NOTE

THE COMMON LAW OF INTERPRETATION

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Courts and commentators have claimed that there is no methodological stare decisis. That is, the Supreme Court's decision to use purposivism or textualism to interpret a legal text in one case is not binding in future cases. While a contrarian strain of scholars has argued that judicial decisions about interpretation should serve as controlling authority in later cases, critics fear that this approach would tie the hands of future courts too tightly.

However, this Note argues that the Supreme Court's directions about how to interpret legal texts already have a soft and salutary authoritative force. It does so, first, by reconceptualizing so-called "methodological precedent." Those who argue that interpretive decisions are not binding are led astray by the assumption that methodological stare decisis would look like a categorical commandment, such as: "Thou shalt not consult legislative history." A more modest vision of methodological precedent is a kind of common law: that is, a collected series of smaller decisions converging on a set of norms for interpreting legal texts. Different norms might be settled to different degrees at different times. But as certain methods become accepted in the case law, even opponents may employ them, or feel that they have some constraining force. This kind of case-by-case development is already happening (albeit imperfectly). It has both horizontal and vertical effects, causing judges to adopt specific interpretive approaches or engage in specific modes of analysis. Additionally, this methodological common law is normatively desirable because it balances goals of stability and predictability while respecting the value of interpretive pluralism.

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INTRODUCTION

The U.S. Supreme Court is in the business of determining the meaning of legal texts.[1] It should be no surprise, then, that many of the pages in the

[1] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

U.S. Reports are devoted to communicating the Court's views on the proper methods of interpretation. Some of these statements are general and trans-substantive, like the declaration, "Today, our statutory interpretation cases almost always start with a careful consideration of the text."[2] Some are specific to the kind of legal directive, such as the principle that "remedial statutes should be liberally construed."[3] Sometimes the Court articulates a canon of construction that is triggered by a particular context, such as the rule that "[i]mplications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction."[4]

But what is the legal status of these interpretive directions? For many years, judges and scholars have agreed there is no such thing as "methodological stare decisis."[5] No Supreme Court majority opinion purports to require that future justices be textualists or purposivists. Nor does one majority's decision to use a particular extrinsic source (like dictionaries or drafting history) seem to mean that future courts must do the same. Thus, while a given case may stand for any number of legal propositions, each court supposedly writes on a blank methodological slate.

But this consensus may rest on eroding foundations. First, the wholesale exclusion of interpretive premises from a case's "holding" has always been in tension with the Supreme Court's view that the "portions of the opinion necessary to [reach the] result" are binding on future

[2] Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2337 (2021).

[3] Peyton v. Rowe, 391 U.S. 54, 65 (1968).

[4] Immigr. Naturalization Serv. v. St. Cyr, 533 U.S. 289, 299 (2001).

[5] See, e.g., Nicholas Quinn Rosenkranz, Federal Rules of Statutory Interpretation, 115 Harv. L. Rev. 2085, 2144 (2002) ("[T]he Justices do not seem to treat methodology as part of the holding [of a case]."); Jonathan R. Siegel, The Polymorphic Principle and the Judicial Role in Statutory Interpretation, 84 Tex. L. Rev. 339, 389 (2005) ("[S]tare decisis effect attaches to the ultimate holding . . . but not to general methodological pronouncements, no matter how apparently firm."); Stephen M. Rich, A Matter of Perspective: Textualism, Stare Decisis, and Federal Employment Discrimination Law, 87 S. Cal. L. Rev. 1197, 1197 (2014) ("When the Supreme Court rules on matters of statutory interpretation, it does not establish 'methodological precedents.'" (quoting Abbe R. Gluck, Intersystemic Statutory Interpretation: Methodology as "Law" and the *Erie* Doctrine, 120 Yale L.J. 1898, 1902 (2011))); B & B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 167 n.4 (2015) (Thomas, J., dissenting) ("[N]o principle of *stare decisis* requires us to extend a tool of statutory interpretation from one statute to another without first considering whether it is appropriate for that statute.").

courts.[6] The fact that the Supreme Court's conclusions about legal interpretation are treated differently than its other outcome-determinative premises has been assumed more often than it has been defended. Second, an emerging wave of scholars has suggested that the Court's statements about methodology should (and perhaps do) have some precedential effect.[7] They contend that rule of law values would be enhanced by clarity about how courts will approach difficult questions of statutory interpretation.

But these arguments in favor of methodological stare decisis have provoked strong criticism.[8] As a descriptive matter, at least some judges may not feel that they are bound by the Supreme Court's prior methodological decisions.[9] Indeed, it is hard for lawyers to believe that the Court's interpretive views are "binding" in any sense when they have

[6] Seminole Tribe v. Florida, 517 U.S. 44, 67 (1996). Although, what makes a part of an opinion "necessary" to the result and what kinds of propositions are "necessary" is open to interpretation.

[7] E.g., Sydney Foster, Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?, 96 Geo. L.J. 1863, 1870 (2008) ("[A]s a matter of policy, courts should give extra-strong stare decisis effect to doctrines of statutory interpretation."); Jordan Wilder Connors, Note, Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology, 108 Colum. L. Rev. 681, 684 (2008) (terming decisions about judicial methodology "subdecisions" and arguing that "the purposes behind traditional stare decisis suggest that the appropriate reform is to extend the scope of stare decisis to statutory interpretation subdecisions"); Abbe R. Gluck, The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism, 119 Yale L.J. 1750, 1754, 1848 (2010) [hereinafter Gluck, States as Laboratories] (arguing that methodological stare decisis "appears to be a common feature of some states' statutory case law" and is therefore possible and potentially beneficial); Grace E. Hart, Comment, Methodological Stare Decisis and Intersystemic Statutory Interpretation in the Choice-of-Law Context, 124 Yale L.J. 1825, 1826 (2015) (arguing that statutory interpretation decisions should be treated as substantive law to help govern choice-of-law disputes); Aaron-Andrew P. Bruhl, Eager to Follow: Methodological Precedent in Statutory Interpretation, 99 N.C. L. Rev. 101, 106 (2020) (arguing primarily that lower courts follow the Supreme Court's lead on methods of statutory interpretation).

[8] See, e.g., Evan J. Criddle & Glen Staszewski, Against Methodological Stare Decisis, 102 Geo. L.J. 1573, 1591 (2014) ("[I]t would be severely problematic for federal courts to attempt to freeze interpretive rules into place by applying stare decisis."); Chad M. Oldfather, Methodological Stare Decisis and Constitutional Interpretation, *in* Precedent in the United States Supreme Court 135, 154 (Christopher J. Peters ed., 2013) ("[Adopting] a regime of methodological stare decisis . . . would for some period of time imperil rather than foster stability.").

[9] See, e.g., Kisor v. Wilkie, 139 S. Ct. 2400, 2444 (2019) (Gorsuch, J., concurring in the judgment) ("[W]e do not regard statements in our opinions about . . . generally applicable interpretive methods . . . as binding future Justices with the full force of horizontal *stare decisis*.").

witnessed decades of intractable disagreement over the proper methods of statutory and constitutional interpretation.[10] As a normative matter, judges are likely to chafe at the suggestion that their deeply held convictions about interpretation are trumped by old judicial decisions or long-dead members of their court.[11]

This Note pushes back against both of those objections. First, it argues that there is already a soft system of methodological precedent at the Supreme Court and in the lower federal courts. Both critics and detractors of the idea of methodological precedent generally assume that, if such precedent existed, the Supreme Court would issue (and future courts would follow) explicit and broad legal directives, like: "legislative history is a permissible source of evidence for resolving statutory ambiguity," or "the Constitution should be interpreted according to its original public meaning."[12] But the absence of such categorical holdings does not mean that the interpretive statements that the Court does issue are not authoritative. Instead, the Supreme Court's back-and-forth about interpretation operates as a common law of methods, where individual cases elucidate specific norms and facilitate consensus. It can take multiple cases and many decades for a methodological dispute to be "settled," and different areas of the law are settled to different degrees. But as interpretive norms are enshrined in case law, they exert an authoritative force on the Supreme Court and lower courts in a way that mimics the effect of precedent. And second, despite the fears of commentators, this system is actually beneficial. In fact, a system of gradual methodological common law achieves many of the rule of law goals underlying stare decisis while still allowing room for interpretive pluralism.

The argument proceeds in four Parts. Part I briefly explores the concept of "precedent." Part II proposes a common law model of interpretive precedent where individual cases serve as minor but meaningful authorities about the proper way to interpret legal texts. Over time, debates about interpretive methods can be settled through accumulated decisions and judicial practice, even without the Supreme Court explicitly

[10] Gluck, States as Laboratories, supra note 7, at 1753–54.

[11] See Randy J. Kozel, Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis, 97 Tex. L. Rev. 1125, 1149 (2019) (suggesting that a jurist would likely protest if "faced with the prospect of subordinating her individual view" and "urged to apply an interpretive methodology").

[12] See notes 57–59 and accompanying text.

dictating a comprehensive philosophy of interpretation. Part III is descriptive, arguing that such a common law of interpretive methods already exists. Part IV is a normative defense of this status quo.

I. A PRIMER ON PRECEDENT

Before we can determine whether methodological precedent exists, we have to know what we mean by "precedent." Much has been written on the subject, but a brief treatment here is necessary to set the terms of the debate.

A. The Nature of Precedent

A precedent is a legal authority that gives a content-independent reason to adopt its conclusion.[13] That is, courts follow precedents for reasons other than the rightness of past decisions. In the abstract, there might be any number of reasons (both epistemic and justificatory) to cite to an authority.[14] You might rely on a case because you find its reasoning persuasive,[15] or because of the author's status or expertise,[16] or simply for the strength in numbers.[17] But all of these justifications for following authority might be more or less compelling in individual cases. Our judicial system instead operates on a more categorical principle that certain proclamations of the Supreme Court, when they apply, are "determinative within [their] scope" and *must* be "followed or distinguished," regardless of whether future courts think they are right on the merits.[18] This custom of "stare decisis" is the content-independent reason to follow legal rules designated as "precedent."

Stare decisis is justified by an interlocking set of normative values. These goals can be roughly categorized into three groups. In the first

[13] See Frederick Schauer, Authority and Authorities, 94 Va. L. Rev. 1931, 1937 (2008) [hereinafter Schauer, Authority and Authorities].

[14] See Frederick Schauer, Precedent, 39 Stan. L. Rev. 571, 576 (1987) [hereinafter Schauer, Precedent]; Deborah Hellman, An Epistemic Defense of Precedent, *in* Precedent in the United States Supreme Court 63, 63–65 (Christopher J. Peters ed., 2013).

[15] Schauer, Authority and Authorities, supra note 13, at 1940.

[16] Id. at 1948–49.

[17] E.g., United States v. Knights, 219 F.3d 1138, 1145 (9th Cir. 2000) ("In making this decision we . . . can . . . rely upon the wisdom of the ages and upon the sagacity of the numerous Ninth Circuit judges who have written before us.").

[18] Schauer, Authority and Authorities, supra note 13, at 1952. The Supreme Court sometimes cites authority for the aforementioned reasons as well.

group are so-called "rule of law" values: fairness,[19] stability,[20] efficiency,[21] predictability,[22] and transparency.[23] Related but separate are ideas about the legitimacy of the courts. Keying in on what Professor Fallon calls "sociological legitimacy,"[24] when courts adhere to the rules laid down by prior courts, it may make the court appear more impartial.[25] This, in turn, may increase the public's willingness to obey the Supreme Court's directives.[26] Finally, there are epistemic reasons to follow past decisions. Stare decisis may reflect an honest humility about judges' ability to reach the "right" legal conclusions by giving proper deference to settled understandings.[27]

However, these goals only work if we can identify with some precision the parts of a Supreme Court opinion that deserve precedential status.[28] After all, not every stray judicial remark can carry the full weight of the

[19] Schauer, Precedent, supra note 14, at 596.

[20] Thomas W. Merrill, The Conservative Case for Precedent, 31 Harv. J.L. & Pub. Pol'y 977, 981 (2008).

[21] Benjamin N. Cardozo, The Nature of the Judicial Process 149 (1921) ("[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him.").

[22] Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 568 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (arguing stare decisis facilitates "private ordering").

[23] Amy Coney Barrett, Precedent and Jurisprudential Disagreement, 91 Tex. L. Rev. 1711, 1722 (2013) ("[I]n a system of precedent, the new majority bears the weight of explaining why the . . . vision of their predecessors was flawed.").

[24] Richard H. Fallon, Jr., Legitimacy and the Constitution, 118 Harv. L. Rev. 1787, 1796 (2005).

[25] Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970) (suggesting that stare decisis preserves the perception of "the judiciary as a source of impersonal and reasoned judgments"); see also Schauer, Precedent, supra note 14, at 600 (suggesting "internal consistency strengthens external credibility").

[26] See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865–66 (1992) (plurality opinion) ("[T]he Court cannot . . . independently coerce obedience to its decrees. The Court's power lies, rather, in . . . . making legally principled decisions . . . ."), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022)).

[27] See Hellman, supra note 14, at 64–65; cf. Caleb Nelson, *Stare Decisis* and Demonstrably Erroneous Precedents, 87 Va. L. Rev. 1, 3 (2001) (arguing that deference should be given to prior legal interpretations within the range of reasonability) [hereinafter Nelson, Stare Decisis].

[28] Schauer, Precedent, supra note 14, at 578 ("[O]nly the intervention of organizing theory, in the form of *rules of relevance*, allows us to distinguish the precedential from the irrelevant.").

law.[29] This is why every first-year law student learns that only the "holding" of a case is binding precedent.[30] But what is a "holding"? Professor Solum has helpfully identified at least three dominant views: (1) the holding of a case is the rule entailed by the set of legal propositions necessary to reach the result in a case (or the "ratio decidendi"); (2) the holding of a case is the disposition of the case in response to a set of salient facts; or (3) the holding of the case is the legal proposition that comes after "we hold that . . . " (or its equivalent).[31] Unfortunately, however, courts operate as if different theories are true at different times, even though the application of different models in the same case can lead to different results.[32] And any analytical rigor that does exist breaks down as Supreme Court opinions become increasingly "textualized,"[33] resulting in close scrutiny of each and every word from the Court's mouth, regardless of its importance to the opinion. This makes disputes over what should get the weight of stare decisis ever-frequent and consistently inconsistent.[34]

B. The "Settling" of Precedent

These debates are amplified by the concern that a system of precedent privileges stasis and legitimacy at the expense of other social goods. After all, stare decisis only has bite when it protects decisions we think are wrongly decided.[35] Thus, even though our legal culture still grants certain propositions the distinguished status of "settled law,"[36] such that they are entitled to a presumption of force, reasonable minds disagree about when

[29] See Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1366 (2020) (Gorsuch, J., concurring) (warning against reading judicial opinions "as if they were some sort of legislative code").

[30] See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 563–64 (1993) (Souter, J., concurring) (distinguishing holding from dicta).

[31] Lawrence B. Solum, Originalist Theory and Precedent: A Public Meaning Approach, 33 Const. Comment. 451, 459 (2018).

[32] See Michael Abramowicz & Maxwell Stearns, Defining Dicta, 57 Stan. L. Rev. 953, 958–59 (2005).

[33] See Peter M. Tiersma, The Textualization of Precedent, 82 Notre Dame L. Rev. 1187, 1188–90 (2007).

[34] See Abramowicz & Stearns, supra note 32, at 958–59.

[35] Richard H. Fallon, Jr., Stare Decisis and the Constitution: An Essay on Constitutional Methodology, 76 N.Y.U. L. Rev. 570, 570 (2001) ("The force of the doctrine . . . lies in its propensity to perpetuate what was initially judicial error or to block reconsideration of what was at least arguably judicial error.").

[36] Charles J. Cooper, Stare Decisis: Precedent and Principle in Constitutional Adjudication, 73 Cornell L. Rev. 401, 401 (1988).

a precedent becomes "settled." Some might say that individual Supreme Court holdings are *legislative*. A single precedent settles a legal question when it says so directly.[37] On this view, *District of Columbia v. Heller* settled the constitutionality of handgun bans in the home;[38] *Grutter v. Bollinger* established the constitutionality of certain race-conscious university admissions policies.[39] Alternatively, you might say that precedent is *sociologically* settled.[40] A case is settled law when a cross-section of the public treats it as such. On this view, *Heller* and *Grutter* might not be settled, but the *Legal Tender Cases*[41] and *Brown v. Board of Education*[42] are. A third and older view is the common law model. In the traditional English system, a single case did not necessarily set a precedent—after all, judicial decisions merely declared the content of the common law (a real, external thing), they did not create it anew.[43] Thus, the law was only settled after the accumulation of multiple decisions gave judicial imprimatur to the underlying norm and clarified the ambiguities of the applicable law.[44]

But even if we could agree what law is "settled," the fear of dead hand control creates the need for rules about when judges are allowed to revise or discard precedent that would otherwise be binding. The difficulty, of course, is articulating the exceptions with enough specificity that the rule and benefits of stare decisis are not compromised. Once again, disagreement abounds. Some argue that precedent should be overruled

[37] See Bruhl, supra note 7, at 108 & n.19.
[38] 554 U.S. 570, 636 (2008).
[39] 539 U.S. 306, 343–44 (2003).
[40] See Barrett, supra note 23, at 1735.
[41] 79 U.S. (12 Wall.) 457 (1871).
[42] 347 U.S. 483 (1954).
[43] See Thomas R. Lee, Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court, 52 Vand. L. Rev. 647, 660, 666 (1999); see also Livingston's Ex'x v. Story, 36 U.S. (11 Pet.) 351, 400 (1837) (Baldwin, J., dissenting) ("[O]ne decision does not settle the law . . . .").
[44] See Gerald J. Postema, Classical Common Law Jurisprudence (Part I), 2 Oxford U. Commonwealth L.J. 155, 178–79 (2002). A related notion is the Madisonian idea of "liquidation," recently resurrected by Professors Nelson and Baude as a theory for settling the meaning of the federal Constitution. See Caleb Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. 519, 527 (2003) [hereinafter Nelson, Originalism and Interpretive Conventions]; William Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1, 4 (2019); The Federalist No. 37, at 228–29 (James Madison) (Clinton Rossiter ed., 1961); Letter from James Madison to Judge Roane (Sept. 2, 1819), *in* 3 Letters and Other Writings of James Madison 143, 145 (J.B. Lippincott 1865). On this view, the meaning of an ambiguous legal text can be settled over time by both judicial decisions and the practice of relevant actors. Baude, supra, at 4.

when it is "demonstrably erroneous,"[45] when there exists a "special justification,"[46] or when multiple prudential factors are satisfied.[47] Others express fear about this kind of easy defeasibility,[48] even arguing that strict adherence to precedent is required in all but the most exceptional circumstances.[49] Others doubt the efficacy of such doctrinal tests for when to overturn precedent, since judges sometimes seem incapable of adhering to prior authority in a merits-neutral way.[50] Leaning into this skepticism, some have argued that precedent does not constrain but rather gives authoritative permission for the Court to take particular legal paths.[51] Some of these theories overlap, but they also represent a wide spectrum of potential regimes. In sum, even the notion of what law is "settled" is itself far from settled.

II. THE CONCEPT OF METHODOLOGICAL PRECEDENT

The conceptual difficulties with ordinary precedent map directly onto the debates over methodological precedent. Absent agreement on the proper scope and strength of stare decisis, saying that interpretive decisions of the Supreme Court are "precedential" does not tell us much. Thus, in order to say whether methodological precedent does or should

[45] Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring); Nelson, Stare Decisis, supra note 27, at 3.

[46] Payne v. Tennessee, 501 U.S. 808, 849 (1991) (Marshall, J., dissenting) (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).

[47] Compare Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992) (plurality opinion) (discussing "a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law"), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022), with Ramos v. Louisiana, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring) (consolidating the Court's statements into three criteria which set a "high (but not insurmountable) bar for overruling a precedent").

[48] See, e.g., William Baude, Precedent and Discretion, 2019 Sup. Ct. Rev. 313, 313–14 (2020).

[49] E.g., Lawrence B. Solum, The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights, 9 U. Pa. J. Const. L. 155, 159 (2006) ("[T]he Supreme Court should abandon adherence to the doctrine that it is free to overrule its own prior decisions.").

[50] E.g., Frederick Schauer, Stare Decisis—Rhetoric and Reality in the Supreme Court, 2018 Sup. Ct. Rev. 121, 143 (2019). The popular podcast Strict Scrutiny used to sell merchandise with the motto "stare decisis is for suckers." Richard M. Re, Is "Stare Decisis … for Suckers"?, PrawfsBlog (Mar. 24, 2020, 8:30 AM), https://prawfsblawg.blogs.com/prawfsblawg/2020/03/is-stare-decisis-for-suckers.html [https://perma.cc/9EDZ-UNM6].

[51] Richard M. Re, Precedent as Permission, 99 Tex. L. Rev. 907, 911 (2021) [hereinafter Re, Precedent as Permission].

exist, we must commit to a theory for how these precedents would operate as legal authority.

A. The Frustrated Search for Methodological Stare Decisis

Those who reject the notion of methodological precedent appear to do so in part because of a few interrelated propositions. First, there is an implicit assumption that methodological precedent would resolve interpretive questions at a high level of abstraction (such as mandating textualism or purposivism in statutory interpretation).[52] Second, many assume that methodological precedent would be strictly binding, analogous to a muscular version of ordinary stare decisis.[53] The third factor is the existence of deep disagreement about statutory and constitutional interpretation, both on and off the bench.[54] Critics argue that it is implausible that a Justice will ever feel that precedent demands a certain interpretive approach, especially since different judges alternatively accept (or refuse to accept) certain sources of legal meaning depending on whether they are in the majority.[55] Seeing both outstanding disagreement and the absence of high-level interpretive dictates from the high court, they conclude that there is no precedent on interpretation.[56]

Indeed, even scholars who argue in favor of methodological stare decisis presume that it would follow a legislative model of settled precedent. Professor Gluck, for example, highlights state court cases as paradigmatic examples of methodological precedent in action.[57] But these cases do things like listing a mandatory hierarchy of interpretive tools for all statutory interpretation cases,[58] something the Supreme Court has never done. Even Professor Bruhl, who has done the most work arguing

[52] Criddle & Staszewski, supra note 8, at 1595 (suggesting that methodological precedent, if it existed, would end the "interpretation wars").

[53] See, e.g., Oldfather, supra note 8, at 153 ("[M]aintenance of a regime of methodological stare decisis would likely require that it be . . . an inexorable command . . . .").

[54] See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 9–46 (2012) (surveying these debates).

[55] See, e.g., Rosenkranz, supra note 5, at 2144–45 (using Justice Scalia as an example, since he continued to dissent from cases using legislative history, even after majorities of the Court used legislative history to reach an interpretive conclusion).

[56] See sources cited supra note 5.

[57] Gluck, States as Laboratories, supra note 7, at 1775–811.

[58] E.g., Portland Gen. Elec. Co. v. Bureau of Lab. & Indus., 859 P.2d 1143, 1145–47 (Or. 1993) (requiring a three-step analysis for interpreting legal texts: (1) examine the text of the statute and any relevant context, (2) consider legislative history, and (3) fall back on "general maxims of statutory construction").

for the existence of methodological precedent, does so within the paradigm that individual methodological precedents would have "honest-to-goodness binding effect in the modern sense in which federal courts understand precedent."[59] In the absence of such broad holdings, it is no surprise that many are skeptical of the notion of methodological precedent.

However, this overly legislative and overly mechanical view overlooks some key differences between methodological conclusions and other substantive legal propositions. For starters, conclusions by the Supreme Court about interpretive methodology are not just decisions, they are "subdecisions," or second-order conclusions that occur prior to the merits issue in a case of what a legal text means and how it applies to the parties.[60] But these subdecisions are not always outcome-determinative. After all, judges purporting to use the same interpretive methodology do not always reach the same legal conclusion.[61] Further complicating matters, cases discussing statutory interpretation are often cited by the Supreme Court for non-authoritative reasons, such as an appeal to the underlying reasoning for the methodological approach.[62] Even when a subdecision is used as authority for a methodological premise, that proposition may be applicable to many types of interpretive problems or it might be a ticket "good for this day and train only."[63] Methodological precedents might also be employed in the permissive or easily defeasible manner that differs from the ordinary narrative about stare decisis.[64]

But none of this means that the Court's interpretive directions lack constraining power. It only means that methodological decisions defy our assumptions about how precedent should function. In order to see the

[59] Bruhl, supra note 7, at 109.

[60] Connors, supra note 7, at 683.

[61] Compare Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020) (Gorsuch, J.) (arguing that the "express terms" of Title VII prohibit discrimination on the basis of sexual orientation or gender identity), with id. at 1767 (Alito, J., dissenting) (citing the ordinary meaning of the same terms to conclude the opposite). Compare Monroe v. Pape, 365 U.S. 167, 188–91 (1961) (arguing that the legislative history of § 1983 did not support damages liability for municipalities), with Monell v. Dep't of Soc. Servs., 436 U.S. 658, 664–65 (1978) (relying on the same legislative history to conclude the opposite). The converse is also true, judges who use different methodologies sometimes arrive at the same result. See infra note 266.

[62] E.g., Digit. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 782–83 (2018) (Sotomayor, J., concurring) (quoting Supreme Court precedents to argue that legislative history is a reliable a proxy for "Congress' intended meaning").

[63] Smith v. Allwright, 321 U.S. 649, 669 (1943) (Roberts, J., dissenting).

[64] See Re, Precedent as Permission, supra note 51, at 908, 911.

authoritative influence of the Supreme Court's methodological decisions, we just need to leave some of our presuppositions about precedent at the door.

B. A Counter Model: A Common Law of Interpretation

It is more appropriate to think of the Supreme Court's statutory and constitutional subdecisions as a modest common law of interpretive methods. Rather than looking for a few watershed decisions which set the rules of interpretation for the Court and the country (and giving up when we do not see them), we should consider that individual cases actually serve as minor but meaningful authorities about the proper way to interpret legal instruments.[65] Admittedly, even suggesting that there is a common law of interpretation could smuggle in preconceptions about "precedent," depending on whether you think of the common law as a judicial plaything or a rigorous method of following prior decisions.[66] But to function as a common law, the Court's methodological decisions need only be authoritative in the following sense: individual cases establish presumptive expectations about how judges should find meaning in legal texts.[67] Over time, a series of cases can elucidate underlying norms and converge on a consensus approach to interpretation.[68]

[65] Some authors have started to make this conceptual move. See, e.g., Anthony J. Bellia, Jr., State Courts and the Making of Federal Common Law, 153 U. Pa. L. Rev. 825, 832–33 (2005) (arguing that the definition of federal common law "is broad enough to encompass certain judicial determinations about the propriety of different methods of interpretation"); Jacob Scott, Codified Canons and the Common Law of Interpretation, 98 Geo. L.J. 341, 345 (2009) (asserting without much additional development that "[t]he common law should be understood to encompass judicial methodology in addition to the traditional substantive common law subjects"); William Baude & Stephen E. Sachs, The Law of Interpretation, 130 Harv. L. Rev. 1079, 1099 (2017) (arguing that there exists "common law rule[s] of interpretation [which] . . . provide[] the fundamental structure of legal interpretation, identify[] what counts as a legal text, what role that text plays in our law, and how we should go about interpreting it"). But these authors have not yet considered whether, if this is already true, these methodological decisions act as precedent. See Baude & Sachs, supra, at 1137 (bracketing the question); cf. Abbe R. Gluck, The Federal Common Law of Statutory Interpretation: *Erie* for the Age of Statutes, 54 Wm. & Mary L. Rev. 753, 757–58 (2013) (arguing that a common law of interpretive methodology exists but that it does *not* act as precedent in the traditional sense) [hereinafter Gluck, Common Law].

[66] See supra Section I.B.

[67] Schauer, Authority and Authorities, supra note 13, at 1953–54.

[68] This Note does not address the separate issue of whether, if methodological decisions function as a common law, they have the status and authority of federal law. See Gluck, Common Law, supra note 65, at 758. This Note merely considers whether methodological

Under this model, courts' methodological decisions share several important features of the old common law. First: *case-by-case adjudication*. Even without committing to one side of the debate about whether the common law creates or discovers norms,[69] in a common law of methods, each case is part of a larger body of law and does not purport to resolve the universe of interpretive problems.[70] Moreover, it is the cumulative effect of cases that establishes "precedent," rather than isolated judicial proclamations.[71] Second, decisions about methodology are *appurtenant* and *ancillary* to the resolution of particular legal disputes.[72] Even if a court majority does not say, after its final three asterisks, something to the effect of, "We hold that statutes should be read in light of Congress' stated purposes," if such an interpretive proposition is necessary to reach the conclusion, it can be relevant to similar legal questions in the future. Third, subdecisions have varying *scope*. Some decisions are broad, and others narrow, but rarely is there a systematic synthesis of the law of interpretation (a feature of the old common law that prompted the Restatements).[73] Fourth, the common law tolerates *disagreement*, both in a moment in time and across time. The art of common law judging is sifting through idiosyncratic judicial opinions and aberrant views to find the law that is "common."[74] The existence of a single opinion deviating from an interpretive norm is not fatal to the

decisions act as a common law for the purposes of precedent and whether there are reasons to embrace that system.

[69] See Stephen E. Sachs, Finding Law, 107 Calif. L. Rev. 527, 527–28 (2019) (overviewing the debate).

[70] See Jeremy Bentham, A Comment on the Commentaries *and* A Fragment on Government 192–94 (J.H. Burns & H.L.A. Hart eds., 1977) (discussing how judicial decisions were individual evidences of the broader common law, which in turn represented a comprehensive collection of "customs").

[71] See Theodore F.T. Plucknett, A Concise History of the Common Law 349–50 (5th ed. 1956) (noting that, in the pre-nineteenth-century common law, it was a line of cases, rather than a single decision, that ought not to be overturned in the absence of very weighty reasons); see also Nelson, Stare Decisis, supra note 27, at 15 (describing how a "regular course of decisions" made precedent in the common law).

[72] Cf. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (describing how explication of the law was necessary to decide individual cases).

[73] Kristen David Adams, Blaming the Mirror: The Restatements and the Common Law, 40 Ind. L. Rev. 205, 254 (2007).

[74] E.g., Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18–19 (1842) (disregarding several idiosyncratic judicial opinions in favor of the "general" commercial common law); see also Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed, 3 Vand. L. Rev. 395, 399 (1950) ("[A] a court must strive to make sense *as a whole* out of our law *as a whole*.").

system. Finally, the common law is *flexible*, permitting judges to distinguish and distance themselves from past cases when new facts make it clear that old principles need clarification or amendment.[75]

But just because the common law has these inherent features, it is still a system of authority. Individual cases stand for certain propositions, which have coercive or focusing power on the reasoning of future judges, if not the result of future cases.[76] A precedent may require future judges to go through certain modes of analysis (like balancing or a checklist).[77] It might require judges to consider particular sources as probative of certain legal conclusions.[78] Conversely, cases can identify certain sources or considerations as presumptively "off limits."[79] When similar modes of analysis are used on similar facts, it may pressure judges towards reaching similar outcomes. Perhaps most importantly, if a judge is going to depart from the methodology of prior cases, she must think hard about it and offer reasoned argument.[80] The greater the consensus of the cases, the greater the burden on the judge looking to depart from past practice and the harder it is to chart a new path. In this way, a series of minor cases and decisions can have an aggregate effect that is greater than the sum of their parts.

[75] Nicola Gennaioli & Andrei Shleifer, The Evolution of Common Law, 115 J. Pol. Econ. 43, 46 (2007) ("Distinguishing cases is the central mechanism, or leeway, through which common law evolves . . . .").

[76] See Vince Blasi, Creativity and Legitimacy in Constitutional Law, 80 Yale L.J. 176, 189 (1970) (book review) (arguing that if a certain interpretive approach "were more commonly and more consciously employed, it might exert an influence over judges' thought patterns, perhaps resulting in a refinement and sophistication of intuitions and preconceptions"); cf. Joseph Raz, The Authority of Law: Essays on Law and Morality 195 (1979) ("In every case in which the court makes law it also applies laws restricting and guiding its law-creating activities.").

[77] See, e.g., Donald Dewey, The Common-Law Background of Antitrust Policy, 41 Va. L. Rev. 759, 771–76 (1955) (discussing early common law decisions requiring consideration of specific factors to gauge the "reasonableness" of contracts in restraint of trade).

[78] See Charles E. Carpenter, The Doctrine of Res Ipsa Loquitur, 1 U. Chi. L. Rev. 519, 523 (1934) (describing certain categories of evidence as creating a defeasible presumption of liability in tort).

[79] See Arthur L. Corbin, The Parol Evidence Rule, 53 Yale L.J. 603, 608 (1944) (describing common law rules against extrinsic evidence to interpret contracts).

[80] See Hellman, supra note 14, at 73–74 (arguing that precedent "requires" judges to "seriously consider" alternate viewpoints, strengthening their own arguments even if they choose to part ways with past practice); see also Livingston's Ex'x v. Story, 36 U.S. (11 Pet.) 351, 400 (1837) (Baldwin, J., dissenting) ("[A] court may and ought to revise its opinions; when, on *solemn and deliberate consideration*, they are convinced of their error." (emphasis added)).

This kind of common law precedent is also possible with interpretive disputes. Through a series of cases and adjudications, the Supreme Court establishes a pattern and practice of interpreting legal texts in a certain way. The settling of specific interpretive debates creates something like a prima facie presumption that future courts will act similarly in similar cases, and the lower courts generally treat the decisions (both separately and in cumulatively) like the "common" law. In this way, the Supreme Court sets "precedents" of interpretive methodology.

C. Limitations

Before proceeding to the evidence of this methodological common law, it is worth noting a few limitations of the theory. First, the existence of a common law does not imply that judicial case law will eventually dictate consensus about methods of statutory and constitutional interpretation. Jurisprudential debate is sure to continue into the future. Nevertheless, interpretive debates can be resolved "as applied," in specific contexts, without necessitating full consensus on a broad theory. Moreover, changed facts and new legal directives may reveal weaknesses or difficulties that require resolution within even settled interpretive norms.[81] The common law facilitates the incremental settling of certain cognizable differences with time, it does not promise the end of disagreement.

Second, and relatedly, a methodological common law does not require strict defeasibility rules. To the contrary, it is compatible with almost any theory of when precedent should be overturned.[82] You might say that once an interpretive dispute has been settled through a series of decisions, future courts *must* follow those rules. But just as with ordinary precedent, you might think that even a legal proposition that has been uncontroversial for decades should now be distinguished or disregarded because it was "demonstrably erroneous" or inoperable.[83] This Note proposes that methodological precedent, established by a course of

[81] Professor Nelson has noted that the passage of time can reveal additional ambiguities in a legal text that was previously thought to have an established meaning. See Nelson, Originalism and Interpretive Conventions, supra note 44, at 597. Similarly, even if methodological norms become settled in a particular area, new cases or applications may reveal presuppositions underlying the law of interpretation that need to be reexamined.

[82] See supra notes 45–47 and accompanying text.

[83] Id. You might also say that the common law does not create presumptions as much as it gives "permissions." See Re, Precedent as Permission, supra note 51, at 911.

decisions, could be binding only in the weakest form and still operate as a source of authority.[84]

Third, not all methodological rules are equal. Some are very narrow, such as which rules of interpretation get priority when they conflict,[85] and some are broader, such as what sources can serve as evidence of congressional intent to take a drastic constitutional step.[86] There may also be some notable differences and interactions between constitutional and statutory interpretation.[87] And the confluence of multiple minor interpretive rules can be difficult to identify with precision. But individual methodological rules and their combination can still have operative effects.

And finally, not all the maxims of the common law are equally settled. Some norms may just be developing for the first time and will take decades and many more cases before there is any meaningful precedent on the issue. Some debates are so deeply ingrained in the judiciary that there are myriad contrary indications in the law. In other areas, underlying customs of interpretation have been identified in judicial opinions, and the contours of those norms have been liquidated with surprising clarity. But all of this is true of the substantive law as well, where disagreement abounds both in time and across time. We are looking for trendlines in

[84] See supra notes 76–80 and accompanying text.

[85] See, e.g., Babbitt v. Sweet Home Chapter of Cmtys. For a Great Or., 515 U.S. 687, 704 n.18 (1995) (discussing the interaction of *Chevron* deference with the rule of lenity).

[86] See, e.g., United States v. Bass, 404 U.S. 336, 349 (1971) (considering what interpretive sources permit the inference that Congress intended to upset the federal-state balance).

[87] A full treatment of this question is beyond the scope of this Note, but there might be more opportunities in the realm of statutory interpretation to clarify and reach consensus on minor interpretive rules (such as the interaction between canons) than in the constitutional arena, where interpretive debates tend to be more categorical. Compare, e.g., Georgia v. Randolph, 547 U.S. 103, 123–25 (2006) (Stevens, J., concurring) (using a narrow fact pattern to critique "an approach to constitutional interpretation that places primary reliance on the search for original understanding" while ignoring "the relevance of changes in our society"), with id. at 143 (Scalia, J., dissenting) (treating Justice Stevens's concurrence as an attack on "originalism" writ large). You might also think that the Court's role interpreting statutes should be more formal and rule-bound but that the Constitution is the impetus for judicial common-lawmaking. See Kevin M. Stack, The Divergence of Constitutional and Statutory Interpretation, 75 U. Colo. L. Rev. 1, 5–6 (2004). Finally, there might be feedback effects between the two fields. For example, trends towards statutory textualism may pressure courts towards closer readings of constitutional provisions. See, e.g., Gamble v. United States, 139 S. Ct. 1960, 1965–66 (2019) (citing a statutory interpretation precedent as authority for how to interpret the Constitution's text). These considerations notwithstanding, the interpretive subdecisions in both fields are similar enough to speak about a methodological common law in both constitutional and statutory interpretation.

practice and the considered elucidation of the courts.[88] Until a legal norm actually reaches the rarified status of "settled precedent," we have to be willing to tolerate a certain level of opacity.

III. THE EXISTENCE OF A METHODOLOGICAL COMMON LAW

If the common law of interpretive methodology described above did exist, you would expect to see the accumulation of individual decisions over time, some narrower and some broader, leading to resolution of specific interpretive disputes. There is good evidence of this pattern at both the Supreme Court and lower federal courts.

A. Horizontal Precedent

Even though it considers a small set of the most difficult interpretive questions in the legal system,[89] the Supreme Court has managed to generate meaningful principles about how to interpret legal directives. These norms both separately and cumulatively affect future judicial practice.[90] Because of the varied nature of these interpretive directions, it is helpful to sort them into categories.

[88] See Madison, The Federalist No. 37, supra note 44.

[89] Cf. Frederick Schauer, Easy Cases, 58 S. Cal. L. Rev. 399, 423 (1985) (noting that legal commentators tend to "focus only . . . on [Supreme Court] cases that a screening process selects [for] their very closeness").

[90] Professor Bruhl suggests that there is only evidence of methodological precedent if we can find instances of judges going against their own interpretive precommitments because of a given case or set of cases. See Bruhl, supra note 7, at 115. That is, precedent is only precedent if it forces a judge to support legal proposition *A* when, in the absence of precedent, they would have chosen proposition ~*A* (or *B*). Yet while this might be strong evidence of methodological precedent, it is not the only evidence. Indeed, it is not clear that ordinary "precedents" of the Supreme Court would meet this high standard, as examples of judges applying law that they disagree with on the merits are few and far between. See Schauer, supra note 50, at 143. And even if later Justices are not so bold as to overrule cases they do not like, they frequently narrow prior precedents, see Richard M. Re, Narrowing Precedent in the Supreme Court, 114 Colum. L. Rev. 1861, 1865 (2014). Thus, the way judges speak about and cite the law, as well as how they formulate the law when they purport to follow it, are all probative of the Supreme Court using past interpretive decisions as common law authorities.

1. Mandatory Exclusion of Sources

Oftentimes the Supreme Court states that some kinds of sources are not probative or sufficient to reach certain legal conclusions.[91] For example, the Court in *Immigration Naturalization Service v. St. Cyr* said that "[i]mplications from statutory text or legislative history are *not* sufficient to repeal habeas jurisdiction."[92] Not only did the Court describe this as a "rule" of law,[93] the majority reasoned that it derived from other norms about how to interpret the meaning of statutes that invoke "the outer limits of Congress' power."[94] Two decades later, the Court suggested that this rule would control a completely separate methodological dispute.[95]

The use of legislative history, while not categorically eschewed, has been limited in other specific contexts. For example, courts must sometimes determine whether Congress has divested state courts of their ordinary concurrent jurisdiction to hear federal claims.[96] In the seminal *Gulf Offshore Co. v. Mobil Oil Corp.* case, the Supreme Court stated explicitly that the presumption can be overcome by "an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests."[97] Later courts dutifully followed these sources of evidence,[98] until Justice Scalia began to dissent, arguing that "surely what is required is implication in the text of the statute, and not merely . . . through 'unmistakable implication from legislative history.'"[99] Then, in *Yellow Freight System v. Donnelly*, a unanimous court—speaking through Justice Stevens, no less—held that Congress' failure to explicitly oust state courts of jurisdiction in the text of a statute is "strong, and arguably sufficient, evidence that Congress had no . . . intent" to do so.[100] They even went so far as to say that congressional "expectation[s]" inferred from legislative

[91] The sources one can consult play a major role in statutory interpretation, as the "meaning" of a legal text depends on what sources an interpreter's method allows them to take into account. Caleb Nelson, Statutory Interpretation 2 (2012).

[92] 533 U.S. 289, 299 (2001) (emphasis added).

[93] Id.

[94] Id.

[95] Dep't of Homeland Security v. Thuraissigiam, 140 S. Ct. 1959, 1979 (2020) (calling *St. Cyr*'s statement a "rule" and saying in dicta that if the court were revisiting an old precedent, *St. Cyr* would control the statutory interpretation question).

[96] See Tafflin v. Levitt, 493 U.S. 455, 459–60 (1990).

[97] Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981).

[98] E.g., *Tafflin*, 493 U.S. at 460.

[99] Id. at 471–72 (Scalia, J., concurring) (quoting *Gulf Offshore*, 453 U.S. at 478).

[100] 494 U.S. 820, 823 (1990).

history are "not an adequate substitute for a legislative decision to overcome the presumption of concurrent jurisdiction."[101]

The Court's precedents on inferring a private right of action from a silent federal statute also place certain interpretive sources out-of-bounds.[102] There was once a time when the Supreme Court gave explicit guidance on what sources of evidence should be consulted to determine Congress' intent. These included the "underlying purposes of the legislative scheme," "explicit or implicit" "indication[s] of legislative intent" (including legislative history), and the traditional scope of federal legislative power.[103] The factors were applied in cases like *Cannon v. University of Chicago*, where the court relied heavily on floor statements, drafting history, and legal context to conclude that Title IX of the Education Amendments included an implied private right of action.[104] But in *Alexander v. Sandoval*, the Court rejected the older, purposive approach to finding private rights of action.[105] It also denounced the probative value of legislative history and extrinsic sources, concluding it could "begin" and "*end* [the] search for Congress's intent with the text."[106] *Sandoval* now stands for the proposition that Courts will only interpret statutes to include private rights of action if Congress says so in

[101] Id. at 824–25. An interesting and related example is the Court's discussion about the limits of legislative history in surmounting the rule of lenity, where Justice Souter explicitly relied on the way the Court "approached the use of lenity" "in the past" as support for his consulting legislative history before falling back on lenity. United States v. R.L.C., 503 U.S. 291, 306 n.6 (1992).

[102] You might say that this activity is not really interpretation as it is interstitial common law (that is, the Court *creates* private rights of action rather than inferring them). But the Supreme Court has characterized the seminal *J.I. Case Co. v. Borak* case and its progeny as "statutory decisions," Ziglar v. Abassi, 137 S. Ct. 1843, 1855 (2017), that is, cases about how to give effect to written legal directives. This implicates interpretive methodology at least as much as it does the legitimacy of federal common law. For more on the relationship between interpretation and common law making, see Thomas W. Merrill, The Common Law Powers of Federal Courts, 52 U. Chi. L. Rev. 1, 49 (1985).

[103] Cort v. Ash, 422 U.S. 66, 78 (1975).

[104] 441 U.S. 677, 694–701 (1979).

[105] 532 U.S. 275 (2001). Notably, they did not claim to do so because of a simple disagreement with prior Courts, but because there had been a meaningful change in the law of interpretation. In the years since *Ash*, they said, the Court had "sworn off the habit of venturing beyond Congress's intent." Id. at 287.

[106] Id. at 288 (emphasis added).

the text.[107] Indeed, the old approach has been dismissed as the "*ancien regime*."[108]

In specific contexts, the modern Court has also cabined the exercise of "imaginative reconstruction," or an inquiry into what Congress *would* have thought about an interpretive issue if it had arisen during the enactment of a particular statute.[109] This kind of analysis, once common,[110] is now derided as too speculative, much like asking: "If I had a sister, would she like cheese?"[111] In its recent decision in *Barr v. American Association of Political Consultants*, the Court engaged in a rich discussion of the developing law of methodology.[112] In his lead opinion (albeit in a part not joined by a majority), Justice Kavanaugh dismissed the argument that a pro forma severability clause should be ignored "on the ground that the text does not reflect Congress's 'actual intent' as to severability."[113] "That kind of argument may have carried some force back when courts paid less attention to statutory text as the definitive expression of Congress's will," he said.[114] "But courts today zero in on the precise statutory text."[115] Second, in cases where Congress has neither explicitly endorsed nor forsworn the statute's severability, courts should *not* "imaginatively reconstruct a prior Congress' hypothetical intent."[116]

The Court has also rejected the use of both imaginative reconstruction and legislative history to surmount the presumption against extraterritoriality. For many years, courts have assumed that

[107] See Comcast v. Nat'l Ass'n of African-Owned Media, 140 S. Ct. 1009, 1015 (2020) (citing *Sandoval*, 532 U.S. at 286–87) (unanimous opinion); see also Hernandez v. Mesa, 140 S. Ct. 735, 741 (2020) (holding that the court has moved away from the "era" where rights of action were inferred based on evidence outside statutory text).

[108] Ziglar v. Abassi, 137 S. Ct. 1843, 1855 (2017) (quoting *Sandoval*, 532 U.S. at 287).

[109] See Richard A. Posner, Statutory Interpretation—in the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 817 (1983).

[110] Nelson, supra note 91, at 937.

[111] John C. Jeffries, Jr., Disaggregating Constitutional Torts, 110 Yale L.J. 259, 261 (2000).

[112] 140 S. Ct. 2335 (2020).

[113] Id. at 2349 (Kavanaugh, J., concurring).

[114] Id.

[115] Id. In support of this proposition, Justice Kavanaugh cited to *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2209 (2020), which itself took a text-based approach to severability. He also cited *Milner v. Department of the Navy*, 562 U.S. 562, 569 (2011), which focused on textual directives as the best evidence of Congress' purpose. He called these "ordinary severability principles." *Barr*, 140 S. Ct. at 2349.

[116] *Barr*, 140 S. Ct. at 2350. For a nuanced survey of modern uses of imaginative reconstruction, see Caleb Nelson, What is Textualism?, 91 Va. L. Rev. 347, 403–16 (2005).

congressional enactments which do not specify a territorial reach are meant only to apply within the jurisdiction of the United States.[117] In an early case called *Foley Brothers v. Filardo*, the Court said that the text of a statute, inferences from its scheme, and evidence from legislative history could be used to discern whether Congress meant a statute to apply extraterritorially.[118] But in *EEOC v. Aramco*, the Court shifted its focus, holding that Congress needed to make a "clear statement" in the statute's text in order to communicate an extraterritorial intent.[119] Indeed, Justice Marshall dissented, arguing that the precedent of *Foley Brothers* meant that the full range of "conventional" interpretive tools—including legislative history—were permissible sources to discern Congress' unexpressed intentions.[120] Marshall did not just complain that the majority was interpreting the statute wrong, he complained that they were creating a new "rule" of interpretation.[121] But Marshall lost that fight. In ensuing cases, the Supreme Court redoubled its emphasis on the textual focus of the clear statement rule, even chiding courts for engaging in more generalized inquiries "to 'discern' whether Congress would have wanted [a] statute to apply" extraterritorially.[122] As this law developed, the prior cases were not just cited for their bottom-line holdings about whether a statute was indeed extraterritorial; they were also cited to support *how* to conduct the analysis and what kinds of interpretive sources were in play.[123]

2. Mandatory Inclusion of Sources

Like the Court placing certain modes of analysis off limits, the Court also fashions legal rules that require future courts (and lower courts) to consider certain sources in interpreting a statute.[124] For example, in interpreting the scope of the federal courts' equitable power conferred by

[117] See Blackmer v. United States, 284 U.S. 421, 437 (1932).
[118] Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949).
[119] 499 U.S. 244, 258 (1991).
[120] Id. at 263 (Marshall, J., dissenting).
[121] Id.
[122] Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 255 (2010).
[123] See RJR Nabisco, Inc. v. European Community, 579 U.S. 325, 335–36, 340 (2016).
[124] Some of the examples of mandatory exclusion noted above actually reversed cases where courts dictated the inclusion of sources, such as the Court's older instructions on inferring private rights of action in *Cort v. Ash*. See supra notes 103–08.

the Judiciary Act of 1789,[125] courts are required to look to the historic equity powers that existed in the "English Court of chancery at the time of the separation" of England and the United States.[126] In defining a case and controversy for the purposes of Article III standing, the Supreme Court has instructed courts to look to "history" for causes of action that were "traditionally recognized as providing a basis for a lawsuit in American courts."[127] This analysis is explicitly meant to replace "contemporary, evolving beliefs about what kinds of suits should be heard in federal courts."[128] As a more complex example, the Court in *Solem v. Bartlett* gave instructions for what sources to consider when concluding that Congress had revoked its grant of an Indian reservation: laws passed by Congress first, then contemporary events, and then ensuing events and demographics.[129] When the Court tried to depart from this framework in *McGirt v. Oklahoma*, the dissent chastised the majority for "disregarding the 'well-settled' approach required by our precedents."[130]

Several of the interpretive disputes over 42 U.S.C. § 1983 provide less explicit but similarly persuasive examples of methodological precedent at work. In the string of watershed precedents debating the existence of municipal liability under § 1983, the Supreme Court placed heavy emphasis on legislative history and the historical context surrounding the passage of the civil rights statute in 1871.[131] When the Court in *Owen v. City of Independence* was asked to determine how much municipal liability § 1983 provided, it cited those prior precedents not just for their legal conclusions, but to support the idea that the methodological question

[125] Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (conferring jurisdiction over "all suits . . . in equity").

[126] Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, 527 U.S. 308, 318 (1999). As with other examples in this Part, the Court supported this claim with a string of case citations in which a similar methodological approach was taken.

[127] TransUnion, LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021) (internal quotations omitted).

[128] Id.

[129] 465 U.S. 463, 470–71 (1984). Consistent with the common law model, the Court thought that the "clean analytical structure" was "established" by "precedents." Id. at 470.

[130] McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020) (Roberts, C.J., dissenting) (citation omitted). You might argue that this, therefore, is proof that source-inclusion precedents are not mandatory. But this approach was indeed followed by the Supreme Court for many years, see, e.g., Nebraska v. Parker, 577 U.S. 481, 487–88 (2016), and Justice Gorsuch in his majority in disagreeing with *Solem* felt the need to both cite precedent and offer substantive arguments as to why the judicial analysis should proceed differently, see McGirt, 140 S. Ct. at 2465.

[131] See Monroe v. Pape, 365 U.S. 167, 188–91 (1961); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 664 (1978).

was "essentially one of statutory construction."[132] It proceeded to explicitly follow those cases' (and others') interpretive approach, considering the state of the common law at the time of § 1983's passage and making inferences from the legislative history.[133] As a second example, § 1983 allows private plaintiffs to sue for damages for the violation of other federal statutory rights.[134] But Congress can choose to enact a statute that is not enforceable via § 1983. Before a court will conclude Congress intended to pass a statute that was unenforceable under § 1983, courts are required to look to whether there is an "express" provision of an alternate remedy.[135] The provision of a specific statutory remedy is considered strong evidence that Congress did not intend other, general remedies to apply, unless there is a textual "indication" to the contrary.[136] This rule was also established in a series of decisions across multiple decades.[137]

3. Deference Doctrines

The Supreme Court also sets the rules for interpreting statutes administered by regulatory agencies. Through the familiar deference doctrines laid out in *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.* and its progeny, the Court has articulated norms for interpreting specific legal directives.[138] Some commentators treat *Chevron* and *Auer* as the only exception to the rule that methodological decisions are not binding.[139] In fact, these cases are the proof of the rule, not the exception to it. *Chevron* and *Auer v. Robbins* demonstrate how decisions of the Court can set interpretive norms in context-specific enclaves and guide the analysis of future courts.[140]

[132] 445 U.S. 622, 635 (1980).
[133] Id. at 635–37.
[134] Maine v. Thiboutot, 448 U.S. 1, 4 (1980).
[135] City of Rancho Palos Verdes v. Abrams, 554 U.S. 113, 121 (2005).
[136] Id.
[137] See Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 254 (2008).
[138] See Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1984); Auer v. Robbins, 519 U.S. 452 (1997).
[139] See Gluck, Common Law, supra note 65, at 791.
[140] Some also dispute that *Chevron* really operates like precedent. E.g., Connor 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. 1726, 1796 (2010). But it at least does so in the weak sense used in this Note, setting a defeasible permission. See supra notes 76–80 and accompanying text.

For starters, the Supreme Court discusses the *Chevron* methodology as a binding precedent. The case is not simply cited for the legal conclusion about what counts as a "stationary sourc[e],"[141] but for its "principle of deference to administrative interpretations."[142] In later cases, the Court has clarified the "category of interpretive choices" to which *Chevron* deference applies,[143] and in those cases the Court has said that "[t]he *Chevron* framework governs our review."[144] Justice Scalia even referred to the norm of *Chevron* deference as "settled law."[145] Similarly, *Auer* deference to an agency's interpretation of its own ambiguous regulation is said to be "generally require[d]."[146] Chief Justice Roberts even wrote separately in *Kisor v. Wilkie* to insist that *Auer* deserved the protection of stare decisis.[147]

Beyond speaking about *Chevron* and *Auer* like methodological precedents, the Court has also treated the underlying methodological approach as precedential when considering whether to amend or revise these decisions.[148] In recent years, Justice Thomas has advocated for a considered departure from *Chevron* and its progeny, as if it were an established precedent that he wishes to overrule.[149] In an oral argument this Term, the Justices questioned the advocates about whether "we should *overrule Chevron*."[150] Similarly, the Court squarely considered whether to "overrule" *Auer* in the recent case of *Kisor*.[151] While the Court ultimately upheld the precedent, Justice Kagan adjusted the interpretive

[141] *Chevron*, 467 U.S. at 840 (quoting 42 U.S.C. § 7502(b)(6)).

[142] Id. at 844; see also United States v. Mead Corp., 533 U.S. 218, 229 (2001) (citing *Chevron* for the same proposition).

[143] *Mead*, 533 U.S. at 229.

[144] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005).

[145] Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 381 (1988) (Scalia, J., concurring).

[146] Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012). Indeed, Justice Kagan referred to *Seminole Rock*'s "deference regime" as part of the "pre-APA common law." Kisor v. Wilkie, 139 S. Ct. 2400, 2420 (2019).

[147] See *Kisor*, 139 S. Ct. at 2424 (Roberts, C.J., concurring).

[148] For example, when the Court declined to apply *Chevron* deference in *King v. Burwell*, it felt the need to explain why. 135 S. Ct. 2480, 2489 (2015).

[149] See Baldwin v. United States, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from denial of certiorari) (asking the court to "revisit" *Brand X* and *Chevron*). Commentators have also spoken about *Chevron* deference as a legal rule when debating its overrule. See Cass R. Sunstein, *Chevron* as Law, 107 Geo. L.J. 1613, 1615 (2015).

[150] Transcript of Oral Argument at 5, American Hospital Ass'n v. Becerra, 142 S. Ct. 1896 (2022) (No. 20-1114) (emphasis added).

[151] 139 S. Ct. 2400, 2408 (2019).

rule using a mode of analysis that was paradigmatic of the common law. With one hand, she reaffirmed the *Auer* framework, but with the other hand she laid out precise conditions for when deference to an agency's interpretation of its own regulation was permissible.[152] In doing so, she cabined *Auer* to cases of genuine ambiguity, marshalling the authority of numerous other cases as support for her text-focused approach.[153] *Kisor* is a fascinating example of both the ability of an interpretive approach to be entrenched in the Court's case law, as well as how a string of methodological subdecisions can influence how the Court will interpret texts going forward.[154]

4. More Generalized Norms

In addition to the aforementioned examples, interpretive norms have also changed in more generalized ways through the aggregate effect of methodological decisions. While it is difficult to speak too generally about the Supreme Court's body of decisions, a few norms are identifiable. First and foremost, the modern Court treats the text as a *sine qua non* of interpretation, even when they go on to use other sources to illuminate the text.[155] This has not always been the case.[156] Indeed, the Court's increased use of descriptive canons to interpret legal directives is strong evidence of a shifting norm of interpretation toward a focus on written enactments and away from purposive readings.[157] In *Lockhart v.*

[152] Id. at 2408–18.

[153] Id. (citations omitted).

[154] You might think that *Chevron* and *Auer* are examples of legislative stare decisis more than a common law approach to methodological precedent. However, even though both *Chevron* and *Auer* are cited as seminal cases for their interpretive rules, neither case purported to create a deference regime out of whole cloth. Rather each case, in turn, cited prior cases as establishing methodological principles such as proper respect for executive judgment. See *Chevron*, 467 U.S. at 844 ("[T]he principle of deference to administrative interpretations has been consistently followed by this Court . . . .") (citing, among others, NLRB v. Hearst Pubs., Inc., 322 U.S. 111 (1944)); *Auer*, 519 U.S. at 461 (noting administrative interpretations of ambiguous regulations are, "under our jurisprudence, controlling" and citing cases). Indeed, these are prime examples of a string of minor common law decisions converging on interpretive consensus over time.

[155] E.g., New Prime, Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019).

[156] See Diarmuid F. O'Scannlain, "We Are All Textualists Now": The Legacy of Justice Antonin Scalia, 91 St. John's L. Rev. 303, 304 (2017).

[157] A good example is *Yates v. United States*, where Justices Ginsburg and Kagan employ a variety of interpretive canons to reach contrary conclusions about the meaning of the statutory term "tangible object." Compare 574 U.S. 528, 537–38 (2015), with id. 569–70 (Kagan, J., dissenting); see also Landgraf v. USI Film Prods., 511 U.S. 244, 263–64 (1994) (attempting

United States, for example, the Court split over the correct interpretation of the phrase "involving a minor or ward" in the federal child pornography statute.[158] In dueling opinions, Justice Sotomayor for the majority and Justice Kagan relied heavily on so-called "textual" canons,[159] even quoting Scalia and Garner's textualist treatise *Reading Law* at each other![160] It is difficult to think of a more striking sign of a change in the winds. Even if different canons are applicable in different situations and the use of a single canon is not conclusively binding on a future case, we have certainly moved away from the era where canons were dismissed as indeterminate "thrusts" and "parries."[161]

Second, the Court's shifting relationship with legislative history is further evidence of accumulated norms. Critics of methodological precedent are correct to say that the Court's use of legislative history has been, and remains, inconsistent.[162] Justice Scalia's dream of purging legislative history from the federal reporters has not actualized. But when the modern Court does use legislative history, it does so with qualifying and hedging phrases.[163] In a recent opinion, Justice Sotomayor relegated the entirety of her legislative history argument to a footnote.[164] This is a stark departure from the days when legislative history was trotted out with abandon, with the presumption that all parties would consider it

to reconcile seemingly contradictory canons of construction in order to determine if a law applied retroactively).

[158] Lockhart v. United States, 577 U.S. 347, 349 (2016).

[159] Id. at 351.

[160] See id. at 351 (Sotomayor, J.); id. at 364 (Kagan, J., dissenting).

[161] Llewellyn, supra note 74, at 401. In a recent paper, Professor Doerfler has suggested that the current Court's use of the canons is "wooden" and fails to acknowledge the true extent of statutory indeterminacy, exposing the Court to Llewellyn's old critiques. See Ryan Doerfler, Late-Stage Textualism, 2022 S. Ct. Rev. (forthcoming) (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3969398 [https://perma.cc/US7U-DU33]. But interestingly, although he attributes the "renaissance" of these tools to conservative political forces, he documents their explicit use by Justice Sotomayor in *Facebook v. Duguid*. Id. at 7, 13 (citing 141 S. Ct. 1163 (2021)). Even if he finds this mode of interpretation "embarrassing," id. at 17, his essay supports the thesis that underlying norms of interpretation have dramatically changed over time and that Justices who might otherwise not be inclined to use those methods have acceded to these norms.

[162] See Anita Krishnakumar, Statutory History, 108 Va. L. Rev. 263, 297–313 (2022) (cataloguing the nuanced uses of legislative history by the Roberts Court).

[163] Sturgeon v. Frost, 139 S. Ct. 1066, 1085 (2019) (commenting that legislative history confirms the textual analysis "for those who consider it").

[164] Return Mail, Inc. v. U.S. Postal Serv., 139 S. Ct. 1853, 1865 n.8 (2019).

probative.[165] Furthermore, the use of legislative history is cabined by agreed-upon limiting principles, like the maxim that legislative history cannot be used to muddy an unambiguous text.[166] That is itself a norm that has been "settled" by a series of cases.

Third, the Court's comfort with history as a means of interpreting the Constitution's text evinces changes in accumulated norms.[167] A good example is Justice Ginsburg's various interpretations of the Fourteenth Amendment. In her legacy-shaping opinion in *United States v. Virginia*, Justice Ginsburg wrote that the Equal Protection Clause prohibited sex discrimination at Virginia Military Institute with nary a mention of the original public meaning (much to Justice Scalia's chagrin).[168] But twenty years later, in *Evenwel v. Abbott*, Justice Ginsburg wrote another Fourteenth Amendment opinion in which she "beg[an] with constitutional history," framing the question in a set of rich paragraphs on the original meaning of the document.[169]

B. Vertical Precedent

Once the Supreme Court has framed the rules of legal interpretation through its cases, lower courts follow the Supreme Court's lead. In this way, the Supreme Court's subdecisions also have a vertical precedential effect.[170] Sometimes this process does not look as much like a gradual common law as it does at the Supreme Court, perhaps because the lower courts are primed to strictly follow individual decisions of the Supreme Court rather than waiting for a series of cumulative decisions. Although, because lower courts also frequently narrow individual high court

[165] See, e.g., United Steelworkers of America v. Weber, 443 U.S. 193, 201 (1979) (citing a case for the proposition that the statute in question "must" be read "against the background of the legislative history").

[166] See, e.g., Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2364 (2019); NLRB v. SW Gene., 137 S. Ct. 929, 942 (2017) (stating that "we need not consider" legislative history because "[t]he text is clear"); accord Epic Sys. v. Lewis, 138 S. Ct. 1612, 1631 (2018) (citing cases for the proposition that legislative history cannot be used to make plain text ambiguous).

[167] Cf. William Baude, Is Originalism Our Law?, 115 Colum. L. Rev. 2349, 2373–76 (2015) (citing modern cases reflecting shared agreement about the "priority" and importance of the original meaning of the Constitution in interpretive disputes).

[168] Compare 518 U.S. 515, 556–58 (1996) (extolling the virtues of the Constitution's "extension" as mores evolve), with id. at 568–69 (Scalia, J., dissenting) (emphasizing historical practice).

[169] Evenwel v. Abbott, 578 U.S. 54, 64 (2016).

[170] Much descriptive work has been done in this area by Professor Bruhl, even though he views it as evidence of a slightly different thesis. See Bruhl, supra note 7.

decisions that they disagree with,[171] one would expect to see norms that are more settled across the body of Supreme Court case law to have greater precedential weight in the lower courts. The evidence appears to bear this out.[172] In individual areas where the court has given explicit guidance, lower courts respect the Supreme Court's directions about what sources to use and when. But even when the high court's guidance is less clear, lower courts seem to take implicit cues from the Supreme Court about the proper way to interpret legal directives.

1. Explicit Directions

When the Supreme Court gives explicit instructions about legal interpretation, the lower courts tend to follow. Whether these rules look like mandatory rules of exclusion,[173] rules of inclusion,[174] priority rules,[175] interpretive defaults,[176] or more traditional "tests" in specific doctrinal areas,[177] the lower courts cite and apply them. The more candid the Court, the more likely the directive will trickle down. For example, the recent decision in *Bostock v. Clayton County* was a watershed moment for plain meaning textualism in statutory interpretation.[178] It stated in no uncertain terms that courts normally interpret a statute "in accord with the ordinary

[171] See Richard M. Re, Narrowing Supreme Court Precedent from Below, 104 Geo. L.J. 921, 923 (2016).

[172] Indeed, Professor Bruhl's empirical research suggests that the methods used by lower courts shift in parallel with the methods used at the Supreme Court. Aaron-Andrew P. Bruhl, Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court, 68 Duke L.J. 1, 57–60 (2018).

[173] E.g., Harry v. Marchant, 291 F.3d 767, 772 (11th Cir. 2002) (refusing to consider legislative history "to cloud a statute that is clear," citing Supreme Court guidance).

[174] Cf. Schantz v. Deloach, 2021 WL 4977514, at *12 (11th Cir. Oct. 26, 2021) (Jordan, J., concurring) (bemoaning the Court's requirement that courts interpret § 1983 in light of common law immunities that existed at the time of enactment).

[175] See, e.g., Impact Energy Res., LLC v. Salazar, 693 F.3d 1239, 1249–61 (10th Cir. 2012) (debating the Supreme Court's guidance on the interaction between the conflicting presumptions); Make The Rd. N.Y. v. Wolf, 962 F.3d 612, 638 (D.C. Cir. 2020) (Rao, J., dissenting) (arguing that the Supreme Court has instructed lower courts to credit the plain meaning of jurisdictional statutes rather than apply a presumption against jurisdiction stripping too quickly).

[176] See, e.g., Navarro v. Encino Motorcars, LLC, 845 F.3d 925, 935 (9th Cir. 2017) (attempting to follow Supreme Court precedent on how to construe the Fair Labor Standards Act); Rodriguez v. Adams Rest. Grp., 308 F. Supp. 3d 359, 364 n.1 (D.D.C. 2018) (same).

[177] E.g., Matz v. Household Int'l Tax Reduction Inv. Plan, 265 F.3d 572, 574–76 (7th Cir. 2001) (stating the court felt compelled by *Chevron* deference to adopt an interpretation it would not adopt if they were "writing on a blank slate").

[178] Bostock v. Clayton County, 140 S. Ct. 1731, 1738 (2020).

public meaning of its terms at the time of its enactment."[179] You might see that as a quasi-legislative holding rather than a common law decision, but *Bostock* itself cites prior caselaw for its methodological premises.[180] And in many ways, *Bostock* was the culmination of the Supreme Court's recent pivot towards textual analysis, the product of repeated emphasis on Congress's enacted words in accumulated subdecisions.[181] This settling of interpretive principles by the Supreme Court already seems to have had an immediate impact on the lower courts. Of the 306 instances of federal courts using the phrase "public meaning," 131 of them are in the months since *Bostock*.[182] Many of these cases cite *Bostock* for its methodological holding, including circuits that are more formalist by composition[183] and courts who are perhaps less inclined to be textualists.[184]

Similarly, in constitutional interpretation, lower courts treat the methodology used by the Supreme Court in that area of law as guiding, if not controlling, the interpretive analysis. Sometimes the lower courts' analysis is relatively straightforward: the Supreme Court addressed the question this way, and so will we. For example, the U.S. Court of Appeals for the District of Columbia Circuit said it felt compelled to follow "the Supreme Court's adherence to a purposive approach to the Origination Clause."[185] The Fourth Circuit argued that the guidance of the Supreme Court required that it look to the "historical record" to ascertain the scope

[179] Id.

[180] Id. at 1738, 1751.

[181] See supra Subsection III.A.4; see also Towns v. And Action, LLC, 2021 WL 2607042, at *2 (N.D. Ga. Feb. 1, 2021) ("[*Bostock* does] not change the long-standing rule of statutory construction that the first step is to determine whether the language at issue has a plain and unambiguous meaning.").

[182] Westlaw search last conducted Dec. 4, 2021, with the term "public meaning" (in quotation marks), filtered for cases in the federal courts of appeals and the federal district courts. When the 306 case results are arranged by date, 131 were issued in July 2020 or later.

[183] See, e.g., United States v. Dominguez, 997 F.3d 1121, 1124 (11th Cir. 2021) (Jordan, J.).

[184] See, e.g., Khan v. Att'y Gen., 979 F.3d 193 (3d Cir. 2020) (Krause, J.); Collins v. United States, 996 F.3d 102, 109–10 (2d Cir. 2021) (Raggi, J.); Maner v. Dignity Health, 9 F.4th 1114, 1122 (9th Cir. 2021) (Bea, J.).

[185] Sissel v. U.S. Dep't of Health & Hum. Servs., 799 F.3d 1035, 1039 (D.C. Cir. 2015) (Rogers, Pillard & Wilkins, JJ., concurring in the denial of rehearing en banc) (affirming the underlying panel opinion on these grounds). As another example, when the D.C. Circuit originally heard *Trump v. Mazars*, both the majority and the dissent cited Supreme Court precedent saying that historical practice was especially probative in assessing the scope of the Congress's powers vis-à-vis the President. Compare Trump v. Mazars USA, LLP, 940 F.3d 710, 735 (D.C. Cir. 2019) (Tatel, J.), with id. at 753 (Rao, J., dissenting).

of the Second Amendment.[186] As evidenced by these two examples, following the Supreme Court's guidance does not mean that methodological approaches are uniform across cases. Just as the Supreme Court itself has employed differing approaches to exegeting different constitutional provisions over the years, so have lower courts.

But rather than treating the Supreme Court's inconsistency as license to follow whatever methodology they see fit, lower courts seem to try to follow the approach of the high court in the area of law in question. A prominent example is Judge Pryor in *United States v. Johnson*.[187] While Judge Pryor himself is an originalist,[188] in *Johnson* he wrote for an en banc majority, attempting to discern the application of the Fourth Amendment to a stop and frisk.[189] He wrote that in the specific area of *Terry* stops, the Supreme Court has not looked to the original public meaning of the document but instead has focused on the need for officer safety.[190] "To be sure, in several areas," he hedged, "the Supreme Court has considered the original meaning of the Fourth Amendment."[191] In those areas, as well as Fourth Amendment issues of first impression, Judge Pryor cited repeated examples where the Eleventh Circuit has likewise interpreted the document in line with its original meaning.[192] But where the Supreme Court has given clear guidance to the contrary, "[w]e cannot use originalism as a makeweight."[193] This is an example of a conservative judge (on a conservative court) subordinating his own methodological priors to the interpretive common law of the Supreme Court.

[186] Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives, 5 F.4th 407, 414–15 (4th Cir. 2021); see also District of Columbia v. Trump, 315 F. Supp. 3d 875, 881 (D. Md. 2018) ("Supreme Court precedent confirms that a blend of textualism and purposivism should guide the Court's approach [to this area of the law].").

[187] United States v. Johnson, 921 F.3d 991 (11th Cir. 2019).

[188] See William H. Pryor, Jr., Honoring Good Jurists and Opposing Bad Rulings, 22 Tex. Rev. L. & Pol. 1, 1–3 (2017).

[189] *Johnson*, 921 F.3d at 994–95.

[190] Id. at 1001.

[191] Id. (citing cases).

[192] Id. at 1001–02.

[193] Id. at 1002. Judge Pryor seems to be arguing both that lower court judges cannot follow their understanding of the original meaning when it contradicts explicit rules of law devised by the Supreme Court, but also that they cannot use originalism as a methodology to limit the application of doctrine when the Supreme Court has given clear guidance to interpret the law using other considerations. See id.

2. Implicit Directions

Lower courts also read between the lines of Supreme Court opinions to see what kind of methodological approaches are likely in accord with how the Supreme Court wants cases decided. In fact, when Justice Scalia was still a judge on the D.C. Circuit, he said in an interview that he paid attention to the methodological approach of the Supreme Court as he decided cases, even when the high court's views differed from his own. "As an intermediate Federal judge," he said, "I can hardly ignore legislative history when I know it will be used by the Supreme Court."[194] What Justice Scalia purported to do anecdotally, the Article III judiciary seems to do *en masse*.[195] Professor Caminker has argued persuasively that lower courts not only look to the letter of Supreme Court precedent, they also consider a diverse array of signals about how their superior courts will approach particular questions, and tailor their decisions to avoid being overruled.[196]

This is no less true in the realm of methodology. For example, consistent with the Supreme Court's trend towards constitutional originalism,[197] the lower courts have begun to use constitutional history and public meaning in areas where the court has not been explicitly originalist. In the Fourteenth Amendment context, Judge Dennis (a Clinton appointee, writing for the wing of the Fifth Circuit composed of largely Democratic appointees) used the original meaning of the federal

[194] Hearings on the Nomination of Judge Antonin Scalia, to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary, 99th Cong. 105 (1986).

[195] See Bruhl, supra note 7, at 148 (arguing that the "lower courts feel obliged to follow the Supreme Court's interpretive regime" because "lower courts' mix of interpretive tools shift in parallel with changes in the Supreme Court's mix of tools"). For example, in a recent interview, Judge Andrew Oldham of the Fifth Circuit claimed that "the [Supreme] Court has told us [lower court judges] that we should care about the original meaning of the Constitution. They've done that specifically in instructions to us in specific cases but they've also said it in the . . . way they go about analyzing constitutional questions." The Federalist Society, Founders & Foes (An Exchange), YouTube, at 1:16:11 (Mar. 5, 2022), https://www.youtube.com/watch?v=zwb9Rn_FMd0 [https://perma.cc/6ZPX-582R]. He intimated that lower courts feel an obligation to follow the "instructions the court has given us on the methodology about answering [constitutional] questions." Id.

[196] Evan H. Caminker, Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking, 73 Tex. L. Rev. 1, 5 (1994) ("[Lower courts] predict their higher court's subsequent ruling and, taking that as a given, conform today's decision to tomorrow's.").

[197] See Richard H. Fallon, Jr., The Chimerical Concept of Original Public Meaning, 107 Va. L. Rev. 1421, 1423–24 (2021) (documenting the Supreme Court's modern turn).

Indian power to argue for expansive congressional authority over the adoption of Native American children.[198] It is difficult to explain this kind of behavior if lower court judges really believe they have total methodological freedom.[199] Similarly, in the statutory realm, the lower courts have recently entered into fights about who is being a purposivist, using "purposivist" almost as a dirty word.[200] This is a stark departure from the days when Justice Brennan called it "black letter law" that it was necessary in statutory interpretation to construe a statute in a way that furthers Congress's broader policy goals.[201] Lower courts also feel comfortable making broad generalizations about limits on the use of legislative history. "Gone are the 'bacchanalian days' when courts idolized legislative history," wrote one district court judge recently[202]—a bold statement to make if he did not believe the higher courts would back him up.

In summary, there is much the Supreme Court disagrees about, but there are also real norms of interpretation. These norms have a meaningful effect on the way the Supreme Court decides cases. The decisions of the Supreme Court expound, apply, and "rule-ify" these norms through individual cases. Future and lower courts follow both the Supreme Court's direct guidance and its patterns of behavior, treating these common law decisions as rules of interpretation.

[198] See Brackeen v. Haaland, 994 F.3d 249, 272 (5th Cir. 2021) (en banc) (arguing that "[p]articularly significant to our analysis" is how the Constitution was understood "at the time of its adoption").

[199] One could argue that Judge Dennis was merely trying to persuade conservative colleagues on a conservative court, but he did not succeed in persuading his most originalist colleagues. See id. at 267–68 (per curiam). If anything, his audience seems to be the high court.

[200] Am. Trucking Ass'ns v. Alviti, 944 F.3d 45, 52 (1st Cir. 2019) (speaking dismissively about the opposition's "purposive arguments"); Hewitt v. Helix Energy Sols. Grp., 983 F.3d 789, 800–01 (5th Cir. 2020) (Ho, J., concurring) (trying to mediate the majority and dissent, both accusing the other of "engaging in purposivism"); United States v. Bryant, 996 F.3d 1243, 1261 (11th Cir. 2021) (rejecting the "purposivist points" of "sister circuits"); see also Seth B. v. Orleans Par. Sch. Bd., 810 F.3d 961, 985 & n.17 (5th Cir. 2016) (Smith, J., dissenting) (rejecting "purposivism" as judicial "license," on the authority of the Supreme Court majority in *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 112 (2014)).

[201] Evans v. Jeff D., 475 U.S. 717, 744 (1986) (Brennan, J., dissenting).

[202] Lawyers' Comm. for 9/11 Inquiry, Inc. v. Wray, 424 F. Supp. 3d 26, 31 (D.D.C. 2020).

C. Responding to Objections

Despite this evidence of an already-operative common law of methodology, the skeptic may still harbor reservations about my thesis.

1. Argument from Changing Personnel

To begin, one might object that even if these cases accurately describe judicial behavior, the changes are judge-driven rather than precedent-driven.[203] After all, we can associate views on interpretive methods with particular Justices, and personnel shifts on the court seem to play a significant role in how this law has developed.[204] Judges themselves are influenced by the academy and their clerks.[205] These inputs may have a greater effect on case outcomes than do judicial precedents.

It is true that all these factors contribute to paradigm shifts in how judges approach legal interpretation. However, this is also true in nearly every area of substantive law. Each generation has had different substantive views on the law than their parents. But when those views become ossified in the language of judicial opinions, we do not say that precedent played no part in courts' decision making. The common law model recognizes that judicial opinions are reflective (and not necessarily constitutive) of underlying jurisprudential norms,[206] but how those judicial opinions state and clarify the law shapes the legal effect of those norms.[207] Indeed, the fact that Justices adopt new interpretive modes (like Justice Ginsburg in *Evenwel* or Justice Kagan in *Auer*)[208] after the accumulation of case law and lower court judges follow the interpretive directions of their high court is evidence that precedent and underlying

[203] See Doerfler, supra note 161, at 7.

[204] See Lee Epstein & Joseph F. Kobylka, The Supreme Court & Legal Change: Abortion and the Death Penalty 20 (1992) ("It goes without saying that the personnel changes that have occurred over the past three decades could have substantial bearing on the direction of legal change.").

[205] See Neal Kumar Katyal, Foreword: Academic Influence on the Court, 98 Va. L. Rev. 1189, 1194 (2012); Sambrano v. United Airlines, Inc., No. 21-11159, 2022 WL 486610, at *15 (5th Cir. Feb. 17, 2022) (Smith, J., dissenting) (suggesting that federal judges are influenced by their "zealous law clerks").

[206] See sources cited supra notes 69–74.

[207] See Mark J. Richards & Herbert M. Kritzer, Jurisprudential Regimes in Supreme Court Decision Making, 96 Am. Pol. Sci. Rev. 305, 315 (2002) (arguing that legal and jurisprudential regimes necessitate certain modes of analysis and therefore work in concert with judges' individual predilections to shape legal development).

[208] See supra notes 151–53, 169 and accompanying text.

norms work together. It is no less true in the realm of interpretive methodology than in substantive areas of the law.

2. Argument from "False Flags"

A second objection is that judges respond to changing interpretive norms by using new terms and categories—adopting the *lingua franca*, so to speak—but they still reach the same results as they would in the absence of the methodological precedents.[209] References to past decisions about text or statutory language might be placed there to appease colleagues, to satisfy public expectations, or to win a fifth vote.[210] Just as Justice Alito accused Justice Gorsuch of "legislation" under a "textualist flag,"[211] judges' citations and allusions to prior methodological precedents might be the equivalent of flying enemy colors to disguise their true behavior.

Again, this realist critique is not unique to the methodological common law. Critics have long protested that precedents are manipulated by results-oriented judges.[212] But just because the law is manipulable does not mean it does not have authoritative or outcome-shaping force. As Professor Gluck has said, "The fact that 'ideology' is a factor in judicial decision-making does not necessarily mean that ideology is the only factor or that legal doctrine is not the salient one."[213] True, it can be difficult to quantify just how much work a set of methodological precedents is doing in an individual case with the individual Justice writing an opinion. But when accumulated precedents establish a certain interpretive approach as lawful, this seems to require judges to go through the steps of that methodology, or at least explain their departure.

[209] See Anita S. Krishnakumar, Backdoor Purposivism, 69 Duke L.J. 1275, 1278 (2020) (arguing that there are "purposivist and intentionalist undertones to the Roberts Court's use of textualist . . . tools" of interpretation).

[210] Cf. Thomas W. Merrill, Textualism and the Future of the *Chevron* Doctrine, 72 Wash. U. L.Q. 351, 365 (1994) (suggesting that decreasing the use of legislative history was the price of getting Justice Scalia or Justice Thomas to sign on to majority opinions).

[211] Bostock v. Clayton County, 140 S. Ct. 1731, 1754–55 (2020) (Alito, J., dissenting).

[212] E.g., Daniel H. Chamberlain, The Doctrine of Stare Decisis: Its Reasons and Its Extent 26 (N.Y., Baker, Voorhis & Co. 1885) ("The doctrine of *stare decisis* may be said to be a much abused doctrine. It has pointed many a sneer, feathered many a shaft hurled at *the law* . . . .").

[213] Gluck, States as Laboratories, supra note 7, at 1820.

3. Argument from Inconsistent Judicial Behavior

Another objection is that any consistency in the narrative is overblown. Individual judges flip-flop between their own interpretive commitments, and the Court as a whole has failed to reach consensus on a number of key issues—like the use of legislative history—despite decades of disagreement.[214] Can we really say that any methodological dispute has been "settled"?

This is an empirical disagreement more than a theoretical one, and so it is difficult to disprove other than by pointing the skeptic back to the evidence. Yes, judges are not perfectly consistent at a high level of abstraction (e.g., a formalist judge might resort to arguments about statutory purpose),[215] but it is important to remember that the high-profile cases at the Supreme Court involve the most contentious interpretive questions in the law. They push judges to the limits and the "fringe cases" in their own judicial philosophy, which may give the appearance of contradiction, but may or may not be true in individual cases.[216] However, the concept of common law adjudication tolerates inconsistency and vacillation. It often takes many difficult cases and many decades to determine the best approach to interpreting statutes. But that does not mean liquidation of those disputes is impossible. The current unanimity about certain uses of legislative history would have been unthinkable in 1975, as would some of the Court's refusal to look outside the text to draw inferences about Congress' intent.[217] If a judge purported to use legislative history today to, for example, infer the repeal of habeas jurisdiction, they would be accused of not only flaunting norms but also the *law*.[218]

[214] See Krishnakumar, supra note 162, at 318–19.

[215] Some have pointed to Chief Justice Roberts's reliance on statutory purpose in *King v. Burwell* as an example of this inconsistency. 135 S. Ct. 2480, 2485–86 (2015); see, e.g., Krishnakumar, supra note 209, at 1319.

[216] See Bruhl, supra note 7, at 106.

[217] See O'Scannlain, supra note 156.

[218] See Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1979 (2020). As another example, Justice White attributed legal status to methodological propositions in *Gregory v. Ashcroft*, when he criticized the majority for "depart[ing] from established precedent" in requiring heightened proof of congressional intent to upset the federal-state balance via statute. 501 U.S. 452, 481 (1991).

4. Argument from Judicial Rhetoric

A fourth objection is that the Court does not talk about its methodological decisions like precedent enough for us to say with any confidence that they feel bound by precedent. Even though Professor Gluck advocates for methodological stare decisis, this is her diagnosis of the current state of affairs.[219]

However, in other cases, the Court speaks very clearly about methodological decisions as precedent.[220] And it acknowledges the effect of many accumulated precedents.[221] Indeed, the common law notion that some norms are more settled than others (depending on the strength of consensus in the case law) would allow for more judicial freedom in some areas than in others.[222] Once again, a common law model helps explain what others see as inconsistency. Furthermore, lower courts' behavior strongly suggests that they treat the interpretive directions from the Supreme Court as authorities, both in individual cases and as evidence of deeper jurisprudential norms.[223]

5. Argument from Interpretive Pluralism

Lastly, the astute objector could propose a counter model: the real story might be that judges have a pluralist mentality about methods of interpretation. They feel free to choose from among competing interpretive tools in any given case, even if those tools are mutually exclusive in the abstract.[224] Admittedly, some forms of argument are

[219] Gluck, Common Law, supra note 65, at 777–78 (arguing that Supreme Court Justices speak about interpretation like "rules of thumb," applicable only when they want them to be, not based on prior precedent).

[220] See supra Section III.A. Some of these examples might be dismissed by a critic as doctrinal "tests" or examples of judicial common-lawmaking rather than interpretive precedents. But the fact that norms about how to give legal meaning to enacted directives are mistaken for rule-like "tests" is only further evidence of their precedential power.

[221] Id.

[222] See Lee, supra note 43, at 670–71 (arguing that the early Marshall Court's adherence to precedent depended on how settled the prior norm was); see also Gluck, Common Law, supra note 65, at 808 (arguing that statutory interpretation principles can still be law even if they are not "*as* lawlike as other legal mandates").

[223] See supra Section III.B.

[224] See Richard H. Fallon, Jr., The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation, 82 U. Chi. L. Rev. 1235, 1239, 1243–45 (2015) (arguing for "interpretive eclecticism," where jurists do not commit in advance to any source of legal meaning, and argues that this describes much of modern interpretive debate at the Court); see also Siegel, supra note 5, at 385–86 ("Time and again one sees the Court stating a principle of

considered "out of bounds,"[225] while some have the blessing of "legitimacy."[226] But as long as judges use interpretive methods that are considered acceptable, they retain methodological freedom. This would explain the seeming consensus around certain methods of interpretation in certain areas, but the fracturing of courts on interpretive grounds when judges disagree on an ultimate decision.

First of all, if judges feel like they are limited to making certain kinds of "acceptable" interpretive moves, this itself would be evidence of legally relevant norms of interpretation. Furthermore, while this story of near-total judicial freedom may be compelling, it runs aground on the evidence of judicial behavior. For one thing, judges have incentives to remain internally consistent. The only reason we can criticize Justice Scalia for being inconsistent in particular cases is because we can compare him to his "norm," the philosophically consistent textualist.[227] It is doubtful Justice Gorsuch, having written at length about the values of textualism in his personal capacity,[228] feels like he could write an opinion employing sweeping purposivism without an ounce of explanation.[229] The Court as an institution might have similar pressures towards consistency.[230] Indeed, this forcing effect is one of the huge implications (and proofs) of a methodological common law. In short, when the Supreme Court does establish methodological precedent through the common law process, it either follows that law (and so do the lower

statutory interpretation without apparent qualification in one case, only to ignore it in the next.").

[225] David E. Pozen & Adam M. Samaha, Anti-Modalities, 119 Mich. L. Rev. 729, 731, 763 (2021) (arguing that there are certain methods of interpretation that "no reputable . . . decisionmaker wishes to be associated with").

[226] See Philip Bobbitt, Constitutional Fate: Theory of the Constitution 5–6 (1982) (arguing that there are certain modalities, like rules of grammar, that are the permissible forms of argument in constitutional debate).

[227] See Jonathan R. Siegel, The Legacy of Justice Scalia and His Textualist Ideal, 85 Geo. Wash. L. Rev. 857 (2017).

[228] See Neil M. Gorsuch, A Republic, If You Can Keep It 108–44 (2019) (making systematic arguments for originalism and plain meaning textualism).

[229] See generally Richard M. Re, Personal Precedent at the Supreme Court, 137 Harv. L. Rev. (forthcoming 2022) (manuscript at 2) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4068518 [https://perma.cc/J994-MSGP]) (arguing that judges presumptively adhere to their own prior expressed views of the law).

[230] It is possible that clashes between the Court's institutional norms of interpretation and a judge's personal interest in consistency drive change in the law of interpretation, but this is an area for further exploration and study.

courts) or it feels the need to distinguish the precedent like any other substantive precedent.

IV. ADVANTAGES OF A METHODOLOGICAL COMMON LAW

Perhaps some of the disbelief about the existence of methodological precedent—even in the weaker, common law form described here—stems from concerns that such a system would be a decidedly worse state of affairs. This Part seeks to assuage those fears. A common law of methodology captures much of the upside of ordinary precedent while minimizing the risks of an overly rigid conception of methodological stare decisis.

A. Promotes Consistent Outcomes

A common law of methodological precedent advances the rule of law values of ordinary precedent.[231] For starters, the use of similar methodological principles in the same area of law may lead to more consistent outcomes.[232] Take, for example, rules about interpreting jurisdictional statutes. If the Court requires a clear statement in the statutory text that Congress intended to divest states of jurisdiction over federal claims,[233] and this is a matter of decisional law, two cases dealing with two statutes that both fail to satisfy this test should be interpreted similarly. Not only does this resonate with our intuition that like cases should be treated alike,[234] it also gives more notice to regulated parties. And the common law method of gradual change ensures that interpretive regimes do not change rapidly, making disruptive parallel changes in the substantive law.[235] Moreover, institutionally, when methodological approaches are described as law and derive from the considered decisions of multiple past courts, this may make the public more willing to respect the court's conclusion rather than viewing a given interpretation as a fig leaf for motivated reasoning.[236]

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[231] See supra Section I.A.

[232] See Connors, supra note 7, at 709.

[233] See Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 823 (1990).

[234] See Schauer, Precedent, supra note 14, at 595.

[235] Cf. William N. Eskridge, Jr. & Philip P. Frickey, Foreword, The Supreme Court 1993 Term: Law As Equilibrium, 108 Harv. L. Rev. 26, 81 (1994) (noting the dangers of "disrupt[ion]" of a "stable practice" in the law).

[236] Cf. Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723, 753 (1988) ("[T]he real focus of rule of law theories about the Supreme Court . . . is

An objector might respond to these advantages in one of two ways. For those who think stare decisis overprotects bad precedents,[237] constancy is a bane and not a boon. In the area of methodology, there is also an extra concern: the loss of judicial freedom. Perhaps unlike in substantive areas of the law, where we want the rules governing private and public conduct to be clear and settled, we want judges to have the freedom to choose their own interpretive approach.[238] However, even assuming that some level of judicial freedom is desirable, the advantage of a gradual common law precedent is that it is defeasible without being too defeasible. Neither Rome nor methodological precedents are built in a day. A single case cannot work comprehensive changes in the law of methods, and interpretive rules only become settled after the considered elucidation of multiple cases.[239] And even after an interpretive rule achieves this quasi-precedential status, judges can still distinguish the prior case. They just need to give a good reason to do so—the common law establishes a burden of persuasion rather than inflexible structures.[240]

The second type of objection has the opposite worry, that this form of precedent is too malleable. If methodological precedents can be so easily distinguished, can a common law of interpretation really further the rule of law? First of all, even a system of precedent which does not formally constrain judges still offers many benefits.[241] If all a case does is give judges an explanatory hurdle, the transparency gains alone might justify the system.[242] But additionally, the evidence suggests that the common

to contain, if not minimize, the existing cynicism that constitutional law is nothing more than politics carried on in a different forum. . . . If courts are viewed as unbound by precedent, . . . considerable efforts would be expended to get control of such an institution—with judicial independence and public confidence greatly weakened.").

[237] See, e.g., Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring).

[238] See Criddle & Staszewski, supra note 8, at 1582 (speculating that "courts best represent the diverse constituencies within Congress if individual judges and justices remain free to follow their own diverse methodological preferences"); see also Oldfather, supra note 8, at 156 (arguing that judges should not have to precommit to interpretive theories, as individual cases may reveal that other considerations trump the abstract principles on which many interpretive theories are based).

[239] See Postema, supra note 44, at 161; cf. Letter from James Madison to Judge Roane, supra note 44, at 145 (noting that disputes about constitutional meaning would only be settled by a "regular course of practice" over many years).

[240] See Hellman, supra note 14, at 73–75.

[241] See Re, Precedent as Permission, supra note 51, at 922–29.

[242] Cf. Barrett, supra note 23, at 1737 (arguing that a system of defeasible precedent "enables a reasoned conversation over time between justices—and others").

law of interpretation does cause judges to coalesce around certain norms.[243] This increases predictability, even if only in small enclaves. For example, the clarity about when the Court will interpret a statute to operate retroactively certainly advances values about notice and clarity.[244] Setting an originalist heuristic for the Second Amendment (which clearly endorses historic exceptions for bans on possession by felons)[245] might give the law some stability that would not exist with the bare phrase "shall not be infringed."[246]

Admittedly, one downside of this system is that different strains of subdecisions might lead to philosophically opposed places. That is, in one area of the law you might have agreement across cases about an interpretive principle that sounds in purposivism, such as the maxim that "remedial statutes should be liberally construed."[247] Meanwhile, another area of the law of interpretation might have reached an explicitly textualist settlement, perhaps like precedents about the extraterritoriality of statutes.[248] But this seeming incongruity is not fatal to a common law system. Other areas of federal law which have developed like common law have strains of doctrine that are apparently contradictory in theory and in practice.[249] Even if there are broad philosophical inconsistencies across the body of law, small-scale decisions can still be settled precedent.

B. Increases Accuracy of Communication Between Courts and Congress

Greater clarity about the Court's interpretive approach also enhances the communication between the judiciary and the political branches. For those who believe that courts ought to be faithful agents of Congress,[250] greater surety about how judges will interpret legislative directions gives Congress guidance ahead of time about the legal effect of their enacted words. Even for someone who views the relationship between the courts

[243] See supra Sections III.A–B.

[244] See Vartelas v. Holder, 566 U.S. 257, 273–74 (2012) (noting that the petitioner relied on principles of nonretroactivity).

[245] District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

[246] U.S. Const. amend. II.

[247] Peyton v. Rowe, 391 U.S. 54, 65 (1968).

[248] See supra notes 117–23 and accompanying text.

[249] For example, the law of antitrust has historically been derided for its "internal contradictions." E.g., Robert H. Bork, The Antitrust Paradox 408 (1978).

[250] See Amy Coney Barrett, Substantive Canons and Faithful Agency, 90 B.U. L. Rev. 109, 112 (2010).

and the legislature as more dialogic and functional,[251] the settling of interpretive norms gives Congress more information about how to best respond to courts' actions to achieve their policy goals. For example, today, Congress knows if it wants to create a private right of action in a statute, it cannot rely on courts inferring such a right through silence.[252] And legislators know that ambiguous directives to regulatory agencies will give the agency considerable discretion to choose a legally enforceable meaning.[253]

The most powerful objection to this argument is based on empirical research that reveals just how little Congress knows about the courts' interpretive norms.[254] If this is true, can we really expect legislators to pick up on the nuances of precedent as it develops over time? While a full response to this data is beyond the scope of this Note, the failure of some drafters of legislation to understand the courts' behavior does not alone prove that meaningful court-to-Congress communication is a fiction. There are prominent examples of congressional response to substantive outcomes that Congress does not like, even in obscure areas of the law.[255] And, at a fundamental level, the failure of Congress to correctly perceive how the Court will interpret its directives is an argument for more regularity and candor, not less. Consistency in statutory interpretation could help narrow the gap between legislative goals and judicial outcomes.

C. Avoids Oversimplified Interpretive Theory

A third advantage of the case-by-case method is it might avoid some of the pitfalls of totalizing interpretive theory. "Totalizing" in this sense means theories which purport to reduce all of interpretation down to a few simplistic maxims. This argument might be startling to some, since there are so many pressures in the legal community to "commit" to a particular

[251] James J. Brudney & Ethan J. Leib, Statutory Interpretation as "Interbranch Dialogue"?, 66 UCLA L. Rev. 346, 398 (2019).

[252] See Alexander v. Sandoval, 532 U.S. 275, 286 (2001).

[253] See Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

[254] A prominent example is the two-part survey done by Professors Bressman and Gluck, titled Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons. 65 Stan. L. Rev. 901 (2013); 66 Stan. L. Rev. 725 (2014).

[255] See William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331, 333 (1991).

philosophy for interpreting the Constitution and statutes.[256] But this argument should not be misconstrued—this Note does not purport to discredit judicial philosophy. There is substantial merit in judges understanding and systematizing their core beliefs about legal meaning. This Note purports neither to discredit nor to resolve those debates. Indeed, the thesis of this Note depends on judges' ability to systematize and articulate principles of interpretation. But theory goes awry when it fails to account for the complexities of practice. The law is an elaborate and delicate ecosystem, and there are disadvantages to oversimplified solutions.[257]

First, general maxims may fail to account for (or explain) tough cases, at least on their face. What ought a textualist do, for example, with a statute whose semantic meaning is so under-determinate that essentially all its application requires judicial construction?[258] Or should a textualist's calculus change when a plain reading of a statute clashes with the universal expectations of the drafters? Perhaps legal theorists can fashion solutions for these difficulties ex ante, but often it is specific cases that reveal these questions in the first place and put pressure on the existing answers.[259] The prudent jurist should remain open to the possibility that a new problem will expose the limits of existing theory. They may need to assess, adapt, and amend their precommitments to

[256] Although the example is tainted by the complex politics of her confirmation, Justice Ketanji Brown Jackson was criticized for her answer during her confirmation hearing that she did not have a judicial philosophy. See Harmeet K. Dhillon, 'Disqualifying' words from Judge Ketanji Brown Jackson, N.Y. Post (Mar. 24, 2022, 9:48 PM), https://nypost.com/2022/03/24/disqualifying-words-from-judge-ketanji-brown-jackson/ [https://perma.cc/83X9-BX5U].

[257] This is an intuition shared by thinkers across the jurisprudential spectrum. Formalists like Professors Baude and Sachs have suggested that "the right way to read a text, in a given circumstance" depends on context. Baude & Sachs, supra note 65, at 1090. Justice Breyer has said, "The statute books are too many, federal laws too diverse, and their purposes too complex, for any legal formula to provide more than general guidance." See City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 127 (2005) (Breyer, J., concurring). Professor Amar has also said that interpretive tools should be judged "instrumentally" to see whether they "work," a question "best answered by example rather than by a priori reasoning." Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 747, 827 n.305 (1999).

[258] See Lawrence B. Solum, The Interpretation-Construction Distinction, 27 Const. Comment. 95, 96 (2010) (defining "construction" as a process separate from interpretation). The All Writs Act might be a good example of a statute that requires significant construction. 28 U.S.C. § 1651(a).

[259] See Tara Leigh Grove, Comment, Which Textualism?, 134 Harv. L. Rev. 265, 266 (2020) (arguing that *Bostock* required both sympathetic and skeptical observers to "reexamine some assumptions about textualism").

account for difficult applications. The common law of methodology helps judges to work through these difficulties at the level of the case, rather than in the abstraction of a law review article.

Second, general principles may cause interpreters to make hasty generalizations about the utility of certain sources. Even the most battle-tested of principles must admit of caveats at the extremes. For example, Justice Scalia often talked in categorical terms about the irrelevance of legislative history.[260] But in an individual case, he was willing to look at the statements of legislators to see if anyone contemplated a seemingly absurd outcome.[261] Another good example is the case law about the presumption against extraterritoriality. In *Morrison v. National Australia Bank*, the Court initially made a fairly categorical statement that a federal law will not be read to apply extraterritorially absent an express statement in the text of a statute.[262] But in the face of a concurrence, it was forced to clarify that a statute need not say explicitly "this law applies abroad"—"[a]ssuredly context can be consulted as well."[263] A few years later, a majority of the Supreme Court relied on *Morrison*'s methodological approach to decide another extraterritoriality case, explicitly quoting the phrase about the probative value of "context."[264] This is an excellent example of the common law of interpretation in action and the focusing power of a case to act as an antidote to overbreadth.

D. Allows for Jurisprudential Disagreement

Finally, a common law of interpretation permits and promotes jurisprudential disagreement. This is possibly the most surprising advantage, since the constraint on judicial freedom is usually seen as methodological precedent's fatal flaw.[265] However, the common law does

[260] See Hearings on the Nomination of Judge Antonin Scalia to be Associate Justice of the Supreme Court of the United States, supra note 194, at 105 (stating that if he could "create the world anew," he would do away with "all of legislative history").

[261] For example, Justice Scalia—the Court's most vociferous opponent of legislative history—was willing to use legislative history to implement the presumption against absurdity. See Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring) ("I think it entirely appropriate to consult all public materials, including the background of [the rule] and the legislative history of its adoption, to verify . . . what seems to us an unthinkable disposition . . . .").

[262] See Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 255 (2010).

[263] Id. at 265.

[264] RJR Nabisco, Inc. v. European Community, 579 U.S. 325, 340 (2016).

[265] See Kozel, supra note 11, at 1149.

not quash disagreement. For one thing, the settling of interpretive precedents does not always require judges to share philosophical priors or agree on the underlying rationales. Sometimes the same interpretive rule—*Chevron* deference, for example—can have different theoretical justifications.[266] When judges of different persuasions agree on the bottom line, they can employ the rule and give clear instructions for lower courts, even if they spend time debating the policies behind the rule.[267] Meanwhile, when judges disagree on both the rule of interpretation and its reasoning (and this difference is dispositive in a case), judges can have open dialogue in their opinions.[268] Indeed, because no single case has the power to establish a legislative-style interpretive precedent in a common law system, the stakes are lowered in a way that may focus interpretive debates on the specific case.

You might still think, however, that this conception puts dissenting Justices in the strange position of advocating not just for their personal interpretive framework, but to change the *law*. Perhaps this will create unnecessary barriers to dialogue about interpretive methods.[269] In reality, this model is neither foreign nor inflexible. At one point, the use of legislative history was in many ways a settled norm.[270] But Justice Scalia was able to point out some flaws in this approach, attract adherents over time, and win small victories. But, notably, he did not win outright. The common law process moderated his aspirations. There are small, accepted limits on legislative history[271]—and the skepticism about some uses of legislative history is itself norm-setting[272]—but judges largely remain free

[266] Doerfler, supra note 161, at 21–22 (noting how *Chevron* can be justified by different philosophical premises).

[267] Indeed, the justifications for an interpretive rule might determine its scope in a later case. See Nelson, supra note 91, at 706–11 (suggesting that *Chevron* deference might be more or less appropriate in a given case depending on the reasons for the doctrine).

[268] See, e.g., Smith v. Wade, 461 U.S. 30, 92 (1983) (O'Connor, J., dissenting) (making the case for purposive analysis of § 1983 given the shortcomings of both textualism and inquiries into congressional intent in the majority opinion).

[269] At the very least, it may seem counterintuitive to believe that when Scalia first began to voice his concerns with legislative history, he was arguing against the common law. See Justice Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, *in* A Matter of Interpretation 3, 29–37 (1997) (arguing against the use of legislative history).

[270] See Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 612 n.4 (1991) ("Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past. We suspect that the practice will likewise reach well into the future." (citation omitted)).

[271] See supra notes 96–101 and accompanying text.

[272] See supra Subsection III.A.4.

to debate the merits and applications of legislative history in new cases. It is precisely the dialectic of the common law that allows this debate to flourish.

CONCLUSION

This Note has argued that a common law of interpretive methods already exists and that the decisions of the Supreme Court act incrementally to elucidate and settle interpretive norms. It has also suggested that this system is neither too weak nor too muscular, instead providing a forum for debate and creating salutary pressures towards interpretive consistency.

While these arguments necessarily require some abstraction, the thesis has more than just theoretical significance. It is helpful for lawyers to recognize the complex ways that Supreme Court decisions serve as authority, as well as the ways in which past interpretive decisions affect the posture of later courts. More importantly, if judges fully appreciated the ways in which their small interpretive decisions contribute to the norms of interpretation, they might be more rigorous about explaining their adherence to (or departure from) the methodological common law. The legal system would be enriched if courts spoke more candidly about the role of their subdecisions. It would focus and further critical debates about how we make and find meaning in the law.