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BOSTOCK V. LEXMARK: IS THE ZONE-OF-INTERESTS TEST A CANON OF DONUT HOLES?

*Joseph S. Diedrich**

The U.S. Supreme Court’s recent decision in *Bostock v. Clayton County* has understandably received considerable popular and scholarly attention, both for its substantive holding and for its opinions’ differing approaches to statutory interpretation. Writing for the majority, Justice Neil Gorsuch refused to allow extratextual considerations—such as assumptions about statutory purpose and expectations of bygone eras—to influence the interpretation of unambiguous text. And he implored judges to eschew related interpretive gestures—dubbed “canon[s] of donut holes”—that atextually limit the reach of statutory language.

This Article argues that one such canon of donut holes is the “zone of interests” test, as articulated in *Lexmark International, Inc. v. Static Control Components, Inc.* Applicable to all statutory causes of action, the zone-of-interests test invites reliance on extratextual considerations to limit a statute’s reach to only those plaintiffs within the “zone of interests” Congress supposedly meant to protect. The test clashes with the interpretive principles championed by the *Bostock* majority. *Bostock*, in fact, may also cast at least a shadow of doubt on other clear-statement rules, substantive canons, and judicial doctrines that limit the reach of statutory causes of action. This Article tentatively concludes that such rules, canons, and doctrines are in tension with now-prevailing notions of textualism and perhaps even the separation of powers.

I. INTRODUCTION

Hailed as a civil-rights triumph, the blockbuster case of *Bostock v. Clayton County, Ga.*¹ is also a study in statutory-interpretation methodology. Writing for the 6-3 majority, Justice Neil Gorsuch not only declared that Title VII of the Civil Rights Act of 1964 prohibits an employer from “fir[ing] someone simply for being homosexual or transgender.”² He also used the case’s platform to comprehensively explain his views on textualism. For Justice Gorsuch and the *Bostock* majority, “[o]nly the written word is the law” and “all persons are entitled to its benefit.”³ To that end, courts should disregard “extratextual

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1. 140 S. Ct. 1731 (2020). I co-authored an *amicus curiae* brief in support the employees in *Bostock*.

2. *Id.* at 1737.

3. *Id.*

consideration[s]”—including how the enacting Congress or enactment-era public expected or assumed a statute would apply—that “add to, remodel, update, or detract from” statutory text itself.⁴ To that end, courts should reject “canon[s] of donut holes” that assume “Congress’s failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception.”⁵

Provoking two interpretation-focused dissents, *Bostock* reveals conflicts “within textualism.”⁶ This Article argues that Justice Gorsuch’s approach to textualism, as embraced by the majority, has implications well beyond Title VII. Specifically, *Bostock*’s directives to not “detract from” a text’s meaning and to avoid canons of donut holes call into question the judicially-created zone-of-interests test, as stated in *Lexmark International, Inc. v. Static Control Components, Inc.*⁷ Described in *Lexmark* as a “limitation,” the zone-of-interests test restricts every federal “statutory cause of action” to “only” those plaintiffs “whose interests fall within the zone of interests protected by the law invoked.”⁸ Courts implementing that test often look beyond the text of (even unambiguous) statutes to extratextual considerations like purpose and “assum[ed]” intent.⁹ As a result, the test has the potential to deny a claim to plaintiffs who would otherwise come within the scope of a statute’s plain text. The zone-of-interests test, in short, is a “canon of donut holes.” In formulation and effect, it resembles aspects of the *Bostock* dissents and challenges the approach advocated by the majority.

This Article proceeds in three main parts. Part II recounts *Bostock* in detail, focusing primarily on the majority’s and dissents’ differing approaches to statutory interpretation (and textualism in particular). Part III turns to *Lexmark* and the zone-of-interests test. Part IV discusses how the interpretive precepts championed by Justice Gorsuch in *Bostock* appear to be in tension with *Lexmark* and its ilk. Part IV further comments on some implications of that tension, including how the zone-of-interests test enables courts to deny the benefit of the law to historically unpopular individuals and minorities and may contribute to an already-acrimonious judicial selection process. Finally, this Article concludes with thoughts on how the *Bostock–Lexmark* tension relates to other judicial rules and doctrines of interpretation, as well as the separation of powers. The

4. *Id.* at 1737–38, 1749.

5. *Id.* at 1747.

6. Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 266 (2020) (emphasis removed).

7. 572 U.S. 118 (2014).

8. *Id.* at 129 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

9. *Id.* at 130 (quoting *Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012)).

upshot: *Bostock*'s textualism and the separation of powers offer reason to doubt the validity of many judicially-created limitations on legislatively-created causes of action.

II. *BOSTOCK*, TEXTUALISM, AND DONUT HOLES

In *Bostock v. Clayton County*, the U.S. Supreme Court was asked whether Title VII of the Civil Rights Act of 1964 prohibits an employer from “fir[ing] someone simply for being homosexual or transgender.”¹⁰ Writing for a 6-3 majority, Justice Gorsuch answered that question with a “yes.” The case comprised three consolidated disputes with roughly similar facts. In two of them, a gay male employee was fired shortly after his employer learned he was gay. In the third, a transgender female employee was fired after she informed her employer she would begin presenting as a female. As pleadings-stage cases, the question was whether these employees had stated a claim under Title VII,¹¹ which makes it “unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, *sex*, or national origin.”¹²

The Court held that Title VII’s text led to an “ineluctabl[e]” conclusion.¹³ If an employer fires a gay man (a *male* attracted to males) but would not have fired a similarly situated straight woman (a *female* attracted to males), then that employer “discharge[s]” the “individual” “because of such individual’s *sex*.”¹⁴ The same logic applies to transgender employees.¹⁵ In short, “[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different *sex*.”¹⁶ The employees in *Bostock* had all stated a claim under Title VII.

For Justice Gorsuch, *Bostock* was about more than Title VII. His

10. 140 S. Ct. at 1737.

11. *Id.* at 1737–38, 1744.

12. 42 U.S.C. § 2000e–2(a)(1) (emphasis added).

13. *Bostock*, 140 S. Ct. at 1750.

14. *Id.*; 42 U.S.C. § 2000e–2(a)(1).

15. If an employer fires a transgender woman (a *male* identifying as female) but would not have fired a similarly situated cisgender woman (a *female* identifying as female), then that employer has “discharge[d]” the “individual” “because of such individual’s” “*sex*.” (Although the phrase “male identifying as female” may not perfectly reflect contemporary medical or social understanding, this was the approach the Court took.)

16. *Bostock*, 140 S. Ct. at 1737. In reaching his conclusion, Justice Gorsuch reasoned that “[i]t doesn’t matter if other factors besides the plaintiff’s *sex*”—such as sexual orientation—“contributed to the [employer’s] decision.” *Id.* at 1741. (Because of Title VII’s but-for causation standard.) Nor does it “matter if the employer treated women as a group the same when compared to men as a group.” *Id.* (Because of Title VII’s focus on individuals, not groups.)

majority opinion sets forth a specific, comprehensive approach to statutory interpretation. Building on recent opinions in *Wisconsin Central, Ltd. v. United States*¹⁷ and *New Prime, Inc. v. Oliveria*,¹⁸ Justice Gorsuch's *Bostock* opinion describes and applies a semantics-centric textualism, anchored by original meaning, that consciously avoids limiting (or expanding) a statute's textual reach based on how the text applies in a particular case. In Justice Gorsuch's words, "every statute's meaning is fixed at the time of enactment," and that meaning cannot be "add[ed] to, remodel[ed], update[d], or detract[ed] from" based on "new applications may arise in light of changes in the world."¹⁹ Applied to the *Bostock* plaintiffs, this approach cares only that Title VII's text encompasses their claims, regardless of whether Congress or the general public had foreseen such application of the law in 1964.

Yet even if "we're all textualists now,"²⁰ *Bostock* brings into stark relief disagreements "within textualism."²¹ Justice Samuel Alito dissented (joined by Justice Clarence Thomas), skewering the majority opinion as a "pirate ship" flying under a false textualist flag. For Justice Alito, the majority's semantics-centric approach fails to appreciate how "[i]n 1964, ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity."²² In 1964, after all, "homosexuality [was considered] a mental disorder, and homosexual conduct . . . [was considered] morally culpable and worthy of punishment."²³ Because "[t]he possibility that discrimination on either of these grounds might fit within some exotic understanding of sex discrimination would not have crossed their minds[,]" the statute should not be interpreted to cover such discrimination.²⁴ In a separate dissent, Justice Brett Kavanaugh criticized the majority's "literal" interpretation.²⁵

17. 138 S. Ct. 2067 (2018).

18. 139 S. Ct. 532 (2019).

19. *Bostock*, 140 S. Ct. at 1738; *Wis. Central*, 138 S. Ct. at 2074; see Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63, 93 (2019); see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 101 (2012) (rejecting view that courts should "infer exceptions" to a statute's plain meaning "for situations that the drafters never contemplated").

20. Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, HARV. L. TODAY (Nov. 17, 2015) [<http://perma.cc/3BCF-FEFR>].

21. Grove, *supra* note 6, at 266 (emphasis removed).

22. *Bostock*, 140 S. Ct. at 1767 (Alito, J., dissenting); see also *id.* at 1755 ("If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation-not to mention gender identity, a concept that was essentially unknown at the time."); *id.* at 1830 (Kavanaugh, J., dissenting) ("We cannot close our eyes to the indisputable fact that Congress-for several decades in a large number of statutes-has identified sex discrimination and sexual orientation discrimination as two distinct categories.").

23. *Id.* at 1769 (Alito, J., dissenting).

24. *Id.*

25. *E.g., id.* at 1824 (Kavanaugh, J., dissenting); *cf. id.* at 1745 (majority opinion) (noting that the

In Justice Gorsuch’s view, the dissenters (and employers) were not arguing that “the statutory language bears some other *meaning*.”²⁶ They were arguing, instead, that “few in 1964 expected today’s *result*.”²⁷ Yet for Gorsuch, “contend[ing] that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons” “abandon[s] the statutory text” and “appeal[s] to assumptions.”²⁸ This “logic impermissibly seeks to displace the plain meaning of the law in favor of something lying beyond it.”²⁹ Justice Gorsuch’s textualism, then, firmly denounces consideration of either Congress’s or the public’s expected application of a law. It also rejects the notion that courts can limit a statute’s textual reach—either by precluding plaintiffs from bringing a cause of action or by shielding defendants from liability—based on extratextual considerations. All this means that “Congress’s failure to speak directly to a specific case that falls within a more general statutory rule” does not “create[] a tacit exception”³⁰—or, as Justice Gorsuch playfully put it, “there [is] [no] such thing as a canon of donut holes.”

In one of the first scholarly treatments of *Bostock*, Tara Leigh Grove described Justice Gorsuch’s interpretive approach as a “formalistic textualism” that “instructs interpreters to carefully parse the statutory language, focusing on semantic context.”³¹ The *Bostock* dissenters, by contrast, relied on “flexible textualism,” a variant of textualism that “authorizes interpreters to make sense of the statutory language by looking at social and policy context, normative values, and the practical consequences of a decision.”³² By employing that flexible textualism, the *Bostock* dissenters were able to make what Andrew Koppelman calls “subtractive moves.” According to Koppelman, the dissenters’ approach:

presume[es] that if a background belief was entrenched in the culture at the time of a law’s enactment, then one can rely on that background belief in order to *subtract* meaning from the plain language of a statute, to limit its extension in order to exclude applications that most people [including Congress] at the time would have rejected.³³

dissents “dismiss [the majority’s interpretation of Title VII] as wooden or literal”).

26. *Id.* at 1750.

27. *Id.*

28. *Id.* at 1749.

29. *Id.* at 1750.

30. *Id.* at 1747. “Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule.” *Id.*

31. Grove, *supra* note 6, at 267, 279.

32. *Id.* at 286.

33. Andrew Koppelman, *Bostock, LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1, 25 (2020). Among these subtractive moves are: interpreting a law to apply only to its “prototypical referent;” interpreting a law to only apply to “the categories of objects that it happens

Whether described as “flexible textualism” or in terms of “subtractive moves,” the *Bostock* dissenters’ interpretive approach implicitly relies on the “mischief rule,” which instructs the interpreter to “read a statute purposively, so that it applies only to the defect”—or “mischief”—“that the law aims to remedy.”³⁴

Whatever the merits of different forms of textualism or other interpretive approaches generally, Justice Gorsuch’s approach prevailed in *Bostock*. A six-member majority of the Court joined together to declare that “[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law, and all persons are entitled to its benefit.”³⁵

III. LEXMARK AND THE ZONE-OF-INTERESTS TEST

Six years before *Bostock*, Justice Antonin Scalia authored a unanimous opinion in *Lexmark International, Inc. v. Static Control Components, Inc.*³⁶ Lexmark sold printers and new toner cartridges. “Remanufacturers” purchased used Lexmark cartridges, refurbished them, and then sold them in competition with Lexmark’s new cartridges.³⁷ To dampen this competition, Lexmark began installing microchips on certain cartridges that disabled the cartridge once it was used. Lexmark also offered a rebate to customers who returned used microchipped cartridges. Static Control developed and sold to remanufacturers microchips that “mimic[ked]” Lexmark’s.³⁸ Lexmark sued Static Control for copyright infringement.

Static Control counterclaimed for false advertising under the Lanham Act, which prohibits false advertising:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities . . . shall be liable in a civil action by any person who believes that he or she is or is

to bring to mind;” making “distinctions that feel familiar but which do not appear in the statute;” making exceptions based on the law’s “cultural background,” including by claiming that “the law, read in its cultural context, simply does not mean what it literally says.” *Id.* at 3.

34. *Id.* at 20–21 (citing Heydon’s Case, 3 Rep 7a, 76 ER 637 (1584)). On the history and uses of the rule, see generally Samuel Bray, *The Mischief Rule*, 109 GEO. L.J. (forthcoming 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3452037.

35. *Bostock*, 140 S. Ct. at 1737.

36. 572 U.S. 118 (2014).

37. *Id.* at 121.

38. *Id.* at 118.

likely to be damaged by such act.³⁹

Static Control argued that Lexmark misled purchasers of microchipped cartridges to believe they were legally bound to return the cartridges to Lexmark, causing Static Control lost sales and reputational harm.⁴⁰ The district court dismissed Static Control's counterclaim on the grounds that Static Control lacked "prudential standing," a protean doctrine enabling federal courts to "decline to adjudicate [a plaintiff's] claim on grounds that are prudential, rather than constitutional."⁴¹ That court concluded that Static Control's injuries were too remote and that the remanufacturers themselves would serve as more direct plaintiffs.⁴² The case eventually rose to the Supreme Court, where it was litigated under the framework of prudential standing.

The Court, however, held that the existing doctrine of prudential standing was too uncertain and gave courts unauthorized discretion to willy-nilly reject claims.⁴³ At the same time, the Court preserved a component of the prudential-standing framework: the "zone of interests" test, which asks "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim."⁴⁴ According to Justice Scalia, this "modern" zone-of-interests test originated "as a limitation on the cause of action for judicial review conferred by the Administrative Procedure Act (APA)."⁴⁵ Yet regardless of its origins, the test applies to all statutory claims, and "Congress is presumed to legislat[e] against the background of the zone-of-interests limitation"⁴⁶

To that end, the Court deployed the zone-of-interests test to determine "whether Static Control has a cause of action under the statute."⁴⁷ Because "a statutory cause of action extends only to plaintiffs whose interests fall within the zone of interests protected by the law invoked,"⁴⁸ the test asks "whether Static Control falls within the class of plaintiffs whom Congress has authorized to sue under" the Lanham Act.⁴⁹ Relying on an "[u]nusual,

39. 15 U.S.C. § 1125(a)(1)(B).

40. *Lexmark*, 572 U.S. at 121–23.

41. *Id.* at 123–26. (All parties and the district court agreed that Static Control had Article III standing.)

42. *Id.* at 123.

43. *Id.* at 125–26.

44. *Id.* at 127, 129.

45. *Id.* at 129 (citing *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970)). *But see* Michael P. Healy, *The Claims and Limits of Justice Scalia's Textualism: Lessons from His Statutory Standing Decisions*, 40 *CARDOZO L. REV.* 2861 (2019) (arguing that the zone-of-interests test was originally developed to expand—not limit—textual reach).

46. *Lexmark*, 572 U.S. at 129 (quoting *Bennett v. Spear*, 520 U.S. 154, 163 (1997)) (alteration in original).

47. *Id.* at 128.

48. *Id.* at 129 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

49. *Id.* at 128.

and extraordinarily helpful” statement of purpose in the Lanham Act’s text, the Court reasoned that the Act’s false-advertising provision only encompasses claims by plaintiffs who “allege an injury to a commercial interest in reputation or sales.”⁵⁰ Because Static Control had alleged such an injury, the Court held that it fell within the Lanham Act’s zone of interests—and therefore had stated a cause of action.

Although the Lanham Act’s statement of purpose provided textual and contextual evidence for *Lexmark*’s holding, the opinion reveals that the zone-of-interests test need not be so textually grounded. For example, the Court noted how the Lanham Act authorizes suit by “any person who believes that he or she is likely to be damaged” by a defendant’s false advertising.⁵¹ “Read literally,” the Court conceded, “that broad language might suggest that an action is available to anyone who can satisfy the minimum requirements of Article III” standing.⁵² Yet, without explanation—and without connection to the Lanham Act’s statement of purpose—the Court pondered the “unlikelihood that Congress meant to allow all factually injured plaintiffs to recover persuades us that [§ 1125(a)] should not get such an expansive reading.”⁵³ This statement (and others like it in the opinion) would apply to statutes even without an “[u]nusual, and extraordinarily helpful” statement of purpose.⁵⁴ For those statutes, how do courts determine the “zone of interests protected by the law invoked”?⁵⁵ Must they, too, ponder the likelihood or “unlikelihood” of what Congress “meant to allow”?

Since *Lexmark*, the Supreme Court has applied the zone-of-interests test once more in 2017 in *Bank of America Corp. v. City of Miami, Fla.*⁵⁶ That case involved the federal Fair Housing Act (“FHA”), which forbids “discriminat[ing] against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race”⁵⁷ The FHA also prohibits “any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race”⁵⁸ A cause of action

50. *Id.* at 131–32 (quoting *H.B. Halicki Prods. v. United Artists Commc’ns., Inc.*, 812 F.2d 1213, 1214 (9th Cir. 1987)).

51. *Id.* at 129 (quoting 15 U.S.C. § 1125(a)(1)).

52. *Id.*

53. *Id.* (quoting *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 266 (1992)).

54. *Id.* at 131 (quoting *H.B. Halicki*, 812 F.2d at 1214).

55. *Id.* at 129 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

56. 137 S. Ct. 1296 (2017).

57. 42 U.S.C. § 3604(b).

58. *Id.* § 3605(a).

is available to any “aggrieved person,”⁵⁹ which the FHA defines to include “any person who . . . claims to have been injured by a discriminatory housing practice.”⁶⁰

The City of Miami sued two banks, claiming they “intentionally issued riskier mortgages on less favorable terms to African–American and Latino customers than they issued to similarly situated white, non-Latino customers, in violation of §§ 3604(b) and 3605(a).”⁶¹ These discriminatory practices “disproportionately “cause[d] foreclosures and vacancies in minority communities in Miami,”⁶² which in turn harmed the City by decreasing property values, reducing tax revenues, and “forcing the City to spend more on municipal services” in blighted areas.⁶³ The Court held that the City fell within the FHA’s zone of interests.⁶⁴ Writing for a 5-3 majority on the issue, Justice Stephen Breyer relied primarily on precedent and did not engage extensively with the FHA’s text.⁶⁵

Justice Thomas wrote a dissent in part, joined by Justices Alito and Anthony Kennedy. Invoking *Lexmark*, Justice Thomas opined that the City’s “asserted injuries are ‘so marginally related to or inconsistent with the purposes’ of the FHA that they fall outside the zone of interests.”⁶⁶ Justice Thomas relied heavily on these “purposes,” reasoning that “[n]othing in the text of the FHA suggests that Congress was concerned about decreased property values, foreclosures, and urban blight, much less about strains on municipal budgets that might follow.”⁶⁷ While “[a] budget-related injury might be necessary to establish a sufficiently concrete and particularized injury for purposes of Article III,” it “is not sufficient to satisfy the FHA’s zone-of-interests limitation.”⁶⁸

IV. *BOSTOCK V. LEXMARK*: TENSIONS AND IMPLICATIONS

There are two possible ways to conceive of *Lexmark*’s zone-of-interests test. The first possibility is that the test is redundant—or that there’s no “test” at all. Whether a plaintiff “has a cause of action under

59. *Id.* §§ 3613(a)(1)(A), 3613(c)(1).

60. *Id.* § 3602(i).

61. *Bank of Am.*, 137 S. Ct. at 1300–01.

62. *Id.*

63. *Id.*

64. The Court ultimately vacated and remanded for further consideration of proximate cause.

65. Whether or not further engagement was necessary is beyond the scope of this Article.

66. *Id.* at 1308 (Thomas, J., concurring in part and dissenting in part) (quoting *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014)).

67. *Id.* at 1309 (Thomas, J., concurring in part and dissenting in part). The dissent did not point to any text suggesting that Congress *wasn’t* concerned about those issues.

68. *Id.* at 1310 (Thomas, J., concurring in part and dissenting in part).

the statute⁶⁹ is a workaday inquiry that courts routinely consider without ever uttering the phrase “zone of interests.” Per this conception, the test merely restates the inquiry under Federal Rules of Civil Procedure 8 and 12 into whether the plaintiff has plausibly pleaded the elements of a particular claim.⁷⁰ Indeed, it is difficult to envision how *Lexmark*’s outcome would have materially changed had nobody ever mentioned the Lanham Act’s “zone of interests.” Yet for all its intuitive appeal, this first conception is grossly unsatisfactory. Why would the Court maintain a separate zone-of-interests test if it were entirely redundant?

The second possible conception is that the zone-of-interests test must do *something* (or at least must be capable of doing something in certain cases). After all, a unanimous Court in *Lexmark* endorsed the zone-of-interests test *qua test*. Given Rule 8’s and Rule 12’s roles apart from the zone-of-interests test, the test could never function to *expand* a statutory cause of action. Instead, to the extent it makes a difference in a particular case, the test can only *limit* a statutory cause of action. *Lexmark*, in fact, even referred to the test as the “zone-of-interests *limitation*.”⁷¹ At its most lenient in the Administrative Procedure Act context, the zone-of-interests test “forecloses suit only when a plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue.”⁷² Yet it still “forecloses suit” sometimes based on the statute’s “implicit purposes.” Because “the breadth of the zone of interests varies according to the provisions of law at issue,”⁷³ all other statutory causes of action (besides the APA) are potentially limited *more* by the zone-of-interests test. All told, this second conception is more plausible than the first.

Proceeding under the second conception, *Lexmark*’s zone-of-interests test facilitates judicial limitation of statutory coverage, thereby necessarily butting heads with *Bostock*’s textualism in methodology and effect.⁷⁴ The zone-of-interests test limits the scope of statutory causes of action “by ignoring clear statutory text”⁷⁵ (in Michael Healy’s words) and by transparently considering—regardless of ambiguity—a statute’s

69. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118,128 (2014).

70. *See generally, e.g., Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

71. *Lexmark*, 572 U.S. at 129 (emphasis added)

72. *Id.* at 131 (quoting *Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012)).

73. *Id.* at 130 (quoting *Bennett v. Spear*, 520 U.S. 154, 163 (1997))

74. One could argue that such tension doesn’t actually exist: whereas the zone-of-interests test addresses whether a plaintiff can sue, *Bostock* addresses whether a defendant is liable. That argument is weak. Both *Bostock* and *Lexmark* purport to base their reasoning on generally applicable principles of textual interpretation.

75. Healy, *supra* note 45, at 2865

“purposes.”⁷⁶ In *Lexmark*, Justice Scalia entertained “assum[ptions]” about whether “Congress authorized [a] plaintiff to sue”⁷⁷ and pondered the “unlikelihood” that “Congress meant to allow all factually injured plaintiffs recover” under the Lanham Act.⁷⁸ In tension with the *Bostock* majority, these statements call upon the same types of extratextual considerations the *Bostock* dissenters relied on and strongly resemble those dissenters’ “subtractive moves.” Fundamentally, *Lexmark* shares the *Bostock* dissenters’ implicit embrace of the “mischief rule,” which invites the interpreter “to read a statute purposively, so that it applies only to the defect that the law aims to remedy.”⁷⁹ The zone-of-interests test, like the *Bostock* dissenters’ approach, excludes—or, at least, permits judges to exclude—“applications that most people [including Congress] at the time would have rejected.”⁸⁰ The *Bostock* majority, by contrast, criticized those moves and that evidence as “abandon[ing] the statutory text” and “appeal[ing] to assumptions.”⁸¹ Whereas *Bostock*’s textualism would reject a limiting interpretation of a statutory cause of action because “few” people at the time of its enactment would “expect[] today’s result,”⁸² *Lexmark*’s zone-of-interests test not only provides cover for that reasoning, but arguably encourages it.

The zone-of-interests test ultimately falls within Justice Gorsuch’s description of a “canon of donut holes.”⁸³ Indeed, in many situations, the zone-of-interests test invites judges to assume that “Congress’s failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception.”⁸⁴ By considering the “interests” a statute “protects,” with reference to extratextual evidence of purpose, the test searches for affirmative evidence that Congress intended or expected a particular plaintiff or class of persons to have a claim under a statute, regardless of whether broad text facially provides one. Depending on the particular case, then, the test opens the door for judges to “add to, remodel, update, or detract from” textually apparent meaning and scope.⁸⁵

76. *Lexmark*, 572 U.S. at 131 (quoting *Match–E–Be–Nash–She–Wish*, 567 U.S. at 225).

77. *Id.* at 130.

78. *Id.* at 129 (quoting *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 266 (1992)). These statements, Michael Healy has observed, “inquir[e] into” (or at least contemplate inquiry into) “Congress’s intent,” making them “curious” for a self-described textualist like Justice Scalia. Healy, *supra* note 45, at 2906.

79. Healy, *supra* note 45, at 20–21.

80. *Id.* at 25.

81. *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1749 (2020).

82. *Id.* at 1750.

83. One could simply stop the analysis here and say that Justice Gorsuch was wrong and that there is a canon of donut holes. Of course, implicit in Justice Gorsuch’s statement is that even if there is a canon of donut holes, there *shouldn’t* be one: *proper* statutory interpretation doesn’t include it among its ranks.

84. *Bostock*, 140 S. Ct. at 1747.

85. *Id.* at 1738.

Bostock's textualism, by contrast, eschews consideration of expected application, meaning that the statutory cause of action applies without judicial limitation: "when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule."⁸⁶ Under *Bostock*'s textualism, there is no room for a zone-of-interests test.

The battle of "textualisms"⁸⁷ between the *Bostock* majority and dissents goes beyond the legalistic. In this regard, because of the tension between the *Bostock* majority and *Lexmark* (and, transitively, the common ground between *Lexmark* and the *Bostock* dissents), what can be said about the *Bostock* dissents can also be said about *Lexmark*. Justice Gorsuch and commentators writing about his majority opinion have stressed why his approach deserves favor over the dissent. *Lexmark*'s and the *Bostock* dissents' "flexible" textualism and "subtractive" qualities allow judges to "put the[ir] gut[s] in charge" and "restrict the operation of any statute, so that it has only the effects that were obvious at the time of enactment, rather than the effects dictated by the words of the law."⁸⁸ But in Justice Gorsuch's view, this simply covers for "cynicism that Congress could not possibly have meant to protect" a particular person or class of people.⁸⁹ Interpreting a statute's meaning based on such reasoning, he cautioned, "would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms."⁹⁰ For that reason, "formalistic" (or semantics-centric) textualism "may be valuable for politically vulnerable communities."⁹¹ In addition, as Tara Leigh Grove has argued, the "formalistic" textualism embraced by Justice Gorsuch and the *Bostock* majority, as a comparatively "rule-bound method," has the potential to "better constrain. . . a judge's proclivity to rule in favor of the wishes of the political faction that propelled her into power."⁹² In other words, "[f]ormalistic textualism calls upon judges to limit their own discretion to rule consistently for their perceived 'team' in statutory cases."⁹³ This limited discretion, in turn, could have positive effects on the Court's legitimacy and over time even help relax the current era's rancorous Article II selection process.⁹⁴ On

86. *Id.* at 1747.

87. Grove, *supra* note 6, at 267 (emphasis removed).

88. Koppelman, *supra* note 33, at 4, 38.

89. *Bostock*, 140 S. Ct. at 1751; cf. Grove, *supra* note 6, at 266 n.10 (quoting NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 131, 144 (2019) ("[T]extualism helps ensure that all people, not just the popular or powerful, get the benefit of a law[.]")).

90. *Bostock*, 140 S. Ct. at 1751. "Only the written word is the law, and all persons are entitled to its benefit." *Id.* at 1737.

91. Grove, *supra* note 6, at 274.

92. *Id.* at 269.

93. *Id.* at 304.

94. *See id.* at 296–307.

the flip side, then, perpetuating *Lexmark*'s zone-of-interests test—as well as any other rule, canon, or doctrine that permits comparatively easy injection of purpose and “gut” into statutory interpretation, thereby enabling judicial limitation of statutory language—risks undermining the Court's legitimacy and further destabilizing the judicial nomination and confirmation process.

Lest anyone think this Article overstates the potential of the zone-of-interests test to deny “all persons” the “benefit” of the “written word,”⁹⁵ consider just a few recent circuit court decisions invoking the zone-of-interests test. In *Delta Const. Co. v. EPA*,⁹⁶ for example, the D.C. Circuit held that the plaintiffs fell outside the zone of interests protected by the Clean Air Act:

Whenever Congress pursues some goal, it is inevitable that firms capable of advancing that goal may benefit. . . . But in the absence of either some explicit evidence of an intent to benefit such firms, or some reason to believe that such firms would be *unusually suitable champions* of Congress's ultimate goals, no one would suppose them to [be within the zone of interests] to attack regulatory laxity.⁹⁷

Per this reasoning, even if a plaintiff is clearly within a statute's textual scope, a court can nevertheless deem that plaintiff outside the statute's primary purposes and put the burden on the plaintiff to provide “explicit evidence” of an “intent” to benefit *it*. Just like the *Bostock* dissents, then, *Delta Construction* “subtract[s] meaning from the plain language of a statute”⁹⁸ and requires “explicit” extratextual evidence to bring a case back to where it started: within the bounds of a statute's textual coverage.

Similarly in *In re Peeples*,⁹⁹ the Tenth Circuit invoked *Lexmark* to reject a plaintiff's claim based on the Bankruptcy Code's automatic stay. Even though the relevant statute said that “an *individual injured* by any willful violation of a stay provided by this section shall recover actual damages,”¹⁰⁰ the Court surmised that “Congress *couldn't possibly have intended* for anyone who is marginally injured by an automatic-stay violation to sue for damages under § 362(k).”¹⁰¹ Quite transparently, this reasoning “abandon[s] the statutory text,” “appeal[s] to assumptions,”¹⁰² and embraces the dubious mischief rule by “read[ing] [the] statute

95. *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1737 (2020).

96. 783 F.3d 1291 (D.C. Cir. 2015) (per curiam).

97. *Id.* (quoting *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 283 (D.C. Cir. 1988)).

98. Koppelman, *supra* note 33, at 25.

99. 880 F.3d 1207 (10th Cir. 2018).

100. 5 U.S.C. § 362(k) (emphasis added).

101. *Peeples*, 880 F.3d at 1216 (emphasis added).

102. *Bostock*, 140 S. Ct. at 1749.

purposively, so that it applies only to the defect that the law aims to remedy.”¹⁰³ It uses the exact same couldn’t-possibly-have-meant-it speculation that Justice Gorsuch expressly chided as threatening to “tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law’s terms.”¹⁰⁴

Finally, in *Stockbridge-Munsee Cmty. v. Wisconsin*,¹⁰⁵ the Seventh Circuit (arguably in dicta) considered the zone of interests protected by the Indian Gaming Regulatory Act. Despite statutory language that facially gives tribes an unqualified cause of action to sue for a violation of the Act, the court observed that “none of the Act’s substantive rules *seems* to protect one tribe from competition by another.”¹⁰⁶ It therefore would have held that the zone-of-interests test precludes claims by a tribe against another tribe (as opposed to a state).¹⁰⁷ Contrary to *Bostock*, the courts in all three of these cases privileged “extratextual considerations” over text, “detract[ed] from” a statute’s meaning, and thereby denied some persons the benefit of written law.¹⁰⁸

To be sure, there are certainly grounds on which to push back against this Part’s argument thus far. One might wonder, for instance, whether it is fair to compare *Bostock* with *Lexmark* at all. *Lexmark* and the zone-of-interests test are used to interpret statutory provisions creating a cause of action. *Bostock*, on the other hand, interpreted a statutory provision setting forth a liability rule.¹⁰⁹ Still, so what? By *Lexmark*’s own terms, the zone-of-interests test is *about* “straightforward” “statutory interpretation.”¹¹⁰ If the topic of discussion is statutory interpretation, then making sense of different cases’ statutory-interpretation approaches is fair game. From there, especially for self-proclaimed textualists, what basis exists to apply different approaches to different types of statutory text when they are fundamentally *all statutory text*?¹¹¹

Justice Scalia also arguably justified the zone-of-interests test in a way that preempts or resolves the tension described in this Part. He defended

103. Koppelman, *supra* note 33, at 20–21.

104. *Bostock*, 140 S. Ct. at 1751.

105. 922 F.3d 818 (7th Cir. 2019). I was among multiple counsel representing one of the parties in the case.

106. *Id.* at 821 (emphasis added).

107. *Id.* at 823.

108. *Bostock*, 140 S. Ct. at 1737.

109. Even this distinction rests on shaky foundation. How does a judge *really* know when to use the zone-of-interests test? Can’t any liability rule be reframed as a question about the type of plaintiff that can sue?

110. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118,129 (2014)..

111. If the zone-of-interests test is so susceptible to purposive influence, then what explains self-proclaimed textualists’ (like Justice Scalia in *Lexmark* and Justice Thomas in *Bank of America*) enthusiastic support of it? Especially outside the APA context, is it just a way for textualists to obscure their own departures from textualism?

the zone-of-interests test as a “requirement of general application” that Congress “legislat[es] against the background of” and that “applies unless it is expressly negated.”¹¹² Nearly identical language is often used to describe other clear-statement rules and substantive canons.¹¹³ But there are several problems with this defense. To begin, the validity of such rules and canons has been questioned, especially when they are used in a way other than to break a tie between two equally plausible interpretations of statutory text.¹¹⁴ Moreover, if the modern zone-of-interests test was created in 1971,¹¹⁵ how could earlier Congresses—such as the one that enacted the Lanham Act or the one that enacted Title VII—have legislated against its background?¹¹⁶ Finally, other clear-statement rules and substantive canons are applied without regard to the purpose or intent of the particular statute at issue. As an example, Congress is presumed to enact statutes of limitation with the understanding that they are subject to equitable tolling.¹¹⁷ But courts apply equitable tolling *irrespective* of the intent, purpose, or expected application of a particular statute. The zone-of-interests test, by contrast, limits a statute’s reach based on *that statute’s* purpose (and, potentially, its intent and expected application). How can Congress legislate against the background of the zone-of-interests test if the *test itself* depends on the *particular statute*?¹¹⁸ For Congress to legislate against a background rule, the content of that background rule must be ascertainable by Congress ahead of time. In sum, the background justification is unsatisfactory for allowing the zone-of-interests test to overcome statutory language.

Finally, this Article’s observations likely extend beyond *Lexmark’s* zone-of-interests test. The tension between *Bostock* and the zone-of-interests test suggests that *Bostock’s* textualism may denounce *any*

112. *Lexmark*, 572 U.S. at 129 (quoting *Bennett v. Spear*, 520 U.S. 154, 163 (1997)).

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

114. See generally *id.* Justice Gorsuch left room for extratextual considerations – such as legislative history – to resolve ambiguity. See *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1749 (2020). The zone-of-interests test, by contrast, invites extratextual considerations regardless of ambiguity.

115. *Lexmark*, 572 U.S. at 130 n.5.

116. Justice Scalia attempted to address that question by citing the common law: “Although we announced the modern zone-of-interests test in 1971, its roots lie in the common-law rule that a plaintiff may not recover under the law of negligence for injuries caused by violation of a statute unless the statute is interpreted as designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation.” *Id.* (quoting W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, *PROSSER AND KEETON ON LAW OF TORTS* § 36, pp. 229–30 (5th ed. 1984)). Even if that explanation could justify a pre-1971 background principle, however, it is difficult to envision how it extends to statutory causes of action that bear little resemblance to common-law tort claims.

117. Barrett, *supra* note 113, at 123 n.65.

118. “[T]he breadth of the zone of interests varies according to the provisions of law at issue” *Lexmark*, 572 U.S. at 130 (quoting *Bennett v. Spear*, 520 U.S. 154, 163 (1997)).

judicial limitation on a statutory cause of action. *Bostock*'s methodological themes of respecting semantic meaning, eschewing expected application, and rejecting canons of donut holes also call into question other clear-statement rules, substantive canons, and judicial doctrines that limit what statutes say.¹¹⁹ Crucially, not only does judicial limitation of statutory language contradict textualist principles, but it also undermines constitutional order. Under the U.S. Constitution (and similarly under state constitutions), Congress is vested with the "legislative Power," and courts are vested with the "judicial Power."¹²⁰ Judicial power consists of applying law to adjudicate particular disputes, interpreting that law in the course of applying it, and (if multiple applicable sources of law conflict) deciding in accord with higher-order law.¹²¹ When the law supplying a rule of decision is statutory, and there is no question of the statute's constitutionality, courts exceed their constitutionally vested power if, in the course of adjudicating a dispute, they interfere with or exercise legislative power. In short, courts interpret and apply law; they cannot "add to, remodel, update, or detract from" statutory law.¹²² Doing so "would risk amending statutes outside the legislative process reserved for the people's representatives."¹²³

Bostock thus brings to the surface a quandary that has always lurked just beneath: judicially-created limitations on legislatively-created causes of action may violate the separation of powers, at least in certain circumstances. Many state courts, for example, have adopted some version of the common-law economic-loss doctrine, which holds that "there is no liability in tort for economic loss caused by negligence in the performance or negotiation of a contract between the parties."¹²⁴ Although the economic-loss doctrine originated as a judicial limitation on *common-law* tort claims, some courts have applied the doctrine to

119. Grove, *supra* note 6, at 286–87; see, e.g., Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 835 (2017) (noting the "significant theoretical tension between substantive canons and textualism"); John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 403–06 (2010); Barrett, *supra* note 113; John F. Manning, *Absurdity Doctrine*, 116 HAR. L. REV. 2387 (2003). ANTONIN SCALIA, A MATTER OF INTERPRETATION 28 (Amy Gutmann ed., 1997) ("To the honest textualist, all of these preferential rules and presumptions are a lot of trouble [I]t is virtually impossible to expect uniformity and objectivity [from an interpretive method] when there is added . . . a thumb of indeterminate weight."). *But see, e.g.*, SCALIA & GARNER, *supra* note 19, at 247–339 (endorsing certain of these canons and rules).

120. U.S. CONST. art. I, § 1; *id.* art. III, § 1.

121. See Joseph S. Diedrich, *Separation, Supremacy, and the Unconstitutional Rational Basis Test*, 66 VILLANOVA L. REV. (forthcoming 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696681. See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008).

122. *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1738 (2020).

123. *Id.*

124. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 3 (2020).

preclude *statutory* causes of action.¹²⁵ Many other courts, however, have held that the doctrine cannot be deployed to bar a legislatively-created cause of action or remedy.¹²⁶ And some have done so by explicitly invoking the respective state’s separation of powers.¹²⁷ Recently in Colorado, for example, a trial court found an individual liable both for breach of contract and for violation of Colorado’s civil-theft statute.¹²⁸ On appeal, the defendant argued, under the economic-loss doctrine, that the plaintiff’s “remedies were limited to those for breach of contract, and that Colorado’s economic loss rule bars [the plaintiff’s] claim for civil theft.”¹²⁹ The Colorado Supreme Court rejected the argument, holding that “the judge-made economic loss rule cannot bar a statutory cause of action.”¹³⁰ “[T]o limit or abrogate a clear legislative pronouncement by reason of such judicial policy concerns would offend the separation of powers.”¹³¹

The Colorado Supreme Court’s reasoning may extend to other interactions between judicial doctrines and statutory causes of action. For instance, depending on the statutory cause of action at issue, might the exhaustion-of-remedies doctrine or primary-jurisdiction doctrine encroach on legislative power by atextually limiting the statute’s

125. *See, e.g.*, *Dillon v. Leazer Grp., Inc.*, 374 F. Supp. 3d 547, 558 (E.D.N.C. 2019) (holding that economic-loss doctrine barred claims under North Carolina’s Unfair and Deceptive Trade Practices Act); *Ridolfi v. State Farm Mut. Auto. Ins. Co.*, 146 F. Supp. 3d 619, 626 (M.D. Pa. 2015) (holding that economic-loss doctrine barred claims under the Pennsylvania Unfair Trade Practices and Consumer Protection Law); *MBI Acquisition Partners, L.P. v. Chronicle Publ’g Co.*, 301 F. Supp. 2d 873, 886 (W.D. Wis. 2002) (holding that economic-loss doctrine barred claim under Wisconsin’s Deceptive Trade Practices Act).

126. *Shaw v. CTVT Motors, Inc.*, 300 P.3d 907, 909–10 (Ariz. Ct. App. 2013), *as amended* (Mar. 29, 2013) (and listing other states and cases); *Hinrichs v. DOW Chem. Co.*, 937 N.W.2d 37, 50 (Wis. 2020) (holding that economic-loss doctrine did not bar claim under Wisconsin’s Deceptive Trade Practices Act, because the claim was statutory).

127. *See, e.g.*, *Bermel v. BlueRadios, Inc.*, 440 P.3d 1150, 1153 (Co. 2019); *Ulbrich v. Groth*, 78 A.3d 76, 102 (Conn. 2013) (and listing other states and cases); *Stallings v. Kennedy Elec., Inc.*, 710 So. 2d 195, 196 (Fla. Dist. Ct. App. 1998), *approved sub nom.* *Comptech Int’l, Inc. v. Milam Commerce Park, Ltd.*, 753 So. 2d 1219 (Fla. 1999) (quoting *Delgado v. J.W. Courtesy Pontiac GMC–Truck, Inc.*, 693 So. 2d 602, 609 (Fla. Dist. Ct. App. 1997)) (emphasis removed) (first alteration in original) (“[C]ourts do not have the right to limit and, in essence, to abrogate . . . the expanded remedies granted . . . under [a] legislatively created scheme by allowing the judicially favored economic loss rule to override a legislative policy pronouncement and to eliminate the enforcement of those remedies. In sum, any tension between the legislative policy embodied in the [statutory cause of action] and the judicial policy embodied in the economic loss rule must be resolved under the doctrine of separation of powers in favor of the legislative will so long as the [statute] passes constitutional scrutiny.”); *Eastwood v. Horse Harbor Found., Inc.*, 241 P.3d 1256, 1268–69 (Wash. 2010) (Madsen, C.J., concurring) (“[W]e cannot apply the common law economic loss rule to nullify the statutory cause of action for waste without violating separation of powers principles and encroaching on the legislature’s authority to establish a cause of action.”).

128. *Bermel*, 440 P.3d at 1151–52.

129. *Id.*

130. *Id.*

131. *Id.* at 1157.

scope?¹³² Or how about qualified immunity, when used to limit a 42 U.S.C. § 1983 action to only those plaintiffs who can show their violated constitutional rights were clearly established?¹³³ At minimum, any judicially-created limitation on the textually-ascertainable scope of a legislatively-created cause of action should be carefully scrutinized for compliance with the separation of powers.

V. CONCLUSION

Bostock has drawn attention to different approaches to statutory interpretation and has highlighted conflicts “within textualism.”¹³⁴ Rejected by Justice Gorsuch and the *Bostock* majority, the *Bostock* dissenters’ flexible textualism entertains extratextual considerations and resembles *Lexmark*’s zone-of-interests test. Indeed, the zone-of-interests test constitutes a “canon of donut holes” that invites courts to “detract from” statutory text and deny to some plaintiffs the “benefit” of “written . . . law.”¹³⁵ The test may thus be susceptible to challenge (or, at least, may be at risk of gradual “zombif[ication]”).¹³⁶ Interpretation principles underlying Justice Gorsuch’s *Bostock* majority, moreover, cast doubt on other judicially-created canons, rules, and doctrines. To the extent a canon, rule, or doctrine limits the reach of legislatively-created causes of action, the separation of powers will have in *Bostock* a strong ally going forward.

132. Indeed, “where a cause of action,” such as a declaratory-judgment claim under certain statutes, “already has arisen, the exhaustion [doctrine] amounts to little more than the *exhaustion of plaintiffs* by denying them access to the courts and the equal protection of the law.” PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 304 (2014) (emphasis added).

133. See generally, e.g., William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45 (2018).

134. Grove, *supra* note 6, at 266 (emphasis removed).

135. *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1738, 1747 (2020).

136. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., concurring in the judgment). The answer may depend, at least in part, on respective Justices’ views about methodological stare decisis. Assuming the zone-of-interests test exists among clear-statement rules and substantive canons, what, if any, precedential respect is owed to such tests and rules? For present purposes, it suffices to say that descriptively and normatively, the answer is unclear. See, e.g., Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1576–77 (2014) (“Despite widespread support for the doctrine of stare decisis on *substantive statutory issues*, federal courts generally do not give stare decisis effect to their *methodological decisions* in statutory interpretation cases.”); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1823, 1848 (2010) (observing that “judges can and do bind other judges’ methodological choices, in the same way they bind one another with respect to substantive precedents,” and arguing that “settling on a consistent approach is a worthy goal for statutory interpreters”) (emphasis removed). See generally Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863 (2008).