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## Eager To Follow: Methodological Precedent in Statutory Interpretation

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## EAGER TO FOLLOW: METHODOLOGICAL PRECEDENT IN STATUTORY INTERPRETATION\*

AARON-ANDREW P. BRUHL\*\*

*An important recent development in the field of statutory interpretation is the emergence of a movement calling for “methodological precedent”—a regime under which courts give precedential effect to interpretive methodology. In such a system, a case would establish not only what a particular statute means but could also establish binding rules of methodology—which tools are valid, in what order, and so on. The movement for methodological precedent has attracted sharp criticism on normative grounds. But both sides of the normative debate agree on the premise that the federal courts generally do not give precedential effect to interpretive methodology today.*

*This Article shows that both sides have misapprehended the current state of affairs. The federal courts already display a substantial amount of methodological precedent. Commentators have underestimated its prevalence for a few reasons, some conceptual and some empirical. On the conceptual side, scholars are rarely explicit about what they believe methodological precedent entails, and some of their implicit criteria are incorrect. On the empirical side, commentators focus too much on the Supreme Court and a few of its fiercest methodological battles rather than viewing the federal judiciary as a whole. If one applies the right criteria and expands the field of view, one sees that we already have a federal interpretive system that is at least semi-precedential. Methodological precedent is most prominent in the lower courts, but there is unappreciated evidence of it in the Supreme Court as well. And there is reason to expect that methodological precedent will grow over time.*

*Adopting a proper understanding of methodological precedent’s nature and extent has some implications for the normative debate over expanding the role of precedent in interpretive methodology. Some of the implications should hearten the proponents of methodological precedent. But the fact that the current level of methodological precedent has not received its proper due may show that*

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\*\* Associate Dean for Research and Faculty Development and Rita Anne Rollins Professor of Law, William & Mary Law School. I gratefully acknowledge support from a Plumeri Faculty Excellence Award. For helpful comments, I thank Jim Brudney, Abbe Gluck, Randy Kozel, Anita Krishnakumar, Alli Larsen, Ethan Leib, Glen Staszewski, and an audience at the Southeastern Association of Law Schools. I thank Cody Brandon, Stephanie Cone, Lindsey Folcik, Damian Gallagher, and Benjamin Holwerda for valuable research assistance.

*its proponents' real aims are unlikely to be satisfied even as methodological precedent expands and solidifies.*

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## INTRODUCTION

Suppose the Supreme Court decides that the term “vehicle” in a particular federal statute does not include bicycles. As part of the reasoning leading to its conclusion, the Court states that one canon of interpretation takes priority over another, that a different canon of interpretation does not apply to statutes of this sort at all, and that presidential signing statements may be used to resolve textual ambiguities.

Which aspects of the decision have the force of precedent? That is, which aspects of the case must the lower courts follow absolutely and must the Supreme Court itself follow, under the doctrine of *stare decisis*, unless the stringent criteria for overruling precedent are satisfied? Everyone would agree that precedential effect attaches at least to the conclusion that a bicycle is not a “vehicle” for purposes of the particular statute. But what is the future effect of the methodological rulings that accompany the substantive holding, such as the pronouncement about the relative priority of two canons? Do those kinds of rulings enjoy precedential status in future cases?

The conventional view within the field of statutory interpretation is that propositions of interpretive methodology generally do not, as a descriptive matter, enjoy precedential status in the federal courts.<sup>1</sup> That is, the courts

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1. See, e.g., Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1872–74 (2008) (explaining that the Supreme Court does not give decisions about interpretive methodology ordinary binding effect); Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 757 (2013) (stating that the idea of *stare decisis* for rules of interpretation “has been rejected by all federal courts and most scholars”); *id.* at 777 (observing “the absence of any kind of system of precedent for statutory interpretation methodology” in the federal courts); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1754 (2010) [hereinafter Gluck, *Laboratories*] (“Methodological *stare decisis*—the practice of giving precedential effect to judicial statements about methodology—is generally absent from the

regard a case as settling a particular substantive question—such as whether a bicycle is a “vehicle” within the meaning of a certain statute—but the courts do not regard a case as settling various questions of interpretive methodology that arise along the way, no matter how central to the result.

One of the most interesting developments in the last decade or so of legislation scholarship has been the emergence of a movement calling on the federal courts to reverse the state of affairs just described and to give precedential effect to methodological rulings.<sup>2</sup> Under a regime of methodological precedent (or “MP,” for short), a case deciding whether a bicycle is a vehicle could authoritatively settle methodological matters such as the scope of a canon’s application, the relative priority of two conflicting canons, or the permissible uses of legislative history. The movement for MP draws inspiration from the example of certain state supreme courts that have self-consciously attempted to establish binding interpretive regimes.<sup>3</sup> The hope of MP advocates is that making interpretive methodology into binding law will reduce the much lamented unpredictability of statutory interpretation.<sup>4</sup>

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jurisprudence of mainstream federal statutory interpretation . . . .”); Stephen M. Rich, *A Matter of Perspective: Textualism, Stare Decisis, and Federal Employment Discrimination Law*, 87 S. CAL. L. REV. 1197, 1197 (2014) (“When the Supreme Court rules on matters of statutory interpretation, it does not establish ‘methodological precedents.’ The Court is not bound to follow interpretive practices employed in a prior case even if successive cases concern the same statute.” (footnote omitted)); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2144 (2002) (“[T]he Justices do not seem to treat methodology as part of the holding of case law.”); Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 385–86, 389 (2005) [hereinafter Siegel, *The Polymorphic Principle*] (observing that “stare decisis effect attaches to the interpretation that the Court gives to a statute, but the Court does not adhere to the interpretive methods used to reach that interpretation” and that “stare decisis effect attaches to the ultimate holding as to the meaning of the particular statute interpreted, but not to general methodological pronouncements”); see also James J. Brudney & Lawrence Baum, *Protean Statutory Interpretation in the Courts of Appeals*, 58 WM. & MARY L. REV. 681, 690–93 (2017) (describing the limited role of Supreme Court precedent in guiding lower-court methodology); cf. WILLIAM N. ESKRIDGE JR., INTERPRETING LAW 145–46 (2016) (“The Court does not accord formal *stare decisis* effect to its methodological precedents. . . . [But] those precedents have a *quasi-stare decisis* authority, not formally binding but weighty nonetheless.”); Philip P. Frickey, *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1971, 1976 (2005) [hereinafter Frickey, *Interpretive-Regime*] (stating that methodological statements are technically dicta and therefore “not binding on the Supreme Court or even on lower courts”—but that the statements are nonetheless practically influential).

2. E.g., Foster, *supra* note 1, at 1884; Gluck, *Laboratories*, *supra* note 1, at 1848–55; Abbe R. Gluck, *Justice Scalia’s Unfinished Business in Statutory Interpretation: Where Textualism’s Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2057 (2017); Jordan Wilder Connors, Note, *Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology*, 108 COLUM. L. REV. 681, 708 (2008); see also Matthew Mezger, *Using Interpretive Methodology To Get out from Seminole Rock and a Hard Place*, 84 GEO. WASH. L. REV. 1335, 1351, 1353 (2016) (arguing that the Supreme Court should impose a binding methodology for interpreting ambiguous agency regulations).

3. See Gluck, *Laboratories*, *supra* note 1, at 1775–1811 (describing efforts in several states).

4. E.g., Foster, *supra* note 1, at 1885, 1893–94; Connors, *supra* note 2, at 709.

The call for MP has not gone unchallenged. Several scholars have charged that MP is undesirable or even unconstitutional.<sup>5</sup> But this Article's inquiry is more positive and explanatory than normative. It examines some matters that are often taken for granted or overlooked on both sides of the normative debate but that should be sorted out before deciding whether to support the MP program. In particular, we need to answer questions like the following: What does it mean to have, or to lack, MP? Might we already have it, or at least much more of it than is commonly believed? How would we know if we have it? And how much difference would a robust practice of MP make?

This Article tackles those questions. The Article's first task, which is taken up in Part I, is to sort out what it would mean to have MP and what kinds of evidence would indicate that MP exists in a judicial system. Authors are rarely explicit about their criteria for MP's existence, which tends to confuse the whole debate. Part I therefore develops a list of indicia, to be detected in judges' actions and attitudes, that would show the existence of MP.

With a proper conceptual understanding of MP in place, Parts II and III then assess whether the federal courts today exhibit MP. Part II focuses on how courts talk about methodology, while Part III focuses on how courts handle methodology. Although the nature of interpretive methodology precludes precisely measuring the scope and strength of MP, the evidence marshaled in Parts II and III shows, at a minimum, that there is much more MP than either MP's backers or its detractors recognize.<sup>6</sup> Moreover, the phenomenon of MP is not limited to the *Chevron* deference doctrine ("the *Chevron* doctrine"),<sup>7</sup> which some MP advocates believe has already obtained precedential status.<sup>8</sup> The

5. *E.g.*, Brudney & Baum, *supra* note 1, at 760–61; Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1581–95 (2014); Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1148–52 (2019) [hereinafter Kozel, *Statutory Interpretation*]; Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47, 48 (2010); Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 904–06 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)); Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 268–70 (2015); Jennifer M. Bandy, Note, *Interpretive Freedom: A Necessary Component of Article III Judging*, 61 DUKE L.J. 651, 676–77 (2011); see also Chad M. Oldfather, *Methodological Pluralism and Constitutional Interpretation*, 80 BROOK. L. REV. 1, 5 (2014) (expressing skepticism about methodological stare decisis in the context of constitutional interpretation). For an article that was against what one might recognize as MP even before others were for it, see generally Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1 (2004).

6. Note that this Article is limited to federal courts interpreting federal statutes. I believe that the federal courts' perception that they are required to use state methodology when interpreting state statutes has been underestimated too, and I take up that subject in future work.

7. The *Chevron* deference doctrine refers to the process by which courts evaluate an agency's interpretation of a governing statute. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

8. *E.g.*, Gluck, *Laboratories*, *supra* note 1, at 1817; Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 613 (2014) [hereinafter Gluck,

*Chevron* doctrine is not exceptional, and, in fact, the *Chevron* doctrine may not even be a particularly strong example of MP.

Observers underestimate MP's prevalence not only because they lack a proper definition of it but also because they focus too much on the Supreme Court and, moreover, on a few of its fiercest methodological battles, particularly the fight over the use of legislative history. Perhaps it was not an accident that Justice Gorsuch's recent concurring opinion in *Kisor v. Wilkie*,<sup>9</sup> which advocated rejecting administrative law's *Auer* deference doctrine ("the *Auer* doctrine"),<sup>10</sup> invoked *both* of those narrowing features in suggesting that interpretive frameworks like the *Auer* doctrine may not even be eligible for precedential status.<sup>11</sup> "We [presumably meaning the Justices]," he wrote, "do not regard statements in our opinions about such generally applicable interpretive methods, like the proper weight to afford historical practice in constitutional cases or *legislative history in statutory cases*, as binding future *Justices* with the full force of horizontal *stare decisis*."<sup>12</sup>

Whatever the precedential status of interpretive methodology at the Supreme Court, the Court is generally the worst place to look for any kind of precedent. The Court's docket consists of a small and unrepresentative set of cases that are chosen precisely because the law governing them is underdeterminate and, often, because the cases have high moral and political stakes.<sup>13</sup> By contrast, the evidence of MP is pervasive in the lower courts. The different treatment of MP across the levels of the judicial system, which is documented in Parts II and III, provides further support for the proposition that approaches to statutory interpretation are hierarchically variable.<sup>14</sup>

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30 Years of *Chevron*]; J. Stephen Tagert, Note, *To Erie or Not To Erie: Do Federal Courts Follow State Statutory Interpretation Methodologies?*, 66 DUKE L.J. 211, 215 n.23 (2016). *But see* Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1766 (2010) (arguing that the Supreme Court does not apply deference doctrines in a precedential way).

9. 139 S. Ct. 2400 (2019).

10. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding that an agency's evaluation of its own regulations is reasonable unless "plainly erroneous").

11. *Kisor*, 139 S. Ct. at 2444–45 (Gorsuch, J., concurring in the judgment).

12. *Id.* at 2444 (emphasis added).

13. Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 399–400 (2007) [hereinafter Schauer, *Has Precedent Ever Really Mattered*]; *see also* Gluck, *Laboratories*, *supra* note 1, at 1820–21 ("[A]t least one reason [for the dominance of legal skepticism in statutory interpretation] is what has been the almost exclusive focus on the U.S. Supreme Court . . .").

14. Previous research shows, for example, that courts at different levels differ in terms of which tools they tend to use. *See* Lawrence Baum & James J. Brudney, *Two Roads Diverged: Statutory Interpretation by the Circuit Courts and Supreme Court in the Same Cases*, 88 FORDHAM L. REV. 823, 839–40 (2019); Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 64–65 (2018) [hereinafter Bruhl, *Statutory Interpretation*].

Nonetheless, although the evidence of MP at the Supreme Court is admittedly mixed, Parts II and III also aim to adduce enough previously unappreciated evidence of MP at the Supreme Court to demonstrate that observers who have assumed that there is no MP should adjust their prior views about the Court's behavior. In that regard, note that the majority opinion in *Kisor*, without directly disputing Justice Gorsuch's doubts about *Auer*'s eligibility for precedential status, did conduct a stare decisis analysis in deciding to modify *Auer* rather than overrule it—"overrule" being the Court's terminology, a telling choice given that only precedents require overruling.<sup>15</sup>

Having surveyed MP's extent in Parts II and III, the Article then considers the implications of the current state of MP in Part IV. That our practice of interpretation is already semi-precedential is good news for the MP movement in that it shows that MP is not a hopeless fantasy. The news gets better still when one considers that the conditions are ripe for some further expansion of MP in the future. However, the findings of Parts II and III raise a question that should worry the backers of the MP program. Namely, if MP is already a prominent and expanding feature of current judicial practice, why does it not feel that way to those who hunger for it? Part IV explains that the existing practice of MP feels dissatisfying because it has not delivered on its advocates' goal of predictability in outcomes. Worse, it probably cannot deliver on that goal, even if we do enter, as we plausibly will, a future era of stronger and more expansive MP.

Finally, the Article concludes by suggesting that MP, once it is properly understood, should play a different role in future normative debates about statutory interpretation. The most important questions going forward are not about MP's feasibility but rather about what methods and rules are desirable. That is, the focus of normative interpretive theory should return to *content*, though the old debates over what methods are desirable should now be informed by a proper understanding of and prospects for precedentialization of different approaches and rules.

#### I. WHAT WOULD IT MEAN TO HAVE METHODOLOGICAL PRECEDENT, AND HOW WOULD WE KNOW IF WE HAVE IT?

This part describes what it means to have MP and develops criteria for how to detect it. Section I.A begins by considering precedent as a general phenomenon rather than MP in particular. Section I.B builds upon that understanding to develop a conception of precedent that is suitable to the domain of interpretive methodology. Section I.C explains why the search for MP should target certain canons more than others. Section I.D considers the criteria that other scholars have employed (sometimes only implicitly) in

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15. See *Kisor*, 139 S. Ct. at 2409, 2422–23.



reaching their conclusions that the federal courts do not have MP. Section I.E summarizes the indicia of precedential behavior that will be used in Parts II and III to search for the presence of MP.

A. *Precedent in General*

We should first distinguish between a conceptual inquiry—*what does it mean to follow precedent?*—and an epistemic or evidentiary inquiry—*how do we know if courts are following precedent?* Both are important, but they are not the same. Let us begin with the conceptual inquiry.

As a general matter, to treat a prior decision as precedent is to treat it as providing a reason for action in accordance with the prior decision regardless of the prior decision's correctness. That is, to treat a prior decision as precedent is to treat it as an authority, a source of content-independent reasons for action.<sup>16</sup> In the federal judiciary, lower courts cannot overrule the precedents of a superior court, and they must treat them as reasons for action that are conclusive within their scope.<sup>17</sup> So, for example, if the Supreme Court has held that a certain filing deadline is a jurisdictional requirement and failure to comply with the deadline cannot be excused by equitable defenses, then a lower court must reject an untimely filing—even if the lower court disagrees with the Court's reasoning and would accept the filing if the decision were its own to make.<sup>18</sup>

Our modern understanding of precedent gives full force, at least as a matter of vertical precedent and circuit law, to a proposition as soon as it is established by a single published case from an authoritative court.<sup>19</sup> According to the older, declaratory theory of the common law, judicial opinions are not law but merely imperfect evidence of it.<sup>20</sup> On that theory, precedent solidifies over time rather than springing into existence through a single act of judicial positing. It may be that older notions of common law as a discovered, "general"

16. See Deborah Hellman, *An Epistemic Defense of Precedent*, in PRECEDENT IN THE UNITED STATES SUPREME COURT 63, 64–65 (Christopher J. Peters ed., 2013); Frederick Schauer, *Precedent*, in THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 123, 124 (Andrei Marmor ed., 2012) [hereinafter Schauer, *Precedent*].

17. Precedents from outside the jurisdiction are conventionally called "persuasive authorities." See generally Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 OKLA. L. REV. 55 (2009) (discussing the nature of persuasive authorities). This Article concerns Supreme Court and same-circuit precedents, which have force beyond their mere power to persuade.

18. E.g., *United States ex rel. Haight v. Cath. Healthcare W.*, 602 F.3d 949, 953 (9th Cir. 2010).

19. See *Hart v. Massanari*, 266 F.3d 1155, 1168 (9th Cir. 2001); John B. Oakley, *Precedent in the Federal Courts of Appeals: An Endangered or Invasive Species?*, 8 J. APP. PRAC. & PROCESS 123, 125–29 (2006). By vertical precedent, I refer to the rule that rulings of hierarchically superior courts are absolutely binding on courts below them, as opposed to the doctrine of horizontal precedent that applies to a court's own prior rulings.

20. See generally Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999) (tracing the rise of the modern understanding of stare decisis).

law are a better fit for interpretive methodology than the modern notion of judicially posited law.<sup>21</sup> Nonetheless, for purposes of this Article, I will use the modern understanding of precedent and show that methodology possesses not only features of a customary general law but also honest-to-goodness binding effect in the modern sense in which federal courts understand precedent.

Because treating a decision as precedential requires a certain attitude toward it—regarding it as providing a reason for acting in a certain way—*precedent involves both more and less than decisional outcomes*. To adapt an example from Frederick Schauer, if someone in a position of authority (such as a parent or military superior) orders me to eat pistachio ice cream, which I happen to *love*, then eating the ice cream does not show that I treated the order as the reason, or any reason, for my behavior.<sup>22</sup> And so, precedent is not necessarily operating merely because judicial behavior is consistent with what precedent directs. The precedent must be treated as a reason for acting in line with the precedent, independent of any persuasive force of the precedent's content.<sup>23</sup> In that sense, outcomes are not sufficient when assessing precedential influence.

Nor are particular outcomes necessary. A decision maker may give force to precedent even without deciding in the direction that precedent directs. A precedent can push a decision maker in one direction, yet the precedent's force can be overcome by contrary reasons pushing the other way. That is, the reason for action generated by precedent need not be conclusive.<sup>24</sup> A familiar example in our system comes from the fact that the Supreme Court may overrule its own precedents.<sup>25</sup> Even when the Court does that, though, in a system of precedent, the Court would feel the pull of precedent rather than merely ruling as if the slate were clean.<sup>26</sup> That is why the Court generally says that *stare decisis* requires it to provide reasons—such as unworkability or changed circumstances—beyond those that it would offer in a case of first impression.<sup>27</sup>

Turn now to the evidentiary matter of how we would detect precedent. We can look for evidence of precedent in both *attitudes* and *actions*. As for

21. See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1137 (2017) [hereinafter Baude & Sachs, *The Law of Interpretation*]; Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. CHI. L. REV. 1551, 1571 n. 121 (2020); see also Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 179–90 (2018) (setting out positive guideposts for determining whether a proposition is a canon, which include frequency and longevity of use).

22. Schauer, *Has Precedent Ever Really Mattered*, *supra* note 13, at 385–86.

23. *Id.* at 386–87.

24. Schauer, *Precedent*, *supra* note 16, at 124–25.

25. *State Oil Co. v. Khan*, 522 U.S. 3, 20–22 (1997).

26. See NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* 112–13 (2008). One could deny that the Justices in fact feel that pull; nevertheless, that does not affect the conceptual point.

27. See *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2134–35 (2020) (Roberts, C.J., concurring in the judgment) (following precedent set by an opinion from which Chief Justice Roberts dissented).

attitudes, evidence of precedent can take the form of what judges say in their decisions, speeches, or elsewhere about their sense of obligation. Thus, we should expect to find judges (especially on inferior courts) stating that “precedent requires” such and such or that the court is “bound by [Case X]” to rule this way or that. Additionally, when a court has the power to overrule precedent, we should expect an overruling to be accompanied by an analysis that acknowledges an obligation to find special factors that justify changing course.<sup>28</sup>

In response to the previous paragraph, a skeptical sort of person might demand to see not just statements attesting to obligation but behavioral evidence of it. Fair enough, though one should keep in mind that courts’ words, to a substantial degree, *are* their actions.<sup>29</sup> Behavioral evidence of precedent most compellingly reveals itself when precedent causes one to act against what one would otherwise prefer.<sup>30</sup> To return to the ice cream example, it would be really good evidence of my obedience to authority if, despite hating orange sherbet, I ate orange sherbet on command. Similarly, one very good kind of evidence for the existence of precedent is the existence of decisions that would have been different *but for* the precedent.<sup>31</sup> (Again, this is an evidentiary point, not a conceptual one: it is logically possible, just practically unlikely, that the law will always align with what judges otherwise prefer.) It will often be difficult to tell whether precedent is the but-for cause of an outcome, especially if one is inclined to disbelieve self-accounts, but the task needs to be attempted.

#### B. *Methodological Precedent in Particular*

The discussion above concerns legal precedent in general—what it is and how we can detect it—but we are more concerned with the specific matter of precedent in interpretive methodology. Are some context-specific adjustments needed? Yes and no.

At the conceptual level, MP is the same as other types of precedent: a methodological proposition (such as a directive not to use a source unless the

28. *E.g.*, *Hohn v. United States*, 524 U.S. 236, 251 (1998); *see also* Randy J. Kozel, *Special Justifications*, 33 CONST. COMMENT. 471, 473–85 (2018) (describing various accounts of what special factors are required).

29. That is, courts’ most significant actions largely take the form of statements (especially for appellate courts). Their words are often performative “speech acts,” such as acts of lawmaking, rather than mere talk. For a description of performative speech, *see generally* J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 4–7 (J.O. Urmson ed., 1962).

30. *See* *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015) (“[S]tare decisis has consequence only to the extent it sustains incorrect decisions . . . .”); Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 4 (1989) (emphasizing the diagnostic value of incorrect precedents).

31. *Cf.* Schauer, *Has Precedent Ever Really Mattered*, *supra* note 13, at 387 (looking for evidence of precedent by searching for, among other things, “an appreciable number of instances . . . in which a Justice who would have decided a case in one way held otherwise solely because of the obligation to follow precedent”).

text is ambiguous or to use one canon before another) is precedent if it is treated as providing a content-independent reason for acting in accordance with its directions. In lower courts, the proposition must be obeyed when it applies. In the Supreme Court, it must be obeyed when it applies unless it is overruled. (Set aside the familiar difficulties of determining the content of the proposition established in a prior case and how to reconcile conflicting propositions, which are universal.)

When it comes to looking for evidence of MP, some things are the same while others are different. As with precedent generally, we need to consider both attitudes and actions. Regarding how judges talk about interpretive methodology, we should ask questions like these: Do they speak in terms of legal obligation, using phrases like “Supreme Court precedent requires”? Do they talk about canons as the sort of thing that could be overruled but, barring overruling, must be followed (as opposed to ignored or treated as optional)? Neither of these inquiries is distinctive to MP.

Regarding judicial actions, the particular context of interpretive methodology does require some adjustment to our evidentiary standards. The filing deadline described above was a hard-edged rule that clearly applied and fully resolved whether the late filing could be accepted. Much of the law of interpretation (if law it be) lacks a rule-like form, lacks outcome-determinative character, or both. These characteristics do not raise insurmountable barriers to identifying evidence of MP, but they are important enough to merit some further discussion.

First, one significant difficulty involves the doctrinal form of many methodological propositions, in particular the prevalence of nonrule propositions. One could imagine an interpretive regime that features many bright-line rules. For example, the regime could have clear rules of admissibility such as, “*Webster’s Second Edition* is the only permissible dictionary for construing criminal statutes.” Or a method could have many clear rules of priority like, “Consider tool *X* before tool *Y* before tool *Z*.” Our actual practice of interpretation has some bright-line rules, but it also has many standards and multifaceted balancing tests, plus complex amalgams of forms. Consider the following familiar kind of proposition:

*If a statute of type T is ambiguous [and condition C applies, etc.], then choose interpretation Z.* For example, if a statute concerning Native American tribal sovereignty is ambiguous, and there is no agency regulation that reasonably resolves the ambiguity, then read the statute in favor of the tribe.<sup>32</sup>

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32. This method of interpretation is part of what is known as the Indian Canons of Construction. See, e.g., Jill De La Hunt, *The Canons of Indian Treaty and Statutory Construction: A Proposal for Codification*, 17 U. MICH. J.L. REFORM 681, 689 (1984).

This type of proposition has a rule-like cast, but the embedded triggering condition of ambiguity is itself vague and possibly ambiguous. So too with canons directing courts to avoid interpretations with absurd results or to select a “plausible” alternate construction in order to avoid “serious” constitutional doubt.<sup>33</sup>

A second, related difficulty in detecting MP concerns outcome determinativeness. Outcome determination is always a tricky criterion, even for substantive law, but it is particularly poorly suited for trying to detect the binding force of things like interpretive canons. To appreciate this point, it helps to be precise about what we mean by an “outcome.” The relevant outcome cannot plausibly be the ultimate outcome *of the case*, as the case outcome may turn on the facts, a procedural problem, or a failure on some other element of a claim aside from the one that presents the interpretive puzzle. But even if we narrow our focus to a narrower conception of an “interpretive outcome”—that is, the interpretation of the statute at issue to mean *X* rather than *Y* (for instance, that bicycles are not “vehicles”)—the majority of canons are only loosely tied to outcomes so defined. True, some canons, such as the super strong clear-statement rule protecting state immunity, require the pro-immunity interpretation unless there is unmistakable textual abrogation.<sup>34</sup> But more often, canons take the form of mandatory-but-nondeterminative presumptions about meaning or mandates to consider a particular factor in the course of arriving at an interpretation. For example:

- A court should presume that a word has the same meaning every time it is used in a statute, though this presumption can be overcome by strong contrary evidence.<sup>35</sup>
- A court should presume that Congress follows established rules of punctuation and grammar, but those considerations readily yield before contrary evidence.<sup>36</sup>
- In deciding whether to adopt an agency’s informally generated (that is, non-*Chevron* eligible) interpretation, *Mead*<sup>37</sup> and *Skidmore*<sup>38</sup> direct the court to consider the thoroughness of the agency’s

33. *E.g.*, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 238–39 (2010).

34. *E.g.*, *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) (“[E]vidence of congressional intent [to abrogate immunity] must be both unequivocal and textual.”). Although the failure to find clarity dictates an interpretive outcome, the requirement that text be “unequivocal” or “clear” is itself vague and its satisfaction is often disputable.

35. *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 108 (2012).

36. *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 453–55 (1993).

37. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

38. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

reasoning, the degree of expertise implicated, the consistency of the interpretation over time, and other factors.<sup>39</sup>

- Under the federal Dictionary Act<sup>40</sup> and many state interpretation codes, various definitions and inferences apply presumptively, unless the context dictates otherwise.<sup>41</sup>

In addition, one could regard at least some substantive canons as mandates to give some weight to a particular policy value in the analysis of the pertinent kind of statute or to break a tie in favor of that value if other sources are evenly balanced.<sup>42</sup>

In short, many canons take the form of mandatory, but not necessarily outcome-determinative, *inputs* into a decision. This is probably why, to the uncharitable observer, statutory interpretation looks like a jumble of linguistic inferences, substantive presumptions, maxims, rules of thumb, thumbs on the scale, all of indeterminate weight, with little in the way of priority, any of which can be called forth according to the interpreter's whim. This sense of unordered jumble, with only tenuous links to outcomes, no doubt underlies much of the skepticism of the possibility of MP. And, indeed, the nature of interpretation, even when conducted faithfully by its best craftspeople, probably does rule out the hope of ever achieving a highly predictable, fully determinate system of interpretation when applied to all cases.

But it would be a mistake to leap from the proposition that much of the law of interpretation takes the form of imprecise standards and required-but-nondeterminative inputs to the conclusion that there can be no binding law about such matters. We simply need to make sure we use a conception of bindingness that fits the nature of the thing at hand. For a canon, to be binding means that the canon is a mandatory contributor to the resolution of an interpretive problem and that it contributes in the way the canon specifies, when the conditions for the canon's applicability are satisfied. The matter of *how much* the canon contributes to meaning relative to other inputs is sometimes dictated by the canon itself (for example, punctuation is *supposed* to be a weak contributor, while a clear-statement rule should determine an interpretation in

39. See *Mead Corp.*, 533 U.S. at 235; *Skidmore*, 323 U.S. at 140.

40. Act of July 30, 1947, Pub. L. No. 80-278, § 1, 61 Stat. 633 (codified as amended at 1 U.S.C. § 1). 1 U.S.C. § 1 is generally referred to as the "Dictionary Act," which traces its modern-day roots back to 1947. See Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying To Do*, 84 U. CHI. L. REV. 177, 209 n.141 (2017). *But cf.* *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 69 n.8 (1989).

41. See, e.g., 1 U.S.C. § 1; see also Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 420–25 (2010) (listing many codified state presumptions).

42. See WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY, JOSH CHAFETZ, PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION AND REGULATION* 649 (6th ed. 2019) (noting that presumptions "can be treated as a starting point for discussion, a tiebreaker at the end of discussion, or just a balancing factor").

the absence of clear countervailing text). In other instances, the canon does not purport to specify the weight of its contribution, only that it has some weight. A court honors such a canon's binding force by recognizing the obligation to give it some weight rather than none, and the court would err if it thought the canon demanded more.

To say that precedent—and our mode of detecting it—takes on different coloration depending on the content of the law at issue should not be mysterious. Standards like “reasonable care,” “substantial performance,” and “material misrepresentation” are familiar in the substantive law, and so there should be no great surprise to find the law of interpretation populated by standards and not just rules. Mandatory inputs—the form taken by many canons—are common in other domains of law as well. Consider these examples:

- The Copyright Act of 1976<sup>43</sup> provides a nonexhaustive list of several factors that bear on the fair-use defense.<sup>44</sup> “All [of the factors] are to be explored, and the results weighed together, in light of the purposes of copyright.”<sup>45</sup> It is error to treat one factor as dispositive, though some factors should be given more weight than others.<sup>46</sup>
- In criminal sentencing, district judges must consider several factors and can be reversed for failing to do so, though the factors do not select a uniquely correct sentence.<sup>47</sup>
- The Supreme Court's personal jurisdiction doctrine is an amalgam of standards (“minimum contacts”), factors of different weights (such as the burden on the defendant and the forum state's interests), plus a few sharp rules for special cases like in-state service.<sup>48</sup>
- The widely adopted *Restatement (Second) of Conflict of Laws* sets out a number of principles and factors that courts should consider in deciding which state's substantive law to apply.<sup>49</sup> The approach of the *Restatement (Second)* may not be particularly determinate, but it is erroneous to disregard the approach where it has been adopted.<sup>50</sup>

43. Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.).

44. § 107, 90 Stat. at 2546 (codified as amended at 17 U.S.C. § 107).

45. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

46. *Id.* at 584, 591; *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

47. 18 U.S.C. § 3553(a); *Gall v. United States*, 552 U.S. 38, 49–51 (2007); *United States v. Sanchez-Juarez*, 446 F.3d 1109, 1115 (10th Cir. 2006).

48. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

49. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145 (AM. L. INST. 1971).

50. *See, e.g., Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420–21 (Tex. 1984), *superseded by statute*, Act of June 3, 1987, ch. 2, §§ 2.03–.06, 1987 Tex. Gen. Laws 37, 41 (amended 1995) (current version at TEX. CIV. PRAC. & REM. CODE §§ 33.001–.004), *as recognized in Sky View at Las Palmas, LLC v. Mendez*, 555 S.W.3d 101 (Tex. 2018).

Formalists might deem the examples above to be poorly devised law, because they are not sufficiently rule-like, but they are still the law. So, the fact that much of the law of interpretation (if law it be) takes nonrule forms raises some evidentiary hurdles, but it is not a barrier to precedential status.

A concluding word on evidentiary expectations in theory and in practice: the discussion above shows that canons and other methodological propositions can, as a conceptual matter, be binding law even if they do not change case outcomes or the construction a statute ultimately receives. They only need to act as a mandate to analyze a statute in the way the canon directs if the canon directs at all. Still, if judges treat the canons as precedential, then we can expect to observe those canons exerting some influence on interpretive outcomes. When surveying a sufficiently large number of cases, we can reasonably expect to find some in which the interpretation of a statute comes out differently than it would have without a precedential duty to apply a canon.

### C. *Canons that Provide the Best Testing Grounds for Methodological Precedent*

As a practical matter, certain interpretive propositions afford better opportunities for testing for MP than others. This is so for a few reasons.

To begin, recall the problem of behavioral equivalence highlighted by the ice cream example: acting consistently with a command does not confirm the existence of precedent if the behavior would occur regardless. Behavioral equivalence is a real problem for detecting the precedential force of canons of interpretation that reflect sensible patterns of natural communication, as readers would use them as guides to meaning without being told to do so. For example, a communication referring to the tax treatment of “income resulting from exploration, discovery, or prospecting” would more likely be thought to apply to income resulting from the discovery of a mineral vein than from the invention (“discovery”) of a new image-processing technology—and that is true even if no one had ever heard of the maxim *noscitur a sociis*, which tells us, sensibly enough, that words often draw meaning from the words surrounding them.<sup>51</sup> “Exploration” and especially “prospecting” suggest digging around for things like oil and minerals, so it is sensible to read “discovery” similarly, at least in the absence of countervailing clues. The law’s wise decision, often implicit, is to accept many preexisting communicative presumptions—along with their limitations and defeasible nature—as tools of statutory interpretation.<sup>52</sup>

51. See WILLIAM D. POPKIN, A DICTIONARY OF STATUTORY INTERPRETATION 201 (2006). The example is derived from *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961).

52. See THE FEDERALIST NO. 83, at 496 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The rules of legal interpretation are rules of *common sense*, adopted by the courts in the construction of the laws.”).



To be clear, not all language-based canons reflect ordinary patterns of communication. For example, the rule against superfluity—that every part of a statute must be given meaning<sup>53</sup>—can be a *legally* valid interpretive rule even if ordinary speakers and legislative drafters use redundancy. The prevalence of redundant language in both ordinary and statutory language might show that a rule against superfluity is a *bad* interpretive rule for courts to embrace, but rules with premises that butt their heads against reality can still be the law.<sup>54</sup> Indeed, when rules of interpretation are only creatures of law, it is easier to determine whether their use is the product of legal obligation.

Turning to substantive canons, some are like *noscitur a sociis* in that they reflect the likely legislative intent or, if one prefers, the meaning a reasonable, informed reader would impute to uncertain language.<sup>55</sup> For example, it is plausible that the presumption against retroactivity “will generally coincide with legislative and public expectations.”<sup>56</sup> If that is so, then telling someone to follow that rule is like telling someone to breathe normally. When a proposition does dual work as a rule of communication and, by explicit or implicit adoption, as a rule of law, observing its use does not provide strong evidence for MP. Case citations accompanying a canon do not necessarily signal legal obligation either, for it is a rhetorical convention that one provides a citation for almost everything.<sup>57</sup>

The discussion above does not mean that dual-duty canons cannot be at all probative of whether a system displays MP. If courts use the normative language of duty when they invoke canons, that provides some modest affirmative evidence that precedent is operating.<sup>58</sup> More significantly, *any* canon can tend to *disprove* the existence of MP if it is wielded in certain ways. For example, a statement by a lower court that *noscitur a sociis* is not a valid canon at all—or, for that matter, that *noscitur a sociis* is a conclusive determinant

53. *E.g.*, *Lockhart v. United States*, 136 S. Ct. 958, 965–66 (2016).

54. In addition to embracing a bad rule, the law might exclude a good rule of communication. An effort at exclusion might not be wholly successful, however. The Court might succeed in banishing the phrase *noscitur a sociis* from the case reports, for example, but it is hard to imagine that the natural intuition behind it could be so easily rooted out. *Cf.* Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392, 1457 (2017) (explaining that courts would have a hard time ignoring the deferential instinct that lies behind the *Chevron* doctrine even if it were formally overruled). A smart court would not fight natural interpretive strategies too often.

55. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 28–29 (1997). *See generally* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 117–21 (2010) (describing the fraught relationship between substantive canons and legislative supremacy).

56. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272 (1994).

57. Courts often provide citations to prior cases for familiar canons like *ejusdem generis*. Lawrence M. Solan, *Precedent in Statutory Interpretation*, 94 N.C. L. REV. 1165, 1186 (2016).

58. *Cf.* H.L.A. HART, THE CONCEPT OF LAW 56–57 (2d ed. 1994) (observing that binding rules differ from social habits, among other ways, because people take a reflective attitude toward the rules, which is commonly expressed through normative language like “must” and “right”).

of meaning—would contradict prevailing doctrine. If a court makes such a statement even while acknowledging contrary decisions, that counts against MP’s existence. If the court seems, instead, to be mistaken about or ignorant of how the canon works, that provides some mild evidence that MP may exist in principle but is not functioning very well.

Fortunately for our ability to find solid evidence of MP, many rules of interpretation are not like the unneeded command to “breathe normally.” They do not reflect regularities of communication or likely intents.<sup>59</sup> Ordinary language does not have a rule about whether tax exemptions are to be interpreted narrowly, broadly, or just normally, but the law might. Similarly, the canon of constitutional avoidance and the rule of lenity are not rules of language, nor do they reflect likely congressional intentions—the contrary is more likely the case<sup>60</sup>—but they can exist as rules of law nonetheless. These artificial rules provide good tests in both directions: adherence to them tends to show legal obligation, and departure from them (especially open departure) tends to show the absence of the same.

Secondary rules governing the relationship between canons also tend to provide good testing grounds, even when the secondary rules govern the use of canons that are not helpful test subjects. Ordinary habits of communication suggest the value of *noscitur a sociis*, but they do not tell us whether to use it or other canons before or after legislative history or administrative interpretations—though, again, *the law* might choose to impose such a priority.

To sum up the discussion regarding the best testing grounds for detecting or rejecting MP: First, contradicting or rejecting any established canon can cast doubt on MP. Second, the best canons for detecting the existence of MP tend to be those that are not rules of ordinary communication. Third, rules about the *admissibility* of sources like administrative interpretations and legislative history and rules that establish the relative *priority* of interpretive tools (of whatever type) are also good test subjects, precisely because such rules are artifices of the law.

59. See REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 221–29 (1975) (distinguishing between factual presumptions used in ascertaining legislative meaning and legal rules used in assigning judicial meaning); Baude & Sachs, *The Law of Interpretation*, *supra* note 21, at 1088–97 (distinguishing between canons as rules of language and canons as rules of law); see also Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part 1*, 65 STAN. L. REV. 901, 926–33 (2013) (showing that some canons purportedly based on congressional expectations are only dimly known in Congress). Alexander and Prakash doubt the constitutionality of courts’ use of artificial interpretive rules that depart from attempts at discerning actual meaning. Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97, 102–04 (2003). For purposes of this Article, I assume the courts’ routine use of such rules is indeed constitutional.

60. Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2193 (2002).

Now, to be clear, following an artificial rule does not necessarily show constraint. A judge might use the artificial rule because, in a happy coincidence, it advances the judge's extra-legal preferences (like pistachio ice cream). The very best evidence of obligation will come from those cases in which there is reason to believe the decisionmaker is following an artificial rule that is not otherwise agreeable.<sup>61</sup> Such cases will be hard to identify with certainty, but there are some.<sup>62</sup>

#### D. *Other Scholars' Understandings of Methodological Precedent*

As the final step before setting out my list of criteria for the existence of MP, it is helpful to check the validity of my account of MP by considering the accounts of other scholars. As stated above, the prevailing view is that there is no general practice of MP in the federal courts.<sup>63</sup> At the same time, it has been argued that some *state* systems have adopted MP and that, within the federal courts, the *Chevron* doctrine has achieved precedential status. Those conclusions—about federal interpretation generally, *Chevron* in particular, and the MP situation in certain states—must rely on some explicit or implicit criteria for the detection of precedent.

##### 1. Methodological Precedent in Some State Courts

Let us begin with the considerations that led Abbe Gluck to conclude that some state courts have established binding interpretive approaches. Her best example is Oregon, where, for about fifteen years, the state courts followed an interpretive approach known as the “*PGE* framework” (named after the case that announced it).<sup>64</sup> What facts about the Oregon experience did Gluck marshal to show that *PGE* was binding law? Facts like the following: Oregon courts routinely cited *PGE* and its prescribed hierarchy of sources as supplying the governing law of interpretation.<sup>65</sup> Dissenters disagreed with case-specific applications of *PGE* but not with the framework's binding nature.<sup>66</sup> The state supreme court's use of legislative history and substantive canons dropped markedly during the *PGE* era, which suggests that *PGE* was actually obeyed.<sup>67</sup> Some cases probably came out differently due to the exclusion of nontextual

61. Cf. Krishnakumar & Nourse, *supra* note 21, at 188–89 (arguing that usage across ideological divides is necessary to canon status).

62. See *infra* Sections III.B, III.D.

63. *Supra* notes 1–2 and accompanying text.

64. *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 859 P.2d 1143, 1146 (Or. 1993); see Gluck, *Laboratories*, *supra* note 1, at 1775–85.

65. Gluck, *Laboratories*, *supra* note 1, at 1775.

66. *Id.* at 1775, 1781; Jack L. Landau, *Oregon As a Laboratory for Statutory Interpretation*, 47 WILLAMETTE L. REV. 563, 566 n.9, 567–68 (2011).

67. Gluck, *Laboratories*, *supra* note 1, at 1779–80.

sources at *PGE*'s first step; judges certainly said so.<sup>68</sup> All of these are the kinds of things that count as evidence of MP according to the account I set out above. Note that it does not matter for purposes of the validity of the criteria whether the facts about Oregon remain true or ever were true.

Gluck adds, as another indication of precedent, that appellate courts in at least one of the states she studied have vacated and remanded cases merely because the lower court used the wrong method, without reviewing the outcome.<sup>69</sup> That too is telling, inasmuch as the reviewing courts treat methodology as worthy of concern and correction for its own sake.

## 2. *Chevron* Exceptionalism

Some authors identify the *Chevron* doctrine as an exception to the general lack of MP in the federal courts.<sup>70</sup> *Chevron* has become the shorthand for the idea that courts should defer to certain authoritative agency interpretations of ambiguous statutes.<sup>71</sup> It does not matter whether the commentators are correct about the *Chevron* doctrine being exceptional, but it is helpful to ask what features lead them to regard the *Chevron* doctrine as exceptional.

The *Chevron* doctrine's purported exceptional status cannot be attributed to any vast alteration in the Supreme Court's propensity to defer to agencies. The extent to which the *Chevron* doctrine changed the level of deference is surprisingly difficult to measure, but, at least at the Supreme Court level, even *Chevron*'s fans have to admit the effect is probably modest.<sup>72</sup> Nor is *Chevron* composed of bright-line rules that can be expected to yield highly predictable outcomes. On the contrary, Step 1 incorporates the squishy trigger of ambiguity/clarity.<sup>73</sup> So, the *Chevron* doctrine is hardly the obvious poster child for the possibility of MP.

For Gluck, the *Chevron* doctrine is precedential because it establishes a mandatory analytical framework for agency cases, a framework that is generally used and which courts speak about in precedential ways.<sup>74</sup> Those criteria are

68. *Id.* at 1781; *see also id.* at 1823 (noting in her study that judges in some states "say they would decide cases differently were they not constrained by the interpretive framework").

69. *Id.* at 1807–08, 1823.

70. *Supra* note 8 and accompanying text. Gluck states that the extraterritoriality canon may be another "emerging exception[.]" writing that "in recent years [it] seems to have taken on the status of something closer to a precedential rule than a presumption of statutory interpretation." Gluck, *30 Years of Chevron*, *supra* note 8, at 614 n.29. Tagert posits the federalism clear-statement rule as an exception, though without explaining what makes it so. Tagert, *supra* note 8, at 215 n.23.

71. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984).

72. One difficulty is that agencies may become more aggressive in their interpretation if they believe the courts will judge them more leniently. *See generally* JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 985–90 (3d ed. 2017) (describing the empirical research on *Chevron* and limitations of the same).

73. *See Chevron*, 467 U.S. at 842–43.

74. Gluck writes:

compatible with those I developed above. William Eskridge and his coauthors Lauren Baer and Connor Raso reject the precedential characterization for *Chevron*, at least at the Supreme Court level (the focus of their studies).<sup>75</sup> They point out that precedents should be followed where applicable, distinguished if not applicable despite appearances, or (on rare occasions) overruled.<sup>76</sup> I agree that those too are good criteria. They then contend, descriptively, that the Supreme Court often ignores *Chevron* when it seems to be applicable.<sup>77</sup> The Court therefore does not, in their view, treat it as precedent.<sup>78</sup>

The disagreement between Gluck on the one hand and Eskridge and his coauthors on the other hand stems from a few sources. One of them is empirical disagreement over how faithfully the courts adhere to *Chevron*. Behind that, and influencing the descriptive assessments, is an apparent difference in perspective: for Gluck, the important conclusion is that the precedential glass is at least half full when it comes to *Chevron*, where she sees the level so much lower for other canons and doctrines. Eskridge and his coauthors, by contrast, emphasize the half emptiness. Both camps largely agree on the kinds of things we should look for, though Gluck may credit opinion language a bit more than do Eskridge and his coauthors.

### 3. The Purported General Absence of Methodological Precedent in the Federal System

It is also important to consider why most observers believe that the federal system generally does not display MP outside of the *Chevron* context. As I disagree with that conclusion, I want to know whether the source of the disagreement is different criteria or different assessments of the evidence.

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*Chevron* is routinely referred to as a “precedent” by courts and scholars alike, and . . . it is one of the most cited cases in history. Indeed, *Chevron* is a precedent that was modified by another precedent (i.e., *Mead*) that was modified by yet another precedent (i.e., *Brand X*). . . . Nothing like this exists with respect to the rest of the interpretive doctrines.

Gluck, *30 Years of Chevron*, *supra* note 8, at 613–14; *see also* Gluck, *Laboratories*, *supra* note 1, at 1817–19 (arguing that *Chevron* establishes a mandatory framework for analyzing cases, whether or not it succeeds in constraining outcomes).

75. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1090 (2008); Raso & Eskridge, *supra* note 8, at 1733–34.

76. Raso & Eskridge, *supra* note 8, at 1751.

77. *Id.* at 1733–34, 1751, 1756–1757, 1764; Eskridge & Baer, *supra* note 75, at 1121. *But see infra* note 204 and accompanying text (explaining that the Supreme Court may not ignore *Chevron* as often as these articles claim).

78. Rather, the Court treats *Chevron* “only” as a canon, which means, for them, that it is invoked episodically rather than systematically and invoked in proportion to the case-specific force of its underlying policies rather than strictly according to agreed-upon rules. Raso & Eskridge, *supra* note 8, at 1734.

a. *Other Scholars' Criteria*

Among the many scholars who have observed or criticized the general lack of MP in the federal courts, and in the Supreme Court in particular, Sydney Foster has probably been the most precise about her criteria. She relies primarily on the lack of two indicia of precedential status. First is the absence of overruling analysis.<sup>79</sup> That is, when the Court changes the interpretive rules, the Court generally does not engage in a *stare decisis* analysis that acknowledges the force of precedent, identifies special factors that justify overcoming it, reckons with reliance interests, and the like. Setting aside for the moment the truth of the factual premise that courts do not engage in such analyses in those (rather rare) instances in which they consider overruling methodological precedent, I agree that the presence or absence of such analyses is a good criterion.<sup>80</sup>

Foster's second indicator of the absence of MP is the absence of but-for causation. More specifically, Foster contends that judges do not apply interpretive principles or canons they oppose, which tends to show that they are not binding.<sup>81</sup> I agree with Foster that the absence of but-for causation, if indeed it is absent, would be probative of the absence of MP.<sup>82</sup>

Most commentators are less explicit and systemic about their criteria than Foster. Probably what most observers would cite as the key evidence for the absence of MP, if asked, is the fact that the Justices state and act upon inconsistent and even contradictory methodological propositions, often openly.<sup>83</sup> The Justices' disagreements include disputes over the high-level goals of statutory interpretation as well as disagreement over some key operative propositions. In addition, and to some degree as a result, the outcome of interpretive questions is hard to predict.

Not all disagreements are created equal, however. For purposes of MP, disagreement over *operative propositions* is what matters, not disagreement over *goals*, not unpredictability of *outcomes*. Let me explain why operative propositions are the proper focus:

Although there is disagreement over the goals of statutory interpretation, there are several reasons why disagreement over goals does not preclude MP. First, although the goals of interpretation interact with operative propositions—such as by suggesting the propriety and weight of certain tools over others—the goals of interpretation are underdeterminate with regard to

79. Foster, *supra* note 1, at 1875–77.

80. See *infra* Section III.C (assessing this factual premise).

81. Foster, *supra* note 1, at 1876–77, 1881.

82. I believe Foster is incorrect in finding an absence of but-for causation even at the Supreme Court level. See *infra* Section III.D.

83. E.g., Siegel, *The Polymorphic Principle*, *supra* note 1, at 388 (“[I]ndividual Justices, like the Court as a whole, seem to lack truly firm methodological [c]ommitments.”).

operative propositions. Goals do not decide cases but are instead mediated through operative propositions. Second, some matters of interpretive doctrine are low stakes, such that we can reasonably expect judges to set aside their preferred theory of interpretation, just as we routinely expect them to do on other legal matters. Third, and relatedly, adherents of different theories can forge “incompletely theorized agreements” in order to settle on operative rules or frameworks that everyone can accept.<sup>84</sup> For example, most or all theories agree on the primacy of statutory text, even if they do so for different reasons: because “the text is the law,” because it is the best evidence of the legislative plan, and so on. Fourth, it is worth remembering that many judges lack any real theory of interpretation yet seem to do the job of judging just fine. Consider that judges need not have a theory of tort law, much less all share a theory of tort law—such as corrective justice, efficiency, or civil recourse—in order to do the work of tort judging.

A lack of predictability in the outcomes of statutory interpretation cases is also offered as evidence for the lack of MP, at least implicitly in the sense that advocates of MP argue that adopting MP would provide the valuable benefit of fostering predictability in judicial decisionmaking.<sup>85</sup> But predictability of outcomes is not a good criterion either. A method’s precedential status and its propensity to generate predictable outcomes are different things. Cases can be highly predictable even without MP, such as if judges reliably vote based on ideology or other known, fixed characteristics. And, likewise, even with iron-clad MP, the predictability of outcomes under the precedential method would depend on the *content* of that method. As in other domains, doctrines that feature standards (versus rules) and multifactor tests can be the law whether or not they generate highly predictable outcomes in all cases.<sup>86</sup>

Moreover, difficulty in predicting interpretive outcomes is hardly surprising or unique given that scholars are usually looking at Supreme Court cases.<sup>87</sup> Cases proceed to the Supreme Court because they are legally underdetermined and, often, have stakes high enough to trigger a surge of extra-legal preferences.<sup>88</sup> Looking at cases in the upper reaches of the system and

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84. See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735–36 (1995).

85. See Connors, *supra* note 2, at 709; Foster, *supra* note 1, at 1885, 1893–94.

86. *Supra* Section I.B.

87. See generally Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150 (2004) (showing that legal experts underperformed a simple model in predicting Supreme Court decisions).

88. See LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 101, 44–45 (2013).

finding substantial rates of dissent and reversal therefore tells us little about the constraining force of precedent.

The things that matter for the existence of MP are neither goals nor outcomes but instead operative propositions of statutory interpretation. These bridge the space between goals and outcomes. Operative propositions govern things such as the following:

- whether a presumption or canon exists;
- the scope and formulation of the canon (in which circumstances does it apply and how weightily);
- the relative priority of tools (where the law establishes any priority); and
- the circumstances under which judges may consult legislative history (of various kinds), presidential signing statements, agency views, or other extrinsic sources.

Thus, an operative proposition takes a form such as: *The rule of lenity applies to civil provisions the violation of which can also be a crime; ambiguity in such a provision may not be resolved through recourse to legislative history.* Or like this: *The presumption against preemption has no application in express preemption cases.* Or: *Only dictionaries from the period during which a statute was enacted may be consulted.*

As the next section acknowledges, there is disagreement over some operative propositions of interpretive method. But, as it also explains, the existence of some disagreement is not determinative of the existence of MP.

*b. The Probative Value of Clashes over Legislative History*

How much evidentiary weight should one assign to disagreements over operative propositions? A couple scattered successes of precedentialization does not mean there is a system of MP worth talking about but neither does some conflict over propositions of law mean there is no meaningful system of MP. Precedentialization does not have to exist across all operative propositions in order to have a meaningful, though incomplete, system of MP. The importance of failures of MP depends on the frequency and persistence of disagreement and which topics are involved.

The most obvious evidence for the claim that methodological propositions lack precedential force comes from the decades-old dispute on the Supreme Court between textualist and more pragmatic or intent-oriented interpreters regarding the permissible uses of legislative history.<sup>89</sup> The permissible uses of legislative history implicate operative propositions, and open and sustained

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89. See, e.g., KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION 212 (2013); Connors, *supra* note 2, at 705–07; Foster, *supra* note 1, at 1865–66; Rosenkranz, *supra* note 1, at 2144.



disagreement over the use of legislative history counts against the existence of MP.

How much does it count? We will be in a better position to assess the relative importance of the successes and failures of MP in different domains once we know more of the facts about actual judicial practices, which Parts II and III will set out. So, there will be more to say about conflicts over legislative history. For now, though, it suffices to say that the forthcoming evidence should be viewed with an appropriate baseline of “normal” levels of judicial disagreement in mind. The Supreme Court, in its meritorious decisions on *substantive* questions, is not famous for rigorously obeying stare decisis.<sup>90</sup> Although express overruling is not the norm, the Court regularly engages in “stealth overruling,” narrowing, or other indirect methods of arguable noncompliance with law.<sup>91</sup> Individual Justices often do not reconcile themselves to decisions from which they originally dissented. Some of the Court’s more liberal Justices have never reconciled themselves to the Court’s Eleventh Amendment jurisprudence and repeatedly dissent from it in later cases that involve applications of the doctrine.<sup>92</sup> Some of the conservative Justices have been ready to overrule *Roe v. Wade*<sup>93</sup> whenever the necessary votes materialize.<sup>94</sup> Viewing the matter more systematically, Harold Spaeth and Jeffrey Segal’s study of precedent at the Supreme Court showed that members of the Rehnquist Court usually continued to disagree with precedents from which they originally dissented, including three-quarters of the time for relatively “ordinary” cases.<sup>95</sup>

In short, the existence of some departures from precedent does not mean that stare decisis does not exist at all. Even more clearly, a casual attitude toward precedent at the Supreme Court level does not tell us much about the practices of the lower courts, where the vast majority of cases are decided.

90. See Schauer, *Has Precedent Ever Really Mattered*, *supra* note 13 at 399. The qualification about “merits decisions” is important; many denials of certiorari must reflect the power of stare decisis. MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 45 (2008); Schauer, *Has Precedent Ever Really Mattered*, *supra* note 13, at 399–400.

91. See Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 *GEO. L.J.* 1, 6–8 (2010).

92. *E.g.*, *Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30, 46 n.1 (2012) (Ginsburg, J., dissenting); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 699–700 (1999) (Breyer, J., dissenting).

93. 410 U.S. 113 (1973).

94. *E.g.*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., concurring in part and dissenting in part).

95. HAROLD J. SPAETH & JEFFREY A. SEGAL, *MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT* 272–86 (1999); see also Allison Orr Larsen, *Perpetual Dissents*, 15 *GEO. MASON L. REV.* 447, 453–58 (2008) (reporting that every member of the Rehnquist Court had engaged in perpetual dissenting on certain topics).

E. *Summary: Signs of Methodological Precedent*

Time to take stock and summarize. As a conceptual matter, following MP is treating a methodological proposition as an authority, a source of reasons for action that apply independent of the proposition's persuasive appeal. As for how to detect the operation of MP, we should look at what courts do when they interpret statutes and why they do it. Courts should state propositions of law that conform to prior decisions and should not state contradictory propositions.<sup>96</sup> Courts should use canons when their triggering criteria are satisfied. And, at least when challenged, judges should identify the law as providing a reason for their interpretive choices. Ideally, we would be able to confirm the courts' self-reports of legal obligation by identifying instances in which a court would have analyzed the statute differently, and even reached a different interpretation, but for the binding law of interpretation. However, we should keep in mind that finding such cases is complicated by the nature of the enterprise.

In sum, here are things we should look for as evidence of MP:

- Courts describe methodology in language indicative of precedent (“binding,” “holdings,” etc.).
- Courts describe methodology as the sort of thing that can be overruled (rather than ignored).
- Courts treat canons like precedent. More particularly, courts:
  - do not state incorrect or inconsistent methodological propositions,
  - apply canons when their triggering conditions are satisfied,
  - engage in distinguishing behavior, and
  - conduct an overruling analysis when they overrule.
- Appellate courts regard methodological errors as worth their attention (as manifested, for example, in their practices of error correction and discretionary review).
- Canons are, at least sometimes, but-for causes of interpretive outcomes.

The more of these indicia that are present, and the more regularly they are observed, the more confident we can be in MP's existence and extent. It is not possible to say exactly *how often* the indicia above must be detected, either in

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96. Cf. William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2371 (2015) (identifying, as evidence that judicial practice is originalist, the Supreme Court's choice of originalism when different methods collide and the absence of cases contradicting originalism).

absolute terms or as a proportion of relevant cases, in order to count as solid evidence of a meaningful amount of MP. As recounted above, much of statutory interpretation parallels the automatic processes of ordinary interpretation, many interpretive propositions are not particularly rule-like, and some interpretive propositions align with preexisting judicial preferences. All of those make precise testing impossible. What I can do is provide quite a bit of probative evidence, measured according to the criteria set out above, involving many different interpretive rules, including examples that should be surprising in light of the conventional rejection of MP's existence. Also highly probative is the paucity of cases, especially in the lower courts, that contradict the existence of MP.

## II. DO COURTS DESCRIBE METHODOLOGY AS BINDING?

Having identified the kinds of evidence to look for, we can now begin the search for that evidence. As described above, one aspect of following precedent is acting with a particular attitude, and so this part considers how courts describe interpretive methodology. Section II.A shows that courts often refer to methodology as binding or otherwise speak about it in ways that present it as precedential. Section II.B explains that courts also describe methodology as the sort of thing that can be overruled, which actually supports MP in that overruling applies only to matters that are law.

### A. *Courts Refer to Methodological Propositions in Ways that Suggest the Sense of Obligation Associated with Precedent*

There are several features of legal rhetoric that suggest precedential status for interpretive methodology. This section canvasses some of them. The evidence for MP is strongest in the lower courts, but it can be found in the Supreme Court too.

#### 1. Looking for Binding Law—and Finding It

Lower courts often state that they must apply the canons because a previous decision of the Supreme Court or the circuit has commanded it. That is, lower courts speak of “binding” interpretive frameworks, of being “required” to use a canon, and the like. The cases refer, indeed, to interpretive “precedent” that it is their duty, as inferior courts, to apply. There are many examples of such language, and they are not remotely limited to the context of the *Chevron* doctrine and related deference doctrines. Some examples from various courts dealing with various interpretive propositions are collected in the margin.<sup>97</sup>

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97. *E.g.*, *United States v. Fontaine*, 697 F.3d 221, 230 n.14 (3d Cir. 2012) (“Our dissenting colleague misinterprets, we believe, our precedent regarding statutory interpretation.”); *Andrews v. United States*, 441 F.3d 220, 223 (4th Cir. 2006) (observing that the Supreme Court had not

That the courts refer to methodology as having precedential status does not mean, of course, that it is always clear what precedent commands. A recent Fifth Circuit opinion observed that the parties disagreed over whether the textual canon *ejusdem generis* could be applied before finding that the plain

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interpreted the provision at issue but that “the Court did establish an important interpretative method” for approaching the provision), *abrogated by* *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214 (2008); *Cleveland v. City of Elmendorf*, 388 F.3d 522, 527 (5th Cir. 2004) (“[T]he Supreme Court has directed that exemptions from the [Fair Labor Standards Act] are to be construed narrowly and in favor of employees . . . .”); *Miss. Poultry Ass’n v. Madigan*, 31 F.3d 293, 307 (5th Cir. 1994) (en banc) (referring to “binding precedent” that governs the role of dictionaries in discerning statutory ambiguity under *Chevron*); *Navarro v. Encino Motorcars, LLC*, 845 F.3d 925, 935 (9th Cir. 2017) (referring to the narrow-construction canon governing exceptions to the Fair Labor Standards Act as “binding precedent”), *rev’d*, 138 S. Ct. 1134 (2018); *EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989) (“We believe that unequivocal Supreme Court precedent dictates that in cases where ambiguity exists . . . and there is no clear indication of congressional intent to abrogate Indian sovereignty rights (as manifested, e.g., by the legislative history, or the existence of a comprehensive statutory plan), the court is to apply the special canons of construction to the benefit of Indian interests.”); *United States v. Phifer*, 909 F.3d 372, 385 (11th Cir. 2018) (stating that “[w]e are bound by” a circuit precedent described as holding that the rule of lenity trumps *Auer* deference); *United States v. Delgado-Garcia*, 374 F.3d 1337, 1352 (D.C. Cir. 2004) (Rogers, J., dissenting) (reading Supreme Court extraterritoriality opinions as “announcing, and strengthening, a generally applicable rule of statutory construction”); *In re Lenton*, 358 B.R. 651, 655 (Bankr. E.D. Pa. 2006) (referring to “basic rules of statutory interpretation by which this Court is bound” and then discussing canons regarding ordinary meaning, superfluity, and limitations on use of legislative history); *In re TLI, Inc.*, 292 B.R. 589, 593 (Bankr. W.D. Mich. 2003) (“We are bound by the canons of statutory construction, even though some may conclude that common sense requires a different, more appropriate result.”); *St. Louis Fuel & Supply Co. v. FERC*, 890 F.2d 446, 449–50 (D.C. Cir. 1989) (“[W]e are bound to honor the canon that waivers of the sovereign’s immunity must be strictly construed.”); *Ethington v. Gen. Elec. Co.*, 575 F. Supp. 2d 855, 859 (N.D. Ohio 2008) (“The only precedential case law applicable here governs the Court’s statutory interpretation methodology [as opposed to the substantive question, on which there is no precedent.]”); *Savko v. Port Auth. of Allegheny Cnty.*, 800 F. Supp. 268, 273–74 (W.D. Pa. 1992) (“[T]he doctrine of *stare decisis* requires that I apply [a presumption in favor of retroactivity.]”); *Samsung Elecs. Co. v. Rambus Inc.*, 440 F. Supp. 2d 495, 506 (E.D. Va. 2006) (“[T]he Supreme Court has made clear that district courts are bound by the canons of statutory construction in interpreting [the Federal Rules]”); *Burch v. Sec’y of Health & Hum. Servs.*, No. 99-946V, 2010 WL 1676767, at \*9 (Fed. Cl. Apr. 9, 2010) (“Based on Supreme Court sovereign immunity cases, I was *not* free to choose the interpretation that I found to be more persuasive. I was bound . . . , rather, to choose the interpretation that would produce the most narrow and restricted waiver of sovereign immunity.”). One methodological question over which different courts disagree is whether the *Chevron* doctrine or the Indian canon of construction takes priority, but they agree that there is a legally correct answer to be found in Supreme Court or circuit precedent. *Compare* *Confederated Salish & Kootenai Tribes v. United States ex rel. Norton*, 343 F.3d 1193, 1198 (9th Cir. 2003) (Browning, J., concurring) (“[The Ninth Circuit] has held that the canon of liberal interpretation in favor of Native Americans must give way to the *Chevron* rule . . . .” (citations omitted)), *with* *Wyandotte Nation v. Nat’l Indian Gaming Comm’n*, 437 F. Supp. 2d 1193, 1204 (D. Kan. 2006) (“[T]he Tenth Circuit has held that the canon of construction that ambiguities are to be resolved in favor of Native Americans may control over the deference otherwise afforded administrative agencies under *Chevron*.”), *and* *Koi Nation of N. Cal. v. U.S. Dep’t of Interior*, 361 F. Supp. 3d 14, 49 (D.D.C. 2019) (describing the “binding precedent” in which the D.C. Circuit “depart[s] from the *Chevron* norm” in cases involving the Indian canon (internal quotation marks omitted)). I omit here many examples of federal courts stating that they are required to follow state interpretive methods. *See supra* note 6 (noting that “crossover” MP is beyond the scope of this Article).

language of the statute was ambiguous.<sup>98</sup> The court stated that “[p]recedent from the Supreme Court is not entirely clear on this point” and “[n]either is precedent from our Court.”<sup>99</sup> The court ultimately avoided the need to resolve the methodological question, concluding that the language was in fact ambiguous, so canons of construction were needed regardless.<sup>100</sup> The key point, however, is that in this and many other cases, the lower courts treat the methodological question as the kind of thing that precedent can resolve.<sup>101</sup> Indeed, the same Fifth Circuit decision quoted a previous Fifth Circuit case involving a different statute for the methodological proposition that “there is no doubt that legislative history can only be a guide *after* the application of canons of construction.”<sup>102</sup> (That prior Fifth Circuit case has been cited more than a dozen times for the canons-before-legislative-history proposition, including by a Tenth Circuit opinion that canvassed authorities from several jurisdictions on that methodological question of source priority.<sup>103</sup>)

The lower courts sometimes take things too far, perceiving binding law on topics where the Justices themselves do not act bound and where the Justices themselves would probably be surprised to see their statements taken so seriously. For example, in a case about recognizing a private right of action, a district court concluded that any possibility of finding such an implied right was

98. *United States v. Kaluza*, 780 F.3d 647, 658 (5th Cir. 2015).

99. *Id.* at 658 n.34.

100. *Id.* at 658.

101. *See, e.g., Sanders v. Allison Engine Co.*, 703 F.3d 930, 942 n.11 (6th Cir. 2012) (“[W]e have not found any binding authority indicating the presumption against retroactivity should be used as a canon of construction [in these circumstances].”); *Kisor v. Shulkin*, 880 F.3d 1378, 1380 (Fed. Cir. 2018) (O’Malley, J., dissenting from denial of rehearing en banc) (“In a case like this one, where the agency’s interpretation of an ambiguous regulation and a more veteran-friendly interpretation are in conflict, it is unclear from our precedent which interpretation should control.”). In a recent case, the Third Circuit expressed its doubt that methodological propositions enjoy *stare decisis* effect, but it then nonetheless went on to acknowledge the force of the Supreme Court’s methodological propositions. *Cabeda v. Att’y Gen. of the U.S.*, 971 F.3d 165, 171 n.4 (3d Cir. 2020) (“[S]hifting interpretive methodologies are not usually viewed as carrying the force of *stare decisis*, at least not when the decisions employing them do not purport to overrule past precedent . . . . We certainly agree that [two Supreme Court cases] provide an analytical approach we ought to follow now, but that does not mean the substantive conclusions reached in earlier cases have all been overruled . . . . That is not ‘turn[ing] vertical *stare decisis* on its head,’ as our colleague says. It is giving necessary respect to our existing precedent, even when we ourselves might be inclined to decide things differently now.” (citation omitted)). The best reading of this case is that the court is attempting to determine how broadly to read a new Supreme Court methodological proposition when it conflicts with the approach taken in a prior circuit case that addressed a different substantive question. That is a good question, but it does not call into doubt the binding nature of methodology.

102. *Kaluza*, 780 F.3d at 658 (emphasis added). That prior case stated: “Only after application of principles of statutory construction, including the canons of construction, and after a conclusion that the statute is ambiguous may the court turn to the legislative history.” *Carrieri v. Jobs.com Inc.*, 393 F.3d 508, 518–19 (5th Cir. 2004) (internal footnote omitted).

103. *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1239 n.1 (10th Cir. 2016) (Holmes, J., dissenting).

foreclosed by a then-recent Supreme Court case, *Exxon Mobil Corp. v. Allapattah Services, Inc.*,<sup>104</sup> that concerned an entirely different field of law. The district court wrote:

*Exxon Mobil* addressed a conflict between unambiguous statutory language and an unambiguous statement of congressional intent . . . Its approach to that conflict *dictates* the outcome here . . . In short, *Exxon Mobil* declares that *it is impermissible to consult legislative history when the statutory language is unambiguous* . . . *Exxon Mobil* forecloses any possibility of using [the statute’s] clear legislative history to create a private right of action where the unambiguous statutory language creates none.<sup>105</sup>

The court was probably overly hasty in discerning vertically binding precedent here, given the Supreme Court’s own disagreements and vacillations on the proper uses of legislative history.<sup>106</sup> Other lower courts have been more circumspect about finding binding law on this vexed question or have come out the other way.<sup>107</sup> But, again, it is informative that courts state there is precedent to be found, sometimes even on the use of legislative history.<sup>108</sup>

To be sure, one can find plenty of statements, from whatever court one likes, to the effect that canons are merely “rules of thumb,” not absolute rules.<sup>109</sup> Such statements usually mean, in context, that a canon is not determinative of a proper interpretation but must be considered in light of other relevant factors, including competing canons.<sup>110</sup> That is simply a correct statement of the proper

104. 545 U.S. 546 (2005).

105. *Jacobs v. Bremner*, 378 F. Supp. 2d 861, 865–66 (N.D. Ill. 2005) (emphasis added).

106. *Supra* note 89 and accompanying text.

107. Thus, in *Paskel v. Heckler*, 768 F.2d 540 (3d Cir. 1985), the court cited conflicting decisions and concluded that the correct view was that legislative history could always be considered, but “clear statutory language places an extraordinarily heavy burden on the party who seeks to vary it by reference to legislative history.” *Id.* at 543; see also *In re Sinclair*, 870 F.2d 1340, 1341–42 (7th Cir. 1989) (collecting apparently conflicting statements from the Supreme Court regarding whether legislative history may be consulted when the text is clear).

108. Addressing an analogous objection, Baude and Sachs explain that originalism can be the existing law of constitutional interpretation—the “official story of our legal system”—even if courts’ decisions often mistake the original meaning. William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1468 (2019). What matters is how courts justify their decisions, not whether they reach correct decisions on the chosen theory. See *id.* at 1468–77.

109. *E.g.*, *Corley v. United States*, 556 U.S. 303, 325 (2009) (Alito, J., dissenting) (“Like other canons, the antisuperfluosity canon is merely an interpretive aid, not an absolute rule.”); *Silvers v. Sony Pictures Ent.*, 402 F.3d 881, 900 (9th Cir. 2005) (en banc) (Bea, J., dissenting) (“[W]hile maxims of statutory construction may, indeed, be *helpful* in interpreting statutes, they are not *binding*.”).

110. See *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (“[C]anons are not mandatory rules. . . . They are designed to help judges determine the Legislature’s intent as embodied in particular statutory language. And other circumstances evidencing congressional intent can overcome their force.”). The Court is on weak ground in saying, without qualification, that canons are designed to find congressional intent. That is true of some canons but not all. *Supra* Section I.C.

operation of most canons, even according to the canons' biggest boosters.<sup>111</sup> As such, these judicial pronouncements are not inconsistent with the canons' role as mandatory *contributors* to meaning, and therefore such pronouncements do not undermine the canons' precedential status.

Statements referring to canons in lawlike terms are most prevalent in the lower courts, but the Supreme Court makes such statements too, and not just in the context of the *Chevron* doctrine. Various substantive canons have been described as "holdings" or in similar terms.<sup>112</sup> In *Ali v. Federal Bureau of Prisons*,<sup>113</sup> the Supreme Court majority rejected an argument based on the *eiusdem generis* canon, reasoning (in part) that the provision at issue did not involve "a list of specific items separated by commas and followed by a general or collective term."<sup>114</sup> Justice Kennedy's dissent, joined by three other Justices, disagreed with the Court's result but, more interestingly, also expressed concern about the Court's understanding of the canon:

[T]he Court's approach [to *eiusdem generis*] is incorrect as a general rule and as applied to the statute now before us. Both the analytic framework and the specific interpretation the Court now employs *become binding on the federal courts*, which will confront other cases in which a series of words operate in a clause similar to the one we consider today. So this case is troubling not only for the result the Court reaches but also for the analysis it employs.<sup>115</sup>

The dissent's concern is odd and overstated given that *eiusdem generis* reflects an inference of natural communication (adopted into the law) and operates as a matter of degree rather than an on/off switch. Other courts are therefore unlikely to see *Ali* as announcing some sharp new rule about its scope. But the dissent's statement would make no sense at all if methodology were not binding across cases and statutes.

The holding/dictum distinction is no longer as central to legal reasoning as it once was,<sup>116</sup> so we tend not to see courts agonizing over whether a particular

111. See, e.g., ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 51, 59–62 (2012) (explaining that competing inferences from canons must be synthesized through sound professional judgment).

112. E.g., *RJR Nabisco, Inc. v. Eur. Cmty.*, 136 S. Ct. 2090, 2101 (2016) (describing prior cases as setting out a mandatory framework for applying the presumption against extraterritoriality); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) ("We have held that [the Fair Labor Standards Act's] exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit.").

113. 552 U.S. 214 (2008).

114. *Id.* at 224–25. The canon provides that a general term at the end of a list encompasses items of the same general kind as the listed items. POPKIN, *supra* note 51, at 74.

115. *Ali*, 552 U.S. at 229 (Kennedy, J., dissenting) (emphasis added).

116. David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2025–26, 2032–42 (2013); Judith M. Stinson, *Why Dicta Becomes Holdings and Why It Matters*, 76 BROOK. L. REV. 219, 220 (2010); Lawrence B. Solum, *Legal*

tool was truly necessary to an outcome or otherwise counts as a holding under some method of discerning holdings. But courts occasionally employ the holding/dictum distinction in the context of interpretive methodology. When the question occurs to them, lower courts typically conclude that the Supreme Court's methodological statements are holdings and thus binding.<sup>117</sup> Justice Thomas, more than his colleagues, seems to engage in debates over whether a methodological proposition in a prior case has really become established as a canon and whether it applies to statutes beyond the one that birthed it.<sup>118</sup> Advocates too will characterize a canon as dictum when they seek to avoid its influence.<sup>119</sup> All of this is normal behavior in a system based on precedent.

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*Theory Lexicon 005: Holdings*, LEGAL THEORY LEXICON, [http://lsolum.typepad.com/legal\\_theory\\_lexicon/2003/10/legal\\_theory\\_le\\_2.html](http://lsolum.typepad.com/legal_theory_lexicon/2003/10/legal_theory_le_2.html) [<https://perma.cc/32N9-JZPW>] (last revised Apr. 28, 2019).

117. *E.g.*, *Jordan v. Nationstar Mortg. LLC*, 781 F.3d 1178, 1183–84 (9th Cir. 2015) (rejecting an argument that a statement made about an interpretive presumption made by the Supreme Court in an earlier case was “mere ‘dicta’”). Lower courts are more likely to deem a statement dictum when it appears to conflict with a more definitive prior methodological proposition. *See, e.g.*, *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1024 (6th Cir. 2016) (stating that “we do not read dicta in [recent cases] as overruling” a prior case the court understood as holding that the rule of lenity did not apply to civil statutes with criminal applications), *rev'd sub nom.*, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017). Although one could take a narrow view of holdings on which methodological rulings are never deemed holdings, I believe the better view is that interpretive propositions do count as holdings at least when they are integral to the court's ruling. *See* GREENAWALT, *supra* note 89, at 131, 211–12. For additional views on the holding/dictum status of interpretive propositions, see, for example, Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1065–76 (2005); Frickey, *Interpretive-Regime*, *supra* note 1, at 1976; *see also* Ernest A. Young, *Our Prescriptive Judicial Power: Constitutive and Entrenchment Effects of Historical Practice in Federal Courts Law*, 58 WM. & MARY L. REV. 535, 579 (2016) (observing that whether or not canons are “law,” they “represent longstanding regularities of practice within the judiciary” (emphasis omitted)). In any event, my purpose here is to describe how the courts treat methodology, not how they should treat it under various approaches to separating holdings from dicta.

118. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2131 (2016) (Thomas, J., dissenting) (calling an interpretive principle a “made-up canon”); *B&B Hardware v. Hargis Indus.*, 135 S. Ct. 1293, 1314 n.4 (2015) (Thomas, J., dissenting) (calling a presumption dictum and stating that “[e]ven if the Court's description of the presumption were not dictum, no principle of *stare decisis* requires us to extend a tool of statutory interpretation from one statute to another without first considering whether it is appropriate for that statute”); *see also* *United States v. R.L.C.*, 503 U.S. 291, 310–11 (1992) (Scalia, J., concurring in part and concurring in the judgment) (“In sum, I would not embrace, as the plurality does, the *Moskal* [*v. United States*, 498 U.S. 103 (1990),] formulation of this canon of construction [i.e., the rule of lenity], lest lower courts take the dictum to heart. I would acknowledge the tension in our precedents, the absence of an examination of the consequences of the *Moskal* mode of analysis, and the consequent conclusion that *Moskal* may not be good law.”).

119. *E.g.*, Brief of Chamber of Commerce of the United States of America et al. as Amici Curiae in Support of Petitioner at 15–19, *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018) (No. 16-1362), 2017 WL 5186083, at \*15–19 [hereinafter Brief of Chamber of Commerce in *Encino Motorcars*] (urging the Court to reject the “supposed canon” that the Fair Labor Standards Act exceptions must be narrowly construed); Brief for the Appellee at 23–26, *Portner v. McHugh*, 395 F. App'x 991 (4th Cir. 2010) (No. 09-2111), 2010 WL 943516, at \*23–26 (arguing that the veterans' canon was only recognized by the Court in dicta).



Admittedly, even a great many examples of courts using precedential language do not establish the existence of MP on their own. However, the existence of a great many examples (and there are more than even a long article can provide) of MP language *is* probative evidence against the conventional view that MP is absent from or rejected by (non-*Chevron*) federal jurisprudence.<sup>120</sup> There is also a notable paucity of judicial statements *denying* the mandatory (though nondeterminative) force of methodological propositions, particularly from the lower federal courts. As shown later, one does not see lower courts openly embracing contradictory methodological propositions as if no law applied, and even the Supreme Court's behavior in that regard is overstated.<sup>121</sup> Similarly, one generally does not see federal courts making the categorical claim that interpretive propositions are always dicta or otherwise that they are categorically nonbinding.

## 2. Criticizing Colleagues for Departing from Methodological Precedent

There are many ways for a judge to criticize another judge, but one particularly stinging criticism is to say that a colleague has disregarded precedent. If methodology is precedential, then one should expect to see judges criticizing other judges for flouting it and to see the targets of the criticism denying the charge.<sup>122</sup> The frequency of such episodes will be limited by the lack of clarity in the content of much of the law of interpretation, but it should happen sometimes.

We do in fact see such rhetoric even from the Supreme Court, though only sporadically. In *Gregory v. Ashcroft*,<sup>123</sup> Justice White's partial concurrence criticized the majority for "depart[ing] from established precedent" in creating a federalism clear-statement rule rather than using the existing weaker presumption.<sup>124</sup> His criticism is noteworthy because he agreed with the majority's ultimate interpretation of the statute; his dispute instead concerned the interpretive rules that should govern.<sup>125</sup> And Justice Alito recently accused his colleagues of evading *Chevron*'s directive to defer to reasonable agency interpretations, complaining that "unless the Court has overruled *Chevron* in a secret decision that has somehow escaped my attention, it remains good law."<sup>126</sup>

120. See sources cited *supra* note 1 (citing descriptions to this effect).

121. See, e.g., *infra* Sections II.A.2, III.A–B, III.D.

122. See HART, *supra* note 58, at 138 (explaining that those who have internalized a rule "refer to it in criticizing others, or in justifying demands, and in admitting criticism and demands made by others").

123. 501 U.S. 452 (1991).

124. *Id.* at 475–76, 481 (White, J., concurring in part, dissenting in part, and concurring in the judgment).

125. *Id.* at 481.

126. *Pereira v. Sessions*, 138 S. Ct. 2105, 2129 (2018) (Alito, J., dissenting). The majority contended that *Chevron* was irrelevant because the statute was clear. *Id.* at 2113.

In the great legislative history debate, by contrast, the Justices cite prior opinions blessing or disclaiming the use of legislative history, but they stop short of saying that the other side is flouting precedent by persisting in its position.<sup>127</sup> The Justices themselves seem to regard this particular debate as largely unbound by precedent, at least for now.

As usual, the lower courts furnish many examples of precedent-tinged rhetoric and behavior. Judges accuse colleagues of ignoring interpretive precedent or violating established canons.<sup>128</sup> When faced with these accusations, judges on the other side do not deny that canons are binding but instead say that the canons are overcome by other factors in the particular case or otherwise disagree about the correct application of the canon.<sup>129</sup> That is, they respond in the normal way one responds to appeals to precedent.

### 3. Survey Responses

We can also consider what judges say about the status of methodology in extra-judicial statements, and, in that regard, we should attend to the findings of Abbe Gluck and Richard Posner's recent survey of several dozen federal appellate judges.<sup>130</sup> Their interviews included a question about MP.<sup>131</sup> Some respondents said that the Supreme Court's methodological rulings were precedential, but most of the respondents appeared to believe MP does not exist, though they were divided on why.<sup>132</sup> Some believed that the Court could

127. *Compare* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991) ("Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past. We suspect that the practice will likewise reach well into the future." (citation omitted)), *with id.* at 622 (Scalia, J., concurring in the judgment) (citing United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290 (1897) (rejecting interpretive use of legislative history)).

128. *E.g.*, United States v. Fontaine, 697 F.3d 221, 237 (3d Cir. 2012) (Cowan, J., concurring in part and dissenting in part) (accusing the majority of "violating basic canons of statutory construction"); United Keetoowah Band of Cherokee Indians v. U.S. Dep't of Hous. & Urb. Dev., 567 F.3d 1235, 1247 (10th Cir. 2009) (Briscoe, J., dissenting) ("[The majority's] approach ignores an important canon of statutory construction."); United States v. Delgado-Garcia, 374 F.3d 1337, 1352–53 (D.C. Cir. 2004) (Rogers, J., dissenting) (stating that the majority's formulation of the extraterritoriality canon "lacks a basis in the jurisprudence of the Supreme Court" and "runs contrary to" precedent); Doe v. Casey, 796 F.2d 1508, 1525 (D.C. Cir. 1986) (Buckley, J., concurring in part and dissenting in part) (accusing the majority of disregarding cases that had reformulated the presumption of reviewability), *aff'd in part, rev'd in part sub nom.* Webster v. Doe, 486 U.S. 592 (1988).

129. *E.g.*, Fontaine, 697 F.3d at 230 n.14 ("Our dissenting colleague misinterprets . . . our precedent regarding statutory interpretation."); United Keetoowah Band, 567 F.3d at 1243 n.8 ("While the dissent claims that we 'ignore' the important canon of statutory construction that we are to consider the statute as a whole, we do not do so." (citation omitted)).

130. Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1302 (2018).

131. *Id.* at 1356 ("Do you feel bound by whatever methods the Court uses in interpreting statutes? That is, are interpretive rules laid down by the Court holdings that operate as precedent in future cases involving statutory interpretation?").

132. *Id.* at 1343–44.

in principle make MP but had not gotten its act together to create a consistent approach, while others thought the Supreme Court lacked the power to bind them on matters of methodology.<sup>133</sup> Regarding the latter response, it is notable that one does not see such objections to MP in judicial opinions.<sup>134</sup>

There are several limitations on what we can conclude from the interview findings. As the authors acknowledge, most of the judges were not selected randomly.<sup>135</sup> It appears that the sample overrepresents judges who have strong views or at least a particular interest in statutory interpretation.<sup>136</sup> These are judges who are especially likely to do their own thinking about methodology and not just do what they are told.

Perhaps more problematic is that it is hard to know how the judges understood MP when answering MP-related questions. The judges were asked whether “interpretive rules laid down by the Court [are] holdings that operate as precedents in future cases.”<sup>137</sup> It may be that some of the judges think of MP as a system of relatively bright-line or outcome-determinative rules, which our interpretive regime mostly is not. Yet, as previously mentioned, that goes to the content of an interpretive regime, not its binding character. In addition, it appears that some judges who generally denied the precedential status of methodology then made contradictory statements, namely by accepting MP for *Chevron* and, more tellingly, for other canons like lenity and avoidance.<sup>138</sup> The researchers, mindful of the respondents’ time and hoping to maintain the questions’ consistency, did not follow up to probe the interviewees’ understanding of the question or resolve the apparent contradictions.<sup>139</sup>

B. *Courts Refer to Interpretive Canons as the Sort of Thing That Could Be Overruled*

The doctrine of stare decisis notwithstanding, courts can overrule their case law.<sup>140</sup> Indeed, the very fact that something *can* be overruled—and *needs* to be overruled, rather than just ignored—suggests it was binding law to start with.<sup>141</sup> If interpretive methodology is the sort of thing that judges and other participants in the legal system speak about in terms of overruling (or abrogating or the like), that would tend to show that it is precedential.

133. *Id.* at 1345–46.

134. *See supra* Section II.A.1.

135. Gluck & Posner, *supra* note 130, at 1307.

136. *See id.*

137. *Id.* at 1356.

138. *Id.* at 1345–46, 1348.

139. *Id.* at 1307, 1310, 1355.

140. *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991).

141. *See* John Gardner, *Some Types of Law*, in *COMMON LAW THEORY* 51, 74 (Douglas E. Edlin ed., 2007).

Courts and others do speak of overruling interpretive canons. At the Supreme Court level, the evidence mostly concerns deference doctrines, most prominently the *Auer* doctrine,<sup>142</sup> which endorses agency interpretations of their own rules unless they are clearly incorrect.<sup>143</sup> The Supreme Court's recent decision in *Kisor*<sup>144</sup> expressly took up the question whether to overrule that doctrine, and the opinions in the case repeatedly used the terms "overrule" and "overruling."<sup>145</sup>

In addition, a genre of Supreme Court amicus brief has developed: the "canon killer" brief. This is an amicus brief devoted to arguing that the Court should use the case before it as a vehicle to overrule a canon governing the field of law in which the case arises. Canons targeted for abrogation in this way include the canon of narrowly construing the Fair Labor Standards Act ("FLSA")<sup>146</sup> exceptions;<sup>147</sup> the presumption against preemption;<sup>148</sup> the canon of narrowly construing federal removal jurisdiction;<sup>149</sup> and, unsurprisingly, the *Auer* doctrine<sup>150</sup> and the *Chevron* doctrine.<sup>151</sup>

The lower courts cannot overrule canons they believe the Supreme Court has adopted, but they do recognize that the Court may abrogate both its own canons and those the lower courts have previously employed. For instance, in its 2014 decision interpreting the Class Action Fairness Act of 2005 ("CAFA"),<sup>152</sup> *Dart Cherokee Basin Operating Co. v. Owens*,<sup>153</sup> the Supreme Court

142. Here, the *Auer* doctrine incorporates *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), but *Seminole Rock* is often overshadowed by the *Auer* name.

143. *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *see also* *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

144. 139 S. Ct. 2400 (2019).

145. *E.g.*, *id.* at 2406, 2408–09, 2418, 2422–23; *id.* at 2424 (Roberts, C.J., concurring); *id.* at 2425 (Gorsuch, J., concurring); *see also* *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1212–13 (2015) (Scalia, J., concurring in the judgment) (urging "overruling" *Auer*).

146. Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–219).

147. Brief of Chamber of Commerce in *Encino Motorcars*, *supra* note 119, at 15 (stating in a section heading that "[t]he Court should seize this opportunity to reject the purported canon that FLSA exemptions must be narrowly construed").

148. Brief of Washington Legal Foundation as Amicus Curiae in Support of Petitioners at 15–16, *Altria Grp., Inc. v. Good*, 555 U.S. 70 (2008) (No. 07-562), 2008 WL 976401, at \*15–16 [hereinafter Brief of Washington Legal Foundation in *Altria Group*] ("[S]tare decisis concerns should not cause the Court to refrain from re-examining the continued viability of the presumption [against preemption].").

149. Brief of Washington Legal Foundation as Amici Curiae in Support of Petitioners at 24, *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014) (No. 13-719), 2014 WL 2361914, at \*24 (urging the Court to "strongly disavow the existence of a presumption against removability").

150. Brief of Amicus Curiae the Chamber of Commerce of the United States of America in Support of Petitioner at 9, *Garco Constr., Inc. v. Speer* 138 S. Ct. 1052 (2018) (No. 17-225), 2017 WL 4022781, at \*9 (arguing that *Auer* should be "overruled").

151. Brief of Amicus Curiae Landmark Legal Foundation in Support of Petitioners at 4, *Cal. Sea Urchin Comm'n v. Combs*, 139 S. Ct. 411 (2018) (No. 17-1636), 2018 WL 3435205, at \*4 (mem.) ("[T]his case presents the optimum vehicle for overturning *Chevron*[.].").

152. Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. §§ 1453, 1711–1715).

153. 135 S. Ct. 547 (2014).

held that a traditional interpretive rule—that statutes conferring jurisdiction on federal courts are narrowly construed—does not apply to CAFA.<sup>154</sup> The Court’s interpretive dictate conflicted with the approach of most circuits, and those courts have accordingly treated *Dart Cherokee* as overruling their prior interpretive rules. Thus, the Eleventh Circuit read *Dart Cherokee* as establishing “binding precedent” on *how* to interpret CAFA’s jurisdictional provisions, not just as precedent on the particular question at issue in *Dart Cherokee*.<sup>155</sup> As a result, the Eleventh Circuit repudiated its prior law that had employed the narrow construction canon. Similarly, the Ninth Circuit rejected an argument that *Dart Cherokee*’s statement about interpretive presumptions was dictum; instead, the Ninth Circuit stated that the Supreme Court’s new “instruct[ions]” abrogated prior circuit law that had applied the narrow construction canon to CAFA cases.<sup>156</sup> Again, this circuit case did not involve the particular issue involved in *Dart Cherokee*, just the same interpretive canon.

Lower courts also recognize, as they do in other fields of law, that they may not anticipatorily overrule a doctrine that the Court seems poised to jettison. In a recent Ninth Circuit case concerning the interpretation of an exemption under the FLSA, the court “recognize[d] that some members of the Supreme Court have questioned the soundness of the rule of narrow construction [of FLSA’s exemptions]. But we may not disregard the Court’s existing, binding precedent.”<sup>157</sup> The Ninth Circuit’s perception that the canon’s future was insecure proved accurate, as the Supreme Court subsequently “reject[ed] this principle” of narrow construction.<sup>158</sup>

\* \* \*

Statements like those above suggest that judges feel bound, compelled by law to apply particular methods or tools of interpretation. The statements accordingly provide evidence for the precedential status of methodology. Yet it is not particularly controversial to say that humans are sometimes mistaken, deluded, or insincere. Therefore, we should consider what judges actually *do*

154. *Id.* at 554. *See generally* Aaron-Andrew P. Bruhl, *The Jurisdiction Canon*, 70 VAND. L. REV. 499 (2017) (describing this canon’s history, justifications, and current status).

155. *Dudley v. Eli Lilly & Co.*, 778 F.3d 909, 912 (11th Cir. 2014) (“Applying this binding precedent from the Supreme Court [i.e., the *Dart Cherokee* case], we may no longer rely on any presumption in favor of remand in deciding CAFA jurisdictional questions.”).

156. *Jordan v. Nationstar Mortg. LLC*, 781 F.3d 1178, 1183–84, 1183 n.2 (9th Cir. 2015); *see also* *White & Case LLP v. United States*, 89 Fed. Cl. 12, 21–22 (2009) (explaining that the court’s prior law on deference to administrative agencies had been superseded by later Supreme Court precedents).

157. *Navarro v. Encino Motorcars, LLC*, 845 F.3d 925, 935 (9th Cir. 2017) (citation omitted), *rev’d*, 138 S. Ct. 1134 (2018); *see also* *Shuker v. Smith & Nephew, PLC*, 885 F.3d 760, 771 n.9 (3d Cir. 2018) (stating that the court will “continue to apply the presumption against preemption” unless the Supreme Court “overrul[es]” it).

158. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018); *see also infra* Section III.A.2 (discussing the overruling of the FLSA canon).

with interpretive methodology in addition to how they describe its status. That is, do they handle methodological propositions like law? Answering that question is the task of Part III.

### III. DO COURTS TREAT METHODOLOGY AS BINDING?

Not only do courts talk about methodology like it is precedential law, but they also use methodology that way. Consistent with the criteria developed in Section I.E, we can divide the examination of courts' use of methodology into several categories. Because open endorsement of previously rejected propositions of law suggests a failure of precedent, Section III.A examines the extent to which courts either state or refrain from stating contradictory operative propositions of interpretive methodology. And because precedents should not be ignored when they apply, Section III.B examines whether courts cite methodological propositions when their triggering circumstances are satisfied and either apply the propositions or distinguish them. Section III.C considers whether courts employ an overruling analysis—identifying exceptional circumstances, contending with reliance interests, and so on—in the rare cases in which they overrule MP. Section III.D considers whether canons act as but-for causes of interpretive outcomes. Finally, Section III.E examines whether appellate courts treat errors of interpretive method as significant enough to correct.

#### A. *Courts Refrain from Stating Inconsistent Methodological Propositions*

A fairly minimal requirement for the existence of MP is that courts avoid persistent, open disagreement on methodological propositions. MP is not very successful in that regard at the Supreme Court level, especially on certain matters, but it is quite successful in the lower courts.

##### 1. Supreme Court

There are certainly domains in which the Justices openly make inconsistent pronouncements, the leading example being legislative history.<sup>159</sup> The Court also makes contradictory statements on matters like its power to repair legislative drafting errors.<sup>160</sup> Some of those contradictions are more apparent than real,<sup>161</sup> but nonetheless there is genuine disagreement. There are,

159. *Supra* text accompanying note 89.

160. See Siegel, *The Polymorphic Principle*, *supra* note 1, at 386–88 (providing such examples).

161. For example, the Court has stated, “It is beyond our province to rescue Congress from its drafting errors,” *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) (quoting *United States v. Granderson*, 511 U.S. 39, 68 (1994)), even though in other cases the Court corrects scrivener’s errors without textualist objections, see Siegel, *The Polymorphic Principle*, *supra* note 1, at 388. In *Lamie*, it was unclear whether the text reflected a true drafting error. See *Lamie*, 540 U.S. at 540–42; *id.* at 542–43 (Stevens,

as well, failures of stare decisis when it comes to particular canons. The Court has been erratic in its use of the presumption against federal preemption of state law, for example, with some Justices calling the presumption itself into question.<sup>162</sup>

Perpetual dispute is a problem for MP, but the presence of some amount of that behavior does not rule out MP's existence. If that were so, we could not have substantive stare decisis. In substantive fields, Justices sometimes adhere to their dissents, and not only on the most fraught issues like abortion or the death penalty.<sup>163</sup> The Court often ignores supposedly governing tests and zig-zags based on individual idiosyncrasies.<sup>164</sup>

The use of legislative history and the judiciary's ability to fix legislative mistakes are unsurprising areas for abiding disagreement among the Justices. The stakes are high, the contending sides are too far apart, and the disagreement is too deeply rooted in conflicting conceptions of the judicial role for MP to take hold.<sup>165</sup> (This suggests some limits on what any system of precedent can be realistically expected to achieve, a point to which I return in Section IV.A.) The proper formulation and scope of the presumption against preemption of state law might, by contrast, seem easy enough to settle, which makes the failure to reach settlement there more damning. Then again, the Court encounters methodological questions in the most difficult cases, usually ones that have split the lower courts. And disputes over preemption implicate constitutional values, foundational debates over the value of text versus purposes, and political preferences over deregulation—not easy stuff.<sup>166</sup>

To be sure, one could try to produce an explanation for any particular example of the Court's methodological disagreement. Such apologies and special pleas become less convincing the more they multiply. Instead, and while acknowledging areas of abiding disagreement, I want to point out what may be surprising instances of methodological law abiding on the Supreme Court.

Consider the evaporation of opposition to federalism clear-statement rules. As evidence for the claim that “Justices who disagree with an interpretive principle established in a particular case appear to feel unconstrained by that precedent in subsequent cases,” Foster cites the early experience under the

J., concurring) (noting that the putative error was brought to Congress's attention but not corrected). One could easily deem *Lamie's* statement to be an overly broad dictum rather than a categorical bar.

162. *E.g.*, *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 621–22 (2011) (plurality opinion).

163. *See supra* notes 91–95 and accompanying text.

164. Consider, as an exhibit, the outcomes and fractured opinions in Establishment Clause cases like *Van Orden v. Perry*, 545 U.S. 677 (2005), and *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), which were decided the same day.

165. *Cf.* GREENAWALT, *supra* note 89, at 212 (observing that lack of stare decisis on certain aspects of interpretive method may derive from the perceived constitutional objections to some methods).

166. *See* Ernest A. Young, “The Ordinary Diet of the Law”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 256, 340–44.

Rehnquist Court's newly minted federalism clear-statement rules.<sup>167</sup> As Foster explains, four Justices dissented from the Court's 1985 decision in *Atascadero State Hospital v. Scanlon*,<sup>168</sup> which established a rule that abrogation of sovereign immunity requires unmistakably clear textual evidence, and those four Justices did not accede to the rule's authority in several subsequent cases.<sup>169</sup> That is true, but objections to the clear-statement rules later disappeared. As early as 1991, Justice Stevens, who was one of the original dissenters, joined without objection a majority opinion setting out the clear-statement requirement.<sup>170</sup> Justice Blackmun, another original dissenter, concurred in the judgment in that same case but did not write an opinion, so it is uncertain whether he still objected.<sup>171</sup>

Justices Brennan and Marshall, the other two dissenters, were off the Court by the time of the case just mentioned, and Blackmun departed not much later, so it is hard to know whether all of the original dissenters would have acquiesced. Still, their objections could have been taken up by their liberal replacements, who did in fact continue to dissent from the analogous constitutional sovereign-immunity rulings that their predecessors had opposed. But the new liberals did not dissent from the statutory clear-statement rule of *Atascadero*. In *Kimel v. Florida Board of Regents*,<sup>172</sup> a subsequent abrogation case, the four dissenting liberal Justices joined the section of the Court's opinion setting out the *Atascadero* clear-statement rule.<sup>173</sup> They dissented from the judgment because they refused to accept the precedential force of the *substantive* constitutional precedent limiting Congress's Article I power to abrogate state immunity.<sup>174</sup>

One might respond that the events just described reflect the liberals' tactical concession to the reality that there were not five votes to overrule the clear-statement rule. Keep in mind, though, that there were not five votes to overrule the Eleventh Amendment precedents either, yet the dissenters fruitlessly stuck to their guns there.<sup>175</sup> A tougher test would come if there were enough votes to change the rules. Again, though, such an overruling, if it were to happen, would not set methodology apart from other domains where changes in Supreme Court personnel lead to changes in law. Nonetheless, I would be

167. Foster, *supra* note 1, at 1881.

168. 473 U.S. 234 (1985)

169. Foster, *supra* note 1, at 1881; see *Atascadero State Hosp.*, 473 U.S. at 242. As examples of the subsequent dissents, Foster cites *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 790 (1991) (Blackmun, J., dissenting, joined by Marshall and Stevens, JJ.), and *Dellmuth v. Muth*, 491 U.S. 223, 239–41 (1989) (Brennan, J., dissenting, joined by Marshall, Blackmun, and Stevens, JJ.). Foster, *supra* note 1, at 1881 n.100.

170. *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 198, 206 (1991).

171. *Id.* at 207.

172. 528 U.S. 62 (2000).

173. *Id.* at 96 n.5 (Stevens, J., dissenting in part and concurring in part).

174. *Id.* at 97–98.

175. *E.g., id.* at 97–99.



willing to wager that a future majority of liberal Justices would not overrule the interpretive rules, though they might overrule the constitutional limits on congressional power to abrogate state immunity.

To take a more recent example of an apparent success of MP, the Justices who opposed the strengthening of the presumption against extraterritoriality in *Morrison v. National Australia Bank Ltd.*<sup>176</sup> reconciled themselves to the presumption in later cases. Thus, in *RJR Nabisco, Inc. v. European Community*,<sup>177</sup> despite their disagreements on the outcome, *all* of the participating Justices signed on to the section of the opinion setting out the *Morrison* version of the presumption against extraterritoriality.<sup>178</sup> The *RJR Nabisco* dissenters' argument was that the presumption should not apply separately to both substantive and remedial questions.<sup>179</sup> That is, they were arguing over the presumption's scope. What's more, the dissenters' argument over the presumption's scope relied in part on precedents applying the presumption, not blank-slate reasons to narrow it.<sup>180</sup> This sort of argumentation—drawing on prior decisions to justify competing views of what the law demands—is exactly what one would expect in a system of precedent.

## 2. Lower Courts

If a lower court stated that dictionaries must not be considered, that there is a presumption that substantive legislation is retroactive, or that the *Skidmore* doctrine no longer exists, the lower court would be stating incorrect propositions within the governing interpretive regime. Busy lower courts can be expected to make mistakes, especially where briefing is inadequate or the law is complicated or changing.<sup>181</sup> Much more telling would be open and acknowledged departures from prevailing methodological propositions. *That* is something we do not see from lower courts to any appreciable degree in any context.

What we see instead is that the lower courts pay attention to the Supreme Court's operative propositions of methodology and try to follow them.<sup>182</sup> Lower

176. 561 U.S. 247 (2010).

177. 136 S. Ct. 2090 (2016).

178. To elaborate: Justices Ginsburg and Breyer joined the Court's explication of the presumption in Parts II and III of the *RJR Nabisco* opinion, 136 S. Ct. at 2111, but Ginsburg had earlier joined Justice Stevens's concurrence in which he disagreed with the majority on that issue in *Morrison* and Breyer had concurred only in the *Morrison* judgment, 561 U.S. at 273, 278.

179. *RJR Nabisco, Inc.*, 136 S. Ct. at 2113 (Ginsburg, J., concurring in part and dissenting in part).

180. See, e.g., *id.* at 2113 & n.2 (citing a supportive precedent and distinguishing another).

181. See, e.g., Diego A. Zambrano, *Judicial Mistakes in Discovery*, 112 NW. U. L. REV. ONLINE 217, 225–26, 238 (2018).

182. Consider, as an example of the efforts of the lower courts, *Impact Energy Res., LLC v. Salazar*, 693 F.3d 1239 (10th Cir. 2012), in which each judge on the panel filed a separate opinion addressing, in part, the interaction of the sovereign immunity clear-statement rule and the presumption governing

courts' obedience extends to situations in which the Supreme Court appears to change the rules. One might imagine lower courts taking such shifts as evidence that MP does not exist, but instead they faithfully seek to discern and follow the new rules. Consider the FLSA canon that the Court recently interred in *Encino Motorcars, LLC v. Navarro*.<sup>183</sup> In its initial decision, the court of appeals followed the then-prevailing rule that the FLSA's exemptions should be narrowly construed, citing a 1960 Supreme Court decision in support.<sup>184</sup> It then observed that "[i]n recent years, the Supreme Court has clarified [the canon's scope]" and cited two of the Court's more recent cases that narrowed the canon.<sup>185</sup> After the Supreme Court remanded the case on unrelated grounds, the court of appeals again deemed the canon "binding precedent" even while acknowledging that some Justices had continued to question the canon.<sup>186</sup> After the Court finally repudiated the canon,<sup>187</sup> lower courts recognized within weeks that the Court had "rejected [the] principles" calling for broad interpretation of the FLSA and narrow construction of its exceptions.<sup>188</sup> Similarly, when the Supreme Court changed the deference regime applicable to Treasury Department regulations, the lower courts caught on almost immediately.<sup>189</sup> Probably more common than lower courts dismissing interpretive law is perceiving interpretive law where there is none.<sup>190</sup>

One situation in which we do see slippage between the interpretive regimes of the Supreme Court and the lower courts involves canons that the Court has stopped citing but has not expressly rejected. One example of a canon that lingers on in the lower courts after apparently being abandoned by the Supreme Court is the canon calling for liberal interpretation of civil rights acts.<sup>191</sup> Yet, as precedents live on indefinitely until overruled, it is not disobedient for the lower courts to continue citing canons that have been neglected of late but not overruled.

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statutes of limitations. *Id.* at 1249–50, 1253 (Lucero, J., concurring); *id.* at 1254–55 (Seymour, J., concurring); *id.* at 1260–61 (Tymkovich, J., dissenting).

183. 138 S. Ct. 1134 (2018); *id.* at 1142.

184. *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1271 n.3 (9th Cir. 2015), *vacated*, 136 S. Ct. 2117 (2016).

185. *Id.*

186. *Navarro v. Encino Motorcars, LLC*, 845 F.3d 925, 935 (9th Cir. 2017), *rev'd*, 138 S. Ct. 1134 (2018).

187. *Encino Motorcars*, 138 S. Ct. at 1142.

188. *Rodriguez v. Adams Rest. Grp.*, 308 F. Supp. 3d 359, 364 n.1 (D.D.C. 2018).

189. Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481, 508 (2015) [hereinafter Bruhl, *Communicating the Canons*].

190. See *supra* text accompanying notes 104–08.

191. See Bruhl, *Communicating the Canons*, *supra* note 189, at 521–24; see also Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 110–11 (2018) (discussing canons that the Supreme Court has apparently abandoned).

B. *Courts Apply a Canon when Its Triggering Conditions Appear to Be Satisfied*

In a well-functioning system of MP, courts would not merely refrain from stating incorrect or inconsistent methodological propositions; they would also cite canons when the canons' criteria for application are satisfied. Acknowledging the existence of a canon does not necessarily mean allowing it to control the outcome, but that initial step of recognition is needed before the canon can perform its role of contributing to the resolution of an interpretive problem. If the court does not think the canon is applicable, despite its facial relevance, the court should distinguish the canon or otherwise explain itself.<sup>192</sup>

Now, there is a complication here in that the failure to mention an arguably relevant canon is an ambiguous signal. The court's silence could mean that the court: (1) deemed the canon inapplicable (perhaps correctly so) without explaining why, (2) mistakenly failed to realize the canon was relevant, (3) refused to mention the canon in order to conceal it or avoid its effect, or (4) declined to mention the canon despite its applicability because the canon is not law. The first possibility may represent a failure of reason giving, which perhaps deserves criticism depending on the circumstances, but it does not undermine MP. The second situation is a failure of precedent, but it is the kind of failure one would expect in a system run by fallible humans. If this kind of innocent failure is particularly common with methodological questions, that would tend to suggest that courts may not yet think of methodological propositions as law. The third scenario is an evasion of precedent, which is premised on the existence of a duty that is being flouted. The fourth situation is the strongest evidence against the existence of MP.

In some circumstances, we can exclude some of the possibilities just listed. For example, if there is a dissent that urges the canon's applicability and the majority fails to respond, that is at least evidence that the majority was aware of the canon. That still does not rule out the possibility that the majority thought it was obvious why the canon was inapplicable or outweighed, but it is common for a majority opinion to respond to the major points in the dissent.

As before, we can start with evidence from the Supreme Court, which is mixed, and then consider the lower courts, where canon following is the norm.

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192. There are two different understandings of what it means to distinguish precedent. One version views distinguishing as discovering that an existing rule, taken as is, does not apply to the circumstances at hand. The other version portrays distinguishing as a way of subtly changing the law by narrowing the prior rule, albeit in a way such that the modified rule still justifies the prior case. See JOSEPH RAZ, *THE AUTHORITY OF LAW* 185–86 (1979) (discussing these two interpretations of distinguishing precedent). The two activities blur together when the prior rule is uncertain or unclear. Neither activity customarily involves a stare decisis analysis.

## 1. Supreme Court

When it comes to interpretive propositions, the Supreme Court does engage in the ordinary legal activities of parsing precedent to determine a rule's scope and then either applying it or distinguishing it. An example comes from *Landgraf v. USI Film Products*,<sup>193</sup> a leading case on legislative retroactivity. The Court was faced with the argument that a prior case, *Bradley v. School Board of Richmond*,<sup>194</sup> had undermined the long-standing presumption against retroactivity.<sup>195</sup> The Court did not ignore *Bradley* or other cases on the topic, nor did the Court intimate that those cases did not make any law beyond the statutes at issue.<sup>196</sup> The Court instead distinguished *Bradley* and reconciled it with prior cases, all in very conventional terms:

Although [language in *Bradley*] suggests a categorical presumption in favor of application of *all* new rules of law, we now make it clear that *Bradley* did not alter the well-settled presumption against application of the class of new statutes that would have genuinely “retroactive” effect. . . . Our opinion [in *Bradley*] distinguished, but did not criticize, prior cases that had applied the antiretroactivity canon. The authorities we relied upon in *Bradley* lend further support to the conclusion that we did not intend to displace the traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment. *Bradley* relied on [several precedents] that are consistent with a presumption against statutory retroactivity . . . .<sup>197</sup>

The Court sought to explain why *Bradley* was an exception to the usual rule and, despite containing some loose language, was compatible with that rule. Presumably, the Court engaged in this discussion for the guidance of lower courts, and perhaps too because it felt an obligation to show the lawfulness of its own decisionmaking.

In a famous recent example of distinguishing MP, the Supreme Court in *King v. Burwell*<sup>198</sup> (the Affordable Care Act subsidies case) did not employ the *Chevron* doctrine but instead engaged in de novo interpretation of the statute.<sup>199</sup> Whether or not the Court's sidestepping of *Chevron* was persuasive, the key point is that the Court felt the need to offer an explanation for doing so. That explanation drew on principles underlying *Chevron* (namely congressional delegation and agency expertise) and cited previous cases in which *Chevron* had

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193. 511 U.S. 244 (1994).

194. 416 U.S. 696 (1974).

195. See *Landgraf*, 511 U.S. at 276.

196. See *id.* at 276–77.

197. *Id.* at 277–78 (citations omitted).

198. 135 S. Ct. 2480 (2015).

199. *Id.* at 2489.

been found inapplicable to questions of deep economic or social significance.<sup>200</sup> (Later cases then describe a “major questions” doctrine or canon, and lower courts argue over its scope, treating all of this—perhaps too credulously, given the disputes involved—like normal law.<sup>201</sup>)

Despite cases like those above, there are numerous instances in which the Supreme Court does not distinguish canons (or otherwise explain why they are not controlling in the circumstances) but instead just ignores them. This has happened even when the Court was certainly aware of the canon and when it is hard to imagine that the Court believed the canon was so obviously inapplicable that no distinction needed to be made.

Consider first the *Chevron* doctrine, which, recall, some scholars have put forward as the exceptional doctrine that does achieve MP.<sup>202</sup> Eskridge and Baer’s study of deference doctrines found that the Supreme Court often failed to invoke *Chevron*’s analytical framework when it should.<sup>203</sup> A reanalysis of the data, using a different and (to this observer, better) method, found a far lower rate of ignoring *Chevron*.<sup>204</sup> Even so, using whatever methods, some cases do not use *Chevron*’s analytical framework when they apparently should. And the outlook is not especially promising for future adherence to the *Chevron* doctrine, given that it finds itself besieged at the moment.<sup>205</sup>

Other canons too sometimes go unmentioned when they ought to be cited. That has happened, for example, in some cases that should have featured the presumption against preemption, a long-standing and (one would think) well-established canon. Yet, in *PLIVA, Inc. v Mensing*,<sup>206</sup> the majority did not mention the presumption against preemption despite the dissent’s heavy reliance on it.<sup>207</sup> Instead, several members of the majority made remarks that arguably called the presumption’s very validity into doubt, though without

200. *Id.* (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)).

201. *See, e.g.*, *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 291 (4th Cir.) (Gregory, C.J., concurring), *vacated*, 138 S. Ct. 2710 (2018); *id.* at 328 n.3 (Wynn, J., concurring); *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 422 & n.4 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

202. *Supra* text accompanying note 8.

203. Eskridge & Baer, *supra* note 75, at 1121, 1124–27 (observing the Court’s failure to cite *Chevron* when it appears applicable); Raso & Eskridge, *supra* note 8, at 1734, 1751, 1764 (concluding that deference doctrine is not precedential in part due to the Court’s failure to follow, distinguish, or overrule relevant cases).

204. Natalie Salmanowitz & Holger Spamann, *Does the Supreme Court Really Not Apply Chevron When It Should?*, 57 INT’L REV. L. & ECON. 81, 81–82 (2019). Salmanowitz and Holger examined whether the parties invoked *Chevron* in the briefs rather than relying on researcher judgment applied to case facts. *Id.* at 82.

205. *See* Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937, 946–55 (2018) (describing recent attacks on *Chevron* from courts, Congress, and commentators).

206. 564 U.S. 604 (2011).

207. *See id.* at 627 (Sotomayor, J., dissenting).

expressly saying that they were doing so.<sup>208</sup> Similarly, in *Riegel v. Medtronic, Inc.*,<sup>209</sup> an express preemption case, the dissent relied heavily on the canon but the majority did not employ it or explain its absence.<sup>210</sup>

Another example of the majority's silence involves the traditional canon according to which statutes conferring federal subject-matter jurisdiction, especially removal jurisdiction, are narrowly construed. In a 1999 case involving the timing requirements for removal, one of the main points of Chief Justice Rehnquist's brief dissent was to accuse the majority of "depart[ing] from this Court's practice of strictly construing removal and similar jurisdictional statutes."<sup>211</sup> One might have expected the majority to respond, perhaps by explaining that the canon had been overcome by other considerations, but the majority did not mention the canon at all.<sup>212</sup>

One could cite other examples,<sup>213</sup> but the point should be clear enough: despite their penchant for loquaciousness, the Justices will let canons go by unrebuted or unmentioned even when it appears that they are relevant and even when other Justices urge their importance. They do not ignore inconvenient canons all the time, to be sure, but it happens enough to raise doubts about the canons' precedential status in the minds of the Justices.

## 2. Lower Courts

As usual, the lower courts more consistently display behaviors that one expects from courts bound by law. They routinely parse the scope of canons to see whether they apply, distinguish cases applying canons rather than ignore them, and otherwise subject canons to normal precedential treatment. Here are a few of the many illustrations that could be chosen.

The usual rule is that grants of public land are strictly construed against the recipient, but the Supreme Court deemed that canon inapplicable, or overcome by countervailing considerations, while interpreting the Union Pacific Railroad Charter Act of 1862<sup>214</sup> in *Leo Sheep Co. v. United States*.<sup>215</sup> The

208. *Id.* at 621–22 (plurality opinion) (citing Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 234 (2000)); *id.* at 642 (Sotomayor, J., dissenting).

209. 522 U.S. 312 (2008).

210. *Id.* at 334–35, 338 n.8, 339 n.9 (Ginsburg, J., dissenting); *see also* *Altria Grp., Inc. v. Good*, 555 U.S. 70, 99–103 (2008) (Thomas, J., dissenting) (observing that "the Court's reliance on the presumption against pre-emption has waned in the express pre-emption context" and discussing cases failing to mention the presumption).

211. *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 357 (1999) (Rehnquist, C.J., dissenting).

212. The Court's rather short opinion relied largely on traditional practice and pragmatic considerations. *See id.* at 351–56.

213. *See generally* Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 937 (2016) (showing that opinions often do not respond to the particular canons invoked in opposing opinions in a case).

214. Pub. L. No. 37-120, 12 Stat. 489.

215. 440 U.S. 668 (1979); *id.* at 669.

*Leo Sheep* opinion reasoned that narrow construction of the land grant at issue was inappropriate in light of the Act's great public purpose of promoting the development of the American West.<sup>216</sup> Later, a district court was faced with the question whether the Court's deviation from the strict-construction canon for public grants in *Leo Sheep* should extend to an 1891 statute that provided easements over public land for the construction of irrigation works.<sup>217</sup> The district court distinguished *Leo Sheep*, reasoning that "[a] canal and ditch system, while it serves the public interest, is not the same type of massive undertaking as building three thousand miles of transcontinental railroad through the unsettled and undeveloped American West which faced the Court in *Leo Sheep*."<sup>218</sup>

Opportunities for explaining, applying, and distinguishing canons arise with particular urgency after the Court appears to alter an interpretive canon. As described earlier, lower courts regarded *Dart Cherokee* as altering the interpretive regime by abrogating the presumption against jurisdiction at least in cases under the CAFA.<sup>219</sup> The canon of narrowly construing jurisdictional statutes had been well settled in the prior law, and so, in the wake of *Dart Cherokee*, courts needed to decide whether the canon still applied to non-CAFA jurisdictional statutes. For the most part, courts have limited *Dart Cherokee* to CAFA cases and followed the older principle in other cases. As one court explained:

The Supreme Court [in *Dart Cherokee*] made it clear that any presumption against removal [to federal court] is inappropriate in a CAFA action, but left open the question of whether such a presumption is still valid in an average removal case.

. . . [B]ecause this lawsuit is a non-CAFA one, the rule of construing removal statutes strictly and resolving doubts in favor of remand is still in place.<sup>220</sup>

The court sees law on both sides of the dispute: *Dart* on one side and the circuit precedent calling for strict construction on the other. The task, as it would be in any dispute of substantive law, is to decide which rule governs in the case at hand. Likewise, the Supreme Court's strengthening of the presumption against

216. *Id.* at 682–83.

217. *Overland Ditch & Reservoir Co. v. United States*, No. 98 N 1149, 1999 WL 1087478, at \*1, \*4 (D. Colo. June 17, 1999).

218. *Id.* at \*7 n.4.

219. *See supra* notes 155–56 and accompanying text.

220. *Erby v. Pilgrim's Pride*, No. 2:16-CV-0497-VEH, 2016 WL 3548792, at \*6–7 (N.D. Ala. June 30, 2016); *see also* *Madison v. U.S. Bancorp*, No. C-14-4934-EMC, 2015 WL 355984, at \*2 (N.D. Cal. Jan. 27, 2015) (rejecting argument that the Supreme Court “recently overruled (or at least called into significant doubt) any rule [like those in circuit precedent] that might reflect a ‘presumption against removal’”).

extraterritoriality in cases like *Morrison* required lower courts to consider new questions about the beefed-up canon's application, in particular whether *Morrison* effectively overruled cases that had found certain criminal statutes to have extraterritorial application.<sup>221</sup>

Even if one credits the discussion above, it is hard to prove the claim that the lower courts do not regard themselves as free to ignore canons when they do not wish to grapple with them. After all, there are lots of cases out there and plenty of instances in which lower courts do not cite a canon that seems relevant. Yet as already noted, mere failure of citation is an ambiguous signal, and, more than at the Supreme Court level, some failures can be attributed to mere oversight.<sup>222</sup> Without claiming to make a definitive demonstration, I can point to several factors that militate against the existence of a widespread pattern of ignoring canons.

First, although *Chevron* and associated deference doctrines may be struggling in the Supreme Court, these doctrines do seem more lawlike in the lower courts. Whatever private misgivings some judges may have, they regard *Chevron* as mandatory and apply it accordingly.<sup>223</sup> They routinely use *Skidmore* as well, and when they are not sure which regime applies, they say the result would be the same under either rather than viewing themselves free to do whatever they wish.<sup>224</sup>

Second, lower courts appear to believe that canons remain valid even when the Supreme Court has not cited them in years. This behavior makes sense in that precedents have indefinite life, persisting until overruled. The Court's failure to mention a canon, even a failure that extends for decades, seems at most to be *implicit* overruling, and lower courts "are ordinarily reluctant to conclude that a higher court precedent has been overruled by implication."<sup>225</sup> Accordingly, the lower courts continue to cite canons that the U.S. Reports have not seen for years.<sup>226</sup>

221. See, e.g., *United States v. Campbell*, 798 F. Supp. 2d 293, 302–04 (D.D.C. 2011); see *supra* text accompanying notes 176–80 (describing *Morrison*'s bolstering of the extraterritoriality canon).

222. *Supra* text accompanying note 180.

223. E.g., *U.S. Steel Mining Co. v. Dir.*, OWCP, 386 F.3d 977, 985 (11th Cir. 2004); see also Gluck & Posner, *supra* note 130, at 1348 ("[E]very judge we interviewed told us that he or she was bound by *Chevron* [but] most of the judges we interviewed do not favor the *Chevron* rule.").

224. See Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1464–65 (2005); Kristin E. Hickman & Matthew D. Kruger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1280–81, 1301–02 (2007).

225. *Levine v. Heffernan*, 864 F.2d 457, 461 (7th Cir. 1988).

226. See, e.g., *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 249 (3d Cir. 2008) ("Although we are aware that the Supreme Court has applied the presumption in few conflict preemption cases of late . . . we will continue to apply the traditional presumption [against preemption] until the Supreme Court provides guidance to the contrary."); Bruhl, *Communicating the Canons*, *supra* note 189, at 520–37 (discussing "zombie" canons that continue to be cited by lower courts).



Third, we can find supportive evidence of MP in macro-level patterns of judicial behavior. Evidence of MP emerges not only from studying particular rulings but also by examining aggregate patterns of how often courts, in the whole corpus of their output, use various interpretive tools. In particular, if lower courts feel obliged to follow the Supreme Court's interpretive regime, we should expect, other things being equal, to see the lower courts' mix of interpretive tools shift in parallel with changes in the Supreme Court's mix of tools. We do in fact see such correspondences across tiers of the judiciary. In previous work, I studied the use of several interpretive tools at each level of the federal judiciary over a period of forty years. The results show that the Supreme Court's use of textualist tools like dictionaries, linguistic canons, and holistic canons increased, and its use of legislative history decreased, beginning in approximately the late 1980s.<sup>227</sup> The lower courts displayed similar shifts in citation behavior, though the changes were less pronounced in magnitude.<sup>228</sup> To be clear, this parallel shift does not necessarily prove the causal influence of precedent, as other factors were influencing all of the courts, but correlated shifts in citation frequency are at least consistent with hierarchical influence.

C. *Courts Conduct a Stare Decisis Analysis when They Overrule Their Own Methodological Precedent*

A court with the power to overrule a decision is not supposed to do so whenever it feels differently than it did when the precedent was set. Instead, the court is supposed to identify special factors, such as the precedent's unworkability or changed circumstances, and to consider reliance interests before it overrules precedent.<sup>229</sup> In a world of MP, one should expect to see a stare decisis analysis before a court overrules a proposition of interpretive methodology.<sup>230</sup> To be sure, it may be that courts should be more willing to overrule interpretive doctrines than substantive precedents, because (for instance) such doctrines typically engender less reliance on the part of the public.<sup>231</sup> Still, if that is what courts believe, one can expect courts that overrule methodological propositions to explain that stare decisis is relaxed, rather than to ignore the analysis completely.

Once again, we can divide our observations by court, starting with the Supreme Court.

227. Bruhl, *Statutory Interpretation*, *supra* note 14, at 57–60.

228. *Id.*; *see also* Baum & Brudney, *supra* note 14, at 849 (showing generally similar patterns of an increasing use of textualist tools and decreasing use of legislative history).

229. *See* *Kimble v. Marvel Ent.*, 135 S. Ct. 2401, 2409–11 (2015).

230. *See* Foster, *supra* note 1, at 1877 (citing the Supreme Court's failure to conduct such analyses as evidence of the absence of horizontal stare decisis for methodology).

231. *See* Criddle & Staszewski, *supra* note 5, at 1593–94; Raso & Eskridge, *supra* note 8, at 1809–10.

## 1. Supreme Court

The Supreme Court's most extended treatment of overruling interpretive precedent comes from the recent case of *Kisor*. Justice Kagan, writing for the majority of the Court on this issue, devoted several pages to demonstrating that the party advocating overruling had not provided "the kind of special justification needed to overrule *Auer*, and *Seminole Rock*, and all our many other decisions deferring to reasonable agency constructions of ambiguous rules."<sup>232</sup> As one would expect in a consideration of whether to overrule, the discussion noted the potential for unsettling the law plus the ability of Congress to reject or revise the deference doctrine if it wished.<sup>233</sup> In engaging in this discussion, the Court implicitly rejected Justice Gorsuch's doubts about whether *stare decisis* applies at all to "such generally applicable interpretive methods."<sup>234</sup>

Now, *Kisor* was a case about deference, and one might wonder about *Kisor*'s probative value in the broader inquiry into the existence of MP. When we look to other interpretive domains, we do not find extended *Kisor*-like analyses of *stare decisis*, at least not at the Supreme Court level (an important proviso, as usual). But, sticking with the Supreme Court for the moment, let me explain why we should not expect to observe much overruling and then mention some glimmers of *stare decisis* treatment in the nondeference case law.

The opportunities to observe an overruling analysis for an interpretive doctrine or canon are rare because the need for overruling is rare. As we have already observed, many canons describe actual regularities of communication, and so it would be bizarre (albeit logically conceivable) to imagine trying to overrule them. Many other canons are mushy enough—in their triggering criteria (often, "ambiguity"), their range of application, or their weight—that it is hard to say that a particular decision is overruling a canon rather than (say) deeming the canon outweighed by another consideration. Canons can often be nudged this way and that without a conscientious judge feeling a need to "overrule." Even in the context of substantive law, outright overruling is less common than narrowing, distinguishing, or other reinterpretations of precedent, which are not accompanied by a *stare decisis* analysis.<sup>235</sup> And this is not even to mention disingenuous distinctions that pretend not to be

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232. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019).

233. *See id.* at 2422.

234. *Id.* at 2444 (Gorsuch, J., concurring in the judgment). A few years before, Justice Thomas had expressed similar doubts. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1214 n.1 (2015) (Thomas, J., concurring in the judgment) ("Although the Court has appeared to treat our agency deference regimes as precedents entitled to *stare decisis* effect, some scholars have noted that they might instead be classified as interpretive tools.")

235. *See* Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1862–63 (2014).

overrulings, a phenomenon that is in no way limited to statutory interpretation.<sup>236</sup>

Furthermore, the fact that the Court's prior methodological pronouncements may have been inconsistent or unclear also tends to obviate the need for overruling as opposed to "clarification." A recent example of a "nonoverruling" adjustment in interpretive doctrine comes from the context of administrative deference, where methodology is supposed to be most lawlike. In *Mayo Foundation for Medical Education and Research v. United States*,<sup>237</sup> the Supreme Court held that *Chevron*, rather than the older, less deferential *National Muffler* standard,<sup>238</sup> applied to tax regulations.<sup>239</sup> The Court did not understand itself to be overruling *National Muffler* so much as clarifying its previously inconsistent statements on the subject.<sup>240</sup> If a future case were to revert back to *National Muffler*, that would be hard to characterize as anything other than an overruling, but that is only because *Mayo Foundation* self-consciously established clear law.

Having explained why a stare decisis analysis is going to be rare, let me now point to some signs of it in the nondeference cases. Some dissents from years past have criticized the majority for changing the interpretive rules and in so doing used language that invokes the usual overruling factors. For example, in *Dellmuth v. Muth*,<sup>241</sup> in which the Court ratcheted up the clarity demanded of Congress to abrogate state immunity, Justice Brennan highlighted the unfairness of "test[ing] congressional intent using a set of interpretive rules . . . altogether different from, and much more stringent than, those with which Congress, reasonably relying upon this Court's opinions, believed itself to be working."<sup>242</sup> The language about Congress's reasonable reliance seems like a reference to stare decisis, given that reliance is arguably the most important limitation on overruling incorrect decisions.<sup>243</sup>

In addition, the Court's pattern of actions leading up to the repudiation of a canon generally resemble its preparations for overruling a substantive decision. The Court often leads up to an overruling over a period of years through a series of decisions in which a rule is questioned, chipped away at,

236. Friedman, *supra* note 91, at 6–7.

237. 562 U.S. 44 (2011).

238. *Nat'l Muffler Dealers Ass'n v. United States*, 440 U.S. 472 (1978).

239. *Mayo Found.*, 562 U.S. at 57–58.

240. *See id.* at 54 ("Since deciding *Chevron*, we have cited both *National Muffler* and *Chevron* in our review of Treasury Department regulations."). Similarly, Justice Scalia's dissent in *Mead* called it an "avulsive" change in the law—a sudden and substantial one, which calls to mind overruling—but the majority cast its analysis as a summation and restatement of existing doctrine, at most an accretive change. *Compare* 533 U.S. 218, 227–31 (2001), *with id.* at 239–40 (Scalia, J., dissenting).

241. 491 U.S. 223 (1989).

242. *Id.* at 239–40 (Brennan, J., dissenting).

243. *See* Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 GA. L. REV. 1035, 1038–40 (2013).

distinguished, and otherwise undermined.<sup>244</sup> Something like this recently played out with regard to the canon, mentioned above, of narrowly construing FLSA exemptions.<sup>245</sup> The canon's ultimate demise in *Encino Motorcars* was foreshadowed in *Christopher v. SmithKline Beecham Corp.*,<sup>246</sup> where the Court stated that the canon "is inapposite where, as here, we are interpreting a general definition that applies throughout the FLSA."<sup>247</sup>

The Court's next encounters with the canon were less than ringing endorsements. Two years after *Christopher*, the Court declined to apply the canon again, explaining that it was inapplicable because, as in *Christopher*, a definition was at issue rather than an exemption.<sup>248</sup> By the time two more years had passed, Justice Thomas was referring to "the made-up canon that courts must narrowly construe the FLSA exemptions."<sup>249</sup> He noted that the Court has "declined to apply that canon on two recent occasions, one of which [i.e., *Christopher*] also required the Court to parse the meaning of an exemption."<sup>250</sup> The reader will recall that the *Christopher* Court justified its decision not to apply the canon (which it did not call "made-up," back then) by claiming that it was *not* interpreting an exemption.

The axe finally fell on the canon two years later.<sup>251</sup> This step-by-step build up, which matches that approach often used on endangered substantive precedents, would hardly be necessary if the canons could simply be ignored at will.

## 2. Other Actors in the System

Other actors in the system treat overruling interpretive canons as requiring more than simple disagreement with them.

Courts of appeals can overrule their own precedent, though this usually requires action from the en banc court. There is evidence that the courts of appeals believe en banc rehearing is necessary to alter circuit precedent on matters of interpretive method, which suggests they regard it as insulated in the way other circuit law is insulated against overruling by panels.<sup>252</sup>

244. See Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 782–91 (2012) (cataloging the Court's use of such techniques).

245. *Supra* text accompanying notes 183–91.

246. 567 U.S. 142 (2012).

247. *Id.* at 164 n.21.

248. *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 232 n.7 (2014).

249. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2131 (2016) (Thomas, J., dissenting).

250. *Id.*

251. *Supra* text accompanying notes 183–91.

252. *E.g.*, *Mojica v. Gannett Co.*, 7 F.3d 552, 557 (7th Cir. 1993) ("When sitting *en banc*, the full court has the power to change general rules stated in previous cases. . . . [T]herefore, the first issue before us is whether the presumption against retroactivity should remain the law of this Circuit."); *Kisor v. Shulkin*, 880 F.3d 1378, 1382 (Fed. Cir. 2018) (O'Malley, J., dissenting from denial of

Litigants and scholarly commentators are part of the interpretive system as well, and they often undertake an overruling analysis when they ask for courts to change the interpretive rules. As noted above, there has developed a genre of “canon killer” briefs that aim at urging the Supreme Court to repudiate a particular interpretive rule.<sup>253</sup> Briefs targeting a canon sometimes undertake a stare decisis analysis, though they also sometimes express uncertainty over whether it is really necessary.<sup>254</sup>

D. *Precedent Acts As a But-for Cause of Interpretive Outcomes*

We come next to what some might think is the most important criterion for MP: whether methodology has enough precedential oomph to cause interpretations to come out one way rather than another. Recall weaknesses of this criterion noted above: Most canons and other interpretive rules are not supposed to dictate outcomes single-handedly but rather to contribute to meaning in concert with other tools. Outcome determination therefore underestimates precedential force. At the same time, on a more cynical view, a focus on outcomes could overstate precedential force if outcomes reached on other grounds cause canons to be employed rather than canons causing an outcome to be reached. For these reasons, I think it is a mistake to fixate on but-for causation of interpretive outcomes.

Nonetheless, if MP exists, we should be able to identify some cases in the big world out there in which it appears to determine outcomes. In searching for such cases, it makes sense to focus on canons that are supposed to be especially outcome influential—such as clear-statement rules or the *Chevron* doctrine—rather than canons that at best are supposed to have only slight weight—like rules about punctuation. To ensure that the canon is being used because the law requires it, not because the judge likes the outcome anyway, it makes sense to look for cases in which judges act against what we believe to be their preferences. The lower courts furnish some highly probative examples, but let us begin with the Supreme Court.

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rehearing en banc) (“This case presents an ideal vehicle for us to consider the reach of *Auer* deference when it comes into conflict with the pro-veteran canon of construction.”).

253. *Supra* notes 147–51 and accompanying text.

254. See, e.g., Amicus Brief of Utah et al. in Support of Petitioner, at 18, *Garco Constr., Inc. v. Speer*, 138 S. Ct. 1052 (2018) (mem.) (No. 17-225), 2017 WL 4082233, at \*18 (expressing doubts over whether stare decisis applies but also arguing that the traditional stare decisis factors support overruling *Auer* and *Seminole Rock*); Brief of Washington Legal Foundation in *Altria Group*, *supra* note 148, at 15–16 (“[S]tare decisis concerns should not cause the Court to refrain from re-examining the continued viability of the presumption [against preemption].”); see also Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 841–43 (2010) (conducting stare decisis analysis with respect to *Chevron*).

## 1. Supreme Court

As usual, it is hard to demonstrate precedent exerting strong influence on the Supreme Court's merits decisions. The cases have high stakes, the legal materials are underdeterminate, and there is plenty of time (and cleverness) to reason one's way to a congenial outcome.<sup>255</sup> Nonetheless, there are cases in which we can conclude with reasonable confidence that the law of interpretation has caused a Justice to reach an outcome that otherwise would not have been reached.

Particularly strong examples come in situations in which Justices vote against their ideological disposition. In *Sossamon v. Texas*,<sup>256</sup> which applied a particularly demanding version of the federalism clear-statement rule, Justice Ginsburg joined the majority in holding the state exempt from liability, even though it was a result she probably disfavored as a blank-slate matter.<sup>257</sup> Given her views on state immunity, it is reasonable to believe that she did so only because of the clear-statement precedent.<sup>258</sup> From the Court's other wing, Justice Scalia was no fan of broad interpretations of employment-discrimination laws,<sup>259</sup> yet he went along with a holding that the Age Discrimination in Employment Act of 1967<sup>260</sup> authorized disparate-impact claims because, so far as it appears from his opinion, the agency's interpretation of the statute deserved deference under *Chevron*.<sup>261</sup> The Court was otherwise divided along ideological lines, and his concurrence with the Court's liberal members was necessary to make a majority in favor of the availability of disparate impact. Similarly, in *Kisor v. Wilkie*, Chief Justice Roberts did not join the portion of Justice Kagan's opinion that defended *Auer* deference on the doctrine's merits, but he did join the four more liberal members to form a majority for the proposition that *stare decisis* saved the deference regime from overruling.<sup>262</sup>

255. *Supra* text accompanying notes 13, 87–88.

256. 563 U.S. 277 (2011).

257. *Id.* at 292–93.

258. *See, e.g.*, *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 305–06 (2006) (Ginsburg, J., concurring in part and concurring in the judgment) (deeming “unwarranted” the Court’s use of a “clear notice” rule applicable to the remedies available under a Spending Clause statute). Justice Sotomayor’s dissent (joined by Justice Breyer) argued that the language was clear enough to satisfy the clear-statement requirement but did not directly challenge the clear-statement rule itself. *Sossamon*, 563 U.S. at 306 (“[N]othing in our precedent demands the result the majority reaches today”). Justice Kagan did not participate. *Id.* at 293.

259. *Johnson v. Transp. Agency Santa Clara Cnty.*, 480 U.S. 616, 657–58 (1987) (Scalia, J., dissenting).

260. Pub. L. No. 90-202, 81 Stat. 602 (codified as amended in scattered sections of 12 U.S.C., 29 U.S.C., and 45 U.S.C.).

261. *Smith v. City of Jackson*, 544 U.S. 228, 243 (2005) (Scalia, J., concurring) (citing *Chevron*, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)) (calling *Chevron* “an absolutely classic case for deference to agency interpretation”).

262. 139 S. Ct. 2400, 2424 (2019) (Roberts, C.J., concurring in part).

*Chevron* is the most heavily studied interpretive doctrine, and we have more systematic, if not wholly definitive, evidence about its ability to constrain the courts. It appears that *Chevron* does exert constraint, though imperfect, even on the Supreme Court. As Raso and Eskridge conclude, “deference doctrine matters”—though “ideology *also* correlates significantly with how Justices vote.”<sup>263</sup> That may not sound like much, but again remember that we should not expect much constraint from an apex court that handles the hardest and most politically charged cases.

## 2. Lower Courts

We know, as a general matter, that law constrains more as one moves down the judicial hierarchy.<sup>264</sup> As for interpretive methodology in particular, it is easy to find lower court opinions with remarks to the effect that a particular decision would not have been reached but for the command of a canon.<sup>265</sup> But a skeptic could respond that such statements are insincere or mistaken, that the court would have ruled that way for other reasons. Solid, systematic evidence of changes in outcomes traceable to changes in interpretive methods is tough to come by. Even in substantive law, it is hard to observe changes in outcomes when a new factor is added to or subtracted from a multifactor balancing test.<sup>266</sup> Among other difficulties, the selection of disputes for litigation may change as the law changes.

But all is not lost. We can be especially confident that a canon changed an outcome when *the same decision maker* switches their decision in *the same case* after a change in the interpretive regime. Clean breaks in interpretive rules do not happen often, so there are few such occasions for study. But when they do happen, they provide powerful evidence of MP. A few examples of cases drawn from such circumstances follow.

Consider first a Seventh Circuit employee benefits case in which the court initially deferred to the IRS’s interpretation of a statutory provision about

263. Raso & Eskridge, *supra* note 8, at 1778, 1784; *see also* Baum & Brudney, *supra* note 14, at 847 (finding ideological differences in the invocation of agency deference at the Supreme Court but deeming the differences “small”).

264. *Supra* text accompanying notes 14, 87–88.

265. *E.g.*, *EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989) (“While normal rules of construction would suggest the outcome which the district court adopted, . . . unequivocal Supreme Court precedent dictates that in cases where ambiguity exists . . . the court is to apply the special canons of construction to the benefit of Indian interests.”); *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459, 472 (S.D.N.Y. 2008) (refusing to follow prior similar cases in part because the cases did “not acknowledge that the FLSA’s exemptions must be narrowly construed against employers”).

266. Anthony Niblett, *How Lower Courts Respond to a Change in a Legal Rule* 16–17 (July 23, 2018) (unpublished manuscript), <https://ssrn.com/abstract=3129865> [<https://perma.cc/Q33D-CEGK>] (showing in empirical study that it was difficult to discern shift in outcomes when one factor in a multifactor employee-contractor test was changed).

partial terminations of benefits plans.<sup>267</sup> The IRS had set forth its interpretation in an amicus brief.<sup>268</sup> The losing party sought Supreme Court review, and the Court summarily vacated the Seventh Circuit's decision for further consideration in light of the newly issued opinion in *Mead*, which held that *Chevron* deference should ordinarily apply only to more formal agency actions.<sup>269</sup> Under *Mead*, the amicus brief should be analyzed under the less deferential *Skidmore* standard and given only whatever weight its persuasive force merited.<sup>270</sup> On remand, the Seventh Circuit reversed its position. It explained:

In our first opinion in this case . . . we felt constrained by [*Chevron*] to defer to the IRS' reasonable interpretation of the partial termination statute. . . . Since we indicated that if we were writing on a blank slate we would have held differently, we now adopt the [position contrary to the IRS interpretation].<sup>271</sup>

Consider next a pair of decisions from the Court of Federal Claims in a case concerning an application for compensation from the National Vaccine Injury Compensation Program.<sup>272</sup> In 2001, the court denied the application based on the proposition that the canon disfavoring waivers of sovereign immunity trumped the canon of liberally construing remedial legislation.<sup>273</sup> A decade later, the same special master who had issued the prior denial reopened and reversed his earlier decision in light of *Richlin Security Service Co. v. Chertoff*,<sup>274</sup> a new Supreme Court precedent.<sup>275</sup> *Richlin* did not concern the

267. *Matz v. Household Int'l Tax Reduction Inv. Plan (Matz I)*, 227 F.3d 971, 974, 976 (7th Cir. 2000), *vacated*, 533 U.S. 925 (2001).

268. *Id.* at 974–75; *Matz v. Household Int'l Tax Reduction Inv. Plan (Matz II)*, 265 F.3d 572, 574 (7th Cir. 2001).

269. *Household Int'l Tax Reduction Inv. Plan v. Matz*, 533 U.S. 925, 925 (2001); *Mead*, 533 U.S. at 229–30.

270. *Mead*, 533 U.S. at 234–35.

271. *Matz II*, 265 F.3d at 574–76.

272. *Burch ex rel. Burch v. Sec'y of Health & Hum. Servs.*, No. 99-946V, 2001 WL 180129, at \*1 (Fed. Cl. Feb. 8, 2001), *granting reconsideration*, 2010 WL 1676767 (Fed. Cl. Apr. 9, 2010).

273. The court concluded its 2001 decision this way:

I personally find some of the dissenting opinions in the 1990's Supreme Court cases [on sovereign immunity] to be persuasive in arguing against the recent trend to rigorously apply the sovereign immunity doctrine. However, . . . I am bound to follow, instead, the *majority* opinions in those cases, which mandate strict enforcement of the doctrine, even in cases where the statutory scheme involves a remedial program.

*Burch*, 2001 WL 180129, at \*11. The court added in a footnote: “But for the sovereign immunity doctrine, I would likely have interpreted the statutory provision in petitioners' favor . . .” *Id.* at \*11 n.13.

274. 533 U.S. 571 (2008).

275. *Burch ex rel. Burch v. Sec'y of Health & Hum. Servs.*, No. 99-946V, 2010 WL 1676767, at \*5–6 (Fed. Cl. Apr. 9, 2010).



vaccine program in particular but instead involved the canon governing waivers of sovereign immunity in general.<sup>276</sup> The second decision stated:

After carefully studying the more recent Supreme Court decisions . . . I conclude that the applicable law concerning the application of statutory construction principles has *substantially changed* since I issued my ruling in this case in 2001.

. . . .

Under *Richlin* [i.e., one of the more recent cases], when faced, as here, with two plausible interpretations of a statute, I am no longer required to automatically choose the more narrow construction. Pursuant to *Richlin*, I am no longer bound to conclude that the sovereign immunity canon of “strict construction” automatically overrides other principles of statutory construction.

This altered analysis of the sovereign immunity doctrine, in fact, changes the result of the statutory interpretation issue in this case.<sup>277</sup>

A cynic might respond that the court was simply reaching the result it wanted to reach all along (such as ruling in favor of compensation for sympathetic plaintiffs). But if that is so, then the cynic needs to explain the prior decision, in which the court concluded that the earlier, stingier version of the sovereign-immunity canon required it to deny compensation. The interpretive regime constrained at least one of the two decisions.

One more example of a same-decision-maker-same-case switch comes from the long-running Racketeer Influenced and Corrupt Organization Act<sup>278</sup> case against cigarette manufacturers. After the Supreme Court’s decision in *Morrison*, a foreign manufacturer argued that the district court’s previous injunction against it was no longer valid because *Morrison* had strengthened the presumption that federal statutes do not apply abroad.<sup>279</sup> *Morrison* involved a different area of law (securities regulation), but the district court emphasized *Morrison*’s statement that the presumption against extraterritoriality applies “*in all cases.*”<sup>280</sup> The district court accordingly concluded that *Morrison* was a significant change in law, and it granted the defendant’s motion to modify the injunction.<sup>281</sup>

276. *Id.*

277. *Id.* at \*7, \*9.

278. Pub. L. No. 91-452, 84 Stat. 941 (codified as amended at 18 U.S.C. §§ 1961–1968).

279. *United States v. Philip Morris USA, Inc.*, 783 F. Supp. 2d 23, 27 (D.D.C. 2011).

280. *Id.* at 27 (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 261 (2010)).

281. *Id.* at 29–30.

E. *Appellate Courts View Methodological Errors as Worth Correcting*

If methodology is precedential like other law, we should expect appellate courts to treat methodological errors and confusion as worth the effort to correct and clarify in ways that go beyond the substantive outcomes of particular cases. Indeed, if methodological rulings systematically influence the course of future decisionmaking (through MP or otherwise), appellate courts should care a lot about articulating the law of interpretation.<sup>282</sup> We have already observed that appellate courts' decisions often address and clarify interpretive issues as such, with an apparent expectation that they will be binding on future courts. Thus, in *Morrison*, the Court spent many pages on the presumption against extraterritoriality and described it as a rule that should apply across all statutes.<sup>283</sup> This section addresses the related matter of how the creation and correction of interpretive precedent affects appellate courts' case selection and agenda setting.

Cases in which the Supreme Court grants certiorari primarily to address methodology for its own sake arise with some frequency in the context of deference doctrines.<sup>284</sup> One such case was *Mead*, in which the Supreme Court clarified the domain of the *Chevron* doctrine, found the case at hand outside of *Chevron's* domain, and remanded for the lower court to apply the weaker *Skidmore* regime.<sup>285</sup> Shortly after the *Mead* decision, the Supreme Court vacated and remanded a Seventh Circuit decision that had accorded significant deference to an amicus brief in a dispute involving a different agency and different statute than *Mead*.<sup>286</sup> The Seventh Circuit's decision to grant so much deference was probably incorrect in light of *Mead*, whether or not its ultimate result was still supportable. The Supreme Court's decision to vacate and remand in this case underscores the Court's trans-substantive interest in interpretive methodology. The Court's action parallels one of the indications of MP that

282. Cf. THOMAS G. HANSFORD & JAMES F. SPRIGGS II, *THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT* 3 (2006) (“[L]egal reasoning . . . can have more far-reaching consequences by altering the existing state of legal policy and thus helping to structure the outcomes of future disputes.”).

283. 561 U.S. at 261.

284. E.g., *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019) (“The only question presented here is whether we should overrule [*Auer* and *Seminole Rock*], discarding the deference they give to agencies.”); *City of Arlington v. FCC*, 569 U.S. 290, 295 (2013) (deciding whether the *Chevron* doctrine applies to an agency's determination of its own jurisdiction). In *Mead*, the petition for certiorari presented two questions, one concerning which deference regime applied and the other concerning whether the agency's interpretation was reasonable. *Petition for a Writ of Certiorari at I, United States v. Mead Corp.*, 533 U.S. 218 (2001) (No. 99-1434), 2000 WL 33979582, at \*I. The Supreme Court's decision resolved only the methodological question. *Mead*, 533 U.S. at 238–39.

285. *Mead*, 533 U.S. at 226–39.

286. *Matz v. Household Int'l Tax Reduction Inv. Plan*, 227 F.3d 971, 974–76 (7th Cir. 2000), vacated, 533 U.S. 925 (2001); see also *supra* text accompanying notes 268–73 (discussing this litigation).

Gluck discerned in the states, namely vacating cases just because of an error in interpretive method without more.<sup>287</sup>

Turning to the practices of attorneys, parties sometimes petition for certiorari by asking the Court to resolve a methodological question. Some of these petitions involve *Chevron* or other deference regimes, of course.<sup>288</sup> But petitions also assert splits over other canons and interpretive issues.<sup>289</sup>

The Supreme Court is the prime mover when it comes to altering the interpretive regime, but the courts of appeals also care about clarifying the law of interpretation for reasons that go beyond a particular interpretation or case. Courts rehear cases en banc and judges advocate doing so for the purpose of clarifying a matter of interpretive method, such as which of two canons takes precedence.<sup>290</sup> Attorneys also sometimes request that courts of appeals grant rehearing to address methodology.<sup>291</sup>

287. Gluck, *Laboratories*, *supra* note 1, at 1807–08, 1823.

288. *E.g.*, Petition for Writ of Certiorari at i, *Cal. Sea Urchin Comm'n v. Combs* (No. 17-1636), 139 S. Ct. 411 (2018), 2018 WL 2684568, at \*i (presenting two questions about how to apply the *Chevron* doctrine).

289. *E.g.*, Petition for a Writ of Certiorari at 34, *Pub. Serv. Co. of N.M. v. Barboan*, 138 S. Ct. 1695 (2018) (mem.) (No. 17-756), 2017 WL 5644417, at \*34 (urging review because “[t]he [c]ircuits [a]re [s]plit on the [m]eaning of the Indian [c]anon”); Petition for a Writ of Certiorari at i, *Deutsche Bank Tr. Co. Ams. v. Robert R. McCormick Found.*, 138 S. Ct. 1162 (2018) (No. 16-317), 2016 WL 4761722, at \*i (asserting circuit split involving presumption against preemption); Petition for a Writ of Certiorari at 17–18, *Wisconsin v. Ho-Chunk Nation*, 136 S. Ct. 231 (2015) (mem.) (No. 14-114) 2015 WL 4537878, at \*17–18 (stating that the lower court’s “application of the Indian law canons and its use of legislative history conflicts with this Court’s precedent regarding interpretive canons and unambiguous statutes”); Petition for a Writ of Certiorari at 12, *Aracoma Coal Co. v. United States*, 134 S. Ct. 2291 (2014) (mem.) (No. 13-941) 2014 WL 491630, at \*12 (urging the Court to resolve “a three-to-two circuit conflict over whether the canon of constitutional avoidance takes precedence over [the *Chevron* doctrine]”); *see also* Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 8, *Tri-Union Seafoods v. Fellner*, 556 U.S. 1182 (2009) (mem.) (No. 08-889), 2009 WL 585766, at \*8 (urging the Court to “decide whether the presumption against preemption applies to conflict preemption”).

290. *E.g.*, *Eur. Cmty. v. RJR Nabisco, Inc.*, 783 F.3d 123, 131 (2d Cir. 2015) (Raggi, J., dissenting from denial of rehearing en banc) (urging rehearing in part due to conflict with Supreme Court precedent on the presumption against extraterritoriality); *Procopio v. Wilkie*, 913 F.3d 1371, 1382–83 (Fed. Cir. 2019) (en banc) (O’Malley, J., concurring) (addressing relationship between *Chevron* and veteran canon); *Kisor v. Shulkin*, 880 F.3d 1378, 1382 (Fed. Cir. 2018) (O’Malley, J., dissenting from denial of rehearing en banc) (“This case presents an ideal vehicle for us to consider the reach of *Auer* deference when it comes into conflict with the pro-veteran canon of construction.”); *see also* *Allapattah Servs., Inc. v. Exxon Corp.*, 362 F.3d 739, 755–57 (11th Cir. 2004) (Tjoflat, J., dissenting from denial of rehearing en banc) (urging the Supreme Court to grant certiorari in order to clarify several interpretive propositions).

291. *E.g.*, Combined Petition for Panel Rehearing and Rehearing En Banc at 2–4, *Guerra v. Shinseki*, No. 2010-7080 (Fed. Cir. June 28, 2011), 2011 WL 3102473, at \*2–4 (urging rehearing in order to overrule circuit precedent about the relationship between the veteran canon and the *Chevron* doctrine).

IV. WILL REASONABLY ATTAINABLE METHODOLOGICAL PRECEDENT BE ENOUGH?

The discussion above has developed an account of what MP would look like (Part I) and has shown that we already have quite a bit of it (Parts II and III). “Quite a bit” is admittedly imprecise, but the amount of MP is enough to be an important feature of judicial decisionmaking, especially in the lower courts, and easily exceeds the amount of MP that conventional thinking acknowledges.

If I am right about those points, then there are some implications for the recent scholarly push, described at the outset,<sup>292</sup> to make interpretive methodology more fully precedential. As the following pages describe, what initially looks like good news about the progress of precedentialization actually leads to some difficult questions about the possibility of satisfying the MP movement’s ultimate goals.

A. *Good News and Bad News for the Movement for Methodological Precedent*

We can start with three pieces of good news for proponents of MP.

First, the existence of MP in the federal courts shows that getting them to treat methodology as binding law is not a hopeless pipedream. MP exists—and not just in a few states in certain years but in the federal courts too, especially in the lower courts, and not just (or even particularly) for the *Chevron* doctrine.

Second, environmental conditions within the judiciary favor the continued precedentialization of methodology. Courts are becoming more self-conscious about interpretive method, regarding it as a law-governed activity.<sup>293</sup> Legal education deserves some credit for this developing self-consciousness, for a generation of law students has now been trained since the revival of statutory interpretation as a field of widespread study and teaching.<sup>294</sup> These graduates take their knowledge to judges’ chambers as clerks, and some are now old enough to be judges themselves. Although I believe the Gluck and Posner survey underestimates the prevalence of MP,<sup>295</sup> it does suggest that “younger” judges—roughly, judges educated after the 1980s revival of textualism—are more attracted to canons and interpretive formalism than are judges of the

292. *Supra* text accompanying notes 2–3.

293. See Phillip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 258 (1992); see also Staszewski, *supra* note 5, at 267–70 (describing and criticizing several developments aimed at unifying, formalizing, and simplifying statutory interpretation).

294. The publication of the first edition of Eskridge & Frickey’s casebook is as good a choice as any other event to mark the beginning of this period. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (1987).

295. See *supra* Section II.A.3.

previous generation.<sup>296</sup> Attraction to canons and formalism is not the same thing as adherence to MP, but they are compatible and reinforcing impulses.

A broader environmental factor that favors MP is a longer-term shift toward expansive notions of precedent in the lower federal courts. The lower courts increasingly view the Supreme Court as a generator of rules to be followed, and they rarely deem the Court's words to be nonbinding dicta.<sup>297</sup> With regard to their own circuit law, the federal courts of appeals apply a peremptory law of the circuit that is established by one ruling, rather than an older notion of precedent that accretes over time as a proposition becomes better and better established.<sup>298</sup>

The third piece of good news for fans of MP is that certain doctrinal spaces seem ripe for relatively easy precedentialization. Consider rules that set priorities among interpretive sources or canons. Although it is hard to imagine the Supreme Court adopting a complete order of operations, less ambitious priority rules aimed at specific topics or particular tools are easier to settle. Which comes first: lenity or legislative history in a criminal case? The Indian canon of construction or the *Chevron* doctrine? The Supreme Court has sometimes hesitated to establish firm rules on such matters,<sup>299</sup> but these are the kinds of questions the Supreme Court or other courts could answer in an easily articulable and quotable way that future courts would regard as binding. To be clear, I am not advocating these moves, just pointing out their doctrinal tractability.

The Supreme Court could also generate more MP around substantive canons. One way to do so is by clarifying whether certain long-neglected canons still exist at all. The Court has lately repudiated some substantive canons, and the lower courts took notice.<sup>300</sup> The Court could also answer categorical questions of scope (for example, whether the presumption against preemption applies at all to express preemption clauses). Lower courts would treat these rulings as law as well.<sup>301</sup>

Now for the bad news for the MP program. The existence of rather a lot of MP leads to a troublesome question. Namely, why does the system fail to exhibit even more MP than it already does? After all, MP is sitting right there. I see two likely answers to the question, and neither of them bodes well for the forward march of MP.

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296. Gluck & Posner, *supra* note 130, at 1311–12.

297. Klein & Devins, *supra* note 116, at 2025–26, 2041–42.

298. *See supra* text accompanying notes 19–21.

299. *E.g.*, *Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001) (declining to establish a general priority rule between the Indian canon and the tax-exemption canon).

300. *See, e.g., supra* Sections II.B, III.A.2 (discussing *Encino Motorcars* and the rejection of the FLSA canon).

301. *See supra* Section II.B (discussing *Dart Cherokee* and the narrowing of the jurisdictional canon).

First, many aspects of interpretive methodology have little capacity for further specification. The areas for progress identified above involve the resolution of such matters as the *admissibility* of a source, the *validity* of a canon, *priority* between canons, and *categorical questions of scope*. All of those matters can be distinguished from questions of a source's *weight* (how powerfully does the source contribute to meaning) and *noncategorical matters of scope* (for example, how ambiguous does text have to be before canon *X* applies?), neither of which is susceptible of precise specification. Consider canons of word association like *ejusdem generis* and *noscitur a sociis*, both of which tend to narrow down general terms to fit the particular context at hand.<sup>302</sup> The force of such rules is highly sensitive to context, and, even when they are being handled sincerely, it is hard to generalize about when they will prevail. The law has adopted them as principles of legal interpretation, and the law plausibly could specify their priority vis-à-vis other tools (for instance, “syntactic canons come before legislative history”), but the law can do little to specify their exact weight or contours.

Second, and worse, certain methodological matters are too controversial and consequential for MP to take hold. The great legislative history debate provides the leading example of a high-stakes methodological controversy, though controversies over fixing likely legislative oversights (apart from pure typographical errors) are good examples too.<sup>303</sup> Part of the point of precedent is to generate agreement despite conflicting individual first-order preferences, but if preferences are too deeply held and too consequential to consider giving them up, the project cannot get off the ground.<sup>304</sup> Put differently, precedent is most useful for matters that are *somewhat* contentious, such that *stare decisis* is needed, but not *so* contentious that achieving settlement is impossible. Because some disputes over interpretive method derive from deep disagreements over the judicial role and the nature of representative government, we cannot expect judges to acquiesce in what they regard as usurpation of legislative power or subversion of democracy.<sup>305</sup> Or at least we cannot expect Supreme Court Justices to so acquiesce, even if lower courts would be inclined to obey any doctrine that the Court announced.

Of course, judicial preferences can change over time, especially with changes in personnel. If the ideological disagreements on the Supreme Court weaken, the domain of MP may expand to some matters that previously proved too contentious. The departures from the Court of a committed supporter of legislative history and other intentionalist tools (namely Justice Stevens) and

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302. POPKIN, *supra* note 51, at 74–75, 201.

303. See *supra* text accompanying note 160.

304. See Oldfather, *supra* note 5, at 5–6, 31–32.

305. See Kozel, *Statutory Interpretation*, *supra* note 5, at 1151–53; Glen Staszewski, *Precedent and Disagreement*, 116 MICH. L. REV. 1019, 1037–39 (2018).

its most uncompromising opponent of the same (the late Justice Scalia) may lead to an era of somewhat greater consensus. The Court's newer liberal members, Justice Kagan in particular, are less supportive of the use of legislative history than Justice Stevens was, so the Court's left wing may be ceding some ground on that particular battlefield.<sup>306</sup> If the Court's newer conservative Justices showed a willingness to moderate their demands a bit, they might be able to achieve a settlement on mostly favorable terms.<sup>307</sup>

Still, although ideological homogeneity may create the semblance of MP, the settlement of highly consequential matters may not survive the loss of the homogeneity that sustained it. The recent history of the Michigan Supreme Court provides a cautionary example. Textualists gained a narrow majority and established what purported to be a binding regime of textualism.<sup>308</sup> But the minority did not fully buy in, and the court's commitment to the textualist revolution has waxed and waned according to the election returns.<sup>309</sup> At the federal level, the *Chevron* doctrine, once presented as the example of the possibility of MP, faces a similar test as committed opposition to it grows.<sup>310</sup>

To sum up: Where doctrinal structures lend themselves to regularization and ideological stakes are low, we often have MP or can realistically foresee getting more of it. But in areas that lack one or both of those features, MP is unlikely to take hold. As the next section explains, proponents of MP are more likely to linger over the bitter than the sweet.

#### B. *Why Methodological Precedent Is Likely To Disappoint Its Proponents*

The MP we currently have is meaningful. MP means that it is *error* to ignore a canon when its conditions for applicability are satisfied.<sup>311</sup> Or to continue to use a canon of narrowly construing exceptions to the FLSA.<sup>312</sup> Or to fail to draw inferences (not conclusive, to be sure) from the use of different language in different parts of a statute.<sup>313</sup> Or to use the canon of narrowly construing federal jurisdiction when the CAFA is involved.<sup>314</sup> Or for a district court to employ the *Chevron* doctrine and the Indian canon of construction in

306. Cf. Adam Feldman, *A New Era in SCOTUS Textualism*, EMPIRICAL SCOTUS (Jan. 3, 2018), <https://empiricalscotus.com/2018/01/03/scotus-textualism/> [<https://perma.cc/H CZ2-TM6B>] (finding "evidence for the likelihood of the Court's continued, strong reliance on textualism moving forward" in the behavior of the Court's conservatives, Justice Kagan, and the early behavior of Justice Gorsuch).

307. *But cf.* *Digit. Realty Tr. v. Somers*, 138 S. Ct. 767, 782–83 (2018) (featuring concurring opinions dueling over the use of legislative history).

308. Gluck, *Laboratories*, *supra* note 1, at 1803–04.

309. *Id.* at 1807–11; Tagert, *supra* note 8, at 231–32.

310. *See supra* note 205 and accompanying text.

311. *See supra* text accompanying notes 153–56.

312. *Supra* text accompanying notes 183–88.

313. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004).

314. *See supra* notes 153–56 and accompanying text (describing *Dart Cherokee*).

the wrong order, where the relevant circuit has established a prescribed order.<sup>315</sup> And so on, for a hundred different methodological propositions. Lower courts may not do such things without breaking the law. Even the Supreme Court is coming to believe that it may not, lawfully, discard its own methodological propositions without overruling them.<sup>316</sup> And further precedential expansion is reasonably achievable, in certain areas.

Yet despite MP's progress, my sense is that it has not registered to most observers, maybe especially to those who support MP as a normative matter. One factor that probably explains a lot of the dissatisfaction is the usual focus on the Supreme Court and its biggest methodological dispute, the enduring debate over the use of legislative history. But even if one abjures the unhealthy, distorting focus on the Supreme Court and its most contentious debates, I suspect that those who come to recognize the full extent of actually existing MP will not find it as gratifying as they expected. If we have MP already, why does it feel so unsatisfactory?

This answer necessarily enters the realm of speculation, but the cause of dissatisfaction may be that MP has not delivered on predictability in outcomes, the felt absence of which provides much of the motivation behind the push for MP.<sup>317</sup> To some extent this dream is simply unachievable, especially at the Supreme Court level, which generally gets most (too much) of the attention. There, the law is often vague, conflicting, or otherwise underdeterminate.<sup>318</sup> As one moves down the hierarchy, relatively fewer cases are hard enough or fraught enough to generate disagreement. In that sense, outcomes are very predictable on the whole, and part of the credit for that belongs to precedent, both methodological and substantive. But predictability is scarcer in the hard cases that make it to the top.

Even more dispiriting than the unrealistic goal of predicting outcomes in the hardest interpretive cases, though, is the surprising lack of consistency when it comes to which tools are even employed. In a study of five recent years' worth of statutory interpretation cases that eventually made it to the Supreme Court, I found that it was rare for courts at different levels of the system to cite the same tools in their decisions in the very same case.<sup>319</sup> That is, the Supreme Court might decide a case based on dictionaries and a substantive canon when neither of those sources was cited in the court of appeals, which might instead have used the *Chevron* doctrine and a different substantive canon. Another recent study, Lawrence Baum and James Brudney's examination of several

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315. See sources cited *supra* note 101 (citing decisions from several courts regarding the proper priority).

316. See *supra* Sections II.B, III.C.

317. See *supra* text accompanying notes 4, 85.

318. See *supra* note 13 and accompanying text.

319. Bruhl, *Statutory Interpretation*, *supra* note 14, at 46–54.



decades of labor and employment cases, found a similar lack of overlap in tools used by different courts within the same case.<sup>320</sup> Further, they found that the rate of co-reliance on sources declined a bit from the Burger Court to today.<sup>321</sup> These findings are bad news for the hopes for a predictable interpretive regime orchestrated by the Supreme Court.

The difficulty with achieving predictability is that it requires not only a settled approach to interpretation but that the settled approach have particular contents. “Always rule for the defendant in criminal cases” is a method that generates highly predictable outcomes. But as that example suggests, the most predictable regimes are often unpalatable.

Some palatable regimes might be able to increase predictability in terms of which tools are used, but difficulties will remain. Consider a tiered system such as Oregon’s *PGE* framework, which put text in the first tier and permitted recourse to lower-tier sources only if the text was unclear.<sup>322</sup> That system, while it lasted, actually did tend to reduce citations of legislative history,<sup>323</sup> and in that limited sense it increased the predictability of the interpretive toolkit. (It is not clear if it improved predictability more broadly.<sup>324</sup>) One major downside of such tiered approaches, however, is that the predictability of their toolkit stems from their use of *lexical priority*, which means that sources or tools from the next tier may not be used at all unless the previous tier’s analysis is inconclusive.<sup>325</sup> As a theoretical matter, lexical prioritization involves difficult tradeoffs between decision quality, decision costs, and other virtues.<sup>326</sup> Consider the situation in which a second-tier canon or source favors interpretation *X* overwhelmingly but the first-tier tool favors interpretation *Y* by only the minimally sufficient amount to preclude moving to the next tier. Interpretation *Y* would win in a system of lexical priority, even if the overall balance of considerations favors *X*. Whether accepting the lower-quality decision is worth it depends on various features of the decisionmaking environment, which can vary across courts and time.<sup>327</sup>

And that is when the system of lexical priority is being followed sincerely! In a tiered system, much rests on the gateway finding—often described as

320. Baum & Brudney, *supra* note 14, at 827–28, 840–46.

321. *Id.* at 859–60.

322. *See supra* Section I.D.1.

323. *See supra* Section I.D.1.

324. *See* Steven J. Johansen, *What Does Ambiguous Mean? Making Sense of Statutory Analysis in Oregon*, 34 WILLAMETTE L. REV. 219, 220, 251 (1998) (offering a skeptical take on the *PGE* framework).

325. *See* Adam M. Samaha, *If the Text Is Clear—Lexical Ordering in Statutory Interpretation*, 94 NOTRE DAME L. REV. 155, 162–72 (2018) (distinguishing among different kinds of priority rules).

326. *Id.* at 180–89; *see also* William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 540–41, 549 (2017) (explaining that the case for the plain-meaning rule depends on contingent and uncertain features of the decisionmaking environment).

327. *See* Samaha, *supra* note 327, at 180–89.

“ambiguity”—that permits the interpreter to move to the next stage. These sorts of vague, yet consequential, doctrinal hinges are a recipe for evasion and manipulation. And that, of course, bodes ill for predictability or quality or both.

#### CONCLUSION: BACK TO CONTENT

Following MP is much like following other precedent. And, like other forms of precedent, we find more of it in the lower federal courts than in the U.S. Supreme Court. The lower courts refer to the “binding” force of methodological propositions and treat canons as mandatory contributors to meaning. Their decisions change when interpretive precedent changes, such as when the Court modifies or retires a canon. The evidence from the Supreme Court is naturally more mixed, but the Court surely engages in more MP-like behavior than the conventional wisdom supposes. Although it is true that the Court sometimes ignores relevant canons, it also parses their scope, distinguishes them, and occasionally overrules them or reaffirms them, as it does with substantive precedents. And although the Court has been unable to coalesce around a single position on legislative history or a shared view of the ultimate goals of interpretation, in many areas the Justices appear to feel bound to accept and apply canons they do not prefer.

Where does the reality of actually existing MP leave us? As far as normative theory goes, it should direct us to debates over content—that is, what the courts’ methods should be. Of course, that is what the normative literature on statutory interpretation has mostly been doing all along, both before and after the MP program arose. This does not mean we should just carry on the interpretation debates in their status quo ante. Instead, we should engage in normative debate that is informed by the potential for precedentialization. Some of the highest-stakes matters of interpretive theory are likely to resist MP, at least in the near term. But there are other areas where the temperature is low enough to allow the bonds of precedent to form. And, within those areas, certain types of changes in the interpretive regime are more precedentializable than others. For example, priority rules and order of operations are plausible growth areas for MP. Fans of MP, and fans of formal rule-of-law values like consistency and uniformity, should direct their attention to such matters. And all should understand that the stakes of resolving those methodological matters are higher than the stakes of any particular case, because resolutions of these matters can stick, especially in the lower courts. So: What *should* come first, the *Chevron* doctrine or the Indian canon of construction? In criminal cases, legislative history or lenity? Or is the best answer that there is no mandatory priority? That can be binding law too, though law that the proponents of MP are unlikely to favor.

Over a longer horizon, we can imagine plausible futures in which the Court adopts a macro-level order of operations, such as “modified textualism”

or some other form of tiered methodology in which text comes first and subsequent tiers of sources (like legislative history and substantive canons) are used only if the preceding tier's sources are inconclusive.<sup>328</sup> Would that be an improvement?<sup>329</sup>

These are good normative debates to have. Deciding which sources and canons are admissible, under what circumstances, and in what order—those things matter, especially in the law-abiding lower courts, and they matter even more in an era when methodological decisions can attain the full force of law.

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328. See Gluck, *Laboratories*, *supra* note 1, at 1777, 1829–30 (describing modified textualism). As practiced in the states Gluck studies, modified textualism is not an *exhaustive* priority system, for it does not prioritize tools within tiers. See, e.g., *id.* at 177 (listing the interpretive factors used in Oregon's *PGE* framework).

329. See Brudney & Baum, *supra* note 1, at 760–61 (advocating the virtues of a “pragmatic and adaptable” approach). Compare Gluck, *Laboratories*, *supra* note 1, at 1829–44 (presenting a largely positive view on modified textualism), with Leib & Serota, *supra* note 5, at 58–62 (presenting a negative perspective). See generally Mitchell Chervu Johnston, *Stepification* (Feb. 8, 2020) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3542568](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3542568) [<https://perma.cc/683V-2HAE>] (describing the attractions of and advantages and disadvantages of step-based doctrinal structures).