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High-Stakes Interpretation

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HIGH-STAKES INTERPRETATION

Ryan D. Doerfler

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HIGH-STAKES INTERPRETATION

*Ryan D. Doerfler**

Courts look at text differently in high-stakes cases. Statutory language that would otherwise be ‘unambiguous’ suddenly becomes ‘less than clear.’ This, in turn, frees up courts to sidestep constitutional conflicts, avoid dramatic policy changes, and, more generally, get around undesirable outcomes. The standard account of this behavior is that courts’ failure to recognize ‘clear’ or ‘unambiguous’ meanings in such cases is motivated or disingenuous, and, at best, justified on instrumentalist grounds.

This Article challenges that account. It argues instead that, as a purely epistemic matter, it is more difficult to ‘know’ what a text means—and, hence, more difficult to regard that text as ‘clear’ or ‘unambiguous’—when the practical stakes are raised. For that reason, this Article insists, it is entirely rational for courts to be more cautious when interpreting text in high-stakes cases than they would be if the stakes were low. Drawing on contemporary work in philosophy of language and epistemology, this Article grounds its argument in the observation that ordinary speakers’ willingness to attribute ‘knowledge’ or ‘clarity’ decreases as the practical stakes increase. And while the technical explanations of this phenomenon vary, they all reflect a basic insight: that one needs greater epistemic justification to act on some premise the higher the practical stakes.

To illustrate, this Article applies the above insight to various interpretive settings. Considering judicial review, for example, this Article explains that it makes good epistemic sense for a court to wait until it is really sure that a statute means what it thinks it means before taking the extraordinary step of invalidating that statute as unconstitutional. Similarly, this Article urges that it is just sound epistemic practice for a court to construe a statute in a way that would unsettle an existing implementation regime only if it is especially well justified in its reading of the statutory text, i.e. only if it really knows that its reading is correct.

This Article thus offers at least a partial justification of courts’ seemingly loose treatment of statutory text when the practical stakes are raised. And it does so, in contrast to prior scholarly efforts, by appeal to reasons that both formalists and instrumentalists can accept.

We’re all textualists now[, except in June].

— Justice Elena Kagan, The Scalia Lecture, Harvard Law School
(November 18, 2015) (alteration added)

INTRODUCTION

“We must enforce plain and unambiguous statutory language according to its terms.”¹ Courts recite such maxims again and again.² And, in run-of-the-mill cases,

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¹ *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010).

² *See, e.g.*, *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 2002 (2016) (“[P]olicy arguments cannot supersede the clear statutory text.”); *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016) (“Statutory interpretation, as we always say, begins with the text. ... [T]he statute speaks in unambiguous terms ...”); *Nichols v. United States*, 136 S. Ct. 1113, 1119 (2016) (“[E]ven the most formidable argument

they pretty much do as they say. As John Manning has observed, gone are the days when courts would openly rewrite statutory language in the service of Congress's apparent policy aims.³ More still, courts (somewhat) reliably give effect to "plain" or "clear" language, ostensible (or perhaps conceivable) practical downsides notwithstanding.⁴ All of this suggests a new consensus that courts should prioritize Congress's specific instructions over its general policy ambitions—the reason being that those instructions are the best indication of "Congress's specific choices about the *means* to carry [its policy] *ends* into effect."⁵ Courts thus agree that a statute's precise contribution to the law is (at a minimum) what Congress communicates through that statute precisely—at least, that is, where what Congress communicates is "clear."⁶

Again, the above story does reasonably well with ordinary cases. More worrisome is how it seems to fare when the practical stakes are raised. As different scholars have noted, courts treat statutory text as more malleable in big cases. When considering constitutional challenges, for example, courts frequently bend over backwards to avoid reading statutes in ways that would raise "serious constitutional doubts."⁷ The result is the adoption of what Neal Katyal and Thomas Schmidt disparage as "tortured constructions of statutes ... bear[ing] little resemblance to laws actually passed."⁸ So too in cases involving non-constitutional 'challenges' to major

concerning the statute's purposes could not overcome the clarity we find in the statute's text." (quoting *Kloeckner v. Solis*, 133 S.Ct. 596, 607, n.4 (2012)); *Sebelius v. Cloer*, 133 S. Ct. 1886, 1895 (2013) ("Our inquiry ceases [in a statutory construction case] if the statutory language is unambiguous and the statutory scheme is coherent and consistent." (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)) (alteration in original)).

³ John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 114 (2011) [hereinafter, Manning, *The New Purposivism*] ("[T]he Court in the last two decades has mostly treated as uncontroversial its duty to adhere strictly to the terms of a clear statutory text, even when doing so produces results that fit poorly with the apparent purposes that inspired the enactment."); see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 12 (2012) (observing that "*Holy Trinity* is a decision that the Supreme Court stopped relying on more than two decades ago").

⁴ See, e.g., *Nichols*, 136 S. Ct. at 1113; *Cloer*, 133 S. Ct. at 1886; *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034 (2012); *Milner v. Dep't of Navy*, 562 U.S. 562 (2011).

⁵ Manning, *The New Purposivism*, *supra* note 3, at 115 (emphasis added); accord Ryan D. Doerfler, *The Scrivener's Error*, 110 NW. U. L. REV. 811, 827-30 (2016) [hereinafter Doerfler, *The Scrivener's Error*].

⁶ This is, to be clear, a claim about our positive law of statutory interpretation. See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017). In principle, a statute's contribution to the law could diverge sharply from its communicative content. See Mark Greenberg, *The Standard Picture and Its Discontents*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 39, 48 (Leslie Green & Brian Leiter eds., 2011) (observing that the phrase "legal interpretation" is ambiguous between ascertaining the communicative content of a legal text and determining its legal significance). This claim assumes also that the communicative content of the statute is not superseded by some other source of law (e.g., the Constitution). See Hrafn Asgeirsson, *Can Legal Practice Adjudicate Between Theories of Vagueness*, in VAGUENESS AND THE LAW: PHILOSOPHICAL AND LEGAL PERSPECTIVES 95, 103-04 (Ralf Poscher ed., 2016) (arguing that the communicative content of a statute is coextensive with its legal content absent some "rebutting" or "undercutting" source of law).

⁷ *Clark v. Martinez*, 543 U.S. 371, 381 (2005); accord *Rust v. Sullivan*, 500 U.S. 173, 191 (1991); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988).

⁸ Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2112 (2015).

statutes,⁹ where courts—and, in particular, Chief Justice Roberts—are routinely criticized for “ignor[ing]” statutory text outright in an effort to uphold existing implementation regimes.¹⁰

So what to make of the disparity? Is it just that courts stick to the text in low-stakes cases but are textually unbound when it matters?¹¹ Or, only slightly more charitably, is it that courts care about text only so much, and that, at some point, practical or institutional interests simply outweigh? Something like this cynical (or semi-cynical) explanation is familiar, especially as the Supreme Court issues its late-Term decisions. Hence, Adrian Vermeule’s remark: “We have two Supreme Courts—roughly, constrained legalism October through May, and then a free-for-all.”¹²

More recently, a handful of scholars have offered limited justifications of the disparity, ultimately on instrumentalist grounds. Richard Re, for instance, has suggested that judges consistently adhere to “clear” text, but that, for some, “purposive and pragmatic considerations” partially determine just *how* clear a text needs to be to command respect.¹³ Re’s explanation is that “when a statute’s central objective is at risk or an otherwise plausible reading leads to alarming results,” it only makes sense to “hold the text to a higher-than-normal standard.”¹⁴ Somewhat differently, Curtis Bradley and Neil Siegel have argued in the constitutional context that whether a text is perceived as “clear” or “ambiguous” depends in part on historical practice.¹⁵ According to Bradley and Siegel, even if a text is “clear” at the time of enactment, subsequent activity to the contrary (e.g., a “[l]ong-settled and established practice”¹⁶ of congressional acquiescence) can actually render that text “ambiguous,” thereby freeing courts from textual constraint.¹⁷ In support of this striking claim, Bradley and Siegel

⁹ That is, cases in which a litigant advances an interpretation the acceptance of which would dramatically limit the practical effect of a statute relative to the existing implementation regime.

¹⁰ George F. Will, *On Obamacare, John Roberts helps overthrow the Constitution*, WASH. POST (June 25, 2015), https://www.washingtonpost.com/opinions/john-roberts-helps-overthrow-the-constitution/2015/06/25/47d9ffde-1b67-11e5-93b7-5eddc056ad8a_story.html; see also Ilya Somin, *How John Roberts Begat Donald Trump*, THE FEDERALIST (May 5, 2016), <http://thefederalist.com/2016/05/05/how-john-roberts-begat-donald-trump> (attributing to the Chief Justice “contempt for the rule of law”).

¹¹ Cf. Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231 (arguing that ordinary meaning serves a coordinating function in low-stakes cases).

¹² Adrian Vermeule (@avermeule), TWITTER (June 27, 2016, 2:42 PM), <https://twitter.com/avermeule/status/747515425764810752>.

¹³ Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2d 407, 417 (2015).

¹⁴ *Id.* at 421.

¹⁵ See Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213 (2015) [hereinafter Bradley & Siegel, *Constructed Constraint*]; Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1 [hereinafter Bradley & Siegel, *After Recess*].

¹⁶ N.L.R.B. v. Noel Canning, 134 S. Ct. 2550, 2559 (2014) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (alteration in original)).

¹⁷ See Bradley & Siegel, *Constructed Constraint*, *supra* note 15, at 1287 (allowing that “the meaning of an otherwise clear numerical provision could become unclear” through subsequent practice).

cite practical and institutional interests, claiming, for example, that crediting historical practice shows respect for coordinate branches and helps keep old texts up-to-date.¹⁸

Both of the justifications of the high-stakes/low-stakes disparity just mentioned are limited in that each maps onto the high-stakes/low-stakes distinction only somewhat. Re’s account, for example, predicts that courts will treat text more loosely if either pragmatic *or purposive* reasons¹⁹ cut against the otherwise “clear” meaning of the text.²⁰ As such, that account would have it that, even in *low-stakes* cases, the presence of purposive reasons will result in more casual reading—a prediction that runs contrary to the pattern of judicial behavior observed at the outset.²¹ Bradley and Siegel’s account, by contrast, applies principally in high-stakes cases: The possible invalidation of a long-established practice will, after all, typically render a case high stakes.²² At the same time, the universe of high-stakes cases is plainly much larger than that of cases involving challenges to long-established practice (e.g., major cases involving recently enacted statutes or regulations), making that account incomplete.²³

More fundamentally, though, both Re’s and Bradley and Siegel’s accounts require that one accept the sort of instrumentalist reasoning that most proponents of careful statutory reading reject. Re’s suggestion, for instance, that some texts be held to “higher-than-normal standard” sets off alarm bells for those for whom the role of a court when interpreting a statute is to determine what Congress meant by the words that it used.²⁴ Similarly, Bradley and Siegel’s suggestion that texts need to be kept up-to-date seems to run contrary to what Larry Solum calls the “fixation thesis,” i.e. the thesis that the meaning of a text is fixed at the time of enactment, a basic assumption of most any version of textualism.²⁵

As an alternative, this Article contends that one can plausibly make sense of how courts handle text in high-stakes cases by appeal to *epistemological* considerations

¹⁸ *E.g.*, Bradley & Siegel, *After Recess*, *supra* note 15, at 61-63.

¹⁹ That is, reasons reflecting Congress’s apparent *policy* aims (e.g., to expand health insurance coverage, to curtail insider trading).

²⁰ Re, *supra* note 13, at 417.

²¹ Re cites *Yates v. United States*, 135 S.Ct. 1074 (2015), as an example of a low-stakes case in which purposive reasons overcome an otherwise “plain” textual meaning. *See* Re, *supra* note 13, at 411-13. As I have argued elsewhere, however, that assessment of *Yates* rests on a confused understanding of “plain” meaning. *See* William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. ___ (forthcoming 2017), <http://ssrn.com/abstract=2805431>.

²² *But see infra* notes 125-133 and accompanying text (discussing *Milner v. Dep’t of Navy* 562 U.S. 562, 580-81 (2011)).

²³ That is, incomplete as an explanation of the disparate treatment of text in high-/low-stakes cases. To the extent that Bradley and Siegel set out to explain a subset of that phenomenon (or a distinct but overlapping phenomenon), it is no discredit to their account that it fails to explain in full the phenomenon under consideration here.

²⁴ *Cf. King v. Burwell*, 135 S. Ct. 2480, 2497 (2015) (Scalia, J., dissenting) (“Under all the usual rules of interpretation, in short, the Government should lose this case. But normal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved.”).

²⁵ Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015) [hereinafter Solum, *The Fixation Thesis*].

cognizable by formalists and instrumentalists alike. The argument is as follows: To say that the meaning of a statute is “clear” or “plain” is, in effect, to say²⁶ that one *knows* what that statute means.²⁷ As numerous philosophers have observed, however, ordinary speakers attribute “knowledge”—and, in turn, “clarity”—more or less freely depending upon the practical stakes.²⁸ In low-stakes situations, speakers are willing to concede that a person “knows” this or that given only a moderate level of justification: Suppose, for example, Jane has checked the train schedule, uses the train system with some regularity, and is in no particular rush; in that situation, it is plausible for Jane to say that she “knows” that the train will arrive at 7 AM as scheduled. By contrast, if the practical stakes are high, speakers require greater justification before allowing that someone “knows” that same thing, holding constant that person’s evidence: If, say, Jane has the same evidence as above but absolutely cannot afford to be late, Jane’s claim to “know” that the train will arrive at 7 AM is more doubtful.²⁹

As this Article explains, philosophers differ in their technical explanations of the above phenomenon: some attribute it to the *semantic connection* between “knowledge” and action,³⁰ others suggest that we *mean different things* by “know” in different practical contexts,³¹ and others still contend that it has to do not with semantics but with *pragmatics*—very roughly, what we *imply*, as opposed to what we say, when attributing “knowledge.”³² Technical disagreements notwithstanding, most agree, however, that this pattern of linguistic behavior reflects a basic insight concerning the relationship between epistemological and practical reason, namely that *that one needs greater epistemic justification to act on some premise the higher the practical stakes.*³³

Applying that basic insight, this Article urges that courts’ seemingly loose treatment of statutory text in high-stakes cases is partially attributable to (or at least justified by) the heightened epistemological standards that apply in high-stakes settings. Put more colloquially, because it is more difficult to “know” what statutes mean in high-stakes cases, it makes perfect sense that courts find “clear” or “plain” meaning less often. And, as a result, courts will more often have license to resort to ‘gap-filling,’ i.e. non-linguistic, measures in those cases.³⁴ Consider cases involving

²⁶ Or, possibly, *convey*.

²⁷ See Doerfler & Baude, *supra* note 21, at *8-9.

²⁸ See, e.g., KEITH DEROSE, THE CASE FOR CONTEXTUALISM (2009); Jessica Brown, *Contextualism and Warranted Assertibility Manoeuvres*, 130 PHIL. STUD. 407 (2006); JASON STANLEY, KNOWLEDGE AND PRACTICAL INTERESTS (2005).

²⁹ See Stuart Cohen, *Contextualism, Skepticism, and The Structure of Reasons*, 13 PHIL. PERSPECTIVES 57, 58 (1999) (offering an analogous example); see also *infra* Part II.A.

³⁰ See STANLEY, *supra* note 28.

³¹ See DEROSE, *supra* note 28.

³² See Brown, *supra* note 28.

³³ See, e.g., STANLEY, *supra* note 28, at 9.

³⁴ See, e.g., Baude & Sachs, *supra* note 6, at 1083 (“Yet we still have to decide the case. We don’t keep fruitlessly hunting for a hidden meaning; but neither do we tell judges to fill the gap with whatever they think best. Instead, we use law to displace our ordinary inquiries about meaning.”); Tun-Jen Chiang & Lawrence B. Solum, *The Interpretation-Construction Distinction in Patent Law*, 123 YALE L.J. 530, 537 (2013) (“[I]f a court chooses to follow the linguistic meaning of text, it must decide how to fill in the gaps when the linguistic meaning does not fully answer a legal dispute”).

constitutional challenges. As Justice Brandeis observed, “The Court has frequently called attention to the ‘great gravity and delicacy’ of its function in passing upon the validity of an act of Congress.”³⁵ As such, it comes as no surprise that courts require a great deal of epistemological justification before acting on the premise that a statute means X where reading the statute to mean X would raise serious constitutional concerns. Because of the “gravity” of acting on that premise, it is, for the reasons articulated above, more difficult for courts to “know” that the statute means X in the context of an adjudication. This, in turn, makes it more difficult in turn for courts to regard X as the statute’s “clear” or “plain” meaning. The range of “fairly possible” readings for that statute thus proves greater than it would absent the looming constitutional concern, in the sense the statute turns out, in that context, to admit of readings *other than X*.³⁶ Readings that would otherwise be reasonably regarded as “tortured”³⁷ thus become epistemologically available owed to the heightened practical stakes.

To be clear, to say that it is *more difficult* to “know” what a statute means in a high-stakes case is not to say that to do so is impossible. To illustrate, this Article contrasts two relatively recent Supreme Court decisions: *Bond v. United States*³⁸ and *Northwest Austin Municipal Utility District No. 1 v. Holder*.³⁹ In *Bond*, this Article argues, the Supreme Court relied explicitly upon the epistemological principle at issue here,⁴⁰ but did so in the service of a plainly implausible reading—plainly implausible even considering the heightened practical stakes of the case. In *Northwest Austin*, by contrast, the Court’s reliance on that principle was implicit, but its *prima facie* strained reading of the statute at issue was one arguably made plausible by the raised stakes. In comparing these two cases, this Article efforts to show that, even in high-stakes situations, courts remain at least somewhat textually constrained. Further, the contrast is intended as a concession that some but *not all* of the observed disparity between high- and low-stakes cases might be justified on epistemological grounds.

In terms of which cases count as “high-stakes,” this Article takes no position except to say that a case is high stakes just in case it *matters* a great deal to the deciding court and to those to whom its opinion is addressed.⁴¹ For that reason, the arguments below depend in part on apparent subjective evaluation: only if it seems likely that the deciding court thinks that a case matters specially should one expect that court to proceed with the corresponding epistemic caution. On the other hand, this Article

³⁵ *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring).

³⁶ *Id.*

³⁷ Katyal & Schmidt, *supra* note 8, at 2112.

³⁸ 134 S. Ct. 2077 (2014).

³⁹ 557 U.S. 193 (2009).

⁴⁰ *See* 134 S. Ct. at 2090.

⁴¹ Because judicial opinions are written for an audience, the implicit assessment of a case’s relative importance contained in an opinion must be presumed by deciding court to be shared by that audience, on pains of being an uncooperative interlocutor. *See* Stefano Predelli, *Painted Leaves, Context, and Semantic Analysis*, 28 LING. & PHIL. 351, 365 (2005) (observing that successful communication depends upon agreement among conversational participants as to what “matters”). As such, it is not enough to render a case “high stakes” that it matters specially *to the deciding court*.

leaves open the possibility of objective critique: even if courts do (or don't) regard some class of cases as high stakes, one can still argue they should (or shouldn't).

This Article has four Parts. Part I considers prior explanations of the disparity between high-stakes and low-stakes interpretation. Part II offers an alternative, epistemological explanation of that phenomenon, building upon the basic insight that the degree of epistemological justification required to act on a premise increases as do the practical stakes. Part III applies that basic insight to uncontroversially high-stakes adjudicatory situations. It also considers situations one might think *should* qualify as high-stakes—in particular, criminal adjudication—but that courts appear to regard as low-stakes, given the ease with which they identify “plain” or “unambiguous” meaning. In so doing, it shows that the insight this Article leverages has critical as well as justificatory potential. Last, Part IV considers the applicability of the Article’s thesis to constitutional interpretation. As this Part observes, the inherently high-stakes nature of constitutional interpretation might seem to explain why courts treat constitutional text much more loosely than statutory text. Be that as it may, this Part concedes that courts treat constitutional text *so* loosely in certain instances that it becomes fair to ask whether courts are engaged in constitutional *interpretation* at all.⁴²

I. PRIOR EXPLANATIONS

This Part discusses prior accounts of courts’ disparate treatment of text in high- and low-stakes cases. Part I.A sets out the standard account of the disparity, according to which courts’ reluctance to identify “clear” or “unambiguous” meanings is either disingenuous or the product of motivated reasoning. Part I.B examines a recent, non-cynical account that attributes the disparity to the rise of a new form of purposivism. Part I.C borrows from constitutional law, considering the “historical gloss” approach to interpretation, pursuant to which post-enactment practice can render a previously “clear” text “unclear” (or vice versa). As this Part argues, all of these accounts are limited in that each promises to justify at most a subset of high-stakes decisions. More still, the justifying reasons each account offers are ones that formalists—the strongest proponents of adherence to “clear” or “unambiguous” text—would reject.

A. Cynicism

According to the standard, cynical account, courts are reluctant to identify “clear” or “unambiguous” meanings in high-stakes cases because the practical

⁴² See, e.g., David A. Strauss, *Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1 (2015) (cataloging consensus ‘readings’ of constitutional provisions that are utterly at odds with the constitutional text).

concerns raised in those cases overwhelm any commitment to textual fidelity. In its starkest form, the standard account has it that courts outright “ignore” statutory text in an effort to advance some political or institutional agenda.⁴³ Or, in a slightly milder form, the suggestion is that such agendas skew courts’ perception of statutory text in high-stakes cases, causing them to fail to perceive “clear” or “unambiguous” meanings apparent to the unmotivated reader. To the extent that the standard account is justificatory, it is so in virtue of the principle that ‘the [practical] ends justify the [interpretive] means.’ With, for example, the Paris Climate Agreement at stake, one might (might!) forgive courts for attending to text less carefully than normal.⁴⁴

Proponents of the standard account include Neal Katyal and Thomas Schmidt, who, in a recent article, criticize the Roberts Court sharply for its treatment of statutory text in cases involving constitutional challenges.⁴⁵ As explained above, the canon of constitutional avoidance in its modern form permits courts to reject the “most natural reading” of a statute⁴⁶ if that reading would raise “serious constitutional questions.”⁴⁷ A court may, however, adopt a less-natural-but-also-less-constitutionally-doubtful reading only if that alternate reading is “fairly possible.”⁴⁸ If, by contrast, the meaning of the challenged statute is “clear,” a court must accept it and address any constitutional questions directly.⁴⁹

Katyal and Schmidt argue that, through application of the avoidance canon, the Roberts Court has engaged in an aggressive campaign of judicial “rewriting” of statutes in constitutional cases, “usher[ing] in legal change” under the banner of judicial restraint.⁵⁰ According to Katyal and Schmidt, the Roberts Court has appeared “indifferent” to whether the statutory readings it adopts in constitutional cases are “at all plausible.”⁵¹ Instead, they continue, the Court has freely endorsed interpretations that are otherwise “unthinkable,” “abandon[ing] normal principles of statutory interpretation whenever a serious constitutional issue looms.”⁵² The result is that the Court “leaves in place ... law[s] that Congress never passed and may never have wanted to pass,” a problem made all the worse by the reality of partisan gridlock and,

⁴³ See *supra* note 10.

⁴⁴ See *Why Insiders Think the EPA Got the Best of the Clean Power Plan Hearing Last Week*, UTILITY DIVE (October 5, 2016), <http://www.utilitydive.com/news/why-epa-got-the-best-of-the-clean-power-plan-hearing/427657/> (quoting an attorney for petitioners challenging the Clean Power Plan: “I tend to agree that if you take all of the passion of climate change and the Paris agreement out, I think EPA loses 10-0 ... [b]ut there certainly seem to be some judges who were looking for a way to allow EPA to do something like this, and I think that’s hard to take out of the case.”).

⁴⁵ See Katyal & Schmidt, *supra* note 8.

⁴⁶ *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015); *accord* *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2600 (2012).

⁴⁷ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009).

⁴⁸ *United States v. Locke*, 471 U.S. 84, 92 (1985) (“[T]his Court will not pass on the constitutionality of an Act of Congress if a construction of the Act is fairly possible ... by which the constitutional question can be avoided.”).

⁴⁹ *Peretz v. United States*, 501 U.S. 923, 929–30 (1991).

⁵⁰ Katyal & Schmidt, *supra* note 8, at 2111-12.

⁵¹ *Id.* at 2112.

⁵² *Id.* at 2116.

hence, the implausibility of legislative override.⁵³ Katyal and Schmidt allow that the Court’s motivations in these cases may be innocent, driven by, for example, a “desire for narrower rulings.”⁵⁴ Be that as it may, Katyal and Schmidt insist that sometimes “distorting a statute in the name of avoidance does more violence to congressional intent—and is therefore more countermajoritarian—than outright invalidation.”⁵⁵

Sounding a more optimistic note, Jonathan Adler characterizes the Roberts Court’s apparent loose treatment of text as an exercise of “Burkean minimalism.”⁵⁶ Like Katyal and Schmidt, Adler describes the Court as ignoring the “plain meaning” of statutory text in cases involving constitutional challenges, as well as cases involving non-constitutional challenges to major statutes.⁵⁷ According to Adler, though, the Court’s “willing[ness] to stretch or massage relevant statutory provisions” in such cases reflects a desire to “avoid interpretations that would require invalidating federal statutes on constitutional grounds or would otherwise prove disruptive to the status quo.”⁵⁸ In Adler’s view, the Court seems committed in these cases not only to respecting and deferring to the political branches—the traditional understanding of judicial minimalism—but also to “reducing the practical impact of [its] rulings.”⁵⁹ Drawing on Chief Justice Robert’s famous analogy between judges and umpires, Adler suggests that, in the Chief Justice’s view, a good judge, like a good umpire, is one who “avoid[s] making calls that control the outcome of the game.”⁶⁰ And while Adler is careful not to endorse this understanding of judging,⁶¹ he does offer a *prima facie* justification for the Roberts Court’s “willing[ness] ... to stretch statutory text,” namely the “avoid[ance of] disruptive consequences.”⁶²

Needless to say, the justification that Adler highlights is both highly contestable and of limited appeal. As Adler himself points out, “strain[ing]” to read text in ways that promote desirable outcomes—status-quo preserving or no—threatens institutional legitimacy.⁶³ In addition, as Katyal and Schmidt observe, efforts to minimize judicial impact can have unintended practical consequences.⁶⁴ More fundamentally, whatever appeal this sort of practical justification has to

⁵³ *Id.* at 2118-20.

⁵⁴ *Id.* at 2114.

⁵⁵ *Id.* at 2128.

⁵⁶ Jonathan H. Adler, *Anti-Disruption Statutory Construction*, 38 CARDOZO L. REV. 101, 103 (2016).

⁵⁷ *Id.*; see also *id.* at 119-20 (“There is often room for reasonable people to differ on the best interpretation of a complex statute, but some of the Chief Justice’s opinions seem to stretch interpretive choices beyond their breaking point.”).

⁵⁸ *Id.* at 103.

⁵⁹ *Id.* at 105.

⁶⁰ *Id.*

⁶¹ *Id.* at 119 (“The analysis presented here is descriptive, not normative.”).

⁶² *Id.* at 120.

⁶³ *Id.* at 105.

⁶⁴ Katyal & Schmidt, *supra* note 8, at 2163 (observing that, by merely hinting at answers to constitutional questions via application of the avoidance canon, higher courts provide lower courts little guidance concerning how to handle similar challenges).

instrumentalists, formalists reject it out of hand.⁶⁵ As mentioned above, any justification resulting from the standard, cynical (or semi-cynical) account must be of the ‘ends-justify-the-means’ variety. And that sort of justification is, for the formalist, uncognizable per se.

B. *The New Holy Trinity*

The cynical account has it that courts abandon interpretive principle in high-stakes cases.⁶⁶ Richard Re argues, by contrast, that interpretive principle has “evolved” in ways that helps explain the high-/low-stakes disparity.⁶⁷ According to Re, although courts no longer “rewrite” statutory language openly in the service of Congress’s apparent policy aims, the Roberts Court in particular has come to assign significant weight to such aims—along with other pragmatic considerations—when determining “how much clarity is required for a text to be clear” and so to command a particular outcome.⁶⁸ The result, Re continues, is a new form of purposivism, pursuant to which text constrains, but the degree to which it constrains depends upon nontextual factors.⁶⁹ As Re explains it, “[i]f a reading has no textual support, then no amount of pragmatism or purpose can carry the day.”⁷⁰ If, on the other hand, “a statute’s central objective is at risk or an otherwise plausible reading leads to alarming results,” then the approach requires overwhelming textual evidence for text to control—assuming, that is, some minimally textually plausible alternative.⁷¹ Re dubs this approach the “New *Holy Trinity*,”⁷² contrasting it with the old, open-rewriting brand of purposivism associated with the now-infamous *Holy Trinity Church v. United States*.⁷³

Much like Adler, Re suggests that loose treatment of text in “unusual but pivotal” cases helps to avoid “shocking effects or disruptive consequences.”⁷⁴ Unlike Adler, however, Re does his best to translate that justification into non-instrumentalist terms. Re hypothesizes that, by holding text to a higher standard when a surprising or harmful result looms, courts are attempting to “adhere to clear text when it’s the product of deliberate compromise” but to set it aside “when it springs from an

⁶⁵ Cf. Adler, *supra* note 56, at 103 (“Whatever the merits of this approach, it [i]s not textualism as we’ve come to know it.”).

⁶⁶ See *id.* (remarking that the Roberts Court’s “preference for limiting the disruptive impact of the Court’s decisions takes priority over any commitment to a particular interpretive technique”).

⁶⁷ Re, *supra* note 13, at 407; see also *id.* at 421 (suggesting that his account make sense of the difference between “banal” and “unusual but pivotal” cases).

⁶⁸ *Id.* at 417.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 421.

⁷² *Id.* at 408.

⁷³ 143 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.”).

⁷⁴ Re, *supra* note 13, at 421.

inattentive mistake.”⁷⁵ So articulated, Re’s defense of the New *Holy Trinity* mirrors the standard defense of the old doctrine that “judges may deviate from even the clearest statutory text when a given application would otherwise produce ‘absurd’ results”⁷⁶— a doctrine associated, fittingly, with the old *Holy Trinity*.⁷⁷ As Manning explains, the basic thought underlying the absurdity doctrine is that “legislators necessarily draft statutes within the constraints of bounded foresight, limited resources, and imperfect language.”⁷⁸ For that reason, if a given statutory application is “absurd,” a court should “presume[] that this absurd result reflects imprecise drafting that Congress could and would have corrected had the issue come up during the enactment process.”⁷⁹

Because Re’s defense of the New *Holy Trinity* is familiar, so too is the basic objection. It is, at this point, widely recognized that Congress legislates means as well as ends. Enacting legislation (when it happens) requires compromise, and implementing compromise often requires adopting otherwise suboptimal means.⁸⁰ As textualists have long argued, the most feasible way for Congress to identify specific means is for it to use specific words.⁸¹ For that reason, if courts treat precise statutory language as a mere “proxy” of Congress’s general policy aims, they make it infeasible for members of Congress to negotiate compromises with binding force.⁸² This is why there is now a consensus that courts must enforce “clear” statutory text.⁸³ And, as Manning has argued, the reasons that support that consensus do not support an exception for cases in which enforcing “clear” text would entail an “absurd” practical outcome.⁸⁴ It is, of course, entirely sensible for courts to consider the “absurdity” of a practical outcome as evidence against a particular reading of some text.⁸⁵ But once, having taken that outcome into account, a court deems the corresponding reading “best” nonetheless, that court would exceed its authority by setting that reading aside, dismissing it as a mistake.⁸⁶

⁷⁵ *Id.* at 418.

⁷⁶ John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003) [hereinafter Manning, *The Absurdity Doctrine*].

⁷⁷ *Id.* at 2403.

⁷⁸ *Id.* at 2389.

⁷⁹ *Id.* at 2389-90.

⁸⁰ See, e.g., *Wyeth v. Levine*, 555 U.S. 555, 601 (2009) (Thomas, J. concurring in the judgment) (“[A] statute’s text might reflect a compromise between parties who wanted to pursue a particular goal to different extents.”); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 (1994) (Stevens, J.) (“Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal.”).

⁸¹ Manning, *The New Purposivism*, *supra* note 3, at 116.

⁸² *Id.*

⁸³ See *supra* note 2 and accompanying text.

⁸⁴ Manning, *The Absurdity Doctrine*, *supra* note 76, at 2392 (“Following such a course would more often require judges to accept seemingly odd or awkward results in particular cases, but doing so would serve important systemic values implicit in the constitutional structure—legislative supremacy, the evenhanded application of statutes, respect for legislative compromise, and the conception of limited judicial power implicit in rationality review.”).

⁸⁵ See Doerfler, *The Scrivener’s Error*, *supra* note 5, at 833.

⁸⁶ That is, a *substantive* mistake, as opposed to a linguistic mistake. See *id.* at 830-34.

Unlike the old *Holy Trinity*, Re’s insists that courts may adopt an unnatural reading only if that reading has “non-frivolous textual support.”⁸⁷ Be that as it may, what Re advocates is that courts reject a statute’s most natural reading on the grounds that Congress’s choice of language is more likely owed to “inattent[ion]” than to compromise.⁸⁸ Re appears, in so doing, to suggest that courts treat precise statutory language as a mere “proxy” for purpose—so long, that is, as that language is anything less than crystal clear. If that’s right, the New *Holy Trinity* thus threatens to undermine legislative bargains in just the same way as the old. Although it is more limited in scope, the kind of damage caused is the same.

Another way of putting the objection is that the New *Holy Trinity* double-counts legislative purpose. Again, pursuant to the New *Holy Trinity*, courts consider Congress’s apparent policy aims when deciding “how much clarity is required” in order for text to control—if a text’s most natural reading runs contrary to purpose, that reading must be especially clear for courts to give it effect.⁸⁹ The problem with tying “clarity” to purpose, however, is that contemporary courts *already* consider Congress’s apparent policy aims when determining a text’s most natural reading. As Manning observes, in the bad old days, textualist judges were “literalists,” equating fidelity to text with enforcement of “ordinary” meaning.⁹⁰ Over time, though, textualists came to recognize that language has meaning only in context, and so began to consider the practical setting when making sense of a particular text.⁹¹ In a slogan, textualists now accept that, to understand “what Congress is trying to *say*,” courts must have some grasp of “what Congress is trying to *do*.”⁹² But if courts now consider legislative purpose when figuring out how a statute is most naturally read, the question for Re becomes, why consider purpose *again* when deciding how clear that most natural reading must be to control?

⁸⁷ Re, *supra* note 13, at 417.

⁸⁸ *Id.* at 418.

⁸⁹ Re, *supra* note 13, at 417.

⁹⁰ Manning, *The Absurdity Doctrine*, *supra* note 76, at 2456. At times, Re sounds as if he regards textualist judges as belong the old “plain meaning” school. See, e.g., Re, *supra* note 13, at 421 (attributing to textualists the principle that “legal ambiguity must be discoverable in text alone”). So understood, the double-counting problem articulated above disappears. It does so, however, only at the cost of rendering Re’s opponent an anachronism.

⁹¹ To illustrate, Manning considers Puffendorf’s classic example of a statute imposing criminal penalties on any person who “drew blood in the streets.” Manning, *The Absurdity Doctrine*, *supra* note 76, at 2461 (quoting *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 487 (1868)). Puffendorf concluded, quite sensibly, that the statute should not extend to a surgeon who opened the vein of a person in the street felled by a seizure. As Manning observes, for the old “plain meaning” textualist, Puffendorf’s conclusion is awkward since, “[r]ead literally,” that statute seemingly extends to the surgeon. *Id.* For the contextualist, by contrast, that sensible conclusion is straightforwardly available. See *id.* (observing that, for example, as used “in the criminal code, one might expect the term ‘drew blood’ to describe a violent act”). For extensive discussions of the ways in which context informs textual interpretation within a textualist framework, see also Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 986-98 (2017) [hereinafter Doerfler, *Who Cares How Congress Really Works?*] (cataloging examples).

⁹² Doerfler, *Who Cares How Congress Really Works?*, *supra* note 91, at 981.

A second objection, already mentioned, is that Re’s account predicts loose treatment of text even in cases with low practical stakes.⁹³ Again, according to Re, courts’ treat text more loosely when purposive considerations cut against.⁹⁴ This, in turn, suggests that courts will read text ‘creatively’ even in low-stakes cases so long as Congress’s apparent purpose runs contrary to a statute’s most straightforward reading. As indicated above, that prediction appears inconsistent with judicial behavior in recent years.⁹⁵

Both of the objections above pertain to what one might call the “purposive” branch of the New *Holy Trinity*, i.e. the claim that, where a text’s most natural reading runs contrary to Congress’s apparent policy aims, a heightened standard of clarity goes into effect. This leaves the proposal’s “pragmatic” branch, i.e. the analogous claim as to dramatic practical consequences. For reasons articulated below, there is something fundamentally correct about the pragmatic branch of the New *Holy Trinity*, even if it is not fully theorized—as explained below, the justification for such a doctrine has not to do with risk of Congressional mistake, but rather judicial mistake.⁹⁶ If one were to rid the proposal of its purposive branch, one could thus conceive of the New *Holy Trinity* less as an alternative to the account offered here than as an early predecessor to it.

C. Constructed Constraint

In constitutional law, a popular claim as of late is that post-enactment practice can render constitutional text clearer or—more controversially—less clear.⁹⁷ Sometimes termed the “historical gloss” approach to interpretation, in a nod to Justice Frankfurter’s famous opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,⁹⁸ the motivating thought is that the “perceived clarity or ambiguity” of some text is attributable not just to considerations having to do with linguistic meaning (e.g., ordinary usage, apparent purpose), but also to non-linguistic considerations such as, for example, congressional acquiescence to executive action or steady judicial enforcement.⁹⁹ So conceived, “textual clarity is not just some linguistic fact of the matter that exists apart from the overall process” of constitutional implementation.¹⁰⁰ Rather, “the clarity and

⁹³ See *supra* note 20 and accompanying text.

⁹⁴ See Re, *supra* note 13, at 409.

⁹⁵ See *supra* note 4 (collecting cases).

⁹⁶ See *infra* Part II.

⁹⁷ See, e.g., Bradley & Siegel, *After Recess*, *supra* note 15; Bradley & Siegel, *Constructed Constraint*, *supra* note 15; William Baude, *Constitutional Liquidation* (manuscript, copy on file with author).

⁹⁸ 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

⁹⁹ Bradley & Siegel, *After Recess*, *supra* note 15, at 44.

¹⁰⁰ *Id.* at 44-45.

ambiguity of the constitutional text is,” as Bradley and Siegel put it, “partially constructed” by subsequent practice.¹⁰¹

As one example, Bradley and Siegel cite the Supreme Court’s recent decision in *N.L.R.B. v. Noel Canning*.¹⁰² In that case, one question before the Court was whether the Recess Appointments Clause, which authorizes the President to fill up any vacancies that “may happen during” a Senate recess, encompasses vacancies that come into existence prior to the recess at issue.¹⁰³ As Justice Breyer, writing for the majority, conceded, the “most natural” reading of that language is as limiting the recess appointment power to vacancies that come into existence during the relevant recess.¹⁰⁴ At the same time, Justice Breyer continued, the Clause’s language at least “permits” a “broader interpretation” according to which vacancies that arise before but persist into the recess are included within the President’s power¹⁰⁵—an interpretation, Justice Breyer went on to argue, more consonant with the Clause’s “purpose.”¹⁰⁶ As evidence of the Clause’s “ambigu[ity],” Justice Breyer appealed to the longstanding executive branch practice of reading that language expansively.¹⁰⁷ In dissent, Justice Scalia contested the linguistic availability of the majority’s interpretation, maintaining that “no reasonable reader” would have understood the Clause’s language as the majority suggested.¹⁰⁸ According to Justice Scalia, to use those words to achieve that end would have been “surpassingly odd,” in particular given the “read[y] availab[ility]” of “alternate phrasings” that would have “convey[ed] that meaning clearly.”¹⁰⁹ As to executive branch practice, Justice Scalia went on to observe that appointments for vacancies coming into existence prior to the recess at issue became common only

¹⁰¹ *Id.* at 45. Bradley and Siegel contrast the “historical gloss” approach to the idea of “constitutional liquidation,” according to which uncertainties about constitutional meaning would be “worked out, or ‘liquidated,’ through decisions and practices.” “Once liquidated,” according to Bradley and Siegel, “the meaning of the Constitution on those questions would become ‘fixed’ and so not subject to change.” *Id.* at 30-31; *but see* Baude, *supra* note 97, at *34-48 (arguing that liquidation correctly understood does not require that “liquidated” meanings be permanently “fixed”).

¹⁰² 134 S. Ct. 2550 (2014).

¹⁰³ U.S. CONST, Art II, § 2, cl 3 (“The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”).

¹⁰⁴ *Id.* at 2567; *see also* Ryan D. Doerfler, *Go Big or Go Home: The Constitutionality of Recess Appointments Following Pro Forma Sessions of the Senate*, 65 ADMIN. L. REV. 975, 980-88 (2013) (providing a linguistic analysis of this portion of the Recess Appointments Clause).

¹⁰⁵ *Noel Canning*, 134 S. Ct. at 2567-68.

¹⁰⁶ *Id.* at 2568 (“The Clause’s purpose strongly supports the broader interpretation. That purpose is to permit the President to obtain the assistance of subordinate officers when the Senate, due to its recess, cannot confirm them.”).

¹⁰⁷ *Id.* at 2567-68 (noting, e.g., that “Attorney General William Wirt advised President Monroe to follow the broader interpretation”); *see also id.* at 2570 (contending that “[h]istorical practice over the past 200 years strongly favors the broader interpretation”).

¹⁰⁸ *Id.* at 2606 (Scalia, J., dissenting).

¹⁰⁹ *Id.* at 2606-07 (Scalia, J., dissenting) (remarking that “the reasonable reader might have wondered, why would any intelligent drafter intending the majority’s reading” have used language contained in the Clause, thereby making that reading “awkward and unnatural”).

around the mid-nineteenth century, and only after a great deal of contestation within the executive branch.¹¹⁰

Characterizing the dispute between Justice Breyer and Justice Scalia, Bradley and Siegel observe that both accept that “historical practice might be relevant” to constitutional interpretation, but only if “the constitutional text is ambiguous.”¹¹¹ For Justice Scalia, the text of the Recess Appointments Clause was “clear,” making post-enactment practice largely irrelevant.¹¹² For Justice Breyer, by contrast, the text of the Clause was “ambiguous,” thus giving historical practice “significant weight.”¹¹³ According to Bradley and Siegel, this difference in perception of textual clarity is at least partially attributable to a difference in which considerations each thought relevant to the question of whether text is “clear.” For Justice Scalia, the clarity of the text was shown mostly if not entirely by appeal to *linguistic* considerations such as ordinary usage¹¹⁴—characteristic, as Bradley and Siegel observe, of originalist approaches to constitutional interpretation.¹¹⁵ For Justice Breyer, on the other hand, the reason—indeed, the “only reason”—for “s[ee]king] out a *possible* reading” beyond the deemed “most natural” was, seemingly, the longstanding historical practice of acting contrary to that “most natural” reading.¹¹⁶ As such, the language of the Recess Appointments Clause was actually *made* ambiguous, claim Bradley and Siegel, by that historical practice.¹¹⁷

However it fares as an approach to constitutional interpretation,¹¹⁸ “historical gloss” has ready appeal when it comes to statutes. If, for example, Adler is right that the Court has a bias in favor of the status quo,¹¹⁹ one way to make sense of that ‘bias’ is as an application of “historical gloss.” Applying that framework, one could say the

¹¹⁰ *Id.* at 2610-13 (Scalia, J., dissenting).

¹¹¹ Bradley & Siegel, *After Recess*, *supra* note 15, at 18.

¹¹² *Noel Canning*, 134 S. Ct. at 2617 (Scalia, J., dissenting). Irrelevant, that is, insofar as historical practice is evidence of something *other than* the original public meaning of the Clause’s language. See, e.g., Vasana Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1164-76 (2003) (discussing the (in their view, limited) probative value of early congressional, executive, and judicial precedents to the original public meaning of the constitutional text).

¹¹³ *Noel Canning*, 134 S. Ct. at 2559, 2568.

¹¹⁴ See *id.* at 2606-10 (Scalia, J., dissenting) (discussing the “plain meaning” of the language at issue). As Bradley and Siegel observe, Justice Scalia also appears moved by what he perceives as the “purpose” of the Recess Appointments Clause. See Bradley & Siegel, *After Recess*, *supra* note 15, at 48-49. As I have argued elsewhere, however, a drafter’s apparent purpose is a quintessentially *linguistic* consideration. See Doerfler, *Who Cares How Congress Works?*, *supra* note 91, at 995-98.

¹¹⁵ See Bradley & Siegel, *Constructed Constraint*, *supra* note 15, at 1241 (observing that for most originalists, non-linguistic considerations such as historical practice are relevant only if, on the basis of linguistic considerations, the constitutional text is unclear); see also *id.* at 1241 (observing that originalists “are likely to accept [pre-ratification practice] but not [post-ratification practice] as relevant to textual interpretation, especially if the post-ratification practice occurs long after the Founding”).

¹¹⁶ Bradley & Siegel, *After Recess*, *supra* note 15, at 47-48.

¹¹⁷ *Id.* at 47 (“[T]he Court’s finding of ambiguity for the phrase ‘vacancies that may happen’ suggests substantial extratextual construction”); see also Bradley & Siegel, *Constructed Constraint*, *supra* note 15, at 1266.

¹¹⁸ See *infra* Part IV.

¹¹⁹ See *supra* notes 56-62 and accompanying text.

Court perceives otherwise “clear” text as “ambiguous” in the cases Adler cites precisely because the “most natural reading” of the text in those cases would, if accepted, be disruptive of, for example, the existing implementation regime. So understood, it is not that the Court pretends to see “ambiguity” to avoid a disruptive result. Rather, it is that the specter of disruption “constructs” unclarity where none existed before.¹²⁰

Despite its appeal, “historical gloss” also has serious limitations in terms of explaining the high-/low-stakes disparity in statutory interpretation.¹²¹ First and most obvious, even if some high-stakes cases are plausibly situated within the “historical gloss” framework, others are plainly not. As discussed below, cases involving non-constitutional challenges to major statutes are, for example, uncontroversially ‘high-stakes.’¹²² Some of those cases involve challenges to longstanding implementation regimes and thus fit squarely within the “historical gloss” approach.¹²³ Others such cases, however, involve what are more or less preemptive strikes.¹²⁴ And while a nascent implementation regime is plausibly a “gloss” on the corresponding statutory text, a *historical* gloss it is not.

Second, much like Re’s account, the “historical gloss” approach would seem to predict loose treatment of text if a text’s “most natural” reading is contrary to settled post-enactment practice, regardless of the practical stakes. Again, that prediction appears incorrect. In *Milner v. Navy*,¹²⁵ for instance, the Supreme Court considered whether the Navy could invoke the Freedom of Information Act’s (FOIA’s) exemption for an agency’s “personnel rules and practices” to withhold internal maps pertaining to the storage of munitions.¹²⁶ Below, the Ninth Circuit held that it could, reasoning that the maps in question related to “predominantly internal” matters the disclosure of which “presents a risk of circumvention of agency regulation.”¹²⁷ In so holding, the Ninth Circuit applied a test articulated almost three decades earlier by the D.C. Circuit¹²⁸—a test, according to Justice Breyer, “consistently followed, or favorably cited, by every Court of Appeals to have considered the matter during the

¹²⁰ See Strauss, *supra* note 42, at 28 (“If an agency has consistently adhered to a view that seems to be at odds with the text of the statute, that might persuade a court to find a degree of vagueness or ambiguity in the text that the court would otherwise not perceive and to defer to the agency’s longstanding view.”).

¹²¹ Again, this is no discredit to the proponents of the “historical gloss” approach in the area of constitutional interpretation. The purpose of this Part is to explore a potentially helpful analogy, not to impute to the authors discussed the intention to explain areas of interpretation other than the one they address explicitly.

¹²² See *infra* Part III.B.

¹²³ See *infra* Part III.B.2 (discussing *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015)).

¹²⁴ See *infra* Part III.B.1 (discussing *King v. Burwell*, 135 S. Ct. 2480 (2015)).

¹²⁵ 562 U.S. 562 (2011).

¹²⁶ 5 U.S.C. § 552(b)(2).

¹²⁷ *Milner v. U.S. Dep’t of the Navy*, 575 F.3d 959, 965 (9th Cir. 2009), *rev’d and remanded sub nom. Milner v. Dep’t of Navy*, 562 U.S. 562 (2011).

¹²⁸ See *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc) *abrogated by Milner v. Dep’t of Navy*, 562 U.S. 562 (2011). The D.C. Circuit grounded its broad reading of the exemption in FOIA’s “secondary purpose” of “preserving the effective operation of governmental agencies.” *Id.* at 1070.

past 30 years.”¹²⁹ The Supreme Court reversed, holding that “the plain meaning of the term ‘personnel rules and practices,’ encompasses only records relating to issues of employee relations and human resources,” and so excludes maps of explosives.¹³⁰ Rejecting the more expansive reading of the relevant exemption, the Court insisted that to accept the D.C. Circuit’s reading would require it to “flout all usual rules of statutory interpretation.”¹³¹ The Court continued that it had “no warrant to ignore clear statutory language on the ground that other courts have done so.”¹³² The Court concluded by observing that “the Government has other tools at hand to shield national security information and other sensitive materials,” in particular other exemptions within FOIA.¹³³ For that reason, the Court’s decision was likely of limited practical significance. This despite its invalidating a (relatively) settled interpretive practice.

Third, the appeal of “historical gloss” is limited insofar as it is fundamentally at odds with familiar formalist approaches to interpretation. Again, Bradley and Siegel rightly contrast the “historical gloss” approach with “originalist” and “textualist” methods of interpretation.¹³⁴ Pursuant to those methods, what a text *means* turns exclusively on linguistic considerations.¹³⁵ By contrast, “historical gloss” grounds textual meaning in decidedly non-linguistic considerations, in particular political branch practice not at all proximate to the enactment of the corresponding text. For that reason, “historical gloss” also involves a rejection of the “fixation thesis,” a basic premise of most any originalist or textualist theory.¹³⁶ If, for example, historical practice contrary to a text’s “most natural” reading becomes sufficiently settled, the meaning of that text might flip, such that the ‘unnatural’ reading becomes “clear.”¹³⁷ According to Bradley and Siegel, this surprising implication is a feature of the “historical gloss” approach, not a bug. The reason is that it facilitates textual “updating,” permitting legal texts “to evolve in response to ... changing needs.”¹³⁸

¹²⁹ *Milner*, 562 U.S. at 585 (Breyer, J., dissenting); *but see id.* at 576 (Kagan, J.) (observing that “[p]rior to *Crooker*, three Circuits adopted the reading of [the exemption] we think right, and they have not changed their minds”).

¹³⁰ *Id.* at 581.

¹³¹ *Id.* at 577.

¹³² *Id.* at 576.

¹³³ *Id.* at 580-81.

¹³⁴ Bradley & Siegel, *Constructed Constraint*, *supra* note 15, at 1216-17, 1241.

¹³⁵ Such methods often do permit consideration of non-linguistic considerations to fill gaps in textual meaning. *See, e.g.*, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453 (2013) (distinguishing constitutional “interpretation,” i.e. “the activity that discovers the communicative content or linguistic meaning of the constitutional text,” from constitutional “construction,” i.e. “the activity that determines the legal effect given the text,” observing that “the actual text of the U.S. Constitution contains general, abstract, and vague provisions that require constitutional construction that goes beyond the meaning of the text for their application to concrete constitutional cases”).

¹³⁶ *See* Solum, *The Fixation Thesis*, *supra* note 25.

¹³⁷ Perhaps the best example Bradley and Siegel provide is the consensus that the First Amendment’s instruction that “Congress shall make no law . . . [e.g.] abridging the freedom of speech,” U.S. CONST. AMEN. I, applies not just to Congress but to all branches of the federal government. *See* Bradley & Siegel, *Constructed Constraint*, *supra* note 15, at 1243-47; *but see infra* Part IV.

¹³⁸ Bradley & Siegel, *After Recess*, *supra* note 15, at 63.

Needless to say, such “updating” is anathema to constitutional or statutory formalists, for whom Article V¹³⁹ and Article I, § 7¹⁴⁰ are, respectively, of the utmost importance.¹⁴¹

II. HIGH/LOW STAKES

This Article’s working hypothesis is that to say that it is “clear” (or “plain” or “unambiguous”) that something is the case is, roughly speaking, to claim that one is in an epistemic position to “know” it.¹⁴² Various linguistic data support this hypothesis. Like claims about “knowledge,” claims about “clarity” appear to be *factive*, i.e. truth-entailing.¹⁴³ In addition, claims about “clarity” and claims about “knowledge” seem to be *mutually warranting*, i.e. if one is warranted in claiming that something is “clear,” one is warranted in claiming to “know” it, and vice versa.¹⁴⁴

Building on the above hypothesis, this Part articulates an alternate, epistemological explanation/justification of courts’ disparate treatment of text in high- and low-stakes cases. Drawing on contemporary work in philosophy of language and epistemology, it argues that courts’ hesitancy to identify “clear” or “plain” statutory meaning in high-stakes cases is plausibly an instantiation of the more general reluctance on the part of ordinary speakers to claim to “know” things when the practical stakes are raised. As this Part goes on to explain, this general reluctance on the part of speakers reflects a basic insight concerning the relationship between epistemic and practical reason, specifically that the epistemological justification required to act on some premise increases as do the practical stakes.

¹³⁹ U.S. Const. art. V (establishing formal procedures for amending the Constitution).

¹⁴⁰ U.S. Const. art. I, § 7 (establishing formal procedures for enacting legislation).

¹⁴¹ See, e.g., John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 714 (1997) (discussing the importance of bicameralism and presentment); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (emphasizing the value of the “long and hard consideration required for a constitutional amendment”).

¹⁴² Unlike claims about “knowledge” (e.g., “X knows that *p*.”), claims about “clarity” are typically impersonal (e.g., “It is clear that *p*.”). As such, claims about “clarity” appear to be indexed to a particular body evidence (e.g., “It is clear (given the available evidence) that *p*.”). In turn, claims about clarity seem to imply that those in the conversational circle have access to that body of evidence and so are in a position to “know” the proposition at issue.

¹⁴³ E.g., if I “know” that Oswald killed Kennedy, then Oswald in fact killed Kennedy. The same is true if it is “clear” that Oswald killed Kennedy.

¹⁴⁴ The best evidence of mutual warrant is, perhaps, the infelicity of claiming to “know” something while denying that it is “clear,” or vice versa (“#” indicates infelicity):

(A) I know that Oswald killed Kennedy, but it isn’t clear that he did.

(B) It is clear that Oswald killed Kennedy, but I don’t know that he did.

For reasons below, this Article takes no position as to whether such claims are mutually *entailing*.

A. Motivating Examples

In recent years, philosophers have offered various technical explanations of the relationship between the practical stakes of a situation and the use of certain epistemological predicates. In particular, a great deal of work has gone into making sense of the effect changing the practical stakes has on speakers' willingness to claim to "know" things. This work has been motivated largely by a handful of intuitive, everyday examples that suggest the appropriateness of "knowledge" attributions vary according to the practical circumstances.¹⁴⁵ Perhaps the best-known of these examples are the so-called Bank Cases, imagined by Keith DeRose:

[LOW STAKES]: My wife and I are driving home on a Friday afternoon. We plan to stop at the bank on the way home to deposit our paychecks. But as we drive past the bank, we notice that the lines inside are very long, as they often are on Friday afternoons. Although we generally like to deposit our paychecks as soon as possible, it is not especially important in this case that they be deposited right away, so I suggest that we drive straight home and deposit our paychecks on Saturday morning. My wife says, "Maybe the bank won't be open tomorrow. Lots of banks are closed on Saturdays." I reply, "No, I know it'll be open. I was just there two weeks ago on Saturday. It's open until noon."

[HIGH STAKES]: My wife and I drive past the bank on a Friday afternoon, as in [LOW STAKES], and notice the long lines. I again suggest that we deposit our paychecks on Saturday morning, explaining that I was at the bank on Saturday morning only two weeks ago and discovered that it was open until noon. But in this case, we have just written a very large and very important check. If our paychecks are not deposited into our checking account before Monday morning, the important check we wrote will bounce, leaving us in a very bad situation. And, of course, the bank is not open on Sunday. My wife reminds me of these facts. She then says, "Banks do change their hours. Do you know the bank will be open tomorrow?" Remaining as confident as I was before that the bank will be open then, still, I reply, "Well, no. I'd better go in and make sure."¹⁴⁶

¹⁴⁵ A further motivation is that varying the epistemic standards required to "know" something according to the practical circumstances has seemed to many a promising approach to solving various skeptical puzzles. See, e.g., DEROSE, *supra* note 28, at 41-43.

¹⁴⁶ Keith DeRose, *Contextualism and Knowledge Attributions*, 52 PHIL. & PHENOMENOLOGICAL RES. 913, 913 (1992). The other well-known motivating example is Stuart Cohen's so-called Airport Case:

AIRPORT: Mary and John are at the L.A. airport contemplating taking a certain flight to New York. They want to know whether the flight has a layover in Chicago. They overhear someone ask a passenger Smith if he knows whether the flight stops in Chicago. Smith looks at the flight itinerary he got from the travel agent and

The Bank Cases are noteworthy in that they suggest that the appropriateness of claiming to “know” something can vary with the practical stakes, holding constant the considerations that bear on the truth or falsity of the proposition at issue (e.g., the available evidence).¹⁴⁷ In LOW STAKES, it seems appropriate for the speaker to claim to “know” that the bank will be open on Saturday on the basis of his recent experience. In HIGH STAKES, by contrast, it seems appropriate for the speaker to refrain from claiming to “know” that the bank will be open. The speaker’s evidence concerning whether the bank will be open on Saturday is the same in each case. The only difference, seemingly, is that the practical consequences of mistakenly acting as if the bank will be open on Saturday are much greater in HIGH STAKES (e.g., a bounced check) than in LOW STAKES.

Because of the seeming connection between claiming that something is “clear” and claiming to “know” that thing, analogous examples can, unsurprisingly, be constructed for ascriptions of “clarity.” For instance:

ORDINARY: My wife and I are driving home on the evening of the New Hampshire primary. We plan to stop at the polling place on the way home to cast our votes. But as we drive past the place, we notice that the lines inside are very long, as they often are on the day of the primary. Although we generally like to vote, it is not especially important in this case that we do so. All of the candidates seem unremarkable, and all have similar policy platforms. For these reasons, I suggest that we drive straight home, trusting that our preferred candidate will prevail. My wife says, “Maybe she won’t win. Lots of times turnout is the deciding factor.” I reply, “No, it’s clear she’ll win. I checked the polls just a few days ago. She’s comfortably ahead.”

TRANSFORMATIVE: My wife and I drive past the polling place, as in ORDINARY, and notice the long lines. I again suggest that we drive straight home, explaining that I checked the polls a few days ago and that our preferred candidate is ahead. But in this case, the candidate we prefer is markedly different from the other candidates, potentially a transformative figure. If she wins, her candidacy will gain immediate legitimacy, opening the door to a new era of American politics. My wife reminds me of these facts. She then says, “As you know, polls are wrong sometimes. Is it clear that she will win?”

respond, ‘Yes I know—it does stop in Chicago.’ It turns out that Mary and John have a very important business contact they have to make at the Chicago airport. Mary says, ‘How reliable is that itinerary? It could contain a misprint. They could have changed the schedule at the last minute.’ Mary and John agree that Smith doesn’t really know that the plane will stop in Chicago. They decide to check with the airline agent.

Cohen, *supra* note 29, at 58.

¹⁴⁷ More generally, cases of this sort suggest varying appropriateness of knowledge *attributions*, i.e. claims of the form “X knows that *p*.”

Remaining as confident as I was before that our preferred candidate will win, still, I reply, “Well, no. We’d better go in and vote just to be safe.”

Like the Bank Cases, these cases suggest that the appropriateness of claiming that something is “clear” can vary with the practical stakes. In each case, the speaker’s evidence concerning whether the preferred candidate will win regardless is the same. Be that as it may, because the practical consequences of mistakenly acting as if the preferred candidate will win are much lesser in ORDINARY than in TRANSFORMATIVE, it seems appropriate for the speaker to claim that the election outcome is “clear” in the former case but not in the latter.

B. Technical Explanations

Again, technical explanations of the examples discussed in Part II.A vary (readers uninterested in the details of the various candidate explanations should skip to Part II.C). DeRose and other so-called *contextualists* argue that such examples show that attributions of “knowledge” are context-sensitive in that utterances of the form “X knows that *p*” express different propositions in different contexts of use.¹⁴⁸

So characterized, attributions of “knowledge” are much like attributions of “tallness” or “flatness.”¹⁴⁹ The same person, for instance, might be fairly characterized as “tall” in a conversation about gymnastics, but not in a conversation about basketball. The standard explanation is that to characterize someone as “tall” is to say that that person is tall relative to some comparison class determined by the context of use. In a conversation about gymnastics, to utter the sentence “Karen is tall” is to say, very roughly, that Karen is tall *in relation to other gymnasts*. By contrast, to utter the same sentence in a conversation about basketball is to claim, again roughly, that Karen is tall *in relation to other basketball players*.

Turning back to “know,” contextualists claim that the proposition expressed by uttering a sentence of the form “X knows that *p*” depends upon the practical stake the conversational participants have in the truth of *p*. In a low-stakes situation, i.e. a situation in which the truth of *p* matters not very much to the participants, to say that one “knows that *p*” is to claim something like that one knows that *p in a weak sense*, i.e. in relation to a moderately demanding epistemic standard.¹⁵⁰ By contrast, to utter that same sentence in a high-stakes situation, i.e. a situation in which the truth of *p* matters

¹⁴⁸ See generally DEROSE, *supra* note 28.

¹⁴⁹ Contextualists also analogize “know” to familiar indexicals such as “I,” “here,” and “now.” See, e.g., Stewart Cohen, *How to be a Fallibilist*, 2 PHIL. PERSPECTIVES 91, 97 (1988).

¹⁵⁰ An alternative gloss is that practical circumstances determine which possibilities are salient and so which possibilities need to be ruled out in order to “know” something. See Stewart Cohen, *Contextualist Solutions to Epistemological Problems: Scepticism, Gettier, and the Lottery*, 76 AUSTRALASIAN J. PHIL. 289, 294-95 (1998).

a great deal to the participants, is to claim that one knows that *p* in a strong sense, i.e. in relation to a very demanding epistemic standard. Hence, in LOW STAKES, the speaker is in a position to claim to “know” that the bank will be open on Saturday because the evidence available to him satisfies a moderately demanding epistemic standard. By contrast, because that same evidence does not satisfy a very demanding epistemic standard, the speaker in HIGH STAKES reasonably refrains from claiming to “know” that the bank will be open.

A second explanation, defended by so-called *interest-relative invariantists* such as Jason Stanley, is that utterances of the form “*X* knows that *p*” express the same proposition regardless of the practical stakes: that *X* knows that *p*.¹⁵¹ At the same time, whether *X* knows that *p* depends, according to such authors, not just upon familiar considerations such as *X*’s evidence concerning *p* or whether *p* is true, but also, quite unconventionally, on *X*’s practical stake in the truth of *p*. As Stanley puts it, “[t]he basic idea is that, the greater the practical investment one has in a belief, the stronger one’s evidence must be in order to know it.”¹⁵² In other words, for interest-relative invariantists, knowledge is fundamentally a *practical* concept.¹⁵³

Interest-relative invariantism thus provides a straightforward explanation for speakers’ reluctance to claim to “know” things in high-stakes situations, namely that it is *more difficult* to know something if the practical stakes are raised. In LOW STAKES, for example, the speaker can claim to “know” that the bank is open because, given the conversational participants’ limited practical interest, knowledge requires only moderate epistemic justification. In HIGH STAKES, by contrast, to know that the bank will be open would require very strong epistemic justification, a degree of justification the speaker apparently lacks. Given the conversational participants’ heightened practical interest, merely moderate justification will not do.¹⁵⁴

A third, *pragmatic* explanation suggested by Jessica Brown and others is that what varies according to the practical stakes is not the proposition expressed by an attribution of “knowledge,” but rather whether that attribution is *conversationally appropriate*.¹⁵⁵

Here, a helpful analogy can be drawn to Paul Grice’s classic examples of conversational implicature.¹⁵⁶ Suppose, for instance, that A is standing by an obviously immobilized car and is approached by B. A says to B, “I am out of petrol.” B

¹⁵¹ See generally STANLEY, *supra* note 28.

¹⁵² *Id.* at 88.

¹⁵³ Interest-relative invariantism thus involves a rejection of what Stanley calls “intellectualism,” i.e. the thesis that the truth of a given “knowledge” attribution turns only on familiar, truth-conducive considerations. *Id.* at 6-7.

¹⁵⁴ Put differently, to claim to “know” something is, for the interest-relative invariantist, to allege sufficient epistemic justification for practical purposes.

¹⁵⁵ See Brown, *supra* note 28; Patrick Rysiew, *The Context-Sensitivity of Knowledge Attributions*, 35 NOÛS 477 (2001).

¹⁵⁶ H.P. Grice, *Logic and Conversation*, in 3 SYNTAX AND SEMANTICS: SPEECH ACTS 41 (Peter Cole & Jerry L. Morgan eds. 1975).

responds, “There is a garage round the corner.” As Grice observed, by uttering the sentence “There is a garage round the corner” in this context, B implies that the garage is (at least possibly) open and sells petrol. The reason, Grice explains, is that otherwise B’s response to A would be conversationally irrelevant and so inappropriate.¹⁵⁷ What matters to B (and hence to A), practically speaking, is that she is able to secure some petrol.

With “know,” the suggestion by Brown and others is that the proposition expressed by uttering a sentence of the form “*X* knows that *p*” is just that *X* stands in a specific epistemic relation—namely, knowing—with *p*. At the same time, what a speaker communicates indirectly by uttering such a sentence can vary with the practical stakes. Thus, in the Bank Cases, the suggestion is that the proposition the speaker expresses is the same in each case: that he knows that the bank will be open on Saturday. At the same time, what the speaker communicates indirectly in each case is different. In LOW STAKES, what matters to the conversational participants, practically speaking, is whether the speaker satisfies a moderately demanding epistemic standard as to the bank’s being open. As such, it is conversationally appropriate for him to say that he “knows” that the bank will be open so long as he satisfies that moderately demanding standard. By contrast, in HIGH STAKES, what matters to the conversational participants is whether the speaker satisfies a very demanding epistemic standard with respect to the bank being open. Hence, in that case, it is inappropriate for him to claim to “know” that the bank will be open if, as it seems, he fails to satisfy that more demanding standard.

Needless to say, adjudicating between these various technical explanations of how speakers use “know” goes beyond the scope of this Article.¹⁵⁸ Worth mentioning, however, is that explaining how speakers use “clear” might be a bit more straightforward. A central objection to contextualist explanations of “know” is that “know” does not appear to behave like other, uncontroversially context-sensitive terms. Stanley, for example, observes that unlike “tall” or “flat,” “know” is not obviously *gradable*, i.e. whereas it makes sense to describe someone as “*very* tall” or “*taller*” than someone else, “know” has no obvious analogues.¹⁵⁹ “Clear,” by contrast, is plainly gradable—one can say, for example, that it is “*very* clear” that one’s preferred candidate will win, or that the outcome of the gubernatorial election is “*clearer*” than the outcome of the Senate race. What this suggests is that, however one makes sense of “know,” “clear” probably admits of a contextualist explanation. Indeed, such an explanation seems largely unavoidable: insofar as something can be more or less clear,

¹⁵⁷ *Id.* at 51. Compare this with a situation in which A’s car is plainly in working order, and A says to B, “I am supposed to pick up a friend at a nearby garage.” In that case, if B were to respond, “There is a garage round the corner,” B’s utterance would have no such implication.

¹⁵⁸ Nor is this list of candidate explanations exhaustive. See, e.g., John MacFarlane, *The Assessment Sensitivity of Knowledge Attributions*, in 1 OXFORD STUDIES IN EPISTEMOLOGY 197 (Tamar S. Gendler & John Hawthorne eds., 2005) (defending an assessment-relativist account of “knowledge” attributions); Jonathan Schaffer, *From Contextualism to Contrastivism*, 119 PHIL. STUD. 73 (2004) (defending a contrastivist account of “knowledge” attributions).

¹⁵⁹ STANLEY, *supra* note 28, at 37-46.

context must determine *how clear* something must be to count as “clear” for purposes of a given conversation.¹⁶⁰ So construed, to claim that something is “clear” in a low-stakes situation is to say that one satisfies a moderately demanding epistemic standard in relation to the thing at issue. By contrast, to say that something is “clear” in a high-stakes situation is to claim that one satisfies a very demanding epistemic standard with respect to that thing.

C. Basic Insight

Whichever technical explanation one prefers, a straightforward connection between epistemic justification and practical interest comes through. On any of the above explanations, it is appropriate to claim to “know” something only if one has adequate epistemic justification as to that thing. And, on any of those explanations, what counts as adequate justification depends upon the practical interests of those involved. In a low-stakes situation, the truth of the thing at issue (e.g., that the bank will be open on Saturday, that the preferred candidate will win the election) matters not very much to the participants in the conversation. As such, what matters to those participants, practically speaking, is just that someone claiming to “know” that thing has moderate epistemic justification as to it. In a high-stakes situation, by contrast, the truth of thing at issue matters a great deal to the conversational participants. In those situations, then, what matters, practically speaking, is that claims to “know” that thing be supported by very strong epistemic justification.¹⁶¹

¹⁶⁰ The reasoning here is similar to Chief Justice Marshall’s analysis of “necessary” in *M’Culloch v. Maryland*. 17 U.S. (4 Wheat.) 316, 413-15 (1819). There, Marshall observed that “[a] thing may be necessary, very necessary, absolutely or indispensably necessary.” *Id.* at 414. Because the term “admits of all degrees of comparison,” Marshall continued, attention to “context” is necessary to determine whether the term is best read in a “rigorous” or “more mitigated sense.” *Id.* at 414-15. A difference worth mentioning, however, is that Marshall’s reasoning probably supports the more modest thesis that appeal to context is necessary to determine whether “necessary” is used literally or, as he put it, “figurative[ly],” *id.* at 414—insofar it is not obviously felicitous to say that something is “*more* necessary” than something else, that “necessary” is a gradable adjective is at least controversial. By contrast, insofar as it is plainly felicitous to say that something “clearer” than something else,” it seems comparably plain that “clear” is a gradable adjective and, in turn, that appeal to context is necessary to determine the threshold for “clarity” even if that term is used literally.

¹⁶¹ A premise of the examples considered above is that the parties involved have considered all available evidence pertaining to their decision. A further way in which raising the practical stakes can affect our epistemic burdens is by increasing the amount of evidence it is reasonable to consider. This is just a corollary of the basic insight discussed above. In a low-stakes situation, it will often be reasonable to act after considering only limited evidence, the reason being that the epistemic justification required to act on some premise is relatively low. By contrast, in a high-stakes situation, reason will often require that one seek out additional evidence, assuming that time permits.

Because this Article focuses on Supreme Court cases, it seems reasonable to assume that, as in the above examples, the Court has considered all available evidence concerning statutory meaning in both high- and low-stakes statutory cases—as a rule, the quality of advocacy before the Supreme Court is excellent, such that even in low-stakes cases, the Court has all of the arguments in front of it. That said, one might argue that, reasonably, the Court considers arguments more or less carefully depending on the practical stakes of the case. If that’s right, a further albeit related reason why the Court might

The coupling of epistemic justification and practical interest in our linguistic practice lends support to an already intuitive connection between epistemic and practical rationality. Specifically, it bolsters the principle that the epistemological justification required to act on some premise increases as do the practical stakes. This principle of rationality is seemingly reflected in all sorts of everyday conduct. In the Bank Cases, for example, it is not just that it is reasonable for the speaker in LOW STAKES to *say* that he “knows” that the bank will be open on Saturday; it is also reasonable for him to *act* on that premise, i.e. it is okay for him to drive past the bank. By contrast, in HIGH STAKES, it seems reasonable, even mandatory, for the speaker to refrain from acting on that premise. Similar cases abound. The epistemic burden for acting on the premise that one turned off the stove plausibly varies according to whether one is leaving for the store or a week-long vacation. So too the burden for acting on the premise that the holding of a particular Supreme Court decision was such and such, depending on whether one is at trivia night or arguing before the Supreme Court.

As the Bank Cases show, how to act in the absence of “knowledge” depends upon whether one course of action constitutes “playing it safe.” In HIGH STAKES, for example, it would be equally unreasonable for the speaker to claim to “know” that the bank will be closed on Saturday. Be that as it may, the speaker stops and waits in the line. In stopping, however, he acts not act on the premise that the bank will be closed on Saturday. Rather, he acts on the premise that whether the bank will be closed is uncertain. And under conditions of uncertainty, stopping is the safe thing to do for the reason that the cost of stopping if the bank turns out to be open on Saturday is much lower than the cost of driving by if it turns out to be closed.¹⁶²

In addition to everyday life, the identified connection between epistemic justification and practical interest seems manifest in our law, in particular our criminal law.¹⁶³ The increased burden of proof for criminal conviction, for example, suggests that acting on the premise that a defendant is guilty of a criminal offense is higher stakes than acting on the premise that she committed a civil violation. Less formally,

find “plain” meaning less often in high-stakes cases is that, upon considering the arguments more carefully, the Court realizes that the issue is more complicated than it might have seemed given just a cursory glance. Again, because the connection between practical stakes and duty of inquiry is just a corollary of the basic insight discussed above, this variation of the story about why the Court behaves as it does is not really a competing explanation. Still, it is a variation worth noting.

¹⁶² Contrast this with a situation in which neither course of action constitutes playing it safe. Suppose, for example, that a bomb is located in one of two buildings and is set to go off in a short period of time. Suppose further that the available evidence, although far from uniform, suggests on the whole that the bomb is in Building A rather than Building B. Finally, suppose that, because of the time constraint, the bomb squad can only secure one building or the other. In that paradigmatically high-stakes situation, it would be implausible for a member of the bomb squad to claim to “know” that the bomb is in Building A and not Building B. Be that as it may, the thing to do is for the bomb squad to rush to Building A, acting on its “best guess” as to where the bomb is hidden. The reason is that the cost associated with rushing erroneously to Building A or Building B is symmetrical. As such, the thing to do under conditions of uncertainty is to act on one’s probabilistic assessment, however weak. Thanks to Mitch Berman for suggesting this type of example.

¹⁶³ *But see infra* Part III.C.

the common sentiment that the beyond-a-reasonable-doubt standard is or should be more demanding in capital cases appears to reflect a practical understanding of “reasonable doubt.”¹⁶⁴

This intuitive principle of rationality—again, that the epistemological justification required to act on some premise increases as do the practical stakes—has ready application in the area of statutory interpretation. Again, the contemporary consensus is that courts must adhere to statutory meaning when “clear” (or “plain” or “unambiguous”). Per this Article’s working hypothesis, for a court to say that statutory meaning is “clear” is for it to claim to have epistemic justification to say that it “knows” what that statute means. As such, for a court to declare statutory meaning “clear” is for it to claim to have epistemic justification to act on the premise that the statute means what the court takes it to mean. As the discussion above suggests, however, what counts as epistemic justification to act on the premise that a statute has a certain meaning depends on the practical stakes of the case. If reading a statute in a particular way would raise no significant concerns, then moderate epistemic justification would seem to suffice for a court to declare that meaning “clear.” If, by contrast, reading a statute that way would have “grave consequences,”¹⁶⁵ then rationality would seem to require that a court have *very strong* epistemic justification before acting on the premise that it should be so read.

As in the everyday life, what to do in the absence of “knowledge” of statutory meaning depends upon whether there is a course of action that constitutes playing it safe. By instructing courts to resolve cases on non-linguistic grounds if statutory meaning is not “clear,” the various doctrines discussed in Part III seem to reflect the judgment that, in the relevant cases, non-linguistic resolution is the safe course of action under conditions of uncertainty about meaning.¹⁶⁶ In other words, what the various doctrines instruct is that, under conditions of uncertainty, courts should resolve statutory cases on the basis of some value other than interpretive accuracy.¹⁶⁷ And while the relative cost assessments contained in those doctrines are open to question (e.g., “Is erroneous invalidation really that bad?”¹⁶⁸), those doctrines do at

¹⁶⁴ See Jon O. Newman, *Beyond “Reasonable Doubt”*, 68 N.Y.U. L. REV. 979, 999-1000 (1993) (“Should not ‘reasonable doubt’ be taken more seriously when a defendant’s life is at stake?” (citing state court cases formally imposing a heightened standard for sufficiency of evidence in capital cases)).

¹⁶⁵ *Bridges v. Wixon*, 326 U.S. 135, 165 (1945) (Murphy, J., dissenting) (noting the “grave consequences” of deportation).

¹⁶⁶ For cases not governed by some such doctrine, courts are probably obliged to act on their best guess as to what the statute at issue means. See, e.g., *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 984 (2005) (contrasting cases in which courts hold that a statute’s “best reading” is X with those in which they hold that a statute’s “only permissible reading” is X).

¹⁶⁷ Otherwise the thing to do under conditions of uncertainty would be for a court to act on its “best guess” as to what the statute means, i.e. to decide the case in accordance with the statute’s most natural reading. See *supra* note 162. Presumably, this is what courts must do under conditions of uncertainty absent some doctrine that authorizes case resolution on some non-linguistic basis.

¹⁶⁸ See Katyal & Schmidt, *supra* note 8, at 2121-22 (questioning the assumption that erroneous invalidation is always more costly than erroneous interpretation).

least provide a positive law justification for courts resolving cases on non-linguistic grounds when statutory meaning is uncertain.

III. APPLICATIONS

This Part applies the epistemological insight identified in Part III to different statutory interpretive settings. Part III.A considers statutory cases involving constitutional challenges—cases the Court expressly regards as high-stakes. Part III.B looks at cases involving non-constitutional challenges to major statutes, paradigmatic high-takes cases from the perspective of citizens. As Parts III.A and III.B argue, the connection between practical stakes and epistemic justification analyzed in Part II helps to explain (or at least justify) courts seemingly loose treatment of text in these two areas.

Part III.C discusses the potential application of the above insight to criminal cases. As this Part observes, current treatment of text in criminal cases suggests that courts regard such cases as relatively low-stakes. To the extent this attitude is normatively unjustifiable, however, this Part contends that, as a purely epistemic matter, much more aggressive application of the rule of lenity is called for.

Part III.D looks at implications for judicial deference to agency interpretations of agency-administered statutes. As this Part explains, whether the epistemological insight identified above recommends more or less deference depends upon which aspect of deferring to agencies one thinks more practically or constitutionally significant: 1) courts deferring to agencies concerning ‘what the law is,’ or 2) courts substituting their judgment for that of agencies on questions of policy.

A. Constitutional Avoidance

According to Justice Holmes, “to declare an Act of Congress unconstitutional” is “the gravest and most delicate duty that this Court is called on to perform.”¹⁶⁹ The reasons courts articulate in support of this claim vary. Sometimes they cite “respect for Congress, which we assume legislates in the light of constitutional limitations.”¹⁷⁰ Other times courts cite the “prudential concern that constitutional issues not be

¹⁶⁹ *Blodgett v. Holden*, 275 U.S. 142, 147–48 (1927) (Holmes, J., concurring).

¹⁷⁰ *Rust v. Sullivan*, 500 U.S. 173, 191 (1991); *see also Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (“The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States. . . . [W]e must have ‘due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government.’” (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 164 (1951))).

needlessly confronted.”¹⁷¹ Whatever their reasons, however, courts agree that cases involving constitutional challenges are unambiguously high-stakes.¹⁷²

Starting from that premise, this Part suggests that courts’ nonstandard treatment of statutory text in constitutional cases is partially attributable to (or at least justified by) the raised stakes of those cases. Again, pursuant to the canon of constitutional avoidance, a court will not read a statute in a way that raises serious constitutional doubts if an alternate reading is “fairly possible.”¹⁷³ What this Part tries to show is that courts’ assessment of what is “fairly possible” in such cases is rightly affected by the perceived practical stakes.

1. *Bond v. United States*

The Chemical Weapons Convention Implementation Act of 1998¹⁷⁴—which implements the near-identically worded international Convention on Chemical Weapons, ratified by the Senate in 1997¹⁷⁵—prohibits the knowing “possess[ion]” or “use” of any “chemical weapon.”¹⁷⁶ “Chemical weapon” is defined to include any “toxic chemical” not used for a “peaceful purpose.”¹⁷⁷ “Toxic chemical,” in turn, is defined as “any chemical” that can “cause death, temporary incapacitation or permanent harm to humans or animals.”¹⁷⁸

In *Bond*, federal prosecutors charged a Pennsylvania woman with two counts of possessing and using chemical weapons in violation of the Act.¹⁷⁹ Upon discovering that her “closest friend” had engaged in an extramarital affair with her husband, the defendant acquired two chemicals conceded to be “toxic to humans and, in high enough doses, potentially lethal.”¹⁸⁰ She proceeded to spread those chemicals on the friend’s “car door, mailbox, and door knob,” hoping that the friend would “develop an uncomfortable rash.”¹⁸¹ Though mostly unsuccessful, the defendant did cause the

¹⁷¹ Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 575 (1988); see also ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962) (discussing the “countermajoritarian difficulty” involved in judicial review).

¹⁷² See *supra* notes 35-37 and accompanying text.

¹⁷³ *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring).

¹⁷⁴ 112 Stat. 2681–856.

¹⁷⁵ 1974 U.N.T.S. 317.

¹⁷⁶ 18 U.S.C. § 229(a)(1).

¹⁷⁷ *Id.* §§ 229F(1)(A); 229F(7)(A) (exempting the use of chemicals for “[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity”). The Act contains other exemptions not relevant here. See, e.g., *id.* §§ 229F(7)(B)-(D).

¹⁷⁸ *Id.* § 229F(8)(A).

¹⁷⁹ 134 S. Ct. 2077, 2085-86 (2014).

¹⁸⁰ *Id.* at 2085.

¹⁸¹ *Id.* (noting that it was “undisputed” that the defendant “did not intend to kill” her friend).

friend to suffer a “minor chemical burn on her thumb, which [the friend] treated by rinsing with water.”¹⁸²

At first blush, application of the statute in *Bond* is straightforward. The defendant’s “purpose,” after all, was evidently not “peaceful.” And the chemicals she possessed and used were, again, “potentially lethal” and so seemingly “toxic.” Under the “plain” meaning of the statute, the defendant thus acted in violation.¹⁸³ Or so it would seem.

On appeal, the defendant argued that her conviction should be set aside on the ground that the Act as applied to her conduct exceeded Congress’s enumerated powers and invaded powers reserved to the States by the Tenth Amendment.¹⁸⁴ The Constitution, the defendant maintained, does not permit Congress to police “local crime,” a “bedrock principle” unaffected by the implementation of a valid, non-self-executing treaty.¹⁸⁵ In so arguing, the defendant appeared to call into question the Court’s century-old precedent *Missouri v. Holland*,¹⁸⁶ which stated that “[i]f the treaty is valid there can be no dispute about the validity of the statute” that implements it “as a necessary and proper means to execute the powers of the Government.”¹⁸⁷

Rather than address that constitutional question, the Court sided with the defendant on statutory grounds, holding that the Act, interpreted correctly, did not cover her conduct. Anticipating skepticism, the Court gestured at the epistemological insight discussed in Part II, remarking that otherwise “clear” text can be made “ambigu[ous]” by the “deeply serious consequences of adopting” its otherwise most natural reading.¹⁸⁸ As the Court observed, our “constitutional structure” leaves the prosecution of “purely local crimes” to the States.¹⁸⁹ As such, it continued, one should hesitate to infer that Congress intended to “upset the Constitution’s balance between national and local power” by “defin[ing] as a federal crime conduct readily denounced as criminal by the States.”¹⁹⁰ The Court emphasized further the “ordinary meaning” of the phrase “chemical weapon” calls to mind “chemical warfare,” not “spreading irritating chemicals on [a] doorknob.”¹⁹¹ For all of these reasons, the Court concluded

¹⁸² *Id.*

¹⁸³ *Id.* at 2094 (Scalia, J., dissenting).

¹⁸⁴ *Id.* at 2087.

¹⁸⁵ Brief for Petitioner at 2, 16-19, *Bond v. United States*, 134 S. Ct. 2077 (2014) (No. 12-158), 2013 WL 1963862, at *2, *16-19.

¹⁸⁶ 252 U.S. 416 (1920).

¹⁸⁷ *Id.* at 432.

¹⁸⁸ *Bond*, 134 S. Ct. at 2090.

¹⁸⁹ *Id.* at 2083, 2087.

¹⁹⁰ *Id.* at 2093.

¹⁹¹ *Id.* at 2090-91.

that, to whatever conduct the statute extends,¹⁹² it did not extend to this “unremarkable local offense.”¹⁹³

In dissent, Justice Scalia ridiculed the majority for its reliance upon, in his view, a laughable if also dangerous epistemological principle.¹⁹⁴ He likewise dismissed the majority’s specific reasoning, insisting that, for example, the “ordinary meaning” of a phrase is “irrelevant” when that phrase is specifically and clearly defined.¹⁹⁵

For the reasons articulated in Part II, Justice Scalia was wrong to mock the majority’s epistemological principle. He was right, nonetheless, to criticize the majority’s application thereof. As Part II argues, raising the practical stakes makes it more difficult to “know” what a statute means. It does not, however, make it impossible to do so. Nor does it make all readings equally or even minimally plausible. In *Bond*, the majority observed rightly that, given the constitutional stakes, it was more difficult to “know” what Congress meant by “chemical weapon” than in the ordinary case. Be that as it may, the majority put forth only minimal effort to explain why, constitutional stakes notwithstanding, the series of seemingly precise and applicable statutory definitions did not control the case. In terms of linguistic analysis, really all the Court had to offer was that sometimes it “go[es] without saying” that a class of cases is implicitly excluded from a superficially general prescription. That’s true: sometimes, for example, “person” refers just to *natural* persons;¹⁹⁶ other times “conviction” means *domestic* conviction.¹⁹⁷ Be that as it may, the majority in *Bond* gave no indication which class of cases the statute excluded implicitly (cf. corporate persons, foreign convictions). Nor did it explain to which specific class of cases the Act was implicitly limited.¹⁹⁸ Such specification of Congress’s meaning is part and parcel of a plausible *linguistic* story of implicit exclusion.¹⁹⁹ Here instead the majority reasoned, in

¹⁹² See *id.* at 2097 (Scalia, J., dissenting) (“Thanks to the Court’s revisions, the Act, which before was merely broad, is now broad and unintelligible. [N]o standard of conduct is specified at all.”) (quoting *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971)). See also *infra* notes 198-201 and accompanying text.

¹⁹³ *Id.* at 2083.

¹⁹⁴ *Id.* at 2096 (“Imagine what future courts can do with that judge-empowering principle: Whatever has improbably broad, deeply serious, and apparently unnecessary consequences ... *is ambiguous!*”).

¹⁹⁵ *Id.*

¹⁹⁶ *Rowland v. California Men’s Colony, Unit II Men’s Advisory Council*, 506 U.S. 194 (1993) (holding that only natural “person[s]” may qualify for treatment *in forma pauperis* under the federal statute).

¹⁹⁷ *Small v. United States*, 544 U.S. 385 (2005) (holding that a statute making it unlawful for a person “convicted in any court” of a crime punishable by imprisonment for a term exceeding one year to possess a firearm refers only to domestic convictions).

¹⁹⁸ Ironically, the defendant in *Bond* did suggest one such class when she argued that her conduct: fit within the Act’s “peaceful purpose” exemption. According to the defendant, “peaceful” as used in the Act means something like not “warlike.” See 134 S. Ct. at 2094 n.2 (Scalia, J., dissenting). Because her conduct was clearly not “warlike,” the defendant concluded, it thus fit within the “peaceful purpose” exception. See *id.* As Justice Scalia observed in dissent, that reading fails for the reason that it renders superfluous the Act’s specific exemption for the use of “self-defense devices” such as “pepper spray,” see 18 U.S.C. § 229C, “the prosaic uses of which are surely nonwarlike.” *Bond*, 134 S. Ct. at 2094 n.2.

¹⁹⁹ A distinguishing feature of statutory interpretation in the textualist era is that a court is expected to supply a plausible *linguistic* story in support of any reading it adopts. This contrasts with an earlier era in which providing a plausible *policy* story would suffice. See Doerfler, *The Scrivener’s Error*, *supra* note 5, at 828-29. In recent years, Abbe Gluck in particular has praised courts for their renewed commitment

effect, that *this* case was surely excluded,²⁰⁰ harkening back to the earlier era of ad hoc judicial carve-outs.²⁰¹

2. Northwest Austin

Bond is helpful in that it supplies a judicial gloss on the epistemological insight discussed in Part II. *Northwest Austin*, by contrast, says nothing of interest. It does, however, better show that insight in action.

Like *Bond*, *Northwest Austin* was conceived by commentators principally as a constitutional case.²⁰² In *Northwest Austin*, the plaintiff was a small Texas utility district seeking relief from the “preclearance” requirements set forth by § 5 of the Voting Rights Act of 1965.²⁰³ Under § 5, covered “States” and “political subdivisions” are required to obtain federal approval before changing their election laws in any way.²⁰⁴ Section 4(b), in turn, contains a “coverage formula” used to determine which “States” or “political subdivisions” are subject to preclearance requirements.²⁰⁵ Any covered “State” or “political subdivision” may seek relief from preclearance requirements pursuant to the “bailout” provision contained in § 4(a).²⁰⁶

In *Northwest Austin*, the plaintiff argued that it was a “political subdivision” within the meaning of § 4(a) and so entitled to seek bailout relief.²⁰⁷ As the Court observed, there is “no dispute that the district is a political subdivision” of a covered State “in the ordinary sense of the term.”²⁰⁸ It is, after all, a “division of a state that

to articulating policy stories in support of their readings. Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62 (2015) (praising the Court for its express attention to Congress’s “legislative plans”). As I have argued elsewhere, any defensible version of statutory analysis is attendant to Congress’s apparent practical ends. See Doerfler, *Who Cares How Congress Really Works?*, *supra* note 91, at 995-98. Be that as it may, coming to accept readings of statutes on the basis of a plausible policy story alone, i.e. absent a plausible supporting linguistic story, would mark a dramatic, unfortunate shift in our interpretive practice. See *supra* notes 1-5 and accompanying text.

²⁰⁰ Along with an improbable hypothetical. See *Bond*, 134 S. Ct. at 2091 (“Any parent would be guilty of a serious federal offense—possession of a chemical weapon—when, exasperated by the children’s repeated failure to clean the goldfish tank, he considers poisoning the fish with a few drops of vinegar.”).

²⁰¹ See Doerfler, *The Scrivener’s Error*, *supra* note 5, at 831-32 (analogizing *Bond* to the old *Holy Trinity*).

²⁰² See Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 201-02 (“[V]oting rights experts believed that the statutory ... argument had no chance Instead, it seemed unavoidable that the Court would address the constitutionality of the [statute].”); see also *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009) (“Th[e] constitutional question has attracted ardent briefs from dozens of interested parties, but the importance of the question does not justify our rushing to decide it.”).

²⁰³ *Nw. Austin*, 557 U.S. at 200.

²⁰⁴ 52 U.S.C. § 10304(a).

²⁰⁵ *Id.* § 10303(b), *invalidated by* *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612 (2013).

²⁰⁶ *Id.* § 10303(a).

²⁰⁷ *Nw. Austin*, 557 U.S. at 200-01.

²⁰⁸ *Id.* at 206.

exists primarily to discharge some function of local government.”²⁰⁹ The problem for the plaintiff, as the district court panel observed below,²¹⁰ was that § 14(c)(2) of the Act specifically defines “political subdivision” as “any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.”²¹¹ Because the plaintiff does not conduct voting registration, it plainly falls outside that definition.²¹² As such, it seems straightforwardly ineligible for bailout relief under § 4(a).

In addition to its statutory argument, the plaintiff in *Northwest Austin* argued in the alternative that the preclearance requirements imposed by § 5 exceeded Congress’ powers under Enforcement Clause of Fifteenth Amendment and so were unconstitutional.²¹³ According to the plaintiff, the Act’s preclearance requirements “differentiate[] between the States, despite our historic tradition that all the States enjoy ‘equal sovereignty.’”²¹⁴ As such, deviation from equal sovereignty requires “showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”²¹⁵ The concern raised by the plaintiff is that the problem § 5 is intended to address “may no longer be concentrated in the jurisdictions singled out.” As the Court observed, “[t]he statute’s coverage formula is based on data that is now more than 35 years old, and,” it opined, there is considerable evidence that it fails to account for current political conditions.”²¹⁶

Again, rather than address that constitutional question, the Court sided with the plaintiff on statutory grounds, holding that the plaintiff is a “political subdivision” for purposes of § 4(a) even if not for purposes of § 14(c)(2). According to the Court, the definition of “political subdivision” articulated in § 14(c)(2) applied to some but not all uses of that phrase within the Act.²¹⁷ Specifically, the Court held that the definition applied to uses of the phrase in § 4(b), but not to uses in § 4(a) or, for that matter, § 5.²¹⁸ To substantiate this claim, the Court referred to its earlier decision in *United States v. Board of Commissioners of Sheffield, Alabama*,²¹⁹ in which it remarked that § 14(c)(2)’s definition applied to uses of “political subdivision” in § 4(b), but not to those in § 5.²²⁰ Reasoning that it had established already that § 14(c)(2)’s definition

²⁰⁹ *Id.* (quoting BLACK’S LAW DICTIONARY 1197 (8th ed. 2004)).

²¹⁰ *See* *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 230-35 (D.D.C. 2008), *rev’d and remanded sub nom.* *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 129 S. Ct. 2504 (2009).

²¹¹ 52 U.S.C. § 10310(c)(2).

²¹² *See Nw. Austin*, 557 U.S. at 200, 206.

²¹³ *Id.* at 197.

²¹⁴ *Id.* at 203 (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1960)).

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 208.

²¹⁸ *Id.* *See also* *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612 (2013) (invalidating § 4(b)’s coverage formula on equal sovereignty grounds).

²¹⁹ 435 U.S. 110 (1978).

²²⁰ *Nw. Austin*, 557 U.S. at 207 (citing *Sheffield*, 435 U.S. at 128-29, 130 n.18).

was of limited application within the Act, the Court concluded that it was at least plausible that that definition did not apply to § 4(a), and, in turn, that “political subdivision” as used in § 4(a) retained its ordinary, more expansive meaning.

As the district court panel observed, the Court’s reading of § 4(a) is not without textual difficulty.²²¹ Specifically, § 4(a)’s bailout provision applies not to “political subdivisions” in general, but rather to:

any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), *though such determinations were not made with respect to such subdivision as a separate unit*, or in any political subdivision with respect to which such determinations have been made as a separate unit.²²²

The function of the italicized language is to make clear that a “political subdivision” of a covered State is permitted to seek bailout relief even if that subdivision has not been deemed subject to preclearance requirements specifically.²²³ In other words, even if a subdivision is “covered” only because the State in which it exists was determined to be “covered” pursuant to an application of the coverage formula articulated in § 4(b), that subdivision can request relief apart from the State as a whole.²²⁴ The problem the italicized language creates for the Court’s analysis is that it suggests strongly that the “political subdivisions” referred to in § 4(a) were at least *eligible* for coverage determination pursuant to an application of the coverage formula in § 4(b).²²⁵ But, of course, the only “political subdivisions” eligible for a § 4(b) determination are those that fall within § 14(c)(2)’s definition.

Under normal circumstances, the textual difficulty just identified would seemingly be enough to render the Court’s reading of § 4(a) unavailable. What this Part suggests, however, is that given the heightened practical stakes of the case, it is at least plausible that the Court’s preferred reading is “fairly possible.” To see why, consider first that the Court’s reading is not, strictly speaking, foreclosed by the structure of the sentence in § 4(a). So long as some *subset* of the “political subdivisions” referenced in § 4(a) are eligible for coverage determination pursuant to § 4(b), one can read “political subdivision” in § 4(a) broadly without violating what Grice called the

²²¹ See *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 230-35 (D.D.C. 2008), *rev’d and remanded sub nom.* *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 129 S. Ct. 2504 (2009).

²²² 52 U.S.C. § 10310(c)(2).

²²³ See *Nw. Austin*, 573 F. Supp. 2d at 231.

²²⁴ Prior to amendment in 1982, only “subdivisions” specifically determined to be “covered” were eligible to request bailout relief. *Id.*; see also *City of Rome v. United States*, 446 U.S. 156, 167 (1980) (holding that a city within a covered state was ineligible for bailout relief because § 4(b) had never been applied to it).

²²⁵ See *Nw. Austin*, 573 F. Supp. 2d at 232 (“Had Congress stopped at the comma, there might be some question as to whether it intended to use the term “political subdivision” in its broadest sense. But Congress did not stop at the comma.”).

“maxim of quantity.”²²⁶ By analogy, suppose that Congress were to enact a public-financing system for congressional races, providing matching funds for:

any candidate who has raised in excess of \$10,000 in her congressional district, though she has not been approved for presidential-primary matching funds, or any candidate who has been approved for presidential-primary matching funds.²²⁷

The eligibility criteria for President are more restrictive than those for Congress.²²⁸ As such, not all candidates for Congress are eligible to run for President simultaneously, or, in turn, to be considered for presidential-primary matching funds. Be that as it may, it would be bizarre to suggest that “candidate,” as used above, referred only to candidates eligible to run for President simultaneously.

A related but distinct worry is that the Court’s reading of § 4(a) renders the italicized language superfluous.²²⁹ If, after all, in-State “political subdivisions” *ineligible* for a § 4(b) determination are eligible for bailout relief, what is the purpose of specifying that a subdivision need not have *received* such a determination? Again, under normal conditions, this argument would have real force. Consider, though, that there is a conceivable response. Just prior to the addition of the italicized language, the Court had held in *City of Rome v. United States*²³⁰ that only “political subdivisions” specifically designated for coverage under § 4(b) were eligible for bailout relief under § 4(a).²³¹ The effect of the subsequent amendment was thus to eliminate specific designation as a prerequisite for bailout relief. As such, even if the italicized language is, in terms of content, redundant on the Court’s reading of § 4(b), that language could conceivably serve to *emphasize* the change in the law brought about by that amendment.²³²

²²⁶ Grice, *supra* note 156, at 45 (observing that “overinformativeness may be confusing in that it is liable to raise side issues; and there may also be an indirect effect, in that the hearers may be misled as a result of thinking that there is some particular POINT in the provision of the excess of information”).

²²⁷ To receive presidential-primary matching funds, a “candidate” must, among other things, raise in excess of “\$5,000 in contributions from residents of each of at least 20 States.” 26 U.S.C. § 9033(b)(3).

²²⁸ See U.S. CONST. art. II, § 1, cl. 4 (“No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.”).

²²⁹ See *Nw. Austin*, 573 F. Supp. 2d at 232 (reasoning that “[u]nder the District’s interpretation, this language would be surplusage”).

²³⁰ 446 U.S. 156 (1980).

²³¹ *Id.* at 167.

²³² See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 209 (2009) (“In 1982, however, Congress expressly repudiated *City of Rome* and instead embraced ‘piecemeal’ bailout.”). Rick Hasen argues forcefully that the legislative history surrounding the 1982 amendment cuts against this reading. See Hasen, *supra* note 202, at 205-06 (“There was no ‘express repudiation’ of *City of Rome* in the text of the 1982 renewal. Indeed, *City of Rome* is not mentioned in the Senate Report as being repudiated.”). Because the relevance of legislative history to statutory meaning is sharply contested, however, it seems dubious to suggest that appeal to legislative history can render a reading not “fairly available.” See, e.g., John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 124 (2001) (observing that “textualists tend to be stricter in their application of clear statement rules, because they require the

More generally, note that, in contrast to *Bond*, the Court in *Northwest Austin* is able to articulate a distinctly linguistic story in support of its seemingly unusual reading.²³³ As in *Bond*, the Court's reading appears to be undermined by a clear, applicable statutory definition. Unlike in *Bond*, however, the Court offers a specific explanation as to why that definition is inapposite, namely that the definition applies to certain subsections but not to others. Schematically, that explanation is familiar to ordinary language and, for that matter, the law.²³⁴

In sum, although the Court's reading of the statute in *Northwest Austin* is not without difficulty, it is, upon closer inspection, at least not ridiculous. And, given the high-stakes of the case, perhaps that is enough to render its reading "fairly possible."

B. Non-Constitutional Challenges

Following the Court's textualist turn, litigants have taken to 'challenging' statutes on non-constitutional grounds. Such challenges consist of a litigant advancing an interpretation that, if accepted, would radically curtail the implementation regime of the statute at issue. In recent years, litigants have mounted non-constitutional challenges to a number of major statutes. These cases are, from the public's perspective, the very definition of 'high-stakes.' Up to now, such challenges have been mostly unsuccessful. The reason, according to critics, is that courts have been willing to stretch or even disregard statutory text to preserve the status quo.

This Part argues instead that courts' repeated rejection of non-constitutional challenges to major statutes is at least partially attributable to (or justified by) the epistemic insight identified in Part II. In such cases, courts have indeed rejected readings of statutes that would have been "clear" under ordinary circumstances. Because of the incredibly high stakes of these cases, however, this Part suggests that courts are epistemically rational in exhibiting extraordinary caution before accepting readings that would have such unsettling effects.

expression of clear intent to be derived from the text of the statute, rather than in the legislative history").

²³³ See *supra* notes 217 -232 and accompanying text.

²³⁴ See *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932) ("It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the Legislature intended it should have in each instance.").

1. King v. Burwell

In *King v. Burwell*,²³⁵ the plaintiffs challenged the implementation regime of the Patient Protection and Affordable Care Act (PPACA), the most significant health reform legislation since the passage of Medicare and Medicaid.²³⁶ As widely discussed, the PPACA consists primarily of three interdependent reforms.²³⁷ First, the Act prohibits insurers from denying coverage or increasing premiums on the basis of preexisting conditions (community rating).²³⁸ Second, it imposes a tax penalty on nonexempt individuals who fail to maintain coverage (individual mandate).²³⁹ Third, it provides subsidies in the form of tax credits for the purchase of insurance by low-income persons (subsidies).²⁴⁰ Together, community rating and subsidies help make insurance affordable for customers by ensuring a price not in excess of a reasonable percentage of income. At the same time, the individual mandate helps make the provision of affordable insurance financially feasible for insurers by ensuring a broad risk pool.

As *King* brought out, a concern with the above characterization is that the specific language of the PPACA's subsidies provision appears to limit the availability of tax credits in a way that is largely incompatible with the Act functioning as a "three-legged stool."²⁴¹ The worry results from the Act's permitting different types of health insurance "Exchanges," i.e. state-specific marketplaces on which customers can compare and purchase insurance policies.²⁴² Under § 1311 of the Act, "[e]ach State shall . . . establish an [Exchange] for the State."²⁴³ In turn, § 36B of the Internal Revenue Code, enacted as part of the PPACA, instructs that tax credits shall be available for persons who purchase health insurance "through an Exchange established by the State under [§] 1311 of the [Act]."²⁴⁴ Because, however, Congress cannot require states to implement federal laws,²⁴⁵ if a state refuses or is unable to set up an Exchange, § 1321 of the Act provides that the federal government, through the Secretary of Health and Human Services, "shall . . . establish and operate such Exchange within the State."²⁴⁶ As Jonathan Adler and others observed, these provisions read together seem to suggest that the PPACA authorizes tax credits only

²³⁵ 135 S. Ct. 2480 (2015).

²³⁶ Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of the U.S.C.).

²³⁷ See *King*, 135 S. Ct. at 2485 (characterizing these reforms as "interlocking").

²³⁸ 42 U.S.C. § 300gg.

²³⁹ 26 U.S.C. § 5000A.

²⁴⁰ *Id.* § 36B.

²⁴¹ Jonathan Gruber, *Health Care Reform Is a "Three-Legged Stool": The Costs of Partially Repealing the Affordable Care Act*, CTR. FOR AM. PROGRESS (Aug. 5, 2010), <https://www.americanprogress.org/issues/healthcare/report/2010/08/05/8226/health-care-reform-is-a-three-legged-stool/>.

²⁴² *King*, 135 S. Ct. at 2485.

²⁴³ 42 U.S.C. § 18031(b)(1); see also *id.* § 18024(d) (defining "State" to mean "each of the 50 States and the District of Columbia").

²⁴⁴ 26 U.S.C. § 36B(b)(2)(A).

²⁴⁵ See *Printz v. United States*, 521 U.S. 898, 935 (1997).

²⁴⁶ 42 U.S.C. § 18041(c)(1).

for insurance purchased on a state-run Exchange, i.e. an Exchange “established” by a state “under [§] 1311.”²⁴⁷

In *King*, the plaintiffs challenged an Internal Revenue Service (IRS) rule interpreting the PPACA’s subsidy provision as authorizing the agency to grant tax credits to persons who purchased insurance through either a state-run or a federally facilitated Exchange.²⁴⁸ The challengers argued that the IRS rule was inconsistent with the plain language of § 36B, which, according to them, authorizes subsidies for insurance purchased through state-run Exchanges alone.²⁴⁹ At the time of the challenge, more than half of states utilized federally facilitated Exchanges.²⁵⁰ Within two years of the rule’s adoption, millions of individuals had purchased insurance through such an Exchange, with the vast majority relying upon subsidies.²⁵¹ If the challenge were to have succeeded, health insurance would thus have been rendered unaffordable for a huge number of would-be customers absent state or congressional action. In turn, most of those individuals would have become exempt from the individual mandate on grounds of financial hardship. Under these conditions, the individual mandate would plausibly have failed to produce a broad enough risk pool to avoid adverse selection, causing premiums to increase precipitously.²⁵²

For doctrinal reasons, the Government conceded in *King* that § 36B was precisely worded, i.e. that the language at issue was not attributable to a drafting mistake.²⁵³ Given that concession, the Government was left to argue that § 36B’s reference to Exchanges “established by the State under [§] 1311” is a “term of art,” encompassing state-run and federally facilitated Exchanges alike.²⁵⁴ Famously, the Supreme Court agreed, reasoning that, “when read in context,” the language of § 36B was “ambiguous,” and that although the “most natural reading” of the pertinent phrase was as limited to state-run Exchanges, it was “also possible” that the phrase referred to federally facilitated Exchanges as well.²⁵⁵ As evidence, the Court cited various anomalies the plaintiff’s reading would produce elsewhere in the statute, requiring, for example, the creation of federally facilitated Exchanges on which there would be no

²⁴⁷ See, e.g., Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, 23 HEALTH MATRIX 119, 123 (2013).

²⁴⁸ Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377 (May 23, 2012) (codified at 26 C.F.R. § 1.36B-2; 45 C.F.R. § 155.20).

²⁴⁹ *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015).

²⁵⁰ *Id.* at 2487.

²⁵¹ *Id.* at 2493.

²⁵² *Id.* (“The combination of no tax credits and an ineffective coverage requirement could well push a State’s individual insurance market into a death spiral.”).

²⁵³ See Doerfler, *The Scrivener’s Error*, *supra* note 5, at 814 (explaining that § 36B likely contains a simple scrivener’s error, but that the error is less than “absolutely clear,” as required for recognition under current doctrine); Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 67 (2015) (observing that *King* “says nothing explicit about what the Court is to do when there is a statutory mistake—the enormous elephant that neither party dared mention throughout the litigation”).

²⁵⁴ Brief for the Respondents at 13, *King*, No. 14-114 (U.S. June 25, 2015), 2015 WL 349885, at *13.

²⁵⁵ *King*, 135 S. Ct. at 2490-91.

“qualified individuals” eligible to shop,²⁵⁶ as well as the reporting of information for a “[r]econciliation” of tax credits that could never occur.²⁵⁷ As to the apparent contrast between Exchanges “established “under [§] 1311” and § 1321, respectively, the Court observed that § 1321 instructs the Secretary to “establish and operate *such Exchange* within the State.”²⁵⁸ “By using the phrase ‘such Exchange,’” the Court explained, § 1321 “instructs the Secretary to establish and operate the *same* Exchange that the State was directed to establish” under § 1311.²⁵⁹

So was a broad reading of § 36B at least “possible”? Under normal circumstances, the answer would seem to be no. Again, given the plain contrast between § 1311 and § 1321 together with § 36B’s reference to Exchanges “established under [§] 1311,” it would be “natural” infer that § 36B excludes Exchanges established under § 1321. More still, that § 1321 instructs the Secretary to establish “*such Exchange* within the State,” would suggest ordinarily that an Exchange established under § 1321 is *qualitatively similar to but numerically distinct from* an Exchange “established by the State under [§] 1311.”²⁶⁰ And while the various anomalies to which the Court pointed are real—and indicative of a drafting mistake²⁶¹—those anomalies do not cause § 36B’s specific language to vanish.²⁶²

As the Court noted, however, these were not normal circumstances. To accept the plaintiffs’ reading of § 36B would have been to undermine substantially the PPACA’s implementation regime, potentially “destabiliz[ing] the individual insurance market in any State” with a federally facilitated Exchange.²⁶³ Under such circumstances, it would make sense for a court to require increased epistemic justification before regarding the “destabiliz[ing]” reading as “clear.” Whether *King* is

²⁵⁶ *Id.* at 2490 (quoting 42 U.S.C. §§ 18031(d)(2)(A), 18032(f)(1)(A)).

²⁵⁷ *Id.* at 2492 (quoting 26 U.S.C. § 36B(f)(3)).

²⁵⁸ *Id.* at 2489 (quoting 42 U.S.C. § 18041(c)(1)).

²⁵⁹ *Id.*

²⁶⁰ *See* Doerfler, *The Scrivener’s Error*, *supra* note 5, at 848 (“Suppose ... that Ann instructs Beth to purchase a blueberry pie from Hi-Rise Bakery but instructs Carl to purchase ‘such pie’ from Petsi Pies if Beth fails. If Carl goes on to purchase ‘such pie,’ is that pie ‘purchased by Beth?’ Is it also ‘from Hi-Rise?’ Doubtful.”).

²⁶¹ *See id.* at 846-47 (arguing that these anomalies indicate that various provisions of the Act were drafted on the assumption that it would provide only for state-run Exchanges, but that later it was amended, albeit incompletely, to provide for federally facilitated Exchanges as a fallback).

²⁶² Interestingly, the Court in *King* did, in some sense, try to make § 36B’s reference to “the State” disappear, attributing that language to “inartful drafting.” 135 S. Ct. at 2483. As Justice Scalia explained in dissent, however, unless the inartful drafting in question amounted to a scrivener’s error—a claim rendered unavailable by current doctrine—it is unclear how that attribution supports the majority’s reading. *See id.* at 2505 (Scalia, J., dissenting) (“Perhaps sensing the dismal failure of its efforts to show that ‘established by the State’ means ‘established by the State or the Federal Government,’ the Court tries to palm off the pertinent statutory phrase as ‘inartful drafting.’ This Court, however, has no free-floating power ‘to rescue Congress from its drafting errors.’” (citation omitted) (quoting *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004))). The Government, for its part, addressed this language directly, arguing that the Secretary acts as a State’s “statutory surrogate” in establishing an Exchange, and so that an Exchange established by the Secretary just is an “Exchange established by the State.” Brief for the Respondents, *supra* note 254, at 13.

²⁶³ *King*, 135 S. Ct. at 2492-93.

best understood as a display of reasonable epistemic caution is, of course, open to question.²⁶⁴ Also unclear is whether the Court’s preferred reading was “fairly available,” even considering the heightened practical stakes.²⁶⁵ Regardless, what *King* represents is a type of case in which it would be entirely reasonable, as an epistemic matter, for a court to look at a text with more hesitation than it would in a run-of-the-mill case. And, if nothing else, the Court in *King* did look at § 36B with greater-than-usual skepticism—and it did so with an eye to the practical stakes of the case.²⁶⁶

2. Inclusive Communities

Whereas *King* was about preempting the implementation of a new statute, the challenge in *Inclusive Communities* was about curtailing the implementation of an old one.

In *Inclusive Communities*, the defendant was a state agency responsible for the distribution of federal low-income housing tax credits.²⁶⁷ A local nonprofit sued the agency, alleging that its “disproportionate” allocation of those tax credits—skewed toward projects in “predominantly black inner-city areas” and away from those in “predominantly white suburban neighborhoods”—caused segregated housing patterns to persist in violation of the Fair Housing Act (FHA),²⁶⁸ a landmark 1968 civil rights law.²⁶⁹ Importantly, the nonprofit’s was a so-called disparate-impact claim, i.e. a claim predicated upon disproportionate adverse effects on minorities not justified by a legitimate rationale.²⁷⁰ A disparate-impact claim contrasts with a claim of intentional discrimination, i.e. a claim that a defendant acted with discriminatory intent or motive.²⁷¹

The question presented in *Inclusive Communities* was whether disparate-impact claims are cognizable under the FHA. Arguing no, the defendant relied significantly upon the “plain text” of the statute.²⁷² In relevant part, the FHA makes it unlawful to:

refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or

²⁶⁴ As indicated above, *King* most likely involves a scrivener’s error rendered unspeakable by current doctrine. See *supra* note 253. For that reason, it is likely that the opinion in *King* constitutes an attempt to work around that doctrinal impediment. See Doerfler, *The Scrivener’s Error*, *supra* note 5, at 849.

²⁶⁵ See *id.* at 847-48 (discussing the weaknesses of the Government’s argument).

²⁶⁶ See, e.g., *King*, 135 S. Ct. at 2496 (noting the “calamitous result” to which the challenger’s interpretation would give rise).

²⁶⁷ *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2513-14 (2015).

²⁶⁸ 42 U.S.C. § 3601 et seq.

²⁶⁹ *Inclusive Communities*, 135 S. Ct. at 2514.

²⁷⁰ *Id.* at 2513.

²⁷¹ *Id.*; see also *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009).

²⁷² *Inclusive Communities*, 135 S. Ct. at 2537 (Alito, J., dissenting).

deny, a dwelling to any person *because of* race, color, religion, sex, familial status, or national origin.²⁷³

The Act similarly provides that:

It shall be unlawful for any person or other entity whose business includes engaging in real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, *because of* race, color, religion, sex, handicap, familial status, or national origin.²⁷⁴

According to the defendant, because it is limited to actions taken “because of” a protected trait, the FHA precludes disparate-impact liability. In the words of Justice Alito, “A person acts ‘because of’ something else ... if that something else ‘was the ‘reason’ that the [person] decided to act.’”²⁷⁵ And a protected trait is only one’s “reason” for action if discriminatory treatment is intentional. As Justice Alito went on to observe, “many other federal statutes use the phrase ‘because of’ to signify what that phrase means in ordinary speech,”²⁷⁶ including, for example, the federal hate crime statute, which authorizes enhanced sentences for certain crimes only if the defendant acted with discriminatory intent.²⁷⁷

As in *King*, the Court rejected the restrictive reading of the statute proposed, apparent textual strength notwithstanding. Holding that disparate-impact claims are, indeed, cognizable under the FHA, the Court emphasized that the Act had long been so understood. By 1988, the Court noted, all nine Courts of Appeals to have addressed the question had so held.²⁷⁸ More still, when Congress amended the FHA that year, it left unaltered the portions of the statute at issue—evidence, according to the Court, that Congress had “accepted and ratified” those “unanimous” holdings.²⁷⁹

The Court relied, in addition, on two prior decisions in which it held that similar “because of” language created disparate-impact liability in similar statutes. First, in 1971, the Court held in *Griggs v. Duke Power Co.*²⁸⁰ that provisions in Title VII making it unlawful for an employer to make an employment decision “because of” a protected trait of an employee or applicant encompassed disparate-impact claims.²⁸¹ In *Griggs*, the Court based its decision almost entirely upon Congress’s apparent purpose of “achiev[ing] equality of employment opportunities” and “remov[ing] barriers” that have operated to the advantage of white employees.²⁸² In a sign of an

²⁷³ 42 U.S.C. § 3604(a) (emphasis added).

²⁷⁴ *Id.* at § 3605(a) (emphasis added).

²⁷⁵ *Inclusive Communities*, 135 S. Ct. at 2533 (Alito, J., dissenting) (quoting *University of Tex. Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2527 (2013)).

²⁷⁶ *Id.* at 2535.

²⁷⁷ 18 U.S.C. § 249; *see also* *Wisconsin v. Mitchell*, 508 U.S. 476, 484–485 (1993).

²⁷⁸ *Inclusive Communities*, 135 S. Ct. at 2519.

²⁷⁹ *Id.* at 2520.

²⁸⁰ 401 U.S. 424 (1971).

²⁸¹ *Id.* at 429-30.

²⁸² *Id.*

earlier methodological era, the Court made no effort to explain how its holding could be reconciled with the specific wording of the provisions at issue.²⁸³ More than thirty years later, in *Smith v. City of Jackson, Miss.*,²⁸⁴ a plurality held that sections of the Age Discrimination in Employment Act of 1967 (ADEA) that render unlawful employment decisions made “because of” an employee’s or applicant’s age similarly create disparate-impact liability.²⁸⁵ Recognizing the parallel with *Griggs*, the plurality insisted that, despite its reliance on purpose, that decision also “represented the better reading of the statutory text.”²⁸⁶ According to the plurality, because Title VII makes unlawful actions that “deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of” a protected trait, the statute evinces a concern not just with employer motivation but with “the *effects* of the action on the employee.”²⁸⁷ So too, the plurality reasoned, with the ADEA, which prohibits action that “would deprive or tend to deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of” that individual’s age.²⁸⁸

Returning to *Inclusive Communities*, the Court reasoned that, as with Title VII and the ADEA, the language of the FHA indicates a concern not just with motive but with consequence. Specifically, the FHA makes it unlawful to “refuse to negotiate for the sale or rental of, or *otherwise make unavailable* or deny, a dwelling to any person because of” a protected trait.²⁸⁹ This, according to the Court, is the same sort of “results-oriented language” that supported recognition of disparate-impact liability in both *Griggs* and *Smith*.²⁹⁰

The Court’s reasoning on the above point is shaky. Even if the FHA (and Title VII and the ADEA) make unlawful the bringing about of certain consequences, unlawfulness is nonetheless contingent upon bringing about those consequences “because of” a protected trait. In other words, even if liability can result despite one’s having some non-discriminatory *goal*, it still seems that, to be liable, one’s *motivation* must be discriminatory. To illustrate the contrast, suppose that a landlord were to tell racially stereotypical jokes to minority rental applicants, intending not to dissuade those applicants from renting, but rather to cause them to laugh. In that case, the landlord might still be liable under the FHA for “mak[ing]” his rental property “unavailable” to minority applicants insofar as her jokes make minority applicants uncomfortable and so discourage them from renting. Although the landlord’s goal in joking is innocent (e.g., to cause laughter), the consequence of her joking is not (e.g., to discourage minority applicants). More still, the landlord’s motivation for joking is

²⁸³ See *Inclusive Communities*, 135 S. Ct. at 2544 (Alito, J., dissenting).

²⁸⁴ 544 U.S. 228 (2005).

²⁸⁵ *Id.* at 233-40.

²⁸⁶ *Id.* at 235.

²⁸⁷ *Id.* at 235-36 (quoting 42 U.S.C. § 2000e-2(a)(2)).

²⁸⁸ *Id.*

²⁸⁹ 42 U.S.C. § 3604(a) (emphasis added).

²⁹⁰ *Inclusive Communities*, 135 S. Ct. at 2518 (reasoning that “the logic of *Griggs* and *Smith* provides strong support for the conclusion that the FHA encompasses disparate-impact claims”).

partially discriminatory in that one of her *reasons* for joking with minority applicants is that those applicants *are minorities*.

So, in an ordinary case, a court would probably read the “because of” language at issue to prohibit only intentional discrimination. That seems to be the better reading of the statute. Indeed, under typical circumstances, one could fairly characterize that language as “clear.” Be that as it may, the circumstances surrounding *Inclusive Communities* were far from typical: to have adopted the “most natural” reading of the statute would have been to curtail dramatically the implementation of a major civil rights statute.²⁹¹ Given those unusually high stakes, one can see how members of the Court might reasonably have become less than certain that the “most natural” reading was, in fact, correct. Particularly so given the longstanding judicial practice of reading the FHA and similar statutes ‘unnaturally’—under the circumstances, considerations of *epistemic humility* alone might have been enough to shake a justice’s confidence in her own linguistic assessment.²⁹² Thus, to the extent that courts should preserve existing implementation regimes absent a “clear” indication from Congress,²⁹³ one can see how the raised stakes of *Inclusive Communities* might make sense of (or at least vindicate) its otherwise (textually) surprising result.

C. Rule of Lenity

The rule of lenity requires courts to resolve unclarity in criminal statutes in favor of defendants.²⁹⁴ The purpose of the rule is to “ensure that those subjected to criminal prosecution have adequate notice of the conduct that the law prohibits,”²⁹⁵ and to prevent courts, rather than legislatures from “defin[ing] criminal activity.”²⁹⁶

²⁹¹ Or, in more colloquial terms, to “gut” the FHA. *E.g.*, *Supreme Court’s Latest Race Case: Housing Discrimination*, PRO PUBLICA (Jan. 21, 2015), <https://www.propublica.org/article/supreme-courts-latest-race-case-housing-discrimination> (remarking that “[t]any fear [the] Texas case could gut the landmark Fair Housing Act”).

²⁹² See William Baude & Ryan D. Doerfler, *Arguing with Friends* (manuscript); Eric Posner & Adrian Vermeule, *The Votes of Other Judges*, 105 GEO. L.J. 159 (2016).

²⁹³ *Cf.* *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

²⁹⁴ *E.g.*, *Liparota v. United States*, 471 U.S. 419, 427 (1985) (noting the Court’s “longstanding recognition of the principle that ‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.’” (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)); *United States v. Bass*, 404 U.S. 336, 347-48 (1971) (“In various ways over the years, we have stated that ‘when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.’” (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952))); *C.I.R. v. Acker*, 361 U.S. 87, 91 (1959) (“The law is settled that penal statutes are to be construed strictly, and that one is not to be subjected to a penalty unless the words of the statute plainly impose it.” (internal quotation marks and citations omitted)).

²⁹⁵ *Clark v. Martinez*, 543 U.S. 371, 397 (2005) (O’Connor, J., concurring); *accord* *United States v. Cardiff*, 344 U.S. 174, 176 (1952); *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.).

²⁹⁶ *Bass*, 404 U.S. at 348 (“[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts

Structurally, the rule of lenity is thus identical to the canon of constitutional avoidance: If statutory meaning is less than clear, courts must select among available readings on the basis of non-linguistic considerations.

Same as the avoidance canon in form, the rule of lenity could hardly be more different in operation. As discussed in Part III.A, courts have a high threshold for what counts as “clear” text in the face of constitutional questions. In criminal cases, by contrast, courts’ threshold for clarity is remarkably low. Indeed, that threshold is *so* low as to approach its logical limit.

In the abstract, the current approach to lenity is summarized neatly as follows:

The simple existence of some statutory ambiguity ... is not sufficient to warrant application of th[e] rule, for most statutes are ambiguous to some degree. The rule of lenity applies only if, after seizing everything from which aid can be derived, we can make *no more than a guess* as to what Congress intended. To invoke the rule, we must conclude that there is a *grievous* ambiguity or uncertainty in the statute.²⁹⁷

In other words, so long as courts have *some* inclination about statutory meaning, lenity has no role to play. Functionally, then, statutory text counts as “clear” in criminal cases so long as courts have an “opinion as to the best reading.”²⁹⁸ Put differently, so long as some reading seems to courts more plausible than the others, operationally speaking, that reading is “plainly” correct.

In the concrete, courts’ handling of criminal statutes is exemplified by the Court’s recent decision in *Lockhart v. United States*.²⁹⁹ In that case, the question before the Court was whether an enhanced sentencing provision applicable to defendants with a “prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct *involving a minor or ward*”³⁰⁰ applies to a defendant whose only prior state-law conviction is for sexual abuse of an adult.³⁰¹ Arguing no, the defendant in *Lockhart*—previously convicted under New York state law for sexual abuse of his then-53-year-old girlfriend—contended that the participle phrase “involving a minor or ward” binds each item in the list of predicate crimes (“aggravated sexual abuse,” “sexual abuse,” and “abusive sexual conduct”).³⁰² Because his prior conviction was not for “sexual abuse ... *of a minor or ward*,” the defendant continued, the enhancement provision thus did not apply. In response, the

should define criminal activity.”); *accord* Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 704 n.18 (1995).

²⁹⁷ Muscarello v. United States, 524 U.S. 125, 138–39 (1998) (emphasis added) (internal quotation marks and citations omitted).

²⁹⁸ Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs., 545 U.S. 967, 983–84 (2005) (contrasting decisions that expresses a court’s “opinion as to the best reading of an ambiguous statute” with those that identify a “statute’s *clear* meaning”).

²⁹⁹ 136 S.Ct. 958 (2016).

³⁰⁰ 18 U.S.C. § 2252(b)(2) (emphasis added).

³⁰¹ *Lockhart*, 136 S. Ct. at 961.

³⁰² *Id.* at 961–62.

Government argued that “involving a minor or ward” binds only the last item in the list of predicate offenses (“abusive sexual conduct”), and so that the defendant’s prior state-law conviction for “sexual abuse” *of an adult* was enough to trigger the enhancement provision.³⁰³

Siding with the Government, the Court assured that “the provision’s text and context together reveal a straightforward reading.”³⁰⁴ Writing for the majority, Justice Sotomayor invoked what it called the “rule of the last antecedent,” according to which a “limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows.”³⁰⁵ Acknowledging that this “rule” reflected at best a presumption, Justice Sotomayor went on to note the seeming parallel between the language at issue and the chapter of the federal criminal code pertaining to “sexual abuse,” a “prior conviction” under which triggered the same enhancement provision.³⁰⁶ As Justice Sotomayor observed, the first three sections of that chapter are titled “Sexual Abuse,” “Aggravated Sexual Abuse,” and “Sexual Abuse of a Ward or Minor,” respectively. According to Justice Sotomayor, that “[similarity appears to be more than a coincidence.”³⁰⁷ Swatting aside the defendant’s rule of lenity argument, Justice Sotomayor thus concluded that the “text and structure of [the provision] confirm[ed]” the Government’s reading.³⁰⁸

In dissent, Justice Kagan offered various ordinary conversation and legal examples in which, intuitively, the “modifying phrase ... applies to each term in the preceding list, not just the last” (e.g., “the laws, the treaties, and the constitution *of the United States*”).³⁰⁹ In an effort to match canon with canon, Justice Kagan also invoked what she called the “series-qualifier” canon,³¹⁰ i.e. the principle that “[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series, a modifier at the end of the list ‘normally applies to the entire series.’”³¹¹ Despite its

³⁰³ *Id.* at 962.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 962-63; *see also id.* at 963 (“The rule reflects the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it. That is particularly true where it takes more than a little mental energy to process the individual entries in the list, making it a heavy lift to carry the modifier across them all.”).

³⁰⁶ *Id.* at 964.

³⁰⁷ *Id.*; *but see id.* (“We cannot state with certainty that Congress used [the federal chapter] as a template for the list of state predicates set out in [the enhancement provision], but we cannot ignore the parallel ...” (emphasis added)).

³⁰⁸ *Id.* at 968 (“We will not apply the rule of lenity to override a sensible grammatical principle buttressed by the statute’s text and structure.”).

³⁰⁹ *Id.* at 972 n.2 (quoting *James v. Boise*, 577 U.S. 136 S. Ct. 685, 686–687 (2016) (per curiam)) (collecting cases); *see also id.* at 969 (“Suppose a real estate agent promised to find a client ‘a house, condo, or apartment in New York.’ Wouldn’t the potential buyer be annoyed if the agent sent him information about condos in Maryland or California?”).

³¹⁰ *Id.* at 970.

³¹¹ *Id.* (quoting ANTONIN SCALIA & BRIAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 147 (2012)).

“fancy name,” Justice Kagan insisted, that principle “reflects the completely ordinary way that people speak and listen, write and read.”³¹²

Whether Justice Sotomayor or Justice Kagan has the better reading in *Lockhart* is hard to say. Commenting on the exchange, Judge Frank Easterbrook remarked that he has no idea who is right.³¹³ But if even arch-textualist Judge Easterbrook can’t make heads or tails of a text, how can the rule of lenity fail to apply? The only explanation, it seems, is that, in criminal cases, whatever reading a court deems “best” is, almost by definition, “clear” enough to render that rule inapplicable. What this suggests is that courts regard criminal cases as having remarkably low stakes. Indeed, if courts deem statutory meaning “clear” in criminal cases just in virtue of having an “opinion as to the best reading,” the attributed stakes could not be any lower.

That courts regard criminal cases as low-stakes—indeed, the lowest of stakes—is somewhat surprising, or at least disappointing, given the special concern with criminal conviction embedded in our constitutional and broader legal system.³¹⁴ If, for example, criminal conviction “constitutes a formal judgment of [moral] condemnation by the community,” imposing “stigma” and causing “damage to the defendant’s reputation,”³¹⁵ then surely greater epistemic caution is called for than when adjudicating a generic civil dispute. Perhaps in an era of mass incarceration, criminal conviction truly is run-of-the-mill.³¹⁶ Still, insofar as courts at least purport to take criminal conviction very seriously, it is disconcerting that, in practice, courts attribute to criminal cases minimal practical significance. What this suggests, then, is that, as a normative matter, the rule of lenity ought to look much like the avoidance canon, not just in form, but also in operation. If criminal conviction carries with it such significant consequences, then it seems that, as an epistemic matter, courts should be much more hesitant to declare criminal statutes “clear.” This is not to claim that all criminal cases are *high* stakes—whether, for example, some class of criminals is subject to a 10-year, as opposed to a 5-year mandatory minimum sentence is perhaps not the most pressing

³¹² *Id.* Justice Kagan also questioned Justice Sotomayor’s analogy between the language at issue and the chapter of the federal criminal code pertaining to “Sexual Abuse,” observing that, unlike the state-law predicate offense language, the federal chapter divides “sexual abuse” into *four* categories: “aggravated sexual abuse,” “sexual abuse,” “sexual abuse of a ward or minor,” and “abusive sexual contact.” *Id.* at 975-76.

³¹³ Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. ___ (forthcoming 2017).

³¹⁴ See Hrafn Asgeirsson, *On the Possibility of Non-Literal Legislative Speech*, in PRAGMATICS AND LAW: THEORETICAL AND PRACTICAL PERSPECTIVES *1, *20-21 (Alessandro Capone & Francesca Poggi eds., forthcoming) (arguing that, generally speaking, the practical stakes of criminal law cases are “fairly high”).

³¹⁵ *Missouri v. Hunter*, 459 U.S. 359, 373 (1983) (Marshall, J., dissenting).

³¹⁶ See, e.g., ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

of issues.³¹⁷ The claim here instead is just that, contrary to current practice, criminal cases ought not to be regarded as having as low of stakes as imaginable.³¹⁸

D. Chevron

Like the rule of lenity, the so-called *Chevron* doctrine is a rule for resolving statutory unclarity. Pursuant to that doctrine, a court is, famously, to defer to an agency's reasonable construction of a statute it administers unless, as to the "precise question at issue," statutory meaning is "clear"³¹⁹ The standard justification for so deferring is equal parts democratic and technocratic. Unclear statutory language, the Court has reasoned, leaves in "gaps" in the law that need to be filled, and filling those gaps inevitably "involves difficult policy choices."³²⁰ And because agencies are both more democratically accountable³²¹ and more technically expert than courts,³²² it makes sense for courts to defer to them on "how best to construe" indeterminate language "in light of competing policy interests."³²³ Based on these considerations, courts attribute to Congress the—concededly fictional³²⁴—intention to delegate to agencies rather than to courts the authority to resolve such unclarity.³²⁵

In recent years, various judges and justices, principally on the right side of the political spectrum, have hinted or outright declared that *Chevron* should be reconsidered. Justice Thomas, for example, has argued that relying upon agencies to resolve statutory unclarity violates the separation of powers.³²⁶ Drawing on the work

³¹⁷ Nor is it to suggest that all criminal cases are created equal. Surely some criminal cases are higher stakes than others (e.g., cases involving the applicability of severe penalties). In turn, one would expect courts to apply the rule of lenity more or less aggressively depending upon the stakes of the particular case.

³¹⁸ Cf. Adam M. Samaha, *Low Stakes and Constitutional Interpretation*, 13 U. PENN. J. CONST. L. 305, 319 (2010) (reminding that a "low-stakes decision" is not "zero-stakes decision").

³¹⁹ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). See also Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009) (explaining that an agency's interpretation is "reasonable" so long as it is among "the set of interpretations which the statute does not clearly prohibit").

³²⁰ *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

³²¹ See *Chevron*, 467 U.S. at 865 (observing that judges "have no constituency" and "have a duty to respect legitimate policy choices made by those who do").

³²² See *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2726 (2015) (Kagan, J., dissenting) ("Far more than courts, agencies have the expertise and experience necessary to design regulatory processes suited to 'a technical and complex arena.'" (quoting *Chevron*, 467 U.S. at 863)).

³²³ *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1873 (2013).

³²⁴ See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516-17; but see Doerfler, *Who Cares How Congress Really Works?*, *supra* note 91, at 1022-31 (arguing that all attributions of legislative intent are fictional in character, but that such attributions are evaluable as apt or inapt nonetheless).

³²⁵ See *Chevron*, 467 U.S. at 843-44.

³²⁶ See *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring); *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *Dep't of Transp. v. Ass'n of*

of Phillip Hamburger, Justice Thomas has asserted that “the judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws.”³²⁷ And because “[t]hose who ratified the Constitution knew that legal texts would often contain ambiguities,” a court’s obligation includes “resolv[ing] these ambiguities over time.”³²⁸ Deploying less heavy artillery,³²⁹ Justice Scalia, in some of his later administrative law opinions, appeared to suggest that deferring to an agency construction of an agency-administered statute is inconsistent with the Administrative Procedure Act’s (APA’s) instruction that a “reviewing court shall decide all relevant questions of law” and “interpret ... statutory provisions.”³³⁰ Though Justice Scalia went on to assure that *Chevron* “at least was in conformity with the long history of judicial review of executive action,”³³¹ others such as Aditya Bamzai have called that historical claim into question.³³²

Assessing the merits of these critiques goes beyond the scope of this Article.³³³ Here, instead, the thing to observe is that what a court makes of these critiques—as well as the doctrine’s justification—is likely to affect, *for purely epistemic reasons*, how freely it defers to agencies under the current regime. Start with the determination whether the *Chevron* framework applies to the dispute in question, so-called *Chevron* Step Zero.³³⁴ As first articulated, *Chevron* appeared a generic framework for disputes involving agency-administered statutes.³³⁵ Over time, however, courts indicated a willingness to sort among administrative law disputes by type,³³⁶ considering whether, for example, the *Chevron* framework applied to disputes concerning an agency’s

Am. Railroads, 135 S. Ct. 1225, 1241-45 (2015) (Thomas, J., concurring in judgment); *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1217-20 (2015) (Thomas, J., concurring in judgment).

³²⁷ *Perez*, 135 S. Ct. at 1217-18 (Thomas, J., concurring in judgment) (citing PHILLIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2004)); see also PHILLIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

³²⁸ *Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring in judgment).

³²⁹ Cf. Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. ___ (forthcoming 2017) (criticizing the deployment of “heavy constitutional artillery” against the doctrine that courts should defer to reasonable agency constructions of unclear regulations).

³³⁰ See *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment) (quoting 5 U.S.C. § 706).

³³¹ *Id.*

³³² Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2016). Bamzai urges that the “most natural reading” of the APA is that it restores what he terms the “traditional” approach to deference to agencies. *Id.* at 987. On that approach, courts ‘defer’ to an agency’s construction only if “contemporaneous” with the enactment of the statute at issue, or reflective of the “customary” interpretation thereof. *Id.* at 916. As Bamzai points out, neither of these grounds for deferring to executive agencies is “because they [a]re executive as such.” *Id.* at 941.

³³³ For a forceful rejoinder, see, e.g., Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41.

³³⁴ See Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 836 (2001); see also Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

³³⁵ See, e.g., Scalia, *supra* note 324, at 511 (characterizing *Chevron* as “announc[ing] the principle that the courts will accept an agency’s reasonable interpretation of the ambiguous terms of a statute that the agency administers”).

³³⁶ Courts have never gone so far as to adopt Justice Breyer’s recommended approach of determining *Chevron*’s applicability case-by-case, at least not explicitly. See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 397-98 (1986); see also Scalia, *supra* note 324, at 516 (characterizing pre-*Chevron* as adhering to a case-by-case approach to deference).

jurisdiction³³⁷ or ones involving questions of “deep ‘economic and political significance.’”³³⁸ In each instance, the question presented was whether Congress would really intend to delegate to agencies rather than to courts the authority to make decisions of this type.³³⁹ So characterized, one can see how a court’s (or an individual judge’s or justice’s) receptiveness to Step Zero arguments might be affected, for purely epistemic reasons, by its attitude toward *Chevron* in general: To the extent that a court (or individual judge or justice) regards deferring to agencies as constitutionally dubious, that court would reasonably demand heightened epistemic justification before acting on the premise that Congress intends to delegate such decisionmaking authority to agencies over some class of disputes. By contrast, if a court (or individual judge or justice) does not share that worry, it would require only ordinary epistemic justification before acting on that premise.

Turn next to the determination whether Congress has spoken “clearly” in an individual case. Here, the epistemic situation reverses. For *Chevron* proponents—unmoved by Hamburger-ian critiques and persuaded by supporting democratic and technocratic arguments—the *risky* premise upon which to act is that Congress has answered the “precise question at issue.” To explain: It is common ground among proponents and detractors of deference that “law” gives out at some point, after which there are questions of “policy.”³⁴⁰ For proponents of deference, or at least *strong* proponents of deference, the worrisome prospect is less of agencies exercising judicial authority than of courts making policy in complex areas absent technical competence or democratic mandate.³⁴¹ Given that concern, it makes sense for strong proponents to require increased epistemic justification before acting on the premise that Congress has spoken “clearly” on a particular question. By contrast, for those not disturbed by prospect of judicial policymaking, ordinary epistemic justification should suffice before acting on the premise that “law” settles the dispute at issue.

Whether this is how things play out in practice is tough to assess. Chief Justice Roberts, a consistent critic of *Chevron*, has also been a consistent vote in favor of

³³⁷ *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863 (2013).

³³⁸ *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014)).

³³⁹ See *King*, 135 S. Ct. at 2489 (“[H]ad Congress wished to assign that question to an agency, it surely would have done so expressly.”).

³⁴⁰ See Jeffrey A. Pojanowski, *Neoclassical Administrative Common Law* (reviewing JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* (2004)), *NEW RAMBLER REV.* (2016).

³⁴¹ See, e.g., Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 *YALE L.J.* 2580 (2006) (“*Chevron* is best taken as a vindication of the realist claim that resolution of statutory ambiguities often calls for judgments of policy and principle. . . . The meaning of statutory enactments is no brooding omnipresence in the sky. *Chevron* is our *Erie*, and much of the time, it is emphatically the province and duty of the executive branch to say what the law is.”); see also ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 217 (2006) (arguing that the best “justification for *Chevron* is simply that judicial deference to agencies produces better consequences than nondeference”). Indeed, one way to characterize the spectrum of support for deference to agencies is according to the relative concern assigned to those two prospects.

restrictions on *Chevron*'s domain.³⁴² On the other hand, Justice Thomas, the Court's most vocal critic of *Chevron* as of late,³⁴³ has been less reliable on that front.³⁴⁴ As to so-called Step One determination, i.e. determinations whether statutory meaning is "clear,"³⁴⁵ the suggestion above might seem to run contrary to Justice Scalia's observation that those "who find[] more often ... that the meaning of a statute is apparent" are more likely to think *Chevron* "desirable."³⁴⁶ That remark, however, had to do with propensity to see "apparent" meaning in general, something Justice Scalia attributed a judge's interpretive methodology.³⁴⁷ Holding interpretive methodology constant, it is hard to tell whether a distaste for *Chevron* correlates with finding "clear" meaning at Step One.³⁴⁸

Data aside, whether the epistemological insight discussed in this Article recommends more or less deference to agencies thus turns on what, in a court's view, makes a decision whether to defer 'high-stakes.' If the major worry is exercise by the executive branch of judicial authority, deference will seem appropriate even less often. If, on the other hand, the more pressing concern is judge-made communications or environmental policy, deference will appear proper all the more.

³⁴² See *King*, 135 S. Ct. at 2489 (holding that the *Chevron* framework does not apply to questions of deep economic and political significance); *City of Arlington*, 133 S. Ct. at 1877-86 (Roberts, C.J., dissenting) (arguing that the *Chevron* framework should not apply to "jurisdictional" constructions).

³⁴³ Compare *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring) (calling for *Chevron* to be reconsidered) with *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 967 (2005) (Thomas, J.) (holding that a reasonable agency construction of a statute it administers supersedes any prior judicial construction).

³⁴⁴ See *City of Arlington*, 133 S. Ct. at 1874-75 (holding that the *Chevron* framework applies to "jurisdictional" constructions).

³⁴⁵ E.g., *Brand X*, 545 U.S. at 982-83; see also Merrill & Hickman, *supra* note 334, at 834 (characterizing *Chevron* as establishing a "two-step deference regime"); but see Stephenson & Vermeule, *supra* note 319 (arguing that *Chevron*'s two "steps" logically reduce to one).

³⁴⁶ Scalia, *supra* note 324, at 521.

³⁴⁷ *Id.* (contrasting "strict constructionalist[s]" with those who "abhor[] a 'plain meaning' rule, and [are] willing to permit the apparent meaning of a statute to be impeached by the legislative history"). In effect, Justice Scalia's claim was that support for *Chevron* is inversely proportional to the frequency with which one thinks the doctrine would make a difference. Empirical studies provide moderate support for Justice Scalia's observation. See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 823, 828-29 (2006) (finding that "conservative" justices vote to validate agency decisions less often than "liberal" justices, noting that "as an empirical matter, the more conservative justices (Justices Antonin Scalia and Clarence Thomas) have embraced 'plain meaning' approaches and the more liberal justices have not").

³⁴⁸ As an empirical matter, this question is complicated by, for example, Justice Thomas's shifting assessment of *Chevron*. See *supra* notes 326-328 and accompanying text. Although Justice Scalia and Justice Thomas were consistently similar in terms of interpretive methodology, whether or at what point their respective attitudes towards *Chevron* diverged is unclear, making a meaningful side-by-side comparison difficult if not impossible.

IV. CODA: ON CONSTITUTIONAL INTERPRETATION

As David Strauss and others have noted, courts adhere to constitutional text much less closely than they do to the text of statutes.³⁴⁹ As with statutory interpretation, courts insist that where constitutional text is “clear” or “unambiguous,” the text controls.³⁵⁰ At the same time, pursuant to Chief Justice Marshall’s famous reminder that “it is a *constitution* we are expounding,”³⁵¹ courts frequently construe constitutional text in ways that would be unimaginable in the modal statutory case. To give two examples, courts agree that the First Amendment applies to all branches of government despite the text instructing that “*Congress* shall pass no law . . .”³⁵² Similarly, courts accept that the Constitution bars suits in federal court by private citizens against their home state³⁵³—this notwithstanding the Eleventh Amendment’s reference to suits “commenced or prosecuted against one of the United States by Citizens of *another* State, or by Citizens or Subjects of any *Foreign* State.”³⁵⁴

Given the inherently high-stakes nature of constitutional interpretation, one might think that the epistemological insight discussed in this Article helps to explain (or at least justify) the disparate treatment of constitutional text just described.³⁵⁵ For reasons that Strauss articulates, however, it is hard to believe that courts are really trying to read the constitutional text. First, claims like that “Congress,” as used in the First Amendment, is a synecdoche referring to all branches of the federal government³⁵⁶ are so at odds with ordinary norms of interpretation that, if true, would seem to entail interpretive skepticism (to borrow Justice Scalia’s phrasing, if “Congress” can mean *all branches of government*, the “[w]ords no longer have meaning”³⁵⁷).³⁵⁸ Second, as Strauss observes, in the modal constitutional decision, constitutional text serves at most a “ceremonial role,” with “the serious analysis

³⁴⁹ See, e.g., Strauss, *supra* note 42, at 3 (identifying various “anomalies,” i.e. “outcomes that are inconsistent with established principles of constitutional law,” “that following the text of the Constitution would produce”); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004) (discussing the disparity between the constitutional text and the Supreme Court’s sovereign immunity jurisprudence).

³⁵⁰ See *id.* at 21 (observing that “it is not acceptable *explicitly* to ignore the text of the Constitution”); see also William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015) (arguing that courts rarely if ever “explicitly repudiate” the original meaning of constitutional provisions).

³⁵¹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

³⁵² U.S. CONST. amen. I (emphasis added).

³⁵³ See *Hans v. Louisiana*, 134 U.S. 1, 1 (1890).

³⁵⁴ U.S. CONST. amen. XI (emphasis added).

³⁵⁵ Cf. Christopher R. Green, *Constitutional Theory and the Activismometer: How to Think About Indeterminacy, Restraint, Vagueness, Executive Review, and Precedent*, 54 SANTA CLARA L. REV. 403, 430-32 (2014) (articulating a conception of “judicial activism” that reflects the “interest-sensitivity” of knowledge).

³⁵⁶ See AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 34 (2012).

³⁵⁷ *King v. Burwell*, 135 S. Ct. 2480, 2497 (2015) (Scalia, J., dissenting).

³⁵⁸ See Strauss, *supra* note 42, at 30-34 (observing, among other things, that “[t]he other provisions [of the Bill of Rights] refer to the ‘right’ of the people or of an individual, or they simply say that certain actions are not allowed”).

focus[ing] on the precedents.”³⁵⁹ In Strauss’s view, courts’ inattention to constitutional text suggests that constitutional “interpretation” is really something like common law adjudication, with constitutional text “treated in more or less the same way as precedents in a common law system.”³⁶⁰

Whatever courts are doing with constitutional text, it seems plain that what they are *not* doing is attending to linguistic nuance. But if constitutional “interpretation” is, as Strauss suggests, a misnomer,³⁶¹ it is highly doubtful that the connection between epistemological and practical reason discussed here sheds any light on courts’ treatment of constitutional text vis-à-vis statutory text. Perhaps if courts did care what the Constitution says, their ability to identify constitutional meaning definitively would be limited by the would-be heightened practical stakes of that task.³⁶² On the other hand, perhaps discerning constitutional meaning would be easier in some cases rather than others, owed not just to differences in textual clarity,³⁶³ but also to differences in the practical stakes.³⁶⁴ Regardless, because it is so speculative to imagine what our constitutional order would look like if constitutional adjudication consisted of careful reading, speculating about the implications of contemporary epistemology for that would-be practice is not especially useful at this stage.

CONCLUSION

This Article is not so naïve as to suggest that all loose treatment of statutory text is attributable to epistemological hurdles. Sometimes politics trumps text, right or wrong. What this Article claims, more modestly, is that, as an epistemological matter, there are limits to what one can reasonably expect of courts in high-stakes

³⁵⁹ See Strauss, *supra* note 42, at 8.

³⁶⁰ *Id.* at 4-5 (arguing that constitutional text is constitutional text is “expanded, limited, qualified, reconceived, relegated to the background, or all-but-ignored, depending on what comes afterward”; see also DAVID A. STRAUSS *THE LIVING CONSTITUTION* (2010) (articulating a common law theory of constitutional adjudication). For an alternative, more eclectic non-originalist account, see, e.g., Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 *TEX. L. REV.* 1739 (2013) (suggesting that an array of non-linguistic factors help to determine constitutional law).

³⁶¹ To the extent that “interpretation” is an inherently *linguistic* task. *But see* Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 *FORDHAM L. REV.* 545, 546-50 (2013) (arguing that the phrase “constitutional interpretation” could refer either to the task of discerning the constitutional text’s linguistic meaning or to that of determining the text’s legal significance).

³⁶² Seemingly, the heightened practical stakes of judicial review would push in favor of a Thayerian approach to constitutional interpretation. *See generally* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *HARV. L. REV.* 129 (1893) (recommending a highly deferential approach to judicial review).

³⁶³ See Bradley & Siegel, *Constructed Constraint*, *supra* note 15, at 1287 (observing the relative clarity of numeric constitutional provisions).

³⁶⁴ See Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 *HARV. L. REV.* 657 (2011) (arguing that “[t]he constitutional text is quite specific on many low-stakes issues, where agreement is more important to most political actors than achieving any particular outcome”).

cases.³⁶⁵ Happily, courts seem committed for the most part to following statutory text where “clear.” Courts can only do so, however, if it is epistemologically feasible. And, for the reasons this Article explains, it is simply harder to “know” what a statute means when the practical stakes are raised. Again, this is not to say that it is impossible to discern statutory meaning in high-stakes cases, just that to do so is more difficult. The purpose of this Article is thus not to excuse all deviations from text in big cases. It is, instead, to recommend a bit more sympathy—and hence, a bit less cynicism—as the Court goes about its work at the end of Term.

³⁶⁵ As a corollary, this Article suggests we ought to have more modest expectations of Congress when drafting high-stakes legislation. Assuming that it is more “costly” for Congress to draft precise legislative text, *see* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 75, 103 (1983) (arguing that the costs associated with legislating precisely often leads legislatures to adopt “open-ended language”), an entailment of the observation here is that it is more difficult for Congress to speak “clearly” when drafting legislation that is inherently high-stakes.