The Cost of the Text

Richard A. Primus
University of Michigan Law School, rprimus@umich.edu

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Christopher Serkin and Nelson Tebbe's *Is the Constitution Special?*4 explores many facets of constitutional interpretation. I will focus here on their observation that constitutional interpretation is "less textual" than statutory interpretation. I place the expression "less textual" in quotation marks because "textual" could mean many things, such that it would often be problematic to characterize one interpretive exercise as more or less textual than another. In Serkin and Tebbe's view, as I understand it, mainstream constitutional interpretation is "less textual" than statutory decisionmaking in that it is less constrained by the words of particular enacted clauses.5 As a convenient shorthand, I will refer to the phenomenon that Serkin and Tebbe observe—that lawyers and judges are more prone to hew closely to the language of particular clauses in statutory cases than in constitutional ones—as the "textualism gap."

I suspect that Serkin and Tebbe are right to think that the textualism gap exists. And a rich literature offers reasons why legal practitioners should treat statutory and constitutional...
text differently. For present purposes, however, I am less interested in whether interpreters should treat statutory language differently from constitutional language than I am in explaining observed patterns in how practitioners actually do treat the two kinds of text. If practitioners do treat the two kinds of text differently in the ways that prescriptive theories advocate, it is possible that the persuasive power of the theories explains, or helps to explain, the observed differences. But it is also possible that the observed differences in practice are largely independent of what judges and professors say ought to be done. Indeed, the textualism gap might not reflect—or might not merely reflect—any conscious choices among practitioners to treat the different kinds of text differently. Perhaps the reasons for decisionmaking that does not hew closely to the words of enacted clauses are roughly the same in the statutory and constitutional contexts, but, for a combination of reasons, the circumstances in which those reasons apply are more common in constitutional cases than in statutory ones.

Consider three reasons why judges decide cases on bases other than the wording of particular enacted texts. (1) Sometimes there is no enacted text directing a determinate answer to the question that must be decided. (2) Sometimes prior courts have decided cases that bear on the question at issue, such that courts decide by reference to precedent rather than by reference to an enacted text. (3) Sometimes the decision to which enacted language points is simply unacceptable, such that judges feel it would be irresponsible to follow the words of a text meekly down the road to perdition.

Serkin and Tebbe have the first reason firmly in view. The Constitution contains many broadly worded standards, and cases calling for the application of those standards require something beyond textual reasoning. I suspect, however, that the textualism gap is mostly a product of the other two reasons—the role of precedent and the costs of adhering to the wording of enacted texts.

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6 See, e.g., Kevin Stack, The Inference from Authority to Interpretive Method in Constitutional and Statutory Domains, supra (responding to Serkin & Tebbe, supra note 4).

7 By setting out these three reasons, I do not mean to suggest that decisionmaking by direct reference to enacted text is the normal or the default mode of judicial decisionmaking in the American system.

8 See, e.g., Serkin & Tebbe, supra note 4, at 751 (identifying several broadly worded constitutional clauses that might give rise to nontextual interpretation in constitutional law).
Consider the role of precedent first. Most constitutional litigation occurs in a small number of doctrinal categories, each of which is piled high with case law. As a result, judges rarely have occasion to recur to the underlying text. Statutory litigation also has many domains with richly developed case law, and in those domains, it is similarly true that decision-making proceeds on the basis of case law more than by reference to enacted text. But because the U.S. Code is sprawling and prolix, and because its text changes much more frequently than the text of the Constitution does, statutory litigation features orders of magnitude more opportunities for decision-making in areas of first impression. As a result, more statutory cases are decided by reference to the text directly.

Next, and perhaps most interestingly, consider the costs of adhering strictly to the wording of enacted texts. Constitutional law, I suggest, is more prone than statutory law to furnish occasions on which following a text woodenly would yield an unacceptable result in a high-stakes case. It does so not because the Constitution is especially poorly drafted but because Americans in each generation have a way of making their most salient issues into issues of constitutional law, whether or not prior generations would have recognized them as such. That means that constitutional law regularly presents highly salient issues that the text of the Constitution was not written to address. There is a persistent mismatch between the text of the document and the set of concerns that well-socialized American lawyers expect the Constitution to vindicate. Constitutional interpretation responds to that mismatch by deciding cases nontextually—by which I mean, in this paper, deciding cases in ways other than by reading enacted language to mean something that might occur to a competent reader of English who did not share the substantive expectations of American constitutional lawyers.¹

I

OF NONTEXTUAL STATUTORY INTERPRETATION

Courts sometimes depart from the words of enacted clauses in statutory cases, not just in constitutional ones. Serkin and Tebbe give the example of the Sherman Act, under which courts have elaborated doctrine that particularizes a general standard but without being guided by specific statutory

In other words, decisionmaking under the Sherman Act does not proceed on the basis of close readings of enacted text, and the reason why might be (most commentators just say that it is) the first of the reasons for "nontextual" decisionmaking given above: the text is not specific enough to resolve the issues presented.

In a different vein, consider the status of workplace affirmative action under Title VII of the Civil Rights Act of 1964. The wording of 42 U.S.C. § 2000e-2(a) does not contain vague language about equality that courts have particularized in a way that permits affirmative action. On its face, 42 U.S.C. § 2000e-2(a) seems to prohibit affirmative action, because it clearly and flatly prohibits employers from distinguishing among employees or applicants on the basis of race or sex. Nonetheless, courts construe Title VII to permit affirmative action on the basis of race and sex when certain conditions are met. Note that courts do not pretend that the specific words of Title VII permit affirmative action under those conditions as an exception to its otherwise general rules prohibiting discrimination on the basis of race and sex. Nor do courts claim that the wording of Title VII is indeterminate on the point. They simply proceed under established doctrine that treats affirmative action as permissible under Title VII when the given conditions are met, irrespective of what the words of the statute say.

In other cases, courts wrestle with the meaning of words in statutes, and even read the words closely, but then decide that the words mean something that might surprise competent readers of English. Consider King v. Burwell. The Supreme Court in that case asked whether the phrase "an Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act" refers only to exchanges es-
established by state governments or also to certain exchanges established by the federal government. The Court in *King* devoted considerable effort to a close reading of the statute, taking fourteen paragraphs to find the relevant language "ambiguous" as between the two possibilities and then explaining at similar length why the ambiguity should be resolved in favor of reading "an Exchange established by the State" to include exchanges established by the federal government.

In my view, *King* was rightly decided, and obviously so. But the Court's characterization of the phrase "an Exchange established by the State" as "ambiguous" requires critical scrutiny. Ordinarily, to say that a phrase is ambiguous is to say that it admits of two different meanings. As applied here, the suggestion would be that the words "the State" in section 1311 could mean either "the state" or "the state or the federal government." But the expression "the State" does not normally admit of that second meaning. Moreover, the Affordable Care Act (ACA) defines the term "State" to mean 

Whatever problems the wording of section 1311 might have raised, a lack of semantic clarity rooted in multiple possible meanings of the term "State" was not among them.

The decision in *King* makes sense not because a competent reader of English who came across section 1311 standing alone might wonder whether "the State" meant "the state" or "the state or the federal government" but because the overall statute of which section 1311 is a part—the Patient Protection and Affordable Care Act—would make no sense if the phrase "an Exchange established by the State" were given its plain meaning. Common sense therefore required implementing the statute as if section 1311 contained different words from the words Congress actually enacted. But the Court was not confronting statutory language whose meaning was relevantly indeterminate and choosing one of the plausible meanings of that language. It was confronting words that had a clear meaning and rejecting that meaning—correctly, in my view—in order to prevent those words from defeating the purpose of the statute

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16 *King*, 135 S. Ct. at 2489–92.
17 *Id.* at 2492–95.
18 To be sure, there is a generic sense of "state" in which the word just means something like "government." But that is not the normal meaning of "state," much less "State," in American law.
In other words, the Court rejected the plain meaning of a textual clause in favor of other, more important considerations, but when it did so it purported to be interpreting the language rather than disregarding it.

The point of the foregoing examples is not to deny the textualism gap. I agree with the conventional wisdom on which statutory decisionmaking today is, on the whole, more governed by the wording of specific enacted clauses than constitutional decisionmaking is. But the fact that various areas of statutory law depart from the wording of enacted clauses as

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20 This understanding supports the Court's choice not to afford the Internal Revenue Service *Chevron* deference in its construction of the language at issue in *King*. See *King*, 135 S. Ct. at 2488–89 (refusing, on a rationale different from the one explained here, to afford *Chevron* deference). *Chevron* deference applies when statutory language could reasonably be given legal force in more than one way. In *King*, the plain meaning of section 1311 pointed to a certain way of giving legal force to the statute, and the overall plan of the statute pointed to another. But the fact that the plain meaning of section 1311 and the overall plan of the statute pointed in two different directions does not mean that there were two reasonable interpretations of the law. Given the statute overall, giving legal force to the plain meaning of section 1311 would have been unreasonable. Put differently, the interpretation of the *ACA* proffered by the *King* challengers was not one reasonable interpretation out of some larger set of plausible reasonable decisions. It was just wrong, despite the fact that it would have given the statute a meaning that accorded with the plain meaning of section 1311's language.

One could also shed light on this point by asking about the locus of the alleged "ambiguity" in *King*. What, precisely, was ambiguous? The answer cannot be section 1311 standing alone. Standing alone, the words of section 1311 unambiguously point to the meaning for which the challengers contended. The Court's reasoning might accordingly be taken to mean that section 1311 was ambiguous in context—that when the *ACA* is considered as a whole, the meaning of section 1311 becomes less clear. But it is not correct, I suggest, to think that there was any relevant ambiguity at the level of the statute as a whole. Considered as a whole, the *ACA* clearly points to the result sought by the government.

The fact that the statute as a whole clearly requires departing from the plain wording of section 1311 does not make that wording "ambiguous." It means that section 1311 must be given a meaning different from the meaning it would plainly have standing on its own. In particular, section 1311 must be read to refer to exchanges established by the federal government as well as to exchanges established by states. To state baldly what should be obvious, language that must be given one particular meaning is not "ambiguous," regardless of whether the one meaning the language must be given is its literal meaning or some other meaning. And where there is no ambiguity—no multiplicity of reasonable ways in which legal language could be given force—there is no role for *Chevron* deference.

21 As noted in the first paragraph of this Response, "textualism" names a family of interpretive approaches rather than a single rule or set of rules. There is of course a sense in which such a decision like *King*, which is based on the overall plan or purpose of a statute, is not less "textual" than a decision that hews closely to particular language in the statute, because both the meaning of the particular words and the sense of a statute overall can reasonably be described as considerations about the text. But as was also noted, see supra note 2 and accompanying text, it is the role of close reading, or of "clause-bound" textualism, that is of interest in the present analysis.
much as any area of constitutional law suggests that the formal division between statutory and constitutional cases is not enough to explain the textualism gap.

II
THREE FACTORS

I suspect that more substantive considerations do the work of determining when courts hew closely to enacted clauses and when they are more willing to reason in other ways. Above, I noted three relevant factors: the determinacy of enacted clauses, the presence of precedent, and the potential cost of hewing closely to the wording of enacted language. Consider each now in a bit more depth.

(1) Indeterminacy. Serkin and Tebbe note the difference between enacted language that articulates precise rules and enacted language that articulates less determinate standards.22 Not all texts are equally directive, and a court confronting a less-directive text is more likely to reason in ways that go beyond the words in front of it, if only because it is impossible to decide the case without doing so. But that difference between rule-like and standard-like texts is only the beginning.

(2) Precedent. Another factor is the difference between legal questions with thick accumulations of case law on point and legal questions where the case law is thinner. The first case to construe a constitutional clause, like the first case to construe a statutory provision, is more likely to reason closely about the text than the hundredth case decided under the same language, because the hundredth case has ninety-nine precedents shaping its approach. If those precedents are sufficient to dispose of the issue, then the court is unlikely to reason closely about the underlying enacted language at all. It doesn’t need to. Indeed, it might go wrong by doing so, because part of a court’s responsibility is to decide consistently with precedent. And even if the precedents don’t fully dispose of the issue, the question that the court must decide might be one to which no close reading of the underlying text would speak, either because governing doctrine had already traveled a fair distance from enacted text, or, if the doctrine was fairly understood as working within possible meanings of enacted text, because the question presented for decision might concern

22 Serkin & Tebbe, supra note 4, at 719.
something that had never been adequately specified by that
text.

(3) Cost. Some cases have a great deal at stake, whether
practically or symbolically or both. Others matter less. Where
relatively little is at stake, courts are more likely to be content
to go where a text (or any other preexisting authority) points
them, regardless of whether that destination seems sensible to
them on the merits. But the more that a case matters—or
perhaps more precisely, the more that the decisionmakers
think that a particular outcome in the case would be awful\textsuperscript{23}\textsuperscript{23}—
the more those decisionmakers are likely to resist authorities
that seem to direct undesirable outcomes. It is one thing to
lose a dollar because of a poorly worded clause, and it is quite
another to lose a kingdom because of one. Reasonable people
expend more effort in fighting the latter prospect than they do
in fighting the former one. So the tendency to reject a text and
the tendency to work hard to find a way to re-read that text
both increase as the perceived cost of obeying the conventional
reading of the text increases.

III
ASSESSING THE FACTORS

The literature on constitutional interpretation canonically
points to the first factor—the indeterminacy of the relevant
texts—as a reason why constitutional interpreters frequently
reason nontextually.\textsuperscript{24} There is something to that observation.
I suspect, however, that the second variable—the existence of
relevant precedent—explains more of the textualism gap be-

\textsuperscript{23} This refinement is meant to operate along two dimensions. First, the
importance of a case for these purposes is measured subjectively, from the deci-
sionmakers' point of view, rather than objectively. What matters for predicting
whether decisionmakers will be content to follow a text meekly, even when it
seems to point in a bad direction, is the decisionmakers' sense of the stakes rather
than anything about what the stakes "really" are. See infra pp. 109-10. Second,
by saying that the willingness to depart from textual authority rises with the
decisionmakers' sense that a particular outcome would be awful, rather than just
the sense that a lot is at stake, I mean to point out that decisionmakers often
know that a legal question is important but do not have a confident sense of which
outcome would be harmful. See, e.g., Daryl Levinson, Parchment and Politics: The
Positive Puzzle of Constitutional Commitment, 124 Harv. L. Rev. 657, 694 (2011)
(suggesting that decisionmakers are often unable to predict whether constitutio-
nal decisionmaking procedures will yield outcomes they favor or outcomes they
oppose). A decisionmaker in that situation might be delighted to have a rule to
follow mechanically, because it relieves him of the responsibility for the decision.

\textsuperscript{24} See, e.g., Ely, supra note 5, at 13 (noting that several constitutional
clauses cannot be given determinate legal content unless the interpreter looks
beyond the words of the clause).
tween statutory and constitutional interpretation than the first factor does.

Consider equal protection cases. In most cases that we say "arise under the Equal Protection Clause," courts do not reason about the meaning of the words "equal protection," struggle with the indeterminacy of that phrase, and then reason nontextually to decide which possible meaning of those words is most appropriate. They simply consult case law, deciding the issues before them without ever grappling with the possible meanings of the words "equal protection." So it is true that the words "equal protection" do not carry a single, determinate meaning. But the indeterminacy of the clause's meaning is not what prompts courts to engage in the kind of nontextual reasoning in which they do in fact engage. What drives courts to reason as they do is a thick body of case law.

One might be tempted to think that the existence of that thick body of case law is itself a product of the indeterminacy of the underlying text. If that were so, then the indeterminate meaning of the words "equal protection" would still be driving the nontextual decisionmaking we see in equal protection cases, just at one remove. Textual indeterminacy would drive the development of case law as a means of settling questions that could not be resolved on the basis of the text alone, and the fact that judges made decisions based on that case law rather than directly on the basis of the text would then be traceable to that text's indeterminate meaning.

Perhaps such a dynamic does account for a share of constitutional interpretation's tendency to operate less textually than statutory interpretation. But we should not overestimate that share. After all, broadly worded and standard-like constitutional clauses are not the only ones that become the subjects of thickly developed case law. Consider the Eleventh Amendment. No first-semester law student identifies the Eleventh Amendment

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25 In the Supreme Court's recent landmark decision in *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016), the opinion of the Court used the words "equal protection" four times: once when stating the question presented, *id.* at 2204, once when stating the holding of a lower court, *id.*, once when stating the petitioner's claim, *id.* at 2207, and once when stating the meaning of one of its own precedential cases, *id.* at 2210. At no point did the Court engage questions about the range of meanings that the phrase "equal protection" might bear, nor did it at any point frame its analysis as answering questions about how to particularize the meaning of those words.

26 U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").
Amendment as a text that speaks in broad and indeterminate principles. It reads like the statement of a relatively specific rule. But that has not prevented the development of a thick body of case law. When judges decide Eleventh Amendment cases, they do so on the basis of that case law rather than by reading the text closely, and their reason for doing so is not that the text is broad and indeterminate.

What drives interpreters to develop thick case law, and to decide cases nontextually, in contexts like Eleventh Amendment jurisprudence, where the text is not especially broad? A big part of the answer, I suspect, is about the third factor I identified above: the perceived cost of hewing closely to the text. For many constitutional interpreters, state sovereign immunity and the related issues of federalism are enormously important. These interpreters are strongly committed to the idea that the constitutional system requires a certain set of answers to the relevant questions. The text of the Eleventh Amendment, on its face, would not vindicate the answers to which these interpreters are sincerely and powerfully committed. And their commitment is strong enough to prompt them to depart from the enacted language, even though the language is specific rather than general.

I suspect that this third reason for nontextual decision-making—the stakes of a case, and the unacceptably high cost of the result that simple forms of textualism would direct—has been underappreciated in the recent literature on legal interpretation. Indeed, I suspect that this third factor is sometimes the most powerful force in prompting nontextual decisionmaking. And it operates in statutory cases as well as constitutional ones.

Consider King v. Burwell again. Each of the first two factors discussed above would seem to make King a case in which courts would hew closely to the language of the clause at issue. First, the relevant wording—“an Exchange established by the State under section 1311 of the Patient Protection and Afforda-

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27 See generally John F. Manning, The Eleventh Amendment and the Reading of Precise Constitutional Texts, 113 YALE L.J. 1663, 1665–67 (2004) (characterizing the Eleventh Amendment as "precise"). To be sure, one can argue about whether a text is specific or general. But if the wording of the Eleventh Amendment is nonspecific, then so is most if not all of the wording of the U.S. Code, and that would mean that we could not point to the generality of the Constitution's wording as a factor that distinguished statutory from constitutional interpretation.

28 That is exactly what Manning cogently argues ought not to happen. Id. at 1665. And yet it does.
ble Care Act”—did not force judges to reason nontextually by virtue of being broad or general. The clause states a rule, not a standard, and the rule is stated with a fair degree of specificity. Second, the issue was a matter of first impression. No prior Supreme Court decisions had construed the meaning of the language at issue. So the Court’s choice to depart from the plain meaning of section 1311 in favor of considerations of statutory purpose and common sense was not driven by either of the first two factors. It was driven instead, I think, by the third factor: the enormous cost of taking the plain meaning of section 1311 as authoritative. Giving the words “established by the State” their ordinary meaning would have made hash of a major statute and wrecked a gargantuan government program. That consideration was strong enough to overcome whatever tendency the first two factors might have had to foster a ruling based on the plain meaning of the words “established by the State.”

Something similar is true with respect to affirmative action under Title VII, or at least with respect to the initial cases departing from statutory language in that domain. The reason why courts permit affirmative action in workplaces covered by Title VII is not that 42 U.S.C. §2000e-2 contains broad or open-ended language on the point. The wording of section 2000e-2 would pretty clearly prohibit employers from practic- ing affirmative action if it were given its plain meaning. And courts have not pretended that the language itself is indetermi- nate. They have simply overcome the language, ruling that

29 It is worth noting that in the particular case of King, the enormous potential consequences of the case were the motivation for the plaintiffs’ making the close-reading argument in the first place, as well as the major reason for refusing to accept that argument. The case in King arose as a deliberate attempt to wreck the ACA; the architects of the challenge scoured the statute’s language for weaknesses that could be used to bring down the system, and they found 26 U.S.C. §36B(b)-(c). Absent the motivation to destroy the ACA, it is likely that nobody would have given the language “an Exchange established by the State” its plain meaning simply because nobody would have thought about it. As a matter of the common sense of the regulatory plan, 26 U.S.C. §36B(b)-(c) was obviously sup- posed to apply to exchanges established by the federal government as well as those established by states, and everyone would have operated the statutory scheme that way without a second thought if nobody had gone looking for problems. But once the linguistic glitch was spotted and made salient, a court would need to overcome the plain meaning of the language in order to deny the plaintiffs’ claim. In a case with less at stake, the Supreme Court might well have gone along with the challenge, saying something like, “Look, we know that reading ‘State’ to mean ‘State’ might make a mess of how Congress intended its system to work, but hey, this is what they legislated, and it’s not our job to clean up after them.” But that argument goes down easier when the mess is small. See discus- sion of Lamie v. United States Trustee infra p. 116.
affirmative action is sometimes permissible even though the words of section 2000e-2 do not seem to permit it.30 Today, of course, the reason why courts permit affirmative action despite the wording of section 2000e-2 is that case law directs them to. But when the first cases establishing this line of precedent were decided, it mattered that the permissibility vel non of affirmative action was highly important, both as a practical matter and as a symbolic one. The Supreme Court that decided United Steelworkers v. Weber31 in 1979 was not going to let affirmative action in the workplace disappear just because the language of section 2000e-2, read strictly, would prohibit it— not as long as the Court could say, and, I am confident, believe, that the overall purpose of Title VII was consistent with some affirmative action, whether or not affirmative action was consistent with the letter of the statute.32

Now consider the constitutional domain. As noted earlier, most cases here are decided by reference to judicial precedent, not by reference to enacted constitutional text. Many bodies of constitutional doctrine are, at least officially, engaged in giving meaning to textual standards that are too indeterminate to dispose of particular cases, such that courts must engage in nontextual reasoning in order to apply the text at all. Think of free speech cases, or takings cases, or cases about cruel and unusual punishments. But as also noted earlier, constitutional decisionmaking frequently proceeds under precedent even when the associated text is specific, and in some contexts the doctrines developed to "apply" those texts cannot reasonably be described as particularizing those texts further. Instead, the doctrines direct decisionmaking that competent speakers of English who did not know the stakes of the cases would

30 See United Steelworkers v. Weber, 443 U.S. 193 (1979) (upholding a private affirmative action plan aimed at addressing the past practices that had blocked African Americans from holding certain positions).
31 Id.
32 The resemblance between Weber and King is obvious, with the distinction that in King the Court labored to declare the statutory language "ambiguous," rather than forthrightly acknowledging its choice to do something at variance with the wording of an enacted clause. That difference is likely the product of a changed legal culture. In 2015, judges were much less willing than they were in 1979 to admit, and perhaps even to recognize, that they are doing something other than abiding by an available meaning of particular enacted language. The desire to maintain the pretense that one is not subordinating a statute's wording to other considerations is what drives the Court in King to its nonstandard deployment of the word "ambiguous." In current practice, perhaps a clause is "ambiguous" if either (a) its language admits of two different meanings, or (b) the one meaning of which its language admits is so unfortunate that courts will refuse to give that meaning legal force. (Call this the ambiguity of ambiguity).
simply never imagine could be plausible interpretations of the constitutional language. Above, I gave the example of Eleventh Amendment doctrine. Other examples include cases applying the First Amendment against the federal executive branch and cases reading the Tenth Amendment as an affirmative limit on Congress's delegated powers rather than an instruction applicable in cases where Congress has no delegated power to act upon. In these cases, the courts are not choosing among possible plain meanings of the relevant words in constitutional clauses. The First Amendment says that "Congress shall make no law respecting an establishment of religion." There is no theory of plain meaning on which "Congress" might mean "The President." None, anyway, that preserves what a theory of plain meaning is supposed to deliver, because a theory on which "Congress" might mean "The President" is a theory on which language could mean a lot of surprising things, and that is exactly what plain-meaning jurisprudence is supposed to prevent.

So the reason why courts do not hew closely to the wording of enacted texts in these contexts is not that the textual language is imprecise. It is that following the specifications of the language would yield unacceptable results in fields of law too important to be sacrificed to the abstract idea that plain language ought to govern. Courts are unwilling, and properly so, to permit Presidents to censor speech, because doing so would betray a deeply held American value and probably enable the President to become a dangerously threatening figure. Current doctrine reads the Tenth Amendment as affirmatively pushing back against the enumerated powers of Congress on the theory that the essence of American federalism requires such a doctrine, whether the wording of the Constitution captures it or not. In short, mainstream interpretive practice is for courts to depart from enacted language when they really need to—that is, when they see a lot to lose from a mechanical application of the idea that enacted language, read plainly, states the law.

33 See, e.g., N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (applying the First Amendment against the federal executive despite its being addressed to "Congress").
34 See, e.g., New York v. United States, 505 U.S. 144, 156 (1992) ("[U]nder the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself,"). For further development of this point about the Tenth Amendment, see Richard Primus, The Limits of Enumeration, 124 YALE L.J. 576, 629–30 (2014).
35 U.S. CONST. amend. I.
A caveat is here in order. The point is not that the areas of law—be they constitutional or statutory—in which courts set aside the plain meaning of enacted texts have systematically higher stakes than those in which courts stay within the limits of enacted phrases. Much of the time, enacted language successfully describes what a court should do in order to prevent things from going badly wrong. As a result, courts (and other officials) can usually keep the government operating smoothly without departing from the directions given in relevant statutes and constitutional clauses. It is not necessary to depart from plain meanings in order to authorize the federal government to maintain the armed forces,\(^\text{36}\) or to prohibit states from holding whites-only elections,\(^\text{37}\) or to prevent Congress from declaring its members officeholders for life.\(^\text{38}\) The situation where courts must set plain meanings aside in order to prevent seriously adverse consequences arises only when something has gone wrong, either because the text was badly written or because something important—maybe a material circumstance, maybe the prevailing set of normative values—has changed since the text was written.

So with respect to each kind of enacted text, two questions arise. First, how often does something go wrong in one of these ways? Second, when something does go wrong in one of these ways, what are the costs of hewing closely to enacted language?

One of the reasons why constitutional law lends itself to "less textual" decisionmaking than statutory law, I suspect, is that a larger proportion of the cases falling within the constitutional domain have high stakes, whether practically or symbolically. So even if the Constitution and the U.S. Code were drafted with equal degrees of skill and equal degrees of specificity, and even if both texts were revised to keep up with a changing world at the same rate (which of course they are not), constitutional litigation would probably involve a higher percentage of cases in which courts would be put to the choice between abiding by the words of enacted clauses and sanctioning terrible results. Assuming that judges are no less inclined to avoid terrible results in constitutional litigation than in other kinds of litigation, we should expect judges to depart from enacted language more often in the constitutional context.

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\(^{36}\) See U.S. Const. art. I, § 8, cls. 13-14.

\(^{37}\) See U.S. CONST. amend. XV.

\(^{38}\) See U.S. CONST. art. I, § 2, cl. 1 (House of Representatives); U.S. Const. amend. XVII (Senate).
In suggesting that constitutional law involves a higher proportion of high-stakes cases than statutory law does, I am not claiming that constitutional law is more important overall than statutory law, nor that in each year the number of high-stakes constitutional cases exceeds the number of high-stakes statutory cases, nor that the most important cases are always constitutional. I am not claiming that all constitutional cases are high-stakes cases, nor even that most of them are. It is obviously true that modern America is pervasively structured by statutory law, and a reasonable case could be made for the proposition that the U.S. Code today is, as a practical matter, more important, both in the functioning of American government and in the lives of individual Americans, than the Constitution is.39

But the U.S. Code, being orders of magnitude more extensive and prolix than the Constitution, also gives rise to a great many low-stakes cases. A "low-stakes case," in the sense in which I intend the term, is one in which the decisionmakers do not feel deeply invested in the outcome, except in the general sense in which they always think it important to get decisions right. To be sure, many of the cases I am calling "low-stakes" are important to someone. The parties to particular cases often have a great deal at stake, even if nothing about the case is unusually salient from the perspective of the decisionmaker. To criminal defendant Smith facing the possibility of prison, United States v. Smith is a high-stakes case, and it is a high-stakes case regardless of whether it turns legally on a statutory question (like the meaning of an element in a federal criminal law) or a constitutional one (like whether evidence was gathered in violation of the Fourth Amendment). But most judges regard criminal prosecutions as routine, meaning not that they see the cases as unimportant, but that their importance is of an ordinary sort within the judges' professional lives. Similarly, statutory cases in civil litigation might decide matters of considerable personal and economic importance to a great many people without being especially salient to the judiciary. Consider Lamie v. United States Trustee,40 which Serkin and

39 See William N. Eskridge, Jr. & John Ferejohn, A Republic of Statutes: The New American Constitution 27 (2010). My only hesitation in agreeing to that proposition outright is that I find it hard to think about either regime in hermetic isolation from the other. But that means only that the idea that statutory law is more important should not be taken too woodenly, not that it lacks an important message about how modern American government really works.
Tebbe discuss as an example of statutory textualism.\textsuperscript{41} It seems plausible that a ruling about the availability of attorneys' fees in bankruptcy cases would have important effects on many people, including those who practice bankruptcy law as well as those who are bankrupt or who are the creditors of bankrupt estates. Congress bothered to pass the relevant statute, after all. But from the perspective of a federal court, the question in \textit{Lamie} might just be one of many going to the intricate and opaque mass of regulation that the law provides for a complex society. Before the briefs in \textit{Lamie} landed on their desks, Article III judges might have had no view on the issue at all, and they might not worry much about the issue once the decision is handed down. The decisions I am calling "high-stakes," in contrast, are the ones whose outcomes are particularly salient to the judges, either because of their expected consequences or their symbolic value or both.

So maybe the textualism gap between constitutional and statutory interpretation is mostly explained by two facts. First, statutory litigation presents more matters of first impression than constitutional litigation does. After all, the U.S. Code is a great deal more extensive than the U.S. Constitution. It contains orders of magnitude more clauses to be litigated, and new ones are produced at a much faster rate than new constitutional clauses are. Given this difference in the number of topics that are litigated, judicial precedent—the chief displacer of enacted textual authority—does its displacing work less frequently in statutory cases than in constitutional ones. Second, constitutional litigation might be more likely than statutory litigation to put judges to the choice between nontextual decisionmaking and unacceptable results. Not because the Constitution is especially poorly drafted, and not because bad decisionmaking in statutory cases is a low-cost affair from society's point of view, but because most of the statutory issues that courts confront as matters of first impression are not issues in which the judges are deeply invested on the merits.

\textbf{CONCLUSION}

Serkin and Tebbe’s titular question is whether the Constitution is special. With specific reference to the textualism gap, I think the answer is partly no and partly yes. By proposing that departures from the wording of enacted clauses are driven by the same factors in the statutory and constitutional con-

\textsuperscript{41} Serkin & Tebbe, \textit{supra} note 4, at 716.
texts, I am pushing back against the claim that prevailing practice treats constitutional text differently just because it is the text of the Constitution. More particularly, I do not think that the largest cause of the textualism gap—the relatively larger share of precedential decisionmaking in constitutional law—reflects a way in which the Constitution is "special," at least not in the sense that interests Serkin and Tebbe. It reflects, as noted above, the fact that the Constitution is much shorter than the U.S. Code, or more precisely the fact that there are far fewer substantive issues that get litigated under the Constitution, which means that a larger share of all constitutional litigation arises in areas with prior case law.

But the tendency of constitutional law to present a higher share of cases where judges feel there is something important to lose does reflect a way in which the Constitution is special. It does so for a reason that I have the space here to gesture at but not to argue for at length. In brief: constitutional law does not skew toward highly salient cases because the text of the Constitution happens, by design or accident or both, to address the most salient issues in American law. It skews toward highly salient cases because American lawyers find ways, consciously and unconsciously, to make the issues that are most salient to them into constitutional issues. The Constitution always embodies the deepest values and highest aspirations of the American people—not because the words of the document name a set of values and aspirations that were most salient to the document's authors and which have remained constant over time, but because constitutional interpretation is a practice in which Americans invest the document, in its particular phrases and in general, with meanings that are relevant to their own values and aspirations.42 That is special. As long as American constitutional practice exhibits that dynamic, constitutional cases will contain a relatively high share of the cases where judges see the most to lose from bad decisions—and the most to be gained from avoiding too mechanical a reliance on the language of enacted text.

42 See infra Richard Primus, The Constitutional Constant.