religious people."<sup>51</sup> The Court's analysis consisted of (1) anthropomorphizing Congress by searching for "the intent of the legislature,"<sup>52</sup> "the design of the legislature,"<sup>53</sup> what "Congress had in its mind," what "Congress sought," and what Congress expected,<sup>54</sup> (2) considering what the anthropomorphized Congress must have known about the nation's Christian character,<sup>55</sup> and finally (3) concluding that, because the individualized Congress must be familiar with and believe these Christian principles, the individualized Congress could not have meant to include clergymen in its prohibition.<sup>56</sup> Thus, in contrast with the textualist axiom that "the objective indication of the words, rather than the intent of the legislature, is what constitutes the law," intentionalism considers the anthropomorphized legislature's intent (as opposed to that minimal objective intent captured by the text) as the touchstone of statutory construction.<sup>57</sup>

These observations highlight two relevant errors. First, because the law is what the text means in its full context to the reasonable reader, a faithful textualist cannot make an epistemological decision to exclude relevant extratextual context. If the reasonable reader brings his understanding to the text—and that understanding includes "social context, normative values, and practical consequences,"<sup>58</sup> then the faithful textualist must consider those things too. So Professor Grove's preferred epistemological structure may be text focused, but it is not ontological textualism.

A second, related error lies in viewing textualism as a merely epistemic methodology. If one views the intent of the legislature as the proper criterion of law, he is an intentionalist, even if he restricts his epistemological method (that is, how he discovers the legislature's intent) to the text. The ontology-based textualism does not ask "what did the legislature mean by this statute?" but rather "what does this statute mean?" The unexpressed intent/knowledge/expectations of the legislature—even if such singular attributes could conceptually be ascribed to a multi-member body beyond the minimal objectified

51 *Church of the Holy Trinity v. United States*, 143 U.S. 457, 458, 465 (1892) (quoting Act of Feb. 26, 1885, ch. 164, § 1, 23 Stat. 332, 332 (repealed 1952)).

52 *Id.* at 462.

53 *Id.* (quoting *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805)).

54 *Id.* at 463–64.

55 *See id.* at 465–470 (concluding based on historical analysis that "this is a religious nation," *id.* at 470).

56 *See id.* at 471–72 ("[H]owever broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute," *id.* at 472).

57 Scalia, *supra* note 8, at 29.

58 Grove, *supra* note 11, at 290.

intent—are totally irrelevant to the actual task of interpretation. The legislature cannot opt out of the ordinary meaning of its words. Indeed, if the law is, then it is what the words mean; and if the meaning of the law can be known, then it can be known only by what the words mean; so if the meaning of the law is not contained in the words, then there is no law at all. Thus, for a textualist, the epistemology of law and the ontology of law have the same description: the law is what the words of the statute mean, in context, to the reasonable interpreter.

Textualists understand texts in their full context, including extratextual context. Sometimes that means considering common law principles like *mens rea* requirements. Sometimes that requires application of common sense, as in scrivener's error. Sometimes textualists apply semantic canons, which require dozens of presumptions about how language is used, how legislators write, and how unwritten general connect groups of words. And sometimes textualists look to objectified intent. None of these considerations are textually explicit, but all are part of the relevant context in the mind of the reasonable reader.

This brings us to substantive canons. Substantive canons are rules of interpretation which favor some extratextual substantive outcome; rules which critics like Eidelson and Stephenson argue are incompatible with textualism.<sup>59</sup> But what makes them incompatible? They represent extratextual ideas? So do the premises underlying most textualist interpretive tools, including the well-regarded semantic canons. To say that a substantive canon serves some substantive outcome does not mean that it is not also relevant for decoding textual meaning. Just as semantic canons are tools for understanding semantic context, substantive canons can be tools for understanding substantive context, which is an equally relevant element of the total context of the text. As Justice Scalia observed: "Some [substantive canons], perhaps, can be considered merely an exaggerated statement of what normal, no-thumb-on-the-scales interpretation would produce anyway."<sup>60</sup>

There is something inherent in the nature of our Congress as an organ of the Constitution that colors the meaning of the words it enacts.<sup>61</sup> Knowing that the statutory text is the product of Congress informs the way the ordinary reasonable user of language understands its words. This is not a matter of judicial activism forcing political preferences down the throat of the "reasonable person." Rather, it is—or should be—an uncontroversial reality of interpreting language, whether a statutory text, a shopping list, or a Wordsworth stanza: the speaker matters. So, if a particular substantive canon captures a value

---

59 See *supra* notes 5–7 and accompanying text.

60 Scalia, *supra* note 8, at 29.

61 This inference undergirds textualist use of minimal objectivized legislative intent. See *supra* notes 36–49 and accompanying text.

that the reasonable person would consider in determining the meaning of the statute in context, textualists are not merely permitted to consider it; they are obligated to do so.

This insight is not diminished by the fact that application of the substantive canon may “compel a judge to adopt a reading that would not otherwise be the most natural semantic reading of the statutory text.”<sup>62</sup> If the substantive canon suggests the meaning the reasonable person would understand from the text in context, then it is a beneficial indicium of textual meaning. Textualism is not literalism. Consideration of common law context changed the outcome in *Morissette* when the Court read implied mens rea terms into the silent text.<sup>63</sup> So too the scrivener’s error doctrine (properly understood) vindicates the text’s reasonable meaning over and above the literal one.<sup>64</sup> Good canons—whether semantic, substantive, or something in-between—change the outcome of statutory interpretation, and that is exactly what they are supposed to do.

### B. *The Major Questions Doctrine*

Justice Barrett’s concurrence in *Biden v. Nebraska* presents a perfect example of a substantive canon working to clarify the meaning of the text in context as understood by the reasonable person.<sup>65</sup> In that case, the Court considered a statutory provision empowering the Secretary of Education to “waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency.”<sup>66</sup> The Court held that the statute did not grant the Secretary authority to cancel \$430 billion of federal student loan balances.<sup>67</sup> Justice Barrett joined the majority opinion in full but also concurred separately to explain how, in her view, the major questions doctrine is compatible with textualism.<sup>68</sup>

---

62 MANNING & STEPHENSON, *supra* note 2, at 410.

63 See *supra* note 24 and accompanying text.

64 See *supra* notes 26–27 and accompanying text.

65 See *Biden v. Nebraska*, 143 S. Ct. 2355, 2384 (2023) (Barrett, J., concurring). It is worth noting that Justice Barrett does not classify the major questions doctrine as a substantive canon because she does not see it as “counsel[ing] a court to *strain* statutory text to advance a particular value.” *Id.* at 2376. While I use the “substantive” label here, the underlying logic of my argument is the same.

66 *Id.* at 2363 (majority opinion) (alteration in original) (quoting 20 U.S.C. § 1098bb(a)(1) (2018)).

67 *Id.* at 2368.

68 *Id.* at 2376 (Barrett, J., concurring).

The major questions doctrine has been defined variably. In her dissent in *Biden v. Nebraska*, Justice Kagan explained it as an “extra-statutory” means for the “Court to negate broad delegations Congress has approved, because they will have significant regulatory impacts.”<sup>69</sup> In another dissent against the Court’s reliance on the major questions doctrine, Justice Kagan observed, “When [textualism] would frustrate broader goals, special canons like the ‘major questions doctrine’ magically appear as get-out-of-text-free cards.”<sup>70</sup> In Justice Kagan’s view, the major questions doctrine contorts statutory language toward values favored by judges—“anti-administrative-state”<sup>71</sup> values—and therefore the “major-questions doctrine works not to better understand—but instead to trump—the scope of a legislative delegation.”<sup>72</sup>

Justice Barrett defines the major questions doctrine differently in her *Biden v. Nebraska* concurrence. In her view, the major questions doctrine “emphasize[s] the importance of context when a court interprets a delegation to an administrative agency.”<sup>73</sup> Thus, “the major questions doctrine is a tool for discerning . . . the text’s most natural interpretation.”<sup>74</sup> Relying on the textualist principles outlined above—that textualism is not literalism<sup>75</sup> and so construing a text requires considering context through the lens of the reasonable person<sup>76</sup>—Justice Barrett argues that the major questions doctrine actually represents the reasonable, substantive intuition that “we . . . ‘expect Congress to speak clearly if it wishes to assign to an agency decisions of vast “economic and political significance.”’”<sup>77</sup> Justice Barrett buttresses this intuition with common-sense examples,<sup>78</sup> parallel legal

69 *Id.* at 2391 (Kagan, J., dissenting).

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

71 *Id.*

72 *Biden*, 143 S. Ct. at 2397 (Kagan, J., dissenting).

73 *Id.* at 2376 (Barrett, J., concurring) (emphasis omitted).

74 *Id.*

75 *See id.* at 2378 (“Context is not found exclusively “within the four corners” of a statute.” (quoting John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2456 (2003))).

76 *Id.* at 2378–79 (listing various examples of reading in reasonable extraneous ideas—like mens rea requirements—from context despite statutory silence).

77 *Id.* at 2380 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

78 *See id.* at 2379–80 (arguing that when a parent gives the babysitter a credit card with the instruction “[m]ake sure the kids have fun,” *id.* at 2379, she is not authorizing a road trip to a theme park; the reasonable person would expect a clearer delegation of such authority).

principles,<sup>79</sup> and constitutional, structural commitments.<sup>80</sup> Importantly, these arguments are aimed at situating the text in context rather than serving some judge-held political preference: “Crucially, treating the Constitution’s structure as part of the context in which a delegation occurs is *not* the same as using a clear-statement rule to over-enforce Article I’s nondelegation principle.”<sup>81</sup>

Of course, Justice Barrett recognizes that the major questions doctrine “is not an on-off switch” and so context may sometimes suggest that a major delegation has indeed occurred.<sup>82</sup> And thus she lists a number of contextual indicators, derived from “a line of decisions spanning at least 40 years” that weigh against understanding a text to vest broad power in an agency.<sup>83</sup> Given this emphasis of context, Justice Barrett’s presentation of the major questions doctrine represents “the familiar principle that we do not interpret a statute for all it is worth when a reasonable person would not read it that way.”<sup>84</sup> “Congress does not ‘hide elephants in mouseholes.’”<sup>85</sup> Far from contorting statutory language’s reasonable, contextual meaning, Justice Barrett’s presentation of the major questions doctrine serves textual meaning and demonstrates how a substantive canon can be compatible with textualism.

Though elements of Justice Barrett’s argument have drawn critiques, addressing most of these objections is outside the scope of this Note.<sup>86</sup> That said, one criticism from Eidelson and Stephenson does

79 See *id.* at 2379 (citing the principle of agency law that “[w]hen an agent acts on behalf of a principal, she ‘has actual authority to take action designated or implied in the principal’s manifestations to the agent . . . as the agent reasonably understands [those] manifestations’” (alterations in original) (quoting RESTATEMENT (THIRD) OF AGENCY § 2.02(1) (AM. L. INST. 2005))).

80 *Id.* at 2380 (arguing that the inference that Congress would delegate questions of major political and economic significance only in clear language “makes eminent sense in light of our constitutional structure . . . [b]ecause the Constitution vests Congress with ‘[a]ll legislative Powers’” (third alteration in original) (quoting U.S. CONST. art. I, § 1)).

81 *Id.*

82 *Id.* at 2384.

83 *Id.* at 2381. It is strange to find a delegation where:

- (1) An agency is attempting to regulate outside its competency, *id.* at 2382;
- (2) There is a history of contrary regulation, *id.* (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000));
- (3) The purported power is drawn from narrow statutory language, *id.* (citing *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021)); and
- (4) An agency purports to find broad new authority in old statutory language, *id.* at 2383 (citing *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

84 *Id.* at 2384.

85 *Id.* at 2382 (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001)).

86 For a thorough defense of Justice Barrett’s methods along lines similar to my argument here, see Jonathan Meilaender, Note, *Structural Textualism and Major Questions*, 48 HARV. J.L. & PUB. POL’Y 369 (2025).

bear discussion here. But to properly understand their criticism, first something must be said of their framing of Justice Barrett's argument. They describe it thus: "[T]he canons simply distill general background knowledge about how lawmakers would naturally tend to express themselves, at least when they intend to convey certain content; the canons would thus speak to a statute's communicative content even if that statute had been enacted in a canon-free world."<sup>87</sup>

The framing of "how lawmakers would naturally tend to express themselves" is misleading on several points. First, it goes far beyond the minimal objectified intent into guessing at how a fictional, singular legislator might tend to express himself.<sup>88</sup> Second, and more importantly, the ontological foundation of textualism places the meaning of the statute not in the fictionalized intent of an anthropomorphized legislator but rather in the objective meaning of the text in context as understood by the reasonable person. So, the important question is not "how might a reasonable lawmaker express this idea" but rather "what idea would a reasonable person understand in this text?"<sup>89</sup> Their focus on the speaker, rather than the reader, undermines much of Eidelson and Stephenson's following criticism.

Based on their description above, Eidelson and Stephenson posit a criticism to Justice Barrett's argument: that it depends on an almost farcical choice on the part of the lawmaker. On one hand, he must anticipate that the reasonable reader would share the interpreter's view of background context, but on the other hand, the legislator must nonetheless choose to leave the text ambiguous so as to require application of the canon.<sup>90</sup> The problem with this argument is that it relies on premises more appropriate to intentionalism than textualism. Eidelson and Stephenson's criticism has three steps: (1) They anthropomorphize the legislature beyond the scope of minimal objectified intent by demanding a "lawmaker thought" that the reasonable reader would understand the text as Justice Barrett had;<sup>91</sup> (2) then they treat this anthropomorphized legislature as a person, arguing that the

87 Eidelson & Stephenson, *supra* note 5, at 538 (emphasis omitted).

88 See *supra* notes 37–50 for discussion of Doerfler and the minimum objectivized legislative intent. Because this intent need only "satisfy the minimum conditions for meaningful communication by a multi-member body without actual intentions," this kind of legislative anthropomorphizing cannot be justified by Doerfler's formulation. Manning, *supra* note 17, at 434.

89 See generally Barrett, *supra* note 18.

90 Eidelson & Stephenson, *supra* note 5, at 542 n.144 (noting that this presentation of the pro-substantive canons argument "applies only when it would have been *apparent* to Congress and to reasonable readers that some interpretation *would* effect a major delegation—since that awareness is what triggers the expectation that Congress would convey that content clearly if it intended to convey it at all").

91 *Id.* at 542.

“lawmaker would not naturally feel under pressure to specially flag any major delegations . . . for fear of being” misunderstood;<sup>92</sup> and (3) finally they conclude that the legislature probably would not choose this course of action, and therefore the major questions doctrine is either “a very weak” inference or else totally inappropriate.<sup>93</sup> Does this three-step analysis ring a bell? Recall the Court’s intentionalist methodology in *Holy Trinity*: (1) anthropomorphize Congress, (2) ask what Congress must have thought/expected/believed, and (3) conclude that Congress cannot have intended what its words otherwise seem to mean.<sup>94</sup>

This similarity is not a coincidence. Unlike the minimal objectivized legislative intent derived solely from what the text says and fairly implies, Eidelson and Stephenson treat fictionalized intent as though it were a mirror image of the intentionalist ontology of law. They “anthropomorphize the legislature” and “believe that a legislative command can and should be treated as one would treat the speech of an individual human actor.”<sup>95</sup> A textualist does not ask “did Congress know that its words would be given the meaning understood by the reasonable person?” because, to a textualist, Congress’s secret knowledge behind the text does not matter. All that matters is how a reasonable person understands the text in context. Congress cannot opt out of the reasonable meaning of its words, and “[t]he 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.”<sup>96</sup>

Thus, Eidelson and Stephenson’s critique falls flat, and so it must given their apparently intentionalist ontology. It would seem then that Justice Barrett’s defense of the major questions doctrine remains compelling. But this raises another question: Can textualists justify their use of any other substantive canons? Part II suggests that they can.

## II. OTHER SUBSTANTIVE CANONS JUSTIFIED BY TEXTUALISM

Eidelson and Stephenson are right when they observe, “Whenever [a substantive canon] does any work, it must be leading a court to a result different from the one that the same court would have reached based only on the apparent linguistic import of the text.”<sup>97</sup> And of

---

92 *Id.*

93 *Id.*

94 *See supra* notes 51–58 and accompanying text.

95 Manning, *supra* note 17, at 423, 423–24.

96 Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112 (2010).

97 Eidelson & Stephenson, *supra* note 5, at 517.

course that should make textualists uneasy. Justice Scalia described substantive canons as rules “that load the dice for or against a particular result” which are “a lot of trouble” for “the honest textualist.”<sup>98</sup> But as demonstrated in Part I, “[s]ome [substantive canons], perhaps, can be considered merely an exaggerated statement of what normal, no-thumb-on-the-scales interpretation would produce anyway.”<sup>99</sup>

Justice Barrett’s defense of the major questions doctrine provides a framework by which textualists might justify at least some substantive canons: Where the reasonable person would interpret the text in light of the substantive value which the canon represents, the canon elucidates the reasonable meaning for which textualists search. This argument is highly specific, so each canon must be defended on its own two feet. Most substantive canons probably do not pass muster. Of course, there may be other arguments that justify other canons, but that is outside the scope of this Note. Rather, the remainder of this Note seeks to lay out arguments like Justice Barrett’s (though comparatively rudimentary) by which two other substantive canons can be justified: the rule of lenity and the federalism canon.

A final prefatory note on my methodology: It should hopefully be clear by now that I do not seek to justify any canons on the basis that “they represent what Congress would have wanted”—such an argument, as then-Professor Barrett has pointed out, conflicts with “the foundation of modern textualism” in “its insistence that congressional intent is unknowable.”<sup>100</sup> Nor do I suggest that a canon is validated on the basis of sheer longevity or some constitutional hook. That said, there must be some basis for distinguishing those canons which truly represent substantive context from the rest—so for each canon I will consider the same factors Justice Barrett did in her *Biden v. Nebraska* concurrence: the historical, constitutional, and common-sense basis for the reasonable interpreter to understand the implicated substantive value as weighing on the meaning of the text in context.

### A. *The Rule of Lenity*

One of the oldest, perhaps the oldest, substantive canon is the rule of lenity.<sup>101</sup> The rule of lenity, in its simplest formulation, holds that “penal statutes should be narrowly construed.”<sup>102</sup> The canon is usually described as an “ambiguity-dependent” canon that is only applied

---

98 Scalia, *supra* note 8, at 27–28.

99 *Id.* at 29.

100 Barrett, *supra* note 96, at 124.

101 *Id.* at 128.

102 *Id.*

when the statutory language is otherwise ambiguous.<sup>103</sup> But recently, some—particularly Justice Gorsuch—have been urging the Court to adopt a stronger formulation of the rule of lenity. In his concurrence in *Wooden v. United States*, Justice Gorsuch suggested that the Court’s current lenity trigger—a “‘grievous’ ambiguity”—is “a modern phenomenon grounded in dicta” characteristic of the 1970s “freewheeling approach to statutory construction.”<sup>104</sup> Instead, Justice Gorsuch defined lenity as a canon “upholding the Constitution’s commitments to due process and the separation of powers” which requires that “where uncertainty exists, the law gives way to liberty.”<sup>105</sup> Most recent scholarship treats lenity as serving the more modest role of a tiebreaker canon. Indeed, Eidelson and Stephenson’s attack against lenity places it squarely within that category—as an ambiguity-dependent canon.<sup>106</sup> But this Note suggests lenity can and should be conceptualized and defended as a stronger canon justified by its relevance to evaluating the substantive context of a penal statute.

The rule of lenity serves two primary purposes: ensuring fair notice (which is relevant to the due process clause) and protecting the separation of powers.<sup>107</sup> Chief Justice Marshall articulated these dual values as the basis of lenity:

The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.<sup>108</sup>

These values remain at the forefront of the contemporary theoretical basis for lenity: “The American legal system espouses the principle *nullum crimen sine lege, nulla poena sine lege*, or ‘no crime without law, no punishment without law.’ In other words, a person may not be convicted and punished unless her conduct was previously defined as criminal.”<sup>109</sup> Dressler and Garvey describe this as the “legality principle” which requires both that “criminal statutes should be crafted so

---

103 Eidelson & Stephenson, *supra* note 5, at 548.

104 *Wooden v. United States*, 142 S. Ct. 1063, 1084, 1085, 1086 n.6 (2022) (Gorsuch, J., concurring in judgment) (citing *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019)).

105 *Id.* at 1082.

106 Eidelson & Stephenson, *supra* note 5, at 548–49.

107 See Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RESV. L. REV. 581, 582 (1989).

108 *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

109 JOSHUA DRESSLER & STEPHEN P. GARVEY, *CRIMINAL LAW: CASES AND MATERIALS* 95 (9th ed. 2022).

that they do not ‘delegate[] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis’” and that “judicial interpretation of ambiguous statutes should ‘be biased in favor of the accused,’ a concept known today as the lenity doctrine.”<sup>110</sup> I take each of lenity’s protected values in turn.

One value served by the rule of lenity—fair notice—has been a fundamental aspect of the rule of law since antiquity.<sup>111</sup> The importance of notice was recognized in Magna Carta’s guarantee of “libert[y]” unless convicted by “lawful judgement” under “the law of the land.”<sup>112</sup> As such, the rule of lenity is “almost as old as the common law itself.”<sup>113</sup> Lenity has been almost universally present in our legal tradition. It was recognized in the first treatise on statutory interpretation in England,<sup>114</sup> and its importance was extolled by the likes of Blackstone,<sup>115</sup> Hale,<sup>116</sup> Bacon,<sup>117</sup> and others.<sup>118</sup> The importance of fair

110 *Id.* (alteration in original) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)).

111 *See, e.g., Romans* 5:13 (ESV) (“[S]in is not counted where there is no law.”).

112 MAGNA CARTA, ch. 29 (1297) (“No freeman is to be taken or imprisoned or disseised [sic] of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgement of his peers or by the law of the land. To no-one will we sell or deny of delay right or justice.”).

113 Scalia, *supra* note 8, at 29 (citing PETER BENSON MAXWELL, ON THE INTERPRETATION OF STATUTES 239 (London, William Maxwell & Son 1875)).

114 A DISCOURSE UPON THE EXPOSITION & UNDERSTANDING OF STATUTES, at v, 154–55 (Samuel E. Thorne ed., 1942) (This is “the earliest treatise yet brought to light on the interpretation of statutes in England.” *Id.* at v.).

115 1 WILLIAM BLACKSTONE, COMMENTARIES \*88 (“Penal Statutes must be construed strictly.”).

116 2 MATTHEW HALE, HISTORIA PLACITORUM CORONAE 335 (Sollom Emlyn ed., London, E. & R. Nutt & R. Gosling 1736) (“That where any statute subsequent to 25 E. 3. cap. 4. hath ousted clergy in any of those felonies, it is only so far ousted, and only in such cases and as to such persons, as are expressly comprised within such statutes, for *in favorem vite & privilegii clericalis* such statutes are construed literally and strictly.”). “In favorem vitae” means “[i]n favor of life,” *In Favorem Vitae*, BLACK’S LAW DICTIONARY (12th ed. 2024), and “privilegium clericale” means “benefit of clergy,” *Privilegium Clericale*, *id.*

117 FRANCIS BACON, LAW TRACTS: THE ELEMENTS OF THE COMMON LAWS OF ENGLAND, reprinted in 4 THE WORKS OF FRANCIS BACON 51–52 (London, W. Baynes & Son 1824) (“[I]t is a rule that penal statutes shall not be taken by equity . . . for it is to be noted, that penal statutes are taken strictly and literally only in the point of defining and setting down the fact and the punishment.”). Significantly, Bacon distinguishes the application of this primordial rule of lenity between acts prohibited only by positive law and acts prohibited by “*regulae juris*.” *Id.* at 50, 50–52. In other words, lenity was not relevant where acts were clearly criminal. This supports this Note’s assertion that lenity was viewed as one contextual element that could be overcome by other factors (e.g., the obvious wrongfulness of an act). *See infra* notes 138–47 and accompanying discussion.

118 There is some similarity between lenity and Coke’s description of the laws against heresy:

notice made it to American shores as well. The American Founders protested that “transporting us beyond Seas to be tried for *pretended Offences*” had “in direct Object the Establishment of an absolute Tyranny over these States” and was therefore a justification for declaring American independence.<sup>119</sup> And “subjecting of men to punishment for things which, when they were done, were breaches of no law” was described in the Federalist Papers as one of “the favourite and most formidable instruments of tyranny.”<sup>120</sup> No wonder the rule of lenity appears in American caselaw as early as 1794<sup>121</sup> and was described by Chief Justice Marshall as “not much less old than construction itself.”<sup>122</sup> Notably, lenity’s role in ensuring fair notice is explicitly recognized in early American caselaw: “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.”<sup>123</sup>

And the value of fair notice is no less important or obvious today than it was for our ancestors. Indeed, in the field of statutory interpretation, Justice Scalia identified fair notice as a primary argument for textualism:

[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. That seems to me one step worse than the trick the emperor Nero was said to engage in: posting edicts high up on the

---

[I]f any person be charged with heresy before the High Commissioners, they have no authority to adjudge any matter of cause to be heresy, but only such, as hath been so adjudged by the authority of the Canonick Scripture, or by the first four generall Councils, or by any other generall Councell, wherein the same was declared heresie by the *expresse and plain words* of the Canonick Scripture.

3 EDW. COKE, INSTITUTES OF THE LAWS OF ENGLAND 40 (London, W. Lee & D. Pakeman 1648) (emphasis added). I have found no other statements like lenity in Coke.

119 THE DECLARATION OF INDEPENDENCE para. 2, 21 (U.S. 1776) (emphasis added).

120 THE FEDERALIST NO. 84, at. 444 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

121 *Bray v. The Atalanta*, 4 F. Cas. 37, 38 (D.S.C. 1794) (No. 1,819) (“[I]t is a penal law and must be construed strictly.”).

122 *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

123 *The Enterprise*, 8 F. Cas. 732, 734 (Livingston, Circuit Justice, C.C.D.N.Y. 1810) (No. 4,499). Significantly, the court’s discussion of the fair notice element of lenity was couched implicitly in a textualist idea of minimal objectivized intent. Legislative intent must ever . . . be a matter of inquiry. A court is not however permitted to arrive at this intention by mere conjecture, but it is to collect it from the object which the legislature had in view and the expressions used, which should be competent and proper to apprise the community at large of the rule which it is intended to prescribe for their government.

*Id.*

pillars, so that they could not easily be read. Government by unexpressed intent is similarly tyrannical. It is the *law* that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts constitution: A government of laws, not of men.<sup>124</sup>

And as for modern criminal law, the Model Penal Code directs that “when the language [of the Code] is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this Section” which include “to give fair warning of the nature of the conduct declared to constitute an offense.”<sup>125</sup> Thus, one value protected by lenity—fair notice—has been and continues to be a fundamental aspect of our legal tradition.

Lenity has also long been recognized as protecting the separation of powers. “[I]nsistence upon legislative supremacy is a constant refrain in the case law regarding” lenity.<sup>126</sup> The Constitution vests in Congress “[a]ll” of the federal government’s “legislative Powers,”<sup>127</sup> and courts as early as 1812 stressed that the rule of lenity—“a principle grown hoary in age and wisdom”—compelled deference to the roles of the coordinate branches in defining crimes and “pardoning offences.”<sup>128</sup> “We cannot assume,” Justice Story wrote, “a jurisdiction to moderate the promulgated sentence of the legislature, neither ought we to increase its severity by enlarging doubtful expressions. . . . I will not be the first judge, sitting in this seat, to strain a proviso against the citizen, beyond the fair import of its expressions.”<sup>129</sup> And thus Chief Justice Marshall explained lenity as reflecting that “the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.”<sup>130</sup>

What does all this history mean for the rule of lenity today? Two things: First, the values protected by lenity—and especially fair notice—are not merely accidents of one judge or even one generation of judges; rather, lenity has been a constant in legal thought for hundreds (and perhaps thousands) of years. Second, a corollary of this first insight is that lenity is not merely an artifact of antiquity or a vice of a bygone era; rather it is a rule that protects the enduring values of fair notice and the separation of powers—values so fundamental to the

124 Scalia, *supra* note 8, at 17.

125 MODEL PENAL CODE § 1.02(1)(d), 1.02(3) (AM. L. INST. 2017).

126 Barrett, *supra* note 96, at 131.

127 U.S. CONST. art. I, § 1.

128 See *United States v. Mann*, 26 F. Cas. 1153, 1157 (Story, Circuit Justice, C.C.D.N.H. 1812) (No. 15,718).

129 *Id.*

130 *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

American legal system that they can doubtlessly be imputed to the reasonable interpreter of language. So maybe the rule of lenity provides insight into how the reasonable person understands the text of a penal statute in its substantive context. Maybe the context that a law is a penal statute would lead the reasonable person to interpret it differently than other kinds of texts.

Common sense confirms the truth of these suggestions. Consider the textualist basis for reading implied mens rea terms into criminal statutes.<sup>131</sup> How can adding mens rea requirements to silent statutory language be justified? In part because the reasonable reader would understand that reading a criminal statute—particularly codification of a common law crime—is different than reading other kinds of law and thus changes the context used to give the text its best meaning. Or consider Puffendorf’s famous example of a statute providing “that whoever drew blood in the streets should be punished with the utmost severity.”<sup>132</sup> Does this statute forbid a surgeon from performing an emergency medical procedure by opening a vein of someone who falls in the street? Or did the statute at issue in *United States v. Kirby* that prohibited “knowingly and wilfully obstructing and retarding the passage of the mail” apply to the sheriff who arrested a mail carrier indicted for murder and thereby delayed the delivery of the mail?<sup>133</sup> Textualists answer with a resounding no. Though “[r]ead literally, such a statute might sustain the surgeon’s conviction . . . [a] modern textualist . . . would place different glosses on the phrase ‘drew blood’ in different contexts.”<sup>134</sup> To “draw blood” means one thing for a nurse at a blood drive and something very different for a dog attack.<sup>135</sup> So the fact that Puffendorf’s statute appeared in the criminal code and not in health regulations suggests “draw blood” has a violent meaning, so “dismissing the charges against Puffendorf’s surgeon would comport with the ordinary meaning of the statute in context.”<sup>136</sup> In short, the reasonable reader reads criminal statutes differently precisely *because* they are criminal statutes. And the values of fair notice and separation of powers are deeply intertwined with substantive notions of criminal fairness.<sup>137</sup> Thus, the rule of lenity represents the reasonable person’s intuition that a text’s best meaning is affected by the context of criminal law.

---

131 See *supra* note 23 and accompanying text.

132 *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 487 (1868); see also Manning, *supra* note 75, at 2461.

133 *Kirby*, 74 U.S. (7 Wall.) at 483, 483–84.

134 Manning, *supra* note 75, at 2461.

135 *Id.*

136 *Id.* at 2462, 2461–62.

137 See *supra* notes 108–31 and accompanying text.

But if the rule of lenity is truly a substantive canon representing reasonable intuitions about a penal statute's meaning in context, then shouldn't that insight be reflected in the historical record? Sure enough, early American caselaw suggests that lenity was conceptualized just this way. Justice Marshall, riding circuit, observed:

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; especially in cases where the act to be punished is in itself indifferent, and is rendered culpable only by positive law.<sup>138</sup>

Justice Marshall makes several observations that bear emphasis. First, his analysis in this case is predicated on essentially the textualist methodology outlined in Part I. Justice Marshall observes earlier in that opinion, “[W]hen the policy of the law is mentioned by a judge, I always understand him to use the term in reference to the object of the legislature . . . as disclosed in the words they have employed.”<sup>139</sup> That is, Justice Marshall understood consideration of policy (legislative intent or the “object of the legislature”) as disclosed only in the words of the statute, which mirrors exactly the textualist concept of minimal objectivized intent.<sup>140</sup> Second, Justice Marhsall does not consider application of the rule of lenity to lead courts to depart from “the intention of the legislature, as manifested by their words.”<sup>141</sup> Rather, lenity is used to understand the meaning of the text “where the mind balances and hesitates between the two constructions.”<sup>142</sup> That is, lenity does not overpower otherwise plain meaning but rather serves as one contextual element among several. Finally, Justice Marhsall's treatment of lenity as substantive context is evident in his caveat that lenity is relevant “especially in cases where the act to be punished is in itself indifferent, and is rendered culpable only by positive law.”<sup>143</sup> Why is lenity especially relevant in such a case? Because where an act is obviously wrongful, that context makes it more likely the reasonable person will understand the act to be captured by the text—but if an act is morally

---

138 *The Adventure*, 1 F. Cas. 202, 204 (Marshall, Circuit Justice, C.C.D. Va. 1812) (No. 93), *rev'd on other grounds*, 12 U.S. (8 Cranch) 221 (1814).

139 *Id.*

140 *See supra* notes 36–49 and accompanying text.

141 *The Adventure*, 1 F. Cas. at 204.

142 *Id.*

143 *Id.*

neutral and thus only wrongful *if* forbidden by the statute in question, then the context weighs the other direction.<sup>144</sup> Thus, Justice Marshall presents lenity as a canon relevant for the reasonable person's understanding of the substantive context of the text.

Then-professor Barrett's analysis of lenity in early American caselaw reached a similar conclusion: "This insistence upon legislative supremacy is a constant refrain in the case law regarding [lenity]."<sup>145</sup> "Over and over again, courts stressed that they were obliged to choose the best, not the narrowest, interpretation of a statute."<sup>146</sup> And over and over again courts recognized that legislative intent, as manifested by the words of the statute, was the ultimate value at stake in lenity cases.<sup>147</sup>

All of this shows that the rule of lenity is much more fundamental and important than modern jurisprudence might otherwise suggest. It should not be dismissed as ancient judicial activism "bootstrapped" by age and use into our modern doctrines of statutory construction.<sup>148</sup> Nor should it be maligned as a "judicial thumb" weighing against a statute's "most plausible meaning."<sup>149</sup> No, a properly defined lenity helps realize a text's best meaning, not reject it. And as such, this account of lenity, like Justice Barrett's major questions doctrine,<sup>150</sup> does not provide a hard and fast clear statement rule. But it is also much more expansive than a last-resort tiebreaker applied only when grievous ambiguity requires it. The values protected by lenity are relevant context for the reasonable person interpreting any penal statute in its substantive context, and any canon with such ancient and noble vintage, such deeply embedded constitutional roots, such ubiquity in precedent, and such easy sense in application should be a favorite tool of committed textualists.

---

144 For a thorough analysis of this observation, see generally REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 209–11 (1975).

145 Barrett, *supra* note 96, at 131.

146 *Id.*; *see id.* at 131–32 n.99 (listing various early cases).

147 *See e.g.*, *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95–96 (1820) (In a discussion of lenity, the Court observed: "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."); *see also* *The Enterprise*, 8 F. Cas. 732, 735 (Livingston, Circuit Justice, C.C.D.N.Y. 1810) (No. 4,499) (In a discussion of lenity, the court observed: "This may have been in the contemplation of congress, but we are not bound to conclude that they have done what was intended, unless fit words be used for the purpose."); *see also* Barrett, *supra* note 96, at 131–32 n.99 (listing cases).

148 Eidelson & Stephenson, *supra* note 5, at 544.

149 *See* Scalia, *supra* note 107, at 582.

150 *See supra* Section I.B.

### B. *The Federalism Canons*

The American federalist system—a system of dual sovereigns—is unique in political history, and as such presents unique issues for statutory construction. Courts have recognized several substantive canons dealing with these issues, all of which might broadly fall under the umbrella of the “federalism canons.” Here I will discuss three species of the federalism canon genus, each of which limit the scope of federal legislation: (1) a clear statement is required to abrogate state sovereign immunity,<sup>151</sup> (2) a clear statement is required to apply a law of general applicability to a state,<sup>152</sup> and (3) a clear statement is required to regulate traditional state governmental functions.<sup>153</sup> I discuss these three together because they are all essentially applications of the same one canon (just applied to different controversies) and are therefore amenable to the same basic defense. Importantly, the federalism canon reflects two closely intertwined values: state sovereignty and the separation of powers. Because these values are so closely related, I discuss them together.

Though some formulations of the federalism canons have developed relatively recently—more on that in a moment—the federalism canons’ roots reach far back into English common law.<sup>154</sup> For example, the basic principle that the sovereign is not bound by legislation unless done so explicitly “appears in, among other sources, Bacon’s *Abridgement of the Law*, Bracton’s treatise, and the sixteenth century *Discourse upon the Exposition and Understanding of Statutes*.”<sup>155</sup> Blackstone described the rule thus:

I shall only farther 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.<sup>156</sup>

---

151 See, e.g., *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) (“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.” (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))).

152 See, e.g., *Dollar Sav. Bank v. United States*, 86 U.S. (19 Wall.) 227, 239 (1873).

153 See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) (The court’s “plain statement rule” means “[i]n the face of such ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions . . .”).

154 See generally Anthony J. Bellia Jr. & Bradford R. Clark, *The Federalism Canons as Ordinary Interpretation*, 120 NW. U. L. REV. 991 (2026).

155 Barrett, *supra* note 96, at 147 & n.176 (listing sources).

156 1 WILLIAM BLACKSTONE, COMMENTARIES \*253.

And in a passage discussing statutory interpretation more generally, Blackstone observed:

A statute, which treats of things or persons of an inferior rank, cannot by any *general words* be extended to those of a superior. So a statute, treating of “deans, prebendaries, parsons, vicars, *and others having spiritual promotion,*” is held not to extend to bishops, though they have spiritual promotion; deans being the highest persons named, and bishops being of a still higher order.<sup>157</sup>

So both substantive and semantic considerations have historically required an explicit statement before statutory language could be applied against the sovereign. And in our federal system, the states have always been considered sovereigns. Madison described the parties to the Constitution as “the people as composing thirteen sovereignties.”<sup>158</sup> Moreover, early American courts extended to states a privilege historically reserved for the king: sovereign immunity. “The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted.”<sup>159</sup>

Of course, some—particularly antifederalists objecting to the proposed Constitution—suggested that Article III<sup>160</sup> divested states of their sovereign immunity, a defect “as radical as that which separated us from Great Britain” and thus impelled rejecting the convention’s plan.<sup>161</sup> But many responded that Article III carried no such effect. Hamilton wrote in *The Federalist No. 81*:

It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal.<sup>162</sup>

157 *Id.* at \*88.

158 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 114 (Washington, D.C., Jonathan Elliot, 2d ed. 1836) [hereinafter THE DEBATES IN THE SEVERAL STATE CONVENTIONS] (statement by James Madison).

159 *Hans v. Louisiana*, 134 U.S. 1, 16 (1890).

160 U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to . . . Controversies . . . between a State and Citizens of another State.”).

161 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 158, at 72 (statement by Patrick Henry). The vehemence with which antifederalists opposed abrogation of state sovereign immunity is further evidence of its acceptance and importance during this period.

162 THE FEDERALIST NO. 81, at 422 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

Likewise, John Marshall argued in the Virginia ratification convention that no “state will be called at the bar of the federal court. . . . It is not rational to suppose, that the sovereign power shall be dragged before a court.”<sup>163</sup> And James Madison addressed the Article III argument specifically, noting that “[i]t is not in the power of individuals to call any state into court. The only operation [the judicial power] can have, is that if a state should wish to bring suit against a citizen, it must be brought before the federal court.”<sup>164</sup>

When the question whether Article III abrogated state sovereign immunity came before the Court in *Chisholm v. Georgia*, the Court held that it did—in contravention of the federalist assurances during the ratification debates.<sup>165</sup> But that decision “created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States.”<sup>166</sup> The Eleventh Amendment, which provided that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State,”<sup>167</sup> demonstrates that, among the people, the Constitution was generally (and perhaps almost universally) not understood to abrogate state sovereign immunity.<sup>168</sup>

Early American courts agreed that the states were sovereigns, and they read statutes in light of state sovereignty. Though there were apparently no cases involving a federal statute piercing state sovereign immunity before the 1840s—neither Congress nor individual litigants even tried to circumvent state sovereign immunity before then, which further suggests the doctrine’s widespread acceptance—there were various disputes regarding “whether generally worded statutes applied to the government outside the context of sovereign immunity.”<sup>169</sup> Over and over again, courts held that application of general statutory provisions to states required a clear statement or implication from the

---

163 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 158, at 503 (statement by John Marshall).

164 *Id.* at 485 (statement by James Madison).

165 *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), *superseded by* U.S. CONST. amend. XI.

166 *Hans v. Louisiana*, 134 U.S. 1, 11 (1890).

167 U.S. CONST. amend. XI.

168 *See Hans*, 134 U.S. at 11 (“This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court.”).

169 Barrett, *supra* note 96, at 147, 146–47.

text.<sup>170</sup> The rule was also reflected in early American treatises,<sup>171</sup> and it continued to be consistently applied as a rule requiring either clear text or strong implication “throughout the nineteenth and twentieth centuries.”<sup>172</sup>

Significantly, early applications of the federalism canon were frequently justified based on a theory similar to minimal objectivized intent. Justice Story, for example, explained one basis for the federalism canon as “founded upon the legislative intention.”<sup>173</sup> He continued:

Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the government itself. . . . [T]he general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act.<sup>174</sup>

That is, an act’s meaning depends in part on the substantive context of the statute, which includes both “the nature of the mischiefs to be redressed” as revealed by “the text of the act,” and the general presumption that “acts of the legislature” are directed toward citizens.<sup>175</sup> In other words, the reasonable person does not expect the average federal statute to be directed against states, especially given the historical and constitutional tradition of state sovereignty, so, as Justice Scalia later put it, “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.”<sup>176</sup> And far from the exception, this justification has been offered consistently—though not always explicitly—by courts for the past several hundred years.<sup>177</sup>

---

170 See *id.* at 147–48 & nn.178–80 (citing sources for the proposition that “federal courts held the United States exempt from statutes of limitation, the jurisdictional limitations of the Judiciary Act of 1789, and a bankruptcy law”).

171 See *id.* at 148 & n.181 (listing treatises including Dwaris, Kent, and Sedgwick).

172 See *id.* at 149 & nn.187–88 (listing cases).

173 *United States v. Hoar*, 26 F. Cas. 329, 330 (Story, Circuit Justice, C.C.D. Mass. 1821) (No. 15,373).

174 *Id.*

175 *Id.*

176 Scalia, *supra* note 8, at 29.

177 See Barrett, *supra* note 96, at 149–50 & nn.187–92 (listing and explaining cases).

Take, for example, *Gregory v. Ashcroft*.<sup>178</sup> There, the Court held that the Age Discrimination in Employment Act of 1967 did not protect state judges from a mandatory retirement age.<sup>179</sup> To reach that conclusion, the Court applied an ostensibly new formulation of the federalism canon which requires a “plain statement” before reading a law to “intrude on state governmental functions.”<sup>180</sup> To defend that rule, the majority emphasized an “axiom” which “every schoolchild learns”—that the “promise of liberty” depends on the separation of powers between the federal government and the sovereign states.<sup>181</sup> Justice White, in dissent, criticized the majority for announcing an “unprecedented” new rule.<sup>182</sup> But was that rule really so new? The roles and rights of sovereigns are clearly ancient,<sup>183</sup> and the “axiom” that states enjoy those rights is not much older.<sup>184</sup> So too the importance of federalism and the separation of powers have been extolled as national values since the founding, sometimes even by the super-majoritarian voice of the people required for a constitutional amendment.<sup>185</sup> In a country with a history and structure like ours, the reasonable reader would find it remarkable (as would, perhaps, “every schoolchild”) for Congress to meddle with the affairs of a co-sovereign’s government in ambiguous language. So, though *Ashcroft*’s particular formulation of the federalism canon may have been novel, its force was merely a natural and reasonable accretion from the well-established principles underlying our constitutional structure.

The federalism canon, to borrow a phrase, is “deeply rooted in [our] history and tradition” and perhaps is even “essential to our Nation’s ‘scheme of ordered liberty.’”<sup>186</sup> But I do not suggest that either age or importance makes the canon compatible with textualism’s goal of finding the best meaning of the text. Instead, I suggest that the values served by the federalism canon—federalism and the separation of powers—are important substantive context for the reasonable person’s understanding of statutory text. It is precisely this importance that has earned the doctrine its place in precedent and our Constitution. And what history suggests, common sense confirms. To take an example not unlike Justice Barrett’s hypothetical in *Biden v.*

178 *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

179 *Id.* at 473.

180 *Id.* at 470.

181 *Id.* at 457–59 (citing *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)).

182 *Id.* at 477 (White, J., dissenting in part and concurring in part).

183 *See supra* notes 155–58.

184 *See supra* notes 159–72.

185 *See supra* notes 165–69. *See also* *Gregory v. Ashcroft*, 501 U.S. 452, 457–64 (1991).

186 *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2246 (2022) (alteration in original) (quoting *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019)).

*Nebraska*,<sup>187</sup> consider the situation of children governed by dual sovereigns: their mother and their father. Would we understand the mother’s command “Everyone has to spend an hour practicing piano before dinner” as enforceable against the father? Or the father’s scolding after finding a messy playroom “Go to your rooms” as directed against the mother? The suggestion is almost absurd. Now of course, context can change this presumption—“Everyone pack your bags before we leave for Hawaii” seems to capture the co-parent as well—but generally, we understand broad commands as directed only against the children (the governed) and not against the spouse (the dual sovereign).

So, common sense, political history, our constitutional system, and centuries of precedent all suggest that the federalism canon—at least some form of it—has an important role to play in statutory interpretation. That role will vary with context—and as such may lead to a stronger presumption against abrogating state sovereign immunity than against regulating state governmental functions. Textualists seek to vindicate minimal objectivized intent by understanding the text in its context—both substantive and semantic. And so, because the reasonable person would not generally understand broad federal statutory language to be directed against state governments, neither should we.

#### CONCLUSION

Since the very beginning of our republic, courts have worked to live up to their duty to say what the law is. And in that time, “[a]ll 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.”<sup>188</sup> Maybe this suggests that the original meaning of “the judicial power”—whatever it might be—is inconsistent with modern textualism and how the ordinary reasonable person understands language. But maybe not. In arguing that the Constitution did not protect slavery, Frederick Douglass observed:

[W]here would be the advantage of a written Constitution, if, instead of seeking its meaning in its words, we had to seek them in the secret intentions of individuals who may have had something to do with writing the paper? . . . [W]e certainly owe it to ourselves, and to mankind, and to God, to maintain the truth of our own language . . . . We owe it to ourselves to compel the devil to wear his own garments, and to make wicked laws speak out their wicked

---

187 *Biden v. Nebraska*, 143 S. Ct. 2355, 2379–80 (2023) (Barrett, J., concurring).

188 Barrett, *supra* note 96, at 128.

intentions. Common sense, and common justice, and sound rules of interpretation all drive us to the words of the law for the meaning of the law. . . . [W]hen it is proposed to transform persons into “property” and men into beasts of burden, I demand that the law that contemplates such a purpose shall be expressed with irresistible clearness. The thing must not be left to inference, but must be done in plain English.<sup>189</sup>

Reading the law through the lens of substantive values—values like lenity and federalism and the equality of mankind—reflects how reasonable people understand the text in its full context. We must “look[] to the written paper itself, for its meaning,”<sup>190</sup> and in doing so, must consider the “nature of law” and the “human liberty and justice . . . at stake.”<sup>191</sup>

I do not advocate for inflexible clear statement rules. “Every canon is simply *one indication* of meaning; and if there are more contrary indications (perhaps supported by other canons), it must yield. But that does not render the entire enterprise a fraud—not, at least, unless the judge wishes to make it so.”<sup>192</sup> Substantive canons, at least some of them, are simply indications of statutory meaning—neither absolute nor insoluble. A substantive canon may be one indication of a text’s meaning in its full context, but the presumption created is but one of the various factors courts might consider in rendering the statute’s best meaning. And giving a statute its best meaning is exactly what textualists seek to do. So good textualists should neither be hard-nosed literalists nor freewheeling intentionalists. Good textualists should neither require unmistakably clear statements nor ignore historical and constitutional imperatives. In short, good textualists should choose the *via media* and recognize texts in their full context—both semantic and substantive. Perhaps, then, it is time for a rebirth of substantive canons. After all, “we’re all textualists now.”<sup>193</sup>

---

189 Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Antislavery?*, Speech Delivered in Glasgow, Scotland (Mar. 26, 1860), in FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 382–87 (Philip S. Foner ed., abr. & adapted by Yuval Taylor 1999).

190 *Id.* at 381.

191 *Id.* at 386.

192 Scalia, *supra* note 8, at 27 (arguing against Llewellyn’s parry and thrust model).

193 Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 8:29 (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg&t=1s> [<https://perma.cc/WX2S-6682>].