

Article

**Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation**

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Introduction ..... 482

I. Inconsistency and Authority in Interpretive Methodology ..... 485

    A. Methodology in Statutory Interpretation ..... 485

    B. Methodological Inconsistency and Methodological *Stare Decisis* ..... 487

    C. A Note on the Selection of Case Studies and the Inferences They Support ..... 493

II. Large-Scale Trends ..... 494

III. Quick Canons ..... 507

IV. Fixed Canons ..... 513

V. Loose Canons (The Problem of Canon Prominence) ..... 518

    A. Ghosts and Zombies ..... 519

        1. The Slow Fade (and Nascent Transformation?) of the Civil-Rights Canon .... 520

        2. The Uncertain Future of the Subject-Matter Jurisdiction Canon ..... 529

    B. Runaway Canons ..... 537

VI. Canon Crystallization ..... 542

VII. Summary and Implications ..... 546

    A. Factors Bearing on Lower-Court Responsiveness.. 547

        1. Different Kinds of Canons ..... 547

        2. Different Kinds of Changes ..... 548

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3. Features of the Lower Courts .....	553
4. Features of the Broader Institutional Context .....	555
B. The Limits of Methodological <i>Stare Decisis</i> .....	557
Conclusion .....	558

## INTRODUCTION

More than fifty years ago, the legal scholars Henry Hart and Albert Sacks famously observed that “[t]he hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.”<sup>1</sup> To be sure, it would be an exaggeration to present the enterprise of statutory interpretation as wholly chaotic. In practice, there is widespread agreement on the centrality of statutory text, there is an established toolkit of interpretive canons, and there are enduring frameworks that structure courts’ statutory analyses. Still, commentators agree that Hart and Sacks’s observation about the unsettled state of statutory interpretation remains apt today.<sup>2</sup>

Yet while an absence of consensus in statutory interpretation is nothing new, it seems that people have lately become less content with this state of affairs. Indeed, one of the more interesting recent developments in the field of statutory interpretation has been the growing chorus of calls for more structure and predictability in interpretive methodology. In particular, several scholars have called for treating interpretive methodology as binding law that should be honored as a matter of *stare decisis*.<sup>3</sup> That is, just as the Supreme Court might de-

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1. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., West Academic 1994) (1958).

2. *E.g.*, KENT GREENAWALT, *STATUTORY AND COMMON LAW INTERPRETATION* 43 (2013); Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 855 (2013).

3. *E.g.*, Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1866–67 (2008); Jordan Wilder Connors, Note, *Treating Like Subdecisions Alike: The Scope of Stare Decisis As Applied to Judicial Methodology*, 108 COLUM. L. REV. 681, 708–14 (2008); *see also* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology As “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1909–18 (2011) (discussing whether interpretive methodology is binding law); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2145–56 (2002) (arguing for the codification of binding interpretive rules).

cide in a particular case whether a bicycle is a “vehicle” within the meaning of some statute, so too should the Court decide, with precedential force that would bind itself and the lower courts, whether legislative history may be used to resolve statutory ambiguities, whether one particular dictionary is more authoritative than another, when to apply a presumption against federal preemption of state law, and the like.

A second budding line of inquiry in the field of statutory interpretation concerns the empirical realities of statutory interpretation in courts that are not the U.S. Supreme Court. The usual academic focus on the Supreme Court has meant that we do not know very much about the interpretive practices of the lower federal courts and the state courts, but thankfully this is starting to change. To choose two notable contributions, Abbe Gluck has shed light on interesting developments in several states, and Frank Cross has tracked some broad patterns of interpretive methodology in the federal courts of appeals.<sup>4</sup>

This Article explores the fruitful, yet largely uncharted, territory found at the intersection of the two lines of inquiry just described. That is, it considers the relationship between the Supreme Court’s methodological practices, haphazard and inconsistent as they sometimes are, and the behavior of other courts. More specifically, this Article concerns whether and how the lower federal courts respond to changes in the Supreme Court’s interpretive practices.<sup>5</sup> Instructions and diseases are both communicable in their different ways, but what about the Supreme Court’s canons of interpretation? When there are discernable trends in the Supreme Court’s practices, do the lower courts’ practices tend to move in parallel? When the Supreme Court modifies a particular interpretive canon, invents a new one, or disapproves an old one, how do the lower courts tend to react? What factors—regarding the Court’s opinion, the nature of the canon involved, or other contextual considerations—affect the lower courts’ behavior?

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4. FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 180–200 (2009); Abbe R. Gluck, *The States As Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *YALE L.J.* 1750, 1771–1811 (2010).

5. My focus on the federal courts is not meant to deny that the state courts are interesting and important; certainly they are more important numerically. But studying the state courts introduces some additional complications, *see infra* note 21, and so it makes sense to begin with the lower federal courts. Future work might study how state courts respond to the U.S. Supreme Court and to their own state supreme court.

Answering such questions about the linkages between different courts' interpretive regimes would be valuable for two reasons. First, the answers would be interesting in their own right, as they would contribute to our still-nascent understanding of the lower courts' behavior. The vast majority of the cases in the federal system are decided in the lower courts, so the Supreme Court cannot meaningfully change the interpretive regime without their assistance. Yet we still know relatively little about the lower courts' interpretive practices and how those practices correspond (or do not) to those of the Supreme Court. Second, a fuller understanding of current lower-court behavior can help us evaluate the movement for a more formal system of methodological *stare decisis*. Examining how the lower courts respond to the Supreme Court's signals today might help us estimate the likely effects and benefits were the courts to develop a more strictly precedential approach in the future.

The Article unfolds as follows:

Part I briefly situates this project within the existing debates over interpretive uniformity and methodological *stare decisis*. It also addresses my approach to selecting the Article's set of case studies of interpretive change.

Part II begins the study of how canons are communicated through the judicial system by examining some large-scale patterns over the last several decades. Existing evidence shows that the Supreme Court and the lower courts tended to move roughly in parallel with regard to several aspects of their interpretive approaches. I present some new evidence of parallelism. Specifically, as the Supreme Court became more favorably disposed toward textualist tools like linguistic canons in recent decades, so did the lower courts.

The next several parts then turn the focus toward more particular episodes and issues in canonical evolution. Sometimes the Supreme Court invents a new canon or modifies an old one; sometimes it lets a canon fall into disuse. When the Court changes its interpretive regime in these kinds of ways, that event creates an opportunity to observe how the lower courts respond. The results reveal a variety of dynamics and patterns, some expected but others quite surprising. As Part III shows, the lower courts have the capacity, given the right conditions, to catch on very quickly to changes in the Supreme Court's interpretive regime. In other situations, illustrated in Part IV, canons seem rather impervious to modification. In still other instances, one finds zombie canons that linger in the low-

er courts despite their demise in the Supreme Court (Part V.A) or canons that take off in the lower courts like pathogens escaped from the lab (Part V.B). Part VI addresses the issue of how an idea crystallizes into an interpretive canon. The investigations undertaken in Parts III through VI draw on a range of interpretive canons and doctrines, including linguistic canons such as *ejusdem generis* and the rule of the last antecedent, substantive canons governing civil-rights statutes and jurisdictional statutes, the doctrines governing judicial deference to agency interpretations, and the “no elephants in mouseholes” rule.

With the benefit of the investigations just described, Part VII then draws some tentative lessons about how canons propagate through the system and which features—of the canons, of the lower courts, and of the broader institutional context beyond the judiciary—either enhance or inhibit accurate communication. Although this Article’s case studies can identify factors that plausibly have generalizable effects, one overriding conclusion is that the interpretive regime is a complicated system about which we still have only a very partial understanding. Modifying the interpretive regime is not a simple matter of top-down instruction from the Supreme Court to lower courts but rather involves multiple potentially relevant actors and factors whose interactions defy simple explanations. The findings also illustrate the limits of the movement to give interpretive methodology more binding precedential effect. Specifically, that movement appears to underestimate the degree to which the system already displays forms of methodological precedent as a practical matter, to misunderstand the factors preventing the system from displaying more precedential behavior, and, as a result, to overestimate the potential for formally binding rules to improve the system.

## I. INCONSISTENCY AND AUTHORITY IN INTERPRETIVE METHODOLOGY

This Part frames the inquiry by providing some brief comments on interpretive methodology and *stare decisis* and then explaining my own research methods.

### A. METHODOLOGY IN STATUTORY INTERPRETATION

This Article concerns the judicial methodology of statutory interpretation—that is, how courts approach questions about the meaning of statutory text. The focus on the interpretation

of statutes, rather than constitutions or other legal texts, is appropriate for a few reasons. First, although some principles apply to the interpretation of any instrument (e.g., read the text as a whole), statutory interpretation in particular has a rich toolkit consisting of scores of rules ranging from linguistic canons (*noscitur a sociis*, *in pari materia*, and so on) to substantive presumptions (like the rule that Congress is presumed not to legislate extraterritorially) to rules about the use of extrinsic sources (such as rules governing the force of legislative history and administrative guidance).<sup>6</sup> Second, occasions for statutory interpretation confront both the Supreme Court and the lower courts routinely.<sup>7</sup> By contrast, it is quite rare for the lower courts to engage in genuine constitutional interpretation: most areas of constitutional law are so thick with Supreme Court case law that the lower courts' analyses are almost entirely devoted to parsing the relevant precedents.<sup>8</sup> Therefore, for a study of how lower courts' methodologies respond to the Supreme Court's practices, statutory interpretation is the most promising focus.

Interpretive methodologies do not determine bottom-line case outcomes in a clear way. Judges who disagree about the proper interpretive approach often converge on the same answer in a given case, such that their methodological disagreement was inconsequential. At the same time, agreement on matters of interpretive method does not guarantee agreement on particular results.<sup>9</sup> Therefore, one does not have to be an extreme skeptic about judicial rhetoric to acknowledge that it is hard to know how changes in the interpretive rules affect outcomes. The Supreme Court's famous *Chevron* decision<sup>10</sup> estab-

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6. See generally WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 1195–215 (5th ed. 2014) (listing scores of interpretive doctrines and canons used by the Rehnquist and Roberts Courts).

7. See Ruth Bader Ginsburg, *Informing the Public About the U.S. Supreme Court's Work*, 29 *LOY. U. CHI. L.J.* 275, 282 (1998) (pointing out that the majority of issues in front of the federal courts are issues of statutory interpretation).

8. See Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 *CONN. L. REV.* 843, 849–50 (1993).

9. See Jason J. Czarnezki & William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretation*, 65 *MD. L. REV.* 841, 882 (2006) (finding, in a study of the Seventh Circuit, that differences in interpretive approach did not explain the disagreements in the few cases in which the judges disagreed).

10. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837

lished an extraordinarily influential doctrinal framework for assessing the validity of agency statutory interpretations, and so one would think that *Chevron*, of all things, must affect outcomes. And yet it is difficult to prove that *Chevron* increased the amount of leeway courts afford agency interpretations.<sup>11</sup>

Nonetheless, even if one cannot easily draw a straight line between interpretive methodology and bottom-line outcomes, the methodology used by lower courts—and how their methodology responds to the Supreme Court’s signals—still matters for numerous reasons. The governing interpretive regime structures the courts’ analyses and emphasizes certain factors and arguments over others, thereby making certain decisional pathways easier or tougher to follow.<sup>12</sup> And even if there were no ultimate impact on case outcomes, the interpretive regime affects how judges justify their decisions and how attorneys must advocate for positions, both of which are important in their own right.<sup>13</sup>

#### B. METHODOLOGICAL INCONSISTENCY AND METHODOLOGICAL *STARE DECISIS*

Our Supreme Court Justices differ in their approaches to statutory interpretation. Textualists like Justice Scalia and eclectic purposivists like Justice Breyer disagree over such things as the relative importance of dictionary meanings versus legislative purposes, how to incorporate consideration of practical consequences, and so forth—and these disagreements stem in part from deeper divisions over the judge’s place in the constitutional structure.<sup>14</sup> In addition, even the same Justice might display some variation in his or her own methods from case to case, such as by invoking a certain presumption in one case but not another or relying on a legalistic definition one day but fa-

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(1984).

11. See JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 772–75 (2d ed. 2013) (summarizing the empirical evidence).

12. Cf. Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 305–06, 308–10 (2002) (describing “jurisprudential regimes”—the frameworks that structure and influence judicial decision making by mediating between case facts and outcomes).

13. See Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 13 (1998).

14. See Jerry Mashaw, *As if Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988) (“Any theory of statutory interpretation is at base a theory about constitutional law.”).

voring a popular meaning the next. The Court as a whole is accordingly inconsistent in its methodology, as many have complained.<sup>15</sup>

Still, mere disagreement among the Justices may not fully explain the Court's methodological inconsistency. The Justices disagree about many things, and yet the law itself can still be mostly predictable and consistent because the Justices do not approach every legal question from scratch. *Stare decisis* is not absolute on the Supreme Court,<sup>16</sup> but it is the norm, and as a practical matter prior decisions are routinely followed. (For the Supreme Court, this adherence to precedent primarily manifests itself through case selection rather than through positive reaffirmation of prior holdings: the Court ordinarily does not review cases just to reiterate settled points of law.)

The Court's methodological inconsistency arises, then, not just from pluralism and disagreement but also from its inability or unwillingness to give ordinary *stare decisis* effect to questions of interpretive methodology. The Court regards a particular case as authoritatively resolving a particular question—e.g., is a houseboat a “vessel” within the meaning of a certain statute?—but the Court does not, or at least not to the same degree, regard that case as settling various questions of interpretive approach that might arise along the way—e.g., whether meaning is fixed at the time of enactment or can evolve in light of current needs, whether judges should adhere more to legislative purposes or dictionary definitions, which dictionary is preferred, and so on.<sup>17</sup>

Now, one should not exaggerate the degree of methodological inconsistency on display. Even without formally binding precedent, there is common ground and a degree of regularity to judicial interpretive practices. Purposivists and intentionalists, just like textualists, ordinarily regard the statutory text as

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15. See, e.g., sources cited *supra* note 3.

16. See *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“*Stare decisis* is not an inexorable command . . .”).

17. See, e.g., Foster, *supra* note 3, at 1872–84 (explaining that the Supreme Court does not give decisions about interpretive methodology ordinary binding effect); Gluck, *supra* note 3, at 1910 (“[T]he Court does not generally give formal *stare decisis* effect to its statements about statutory interpretation methodology.”); Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 389 (2005) (“[W]hen the Court issues opinions interpreting statutes, *stare decisis* effect attaches to the ultimate holding as to the meaning of the particular statute interpreted, but not to the general methodological pronouncements, no matter how apparently firm.”).



the most important source.<sup>18</sup> There are dozens of familiar textual and substantive canons (*ejusdem generis*, the “whole act” rule, the presumption against retroactivity, the canon of constitutional avoidance, and so on and so on), none of which is outcome determinative but all of which have a regular place in the Court’s interpretive toolkit.<sup>19</sup> There are established interpretive frameworks like *Chevron*, the two-step test for judging the permissibility of an agency’s interpretation of gaps or ambiguities in a statute it administers.<sup>20</sup>

The goal for the advocates of methodological *stare decisis* is to strengthen these regularities and expand their domain to cover more of the remaining points of disagreement, generating something like a binding law of interpretation. And although their admonitions are aimed mostly at the Supreme Court, they want methodological *stare decisis* to operate vertically as well—that is, such that the lower courts must adhere to the binding regime the Supreme Court adopts.<sup>21</sup> It could hardly be other-

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18. See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation As Practical Reasoning*, 42 STAN. L. REV. 321, 353–54 (1990).

19. See ESKRIDGE ET AL., *supra* note 6 (listing many such canons and presumptions).

20. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984); see *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005) (“*Chevron* established a familiar two-step procedure for evaluating whether an agency’s interpretation of a statute is lawful.”).

21. See, e.g., *Foster*, *supra* note 3, at 1869, 1884. The assumption among the proponents of methodological *stare decisis*—and probably the prevailing assumption more broadly, to the extent there is one—is that the Supreme Court has the legal authority, if it can overcome its own divisions and chooses to exercise that authority, to direct the inferior federal courts on matters of interpretive methodology. Lower courts tend not to give the question much thought, but they seem to agree that the Supreme Court has this power, or at least they do not openly protest it. See, e.g., *Jordan v. Nationstar Mortg. L.L.C.*, 781 F.3d 1178, 1179–80, 1182–84 (9th Cir. 2015) (treating Supreme Court cases as abrogating circuit precedent that had required a canon of narrow construction of removal-jurisdiction statutes); *Elgharib v. Napolitano*, 600 F.3d 597, 601 (6th Cir. 2010) (stating that the court “employ[s] a three-step legislative-interpretation framework established by the Supreme Court”); *United States v. Hinckley*, 550 F.3d 926, 940 (10th Cir. 2008) (Gorsuch, J., concurring) (“[I]f an ambiguity lurks in the statute’s wording, or if the statute’s wording leads to irrational results, we are instructed by the Supreme Court to consult additional interpretive tools, including the statute’s title, its history and purpose, and canons of construction, in an attempt to ascertain and give effect to Congress’s meaning.”); *Andrews v. United States*, 441 F.3d 220, 223 (4th Cir. 2006) (observing that the Supreme Court had not interpreted the provision at issue but that “the Court did establish an important interpretative method” for approaching the provision); *PPG Indus., Inc. v. United States*, 928 F.2d 1568, 1571 (Fed. Cir. 1991) (“The Supreme Court has instructed that the courts must defer to an agency’s interpretation of the statute

wise, for the supposed benefits of *stare decisis*—predictability, restraint, and so on—would fail to materialize if the courts handling most of the cases did not join the program.

There are plenty of questions one might raise about the desirability and feasibility of methodological *stare decisis*,<sup>22</sup> but surely one interesting and important question regarding the vertical operation of binding methodological precedent is how lower courts behave today in the absence of a formalized, self-consciously binding law of interpretation. To the extent the Su-

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an agency has been charged with administering provided its interpretation is a reasonable one.”). The proposition that the Supreme Court has the authority to supervise methodology has not gone unchallenged. *See* Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 387 (2006) (raising the question whether “the Supreme Court ha[s] the authority to prescribe, through adjudication, rules of statutory interpretation that all federal courts must observe”); Jennifer M. Bandy, Note, *Interpretive Freedom: A Necessary Component of Article III Judging*, 61 DUKE L.J. 651 (2011) (arguing that binding interpretive frameworks conflict with the inherent authority possessed by every federal judge). My focus in this Article is the lower federal courts, but whether the Supreme Court could require *state courts* to follow a particular method when interpreting federal law raises additional interesting questions. The answer might depend on the puzzling matter of what interpretive methodology *is*: substance, procedure, or something else. *See generally* Gluck, *supra* note 3 (discussing different conceptions of the legal status of interpretive methodology). Nonetheless, for purposes of this Article, we can assume that the prevailing attitude is correct and that the Supreme Court indeed has the legal authority to direct lower courts, or at least the lower federal courts, on matters of interpretive method.

22. Some commentators have argued quite forcefully that it is not desirable for the courts to attempt to regularize and solidify their practices across time and across different kinds of cases. *E.g.*, Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1581–95 (2014); Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47, 48 (2010). We can safely bracket that dispute, as the aims here are more descriptive and explanatory than normative. Similarly, we can set aside questions about the desirability of vertical uniformity, i.e., whether it makes sense for the lower courts to use exactly the same interpretive rules and methods as the Supreme Court. Several scholars have considered whether the distinctive institutional roles and competencies of the lower federal courts and the state courts should lead them to employ approaches to statutory interpretation that differ somewhat from the U.S. Supreme Court’s approaches. *See generally* Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215 (2012) (exploring whether elected judges and appointed judges should use different methods); Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How To Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433 (2012) (considering the relationship between a court’s place in the judicial hierarchy and interpretive methodology); Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479 (2013) (examining whether state courts with general common law powers should diverge from federal courts with respect to interpretive method).

preme Court has a comprehensible interpretive regime and modifies it in perceptible ways, perhaps the lower courts already follow along as a matter of what one could call *de facto* precedent. That is the question this Article investigates at some length, but it is worth setting out the expectations that intuition and existing knowledge might suggest.

There are several reasons to expect that the lower courts would tend to follow the Supreme Court's methodological lead, where there is a discernible lead, whether or not they are required to do so by a formal system of methodological *stare decisis*. To begin with, Supreme Court Justices and other judges (especially other federal judges) are members of the same professional legal culture subject to similar internal norms. The judges may regard themselves as members of the same team engaged in the same joint effort, such that the lower courts' role is to emulate what the Supreme Court, their role model, would do.<sup>23</sup> Bolstering the effect of role orientations, the fear of reversal might play a role in encouraging lower courts to heed their superiors' preferences, though such fear probably plays a smaller role with regard to interpretive methods than with regard to substantive policy outcomes. Moreover, even in the absence of any conscious attempt to follow the Supreme Court's methodological trends, the lower courts might still move in parallel to the extent that all courts are influenced by similar external and contextual factors.

Further reasons to expect lower courts to follow the Supreme Court's methodological lead come into view if one considers some other features of our hierarchical judicial system. Lower courts are as a general matter required to obey higher courts, so one should expect compliance as the lower courts' default mode. True, one does see occasional outbursts of lower-court defiance, but empirical testing has turned up little evidence of significant non-compliance with precedent, even in controversial civil-liberties cases that one might expect to engender conflict.<sup>24</sup> Sara C. Benesh and Malia Reddick, for exam-

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23. Cf. Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605, 1612–13 (1995) (developing a “team” model of the judiciary).

24. See, e.g., Donald R. Songer, Jeffrey A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 690 (1994) (finding, in a study of search-and-seizure cases, that the courts of appeals displayed a high degree of congruence with Supreme Court outcomes and responsiveness to the Court's changing preferences).

ple, found that the courts of appeals usually acceded quite quickly to Warren Court decisions overruling prior law, which is an interesting result given that one might have expected the Court's own mutability to diminish the alacrity of lower-court compliance.<sup>25</sup> Moreover, even in circumstances in which the formal legal rule is that lower courts are *not* bound to follow their superiors—namely, when the higher court spoke in dicta—lower courts tend to obey anyway.<sup>26</sup>

For all of the above reasons, one might suspect that formally imposing vertical precedent—making methodology into real law that lower courts must obey—would not have great practical effect. That is, the real impediments to a more lawlike approach to interpretation throughout the hierarchy might not involve the formalities of *stare decisis* but might rather stem from the Court's own inconsistency and from the inherently slippery, non-lawlike nature of many interpretive rules.

Still, we cannot just take lower-court adherence to the Supreme Court's methods for granted. Interpretive methodology presents some unusual possibilities for doctrinal slippages and deviations. As stated already, probably the leading gripe about the Court's methodology is that it is too inconsistent and unclear: even the most faithful agent would lack reliable guidance on many matters, and that faithful lower court might actually be misled if it took all of the Court's vacillating pronouncements as binding. But even setting that important point aside, it may be that the high-profile contexts in which political scientists have tended to search for non-compliance—and largely failed to find it—are actually the *worst* places to look for it. Instead, as recent work by Matthew Tokson suggests, one might do better to look for slippage with regard to lower-profile but more frequently encountered matters, often involving litigation procedure, because such matters involve ingrained judicial habits, may have significant effects on judicial workload, and can be hard for higher courts to police.<sup>27</sup> Although Tokson does not include interpretive methodology among his several case stud-

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25. Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POL. 534, 541–47 (2002).

26. See David Klein & Neal Devins, *Dicta, Schmicia: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2025–26, 2032–42 (2013) (providing empirical evidence that the holding/dictum distinction rarely affects lower-court decision making).

27. See Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. CHI. L. REV. 901, 925–30 (2015).

ies, it may actually provide a very good example of a field in which lower-court non-compliance, *especially of the inertial rather than defiant sort*, is a real prospect. Because judges encounter interpretive problems routinely, they may develop their own habitual approaches that can be slow to change. Even when the Supreme Court does establish and modify genuine rules, interpretation is complex and multi-factored enough that compliance with those rules is hard to divine, both for reviewing courts and maybe even for the lower courts themselves. The focus of most players in the system will, naturally, be on the lower courts' outcomes rather than their reasoning. Moreover, depending on the content of the Supreme Court's interpretive guidance, following the Court's rules could entail substantial additional work, which again provides a reason even for faithful agents to drag their feet.

In sum, although we have plenty of reason to expect that lower courts will, in the main, act as good-faith implementers of perceptible directions, we should not simply assume that the Supreme Court's messages about the interpretive regime will successfully propagate through the judicial system. Investigating the success of such inter-judicial communications, and the factors that may aid or hinder that success, is the aim of the rest of this Article.

### C. A NOTE ON THE SELECTION OF CASE STUDIES AND THE INFERENCES THEY SUPPORT

A note on this Article's methodology is appropriate before proceeding further. The next several parts of the Article consider various instances of interpretive change. The examples involve different kinds of canons (textual, substantive, and other) and different kinds of changes (including gradual shifts in the prevalence of certain canons, sudden shifts in a canon's meaning, and the arrival of new canons). I did not attempt to catalogue and study the whole universe of prior and ongoing interpretive shifts, nor can one realistically claim to assemble a "representative" sample when one is dealing with such a complex and multifarious thing. Given the exploratory nature of this project, I have instead chosen a varied but admittedly non-comprehensive set of examples. No single episode or piece of evidence can answer every question, but examining a variety of episodes using different methods can illustrate some important features of interpretive change and reveal an interesting range of lower-court reactions. One consideration in selecting exam-

ples and choosing measurement techniques was how readily and reliably a particular canon or episode could be studied. For some canons, the Supreme Court's own erratic behavior or features of the canon itself make it hard to know what one should expect even perfect lower courts to do. Regarding measurement techniques, studying changes in citation rates of various canons (which I do in some cases) or changes in courts' statements about the meaning or validity of canons (which I do in other cases) are more tractable forms of investigation than attempting to directly determine whether a canon has gained or lost outcome-affecting force.

A note on the tenability of causal conclusions is in order as well. It is valuable to know how the interpretive practices of different courts compare, but it is more valuable still if one can determine whether and how cross-court influence occurs. If the interpretive practices of the Supreme Court and lower courts tend to move in parallel, that could show the existence of influence (presumably in the top-down direction). Alternatively, parallel conduct could merely reflect the simultaneous but independent effect of external forces (attorney behavior, evolving legal culture, etc.). In some of the instances that follow, the circumstances make it easy to detect the Supreme Court's influence on lower courts. In other instances, it will be hard to rule out external factors as predominant causes. In still others, one observes divergences between different courts' interpretive practices, which shows at least some weakness in some part of the mechanism by which change is transmitted through the system. By comparing and contrasting the lower courts' responses to various instances of interpretive change, one can tentatively identify factors that might have generalizable effects.

## II. LARGE-SCALE TRENDS

The interpretive regime of the Supreme Court has not been static over time. Interpretive approaches wax and wane; particular rules rise and recede.<sup>28</sup> According to some accounts, a

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28. See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 127 & n.84 (2010) (citing examples of substantive canons that evolved over time); Philip P. Frickey, *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1971, 1989–90 (2005) (observing that “the particulars of even longstanding canons drift over time” and that “the Court occasionally creates new canons”); Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149, 181–87 (2001) (providing examples of cyclical changes in interpretive methodology). See generally WILLIAM D. POPKIN, STATUTES IN

key shift in interpretive mindset occurred early in the Nation's history, as courts turned away from an older tradition of equitable interpretation in favor of an approach that emphasized the judiciary's duty to serve as the legislature's "faithful agent."<sup>29</sup> Moving forward to more recent times, the twentieth century saw the Supreme Court's reliance on legislative history increase at first and then drop off toward the end.<sup>30</sup> Other changes are quicker and more discrete than those gradual shifts. In the 1980s and early 1990s, for example, the Court created or seriously strengthened several federalism and state-immunity canons.<sup>31</sup> And for a very recent example, which shows that the interpretive toolkit continues to evolve, just a few years ago the Court altered the standards governing judicial deference to Treasury regulations.<sup>32</sup>

The existence of shifts in interpretive methods leads to a variety of important questions, such as whether the lower courts' interpretive practices tend to move in parallel with the Supreme Court's practices, whether any such parallel behaviors are causally related, and how any such causal mechanism

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COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION (1999) (providing a sweeping history of American statutory interpretation from its English roots to the present age).

29. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 78–105 (2001) (tracing the decline of the interpretive doctrine of the "equity of the statute" in the early Republic).

30. See James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 222 (2006) (noting significant decline in the Supreme Court's use of legislative history from the Burger to the Rehnquist Courts); Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 384–86 (1999) (documenting trends in citations to legislative history from 1980 to 1998); David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1715–16, 1725 (2010) (documenting decline in the Supreme Court's citations to legislative history in recent decades); Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266 (2013) (tracing and explaining the normalization of the use of legislative history on the Supreme Court in the mid-twentieth century); Nancy Staudt et al., *Judging Statutes: Interpretive Regimes*, 38 LOY. L.A. L. REV. 1909, 1942–46 (2005) (tracking use of legislative history in tax cases over most of the twentieth century).

31. See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules As Constitutional Lawmaking*, 45 VAND. L. REV. 593, 619–29 (1992); see also *Gregory v. Ashcroft*, 501 U.S. 452, 477–78 (1991) (White, J., concurring) (complaining about the majority's creation of a federalism "plain statement" rule).

32. See *infra* Part III.

operates. This Part investigates correspondences at the level of large-scale, gradual trends. The following Parts then consider the lower courts' responses to more discrete, quicker methodological changes.

Regarding the large-scale trends, the existing research suggests that the lower courts' patterns of behavior do reflect—in a loose way—patterns in the Supreme Court. To date, the most comprehensive examination of macro-level trends in lower-court methodology is that performed by Frank Cross. He showed, using concededly imperfect measures, that in the early 1990s the federal courts of appeals started referring to legislative history much less and textualist principles and linguistic canons much more.<sup>33</sup> That shift in the lower courts roughly corresponds to trends in the Supreme Court, where reliance on textual and substantive canons was increasing and legislative history was in relative retreat.<sup>34</sup> In addition, recent work on federal courts' citations of dictionaries finds that the Supreme Court and the courts of appeals have both increased their use of dictionaries in recent decades, though the increase in the Supreme Court has been much larger and sharper.<sup>35</sup>

In this portion of the Article, I present some new evidence that bolsters and extends the prior research. One could study any number of interpretive tools, but for present purposes I have chosen to track courts' use, over four decades, of several prominent linguistic canons of word association and grammar. An example is *ejusdem generis*, the maxim providing that a general phrase at the end of a list is limited to instances of the same type as those specifically mentioned, such that “other vehicles” in a statutory provision referring to “cars, trucks, and other vehicles” would more likely include motorcycles than

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33. CROSS, *supra* note 4, at 183–91. Cross's method involved running Westlaw searches for terms like “legislative history” and “*ejusdem generis*” and tallying West Key Number codes related to interpretive principles like the “whole act” rule. *Id.*

34. See James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 29–36 (2005) (tracing the Supreme Court's use of canons in labor and employment cases from 1969–2002); *supra* note 30 and accompanying text (discussing the declining role of legislative history in the Supreme Court).

35. James J. Brudney & Lawrence Baum, *Dictionaries 2.0: Exploring the Gap Between the Supreme Court and Courts of Appeals*, 125 YALE L.J. F. 104, 105, 108–09 (2015), <http://www.yalelawjournal.org/forum/dictionaries-2.0-exploring-the-gap-between-the-supreme-court-and-courts-of-appeals>; John Calhoun, Note, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 YALE L.J. 484, 502 (2014).



trains or bicycles.<sup>36</sup> When one wants to study a large number of cases over a long period, the task is significantly simpler when one can rely on electronic word searches rather than individually reading many potential target cases. Many linguistic canons are good subjects for study in this regard because there is a relatively close association between the interpretive rule and the name for it. As a result, one can run searches that avoid both too many false positives and too many false negatives.

The figures below show citations of four well-established linguistic canons—namely, *ejusdem generis*, *noscitur a sociis*, *expressio unius*, and the rule of the last antecedent (together with a few variant spellings and phrasings)—as applied to questions of statutory interpretation in the Supreme Court and the federal courts of appeals for the forty-year period 1975 through 2014.<sup>37</sup> My strategy resembles that used by Cross, but I employ a somewhat improved (though still imperfect) approach.<sup>38</sup> I also add almost a decade of new data for the courts

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36. WILLIAM D. POPKIN, A DICTIONARY OF STATUTORY INTERPRETATION 74 (2007).

37. The primary search, run in WestlawNext's Supreme Court and federal courts of appeals databases, was:

adv: OP((expressio or expresio or inclusio or "last antecedent" or "noscitur a sociis" or "ejusdem generis") /p (statut! or act or legislat! or congress! or "U.S.C.")).

The "adv" prefix indicates that one is conducting a "terms and connectors" search as one would do in the old Westlaw system, as opposed to using the fuzzier search algorithms employed by default in the new WestlawNext system. The "OP" field restriction limits the search to the court-created opinions, excluding material in West's Key Number topic descriptions and headnotes (which I worried would introduce more error and cross-period variation). The restriction at the end of the search was meant to limit the results to uses of the canons in statutory interpretation as opposed to other contexts such as contract interpretation. There are in fact quite a number of canon-citing contract cases, especially insurance cases, and so I believe that using this limitation makes for a better search overall, even though it falsely excludes some statutory cases. Similarly, because my search terms focus on the names of the canons rather than trying to find other language that captures the idea behind them, the raw numbers reported by the search understate the true number of canon invocations. Although my search is accordingly imperfect, the imprecisions should not distort the patterns over time. Note that the results were limited to published opinions, for the reasons discussed below. *See infra* notes 43–47 and accompanying text. In addition to the combined search, I also ran searches for each canon individually. *See infra* note 50 and accompanying text.

38. My approach differs from Cross's in several ways: First, I include a measure that attempts to roughly capture rates of citation as well as raw counts. Second, my search terms exclude material supplied by West, such as headnotes, and limit the results to cases using the canons in the statutory interpretation context (versus other contexts such as the interpretation of insurance contracts, wills, etc.). *See supra* note 37. Third, I include only published

of appeals (his data ended with 2005), and I add some more directly comparable data on the Supreme Court's use of the canons. (The federal district courts are not included in this analysis because they are difficult to study in a systematic way through electronic databases.<sup>39</sup>)

Every research strategy has strengths and weaknesses. One potential limitation of my approach is that it tracks canon citations without attempting to determine the citations' importance to ultimate case outcomes. In particular, my results do not distinguish between citations that follow the result a linguistic canon suggests and those that acknowledge a canon but then do not follow it. The justification for this approach is that citations of a canon are independently meaningful; they reflect the canon's prominence in the interpretive culture of the day. Further, whatever weaknesses this approach might have in other contexts, it is especially appropriate for study of the linguistic canons. A decision that cites a linguistic canon but finds it outweighed by other considerations is not really a "negative" citation. One could not necessarily say the same thing about all other interpretive canons and sources. Regarding discussions of inferences from legislative inaction, for example, one might expect more references to be genuinely negative in the sense that they question the appropriateness of inferring meaning from silence.<sup>40</sup> This provides another reason the linguistic canons are good test subjects for large-scale study.

Figure 1 presents data for the courts of appeals. The lighter-shaded data series shows the number of cases that cite one or more of the selected linguistic canons, and the darker-shaded data series reflects an adjusted citation rate calculated as described below. For each data series, the jagged line reflects each year's observation and the smoother curve represents a trendline that evens out some of the fluctuations in the annual data so as to aid visualization.<sup>41</sup>

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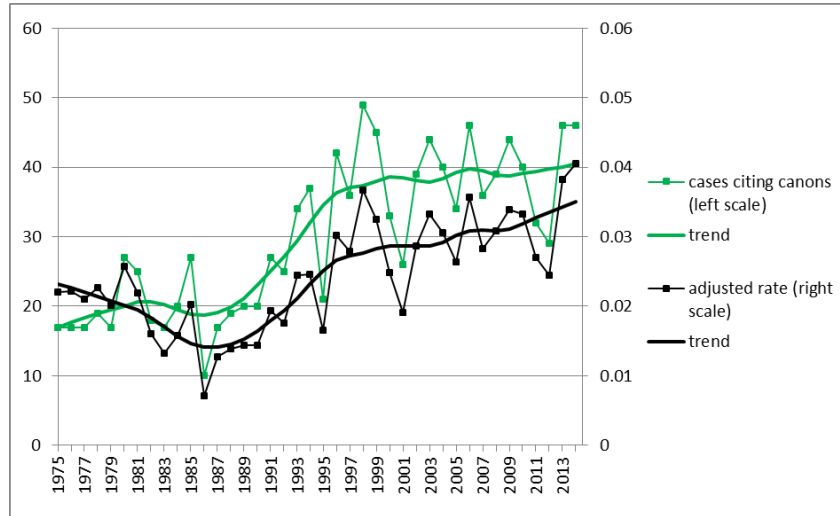
opinions. (One can do this by using the "reported" checkbox on the WestlawNext results screen.) Although Cross's book is not explicit on this point, I believe he includes unpublished cases. (The figures are usually similar whether or not one includes unpublished opinions, as the large majority of these canon-citing cases are published.) Fourth, I have added the "rule of the last antecedent" to the three linguistic canons Cross used.

39. See Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. 973, 982–87 (2008) (explaining that much of the work of the district courts is missing from Lexis and Westlaw).

40. *E.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2426–27 (2014) (Thomas, J., concurring in the judgment).

41. The smoothed trendlines in the figures were generated using a LO-

**Figure 1: Use of Linguistic Canons in the Courts of Appeals, Published Cases 1975–2014**



Caseloads and docket compositions are not constant over time, which raises the possibility that the increase in the number of canon citations merely reflects the increased opportunities for canon citation that come along with larger dockets. I have taken that possibility into account and have corrected for it in two ways. First, to try to contain the role of docket growth, as well as to guard against serious cross-temporal and cross-court discrepancies in how many unpublished decisions made their way into West’s electronic databases over the study period,<sup>43</sup> the results shown above reflect only published opinions. (As it happens, the large majority of the cases using the canons to interpret statutes are published,<sup>44</sup> which is not especially

ESS (local regression) plug-in for Excel, with the smoothing parameter  $\alpha$  set to 0.33.

43. Different circuits began making the full text of their unpublished opinions available to electronic databases at different times. See Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?*, 26 MISS. C. L. REV. 185, 205–15 (2007). Therefore, even setting aside the increase in the number of actual unpublished decisions issued by the courts of appeals, the number available on Westlaw increases during the period under study as more courts made their unpublished decisions available.

44. Even in recent years, in which there are many unpublished opinions and the bulk of them can be found on Westlaw, around 90% of the cases citing the linguistic canons at issue here are published.

surprising if one considers that unpublished decisions are mostly intended for cases that are clearly controlled by binding precedent.<sup>45</sup>) Unpublished opinions sharply increased in number during the study period as a response to rising appellate caseloads.<sup>46</sup> But published opinions, which are always easily searchable, were somewhat steadier in number over the relevant time horizon. In fact, the period of increasing canon use beginning in the late 1980s and continuing to the present actually corresponds to a period of *declining* numbers of published opinions.<sup>47</sup>

Second, as a precaution against changes in docket composition over time, I calculated an “adjusted rate” of canon citation, illustrated by the darker lines in Figure 1, which attempts to measure the cases citing the relevant linguistic canons as a proportion of the cases that meaningfully engage with matters of statutory interpretation.<sup>48</sup> That denominator increased sub-

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45. See *Hart v. Massanari*, 266 F.3d 1155, 1179 (9th Cir. 2001) (“Cases decided by nonprecedential disposition generally involve facts that are materially indistinguishable from those of prior published opinions.”).

46. See Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 221 (1999) (explaining that the growth of nonpublication can be explained in “one word, the same word that describes the most serious problem facing all our courts today: volume”). Today, the traditional terminology of “unpublished” versus “published” decisions is somewhat inapt, as even many “unpublished” (i.e., designated by the court as non-precedential) decisions of the federal courts of appeals are now printed in an actual book, West’s *Federal Appendix*.

47. Here are annual figures on published opinions in the federal courts of appeals, at four-year intervals, with the numbers of opinions rounded to the nearest hundred:

1989: 6800	2005: 5400
1993: 6700	2009: 5000
1997: 6100	2013: 4100
2001: 5500	

The sources for these figures are Table S-3 (or S-5, for 1989) in the annual *Judicial Business* reports published by the Administrative Office of the U.S. Courts. 1993 ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. 176 tbl.S-3; 1989 ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. 109 tbl.S-5; *Judicial Business of the United States Courts*, USCOURTS.GOV, <http://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts> (click on the “Judicial Business” link for the appropriate year; then scroll down to “Table S-3” and click “Download” for years 1997–2009 data; click on the “Judicial Business 2013” link; then click on “Judicial Business 2013 Tables” on the right; then scroll down to “Table S-3” and click “Download” for 2013 data) (last visited Nov. 1, 2015). Note that the reporting years for the Administrative Office do not correspond to calendar years. For example, the 2013 data reflect the twelve-month period that ended September 30, 2013.

48. There is no very good way to determine how many cases decided by the courts of appeals involve statutory interpretation. There are official gov-

stantially during the first decade of the dataset, which initially decreased the citation rate, but the denominator held fairly steady after that, which explains why the citations counts and the citation rate move together quite closely beginning in the late 1980s. The behavior of the adjusted rate suggests that the late-80s increase in citations was not driven primarily by increased opportunities for courts to engage in statutory interpretation.

The data reflected in Figure 1 support several observations. Most importantly, and consistent with Cross's findings, one sees the linguistic canons becoming more prevalent in the courts of appeals in the late 1980s and early 1990s. The courts of appeals cited the linguistic canons in greater raw numbers, and a larger proportion of their cases involving statutory interpretation cited the linguistic canons. Further reason to be confident that the data reveal actual changes in interpretive practices—as opposed to reflecting mere docket effects—comes from Cross's finding, mentioned above,<sup>49</sup> that the courts of appeals began citing legislative history less at about the same time they started using the linguistic canons more. Finally, I note that although Figure 1 shows the results of a combined search for all four of the targeted canons, I also collected data on each separately. Some canons varied more than others, and the smaller numbers that result from disaggregating the canons make it harder to separate trends from noise, but the overall results are not attributable to any particular outlier canon.<sup>50</sup>

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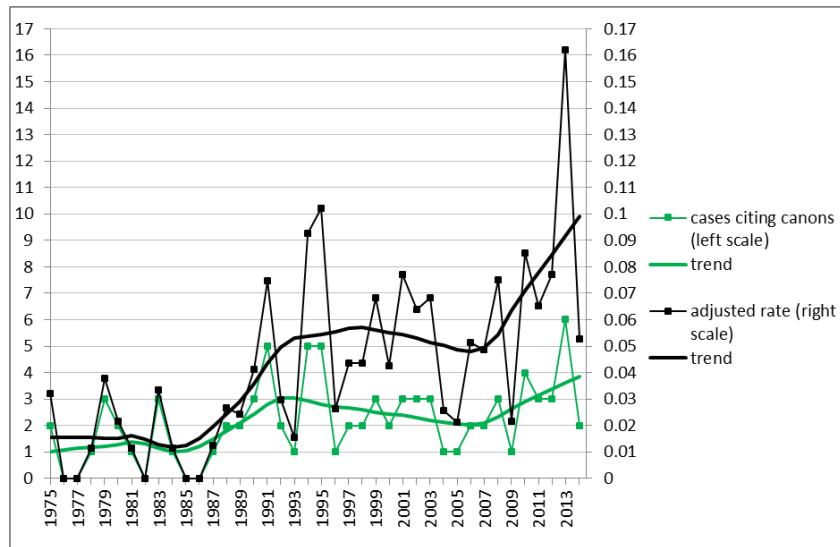
ernment statistics that track appeals by type (e.g., diversity cases, employment discrimination, criminal sentencing, and so forth), but the fact that a case is based on a statutory claim does not mean that the case involves statutory interpretation in any serious way (as opposed to involving the sufficiency of the evidence, the application of settled law to particular facts, the exercise of judicial sentencing discretion, and the like). My approach here, which admittedly generates only a rough measure, was to use a WestlawNext word search that was designed to find cases that deal with statutory interpretation *per se*. The precise terms were: `adv: OP((statut! or legislat! or "act of congress") /s (interpret! or constru!))`. The OP restrictor (i.e., "opinion") excludes the portions of the decisions supplied by West, such as topic key numbers and headnotes; I worried that West's practices might be inconsistent over time. The above search provided a denominator by which one could divide the annual raw citation counts to generate a proportion. Needless to say, different denominators would generate different proportions, so it would be inappropriate to make a strong claim about the absolute level of canon usage (e.g., "Four percent of the statutory interpretation cases in the courts of appeals cite one of these four linguistic canons."). But the point is to provide a measure that can roughly adjust for shifting dockets over time, which this should do.

49. See *supra* text accompanying note 33 (discussing Cross's findings).

50. The behavior of the lowest-frequency member of this set of canons, the

What caused the shift in the courts of appeals' citation patterns? One appealing hypothesis is that the lower courts were following the Supreme Court's lead. It may be impossible to answer the causal question with certainty, but we can at least begin the discussion by examining the patterns in the Supreme Court to see how they compare. Figure 2, accordingly, provides data on citations of the selected linguistic canons by the Supreme Court.

**Figure 2: Use of Linguistic Canons in the Supreme Court, 1975–2014**



Although the small numbers involved can generate severe swings from year to year, Figure 2 nonetheless shows that the Supreme Court started citing the linguistic canons more often in the late 1980s. The Court's merits docket was famously shrinking over much of the period being studied—there was a drop of roughly 50% from the beginning of the period to the end<sup>51</sup>—which makes it important to adjust for the contracting docket, or, better still, to adjust for the number of statutory cases per year. The darker data series in Figure 2 makes such an adjustment; for the sake of consistency, the approach to cal-

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rule of the last antecedent, is considered in greater detail below. *See infra* Part V.B.

51. *See* LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM 89–90 (5th ed. 2012).

culating the adjusted rate is the same one used in Figure 1. The rate of canon citation has increased more sharply than have the raw numbers. It is not clear to me whether the more important measure, *in terms of how the lower courts perceive the Supreme Court's practices*, is the raw number of citations or the rate of citations. My sense is that frequency of canon use *in either sense* is quite hard for lower courts to pick up on, a point to which I return later.<sup>52</sup>

If one compares Figures 1 and 2 above, one sees a rough correspondence in trends. In particular, both courts started citing the linguistic canons more around the late 1980s or early 1990s. (Justice Scalia joined the Supreme Court, notably, in September 1986.) Perhaps another upswing in use of linguistic canons is underway today, though it is hard to say without another few years of data.

What explains this correspondence? Whether the lower courts were influenced by the Supreme Court's actual or perceived interpretive practices is hard to determine with certainty, but the timing of the lower courts' shift naturally suggests that possibility. Further reason to suspect influence comes from the fact that the correlation between the two data series increases if one offsets them by a few years, such that the lower-court data is matched with Supreme Court data from a few years before. The lower courts often say that they regard the Supreme Court as their model on matters of interpretive method,<sup>53</sup> and one would expect the lower courts to notice if the Supreme Court became more textualist generally and canon-inclined in particular. If the Supreme Court's methodology shifted in a textualist direction regarding use of legislative history, dictionaries, and other sources besides just the canons, the combined effect could be more apparent to lower courts than would a single aspect alone.

A related possibility is that the lower courts were influenced, but not by changes in the actual practices of the Supreme Court—which might be rather difficult to discern with much precision—so much as by broader developments in the law, legal culture, and institutional context. These influences would include the aggressive public campaign against legislative intent waged by Justice Scalia and his textualist comrades<sup>54</sup> and, more generally, the late-twentieth-century burst of

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52. See *infra* Parts V, VII.A.

53. See *supra* note 21.

54. See Marty Lederman, *Textualism? Purposivism? The Chief Justice*

conservative legal theorizing about interpretive matters in the judiciary, the academy, and the executive branch.<sup>55</sup>

A few other potential explanations for the lower courts' shifting citation patterns should be mentioned, though they do not fit the data as well. One such hypothesis is that the methodological shift in the lower courts was the result of the changing ideological composition of the lower courts, with Republican appointees being more inclined toward textualism. But that explanation does not fit the pattern well, as the periods of increasingly Republican courts of appeals do not match the periods of increasing textualism.<sup>56</sup>

Another initially appealing hypothesis is that the shift toward textual canons is attributable to the *Chevron* doctrine, which was also gathering strength in the lower courts at around the same time as the observed increase in use of textual canons.<sup>57</sup> According to one understanding of the *Chevron* doctrine, the doctrine's first step privileges textual analysis over other modes of inquiry,<sup>58</sup> which could lead courts reviewing agency action to use textual canons more. Without denying that *Chevron* could play some role, it does not provide a complete explanation. For one thing, the pattern in the data persists even if one excludes from the count any case that cites *Chevron*. Further, the text-only approach to *Chevron*'s first step—which still has not clearly won out today—does not describe a settled approach to *Chevron* that prevailed twenty-five years ago,

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*Comes down on the Side of Interpretive Pragmatism*, SLATE (June 25, 2015), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2015/scotus\\_roundup/supreme\\_court\\_2015\\_john\\_roberts\\_ruling\\_in\\_king\\_v\\_burwell.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2015/scotus_roundup/supreme_court_2015_john_roberts_ruling_in_king_v_burwell.html) (discussing how the textualist campaign led by Justice Scalia has had a “profound” effect on how litigants present their cases and may have meaningfully influenced lower courts). That public campaign continues, most recently in the form of the Scalia/Garner treatise. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

55. Recall, for instance, that the Department of Justice produced an influential report criticizing legislative history in the late 1980s. See OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, *USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION* i, v (1989).

56. See CROSS, *supra* note 4, at 185–86.

57. See *infra* text accompanying notes 176–186 (discussing the rise of the *Chevron* doctrine).

58. See Elizabeth Garrett, *Step One of Chevron v. Natural Resources Defense Council*, in *A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES* 55, 57–58, 63–71 (John F. Duffy & Michael Herz eds., 2005) (contrasting traditional and textualist approaches to step one).



which is when the increase in canon use occurred.<sup>59</sup> Put differently, methodology in *Chevron* cases is an important front in the broader textualist campaign,<sup>60</sup> but *Chevron* probably did not cause the uptick in use of textual canons.

When dealing with a long-term, broad-based shift in interpretive predispositions such as the one described above, one has to acknowledge that the causal relationships can be complex and uncertain. Some of the episodes of interpretive change discussed later in the Article will be simpler and will allow for firmer causal inferences.

A final note about the correspondences observed above: The fact that large-scale interpretive trends in the Supreme Court and the lower courts tend to move together over time does not necessarily mean that decision making in statutory cases at different levels of the judicial hierarchy looks the same in some absolute sense. (To analogize, the moods of a boss and an employee might move up or down in parallel and yet one could be much happier in absolute terms than the other.) On the contrary, the figures above reveal at least one important difference in interpretive approaches across courts. The number of published opinions issued by the courts of appeals every year is around fifty to seventy-five times larger than the number of decisions issued by the Supreme Court.<sup>61</sup> If both levels of the judiciary used the linguistic canons at about the same rate, then one would find roughly fifty to seventy-five more canon invocations in the courts of appeals than in the Supreme Court. But instead, as one can see from the figures above, the number of canon invocations in published opinions of the courts of appeals in any given year is, very roughly, only about ten times greater than the corresponding number in the Supreme Court. That means that the *rate* of canon use in Supreme Court opinions is substantially higher than the rate in the courts of appeals. (And this comparison ignores the large number of unpublished decisions, which use the canons relatively rarely.<sup>62</sup> Including them would widen the disparity in rates of use.)

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59. See MANNING & STEPHENSON, *supra* note 11, at 823–24 (describing continuing disagreement in the Supreme Court and lower courts over the role of legislative history in *Chevron* analysis).

60. See Garrett, *supra* note 58, at 64–65 (discussing how textualism has influenced the *Chevron* doctrine).

61. See *supra* notes 47, 51 (providing docket figures for the Supreme Court and courts of appeals).

62. See *supra* note 44 and accompanying text.

The disparity remains, though its magnitude shrinks, if one adjusts for differences in docket composition. A sizable fraction of Supreme Court cases involve debatable questions of statutory interpretation, but the courts of appeals confront many cases without much of a statutory-interpretive component: cases in which criminal defendants challenge the sufficiency of the evidence and the reasonableness of their sentences, cases concerning whether particular facts satisfy well-established doctrinal tests, diversity cases involving state common law, and so on. Recall that the darker lines in Figures 1 and 2 above represent an adjusted rate of canon citations measured as a proportion of cases discussing statutory interpretation.<sup>63</sup> Citation rates have increased in both the Supreme Court and the courts of appeals since the mid-1980s, but while the rate in the courts of appeals roughly doubled since then, the rate in the Supreme Court increased more sharply.<sup>64</sup> The adjusted rate of citation in the Supreme Court is now around twice as high as the rate in the courts of appeals. (It is hard to quantify the difference very precisely given the swings in the Supreme Court data.)

This cross-court disparity in rates of canon use is not especially surprising. Even if one considers just the subset of cases presenting questions of statutory interpretation, citation rates for many or even most canons should bump up against a sort of ceiling in the lower courts. One important reason is that another source of guidance, namely *precedent*, looms much larger as one moves down the appellate system. If a case is controlled by Supreme Court or circuit precedent, directly or by analogy, then there is little room for independent interpretation in the lower courts. Further, a higher proportion of lower-court cases are relatively easy in the sense that a plain textual analysis yields a sensible result that requires no further inquiry. The canons, legislative history, and other interpretive tools are more relevant when a court is addressing a close question on essentially a blank slate, which is characteristic of many Supreme Court cases but few cases in lower courts.

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63. See *supra* note 48.

64. Calhoun's recent study of dictionary citations reveals a roughly similar pattern: the Supreme Court's citations of dictionaries rose sharply and substantially after the mid-80s, but the increase in the lower courts was more subtle; as a result, the Supreme Court's rate of dictionary usage is now much higher than the courts of appeals' rate. Calhoun, *supra* note 35, at 492, 502, 507.

Another factor that may contribute to disparities in citation rates is that Supreme Court opinions tend to differ in writing style from opinions in the courts of appeals, even the published subset of the latter. As befits a court with plenty of resources and a shrinking, self-selected docket, the Supreme Court's decisions are long and exhaustive and frequently feature dueling opinions that must respond to each other,<sup>65</sup> all of which multiplies the arguments and canons mentioned. If a canon can be used, it probably will be. All of that is less true in the lower courts.

### III. QUICK CANONS

Tracing broad-based, gradual changes such as the textualism shift discussed above is valuable, but it certainly does not tell us everything we would want to know about how the lower courts respond to changes in the interpretive regime. Shifts like those discussed above involve complicated causal explanations, and large-scale correspondences can mask particular cases of divergence. Therefore, it may be more interesting and informative, and one might find some more surprises, if one engages in a more fine-grained analysis of particular changes in the Supreme Court's interpretive regime. Interpretive change does not happen only gradually and in broad terms; some changes can be quick or specific or both, as when the Supreme Court creates a new canon or modifies or abrogates an old one. Such events allow us to observe how the lower courts respond, if they respond at all, and they might help us understand why some changes are more readily communicated through the judicial system than others.

Beginning in this Part of the Article and continuing in the next several Parts, I describe a number of discrete examples of interpretive change. I begin in this Part with an example of a shift that the lower courts rapidly assimilated, and then the following parts turn to instances in which the lower courts have either lagged behind the Supreme Court, jumped out ahead of it, or otherwise failed to closely follow its moves.

The lower courts have the capacity to respond to a change in the interpretive regime with extreme speed. Occasions to do

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65. See Bruhl, *supra* note 22, at 477–79, 484–85 (discussing the style of Supreme Court opinions); see also Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. (forthcoming 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2549248](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2549248) (discussing the phenomenon of dueling invocations of canons).

so are fairly infrequent, as it is not every day that the Supreme Court makes clear, sharp, and definitive breaks in matters of methodology. But an excellent occasion to observe lower-court responsiveness came just a few years ago, when the Supreme Court changed the deference regime governing the Treasury's interpretations of the Internal Revenue Code. Lower courts grasped the significance of the change almost immediately.

To begin with a bit of background: When a court considers an agency's interpretation of a statute the agency administers, the court generally affords the agency's view a degree of deference in the sense that the court will acquiesce in a reasonable agency interpretation even if the court, exercising its own independent judgment, would have chosen a different interpretation. Easily the most famous general-purpose deference regime is *Chevron*, with *Skidmore* playing the role of backup when *Chevron* is found inapplicable.<sup>66</sup> But there are other deference regimes too, some of which apply to specific fields of law, such as national security or labor relations.<sup>67</sup> The field of federal tax law has its own subject-specific deference regime, "*National Muffler* deference."<sup>68</sup> Or, rather, it used to have one: the Supreme Court's 2011 decision in *Mayo Foundation for Educational and Medical Research v. Unites States* abrogated *National Muffler* and brought tax law into the *Chevron* fold.<sup>69</sup> "We see no reason," Chief Justice Roberts wrote for the Court, "why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations."<sup>70</sup> The somewhat less deferential *National Muffler* regime was repudiated, as were some other older tax

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66. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); see also *United States v. Mead Corp.*, 533 U.S. 218 (2001) (explaining when *Chevron* applies and when *Skidmore* applies).

67. 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, 1098–100 (2008) (listing various deference regimes).

68. *Nat'l Muffler Dealers Ass'n v. United States*, 440 U.S. 472 (1979).

69. *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 52–57 (2011). Some lower courts had already anticipated this move, see, e.g., *Swallows Holding, Ltd. v. Comm'r*, 515 F.3d 162, 167–71 (3d Cir. 2008), and the Supreme Court itself had been inconsistent on which deference regime it cited, see 562 U.S. at 53–54, so *Mayo Foundation* was not a total rupture with the past. But it brought clarity and certainty, and it did abrogate the law of a significant number of lower courts, namely those that had not already embraced *Chevron*. See *infra* note 72.

70. *Mayo Found.*, 562 U.S. at 56.

cases that did not accord with the current understanding of the *Chevron* doctrine.<sup>71</sup>

The lower judiciary responded swiftly. *Mayo Foundation* was decided on January 11, 2011. Within weeks, one finds lower courts recognizing that the new decision had changed the applicable deference regime.<sup>72</sup> That is quite impressive, considering the lag time between briefing, oral argument (when there is oral argument), and decision. Of course, finding cases that quickly recognize the shift tells us only one side of the story. Were there other courts that *failed* to catch on? To try to find out, I searched for post-*Mayo Foundation* lower-court cases that met three criteria: (1) they cited *National Muffler* or the other cases abrogated by *Mayo Foundation*; (2) for the standard of review; but (3) *without* citing *Mayo Foundation*.<sup>73</sup> I found only one such case, though it is hardly clear that the proposition for which it cited *National Muffler* was actually incorrect in the wake of *Mayo Foundation*.<sup>74</sup> In short, the lower courts almost

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71. See *id.* at 56–68.

72. For early cases expressly noting that *Mayo Foundation* provided the governing standard of review, see, for example, *Home Concrete & Supply, L.L.C. v. United States*, 634 F.3d 249, 259 (4th Cir. 2011) (decided Feb. 7, 2011) (Wilkinson, J., concurring), *aff'd*, 132 S. Ct. 1836 (2012); *Burks v. United States*, 633 F.3d 347, 360 n.9 (5th Cir. 2011) (decided Feb. 9, 2011); *Grapevine Imports, Ltd. v. United States*, 636 F.3d 1368, 1376, 1380 (Fed. Cir. 2011) (decided Mar. 11, 2011), *vacated mem.*, 132 S. Ct. 2099 (2012). It appears that all of the lower courts just cited had previously been in the *National Muffler* camp, see Brief of Amicus Curiae Professor Kristin E. Hickman in Support of Respondent at 19, *Mayo Found.*, 562 U.S. 44 (No. 09–837), 2010 WL 3934618, so this is not just a case of them continuing to do what they had done before *Mayo Foundation*.

73. The other abrogated cases, besides *National Muffler*, were *Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981), and *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982), both of which stated that Treasury Regulations received less deference when they were issued pursuant to the Treasury Department’s general authority to issue rules instead of pursuant to a specific authorization to implement a statutory provision. For each of these three repudiated cases, I used the Westlaw KeyCite feature to examine every post-*Mayo Foundation* citation in order to determine whether the citations involved the standard of deference due Treasury Regulations and, if so, whether the citing case also cited *Mayo Foundation*. Most of the recent citations to these cases involve other holdings that *Mayo Foundation* did not address.

74. The case was *Schwab v. Commissioner*, 715 F.3d 1169 (9th Cir. 2013), in which the Ninth Circuit indirectly cited *National Muffler* through a citation to a pre-*Mayo Foundation* Ninth Circuit case that itself cited *National Muffler*. Here is the language at issue: “[A]s a general matter, ‘we defer to the Treasury’s interpretation of the statute’ if the applicable regulations prove dispositive. See *Pac. First Fed. Sav. Bank v. Comm’r*, 961 F.2d 800, 805 (9th Cir. 1992) (citing *Nat’l Muffler Dealers Ass’n v. United States*, 440 U.S. 472, 488 (1979)).” 715 F.3d at 1175 (parallel citations omitted). The proposition for

immediately recognized that the deference landscape had changed, and they modified their conduct accordingly. To be clear, I do not claim the lower courts have always applied the new decision *correctly* in all respects—recognizing that *Chevron* applies is only part of the battle—but at a minimum they have realized that they are supposed to be doing something different.

Several features of *Mayo Foundation* probably contributed to its quick uptake, and it is useful to list them so as to facilitate comparisons with other episodes of canonical change. First, the Supreme Court’s opinion was clear and self-conscious about making a change in the governing deference regime.<sup>75</sup> The Court knew that it was making such a change, and the decision was written so as to make that intent abundantly clear to anyone who read it. The old precedents were not ignored or overruled only *sub silentio*; no tea-leaf reading or piecing together of footnotes was required. The opinion presents itself as a directive.

Second, the *content* of the new directive was easy to articulate: *Chevron* now applies in the tax context; *National Muffler* and the other old cases are out. (Again, that does not necessarily mean that applying *Chevron* will be easy or that *Mayo* will generate a substantial shift in outcomes.) One could contrast the clarity of this shift with another pronouncement about deference that was not nearly so easy to articulate, namely the test announced in *United States v. Mead Corp.*<sup>76</sup> *Mead* stated that *Chevron* applies when “Congress delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority.”<sup>77</sup> The *Mead* standard is *ordinarily* satisfied when the agency has engaged in notice-and-comment rulemaking or formal adjudication but

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which *National Muffler* is cited is a bit puzzling, because it seems empty, but it is hard to see how it is inconsistent with *Mayo Foundation*. Moreover, the dispute in the *Schwab* case concerned the IRS’s interpretation of its own regulation rather than the validity of the regulation as an interpretation of the statute. *See id.* at 1176 & n.11.

75. *See Mayo Found.*, 562 U.S. at 53, 55, 57 (“[T]he parties disagree over the proper framework for evaluating an ambiguous provision of the Internal Revenue Code. . . . The principles underlying our decision in *Chevron* apply with full force in the tax context. . . . We believe *Chevron* and *Mead*, rather than *National Muffler* and *Rowan*, provide the appropriate framework for evaluating the [regulation].”).

76. 533 U.S. 218 (2001).

77. *Id.* at 226–27.

not when it has used less formal modes of action, and yet the use of any particular format is neither strictly necessary nor sufficient.<sup>78</sup> The lower courts rather famously struggled to understand how *Mead* modified *Chevron*'s deference regime and, soon after, what to make of *Barnhart v. Walton*.<sup>79</sup> Different circuits took somewhat different approaches, and some of them tried to fudge the issue by saying the result is the same under whatever standard.<sup>80</sup> The lower courts can hardly be blamed when the Supreme Court announces complicated standards and then offers somewhat inconsistent guidance from case to case.<sup>81</sup>

In addition to the clarity of the Court's opinion and the ease of understanding the content of the new rule, a third factor that also likely aided the dissemination of the new rule involves the *nature* of the canon involved. The various deference doctrines—whether *Chevron*, *National Muffler*, or something else—are artificial constructs that the Supreme Court creates and tinkers with regularly. They were different in the past, and they will probably change again in the future. Lower courts, attorneys, and others are therefore receptive to the possibility of change. (This point about the nature of the deference doctrines should become clearer later, when we contrast them with other canons that are not so artificial and mutable.)

A fourth factor that likely contributed to the success of *Mayo Foundation*'s interpretive regime change is that it involved a rule applicable to a specific topic area, namely the specialized field of federal income tax, rather than a general interpretive principle applicable everywhere. Some insight on the role of topic specificity can be found by considering the phenomenon of “agency-specific precedents” described by Richard I. Levy and Robert L. Glicksman.<sup>82</sup> Much of administrative law, such as the procedural requirements for notice-and-comment

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78. See *id.* at 229–31; *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1004 (2005) (Breyer, J., concurring).

79. *Barnhart v. Walton*, 535 U.S. 212 (2002). See generally Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005) (discussing confusion over the Court's shifting pronouncements).

80. Bressman, *supra* note 79, at 1457–69.

81. See, e.g., Adrian Vermeule, *Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 347 (2003) (suggesting that the D.C. Circuit's incoherent jurisprudence in this area is “traceable to the flaws, fallacies, and confusions of the *Mead* decision itself”).

82. Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499 (2011).

rulemaking or the “arbitrary and capricious” standard of review, is supposed to be universal default law that applies the same regardless of which agency is involved. But, as Levy and Glicksman point out, a court deciding an administrative case concerning some particular agency often draws its descriptions of the relevant universal principles from prior cases involving the same agency. For example, cases involving the FCC tend to emphasize prior FCC cases even for supposedly trans-substantive principles such as a standard of review.<sup>83</sup> As a result, the verbal formulations of the relevant principles, and perhaps the actual meaning of the principles, can become differentiated by agency.<sup>84</sup> Levy and Glicksman further opine that these “precedential silos” develop partly due to attorney specialization and judges’ rational attempts to manage decision-making costs.<sup>85</sup>

Related dynamics may help to explain why courts so quickly picked up on the change announced in *Mayo Foundation*. Tax law has a specialized bar on both the government and taxpayer side, and those specialists would learn of the *Mayo Foundation* decision right away through tax blogs, listservs, and the like.<sup>86</sup> And because the newly applicable *Chevron* regime should be somewhat more deferential than the previous regime of *National Muffler*,<sup>87</sup> the attorneys at the Tax Division of the Department of Justice would have the incentive to advise courts of the new development quickly, even in cases that had already been briefed and argued. And, in fact, that is just what those attorneys did, filing post-briefing letters advising the relevant courts of the change in law.<sup>88</sup> Although Levy and Glicksman use their account of information costs and specialization to explain why a general principle can remain stuck in a precedential silo and fail to diffuse into the broader precedential

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83. *See id.* at 526–34.

84. *Id.* at 499–500.

85. *Id.* at 557–63.

86. *See, e.g.*, Alan Horowitz, *Supreme Court Opts for Chevron Analysis of Treasury Regulations, Discarding the Traditional National Muffler Dealers Analysis*, TAX APP. BLOG (Jan. 11, 2011), <http://appellatetax.com/2011/01/11/supreme-court-opts-for-chevron-analysis-of-treasury-regulations-discarding-the-traditional-national-muffler-dealers-analysis>.

87. *See Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53–58 (2011) (distinguishing between the two standards).

88. For example, in *Burks v. United States*, the government filed a letter advising the Fifth Circuit of *Mayo Foundation* the day after *Mayo Foundation* was decided. Rule 28(j) Letter from Tax Division, U.S. Dep’t of Justice, *Burks v. United States*, 633 F.3d 347 (5th Cir. Jan. 12, 2011) (No. 09-11061).



network, those same considerations can also help to explain why a case like *Mayo Foundation*, which was tax-specific, spread so rapidly within the tax silo.

In short, several factors plausibly contributed to *Mayo Foundation*'s quick assimilation by the lower courts: the Court's own self-consciousness about making a change, the relative simplicity of the new rule, the nature of the canon, and the canon's link to a specialized field. Of course, it is hard to form solid generalizations based on one case, and in any event generalizations are not always possible. But we have other examples that can also offer some insight on how interpretive regimes evolve and propagate through the hierarchy—or, as we will see in the next few parts, don't.

#### IV. FIXED CANONS

The example of *Mayo Foundation* shows the interpretive system at the height of its dynamic potential. The Supreme Court changed a canon, and the lower courts turned on a dime, responding instantly and accurately to the shift. This part and the next part of the Article consider some circumstances and examples in which, for various reasons, such responsiveness is absent. Part V will examine several instances in which the frequency of canon use in the lower courts seems disconnected from the canons' use in the Supreme Court. This Part considers how features of certain canons limit their mutability. For certain canons, it is almost inconceivable that the Court could attempt to abolish or meaningfully modify them. The Supreme Court would not purport to do so, and if the Court did appear to do so, the lower courts would not believe it. In that sense the meaning of some canons is fixed.

For a noteworthy recent illustration of the static nature of some canons, consider *Ali v. Federal Bureau of Prisons*.<sup>89</sup> A federal prisoner alleged that prison employees had lost or destroyed some of his personal property, and he sued for damages. The Federal Tort Claims Act waives the government's immunity for certain torts, but it also has many exceptions. The question in *Ali* was whether an exception regarding property claims against "any officer of customs or excise or any other law enforcement officer" included claims against literally *any* law enforcement officer, including the prison employees involved in *Ali*.<sup>90</sup> Although prison guards are certainly "other law

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89. 552 U.S. 214 (2008).

90. *Id.* at 216.

enforcement officer[s]” when that phrase is considered in isolation, one could attempt to limit the phrase on the basis of *ejusdem generis*, the familiar linguistic canon providing that a general phrase at the end of a list encompasses only further instances of the same type as those specifically mentioned.<sup>91</sup> Here, *ejusdem generis* would suggest that the statute encompasses only other officers of a type similar to those listed (i.e., officers involved in customs enforcement, revenue collection, and the like), not literally *any* other law enforcement officer.

In *Ali*, the Supreme Court majority rejected the *ejusdem generis* argument, reasoning (in part) that this statute did not involve “a list of specific items separated by commas and followed by a general or collective term.”<sup>92</sup> “The absence of a list of specific items,” the Court continued, “undercuts the inference embodied in *ejusdem generis* that Congress remained focused on the common attribute when it used the catchall phrase.”<sup>93</sup>

Justice Kennedy’s dissent, joined by three other Justices, disagreed with the result but, more interestingly, also took issue with the Court’s handling of the canon:

[T]he Court’s approach 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>94</sup>

This passage is a bit puzzling. For one thing, it seems to give the case’s interpretive reasoning a stricter sort of precedential effect than methodology is usually thought to possess.<sup>95</sup> But even setting that aside, what should we think of Justice Kennedy’s fears about canonical alteration? Should we expect the lower courts to read the majority opinion for all it is worth, treating it as a significant limitation on the canon’s scope? Or should we expect them to shrug—or even fail to notice at all? For several reasons, Justice Kennedy’s fears seem overblown.

To begin with, *ejusdem generis* is a prime example of a practically immutable canon. The canon is deeply entrenched and, to a significant degree, simply reflects the context-based

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91. See POPKIN, *supra* note 36.

92. *Ali*, 552 U.S. at 225.

93. *Id.*

94. *Id.* at 229 (Kennedy, J., dissenting).

95. See *supra* note 17 and accompanying text (explaining that methodological decisions generally do not enjoy ordinary *stare decisis* effect).

reasoning that ordinary readers would use even if the canon had never existed by name. That is not to say the canon is strong in terms of dictating outcomes. Quite the opposite: this canon, like many others, is something to consider, an aid to discerning likely meaning, but it can readily be overcome by other considerations.<sup>96</sup> But this weakness paradoxically contributes to its power. Like the reeds, it bends under the wind and springs back even as the mighty oak breaks.

We might draw a contrast here to interpretive doctrines that are obviously artificial and contingent in the sense that they are self-consciously tended and calibrated by the Supreme Court. The various deference regimes—*Chevron*, *Mead*, and the rest—are the most obvious examples. No one doubts that the Court can and does change these rules—the Court grants certiorari precisely in order to do so<sup>97</sup>—and thus lower courts (and attorneys and other actors) are alert to the ever-present potential for change. For a canon like *ejusdem generis*, by contrast, the lower courts probably consult their own intuitive sense of the canon's gist rather than following the Supreme Court's latest verbal formulation.

Given the *ejusdem generis* canon's intuitive rooting and long pedigree, lower courts would require the strongest of evidence before they would believe the canon has changed in a meaningful way. The majority in *Ali*, however, did not present its opinion as a major statement on the meaning of the canon. (Justice Kennedy in dissent is the one making that sort of claim.) The Court did not purport to overrule any cases; rather, it distinguished the situation at hand from those in which the canon had prevailed.<sup>98</sup> The dissent stated that the majority “adopt[ed] a rule which simply bars all consideration” of the canon for statutes constructed like the one at issue in *Ali*.<sup>99</sup> More accurate than talk of “rules” or “bars” would be to say that the majority found the canon unpersuasive in the context. The statute deviated somewhat from the paradigm cases for

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96. See, e.g., *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 89 (1934) (“[W]hile the rule [of *ejusdem generis*] is a well-established and useful one, it is, like other canons of statutory construction, only an aid to the ascertainment of the true meaning of the statute.”).

97. E.g., *City of Arlington v. FCC*, 133 S. Ct. 1863, 1867–68 (2013) (“We granted certiorari, limited to the first question presented: ‘Whether . . . a court should apply *Chevron* to . . . an agency’s determination of its own jurisdiction.’” (citation omitted)); see also *supra* Part III (discussing the extension of *Chevron* to the tax realm).

98. *Ali*, 552 U.S. at 224–25.

99. *Id.* at 230–31 (Kennedy, J., dissenting).

the application of the canon, which involve longish lists of specific items followed by a general term. The Court seemed right, in my estimation, to think that the argument for limiting a general phrase gets stronger the longer the list and the clearer the common theme among the items. A canon like this is not an on/off switch; instead, it has a core where it is powerful (though hardly conclusive) and a periphery in which its influence gradually wanes.

Based on the considerations in the preceding paragraphs, and despite the dissent's professed fears, it would be surprising to see *Ali* make a major change in the way lower courts use *eiusdem generis*. But we need not content ourselves with guesses, for enough time has passed to look for evidence. And that evidence shows that *Ali* has not seriously changed the canon. In the nearly eight years since *Ali* was decided, the Supreme Court has cited it as an authority on *eiusdem generis* just once (even then only in a dissent),<sup>100</sup> and the lower courts' reaction has been modest. True, some cases cite *Ali* as support for holding *eiusdem generis* inapplicable to different statutes that are structurally similar to the one in *Ali*.<sup>101</sup> Other cases discuss *Ali* at some length but distinguish it and apply *eiusdem generis*.<sup>102</sup> My admittedly subjective sense is that these cases could have made the same interpretive moves (perhaps citing something else) had *Ali* never existed. Potentially more revealing are some aggregate citation figures. Through the end of 2014, 383 cases had cited *Ali*, but only 11 of them (or 2.9%) include the phrase "*eiusdem generis*."<sup>103</sup> This shows that *Ali* is mainly understood as a case about a particular part of the Federal Tort Claims Act, not a case about a canon.<sup>104</sup> (Some cases, by contrast, do become cases about canons, with *Chevron* being the most obvious example.) Similarly, only a very small percentage of the

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100. *Yates v. United States*, 135 S. Ct. 1074, 1097 (2015) (Kagan, J., dissenting).

101. *See, e.g.*, *United States v. Douglas*, 634 F.3d 852, 858 (6th Cir. 2011); *United States v. Amato*, 540 F.3d 153, 160–61 (2d Cir. 2008).

102. *See, e.g.*, *United States v. EME Homer City Generation, L.P.*, 727 F.3d 274, 292–95 (3d Cir. 2013).

103. This figure was derived by using the WestlawNext KeyCite feature to find cases citing *Ali* and then searching within those results for "*eiusdem generis*."

104. *Ali* is one of those rare cases that inspires an article about the broader role of the textual canons as interpretive tools. *See* Roderick M. Hills, Jr., *The Problem of Canonical Ambiguity in Ali v. Federal Bureau of Prisons*, 44 TULSA L. REV. 501, 502 (2009). *Ali* was relatively well-positioned to become a case about a canon, and yet the judicial response has been muted.

cases in the lower courts citing *ejusdem generis* in the years since *Ali* was decided cite *Ali* in any way, no matter how fleetingly. The following table provides the details.

**Table 1: *Ejusdem Generis* Cases in Lower Federal Courts that Cite *Ali v. Federal Bureau of Prisons*, by Year<sup>105</sup>**

2008: 2 cases citing <i>Ali</i> out of 56 cases citing <i>ejusdem generis</i> (3.6%)
2009: 0 out of 53 (0%)
2010: 0 out of 56 (0%)
2011: 2 out of 44 (4.5%)
2012: 3 out of 63 (4.8%)
2013: 2 out of 71 (2.8%)
2014: 1 out of 66 (1.5%)
Total: 10 out of 409 (2.4%)

Contrary to Justice Kennedy’s fears, then, *Ali* has not become a major precedent about the meaning of the *ejusdem generis* canon, at least not yet.

*Ali*’s relative impotence is not surprising. *Mayo Foundation* had several factors working in its favor, but in *Ali* several similar factors cut *against* successful canonical change: lack of clear intent on the Court’s part to make a major change, the squishy rather than sharp nature of the potential change, an intuitively rooted rather than avowedly artificial canon, and the absence of a specialized bar.

Although every example may have its own peculiarities, some of the factors just mentioned are common to textual canons generally. Textual canons often capture some of the truth about human expression (words derive meaning from surrounding words, different parts of a directive should not contradict themselves, the same word probably means the same thing when used repeatedly in proximity, etc.).<sup>106</sup> The intuitive rooting of these canons makes them hard to grab onto in order to stretch or compress or toss aside as one desires. At the same time, these canons are not outcome determinative, and there-

105. These figures were derived by searching the WestlawNext ALLFEDS database for lower-court cases containing both “*ejusdem generis*” and “*Ali*” for the given years, then searching just for “*ejusdem generis*.” (The search for 2008 was limited to cases decided after *Ali* came down.) The searches returned a few false positives (such as other cases or litigants named “*Ali*”), which I discarded. It appears that only one state case has ever cited both *ejusdem generis* and *Ali*: *Warren v. State*, 755 S.E.2d 171, 173 n.2 (Ga. 2014).

106. See SCALIA & GARNER, *supra* note 54, at 51.

fore the exact details of their scope do not carry high stakes. The Supreme Court is unlikely to have much reason to wish to tinker with them, and lower courts would hesitate to read much into one decision that seems to give them more or less force. There is no specialized bar that lives and breathes these canons, and the Supreme Court does not grant certiorari just to opine on their meaning. Therefore, although Part II showed that the prevalence of textual canons in the lower courts changed over time, roughly tracking the patterns in the Supreme Court, the meaning of textual canons resists modification.

Some *substantive* canons may possess similar tendencies toward stasis. A number of substantive canons—such as the presumption against retroactivity, presumptions in favor of using various common-law doctrines as gap fillers, and so on—reflect preferences for stable, rational law that are intuitive and appealing, at least to a degree; reasonable people would indeed hesitate before reading vague or ambiguous statutes to upset settled expectations and policies, especially policies grounded in the influence of constitutional values.<sup>107</sup> It would be hard not to bring such expectations to bear regardless of what exactly the Supreme Court said in its latest case. Further, although many substantive canons are tied to a particular field of law with an observant, specialized bar, others (such as those just mentioned) are not.

In sum, many canons—and many textual canons in particular—can be expected to resist conscious modification, either by the Court itself or as the lower courts perceive the Court's intent. Their position is in that sense relatively static.

#### V. LOOSE CANONS (THE PROBLEM OF CANON PROMINENCE)

In Part III, we saw a case in which the lower courts responded to the Supreme Court like an attentive dance partner, quickly and accurately picking up on a change in direction. Part IV has just explained that such shifts in meaning are hard to imagine for certain canons, whatever the Court might say about them. But in other instances we encounter a different phenomenon, neither quickness nor stasis but a certain kind of slack. A canon's standing in the lower courts need not be very

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107. Cf. David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 927 (1992) (observing that many canons, both linguistic and substantive, reveal "a preference for continuity over change").

tightly yoked to its prominence in the Supreme Court's decisions. This slack can manifest itself in the form of overreactions, such as when a few mentions from the Supreme Court bump up a canon's salience and then it takes off in the lower courts. Slack can also manifest itself in the form of underreactions, such as when the lower courts are slow to notice a canon's disappearance. Let us begin there.

#### A. GHOSTS AND ZOMBIES

In the M. Night Shyamalan film *The Sixth Sense*, a boy can see dead people, ghosts of the recently departed. The twist is that some of the ghosts, including (*spoiler alert!*) the other main character, a child psychologist played by Bruce Willis, don't yet realize they are dead.<sup>108</sup>

Perhaps something similar is true of some canons of interpretation. Their vitality is questionable because the Supreme Court has not cited them in decades despite many opportunities to do so, yet these ghost canons linger on in the lower courts as if unaware of their own demise. Moreover, there may be some canons—we could call these zombie canons—that the Supreme Court has affirmatively tried to kill, yet still they stalk the pages of the *Federal Reporter* and *Federal Supplement*, undead.

The following sections discuss two canons that might fall into the ghost or zombie categories, but it is worth explaining why this discussion does not include one very famous canon, namely the rule of lenity, which provides that unclear penal statutes are construed in favor of the accused. It is true that some commentators, and recently Justice Scalia too, have questioned whether the rule of lenity has any force in the contemporary Supreme Court.<sup>109</sup> Yet the Court's treatment of the canon falls short of an outright repudiation or even an unspoken abandonment. The rule of lenity rarely carries the day, but the Court cites it regularly, and in fact the canon has played a significant supporting role in a few major pro-defendant rulings in

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108. *THE SIXTH SENSE* (Hollywood Pictures & Spyglass Entertainment 1999).

109. *E.g.*, *Abramski v. United States*, 134 S. Ct. 2259, 2281 (2014) (Scalia, J., dissenting) (asking whether his colleagues still regard lenity as a "genuine part of our jurisprudence"); Rick Hills, *Why Do I Waste My Time Teaching the So-Called "Rule of Lenity"?*, PRAWFSBLAWG (Mar. 22, 2011, 4:28 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/03/why-do-i-waste-my-time-teaching-the-so-called-rule-of-lenity.html>.

recent years.<sup>110</sup> Even the most attentive agent would have trouble reading the Court's signals, and it would be surprising to see lower courts abandon such an ancient canon without very clear evidence. This is not to say that the lower courts' treatment of lenity—in particular the canon's potential to become a zombie—is unworthy of study,<sup>111</sup> but for the present we should focus on the much cleaner cases presented by canons that the Supreme Court has abandoned or worse.

### 1. The Slow Fade (and Nascent Transformation?) of the Civil-Rights Canon

Is there a substantive canon governing the interpretation of civil-rights statutes, such as Title VII, Section 1983, and the Voting Rights Act? I have always thought that there is such a canon and that it provides that civil-rights statutes are to be broadly construed to effectuate their remedial purposes. Various sources report such a canon,<sup>112</sup> and it is easy to find the canon recited in older Supreme Court cases.<sup>113</sup> At the same time, I have had the sense that this canon is not what it used to be, perhaps that it has slipped into disuse. There are other canons that the Court has also neglected of late—the old canon favoring Indian tribes, for example, has practically no purchase

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110. *E.g.*, *Skilling v. United States*, 561 U.S. 358, 410–11 (2010) (interpreting the federal “honest services” fraud statute); *United States v. Santos*, 553 U.S. 507, 513–14 (2008) (plurality opinion) (interpreting a federal money-laundering statute).

111. My sense based on some initial research is that lower courts have not reduced their use of the canon; if anything, it is cited more today than it was a decade ago. Studying the rule of lenity presents some greater challenges than one encounters with other canons, including major changes in docket composition, large numbers of unpublished criminal decisions, varying formulations of the rule, and large numbers of “negative” citations of the canon (i.e., cases that deem it inapplicable). I hope to return to the rule of lenity in future work.

112. *See* 3B NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 76:6, at 178 (7th ed. 2011) (stating that courts “now generally agree . . . that civil rights acts are remedial and should be liberally construed,” though also noting prior contrary authority (footnote omitted)); *see also* *Coles v. Penny*, 531 F.2d 609, 615 (D.C. Cir. 1976) (referring to “the oft-repeated statement that Title VII is remedial in character and should be liberally construed to achieve its purposes”).

113. *See, e.g.*, *City of Memphis v. Greene*, 451 U.S. 100, 120 (1981); *Gomez v. Toledo*, 446 U.S. 635, 639 (1980); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 765–66 (1979) (Blackmun, J., concurring); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 684–86 (1978); *Corning Glass Works v. Brennan*, 417 U.S. 188, 208 (1974).



on the Court today<sup>114</sup>—but the civil-rights canon provides an especially significant object for study because it could be cited in so many cases.

To probe the intuition that the canon has been in decline in the Supreme Court, I ran some rather broad electronic searches of the Court's opinions and consulted the secondary literature. Although it is hard to speak definitively about such matters, given that it is sometimes debatable whether a canon is being invoked, it appears that the liberal-construction canon for civil rights no longer exists at the Supreme Court level. Probably the last clear invocations of the canon in Supreme Court majority opinions came almost twenty-five years ago, in two 1991 cases, *Chisom v. Roemer* and *Dennis v. Higgins*. In *Chisom v. Roemer*, which concerned the Voting Rights Act, the Court cited and quoted an earlier case for the proposition that the Act “should be interpreted in a manner that provides ‘the broadest possible scope’ in combating racial discrimination.”<sup>115</sup> In *Dennis v. Higgins*, which concerned whether Commerce Clause challenges could be brought under Section 1983, the Court quoted prior admonitions that Section 1983 “must be broadly construed” and that its legislative history contemplates that the statute should be “liberally and beneficently construed.”<sup>116</sup> But since 1991, the liberal-construction canon, which had already been in retreat in the preceding years, has gone silent, at least in the Court's majority opinions.<sup>117</sup> Indeed, regarding the Voting Rights Act in particular, the most striking interpretive development of recent years has been the development of a counter-canon *restricting* the statute's coverage so as to avoid federalism concerns.<sup>118</sup>

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114. See, e.g., *Carcieri v. Salazar*, 555 U.S. 379, 413–14 (2009) (Stevens, J., dissenting) (stating that the majority “ignores the ‘principle deeply rooted in [our] Indian jurisprudence’ that ‘statutes are to be construed liberally in favor of the Indians’” (quoting *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992))).

115. 501 U.S. 380, 403 (1991) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)).

116. 498 U.S. 439, 443 (1991) (citing *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 105 (1989), and *Monell*, 436 U.S. at 684).

117. For a mention in a dissent, see, e.g., *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 342 (1993) (Stevens, J., dissenting).

118. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202–07 (2009) (broadly construing an exception to the Voting Rights Act's coverage in order to avoid constitutional difficulties). Those constitutional worries turned into a full-fledged ruling of partial unconstitutionality in *Shelby County v. Holder*, 133 S. Ct. 2612, 2621, 2631 (2013).

Again, it is hard to pinpoint a canon's time of death, and it is not as if a civil-rights plaintiff has not won a debatable statutory interpretation case in the Supreme Court since 1991.<sup>119</sup> Recall that we are considering the rules and presumptions that the Court deploys in its reasoning rather than measuring wins and losses.<sup>120</sup> Still, my judgment on the canon's apparent expiration about twenty-five years ago does not stand alone. Ruth Colker, in a study of the federal courts' interpretations of the Americans with Disabilities Act, likewise concludes that the canon met its "demise" during the Rehnquist Court, with *Chisom* representing its last gasp, and that the canon has since been "abandoned."<sup>121</sup> The demise of the civil-rights canon is an aspect of the broader decline, noted by others, of various canons that traditionally called for the expansive interpretation of various sorts of "remedial" legislation.<sup>122</sup>

Nonetheless, although the Supreme Court has not cited the civil-rights canon lately, and although the thrust of the Court's jurisprudence over the last few decades has been (with exceptions, to be sure) generally against generous readings of anti-discrimination laws, the Court has never abrogated the broad-construction canon in so many words. There has been no public execution, just a withdrawal of sustenance. This raises the possibility that the canon might linger on in the lower courts, at least for a time.

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119. For example, in *CBOCS West, Inc. v. Humphries*, the Supreme Court ruled that 42 U.S.C. § 1981 includes an anti-retaliation remedy, and in doing so it referred to "broadly worded civil rights statute[s]." 553 U.S. 442, 452 (2008). However, it seems to me that the Court was referring to the breadth of the statute's language rather than invoking a substantive canon of liberal construction of ambiguous language and, further, the Court's ruling in *CBOCS West* relied heavily on the *stare decisis* effect of an old decision rather than *de novo* interpretation. *See id.* at 446–52. In any event, any thought that *CBOCS West* revived the broad-construction canon would seem to have been put to rest in *University of Texas Southwestern Medical Center v. Nassar*, which refused to apply *CBOCS West's* reasoning to Title VII. *See* 133 S. Ct. 2517, 2529–31 (2013).

120. *See supra* Part I.A.

121. Ruth Colker, *The Mythic 43 Million Americans with Disabilities*, 49 WM. & MARY L. REV. 1, 20–23 & n.98 (2007).

122. *See* ESKRIDGE ET AL., *supra* note 6, at 690 ("Certain statutes (such as civil rights, securities, and antitrust statutes) are supposed to be liberally construed—in other words, applied expansively to new situations. [But] these liberal construction canons have not been often invoked by the Rehnquist and Roberts Courts." (footnote omitted)); *see also* SCALIA & GARNER, *supra* note 54, at 364 (referring to the "false notion that remedial statutes should be liberally construed").

And linger it has. The liberal-construction canon has not disappeared from the lower courts' interpretive toolkit the way it has vanished at the Supreme Court. Although there are some notable exceptions in which courts have noticed the Supreme Court's implicit rejection of the canon, for the most part the lower courts' statements about the canon do not seem to recognize that anything has happened but instead continue to refer to it as a settled rule, even in the context of the Voting Rights Act.<sup>123</sup> In a sense these lower courts are correct to rely on the canon, given that precedents have indefinite life and remain valid and citable until overruled.

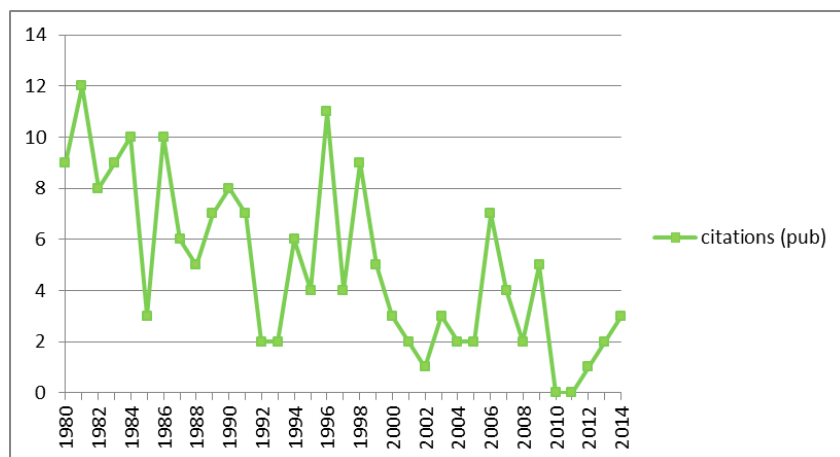
Regarding patterns of frequency of citation of the civil-rights canon, a complicated and interesting story emerges. Figures 3 and 4 below present some rough, aggregate data regarding citations of the canon in the courts of appeals.<sup>124</sup> The figures show that the canon is in gradual decline if one considers the canon in what could be called its "traditional" form; a newer form of the canon, however, is vigorous and possibly still gaining strength.

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123. *E.g.*, *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 553 (6th Cir. 2014) ("The Supreme Court has . . . held that the Voting Rights Act should be interpreted broadly . . ."); *EEOC v. Simbaki, Ltd.*, 767 F.3d 475, 485 (5th Cir. 2014) (referring to our "well recognized" practice of liberally construing Title VII's requirements in light of the statute's remedial purpose" (citation omitted)); *see also* *Padilla v. Lever*, 463 F.3d 1046, 1057 (9th Cir. 2006) (en banc) (Pregerson, J., dissenting) (referring to the rule of broadly construing the Voting Rights Act as "well-established" but citing Supreme Court cases from the 1960s). For a perceptive exception, see *Farrakhan v. Washington*, 359 F.3d 1116, 1124 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc) ("In recent years, the [Supreme] Court has repeatedly rejected broad interpretations of the VRA, obviously troubled by the constitutional implications.").

124. It is difficult to study the district courts systematically through electronic databases, so the discussion in the text concerns the courts of appeals. *See supra* note 39 and accompanying text.

**Figure 3: Citations of the Traditional Civil-Rights Canon in the Courts of Appeals, 1980–2014**



Let me explain how this figure was derived and then set out a few cautions about how to interpret it.

To produce this figure, I began with electronic database searches that sought to find invocations of the canon in what one might call its “traditional” form—that is, as a rule requiring liberal interpretation of “civil rights” laws generally or the great 1960s statutes in particular.<sup>125</sup> I then reviewed the results and counted any case in which the broad-construction canon was arguably invoked, even weakly, including in the form of quotations from prior cases, cases in which the canon was acknowledged but not followed, and cases in which it was invoked in dissent, my rationale being that such uses still show the canon’s currency as a recognized tool. Consistent with the approach elsewhere in this Article, the figure above reflects only published opinions.<sup>126</sup> Nonetheless, in this instance one

125. The WestlawNext search string was as follows: adv: DA(aft1979) and OP((“civil rights” or “equal rights” or “title vii” or “voting rights” or vra) /30 (broad! or liberal!) /5 (read! or interpret! or constru!)). This yielded over 1000 results, the large majority of which were false positives. The most common false positive involved statements of the rule that courts should liberally construe the pleadings of pro se litigants. Nonetheless, although this search cast the net broadly, it is certainly possible to invoke the liberal-construction canon without using the search terms above, and so the search is not fully comprehensive. For the meaning of the “adv” prefix in the search, and for the reasons for using the “OP” limitation, see *supra* note 37.

126. See *supra* notes 43–47 and accompanying text.

might hypothesize that a downward trend in citations of the canon in published cases could simply mean that citations have “migrated” to unpublished cases as the relevant statutes become less novel and better understood. To evaluate that hypothesis, I ran the same searches on unpublished opinions. It appears that citations have not migrated to unpublished opinions in serious numbers: only two years in the period covered by Figure 3 had more than one citation of the canon in an unpublished opinion.

In terms of general caveats, any electronic search string will miss some cases, and judgment calls are involved in reviewing the results. Figure 3 can therefore be treated as illustrating a gradual decline trend but not as presenting an exact measure for any given year.

A more specific caution about interpreting this figure concerns the role of caseload, as the opportunities to cite the canon vary according to the number of relevant appeals. A rough proxy for this “denominator” is the annual number of appeals in employment discrimination cases, a figure that has long been tracked by the Administrative Office of the U.S. Courts.<sup>127</sup> That figure has sometimes been erratic—it nearly doubled during the 1990s and then turned around and halved during the first decade of the 2000s—but despite the ups and downs the number ends up being similar at the beginning and end of the period shown in Figure 3. In sum, we can be fairly confident that the civil-rights canon in its traditional form is in genuine decline in the lower courts, though the drop has been less extreme and complete than the Supreme Court’s decades-long abandonment of it—a bumpy downward incline rather than a cliff.

Whether the Supreme Court played a causal role in this is harder to say. Although lower courts surely perceive the Court’s general attitude toward interpreting antidiscrimination

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127. The data are reported in Table B-7 of the Administrative Office’s annual *Judicial Business* reports. See *Judicial Business of the United States Courts*, USCOURTS.GOV, <http://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts> (click on the “Judicial Business” link for the appropriate year; then scroll down to “Table B-7” and click “Download”) (last visited Nov. 1, 2015) (containing reports back to 1997). The best figure to use is probably the category for “Private Civil Rights: Employment,” which notably includes Title VII cases; however, none of the case categories tracked by the official statistics exactly mirrors the group of cases captured by the electronic search.

legislation (i.e., generally less expansionist than in the past), my review of many cases does not provide much evidence of the lower courts expressly noting the Supreme Court's abandonment of the canon.<sup>128</sup> It is certainly possible that broader ideological or contextual factors simultaneously affected all the courts, making the whole federal judiciary less hospitable to broad interpretations. Further, even if the lower courts had no idea what the Supreme Court was up to, and even if nothing about the lower courts changed, it would not be wholly surprising to see a decline in canon citations over time. That is because we can conceive of statutes as having a natural lifecycle in which they generate many novel interpretive questions in their early years and fewer such questions later. Many of the major civil-rights laws are aging. Title VII, one of the most important, was enacted in 1964 and saw its last major amendment in 1991 (which was, as it happens, largely a response to the Supreme Court's stingy interpretations in the late 1980s).<sup>129</sup> With an old statute, most questions will have been resolved by Supreme Court or circuit precedent already, which tends to diminish the need for interpretive sources like canons.<sup>130</sup>

One can find some contrasting results if one looks for a slightly different version of the civil-rights canon. There appears to be a nascent trend of *increased* use of the broad-construction canon in the interpretation of a different and newer civil-rights law: the Americans with Disabilities Act of 1990 (ADA), as amended by the ADA Amendments Act of 2008 (ADAAA).<sup>131</sup> Though admittedly the numbers are small, the figure below shows the recent growth of an ADA-focused vari-

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128. See *supra* note 123 and accompanying text.

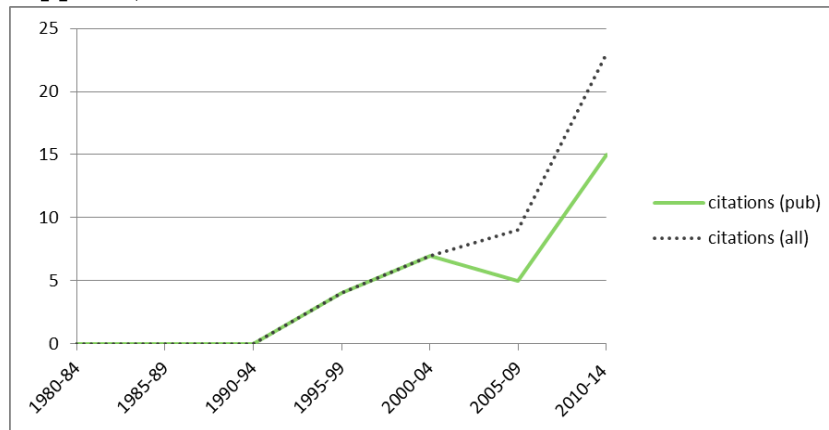
129. See Civil Rights Act of 1991, §§ 2–3, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (findings and purpose clauses); H.R. REP. NO. 102-40, at 87–88 (1991) (criticizing the Supreme Court's rejection of the liberal-construction canon in its recent cases), *reprinted in* 1991 U.S.C.C.A.N. 549, 625–26.

130. Cf. Brudney & Ditslear, *supra* note 30, at 224–26 (presenting tentative evidence of a link between statutory age and declining use of legislative history for several statutes governing the workplace, including Title VII); Law & Zaring, *supra* note 30, at 1722–25 (showing that the Supreme Court's use of legislative history generally declined with statutory age, though usage increased again once a statute became more than ninety years old).

131. Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified as amended at 42 U.S.C. §§ 12101–12213); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–12213).

ant of the broad-construction canon. Again, the details of the search are set out in the margin.<sup>132</sup> Because of the small numbers involved in some years, the citations are grouped into five-year baskets. In this instance I have included data on unpublished cases, because (unlike in other situations studied in this Article) they were a substantial portion of the total citations.

**Figure 4: Citations of Disability Canon in the Courts of Appeals, 1980–2014**



The pattern illustrated above likely has a few causes. Part of the explanation is that that ADA is a relatively young and still evolving statute that continues to generate interpretive questions. But in addition to reflecting a natural statutory lifecycle, this canon’s use is also fueled by non-judicial leadership: (1) the ADAAA contains its own statutory provision calling for broad construction,<sup>133</sup> and (2) the ADA’s implementing regulations and other administrative guidance also contain broad-construction directives.<sup>134</sup> As a result, some of the cases are citing those legislative and administrative directives rather

132. The search strategy was like that described above, *supra* note 125, except for the substitution of ADA-related terms: adv: DA(aft1979) and OP((ADA or “americans with disabilities” or ADAAA) /30 (broad! or liberal!) /5 (read! or interpret! or constru!)). As before, I reviewed the results and removed false positives.

133. See 42 U.S.C. § 12102(4)(A) (2012) (“The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.”).

134. See, e.g., 29 C.F.R. § 1630.2(j)(1)(i), (k)(2) (2015).

than a court-created canon. In fact, over the last decade, those non-judicial sources account for a substantial majority of the canon references and thus explain much of the canon's increasing currency. In that sense, this canon is not directly comparable to the waning traditional civil-rights canon.

There are some interesting lessons here about the complexity of interpretive change. A canon's role can evolve over time as the surrounding legal landscape changes. While the traditional civil-rights canon is in decline even in the lower courts, to some degree the canon has simply shifted ground in light of new circumstances. If one were to combine citations from the two versions of the canon, the drop shown in Figure 3 would be significantly slowed. Further, the growth of the ADA canon has *not* been driven by the Supreme Court. The Court has not announced a pro-ADA canon; on the contrary, it has generally read the ADA narrowly.<sup>135</sup> Indeed, dissatisfaction with the Court's stingy treatment of the ADA was part of the motivation for the enactment of the ADA<sup>AA</sup>,<sup>136</sup> and that new statute's liberal-construction directive is now being cited by the lower courts. The story of the civil-rights canon(s) thus demonstrates a significant degree of slack in multiple dimensions, with the lower courts lagging behind the Supreme Court in one way but leading the Supreme Court—at Congress's behest—in another.

One very interesting question, of course, is what will happen when the Supreme Court begins to decide cases under the ADA<sup>AA</sup>. Will the statute's broad-construction interpretive directive alter the Court's interpretive mood? Will it even be cited?

In the civil-rights field, we encountered a canon that has fallen into disuse in the Supreme Court but that is still hanging on in the lower courts, albeit in a weakened and now evolving form. But, as the next example shows, even negative commentary from the Court might not suffice to silence a canon if the Supreme Court is not unequivocal and consistent.

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135. See *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002) (stating that the definition of disability “need[s] to be interpreted strictly to create a demanding standard for qualifying as disabled”); Colker, *supra* note 121, at 25 (“[T]he Supreme Court has not cited [the broad-construction canon] once in interpreting the ADA.”).

136. ADA<sup>AA</sup> § 2(a)(1), 122 Stat. at 3553 (findings and purpose clauses).



## 2. The Uncertain Future of the Subject-Matter Jurisdiction Canon

Is there a substantive canon governing the interpretation of statutes conferring subject-matter jurisdiction on the federal courts? Plenty of reputable authorities say that such statutes are to be narrowly construed, that is, read so that uncertainty is resolved against federal jurisdiction.<sup>137</sup> The lower courts repeat such a rule in cases both old and new.<sup>138</sup> The rule makes sense, as far as substantive canons go, given that expansive federal jurisdiction implicates federalism concerns.<sup>139</sup> Further, in the particular context of removal jurisdiction, a presumption in favor of state-court jurisdiction is said to gather additional force because of the risk that a case will be swept out of a state court surely having jurisdiction, proceed to judgment in a federal court lacking jurisdiction, then have to be vacated and remanded.<sup>140</sup>

Despite its considerable renown, the narrow-construction canon is not so robust these days in the Supreme Court. When one examines lower-court invocations of the canon and traces the line of precedent back to its eventual source in the *U.S. Reports*, one often ends up (perhaps after several layers of citations to circuit precedent) with rather old Supreme Court cases like *Healy v. Ratta* (1934)<sup>141</sup> or *Shamrock Oil & Gas Corp. v.*

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137. See, e.g., S. REP. NO. 97-275, at 19 (1981) (“[I]t is a canon of construction that courts strictly construe their jurisdiction.”), as reprinted in 1982 U.S.C.C.A.N. 11, 29; ESKRIDGE ET AL., *supra* note 6, at 1206 (citing a canon of “[n]arrow construction of federal court jurisdictional grants that would siphon cases away from state courts”); 13E CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3602.1, at 135 (3d ed. 2009) (“It is a familiar proposition that the constitutional policy of limited jurisdiction requires that the statutes granting subject matter jurisdiction to the federal courts be strictly construed.”).

138. See, e.g., *Grosvenor v. Qwest Corp.*, 733 F.3d 990, 995 (10th Cir. 2013); *Romanella v. Hayward*, 114 F.3d 15, 16 (2d Cir. 1997) (per curiam); *Russell v. New Amsterdam Cas. Co.*, 325 F.2d 996, 998 (8th Cir. 1964); *Kresberg v. Int’l Paper Co.*, 149 F.2d 911, 913 (2d Cir. 1945). Note that there is a different rule concerning the interpretation of jurisdiction-stripping legislation; restrictions of existing jurisdiction are required to be clearly stated, especially where constitutional concerns are involved. See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 298–99 (2001); *Miller v. French*, 530 U.S. 327, 336 (2000).

139. See *Healy v. Ratta*, 292 U.S. 263, 269–70 (1934); *Palkow v. CSX Transp., Inc.*, 431 F.3d 543, 554–55 (6th Cir. 2005).

140. See 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3721, at 66–82 (4th ed. 2009).

141. 292 U.S. at 270 (“The policy of the statute [setting forth a jurisdictional amount] calls for its strict construction.”).

*Sheets* (1941).<sup>142</sup> Even though the Court frequently deals with questions of subject-matter jurisdiction, it is hard to find a recent full-throated endorsement of the narrow-construction canon. In the removal context, where the canon has perhaps always been strongest, the Court in 2003 noted that a litigant relied on a “federal policy of construing removal jurisdiction narrowly,” and the Court acknowledged *Shamrock’s* language setting forth such a canon.<sup>143</sup> The Court nonetheless went on to hold that there was removal jurisdiction and, significantly, to question the continued vitality of the narrow-construction rule in light of post-1941 statutory amendments to the removal statute.<sup>144</sup>

Since then, the Court has continued to deemphasize the canon through both act and omission. In the non-removal context, the Court’s most significant encounter with the canon in the last decade was *Exxon Mobil Corp. v. Allapattah Services, Inc.* (2005), which concerned the scope of 28 U.S.C. § 1367, the supplemental jurisdiction statute.<sup>145</sup> Going into the decision,

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142. 313 U.S. 100, 108 (1941) (“[T]he policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation.”). For an extreme example of reaching *way* back to find support for narrow construction, see *Bell Atl. Md., Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 301 (4th Cir. 2001) (citing *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8, 11 (1799)), *vacated sub nom.* *Verizon Md., Inc. v. Pub. Serv. Comm’n*, 535 U.S. 635 (2002).

143. *Breuer v. Jim’s Concrete of Brevard, Inc.*, 538 U.S. 691, 697 (2003) (citing *Shamrock*, 313 U.S. at 108–09); *see also* *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002) (stating that “statutory procedures for removal are to be strictly construed” and citing four cases from the 1920s through 1940s).

144. *Breuer*, 538 U.S. at 697–98; *see also* *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 357 (1999) (Rehnquist, C.J., dissenting) (accusing the majority of “depart[ing] from this Court’s practice of strictly construing removal and similar jurisdictional statutes”). Citing *Murphy Bros.* as support, *Moore’s Federal Practice* observes that “[r]ecent developments have cast some doubt on the axioms that removal is strictly construed and that a presumption exists against removal.” 16 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 107.05, at 107-26 (3d ed. 2015); *see also* *Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202, 1207 (11th Cir. 2008) (also reading *Murphy Bros.* as possibly stepping away from the canon). I am not sure that *Murphy Bros.* should have such broad significance, but I do agree with the general sense that the Supreme Court has been deemphasizing the canon. The treatise goes on to say, accurately, that “[n]evertheless, federal courts continue to recite these axioms [i.e., of narrow construction].” MOORE ET AL., *supra*.

145. 545 U.S. 546 (2005). There is, obviously, some judgment being exercised in determining when the Court last seriously addressed the canon. Certainly, there have been plenty of cases concerning subject-matter jurisdiction

the participants believed the narrow-construction canon was alive and well. Tellingly, *both* of the courts of appeals under review in *Exxon Mobil* cited the narrow-construction rule (though one ultimately upheld jurisdiction and the other did not).<sup>146</sup> The parties opposing jurisdiction featured the narrow-construction canon in their briefing to the Supreme Court.<sup>147</sup> But the Supreme Court upheld jurisdiction in both cases and, more importantly for present purposes, did not cite the narrow-construction canon, even if only to find it outweighed by other factors. Instead, the Court said this about the governing interpretive rules:

We must not give jurisdictional statutes a more expansive interpretation than their text warrants, but it is just as important not to adopt an artificial construction that is narrower than what the text provides. No sound canon of interpretation requires Congress to speak with extraordinary clarity in order to modify the rules of federal jurisdiction within appropriate constitutional bounds. *Ordinary principles of statutory construction apply.*<sup>148</sup>

Now, we should not make too much of this statement; perhaps the Court was simply saying that clear statutory text should be obeyed, which is about the most ordinary interpretive principle there is. Nonetheless, given the canon's appearance in the briefing and in many prior cases, the Court's admonition to use "ordinary principles" of interpretation certainly seems like a step back from the narrow-construction canon.<sup>149</sup> Read liter-

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since 2005, including some in which the Court could be said to have given a strict reading against jurisdiction. *See, e.g.,* *Bowles v. Russell*, 551 U.S. 205, 209–14 (2007) (construing the period for filing an appeal as jurisdictional and not subject to equitable exceptions). But here we are considering reasoning more than outcomes; that is, we are asking whether the canon is a vital and acknowledged factor in the Court's justifications for its decisions.

146. The Court's opinion resolved two cases that had been consolidated. *See* *Rosario Ortega v. Star-Kist Foods, Inc.*, 370 F.3d 124, 142 (1st Cir. 2004) ("The Supreme Court . . . has repeatedly admonished that in light of the burgeoning federal caseload, diversity jurisdiction must be narrowly construed."), *rev'd sub nom. Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005); *Allapattah Servs., Inc. v. Exxon Corp.*, 362 F.3d 739, 757 (11th Cir. 2004) (Tjoflat, J., dissenting from denial of rehearing en banc) (urging the Supreme Court "to give guidance in applying the 'substantive' canons of statutory construction . . . includ[ing] the directive to construe jurisdictional grants narrowly" (citation omitted)).

147. Brief of Petitioner at 12, *Exxon Mobil*, 545 U.S. 546 (No. 04-70), 2004 WL 2812088; Brief for Respondent at 36, *Exxon Mobil*, 545 U.S. 546 (No. 04-79), 2005 WL 139840.

148. *Exxon Mobil*, 545 U.S. at 558 (emphasis added) (citation omitted).

149. *See* Debra Lyn Bassett, *Statutory Interpretation in the Context of Federal Jurisdiction*, 76 GEO. WASH. L. REV. 52, 86 (2007) ("Although some prior

ally, the passage above could be taken as an abrogation of the canon: use “ordinary principles,” with no thumb on the scales in either direction. The Supreme Court itself has not offered clarification, as it has not subsequently cited *Exxon Mobil* for any proposition related to the status of the canon. But the Court has not relied on the canon in the ensuing years, though certainly the Court could have used it in later cases if it wished.

Although I do not feel that it is possible to present solid numerical data on the prevalence of this canon in the lower courts during different time periods,<sup>150</sup> my sense is that the lower courts’ response to the canonical-methodological developments just described has been muted. To be sure, the passage quoted above has not gone totally unnoticed in the lower courts, for portions of it have been cited as support for jurisdiction propositions.<sup>151</sup> Nonetheless, the language does not seem to have significantly changed the lower courts’ understanding of the relevant ground rules. Perhaps the most serious post-*Exxon Mobil* engagement with the status of the narrow-construction rule came in *Palisades Collections L.L.C. v. Shorts*,<sup>152</sup> in which a panel of the Fourth Circuit divided in its interpretation of the jurisdictional provisions of the Class Action Fairness Act (CAFA), with both the majority and dissent citing *Exxon Mobil* and discussing the canon. The majority cited language from *Exxon Mobil* to the effect that jurisdictional statutes should not be given an artificially narrow construction,<sup>153</sup> but then—showing the canon’s enduring grip on judicial

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Court decisions had expressed favor for interpreting jurisdictional statutes narrowly, *Allapattah* opined that jurisdictional statutes should presumptively be read neither broadly nor narrowly.” (footnotes omitted)).

150. I have attempted a few search strategies, but I have found it difficult to find terms that are capacious enough to capture most invocations while at the same time not allowing in too many false positives. Therefore, the approach in this section is more impressionistic than quantitative.

151. *E.g.*, *Hood v. JPMorgan Chase & Co.*, 958 F. Supp. 2d 681, 697 (S.D. Miss. 2013) (“The Court additionally finds that [a restriction on jurisdiction] cannot be read into the statute as urged by the State.” (citing *Exxon Mobil*, 545 U.S. at 558)), *rev’d*, 737 F.3d 78 (5th Cir. 2013); *United States v. Stein*, No. 05-CRIM.-0888(LAK), 2007 WL 91350, at \*15 n.111 (S.D.N.Y. Jan. 8, 2007) (“The Supreme Court recently confirmed that Congress need not speak explicitly to authorize supplemental jurisdiction over additional parties.” (citing *Exxon Mobil*, 545 U.S. at 557–59)). The Fifth Circuit decision reversing the district court in *Hood* did not cite *Exxon Mobil*; on the contrary, it cited narrow-construction language several times. 737 F.3d at 84, 89, 92.

152. 552 F.3d 327 (4th Cir. 2008).

153. *Id.* at 330.

habits—the opinion nonetheless went on to quote and embrace statements of the traditional narrow-construction canon en route to denying federal jurisdiction.<sup>154</sup> Judge Niemeyer’s dissent, in contrast, acknowledged the narrow-construction canon but then quoted *Exxon Mobil* to the effect that “the canon cannot defeat the plain meaning of the statutory language.”<sup>155</sup> The dissent added that the narrow-construction canon was premised on federalism, but that CAFA had already significantly expanded federal jurisdiction with the aim of altering the federal-state balance.<sup>156</sup> All in all, my sense is that the dissent regarded *Exxon Mobil* as demoting the narrow-construction canon in importance, but not abolishing it, and that the majority did not regard *Exxon Mobil* as changing the canonical landscape in any meaningful way.

*Palisades* is an example of a court seriously engaging with the canon’s status, but that makes it unusual. Far more cases kept mentioning the narrow-construction canon without taking any notice of *Exxon Mobil* or other developments at all.<sup>157</sup> In one telling (though admittedly atypical) example, a district court referred to the narrow-construction canon and cited as support, perhaps unwittingly, a dissent from the Eleventh Circuit’s denial of rehearing in *Exxon Mobil*<sup>158</sup>—without mentioning the Supreme Court’s subsequent decision, which, as we have been discussing, most certainly did *not* invoke the canon and, arguably, disapproved it.

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154. *Id.* at 332–34, 336 & n.5.

155. *Id.* at 341 (Niemeyer, J., dissenting).

156. *Id.* at 341–42.

157. *See, e.g.*, *Grosvenor v. Qwest Corp.*, 733 F.3d 990, 995 (10th Cir. 2013); *Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994, 998 (9th Cir. 2007); *In re Olympic Mills Corp.*, 477 F.3d 1, 6 (1st Cir. 2007); *Arroyo v. FDIC*, 961 F. Supp. 2d 386, 390 (D.P.R. 2013); *Driskell v. Thompson*, 971 F. Supp. 2d 1050, 1059 (D. Colo. 2013); *Brown v. Berhndt*, 1:12-CV-00024-KGB, 2013 WL 1704877, at \*8 (E.D. Ark. Apr. 19, 2013); *Osuch v. Optima Mach. Corp.*, No. CIV 10-6101, 2011 WL 2708464, at \*2 (E.D. Pa. July 12, 2011); *Makro Capital of Am., Inc. v. UBS AG*, 436 F. Supp. 2d 1342, 1350 (S.D. Fla. 2006), *aff’d*, 543 F.3d 1254 (11th Cir. 2008). The canon remains particularly potent and oft-cited when it comes to removal jurisdiction. *See, e.g.*, *Barbour v. Int’l Union*, 640 F.3d 599, 605, 614 (4th Cir. 2011); *Schur v. L.A. Weight Loss Ctrs., Inc.*, 577 F.3d 752, 758 (7th Cir. 2009); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1328 (11th Cir. 2006); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1094–95 (10th Cir. 2005).

158. *RES-GA Four L.L.C. v. Avalon Builders of GA L.L.C.*, No. 5:10-CV-463 (MTT), 2012 WL 13544, at \*5 (M.D. Ga. Jan. 4, 2012).

Why didn't *Exxon Mobil* or other recent developments make a bigger splash? One important factor is that the narrow-construction canon has a long history of frequent citation in the lower courts, so it would be surprising to see many lower courts change their priors based on language in a Supreme Court opinion that was only ambiguously repudiatory. An emphatic, self-conscious disavowal of the sort we saw in *Mayo Foundation*<sup>159</sup> would produce a quicker and more complete effect, or so one would suspect.

We may now have the chance to find out. In December 2014, in *Dart Cherokee Basin Operating Company, L.L.C. v. Owens*,<sup>160</sup> the Supreme Court expressly repudiated the narrow-construction canon insofar as it might apply in the context of cases involving CAFA. The case concerned the required contents for a notice of removal to federal court, and it was abundantly clear that the lower court had erred by imposing an excessive evidentiary burden on the party seeking to invoke federal jurisdiction.<sup>161</sup> Given the obvious nature of the lower court's misunderstanding of removal requirements, it was perhaps unnecessary for the Court to address the canon at all, but it did so anyway:

[The lower court] relied, in part, on a purported "presumption" against removal. We need not here decide whether such a presumption is proper in mine-run diversity cases. It suffices to point out that no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court.<sup>162</sup>

For good measure, the Court then cited a portion of CAFA's legislative history stating that the statute's "provisions should be read broadly,"<sup>163</sup> i.e., contrary to the traditional canon. *Dart Cherokee* must count as a clear repudiation of the canon in the CAFA context. Moreover, it is surprising, in light of long-standing principles, that the Court would refer to the presump-

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159. See *supra* Part III (discussing the lower courts' reception of *Mayo Foundation*).

160. 135 S. Ct. 547 (2014).

161. The case was decided five to four, but the dissenters did not endorse the lower court's understanding of the removal statute on the merits but rather disputed whether the Supreme Court could reach the issue.

162. *Id.* at 554 (citation omitted).

163. S. REP. NO. 109-14, at 43 (2005), quoted in *Dart Cherokee*, 135 S. Ct. at 554.

tion against removal in its more general form as merely a “purported” rule.

If one digs a little deeper, one finds that *Dart Cherokee* holds other surprises too. It turns out that the traditional narrow-construction canon had become the target of an interest-group campaign. An amicus brief filed by the Washington Legal Foundation and other pro-business groups in *Dart Cherokee* took as its main purpose the aim of “urg[ing] the Court to strongly disavow the existence of a presumption against removability.”<sup>164</sup> An op-ed continued the campaign, stating that the case “provides the Court an ideal opportunity to end the rule of construction whereby federal courts continue to narrowly construe federal removal statutes against the party seeking removal.”<sup>165</sup> That the canon should come under attack becomes comprehensible when one considers that matters of jurisdiction and forum selection often have a political valence<sup>166</sup>—and that today civil defendants generally find the federal courts a friendlier forum than (some) state courts.<sup>167</sup>

Another interesting feature of the attack on the narrow-construction canon is the way it shows that the Supreme Court is not the only player in the interpretive game. Litigants and other interested parties, especially repeat players, will pursue rulings addressing broadly applicable interpretive rules, not just individual case outcomes. Attorneys (and courts too, for that matter) can be “canon entrepreneurs” rather than just passive readers of the Supreme Court’s sometimes-ambiguous instructions.

What does the future hold for the traditional narrow-construction canon?<sup>168</sup> As the Supreme Court recognized in

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164. Brief of Washington Legal Found., Int’l Ass’n of Def. Counsel, and Fed’n of Def. & Corp. Counsel as Amici Curiae in Support of Petitioners at 24, *Dart Cherokee*, 135 S. Ct. 546 (No. 13-719), 2014 WL 2361914; see also *id.* at 2 (“Amici are concerned that unless the Court uses this case not only to overturn the decision below but also to explain that the lower courts’ recognition of a presumption against removal is unfounded, many federal courts will continue to adhere to such a presumption.”).

165. Rich Samp, *High Court Should Not “DIG” Dart Cherokee Basin Case*, FORBES (Oct. 21, 2014), <http://www.forbes.com/sites/wlf/2014/10/21/high-court-should-not-dig-dart-cherokee-basin-case>.

166. See Judith Resnik, *Trial As Error, Jurisdiction As Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 979 (2000).

167. See Patrick J. Borchers, *Punitive Damages, Forum Shopping, and the Conflict of Laws*, 70 LA. L. REV. 529, 532–33 (2010).

168. I explore this issue in greater depth in future work. Aaron-Andrew P.

*Dart Cherokee*, CAFA is a strong congressional statement in favor of expanding federal jurisdiction, a purpose at odds with the state-protective rationale that has traditionally supported the narrow-construction canon.<sup>169</sup> Indeed, some CAFA cases are employing a canon according to which CAFA's general jurisdictional grant should be read broadly and the exceptions to that grant should be construed narrowly.<sup>170</sup> CAFA is probably the most significant recent jurisdictional statute, and it will continue to generate interpretive questions into the foreseeable future, so its pro-federal thrust augurs poorly for the health of the traditional narrow-construction canon.

Neither the Supreme Court's ambiguous rejection of the narrow-construction canon in *Exxon Mobil* nor the Court's general neglect of the canon in the years before and after made much of an impact, but the early evidence shows that *Dart Cherokee* is having a greater effect on the lower courts, though perhaps not a revolutionary one.<sup>171</sup> Some courts very quickly picked up on *Dart Cherokee*'s abrogation of the canon in the CAFA context.<sup>172</sup> Some other decisions, however, have continued to cite the strict-construction canon even in CAFA cases, without acknowledging *Dart Cherokee*.<sup>173</sup> That some courts might not immediately assimilate a new decision is not surprising, though it does stand in contrast to the reception of *Mayo Foundation*'s change in tax law, which was remarkably immediate.<sup>174</sup> Perhaps more surprising than the cases that overlook *Dart Cherokee* altogether are the CAFA decisions that show awareness of *Dart Cherokee* by citing it for some proposition

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Bruhl, Retiring the Jurisdictional Canon (2015) (unpublished manuscript) (on file with author).

169. See *supra* note 163 and accompanying text.

170. E.g., *N.J. Carpenters Vacation Fund v. HarborView Mortg. Loan Trust* 2006-4, 581 F. Supp. 2d 581, 584–85, 588 (S.D.N.Y. 2008).

171. The Court's statement repudiating the canon was selected as a headnote by West's attorneys, which should promote its transmission. The Court's statement about the canon in *Exxon Mobil*, by contrast, was not so selected.

172. E.g., *Dudley v. Eli Lilly & Co.*, 778 F.3d 909, 912 (11th Cir. 2014); *Yocupicio v. PAE Group, L.L.C.*, No. CV 14-8958-GW, 2014 WL 7405445, at \*2 (C.D. Cal. Dec. 29, 2014), *rev'd*, 795 F.3d 1057 (9th Cir. 2015).

173. E.g., *Page v. Luxottica Retail N. Am., Inc.*, No. 2:13-CV-01333-MCE-KJN, 2015 WL 966201, at \*2 (E.D. Cal. Mar. 4, 2015); *Levanoff v. SoCal Wings L.L.C.*, No. SACV 14-01861-CJC, 2015 WL 248338, at \*2 (C.D. Cal. Jan. 16, 2015); *Robinson v. Avanquest N. Am. Inc.*, No. 14 C 8015, 2015 WL 196343, at \*2 (N.D. Ill. Jan. 13, 2015).

174. See *supra* notes 72–74 and accompanying text.



but that nonetheless *still* recite the traditional narrow-construction canon.<sup>175</sup> These courts apparently read *Dart Cherokee* for its main holding—that is, clarifying a rule about the necessary contents of a notice of removal—but fail to notice that it changes the interpretive regime. Inertia and habit are powerful, as we have now seen in several contexts.

#### B. RUNAWAY CANONS

We have just examined situations in which the lower courts were slow to react to changes in the Supreme Court's interpretive regime. Yet the opposite scenario—overreaction instead of underreaction—is possible too. With minimal prompting from the Supreme Court, a canon can take off in the lower courts. Once the Court puts a canon into the interpretive toolkit, even accidentally, it can take on a life of its own. Instead of zombies, some canons are, in this respect, like pathogens that escape from the lab. After entering the wild, their patterns of use need not be very closely linked to way the Supreme Court uses them. This Section discusses two examples, the first involving one of the most famous interpretive rules and the second involving a decidedly less prominent canon.

The first example of canonical overreaction is the doctrine of *Chevron* deference, which famously requires that courts follow reasonable agency interpretations of ambiguous statutes, even where the court would have reached a different interpretation on its own.<sup>176</sup> The Supreme Court's 1984 decision in *Chevron* was not, at first, the historic emblem it has become. As Thomas Merrill's history of the *Chevron* decision explains, the opinion was not regarded as a landmark precedent by its author or by the other justices who joined it.<sup>177</sup> Instead, Justice Stevens described his opinion merely as restating existing law.<sup>178</sup> The Court did not treat *Chevron* as a major precedent in

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175. *E.g.*, *Kidner v. P.F. Chang's China Bistro, Inc.*, No. CV 15-287 JGB KKx, 2015 WL 2453523, at \*2 (C.D. Cal. May 21, 2015); *Leon v. Gordon Trucking, Inc.*, 76 F. Supp. 1055, 1072 n.40 (C.D. Cal. 2014); *Baker v. PDC Energy, Inc.*, No. 14-CV-02537-RM, 2014 WL 7445626, at \*2 (D. Colo. Dec. 30, 2014).

176. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

177. Thomas W. Merrill, *The Story of Chevron USA Inc. v. Natural Resources Defense Council, Inc.: Sometimes Great Cases Are Made Not Born*, in *STATUTORY INTERPRETATION STORIES* 164, 165, 183, 185–86 (William N. Eskridge, Jr. et al. eds., 2011).

178. *Id.* at 186.

the following term's cases, and indeed the Court used *Chevron* only inconsistently for years.<sup>179</sup> The earliest discussions in the lower courts did not regard the decision as revolutionary either. Notably, then-Judge Stephen Breyer of the First Circuit wrote two decisions citing *Chevron* in the early months, and both of them treated *Chevron* as no big deal.<sup>180</sup>

How then did this little case become great? By “accident,” according to Merrill.<sup>181</sup> And, more interestingly, as a more recent study by Gary Lawson and Stephen Kam further details,<sup>182</sup> not through the Supreme Court's own doing. Rather, certain D.C. Circuit judges picked up on the framework and began giving it a broad reading as a generally applicable precedent on the standard of review.<sup>183</sup> The emerging *Chevron* doctrine, taking on a life beyond the humble *Chevron* case, then migrated back to the Supreme Court via former D.C. Circuit judges like Antonin Scalia and incoming Supreme Court clerks schooled in *Chevron* during previous clerkships on the D.C. Circuit.<sup>184</sup> Only then did the decision catch on in the Supreme Court—and not without some resistance from its author<sup>185</sup>—but by that time the contagion had already taken hold in the lower courts. Even today, *Chevron* probably plays a more significant role in the lower courts than in the Supreme Court.<sup>186</sup>

The story of *Chevron* presents an interesting dynamic in which a change was driven from below and later embraced (if

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179. *Id.* at 186–87; see also Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 980–84 (1992) (measuring invocations of *Chevron* from its birth through the 1990 term).

180. Here I draw on Gary Lawson and Stephen Kam's recent article on *Chevron*'s reception in the lower courts. See Gary Lawson & Stephen Kam, *Making Law out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1, 33–38 (2013).

181. Merrill, *supra* note 177, at 193.

182. Lawson & Kam, *supra* note 180.

183. See *id.* at 39–59; Merrill, *supra* note 177, at 189–91. Judge Patricia Wald was perhaps the most crucial early adopter. See Merrill, *supra* note 177, at 190. A second factor that promoted *Chevron*'s emergence, according to Merrill, is that executive branch lawyers realized the decision's pro-government potential and pushed it on the courts in their briefing. See *id.* at 191–92.

184. Merrill, *supra* note 177, at 187–88.

185. Compare *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987) (Stevens, J.) (calling the question before the Court “a pure question of statutory construction for the courts to decide”), with *id.* at 455 (Scalia, J., concurring) (“In my view, the Court badly misinterprets *Chevron*.”).

186. See Aaron-Andrew P. Bruhl, *Hierarchically Variable Deference to Agency Interpretations*, 89 NOTRE DAME L. REV. 727, 758–60 (2013).

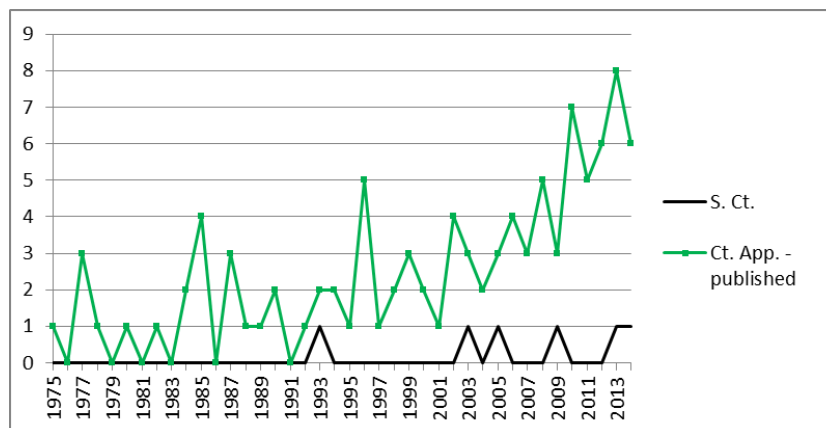
only incompletely) by the Supreme Court. A second example of an overshooting canon involves less back-and-forth interaction and lower theoretical stakes but similarly illustrates a situation in which a canon takes off in the lower courts with slight and unpremeditated encouragement from the Supreme Court. Recall, from Part II, that the prevalence of several established linguistic canons in the lower courts moved roughly in tandem with trends on the Supreme Court. But consider the behavior of the least cited of those canons: the rule of the last antecedent, which provides that a qualifying phrase modifies only the item immediately preceding it.<sup>187</sup> The rule is old but not especially often invoked: during the twentieth century the Supreme Court could go decades at a time between mentions of it. Then, since about 2000, the Court has been mentioning it every few years, though never more than once per year. The last decade has also seen the canon practically explode in popularity in the lower courts, its prevalence increasing severalfold and outpacing the overall growth in use of linguistic canons. Now, to be sure, talk of an explosion should not be taken too far when the raw numbers are small. But still, it is a rather surprising development. The Supreme Court sneezed, and, as Figure 5 illustrates, the lower courts seem to be catching a cold. And the virus is, of all things, an obscure and weak grammatical canon.<sup>188</sup>

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187. See *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (describing the rule of the last antecedent).

188. See Jeremy L. Ross, *A Rule of Last Resort: A History of the Doctrine of the Last Antecedent in the United States Supreme Court*, 39 SW. L. REV. 325, 336 (2009) (“[A]pplication of the [rule of the last antecedent] is flexible, and . . . it is typically applied only where there is no contraindication from [other sources].”).

**Figure 5: Rule of the Last Antecedent, Annual Citations: 1975–2014**<sup>189</sup>



As always, one needs to be cautious about making causal claims about the lower courts' citation patterns, but here there is at least some basis for thinking that the Supreme Court is responsible for the growth in citations and, moreover, that the influence can be traced to a particular decision. The Supreme Court's 2003 opinion in *Barnhart v. Thomas*, authored by Justice Scalia, engaged in an unusually extended discussion of the rule and included a memorable commonsensical illustration involving a teenager's misbehavior.<sup>190</sup> Of the fifty-two reported court of appeals cases invoking the rule of the last antecedent in the decade since *Barnhart*, a rather impressive thirty-six of them (sixty-nine percent) cited that case as support for the ancient canon.<sup>191</sup> None of the Supreme Court's other recent uses

189. The search results shown here are a subset of the aggregate figures described above. See *supra* Part II. The WestlawNext search was: adv: OP("last antecedent" /p (statut! or act or legislat! or congress! or "U.S.C.")), with the results then disaggregated by year and limited to published opinions.

190. The Court gave the example of parents warning their teenage son that he should not "throw a party or engage in any other activity that damages the house." *Barnhart*, 540 U.S. at 27. Under the rule of the last antecedent, the qualifying phrase about damage to the house modifies only "other activity," such that parties are flatly banned regardless of damage. *Id.* at 27–28.

191. *Barnhart* was decided on November 12, 2003. The figures in the text were generated by (1) running a search in the court of appeals database for: adv: OP("last antecedent" /p (statut! or act or legislat! or congress! or "U.S.C.")) & DA(aft 11-12-2003 and bef 2015); (2) limiting to published cases; (3) then using the "search within results" feature to search for "*Barnhart* /3 *Thomas*." As for what explains the canon's increased prominence in Supreme

of the canon has been cited as an authority on the canon nearly as much.<sup>192</sup> In particular, although the Supreme Court cited the rule of the last antecedent (without following it) in its 1993 decision in *Nobelman v. American Savings Bank*,<sup>193</sup> that decision was cited in only four out of twenty-six (fifteen percent) of the uses of the last-antecedent canon in reported decisions of the courts of appeals in the decade between *Nobelman* and *Barnhart*.<sup>194</sup>

It is understandable that canons might linger on in the lower courts without much recent support from the Supreme Court, a phenomenon we observed above in Part V.A. Precedents that have not been overruled remain citable indefinitely, and one should expect that judges, like everyone else, are creatures of habit. Established canons therefore have inertia.

But why, then, do some canons take off with so little encouragement? It is hard to offer confident explanations given the few samples available and the many variables potentially at work. Nonetheless, there are some generalizable considerations that probably play some role. I will return to this topic in Part VII.A.3 below, but one such factor that is worth mentioning here is whether a canon satisfies the human (and thus judicial) desire to avoid effort—i.e., the desire for mechanisms and rules that reduce caseloads and ease the resolution of cases.<sup>195</sup> Effort aversion could explain some of *Chevron*'s runaway success in the lower courts, for it is generally easier to write an opinion affirming an agency view as reasonable than it is to reverse the agency.<sup>196</sup> Deference is, accordingly, an appealing

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Court opinions, Caleb Nelson floats the intriguing possibility that the canon's relatively prominent treatment in the leading Legislation casebook influenced the Court's future clerks. CALEB NELSON, STATUTORY INTERPRETATION 225–26 (2011).

192. The author of a recent study of the rule of the last antecedent has likewise noted an increase in the canon's prevalence in the lower courts and hypothesized that *Barnhart* is responsible. See Ross, *supra* note 188, at 332–34, 336–37.

193. 508 U.S. 324, 330–31 (1993).

194. To obtain these results, I ran the following search in the court of appeals database: adv: OP("last antecedent" /p (statut! or act or legislat! or congress! or "U.S.C.") & DA(aft 05-31-1993 & bef 11-13-2003). Then I limited results to published cases and searched within results for *Nobelman*.

195. See LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES 36–40 (2013) (discussing doctrines and practices that might serve judicial preferences for leisure).

196. See Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 90–93 (2011) (suggesting that

path of least resistance for busy judges who lack the luxury of the Supreme Court's discretionary docket. Another potentially generalizable consideration is that shifts in docket composition (such as would accompany the enactment of important new legislation) can increase the need for the substantive canons governing the growth area. But as for the recent popularity of the rule of the last antecedent, I cannot provide a very satisfying explanation apart from the above-described possibility that one particular Supreme Court decision increased the old canon's salience. If that is indeed what has happened, few observers would have seen it coming.

The following Part continues the discussion of factors that bear on a canon's rise, as we examine the birth and first steps of a new canon.

## VI. CANON CRYSTALLIZATION

In *Whitman v. American Trucking Associations*, which concerned the scope of the EPA's authority under the Clean Air Act, Justice Scalia joined a sensible principle of interpretation to an evocative metaphor and in so doing christened a new canon of interpretation. Congress, he wrote, "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."<sup>197</sup> The "no elephants in mouseholes" canon now occupies a secure, if limited, place in the interpretive landscape.<sup>198</sup>

To call the canon new is not to deny it had forerunners. Although Justice Scalia introduced the "no elephants in mouseholes" phrasing into the interpretive lexicon, he did not invent the sensible idea that one should hesitate before finding a serious change in the law or a major delegation of authority hiding in an unassuming, easy-to-miss provision. The relevant passage in his opinion cited two previous cases. One of those, *MCI Telecommunications Corp. v. AT&T*, concerned whether the FCC's authority to "modify" regulatory requirements permitted it to abolish the requirement that nondominant long-

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other circuits are more deferential than the D.C. Circuit partially because of a higher docket load).

197. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

198. See generally Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19 (2010) (discussing and evaluating the canon).

distance carriers file their rates.<sup>199</sup> There the Court had ruled, again through Justice Scalia, that the agency had no such authority to waive the requirement, reasoning that rate-filing was a crucial part of the regulatory scheme.<sup>200</sup> “It is highly unlikely,” the Court stated, “that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to ‘modify’ rate-filing requirements.”<sup>201</sup> The other prior case cited in *Whitman v. ATA* as the inspiration for the “no elephants in mouseholes” canon was *FDA v. Brown & Williamson Tobacco Corp.*, in which the Court rejected the FDA’s attempt to regulate tobacco as a drug.<sup>202</sup> Justice O’Connor’s opinion in that case ended by citing *MCI v. AT&T* and stating that the Court should hesitate before finding that Congress had delegated authority to an agency to regulate a matter of great “economic and political significance” through “cryptic” language.<sup>203</sup>

The advent and early history of the “no elephants in mouseholes” rule is instructive in a few ways.

To begin with, it illustrates the phenomenon of what we could call “canon crystallization,” the mechanism by which an interpretive notion or practice with many possible names comes to be called one particular thing. In this case in particular, the name is a memorable metaphor about elephants in mouseholes, which one would expect to aid the canon’s propagation. That capacity to communicate, to stick in the mind and rise quickly to the lips in the future, is, after all, an aspect of metaphor’s genius.<sup>204</sup>

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199. *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 220, 224–25 (1994).

200. *Id.* at 229–31.

201. *Id.* at 231.

202. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126 (2000).

203. *Id.* at 160.

204. Cf. JOSÉ ORTEGA Y GASSET, *THE DEHUMANIZATION OF ART AND OTHER ESSAYS ON ART, CULTURE, AND LITERATURE* 33 (1968) (“The metaphor is perhaps one of man’s most fruitful potentialities. Its efficacy verges on magic, and it seems a tool for creation which God forgot inside one of His creatures when He made him.”). The Scalia and Garner treatise gives names to some interpretive moves that heretofore have not had a commonly used label, but most of these attempts at crystallization are far less memorable than “no elephants in mouseholes.” See, e.g., SCALIA & GARNER, *supra* note 54, at xiii (referring to the “series-qualifier canon” and the “scope-of-subparts canon”).

To measure the effect of crystallization, and of the elephant metaphor in particular, one can compare citations of the “no elephants in mouseholes” canon to other ways of expressing the same basic idea through other language. This can be done in a few ways. As one approach, one can measure how often lower courts have cited *Whitman v. ATA* for the elephant canon as compared to the same opinion’s nearby non-metaphorical language about “vague terms or ancillary provisions.”<sup>205</sup> The following table provides data on lower-court citations of the elephant language and the non-metaphorical language; because a subsequent case can cite both phrasings, the table also shows how many cases cite *only* one phrasing without the other.

**Table 2: Lower-Court Citations to *Whitman v. ATA*’s Elephant Canon Versus Non-Metaphorical Language**<sup>206</sup>

Elephant language:	66 citations	Non-metaphorical language:	29 citations
Elephant language without non-metaphorical language:	36 citations	Non-metaphorical language without elephant language:	0 citations

The “no elephants in mouseholes” canon has been cited more than twice as often as the non-metaphorical language, but the stunning fact is that the non-metaphorical language from *Whitman v. ATA* has not been cited by itself in any case in the lower federal courts.<sup>207</sup>

Another approach is to compare citations of the elephant language to citations of alternative formulations of the idea

205. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

206. The following searches were run in the WestlawNext ALLFEDS database, with Supreme Court results then excluded:

adv: whitman /p (elephant /s mousehole);

adv: whitman /p (“vague terms” or “ancillary provisions”);

adv: whitman /p (elephant /s mousehole) BUT NOT (“vague terms” or “ancillary provisions”);

adv:(“vague terms” or “ancillary provisions”) /p whitman BUT NOT elephant.

The searches were run on January 2, 2015. I searched the term “Whitman” rather than using KeyCite because the latter strategy returned false positives due to a headnote that refers to “ancillary provisions” in a different context.

207. The non-metaphorical language from *Whitman v. ATA* has been cited twice without the elephant language by the Supreme Court itself. *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015); *Bd. of Trustees of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 131 S. Ct. 2188, 2199 (2011).



that appear in other sources. The alternative sources obviously include the passages in *MCI v. AT&T* and *FDA v. Brown & Williamson* that *Whitman v. ATA* cited as the inspiration for the elephant canon. Another alternative formulation is the “major questions doctrine,” a phrasing that some academic commentators have used to express the idea present in these cases.<sup>208</sup> Here again, the elephant language has proven much more popular than these competitors, at least as judged by citations in lower courts.<sup>209</sup>

In addition, the early history of the “no elephants in mouseholes” rule is instructive because it points to another factor, besides verbal crystallization, that plays a role in a canon’s propagation: the rhetorical choices of attorneys. The elephant canon took a while to catch on in the lower courts, but its use has grown notably over time. The canon’s ascent has arguably been fueled more by attorneys than by the Supreme Court. The first citation of the canon in the federal courts of appeals and the first citation in the federal district courts, both of which occurred about two-and-a-half years after *Whitman v. ATA*, came in cases in which the attorneys heavily relied on the canon, going so far as to mention it by name in headings in the briefs.<sup>210</sup> In the first five years of the canon’s life, it was cited in six cases in the federal courts of appeals, and at least five of them had briefs that cited the canon. That is a higher rate of correspond-

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208. *E.g.*, Abigail R. Moncrieff, *Reincarnating the “Major Questions” Exception to Chevron Deference as a Doctrine of Noninterference (or Why Massachusetts v. EPA Got It Wrong)*, 60 ADMIN. L. REV. 593 (2008); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 231–47 (2006). The “major questions” phrasing may have originated with then-Judge Breyer. *See* Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (“Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration.”), *quoted in FDA v. Brown & Williamson*, 529 U.S. at 159.

209. A list of the results of searches for various formulations is on file with the author. Note that the various phrasings of the idea are not precisely parallel in their potential application. The elephant canon got its start in administrative law, and that remains the central application, but it can apply to any situation in which a major decision is said to be lurking in a minor provision, thus generating more opportunities for use than, for example, the “major questions” doctrine.

210. Appellants’ Opening Brief at 33, *NISH v. Rumsfeld*, 348 F.3d 1263 (10th Cir. 2003) (No. 02-2089), 2002 WL 32507885; Memorandum of the Am. Bar Ass’n in Opposition to the FTC’s Motion to Dismiss the Complaint at 10, *Am. Bar Ass’n v. FTC*, 276 F. Supp. 2d 110 (D.D.C. 2003) (No. 1:02-cv-01883-RB), 2003 WL 24207845.

ence between briefs and cases than one finds in most later years,<sup>211</sup> perhaps because courts no longer need as much prompting once a canon becomes more popular. The canon's rise, such as it is, has *not* been encouraged much by the Supreme Court, for the Court has employed the canon only sporadically. After the canon's first appearance in *Whitman v. ATA*, it did not appear again in the *U.S. Reports* at all until five years later, in 2006.<sup>212</sup> Since then it has appeared in the Supreme Court several times but only once more in a majority opinion,<sup>213</sup> for a grand total of three appearances in majority opinions so far (versus seven appearances in dissents).

These findings are no more than suggestive, but, together with other findings reported earlier,<sup>214</sup> they illustrate the point that attorneys and other intermediaries play a role in canon development just as they play a role in the development of the law more broadly.

## VII. SUMMARY AND IMPLICATIONS

The survey above obviously does not include every arguable instance of the phenomenon of canonical change, nor does it seem possible that one could deem any sample "representative" of the universe of arguable interpretive shifts. There are many variables that can plausibly affect the speed and accuracy of communications through the judicial system, and it is difficult to isolate them for analysis. Nonetheless, having now reviewed some of the dynamics and possibilities revealed by our examples, we are in a position to provide some structure to the observations and offer some tentative generalizations. In particular, we can now offer a preliminary answer to the question of what factors affect how the lower courts react to arguable changes in the interpretive regime. We also have some new information with which to assess the value of implementing (as

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211. Results list on file with author. In trying to find correspondences between canon citations in opinions and in briefs, one should keep in mind that Westlaw's databases have incomplete coverage of briefs, especially in trial courts; not finding a brief that corresponds to a case citation does not necessarily mean that no such brief existed.

212. *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006).

213. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 116 (2008).

214. See *supra* text accompanying notes 86–88 (discussing the role of government attorneys in bringing *Mayo Foundation* to the attention of lower courts) and 164–166 (discussing the campaign against the subject-matter jurisdiction canon).

some theorists would have us do) a more rigorous system of methodological precedent.

#### A. FACTORS BEARING ON LOWER-COURT RESPONSIVENESS

The factors that may influence the speed and accuracy with which changes in the interpretive regime spread through the judicial system can be divided into several groups: factors stemming from the nature of particular canons, factors related to the type of change at issue, factors deriving from the characteristics of the lower courts, and factors involving the broader institutional context.

##### 1. Different Kinds of Canons

The canons are typically divided into several broad categories, such as textual canons, substantive policy canons, and canons about the use of extrinsic sources (notably legislative history and agency interpretations), with each category then being further divided into subcategories.<sup>215</sup> Some of the discussion above supports certain category-based generalizations. We saw, for example, that many textual canons possess features (such as long pedigrees and intuitive rooting) that make their meanings resistant to fine-tuning.<sup>216</sup> Other categories of canons tend to differ in those respects, with the clearest examples being canons related to *Chevron*.<sup>217</sup>

Nonetheless, making generalizations based on which of the taxonomical categories a canon falls into is not the only way to proceed—and it probably is not the most illuminating way to proceed. Any given canon can change in many different respects: for example, it can gain or lose weight in the interpretive scales, it can become more or less frequently cited, and it can expand or contract in terms of the range of situations to which it applies. The factors that bear on the success of those different kinds of changes can cut across traditional categorizations. Therefore, it makes sense to turn our attention to other kinds of factors that affect the propagation of canonical change.

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215. See, e.g., ESKRIDGE ET AL., *supra* note 6 (categorizing canons in this way).

216. See *supra* text accompanying notes 96 and 106.

217. See *supra* text accompanying note 97.

## 2. Different Kinds of Changes

Other things being equal, one would expect that clear and consistent instructions are more likely to be understood and followed than unclear and inconsistent instructions. Much of the complaint about the Supreme Court's interpretive methodology, of course, is that it is complex and conflicting. But even when the Court does make up its own mind about some matter, certain *types* of instructions about canons are just harder to convey than others. To aid in generalizing about patterns, and in making predictions, let us separate out several different aspects of canons that might change. Although these distinctions admittedly blur at the boundaries, we can distinguish among a canon's existence, its scope, and its power, all of which can at least in principle be changed.

*Existence* refers to whether a purported canon is a legitimate interpretive rule. Examples of existential changes in the interpretive toolkit would include a decision abrogating a particular substantive canon<sup>218</sup> and the British judiciary's now-rescinded ban on using legislative history.<sup>219</sup>

*Scope* refers to the range of circumstances in which the canon applies. Examples are whether *Chevron* deference applies to Treasury regulations, whether the presumption against preemption applies to express-preemption clauses as well as implied-preemption disputes, and how serious a constitutional concern about an interpretation needs to be in order to trigger the canon requiring avoidance of interpretations that raise constitutional doubts.<sup>220</sup> The first two examples just given are dichotomous—the canon either applies or not to the specified circumstances—but the third example is more a matter of degree in that it concerns the precise point along the continuum of constitutional worries (ranging from fairly insubstantial concerns to grave doubt) at which the avoidance canon kicks in.

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218. See *supra* text accompanying notes 160–63 (discussing the Supreme Court's repudiation of the presumption against jurisdiction in cases under CAFA).

219. See James J. Brudney, *The Story of Pepper v. Hart: Examining Legislative History Across the Pond*, in STATUTORY INTERPRETATION STORIES, *supra* note 177, at 259.

220. As these examples may reveal, one can often recharacterize questions of scope as questions of existence (and vice versa). *Mayo Foundation*, for instance, could be treated as a ruling about the scope of *Chevron* deference or about the existence of a distinct *National Muffler* regime. See *supra* Part III.

*Power* is a more complicated concept that itself divides into several sub-characteristics: priority, weight, and frequency.

*Priority* concerns a canon's place in the hierarchy of interpretive sources. Depending on what a high-priority source shows, the court might not consider any lower-priority sources. The enacted text holds a high-priority status for many judges in that facially clear text can preclude any recourse to other considerations such as legislative history or substantive canons. Another example would be a rule that prioritizes the rule of lenity ahead of legislative history, such that legislative history cannot resolve textual ambiguity against the defendant.

*Weight* refers to the strength of a canon in determining outcomes. It could be that several potentially conflicting canons all apply in a given case. Some of them, other things equal, may simply be more powerful than others. Punctuation, for example, is said to be a particularly weak contributor, easily overcome by other considerations.<sup>221</sup> So too with the grammatical rule of the last antecedent, which carries some weight but frequently yields to other indications of meaning.<sup>222</sup>

*Frequency* refers to how often—usually, rarely, never?—a canon appears in judicial analysis when the canon is arguably applicable. An example is how often the courts consider practical consequences or legislative history.<sup>223</sup> Frequency differs in kind from other characteristics of canons; it cannot be discerned from what any particular opinion says about a canon, but rather one can only estimate it from how a court behaves over many cases.

As already acknowledged, the categories set forth above are not airtight, but one can nonetheless use them to offer some generalizations. In particular, we can say that certain canon characteristics are easier for the Supreme Court to modify, and for lower courts to perceive modifications in, than others. This is true whether or not formal rules of *stare decisis* apply.

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221. See, e.g., *Barrett v. Van Pelt*, 268 U.S. 85, 91 (1925) (holding that a comma was not persuasive evidence of legislative intent).

222. See *Ross*, *supra* note 188.

223. Obviously, other types of rules, such as rules of priority or existence, will affect how frequently a given source will appear. For example, if the governing methodology put legislative history off-limits except in narrow circumstances (e.g., in order to confirm that Congress did not intend a facially absurd meaning), then it would appear very infrequently.

To begin with matters that are relatively easy to communicate through the system, it seems that rules of existence—e.g., a hypothetical rule that legislative history is off limits as an interpretive resource—should be easy to convey, at least in theory. (In practice, the intuitions behind some canons would not be so easy to eradicate.<sup>224</sup>) Also on the easy side, other things being equal, are matters of scope that have a dichotomous nature (that is, the canon either applies or not to specified circumstances). *Mayo Foundation* involved this sort of change in the scope of the *Chevron* doctrine, and it was very successful (though it benefitted from other favorable circumstances too<sup>225</sup>). Likewise, one could predict that the lower courts would easily pick up on a decision clearly providing that express preemption clauses are not within the scope of the presumption against preemption.<sup>226</sup> But questions of scope that are non-dichotomous, like the matter of what (if anything) *Ali v. Federal Bureau of Prisons* said about the proper uses of *ejusdem generis*,<sup>227</sup> are harder to express and understand.

A canon's power is generally hard to control and communicate. This is especially true of the frequency dimension of power, because accurately measuring frequency requires looking at patterns of use over many cases rather than just finding some language in an opinion. Given the Supreme Court's rather small docket (around seventy-five cases per term, recently), most canons will appear quite rarely. A big year for a particular canon might amount to several cases employing it, and the next year the canon might disappear due to random fluctuations. Consider, for example, the familiar linguistic canon *noscitur a sociis*, which instructs that a word draws meaning from the words surrounding it.<sup>228</sup> It appeared in zero cases in the Supreme Court's 2008 Term, skyrocketed to three cases in the 2009 Term, and dropped back to one case in the 2010 Term,<sup>229</sup> but surely this evidence does not demonstrate a true

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224. See *supra* Part IV.

225. See *supra* Part III.

226. Cf. *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2189 (2014) (Scalia, J., concurring in part and concurring in the judgment) (disagreeing with a portion of the plurality opinion applying a presumption against preemption to an express preemption clause and noting the Court's "sporadic" use of the canon).

227. See *supra* Part IV.

228. POPKIN, *supra* note 36, at 201.

229. I described my protocol for searching for linguistic canons above. See *supra* notes 37–38.

change in the relative importance of the canon from one year to the next (though broad-based, sustained patterns over a longer period could be meaningful).

Adding to the difficulty of accurately perceiving signals about frequency, what the Supreme Court says about methodology might actually misrepresent the relative importance of various sources. Based on the official doctrines, one might suppose that the Supreme Court would use *Chevron* or some other deference regime in almost every case in which an agency interpretation is at issue—and yet the Supreme Court often does not even cite any deference regime in many cases in which it seemingly should, let alone follow the doctrines faithfully.<sup>230</sup> In this way *Chevron* is not as important on the Supreme Court as one might gather from the Court's official pronouncements. For an example representing the reverse—that is, a canon that is more important than the Court lets on—it may be that the Court considers policy consequences much more often than one might glean from listening to some of its more formalist and textualist members.<sup>231</sup> To the extent that the Court's pronouncements about the relative importance of a canon differ from its actual rate of use, the lower courts will probably attend more to the pronouncements. Most lower-court judges are too busy to read all of the Supreme Court's cases and recognize when words and deeds diverge (though perhaps academic studies can help enlighten them). Maybe the Court likes it that way: it can use its language to tell lower courts what to do, even if it doesn't do as it says in its own cases.

One particular frequency-related problem we have encountered concerns how to silence a canon. If the Supreme Court expressly abrogates or redefines a canon—as the Court recently did when it repudiated the narrow-construction-of-jurisdiction canon for cases arising under CAFA<sup>232</sup>—one expects that mes-

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230. See Eskridge & Baer, *supra* note 67, at 1090, 1117, 1120–21, 1124–25 (reporting that in a majority of cases involving an agency interpretation, the Court invoked no deference regime); 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, 1764–66 (2010) (arguing that the Justices treat deference regimes as flexible presumptions rather than as rigidly binding precedents).

231. See Jane S. Schacter, *Text or Consequences?*, 76 BROOK. L. REV. 1007, 1009, 1012–15 (2011) (explaining that consequentialist arguments are common even among textualists).

232. See *supra* text accompanying notes 160–63.

sage would be heard relatively clearly. But, as we saw with the examples of civil rights and earlier decisions on subject-matter jurisdiction, mere neglect is more difficult for lower courts to pick up on. Precedents in our system remain valid indefinitely unless and until overruled. And given the non-mandatory nature of the canons, failure to cite does not equal implicit overruling. At least from the perspective of lower courts, a canon remains in the toolkit even if the Supreme Court has not pulled it out for quite some time.

A canon's weight, too, is probably hard to adjust in any very precise way. Pronouncements about a canon's weight are in theory easy to state, but it is unclear what exactly they mean in practical terms. It is hard to imagine that a directive to give a certain source or presumption "great weight" versus "significant weight" could have a very precise real-world impact. (Likewise, it is hard for the researcher to study canon weight, as distinguished from either citation rates or verbal formulations of canon meaning.) Further, although dissenting opinions and academic commentators have criticized the Court for its occasional practice of elevating presumptions into clear-statement rules or even into "super-strong" clear-statement rules,<sup>233</sup> I suspect that such distinctions, though not totally lost on the lower courts, would matter less in practice than they do in theory.

The aspect of power that is probably easiest to communicate (again, other things being equal) is priority. An order of operations is achievable, even if the precise force of each operator is hard to gauge or control. This may well explain the appeal of tiered interpretive frameworks such as the "modified textualism" described in Gluck's study of several state courts.<sup>234</sup> In this three-level interpretive approach, the first step is limited to textual analysis, including textual structure and textual canons.<sup>235</sup> If the statute is deemed ambiguous, the court then moves on to the second step, at which legislative history is admissible.<sup>236</sup> If that still does not resolve the interpretive question, the court then turns to substantive canons and

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233. See, e.g., Eskridge & Frickey, *supra* note 31, at 615–17 (discussing the evolution of the rule against extraterritorial application of statutes).

234. See Gluck, *supra* note 4.

235. See *id.* at 1758, 1829–32.

236. See *id.* at 1835–36, 1839.



default rules.<sup>237</sup> According to Gluck's research, states that have found the most success in establishing binding frameworks have often done so by using such tiered approaches, with the most notable example being the framework employed for more than a decade in Oregon.<sup>238</sup> To be clear, one should not overstate the success of Oregon's tiered model. The first step's purported ban on considering legislative history in the absence of ambiguity was abandoned several years ago, ostensibly in response to the legislature's disagreement with it.<sup>239</sup> And even while the regime was in effect, some observers of the Oregon experiment doubted that the facial rigidity of the framework contributed to actual consistency or simplicity in decision making, in part because the analysis at the first step often involved a *mélange* of un-ordered and potentially conflicting presumptions and inferences about likely meaning.<sup>240</sup> Still, even a limited and temporary success shows that binding frameworks of the order-of-operations sort are at least relatively feasible.

### 3. Features of the Lower Courts

The lower courts' receptivity to changes in the interpretive landscape is another factor bearing on the propagation of canons through the system. Their receptivity to changes likely depends, in turn, on several features, including their own interpretive preferences and needs.

As for preferences, lower-court judges have motivations beyond just being faithful agents of the Supreme Court.<sup>241</sup> Obvious sources of potentially contrary motivations are a judge's own jurisprudential approach and political ideology. Such commitments can affect a judge's views on a wide range of interpretive issues, including the role of legislative intent, the

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237. See *id.* at 1830–31, 1839–40.

238. *Id.* at 1775–85, 1855–58; cf. Jack L. Landau, *Oregon As a Laboratory of Statutory Interpretation*, 47 WILLAMETTE L. REV. 563, 566–73 (2011) (concluding that the Oregon framework brought more order to statutory interpretation, though it also suffered from several deficiencies).

239. See *State v. Gaines*, 206 P.3d 1042, 1046–51 (Or. 2009).

240. See Steven J. Johansen, *What Does Ambiguous Mean? Making Sense of Statutory Analysis in Oregon*, 34 WILLAMETTE L. REV. 219, 220, 251 (1998); Robert M. Wilsey, Comment, *Paltry, General & Eclectic: Why the Oregon Supreme Court Should Scrap PGE v. Bureau of Labor & Industries*, 44 WILLAMETTE L. REV. 615, 618–19, 625–28, 664–65 (2008).

241. See EPSTEIN, LANDES & POSNER, *supra* note 195, at 25–50 (setting forth an approach to judicial behavior according to which judges are self-interested employees with multiple goals).

degree of deference agencies should enjoy, and the value of substantive canons that favor particular groups or interests (civil-rights plaintiffs, those seeking exemptions from tax laws, etc.).

Another important type of judicial self-interest, probably less obvious but potentially very important in the lower courts, is the desire for mechanisms and rules that reduce caseloads and ease the resolution of cases.<sup>242</sup> As a general matter, we can expect that lower courts will be especially reluctant to embrace new doctrines that increase their workload, such as new tests that involve complex, multi-factored analyses, and that they will be especially likely to welcome new doctrines that provide for quick and simple decision making.<sup>243</sup> The judicial preference for leisure might have some important effects when it comes to statutory interpretation. It could explain some of *Chevron's* success in the lower courts, for it is generally easier to write an opinion affirming an agency view as reasonable than it is to reverse the agency, and so deference is an appealing option for busy judges.<sup>244</sup> Moreover, quite apart from the decisional shortcuts any particular rule might afford, simply having a regular, established structure for analysis is a benefit all by itself for lower-court judges who deal, as compared to the Supreme Court Justices, with many interpretive problems that are complicated but lack serious attitudinal stakes. For similar reasons, the lower courts could be expected, other things being equal, to be amenable to rules restricting the consultation of legislative history. A preference for docket reduction might also explain why the lower courts responded only slowly to the Supreme Court's neglect and disparagement of the presumption against federal jurisdiction.<sup>245</sup>

As for the lower courts' need for various canons, a court's demand for a particular canon depends on the court's docket composition and role in the judicial system. For example, although the "no elephants in mouseholes" canon is catching on in the courts of appeals,<sup>246</sup> it will never be a high-frequency canon, especially in the district courts. Many suits challenging agency action skip the district courts and begin directly in the courts of

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242. See *id.* at 36–40 (discussing doctrines and practices that might serve judicial preferences for leisure).

243. See Tokson, *supra* note 27, at 912–16, 928–29.

244. See *supra* text accompanying note 196.

245. I consider this possibility in greater detail in Bruhl, *supra* note 168.

246. See *supra* Part VI.

appeals,<sup>247</sup> thus precluding many potential uses at the bottom of the hierarchy. (Jurisdictional considerations, aided by some path-dependence and silo effects, likely also explain why the D.C. Circuit accounts for a disproportionate share of the references to the elephant canon among the courts of appeals.<sup>248</sup>) Moreover, the elephant rule is a particularly complicated and specialized canon (versus, say, most linguistic canons, or even citations to legislative history). Applying it requires the court to measure the policy significance of a proposed interpretation (the potential elephant) and assess the role of a particular statutory provision (the mousehole) within a larger regulatory scheme. Such interpretive moves are more likely to be *necessary* as cases become more complex, and they are more likely to be *feasible* as resources become more abundant. Both of those things happen as one moves up the judicial hierarchy.<sup>249</sup> In sum, the propagation of a canon depends on the environmental conditions, and different courts provide more hospitable niches for different canons.

#### 4. Features of the Broader Institutional Context

The propagation of canons through the system also depends on features of the broader institutional context. This context notably includes attorneys and litigants. Courts do their own research, but attorneys' choices about which points to argue and emphasize, and litigants' choices about which cases to bring, play a role in driving legal developments in interpretive methodology just as they do elsewhere.<sup>250</sup> Although this Article presents only a few suggestive episodes, there is good reason to

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247. *E.g.*, 28 U.S.C. § 2342 (2012) (certain orders of the FCC and several other agencies); 42 U.S.C. § 7607(b) (2012) (various EPA actions under the Clean Air Act).

248. Through the end of 2014, the D.C. Circuit has accounted for eighteen of forty-nine citations in published decisions of the federal courts of appeals.

249. *See* Bruhl, *supra* note 22, at 470–79 (contrasting decision making in the Supreme Court and lower courts in these respects).

250. Valuable recent contributions in this vein include Parrillo's work on the role of New Deal agency lawyers and Washington law firms in pushing legislative history on the Supreme Court. Parrillo, *supra* note 30. Plagiarism detection software has recently been employed to examine the influence of legal briefs on the content of judicial opinions. *See* Pamela C. Corley, *The Supreme Court and Opinion Content: The Influence of Parties' Briefs*, 61 POL. RES. Q. 468 (2008); Adam Feldman, *A Brief Assessment of Supreme Court Opinion Language* (2015) (unpublished manuscript), <http://ssrn.com/abstract=2574451>.

believe that attorneys can play the role of canon entrepreneurs, helping lower courts catch on to new canons (as with *Mayo Foundation* and “no elephants in mouseholes”) or even waging a campaign against a venerable old canon (as with the canon of narrow construction of subject-matter jurisdiction). The structure of the bar could matter as well, as the existence of a highly specialized bar may have accelerated the system’s reception of *Mayo Foundation*’s change in the deference regime governing tax regulations. Additional research into the role of attorneys and other canon entrepreneurs would be fruitful.

The broader context includes other actors beyond attorneys and litigants. Congress can play a role in shaping the development of the interpretive regime by enacting new legislation that then creates a drag on certain canons (as with CAFA’s pressure on the traditional subject-matter jurisdiction canon<sup>251</sup>) or encourages the growth of others (as with the migration of the traditional civil-rights canon to the disability context in the wake of the enactment of the Americans with Disabilities Act and amendments thereto<sup>252</sup>). Congress can also promulgate its own interpretive canons and act as a competing source of canonical leadership in the lower courts, with the disability context again providing an example.<sup>253</sup>

Many other factors could potentially play a role in canon communication and would benefit from further investigation. The rise of legal blogs and instant electronic communication does not guarantee that developments will be transmitted to the lower courts more quickly today than they were in the past, but such new technologies and media must help. The proliferation of required Legislation and Regulation courses<sup>254</sup> could play a role in communicating the canons to the lower courts by educating their future law clerks in recent developments. Books about statutory interpretation such as the one recently authored by Scalia and Garner,<sup>255</sup> the decisions of Lexis and

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251. See *supra* text accompanying notes 160–70.

252. See *supra* text accompanying notes 131–36.

253. See *supra* text accompanying notes 133–36.

254. See Abbe R. Gluck, *The Ripple Effect of “Leg-Reg” on the Study of Legislation and Administrative Law in the Law School Curriculum*, 65 J. LEGAL ED. 121, 123, 126 (2015) (reporting survey results on recent growth of required courses in Legislation and Regulation).

255. SCALIA & GARNER, *supra* note 54. The book has already been cited many times by courts, as a quick search of electronic databases will reveal. The book’s popularity with courts is quite striking given that the book is

Westlaw attorneys about whether to turn opinion language into a headnote<sup>256</sup>—the universe of potential influences is vast and mostly uncharted. The broader point here is that information does not only flow directly from the Supreme Court down; the pathways are multiple and are mediated by other actors.

#### B. THE LIMITS OF METHODOLOGICAL *STARE DECISIS*

Finally, to return to one of the topics broached at the outset of this Article and touched upon at several points along the way, the findings here provide some valuable perspective on the push for greater methodological *stare decisis*, particularly in its vertical aspect (that is, the requirement that lower courts follow the rulings of higher courts). More specifically, the findings show some limits to the utility of the *stare decisis* project.

First, even in the absence of the ordinary doctrines of precedent, we have seen that the lower courts often at least roughly follow the Supreme Court's lead, both as regards broad trends (e.g., the textualist shift described in Part II) and more discrete shifts in interpretive rules (e.g., the *Mayo Foundation* case discussed in Part III and the recently announced partial abrogation of the subject-matter jurisdiction canon noted in Part V.A.2). The current system is already semi-precedential, at least as a matter of the facts on the ground.

Second, and probably more importantly, in those instances in which the lower courts are *not* tightly yoked to the Supreme Court, the culprit does not seem to be the lack of formal doctrines of vertical precedent. Here I do not simply repeat the observation that the Court itself is inconsistent in its approaches, such that even the most faithful and attentive agent would not know what to do (though often that is true). Even if the Court became more consistent, there are deeper problems at work here. Some canons just do not lend themselves to fine-tuning. And some changes in the interpretive regime are hard to communicate and perceive, with frequency of canon usage being a prime example. Making methodology more "binding" would not solve these problems. If anything, a regime of formally binding precedent would further encourage lower courts to rely on the Court's potentially misleading pronouncements about the canons rather than following the Court's actual behavior. That

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avowedly normative rather than descriptive of current practice. *Id.* at 9.

256. See *supra* note 171.

may be a result that the Justices would like just fine, but it probably is not what the proponents of methodological precedent—who tend to extol rule-of-law virtues like uniformity and transparency—have in mind.

The foregoing observations do not establish that the methodological *stare decisis* program is without worth. However, they do suggest, at a minimum, that the additional headway it can make is fundamentally limited.

### CONCLUSION

This Article has explored what happens in the lower courts when the Supreme Court changes the interpretive regime. There is no universal answer, but a review of a number of episodes of canonical evolution is illuminating. Lower courts have the demonstrated capacity to adjust very quickly and accurately to discrete changes in the canonical landscape, and they also seem to move roughly in parallel with the Supreme Court when it comes to broader interpretive tendencies. In some instances, however, there is slippage between the practices in the Supreme Court and the lower courts. In addition, the examples discussed here provide some basis to form generalizations about the factors that improve or detract from the system's responsiveness to interpretive changes. But one major conclusion is that there is still much we need to learn. Further research—examining other canons and digging more deeply into the role of particular contextual factors—would likely yield additional insights and move us closer to a complete understanding of how various canons are communicated through the judicial hierarchy.