STANDARD TEXTUALISM

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For as long as legal scholars have been writing about the rules-versus-standards distinction, textualism has been presumed to produce typically rule-like law. This Article argues for the opposite view. Far from generating the "law of rules" that Scalia famously envisioned, the rule of modern textualism would produce a law of standards—much more so than anybody, proponent of textualism or critic, appears to have recognized.

Two aspects of today's textualism drive this result. The first is its emphasis on ordinary language and communication. Modern textualism would typically produce standards because ordinary language and communication are typically standard-like. The second is modern textualism's drive to resolve as many cases as possible using only the text's clear communicative content. In close cases, the search for something both case-dispositive and "clearly" communicated by the text would lead to minimalist, fact-bound, standard-like interpretations.

To demonstrate, the Article draws on a review of every divided Supreme Court statutory interpretation decision issued in the past three Terms. The cases in the dataset turn out rarely to pose the kinds of conflict which decades of statutory interpretation literature might lead one to expect. Instead of pitting text-based, rule-producing interpretations against purpose-based, standard-producing ones, today's split decisions typically concern the interpretation of standard-like statutory text; the more strictly text-based the interpretation, the more standard-like the resulting legal content.

That's not to say that the Court's self-proclaimed textualists abide by their theory in practice. Every member of the Court, textualist or not, routinely substitutes Justice-made rules for legislature-made standards. The difference is that modern textualism is uniquely incapable of justifying that practice, let alone guiding or constraining those engaging in it. Modern textualism was not made for judicial rule-creation, and it shows.

After criticizing textualist practice on this score, the Article argues that "standard textualism" (i.e., modern textualism, understood in light of its tendency to produce standards) may turn out to be a surprisingly attractive prescriptive theory of interpretation, for both traditional textualists and modern progressives alike. Granted, modern textualism might be no more constraining than its alternatives when it comes to determining who wins and who loses in the case at hand. But by limiting Justices' freedom to create rules that will replace statutory standards going forward, the method forecloses what is often the more consequential, if less frequently discussed, exercise of discretionary power on today's Court.

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INTRODUCTION

A specter is haunting modern textualism—the specter of standards.[1] Its origins can be traced to a tension at the heart of Justice Scalia's early writings. On one hand, in *A Matter of Interpretation*, Scalia emphasized the textualist judge's limited role in statutory interpretation.[2] She must not try to "improve" the statute by selecting whatever means—whether rule or standard—she considers most effective for achieving Congress's ultimate ends, much less her own.[3] Instead, the good textualist simply gives legal effect to the text Congress enacted, as it would be understood by reasonable, ordinary readers (its "ordinary public meaning").[4] On the other hand, in *The Rule of Law as a Law of Rules*, Scalia argued that where Congress has chosen to enact standards, the textualist judge should replace them with rules of her own making.[5] Granted, by changing "vague congressional commands into rules that are less than a perfect fit," the judge will inevitably introduce some amount of "substantive distortion."[6] But, at least for Scalia, this was a price worth paying.[7] These two impulses—an insistence on strict fidelity to the ordinary public meaning of the text, and a desire to avoid standard-like law—were on a collision course from the very beginning.

Textualist theory has resolved the tension decisively in favor of fidelity to the ordinary public meaning of the text. "Although textualists may in practice have a predilection for rules," John Manning explains, "textualism rests on a straightforward conviction that faithful agents must treat rules as rules and

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[1] For a brief introduction to the rules-versus-standards distinction, see Section II below.

[2] *See generally* ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 26 (new ed. 2018).

[3] *E.g., id.* at 14-25 (criticizing a "Mr. Fix-it mentality" in statutory interpretation); MCI Telecomms. Corp. v. Am. Tel., 512 U.S. 218, 231 n.4 (2001) (Scalia, J.) (asserting that judges "are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes").

[4] *See id.* at 17; Bostock v. Clayton Cty, 140 S. Ct. 1731, 1741 (2020). As Scalia would later explain, "a court's application of a statute to a 'new situation' can be said to establish *the law applicable to that situation*…. Yet beyond that retail application, good judges dealing with statutes do *not* make law. They do not 'give new content' to the statute, but merely apply the content that has been there all along, awaiting application to myriad factual scenarios." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 5 (2012). Good judges are thus umpires—rule-appliers, not rule-makers. *Cf. United States v. Rahimi*, 144 S. Ct. 1889, 1912 (2024) (Kavanaugh, J., concurring).

[5] Antonin Scalia, *The Rule of Law as a Law of Rules,* 56 U. CHI. L. REV. 1175, 1179-83 (1989) [hereinafter Scalia, *Law of Rules*] (rather than "making as little law as possible in order to decide the case at hand," judges should "give" the "vague" statutory text "some precise, principled content").

[6] *Id.* at 1178-83.

[7] *Id.* at 1885. *But see* Scalia, *supra* note 2, at 29 ("Can we really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say? I doubt it.").

standards as standards."[8] As Frank Easterbrook points out, "whether to have rules (flaws and all) or more flexible standards (with high costs of administration and erratic application) is a decision already made by legislation."[9]

And yet, underlying modern textualism's insistence on textual fidelity, there remains an implicit but surprisingly pervasive assumption that the statutory text typically communicates rules, not standards.[10] Indeed, it's routine to frame textualism's commitment to the text as, in effect, a commitment to honor Congress's decision to enact *rules*. With striking uniformity, whenever Manning, Easterbrook, and other principled textualists invoke textualism's commitment to "treat[] rules as rules and standards as standards," they spotlight only the first half: the method's refusal to convert legislature-made *rules* into judge-made *standards*.[11] The converse—a refusal to convert legislature-made *standards* into judge-made *rules*—discreetly exits the stage. And textualists are not alone in their failure to focus on their method's treatment of standards; as Fred Schauer has pointed out, "almost all" of the scholarly literature on interpreters' treatment of

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[8] John F. Manning, T*extualism and Legislative Intent,* 91 VA. L. REV. 419, 424 (2005) [hereinafter Manning, *Legislative Intent*]; John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 7 (2001) [hereinafter Manning, *Equity*]; John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1946 (2011) [hereinafter Manning, *Separation of Powers*] ("An interpreter, in other words, must not invoke background purpose as a way to convert rules into standards or standards into rules"). For Manning, courts are faithful agents of Congress. But Manning's point applies with equal or greater force under more recent textualist conceptions of courts as faithful agents of "the people." *See* Amy Coney Barrett, *Congressional Insiders and Outsiders,* 84 U. CHI. L. REV. 2193, 2208-09 (2017); *infra* Part VI.A (discussing "unfair surprise" when statutory standards have been converted into judge-made rules).

[9] Fox Valley & Vicinity Const. Workers Pension Fund v. Brown, 897 F.2d 275, 284 (7th Cir. 1990) (Easterbrook, J., dissenting); Manning, *Separation of Powers, supra* note 8, at 1974-75 (quoting Easterbrook).

[10] *See, e.g.,* Manning, *Equity*, *supra* note 8, at 7, 18, 20-22 ("[T]extualists contend that enforcing the purpose, rather than the letter, of the law may defeat the legislature's basic decision to use rules rather than standards"); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 398 (2005) (discussing "Textualists' Receptivity to Rule-Like Directives from Congress"). This, too, goes back to Scalia. *See, e.g.,* Scalia, *Rule of Law*, at 1184 ("[I]t is perhaps easier for me than it is for some judges to develop general rules, because I am more inclined to adhere closely to the plain meaning of a text.").

[11] *See, e.g.,* Manning, *Legislative Intent*, *supra* note 8, at 439-48 (noting that textualism "treat[s] rules as rules and standards as standards," then exclusively discussing examples of textualists refusing to create standard-like exceptions to rule-like provisions); John F. Manning, *The Absurdity Doctrine,* 116 HARV. L. REV. 2387 (2003) (same); Manning, *Separation of Powers*, *supra* note 8, at 1946 (same); Fox Valley, 897 F.2d at 284-85 (Easterbrook, J.); Adams v. Plaza Fin. Co., 168 F.3d 932, 939 (7th Cir. 1999) (Easterbrook, J., dissenting) (emphasizing that when Congress enacts a rule, courts "disserve that legislative choice by deciding that standards really are the way to go"); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988) (same); Nelson, *supra* note 10, at 400 (noting that "[i]n the first instance, the choice between rules and standards is obviously up to Congress," then emphasizing that textualists "assume[] that Congress generally means its statutory directives to be just as rule-like as they seem on the surface").

rules versus standards, whether written by textualists or not, "has been focused on the *rules* side of the rules-standards divide."[12]

The upshot is that modern textualists and nontextualists alike continue to regard textualism as uniquely conducive to the production of rule-like legal content.[13] But they now ground that tendency in the ordinary public meaning of the statutory texts being interpreted, rather than any Scalia-style commitment to judicial rule-making.[14] Today then, despite the ways textualism has evolved, the predominant view remains the same: "[W]hatever the root causes, it seems clear that the background principles of interpretation used by judges whom we think of as textualists are more likely to produce rule-like laws than the background principles of interpretation used by other interpreters."[15]

This Article argues that the predominant view gets things precisely backwards.[16] For there is a deep irony at the heart of modern textualism: By pledging fidelity to the ordinary public meaning of the statutory text and thereby working itself pure as a rule-like, discretion-minimizing *method* for deciding cases, modern textualism has effectively committed itself—uniquely among interpretive approaches—to producing standard-like legal *content*.[17] Indeed, far

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[12] *See generally* Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards,* 14 J. CONTEMP. LEGAL ISSUES 803 (2005) (providing a psychological account of judges' motivation for converting standards into rules).

[13] *See* Nelson, *supra* note 10, at 350, 403 (2005).

[14] In this way, to quote Justice Kavanaugh, today's textualists can continue to "believe very deeply in these visions of the rule of law as a law of rules and the judge as umpire." *See* Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions,* 92 NOTRE DAME L. REV. 1907, 1909 (2017); *see also* Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 20 n.74 (1998) (noting the conventional wisdom that "proponents of textualism tend to favor rules over standards, while proponents of purposivism tend to prefer standards over rules" but explaining that "the axis dividing textualists from purposivists and the axis dividing those who favor rules from those who favor standards are not linked as a matter of strict logic").

[15] Nelson, *supra* note 10, at 403; Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. 1088, 1099 (2022) (citing Nelson, *supra* note 10, at 349)); Joshua Kleinfeld, *Textual Rules in Criminal Statutes*, 88 U. CHI. L. REV. 1791, 1806, 1814, 1818-19 (2021) (criticizing the "rule-oriented textualism" which has come to dominate statutory interpretation since the 1990s, "as one generation's revolution has become the next generation's assumption"); Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 190 (2018) (discussing "the rules-standards divide that tends to break along textualist-purposivist lines") (citing Nelson, *supra* note 10, at 372-03).

[16] At least when it comes to the implications of textualists' articulated theory. *See* Manning, *Legislative Intent*, *supra* note 8, at 425 (noting that "textualist judicial practice" may fail to track "what flows from textualists' *articulated* theory") (emphasis in original).

[17] Two notes on terminology. First, throughout this Article, the term legal "content" is often used to refer to the legal "directives," or legal "norms," established by judicial opinions. The term "content" isn't intended to imply any more robust metaphysical commitments than those other terms would convey, despite its frequent use in general jurisprudential debates concerning the nature of law. Second, except as noted this Article uses the terms "theory" of interpretation and "method" of interpretation interchangeably. *Cf.* Fransisco J. Urbina, *Reasons*

more standard-like content, across a far broader range of cases, than anybody, critic of textualism or proponent, has recognized.[18] Textualists' vision of a Supreme Court generating "textually driven, rule-bound, rule-announcing judgments"[19] is unattainable, because the more "textually driven" and "rule-bound" the method, the less conducive it is to producing "rule-announcing judgments." The Article's central claim, in short: The rule of modern textualism would produce a law of standards.

Two core features of modern textualism drive this outcome. The first we've already noted: its commitment to ordinary public meaning-based interpretation. Modern textualism favors standards because ordinary public meaning is typically standard-like, both in general and especially in the statutory provisions that divide today's Court.[20] The second feature is modern textualism's commitment to resolving as many cases as possible using only the "clear" communicative content of the text.[21] To accomplish this feat—to wring from the text, in ever closer cases, something that is both clearly communicated and case-dispositive—modern textualism often requires the adoption of incremental, fact-bound, standard-like interpretations.

To demonstrate its central claim, the Article draws on a review of every divided Supreme Court statutory interpretation decision issued in the past three Terms.[22] The cases in the dataset turn out rarely to concern the kinds of clear-

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for Interpretation, COLUM. L. REV. draft at *3 n.4 (forthcoming 2024). The combined effect is to treat modern textualism and modern pluralism in statutory interpretation cases as theories/methods of both interpretation and adjudication. (Again, except as otherwise noted. *See, e.g.*, *infra* Part IV.C.2 (considering, but rejecting as implausible, the notion that Supreme Court rule-creation can be justified as part of an approach to adjudication that tends to produce case outcomes more aligned with standard-like textual provisions than direct application of those standard-like provisions would produce).

[18] Critics of textualism have instead tended to focus on two other aspects of the theory. The first is its underdetermination of outcomes (who wins or loses) in hard cases. But while certainly worth noting, such underdeterminacy is hardly unique to textualism. And in any event, resolving who wins in the case at hand is often far less impactful than choosing a rule that resolves who will win in a whole host of future cases. The second common criticism concerns textualism's production of undesirable outcomes in cases where rule-like statutory provisions are under or over-inclusive relative to the purposes animating the statute. *See, e.g.*, Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 40-42 (2006); Manning, *Absurdity Doctrine, supra* note 11, at 2397 n.30. But despite such cases' pedagogical value in illustrating the differences between textualism and purposivism, on today's Supreme Court docket they turn out to be relatively rare. *See infra* Part IV.B.

[19] Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 639 (1999).

[20] This was less often true of the cases that divided the Court during prior eras of more muscular purposivism. See *infra* note 89 and accompanying text.

[21] This was less characteristic of textualism prior to the past decade or so. *See infra* notes 57-58, 100, and accompanying text (discussing Scalia's initial embrace and later rejection of *Chevron* deference, among other symptoms of the shift toward today's more purist form of textualism).

[22] More specifically, every case with a published merits decision issued between July 2020 and July 2023 in which two or more Justices wrote separate opinions expressing disagreement

text versus underlying-purpose conflict which traditional statutory interpretation literature might lead one to expect.[23] Instead of pitting text-based, rule-producing interpretations against purpose-based, standard-producing ones, today's split decisions typically concern the interpretation of standard-like textual provisions; the more strictly text-based the interpretation, the more standard-like the resulting legal content.

To be clear, the Article's claim isn't that Justices who self-identify as textualists refuse to create rules in practice.[24] After all, there is much more power to be had in making rules than in applying standards[25]; as the cases in the dataset will illustrate, none of the Justices shy away from exercising it, least of all the Court's self-avowed textualists.[26] The claim is instead that modern textualism is uniquely incapable of justifying the practice of judicial rule-creation, let alone guiding Justices engaging in it.[27] One upshot is that modern textualists in practice routinely exercise far greater power than their theory permits.[28] Another is that they do so from a position of willful ignorance, unconstrained by the kinds of purposive and pragmatic considerations that guide rulemakers in other contexts—considerations that could non-arbitrarily bridge the gap between the

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over the meaning of a statutory provision. In total, this amounted to 74 opinions from 33 cases. *See infra* Part IV.B.

For a broader empirical analysis of all cases decided in the first and second of these three Terms, see Victoria Nourse, *The Paradoxes of a Unified Judicial Philosophy: An Empirical Study of the New Supreme Court: 2020-2022*, 38 CONST. COMM. 1 (2024) (analyzing "the first two Terms of the New Court," that is, a Court in which "[u]nity" in "judicial philosophy"—specifically, six Justices' emphasis on an "original public meaning" based approach to interpretation—"has been brought about by … the appointment of three Justices by President Donald Trump").

[23] The only two examples were a solo dissent by Justice Breyer and a dissent by Justice Sotomayor joined only by Breyer. *See* Badgerow v. Walters, 596 U.S. 1, 19 (2022) (Breyer, J., dissenting) (emphasizing that the Court should "consider not simply the statute's literal words, but also the statute's purposes and the likely consequences of our interpretation."); Gallardo By & Through Vassallo v. Marstiller, 596 U.S. 420, 428 (2022) ("The plain text of [the statutory provision] decides this case"); *id.* at 435–36 (Sotomayor, J., dissenting) (arguing that the majority's holding is "inconsistent with the structure of the Medicaid program and will cause needless unfairness and disruption").

[24] *Cf.* Manning, *Legislative Intent*, *supra* note 8, at 425 (noting that "textualist judicial practice" may fail to track "what flows from textualists' *articulated* theory") (emphasis in original); Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 522 (2023) (same).

[25] *See infra* Part V.A.

[26] *See infra* Part III.

[27] For elaboration on "modern textualism" and its main rival, "modern pluralism," see *infra* Section I. As I explain there, I aim especially to capture the competing theories as they exist today, on the post-Scalia, post-Breyer Court. *See* Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 668-70 (2019); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 128 (2011) (calling Justices Stevens and Breyer "the Court's strongest purposivists").

[28] For responses to potential textualist justifications of judicial rule-creation, see *infra* Part IV.C.

input of standard-like statutory text and the output of rule-like legal directive.[29] This marks an important and underappreciated difference between modern textualism and its alternatives.[30] Modern textualism was not made for rule-creation, and it shows.

After highlighting and criticizing these aspects of modern textualist *practice*, the Article's final contribution is to evaluate whether this new vision of "standard textualism"[31]—i.e., modern textualism, understood in light of its tendency to produce standard-like law—is a desirable prescriptive *theory* of statutory interpretation. I argue that, somewhat surprisingly, standard textualism may have a lot to commend itself both to traditional textualists (despite their longstanding taste for rules), and modern progressives (despite their traditional distaste for textualism). More specifically, I argue that for textualists, "standard textualism" not only stays true to their theory's foundational vision of the separation of powers and the limited role of the judiciary; it also turns out to realize the very same rule-of-law and democratic-accountability values that led textualists like Scalia to extoll rule-like law in the first place.[32] At the same time, standard textualism's practical implications nicely align with the interests of Supreme Court reformers, predominantly associated with the political left, who wish to see Supreme Court Justices exercise less power vis-à-vis other decisionmakers.[33] With proposals for a new "progressive textualism" being discussed alongside more structural Court reform efforts,[34] the time may be ripe

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[29] Aside from the effects on the rules thus created, the attempt to create rules without recourse to extratextual considerations renders the origin of those rules opaque.

[30] Indeed, arguably more important than the literature's traditional focus on cases where Justices have created purpose-based exceptions to clear, rule-like statutory text. *See infra* Section V.

[31] While I have been unable to find statutory interpretation scholarship setting forth a similar vision of textualism's implications, it's worth noting that the constitutional law literature features considerable debate over the relative prominence of rules and standards in the U.S. Constitution. *See, e.g.*, John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 749 n. 15 (2017) (collecting sources critical of Justice Scalia's penchant for rule-creation in constitutional interpretation); Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639 (2016); JACK BALKAN, LIVING ORIGINALISM (2011) (building a theory of constitutional interpretation on the premise that most provisions central to current controversies in constitutional law are standard-like). Constitutional law scholarship has also had more to say about the conversion of standard-like (constitutional) text into judge-made rules. See, e.g., Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).

[32] *See infra* Part VI.A.

[33] *See, e.g.*, Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1719-20 (2021); Ryan D. Doerfler & Samuel Moyn, *After Courts: Democratizing Statutory Law*, MICH. L. REV. (forthcoming).

[34] *See* Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Progressive Textualism*, 110 GEO. L. J. 1437, 1455-58 (2022) (advocating a "methodologically progressive" form of textualism); Eliot T. Tracz, *Words and Their Meanings: The Role of Textualism in the Progressive Toolbox*, 45 SETON HALL LEGIS. J. 355, 378 (2021) (advocating the use of textualism to achieve substantively progressive results); Katie Eyer, *Symposium: Progressive Textualism and LGBTQ Rights*, SCOTUSBLOG (June 16, 2020, 10:23 AM), https://www.scotusblog.com/2020/06/symposium-progressive-

for at least a partial realignment of political ideology and interpretive methodology.[35] This Article's vision of "standard textualism" offers one such path forward.

Nor is that path merely an abstraction. "Standard textualism" carries immediate, concrete normative implications. To take one example, consider how today's Court, having gotten rid of *Chevron* deference just last Term, should handle cases challenging agencies' applications of standard-like statutory terms.[36] The Court will of course need to decide whether the relevant statutory term does or does not reach the facts of the case. In other words, the Court will have to reach an outcome. But should it additionally create a rule that effectively replaces the statutory standard going forward? Or should it instead stick as closely as possible to the standard-like text's clear communicative content, leaving any rulemaking to Congress and/or the agency Congress charged with implementing the statute? Standard textualism provides a clear answer: The Court should stick to the text.

Of course, that "clear answer" doesn't resolve which side should win the case. And that's worth emphasizing: This Article does *not* claim that modern textualism is an especially discretion-minimizing method for deciding case *outcomes* (i.e., who wins and who loses) in the kinds of cases that reach the Supreme Court. Maybe it is, maybe it isn't.[37] That's already the subject of extensive debate.[38] This Article focuses on a different issue—one that has received far less attention despite being at least as consequential. The Article's claim is that, relative to its alternatives, modern textualism would minimize the Justices' discretion in determining the *form of the directive* (rule or standard) that their decision establishes going forward, even if it does nothing to reduce the discretion they (perhaps inevitably) exercise in determining which side should prevail in the case at hand.[39] This means, most importantly, that the method forecloses the largest and most frequent exercise of discretionary power in which the Justices currently (and unnecessarily) engage when deciding statutory cases: the creation of rules.[40]

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textualism-and-lgbtq- rights/ [https://perma.cc/RR9Y-HG5T]; *see also* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 80-87 (2022) (arguing against textualism in statutory interpretation and in favor of a substantively conservative form of nontextualism).

[35] *See* Richard Re, *Legal Realignment*, 92 U. CHI. L. REV. (forthcoming 2025).

[36] *See* Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024).

[37] *See infra* Part III.A.

[38] For a sampling of textualists' claims that their method reduces discretion in determining case outcomes, see, e.g., SCALIA & GARNER, *supra* note 4, at 1; NEIL M. GORSUCH ET AL, A REPUBLIC, IF YOU CAN KEEP IT 60 (1st ed. 2019). For a sampling of claims to the contrary, see e.g., William N. Eskridge, Jr., Brian G. Slocum, Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611 (2023); James A. Macleod, *Finding Original Public Meaning*, 56 GA. L. REV. 1, 60-78 (2021); Margaret H. Lemos, The Politics of Interpretation, 89 NOTRE DAME L. REV. 1 (2013).

[39] *See infra* Part III.B.

[40] *See infra* Part V.A.

The Article proceeds as follows. Section I summarizes modern textualism's central tenets and contrasts them with those of its main competitor, modern pluralism. Section II explains the rules-versus-standards distinction. Section III considers whether modern textualism or modern pluralism, understood as directives to judges about how to decide cases, is the more rule-like, discretion-minimizing method. It concludes that, while neither theory is clearly more rule-like in its instructions concerning how to decide case outcomes, modern textualism is clearly more rule-like in its instructions to judges concerning how to determine the form of the directive that the decision establishes. Part IV is the heart of the Article. Part IV.A argues that modern textualism's rule-like insistence on fidelity to ordinary public meaning, along with its pressure to resolve even close cases using only the "clear" communicative content of the text, makes it uniquely prone to produce standard-like legal content. Part IV.B illustrates this using a survey of all divided Supreme Court statutory interpretation cases from the past three Terms. Next, in light of the many cases in which self-proclaimed textualist Justices create rule-like legal content, Part IV.C considers various textualist attempts to deny or to justify judicial rule-creation. Sections V and VI consider some normative implications that become pressing if one accepts the basic thrust of Section IV's argument. Specifically, Section V contrasts modern textualists' and modern pluralists' approaches to rule-creation in practice, and it articulates some concerns about modern textualist practice on this front, beyond mere accusations of theoretical infidelity. Finally, Section VI argues that "standard textualism" may prove to be a surprisingly attractive prescriptive theory of interpretation.

I. Modern Textualism Versus Modern Pluralism

This Section summarizes the two main theories of statutory interpretation currently on offer: modern textualism and modern pluralism. Part I.A provides a relatively uncontroversial and sympathetic account of modern textualism, foregrounding the theory's normative foundations and highlighting judicial practices that stem from them.[41] Those normative foundations include a view of the U.S. Constitution and of democratic governance in which judges play a tightly constrained role, and a closely related commitment to democratic accountability and rule-of-law values like fair notice and predictability. From these foundations spring a refusal to "fix" or "improve upon" duly enacted statutory text, and a drive to resolve as many cases as possible exclusively on grounds of clear ordinary public meaning.

Part II.B gives a very brief account of the modern alternatives to textualism, grouping them under the label "modern pluralism." Modern pluralism envisions a judiciary more actively engaged in assisting Congress's efforts to achieve

[41] My approach here parallels that of Eidelson & Stephenson, *supra* note 23, who arrive at a similar account of modern textualism's core tenets and practices.

whatever policy goals motivated a given statute's passage. From this normative commitment stems a greater willingness, particularly in cases where the text is least clear, to draw on extratextual considerations in order to craft the means (rule or standard) best suited to accomplishing Congress's ultimate ends.

A. Modern Textualism

Modern textualists source their interpretive philosophy to the U.S. Constitution's separation of powers.[42] Congress can make binding law only through a duly enacted *text*. When interpreting a statute, therefore, "[o]nly the written word is the law," not any congressional intent or statutory purpose that might be inferred based on extratextual considerations.[43] This is just as well because, modern textualists emphasize, the Constitution assigns judges a highly circumscribed role in interpreting statutes, and the search for extratextual evidence of intent, or the identification of underlying statutory purposes, invites the sort of creativity that would contravene that role.[44] In modern textualists' vision of the judiciary, judges are engaged in a formalistic enterprise: they are to apply the text that Congress enacted—not add to, subtract from, or otherwise improve upon it.[45] Congress may enact statutory provisions that fail to serve the judge's, the public's, or even the legislature's own view of wise policy. When this happens, modern textualism instructs judges to stand firm and, as always, abide by the text.[46]

Still, to apply statutory texts to facts, one must have some theory of how to decipher what these texts (as in, the words and concepts represented by the little squiggles on the page) actually *mean*.[47] And if textualism's theory of meaning were to license too much judicial creativity—if, for example, statutory language "means" whatever judges think will best accomplish what they believe to be the statute's underlying purpose, or "means" whatever will produce the best consequences—then textualism would lead judges to exceed their constitutionally circumscribed role.[48] Modern textualism therefore requires a

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[42] *E.g.*, NEIL M. GORSUCH ET AL, A REPUBLIC, IF YOU CAN KEEP IT 60 (1st ed. 2019).

[43] Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020).

[44] *E.g.*, Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)); Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315 (2017).

[45] *See, e.g.*, SCALIA & GARNER, *supra* note 4, at 44; Neil M. Gorsuch, *2016 Sumner Canary Memorial Lecture: Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia,* 66 CASE W. RSRV. L. REV. 905, 909-910 (2016); Henson v. Santander Consumer USA, 137 S. Ct. 1718, 1726 (2017) (Gorsuch, J.) (judges' job is "to apply, not amend, the work of the People's representatives").

[46] *See e.g.*, SCALIA, MATTER OF INTERPRETATION, *supra* note 2, at 20; Manning, *Absurdity Doctrine*, *supra* note 11, at 2433, 2439.

[47] *See* Erik Encarnacion, *Text Is Not Law*, 107 IOWA L. REV. 2027 (2022).

[48] *E.g.*, GORSUCH, *supra* note 42, at 60.

theory of meaning that tethers statutory language to objective facts. Judges must find meaning, not create it.

To find a statutory provision's meaning, modern textualism, borrowing from modern originalism, instructs judges to find the provision's "ordinary public meaning," or, "the meaning communicated by that statute to competent English language speakers" at the time it was drafted.[49] By effectively outsourcing the determination of meaning to a reasonable ordinary reader, textualism renders the question of meaning objective and empirical: "The question is only how the words would be read by an ordinary user of the English language."[50] Moreover, modern textualism's emphasis on ordinary public meaning promises to respect the bargain Congress struck when it enacted a given statutory provision.[51] After all, Justice Scalia emphasized, "all we can know is that they voted for a text that they presumably thought would be read the same way any English speaker would read it."[52] And the objectivity, stability, and predictability of ordinary public meaning-based interpretation helps Congress do its job going forward, allowing Congress the flexibility to reach compromises without fear that courts will later adopt an idiosyncratic reading in an effort to "improve" the statute.[53] At the same time, it encourages careful drafting on Congress's part: Judges will not bail Congress out, adding or subtracting from the text in an effort to assist Congress achieve whatever Congress might have wanted.[54] Judges will apply the text as they find it, for better or worse.[55]

While modern textualism is grounded in a view about what the Constitution requires vis-à-vis Congress and the courts, modern textualists emphasize that the method's reliance on ordinary public meaning brings with it a number of normative benefits vis-à-vis the public. Chief among these are rule-of-law values like fair notice and predictability.[56] As Justice Amy Coney Barrett has written, quoting Scalia, "[f]airness requires that laws be interpreted in accordance with their ordinary meaning, lest they be like Nero's edicts, 'post[ed] high up on the

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[49] Bostock, 590 U.S. at 654; Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 BOS. U. L. REV. 1953, 1963 (2021); SCALIA & GARNER , *supra* note 4, at 16.

[50] SCALIA & GARNER, supra note 4, at 16; Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 62-63 (1994); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 62 (1988).

[51] Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1613 (2012).

[52] *Id.*; *see also, e.g.*, Manning, *Legislative Intent*, *supra* note 8, at 444-45.

[53] *E.g.*, SCALIA, MATTER OF INTERPRETATION, *supra* note 2; Manning, *The New Purposivism*, supra note _, at 137.

[54] Manning, *Absurdity Doctrine*, *supra* note 11, at 2389-90; Easterbrook, *supra* note 11, at 65-66.

[55] *E.g.*, Manning, *Absurdity Doctrine*, *supra* note 11, at 2390; SCALIA, MATTER OF INTERPRETATION, *supra* note 2, at 20.

[56] Barrett, *supra* note 8, at 2201–05.

pillars, so that they could not easily be read.'"[57] Going further, Barrett explains that judicial adherence to ordinary meaning reflects judges' role as "agents of the people."[58] As Justice Gorsuch explains, "the people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration."[59] Furthermore, ordinary public meaning-based interpretation promotes a uniquely *democratic* rule of law, allowing the public to understand legislation at the time of its passage and to hold legislators accountable accordingly, rather than waiting for unelected judges to decree what the statute "really" means.[60]

Finally, before turning to textualism's alternatives, one remaining aspect of it deserves emphasis: the increasing pressure it places on judges to find a clear, case-dispositive textual meaning in virtually every case.[61] This pressure stems once again from modern textualism's approach to the separation of powers.[62] On one hand, as we've seen, there's the modern textualist view that it would be an illegitimate enlargement of the judicial prerogative to base statutory interpretation decisions on extratextual considerations except where doing so is absolutely necessary.[63] On the other hand, there is the modern textualist belief that deference to others' interpretations—whether members of Congress (as with legislative history), or executive agencies (as with the *Chevron* doctrine)—is

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[57] *Id.* at 2209 (quoting Scalia, *supra* note 2, at 17 n.29).

[58] *Id.* at 2208-10.

[59] Bostock, 590 U.S. at 674; *accord* SCALIA & GARNER, *supra* note 4, at xxix (2012).

[60] Bostock, 590 U.S. at 785 (Kavanaugh, J., dissenting) ("Judges adhere to ordinary meaning for two main reasons: rule of law and democratic accountability.").

[61] The pressure works. As then-judge Kavanaugh summarized, "a critical difference between textualists" and non-textualists is that "textualists tend to find language to be clear rather than ambiguous more readily" than non-textualists. Kavanaugh, *supra* note_44, at 2129. Many others have made similar observations. Kavanaugh quotes "the archetypal textualist, Justice Scalia" to the same effect, *id.* at 2129 n. 40 (quoting Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521), along with Justice Kagan's observation that she and Justice Scalia differed with respect to "the quickness with which we find ambiguity." *Id.* (quoting Elena Kagan at 56:54); Kethledge, *supra* note 44, at 320 (2017) ("In my own opinions as a judge, I have never yet had occasion to find a statute ambiguous.").

The pressure is also crucial to distinguishing modern textualism from rival methods of interpretation. Textualism "is a monistic thesis"; when the text runs out, "textualism" as a distinctive method runs out too. *See* Mitchell N. Berman & Guha Krishnamurthi, *Bostock Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 120–21 (2021).

[62] That said, part of the explanation may be their view of ordinary language and communication. Textualists may tend to see it as less riddled with vagueness than it is often made out to be. *See* Kavanaugh, *supra* note 44 at 2129; Kavanaugh, *supra* note 14, at 1910-13; *see also* Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW, 218 (Andrew Marmor & Scott Soames eds., 2011).

[63] If, as modern textualism contends, the alternative to deeming the text sufficiently "clear" involves such a high risk of illegitimacy, then it makes sense to maintain a relatively low threshold for textual "clarity." *See* Kavanaugh, *supra* note 44, at 2129; Kethledge, *supra* note 44, at 316-17_.

illegitimate.[64] With reliance on extratextual considerations to be avoided at all costs, and deference to others' interpretations taken off the table, today's textualists are under greater pressure than their textualist forefathers—let alone their modern pluralist colleagues—to find something that is both "clearly" communicated by the text and is case-dispositive, even in the kinds of close cases that generate divided Supreme Court opinions.[65]

B. Modern Pluralism

Modern alternatives to textualism place considerably less pressure on judges to base their decisions exclusively on the ordinary public meaning of the text. The text is centrally important, to be sure (this is the sense in which "we're all textualists now").[66] But whereas modern textualism treats the text's ordinary public meaning as the sole criterion for legal validity, modern nontextualists are more open to additional considerations, especially where the text is arguably unclear.[67]

Chief among these extratextual considerations is the statute's *purposes*, i.e., the more fundamental policy goals that the statute aims to achieve.[68] So, whereas modern textualism focuses exclusively on Congress's choice of legal means (i.e., the rules or standards articulated in the text),[69] modern pluralists often focus additionally on the policy ends in pursuit of which Congress chose them. And, crucially for our purposes, modern pluralism permits judges greater freedom to alter those means—for example, by substituting a judge-made rule for a legislature-made standard—when doing so would better accomplish Congress's

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[64] *See* John F. Manning, *Textualism as a Nondelegation Doctrine,* COLUM. L. REV. 673, 674-75 (1997); Loper Bright Enter.'s v. Raimondo, 144 S.Ct. 2244, 2273 (2024); *id.* at 2274 (Gorsuch, J., concurring); Baldwin v. United States, 140 S. Ct. 690, 691 (2020) (Thomas, J. concurring); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine,* 2 WASH. U. L. Q. 351, 353, 372 (1992).

[65] *See* Ryan D. Doerfler, *Late-Stage Textualism*, 2021 SUP. CT. REV. 267, 290-91 (2022) (discussing Scalia, Easterbrook, and Manning on lack of textual clarity).

[66] Ryan D Doerfler, *How Clear is Clear,* 109 VA. L. REV. 651, 666 (2023). Modern pluralists, more so than their strong-purposivist forebearers, care a great deal about text. *See* [Kagan quote]; Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 416–17 (2015). Still, modern pluralists, at least in the kinds of hard cases the Supreme Court decides, are less likely to find the text clear enough to require judges to ignore all other evidence of statutory meaning. *See* sources cited *supra* note 54.

[67] *See* Berman & Krishnamurthi, *supra* note 61, at 120–21 (explaining that "[s]tatutory textualism, like standard versions of constitutional originalism, is a monistic thesis," whereas "[s]o-called purposivists are rarely monistic" and consider "original textual meaning" alongside other factors); Merrill, *supra* note 64, at 351.

[68] On different kinds of "purpose," see *id.* at 120-21 (distinguishing legal purpose from policy purpose and distinguishing "purposivism" from textualism in part based on purposivism's giving weight to the latter); Samuel L. Bray, *The Mischief Rule,* 109 GEO. L. J. 967, at 973 (2021) (same).

[69] *See* Manning, *Legislative Intent*, *supra* note 8, at 424; Bray, *supra* note 68, at 973.

apparent policy ends.[70]

For modern pluralists, then, ideal appellate statutory interpretation decisions are not necessarily passive applications of law to fact, come what may. Nor are they, as textualists have at times emphasized, opportunities to hold Congress's feet to the fire to encourage greater care when drafting statutes in the future.[71] Instead, appellate decisions are an opportunity to actively partner with Congress, aiding in the development of a legal regime that effectively and efficiently implements policy.[72] Where Congress leaves gaps or imprecision, modern pluralism encourages judges to come to an all-things-considered judgment about the best way to fill those gaps or add that precision.

II. RULES VERSUS STANDARDS

This Part provides a brief account of the traditional distinction between rules and standards. Following Fred Schauer, among many others, the Article characterizes the distinction between rules and standards as a distinction between comparatively non-vague directives (rules) and comparatively vague directives (standards).[73] Two aspects of the distinction deserve emphasis at the outset. First, it places legal directives on a *spectrum* from more rule-like to more standard-like.[74] For brevity, this Article sometimes refers to a given directive as a "rule" or a "standard" without explicitly comparing it to another directive. But

[70] Because modern pluralism, in contrast to the strong purposivism of earlier eras, counsels abiding by clear text, modern pluralism rarely permits creating standard-like exceptions to clear rules. But where the text provides a standard—something less clear and more vague than a bright-line rule—modern purposivists have greater latitude than their textualist counterparts to craft a rule in its place. Whereas modern textualists "believe it imperative, given the complexities of the legislative process, to respect the level of generality at which Congress speaks," Manning, *Legislative Intent*, *supra* note 8, at 424, modern purposivists need not leave things so close to where Congress left them.

[71] *See* Daniel A. Farber, *Do Theories of Statutory Interpretation Matter?*, 94 NW. L. REV. 1412, 1413 (2000) (summarizing textualists' argument); *see* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 677 (same); Molot, *supra* note 18, at 53 (2006) (criticizing "aggressive textualism" on the ground that it "does not just elevate judges to the status of partners, as aggressive purposivism did. It goes one step further by turning them into uncooperative, rather than cooperative, partners.").

[72] Caleb Nelson, *Response to Professor Manning*, 91 VA. L. REV. 451, 463-64 (2005) (arguing that nontextualists "see their aim as fidelity to the policy judgments that statutory language (imperfectly) reflects, rather than as fidelity to the statutory language itself.").

[73] *See, e.g.*, Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. REV. 303, at 305-309 (2003); Schauer, *supra* note 12, at 803-04; *see also* Kevin Clermont, *Rules, Standards, and Such*, 68 BUFF. L. REV. 751, 758 (2020) (canvassing accounts of the distinction and concluding that "[t]he best expression of the essential difference in the nature of the conditions in rules and standards comes in terms of vagueness, with vagueness increasing from rules to standards and so making the conditions less determinative.").

[74] *See, e.g.*, Clermont, *supra* note 73, at 766 (citing Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 26 (2000)).

strictly speaking, a directive cannot be a "rule" or a "standard" in an absolute sense, only more rule-like or more standard-like than some other directive. Second, the crux of the distinction—the thing that makes a given directive more rule-like or more standard-like—is the directive's degree of *vagueness*.[75] Given the central role vagueness plays in distinguishing rules from standards, it's worth clarifying what vagueness is and considering some examples of it.

A word or phrase is *vague* when there are borderline cases for its application.[76] Consider the directive, "Bring me a bunch of chairs." The term "a bunch" is vague: In a given context (say, setting up a room for a meeting), there are some quantities of chairs that would clearly not qualify as "a bunch" (say, two chairs), and there are some quantities that clearly would qualify (say, fifteen chairs), but there are borderline cases (say, five chairs). These borderline cases present a line-drawing problem: There's no clear point at which, upon adding another chair, the quantity of chairs transitions from not "a bunch" to "a bunch"; it's not the case that five chairs is clearly "a bunch of chairs," while four clearly is not. This vagueness renders the directive more standard-like and less rule-like than an alternative directive that specifies the precise number of chairs to bring (e.g., "Bring me *five* chairs").

Much more could be said about vagueness,[77] but for present purposes one more point will suffice. While the term "a bunch" is at least arguably vague only with respect to a single factor (quantity), most terms are vague with respect to multiple factors.[78] Such terms are akin to the quintessential standard-like form of legal directive, the multi-factor balancing test.[79] The term "chair," for example, is vague with respect to multiple factors: Its application is more or less appropriate depending on the length of the object's back (too short and it becomes a stool), and the length of the seat (too long and it becomes a chaise), among other attributes.[80] To foreshadow: The bulk of the Supreme Court's

[75] Schauer, *supra* note 73, at 311; Clermont, *supra* note 73, at 763-64.

[76] TIMOTHY A. O. ENDICOTT, VAGUENESS IN LAW 31 (2000); Lawrence B. Solum, *The Interpretation-Construction Distinction,* 27 CONST. COMMENT. 95*,* 98 (2010); ANDREI MARMOR, THE LANGUAGE OF LAW 85-100 (2014).

[77] *See, e.g.*, ANDREI MARMOR, *4 Varieties of Vagueness in the Law, in* THE LANGUAGE OF LAW, 85-106 (2014); ENDICOTT, *supra* note 76; HRAFN ASGEIRSSON, THE NATURE AND VALUE OF VAGUENESS IN THE LAW (2020). For a careful parsing of different forms of linguistic indeterminacy, and an argument that legal scholars sometimes overstate the prevalence of vagueness relative to other forms of indeterminacy, see DAVID LANIUS, STRATEGIC INDETERMINACY IN THE LAW 4-61, 124-47 (2019).

[78] *See* Marc Andree Weber, *The Non-Conservativeness of Legal Definitions, in* VAGUENESS AND LAW: PHILOSOPHICAL AND LEGAL PERSPECTIVES 189.

[79] *See* James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773, 773-76 (1995).

[80] Leg length, etc. *See generally* Weber, *supra* note 79. Scholars have distinguished various additional types of vagueness, but for present purposes it's unnecessary to delve into these distinctions. *See, e.g.*, Alston 1967 at 219 (distinguishing "degree-vagueness" and "combinatorial vagueness"); GEERT KEIL & RALF POSCHER, VAGUENESS IN THE LAW 3 (2017); ROY A.

divided statutory interpretation cases concern terms that, like "chair," are vague as to multiple factors.[81]

Now that we've seen what the rules versus standards distinction turns on—a directive's vagueness (standard) or lack of vagueness (rule)—it's worth highlighting four things on which the distinction does *not* turn. The first is the presence of *ambiguity*. "A word or phrase is *ambiguous*," as opposed to vague, "when it can be used in more than one sense, such that it is open to a 'discrete number of possible meanings.'"[82] In the directive, "Bring me a bunch of *chairs*," the word "chairs" is ambiguous insofar as it could refer either to pieces of furniture (as we've been assuming), or instead leaders of academic departments (as in, "the chairs of the history and math departments"). Ambiguity, unlike vagueness, forces the interpreter to make a stark choice between discrete meanings ("Is he asking for furniture or department heads?"). Unlike vagueness, ambiguity does not present the interpreter with borderline cases and their associated line-drawing problems; there will be no difficulty determining whether a given thing is a "chair" in the furniture sense or instead a "chair" in the department-head sense. Of course, *after* the interpreter resolves the ambiguity, if it turns out that the directive concerns chairs in the furniture sense, *then*, as we've seen, she may need to engage in a standard-like balancing of multiple factors to determine whether the vague term "chair" (in the furniture sense) applies to a given object. But the presence of ambiguity, which forced her to first choose which discrete meaning of "chair" was at issue, did not itself render the directive any more standard-like than it would have been without the ambiguity.[83]

Second, the rules versus standards distinction does not turn on whether the directive explicitly requires the interpreter to make recourse to any of the *broad, underlying purpose(s)* that may have motivated its promulgation. To be sure, some standards do invoke what may have been relatively fundamental animating purposes. For example, the standard-like directive, "No unsafe driving," by explicitly invoking "safety" without any further specificity, requires the standard-applier to make direct recourse to the directive's presumable purpose: promotion of "safety." But in such cases, for purposes of classification as a rule or standard, vagueness continues to do all the work. The directive is standard-like only because and insofar as "safety" is a vague term. The directive, "No

SORENSON, VAGUENESS AND CONTRADICTION (2001) (distinguishing "ontological vagueness" and "epistemic vagueness"); *see also* Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL L. REV. 509, 517-20 (1994).

[81] *See infra* Part IV.B.

[82] Joel S. Johnson, *Vagueness Avoidance*, 110 VA. L. REV. 71, 81 (2023) (quoting LAWRENCE M. SOLAN, THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION, at 38-39 (2010)); *see also* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMM. 95, 97 (2010); Waldron, *supra* note 80, at 512.

[83] To foreshadow again: The bulk of the Supreme Court's divided statutory interpretation cases do not turn on resolution of ambiguity. *See* Part IV.B.

unreasonable driving," despite its failure to name a deeper purpose such as safety underlying its promulgation, may be even vaguer and therefore more standard-like. Conversely, adding, "*In order to promote safety*, no unreasonable driving," might, by virtue of naming the deeper purpose, render the directive *less* vague and therefore *more rule*-like. In short, vagueness, not recourse to underlying purposes per se, renders a directive relatively rule-like or standard-like.

Third, the distinction doesn't turn on whether the directive *implicitly* requires consideration such underlying purposes. Of course, one common way—perhaps the most common way—to resolve questions about borderline applications of vague concepts is to make recourse to the purpose(s) of the directive containing the vague concept.[84] But that is just one among numerous alternative methods of coming to closure. Others include the use of substantive tie-breaking rules like the rule of lenity[85]; deference to other decisionmakers' interpretations[86]; all-things-considered moral judgment[87]; and so on.[88] A decisionmaker's recourse to a statute's "background policy" is a common but non-necessary consequence of the statute's being standard-like, not a defining feature of standards.

Finally, the rules versus standards distinction does not turn on the directive's *breadth of application*. As an example, consider a bare "no vehicles in the park" directive. That directive is standard-like compared to an otherwise-identical directive that additionally contains an exhaustive list of the things that shall count as "vehicles." Of course the latter, more rule-like directive might, if it contains only a short list, categorize fewer things as "vehicles" than would our ordinary concept of "vehicle." Or, if it contains an especially long list, it might treat *more* things as vehicles, relative to the more standard-like directive that contains no such list. All that matters for purposes of classifying it as a rule rather than a standard is that its exhaustive list makes it relatively more specific, i.e., less vague, about its coverage; the breadth of its coverage is immaterial.

III. IS MODERN TEXTUALISM THE MORE RULE-LIKE METHOD?

Theories of interpretation can be viewed as, among other things, directives

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[84] *See* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards,* 106 HARV. L. REV. 22, 58 (1992); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND LIFE (1991)

[85] *See, e.g.*, Eidelson & Stephenson, *supra* note 23, at 533-34.

[86] *See, e.g.*, Lawrence Solum & Cass Sunstein, Chevron *as Construction*, 105 CORNELL L. REV. 1465 (2020); Scott Soames, *Deferentialism: A Post-Originalist Theory of Legal Interpretation*, 82 FORDHAM L. REV. 597, 605 (2013); Frank Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533, 544-51 (1983).

[87] *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986).

[88] *See, e.g.*, Adam M. Samaha, *Randomization in Adjudication*, 51 WILLIAM & MARY L. REV. 1, 35-37 (2009) (discussing tiebreaking rules, including randomization).

to judges concerning how to decide cases[89]—more specifically, both (A) how to determine a given case's *outcome* (who wins and who loses), and (B) how to determine the *form of the directive* (rule or standard) that the case establishes going forward. And it'll be important for our purposes to distinguish those two aspects of judicial decisionmaking. As directives to judges, theories of interpretation can be relatively rule-like or standard-like with respect to each of them. As Part III.A notes, it's debatable (and hotly debated) whether modern textualism is more rule-like than modern pluralism in determining case outcomes in the kinds of close cases in which the two methods diverge. But the second aspect of judicial decisionmaking—determining the form of the directive the decision will establish going forward—is often more consequential, despite having received far less attention. And as Part III.B explains, there is little doubt that with respect to it, modern textualism is a far more rule-like method than modern pluralism.

A. Determining the Case Outcome

When it comes to determining who wins and who loses in a given case, modern textualism purports to supply judges a rule-like directive. It instructs them to consult one factor (the ordinary public meaning of the text) and give it legal effect.[90] Still, in cases where the text's communicative content clearly favors one side over the other, modern pluralism provides the same instruction.[91] In many cases, then, both approaches are equally rule-like; both reach the same outcome on the same ground: the text's clear ordinary public meaning.

To decide whether modern textualism is a more rule-like method for determining the outcome of statutory interpretation cases, then, one must look to the cases where the statutory text is least clear. Those close cases are the ones where modern textualism and modern pluralism part ways—the former maintaining its exclusive focus on ordinary public meaning, while the latter more readily engages in a standard-like balancing of extratextual factors (policy purposes, practical consequences, judicial efficiency and predictability concerns, and so on).

As applied to those close cases, there's plenty of debate concerning whether modern textualism actually provides a more rule-like directive than modern purposivism.[92] The reason is that, whether modern textualists realize it or not,

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[89] *Cf.* Nelson, *supra* note 10, at 349.

[90] *See* Nelson, *supra* note 72, at 463-64.

[91] *See* Doerfler, *supra* note 66, at 651; Re, *supra* note 66, at 416.

[92] *Compare, e.g.*, Nelson, *supra* note 10, at 372-74 (arguing that textualism is a more rule-like method than intentionalism or purposivism), SCALIA & GARNER, *supra* note 4, at 19 (emphasizing textualism's ability to limit judicial discretion), Kavanaugh, *supra* note _, at _ (same); Gorsuch, *supra* note 45, at 906 (same), *with* James A. Macleod, *Finding Original Public Meaning*, 56 GA. L. REV. 1, 76 n.302 (2021) (highlighting the open-endedness of modern textualists' conception of ordinary public meaning); Richard H. Fallon Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1267 (2015)

their method's central directive—"decide based on the clear ordinary public meaning of the text"—may often be vague enough to allow either side to win.[93] In such cases, if modern textualism effectively provides judges no further guidance, then modern pluralism's recourse to extratextual factors may make it the more rule-like, discretion-constraining method.[94]

This Article won't attempt to resolve that perennial debate. For present purposes, the point is simply that it's a live issue that receives considerable attention from scholars and judges alike. What has received far less attention, despite being at least as consequential, is the question that the next Part addresses: Which interpretive methodology provides the more rule-like instruction to judges as to how they ought to determine the form of the directive (rule or standard) that their decision establishes going forward? As we'll see, the answer to that question is comparatively clear.

B. Determining the Form of the Directive

Modern pluralism is a considerably more standard-like method than modern textualism when it comes to determining the form of the legal directive that the Court's decision will establish,. After all, even where the text clearly dictates who wins and who loses the case, the pluralist judge remains relatively free to choose the means—the rule or standard—that will most effectively accomplish Congress's broader ends going forward. To be sure, modern pluralism doesn't give the judge unlimited discretion to choose whatever rule or standard she might prefer. Her decision is constrained by a multi-factor balancing test (weighing text, purpose, consequences, etc.), and by the necessity of articulating a directive that's consistent with the outcome of the case at hand. But the form of the directive remains highly discretionary. A judge-made rule might work better than a Congress-made standard for any number of reasons—it more effectively accomplishes Congress's purposes, it makes law more predictable, it increases perceptions of fairness, increases ease of judicial administration, and so on.[95] Modern pluralism permits judges to weigh such considerations in settling on a relatively rule-like or standard-like directive that will govern future cases.

Modern textualism, on the other hand, does not permit judges to second-

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(same); William N. Eskridge et. al., *Textualism's Defining Moment*, 123 Col. L. Rev. 1611, 1664 (2023) (highlighting different, potentially outcome-determinative, ways of operationalizing textualism); Carey Franklin, *Living Textualism,* 2020 Sup. Ct. Rev. 119, 151-52 (2020) (same).

[93] *See* Macleod, *supra* note 92, at 11-12; Fallon, *supra* note 92, at 1270-72; Eskridge, Slocum, & Tobia, *supra* note 92, at 1667; *see also* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 306 (2020).

[94] *See* Merrill, *supra* note 64, at 354-55.

[95] Conversely, a judge-made standard may work better than a Congress-made rule for any number of reasons—it produces more just outcomes according to widely held views of morality, it more effectively accomplishes Congress's purposes, it makes law less easily evaded, and so on.

guess Congress's choice in this way.[96] Under modern textualism, judges have no business choosing how rule-like or standard-like statutory law ought to be.[97] As Judge Easterbrook summarized, "[w]hether to have rules (flaws and all) or more flexible standards (with high costs of administration and erratic application) is a decision already made by legislation."[98] Modern textualism instructs judges to treat "rules as rules and standards as standards,"[99] not to choose, based on a discretionary balancing of multiple factors, whether to substitute one for the other.

IV. THE RULE OF TEXTUALISM AS A LAW OF STANDARDS

So, setting aside the issue of case outcomes, and focusing instead on the form of the directive that judicial decisions establish, we can ask the question at the heart of this Article: What would happen if judges followed the rule-like *method* of modern textualism? This Section sets out to prove the following claim: At least at the Supreme Court level, there'd be a whole lot more standard-like legal *content* than anybody, modern textualist or critic of modern textualism, appears to have realized.

As Part IV.A explains, there are two basic reasons why this is so. The first stems from modern textualism's emphasis on ordinary language and communication. Modern textualism typically produces standards because ordinary language and communication are typically standard-like. The second reason stems from modern textualism's drive to resolve as many cases as possible using only the text's clear communicative content. In the kinds of close cases today's Supreme Court hears, the search for something both case-dispositive and "clearly" communicated by the text would lead to minimalist, fact-bound, standard-like interpretations.

If ordinary communication frequently employs vague, standard-like terms, the statutory provisions that generate divided Supreme Court cases are absolutely riddled with them. As one might imagine, case selection virtually

[96] To be clear, modern textualism differs in this respect from the textualism Scalia advocated in *The Rule of Law as a Law of Rules*. *See* Scalia, *Law of Rules*, *supra* note 5, at 1178.

[97] Manning, *Separation of Powers*, *supra* note 8, at 1973-74 ("Treating a precise text as a placeholder for a more general background purpose or treating a broadly framed text as the placeholder for a more precise rule negates the lawmaker's ability to determine the appropriate level(s) of generality at which to frame diverse provisions of law."); *id.* at 1946 ("An interpreter, in other words, must not invoke background purpose as a way to convert rules into standards or standards into rules"); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2007 (2009) ("[B]ecause legislators choose means as well as ends, an interpreter must respect not only the goals of legislation, but also the specific choices Congress has made about how those goals are to be achieved.").

[98] Fox Valley & Vicinity Const. Workers Pension Fund v. Brown, 897 F.2d 275, 284 (7th Cir. 1990) (Easterbrook, J., dissenting).

[99] Manning, *Leglislative Intent, supra* note 8, at 424.

guarantees this.[100] But one needn't imagine. Part IV.B uses a review of the past three Terms' divided Supreme Court decisions to illustrate and substantiate the basic argument articulated in Part IV.A.

The methodology here is important. Historically, the common approach to highlighting a given phenomenon in statutory interpretation has been to select from a large, perhaps unlimited, set of cases a few examples that most clearly illustrate it, leaving unclear how often the phenomenon occurs. Following the literature's recent empirical turn, Part IV.B adopts a more systematic approach befitting this Article's more systematic claim, which is not merely that that modern textualism would sometimes produce more standard-like legal content than has been acknowledged, but that it would do so across the mine-run of cases in which the Justices part ways. Part IV.B therefore presents a relatively large number of examples from a relatively small set of potential cases.[101] This method has its own drawbacks (chief among them is the limited discussion each case receives),[102] but it affords a more illuminating vantage point from which to assess the Article's central claim.

Of course, in many of the cases in the dataset, Justices who self-identify as modern textualists write opinions establishing relatively rule-like directives. Part IV.C considers the ways that modern textualists deny or purport to justify doing so. It argues that each of these attempts fails, and that modern textualists adhering to their theory ought therefore routinely to articulate more standard-like legal directives than they presently do in practice.

A. Why Modern Textualism Favors Standards: The Basic Argument

As we've seen, modern textualism instructs judges to (1) maintain a laser-like focus on the ordinary public meaning of statutory texts, (2) deciding cases, wherever possible, based exclusively on what the text would have clearly communicated to a reasonable, ordinary reader at the time of its enactment. Under current conditions,[103] both of those features inexorably lead modern

[100] To be sure, in times where more muscular purposivism commonly led judges to contravene clear statutory text, case selection likely led to more appellate cases interpreting relatively rule-like provisions whose clear text would produce an outcome apparently at odds with Congress's policy purposes. On case selection effects generally, see George Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUDIES 1 (1984). On the Supreme Court's selection of cases, see Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 423-41 (2004).

[101] The dataset comprised 74 opinions, which corresponded to all 33 cases issued between July 2020 and July 2023 in which one or more of the Justices' separate opinions expressed disagreement over the meaning of a statutory provision.

[102] All 74 opinions are cited in Part IV.B; approximately half of the cases are discussed in the main body of the text. [[Add Appendix?]]

[103] That is, in a world where the legislature passes a mix of rule-like and standard-like provisions and more muscular forms of purposivism no longer lead the Court to take cases

textualism to produce standard-like legal content.

1. The Pervasiveness of Standards in Ordinary Communication

The first reason is that ordinary meaning is typically vague and standard-like, not precise and rule-like. That is because (a) it frequently contains terms that are explicitly, or literally, vague, and because (b) it sometimes contains terms that, despite being literally precise, turn out in context to be implicitly vague, whereas the converse is rarely true (i.e., literally vague terms are rarely implicitly precise). Let's consider each in turn.

a. Explicit, or Literal, Vagueness

Vague terms permeate ordinary communication, and for good reason.[104] In everyday life they are often useful and easily understood. We say things like, "There's a large crowd here," without having to count the precise number of people present, determine their exact location, and so on, and we're untroubled by our inability to delimit the fuzzy borders of the terms "large," "crowd," and "here." When we hear terms like "game," "vehicle," "unreasonable," and "neglectful," we easily understand them even though we're unable to break these concepts down into rule-like sets of necessary and sufficient conditions.

Of course, the fact that we can intuitively apply vague concepts in easy cases doesn't render those concepts non-vague. Lawyers know all too well that borderline cases and their associated line-drawing problems lay in wait, and that when vague terms appear in statutes, these hard cases will percolate into appellate courts. Still, lawyers' over-familiarity with a few famous legal examples of vagueness (e.g., the concept of a "vehicle," at issue in Hart's ubiquitous "no vehicles in the park" hypothetical[105]) may lead them to underappreciate just how pervasive vagueness is in ordinary communication, beyond the well-worn examples and line-drawing hypotheticals to which they were exposed in law school.

In any event, I take it that the frequency of explicitly vague expressions in ordinary language will, with a bit of reflection, come as no surprise to a legally trained audience. And given the previous discussion of vagueness as the crux of the rules-versus-standards distinction,[106] it's only a small step to recognizing that

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concerning the clear, rule-like provisions. *See supra* note 89.

[104] *See* Nikola Kompa, *The Role of Vagueness and Context Sensitivity in Legal Interpretation*, *in* VAGUENESS AND LAW: PHILOSOPHICAL AND LEGAL PERSPECTIVES 205 (Geert Keil & Ralf Poscher eds., 2016) ("Most (if not all) general terms of natural language are vague"); Marmor, *supra* note 76, at 85 (noting "the ubiquitous vagueness of expressions in a natural language").

[105] *See* H.L.A. Hart, *Positivism and the Separation of Laws and Morals,* 71 HARV. L. REV. 593, 607 (1958); Frederick Schauer, *A Critical Guide to Vehicles in the Park,* 83 N.Y.U. L. Rev. 1109, 1109 (2008).

[106] *See supra* notes 75-81 and accompanying text.

these various vague terms are effectively standard-like. To apply the term "vehicle," we intuitively balance multiple factors (How big? Is it motorized? Does it transport people? Etc.). The same goes for "game," "unreasonable," "neglectful," and so on.[107] Multi-factor balancing tests are pervasive in ordinary conceptual and linguistic understanding.[108] They will therefore be pervasive under any method of interpretation that hems closely to ordinary reader understanding.

b. Implicit, or Non-Literal, Vagueness, and the Implied-Rules/Implied-Standards Asymmetry

Until now, we've been emphasizing terms that are overtly, or explicitly vague (and therefore, in effect, standard-like). That is, we've been talking about terms that are vague "on their face." But that focus understates the pervasiveness of vagueness in everyday communication. And that is because even terms that seem on their face to be non-vague often turn out to be vague once they're understood in context. For example, when I say that two people are "equally" tall, or "equally" reasonable, I don't mean, and won't be taken to mean, that they are *precisely* the same height, down to the nonometer, or that they are *precisely* the same degree of reasonable, however such precision might be measured. Instead, I'm understood to mean that they are approximately "equal," despite the precision of the term "equal" if taken literally. And once we acknowledge that we aren't talking about perfectly precise, literal equality, we are back in the vague, standard-like line-drawing business: In context, how close to literal equality must their heights be in order appropriately to be labelled "equal"? Granted, there are some contexts in which the literal, precise meaning of a given term, e.g., "equal," is the one communicated to reasonable readers. But it is not infrequent that, in ordinary communication, a literally precise, or rule-like, term is used to communicate something implicitly more standard-like.[109]

The important point for present purposes is that in this regard, ordinary communication contains an *asymmetry*: While implied standards are common, implied rules are rare. That is, literally vague terms rarely communicate implicitly non-vague concepts. For example, when I ask whether someone is "tall," I don't communicate through my use of the vague term "tall" a more rule-like concept (say, "six-feet or above"), such that a reasonable ordinary listener would

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[107] For more on the different kinds of vagueness these terms contain, see Weber, *supra* note 79, at 192-93 (describing degree-vagueness, combinatorial vagueness, unidimensional and multidimensional vagueness, soritical vagueness and cluster-vagueness, among others); Marmor, *supra* note 76, at 85-105.

[108] *See, e.g.*, Kevin Tobia, *How People Determine What is Reasonable*, 70 ALA. L. REV. 293, 295-298 (2018).

[109] *Cf. infra* notes _-_ and accompanying text (discussing the Court's interpretation, in Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021), of the VRA's guarantee of "equal[ity]" in voting procedures).

understand that anybody under six feet is clearly not "tall," anyone six feet or above is clearly "tall," and there are no borderline cases. After all, if I had meant to invoke the more precise, rule-like concept, "six feet or above," I would have used those precise, rule-like terms! The example generalizes: It's rarely the case that one's use of a literally vague expression implicitly communicates some precise, rule-like concept.

Now, it's true that, with considerable extratextual context, it's *possible* to communicate a rule-like concept using a literally vague term. Imagine, for example, that an amusement park bans all those six feet and above from going on a particular ride, and my only purpose or intent in asking whether someone is "tall" is to determine whether he is barred from the ride. If I'm aware that you know my purpose in asking, and I believe you will take my purpose into account when interpreting my question, then perhaps in context I have implicitly communicated, using the vague term "tall," the precise concept of "six feet or above."

But even though such cases exist, they tend to require that an interpreter consider a lot of extratextual background information—something modern textualism uniquely discourages.[110] In any event, to return to the main point: Whatever amount of contextual enrichment one deems appropriate, it remains the case that in ordinary communication, implied standards are considerably more prevalent than implied rules. This basic asymmetry further contributes to the pervasiveness of standards in ordinary reader understanding, and therefore in the legal content that modern textualism recognizes.

2. Textualism's Push for Case-Dispositive Clarity in Close Cases

Apart from its emphasis on ordinary public meaning, another important aspect of modern textualism pushes it to favor standards: namely, the pressure it puts on judges to find something in the text that is both "clearly" communicated and case-dispositive, even in seemingly close cases where the text is at least arguably unclear. In such cases, modern pluralism would permit consideration of the statute's underlying purposes, the policy consequences of one or another interpretation, and so forth. Even the textualism of a few decades ago was more open to declaring the text unclear, whether the upshot was a turn to purposive considerations, deference to executive agency's interpretation under *Chevron*, or some other extratextual means of resolving the case.[111] In

[110] More generally, context helps a great deal in determining where the clear applications and borderline cases are, even when it does not eliminate the existence of borderline cases. Knowing that I'm asking whether a given adult, as opposed to a given toddler, is "tall" will help locate the approximate range of easy cases and hard, borderline cases.

[111] *See* Doerfler, *supra* note 65, at 292-93 (describing Manning's resort to purpose, Scalia's initial embrace of Chevron deference, and Easterbrook's non-intervention approach). *See infra* notes 66-70 and accompanying text. To be sure, where a "clear statement rule" arguably applies, textualists in practice may be perfectly willing to find statutory language unclear. *See, e.g.*, West

contrast, modern textualism effectively forces judges back to the text, insisting that they wring from it something that resolves the case at hand and that is clearly enough communicated to foreclose any reliance on extratextual considerations.[112]

The clear communicative content thus wrung from the text in close cases will, almost by definition, tend to be relatively fact-intensive, incrementalist, and narrow in its reach—in short, standard-like. To be sure, the communicative content thus identified must reach far enough to resolve the case at hand one way or another. But it will tend not to be the kind of unnecessarily far-reaching rule which would resolve not only the instant (hard) case, but an additional set of (even harder) cases besides.

As an example, consider a recent case, *Wooden v. United States*.[113] One night, Wooden entered into a storage facility, broke through the walls separating multiple storage units inside, and stole goods from each.[114] Did he thereby commit robbery on one "occasion," or instead on multiple "occasions" (in which case the statute's mandatory minimum sentencing provision was triggered)?[115] Whatever the outcome—i.e., whether you conclude that the burglaries took place on three "occasions" or only one—the surest way to ground the outcome exclusively in the clear communicative content of the text would be to adopt a standard-like holding. So, let's say you think it's a close case, but you ultimately think the burglaries occurred on just one "occasion"; you think the text clearly communicates as much, and you're deciding between two possible directives that reach that result:

(1) Standard: At least where, as here, crimes are the same in kind, take place in rapid succession, occur over the course of no more than a few hours, [etc.], they take place on one "occasion"; or
(2) Rule: All crimes that, as here, were committed on a single calendar date, take place on one "occasion."

The former, standard-like holding is less likely to stray from what the text clearly communicates via its use of the term "occasions." To be sure, the latter, more rule-like interpretation might ultimately be preferable in light of the statute's underlying policy purposes, considerations of administrative efficiency and consistency, and so on.[116] And in easy cases, it may be possible to establish rules that reach far beyond the instant case without straying from the text's core, "clear" communicative import. But the harder the case, the less room there will be for the modern textualist judge to venture further beyond that core

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Virginia v. EPA. On the relation between such clear statement rules and modern textualism, see Eidelson & Stephenson, *supra* note 23.

[112] *See supra* notes 42-46 and accompanying text.

[113] Wooden v. United States, 595 U.S. 360, 366 (2022).

[114] *Id.* at 363.

[115] *Id.*

[116] *See, e.g.*, Brief for the United States at 26, Wooden v. United States, 595 U.S. 360 (2022).

communicative import than is necessary to resolve the parties' dispute.

B. *The Basic Argument Illustrated: Supreme Court Terms 2020-2023*

Appellate litigation brings to the fore the vagueness latent in ordinary communication. Where there are potential borderline cases presenting hypothetical line-drawing problems, there are actual litigants with actual cases calling for the relevant lines to be drawn. So it should come as no surprise that in the cases generating divided Supreme Court opinions, the statutory terms in dispute are typically vague and standard-like. We've just seen one recent example, *Wooden v. United States*.[117] Now we'll see numerous others, all similarly drawn from the past three Supreme Court Terms.[118]

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[117] *See supra* note _ and accompanying text.

[118] As previously noted, the dataset comprised 74 opinions, from 33 cases, all of which are cited in this Part. Here's how these numbers were determined. Beginning with all merits decisions from the three Terms, I excluded cases resulting in unanimous opinions. I then excluded all cases resulting in separate opinions that did not involve inter-Justice conflict concerning a statutory provision. For example, some cases exclusively involved constitutional provisions or federal rules of civil or criminal procedure; others included separate opinions whose only dispute was over whether the case should have been dismissed as improvidently granted. I excluded cases in which the Justices agreed that the statute at issue was itself silent and disagreed only over the default rule applicable absent a statutory provision on point. *See, e.g.*, Coinbase, Inc. v. Bielski, 599 U.S. 736, 740 (2023) ("Section 16(a) does not say whether the district court proceedings must be stayed. But Congress enacted § 16(a) against a clear background principle prescribed by this Court's precedents"); *id.* at 748 (Jackson, J., dissenting) (contending that the majority has "depart[ed] from the traditional approach"); Concepcion v. United States, 597 U.S. 481, 497 n.5 (2023); *id.* at 503 (Kavanaugh, J., dissenting); Axon v. FTC, 598 U.S. 175, 180 (2023); *id.* at 196 (Thomas, J., concurring); *id.* at 204 (Gorsuch, J., concurring). I excluded one case in which the Justices apparently agreed that the statute contained an internal inconsistency and disagreed only over which provision of the statute should trump. Biden v. Texas, 142 S. Ct. 2528, 2542 (2022) (noting the statute's conflicting use of the terms "'*shall*' be detained" and "'*may*' return the alien," and criticizing the dissent's treatment of the latter as effectively trumping the former) (citing *id.* at 2554 (Alito, J., dissenting)); cf. Johnson v. Guzman Chavez, 594 U.S. 523, 549, 533-35 (2021); id. at 553-57 (2021) (Breyer, J., dissenting). Finally, I excluded cases in which the dispute concerned the application of the Court's precedent, rather than a statutory provision. *See, e.g.*, Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, 598 U.S. 771, 790 (2023) (Jackson, J., dissenting) (disagreeing with the majority's application of "*Garman* preemption," established in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)); *id.* at 787-88 (Thomas, J., concurring) (agreeing with the majority's application of *Garmon* but urging reconsideration of *Garmon*). As in any such coding exercise, some cases required judgment calls. Still, many of the excluded cases would have offered fine illustrations of this Article's central claim. *See, e.g.*, Yegiazaryan v. Smagin, 599 U.S. 533, 553 (2023) (Alito, J., dissenting) (dissenting on the ground that the case should have been dismissed as improvidently granted, while faulting the majority for "acknowledge[ing] that a bright-line rule would be preferable here, but essentially shrug[ing]").

1. The Pervasiveness of Standards in the Statutory Provisions that Divide the Court

One common source of vagueness is what I'll call statutory "relationship requirements." At their broadest, the question each of these statutory provisions poses is whether a given thing, *X*, bears some vaguely specified, standard-like relation to another thing, *Y*. For example, a recent blockbuster environmental case, *Sackett v. EPA*,[119] turned on whether the Sacketts' wetlands (*X*) were "*adjacent* to" a particular body of water (*Y*).[120] The term "adjacent" is, as a matter of ordinary language and understanding, vague, imprecise—in short, standard-like. Whether, say, House *X* is "adjacent" to House *Y* depends on how far apart they are (10 feet? 10 miles?), the presence of various types of structures in between them (bushes? streets? other houses?), and so on. The same goes for wetlands and bodies of water.

Here are additional examples of similarly standard-like statutory relationship requirements at the center of divided opinions from the past three Terms.

- "*In relation to…*" (*Dubin*[121]): An aggravated identity theft statute applies only if the defendant "used" patients' means of identification "*in relation to*" certain offenses including healthcare fraud. The defendant doctor submitted fraudulent Medicaid bills for services that hadn't actually been rendered. The bills contained patient I.D. numbers. Did the defendant "use" patients' means of identification "in relation to" healthcare fraud (thereby committing aggravated identity theft), even though he didn't pretend to *be* those patients? More generally: When, and in virtue of what, does one "use" something (*X*) "in relation to" something else (*Y*)?
- "*Relating to…*" (*Pugin*[122]): A statute permits removal of noncitizens convicted of "an offense *relating to* obstruction of justice." The petitioner was convicted of an offense for dissuading a witness from reporting a crime. Did this offense "relate to" obstruction of justice, even though there was no pending or active legal proceeding at the time of its commission? More generally: How close must the relation be between one's offense and obstruction of justice for the former to "relate to" the latter?
- "*Relates to…*" (*Rutledge*[123]): ERISA preempts state laws that "relate[] to" ERISA plans. A state law regulating pharmacy reimbursements effectively increased the cost of ERISA plans. Did the law "relate to" ERISA plans? How close must the relationship be between a state law and an ERISA plan in order for the state law to "relate to" the ERISA plan?

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[119] Sackett v. EPA, 598 U.S. 651 (2023).
[120] *Id.* at 662.
[121] Dubin v. United States, 599 U.S. 110, 116-17 (2023).
[122] Pugin v. Garland, 599 U.S. 600, 607 (2023).
[123] Rutledge v. Pharm. Care Mgmt Ass'n, 592 U.S. 80, 85-86 (2020).

- "*Regarding*…" (*Patel*[124]): A statute provides for discretionary granting of relief in immigration proceedings, but strips federal courts of jurisdiction to review "any judgment *regarding* the granting of relief." An immigration judge's decision mistakenly found that the petitioner was ineligible to be considered for discretionary granting of relief. Did that judgment "*regard*[] the granting of relief"? When does a judgment "regard" a given issue?
- "*On the basis of*…" (*Marietta*[125]): A statute prohibits any medical plan from "differentiat[ing] in the benefits it provides between individuals… *on the basis of*" those individuals' having end stage renal disease. The defendant's medical plan limited benefits for dialysis. Nearly everyone with end stage renal disease, and hardly anyone else, undergoes dialysis.[126] Did the defendant's plan therefore differentiate "on the basis of" patients' having end stage renal disease? When does differentiation "on the basis of" one thing constitute differentiation also "on the basis of" another, highly correlated, thing?
- "*On the ground of*…" (*Students for Fair Admissions*[127]): The Civil Rights Act forbids certain schools from denying admission to applicants "*on the ground of* race." The defendant schools factored applicants' race into their "holistic review process" for admissions. Did they thereby deny admission to some applicants "*on the ground of* race"? How central to or influential in a decision must a given factor be in order for the decision to have been made "on the ground of" that factor?
- "*Pursuant to*…" (*BP PLC*[128]): A statute allows appellate review of orders remanding a case to the state court "from which it was removed *pursuant to* section 1442 or 1443." The defendant had premised removal on multiple grounds, including, but not limited to, sections 1442 and 1443. Had the case been removed "pursuant to" sections 1442 and 1443? When is a decision premised on multiple grounds made "pursuant to" a subset of those grounds?
- "*Secured by*…" (*Talevski*[129]): A federal law conditions federal funding on a state's protection of certain rights of nursing home residents. A state that accepts federal funds violated those rights. The petitioner nursing home resident sued under section 1983, which provides a cause of action for deprivation of "any rights…*secured by*" federal "*laws*." Were the rights at issue, which the petitioner possessed by virtue of the state's acceptance of the federal law's terms, "secured by" the federal law? More generally, when

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[124] Patel v. Garland, 596 U.S. 328, 332-33 (2022).

[125] Marietta Mem'l Hosp. Emp. Health Benefit Plan v. Davita Inc., 596 U.S. 880, 883 (2022).

[126] *Id.* at 889 (Kagan, J., dissenting) ("Ninety-seven percent of people diagnosed with end stage renal disease undergo dialysis…. And hardly anybody else.").

[127] Students for Fair Admission, Inc., v. President and Fellows of Harv. Coll., 600 U.S. 181, 288-89 (2023).

[128] BP P.L.C. v. Mayor and City Council of Baltimore, 141 S. Ct. 1532, 1536 (2021).

[129] Health and Hosp. Corp. of Marion Cnty. v. Talevski, 599 U.S. 166, 171 (2023).

are statutory rights whose existence is contingent on events beyond the mere passage of the statute, "secured by" the statute?

Each of these cases concerned a standard-like expression. To explain in a bit more detail, let's return to the first bulleted case, *Dubin*, concerning the use of another's I.D. "in relation to" healthcare fraud. "In relation to," like the other relational terms discussed above, is vague. There are cases in which it seems clearly to apply (e.g., one clearly "uses" another's I.D. "in relation to" healthcare fraud when one obtains healthcare-related compensation owed to the other person by presenting their I.D. and pretending to be them). And there are cases in which it seems clearly not to apply (e.g., one doesn't "use" another's I.D. "in relation to" healthcare fraud by presenting it to a bartender the day before one wakes up hungover and grumpily decides to commit healthcare fraud). But there are a great many borderline cases (including, perhaps, *Dubin* itself, where patients' I.D. numbers were an indispensable part of the fraudulent scheme, even though Dubin did not himself pretend to be any of the patients). And there is no clear line separating the uses of others' I.D.s that are "in relation to" healthcare fraud, or any other predicate offense, from those that aren't. Instead, and more generally, once we determine the relevant context, we have only an intuitive standard-like set of factors that influence whether we view one thing as happening "in relation to" another.[130] The same goes for each of the vague relationship requirements at issue in the above bulleted cases.

A similar point holds with respect to a host of additional statutory provisions at issue in divided cases from the past three Terms. Some contain nouns with fuzzy borders. We've seen one such example already: *Wooden*'s interpretation of the term "occasions."[131] Here's another. In *Niz-Chavez*, the Court interpreted the statutory phrase, "*a notice to appear*."[132] Before the government can hold a removal hearing, an immigration law requires that it serve "a notice to appear" listing the charges and the time and place of his hearing.[133] The government served Niz-Chavez one document with the charges, then, two months later, a separate document with the time and place of his hearing.[134] Did the government serve "a notice to appear" containing all the required information?[135] More generally, when do communications comprise "*a*" single "notice"? As a matter of ordinary language and concepts, the answer is: it depends on a standard-like balancing of multiple factors. (Was the information written on a single sheet of paper? If multiple, were they delivered in separate envelopes? At separate times? How

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[130] *See* Dubin, 599 U.S. at 137-38 (Gorsuch, J. concurring); *supra* note 110 (noting the role of context in identifying the range of borderline cases).

[131] Wooden v. United States, 595 U.S. 360, 369 (2022).

[132] Niz-Chavez v. Garland, 593 U.S. 155, 158 (2021).

[133] *Id.* at 159.

[134] *Id.*

[135] *Compare id.* at 171, *with* id. at 176-81 (Kavanaugh, J., dissenting).

much time elapsed between the deliveries? Etc.).

Or consider *Hollyfrontier*, interpreting the term "extension."[136] A law initially exempted small refineries from certain requirements. It also authorized them to apply for "extensions" of that initial exemption. Some small refineries let the initial exemption lapse.[137] Were they still eligible to apply for "*extensions*" of it?[138] More generally, under what circumstances may a lapsed time-period (whether a homework deadline or a regulatory exemption) be "extended"?[139] Perhaps after thirty years of non-exempt operation, it would make little sense to describe a new period of exemption as an "extension" of the old one.[140] But what if a refinery instead applies for an extension one day after the original one lapsed?[141] And so the line-drawing problems, and the standard-like factors that influence their resolution, emerge—in *Hollyfrontier*, in *Niz-Chavez*, and in various other divided cases concerning similarly vague nouns.[142]

Other times, the Court's divided statutory interpretation decisions concern vague adjectives and adverbs.[143] Under what circumstances, for example, is a

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[136] HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n, 594 U.S. 382, 388, 141 S. Ct. 2172, 2176, 210 L. Ed. 2d 547 (2021).

[137] *Id.* at 387-88.

[138] *Id.* at 390-96 (yes); *id.* at 400-12 (Barrett, J., dissenting) (no).

[139] *Id.* at 403–04 (Barrett, J., dissenting) (answering "no," arguing that "continuity is inherent in the way that people usually use the word 'extension,'" drawing on examples of a former guest at a hotel who returns "three years later" and would not ask to "extend" her earlier stay, a newspaper subscriber who would not ask to "extend" their subscription "long after it expired," and so on).

[140] *Id.* at 404 (Barrett, J., dissenting) (positing such a 30-year lapse and contending that "[i]t defies ordinary usage to deem the second exemption 'an extension' of the first," but that doing so "follows logically from [the majority's] reading of the term 'extension,'…which shows just how far this interpretation strays from the term's ordinary meaning.").

[141] *Id.* (Barrett, J., dissenting) (noting the refineries' contention at oral argument that Barrett's 30-year lapse example is "'extreme' and 'very unlikely'").

[142] *See, e.g.*, Percoco v. United States, 598 U.S. 319, 322 (2023) (Does X constitute "honest services fraud"?); Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 1942–43 (2021) (Does X constitute a "tort" under the Alien Tort Statute?).

[143] *See, e.g.*, Jones v. Hendrix, 599 U.S. 465, 470 (2023); George v. McDonough, 596 U.S. 740, 742; Google LLC v. Oracle Am., Inc., 593 U.S. 1, 19 (2021) ("fair use" of copyrighted work); Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 559 (2023) (Kagan, J., dissenting) (accusing the majority of creating an unwarranted rule concerning "the purpose and character of the use" for "fair use" analysis); Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382, 395 (2023) ("To find petitioners' construction plausible, we would have to interpret 'other foreign or domestic government' to impose a rigid division between foreign governments on the one hand and domestic governments on the other, leaving out any governmental entity that may have both foreign and domestic characteristics (like tribes or the IMF)," whereas in reality "the terms 'foreign' and 'domestic' are two poles on a spectrum"); id. at 402-03 (arguing that petitioners' interpretation is plausible); Alabama v. Milligan, 599 U.S. 1, _ (2023) ("The relevant section provides that '[t]he terms "vote" or "voting" shall include all action necessary to make a vote effective," and "the manner of proceeding in the act of voting entails determining in which districts voters will vote"); id. at _ (Thomas, J., dissenting) (arguing that the VRA's definition of "'[v]ote' and

given remedy "*inadequate or ineffective*"?[144] When is an error "*clear and unmistakable*"?[145] As with the cases discussed already, it would strain credulity to claim that through these explicitly vague terms, Congress communicated directives that are implicitly rule-like, so that the Justices' task is simply to find the bright-line rules that these vague phrases communicate *sub silencio*. If there are to be bright-line rules for the Justices to apply, the Justices will have to make them, not find them in the text Congress enacted.[146]

To be sure, one could try to support a rule-like interpretation of at least some subset of these disputed statutory terms by construing them literally. For example, one could interpret the term "*unmistakable* error" literally to be an impossibility, since in all appellate cases concerning errors, at least the actor who erred mistook his error for non-error.[147] The resulting directive, aimed at "unmistakable error," is very rule-like: there are no fuzzy borders, it simply applies to nothing. Or, returning to *Dubin*, one could contend that a defendant's fraudulent use of another's I.D. necessarily "relates to" his healthcare fraud, no matter how distant the two events may seem; construed literally, after all, Dubin's acts throughout his life bear at least the following "relationship" to each other: they are acts of Dubin.[148] The resulting (ridiculously literalistic) interpretation is once again rule-like: The statute clearly applies whenever the same person has committed both identity fraud and healthcare fraud, no matter how trivial the "relationship" between the two events. But modern textualism does not advocate literalism, it advocates interpreting language the way a reasonable ordinary reader would understand it in context. And often enough, terms that might appear rule-like when construed literally, without context may turn out in context to be more standard-like than meets the eye.

None of this is to say that a literal, rule-like interpretation is always incorrect as a matter of ordinary public meaning.[149] Consider *Brnovich v. DNC*,[150] a recent case concerning the Voting Rights Act's (VRA) requirement that voting processes be "equally" open to minority and non-minority voters.[151] As it happened, nobody on the *Brnovich* Court defended a literal interpretation of the VRA's voting "equal[ity]" guarantee.[152] Justice Kagan, writing in dissent,

'voting'…plainly focuses on ballot access and counting," and does not reach districting).

[144] Jones v. Hendrix, 599 U.S. 465, 470 (2023).

[145] George v. McDonough, 596 U.S. 740, 742**.**

[146] *See supra* note _ and accompanying text (discussing the rarity of implied rules in ordinary communication).

[147] *Cf.* George v. McDonough, 596 U.S. at 740.

[148] *Cf.* Dubin v. United States, 599 U.S. 110, 119 (2023).

[149] *Cf.* Kevin Tobia, Daniel E. Walters, Brian Slocum, *Major Questions, Common Sense?* S. CAL. L. REV. (forthcoming 2024) (critiquing Justice Barrett's claim that the Court's recent "major questions doctrine" decisions simply recognize the non-literal ordinary meaning of statutory terms in context).

[150] Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021).

[151] *Id.* at 2338.

[152] *Id.* at 2339.

"agree[d] with the majority that 'very small differences' among racial groups do not matter…. [T]here may be some threshold of what is sometimes called 'practical significance'—a level of inequality that, even if statistically meaningful, is just too trivial for the legal system to care about."[153] In addition, Kagan construed the statute as containing an implicit exception for voting practices "necessary to support a strong state interest."[154] Perhaps neither the majority nor the dissent tracked the statute's ordinary public meaning in this regard. Perhaps the better reading, in context, really was the more literal one.

Still, for present purposes the point is simply that in context, some literally rule-like directives are at least arguably implicitly standard-like. And importantly, harkening back to the "implied-rules/implied-standards asymmetry" in ordinary communication discussed in Part IV.A.1.b, the converse is rarely true: literally standard-like directives are hardly ever implicitly rule-like.[155] This asymmetry further contributes to the tendency of ordinary public meaning-based interpretation to produce standards rather than rules.[156]

2. Sticking With What the Text Clearly Communicates

Each of the above cases also illustrates the second prong of this Section's basic argument: If one seeks to resolve these cases without relying on anything beyond the text's "clear" communicative content, one will be drawn to relatively narrow, fact-intensive, standard-like interpretations, rather than broader-sweeping rule-like ones. To illustrate, it will help to look at a few of the cases

[153] *Id.* at 2358 (Kagan, J., dissenting); see also *Id.* at 706-09 (Kagan, J., dissenting).

[154] *Id.* at 2356 (stating that voting practices "necessary to support a strong state interest" need not conform to a literal "equality" requirement). [aka 706-09 (Kagan, J., dissenting).

[155] If you ask to see two people of "very similar" height, nobody will understand the vague, standard-like term "very similar" implicitly to convey some more precise rule, e.g., "0.5 inches apart or less," such that those whose heights are 0.4 inches apart are clearly "very similar" in height while those 0.6 inches apart clearly aren't. Rule-like precision is rarely *implied*.

[156] For a less contentious example than *Brnovich*, see Ohio Adjutant General's Dep't v. Fed. Labor Relations Authority, 598 U.S. 449, 452 (2023) (Thomas, J.) (holding that a statutory provision applicable to federal "agencies" also applies to those who "act as a federal 'agency'" under certain circumstances); id. at 462 (Alito, J., dissenting) (arguing that "[b]ecause petitioners are not *actually* federal agencies, a proposition that the Court does not dispute," the statute does not apply to them). For more contentious examples, see, e.g., Biden v. Missouri, 595 U.S. 87, (2022) (Thomas, J., dissenting) (arguing that the statutory authority of the Secretary of Health and Human Services to "promulgate regulations 'as may be necessary to the efficient administration of'" Medicare and Medicaid, and/or to promulgate regulations "necessary in the interest of the health and safety of individuals who are furnished services" at certain medical institutions, did not reach the Secretary's promulgation of COVID vaccination requirements, briefly referencing the major questions doctrine as mere "confirm[ation]"); Alabama Assoc. of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021) (holding that a literally broad statutory grant of regulatory authority was implicitly and unambiguously limited by the narrower list of activities preceding the provision in question, though noting that "[e]ven if the text were ambiguous," the major questions doctrine would require the same result).

discussed above and contrast, for each, the narrower standard-like directive that modern textualism would favor, with the broader, more rule-like one that the Justices instead created.

Start with *Sackett*. Every member of the Court agreed on the outcome: The Sacketts' wetlands aren't "adjacent to" navigable waters and therefore aren't within the CWA's scope.[157] In short, the Sacketts win.[158] The Justices differed only over the rule or standard that should apply going forward.[159] The majority opinion effectively shunted the standard-like term "adjacent" aside.[160] Under the more rule-like test that the majority imposed, "the CWA extends to only those wetlands with a continuous surface connection to" navigable waters, "so that they are indistinguishable from those waters."[161] In other words, wetlands that are merely "adjacent" to—that is, near or close to—navigable waters, but that do not adjoin them, are no longer covered by the CWA.[162]

Now perhaps imposition of this rule was ultimately justified in light of concerns that the alternative tests' "open-ended factors" would "giv[e] too little notice to landowners," as the majority emphasized.[163] Still, if one were to look for something that was both clearly communicated by the text and was case-dispositive, one needn't have created this broad-sweeping rule which resolves not only the Sacketts' case but a whole host of closer cases besides (cases in which, for example, only a tiny, porous, temporary, man-made barrier separates the wetlands from navigable waters).[164] It strains credulity to insist, as the majority did, that the statutory text "clearly" communicates such a rule when four Justices believe that it doesn't even do so *un*clearly.[165] Setting forth a broader rule-like directive risks error, and does so unnecessarily, since one could instead resolve the case on the grounds that wetlands are not "adjacent" to navigable waters *at least* where, as here, they fail to meet even the more standard-

[157] Sackett v. EPA, 598 U.S. 651, 683-84 (2023) (Alito, J., joined by Roberts, Thomas, Gorsuch, and Barrett); *id.* at 684-85, (Thomas, J., concurring, joined by Gorsuch); *id.* at 710 (Kagan, J., concurring, joined by Sotomayor and Jackson); *id.* at 715-16 (Kavanaugh, J., concurring, joined by Sotomayor, Kagan, and Jackson).

[158] *Id.* at 684.

[159] *Sackett* seemed not to strike the Justices as a case where "vague contents of the relevant laws neither determinately apply nor determinately fail to apply to the facts of [the] case," thereby "*requir[ing]* judges to *precisify* legal provisions in order to reach [a] determinate decision[]." *See* Scott Soames, *Originalism and Legitimacy*, 18 GEO. J.L. & PUB. POL'Y 241, 249 (2020) (first emphasis added, second in original) (emphasis added).

[160] *See* Sackett, 598 U.S. at 710 (Kavanaugh, J., concurring); *id.* at 725-26 (Kagan, J., concurring).

[161] *Id.* at 678.

[162] Each concurrence accused Justice Alito's majority opinion of "rewriting" the statute by "disregard[ing] the ordinary meaning of 'adjacent.'" *Id.* at 710, 725-26.

[163] *Id.* at 681.

[164] *But see id.* at 685 (Thomas, J., concurring) ("pick[ing] up where the Court leaves off" to propose a yet broader rule-like directive that would resolve additional cases).

[165] *See id.* at 720-25 (Kavanaugh, J., concurring); 725-26 (Kagan, J., concurring).

like interpretation that four members of the Court take the statute to communicate.[166] The point was not lost on the concurring Justices, who sternly criticized the majority for unnecessarily departing from the clear communicative content of the statutory text—not for reaching the wrong outcome, but for replacing the standard Congress enacted with a judge-made rule.[167]

In another high-profile case, *Brnovich*, the Court's conservative majority showed a similar proclivity for judicial rule-creation.[168] All of the Justices, liberals included, agreed that the VRA's guarantee of "equally open" voting processes could not be taken literally[169] Consequently, the Court would have to be in the business of drawing lines. The dissenting opinion, in arguing that the particular voting laws at issue ran afoul of the VRA's "equality" guarantee, did not purport to establish a bright-line rule that would resolve even closer cases than the one at bar.[170] In contrast, the majority opinion went beyond the kind of fact-intensive, standard-like analysis necessary to support his conclusions, instead creating rules whose hard edges were difficult to discern in the statutory text.[171] To quote the dissent:

> Start with the majority's first idea: a 'mere inconvenience' exception to Section 2. Voting, the majority says, imposes a set of 'usual burdens': Some time, some travel, some rule compliance. And all of that is beneath the notice of Section 2—even if those burdens fall highly unequally on members of different races. But that categorical exclusion, for seemingly small (or 'usual' or '[un]serious') burdens, is nowhere in the provision's text."[172]

The *Brnovich* majority could plausibly have hemmed closer to the statute's clear communicative content without having to reach a different case outcome, but it instead elected to add more rule-like legal content than necessary.[173]

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[166] *See id.*

[167] *Id.* at 712-13, 722-23. And in place of the executive agency-made implementation rule.

[168] *Brnovich*, 594 U.S. at 669-72. Both *Sackett* and *Brnovich* are given special attention because they are relatively well-known cases from the dataset. Both also featured majority opinions by Justice Alito and dissenting opinions by Justice Kagan. But to be clear, Justice Alito is far from unique in writing opinions that substitute judge-made rules for statutory standards. *See, e.g.*, *infra* note 178. And all of the Justices routinely join such opinions, only rarely writing separate concurrences advocating more standard-like holdings.

[169] *See supra* note _ and accompanying text.

[170] *See id.* at 726-29 (Kagan, J., dissenting).

[171] *See id.* at 669. Interestingly, Justice Scalia in *The Rule of Law as a Law of Rules* highlighted the VRA's "totality of the circumstances" test as the rare provision in which Congress explicitly forbid the Court from adopting rules that would categorically exclude potentially relevant circumstances. Scalia, *Law of Rules*, *supra* note 5, at 1183.

[172] *Id.* at 711 (Kagan, J., dissenting).

[173] Granted, in *Brnovich*, unlike in *Sackett*, the Justices actually disagreed as to the case outcome, making adoption of a relatively minimalist, standard-like holding in some ways less obvious (in both cases, doing so would have led to a less far-reaching majority opinion, but in *Brnovich* it would not even have led to consensus).

As another example, consider the Justices' dispute in *Niz-Chavez* over the phrase, "a notice to appear."[174] The majority held that the statute's "ordinary meaning" was "clear" and relatively rule-like: Multiple documents could never constitute "a" single notice.[175] The dissent called the majority's single-document rule "atextual": in "ordinary parlance," two pieces of paper arriving "on the same day but in different envelopes" could comprise "a notice," yet the majority's rule pretends otherwise.[176] Regardless of whether, on the facts of this case, the separate documents delivered two months apart constituted "a notice" containing all of the required information—i.e., regardless of whether the majority or the dissent reached the correct outcome in the case at hand—the majority crafted a rule that would avoid much of the standard-like vagueness in the statutory text, and that would do so by reaching further than necessary, since a more minimalist, albeit more standard-like, interpretation would have left unresolved the kinds of closer cases hypothesized by the dissent.[177]

There are many more examples in the past three Terms alone.[178] But the point isn't to exhaustively catalogue each Justice's infidelity to modern textualism's dictates. It's instead to see, by way of contrast with what the Court typically does, how frequently modern textualism would, if followed, lead to the adoption of relatively fact-intensive, incremental, standard-like legal directives. And the answer is: very often. At least in the kinds of close cases that have divided the Justices over the past three Terms, the pressure modern textualism places on judges to resolve cases based only on the text's clear communicative import virtually guarantees it.

C. Textualists' Responses

It's rare for the Justices to confine themselves to the relatively low-power role of standard-appliers in discreet cases. There is far greater power to be had in rule-creation.[179] And for better or worse—a question taken up in Section V, below—the Justices hardly shy away from exercising it.[180] The Court's self-

[174] Niz-Chavez v. Garland, 593 U.S. 155 (2021)

[175] *Id.* at 171 (Gorsuch, J.).

[176] *Id.* at 178, 183 (Kavanaugh, J., dissenting).

[177] *See id.*

[178] *Compare* Nestle USA, Inc. v. Doe, 141 S. Ct. 1931 (2021) (Thomas, J., in Part III, joined by Gorsuch and Kavanaugh) (arguing that the term "tort," in the Alien Tort Statute's (ATS), does not extend to any torts other than the three specific torts which the Court has previously recognized as giving rise to an ATS claim), and *id.* at 643-46 (Gorsuch, J., concurring, in Part II, joined by Kavanaugh) (same), *with id.* at 1947 (Sotomayor, J., concurring) (arguing that Thomas, Gorsuch, and Kavanaugh's restriction is inconsistent with the ATS's use of the term "tort"); *compare* Marietta Mem'l Hosp. Emp. Health Benefit Plan v. Davita Inc., 596 U.S. 880, 886 (2022) (Kavanaugh, J.), *with id.* at 889-90 (Kagan, J., dissenting); *see also, e.g.*, Google LLC v. Oracle Am., Inc., 593 U.S. 1, 49 (2021) (Thomas, J., dissenting).

[179] *See* Table 1, *infra* Part V.A.

[180] *See supra* Part V.

avowed textualists are no exception. If anything, they appear more willing than their less textualist colleagues to replace Congress-made standards with Justice-made rules.[181] Perhaps this is unsurprising given the conventional wisdom that judges who self-identify as textualists tend to prefer rules.[182] But if this Article's main claim is correct—if the rule of modern textualism would tend to produce standards—then self-avowed textualists must either deny or justify their own practices of judicial rule-creation. This Part considers both strategies and argues that they ultimately fail.[183]

1. Denial

a. Meaning-Splitting

One common strategy for avoiding the appearance of judicial rule-creation is to treat vagueness as if it's ambiguity. Recall that ambiguity forces the interpreter to select between two or more distinct "meanings" of a given term. Does the directive, "Bring me a bunch of chairs," refer to "chairs" in the *furniture* sense or instead in the *head-of-an-academic-department* sense? The directive only refers to one or the other type of chair; the judge merely clarifies which one.[184] Modern textualism is entirely compatible with ambiguity resolution.[185] The trick, then—the way to avoid the appearance of rule-creation in cases concerning vague, standard-like terms—is to speak as if in ordinary language the vague terms have multiple distinct, naturally occurring "meanings," and that the directive the decision establishes is the product of clarifying which one of these discreet meanings the statute uses.[186]

In *Sackett*, for example, the majority contended that "[d]ictionaries tell us that the term 'adjacent' may mean *either* 'contiguous' *or* 'near.'" … [A]nd here, only one meaning [viz. "contiguous"] makes sense in the context of the

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[181] *See, e.g.*, *supra* Part IV.B.2.

[182] *See, e.g.*, Nelson, *supra* note 10, at 398; Sunstein, *supra* note _, at 4; Dorf, *supra* note 14, at 20 n.4.

[183] I don't mean to imply that these are conscious strategies of misdirection; I suspect Justices employing them are often acting in good faith.

[184] Put differently: "Chairs" are not on a continuum from furniture to department heads. Differentiating between the two poses no line-drawing problem, nor does it require any standard-like balancing of factors. Instead, with ambiguities, one simply consults context to determine which discreet "meaning" the directive invoked.

[185] The judge who clarifies that the "chairs" directive refers to furniture, rather than department heads, is not adding to, subtracting from, or otherwise distorting the directive.

[186] To be sure, while it's often clear whether two possible interpretations depend on disambiguation or instead the kind of line-drawing associated with vagueness, "the distinction" is "not stable, in the sense that what appears to be a distinct meaning in one context is reduced to a mere case of vagueness in another." Dirk Geeraerts, *Vagueness's Puzzles, Polysemy's Vagaries, in* WORDS AND OTHER WONDERS: PAPERS ON LEXICAL AND SEMANTIC TOPICS 99, 100-101(2006) (originally published 1993).

statute."[187] By finding a dictionary that "splits" adjacency into these two discreet "meanings," rather than "lumping" the two together, as most dictionaries (and common understanding) do, the majority can present its rule—that wetlands must be contiguous with navigable waters in order to be "adjacent" to them—as simply a context-based clarification of which of the two discreet "meanings" of "adjacent" Congress invoked.[188] This way the majority avoids the "serious vagueness concerns" to which adjacency-as-nearness would give rise, and does so merely by resolving a purported ambiguity.[189] The problem is that, in ordinary parlance, there are not these two separate "meanings" of "adjacent"; there are merely various degrees of closeness, and a line-drawing problem concerning how close something must be in order to be adjacent.[190] As is so often the case, the splitting of "adjacent" into two different "meanings" is not a reflection of some stark cleavage in ordinary usage, but instead an artificial division that serves to justify judicial rule-creation under the guise of disambiguation.[191]

Of course, the Court sometimes resists the move. In *Wooden*, the

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[187] Sackett v. EPA, 598 U.S. 651, 676 (2023) (emphasis added).

[188] On "splitting" versus "lumping" in dictionary entry creation—a decision driven on the margins by the publisher's needs, rather than any clear and consistent principles—see THIERRY FONTENELLE, PRACTICAL LEXICOGRAPHY: A READER 125-60 (2008); *see also* SCALIA & GARNER, *supra* note 4, at 70 (noting uncritically that the word "*run* was once calculated as having more than 800 meanings.").

[189] *Sackett*, 598 U.S. atat 680-81 (2023) (calling the "significant nexus test" urged by the EPA "hopelessly indeterminant," since "the boundary between a 'significant' and an insignificant nexus is far from clear," leaving property owners "to feel their way on a case-by-case basis.").

[190] That is a simplification. See text accompanying note _, *supra*; *cf. id.* at 712 (Kagan, concurring) (endorsing a test that turns in part on the nature of the structure, if any, separating the two bodies of water); *id.* at 726 (Kavanaugh, concurring) (same).

[191] That said, some cases in the dataset do contain disagreements among the Justices over which of two discrete "meanings" a statute employs. *See, e.g.*, United States v. Hansen, 599 U.S. 762, 774 (2023) (rejecting the dissent's contention that the statutory terms "encourages" and "induces" should be construed "in their ordinary rather than their … specialized, criminal-law sense"); *id.* at 792 (Jackson, J., dissenting); *see also* Garland v. Aleman Gonzalez, 596 U.S. 543, 549 (2022) (contending that the statute's reference to the "operation of" certain other statutory provisions referred to at least some enforcement efforts that were not in fact authorized by those other statutory provisions); *id.* at 559 (Sotomayor, J., concurring in part and dissenting in part) (contending that the "operation of" a statutory provision could never include enforcement efforts that were not in fact authorized by the statutory provision); Borden v. United States, 593 U.S. 420, 430–31 (2021) (plurality) (portraying the dissent as adopting a dictionary definition of the statutory term "against" according to which it means "in contact with," rather than "in opposition to"); *id.* at 465-66 (Kavanaugh, J., dissenting) (disputing the plurality's equation of "against" with "in opposition to," though not explicitly adopting the "in contact with" definition); Bittner v. United States, 598 U.S. 85, 93-94 (2023) (holding that the Bank Secrecy Act's $10,000 penalty per "violation" of a requirement that one file certain reports regarding bank accounts accrued on a per-report, not per-account, basis); *id.* at 104-05 (Barrett, J., dissenting) (contending that it should accrue on a per-account, not per-report, basis); Turkiye Halk Bankasi A.S. v. United States, 598 U.S. 264, 276 (2023) (holding that the FSIA applies only in civil proceedings); 283-84 (2023) (Gorsuch, J., concurring in part and dissenting in part) (arguing that the FSIA applies to civil and criminal proceedings).

government's briefing argued unsuccessfully that there are two distinct meanings of "occasion" from which the Court must select: one vague meaning according to which non-simultaneous events may constitute a single "occasion" (e.g., 'the wedding,' comprised of a ceremony followed by a reception, 'was a lovely occasion'), and another non-vague meaning according to which only simultaneous events may take place on a single "occasion."[192] According to the government, only the latter, rule-like meaning made sense in the context of the statute.[193] While this led the parties to spar over which of the various dictionary definitions articulated the relevant "meaning,"[194] the Court didn't buy into this framing. Instead, faced with a transparently vague term, Justice Kagan's majority opinion explained that the government's exclusive focus on precise simultaneity lacked grounding in ordinary usage.[195] Rather than pretending to resolve an ambiguity, the Court thus acknowledged the vague, standard-like nature of the statutory term at issue. Perhaps the resulting "multi-factor test provides too 'little guidance,'"[196] but, as Justice Kagan quipped, "we did not choose the test; Congress did."[197] Precisely.[198]

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[192] Brief for the United States at 27-28, Wooden v. United States, 595 U.S. 360 (2022).

[193] *Id.* at 21.

[194] *E.g.*, Brief for the United States at 26-30, Wooden v. United States, 595 U.S. 360 (2022).

[195] Wooden v. United States, 595 U.S. 360, 366 (2022).

[196] *Id.* at 371 n.4 (quoting id. at 385 (Gorsuch, J., concurring); *see also id.* at 371-72 (articulating a multi-factor balancing test that turns on the physical and temporal proximity of the events at issue, among other possible factors). *But see id.* at 385 (Gorsuch, J., concurring) (arguing that the Court should apply the rule of lenity, and contending that, while "[t]he Court's multi-factor balancing test may represent an earnest attempt to bring some shape to future litigation under the Occasions Clause[,] it is still very much a judicial gloss on the statute's terms—and one that is unnecessary to resolve the case at hand."); *id.* at 383 (Barrett, J., concurring) (criticizing the majority's holding that in close cases courts should consider Congress's purpose, gleaned from legislative history, in passing the "occasions" clause).

[197] *Id.* at 371 n.4.

[198] A similar sentiment gets expressed on occasion in various Justices' opinions, albeit inconsistently. Most notably, Justice Gorsuch has made similar points in cases concerning punitive statutes, concluding that they implicate the rule of lenity or are void for vagueness. *See, e.g.*, *id.* at 389-92 (Gorsuch, J., concurring); Dubin v. United States, 599 U.S. 110, 138-39 (2023) (Gorsuch, J., concurring) (arguing that the statute's "in relation to" requirement renders it "not just an 'ambiguous' statute," in which "the relevant terms could carry only a few possible (and comparatively fixed) meanings," but "a vague statute—one that 'does not satisfactorily define the proscribed conduct' at all," and that the majority's attempts to craft a more rule-like directive were inappropriate because such vagueness is "a problem Congress alone can fix.") (quoting J. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENVER U. L. REV. 241, 260-61 (2002)); Percoco v. United States, 598 U.S. 319, 337 (2023) (Gorsuch, J., concurring) ("Congress cannot give the Judiciary uncut marble with instructions to chip away all that does not resemble David…. [The Court] should decline further invitations to invent rather than interpret this law."); *see also* Ysleta Del Sur Pueblo v. Texas, 596 U.S. 685, 706 (2022) (dismissing concerns about a civil regulatory statute setting forth an "unworkable" standard as "irrelevant. It is not our place to question whether Congress adopted the wisest or most workable policy, only to discern and apply the policy it did adopt…. We do not doubt that the [statute's] prohibitory/regulatory distinction can and will generate borderline cases…. But if

b. Legal Meaning to the Rescue?

The argument for this Article's basic descriptive claim relies on the notion that "ordinary public meaning" is often standard-like. But modern textualism allows that the relevant meaning for purposes of interpreting at least *some* statutory provisions is not their ordinary meaning, but instead their "technical," "legal" meaning.[199] If legal meaning is typically less standard-like than ordinary meaning, then in at least some cases modern textualism might be less prone to producing standard-like legal content than this Article's argument would suggest.

In response, it's worth noting as a preliminary matter that in the divided Supreme Court cases comprising this paper's dataset, there are relatively few cases in which one or more Justices explicitly claim that the statutory provision employs a term's legal, as distinct from its ordinary, meaning.[200] And in those cases, other Justices often disagree, insisting that ordinary meaning governs.[201] The "legal meaning" response therefore may not be available in very many of the divided cases comprising the dataset, although precisely how many is a matter of debate.[202] Additionally, when a provision's "legal meaning" *is* at issue,

applying the Act's terms poses challenges, that hardly makes it unique among federal statutes."); Torres v. Madrid**,** 592 U.S. 306, 346 (2021) (Gorsuch, J., dissenting).

[199] *See, e.g.*, SCALIA & GARNER, *supra* note 4, at 69 (stating the "Ordinary-Meaning Canon": "Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense.").

[200] *See, e.g.*, Borden v. United States, 593 U.S. 420, 434 (2021) ("[T]he dissent claims to find a 'term of art' in the clause—implicitly admitting that the language, as ordinarily understood, excludes reckless conduct. See *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 92, n. 5 (1991) (noting that terms of art '*depart* from ordinary meaning')"; United States v. Hansen, 599 U.S. 762, 774 (2023); George v. McDonough 596 U.S. 740, 746, 754,760 (2022); Minerva Surgical, Inc. v. Hologic, Inc., 594 U.S. 559, 583-84 (2021); *see also* Patel v. Garland, 596 U.S. 328, 353(2022) (Gorsuch, J., dissenting) (discussing the statutory phrase, '"regarding the granting of relief,"' and noting that, while the phrase "grant relief" has a "well-understood meaning" under prior Supreme Court case law, the term "regarding" doesn't).

[201] *See, e.g.*, United States v. Hansen, 599 U.S. 762, 774 (2023) (rejecting the dissent's contention that the statutory terms "encourages" and "induces" should be construed "in their ordinary rather than their … specialized, criminal-law sense"); *id.* at 792 (Jackson, J., dissenting); George v. McDonough 596 U.S. 740, 746, 754,760 (2022) (construing the statutory term "clear and unmistakable error" as a legal term of art); *id.* at 754 (Sotomayor, J., dissenting) (same); *id.* at 760-61 (Gorsuch, J., dissenting) (contending that the phrase should be given its ordinary, non-technical meaning).

[202] *See supra* note 201; Ysleta Del Sur Pueblo v. Texas, 596 U.S. 685, 708, 717–18 (2022) (Roberts, J., dissenting) (contending that the majority construed the statutory term "prohibited" as "a term of art," thus adopting an "interpretation [] at odds with the statute's plain meaning," despite the majority's purported reliance on ordinary meaning). *See also* Tobia, Slocum, Nourse, *Ordinary Meaning and Ordinary People*, PENN L. REV. 381-85 (2023) (providing examples of the Justices' slippage between ordinary and technical meaning and concluding that, "[d]espite the theoretical separation between ordinary and technical meaning, the Court's actual interpretive

that meaning is often closely related to ordinary meaning, so that (typically standard-like) ordinary meaning continues to exert some influence—although just how much influence is again often a subject of disagreement.[203]

Still, even assuming that legal meaning is wholly distinct from ordinary meaning, there remains a problem for rule-craving modern textualists: At least in recent divided Supreme Court cases, the legal meaning at issue often turns out not to be meaningfully more rule-like than ordinary meaning.[204] In *Rutledge*, for example, Justice Thomas notes that in prior cases the Court has crafted its own "test" for whether a state statute "relates to" ERISA and is therefore preempted.[205] Perhaps this "test"—whose creation in earlier cases was based on the Court's explicit determination that "'relate to' is so 'indeterminate' that it cannot 'give us much help drawing the line'"—constitutes a "technical, legal" meaning of "relates to," at least in the context of the ERISA statute.[206] Still, Thomas complains that the Court-created "test" remains "vague" enough to "offer[] 'no more help than' the 'relate to' one" found in the statute's text, despite "recent efforts" to render this arguable technical-legal meaning "more precise."[207] Similarly, in *Ysleta v. Texas*, Justice Roberts claims that the ordinary meaning of the relevant statutory terms ("regulate" and "prohibit") is *less* vague than their "term-of-art" meaning.[208] In *Percoco*, Justice Gorsuch contends that the technical, legal-sounding phrase "honest-services fraud" remains highly

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practices are more muddled").

[203] *See, e.g.*, Students for Fair Admission, Inc., v. President and Fellows of Harv. Coll., 600 U.S. 181, 289 (2023) (Gorsuch, J., concurring) (highlighting the well-established legal meaning of the statutory phrase, "because of," which became well-established through a line of cases relying on Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013)—a case in which it was adopted explicitly on the ground that it constituted the "ordinary" meaning of the phrase); Sackett v. Env't Prot. Agency, 598 U.S. 651, 672 (2023) ("This reading also helps to align the meaning of 'the waters of the United States' with the term it is defining: 'navigable waters.' (quoting *Bond v. United States*, 572 U.S. 844, 861 (2014) ("In settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition"))); Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 668 (2021).

[204] In *George v. McDonough*, for example, setting aside Justice Gorsuch's contention that the statutory phrase, "clear and unmistakable error" should be given its ordinary meaning, 596 U.S. at 758-59, Justice Sotomayor disagreed with the majority about the application of the phrase's "term of art" meaning. *See id.* at 749-50, 754 (Sotomayor, dissenting); *see also* Anuj Desai, *Text is Not Enough*, 93 U. COLO. L. REV. 1, 20 (2022) (highlighting the underdeterminacy of the "but-for" causation test articulated in Justice Gorsuch's *Bostock* and *Students for Fair Admissions* opinions, in which Justice Gorsuch makes clear his belief that the test, as a technical legal gloss on the statutory phrase "because of" can only be applied in one, fully outcome-determinative, way).

[205] Rutledge v. Pharm. Care Mgmt Ass'n, 592 U.S. 80, 95-96 (2020) (Thomas, concurring).

[206] Nobody suggests that this particular "meaning" (or, "test"), which explicitly mentions ERISA, is applicable to any of the other relational phrases cited above, including those that use phrases very similar to "relates to." *See supra* notes _-_ and accompanying text.

[207] Rutledge*,* 592 U.S. at 95-96 (Thomas, concurring).

[208] Ysleta Del Sur Pueblo v. Texas, 596 U.S. 685, 708, 18-22 (2022)..

vague despite its origins as an arguable term of art, and despite decades of common-law style judicial decisions attempting to render the phrase more precise.[209] And as the Court's decisions in *Google v. Oracle* and *Andy Warhol Foundation v. Goldsmith* illustrate, all agree that the Copyright Act's "fair use" test—an open-ended, multi-factor balancing test with common-law origins—remains very standard-like even if its terms have taken on a technical legal meaning through a substantial body of common-law-style precedent.[210]

None of this is to say that statutory terms with standard-like ordinary meanings never have rule-like legal meanings. Indeed, if judges can simply create these rule-like "legal" meanings through decisions purporting to interpret standard-like terms, then many seemingly standard-like statutory phrases might, through a one-shot big bang of judicial rule-creation, come to bear a rule-like "legal" meaning. But even allowing such bootstrapping, the resulting rule-like terms, having acquired a clear, rule-like "meaning," appear rarely to be the subject of divided Supreme Court cases. Congress provides a steady enough supply of standard-like provisions to keep the Supreme Court's docket well-stocked.

2. Justification

a. Congress's Implicit Preference for Judge-Made Rules?

Perhaps there remains an alternative route for those seeking to square judicial rule-creation with modern textualism. This one comes from Scalia's playbook. In *The Rule of Law as a Law of Rules*, Scalia claimed that a Justice's "reduction of vague congressional commands into rules that are less than a perfect fit is *not a frustration of legislative intent because that is what courts have traditionally done, and what Congress anticipates when it legislates*."[211] In this way, one might seek to embrace and justify judicial rulecreation as consistent with, or perhaps even required by, modern textualism.

But that strategy fails for multiple reasons. First, if that kind of historical bootstrapping works as a justification, then it justifies all manner of historically rooted *non*textualist practices.[212] It may be true that Congress expects courts to continue behaving as they have in the past. But modern textualism would

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[209] Percoco v. United States, 598 U.S. 319, 334, 337 (2023) (Gorsuch, concurring).

[210] *See* Google LLC v. Oracle Am., Inc., 593 U.S. 1, 19, 49-50, 57 (2021); *id.* 59 n.12 (Thomas, dissenting) (accusing the majority of creating an unwarranted rule, despite the majority's denial that it had done so); Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023); id. at 559 (Kagan, J., dissenting) (same); Shyamkrishna Balganesh, *Debunking Blackstonian Copyright*, 118 YALE L.J. 1126, 1167 (2008) (describing the Copyright Act as a "common law statute").

[211] Scalia, *Law of Rules*, *supra* note 5, at 1183.

[212] *See generally* Eidelson & Stephenson, *supra* note 23, at 546-57 (questioning modern textualists' ability to justify substantive canons based on historical practice).

collapse if it therefore required judges to be nontextualists when interpreting statutes passed during predominantly nontextualist times.[213] If courts have read purpose-based exceptions into clear statutory language (as they have[214]), or consulted legislative history (as they have[215]), then does modern textualism require judges to continue doing so, on the theory that the enacting Congress would have expected as much? For modern textualism to maintain coherence, the answer must be no.[216]

A second major flaw in the proposed justification is that it posits some knowable congressional intent beyond that which is expressed in the text. Sure, Scalia argued in *The Rule of Law as a Law of Rules*, Congress didn't *say* that the Court should turn its standards into rules. But Congress *intended* for the Court to do so.[217] But for modern textualists, such recourse to unexpressed congressional intent won't do.[218] As now-Justice Barrett has written, "the foundation of modern textualism is its insistence that congressional intent is unknowable."[219]

Third, even if we were to allow that Congress has a knowable intent, there's little evidence that Congress's intent—with respect to all standard-like language generally, or with respect to the particular statutory provisions at issue in recent divided cases—was not for the Supreme Court to apply the standards Congress enacted, but instead for the Supreme Court to convert them into Justice-made rules.[220] Congress knows how to explicitly delegate rulemaking authority; it often does so to executive agencies by, for example, enacting statutory provisions that expressly grant an agency authority to engage in rulemaking.[221] Yet such express

[213] *Cf.* Manning, *Legislative Intent, supra* note 8, at 435 n.53 ("Professor Nelson provocatively suggests that if textualists merely read texts according to prevailing social and linguistic conventions, then they should in fact be purposivists, since purposivism had long represented the prevailing mode of statutory interpretation when textualism came onto the scene.") (citing Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451, 455–57 (2005)).

[214] *See e.g.*, Holy Trinity Church v. United States, 12 S. Ct. 511, 512-13 (1892).

[215] *See e.g.,* Zadvydas v. Davis, 533 U.S. 678, 696-98 (2001).

[216] *See* Manning, *Legislative Intent, supra* note 8, at 435 n.53 (summarizing normative foundations of modern textualism akin to those discussed in Part I.A., *supra*, then concluding, "If one accepts that analytical framework, textualists appropriately rejected purposivism on normative grounds, even if purposivism did constitute a previously established mode of interpretation.").

[217] *See* Scalia, *Law of Rules*, *supra* note 5, at 1183.

[218] *See, e.g.*, Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988) (noting disparagingly that "[i]t is always possible to turn a rule into a vague standard by looking at intent.").

[219] *See, e.g.*, Amy C. Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 123-124 (2010).

[220] *See* Margaret H. Lemos, *Interpretive Methodology and Delegations to Courts: Are "Common-Law Statutes" Different?,* in INTELLECTUAL PROPERTY AND THE COMMON LAW, 89 (Shyam Balganesh ed. 2013).

[221] *See* United States v. Mead Corp., 533 U.S. 218, 229-31 (2001); Lemos, *supra* note 220, at 94; *accord* Loper Bright Enter.'s v. Raimondo, 144 S. Ct. 2244, 2263 (2024).

grants of rulemaking authority to the Court, while not unheard of, are quite rare.[222] Furthermore, even when Congress does not *explicitly* delegate rulemaking authority to executive agencies, there may be compelling reasons to think that a rational Congress would have intended implicitly to do so—considerations of agency expertise, political responsiveness, and so on.[223] But these reasons are, at the very least, less clearly applicable to the Supreme Court.[224] Again, why infer from congressional silence an intent to encourage judicial rulemaking?[225]

Fourth and finally, the proposal that Congress has implicitly delegated rulemaking authority to courts sits uneasily with modern textualism's vision of the separation of powers, in which the judiciary is supposed to play only a minimal role.[226] To the greatest extent possible, modern textualism instructs judges to be umpires, not rulemakers.[227] The separation-of-powers concerns animating the modern Court's skepticism of congressional delegation to agencies—delegation that is oftentimes more explicit and more justified[228]—counsels at least as much skepticism of judicial rulemaking.

b. Supreme Court Rule-Creation as Managerial Standard-Application

One final potential justification for modern textualist rule-creation goes as follows. Perhaps appellate courts should create whatever form of directive—rule or standard—will lead lower courts to arrive at those case outcomes that most closely track the outcomes that an ideal interpreter, applying the standard-

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222 Lemos, *supra* note 220, at 94 ("Explicit delegations of substantive lawmaking power to courts are rare.") (citing a single arguable example and noting that explicit empowerment of courts to create procedural law is more common, even if still rare).

223 *See* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 445 (2008) (citing "agency expertise, accountability, accessibility, and flexibility"); Lemos, *supra* note 222, at 471.

224 *See id.* at 445.

225 For a skeptical account of judges' power to administer "common law statutes," see Tyler B. Lindley, *Interpretive Lawmaking,* 111 VA. L. REV. (forthcoming 2025) (manuscript at i.) (on file at SSRN). For a skeptical account of the ability to demarcate "common law statutes" from others, see Lemos, *supra* note 220, at 90. *See also* Herbert Hovenkamp, *The Antitrust Text,* 99 IND. L. J. 1063, 1063 (questioning the treatment of the Sherman Act as authorizing judicial lawmaking); Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 135 YALE L.J. 175, 222-25 (2021) (arguing that the phrase "restraint of trade" had more substantive content at the time of the Sherman Act's enactment than has been appreciated by those treating it as an invitation to judicial law-making); Alabama v. Milligan, 599 U.S. 1, _ (2023) (Kavanaugh, J., concurring) (contending that VRA §2 is not a "common law statute"); id. at _ (Thomas, J., dissenting) (contending that if VRA §2 applies to districting, then it must be a "common law statute").

226 *See* Part 1.A. and accompanying text; Lindley, *supra* note 225; *Loper Bright*, 144 S. Ct. at 2281 (Gorsuch, J., concurring); *id.* at 2274 (Thomas, J. concurring).

227 *See* United States v. Rahimi, 144 S.Ct. 1889, 1912 (2024) (Kavanaugh, concurring). .

228 *See supra* note 221.

like language Congress enacted, would reach.[229] And perhaps appellate rule creation, at least at the Supreme Court level, best accomplishes this goal. In other words, somewhat counterintuitively, maybe the surest way to generate lower-court outcomes that track statutes' standard-like terms is for appellate courts to provide lower courts a more rule-like *proxy* for those statutory terms, rather than leaving them to more directly apply the statute's actual terms.[230]

This proposed justification is coherent and might work in some hypothetical court system, but there's little reason to believe that it rests on an accurate picture of the courts we actually have. As an initial matter, for the justification to work, lower courts must be failing to accurately apply the standard-like statutory terms Congress enacts. Maybe they're unable to do so, given the complexity of the task, or maybe they're unwilling to do so, given the temptation to reach their preferred outcomes. Let's grant this for the sake of argument. Still—and far less plausibly—the proposed justification only works if Supreme Court Justices are able and willing to perform a much more fraught task: formulating rule-like proxies that will tend to produce outcomes that track Congress's standard-like terms better than direct application of those standard-like terms would. If lower courts' task in applying standards is difficult and bias-prone, the Supreme Court's task in crafting such rules is even more so. Why entrust the Supreme Court with this far more difficult, discretionary, and consequential determination?[231] Before modern textualism can avail itself of this proposed justification, there would need to be reason to believe that the Justices' highly discretionary work of rule-creation actually leads to less distortion of Congress's standards than would the lower courts' application of those standards themselves.[232]

V. REASSESSING THE INTERPRETIVE LANDSCAPE AS IT STANDS

[229] *Cf.* Krishnakumar, *supra* note _, at 191 ("[T]extualists seem to view the Court as more of a monitor, or supervisor, of the lower courts and the legal system as a whole than do purposivists.").

[230] Or, more precisely, the statute's terms, in context, supplemented by whatever precedential decisions have applied the statute.

[231] *Cf. Loper Bright*, 144 S. Ct. at 2267 ("[T]here is little value in imposing a uniform interpretation of a statute if that interpretation is wrong. We see no reason to presume that Congress prefers uniformity for uniformity's sake over the correct interpretation of the laws it enacts.").

[232] Additionally, one might question whether that determination is or should be the Court's to make, rather than Congress's. As Fred Schauer explains, "the relative effectiveness of rules or standards depends upon whether one is more concerned with reducing the risk of under- and over-inclusiveness, or the risk of decisionmaker incompetence or bias." FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE, 149-55 (1991). By adopting a standard instead of a rule, Congress has arguably made clear which was their greater concern. It's not clear that the Court has any business second-guessing that value-laden judgment.

We're now well-positioned to see what the statutory interpretation literature's decades-long focus on text versus purpose has led us to overlook. The most useful cases for illustrating the traditional textualism-purposivism divide involve clear, rule-like statutory provisions that produce outcomes at odds with the statute's apparent purpose.[233] But at least under current conditions, such cases turn out to be relatively rare. As we've seen, far more common are cases concerning standard-like statutory provisions. And in these cases we find the Court's textualist and pluralist Justices alike converting those standard-like provisions into more rule-like directives—albeit in quite different ways.

As Part V.A explains, this conversion of standards into rules is an important exercise of power—even more so than the conversion of rules into standards, the main sin of which textualists have long accused their rivals. Given the frequency of Supreme Court rule-creation, and the substantial exercise of power it entails, we ought to scrutinize the way these different theories lead judges to do it—both as a way to understand the practical differences between current textualist and nontextualist practice as a descriptive matter, and to evaluate those differences normatively.

So, what are these differences? As Part V.B argues, when modern textualists create rules, they aspire to do so from a position of willful ignorance unlike what we demand from other rulemaking institutions. This marks a significant distinction between modern textualists-in-practice and their more pluralist colleagues. Modern pluralist rule-creation openly incorporates the kinds of concerns that could desirably bridge the gap between standard-like text and rule-like legal directive. Modern textualism leaves us guessing how and why that gap was bridged; worse, it produces arbitrary and unpredictable rules. Modern textualism was not made for rulemaking, and it shows.

A. The Rulemaker's Power

As we've noted, determining the outcome of individual statutory cases is, at the Supreme Court level, often far less consequential than determining the rule or standard that will govern cases going forward. And as the following Table explains, when it comes to making that determination, the greatest opportunity to exercise power arises in cases where one can replace a standard-like provision with a rule-like directive of one's own making.

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[233] *See, e.g.*, SCALIA & GARNER, *supra* note 4 (discussing *Holy Trinity*).

TABLE 1: DEGREE OF POWER EXERCISED BY SUPREME COURT JUSTICES IN CHOOSING FORM OF LEGAL DIRECTIVE

Judicial Move	**Rule-Application**	**Standard-Application**	**Standard-Creation**	**Rule-Creation**
Description	Statute establishes a rule, judge applies it.	Statute establishes a standard, judge applies it.	Statute establishes a rule, judge creates a standard.	Statute establishes a standard, judge creates rule.
Amount of Power Exercised	**LOW**	**MEDIUM** Court exercises discretion in hard cases to the extent the statute requires, but Court leaves other actors (lower courts, agencies, jurors, etc.) to do likewise.	**MEDIUM/HIGH** Court may reach otherwise unreachable outcome in the case at hand, but Court leaves other actors to exercise discretion in hard cases to the extent the judicially created standard requires.	**HIGH** Court may reach otherwise unreachable outcome in the case at hand, and Court exercises *ex ante* the discretion that other actors would otherwise have exercised in hard cases.

We'll move in the Table from left to right, beginning with the "Rule-Application" column. Nobody disputes that rule-application is a relatively low-power act. But what about the next column, "Standard-Application"? Could a Supreme Court Justice, contrary to what the Table says, actually exercise less power, and more restraint, by converting the legislature's standards into rules (i.e., going to the far-right, "Rule-Creation," column), than by simply applying those statutory standards?

Justice Scalia apparently thought so. In *The Rules of Law as a Law of Rules*, Scalia contended that a Supreme Court Justice's mere application of a standard-like provision, "'making' as little law as possible to decide the case at hand,"

shows less "judicial restraint" than "adopt[ing] a general rule."[234] The reason? "Only by announcing rules do we hedge ourselves in."[235] Judicial rule-creation renders the rule-creating judge "unable to indulge" their preference for this or that outcome when the next case involving the same standard-like provision comes along.[236]

But Scalia's apologia for Justice-made rules is effectively rebutted by realities he acknowledges a page earlier in the same essay. As Scalia notes, the Supreme Court hears astonishingly few cases.[237] A Justice's conversion of a statutory standard into a Justice-made rule effectively exercises the power that would otherwise be left to others. Those others include other Justices (both present and future), lower court judges (who, together, hear approximately 10,000 times more cases per year than the Supreme Court[238]), executive agencies, and jurors.[239] Whatever power a Supreme Court Justice's rule-creation might effectively foreclose himself from exercising in a later case, it pales in comparison to the power he exercises in the initial act of creating the binding rule that everyone else must henceforth follow. Compared to the act of applying a statutory standard, the Supreme Court Justice's act of rule-creation is anything but an exercise of restraint.

Finally, what about the act of converting a statutory rule into a judge-made standard—the main sin of which textualists have historically accused purposivists—located in the Table's column second from the right? When this happens, it may indeed represent a significant exercise of power. Still, lower courts, among other actors, possess greater discretion in applying a standard than they would a rule. By establishing a standard-like directive for lower courts to apply, an appellate court dictates the outcome of fewer cases than it does in a case where it converts a standard into a rule.[240] In any event, as noted at the

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[234] Scalia, *Law of Rules*, *supra* note 5, at 1179.

[235] *Id.* at 1180.

[236] *Id.*

[237] *Id.* at 1178-79. It also decides which ones to take.

[238] *Id.* at 1178-79 (citing statistics); *see also id.* at 1179 ("[W]hen we decide a case on the basis of what we have come to call the 'totality of the circumstances' test, it is not *we* who will be 'closing in on the law' in the foreseeable future.").

[239] *See, e.g.*, Erlinger v. United States, 2024 WL 3074427, at *8 (U.S. June 21, 2024) (holding that the determination whether the defendant's prior crimes took place on multiple "occasions" under the ACCA is a question for the jury to determine in light of the facts and the multi-factor balancing test articulated in *Wooden*); Lawrence Solan, *Jurors as Statutory Interpreters*, 78 CHI. KENT L. REV. 1281, 1281 (2003).

[240] It's not clear *a priori* which move will tend to produce more "substantive distortion" of the statutory text. *Cf.* Scalia, *Law of Rules*, *supra* note 5, at 1178 (noting the inevitable "substantive distortion" that judicial rule-creation introduces relative to the statutory text). If conversion of a statutory rule into a judge-made standard happens via a small carveout to a rule that's otherwise left intact, then the substantive distortion might be relatively minimal. Likewise, if conversion of a statutory standard into a judge-made rule ends up closely tracking the contours of the standard, then the substantive distortion might be relatively minimal. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557, 586 (1992).

beginning of this Part, on today's Supreme Court, conversion of a rule into a standard occurs less frequently than one might have expected, even if it was more common in earlier eras of stronger purposivism.[241] The Court's self-described "textualists" and their more openly pluralist colleagues rarely flout clear, rule-like statutory language. Under current circumstances, the far more frequent exercise of power—indeed, the one that is so common as to largely escape our notice—is also the biggest one: the conversion of statutory standards into judge-made rules. The way this power is exercised, and the rules that result, deserve scrutiny; they mark a consequential and underexamined difference between the two main approaches to statutory interpretation as practiced in the Court's closest cases.

B. Willfully Ignorant Rule-Creation

So, if the conversion of legislative standards into judge-made rules is an especially consequential move, how do these theories differ in the way they do it? When textualists purport to derive a rule from the ordinary public meaning of standard-like language, their rule-creation is less constrained by the kinds of purposive and pragmatic considerations that guide modern pluralist judicial rule-creation. That's important. Modern textualists aspire to make rules in a uniquely information-poor way. They exercise significant power while seeking to remain willfully blind as to the sorts of things we typically want rulemaking institutions to consider. For example, we typically want legislatures—our primary source of legal rules—to make rules that pursue valuable policy purposes, reach desirable outcomes, prevent easy evasion by the regulated, and so on. And even when executive agencies make rules, we expect them to do so using their own expertise, in pursuit of the policy purposes the statute seeks to further, in a manner that prevents easy evasion by the regulated, and so on.[242] Once we see that some person or body is making rules, we see the desirability of their taking various practical considerations into account. Yet when textualist judges make rules, they aspire to do so willfully ignorant of the ramifications. And this aspect of modern textualist decisionmaking sometimes appears to influence the content of the rules that modern textualists end up creating.[243]

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[241] One prominent exception may be the conservative majority's recent "major questions doctrine" decisions, in which the Court's self-proclaimed textualists have crafted overtly pluralist exceptions to otherwise rule-like statutory language. *See, e.g.*, West Virginia v. EPA, 597 U.S. 697 (2022); Biden v. Nebraska, 143 S.Ct. 2355 (2023). *But see id.* at 509 (Barrett, J., concurring) (contending that these decisions can be justified on grounds of ordinary public meaning).

[242] *See* Lemos, *supra* note 223, at 445-48.

[243] The dataset is replete with examples of modern textualists disavowing practical considerations while creating a more rule-like legal directive than the statute's more standard-like terms dictate. Perhaps the clearest examples involve textualists purporting to ignore the possibility that the rule-like directive they adopt would facilitate evasion and gamesmanship, undermining the statute's ability to address the mischief it aimed to address. *See, e.g.*, BP P.L.C.

The willfully ignorant nature of modern textualist rule-creation may comfort some, including perhaps those who are especially suspicious of judicial discretion. But it strikes me as cold comfort. After all, *something* must be bridging the gap between the input of standard-like statutory language and the output of rule-like legal directives. I'm unsure which is the more charitable interpretation of what's filling the gap. Motivated reasoning? Random chance? The kinds of pluralist considerations that other methods consult openly? Regardless, the main point is this: Rulemakers do not exercise less power when they exercise it from a position of ignorance, even if their subjective experience is one of being "constrained." In short, a willfully ignorant exercise of power is no less consequential. And given the likelihood that it will produce a rule that's either arbitrary and unpredictable or else premised on unstated considerations, it is no less, and potentially a great deal more, dangerous than a more informed and/or forthright exercise of that same power would be.[244]

VI. EVALUATING "STANDARD" TEXTUALISM

The previous Section sought to highlight and evaluate an underappreciated difference between modern textualism-in-practice and modern pluralism, namely, the way each approach makes rules. This Section turns to evaluating modern textualism-in-theory—i.e., the more theoretically pure form of modern textualism that would refuse to convert standards into rules. It argues that even though textualists have historically favored rule-like law, many textualists may find modern textualism-in-theory—what I'll call "standard textualism"—more desirable than it appears at first blush. In particular, standard textualism turns

v. Mayor & City Council of Baltimore, 141 S. Ct. 1532, 1542 (2021) (Gorsuch, J.) ("[T]he City…warns that our interpretation will invite gamesmanship," but "this Court's task is to discern and apply the law's plain meaning as faithfully as we can, not 'to assess the consequences of each approach and adopt the one that produces the least mischief."); *id.* at 1544 (Sotomayor, J., dissenting) (rejecting the majority's rule-like holding on purposive, anti-gamesmanship grounds); Marietta Mem'l Hosp. Emp. Health Benefit Plan v. Davita Inc., 596 U.S. 880, 885 n.1 (2022) (Kagan, J., dissenting); *compare also* Sackett v. Env't Prot. Agency, 598 U.S. 651, 726–27 (2023) (Kavanaugh, concurring), *and id.* at 712 (Kagan, J., concurring) (favoring the same test as Kavanaugh, and noting that ecological importance can help determine the scope of the admittedly standard-like test), *with id.* at 683 (Alito, J.) (purporting to deduce the majority's rule using dictionary definitions and symbolic logic and emphasizing that "the CWA does not define the EPA's jurisdiction based on ecological importance"). *But see id.* at 681 (Alito, J.) (emphasizing the practical desirability of clear notice to property owners).

[244] Furthermore, it may in effect create a sort of penalty default for Congress. Molot, *supra* note 18, at 53 ("Aggressive textualism does not just elevate judges to the status of partners, as aggressive purposivism did. It goes one step further by turning them into uncooperative, rather than cooperative, partners."). If so, that strikes me as undesirable. *See* Einer Elhague, *Preference-Estimating Statutory Default Rules*, 102 Colum. L. Rev. 2027, 2030 (2002) (arguing in favor of the opposite approach to default rules). Still, others may find it attractive on libertarian grounds. *See, e.g.*, GORSUCH, *supra* note 42; *see also* Scalia, *Law of Rules*, *supra* note 5, at 1176 (criticizing on democratic grounds legislative enactment of standard-like laws).

out to further the very same rule-of-law and democratic accountability values that led textualists like Scalia to extoll rule-like law.[245] Moreover, standard textualism may be surprisingly appealing not only to traditional textualists, but also to modern Supreme Court reformers, despite currently prevailing associations of the former with the political right and the latter with the political left.

A. Rule-of-Law Values and Democratic Accountability

Textualists have long assumed that their rule-like method would tend to produce rule-like legal content, and in many cases have extolled rule-like legal content itself, typically contending that rule-like law promotes "rule-of-law values" like fair notice and democratic accountability.[246] This Article has argued that at least in the kinds of Supreme Court statutory interpretation cases that divide the current Court, modern textualism's commitment to sticking with the ordinary public meaning of Congress's enacted text is largely incompatible with a law of rules.[247] Alternatives to modern textualism, meanwhile, remain compatible with the kind of judicial rule-creation that could produce more rule-like legal content.[248] Does this mean that modern textualism must cede to rival methods its position, so central to textualists' self-image, as uniquely promotive of rule-of-law values like fair notice and democratic accountability?[249]

Not necessarily. Here's the pitch, written in a thoroughly modern textualist register, beginning with rule-of-law values. The key is to see that the statute itself should be the focal point for purposes of fair notice, predictability, non-arbitrary enforcement, and so on, not judge-made law. From the moment the statute is passed, modern textualism ensures that citizens can to the greatest extent possible ascertain the statute's content. In contrast, a regime that routinely replaces that content with judge-made rules renders statutory law more like Nero's edicts, "'post[ed] high up on the pillars, so that they could not easily be read.'"[250] The regulated become unable to rely on the statute itself prior to its conversion into a judge-made rules. Moreover, the resulting judge-made rule inevitably leads to arbitrary and surprising enforcement relative to the standard-like statute it purports to interpret. Indeed, that arbitrariness is a hallmark of rule-based decisionmaking.[251] Of course, applications of the rule may appear less

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[245] *See supra* note _ and accompanying text.

[246] *See, e.g.*, Scalia, *Law of Rules*, *supra* note 5, at 1176, 1179; Kavanaugh, *supra* note 14, at 1910; Clarence Thomas, *Judging,* 45 U. KAN. L. REV. 1, 7 (1996).

[247] *See* Section IV.A., *supra.*

[248] *See* I.B., *supra.*

[249] Or that modern textualists should continue their practice of rule creation despite its lack of theoretical foundation, placing weight on the importance of rule-like law, independent of its coherence with their more fundamental first principles?

[250] Barrett, *supra* note 8, at 2209 (quoting Scalia, *supra* note 2).

[251] *See* Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*,

arbitrary down the road, after the rule has been established. But that's only if we sweep under the rug the initial big bang of arbitrary discretion that the Justices exercised in creating the rule.[252]

In the end, judicial rule-creation (and, by extension, judicial rule-*application*, whenever it departs from the statutory standard from which it purportedly sprang), entails at least as much arbitrary and unpredictable exercise of power as does the case-by-case application of legislature-made standards. Judicial rule-creation only furthers fair notice, predictability, and non-arbitrary enforcement if we look not to the statute itself, nor even to the statute plus any case-based applications of it, but to the announcement of some more rule-like directive in a particular judicial decision. For those looking to the statute, it will be a rude surprise when enforcement comes by way of implementation of a rule that reaches a different outcome than the statutory standard would have dictated.

Standard textualism may also facilitate democratic accountability. To hold a given set of Congresspeople accountable for the statutory language they enact or fail to enact, voters must be able to evaluate statutes prior to their ruleification in some eventual Supreme Court decision.[253] Standard textualism gives voters more of this ability than does a method that licenses judicial rule-creation. Granted, to the extent Congress continues to pass standard-like legislation, it will often be difficult to predict how those standards will be applied down the road. And the judiciary's refusal to proactively create rules may lead to disarray, with different jurisdictions applying the same standard-like terms in different ways as each muddles through the difficult borderline cases that inevitably appear. But when this happens—and, for democratic accountability purposes, when, at the time of the statute's passage, we can predict that this will happen—the fault will lie more squarely with Congress.[254]

In this respect, standard textualism resonates with some textualists' goal of incentivizing careful statutory drafting.[255] Textualists have traditionally highlighted this feature of textualism in the context of judicial refusal to "correct" rule-like statutory provisions by crafting standard-like exceptions in cases where the text's plain, rule-like meaning would reach a bad outcome.[256] But the same logic applies to standard textualism's refusal to create rules even where the regulated might prefer it to the disarray of standard-based law. Standard textualists can incentivize careful drafting by refusing to "correct" Congress's choice of standard-like language, even where the benefits of rule-like law—greater uniformity, predictability, appearance of equal treatment, and so

1990 SUP. CT. REV. 231, 236 (1990).

[252] *Cf.* Sullivan, *supra* note **Error! Bookmark not defined.**, at 57 ("Rules, *once formulated*, a fford decisionmakers less discretion than do standards.") (emphasis added).

[253] *See* James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957, 980 (2021).

[254] *Id.* at 980 n.128.

[255] *See supra* notes 60, 76 and accompanying text.

[256] *See, e.g.*, Manning, *Absurdity Doctrine*, *supra* note _, at 2439.

on—might seem desirable going forward. If there should be a rule, modern textualism insists that Congress, or an agency to which it clearly delegated rulemaking authority, be the one to make it or else suffer the consequences by way of political accountability.[257]

B. Supreme Court Reform and "Progressive Textualism"

That, anyway, was the pitch, written in a register harmonious with modern textualist rhetoric. But now here's a pitch written in a rhetoric that, as a contingent matter, carries a different ideological valence: modern Supreme Court reform.[258] Recent Court reform efforts have taken many forms, and it risks oversimplification to paint their various disparate proposals—from term limits to jurisdiction-stripping and so on—with too broad a brush.[259] Still, they are all, generally speaking, a response to one core perceived problem: an unaccountable nine-member body exercising too much power.[260] And if followed, standard textualism would reallocate that power, leaving more of it to Congress,[261] executive agencies,[262] lower courts,[263] and jurors.[264] Perhaps, then, those pushing for Supreme Court reform (typically associated with the political left) ought to embrace standard textualism (despite textualism's historical association with the political right).[265]

On that note, however, a word of caution: There are practical reasons why structural reforms, more so than mere appeals to theories of interpretation, are likely to remain necessary for reformers hoping to achieve widescale change in the real world. Unilateral disarmament is a sure way of losing power, and would-be "standard" textualists know that. If any given Justice refuses to ruleify standard-like statutory provisions, other Justices can simply fill the resulting void with their own preferred rules. It's hard to imagine individual Justices

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[257] *See, e.g.*, Percoco v. United States, 598 U.S. 319, 337 (2023) (Gorsuch, J., concurring) ("Congress cannot give the Judiciary uncut marble with instructions to chip away all that does not resemble David…. [The Court] should decline further invitations to invent rather than interpret this law.").

[258] *See* Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021).

[259] *See Confusion and Clarity in the Case for Supreme Court Reform*, HARV. L. REV. 1634, 1634 (2024) ("Different people want different changes for different reasons.").

[260] *See* Doerfler & Moyn, *Democratizing the Supreme Court, supra* note 33, at 1721-27.

[261] *See, e.g.*, *supra* notes _-_ and accompanying text (explaining that Congress would remain able to explicitly delegate rulemaking authority); note 171 (comparing the *Brnovich* Court's rule-creation in the VRA Section 2(b) context with Scalia's use of the VRA Section 2(b)'s "totality of the circumstances" language as an example of explicit instruction from Congress not to engage in rule-creation).

[262] *See supra* note 111 and accompanying text.

[263] *See supra* note 240 and accompanying text. Because federal circuit courts have more frequent turnover than the U.S. Supreme Court, they are less likely to have long periods of thoroughgoing ideological misalignment with the public.

[264] *See supra* note 239 and accompanying text.

[265] *See, e.g.*, Doerfler, *supra note* 33; *cf.* sources cited *supra* note 35.

consistently ceding such power to their colleagues, and even harder to imagine the entire Court acting collectively to consistently cede it to other actors. Still, from the perspective of many modern Supreme Court reformers, even a small shift on the margins in the direction of standard textualism would be desirable relative to the status quo.

The same might be true for progressive legal scholars interested in statutory interpretation theory, some of whom, highlighting the potential for methodological realignment on today's Court and in the legal academy,[266] have begun articulating visions for a new "progressive textualism."[267] To date, despite the shared label, these proposals reflect a variety of goals. Some focus on achieving substantively progressive outcomes generally[268] or in discrete areas of law,[269] while others propose more systematic methodological reorientation.[270] It's too early to say whether the notion of "progressive textualism" will prove influential. But this Article's account of standard textualism holds promise as a new, alternative vision of progressive textualism—one with deep roots in traditional textualist theory and with consequences that align with the goals of many modern progressive Supreme Court reformers.[271]

CONCLUSION

A lot has changed since the 1980's and 90's, when Scalia, Easterbrook, and Manning laid the groundwork for the textualist revolution. Over the decades, by demanding ever stricter fidelity to ordinary public meaning, modern textualism has sought to work itself pure as a rule-like, discretion-minimizing method of interpretation. The irony is that in doing so, it has become uniquely committed to producing standard-like legal content. Far from exorcising the specter of standards, then, today's textualists have effectively invited it in, though neither they nor their critics appear to have noticed. Once they do notice, neither modern textualists nor their critics need despair at the prospect of a law of

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[266] *See, e.g.*, Kevin Tobia, *We're Not All Textualists Now*, 78 N.Y.U. ANN. SURV. AMER. L. 1 (2023); Doerfler, supra note 11; ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 80-87 (2022) (arguing against textualism in statutory interpretation and in favor of a substantively conservative form of nontextualism).

[267] *See, e.g.*, Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Progressive Textualism*, 110 GEO. L. J. 1437, 1455-58 (2022).

[268] *E.g.*, Eliot T. Tracz, *Words and Their Meanings: The Role of Textualism in the Progressive Toolbox*, 45 SETON HALL LEGIS. J. 355, 378 (2021).

[269] *E.g.*, Katie Eyer, *Symposium: Progressive Textualism and LGBTQ Rights*, SCOTUSBLOG (June 16, 2020, 10:23 AM), https://www.scotusblog.com/2020/06/symposium-progressive-textualism-and-lgbtq- rights/ [https://perma.cc/RR9Y-HG5T].

[270] *E.g.*, Slocum, Tobia, & Nourse, *supra* note 256, at 1455-58 (advocating a "methodologically progressive" form of textualism); (advocating the use of textualism to achieve substantively progressive results); *see also* Frederick Schauer, *Unoriginal Textualism*, 90 GEO. WASH. L. REV. 825 (2022).

[271] [Cite new Richard Re draft, Legal Realignment].

standards. Under current conditions, the rule of standard textualism may turn out to be an interpretive regime on which a surprisingly large set of disparate interests converge.