UNDERSTANDING THE MECHANISMS OF INTERPRETIVE CHANGE*

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Interpretive methodology changes over time, and we appear to be in a period of particular ferment. In federal statutory interpretation, which is the focus of this Article, several important changes in interpretive methods have occurred in recent decades or are underway. There has been a gradual, decades-long shift away from intentionalist tools like legislative history. In addition, as the culmination of a series of smaller steps, the Supreme Court has just reshaped the doctrine governing deference to agency interpretations, a move that will require years of further clarification. And, although this shift is still taking shape, it appears that some Justices are attempting to reconfigure the toolkit of substantive canons.

Much is being written about whether these changes in interpretive methods are normatively desirable, but this Article instead addresses the less studied matters of how interpretive regimes change and how the Supreme Court makes and manages change in the interpretive regime. I refer to "managing" change because one lesson is that the Supreme Court is not the sole participant in interpretive change, as change also involves the lower courts, litigants, and the broader legal culture.

The Article provides several case studies of past and present changes in methods of statutory interpretation and analyzes the mechanisms through which courts bring about or control change, laying out the mechanisms' various strengths and weaknesses. The Article also presents several prudential considerations that would-be regime changers have to confront. Even taking the Court's desire for regime change as a given, these considerations suggest that the Court should pay more attention to the operations of the lower courts, should attend to doctrinal

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interactions, and should not go so fast that it cannot learn from the effects of its decisions.

INTRODUCTION

Methods of legal interpretation are changing. In constitutional law, recent Supreme Court cases are giving new prominence to "history and tradition,"[1] even as the Justices disagree over what that method entails and sometimes abandon originalism and other historically oriented approaches in favor of present-day pragmatic reasoning.[2] In statutory interpretation, the last several decades have seen the Court's practice shift in a textualist direction, though textualism itself may be splintering into competing strains.[3] Last year, in *Loper Bright Enterprises v. Raimondo*,[4] the Supreme Court reworked the law governing review of agency interpretations, calling for courts to find a statute's "best meaning" rather than deferring to reasonable agency views.[5]

In light of these and related developments, we can say we are in the midst of regime change—interpretive-regime change. The "interpretive regime" refers to the set of norms that regulate how to interpret the instruments in a legal system, including the package of canons, presumptions, and sources of evidence that determine the legal meaning of texts.[6] A huge and growing literature[7] justifies or criticizes the changes described in the preceding paragraph, but other aspects of regime change require attention too. One of those aspects in need of attention is the matter of *how* the interpretive regime changes, and that is my topic here. That is, I am going to examine and evaluate the mechanisms by which a system's interpretive regime changes and by which the courts manage change. This investigation involves questions like the

1. *E.g.*, Vidal v. Elster, 144 S. Ct. 1507, 1518 (2024); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2244, 2248 (2022).

2. Several of the opinions in *United States v. Rahimi*, 144 S. Ct. 1889 (2024), debate the role of history and tradition. *See, e.g.*, *id.* at 1902–03 (addressing the degree of specificity required for proper historical analogues); *id.* at 1924–25 (Barrett, J., concurring) (addressing the roles of enacting-era and post enactment history in an originalist inquiry). For a recent majority opinion that relies heavily on instrumentalism rather than originalism, see *Trump v. United States*, 144 S. Ct. 2312 (2024), which affords broad presidential immunity in large part to protect executive vigor against the threat of unwarranted prosecutions. *See id.* at 2329–31, 2346.

3. *See generally* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265 (2020) (describing the divergence of more formalistic and more flexible versions of textualism).

4. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

5. *Id.* at 2266; *see infra* Section I.B.

6. William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, *in* NOMOS XXXVI: THE RULE OF LAW 265, 267 (Ian Shapiro ed., 1994). The regime "tell[s] courts and citizens how strings of words in statutory commands will be interpreted and applied to cases, what presumptions will be entertained as to the scope and effect of legal commands, and what auxiliary materials will be employed to resolve ambiguities." *Id.*

7. *See, e.g.*, Ryan D. Doerfler, *Late-Stage Textualism*, 2021 SUP. CT. REV. 267, 271 (describing aspects of the Court's recent statutory cases as "wooden" and "embarrassing"); Grove, *supra* note 3, at 296–307 (defending a formalistic version of textualism on grounds of judicial legitimacy); Thomas W. Merrill, Case Comment, *The Demise of Deference—And the Rise of Delegation to Interpret*, 138 HARV. L. REV. 227, 234–47 (2024) (criticizing the Court's *stare decisis* analysis in repudiating the *Chevron* doctrine).

following: How does a high court bring about change in the interpretive regime—if indeed the high court is the right place to look? Is it as simple as the court's majority saying, "Everyone should do textualism now"? What role is there for lower courts and litigants, whether as innovators in their own right or as channels of transmission? How can a court slow down or otherwise manage change being pushed upon it from outside? Which judicial techniques are most effective in managing a transition in interpretive regimes?

This Article's particular context for addressing these questions is the interpretive regime for federal statutory interpretation, which provides plentiful opportunities for observation due to the large number of canons, presumptions, and sources that compose the statutory-interpretive toolkit. But some of the mechanisms of change are similar across other forms of legal interpretation and other jurisdictions, so some of the implications extend more broadly.

In addition to describing the mechanisms of change, the Article has a critical aspect, albeit one that takes some degree of change as a given. It considers how the Supreme Court, even one with change in its sights, should go about effecting and managing interpretive change in a way that is consistent with rule-of-law values and takes seriously the Court's role as supervisor of a judicial system.

The Article proceeds as follows:

Part I provides three case studies in interpretive-regime change in the federal courts. The first change is the decades-long transition away from legislative history and toward more characteristically textualist interpretive tools like dictionaries and textual canons. The second is the project of reducing deference to agency interpretations, which encompasses the new *Loper Bright* doctrine (the successor to the *Chevron* doctrine),[8] the "major questions" doctrine, and the like. The third shift, still in the early stages, is the campaign by several Justices, led by Justices Kavanaugh and Barrett, to rearrange the toolkit of substantive canons by eliminating many of them and strengthening a select few canons that serve structural constitutional ends. The three examples are useful because, through their variety, they illustrate many aspects of interpretive-regime change, including the different timescales across which it can occur, the role of individual cases versus broader cultural shifts, and the important role of lower courts and litigants.

Part II turns to the mechanisms of change, analyzing them in detail. As the episodes in Part I show, and additional examples will further illustrate, courts create, destroy, and modify canons and other interpretive tools. Modification can take several forms, such as changes in an interpretive tool's

8. *Loper Bright*, 144 S. Ct. at 2272–73 (overruling Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

scope and its priority relative to other tools. In addition to providing a taxonomy of mechanisms of change, Part II offers some generalizations about the efficacy of different mechanisms in bringing about change. In particular, it reveals some downsides of one of the Supreme Court's favorite mechanisms, in which the Court simply ignores a particular tool rather than abrogating it.

Part III turns to matters of tempo. The Supreme Court, more so than other courts, has several tools it can use to modulate the pace of change, most notably control over its docket. Adhering to methodological precedent, even if doing so is only discretionary, can also play a role in controlling the speed of change.

Part IV provides some prudential considerations that bear on efforts at regime change. Although the Court is not the prime mover in all episodes of change and is never the sole participant, it does have unique managerial powers and corresponding responsibilities. These include responsibilities, rooted in rule-of-law values and institutional roles, to consider the situation of the lower courts and to guard against combinations of changes that can interact in unintended ways. In some circumstances, efforts at interpretive change could undermine the values the new regime is supposed to serve.

I. THREE EXAMPLES OF CHANGE

This part presents three case studies of recent or ongoing interpretive change in the federal courts. One episode is essentially complete, one appears to have just reached its climax, and the last one is still taking shape. Together the case studies display a broad range of mechanisms of change, and they will provide material for the more analytical discussion that comes in Parts II and III.

Most of the discussion in this part concerns changes in how courts use interpretive tools as opposed to directly addressing changes in overarching theories of interpretation. "Tools" is being used here as a broad category that encompasses the various textual canons, substantive canons, and extrinsic interpretive sources (like legislative history) that courts use in statutory interpretation. The textual canons (which are generally meant to describe how different parts of a statute work together) and the substantive canons (which generally favor some policies over others) are numerous, and the borders of the categories are a bit porous.[9] "Tools" is a catch-all label that will suffice for most purposes. More precise terms will be used where needed.

Tools, of course, are not ends in themselves. A theory tells an interpreter what to aim for (such as legislative intent, public meaning, wealth maximization,

9. For attempts to set out more precise definitions of what it takes to be a canon, see generally Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 179–91 (2018); and Evan C. Zoldan, *Canon Spotting*, 59 HOUS. L. REV. 621 (2022).

or other targets), and implications of the theory may specify which tools to use (and in what ways) to find the chosen target.[10] But in a study like this, it makes sense to focus on the lower-level features of an interpretive regime, the tools and such. The different theories find their concrete operationalization through which tools they use, exclude, and prioritize and what norms govern the tools' use. So, looking at the tools is a way to observe changes occurring at the level of theory. Further, a high court will likely have an easier time bringing about and monitoring changes at this operational level compared to changes at the level of theory, a point to which I will return after laying out the episodes of change.[11]

A. *The Displacement of Legislative History*

Gradually over the last several decades, the Supreme Court has changed which interpretive tools it emphasizes. The loser has been legislative history, which the Court now uses less than it did around forty years ago.[12] As Justice Breyer lamented in one of his last oral arguments on the Court, fewer judges now take his approach to resolving uncertainty over what a statute intended to do: "You went and you read the report of the Senate committee or the House committee or the conference committee, and you read the testimony before the committees, . . . and you read what other people said on the floor perhaps"—these documents being the kinds of legislative sources that, for jurists like Breyer, could "shed some light on the proper answer."[13] The decline in the use and perceived value of legislative history is probably the most concrete accomplishment of the "new textualism" that Justice Scalia championed during his time on the Court.[14]

The decline of legislative history was accompanied by the increasing use of strategies and tools associated with textualism, such as an insistence on finding plain textual meanings, an affinity for dictionaries, and the revival of

10. *See* Lawrence B. Solum, Pragmatics and Textualism 11–18 (Va. Pub. L. & Legal Theory Rsch. Paper, Paper No. 2025-06) (Jan. 8, 2025) (unpublished manuscript) (distinguishing between the aim of an approach to interpretation and the sources of evidence it employs).

11. *Infra* Section II.D.

12. *See, e.g.*, 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, 57–58 (2018) [hereinafter Bruhl, *Statutory Interpretation*]; Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 369 (1999); David Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1716 (2010).

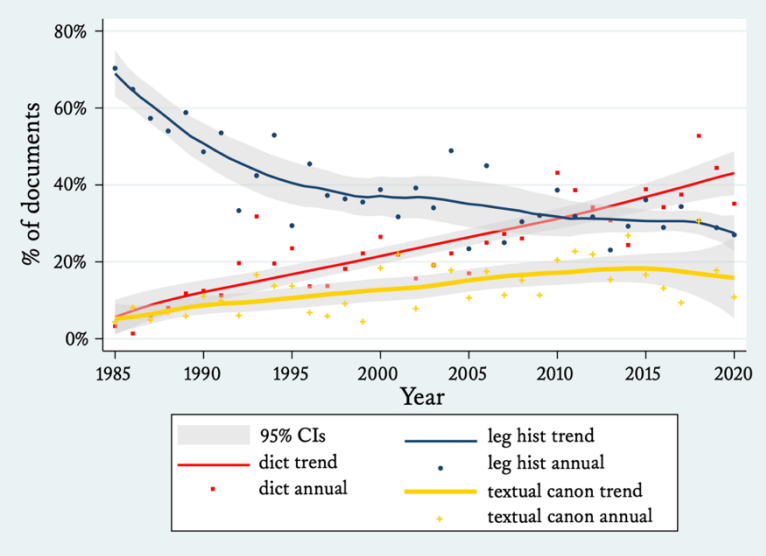
13. Transcript of Oral Argument at 74–75, Ysleta Del Sur Pueblo v. Texas, 142 S. Ct. 1929 (2022) (No. 20-493).

14. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624–25 (1998); Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. 263, 265 (2022).

textual canons.[15] The textual canons are a large collection of presumptions about how to read language, which range from instructions to read different parts of statutes together to Latin maxims about how lists of words fit together.[16]

The figure below illustrates the relative switch in which tools the Court used in majority opinions in statutory cases from 1985 to 2020. The trend lines reflect legislative history ("leg hist") declining sharply, from appearing in most opinions to appearing in only about a third. Dictionaries ("dict") and textual canons increased, with dictionaries showing a particular increase in prevalence.

Figure 1: Supreme Court's Use of Interpretive Sources in Majority Opinions Interpreting Statutes, 1985–2020[17]



15. *See, e.g.*, James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 483 (2013); James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 29–36 (2005); Bruhl, *Statutory Interpretation*, *supra* note 12, at 55–62; John Calhoun, Note, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 YALE L.J. 484, 497–98 (2014).

16. *See* WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY, JOSH CHAFETZ, PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 582, 595, 617, 1151–55 (6th ed. 2020) (describing and listing dozens of such canons).

17. This figure is adapted from Aaron-Andrew P. Bruhl, *Supreme Court Litigators in the Age of Textualism*, 76 FLA. L. REV. 59, 68 (2024) [hereinafter Bruhl, *Supreme Court Litigators*]. Details on the methods are available there. *See id.* at 68 n.28. The trend lines reflect smoothing through locally weighted regression.

These trends arise from changes in the Court's membership and changes in the behavior of the individual Justices. Conservative textualist Justice Barrett replaced the more pluralist Justice Ginsburg.[18] Within the ranks of the more liberal wing, Justice Kagan is more textualist than her predecessor, Justice Stevens.[19] The habits of individuals changed over time too, as they cited dictionaries more once Scalia joined the Court and cited legislative history less.[20]

This is not to say that legislative history has disappeared, nor that all of the Justices have fully embraced the tenets of textualism even in theory, let alone faithfully practicing it in every case. The reduction in discussion of legislative history does not mean that the Justices no longer think about legislative aims, though often the search for them turns to euphemisms like "context" or "legislative plans."[21] There is still the occasional dustup in which the Justices directly clash over the use of legislative history, with Justices Sotomayor and Jackson most likely to defend it.[22]

But all those caveats being entered, the ground really has shifted. Text-focused inquires provide the common ground for disputes; indeed, Justice Kagan's go-to move in the high-profile statutory cases that divide along ideological lines is to accuse the avowed textualists in the majority of failing to honor textualism. "The current Court is textualist only when being so suits it," she wrote in her dissent in *West Virginia v. EPA*.[23] "When that method would frustrate broader goals," she continued, "special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards."[24] Invocations of legislative history, by contrast, tend to be timid.[25]

18. *See* Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2194 (2017) (defending an approach to textualism that prioritizes the views of the "ordinary English speaker—one unacquainted with the peculiarities of the legislative process").

19. *See* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1300 tbl.2 (2020) [hereinafter Krishnakumar, *Backdoor Purposivism*] (showing that Kagan cites dictionaries more than Stevens did and intent and legislative history less).

20. *See* James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 133 tbl.1, 138 tbl.3 (2008) (legislative history); Calhoun, *supra* note 15, at 503–07 (dictionaries).

21. *E.g.*, King v. Burwell, 576 U.S. 473, 498 (2015) ("A fair reading of legislation demands a fair understanding of the legislative plan."); *see* Krishnakumar, *Backdoor Purposivism*, *supra* note 19, at 1304.

22. *E.g.*, Delaware v. Pennsylvania, 143 S. Ct. 696, 700 n.* (2023) (noting that Justices Thomas, Alito, Gorsuch, and Barrett declined to join the portion of Justice Jackson's opinion addressing legislative history); Digit. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 782 (2018) (Sotomayor, J., concurring).

23. 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting).

24. *Id.*; *see also* Sackett v. EPA, 143 S. Ct. 1322, 1359 (2023) (Kagan, J., concurring in the judgment) (similar).

25. *See, e.g.*, Dubin v. United States, 143 S. Ct. 1557, 1569 n.7 (2023) ("Those who find legislative history helpful will find yet further support.").

Although the U.S. Supreme Court is the natural focal point for the interpretive regime, it does not solely define or control the interpretive regime. Indeed, a recurring theme of this Article is that effectuating and evaluating interpretive change requires consideration of other actors, too. The lower federal courts are particularly important contributors to the federal regime, as they do most of the work. Like the Supreme Court, they cite legislative history less and textualist tools like dictionaries and linguistic canons more than they did a few decades ago, though the magnitude of the shift is lower.[26] The trend is likewise apparent across the state courts. Although they enjoy the freedom to go their own way at least as regards state law, they now cite textualist tools and invoke plain meaning much more than they did a few decades ago.[27]

Understanding the interpretive regime requires consideration of attorneys' practices as well, for they far outnumber the community's judicial members and to some degree shape judicial outputs.[28] It is even possible for lawyers to lead interpretive change, as in Nicholas Parrillo's account of the popularization of legislative history in the early- to mid-twentieth century being led by federal agency lawyers.[29] Legislative history's subsequent decline, though not led by litigants, has shown up in litigants' briefing practices. Well-placed observers recount how some briefs or oral arguments used to lead with legislative history, a practice that is almost unimaginable today.[30] Bolstering the anecdotes, a more systematic study of the briefs filed in the Supreme Court over the last several decades shows that litigators now cite textualist tools more and, while they still cite legislative history regularly, they give it less emphasis.[31]

For another window into the legal culture, one might look at how students learn about statutory interpretation. As a crude measure, consider the coverage

26. *See* FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 183–89 (2009); Lawrence Baum & James J. Brudney, *Two Roads Diverged: Statutory Interpretation by the Circuit Courts and Supreme Court in the Same Cases*, 88 FORDHAM L. REV. 823, 824 (2019); Bruhl, *Statutory Interpretation*, *supra* note 12, at 65–66; Jonathan H. Choi, *An Empirical Study of Statutory Interpretation in Tax Law*, 95 N.Y.U. L. REV. 363, 378–79 (2020); Calhoun, *supra* note 15, at 502, 515–16; *see also* Stuart Minor Benjamin & Kristen M. Renberg, *The Paradoxical Impact of Scalia's Campaign Against Legislative History*, 105 CORNELL L. REV. 1023, 1068, 1082 (2020) (finding a more complex pattern for citations to legislative history, in which the appointment of Scalia had partisan effects and changed which kinds of legislative history were cited).

27. Austin Peters, *Are They All Textualists Now?*, 118 NW. U. L. REV. 1201, 1230–36 (2024).

28. *Cf.* Zoldan, *supra* note 9, at 658 (defining "canon" status in part by whether a lawyer's use of an interpretive move would be considered effective advocacy); *infra* Section III.A.2 (discussing the party-presentation principle).

29. Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266, 315, 343–44 (2013).

30. *E.g.*, Paul Clement, Opinion, *Arguing Before Justice Scalia*, N.Y. TIMES (Feb. 17, 2016), https://www.nytimes.com/2016/02/17/opinion/arguing-before-justice-scalia.html [https://perma.cc/3KK7-VSGC (staff-uploaded, dark archive)]; Marty Lederman, *Supreme Court 2015: John Roberts' Ruling in* King v. Burwell, SLATE (June 25, 2015, 4:26 PM), https://slate.com/news-and-politics/2015/06/supreme-court-2015-john-roberts-ruling-in-king-v-burwell.html [https://perma.cc/KA4Q-3EV2].

31. Bruhl, *Supreme Court Litigators*, *supra* note 17, at 87–91.

of legislative history compared to ordinary meaning and textual canons in the leading casebook in the field of Legislation as it moved from its first edition in 1988 to its current edition.[32] The material on legislative history grew somewhat, roughly in line with the overall increase in the book's length.[33] During the same time, the material on ordinary meaning and textual canons ballooned from sixteen pages to sixty-six, with "dictionaries" now appearing in its own section heading.[34]

In sum, in the last several decades we have seen a relative diminution in the role of legislative history in favor of textualist tools, a shift perceptible across multiple domains of legal practice, including those not subject to the Supreme Court's control. The shift in interpretive practices extends to various courts, to litigators, into legal education, and even across other sorts of legal interpretation.[35] This example of methodological change does not represent the only model, and in fact it differs from others in notable ways. This shift is (now) bipartisan in a way that recent developments in deference doctrine, taken up in the next section, are not. And as important as certain judges, scholars, and politicians were in bringing about this shift, there is no single person who effectuated the change, and certainly no single case did it. Indeed, when there were some head-on clashes over the use of legislative history early in Justice Scalia's tenure, he lost them lopsidedly.[36] We will see a contrast to this sort of diffuse shift in methodology in the following sections, where a single case can and does create, eliminate, or modify specific interpretive tools. This shift has outlived Justice Scalia and will likely outlive its other early evangelists on and off the bench. Other shifts may not be so deeply rooted.

In a way, it is surprising to behold such a broad-based change in legal practice. Writing in 2005, already long into the new textualist ascent, Professor Philip Frickey nonetheless still doubted the possibility of interpretive-regime change.[37] He thought that a bare majority of textualist-leaning Justices, even if they could agree among themselves, could not drag legal culture around by the

32. ESKRIDGE ET AL., *supra* note 16; WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (1988).

33. *Compare* ESKRIDGE ET AL., *supra* note 16, at 749–811 (6th edition), *with* ESKRIDGE & FRICKEY, *supra* note 32, at 709–60 (1st edition).

34. *Compare* ESKRIDGE ET AL., *supra* note 16, at 582–648 (6th edition), *with* ESKRIDGE & FRICKEY, *supra* note 32, at 639–55 (1st edition). These numbers are admittedly imprecise. The topics are addressed throughout the book, but for these calculations I considered only the sections devoted to these topics. Crudity notwithstanding, it gives an accurate impression of the change in emphasis.

35. Regarding other interpretive domains, textualism and canons have become more prominent in contract interpretation as practiced by state courts. *See* Farshad Ghodoosi & Tal Kastner, *Big Data on Contract Interpretation*, 57 U.C. DAVIS L. REV. 2553, 2600–01 (2024); Ethan J. Leib, *The Textual Canons in Contract Cases: A Preliminary Study*, 2022 WIS. L. REV. 1109, 1113.

36. *See* Wisc. Pub. Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991) (rebutting Scalia's attack on legislative history in a footnote joined by eight Justices).

37. Philip P. Frickey, *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1971, 1973–74 (2005).

nose.[38] He was right to highlight the obstacles that stand in the way of regime changers, and yet it happened, because the mechanisms of change have been more broadly based.

We probably have not reached the end of history on the matter of which interpretive tools are favored. Although there is currently little evidence of a movement toward restoring legislative history to its former prominence, it is easier to imagine developments within a broadly textualist paradigm, such as the displacement of the currently favored textualist tools like dictionaries and linguistic canons in favor of newer, more empirically oriented textualist tools like corpus linguistics or survey evidence.[39] The more distant future is hard to predict, as the membership of Court will change and interpretive approaches can realign over time as political and jurisprudential currents shift.[40] Observe, in that regard, the recent hints that some conservatives are turning away from textualism toward moral readings and classical sources.[41]

B. *The Decline of Deference Doctrines*

In Hemingway's *The Sun Also Rises*, one character asks another, "How did you go bankrupt?" The response: "Two ways. Gradually and then suddenly."[42]

The same thing might be said of the decline of doctrines of deference to agency interpretations over the last couple of decades. *Chevron*'s assets dwindled and got parceled out, and now the Court has pushed *Chevron* into doctrinal bankruptcy. In contrast to the shift described in the previous section, this story features individual cases more prominently and involves a shift that remains more polarized along the usual partisan lines.

The *Chevron* doctrine takes its name from the case called *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[43] but the doctrine was not born the day that case was decided. The key doctrinal test extracted from the case and repeated thousands of times in subsequent decades held that courts were first to ask whether an agency-administered statute was unclear on the question in dispute; if so, the court should defer to the agency's interpretation as long as it

38. *See id.* at 1996–99.

39. *See* Kevin Tobia, New Methods in Statutory Interpretation: Surveys, Corpus Linguistics, ChatGPT (Aug. 21, 2024) (unpublished manuscript) (on file with the North Carolina Law Review) (describing these tools and their increasing prominence). To simplify, both techniques seek insight into textual meaning, but corpus linguistics involves the examination of large bodies of existing text while surveys involve asking test subjects for their own understandings of contested terms. *See id.*

40. *See generally* Richard M. Re, *Legal Realignment*, 92 U. CHI. L. REV. (forthcoming 2025) (describing realignment of conservative and liberal positions around topics such as formalism and positivism based on conservative control of the courts).

41. *E.g.*, Paul B. Matey, *"Indisputably Obligatory": Natural Law and the American Legal Tradition*, 46 HARV. J.L. & PUB. POL'Y 967, 970–80 (2023).

42. ERNEST HEMINGWAY, THE SUN ALSO RISES 136 (Project Guttenberg 2022) (1926).

43. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

was reasonable.[44] The development of the *Chevron* case into the famous two-step *Chevron* doctrine makes for an extremely interesting story that has been told very well by others.[45] A notable feature of the origin story is that it provides an example of change being driven by actors outside of the Supreme Court. Specifically, the *Chevron* doctrine took off in the D.C. Circuit and later migrated to the Supreme Court, and the Solicitor General's office played a major role in pushing it on the Court.[46] To make the story manageable, my account of *Chevron*'s decline will trace the many ways it has been diminished since around the turn of the twenty-first century. The account will proceed not strictly chronologically but more thematically—that is, by describing different ways in which *Chevron* was diminished over the years. Part II will provide a more formal taxonomy of the mechanisms of change on display.

To begin with changes to the scope of the doctrine, *Chevron* was narrowed in terms of the range of circumstances to which it applied. Unlike the ambient decline of legislative history, the narrowing of *Chevron* happened through a few pivotal cases. Perhaps the most important was *United States v. Mead Corporation*,[47] which basically limited *Chevron* to administrative interpretations created in relatively formal administrative actions such as notice-and-comment rulemaking and formal adjudication.[48] *Mead* relegated less formal agency actions—such as opinion letters, policy manuals, and amicus briefs—to the less deferential *Skidmore* regime, under which an interpretation merits persuasive weight according to its longevity, thoroughness, and other contextual factors.[49] The threshold question about whether to apply the *Chevron* two-step analysis or employ *Skidmore* came to be called Step Zero.[50]

Mead is not the only example of narrowing or attempted narrowing of *Chevron*'s domain. Another way *Chevron* was narrowed involved not the format of agency action but the nature or importance of the question the agency is addressing. An example of a proposed narrowing was the effort to withhold *Chevron* from agencies' determinations of their "jurisdiction," as distinguished

44. *Id.* at 842–44.

45. *See* Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1, 33–59 (2013); Thomas W. Merrill, *The Story of* Chevron USA Inc. v. Natural Resources Defense Council, Inc. *(1984): Sometimes Great Cases Are Made Not Born*, *in* STATUTORY INTERPRETATION STORIES 164, 187–91 (William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett eds., 2011) [hereinafter Merrill, *The Story of* Chevron].

46. Merrill, *The Story of* Chevron, *supra* note 45, at 191–93.

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

48. *Id.* at 230–31.

49. *Id.* at 234–35; *see* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *see also* Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."). The generalization about administrative format misses some cases, as *Mead* itself acknowledges. *See Mead*, 533 U.S. at 230–31.

50. *E.g.*, Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2013).

from what interpretations they make within their jurisdiction. That particular effort stalled, despite the Chief Justice's efforts, in *City of Arlington v. FCC*.[51] The same narrowing impulse prevailed, however, in the Chief Justice's majority opinion in *King v. Burwell*,[52] where he eschewed *Chevron* analysis because the question was too important, and the agency's expertise too lacking, to imagine that Congress would have wanted deference.[53]

Another type of diminishment, different from the narrowing of *Chevron*'s domain, was the reduction in *Chevron*'s impact through a tendency to find clear meanings at Step One. As opposed to a narrow *Chevron*, we could call this a "beady-eyed" *Chevron*. This diminution of *Chevron* had diffuse sources, including roots in textualists' confidence that their method could find correct answers to hard statutory questions.[54] Even in his pro-*Chevron* days, Justice Scalia recognized an association between textualism and finding clarity, explaining that "[o]ne who finds more often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds less often that the triggering requirement for *Chevron* deference exists."[55] The newer-generation textualist Justice Kavanaugh likewise tried to cabin *Chevron* by rigorously applying the tools of statutory interpretation to resolve even tough cases nondeferentially at Step One.[56]

Although my focus is mechanisms of change, not the participants' ultimate motives, it is hard to explain the path of *Chevron* without considering that the doctrine's shifting fortunes have roots in both jurisprudence and politics.[57] On the jurisprudential side, some of the early squeeze on *Chevron* may have been collateral damage from the textualists' effort to find textual clarity more often and thereby reduce the need for nontextual resolvers of ambiguity, a campaign

51. 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting).

52. 576 U.S. 473 (2015).

53. *Id.* at 485–86.

54. *See* John O. McGinnis, *The Rise and Fall of* Chevron, LAW & LIBERTY (Feb. 8, 2024), https://lawliberty.org/the-rise-and-fall-of-chevron/ [https://perma.cc/PWA2-AYPC] (linking the decline of *Chevron* to the rise of a jurisprudence of "right-answer formalism").

55. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (emphasis omitted).

56. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2448–49 (2019) (Kavanaugh, J., concurring in the judgment); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2153 n.175 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

57. For a recent consideration of the underlying drivers of change in the context of constitutional doctrine, see Saikrishna B. Prakash & Cass R. Sunstein, Radical Constitutional Change (July 31, 2024) (unpublished manuscript) (on file with the North Carolina Law Review). One of Prakash and Sunstein's claims is that matters of constitutional structure are more likely than matters of individual rights to be driven top-down by elites rather than bottom-up by the broader public and social movements. *Id.* at 46–47. An elite-focused causal account is likely true for changes in interpretive methodology, too.

more directly and originally aimed at legislative history.[58] The two jurisprudential phenomena may be linked, of course, such as through an orientation that causes both textualism and an affinity for clear answers.[59] However that may be, one cannot understand the whole story without considering political dynamics too. *Chevron* became a chief target of conservative and libertarian judges aiming to rein in the administrative state.[60] By the 2010s, Justice Thomas was entertaining the possibility that *Chevron* was outright unconstitutional, and Justice Scalia, though still adhering to *Chevron* in theory, had turned against its sibling doctrine of *Auer*/*Seminole Rock*[61] deference under which courts deferred to agencies' interpretations of their own rules.[62] Even Justice Kennedy, who had not shown much interest in these matters before, finished his tenure by asking for a reconsideration of the legality of *Chevron*.[63]

Nonetheless, the 2010s did not see *Chevron*'s overruling but instead introduced still another method of diminishing *Chevron*: ignoring it. The Supreme Court cut back on citations to *Chevron* and last relied on it in 2016.[64] The majority's neglect of *Chevron* did not go unremarked. Justice Gorsuch crowed over it, and Justice Alito groused that the Court either needed to use *Chevron* or overrule it.[65] The Court's neglect of *Chevron* was abetted by litigants, most significantly the federal government, which often refrained from invoking *Chevron*,[66] thereby providing another example of the important role that litigation strategy can play in interpretive change.

58. *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 370–73 (1994).

59. *See* McGinnis, *supra* note 54 (describing a jurisprudence of "right-answer formalism").

60. *See generally* Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475 (2022) (tracing *Chevron*'s shifting ideological valence); Craig Green, *Deconstructing the Administrative State:* Chevron *Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 630–77 (2021) (same).

61. Auer v. Robbins, 519 U.S. 452 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

62. *See* Michigan v. EPA, 576 U.S. 743, 760 (2015) (Thomas, J., concurring); Decker v. Nw. Env't Def. Ctr., 568 U.S. 597, 616 (2013) (Scalia, J., concurring in part and dissenting in part).

63. Pereira v. Sessions, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring).

64. *See* Cuozzo Speed Techs., LLC v. Lee, 579 U.S. 261, 280 (2016) (relying on *Chevron* to uphold an agency interpretation); Isaiah McKinney, *The* Chevron *Ball Ended at Midnight, but the Circuits Are Still Two-Stepping by Themselves*, YALE J. ON REGUL.: NOTICE & COMMENT (Dec. 18, 2022), https://www.yalejreg.com/nc/chevron-ended/ [https://perma.cc/Y39W-LEXC] (tracing the Court's neglect of *Chevron*). There have been cases since *Cuozzo* in which the agency won, of course, but in those the Court held in in the agency's favor on the basis that the statute supported the agency without any deference needed. *E.g.*, Becerra v. Empire Health Found., 142 S. Ct. 2354, 2362 (2022).

65. BNSF Ry. Co. v. Loos, 139 S. Ct. 893, 908–09 (2019) (Gorsuch, J., dissenting); *see Pereira*, 138 S. Ct. at 2129 (Alito, J., dissenting).

66. *E.g.*, HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n, 141 S. Ct. 2172, 2179–80 (2021); *see* Daniel Hemel, *Argument Analysis: Hating on* Chevron, SCOTUSBLOG (Nov. 7, 2018, 1:43 PM), http://www.scotusblog.com/2018/11/argument-analysis-hating-on-chevron [https://perma.cc/C82L-E8CF].

A striking feature of *Chevron*'s declining fortunes is the way it played out differently in the lower courts. It appears there was a sizable divergence between the Supreme Court and the lower federal courts when it came to deference. The lower courts noticed what was going on, but they continued to use *Chevron* long after it was obvious that the Supreme Court was souring on it.[67] This sort of hierarchical split is a predictable result of the Court's cold-shoulder strategy: lower courts will quickly catch on to an articulable narrowing or an outright overruling of a doctrine like *Chevron*, but mere failure to cite a tool does not kill it. Exploring the varying effects of different kinds of doctrinal change, and the effects of neglect in particular, will figure prominently in Part II below.

Ignoring and sniping at *Chevron* turned out not to be the end of it. Next was the now-ubiquitous "major questions doctrine" ("MQD").[68] There is considerable debate over what exactly the MQD is and where it came from.[69] In one version of the doctrine, exemplified by *King v. Burwell*, it carved out some cases from *Chevron*'s domain due to their "majorness," making it something like a Step Zero doctrine.[70] But the MQD of cases like *West Virginia v. EPA* operates differently, seemingly as a clear-statement canon about how to read regulatory statutes—namely that they be read not to confer authority on agencies to make "major" decisions, especially in the pro-regulatory direction.[71] This canon of interpretation would exist even in a world without any deference doctrines.

Whatever the MQD's precise specification, its graduation from a notion to a named doctrine has aided its propagation. Even as Justice Barrett tries to domesticate it and make it safe for textualism,[72] it is running feral in the lower courts. Since *West Virginia v. EPA*, the MQD has already been mentioned in

67. *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 5 (2017); Curtis Bradley & Tara Leigh Grove, *Vertical Stare Decisis and Disfavored Precedent: An Empirical and Normative Analysis*, 111 VA. L. REV. (forthcoming 2025) (manuscript at 50–51) (on file with the North Carolina Law Review); Aaron-Andrew P. Bruhl, *Hierarchically Variable Deference to Agency Interpretations*, 89 NOTRE DAME L. REV. 727, 758–60 (2013); Kristin E. Hickman & Aaron L. Nielson, *The Future of* Chevron *Deference*, 70 DUKE L.J. 1015, 1017 (2021); McKinney, *supra* note 64.

68. There is a massive and rapidly growing literature on the MQD. For a recent collection of sources, see Beau J. Baumann, *Volume IV of the Major Questions Doctrine Reading List*, YALE J. ON REGUL.: NOTICE & COMMENT (Aug. 14, 2023), https://www.yalejreg.com/nc/volume-iv-of-the-major-questions-doctrine-reading-list-by-beau-j-baumann/ [https://perma.cc/298V-7YNP].

69. *See, e.g.*, Anita Krishnakumar, *What the New Major Questions Doctrine Is Not*, 92 GEO. WASH. L. REV. 1117, 1117 (2024); *infra* Section II.A (noting the difficulty of determining whether a tool such as the MQD is "new").

70. King v. Burwell, 576 U.S. 473, 485 (2015).

71. West Virginia v. EPA, 142 S. Ct. 2587, 2607–08 (2022); *see* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1012–14 (2023); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 262–64 (2022).

72. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring) (describing the doctrine as an aspect of "context" that textualists should consider).

more than 150 cases in the lower federal courts and in more than 900 briefs filed in the federal courts of appeals, with appearances across virtually every field of regulatory law.[73]

Quick on *West Virginia v. EPA*'s heels came the final blow. In *Loper Bright Enterprises v. Raimondo*, the Supreme Court expressly overruled *Chevron*.[74] The new regime requires courts to use their "independent judgment" to interpret statutes, though in doing so courts may also give some amount of weight to expert, longstanding agency views as under the old *Skidmore* doctrine.[75] As part of the justification for overcoming *stare decisis*, the Court cited the doctrinal narrowing and neglect canvassed above: the carveouts made the doctrine complex and unworkable, and the Court's own neglect reduced reliance on the doctrine.[76]

This section started with a reference to bankruptcy, but there are different kinds of bankruptcy. *Chevron* is gone, but some of its business may continue on, using the same machinery, but organized differently and operating under a new name. It will take time to sort out what the new regime means in practice and how much it differs from the old one.

C. *Shuffling Around the Substantive Canons*

The third illustrative example of change is not as far along, and it is uncertain where things will end up. This change involves the toolkit of substantive canons, also known as policy canons. These are the canons or presumptions, numbering at least in the dozens and perhaps to a hundred, that push interpretation toward a particular policy outcome, such as against expansive criminal liability and in favor of veterans' benefits.[77] The current reshuffling of substantive canons is not without historical precedent. During the Rehnquist Court, Professors Eskridge and Frickey noticed the bulking up of some presumptions against federal regulation of the states into clear-

73. These figures are based on searches, last conducted on March 14, 2025, in the Westlaw databases for the courts of appeals, district courts, and court of appeal briefs using the search term "major questions doctrine" occurring after June 30, 2022, the date of *West Virginia v. EPA*. Note that the databases do not contain every document, and searching for the exact phrase undercounts invocations of the doctrine. The doctrine's uncertain boundaries give it the opportunity to generate citations in all kinds of doctrinal domains. *See infra* note 300 (citing examples).

74. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2272–73 (2024).

75. *Id.* at 2262, 2267.

76. *Id.* at 2270–72.

77. *See* ESKRIDGE ET AL., *supra* note 16, at 1160–71. An enumeration is necessarily imprecise because of uncertainty over whether something rises to the level of "canon" and because some specific canons might be considered mere applications of broader canons rather than canons in their own right.

statement rules or even "super-strong clear-statement rules" that can be defeated only by exceptionally clear and specific language.[78]

Today's incipient rearrangement of the regime of substantive canons involves, as the remainder of this section will explain, changes at both macro and micro levels. At the macro level, there are indications that some judges are aiming to reduce the number of substantive canons in the toolkit, leaving a suite of canons that is few but mighty. The remaining substantive canons, operating as clear-statement rules, will establish hard-to-dislodge baselines that reinforce the majority's view of the proper allocation of governmental power.[79] That macro-level shift will come about through micro-level changes, as individual canons are born, killed off, promoted, or demoted.

Although the content of the Court's interpretive toolkit partly reflects its members' substantive goals for the nation in a pretty direct way, the reshuffling of the substantive canons also reflects the working out of the implications of the legisprudence of the new generation of post-Scalia textualists.[80] Yes, textualists have been expressing unease over substantive canons for decades, with Scalia famously calling them—in a lecture rather than in an opinion, notably—"dice-loading rules" that are "a lot of trouble" for "the honest textualist."[81] Yet, troublesome or not, some of the substantive canons have deep roots, and so Scalia allowed that some of them, like the rule of lenity, might be "validated by [their] sheer antiquity."[82] Scalia further allowed that some canons, like the clear-statement rule against abrogation of state sovereign immunity, might just approximate "normal interpretation," given that momentous acts can be expected to be "explicitly decreed rather than offhandedly implied."[83] Whatever his academic misgivings, Justice Scalia's own practice on the bench showed

78. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 619–29 (1992); *see, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 480–81 (1991) (White, J., concurring in the judgment) (accusing the majority of transforming a mere presumption against federal regulation of the states into a clear-statement rule).

79. *See* William N. Eskridge Jr., Super-Canons 35–43, 50–56 (Nov. 11, 2024) (unpublished manuscript) (on file with the North Carolina Law Review) (describing the Roberts Court's implicit political philosophy and the structural canons that express it).

80. The discussion to follow mostly concerns textualists in the judiciary and their plans for the substantive canons. Academic debate over the compatibility of textualism and the canons continues as well. S*ee generally* Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515 (2023) (assessing the leading efforts to reconcile modern textualism with substantive canons).

81. ANTONIN SCALIA, A MATTER OF INTERPRETATION 27–28 (Amy Gutmann ed., 1997).

82. *Id.* at 29. Whether a canon's age is validating because it gives the canon a firm place in the "law of interpretation" or because it means it has become a backdrop against which Congress subjectively legislates, he does not say. *See id.*

83. *Id.*

more comfort with the canons. By late in his career, in his treatise with Bryan Garner, he blessed a bunch of them.[84]

The new wave of textualists have also given the matter of substantive canons some thought in their academic writings, and their skepticism is generating a plan of judicial action to streamline the toolkit of substantive canons. In one of her more important pre-appointment writings, then-Professor Barrett asked whether it was possible to reconcile substantive canons with textualism, given what she sees as textualism's nature as a restrained approach committed to legislative supremacy in statutory matters.[85] Her answer first concluded that no substantive canon could overcome clear text.[86] Then, for situations in which there were multiple plausible interpretations of the text, she would divide up canons into two different categories.[87] First are constitutionally inspired canons, which could dictate an interpretation that triumphed the most natural reading of the text in favor of a less natural but still plausible reading.[88] Second come canons based on subconstitutional policy preferences; they could only break ties between equally plausible interpretations of the text.[89] For Justice Barrett, antiquity is not enough of a justification to allow a canon to exert greater influence.[90] Her approach therefore opens the door to disruption of longstanding interpretive patterns.

Justice Kavanaugh, too, links his canon-skeptical stance to textualism, though in a less formalistic and more pragmatic way. His stated goal is to bring order, predictability, and the appearance of evenhandedness to statutory interpretation.[91] His particular target is the threshold finding of ambiguity that triggers many substantive canons (and other tools too, namely *Chevron* deference and legislative history).[92] He points out, accurately, that different judges put the line between clarity and ambiguity at different levels of determinacy (fifty-five percent clear, eighty percent clear?) and that it is hard to say whether the threshold for ambiguity is met in a particular case.[93] So, he wants to avoid that inquiry into clarity, directing judges instead to begin by determining the best reading of a statute on the basis of text, textual context, and linguistic canons.[94] Only then would a judge consider substantive canons.

84. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 247–339 (2012) (endorsing many familiar substantive canons).

85. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 110 (2010).

86. *Id.* at 163–64.

87. *Id.*

88. *Id.* at 168–69.

89. *Id.* at 177.

90. *Id.* at 111.

91. Kavanaugh, *supra* note 56, at 2120–21.

92. *Id.* at 2135–36, 2144. As is often the case, "ambiguity" may actually mean various forms of underdeterminacy.

93. *Id.* 2136–38.

94. *Id.* at 2144–45, 2163.

He expressly contemplates jettisoning many substantive canons, even venerable old ones like constitutional avoidance in its general form, though some applications of avoidance, like federalism and the MQD, would survive as clear-statement rules that could counter otherwise-best readings of the text.[95]

These views are being put into action. Even before Justices Kavanaugh and Barrett joined the Court, some substantive canons that pointed in the wrong policy direction, from the majority's perspective, were outright abrogated. (The shuffling of the toolkit is partly about the logic of textualism playing out, but other preferences play a role in which canons get targeted and when.) One victim was the canon that exemptions from the coverage of the Fair Labor Standards Act ("FLSA")[96] "are to be narrowly construed against the employers seeking to assert them."[97] The canon had the Supreme Court's imprimatur in cases going back half a century, and it had been cited more than a thousand times (!) in the lower courts.[98] In the 2010s, though, the Court issued two decisions giving the canon a narrow scope.[99] By 2016, in *Encino Motorcars LLC v. Navarro*,[100] Justice Thomas was referring to it as a "made-up canon."[101] Thomas cited an amicus brief from the Chamber of Commerce and other business groups that was entirely devoted to dumping the canon (highlighting again the role of nonjudicial actors in canon warfare).[102] He noted that the Court had "declined to apply that canon on two recent occasions."[103] (How quickly desuetude can creep up on a canon!) The stage set, the canon met its end two years later when *Encino Motorcars* returned to the Supreme Court.[104] Justice Thomas, now for a majority, "reject[ed] this [narrow construction] principle as a useful guidepost for interpreting the FLSA."[105]

But the story is not only about the demise of substantive canons that point the wrong way, in terms of a mismatch with policy preferences. One would suppose that the substantive canon calling for pro-veteran interpretations of unclear veterans-benefits statutes would be one of the favorite canons in a

95. *Id.* at 2145–49, 2154–56.

96. Pub. L. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–19).

97. Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960).

98. *E.g.*, *id.*; Mitchell v. Kentucky Fin. Co., 359 U.S. 290, 295 (1959) ("It is well settled that exemptions from the Fair Labor Standards Act are to be narrowly construed."). A search in the Westlaw ALLFEDS database using the following search string returns almost 1600 hits, with a quick skim of highlights suggesting the large majority are responsive: "(FLSA or "Fair Labor Standards Act") /s (exemptions or exceptions) /s (narrow! or strict!) /s (constru! or interpret!) and DA(bef2018)."

99. Sandifer v. U.S. Steel Corp., 571 U.S. 220, 232 n.7 (2014); Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 164 n.21 (2012).

100. 579 U.S. 211 (2016).

101. *Id.* at 230–31 (Thomas, J., dissenting).

102. *Id.* at 231 (citing Brief of Chamber of Com. et al. as Amici Curiae in Support of Petitioner at 2–5, *Encino Motorcars* (No. 15-415), 2016 WL 891333).

103. *Id.* at 230–31.

104. Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1142 (2018).

105. *Id.*

popularity contest, but it is now in trouble. In 2023, Justice Barrett wrote a unanimous opinion brushing the canon aside because the text was clear.[106] The next term had another veterans-benefits case, and several amicus briefs focused on the canon.[107] The majority again sidestepped the canon, but separate opinions accounting for four Justices criticized it.[108] Justice Kavanaugh's concurrence, joined by Justice Barrett, devoted itself to questioning the canon and concluded by inviting the Court to reconsider it.[109]

The recent debate around the "Indian canon"—which calls for treaties and statutes to be read in favor of the tribes[110]—likewise illustrates the macro-level forces impinging on a longstanding canon. The canon had sometimes been neglected but not, until recently, attacked head on.[111] That changed in 2022 in *Ysleta del Sur Pueblo v. Texas*.[112] At oral argument, Justice Alito asked about the canon's origin, evincing some skepticism.[113] Justices Kavanaugh and Barrett asked what kind of a canon it is, with Justice Kavanaugh dividing them into "two buckets," the "ambiguity-dependent canons" that favor a particular reading if and only if a statute is ambiguous and the clear-statement rules that require a plain textual statement to overcome.[114] And, if it was the latter, Kavanaugh wondered what sort of "quasi-constitutional value" could justify such a strong rule.[115] The Court's eventual decision in the case sidestepped most of this, stating in a footnote that the tribe prevailed regardless of the canon.[116]

The debate continued the following year, with Justice Thomas casting doubt on the canon in connection with his broader effort to unwind the "trust relationship" between the tribes and the United States.[117] Justice Gorsuch defended the canon's pedigree in a separate opinion.[118] The majority, for its part, did not directly address the canon one way or the other, perhaps because it

106. Arellano v. McDonough, 143 S. Ct. 543, 552 (2023).

107. *E.g.*, Brief for the Veterans of Foreign Wars of the United States as Amicus Curiae in Support of Petitioner at 19–35, Rudisill v. McDonough, 144 S. Ct. 945 (2024) (No. 22-888), 2023 WL 5412073, at *19–35.

108. *Rudisill*, 144 S. Ct. at 958–59; *id.* at 959 (Kavanaugh, J., concurring); *id.* at 967 (Thomas, J., dissenting).

109. *Id.* at 961 (Kavanaugh, J., concurring).

110. *See* RESTATEMENT OF THE L. OF AM. INDIANS §§ 6, 8 (AM. L. INST. 2022) (describing canons for construction of Indian treaties and Indian-affairs legislation).

111. *See, e.g.*, Carcieri v. Salazar, 555 U.S. 379, 413–14 (2009) (Stevens, J., dissenting) (stating that the majority "ignores the principle deeply rooted in [our] Indian jurisprudence that statutes are to be construed liberally in favor of the Indians" (quotation omitted)).

112. 142 S. Ct. 1929 (2022).

113. Transcript of Oral Argument at 55–56, *Ysleta del Sur Pueblo*, 142 S. Ct. 1929 (No. 20-493).

114. *Id.* at 62–65.

115. *Id.* at 63.

116. *Ysleta Del Sur Pueblo*, 142 S. Ct. at 1941 n.3.

117. Arizona v. Navajo Nation, 143 S. Ct. 1804, 1817–18 (2023) (Thomas, J., concurring).

118. *Id.* at 1826 (Gorsuch, J., dissenting).

thought that the language of the treaty was clear enough against the tribe that the canon would not matter.[119]

Lower courts have picked up on the uncertainty around policy canons. In the run up to the *Rudisill v. McDonough*[120] case, the Federal Circuit had lengthy back-and-forths, peppered with citations to Justices Kavanaugh's and Barrett's writings, on the formulation and priority of the veterans' canon.[121] Some lower courts are taking aim at canons that the Court itself has not yet targeted. An interesting example is Eleventh Circuit Judge Newsom's concurring opinion devoted to questioning the canon favoring broad construction of the Federal Arbitration Act.[122] He investigated the canon's pedigree and potential justifications, ultimately declaring the canon "made up."[123] The broader point here is that, much as with potential changes to substantive law, the Court, or even a member or two, can invite ferment in the law, using the lower courts and litigants to try out ideas before the Court itself returns to an issue.

So far, this section has addressed abrogation and demotion of canons, but remember that the other aspect of the shift is that a few other canons are gathering heft. I already addressed the MQD, which can best be considered a substantive canon of the plain-statement variety.[124] Another winner in the canon reshuffle is a hybrid of the MQD and federalism canons that has been used in some recent environmental law cases. This "sagebrush canon," we might call it, requires "exceedingly clear language" from Congress to exert control over real property, a traditional matter for state regulation.[125] It is already taking root in the lower courts, racking up citations.[126]

119. *See id.* at 1813–14 ("And as this Court has stated, Indian treaties cannot be rewritten or expanded beyond their clear terms." (internal quotation marks omitted)).

120. 144 S. Ct. 945 (2024).

121. *E.g.*, Kisor v. McDonough, 995 F.3d 1347, 1348 (Fed. Cir. 2021) (Prost, C.J., concurring in the denial of rehearing en banc); *id.* at 1366 (O'Malley, J., dissenting from the denial of rehearing en banc); Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs., 48 F.4th 1307, 1319–22 (Fed. Cir. 2022) (Prost, C.J., dissenting).

122. Pub. L. 282, 61 Stat. 392 (1947) (codified at as amended at 9 U.S.C. §§ 1–16); Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1215 (11th Cir. 2021) (Newsom, J., concurring). He calls it the "*Moses H. Cone* canon" after *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), which is one of its sources.

123. *Calderon*, 5 F. 4th at 1215, 1220.

124. *Supra* Section I.B.

125. Sackett v. EPA, 143 S. Ct. 1322, 1341–42 (2023); Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1849–50 (2020). The "sagebrush rebellion" was the movement in the 1970s and 80s to reduce federal control over lands in the West. *See* Howell Raines, *States' Rights Move in West Influencing Reagan's Drive*, N.Y. TIMES (July 5, 1980), https://www.nytimes.com/1980/07/05/archives/states-rights-move-in-west-influencing-reagans-drive-federal.html [https://perma.cc/9BJV-STNV (staff-uploaded, dark archive)].

126. *E.g.*, Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev., 5 F.4th 666, 671 (6th Cir. 2021). One easy way to track the citations is through the relevant Westlaw headnotes in the *Sackett* and *Cowpasture* cases. As of March 14, 2025, the relevant headnote in *Cowpasture*, the older of the two cases, has been cited twenty times.

The change in the regime of substantive canons is probably not complete, and the end state is hard to predict, especially for some canons. It is clear enough what Justices Kavanaugh and Barrett have in mind for substantive canons as a whole: a suite of substantive canons that is fewer in number but mighty. Sometimes the Court appears to deal with substantive canons on an ad hoc basis that largely tracks a particular canon's ideological valence.[127] Justice Gorsuch plays an important role in limiting a rightward shift on some canons, as his vehemence on certain canons—that the Indian canon is important and that the rule of lenity should be a strong starting point rather than an impotent last resort—unites him with some of the liberal Justices, perhaps forming a firebreak around those canons.[128] He is fully on board with his conservative colleagues, however, in the bulking up of the MQD and the sagebrush canon.[129]

* * *

This part has presented three episodes of changes in aspects of the interpretive regime. Together they show a range of changes, varying in speed and breadth and mechanisms. Part II will take a more analytical approach, laying out the different mechanisms of change and considering their advantages and disadvantages.

II. THE MECHANISMS OF INTERPRETIVE-REGIME CHANGE

Having examined several examples of past, ongoing, or incipient change in the interpretive regime, we can now consider more systematically the techniques through which courts, primarily the Supreme Court, can bring about or manage change. Most of these techniques are visible in the case studies above, but they will get more deliberate treatment here.

It is probably the case, and worth stating as a general proposition, that system-wide changes in interpretive regimes can be brought about more quickly today than in the past. Part of the explanation is the general fact that, as with seemingly everything else these days, there is more information, available more

127. *See, e.g.*, *supra* text accompanying notes 97–105 (discussing the abrogation of the FLSA canon).

128. *E.g.*, Arizona v. Navajo Nation, 143 S. Ct. 1804, 1826 (2023) (Gorsuch, J., dissenting) (Indian canon); Wooden v. United States, 142 S. Ct. 1063, 1082 (2022) (Gorsuch, J., concurring in the judgment) (lenity). Justice Kagan does not appear to share the enthusiasm for lenity of her fellow Democratic appointees. See, for example, Pugin v. Garland, 143 S. Ct. 1833 (2023), in which Kagan declined to join Part III of Justice Sotomayor's dissent, which used lenity. *Id.* at 1845, 1855–56 (Sotomayor, J., dissenting).

129. Justice Gorsuch joined *Sackett* and *Cowpasture*, for example, and has written separately in support of the MQD. West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring).

instantly, than there used to be.[130] Consider social media, SCOTUSblog, automatic Google alerts, and podcasts. When Justice Barrett writes a concurrence about whether the MQD is a substantive canon or instead an aspect of textual "context," commentary begins on social media within minutes, and sophisticated blog posts appear within hours.[131]

To that fact about our connected world, add two features of contemporary law that also facilitate the transmission of changes in interpretive methods. First, the interpretive debates of recent decades have increased judicial self-consciousness about interpretive method as a thing that can be done in different ways and that judges and legislatures might actually try to change.[132] Second, and as a more general matter, modern courts embrace a one-case-makes-law view of precedent rather than the old accretive approach in which each case served merely as mounting evidence of the law.[133] Put those things together, and we see the Justices debating the soundness of particular canons at oral arguments and in opinions, and if a majority clearly states that a long-standing canon no longer exists, as in *Encino Motorcars* with the FLSA canon, then it immediately doesn't, at least for the lower courts.[134] A majority can "make fetch happen" with one such pronouncement.[135] Lower courts regard the case as a binding change in the interpretive regime and, thanks to the informational environment described above, start issuing opinions using the new regime

130. *See* Allison Orr Larsen, *Why the Word 'Doctrine' Matters in the Major Questions Doctrine*, BLOOMBERG L. (July 6, 2023, 4:00 AM), https://news.bloomberglaw.com/us-law-week/why-the-word-doctrine-matters-in-the-major-questions-doctrine [https://perma.cc/9666-2MQ3 (staff-uploaded, dark archive)] (observing that modern communications tools can speed up doctrine formation).

131. Biden v. Nebraska, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring); *e.g.*, Beau J. Baumann, *Let's Talk About That Barrett Concurrence (on the "Contextual Major Questions Doctrine")*, YALE J. ON REGUL.: NOTICE & COMMENT (June 30, 2023), https://www.yalejreg.com/nc/lets-talk-about-that-barrett-concurrence-on-the-contextual-major-questions-doctrine-by-beau-j-baumann/ [https://perma.cc/WXN6-GDAH].

132. *See generally, e.g.*, Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010) (describing innovations in state interpretive methodologies) [hereinafter Gluck, *States as Laboratories*]; *infra* notes 225–27 and accompanying text (discussing methodological *stare decisis*). The focus in this Article is judicially generated change, but legislatures can and do establish and change interpretive methods and rules. *See generally, e.g.*, Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010) (discussing how legislatures guide statutory interpretation).

133. *See* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 659–87 (1999); John B. Oakley, *Precedent in the Federal Courts of Appeals: An Endangered or Invasive Species?*, 8 J. APP. PRAC. & PROCESS 123, 127 (2006).

134. *Supra* Section I.C.

135. *Cf. Mean Girls* (Paramount Pictures 2004) ("Gretchen, stop trying to make 'fetch' happen. It's not going to happen!"). I follow Stephen Sachs in drawing jurisprudential lessons from Gretchen's attempt to make fetch happen.

within days.[136] That means that such changes can probably be undone too, which provides some comfort to those on the losing end. One might wonder where the Supreme Court gets the authority to make intentional changes in the interpretive regime, a system of law that one might imagine to be bigger than the Court of any given period,[137] but for present purposes the point is that other actors in the system proceed as if it does have that power when it chooses to exercise it.

The reader will notice that the following account of mechanisms of change does not include all-encompassing but underspecified directives like, "Attention, everyone: Switch the regime to original-public-meaning originalism." Overall approaches to interpretation find their concrete operationalization through admissibility rules, priority rules, and other lower-order norms that compose the regime. It is those kinds of rules that the following sections largely concern.

A. *Creation*

Courts and legislatures sometimes create new canons and render admissible new interpretive sources.[138] Legislative history, for example, was not used as a source for discerning legislative intent, but then the Supreme Court started using it, so much so that it became routine.[139] Admittedly, identifying the moment of inception for a new tool can be tricky, as almost everything has antecedents, and courts have incentives to bolster their legitimacy through claims of continuity rather than innovation. Thus, *West Virginia v. EPA* cited several prior cases said to embody the MQD, disclaiming any novelty.[140] As some jurisdictions adopt corpus linguistics as a permissible (and perhaps

136. *Encino Motorcars* was decided on April 2, 2018. Lower courts started citing its abrogation of the FLSA canon later that month. *E.g.*, Rodriguez v. Adams Rest. Grp., 308 F. Supp. 3d 359, 364 n.1 (D.D.C. 2018); Friedman v. Nat'l Indem. Co., No. 8:16-CV-258, 2018 WL 1954218, at *2 (D. Neb. Apr. 13, 2018).

137. *See, e.g.*, Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97, 102 (2003) (doubting such authority); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1138–39 (2017) (discussing limits on deliberate judicial modification of interpretive rules); *see also infra* note 227 and accompanying text (addressing methodological stare decisis).

138. Again, I am concerned with the creation of new interpretive moves, not so much whether the new thing is best described as a "canon" as opposed to something else like an interpretive principle, presumption, or doctrine. *See supra* note 9 and accompanying text.

139. The famous case is *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), though it was not actually the first to use legislative history. *See* Carol Chomsky, *Unlocking the Mysteries of* Holy Trinity*: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901, 943–49 (2000).

140. West Virginia v. EPA, 142 S. Ct. 2587, 2608–09 (2022) (citing, *inter alia*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)); *see also* Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 111–15 (2018) (providing examples of other arguably new canons developed in the Roberts Court).

someday required) method of determining ordinary meaning, they are probably creating a new interpretive practice, but some advocates will cast it as simply a more rigorous way of doing what judges have done before.[141]

A related difficulty concerns naming. A new name need not mean a new tool, nor does the continuation of an old name preclude novelty in substance. The mere fact that the phrase "major questions doctrine" had not appeared in a Supreme Court decision before *West Virginia v. EPA* obviously does not determine whether the idea was new (or, more accurately, where it fell on the continuum between old and new). The Scalia and Garner treatise appears to have coined the term "series-qualifier canon," but that textual rule was not new, nor did they claim it to be.[142] This is not to say that there is nothing in a name. Whether something is called a doctrine (or rule or canon or the like) and consistently so labelled can affect its profile and its perceived legitimacy.[143] It is likely that the label "series-qualifier canon" makes that idea more accessible and transmissible; conceivably, the aided propagation that comes from having a name could even diminish the relative force of the rule of last antecedent against which it is often matched.

Another difficulty with definitively identifying novelty in interpretive tools is that some new canons could be characterized as specific applications of existing canons. The Court at one time deemed the Securities Exchange Act[144] remedial legislation and so applied "the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes."[145] The novel move there was to bring a new statute within an existing paradigm. (To foreshadow the section on canon destruction, note that this liberal-construction approach to the securities laws, and maybe remedial statutes generally, is no longer operative.[146])

The various difficulties in identifying the birthday of an interpretive tool should not obscure the reality that the interpretive regime is not closed to new entrants. Neither does entry to the club ensure immortality, as the next section explains.

B. *Destruction*

There are at least two ways to kill off an interpretive tool: to abrogate it and to ignore it.

141. *See* Transcript of Oral Argument at 8–10, ZF Auto. US, Inc., v. Luxshare, Ltd., 142 S. Ct. 2078 (2022) (No. 21-401) (citing proto-corpus analysis in a prior case as support for the use of corpus linguistics).

142. SCALIA & GARNER, *supra* note 84, at 147–51.

143. *See* Allison Orr Larsen, *Becoming a Doctrine*, 76 FLA. L. REV. 1, 57 (2024).

144. Pub. L. No. 73-291, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a–78rr).

145. Tcherepnin v. Knight, 389 U.S. 332, 336 (1967).

146. *See infra* text accompanying note 151.

1. Abrogating

The most direct approach is to overrule a canon or state that a source is inadmissible. The idea of abrogating an interpretive tool might strike one as odd if one doubted that they qualify as "law" to start with. Yet courts, litigants, and commentators often use the language of overruling or abrogating or the like when it comes to canons and other tools.[147]

Consider a few examples of express abrogation. Likely the context in which people most frequently speak of overruling parts of the interpretive regime is the doctrine of judicial deference to agency interpretations, especially *Chevron*, which was expressly overruled, and *Auer*/*Seminole Rock*, which was modified but not overruled.[148] Lest one think deference doctrine is exceptional, there are other examples of abrogation talk surrounding what are clearly canons. Recall the Court "reject[ing]" the once "well settled," but later described as "made-up," canon about narrowly interpreting FLSA's exemptions.[149] Consider the rejection of the rule of liberal construction of the Securities Exchange Act as well.[150] Those were valid canons, but now they are not. And whether we call the rules governing the use of legislative history a "reference canon" or a rule of admissibility or whatever, if strict textualists succeeded in expressly outlawing it, that would be a clear break in the interpretive regime worthy of being called an overruling, as with the overruling of *Chevron*.

2. Ignoring (and Eventually Implicitly Overruling?)

Some tools just get ignored. *Chevron* in its later years provided the most obvious example, as described above,[151] but it does not stand alone. Several venerable canons, or at least formerly venerable ones, have not been cited by the Supreme Court for some time, even when they appear relevant. One might quibble over the dates of last appearance, but canons experiencing this treatment probably include the rule of liberal construction of the Voting Rights

147. *See* Aaron-Andrew P. Bruhl, *Eager to Follow: Methodological Precedent in Statutory Interpretation*, 99 N.C. L. REV. 101, 134–36 (2020) [hereinafter Bruhl, *Eager to Follow*] (citing examples).

148. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2272–73 (2024); Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019).

149. *Supra* text accompanying notes 99–105.

150. *See* Pinter v. Dahl, 486 U.S. 622, 653 (1988) ("The broad remedial goals of the Securities Act are insufficient justification for interpreting a specific provision more broadly than its language and the statutory scheme reasonably permit." (internal quotation marks omitted)). This specific abrogation parallels the neglect and arguable abrogation of the remedial-statutes canon generally. *See* Mendelson, *supra* note 141, at 110.

151. *Supra* Section I.B.

Act[152] and the canon calling for narrow construction of statutes conferring subject-matter jurisdiction.[153]

The lack of citation is ambiguous as between at least two different situations, one of which is more meaningful than the other. Absence from an opinion may simply mean that the canon's triggering conditions were not satisfied, as where a canon by its own terms applies only when the text is unclear. When the court states or implies that one interpretation is clearly better as a textual matter, the failure to cite such a canon does not necessarily mean anything.

Absence of citation is more meaningful when the canon should by its own terms apply but still goes uncited. True, it is often hard to say when a canon should be cited, as triggering conditions can be fuzzy or contested. A clue to its applicability can come from invocation of the canon in separate opinions or in the briefs.[154] When a canon is not cited when it evidently should be, that likely reflects the desire to avoid a head-on dispute over the canon's formulation or even its continuing validity. Disagreement among the Justices over the correct formulation of the rule of lenity probably explains why some recent majority opinions avoid using the rule.[155] Disagreements over validity likely explain the Court's long neglect of *Chevron* and its recent treatment of the Indian canon.[156] The cold shoulder sometimes foreshadows express abrogation, as happened with the FLSA canon.[157]

At some point neglect may amount to implicit abrogation even if express overruling never happens. Identifying an implicit overruling is tricky even in the familiar context of substantive precedents,[158] and it is murkier still for

152. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 52 U.S.C. §§ 10301–14, 10501–08, 10701–02).

153. *See* Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481, 508–13, 521–22, 529–37 (2015) (citing various examples of canons that have been repudiated or neglected by the Supreme Court) [hereinafter Bruhl, *Communicating the Canons*]; *see also* Mendelson, *supra* note 140, at 110–11 (describing waning canons).

154. *See generally* Natalie Salmanowitz & Holger Spamann, *Does the Supreme Court Really Not Apply* Chevron *When It Should?*, 57 INT'L REV. L. & ECON. 81 (2019) (using citation in the briefs as a measure for whether the Court ignores *Chevron* even when it should be cited).

155. *See infra* text accompanying notes 210–12.

156. *Supra* Section I.C.

157. *See* Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1142 (2018) (abrogating the canon); Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 230–31 (2016) (Thomas, J., dissenting) (observing that the canon had not been used in a recent case in which it was applicable). Neglect has also foretold abrogation of some substantive precedents during the Roberts Court. *See* Richard Re, *Overruling by Ignoring*, RE'S JUDICATA (July 6, 2022, 8:01 AM), https://richardresjudicata.wordpress.com/2022/07/06/overruling-by-ignoring/ [https://perma.cc/9DP5-TDKK] (discussing "fait accompli overrulings" in contexts such as the *Lemon* test for Establishment Clause violations).

158. *See, e.g.*, Mallory v. Norfolk S. Ry., 143 S. Ct. 2028, 2033 (2023) (applying an old precedent for the first time in many years, over the dissent's contention it had been effectively overruled by intervening developments).

methodology. A fairly strong case for finding implicit abrogation occurs when a canon or other tool is not only not applied when it should be, but a different and contrary tool is used instead. Perhaps an example comes from the Voting Rights Act, where the Court stopped citing the liberal-construction canon and instead began interpreting the statute narrowly in order to avoid doubts about its constitutionality.[159]

The discussion in this section has concerned the Supreme Court, but maybe the most interesting aspect of the phenomenon of canon neglect is what the lower courts are supposed to make of it. Section II.D below will address advantages and drawbacks of different vehicles for changing the interpretive regime and will provide evidence that lower courts tend to respond differently to mere neglect versus outright abrogation.

C. *Modification*

In addition to coming and going, the content of an interpretive tool can change over time. One common form of change is when a substantive canon moves between one of the several loosely defined categories of substantive canons, which include presumptions, clear-statement rules, and tiebreakers.[160] An example of that kind of shift, from a prior generation, comes from *Gregory v. Ashcroft*,[161] in which what had probably been best understood as a presumption against federal regulation of the states bulked up into a super strong clear-statement rule shielding the states from generally applicable statutes.[162] Part of the project of Justices Kavanaugh and Barrett, recall, is to sharpen up the distinctions between categories of substantive canons and shuffle some canons between the categories (and eliminate still others).[163]

The sections below will address this and several other, sometimes overlapping forms of modification.[164] To be sure, some cases present borderline cases, whether because the modification is so major that it arguably represents the creation of a new tool or because the modification is so small that some might not identify a change at all. And competing versions of a tool might coexist, such that different expressions of it might not represent modifications

159. *Compare* Chisom v. Roemer, 501 U.S. 380, 403 (1991) (citing liberal-construction canon), *with* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202–05 (2009) (reading VRA preclearance provisions narrowly to avoid constitutional doubts).

160. *See* ESKRIDGE ET AL., *supra* note 16, at 648–51 (distinguishing among these and other categories).

161. 501 U.S. 452 (1991).

162. *See id.* at 460–61 (1991); *see also id.* at 475–76, 480–81 (White, J., concurring in part) (criticizing the Court for changing the interpretive rules).

163. *Supra* Section I.C.

164. *See* Bruhl, *Communicating the Canons*, *supra* note 153, at 548–49 (categorizing features of canons in a similar way).

as much as different formulations within a zone of indeterminacy.[165] Nonetheless, that modifications occur is hard to deny. Consider the following examples.

1. Scope

A tool's scope of application, or domain, can change in at least two ways. First, the range of statutes to which it applies can grow or shrink. For example, there long has been (and probably still exists) a general rule that statutes setting out federal subject-matter jurisdiction are narrowly construed, but in 2014 the Supreme Court decided that the rule does not apply to the Class Action Fairness Act.[166] Similarly, in a pair of cases in 1994, the Supreme Court clarified or perhaps slightly tweaked the presumption against statutory retroactivity to establish that it does not apply to procedural statutes but does apply to "curative" legislation that overturns prior judicial interpretations.[167]

A tool's scope can also change through modifications to the criteria that trigger its application to a particular case within its domain. Certain tools or presumptions apply only upon a finding of ambiguity or the like. One of Justice Kavanaugh's goals is to demote many or most substantive canons so that they apply only in cases of residual ambiguity, not from the start of the analysis.[168] Looking farther back, the shift from the "classical" doctrine of constitutional avoidance to the "modern" version involved a change in trigger: classical avoidance required that one interpretation be unconstitutional, while the modern doctrine applies when an interpretation merely creates doubts about unconstitutionality.[169]

One can analogize changes in the scope of canons to the narrowing of substantive precedents, a practice in which the Supreme Court often engages.[170] On Richard Re's account of it, narrowing occurs when a precedent is not applied to a circumstance in which it is best read to apply but in which a plausible

165. *See* Cargill v. Garland, 57 F.4th 447, 469 (5th Cir. 2023) (en banc) ("We recognize that courts have considered two standards for whether a statute is sufficiently ambiguous to trigger the rule of lenity. . . . The Supreme Court does not appear to have decided which of these standards governs the rule of lenity.").

166. Pub. L. No. 109-2, §§ 4–5, 119 Stat. 4, 9–13 (2005) (codified as amended at 28 U.S.C. §§ 1332(d), 1453); Dart Cherokee Basin Operating Co. v. Owens, 574 U.S. 81, 89 (2014).

167. Landgraf v. USI Film Prod., 511 U.S. 244, 273–79 (1994) (procedural statutes); Rivers v. Roadway Express, Inc., 511 U.S. 298, 310 (1994) (curative or restorative statutes). The presumption against retroactivity means that statutes are generally interpreted not to regulate events that preceded their enactment, even when it would be constitutional for Congress to act retroactively. *Landgraf*, 511 U.S. at 265–68.

168. Wooden v. United States, 142 S. Ct. 1063, 1075 (2022) (Kavanaugh, J., concurring); Kavanaugh, *supra* note 56, at 2135–37, 2144.

169. *See* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1947 (1997).

170. *See generally* Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861 (2014) (describing and defending the phenomenon).

alternative reading of the precedent would not apply. (Extending a precedent is the flip side.) The Court might narrow because it believes the precedent is wrong or that its rule was overly broad, and narrowing is sometimes a prelude to overruling the precedent in a future case.[171] Narrowing (or extending) a canon is similar except that the fuzziness of some canons—they might be expressed somewhat differently in different cases, none of which is the definitive source—could make it harder to identify cases of narrowing or extending on the one hand versus distinguishing or applying on the other.

2. Priority

One way of organizing an interpretive regime is through priority rules, that is, a set of second-order rules that prescribe the sequence in which interpretive tools or sources are to be used. Some states have deployed priority rules to create multi-stage interpretive regimes in which sources are organized into one of several tiers, with lack of clarity at one stage opening the door to the next tier of sources.[172]

In the lower federal courts, probably the most common topic for debates over priority rules involved the relative priority of agency deference versus various substantive canons.[173] That is, under the *Chevron* doctrine, when a statute was found ambiguous as a textual matter, which would normally trigger deference, but a substantive canon militated against the agency's interpretation, did one of those tools categorically prevail over the other? The veterans' canon and Indian canon came up frequently in this debate,[174] and one suspects that similar debates will arise under the remaining, weakened deference regime.

3. Weight

Another characteristic of a tool is its weight—that is, how powerfully it contributes to the determination of meaning when it applies. Weight by itself can be hard to isolate. One might say that a clear-statement rule is "weightier" than a mere presumption, but one could also describe that difference in terms of triggers for application. Weight in the strict sense is better captured through references to one tool "overcoming" another tool when they conflict or

171. *See id.* at 1867.

172. *See* Gluck, *States as Laboratories*, *supra* note 132, at 1856–57 (describing tiered approaches). *See generally* Adam M. Samaha, *If the Text Is Clear–Lexical Ordering in Statutory Interpretation*, 94 NOTRE DAME L. REV. 155 (2018) (describing mechanisms of priority rules and their advantages and disadvantages).

173. *See* Kenneth Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 64 (2008); Note, *Chevron and the Substantive Canons: A Categorical Distinction*, 124 HARV. L. REV. 594, 594 (2010).

174. *E.g.*, Procopio v. Wilkie, 913 F.3d 1371, 1386–87 (Fed. Cir. 2019) (veterans' benefits); Cobell v. Norton, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (Indian canon); Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1461–62 (10th Cir. 1997) (Indian canon).

statements such as "corpus linguistics is a better guide to ordinary meaning than dictionaries." The rule of the last antecedent and punctuation rules are said to be particularly weak contributors to meaning, easily yielding to contrary indications.[175] A more quantitative approach to assessing weight would consider how often a particular tool prevails as a proportion of instances in which it is discussed.[176]

4. Frequency

For the sake of completeness, we should consider changes in frequency of use, understood as the propensity to cite a tool when it is relevant according to its own terms. This type of change is hard to isolate from other kinds of change. For example, a change in a tool's triggering conditions should change the frequency with which the tool is cited but that is not a change in frequency as I am defining it here; a true change in frequency requires a change in how often a tool is cited *when relevant*. A reduction in frequency of citation could be a prelude to overruling, which was discussed above, but a change in frequency need not reflect a change in validity.

Changes in frequency do occur and do seem meaningful. Recall Figure 1 in Section I.A., showing the shifting fortunes of different interpretive tools over the last several decades. The greater prevalence of dictionaries does not stem from a statement expressly declaring them admissible when formerly they had not been. Rather, the major change seems to be that while they have been available all along, a Supreme Court that was more interested in close linguistic analysis started citing them more than it used to, and now everyone does.[177] Similarly, over the last couple of decades the Court started citing the rule of the last antecedent more often, without expressly saying anything about it being more broadly applicable or weightier than before.[178] It is hard to imagine that there are more statutory cases involving qualifying phrases with uncertain referents than there used to be. Yet although the canon remains rarely used, the lower courts now cite the canon more often than they did in the recent past, an increase larger than the increase in textual canons generally. The figure below illustrates the canon's increased use in the courts of appeals in statutory cases over the last several decades, using two different measures.

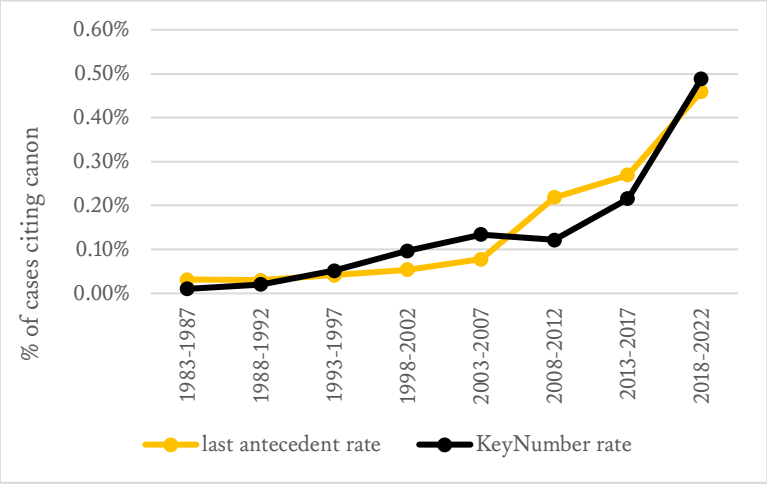
175. *E.g.*, Nobelman v. Am. Sav. Bank, 508 U.S. 324, 330–31 (1993); Joseph Kimble, *The Doctrine of the Last Antecedent, the Example in* Barnhart*, Why Both Are Weak, and How Textualism Postures*, 16 SCRIBES J. LEGAL WRITING 5, 8–10 (2014–2015).

176. *See* Mendelson, *supra* note 140, at 102–03.

177. *Supra* Section I.A.

178. Bruhl, *Communicating the Canons*, *supra* note 153, at 539. The case that is probably most responsible for the improved fortunes of the rule of the last antecedent is *Barnhart v. Thomas*, 540 U.S. 20 (2003), which relied on the rule and criticized the lower court for disregarding it. *Id.* at 26.

Figure 2: Increasing References to the Rule of the Last Antecedent in Statutory Cases in the Courts of Appeals, 1983–2022 (in Five-Year Buckets)[179]



An obvious case of dwindling frequency is the Supreme Court's treatment of *Chevron* in the years leading up to its overruling, but that is a complicated example because the drop in frequency also reflects narrowing in scope via the MQD and other carveouts, all of which was addressed above.[180]

D. *General Remarks on the Efficacy of Different Mechanisms of Change*

Having laid out the mechanisms through which interpretive tools can change, we can move beyond taxonomy by assessing how the mechanisms differ in their utility with respect to bringing about interpretive change. As before, the focus is on the mechanisms of change, not on the content of interpretive doctrines or their doctrinal form (for example, rules vs. standards), although those features may matter to the success of change as well. For example, the Supreme Court is likely to get better compliance, other things being equal, when it changes the law in a way that the lower courts like on the merits. And,

179. Neither of the measures of lower-court citation rates in the chart is perfect, but they largely align despite being imperfect in different directions. "KeyNumber rate" reflects the judgment of Westlaw editors that the last-antecedent canon was used in a case, but it has the advantage of not requiring a particular form of words to appear in the opinion. The other measure, "last antecedent rate" reflects the results of a search for the canon by name and therefore misses opinions that use the canon without using its name. The search string used to create "last antecedent rate" is: adv: OP("rule of the last antecedent" and (statut! or legislat! or congress! or U.S.C.) /s (interpret! or constru! or meaning or reading)). The denominator used to calculate rates is: adv: OP((statut! or legislat! or congress! or U.S.C.) /s (interpret! or constru! or meaning or reading)).

180. *Supra* Section I.B.

depending on how the Court's ideology aligns with that of the lower courts, it may find more success with either rules (which are said to be easier to monitor) or standards (which may give aligned lower courts more room to run).[181]

One consequential distinction between different mechanisms of change concerns their explicitness, such as the difference between express abrogation and mere neglect of a tool. Express statements—"doctrine *X* is overruled," "tool *Y* is not admissible," and the like—are easy for lower courts to perceive, easy for Westlaw and Lexis to turn into a headnote, and easy for litigants to quote.[182] Lower courts generally pick up on such things fast.[183] These same tendencies suggest, by the way, that a future Court that wished to reverse such changes would find these methods similarly efficacious.

Mere absence of a reference to a tool, by contrast, sends an ambiguous signal to lower courts and litigants. It could reflect the Court's inattention, or it could reflect one Justice's objection to citing it. Or maybe the Court disfavors the tool but is not ready to banish it. Or maybe the Court thought the tool's triggering conditions were not met, or that its contribution to meaning was insufficient under the circumstances to make a difference. Or maybe the parties failed to brief it. Even the most meaningful absence of citation—such as when the tool is clearly applicable, at least one party relies on it, and a separate opinion cites it—runs into the general principle that precedents have indefinite life unless overruled.[184] Lower courts are not supposed to anticipatorily overrule.[185] Tools long ignored by the Supreme Court therefore tend to zombie along in the lower courts, with numerous examples including the canon calling for broad construction of civil-rights laws and the *Chevron* doctrine.[186]

Similar conclusions about the value of explicitness apply to the less drastic matter of canon modification. Express, easily understandable, "headnotable" statements about scope or priority—such as statements that a particular rule does not apply in criminal cases or a certain canon takes priority over another—can be expected to bring about change more effectively than merely using the

181. *See generally* Jonathan P. Kastellec, *The Judicial Hierarchy: A Review Essay*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS 2, 8–11 (2016) (reviewing the literature on doctrinal form and judicial compliance).

182. For example, the paragraph of *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018), that abrogates the FLSA canon was headnoted by Westlaw as the proposition that FLSA exemptions are to be given "a fair, rather than a 'narrow,' interpretation." *Id.* at 1136, 1142. That headnote has been cited hundreds of times, more than twice as often as any of the other headnotes in the case (based on Westlaw display March 14, 2025).

183. *Supra* note 136 and accompanying text.

184. Hohn v. United States, 524 U.S. 236, 252–53 (1998).

185. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).

186. *See* Bruhl, *Communicating the Canons*, *supra* note 153, at 523–24, 537–42; *supra* Section I.C. *See generally* Bradley & Grove, *supra* note 67 (observing that substantive precedents also tend to persist in the lower courts despite signs of disfavor from the Supreme Court).

canon in a new way.[187] When the Court said that the presumption against removal jurisdiction does not apply to the Class Action Fairness Act, that statement became a Westlaw headnote that has been cited in more than 700 cases.[188] By contrast, when the Court's early cases reinvigorating the presumption against extraterritoriality were unclear about which statutes the beefed-up canon applied to, the lower courts were uncertain too.[189] The Court eventually made it clear that the presumption applies "across the board."[190]

No matter how clear the Court would like to be, some features of the interpretive regime are just hard to change, often because they are hard to express. Particularly resistant to change are the dimensions I have called weight and frequency. There is no scale for measuring a tool's weight, and so the most precise thing one could probably say is that a certain tool is weightier than another when they conflict. For frequency, changes in the frequency of citation can reveal a change in the regime, especially if long continued, as with the shifts concerning dictionaries and legislative history addressed in Section I.A. Yet changing the frequency with which a tool is changed is a relatively poor way to communicate change to other actors in the system. To know whether the frequency has even changed, one would need to count the opportunities for citation, which in turn depends on docket composition and whether the tool's own criteria for application were satisfied. There are scores of substantive canons across just about all areas of the law, more of them than there are spaces on the modern Supreme Court's docket.[191] An increase in citation from once every four years to once every three years is unlikely to make much of an impression.

Another factor bearing on the success of change is the nature of the tools that are changing. It is no accident that most of my examples of interpretive change involve substantive canons or rules about the use of extrinsic sources, matters that are easily regarded as parts of the law's "artificial reason."[192] Many textual canons, by contrast, are supposed to reflect patterns of actual usage.[193] Given that actual usage is not bound by universally obeyed bright-line rules,

187. *Cf.* Jonathan Remy Nash, *When Is Legal Methodology Binding?*, 109 IOWA L. REV. 739, 758–60 (2024) (arguing that rule-like methodologies are more likely to attain precedential status).

188. Dart Cherokee Basin Operating Co., LLC v. Owens, 574 U.S. 81, 89 (2014). The figure is as of March 14, 2025

189. *See* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 101–04 (1998).

190. *See* William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582, 1597–1603, 1614–15 (2020) (quoting RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 336 (2016)).

191. *See* ESKRIDGE ET AL., *supra* note 16, at 1160–71 (listing substantive canons, including subject-specific canons).

192. *See* Baude & Sachs, *supra* note 137, at 1095–97, 1123–25 (distinguishing between linguistic and legal canons).

193. *See* Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1174 (2021) (Alito, J., concurring) (stating that "[t]he strength and validity of an interpretive canon is an empirical question").

many or most of the textual canons are highly sensitive to context, lack definite boundaries, and have uncertain weight.[194] Trying to fine-tune their weight, scope, and conditions of defeasibility would be like carving a chess set out of cream cheese. Sure, if the Supreme Court tomorrow expressly stated that "the rule against surplusage is hereby disapproved as a canon of statutory interpretation," the lower courts would do their best to comply, subject to the slight yet inescapable force that some applications of the rejected rule would continue to exert as a matter of ordinary interpretation.[195] Wisely, the law generally embraces these intuitions as they are, squishiness and all.

Beyond the inherent differences between different tools and different mechanisms of change, external factors affect the success and speed of interpretive change too. Even in the era of instant communication, the existence of a highly specialized bar in the relevant policy area probably helps the speed and accuracy with which changes are transmitted. Reaction to the change in the deference regime for tax regulations was incredibly fast, for example, while one still finds cases here and there that cite the old FLSA canon without noting *Encino*'s abrogation of it.[196] Sympathetic lower courts and a supportive legal culture matter too.[197] Part of the reason the MQD is running rampant through the lower courts is that the Supreme Court has presented it as a trans-substantive canon with vague triggering conditions,[198] but no doubt part of its growth is attributable to the MQD being released into some hospitable environments like the Fifth Circuit and some of its single-judge divisions.[199]

The discussion above has emphasized factors that bear on the efficacy of different approaches to changing the interpretive regime, but it bears mentioning that snappy adherence is not the only goal the Court might have. Although opaque mechanisms may not change the regime as swiftly, they can advance other aims. They might help forge compromises.[200] They might help the Court avoid the criticism that more overt actions may trigger—though at

194. Even the canons' advocates recognize these features. *See, e.g.*, SCALIA & GARNER, *supra* note 84, at 59–62, 107, 140–42.

195. *Cf.* Jordan v. Maxim Healthcare Servs., Inc., 950 F.3d 724, 747–48 (10th Cir. 2020) (acknowledging that the state legislature had abrogated the rule of the last antecedent, but reaching an interpretation consistent with the rule by relying on statutory context and other canons).

196. *Compare* Bruhl, *Communicating the Canons*, *supra* note 153, at 508–13 (discussing tax example), *with* Luna Vanegas v. Signet Builders, Inc., 46 F.4th 636, 641 (7th Cir. 2022) (citing the FLSA canon and apparently overlooking *Encino*).

197. *See supra* Section I.A (discussing system-wide, cultural shift toward textualism).

198. *See* Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. 465, 513 (2024).

199. *See* Pamela King, Niina H. Farah & Lesley Clark, *Red States Bet on 5th Circuit to Take Down Biden Agenda*, E&E NEWS (Feb. 15, 2023, 1:40 PM), https://www.eenews.net/articles/red-states-bet-on-5th-circuit-to-take-down-biden-agenda/ [https://perma.cc/5T8L-T8ZW].

200. *See infra* text accompanying notes 208–10 (discussing the Court's attempts to avoid disputes over the rule of lenity).

the risk of getting criticized for being opaque.[201] Finally, it could be that the Court actually intends to create the system of *de facto* divergence documented above, in which a certain tool is ignored in the Supreme Court but lives on in the lower courts.[202]

Note, finally, that while an explicit break with prior methods can be effective in bringing about change in the lower courts, quick implementation of big changes presents the risks of upsetting reliance and triggering unintended consequences. Those matters are explored below, beginning in Part III with techniques of controlling the pace of interpretive change.

III. WAYS OF CONTROLLING THE PACE OF INTERPRETIVE CHANGE

One theme of this Article is that interpretive change is a systemic process, something the Supreme Court does not solely initiate and cannot singlehandedly effectuate but something it can manage in various ways. As the discussion in the previous part suggested, some techniques for bringing about change are by their nature more visible to the lower courts and other actors than other techniques. Ignoring a tool is relatively unlikely to bring about a quick and decisive change in the system. An outright abrogation of a tool or an express narrowing of its scope will move through the system faster and more surely.

Beyond the choice between different mechanisms of change, there are other ways that the Court can modulate the pace of change. These include avoiding certain kinds of cases, avoiding clashes over methodology, and deferring to precedent. And even when the Court does modify the interpretive regime, it can adjust the impact through choices about the temporal scope of the change.

A. *Techniques for Temporizing*

There are a number of methods whereby a court or a judge can simply avoid a question. This is true for questions of interpretive method as well as for questions of substance, though the techniques differ somewhat in the two contexts. Opportunities for avoidance also differ across the judicial hierarchy.

1. Discretionary Case Selection

Writing about the Supreme Court, Alexander Bickel argued that while the Court's decisions on the merits had to be scrupulously principled, decisions on the merits were preceded and surrounded by all kinds of discretionary, prudential decisions that the Justices could permissibly use to deflect or delay

201. *Cf.* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 33–40 (2010) (observing that one motive for stealth overruling rather than explicit overruling may be avoidance of publicity).

202. *Supra text* accompanying notes 151–53.

resolution of the merits.[203] Denials of certiorari, dismissals on grounds that a case is not ripe, abstention—these and other tools allow for the exercise of the "passive virtues."[204] As Professor Nagle and then-Professor Barrett more recently explained, various features of the Court's procedures permit the Court "to let some sleeping dogs lie, and so far as we are aware, no one has ever argued that a Justice is duty-bound to wake them up."[205]

While the passive virtues are most often discussed in connection with contentious constitutional matters, such techniques can likewise be used to avoid or defer cases that ask for or foreseeably implicate interpretive change. The Supreme Court has denied petitions that asked it to overrule, limit, prioritize, or clarify various interpretive tools, including but not limited to deference regimes.[206] Those denials can mean "not yet," as evidenced by the eventual decision to abrogate *Chevron*.

Lower courts lack the same luxury of docket control, as they generally have mandatory jurisdiction and must meet the parties' arguments to the extent necessary to resolve a case. Nonetheless, they do have other tools at their disposal, as the following sections explain.

2. Choice of Grounds of Decision and the Party-Presentation Principle

Even when a case cannot be avoided, a court may be able to decide the case in a responsible way while avoiding entanglement with methodological matters. One way to do so is to say that the text is clear enough that a more controversial tool is irrelevant. This approach has become routinized for legislative history, where majority opinions by intentionalist or pluralist Justices keep the textualists from writing separately by introducing the discussion of legislative history with apologetic formulations indicating that the discussion is not necessary to the decision.[207] This sort of avoidance strategy is easier to pull off with methodology than with prior substantive holdings. It would be strange

203. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 26–27, 132, 173 (2d ed. 1986).

204. *Id.* at 111–98.

205. Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 20 (2016).

206. *E.g.*, Petition for a Writ of Certiorari at i, Nat'l Org. of Veterans' Advoc., Inc. v. McDonald (No. 17-700), 2017 WL 5433139 (whether *Chevron* takes precedence over pro-veteran canon); Petition for a Writ of Certiorari at i, Osage Wind, LLC v. United States (No. 17-1237), 2018 WL 1182776 (Indian canon); Petition for a Writ of Certiorari at i, Ford Motor Co. v. United States of America (No. 13-113), 2013 WL 3856382 (sovereign immunity); Petition for a Writ of Certiorari at i, Deutsche Bank Tr. Co. Ams. v. Robert R. McCormick Found., 138 S. Ct. 1162 (2018) (No. 16-317), 2016 WL 4761722 (presumption against preemption); Petition for a Writ of Certiorari at 12, Aracoma Coal Co. v. United States, 134 S. Ct. 2291 (2014) (No. 13-941), 2014 WL 491630 (urging the Court to resolve "a three-to-two circuit conflict over whether the canon of constitutional avoidance takes precedence over [*Chevron* deference]").

207. *E.g.*, Dubin v. United States, 143 S. Ct. 1557, 1569 n.7 (2023) ("Those who find legislative history helpful will find yet further support.").

to read an opinion that said, "For those who care about controlling precedent X, following X would strengthen our conclusion."[208]

A strategy of avoiding methodological entanglement is currently visible in cases implicating the rule of lenity. The Court's majority opinions have not firmly relied on the rule of lenity in a decade.[209] During that time, the Court has many times read criminal statutes in defendants' favor. It just does so based on other grounds like a scienter presumption (a cousin of lenity) or what the Court calls "ordinary" readings that often happen to be narrow ones.[210] This approach of avoiding lenity per se while honoring its spirit lets the Court fudge disagreements between those like Justice Kavanaugh, who would demote or sideline ambiguity-triggered canons, and Justices who want to revive a more robust version of the canon.[211]

The principle of party presentation also plays a role in avoiding methodological debates. The principle provides, generally speaking, that a court is not required to decide, and is in fact discouraged from deciding, matters that are not sufficiently pressed.[212] This gives parties a role in shaping doctrinal evolution, but the doctrine admits of enough fuzziness that it also gives courts some discretion over whether to be methodologically modest or bold. Party presentation has had particular value as a way of avoiding originalist inquiries, given the demands of compiling an adequate record.[213]

3. Deference to Opinion Author

One way that members of multi-member courts make their lives manageable is by deferring to the opinion author on matters of expression,

208. One might suppose that the Court's famous, long-term ignoring of the Establishment Clause *Lemon* test is a counterexample. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080 (2019) (plurality opinion) (observing that the Court "[i]n many cases . . . has either expressly declined to apply the test or simply ignored it"). However, *Lemon* is not a counterexample because what the Court ignored was *Lemon*'s framework of analysis, not its substantive holding about the government giving money to religious schools. The substantive holding can of course be narrowed or distinguished, but the specific holding and the *Lemon* test are different.

209. Joel S. Johnson, *Ad Hoc Constructions of Penal Statutes*, 100 NOTRE DAME L. REV. 73, 79 (2024).

210. *Id.* at 114.

211. In *Wooden v. United States*, the concurrences by Kavanaugh and Gorsuch extensively debated contending formulations of the rule, but the majority did not mention it. *See* 142 S. Ct. 1063, 1067–74, 1075–76, 1082–83 (2022).

212. *See generally* Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447 (2009) (describing the principle of party representation and its limits).

213. *See, e.g.*, Haaland v. Brackeen, 143 S. Ct. 1609, 1631 (2023) (observing that a party had criticized the Court's precedents as being inconsistent with original meaning but had not developed that argument or addressed the consequences of accepting it). *But cf.* Randy E. Barnett & Lawrence B. Solum, Originalism and the Party Presentation Principle 29–32 (Jan. 14, 2025) (unpublished manuscript) (on file with the North Carolina Law Review) (arguing for limiting the party-presentation principle on originalist grounds).

silently joining opinions that are different from the opinions they would write themselves.[214] "Matters of expression" is imprecise, of course. It does not encompass everything short of the bottom-line judgment. At least in precedential opinions, the reasoning matters too, and disagreement with the chosen ground of decision is a common reason for writing separately.

On matters of interpretive method, it appears that deference to the author is limited but not nonexistent. On the Supreme Court, the use of legislative history is not treated as just a matter of stylistic preference, as evidenced by the familiar caveats that precede its invocation, plus the occasional textualist concurrence pointedly refusing to join opinions that are not carefully caveated.[215] Yet it seems that methodological differences are sometimes suppressed rather than made into a fight. All of the Justices who agreed with the bottom line in *Bostock v. Clayton County*[216] silently joined Justice Gorsuch's opinion, which applied one species of textualism and looked much different than a more purposivist or pluralist opinion that some of the joining Justices would have written for themselves.[217] Justice Breyer had idiosyncratic views about agency deference, but other Justices sometimes silently joined his mashups of *Chevron*, *Skidmore*, and pragmatism.[218] Perhaps some Justices regretted silently concurring in Justice Thomas's explication of the "history and tradition" method in the Second Amendment case of *New York State Rifle & Pistol Association, Inc. v. Bruen*,[219] as the next case in the line, *United States v. Rahimi*,[220] saw several separate opinions aimed at methodology.[221]

Deference on methodology must happen more in the lower courts, where the caseloads are heavier and most decisions are designated as nonprecedential.

214. *See* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 385–86 (2013); Allison Orr Larsen & Neal Devins, *Circuit Personalities*, 108 VA. L. REV. 1315, 1378 (2022).

215. For example, Justice Scalia once remarked:

> The Court's introduction of legislative history serves no purpose except needlessly to inject into the opinion a mode of analysis that not all of the Justices consider valid. And it does so, to boot, in a fashion that does not isolate the superfluous legislative history in a section that those of us who disagree categorically with its use, or at least disagree with its superfluous use, can decline to join.

Samantar v. Yousuf, 560 U.S. 305, 327 (2010) (Scalia, J., concurring in the judgment); *see also* Dubin v. United States, 143 S. Ct. 1557, 1569 n.7 (2023) ("Those who find legislative history helpful will find yet further support.").

216. 140 S. Ct. 1731 (2020).

217. *Id.* at 1738–54.

218. For example, only Justice Scalia complained about the analysis in *Barnhart v. Walton*, 535 U.S. 212 (2002), while no other justices wrote separately. *Id.* at 226–27 (Scalia, J., concurring in the judgment).

219. 142 S. Ct. 2111, 2127–28 (2022).

220. 144 S. Ct. 1889 (2024).

221. *Id.* at 1903–47.

4. Following (Methodological) Precedent

Whether an opinion's interpretive approach is an occasion for collegial deference or a matter that demands a separate writing depends in part on whether methodological propositions have precedential effect. Nobody thinks other Justices are required to write their future opinions in #GorsuchStyle[222] just because they fail to dissent from a high-flown passage. But someone might write separately to contest the validity of a substantive canon invoked in a majority opinion,[223] which suggests that the use of a canon in an opinion is believed to have some importance.

Whether interpretive methodology enjoys precedential effect is a matter of some debate. Justices Gorsuch and Thomas in particular have at some points questioned whether interpretive methodology is eligible for such effect, even in the context of deference regimes, which feel more entrenched and "lawlike" to many observers.[224] Some scholars likewise contend that interpretive methodology does not or should not enjoy precedential status.[225] Others believe that it already does, in one form or another, or at least that it should.[226]

222. *See* Adam Liptak, *#GoruschStyle Garners a Gusher of Groans. But Is His Writing Really That Bad?*, N.Y. TIMES (Apr. 30, 2018), https://www.nytimes.com/2018/04/30/us/politics/justice-neil-gorsuch-writing-style.html [https://perma.cc/6SXZ-XWQ9 (staff-uploaded, dark archive)] (noting Twitter criticisms of the style of some of Gorsuch's early opinions but also quoting fans).

223. *E.g.*, Rudisill v. McDonough, 144 S. Ct. 945, 959–60 (2024) (Kavanaugh, J., concurring) (criticizing veterans canon); Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1215 (11th Cir. 2021) (Newsom, J., concurring) (criticizing arbitration canon).

224. *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2444 (2019) (Gorsuch, J., concurring in the judgment) (contending that *Auer*'s "deference framework" was entitled to limited or no stare decisis effect). Notably, when the Court overruled *Chevron* in *Loper Bright*, the Court conducted a conventional *stare decisis* analysis with no Justice objecting to doing so. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2270–72 (2024).

225. *See, e.g.*, RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 154–56 (2017); Chad Oldfather, *Methodological Stare Decisis and Constitutional Interpretation*, *in* PRECEDENT IN THE UNITED STATES SUPREME COURT 135, 135–36 (Christopher J. Peters ed., 2013); Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1577 & n.12 (2014). Gluck's position is that interpretive methodology generally does not have precedential effect in the federal courts but that it should (as it does in some states). Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 758, 777–78 (2013). Gluck also believes that *Chevron* and a few other exceptional canons attained precedential status. Abbe R. Gluck, *What 30 Years of* Chevron *Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 613–14 (2014).

226. *See, e.g.*, Bruhl, *Eager to Follow*, *supra* note 147 (arguing that there is much more methodological precedent than usually recognized, particularly in lower courts); Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1884 (2008) (presenting normative case for precedential effect); Nash, *supra* note 187, at 750–55 (providing examples). Others take the view that methodology is not necessarily precedential in the modern sense in which a single decision establishes a proposition but is precedential in the older sense of an accretive, general law. *See, e.g.*, Baude & Sachs, *supra* note 137, at 1137; Christopher J. Baldacci, Note, *The Common Law of Interpretation*, 108 VA. L. REV. 1243, 1243 (2022). The conception of interpretive methodology

It seems to me that it is hard to make sense of the courts' words and deeds unless at least some matters of interpretive methodology have both horizontal and, even more clearly, vertical precedential effect. To begin with the admittedly weaker horizontal case, the force of methodological precedent is weaker than the force of substantive precedents, but it still enjoys some force.[227] When the Court did a *stare decisis* analysis in *Kisor v. Wilkie*[228] when deciding whether to overrule *Auer* deference, the Chief Justice's vote appears to have turned on that consideration inasmuch as he joined that discussion but did not join the defense of *Auer*'s merits.[229] When the majority wrote that the FLSA canon is not a valid canon, that meant it is not supposed to pop up in the next case, written by a dissenter, as if nothing happened. The main counterexample to the claim of horizontal precedential force in statutory interpretation is the great debate over the permissible uses of legislative history, but even there, things seem to have settled into a reliable pattern, and at most this example shows that the system of precedent is not comprehensive.[230]

Regarding vertical force, the evidence is clearer. The lower courts certainly understand themselves to be bound not to use the FLSA canon any longer.[231] Similarly, Justices Gorsuch and Kavanaugh would not be writing separate opinions debating the correct formulation and priority of the rule of lenity, nor would Justices Alito, Thomas, and Gorsuch be trying to trace the provenance of the Indian canon, if the conclusions were not meant to have forward-looking and downward-guiding significance.[232] Various other aspects of lower-court practice are consistent with methodology having at least substantial precedential force.[233]

as a form of general law—unwritten law that is found, rather than deliberately made, and which is largely similar across jurisdictions but under the control of none of them—likely matches the historical understanding of interpretive methodology from the Founding until roughly the late-nineteenth century. *See* Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921, 942 (2013); *see also* Aaron-Andrew P. Bruhl, The General Law and the Local Law of Interpretation (Mar. 2025) (unpublished manuscript) (on file with author) (exploring historical understandings of the nature of interpretive methodology and identifying early departures from the general law).

227. *Cf.* Payne v. Tennessee, 501 U.S. 808, 828 (1991) ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases such as the present one involving procedural and evidentiary rules." (citations omitted)).

228. 139 S. Ct. 2400 (2019).

229. *Id.* at 2424–25 (Roberts, C.J., concurring in part).

230. *See* Nash, *supra* note 187, at 779–84 (citing factors that tend to push certain matters away from methodological precedent, including broad scope of application and constitutional roots).

231. *Supra* note 136 and accompanying text.

232. *Supra* text accompanying notes 106–28 (discussing the sparring over these matters in recent opinions).

233. *See* Bruhl, *Eager to Follow*, *supra* note 147, at 126–58.

Much more could be said about methodological precedent, but it is not necessary for present purposes. That is because even without possessing an absolute power to bind, precedent might still provide a way for the Supreme Court to modulate the pace of methodological change. The utility of vertical precedent is that it fosters the Court's control over the lower courts and suppresses unauthorized departures from the governing regime. In its horizontal dimension, precedent's utility depends on at least two factors: the content of a judge's interpretive method and whether the judge takes a more formalist or more discretionary approach to *stare decisis*.

Regarding the content of a judge's interpretive method, the interpretive pluralism that many judges practice makes it easy to accommodate a variety of modalities of argument despite entertaining qualms about some of them. A pluralist interpreter can blend textualist and intentionalist arguments, for example, or rely solely on the textual sources when they are strong enough.[234] Pluralists do not regard the latter more limited approach as impermissible, much less as a cause for constant dissent.[235] The situation is different for some textualists, as they may find certain modes not just as incomplete but as wrong or even unconstitutional.[236] Since the current push for interpretive change is coming from the textualists, it makes sense to focus on them when considering whether *stare decisis* might nonetheless lead them to tolerate what they regard as mistaken methods.

On a fully formalist approach to *stare decisis*, duty presses in on the judge from both sides.[237] The judge must honor some precedents *and* must overrule others. Which duty applies depends on how the precedent measures up against the relevant standard. Justice Thomas, who has a particularly weak commitment to *stare decisis*, has written that judicial duty demands overruling demonstrably wrong precedents even if they have engendered reliance: "[I]f the Court encounters a decision that is demonstrably erroneous—*i.e.*, one that is not a permissible interpretation of the text—the Court should correct the error, regardless of whether other factors support overruling the precedent."[238] Even

234. *See* Michell N. Berman & Guha Krishnamurthi, Bostock *Was Bogus: Textualism, Purposivism, and Title VII*, 97 NOTRE DAME L. REV. 67, 121 (2021) (explaining that "virtually nobody is a purposivist in the same single-minded way that defines textualism" but rather that "purposivists are rarely monistic" and believe that interpretation "draws on many factors").

235. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020), illustrates this proposition, as all of the more pluralistic Justices joined Justice Gorsuch's textualist majority opinion without offering additional reasons. *Id.* at 1736–37 (noting that only Justices Thomas, Kavanaugh, and Alito dissented).

236. *See generally* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997) (arguing against reliance on legislative history based on the structure of the Article I lawmaking process).

237. William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 321–22, 329–33.

238. Gamble v. United States, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring); *see also id.* at 1987 ("Although this case involves a constitutional provision, I would apply the same *stare decisis*

Thomas's approach is incompletely formalistic, however: demonstrably wrong precedents must go, but for precedents that Thomas deems wrong but not demonstrably so, he perceives discretion to overrule or to adhere.[239] On this view of precedent, a judge would have to reject those methods that meet the standard of demonstrable wrongness, at least when the questions are squarely presented, but such a judge could use established interpretive tools that are in that judge's view merely doubtful.

There is an alternative to the formalistic duty-based understanding of precedent, one that can easily allow erroneous methodology to go undisturbed for the time being. This alternative focuses not on what *stare decisis* demands but on what it permits. On this view, we might think of *stare decisis* as providing a discretionary permission to adhere to precedent even when the criteria for overruling are satisfied.[240] That is, a decision that is demonstrably wrong, that has not engendered reliance—whatever makes for a strong case for overruling—nonetheless may at the court's option be followed. If this is what *stare decisis* means, then it is easy enough to modulate the pace of change, even when one believes overruling is justified and one plans to do it at some point. Admittedly, this introduces a lot of discretion into a zone that is conventionally considered one of duty. Yet this vision of "precedent as permission" has significant descriptive force when it comes to the Supreme Court.[241] At a minimum, the conception of precedent as permission governs the Court when it comes to agenda setting through certiorari, for it is uncontroversial that the Court does not have to hear every case that satisfies the criteria for overruling.[242] This

principles to matters of statutory interpretation."). Thomas draws substantially from Caleb Nelson's scholarship. *See id.* at 1982–88 (citing Caleb E. Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001)). The matter of the pace of overruling adds a layer of complexity for formalist regime change. Solum poses the hypothetical of an "originalist big bang" that would unsettle vast swaths of the law all at once. Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451, 461–62 (2018). Solum does not think that originalism requires judges to unsettle everything at once, as indeed doing so could undermine some of the rule-of-law values that undergird originalism. *Id.*; *see also* Lawrence B. Solum, The Constraint Principle: Original Meaning and Constitutional Practice (Apr. 3, 2019) (unpublished manuscript) (on file with the North Carolina Law Review) (describing a phased approach to a transition to originalism). Textualism is justified in part through recourse to values like predictability and stability, and so even a committed textualist with a weak commitment to *stare decisis* could forebear from changing everything at once, such as by using the tools addressed in this Part.

239. *Gamble*, 139 S. Ct. at 1984 (stating that a court "may (but need not) adhere" to merely incorrect yet plausible precedents); *see also id.* at 1986 ("[A] subsequent court may nonetheless conclude that an incorrect precedent should be abandoned, even if the precedent might fall within the range of permissible interpretations. But nothing in the Constitution requires courts to take that step."); Baude, *supra* note 237, at 321–24. Even with regard to cases that may be demonstrably incorrect, Thomas makes a concession to practicality in that he is willing to rely on rules of party presentation and waiver to limit an independent judicial duty to test every precedent. *Gamble*, 139 S. Ct. at 1986 n.6.

240. *See* Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907, 908–09 (2021).

241. *Id.* at 911–12.

242. *See* Barrett & Nagle, *supra* note 205, at 16–23; Baude, *supra* note 237, at 322–23.

freedom would extend to denying certiorari in cases that would present awkward methodological questions the Court is not ready to answer.

In sum, despite debates over the binding horizontal effect of methodological precedent, precedent still provides the Court with substantial room not to engage in methodological change, especially not to do so as fast as it could.

B. *Temporal Scope of Change*

Assuming that change in interpretive methods is going to happen, it can be more or less disruptive depending on the temporal scope of the change.[243] Logic supplies at least the following four options, arranged from least to most disruptive:

1. The new regime applies only to subsequently enacted statutes.

2. The new regime applies to all statutes regardless of date of enactment; however, prior applications of the old regime remain effective under normal rules of *stare decisis*. (That is, Case *X* holding that a skateboard is a vehicle under Statute *Y* remains good law even when the method used in Case *X* is abrogated.)

3. The new regime applies to all statutes regardless of date of enactment; prior applications of the old regime are *not* protected by *stare decisis* but must be reconsidered *de novo* under the new regime.

4. Like option 3, but prior *judgments* are reconsidered for compliance with the new regime.

We can take option 4 off the table as being too destructive of the value of repose.[244] This option contemplates that courts would go back and reopen old cases that would have come out differently under the new interpretive regime. Give back the damages previously awarded, rehire the employee formerly adjudged to have no right to reinstatement, and so on, even when the judgment

243. The discussion here represents an application of the more general problem of legal transitions. For a small sample of that literature, see, for example, Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1056–57 (1997), and Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 924 (2006).

244. *See* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 541 (1991) (opinion of Souter, J.) (explaining that "retroactivity in civil cases must be limited by the need for finality; once suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed." (citation omitted)).

has long since become final. That is not how things generally work in our system even when substantive precedents are overruled.[245]

At the other end of the spectrum is option 1. This is a prospective change in interpretive regimes according to which a new regime would apply only to statutes enacted after the change in regimes. An example would be, "Legislative history is off limits for statutes enacted tomorrow and after." If this prospective approach were broadly applied, every statute would be interpreted according to the regime that prevailed at the time of enactment.

Probably the main attraction of option 1 is that it would honor drafters' expectations of legal effect, which are built around the background rules that obtained when they enacted a statute.[246] That means option 1's appeal depends at least in substantial part on the facts about how much Congress relies on the prevailing regime and how much a change in the regime would undermine that reliance.

The real world of drafting and interpretation shows that congressional reliance is probably not very substantial. The kinds of changes in the interpretive regime that the courts are likely to advance are mostly changes that work around the margins of hard cases, not drastic changes like changing statutes' core applications. On the legislative side, the prospects of reliance suffer from uneven knowledge of judicial practice. Some of the most important canons are not well known or are even rejected by drafters.[247]

A tool that merits special mention as a potential exception to the previous paragraph's generalizations is *Chevron*. Congressional staffers knew the doctrine well, believed that ambiguity will be treated as a delegation, and drafted in light

245. There are exceptions. Courts can modify injunctive decrees with ongoing effects that have become inequitable, such as due to a change in law. FED. R. CIV. P. 60(b)(5). Similar principles of ongoing harm explain why new interpretations of criminal laws can justify releasing prisoners whose conduct was criminal when convicted.

246. Theorists of many different stripes can agree on the appeal of a stable interpretive backdrop against which Congress can legislate with confidence in how its work will be interpreted. *E.g.*, Finley v. United States, 490 U.S. 545, 556 (1989) (Scalia, J.) (noting that value of "Congress be[ing] able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts"), *superseded by statute*, 28 U.S.C. § 1367; William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term, Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66 (1994) (explaining that an interpretive regime "lower[s] the costs of drafting statutes"); *see also* Brian G. Slocum, *Overlooked Temporal Issues in Statutory Interpretation*, 81 TEMP. L. REV. 635, 646–54 (2008) (describing the "background rules theory").

247. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 926–30 (2013); Mendelson, *supra* note 140, at 131–34.

of it.[248] They prefer agencies to courts as recipients of interpretive authority.[249] These congressional understandings raise the possibility of frustrated expectations when the interpretive regime changes.

Nonetheless, despite its usual approach of giving statutes the meaning they had when enacted, the Court has not used option 1, not even when it comes to *Chevron*. Various changes to the deference doctrines, like the MQD, *Mead*, and *Loper Bright*, have applied to preexisting statutes, including, obviously, the statutes at issue in the regime-changing cases themselves. And just as a matter of judicial administration, it would be challenging for courts in an era of changing regimes to match every statutory decision to the method of interpretation that prevailed on the statute's date of enactment.[250] (Or should it be the date of the latest amendment or relevant appropriations law? You see the problem.)

If options 1 and 4 are eliminated, that leaves options 2 and 3 on the table, and the difference between them is what effect to give particular precedents that were applications of the discarded interpretive rules. Imagine a prior case that found a "no vehicles in the park" statute textually ambiguous and then turned to legislative history, *Chevron*, or a substantive canon to resolve the ambiguity, concluding on that basis that a skateboard is not a "vehicle" within the statute's meaning. Later on, the high court excludes the relevant tool from the toolkit. But consider the old holding that skateboards are not vehicles under the statute. Is that still precedent and therefore absolutely binding on lower courts and possessing *stare decisis* effect in the high court? Or is the coverage of skateboards now an open question for *de novo* consideration under the new rule? The *de novo* approach of option 3 would unsettle existing law, with the amount of disruption depending on how often the tool at issue was used and how powerful it was in determining outcomes.

Courts and commentators most often embrace or assume option 2.[251] That is, the old applications—that the skateboard is not a vehicle—should still have the same precedential force even if the methods that led to them are repudiated.

248. Gluck & Bressman, *supra* note 247, at 995–98; Brief of Law Professors Kent Barnett & Christopher J. Walker as Amici Curiae in Support of Neither Party at 14–18, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (No. 22-451).

249. Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside–An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 765–67, 773–74 (2014).

250. *See* Frickey, *supra* note 37, at 1990.

251. *E.g.*, KOZEL, *supra* note 225, at 156 (distinguishing between the precedential effect of *Chevron* and the effect of particular prior cases employing it); SCALIA & GARNER, *supra* note 84, at 272 (contending that the courts should not overrule old cases that used the wrong version of the extraterritoriality canon).

To the limited degree that the Supreme Court has considered the matter, it has made some statements to that effect.[252]

Yet the contrary view, option 3, makes some sense and has some support too. In *Kisor v. Wilkie*,[253] which trimmed and clarified but did not overrule *Auer* deference, the Court's argument in favor of retaining the doctrine observed that "abandoning *Auer* deference would cast doubt on many settled constructions of rules," a proposition both parties agreed on.[254] And, perhaps surprisingly, even though *Kisor* did not outright overrule *Auer*, some lower courts nonetheless decided that pre-*Kisor* precedents had to be scrutinized in order to determine if they complied with the new, less deferential standard.[255]

If we look outside of the federal system, the Michigan Supreme Court furnishes a real-world example of a change in interpretive regime that brought down prior applications. In the early 2000s, textualists gained a majority on the state high court, which established a strict form of that approach and overruled a slew of precedents decided by its more purposive predecessors.[256] Regarding *stare decisis* and reliance, it reasoned:

> [I]f the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of *stare decisis*, should overrule the earlier court's misconstruction.[257]

Judges who find the Michigan court's reasoning too extreme may nonetheless perceive a more pragmatic objection to leaving "wrong" precedents in place when changes in interpretive practice are significant. Since all future

252. *E.g.*, Loper Bright v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (stating that the overruling of *Chevron* "do[es] not call into question prior cases that relied on the *Chevron* framework"); Kimble v. Marvel Ent., LLC, 576 U.S. 446, 456 (2015) ("All our interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change.").

253. 139 S. Ct. 2400 (2019).

254. *Id.* at 2422. *But cf. id.* at 2447 (Gorsuch, J., concurring) ("[D]ecisions construing particular regulations might retain *stare decisis* effect even if the Court announced that it would no longer adhere to *Auer*'s interpretive methodology. After all, decisions construing particular statutes continue to command respect even when the interpretive methods that led to those constructions fall out of favor.").

255. *E.g.*, United States v. Adair, 38 F.4th 341, 348–50 (3d Cir. 2022).

256. *See* Gluck, *States as Laboratories*, *supra* note 132, at 1804, 1808; *see, e.g.*, Rowland v. Washtenaw Cnty. Rd. Comm'n, 731 N.W.2d 41, 58 (Mich. 2007) (Markman, J., concurring) (defending the majority's overrulings of forty cases as reflecting disagreement over "the role of the judge in interpreting the law"); People v. Gardner, 753 N.W.2d 78, 88–91 (Mich. 2008) (overruling a precedent that had been based on legislative history).

257. Robinson v. City of Detroit, 613 N.W.2d 307, 321 (Mich. 2000).

interpretations will need to follow the new method, but prior precedents under the old method will remain in force, it may become hard to make the statutory scheme as a whole a consistent *corpus juris*.[258] It could generate a system in which a skateboard is not a vehicle but a wagon is, just because the cases were decided at different times under different regimes.

Here it is worth recalling the techniques from Section III.A and how they can ameliorate disruption. They can blur the boundary between options 2 and 3. Even if old applications lose precedential force, they will not all fall the next day. A court with a discretionary docket can leave in place old applications without formally adopting a position on whether old applications retain their precedential force. If the new interpretive regime sticks, the fabric of the law will gradually align with it. Old out-of-step precedents would eventually become derelicts in the stream of the law, making them ripe for overruling even under a traditional *stare decisis* test.[259]

Here I have set out different options for the temporal scope of regime change and shown the difficult choices that regime changers face regarding the stock of prior interpretations. It bears stating what might be obvious: that one way to reduce the difficulties is to reduce the amount of interpretive change.

IV. PRUDENTIAL CONSIDERATIONS IN REGIME CHANGE

Having laid out the mechanisms for making and controlling interpretive change, this final part develops some prudential considerations that should guide regime changers, including some considerations that the Supreme Court may be neglecting.

Although this part has some critical and prescriptive features, it is only locally or thinly so. To begin with, the discussion here is agnostic as to the contents of different interpretive regimes. I have my own views on the merits of some of the changes that are under way, which is that some of the shifts are fine while others are making statutory interpretation worse, but I set those aside here in light of the large literature on those questions.[260] I am also taking for granted that the Court has the legitimate authority to change the regime in the way that modern courts make common law.[261]

The discussion below appeals to widely shared values associated with the rule of law in its formal sense, values like predictability, generality, and respect

258. *See* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 101 (1991) ("[I]t is our role to make sense rather than non-sense out of the corpus juris.").

259. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989).

260. *See, e.g.*, *supra* note 7 and accompanying text.

261. As noted earlier, I am assuming—as do the lower courts and other officials—that the Supreme Court has the authority to change the interpretive regime in a deliberate way. *Supra* notes 137 & 226 and accompanying text.

for expectations,[262] as well as to some values, which may not be as uncontroversial, that go under the banner of "institutionalism."[263] Yet even treating such values as givens, difficult questions surround how to trade off those values against other considerations and how to manage conflicts internal to different aspects of the rule of law or across different time horizons. I do not prescribe a correct balance here. Judges with similar visions for the end state of the regime may give different weights to the accomplishment of one's vision for the law as against the duty to act as a responsible, process-minded supervisor of a complex legal system along the way. But even radicals will at the very least want to avoid ungoverned efforts at regime change that are self-defeating from their own perspective.[264]

With those prefatory remarks in mind, consider the following prudential considerations against which one might judge a regime change.

A. *The Role of the Workforce*

Although the Supreme Court sits at the top of the judicial hierarchy, it cannot accomplish regime change on its own. It might not even be the initiator in every instance. The system is complex and not susceptible of total control. Nonetheless, a responsible supervisory court should at a minimum know how the lower courts are likely to react to the Court's own moves.

As a general matter, the Court should know that the lower courts can be quite sensitive to changes in the Court's interpretive regime. When the Court's signals are clear, as when it expressly abrogates a canon, the lower courts will take the change seriously, which may come as a surprise to the Justices given their own lower regard for *stare decisis* in methodology and other matters.[265] The lower courts may react even to slight moves that may not have been intended to change things. Consider the path of the rule of the last antecedent, as shown

262. *See* LON L. FULLER, THE MORALITY OF LAW 46–94 (rev. ed. 1969) (describing formal features of the inner morality of the law); *see also* Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, *in* GETTING TO THE RULE OF LAW: NOMOS L 3, 3–12 (James E. Fleming ed., 2011) (distinguishing among formal, procedural, and substantive conceptions of the rule of law).

263. *See generally* Rachel Bayefsky, *Judicial Institutionalism*, 109 CORNELL L. REV. 1297 (2024) (analyzing and defending judicial institutionalism, which is conceptualized as involving interests in judicial legitimacy and efficient administration).

264. Alinksy of all people can provide some advice for today's most eager judicial interpretive-regime changers: "Radicals must be . . . sensitive enough to the process of action and reaction to avoid being trapped by their own tactics and forced to travel a road not of their choosing. In short, radicals must have a degree of control over the flow of events." SAUL D. ALINSKY, RULES FOR RADICALS: A PRACTICAL PRIMER FOR REALISTIC RADICALS 6–7 (1971). Alinsky tells radicals to take the world as it is and think about what works, lest one become a rhetorical but ineffectual revolutionary. *Id.* at xviii. It endorses compromise and incrementalism. *Id.* at 59. The book's subtitle, which refers to pragmatism and realism, captures the ideas pretty well.

265. *See generally* Bruhl, *Eager to Follow*, *supra* note 147, at 126–58 (presenting evidence that lower courts treat the Supreme Court's methodological pronouncements as binding); *supra* notes 136 & 183 and accompanying text (providing examples of responsiveness).

in the figure in Section II.C.4 above. The Court cited it a few times in recent decades, and the lower courts started using it much more. It appears the high court coughed and the lower judiciary caught a cold. To the extent that there is a desire to resist methodological changes, it sometimes takes the form of "uncivil obedience"—literal compliance meant to subvert authority or reveal absurdity—rather than outright refusal to go along.[266]

The Court should also know that certain tools matter in the lower courts more than in the Supreme Court. The obvious example is *Chevron*, which was frequently said to be more consequential in the lower courts than in the Supreme Court.[267] But it is worth considering why that was so and what the answers may tell us. Part of the answer is that the lower courts needed it more. They have large caseloads that they cannot unilaterally decide to cut in half, and they have fewer decision-making resources.[268] That environment creates a need for shortcuts. *Chevron* fit the bill because a decision finding ambiguity and then deferring is likely easier than writing the lengthy, whole-act-parsing, structural-inference-laden opinions that ultimately and miraculously unearth a clear textual meaning against the agency.[269] As Gary Lawson puts it, "lower courts created the *Chevron* doctrine because they thought it would make their lives easier."[270] They will probably want something like it regardless of what the Court says, at least for the unsexy cases.

Tinkering with the toolkit of substantive canons could also have bigger effects in the lower courts than the Justices may realize. Empirical work on the modern Supreme Court shows that substantive canons are rarely important inputs in its decisions.[271] If the Court rearranges the toolkit and banishes some

266. For a potential example of subversive overcompliance with the Court's shift toward originalism in the Second Amendment, see Andrew Willinger, *Thoughts on Judge Carlton Reeves' Critique of Text, History, and Tradition*, DUKE CTR. FOR FIREARMS L. (July 19, 2023), https://firearmslaw.duke.edu/2023/07/thoughts-on-judge-carlton-reeves-critique-of-text-history-and-tradition [https://perma.cc/9G76-6ZKD] (noting Judge Carlton Reeves' critique of the Court's decision in *Bruen*). On the concept of uncivil obedience more generally, see Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809 (2015) (explaining how 'uncivil obedience,' the extreme adherence to the law, is used as a tactic by public and private actors to highlight the law's illegitimacy); and Brannon P. Denning, *Can Judges Be Uncivilly Obedient?*, 60 WM. & MARY L. REV. 1 (2018) (arguing that judges also engage in uncivil obedience).

267. *Supra* note 66 and accompanying text.

268. *See* Richard J. Pierce, Jr., Opinion, *Is* Chevron *Deference Still Alive?*, REGUL. REV. (Jul 14, 2022), https://www.theregreview.org/2022/07/14/pierce-chevron-deference/ [https://perma.cc/VRZ3-PJML].

269. Gary S. Lawson, *The Ghosts of* Chevron *Present and Future*, 103 B.U. L. REV. 1647, 1709–10 (2023); Pierce, *supra* note 268.

270. Lawson, *supra* note 270, at 1709.

271. Anita Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 852–54 (2017) [hereinafter Krishnakumar, *Reconsidering Substantive Canons*]. Krishnakumar's criteria for identifying canon usage were strict in that she required reliance on a canon. *Id.* at 866. Using slightly more capacious criteria, Mendelson found that the Court considered substantive canons in 37% of contested statutory issues, 45% if one includes agency deference canons. Mendelson, *supra* note 140, at 99.

canons, that will not make a huge difference to its own work (and, if the tinkering caused trouble, the Court could tinker back the other direction). Not so in the lower courts. They use certain substantive canons much more often than the Court does. A poster child for the phenomenon of "bottom-heavy canons" is the canon calling for narrow construction of statutes conferring federal subject-matter jurisdiction.[272] It is omitted from most studies of the Supreme Court, understandably enough because it rarely appears there.[273] But it is cited in hundreds of decisions every year in the lower federal courts, making it one of the most cited canons overall.[274] Similarly, the FLSA canon that the Court abrogated several years ago, which may have struck the court as an old anomaly, had been used more than a thousand times in the lower courts.[275] The Court was either unaware or the canon's footprint or did not find it important enough to address.

As noted already, the lower courts are not just followers.[276] The Court should expect that lower courts will press forward on new fronts. Sometimes the advances will be modest and likely welcome, such as a concurrence raising doubts about a substantive canon that the Court itself has not yet put in its sights.[277] Certain lower-court judges seem eager to push the Court and litigants to move faster by injecting new methodological issues into cases.[278] If those moves get too numerous or too bold, they can threaten the Court's techniques for deferring change, which were discussed in Part III.

B. *Interactions with Ancillary Doctrines*

Before launching a ground campaign, prudent planners prepare the battlefield. If the Court were such a planner, it would ensure it is able to control the pace of change and manage its effects before launching a campaign of interpretive-regime change.

The relevant preparations involve attending to a wide range of ancillary doctrines that magnify or retard change. One such doctrine is the doctrine governing the retroactivity of changes in law, which was discussed above.[279] One step further removed, but still important, are various aspects of the law of

272. Bruhl, *Statutory Interpretation*, *supra* note 12, at 37.

273. This canon is tracked in neither Krishnakumar, *Reconsidering Substantive Canons*, *supra* note 271, nor Mendelson, *supra* note 140.

274. Aaron-Andrew P. Bruhl, *The Jurisdiction Canon*, 70 VAND. L. REV. 499, 502 (2017).

275. *See supra* text accompanying notes 98–105 (describing abrogation of the canon).

276. *Supra* text accompanying notes 46, 122–23.

277. *See, e.g.*, *supra* text accompanying notes 122–23 (describing Judge Newsom's concurrence regarding the FAA canon).

278. *See, e.g.*, Ziv Schwartz, *Supplementing Supplemental Briefing*, 22 J. APP. PRAC. & PROCESS 339, 382 (2022) (describing requests for supplemental briefing addressing originalism and corpus linguistics).

279. *Supra* Section III.B.

remedies and civil procedure. Regarding those doctrines, several interlocking features of the current judicial system amplify the risks of changing the interpretive regime applicable to judicial review of agency action.

The short version of a complex situation is that ideological litigants are able to shop for outlier judges who routinely issue national injunctions against or universally vacate administrative initiatives.[280] The Judicial Conference recently recommended that district courts reduce opportunities for judge shopping by randomizing the assignment of certain cases filed in single-judge divisions, but this nonbinding guidance was rejected by the district that was the epicenter of judge shopping during the Biden Administration.[281] Then there is the scope of the remedies those district judges issue. The propriety of universal remedies is too much to address here, but the key point for the moment is the linkage between that debate and managing interpretive change: universal remedies amplify and hasten the consequences of the weakening of deference doctrines.

To be fair, there are limits to what the Court can do to shape the battlefield. It cannot amend the venue statutes or the code provisions giving chief district judges authority over case assignments.[282] It cannot fix the problem of a judiciary that is divided into red and blue courts, as that pattern derives largely from geographic sorting, Senate practices, and happenstance.[283] If the Justices are convinced that the Administrative Procedure Act requires universal vacatur,[284] then they have to swallow the consequences until Congress amends it. Harder to justify, though, is the Court's failure to issue a clear majority holding settling the legality of universal injunctions, which are harder

280. *See, e.g.*, Perry Stein, *The Justice Department's Fight Against Judge Shopping in Texas*, WASH. POST, https://www.washingtonpost.com/national-security/2023/03/19/judge-shopping-justice-protests-texas/ [https://perma.cc/82EH-P5LK (staff-uploaded, dark archive)] (last updated Mar. 19, 2023); Erwin Chemerinsky, Opinion, *Abolish the Courts' Wanton Use of Nationwide Injunctions*, L.A. TIMES (Apr. 28, 2022, 3:00 AM), https://www.latimes.com/opinion/story/2022-04-28/mask-mandate-nationwide-injunction-federal-district-court [https://perma.cc/AY57-KA7H (staff-uploaded, dark archive)].

281. *See* Jud. Conf. Comm. on Ct. Admin. & Case Mgmt., Guidance for Civil Case Assignment in District Courts (Mar. 2024), https://www.washingtonpost.com/documents/9edeb4af-8765-48c6-a94a-733714925a13.pdf [https://perma.cc/SL8H-E54G (staff-uploaded, dark archive)]; Jacqueline Thomsen, *US Judge Shopping Curb Thwarted as Texas Court Resists*, BLOOMBERG L., https://news.bloomberglaw.com/us-law-week/texas-court-eyed-for-judge-shopping-wont-alter-case-assignments [https://perma.cc/A3UU-LND4 (staff-uploaded, dark archive)] (last updated Apr. 1, 2024, 4:56 PM).

282. *E.g.*, 28 U.S.C. § 137(a).

283. *See generally* Mark A. Lemley, *Red Courts, Blue Courts*, 93 MISS. L.J. 143 (2023) (documenting the rise of ideologically pure judicial districts).

284. As Justice Kavanaugh is. *See* Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 144 S. Ct. 2440, 2467 (2024) (Kavanaugh, J., concurring) (relying heavily on the scholarship of Mila Sohoni).

to defend than APA vacatur and which five Justices appear to regard as unlawful or at least doubtful.[285]

Worse than merely failing to build firebreaks that could control the effects of change, the Court has effectively thrown a match into the tinderbox with the MQD. A sort of counter-*Chevron* for big decisions, the doctrine has fuzzy boundaries that invite political decisions about majorness,[286] decisions that litigants can, again, direct to courts likely to resolve doubts in their favor. When a judge blocks an important policy nationwide, the government will predictably need to seek emergency relief from the court of appeals.[287] When outlier courts like the Fifth Circuit do not rein in the outlier district judges, the matter becomes another emergency for the Court to take up on its "shadow docket," a term now wholly out of place for the forum in which the Court does much of its most important work.[288]

C. *Learning Along the Way*

One frequently touted benefit of gradualism and related tactics like decisional narrowness is that it makes for substantively better decision-making.[289] Beginning with small steps allows one to observe the effects and perhaps adjust in response. Big steps, by contrast, threaten big consequences, some of which may be unanticipated. Big steps are particularly risky for courts, which, due to the institutional context of case-based adversarial adjudication, have limited abilities to gather information and few tools for mitigating calamities.[290]

The potential advantage from observing the effects of one's decisions is obvious for avowedly pragmatic judging that assesses the consequences of

285. Labrador v. Poe, 144 S. Ct. 921, 926–28 (2024) (Gorsuch, J., concurring); *see also* Griffin v. HM Fla.-ORL, LLC, 144 S. Ct. 1, 1–2 (2023) (statement of Kavanaugh, J.) (distinguishing between universal vacatur under the APA and national injunctions).

286. *See* Jonathan H. Adler, West Virginia v. EPA*: Some Answers About Major Questions*, 2021–2022 CATO SUP. CT. REV. 37, 61–62; Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 23–24 (2023).

287. *See* Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring).

288. *See* Samuel L. Bray, Statement at the Hearing Before the United States Senate Committee on the Judiciary: "Rule by District Judge: The Challenges of Universal Injunctions" 5–9, 18 (Feb. 25, 2020) (unpublished manuscript) (on file with the North Carolina Law Review) (describing the relationship between the shadow docket and nationwide injunctions).

289. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 4–5, 242–43 (1999); Richard M. Re, *Should Gradualism Have Prevailed in* Dobbs*?*, *in ROE V. DOBBS*: THE PAST, PRESENT, AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION 140, 141–45 (Lee C. Bollinger & Geoffrey Stone eds., 2024). Sunstein's preferred term is minimalism, which has dimensions of theoretical shallowness (versus depth) and decisional narrowness (versus breadth). SUNSTEIN, *supra*, at 10–11. It is the narrowness aspect of minimalism that is most relevant here. Re's chapter uses gradualism, which avoids that potential ambiguity, so I favor that term here.

290. SUNSTEIN, *supra* note 289, at 4–5; Re, *supra* note 289, at 143–44.

particular decisions, but the benefits are not limited to those who use that style of judging. Many arguments for interpretive approaches that disavow concern with case-specific consequences nonetheless derive in part from general claims about how Congress behaves (or can be encouraged to behave through judicial discipline), what Congress expects of courts, and how agencies and lower courts operate.[291] For example, one strain of justification for textualism, expressed at times by Justices Scalia and Kavanaugh among others, depends on textualism's ability to generate predictable, impersonal decisions, the kind of claim that should respond to what actually happens in the judicial system, including in the lower courts.[292] That is why Justice Kavanaugh wants to eliminate fuzzy triggers for canons: because different judges have different thresholds for ambiguity, making ambiguity the trigger to a canon is bound to lead to at least the appearance of ad hoc, political decision-making.[293] Further, many formalists recognize that the pace at which they refashion the law toward their desired end state—which cases to select for the Court's docket, when to overrule versus abide—should consider how those moves might generate systemic disruption that undermines the appeal of formalism.[294] Different aspects of the rule of law, and different time horizons over which to assess them, can come into conflict.

Whether the Supreme Court is moving at a pace that would allow informed, iterative decision-making is hard to say, and here it is particularly hard to separate process from substantive critique, but a few comments about pace are warranted. First, one mechanism of interpretive change that the Court sometimes employs, namely the practice of ignoring a canon, rather than abrogating it,[295] is not well suited for generating useful information. For example, consider the claim that abrogating *Chevron* (or a substantive canon or whatever tool) posed little risk because the Court had not been citing the tool regularly and yet the sky had not fallen during those years of neglect.[296] That the sky had not fallen could well be attributable to the lower courts continuing to use the tool, which is what they tend to do when the Court neglects rather than overrules.[297] So the seemingly gradualist method of ignoring before overruling might not actually generate useful knowledge along the way. Other

291. *See, e.g.*, Nicholas R. Bednar, Chevron *and Candor*, YALE J. ON REGUL.: NOTICE & COMMENT (July 24, 2023), https://www.yalejreg.com/nc/chevron-and-candor-by-nicholas-r-bednar [https://perma.cc/5CTS-TXAZ] (emphasizing the importance of empirical evidence of congressional and administrative behavior in assessing *Chevron*).

292. *E.g.*, Kavanaugh, *supra* note 56, at 2120–21; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177–80, 1183–85 (1989).

293. Kavanaugh, *supra* note 56, at 2135–37.

294. *See supra* note 238 (discussing Solum's big bang hypothetical).

295. *Supra* Section II.B.

296. *E.g.*, Brief for Petitioner at 40, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (No. 22-451), 2023 WL 4666165, at *40 (arguing that overruling *Chevron* would not upset reasonable reliance interests because, among other reasons, the Court does not cite it any longer).

297. *See supra* Sections II.B, II.D.

forms of gradualism such as creating new exceptions to a tool's scope seem better in this regard, as the lower courts do implement those kinds of changes, making it possible in principle to observe the effects.[298]

Second, the Court is likely making interrelated changes to the agency deference regime too fast to learn from its decisions. Although the Court in *West Virginia v. EPA* cited antecedents for the MQD, the newly named and reinforced doctrine is taking off in the lower courts like never before.[299] It is a trans-substantive canon with unclear triggering conditions, which makes it potentially applicable in a wide range of cases from cryptocurrency regulation to antidiscrimination law to the no-fly list.[300] Yet just a year after *West Virginia v. EPA* boosted the MQD, the Court not only applied the doctrine again in the student loan case but did so in the new domain of government spending, likely without appreciating the importance of the expansion into a new context.[301] And then without taking a break to observe how much the MQD would address its concerns with excessively deferential decisions in the lower courts, the Court overruled *Chevron*.[302] If the Court hoped to learn how the MQD was working out—how much does it cut back on *Chevron*, is Congress changing its behavior to decide more questions or delegate more expressly?—this would not be the way to find out. And at the same time the Court sealed *Chevron*'s fate, it boosted the impact of that decision through a ruling on the deadline for challenging agency action, a ruling that allows more challenges to old rules than the prior law of most circuits to have ruled on the matter had countenanced.[303]

Through these mutually amplifying changes, the Court risks moving so fast that it gets inside its own decision-making loop, acting again without first being able to observe the outcome of the prior decision. Merits of each case aside, this combination of actions is entirely unnecessary for a court with discretionary jurisdiction and many other tools to control the pace of change, as catalogued in Part III.

A useful contrast comes from developments in Second Amendment law. The Court in *Bruen* could have narrowly knocked out an outlier state restriction, but it instead announced a broadly applicable test that sent lower courts looking

298. *See supra* Sections II.B, II.D.

299. *Supra* note 73 and accompanying text.

300. Walters, *supra* note 198; *see, e.g.*, Kristen E. Eichensehr & Oona A. Hathaway, *Major Questions About International Agreements*, 172 U. PENN. L. REV. 1845, 1845 (2024) (discussing potential applications to several kinds of international agreements); Todd Phillips & Beau Baumann, *The Major Questions Doctrine's Domain*, 89 BROOK. L. REV. 747, 769 (2024) (discussing invocations of the doctrine in connection with regulation of crypto assets).

301. Biden v. Nebraska, 143 S. Ct. 2355, 2375 (2023); *see* Christine Kexel Chabot, *Appropriating Major Questions*, YALE J. ON REGUL.: NOTICE & COMMENT (July 5, 2023), https://www.yalejreg.com/nc/appropriating-major-questions-by-christine-kexel-chabot/ [https://perma.cc/S88B-6MT2] (observing the importance of this expansion of the doctrine).

302. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2272–73 (2024).

303. Corner Post, Inc. v. Bd. of Govs. of the Fed. Rsrv. Sys., 144 S. Ct. 2440, 2460 (2024).

for historical analogues to current firearms regulations.[304] When that led to the invalidation of broadly popular gun restrictions, in particular the federal law keeping firearms away from those under domestic-abuse restraining orders, the Court in *Rahimi* was able to say that the lower courts had "misunderstood" *Bruen*.[305] The need to reassess might show that *Bruen*'s approach was a misstep from the start, but if that approach was an error it was an easier one to observe and to correct than the multiple, interacting changes going on in administrative law.

D. *The Risk of Backlash and the Reality of Tradeoffs*

Some of the cautions urged above would involve slowing the pace of interpretive change. That is of course a very convenient recommendation coming from one who believes that on balance the changes are probably for the worse.[306] If one instead believes the status quo needs reform, as regime changers presumably do, then every day adds to the pile of error, a mounting cost that counterbalances the risks of haste.

The clash between gradualists and revolutionaries sharpens when one considers that gradualism could even prevent rather than merely delay change. The Supreme Court is staffed by mortals who can die unexpectedly or whose views can evolve over time. It's true that the conservative majority on the Court looks pretty secure for a long time, barring some sort of structural change.[307] Still, there always lurks the question, Why should I risk the accomplishment of my jurisprudential project (with all of the values it serves over the long term) for the sake of gradualism?

It would be nice if one could avoid tough questions about tradeoffs by pointing to win-win scenarios. And, for sure, there may be situations in which even revolutionaries should opt for gradualism. One such situation is where a drastic change would prompt self-defeating backlash. The implementation of *Brown v. Board of Education* potentially furnishes an example.[308] One might suppose that the value of equality militated in favor of the Court decreeing the

304. N.Y. State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111, 2126 (2022); *id.* at 2161–62 (Kavanaugh, J., concurring); *see* Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 76 (2023) (describing difficulties and conflicts in the lower courts).

305. United States v. Rahimi, 144 S. Ct. 1889, 1897 (2024).

306. For a careful treatment of the different possible meanings and motives of criticisms that the Court is moving "too fast," see generally Andrew Coan, *Too Much, Too Quickly?*, 58 U.C. DAVIS L. REV. 407 (2024).

307. *See* Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, The Endgame of Court-Packing (Aug. 9, 2024) (unpublished manuscript) (on file with the North Carolina Law Review) (showing that if current trends hold, the Court will not have a Democrat-appointed majority for several decades).

308. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (*Brown I*), *supplemented by* Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (*Brown II*).

immediate, total end of the evil of segregation. Also in the balance, though, are prudential interests such as social stability, which would presumably point toward caution about timing and methods. However, it is possible that both kinds of interests pointed in the same direction. That would be true if ordering an immediate end to all forms of segregation would trigger desegregation-undermining responses like defiance of court orders. If so, then the substantive value of achieving equality would align with gradualism, with both counseling something less than immediate and total desegregation. On this view, *Brown II*'s decree for desegregation to occur with "all deliberate speed," rather than under a strict deadline, was the winning move from all perspectives.[309] The same alignment of values could occur, to be clear, if it were instead a sharp and immediate repudiation of segregation that would advance both equality *and* stability by disabusing segregationists of any hope that resistance would succeed. That is, caution can be self-defeating too, as it possibly was in the case of *Brown*.[310]

Could the current Court's efforts at interpretive change be self-defeating? Retired Justice Breyer believes the Court faces such a risk, for he suggests in his recent book that a "paradigm shift" toward textualism and originalism would undermine the Court's standing with the "informed public" and thereby compromise the Court's efficacy.[311] If such a thing is possible, it could happen at most rarely. Consider what seems like a promising contemporary candidate for generating such an effect: *Dobbs*.[312] The decision seems to have triggered electoral backlash at least in the short term, with it likely swaying some legislative elections toward Democrats and leading to the enactment of abortion-protective initiatives in some states.[313] Suppose this political reaction leads to a situation in which abortion has more protection than ever, via a combination of state law, federal legislation, and social activation. And suppose the *Dobbs* majority could have avoided this through a more measured approach

309. *Brown II*, 349 U.S. at 301; *see* BICKEL, *supra* note 203, at 253–54; Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 608–09 (1983).

310. The ultimate wisdom of *Brown II*'s approach is still a matter of dispute seventy years later. For a recent treatment of the topic with citations to the voluminous literature and an emphasis on the tradeoffs between the legitimacy of the Supreme Court and the lower courts, see Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. 1555, 1566–75 (2021).

311. STEPHEN BREYER, READING THE CONSTITUTION 258–60 (2024).

312. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

313. *See* Tamara Keith, *One Year After the Dobbs Ruling, Abortion Has Changed the Political Landscape*, NPR (June 23, 2023, 5:00 AM), https://www.npr.org/2023/06/23/1183830459/one-year-after-the-dobbs-ruling-abortion-has-changed-the-political-landscape [https://perma.cc/T9ZR-9SRR]; *Abortion on the Ballot*, N.Y. TIMES, https://www.nytimes.com/interactive/2024/11/05/us/elections/results-abortion.html [https://perma.cc/ZXW9-AMTC (dark archive)] (last updated Jan. 24, 2025).

such as that favored by the Chief Justice.[314] Would this backlash to *Dobbs* count as a self-defeating effort at legal change?

Probably not. Not if the goal of the change was, as the *Dobbs* majority repeatedly said, to enshrine the principle that the U.S. Constitution leaves the legality of abortion to the people and their representatives.[315] The backlash to *Dobbs* is happening through legislation, referenda, and regulation, mostly at the state level.[316] The number of abortions in the country likely matters a lot to some members of the *Dobbs* majority and many of the decision's supporters, but it does not matter to the principle of the Court's opinion. To count as self-defeating, *Dobbs* would need to do something like bring about, through a combination of elections and court reform, a Court staffed with judges with a different view of the Fourteenth Amendment who reinstate a federal constitutional right to abortion. Such a thing is not impossible, but it has not happened (yet).

Let's return to statutory-interpretive methods and consider whether self-defeating backlash is possible here. Something like a self-defeating change happened in Connecticut, where the state supreme court ruled that it could always consider purpose regardless of statutory clarity, and the legislature responded by enacting a statute establishing the plain-meaning rule.[317] This sort of thing seems less feasible at the federal level today, given that any change would need to break through the forces of polarization in elite opinion and, for legislation, the Senate filibuster. Congress did not adopt a statute either confirming or repudiating the *Chevron* doctrine during its decades on the books.[318]

In short, while it is possible to imagine that gradualism happens to be the surest path even for revolutionaries, tradeoffs rather than free lunches are likely the norm for interpretive-regime change.

CONCLUSION

In his article titled "Interpretive-Regime Change" published twenty years ago, the late Phil Frickey doubted the textualists' ability to establish a new interpretive regime, citing several impediments.[319] Things look different today. The center of gravity of the system has shifted, and, with a new generation of judicial textualists, more change is in the offing.

314. *See Dobbs*, 142 S. Ct. at 2310 (Roberts, C.J., concurring in the judgment) (arguing for the narrowing of *Roe* rather than its immediate overruling).

315. *See id.* at 2228, 2243, 2259, 2279, 2284 (majority opinion); *id.* at 2310 (Kavanaugh, J., concurring).

316. *Supra* note 313 and accompanying text.

317. *See* Gluck, *supra* note 132, at 1792.

318. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2301 (2024) (Kagan, J., dissenting).

319. Frickey, *supra* note 37, at 1996–98.

It is worth asking why the interpretive regime proved less resistant to change than Frickey anticipated. One reason is that greater judicial self-consciousness about interpretive methods, something that Frickey and other scholars of his generation fostered through their revival of the discipline, has probably increased the perception among some judges that they can change methods and make them into binding law, at least binding on inferiors.[320] And so individual canons and other tools are coming and going and being modified.[321] As to the prospects for a shift toward textualism in particular, he observed that "[u]nless textualism abandons deference to agency interpretation, nontextualist interpretation will remain a staple of the administrative state."[322] As it would turn out, conservative textualists were just about to turn against deference, removing that obstacle to textualist ascendancy.[323]

Frickey was correct to identify the crucial role of legal culture in setting the boundaries of interpretive practice and limiting the impact of methodological entrepreneurs. "Without changing the legal culture," he wrote, "interpretive-regime change is very unlikely."[324] From his vantage point two decades ago, an impediment to potential change was the "entrenched nontextualist instincts [of] the average American lawyer."[325] But that legal culture—of judges of both political parties, the average lawyer, the law school curriculum—has shifted considerably. Regime change was possible after all, even on something so basic as the role of text versus other sources.

Given that change is occurring with some rapidity, and more may be on the way, attention should be paid to the mechanisms through which it is accomplished. Here I have provided an inventory of the mechanisms of change, along with some of their key features, plus some prudential considerations bearing on the pace of regime change. A better understanding of these matters should be useful whether one hopes to effectuate change, or to resist it, or simply to chart its path.

320. *Compare id.* at 1996 (citing the limited role of methodological precedent), *with* Bruhl, *Eager to* Follow, *supra* note 147, at 106 (showing that lower courts in particular are receptive to interpretive direction from above).

321. *Supra* Section I.C.

322. Frickey, *supra* note 37, at 1997 n.154.

323. *Supra* Section I.B (describing the shifting ideological valence of deference to agencies).

324. Frickey, *supra* note 37, at 1997.

325. *Id.* at 1996–97.