Stanford Law Review

Volume 77 April 2025

ARTICLE

The Curious Case of the Missing Canons

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Abstract. One of the primary roles of judges is to interpret legal texts. These texts generally fall into three categories: statutes/constitutions (public law), contracts (private law), and judicial opinions (precedent/common law). For the first two of these textual buckets, judges have developed and often rely on interpretive canons in distilling legal meaning from the text. But for the third category of legal text—judicial opinions—interpretive frameworks are conspicuously underdeveloped. Why? Is it that the language of judicial opinions is so clear that the best reading is always obvious? Unlikely. How then can we explain why judges—so keen on establishing rigorous interpretive methodologies with regard to other legal texts—have declined to develop or apply similar methodologies for interpreting precedent?

This Article explores the dearth of well-developed interpretive methodologies for deciphering judicial opinions. It offers three key contributions. First, it introduces a novel comparative approach to the three categories of legal texts that lays bare the relative lack of consistent methodological rules for judicial opinions. Second, it outlines the few methodological rules that do exist for judicial opinions and suggests an approach to further development of precedential canons. Third and finally, it examines the root causes of the comparative underdevelopment of canons for precedential interpretation and considers whether the absence of rules in this context might serve institutional goals.

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Introduction

Much ink has been spilled about what it is, precisely, that judges do. But one thing is clear—a big part of the judicial role is focused on interpreting and applying relevant written law. Just how judges do that, and how they *should* do it, is a source of clamorous debate among lawyers, scholars, and the public. But the proposition that judges reason from written law to arrive at their decisions—or, at minimum, that they purport to do so—is relatively unexceptionable. Justice Scalia and Bryan Garner put it succinctly: "judges interpret texts."[1]

So, what kinds of texts? Well, most obviously, judges interpret the written public law (constitutions, statutes, etc.) that might be applicable to any given dispute.[2] Similarly, to the extent a dispute is based on a written private agreement or instrument, judges may interpret any relevant provisions of that document (contracts, settlements, stipulations, etc.).[3]

For each of those two bodies of written law, interpretive canons exist to help judges sort out textual ambiguity, apply consistent presumptions as to drafting intent and normative goals, and arrive at a legally correct meaning of the operative text.[4] "Canons of interpretation are rules of thumb that can aid with reading authoritative legal texts."[5] Interpretive canons are widely used, studied, and debated.[6] Some are deeply entrenched in American law and largely unobjectionable; others are fiercely contested.[7] Canons have gone in and out of academic fashion over the years,[8] and the scholarly debate continues. Some

1. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, at xxx (2012).

2. *Id.* at 42.

3. *Id.*

4. *See* Ethan J. Leib, Essay, *The Textual Canons in Contract Cases: A Preliminary Study*, 2022 WIS. L. REV. 1109, 1110-13; William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1084 (2017) (observing that interpretive rules "determine the legal effect of written instruments," including private instruments, statutes, and the U.S. Constitution).

5. Leib, *supra* note 4, at 1110.

6. *See, e.g.*, Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 165, 167 (2018) (reviewing WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION (2016)); Baude & Sachs, *supra* note 4, at 1088.

7. *See* SCALIA & GARNER, *supra* note 1, at 59-61; Krishnakumar & Nourse, *supra* note 6, at 167.

8. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 647-48 (1992); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 923-24 (1992) ("Although the canons appeared to have been interred by the attacks of Karl Llewellyn and others many years ago (on the basis that, at worst, they obscured analysis, and, at best, they

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current scholars propose new canons of constitutional, statutory, and contractual interpretation;[9] others question their use entirely.[10] Indeed, the role of canons was recently called one of the "hoariest and hottest debates in interpretation."[11] Regardless, the judicial use of canons has persisted and, in recent years, flourished.[12] Today, Supreme Court Justices and judges of all stripes invoke canons freely and frequently—in the first ten years of the Roberts Court, every single Justice discussed an interpretive canon in at least half of their opinions involving statutory interpretation.[13]

But this "canon fever" seems to have passed right over another body of written law: judicial opinions.[14] Judges do not routinely refer to or rely on "canons" of precedential interpretation.[15] And while a few interpretive rules of thumb exist in federal appellate case law, they are often so broad as to be unhelpful and lack the recognition that interpretive rules enjoy in other

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served only as rationalizations of results reached on other grounds), courts have tended to rely on them despite continuing scholarly criticism. Recently, as judicial reliance on various canons seems to have become more visible—at least at the Supreme Court level—some academic commentators have rediscovered the idea and pronounced it not entirely bad." (footnotes omitted)).

9. *See* Evan C. Zoldan, *Canon Spotting*, 59 HOUS. L. REV. 621, 626-27 (2022) ("In just the last few years, scholars have introduced a raft of new canons, including Professor Gluck's 'CBO' canon, Professor Stack's 'enacted purposes' canon, Professor Heinzerling's 'power' canons, Professor Krishnakumar's 'unique national institution' canon, and Professors Leib and Brudney's 'belt-and-suspenders' canon, among many others." (footnotes omitted)); *see also* Sandra F. Sperino, *The Causation Canon*, 108 IOWA L. REV. 703, 704-05 (2023) (arguing that the Supreme Court created a new canon of statutory interpretation that presumes Congress meant to require a plaintiff to show "but-for" causation).

10. *See, e.g.*, 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, 908-09 (2013).

11. Baude & Sachs, *supra* note 4, at 1084; *see also* Krishnakumar & Nourse, *supra* note 6, at 191 ("There is every reason to believe that the 'canon wars' are likely to continue in the Supreme Court and in the legal literature.").

12. Krishnakumar & Nourse, *supra* note 6, at 167 ("[T]he Supreme Court has in the past twenty-five years embraced a variety of new substantive canons."); *see* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 121-23 (2010).

13. 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, 75 & n.12, 99-102, 141 tbl.3 (2018).

14. *See generally* BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 1-2 (2016) (explaining that judicial precedents form part of the written law).

15. *See* Margaret H. Lemos, *Should Judicial Opinions Be Read Like Statutes?* 2-3 (Duke L. Sch. Pub. L. & Legal Theory Series, Working Paper No. 2024-51, 2024), https://perma.cc/DJ8D-QMPJ; Nina Varsava, *How to Realize the Value of Stare Decisis: Options for Following Precedent*, 30 YALE J.L. & HUMANS. 62, 65-68 (2018); *cf.* Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 422 (1988) ("Few Justices hint at a theory of precedent; no Justice has produced a consistent theory . . . .").

contexts.[16] The academic literature on methodology for interpreting precedent is also "relatively thin."[17] Despite the increasing focus on canons in the statutory and constitutional context, little attention has been paid to whether similar canons might, or should, exist for interpretation of precedent.[18]

The inattention to interpretive methodologies for precedent manifests in several ways throughout the judicial lifecycle. Take the beginning of a federal judicial career. As a country, we have become increasingly preoccupied with how judges interpret written public law. During congressional confirmation hearings, would-be federal judges are asked a litany of questions about their interpretive methodology for reading statutes and the Constitution.[19] Nominees provide a range of answers to those questions but generally close with an assertion that, regardless of their own preferred methodology, if confirmed, they would "faithfully apply" binding precedent.[20] And the

16. *See* Thomas W. Merrill, *Legitimate Interpretation—or Legitimate Adjudication?*, 105 CORNELL L. REV. 1395, 1424 (2020).

17. *Id.*; Lemos, *supra* note 15, at 2 ("Unlike other legal texts, however—constitutions, statutes, contracts, regulations, etc.—judicial opinions have not been a focus in debates over interpretive method."). That said, there is a robust academic debate about precedent more generally, including the longstanding discourse on legal indeterminacy, which explores the idea that precedents do not actually bind decision-makers. *See, e.g.*, Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFFS. 205 (1986) (summarizing and discussing the principal philosophical debates over the nature of legal interpretation); H.L.A. HART, THE CONCEPT OF LAW (3d ed. 2012) (developing the theory of legal positivism and arguing that judges have discretion when the law runs out); *see also* LARRY ALEXANDER & EMILY SHERWIN, DEMYSTIFYING LEGAL REASONING (2008) (arguing that judicial decision-makers use ordinary forms of reasoning); Matthew Tokson, *Blank Slates*, 59 B.C. L. REV. 591, 599 (2018) ("Any legal regime, be it constitutional, statutory, or common law, will inevitably leave doctrinal gaps that judges must fill in the course of resolving disputes."); NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT (2008) (exploring the nature of precedential constraint and how decision-makers respond).

18. *See* Varsava, *supra* note 15, at 65-66 ("Although various models of precedential interpretation have been proposed in the theoretical literature, no comprehensive scheme for classifying these models has been developed. This is very different from the field of statutory interpretation, where camps have been labeled and well defined, and key players identified according [sic]—Justices Scalia and Gorsuch as textualists, for example."); Lemos, *supra* note 15, at 2 (noting that judicial opinions present many of the same interpretive questions as other text but, as to opinions, "[n]ot only do we lack consensus on these questions, but we have barely thought to ask").

19. *See, e.g.*, S. COMM. ON THE JUDICIARY, 117TH CONG., NOMINATION OF KETANJI BROWN JACKSON TO THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT: QUESTIONS FOR THE RECORD 1-2, 12-15 (Comm. Print 2021) (questions from Sen. Chuck Grassley) (exploring a nominee's approach to statutory and constitutional interpretation, and questioning the nominee specifically about her approach to resolving conflicting canons of statutory interpretation).

20. William Ross, *The Questioning of Lower Federal Court Nominees at Senate Confirmation Hearings*, 10 WM. & MARY BILL RTS. J. 119, 136-38, 153 (2001); *see, e.g.*, S. COMM. ON THE JUDICIARY, 116TH CONG., NOMINATION OF PATRICK BUMATAY TO THE U.S. COURT OF

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questioning often stops there—as if following precedent were a rote and mechanical endeavor, free from the vagaries of interpretation.[21] Spoiler alert: It's not.

This oversight affects the end product of the judiciary as well. Without a coherent methodology or set of interpretive rules for understanding and adhering to precedent, written decisions interpreting and applying case law begin to look like an interpretive "free-for-all."[22] In the short term, this can contribute to inconsistent results between and within jurisdictions. Zooming out, the absence of a consistent, coherent language for discussing precedential interpretation can increase the public perception that judges are not, in fact, applying prior law but rather are distorting it to achieve their desired results.[23]

APPEALS FOR THE NINTH CIRCUIT: QUESTIONS FOR THE RECORD 14-15 (Comm. Print 2019) (questions from Sen. Patrick Leahy) [hereinafter BUMATAY NOMINATION]; S. COMM. ON THE JUDICIARY, 118TH CONG., NOMINATION OF RICHARD FEDERICO TO THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT: QUESTIONS FOR THE RECORD 3 (Comm. Print 2023) (questions from Sen. Ted Cruz) [hereinafter FEDERICO NOMINATION].

21. *See, e.g.*, BUMATAY NOMINATION, *supra* note 20, at 14-15; FEDERICO NOMINATION, *supra* note 20, at 3; *see also Confirmation Hearings on Federal Appointments: Hearings Before the S. Comm. on the Judiciary*, 105th Cong. 667 (1998) (statement of Sen. Joseph R. Biden, Jr.) (commenting that he was most interested in assessing nominee temperament "because almost everybody follows precedent"). A notable exception is the confirmation proceedings for Amy Coney Barrett to the Seventh Circuit and then to the Supreme Court, which did explore precedent in more detail because of the nature of her prior academic work. *See, e.g.*, S. COMM. ON THE JUDICIARY, 115TH CONG., NOMINATION OF AMY CONEY BARRETT TO THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT: QUESTIONS FOR THE RECORD 1-2 (Comm. Print 2017) (questions from Sen. Dianne Feinstein); S. COMM. ON THE JUDICIARY, 116TH CONG., NOMINATION OF AMY CONEY BARRETT TO THE U.S. SUPREME COURT: QUESTIONS FOR THE RECORD 13-15 (Comm. Print 2020) (questions from Sen. Dianne Feinstein).

22. Glen Staszewski, *Precedent and Disagreement*, 116 MICH. L. REV. 1019, 1019-20 (2018) (book review) ("[T]he Court has never produced a consistent theory of precedent, and there is no dominant understanding of stare decisis or the best way to resolve its seemingly contradictory premises."); *see also* Varsava, *supra* note 15, at 65-66; Merrill, *supra* note 16, at 1450-51.

23. *See* Shawn Patterson, Jr., Matt Levendusky, Ken Winneg & Kathleen Hall Jamieson, *The Withering of Public Confidence in the Courts*, 108 JUDICATURE, no. 1, 2024, at 22, 31 ("Studies have shown that citizens who believe the Court is legalistic in its decision-making express greater institutional support for the judiciary."); Vanessa A. Baird & Amy Gangl, Research Note, *Shattering the Myth of Legality: The Impact of the Media's Framing of Supreme Court Procedures on Perceptions of Fairness*, 27 POL. PSYCH. 597, 604-07 (2006) (concluding that perceptions of legalistic decision-making enhance the perceived fairness of judicial decision-making, which in turn contributes to judicial legitimacy); Rachel Bayefsky, *Judicial Institutionalism*, 109 CORNELL L. REV. 1297, 1300-03, 1315-18 (2024) (discussing the importance of concerns about institutionalism given the current moment's "set of social and political conflicts and its controversies about the role of federal courts in American democracy").

These concerns are not merely theoretical. Take, for example, the question whether a Supreme Court case, *Farmer v. Brennan*,[24] had recognized a new category of *Bivens* claims. In 2018, the Third Circuit said yes, concluding that existence of such a claim had been necessary to the result in *Farmer*.[25] But in 2023, the Fourth and Seventh Circuits read *Farmer* differently, focusing on the idea that the Court had merely "assumed" the existence of the claim, and resorting to the parties' briefs and arguments to show that they had never disputed the claim's viability.[26] These two approaches—and differing results—highlight different interpretive rules and presumptions for understanding precedent. The Third Circuit focused on the theoretically necessary—what must have been true for the Court to reach the result it did.[27] The Fourth and Seventh Circuits, by contrast, focused on the actual—what issues did the parties present to the Court that it in fact resolved through reasoned analysis—and reached outside the four corners of the opinion to answer that question.[28]

Canons of interpretation, which help define presumptions about drafting intent, the scope of relevant extrinsic evidence, and contextual normative goals, might have helped resolve this disparity.[29] But such canons don't exist for interpreting precedent—at least not in any well-defined form.

This Article offers a preliminary attempt to fill the gap. Part I provides a brief overview of the judicial role as textual interpreter and discusses the use of canons in constitutional, statutory, and contractual interpretation. It then explores the comparative underdevelopment of interpretive canons in the context of understanding and applying precedent.

Part II considers what might count as a canon of precedential interpretation. First, it attempts to distill possible canons of precedential interpretation from existing federal appellate decisions, finding a few

24. 511 U.S. 825 (1994).

25. *See* Bistrian v. Levi, 912 F.3d 79, 90-91 (3d Cir. 2018), *abrogated by* Egbert v. Boule, 142 S. Ct. 1793 (2022), *as recognized in* Fisher v. Hollingsworth, 115 F.4th 197 (3d Cir. 2024).

26. *See* Bulger v. Hurwitz, 62 F.4th 127, 139 (4th Cir. 2023); Sargeant v. Barfield, 87 F.4th 358, 364-65, 365 n.2 (7th Cir. 2023).

27. *See Bistrian*, 912 F.3d at 90-91.

28. *See Bulger*, 62 F.4th at 139; *Sargeant*, 87 F.4th at 364-65, 365 n.2.

29. *See* Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 793 (2013) (explaining that canons of statutory and contractual construction are aimed at answering questions "such as whether interpretation should aim to effectuate the drafters' subjective intent or what kind of extrinsic evidence might be consulted to assist in the interpretive effort"). *See generally* Adrian Vermeule, Essay, *Judicial History*, 108 YALE L.J. 1311 (1999) (discussing the potential use of "judicial history" as extrinsic evidence to assist interpretation of disputed precedent); Richard J. Lazarus, *Advocacy History in the Supreme Court*, 2020 SUP. CT. REV. 423 (examining the use of parties' briefing and arguments in interpreting the scope of resulting precedent).

methodological rules of thumb that enjoy consistent support and reasonably frequent invocation. Second, it proposes other possible canons of precedential interpretation by analogizing to existing canons of statutory and contractual interpretation.

Finally, Part III considers the possible reasons for the underdevelopment of canons of precedential interpretation and discusses some potential negative implications of adopting more explicit methodological rules in this context. Most saliently, it considers whether the absence of explicit interpretive rules in fact serves institutional goals in at least two key ways. First, methodological flexibility may foster "precedential plasticity," enabling perceived stability and respect for stare decisis while in fact allowing the meaning of precedent to evolve over time. Second, free-form precedential interpretation may contribute to the perception of individual judicial genius, thereby attracting and retaining judicial talent. On the other hand, identifying and applying discernible interpretive canons for precedent might increase public confidence in the judiciary, improve law-school education, and elevate analytical rigor in opinion writing. Regardless, because precedent plays such an important role in American law—and because judges' choices about *how* to interpret precedent can be both outcome-determinative and influential in shaping public confidence in the judiciary—these are questions worth asking.

I. The Missing Canons

A. Judges Interpret Legal Texts

Our legal system is built on written law. And when disputes arise, courts are called upon "to independently ascertain the meaning of legal texts."[30] "The judicial objective is to construct the best interpretation of the legal materials and to apply this interpretation to adjudicate each particular case."[31]

These relevant "legal materials" can come in several forms. Two categories immediately jump to mind. First, constitutions and statutes govern general conduct, creating a body of public law.[32] Second, contracts and other similar

30. Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 453 (2009).

31. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 9 (1994); *see also* Baude & Sachs, *supra* note 4, at 1147 ("Everybody knows that in legal interpretation we start with written words and somehow end up with law. The question is what happens in between.").

32. SCALIA & GARNER, *supra* note 1, at 42; *see also* Baude & Sachs, *supra* note 4, at 1095, 1097 (referring to the body of law created by legislatures as "public law").

legal instruments prescribe responsibilities between individual actors, also known as private law.[33]

But a third, critically important, category of legal text exists: judicial opinions. Like constitutions, statutes, and contracts, "opinions are textual documents."[34] And like those documents, judicial opinions—at least published opinions from appellate courts, which are the focus of this Article—carry some force of law.[35] That is because, in our common-law system, under "the doctrine of precedent . . . legal cases make law."[36]

Thus, in resolving a particular dispute, judges resort not only to external sources of textual law, but also to the body of written law that their colleagues have generated. Indeed, "[i]t is almost universally agreed that reliance on prior judicial precedent is a significant aspect" of the judicial deliberative process.[37] In other words, in deciding a case, judges "apply[] law (common law, statutes and treaties, the Constitution) to new facts and justify[] that application by reference to preexisting authority—including prior decisions, for precedents themselves have the force of law."[38]

33. SCALIA & GARNER, *supra* note 1, at 42; *see also* Baude & Sachs, *supra* note 4, at 1094 (referring to "private instruments such as contracts, deeds, or wills" and the rules for handling these instruments as "private law").

34. Shawn J. Bayern, *Case Interpretation*, 36 FLA. ST. U. L. REV. 125, 126 (2009); *see also* Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1226-27 (2007) (discussing the widespread requirement in the United States that opinions be written).

35. Varsava, *supra* note 15, at 67; Tiersma, *supra* note 34, at 1243-47 (discussing the publication requirement).

36. Varsava, *supra* note 15, at 67; *see also* Merrill, *supra* note 16, at 1423 ("Precedent following is especially entrenched in American legal culture . . . . [and] arguments from precedent form a . . . robust norm used by adjudicators in resolving disputes."). *But see* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2280 (2024) (Gorsuch, J., concurring) (characterizing precedent as mere "evidence" of the law's meaning).

37. Caminker, *supra* note 31, at 10; *see also* Michael J. Gerhardt, *The Irrepressibility of Precedent*, 86 N.C. L. REV. 1279, 1285 (2008) ("The basic statistics do not prove—but strongly suggest—that the deployment of precedent is more than strategic. If, as Professors Lee Epstein and Jack Knight have suggested, everyone within the legal system or our constitutional culture believed precedent did not matter, then no one would bother to cite it. The Justices persistently ground or frame their decisions in precedent precisely because people (especially lawyers and judges) believe that precedent does matter. In other words, the omnipresent reliance on precedent is not merely a universal cipher, but rather a reflection of the persistent recognition of its influence in constitutional law." (footnote omitted)).

38. ESKRIDGE, *supra* note 6, at 139; *see also* Larry Alexander & Emily Sherwin, *Judges as Rulemakers*, *in* COMMON LAW THEORY 27, 27 (Douglas E. Edlin ed., 2007) ("The sources of law recognized by common law courts are generally understood to include not only legislation and constitutions but also prior judicial decisions.").

Two primary types of precedent exist: vertical and horizontal.[39] Under the theory of vertical precedent, lower federal courts are bound by the decisions of higher courts within the same jurisdiction (for example, a federal district court is bound by the decisions of its encompassing circuit court and the U.S. Supreme Court).[40] And under the theory of horizontal precedent, federal appellate courts are bound by their own prior decisions unless specific conditions are met (for example, a federal circuit court is bound by its own existing panel and en banc decisions, absent extenuating circumstances).[41]

These basic rules of precedent are so familiar as to sound humdrum to any federal litigator or member of the bench. But it is worth noting that the extent to which precedent should or does bind a deciding court is not beyond dispute.[42] This is particularly true as to horizontal precedent, where the court's obligation to follow existing case law is more malleable.[43] And it is acutely true

39. GARNER ET AL., *supra* note 14, at 27. The legal force of precedent is somewhat distinct from the question of whether courts can "make" substantive law. Federal courts, limited by Article III, are generally thought to lack the capacity to make a federal general common law. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). State courts, by contrast, are more forthcoming about their ability to make or define common law. *See* Aaron Saiger, *Derailing the Deference Lockstep*, 102 B.U. L. REV. 1879, 1900 (2022) ("Federal courts, in saying what the law is, eschew the possibility that they are announcing common law; state courts embrace it."). Nevertheless, in both contexts, precedent has the power to bind future courts—even if that precedent is simply saying what the law is, rather than "making" substantive law in some larger sense.

40. GARNER ET AL., *supra* note 14, at 27; *see also* Caminker, *supra* note 31, at 24-25 ("Supreme Court precedents bind all inferior courts, court of appeals precedents bind only those district courts whose decisions they will review, and district court precedents bind no one." (footnote omitted)).

41. *See* GARNER ET AL., *supra* note 14, at 27, 35; *see also* Garcia v. Gateway Hotel L.P., 82 F.4th 750, 759 (9th Cir. 2023) (explaining that in-circuit precedent is binding unless "clearly irreconcilable" with a later Supreme Court opinion (quoting Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003))); Oakey v. US Airways Pilots Disability Income Plan, 723 F.3d 227, 232 (D.C. Cir. 2013) (discussing the D.C. Circuit's standard for departing from prior panel decisions); Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1469 (2013) (defining horizontal precedent as "a court's adherence to its own past decisions," as distinguished from "vertical or hierarchical precedent, which refers to the binding effect of a superior court's opinion on hierarchically inferior courts").

42. *See, e.g.*, Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 923-27 (2016) (arguing that lower courts can and do strategically adopt narrow interpretations of relevant precedent).

43. *See* Paul J. Watford, Richard C. Chen & Marco Basile, *Crafting Precedent*, 131 HARV. L. REV. 543, 545 (2017) (reviewing GARNER ET AL., *supra* note 14); *see also* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1712 (2013) ("Stare decisis has two basic forms: vertical stare decisis, a court's obligation to follow the precedent of a superior court, and horizontal stare decisis, a court's obligation to follow its own precedent. Vertical stare decisis is an inflexible rule that admits of no exception. Horizontal stare decisis, by contrast, is a shape-shifting doctrine." (footnotes omitted)).

as to the Supreme Court, which has struggled in recent terms to articulate a coherent theory of stare decisis.[44] In high-profile or outlier cases—and certainly among scholars—the boundaries and justifications for adhering to horizontal precedent are subject to debate.[45]

But no one disputes that federal courts of all stripes *do* reason from precedent. And almost no one would question that lower courts *must* do so, at least with respect to prior decisions of higher courts within their jurisdiction (vertical precedent).[46] Even as to horizontal precedent, the general rule is that it should be followed.[47] As Thomas Merrill recently put it, "One proposition

44. *See* William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 318 (discussing the incoherence of stare decisis theory in the Court's recent decisions on precedent). *See generally* Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165 (2008) (arguing the Supreme Court's current doctrine of stare decisis should be overruled according to its own logic).

45. A word before we proceed. This scholarly and political debate, while interesting, falls largely outside the scope of our discussion here. Instead, I take as a starting assumption that, at minimum, inferior courts are bound to follow existing precedent created by the relevant superior courts. In other words, in the context of vertical precedent, courts must identify and interpret binding case law. The question for our purposes is *how* those courts talk about interpreting and adhering to precedent and, more specifically, why they have declined to develop and apply interpretive canons for doing so. This means that this Article is primarily focused on lower courts—federal appellate and district courts—which are the courts that are subject to vertical precedent. These lower courts are the ones that, in practice, do most of the precedential interpreting, but they are nevertheless less well studied by academics. *See* 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, 3-4 (2018) (noting the relative lack of academic attention paid to lower-court versus Supreme Court practices in the context of statutory interpretation); *see also* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2277 (2024) (Gorsuch, J., concurring) (recognizing that his limited sketch of common-law understandings of precedent focused "on the horizontal, not vertical, force of judicial precedents"). That said, because federal courts generally respect horizontal precedent and must provide reasons for departing from it, much of the following analysis will also apply in that context.

46. Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818 (1994) ("Stare decisis permits a federal court to overrule its prior decisions under special circumstances, but longstanding doctrine dictates that a court is *always* bound to follow a precedent established by a court 'superior' to it." (footnote omitted)); *see also* Caminker, *supra* note 31, at 5 ("[T]he overwhelming consensus reflected by judicial and academic discourse holds that lower courts ought to define the law merely by interpreting existing precedents . . . ."); GARNER ET AL., *supra* note 14, at 27 ("Federal and state courts are absolutely bound by vertical precedents—those delivered by higher courts within the same jurisdiction."); THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that federal judges would be "bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them").

47. *See* Baude, *supra* note 44, at 314, 317 (explaining that "[t]he Supreme Court's commitment to precedent has become a central topic of both legal theory and legal

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about precedent, however, enjoys general consensus: if a controlling precedent is perceived to be indistinguishable from the case at hand, that precedent must be followed unless there is a 'special justification' for overruling it."[48]

Published appellate opinions thus form a third body of written law from which at least a subset of courts (those inferior to or otherwise bound by the authoring court) must reason—and from which even the highest courts do reason.[49] Accordingly, in resolving disputes, judges consult three primary kinds of text: statutes and constitutions (public law), contracts and other similar instruments (private law), and prior judicial opinions (common law or precedent).

B. The Prevalence of Canons of Interpretation for Most Legal Texts

1. Canon basics

"Every application of a text to particular circumstances entails interpretation."[50] In undertaking that interpretation, courts ask questions like: "What law did this instrument make? How does it fit into the rest of the *corpus juris*? What do 'the legal sources and authorities, taken all together, *establish*'?"[51]

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politics," but noting that "[a]dherence to precedent is still the rule, not the exception, in nearly every case before the Court"); *see also* GARNER ET AL., *supra* note 14, at 35.

48. Merrill, *supra* note 16, at 1424 (quoting Kimble v. Marvel Ent., LLC, 576 U.S. 446, 456 (2015)); *see also* Hillel Y. Levin, *Justice Gorsuch's Views on Precedent in the Context of Statutory Interpretation*, 70 ALA. L. REV. 687, 689-91 (2019) (explaining the various justifications for adherence to precedent and noting that, "[f]or one or more of these reasons, all judges, including originalists, agree that precedent matters").

49. GARNER ET AL., *supra* note 14, at 2 ("It used to be widely thought—until about the end of the 19th century—that judicial precedents were merely *evidence* of the law, as opposed to a *source* of it. No serious legal thinker now believes this. Today, precedents are understood to make up part of the law: 'A judicial precedent speaks . . . with authority; it is not merely evidence of the law but a source of it; and the courts are bound to follow the law that is so established.'" (quoting JOHN SALMOND, JURISPRUDENCE § 56, at 176 (Glanville L. Williams ed., 10th ed. 1947))). *But see Loper Bright*, 144 S. Ct. at 2276-80 (Gorsuch, J., concurring) (suggesting that precedents serve only as "evidence of the law"); Caminker, *supra* note 31, at 24-25 (questioning whether "precedent is properly characterized as a source of positive law," but acknowledging that it "is frequently so characterized" and that it may "count as positive law for only a subset of other [inferior] courts"). Regardless, even if judicial opinions themselves were not legally binding (but rather, as some have argued, simply explanations of the disposition), judges and advocates still must and do reason from those texts. And they do so in ways that elevate the importance of the language of the opinion, not simply its result. *See infra* Part I.C; Tiersma, *supra* note 34, at 1188.

50. SCALIA & GARNER, *supra* note 1, at 53.

51. Baude & Sachs, *supra* note 4, at 1083 (quoting 4 JOHN FINNIS, PHILOSOPHY OF LAW: COLLECTED ESSAYS 18 (2011)); *see also* Caminker, *supra* note 31, at 9 ("Judges must identify relevant sources of enacted law such as constitutional provisions, statutes, and

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For most kinds of legal texts, interpretive "rules of thumb"—so-called "canons"—exist that can help answer those questions.[52] These "[p]rinciples of interpretation are guides to solving the puzzle of textual meaning."[53] And while they might not always produce consistent results, "they form a set of guideposts and folk wisdom for discerning the legal meaning of texts."[54] Indeed, while some canons are of recent vintage,[55] many are so deeply embedded in legal culture that they "continue to bear their Latin names."[56]

Interpretive canons come in two primary flavors. First, linguistic (also called semantic or textual) canons are purportedly "policy-neutral tools" aimed at decoding the meaning of language.[57] And second, substantive canons embody presumptions about meaning that form the backdrop against which the text is read.[58]

Linguistic canons in fact encompass two fairly distinct groups of rules. Most intuitively, linguistic canons "include grammatical and punctuation rules."[59] These "are often characterized as ordinary English usage rules, assisting courts to discern . . . meaning by reference to what ordinary English speakers mean when they use or read particular words and sentences."[60] Examples of grammatical linguistic canons include *noscitur a sociis*[61] and

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administrative regulations, and they must apply some combination of various methods of interpretation in order to discern the meaning of those sources."). This Article uses the word "interpretation" to cover the act of distilling legal meaning from text, rather than trying to distinguish between the concepts of "interpretation" and "construction." *See generally* Greg Klass, *Interpretation and Construction 1: Francis Lieber*, NEW PRIV. L. BLOG (Nov. 19, 2015), https://perma.cc/973N-82RV (outlining the distinction between these concepts). This choice is in keeping with the idea that there is a "law of interpretation" that subsumes elements of both interpretation and construction. Baude & Sachs, *supra* note 4, at 1128-32; *see also* Frederick Schauer, *Constructing Interpretation*, 101 B.U. L. REV. 103 (2021) (suggesting the distinction collapses as to legal language).

52. Leib, *supra* note 5, at 1110.

53. SCALIA & GARNER, *supra* note 1, at 59.

54. Leib, *supra* note 5, at 1110.

55. *See* Krishnakumar & Nourse, *supra* note 6, at 167-68 (discussing difficulties in identifying canons and efforts by scholars and judges to create new canons).

56. SCALIA & GARNER, *supra* note 1, at 51; *see also* Zoldan, *supra* note 9, at 648 ("[T]here is, in fact, widespread agreement about the canonical status of some well-established interpretive principles.").

57. Mendelson, *supra* note 13, at 80; Barrett, *supra* note 12, at 117; Shapiro, *supra* note 8, at 927.

58. *See* Gluck & Bressman, *supra* note 10, at 940.

59. Mendelson, *supra* note 13, at 80.

60. *Id.*

61. The canon of *noscitur a sociis* provides that "the meaning of an unclear word or phrase, esp. one in a list, should be determined by the words immediately surrounding it." *Noscitur a Sociis*, BLACK'S LAW DICTIONARY (12th ed. 2024). More colloquially, this canon

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expressio unius est exclusio alterius.[62] Linguistic canons also include a group of nongrammatical rules, which embody assumptions about the completeness, consistency, and deliberateness with which legal texts are drafted.[63] Examples of nongrammatical linguistic canons include the whole act rule[64] and the rule against surplusage.[65]

Substantive canons, by contrast, "represent a judicial thumb on the scale in favor of a particular norm."[66] When such a canon applies, "[c]lear statutory language or another distinct indication of meaning is usually required to overcome the canon's default result."[67] Perhaps the most famous example of a substantive canon is the rule of lenity, which provides that "ambiguous criminal statutes are to be interpreted in favor of the defendant."[68] The rule of lenity serves the underlying normative value of preventing criminal punishment for an act that has not been clearly proscribed.[69] Other substantive canons include the presumption against preemption, which provides that a federal statute "is presumed to supplement rather than displace state law."[70]

Both types of canons have their detractors. Linguistic canons are criticized as failing to accurately reflect the understanding and intentions of drafters. For

provides that "a word is known by the company it keeps." *Id.* (quoting Yates v. United States, 574 U.S. 528, 543 (2014)).

62. The canon of *expressio unius est exclusio alterius* provides that "to express or include one thing implies the exclusion of the other, or of the alternative." *Expressio Unius Est Exclusio Alterius*, BLACK'S LAW DICTIONARY (12th ed. 2024).

63. Mendelson, *supra* note 13, at 81.

64. The whole act rule provides that "statutory terms are presumed to have a consistent meaning throughout a statute." Gluck & Bressman, *supra* note 10, at 930.

65. The canon against surplusage provides that, "if possible, every word and every provision in a legal instrument is to be given effect." *Surplusage Canon*, BLACK'S LAW DICTIONARY (12th ed. 2024); *see also* SCALIA & GARNER, *supra* note 1, at 174 ("The surplusage canon holds that it is no more the court's function to revise by subtraction than by addition.").

66. Mendelson, *supra* note 13, at 82. More recently, some have offered alternative definitions that focus on substantive canons' departure from plain meaning. *See, e.g.*, Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 533-34 (2023) (defining a substantive canon as one that "purports to speak to a statute's proper legal effect in a way that is not mediated by its evidentiary bearing on what a reasonable reader would take a lawmaker to have said in enacting the statute"). But the traditional view of a substantive canon is a "policy-based presumption[]" about meaning. *Id.* at 533 (quoting Gluck & Bressman, *supra* note 10, at 924).

67. Mendelson, *supra* note 13, at 82.

68. *Id.*; *see also* Shapiro, *supra* note 8, at 935. *See generally* Wooden v. United States, 142 S. Ct. 1063, 1082-83 (2022) (Gorsuch, J., concurring) (discussing historical support for the rule of lenity).

69. *See* Mendelson, *supra* note 13, at 82-83.

70. SCALIA & GARNER, *supra* note 1, at 290; *see also* Mendelson, *supra* note 13, at 83.

example, Abbe R. Gluck and Lisa Schultz Bressman found empirical evidence that congressional staffers—the people who actually draft statutes—knew and accepted only a subset of commonly invoked canons.[71] To the extent, then, that canons of statutory interpretation were meant to reflect Congress's actual intent, the evidence casts doubt on that connection.[72] Substantive canons are more often in the crosshairs, criticized as undercover policymaking by courts or at odds with a textualist adherence to plain meaning.[73]

More fundamentally, some scholars suggest that canons fail to meaningfully constrain decision-makers or guide interpretation.[74] Judges still must make the initial, discretionary choice to rely on an interpretive canon and, even when they do so, often have latitude in determining which canon is applicable.[75] Moreover, canons can contradict one another, such that the choice of which canon to apply becomes particularly impactful.[76]

Nevertheless, when an appellate court adopts and routinely relies on an interpretive canon, it stands to reason that at least some real effects flow from that choice (regardless of whether the canon itself "constrains" the initial decision-maker in a fundamental way). First, when an appellate court endorses and uses a canon, lower courts and advocates will likely feel bound to incorporate that principle into their future decisions and arguments.[77] Thus,

71. Gluck & Bressman, *supra* note 10, at 906-07.

72. *See id.* at 909; *see also* Baude & Sachs, *supra* note 4, at 1093 ("If the canons are descriptively false as accounts of legislative practice, then the courts' continued use of them seems to license other descriptively false approaches, too—with only normative preferences to guide which falsehoods the courts tell.").

73. *See, e.g.*, Barrett, *supra* note 12, at 121-25; *see also* Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, 286-87 (2020).

74. *See, e.g.*, Mendelson, *supra* note 13, at 76-78, 123-31. *But see* Grove, *supra* note 73, at 298-99, 304 (suggesting that "formalistic textualism—a relatively rule-bound method . . . will better constrain [judicial] discretion" and that "there is a strong sense among legal scholars and political scientists that more rule-like methods tend to provide greater constraint than standards").

75. *See* Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1910 (2017) (noting that judges have discretion to determine whether text is ambiguous or not as a precursor to applying any canon to resolve that ambiguity).

76. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950); *see also* Jeffrey Goldsworthy, Essay, *Legislative Intentions in Antonin Scalia's and Bryan Garner's Textualism*, 52 CONN. L. REV. 1549, 1568-69 (2021).

77. *See* Aaron-Andrew P. Bruhl, *Eager to Follow: Methodological Precedent in Statutory Interpretation*, 99 N.C. L. REV. 101, 126-32 (2020) (explaining that lower federal courts tend to respect and adhere to higher courts' approaches to interpretive methodology, including their adoption and use of canons); *see also* Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1845, 1912 & n.337 (2023) (discussing the "uncertain precedential status" of methodological approaches in Supreme Court jurisprudence but

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by relying on canons, appellate courts shape the rationales that advocates and lower courts use going forward. Second, even if canons do not constrain an initial decision-maker directly, the mere process of justifying an interpretive result with reference to articulable interpretive rules may improve the quality of the writing and reasoning contained in the opinion.[78] Third and finally, reliance on canons may, at minimum, give the interpretive effort the appearance of rigor, in ways that might benefit judicial legitimacy.[79]

In sum, well-established linguistic and substantive canons exist—and are widely used, discussed, and debated—for both public (statutes, etc.) and private (contracts, etc.) legal texts.[80] Some canons apply to both types of texts, while

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recognizing that the Supreme Court may, as a practical matter, "coalesce around" certain approaches to stare decisis); Aaron-Andrew P. Bruhl, *Supreme Court Litigators in the Age of Textualism*, 76 FLA. L. REV. 59, 88 (2024) (concluding that litigators' reliance on textual canons and dictionary definitions in their Supreme Court briefings has increased in parallel to the increased reliance on those tools by the Court); Llewellyn, *supra* note 76, at 401 (denying that canons meaningfully constrain decision-makers but acknowledging that they help create "an accepted conventional vocabulary" for "presenting a proposed construction in court").

78. *See* Deborah Hellman, *An Epistemic Defense of Precedent*, *in* PRECEDENT IN THE UNITED STATES SUPREME COURT 63, 70-74 (Christopher J. Peters ed., 2013) (articulating a process-based defense of precedent that posits that the mere act of requiring judges to reason from precedent may improve the quality of judicial decision-making).

79. *See* Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1108-09, 1125 (1995) (explaining that "the reasons offered by the judge must appear principled in order to successfully justify a decision" and exploring the ways in which appearance of principle supports judicial legitimacy); Grove, *supra* note 73, at 296-307; *see also* Richard M. Re, Essay, *Legal Realignment*, 92 U. CHI. L. REV. (forthcoming 2025) (manuscript at 41), https://perma.cc/4WQS-7NHQ ("[C]onvergence with respect to methodology tempers divergence with respect to politics . . . . [A]ll nine justices speak and reason in a formalist language, creating an incentive for litigants, commentators, political actors, law students, and many others to follow suit. That pattern, or set of incentives, is part of why there is a still a degree of broadly shared legal culture in the United States, despite polarization and party-sorting." (footnote omitted)). By "legitimacy," this Article means "sociological legitimacy," including the views not only of the general public but also of political elites and members of the legal community, who tend to pay attention to and care about the intricacies of judicial decision-making. *Cf.* Tara Leigh Grove, Essay, *Sacrificing Legitimacy in a Hierarchal Judiciary*, 121 COLUM. L. REV. 1555, 1561-62 (2021) (advancing a similar definition of judicial legitimacy to argue that the Supreme Court faces a "legitimacy tradeoff" when deciding whether and how to rule on contentious issues).

80. *See, e.g.*, Barrett, *supra* note 12, at 121 (explaining that textualists routinely use linguistic canons and "also embrace substantive canons"); John F. Manning, *Legal Realism & the Canons' Revival*, 5 GREEN BAG 2D 283, 284 (2002) ("[A] large and growing number of academics (and academics-turned-judges) now believe in the utility of canons of construction . . . [and] the newly faithful cover a broad philosophical spectrum."); Zoldan, *supra* note 9, at 642 ("Legal interpreters of all stripes refer to, discuss, and rely on the canons."); Farshad Ghodoosi & Tal Kastner, *Big Data on Contract Interpretation*, 57 U.C. DAVIS L. REV. 2553, 2560-62 (2024) (recognizing that although less widely studied

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others are particularly appropriate in either the public or private context. But what is clear from both practice and scholarship is that interpretive canons have been identified and studied, and they are commonly invoked for two of the main categories of operative legal texts.

2. Canons for public-law texts: Statutes and constitutions

Canons are frequently invoked to aid in interpreting statutes. Statutory text "is often inadequate to the interpretive task"—it "may be silent, indeterminate, ambiguous, or even conflicting on contested legal issues."[81] In such circumstances, courts have "deployed a stockpile of canons to aid the interpretive endeavor."[82]

Indeed, a sort of "canon fever" has been sweeping the Supreme Court. Resort to canons has enjoyed a resurgence among Justices, as textualists grapple with how to resolve textual ambiguity in the absence of reliance on legislative history.[83] During the first decade of the Roberts Court, every Justice invoked a canon of interpretation at least once in a majority of his or her statutory interpretation opinions.[84]

The current significance of canons in the context of statutory interpretation is difficult to overstate. "In this 'age of statutes,' the canons of statutory interpretation are the common language spoken by legal interpreters."[85] Judges rely on canons to support their conclusions.[86] "Advocates rely on . . . canons to articulate legal arguments."[87] Many states have even codified the canons.[88] As Evan Zoldan has observed, "Canon use among

by scholars than canons for statutory interpretation, canons are commonly used for contract interpretation).

81. Mendelson, *supra* note 13, at 74.

82. *Id.*

83. *See* Krishnakumar & Nourse, *supra* note 6, at 167 (discussing extensive use of canons for statutory interpretation); Leib, *supra* note 5, at 1110-11 ("As textualism has gained ascendency as a common method of statutory interpretation—focusing more on statutory text than on legislative history or purposes—textual canons seem especially important for lawyers to master." (footnote omitted)). *But see* Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 829-30 (2017) (questioning the common wisdom that the Supreme Court generally, and textualist Justices in particular, frequently rely on substantive canons of statutory construction); Eidelson & Stephenson, *supra* note 66, at 537 (asserting that reliance on substantive canons conflicts with a textualist approach).

84. Mendelson, *supra* note 13, at 75.

85. Zoldan, *supra* note 9, at 622 (footnote omitted) (quoting GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 163 (1982)).

86. *See id.*

87. *Id.*

88. *Id.*; *see also* ESKRIDGE, *supra* note 6, at 21.

judges and scholars is pervasive in part because it is cross-ideological: although textualists are most well-known for their vociferous support for the canons, purposivists and pragmatists have also taken great care to find a place for the canons in their theories."[89]

Perhaps more controversially, canons are often deployed to aid in constitutional interpretation as well.[90] "The Constitution is a written instrument, and to determine its legal effect, we have to call on the law of interpretation."[91] In other words, "the law of interpretation applies to the Constitution no less than to a statute or contract."[92]

The scholarly literature on canons of interpretation for statutes and constitutions is vast and far-ranging. In the past decade or so, venerable authors have written numerous books and articles attempting to collect, justify, and elucidate the role of canons in constitutional and statutory interpretation. In 2013, Justice Scalia teamed up with grammar legend Bryan Garner to produce *Reading Law: The Interpretation of Legal Texts*.[93] In it, they attempted to compile a definitive list of canons—and an explanation of how to use them—to aid in statutory and constitutional interpretation.[94] A few years later, William Eskridge, Yale Law School professor and one of the most cited legal academics of all time, responded with *Interpreting Law: A Primer on How to Read Statutes and the Constitution*, which offered his own set of interpretive canons.[95] In just the last few years, numerous law review articles have approached the issue from both theoretical and empirical perspectives.[96] And given the separation-of-powers concerns at play, debates about the appropriateness of canons take on particular sharpness in the context of constitutional and statutory interpretation.[97]

89. Zoldan, *supra* note 9, at 623-24 (footnotes omitted); *see also* Harv. L. Sch., *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, YOUTUBE, at 8:29 (Nov. 25, 2015), https://perma.cc/US72-LV3P (Justice Kagan commenting that "we're all textualists now").

90. *See* Baude & Sachs, *supra* note 4, at 1084, 1135.

91. *Id.* at 1118.

92. *Id.* at 1135; *see also* William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2372-76 (2015) (discussing the paramount importance of constitutional text and devices used to resolve ambiguity therein).

93. SCALIA & GARNER, *supra* note 1; *see also* ESKRIDGE, *supra* note 6, at 3.

94. SCALIA & GARNER, *supra* note 1, at 9.

95. ESKRIDGE, *supra* note 6.

96. *See, e.g.*, Eidelson & Stephenson, *supra* note 66, at 520-21 (arguing that the use of substantive canons cannot be reconciled with textualism); Gluck & Bressman, *supra* note 10, at 905-07 (finding in an "extensive empirical study" that "there were a host of canons that [drafters of legislation] . . . do not use, either because they were unaware that the courts relied on them or despite known judicial reliance" (emphasis omitted)).

97. *See* Eidelson & Stephenson, *supra* note 66, at 536-37.

But judicial practice has largely ignored these debates. And the rise of textualism has meant that, for linguistic canons at least, invocation of canons to resolve ambiguity in statutory and constitutional text is a common feature of contemporary jurisprudence.[98]

3. Canons for private-law texts: Contracts

Courts also frequently invoke interpretive canons when interpreting private legal instruments, like contracts, deeds, or wills.[99] As with statutory and constitutional canons, interpretive canons for private legal texts help courts resolve textual ambiguity and establish background presumptions and normative goals. And as with statutory and constitutional canons, canons for contracts come in both linguistic and substantive flavors.[100]

Many canons apply similarly to public and private legal texts.[101] These include the *expressio unius* and *noscitur a socciis* canons discussed above.[102] Canons applicable to both types of text also include *ejusdem generis*, which "captures this intuition: When general words follow an enumerated class of things, the general words should be construed to apply to things of the same general nature."[103] Similarly, the proposition that words should be afforded their ordinary meaning unless context indicates they bear a technical meaning applies to both private and public legal texts.[104] And the whole act rule applicable to statutes has a contractual analogue, which requires "[t]he whole of a contract . . . to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."[105] Finally, the canon of constitutional avoidance (which counsels against a statutory construction that renders the provision unconstitutional)[106] has an analogue in the private context, which directs courts not to construe a contract "in a

98. Kevin Tobia, Brian G. Slocum & Victoria Nourse, Essay, *Statutory Interpretation from the Outside*, 122 COLUM. L. REV. 213, 220 (2022) ("[J]udges cite interpretive canons more frequently now than in the past.").

99. Baude & Sachs, *supra* note 4, at 1094-95.

100. Leib, *supra* note 5, at 1113, 1120-22.

101. *See* SCALIA & GARNER, *supra* note 1, at 30-31, 69; *see also* Leib, *supra* note 5, at 1110-18, 1125.

102. *See supra* notes 61-62; Leib, *supra* note 5, at 1110-18, 1125.

103. Tobia et al., *supra* note 98, at 219; Ghodoosi & Kastner, *supra* note 80, at 2575 & n.96.

104. SCALIA & GARNER, *supra* note 1, at 69-75.

105. *Id.* at 167 (quoting CAL. CIV. CODE § 1641).

106. *See infra* Part II.C.2; *see also* SCALIA & GARNER, *supra* note 1, at 66-68, 247-51.

manner that will render it unlawful if it reasonably can be construed in a manner which will uphold its validity."[107]

But some canons are uniquely suited to particular types of private legal texts. For example, the well-known substantive canon *contra proferentem* provides that courts should "construe ambiguities against a drafting party."[108] That rule clearly applies to interpretation of contracts—and is familiar to most law students by the end of 1L year—but would make little sense in the statutory or constitutional context.[109] The Restatement (Second) of Contracts offers another contractual substantive canon, which provides that "[i]n choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred."[110] Courts and scholars have also identified other contract-specific canons, including directions to narrowly construe force majeure clauses[111] and rules governing interpretation of choice-of-law clauses.[112]

The use of interpretive canons in private law has generally attracted less scholarly attention than the use of canons in interpreting public legal texts.[113] This makes some sense given the absence of separation-of-powers concerns in the private-law arena, as well as the fact that private instruments often matter only to their parties, so the interpretive endeavor of a particular instrument rarely affects the public as a whole.[114]

But text is text. And adjudicators striving to interpret it to arrive at a legally correct meaning face many of the same issues regardless of whether the underlying text is private or public.[115] For that reason, although scholars have

107. Leib, *supra* note 5, at 1129 (quoting Grove v. Metz Baking Co., No. A086904, 2003 WL 21186397, at *4 (Cal. Ct. App. May 20, 2003)).

108. *Id.* at 1111.

109. That said, the rule against lenity, which applies to criminal statutes, could be seen as an analogue to *contra proferentem* in the contract context. *See* SCALIA & GARNER, *supra* note 1, at 30-31.

110. Leib, *supra* note 5, at 1112 (alteration in original) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 207 (AM. L. INST. 1981)).

111. *Id.* at 1136.

112. John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. 631, 637-38 (2017).

113. Leib, *supra* note 5, at 1111; *see also* Ghodoosi & Kastner, *supra* note 80, at 2569-74; Baude & Sachs, *supra* note 4, at 1097 ("As to private instruments, [the law of interpretation is] relatively uncontroversial . . . .").

114. *See* Baude & Sachs, *supra* note 4, at 1097 (discussing possible reasons for greater controversy over interpretative methodology for statutes versus contracts).

115. *See* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1970 (2011) ("Statutory interpretation, like the interpretation of contracts, wills, and trusts, entails the judicial interpretation of a text previously negotiated by others. Many of the same overarching questions arise in each of these contexts . . . .").

been more focused on canons of statutory interpretation, they have often acknowledged and treated similarly the study of canons of contractual interpretation.[116]

Accordingly, both in practice and in scholarship, the existence and use of canons of interpretation for public and private legal texts is widely acknowledged. The applicable canons—which range from grammatical rules to normative presumptions—help adjudicators derive legal meaning from text and allow them to use consistent language and analytical frameworks in doing so. Moreover, as a practical reality, courts frequently invoke interpretive canons when faced with textual ambiguities in contracts, statutes, or the Constitution. And courts, practitioners, and scholars share a basic understanding about the existence and identity—at least for core principles—of the canons that might apply in each context.

C. The Underdevelopment of Canons for Judicial Opinions

Judicial opinions are another matter. Like a statute or contract, an appellate opinion is a "text previously negotiated by others."[117] Like statutes and formal private agreements, appellate opinions are almost always written.[118] And like those texts, a published appellate opinion is a source of law—one which courts must and do interpret when deciding disputes.[119] Indeed, Supreme Court opinions often "resemble statutes; the opinion announces rules, or three-part tests, or some other doctrinal structure resembling a codified legal text."[120] Finally, like statutes or contracts, "precedent is often ambiguous and therefore susceptible to multiple competing reasonable interpretations."[121]

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116. *See, e.g.*, Baude & Sachs, *supra* note 4, at 1084 (explaining that their proposed interpretive rules "govern the interpretation not only of private instruments, but also of new statutes and of the U.S. Constitution").

117. *See* Gluck, *supra* note 115, at 1970.

118. *See* GARNER ET AL., *supra* note 14, at 1-2. This was not always the case—for a relatively short time after the Founding, decisions were often rendered orally, but that practice quickly yielded to issuance of written appellate opinions. *See* Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1184 & n.151 (2004); *see also* Tiersma, *supra* note 34, at 1189-90 ("As opposed to customary English practice, American opinions are invariably written down by the judges themselves.").

119. *See* Tiersma, *supra* note 34, at 1247. *But cf.* GARNER ET AL., *supra* note 14, at 2 ("Although analyzing an opinion involves delving into the judge's words, you must go beyond the judge's words—which in themselves are of no great significance, as opposed to what they denote. . . . [W]ith caselaw you can't just interpret its language; you must also engage in legal reasoning to find what we call the case's *holding* . . . .").

120. Vermeule, *supra* note 29, at 1321.

121. Re, *supra* note 42, at 937.

But unlike for these other legal texts, there are no "canons" for precedential interpretation. Instead, interpretation of precedent is a somewhat amorphous exercise.[122] "[N]o single method of following precedent has been universally adopted or endorsed by the judiciary, and courts in fact employ different methods depending on the details of a given case and its relationship to past cases."[123] Indeed, it can appear that courts "often proceed on a case-by-case basis,"[124] without articulating or adhering to any particular rules about interpretation of precedent.[125]

This underdevelopment isn't because appellate opinions are easy to understand. To the contrary, appellate decisions "increasingly involve complex constitutional, statutory, or administrative law issues, and include lengthy discussions of case facts, findings below, hypothetical disputes of varying significance to the legal issues presented, and discursive and sometimes tendentious treatment of precedent."[126] Determining the binding contours of such opinions—and whether or how they might apply to the case at hand—is no straightforward task.[127] Yet courts seem to operate largely off intuition, failing to articulate rules that could resolve ambiguity or encourage rigorous analysis of precedent.[128]

The academic literature on precedent has also tended to focus on other questions.[129] Some scholars have attempted to characterize the type (or absence) of overarching quasi-analogical reasoning at play when courts apply precedent.[130] And many have focused on horizontal precedent, exploring the

122. *See* Merrill, *supra* note 16, at 1450-51; Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 957-58 (2005); *see also* Alexander & Sherwin, *supra* note 38, at 27 ("Lawyers rely on judicial precedents in advising clients, and courts cite precedents in their opinions. Yet exactly what courts do, or should do, with precedents is a surprisingly complex problem.").

123. Varsava, *supra* note 15, at 65; *see also* Merrill, *supra* note 16, at 1450-51 ("In actual practice, arguments from precedent undoubtedly reflect a complex matrix of approaches to following, distinguishing, extending, and narrowing precedents.").

124. Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 401 (1997) (quoting CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT, at viii (1996)).

125. *See* Abramowicz & Stearns, *supra* note 122, at 958 ("Through a loose set of practices that vary considerably across jurisdictions, and, perhaps more problematically, across courts and cases, judges, entirely on their own, define such terms [like 'holding' and 'dicta'] as needed to assist in the task of resolving particular cases."); Easterbrook, *supra* note 15, at 422.

126. Abramowicz & Stearns, *supra* note 122, at 955 (footnote omitted).

127. *See* Re, *supra* note 42, at 937.

128. *See* Abramowicz & Stearns, *supra* note 122, at 955-59.

129. *See* Lemos, *supra* note 15, at 2.

130. This literature includes philosophical debates about realism and formalism. *See, e.g.*, Altman, *supra* note 17, at 207-12; Michael Stokes, *Formalism, Realism, and the Concept of Law*, 13 LAW & PHIL. 115, 115-16 (1994). It also includes attempts to categorize the

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theoretical bases for stare decisis and questioning when and how the Supreme Court should overrule its own case law.[131] Other commentators have simply thrown up their hands, dismissing any attempt to locate methodological rigor in the process of interpreting precedent.[132]

Indeed, one oft-lamented aspect of precedential interpretation is that "[d]eciding what a precedent means will frequently depend on the particular normative values and assumptions each judge brings to the interpretive enterprise."[133] Yet establishing a set of standardized assumptions and normative values to resolve textual ambiguity is precisely what canons are supposed to do.[134] Linguistic canons help establish assumptions about grammatical rules and about intent, completeness, and consistency in drafting.[135] Substantive canons help standardize the normative goals

potential forms of reasoning (analogical, purposive, etc.) involved in the interpretation and application of precedent. *See, e.g.*, Varsava, *supra* note 15, at 108; Bayern *supra* note 34, at 126-27; *see also* Krishnakumar & Nourse, *supra* note 6, at 175 (distinguishing between "patterns or practices in judicial reasoning" on the one hand, and "rules or legal principles," i.e., canons, on the other).

131. Abramowicz & Stearns, *supra* note 122, at 956-57; *see, e.g.*, Nina Varsava, *supra* note 77, at 1912; Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907, 919-22, 938 (2021); Nina Varsava, Essay, *Precedent on Precedent*, 169 U. PA. L. REV. ONLINE 118, 132-33 (2020); Baude, *supra* note 44, at 329-333; Barrett, *supra* note 43, at 1716-25; Daniel A. Farber, Essay, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1176-86, 1198-1202 (2006).

132. *See, e.g.*, Carol M. Bast & Carlton J. Patrick, *Information Otherwise Unknowable:* Carpenter *as a Window into the Judicial Decision-Making Process*, 57 SAN DIEGO L. REV. 357, 382 (2020) ("The legal model relies on precedents. But the decision whether a given precedent [applies] is a subjective one." (alteration in original) (quoting LAWRENCE S. WRIGHTSMAN, THE PSYCHOLOGY OF THE SUPREME COURT 120 (2006))); Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 953 (1996) ("Posner asserts that analogy 'is inevitable in fields where theory is weak,' such as 'military science, . . . advertising, . . . [and] law,' and he questions 'whether reasoning by analogy, when distinguished from logical deduction and scientific induction on the one hand and stare decisis on the other, deserves the hoopla and reverence that members of the legal profession have bestowed on it.'" (alteration in original) (quoting RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 90 (1990))); Llewellyn, *supra* note 76, at 395-99 ("One does not progress far into legal life without learning that there is no single right and accurate way of reading one case, or of reading a bunch of cases."). *But see generally* Alexander & Sherwin, *supra* note 38 (arguing that precedent does and should create binding rules and that courts should generally be able to discern and follow them).

133. Caminker, *supra* note 31, at 10-11.

134. *See* Krishnakumar, *supra* note 83, at 833.

135. *Id.*; *see also* Tobia et al., *supra* note 98, at 230 (describing textual or linguistic canons as "varied presumptions about meaning 'that are usually drawn from the drafter's choice of words, their grammatical placement in sentences, and their relationship to other parts of the "whole" statute'" (quoting WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 634 (2d ed. 1995))).

underlying the text by placing a "thumb[] on the scale" in favor of or against certain interpretations.[136] In other words, when interpreting legal texts of all kinds, judges may face ambiguities that require them to fill the gaps with assumptions about language, drafting, and normative values. Interpretive canons can help standardize that process—and it is not apparent why that assertion would hold true only for the Constitution, statutes, and contracts.[137]

But few scholars have focused on the more down-to-earth question of how judges (and advocates) can or should articulate arguments based on precedent in terms that appear consistent and rigorous—and what role interpretive rules might play in that endeavor.[138] To the contrary, scholars and judges alike have routinely excluded judicial opinions from their discussion of interpretive rules of thumb for those other texts. For example, in their compendium of interpretive canons, Justice Scalia and Bryan Garner unceremoniously dismissed judicial opinions in two sentences: "The raw material of our study consists of legally operative texts other than judicial opinions. (The words of the latter, as opposed to their dispositions, have, strictly speaking, no legally binding effect.)."[139]

That perfunctory dismissal overlooks the reality of how precedent works.[140] Judges routinely rely on and cite the *language* of prior cases, not merely their dispositions.[141] And they do so in ways that suggest that they

136. Krishnakumar, *supra* note 83, at 833.

137. Lemos, *supra* note 15, at 2-3.

138. Watford et al., *supra* note 43, at 545-47 ("[M]uch scholarship on precedent has traditionally been interested in the question of *why* earlier decisions bind judges' subsequent decisions (and whether they should at all). . . . For judges like the ones who coauthored [*The Law of Judicial Precedent*] and for the lawyers who appear before them, it is axiomatic that precedent binds their work. The question then is *how* does precedent operate in practice? Surprisingly, very little scholarship before this treatise has probed that question systematically, and none in such granular detail, despite its enormous practical importance."). The most notable exception is Bryan Garner's 2016 treatise, *The Law of Judicial Precedent*—the first of its kind in more than 100 years—which proposes over ninety practical principles to aid judges and practitioners in applying precedent in their respective roles. *See id.* at 543-44 (reviewing GARNER ET AL., *supra* note 14).

139. SCALIA & GARNER, *supra* note 1, at 42.

140. Indeed, "numerous judges and scholars have recognized [that] this 'results only' approach to stare decisis is unworkable." Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 824 (2017).

141. *See id.* at 824-25 ("Though traces of the facts-plus-outcome approach to precedent can still be glimpsed at times, the more common practice among modern courts is to give precedential effect to at least some aspects of the reasoning through which the precedent-setting court arrived at its decision. This approach binds lower courts by both the specific result in the precedent case and the broader rule or rationale that the precedent court *articulated* in explaining that result." (emphasis added) (footnotes omitted)); GARNER ET AL., *supra* note 14, at 25 ("The[] reasonings [of judicial opinions]

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view the words—particularly when articulated as a rule or standard—to be binding.[142] For example, if the Supreme Court says that a particular constitutional claim is entitled to strict scrutiny and defines the test that applies (i.e., the challenged law must be narrowly tailored to serve a compelling government interest), lower courts are bound to subject similar claims to that

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have a gravitational force of their own. They are often inspected by later courts and respected when they are thought to apply to the dispute at hand. The Supreme Court often considers one case's reasoning to 'compel' or 'dictate' a later case's result." (first quoting Salazar v. Ramah Navajo Chapter, 567 U.S. 182, 192 (2012); then quoting Miller v. Johnson, 515 U.S. 900, 913 (1995); and then quoting Blount v. Rizzi, 400 U.S. 410, 417 (1971))); Art Theatre Guild, Inc. v. Parrish, 503 F.2d 133, 136 (6th Cir. 1974) ("Opinions of the Supreme Court, however, are more than narrow issues and narrow holdings. Rather, they are guidelines for lower courts to follow as they preside over the multiplicity of problems which arise in the Nation's diverse state and federal courts. As such the opinions must be looked to in their entirety as the Nation's many judges work to breathe life into law as enunciated by the Nation's highest arbitrator of Constitutional issues."); United States v. Meyers, 200 F.3d 715, 720 (10th Cir. 2000) ("The precedent of prior panels which this court must follow includes not only the very narrow holdings of those prior cases, but also the reasoning underlying those holdings, particularly when such reasoning articulates a point of law."). Setting aside whether we might theoretically parse "reasonings" from the written language in which those reasonings are expressed, the fact of the matter is that lawyers and judges routinely rely upon the actual language from judicial opinions as one of the bedrock sources from which to advance legal argument and resolve legal disputes. *See* Frederick Schauer, *Opinions as Rules*, 53 U. CHI. L. REV. 682, 683 (1986) (book review) ("[I]t is not what the Supreme Court held that matters, but what it *said*. In interpretive arenas below the Supreme Court, one good quote is worth a hundred clever analyses of the holding."); *see also* Pierre N. Leval, Madison Lecture, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1268-75 (2006) (observing with consternation that "if it is set down in black and white in a prior court opinion," later courts often "treat it as a holding").

142. *See* Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 182-84, 193-99 (2014) (explaining that the Supreme Court's articulations of doctrinal frameworks and codifying rules are treated as binding by lower courts and even sometimes by the Supreme Court itself); United States v. Files, 63 F.4th 920, 928 (11th Cir. 2023) (explaining that when an appellate "opinion[] chooses between two competing legal 'tests' in the course of resolving a case," later courts consider that articulation of the chosen test to be binding, "even when it's not clear that the [precedential] case would have turned out differently under the other [test]"); *see also* Vidal v. Elster, 144 S. Ct. 1507, 1532 (2024) (Barrett, J., concurring in part) (criticizing the majority for failing to adopt "a generally applicable principle" to guide future courts, and noting that even the majority's purportedly narrow examination of "history and tradition" as to the specific issue in the case "is *itself* a judge-made test"); Caminker, *supra* note 31, at 14-15 ("[J]urists generally agree that legal rules or doctrines invoked by a judge to justify her disposition of a case qualify for precedential status. As Justice Scalia recently observed, '[T]he modern reality, at least, is that when the Supreme Court of the federal system, or of one of the state systems, decides a case, not merely the *outcome* of that decision, but the *mode of analysis* that it applies will thereafter be followed by the lower courts within that system, and even by that supreme court itself.'" (second alteration in original) (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989))).

same level of scrutiny and applicable test.[143] A district court that states instead that it will employ rational basis review would likely be seen to have both committed legal error and disrespected the rules of vertical precedent.[144] And advocates follow suit, relying on the *text* of prior opinions to define legal standards and advance their arguments.[145]

As Peter Tiersma put it, "American opinions are very much 'written' law and . . . in determining the holding or ratio decidendi of a case, there is substantial emphasis on the court's exact words."[146] Indeed, "[i]t is no exaggeration to say that in this country, the common law consists of what judges *write* in their opinions. . . . As a consequence, legal reasoning is gradually being supplanted by close reading."[147]

A recent Supreme Court decision is illustrative. In *Ford Motor Co. v. Montana Eighth Judicial District Court*, the Court was faced with determining the contours of specific jurisdiction.[148] Prior cases had articulated the relevant test: "The plaintiff's claims . . . 'must arise out of or relate to the defendant's contacts' with the forum."[149] Because that test was phrased in the disjunctive (in other words, because it included the word "or"), the majority concluded that a claim that related to the defendant's contacts could satisfy the test, even if there was no proof of causation.[150] Accordingly, the exact words of the prior opinions mattered to the majority and warranted a close reading to clarify the legal rule.

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143. *See* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 764 (1988) ("What the Court said must include the Court's rule or standard. This constitutes the 'enactment force of precedent,' in Dworkin's phrase, or the 'precept,' in Pound's. This is the core of the precedent. The compelling state interest test in cases involving racial discrimination, or the obscenity criteria in first amendment case law, are examples." (footnotes omitted) (first quoting RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 111 (1978); and then quoting Roscoe Pound, *What of Stare Decisis?*, 10 FORDHAM L. REV. 1, 9-10 (1941))); *see also* GARNER ET AL., *supra* note 14, at 31.

144. *See* GARNER ET AL., *supra* note 14, at 60 ("When [the Supreme Court] picks through a menu of 8,000 to 9,000 cases, chooses the 75 or 80 that seem to be most significant, and devotes its full resources to the proper disposition of that tiny number of cases, it seems likely that the Court expects lower courts to respect its considered *expressions* of the law." (emphasis added)).

145. *See* Tiersma, *supra* note 34, at 1247 ("[M]ost [American] lawyers have come to think of a precedent as something to be found in the text of a majority opinion. In fact, for many American lawyers the text of the majority opinion seems to have become synonymous with the notion of precedent. The outcome of the case is almost an afterthought, something that matters only to the parties.").

146. *Id.*

147. *Id.* at 1188.

148. 141 S. Ct. 1017, 1024 (2021).

149. *Id.* at 1025 (quoting Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1780 (2017)).

150. *Id.* at 1026-27.

Moreover, as we have seen, scholars now commonly conceive of written appellate opinions as a positive source of written law or, at minimum, as having binding force beyond the disposition.[151] And scholarly discussion of—and theories about—interpretive methodological rules could often apply to judicial opinions much as they do to other legal texts. Take, for example, William Baude and Stephen E. Sachs's articulation of interpretive rules as intrinsically legal rather than linguistic. Their discussion of the ways in which interpretive canons for constitutions, statutes, and contracts serve uniquely legal goals—rather than striving for pure definitional accuracy or common understanding—could apply with equal force to the interpretation of judicial opinions.[152]

That is not to say that all legal texts should be treated precisely alike. In fact, the Supreme Court has cautioned that "the language of an opinion is not always to be parsed as though [the Court] were dealing with language of a statute."[153] But this idea, also known as the "not-statutes trope,"[154] appears largely aimed at discouraging a literalist approach to reading opinions—in essence, it counsels that courts should not read opinions acontextually.[155] Of course, that is not how most jurists read statutes either.[156] So the trope has

151. *See, e.g.*, Kozel, *supra* note 142, at 193-99; GARNER ET AL., *supra* note 14, at 23 ("Binding precedent is 'very powerful medicine.' If it's on point, it '*is* the law' and 'cannot be considered and cast aside,' even if a later court disagrees with it . . . ." (footnote omitted) (quoting Hart v. Massanari, 266 F.3d 1155, 1170-71 (9th Cir. 2001))); Frost, *supra* note 30, at 494 (noting "judicial decisions have the weight of law and are binding on all those who follow"); *see also* Tiersma, *supra* note 34 at 1247-48 (discussing mid-twentieth century scholarly assertions that the language of judicial opinions was not authoritative but noting that "even as these scholars were writing, the ground beneath them was starting to shift").

152. *See generally* Baude & Sachs, *supra* note 4 (arguing that the interpretation of legal instruments is not primarily linguistic or policy oriented but rather based on legal rules).

153. Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979). Justice Gorsuch has recently taken up this mantle in several concurrences. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2281 (2024) (Gorsuch, J., concurring) ("[I]t would be a mistake to read judicial opinions like statutes."); *Ford*, 141 S. Ct. at 1034 (Gorsuch, J., concurring in the judgment) (criticizing the majority for "pars[ing]" the words of prior opinions).

154. Lemos, *supra* note 15, at 6.

155. *Id.* at 9-13. Lemos's working paper on the not-statutes trope provides a detailed and convincing account of the ways in which courts use the trope to, among other things, provide themselves with greater leeway in interpreting precedent. *Id.* at 41 (describing the trope as a "get-out-of-stare-decisis-free card").

156. *See id.* at 40 ("The not-statutes trope evokes an image of statutory interpretation that is sometimes little more than caricature—a version of textualism that most textualists would reject."); *see also* Tara Leigh Grove, *Is Textualism at War with Statutory Precedent?*, 102 TEX. L. REV. 639, 651 (2024) ("Modern textualists insist that they are not 'literalists.' They do not simply look at the 'four corners' of a written document to divine statutory meaning." (footnote omitted) (first quoting ANTONIN SCALIA, A MATTER OF

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little to say about the appropriateness of developing any rules to guide interpretation of precedent; it simply counsels that to the extent we were to read statutes literally, we should not always do so with opinions.

And indeed, there may be reasons why different rules would apply to the interpretation of a statute than to the interpretation of a judicial opinion. The authors are different, the writing style is different, the institutional roles are different. Legislatures are theoretically capable of looking at a policy issue holistically and attempting to create a unified solution; courts, in contrast, are largely at the whim of evidence and arguments offered by the parties that happen to be before them and can only address issues piecemeal.[157] Statutes are also intended to set out governing rules, while judicial opinions include recitations of fact and context.[158]

But these differences are perhaps not as significant as they may seem at first.[159] Statutes often include precatory remarks and factual background,[160] while modern courts often articulate rules that resemble legislation.[161] Moreover, contracts do not share many of the features discussed above with statutes, but no one questions that interpretive rules might assist in resolving ambiguities in those texts just as they do for statutes. And, in fact, there is reason to believe that modern judicial opinions might be *more* receptive to close reading (and the interpretive demands that it entails) than statutes or contracts: Appellate judges tend to craft their opinions with care, they are likely aware of interpretive canons when they write, and they often write with the specific goal of creating workable and articulable rules for lower courts and future litigants.[162]

INTERPRETATION: FEDERAL COURTS AND THE LAW 24 (1997); and then quoting John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 696 (1997))). *But see* Lemos, *supra* note 15 at 41 ("Perhaps Justice Gorsuch . . . thinks statutory language should be parsed acontextually, but it seems doubtful he would describe his methodology that way").

157. *See* Lemos, *supra* note 15, at 4. *But see generally* Frost, *supra* note 30 (arguing that courts can and often do address issues not presented by the parties).

158. Lemos, *supra* note 15, at 4.

159. *See id.* at 17-29; *see also* Llewellyn, *supra* note 76, at 399 (discussing parallels between the court's role in interpreting precedent and statutes).

160. *See* Lemos, *supra* note 15, at 3.

161. *See* Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1455 (1995); Vermeule, *supra* note 29, at 1321-22.

162. *See* Lemos, *supra* note 15, at 17-22; *see also* Vermeule, *supra* note 29, at 1320 ("Federal judges engage in at least some uncontroversial authorized rulemaking, and when they do so, an interpretive strategy suitable to texts enacted by legislators should suit judicially enacted rules as well. And intentionalism, as a general approach to interpretive questions, could also be applied in the ordinary way to texts (such as judicial opinions) that themselves constitute authorized acts of interpretation . . . .").

Regardless, the point here is not that the rules should be the *same* for statutes, contracts, and judicial opinions; what is interesting is the absence of *some* set of interpretive rules for precedent. Nothing about the nature of judicial opinions exempts them from interpretation—and in fact courts devote substantial time to that endeavor—so it's worth asking why we don't have clear rules to govern the interpretive process.

In sum, for canons of precedential interpretation, the judicial and scholarly canvas is by no means rich—a surprise, given the ample exploration of interpretive canons in the context of other legal texts. Part II sketches out some potential canons of precedential interpretation, while Part III explores the reasons for this underdevelopment and questions whether identifying and applying interpretive canons in this context would serve institutional goals.

II. Searching for Canons of Precedential Interpretation

A. Defining the Endeavor

The concept of an "interpretive canon" can be defined in several ways.[163] These definitions essentially boil down to the idea that a canon is a rule of thumb, or a "background presumption about the legal system that is used to resolve uncertainty in interpretation."[164] Canons might address issues like grammatical ambiguity, background presumptions about the drafter's intent and deliberateness, the scope of materials and context to be considered, and underlying normative assumptions.[165]

But how exactly an interpretive rule of thumb arrives at "canon" status is not entirely clear.[166] Some scholars define the concept more broadly,[167] while

163. *See supra* Part I.B.1.

164. Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 320 (1990).

165. *See supra* note 29 and accompanying text; *see also* Eidelson & Stephenson, *supra* note 66, at 534-37 (outlining four basic ways that canons can dictate meaning: (1) resolving the "communicative content [that] . . . a reasonable reader would take a statute to convey"; (2) providing contextual information about purpose that can resolve textual ambiguity; (3) establishing claims about drafter intent; and (4) prescribing "superimposed values").

166. *Cf.* Zoldan, *supra* note 9, at 630 ("While all canons are interpretive principles, . . . not every interpretive principle can be considered a canon.").

167. Kramer, *supra* note 164, at 320 ("[A]ny interpretive norm that courts rely on to resolve ambiguity is a 'canon.'"); Krishnakumar & Nourse, *supra* note 6, at 168, 174-75 (characterizing—and criticizing as too broad—Eskridge's implicit definition of "canon" as "any judicial principle or method of reasoning that the Supreme Court can use, should use, or has used (even once)").

others advocate a narrower approach.[168] What is clear is that there is no universally accepted method for identifying a canon—even in the well-studied context of canons of statutory interpretation.[169]

So how should we proceed to identify potential canons in the context of precedential interpretation? In the statutory context, some scholars have suggested looking exclusively to Supreme Court practice.[170] That might not work in this context because the Supreme Court is bound only by the weaker, horizontal form of precedent.[171] We therefore cannot look solely to the Supreme Court to articulate a comprehensive account of the interpretive rules of thumb that might apply to inferior courts attempting to abide by binding vertical precedent.[172]

Evan Zoldan recently suggested a more flexible test, proposing three criteria for "spotting" a canon.[173] In his view, an interpretive principle or maxim should be considered a canon only if it (1) is used by legal interpreters, (2) can affect the interpretive outcome, and (3) is supported by a claim of theoretical justification.[174] These criteria seem largely sensible and potentially feasible in this context. Accordingly, one way we might identify canons of precedential interpretation is to survey federal appellate case law, looking for interpretive rules that satisfy the above criteria.[175]

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168. Zoldan, *supra* note 9, at 630 (suggesting that "pervasiveness, antiquity, intuitive appeal, or other factors" might confer canon status (footnotes omitted)).

169. As Eskridge put it, there is "no canonical collection of valid canons." William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 544 (2013) (reviewing SCALIA & GARNER, *supra* note 1); *see also* Krishnakumar & Nourse, *supra* note 6, at 168 (discussing the obstacles to identifying canons "in a universe in which no established consensus exists regarding the criteria for achieving canon status"). Eskridge's proposed canons number in the hundreds, while Justice Scalia and Bryan Garner's collection lists a mere fifty-seven. Zoldan, *supra* note 9, at 649.

170. *See, e.g.*, Krishnakumar & Nourse, *supra* note 6, at 189 ("[T]he ultimate test of a canon . . . reflects the agreement of Supreme Court Justices appointed by different parties and across ideological divides." (emphasis omitted)).

171. *See* Grove, *supra* note 156, at 647-48 (examining the relationship between textualism and statutory precedent with a particular focus on the Supreme Court, in which "precedent of any kind exerts less force").

172. *See* Zoldan, *supra* note 9, at 654 ("With different institutional constraints, lower courts are apt to take the canons more seriously than the Supreme Court."); Bruhl, *supra* note 77, at 106 ("Whatever the precedential status of interpretive methodology at the Supreme Court, the Court is generally the worst place to look for any kind of precedent.").

173. Zoldan, *supra* note 9, at 652.

174. *Id.*; *cf.* Shapiro, *supra* note 8, at 928-29 ("Many maxims or guides to interpretation are simply efforts to articulate approaches that are frequently applied without discussion or controversy.").

175. District court case law would be useful too, but it commands less weight and expands the field of inquiry dramatically. State courts might also articulate and apply different

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But recall that a unique feature of precedential interpretation is that judges are rarely explicit about *how* they go about doing it or which rules govern the inquiry.[176] For that reason, simply surveying case law for cleanly articulated maxims is unlikely to get us very far. It might give us the basics, but it likely will not answer more subtle questions about how to interpret textual ambiguities and whether to apply presumptions as to the drafting process or normative values. As an alternative, therefore, I propose considering whether courts might be implicitly applying analogues to existing statutory or contractual canons that do address those issues—and whether they could or should be.

The inquiry in this Part therefore proceeds along two axes.[177] First, I consider whether certain maxims do appear to be consistently invoked by federal appellate judges in their efforts to determine the scope and applicability of precedent.[178] These maxims may already be operating background presumptions, albeit without widespread acknowledgment—in other words, they may be "undercover canons."[179] Second, I consider whether we might

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canons of precedential interpretation and could even serve as a model for development of canons in the federal context—a promising area for future work. Zoldan suggests using all these sources (and administrative decisions) at once, but that both greatly expands the body of law to be surveyed and risks capturing idiosyncrasies that do not reflect more general practice. *See* Zoldan, *supra* note 9, at 654-55.

176. *See supra* Part I.C; Abramowicz & Stearns, *supra* note 122, at 958 ("Courts themselves have not filled the theoretical void, and so the American judicial system lacks clearly defined rules on an important aspect of the process through which judges resolve cases and make law.").

177. One other note about the scope of the inquiry here. This Article is not primarily concerned with questions of horizontal precedent, such as rules about whether or when existing precedent can be overruled. That question, as noted above, has already garnered significant scholarly, judicial, and public attention. Nor is it concerned about the persuasive value of nonbinding sources or law, such as advisory opinions or the decisions of international courts. Finally, I set aside for the moment specific instances in which precedent can be unusually binding, such as the law of the case or res judicata. Instead, this Article is concerned with the simplest and most common scenario: a district court trying to interpret a potentially relevant federal appellate decision, or an appellate court trying to interpret a potentially relevant Supreme Court decision.

178. Garner's 2016 treatise, *The Law of Judicial Precedent*, suggests that this should be a fruitful inquiry. *See generally* GARNER ET AL., *supra* note 14. The treatise was a collaborative project among twelve well-known judges—including two current Supreme Court Justices—and arrives at some consensus as to the existence of certain rules, even if those rules are not always identified or consistently articulated. *See* Watford et al., *supra* note 43, at 543 & n.2, 544 (explaining that the co-authors "worked together on the entire treatise to speak with one voice in an effort to bring unprecedented cohesion to the law of judicial precedent").

179. This analysis is not intended to provide an exhaustive catalogue of all potential canons as articulated by federal appellate courts. Instead, it looks simply at some frequently cited maxims about precedential interpretation and considers whether those rules play similar roles in arriving at legal meaning as the more recognized canons of statutory or

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identify other "canon candidates" through analogy to existing canons of statutory and contractual interpretation. Some of these rules may already be operating silently in the background. And to the extent that they are inconsistently applied or simply unascertained, these canons may be truly "missing"—but potentially useful, if developed.[180]

B. Undercover Canons from Existing Practices

Interpreting precedent is a multifaceted endeavor. But much of a court's interpretive efforts in this regard can be distilled into two questions: (1) which portions of an existing opinion are binding,[181] and (2) whether an existing case is materially similar to or distinguishable from the instant case.[182]

Each of those questions requires significant interpretive work to answer. And, depending on the circumstances, judges must exercise various "degree[s] of judgment" in reaching their conclusions.[183] That discretion could be relatively unbounded, as some scholars lament, but it could also be hemmed in—or at least dressed up—by rules that help judges resolve uncertainty about the nature and implications of the existing text.[184]

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contractual interpretation—in other words, whether they might already be operating, to some extent, as canons of precedential interpretation.

180. This, I think, may be the more innovative and useful inquiry. As discussed above, courts are disinclined to discuss precedential interpretation in the same standardized terms—and with the same rigor and depth—that they apply to statutory and contractual interpretation. Accordingly, looking for unexpressed canons that may be operating in the background to fill in assumptions about meaning, intent, and normative goals may be both more fruitful and more conceptually interesting.

181. In discussing the line between binding and nonbinding portions of an opinion, courts and scholars frequently refer to the distinction between "holding" and "dicta." But that line is blurry at best. *See* Abramowicz & Stearns, *supra* note 122, at 957-59. Moreover, it fails to account for the practical reality that courts and advocates frequently cite, discuss, and rely on statements from prior opinions that are clearly dicta. *See, e.g.*, Barapind v. Enomoto, 400 F.3d 744, 750-51 (9th Cir. 2005) (en banc) (per curiam) (discussing the significance of dicta in establishing the "law of the circuit"); *see also* Leval, *supra* note 141, at 1250 (lamenting the increasing reliance on dicta in the federal courts).

182. *See* Abramowicz & Stearns, *supra* note 122, at 980 (noting that the practice of distinguishing cases "is the standard fare of judging"); Watford et al., *supra* note 43, at 557 ("[T]he extent to which an earlier decision is 'on point' determines in large part whether the decision is precedent for a particular case and, if so, how much weight it should be afforded.").

183. *See* GARNER ET AL., *supra* note 14, at 61.

184. *See* Abramowicz & Stearns, *supra* note 122, at 958-59 (noting that, in borderline cases, "conceptual uncertainties that result from a lack of rigor in categorizing holding and dicta give rise to the greatest practical difficulties"); *cf.* Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1246-47 (2015) (explaining that "shared background presuppositions regarding application and nonapplication can frame or limit a statute's meaning").

This Part surveys federal appellate decisions to identify some existing interpretive rules of thumb, with a particular emphasis on rules that might assist with discerning binding from nonbinding and "on point" from distinguishable.[185]

1. General expressions must be interpreted in connection with the facts of the underlying case

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used."[186] This is probably the closest we will get to a rule for interpreting precedent that satisfies almost everyone's definition of a canon. It was endorsed by the Supreme Court in the early 1800s,[187] and it has since been cited by other courts over 500 times, including by the Tenth Circuit as recently as 2023.[188]

This rule can affect the ultimate interpretive outcome. Indeed, the basic rule invites the practice of "distinguishing" cases based on their facts by sanctioning reference to the context in which an opinion advances a general proposition of law. Where the underlying context differs significantly from the circumstances at hand, the precedent may not be on point.[189]

It also has theoretical justifications. Although cases may articulate broad rules, the prohibition on advisory opinions at least intuitively precludes those rules from being entirely untethered from the factual circumstances in which they arose.[190] This rule therefore meets Zoldan's canon criteria, as well as the more stringent criteria of scholars who require Supreme Court endorsement to achieve canon status.[191]

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185. The work of this Subpart draws on, but is distinct from, Garner's *Law of Judicial Precedent*. GARNER ET AL., *supra* note 14. His survey is much broader and includes more procedural rules like hierarchy of authority, law of the case, and criteria for en banc review. Moreover, some of the canons I propose from case law are subsumed by Garner's discussion but not fully explored, articulated, or identified within it. That makes sense because the treatise was intended not as a work of scholarship, but "as a practice guide for working lawyers and judges." Watford et al., *supra* note 43, at 544.

186. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821).

187. *Id.*

188. Santucci v. Commandant, 66 F.4th 844, 862 (10th Cir. 2023); *see also* United States v. Rubin, 609 F.2d 51, 69 n.2 (2d Cir. 1979) (Friendly, J., concurring) (referring to this rule as "long established"). A recent Westlaw search indicates that the headnote for this proposition has been cited in 543 cases.

189. *See Santucci*, 66 F.4th at 862-63 (rejecting appellant's argument that several prior cases established a "broad rule" as to the duty of Article III courts to review military tribunals by "read[ing those cases] carefully and within their respective contexts").

190. *See generally* Muskrat v. United States, 219 U.S. 346 (1911) (prohibiting federal courts from hearing cases and issuing opinions absent a true case or controversy).

191. *See supra* notes 170-75 and accompanying text.

Perhaps unsurprisingly, however, this rule arguably creates as many questions as it answers. Just how much does context matter? And where can we glean this context—solely from the four corners of the opinion, or from sources outside the text? Moreover, of all the facts of the underlying case, which are *material* and why? Finally, how do we square this rule with "the courts' practice of establishing doctrinal frameworks, which by their very nature extend beyond the facts of a given case"?[192]

None of this undermines this rule's potentially canonical status. Venerated canons of statutory and contractual interpretation similarly invite a cascade of further inquiry.[193] The canon of statutory and contractual interpretation that suggests words should be afforded their ordinary meaning unless context indicates they bear a technical meaning is an excellent example.[194] Despite the fact that the canon often invites more questions than it answers, it is often the starting place for interpretation of the relevant texts.[195] So too here.

2. An opinion's identification of its own holding is not dispositive

"A judge's power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waiving a wand and uttering the word 'hold.'"[196] Accordingly, even when an existing opinion explicitly identifies a statement as its holding, future courts can disregard that characterization.[197]

This rule, while somewhat counterintuitive, is invoked with some consistency.[198] On its face, it affects precedential interpretation, allowing legal interpreters to depart from the unambiguous text of the opinion. And it has some theoretical underpinnings—mainly that a panel of judges should not be able to transform a statement into binding precedent absent underlying facts

192. *See* GARNER ET AL., *supra* note 14, at 82.

193. SCALIA & GARNER, *supra* note 1, at 59-62 (explaining that the fact that a rule does not always generate a single result, or even general consistency, does not undermine its status or usefulness as a canon).

194. *See id.* at 69-77.

195. *See, e.g.*, Artis v. District of Columbia, 138 S. Ct. 594, 603 (2018) ("In determining the meaning of a statutory provision, 'we look first to its language, giving the words used their ordinary meaning.'" (quoting Moskal v. United States, 498 U.S. 103, 108 (1990))); Midwest Med. Sols., LLC v. Exactech U.S., Inc., 21 F.4th 1002, 1005 (8th Cir. 2021) ("Where the parties to a contract 'express their intent in unambiguous words, those words are to be given their plain and ordinary meaning.'" (quoting Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc., 666 N.W.2d 320, 323 (Minn. 2003))).

196. United States v. Rubin, 609 F.2d 51, 69 n.2 (2d Cir. 1979) (Friendly, J., concurring).

197. *See* Freed v. Thomas, 976 F.3d 729, 738 (6th Cir. 2020) ("[J]ust because a court presents a statement as an alternative holding does not necessarily mean that the statement is entitled to adherence as binding precedent."). Modern courts have increasingly attempted to define their own holdings. *See* Tiersma, *supra* note 34, at 1248-57.

198. *E.g.*, *Freed*, 976 F.3d at 738; United States v. Files, 63 F.4th 920, 926 (11th Cir. 2023).

that necessitate (or at least invite) resolution of that legal question.[199] In other words, judges shouldn't be able, through a simple turn of phrase, to expand their own ability to create precedent.

One interesting thing about this rule is what it says, implicitly, about the relative unimportance of drafter intent when interpreting precedent. It suggests that—at least as to the line between holdings and dicta—even clearly expressed drafter intent is by no means paramount. This rule thus departs from the underlying presumptions we apply in the statutory and contractual contexts, in which drafter intent, particularly when clearly expressed in the text, often bears significant weight in the analysis.[200] It also suggests that this rule, if conceptualized as a canon, is likely a substantive one.

Recent events may bring this rule to the forefront. In March 2024, the Supreme Court ruled that Colorado could not invoke Section 3 of the Fourteenth Amendment to exclude Donald Trump from the presidential ballot.[201] That decision was unanimous. But the per curiam decision went further, "opin[ing] on which federal actors can enforce Section 3, and how they must do so."[202] Four Justices concurred only in the portions of the opinion addressing the power of the States to enforce the provision—the precise question presented by the case—noting that the remainder of the opinion was at minimum unnecessary and perhaps even inappropriate.[203] But the majority insisted that its other observations regarding federal actors were essential: "[I]t is the combination of all the reasons set forth in this opinion—not, as some of our colleagues would have it, just one particular rationale—that resolves this

199. *See* GARNER ET AL., *supra* note 14, at 133-35 (discussing the nonbinding nature of judicial resolution of hypothetical questions).

200. *See* Gluck, *supra* note 29, at 793; Goldsworthy, *supra* note 75, at 1551-53 (discussing the role of legislative intent even in approaches that purport not to consider it); Gregory Klass, Interpretation and Construction in Contract Law 1 (Jan. 2018) (unpublished manuscript), https://perma.cc/SA5B-BPZ8. On the other hand, the rule against allowing the authoring court to define the holding arguably dovetails with the nonentrenchment or repealability canon, which provides that "[t]he legislature cannot derogate from its own authority or the authority of its successors." SCALIA & GARNER, *supra* note 1, at 278. That canon limits the legislature's power to constrain a future legislature's ability to repeal or alter a statute's requirements. Similarly, the rule against an authoring court conclusively defining its own holding is a rule that prevents one panel of judges from derogating the authority of later panels.

201. Trump v. Anderson, 144 S. Ct. 662, 664-65 (2024) (per curiam).

202. *Id.* at 672 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment).

203. *Id.* at 671 (Barrett, J., concurring in part and concurring in the judgment) (explaining that the principle that States cannot enforce Section 3 against presidential candidates "is sufficient to resolve this case, and [she] would decide no more than that"); *id.* at 672 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment) ("We cannot join an opinion that decides momentous and difficult issues unnecessarily, and we therefore concur only in the judgment.").

case."[204] According to the majority, "each of these reasons [was] necessary to provide a complete explanation for the judgment the Court unanimously reache[d]."[205] In other words, the majority attempted to do precisely what this canon would say it cannot: prospectively define and extend its holding beyond the narrow scope of the question presented and necessarily decided. Whether future courts will yield to the majority's efforts may depend on the extent to which they recognize and respect this potential canon of precedential interpretation.[206]

It also remains to be seen whether drafter intent carries more weight as to other concerns apart from designating the holding. For example, appellate courts sometimes carve out exceptions to which they do not intend the rule they articulate to apply.[207] Or an opinion might state explicitly that the rule it articulates is intended to be construed narrowly.[208] How well do these pronouncements fare? They should perhaps fare better, since the theoretical concern about a judge expanding his own authority to create precedent isn't really at play. But Garner suggests that a court cannot in fact limit the precedential scope of its opinion.[209] And the case law does not reveal any consistently articulated rules of thumb as to these issues.

The concern about whether to afford deference to drafter intent in *limiting* the scope of a precedent is a salient one. In overruling its precedent establishing a right to abortion, the Supreme Court explicitly attempted to cabin its

204. *Id.* at 671 (per curiam).

205. *Id.*

206. In the short term, lower courts may defer to the majority's discussion of federal actors because—even if dicta—that discussion may be strongly predictive of the Court's decision in a case squarely presenting the issue. *See generally* Caminker, *supra* note 31, at 16-22 (discussing tendency of lower courts to attempt to predict the higher court's view of an issue). But as the composition of the Court changes, the question of whether those portions of the opinion are in fact binding may become more salient.

207. *See, e.g.*, Martinez v. Ryan, 566 U.S. 1, 16 (2012) (recognizing that ineffective assistance in an initial state postconviction proceeding can excuse procedural default, but noting that rule "does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons").

208. *See, e.g.*, Vidal v. Elster, 144 S. Ct. 1507, 1524 (2024); *see also id.* at 1540 (Sotomayor, J., concurring in the judgment) (emphasizing the narrowness of the majority's opinion and that "nothing in today's opinion calls into question the constitutionality of viewpoint-neutral provisions lacking a historical pedigree"); United States v. Rivera-Constantino, 798 F.3d 900, 906 n.4 (9th Cir. 2015) ("We emphasize that our holding is a narrow one.").

209. GARNER ET AL., *supra* note 14, at 132 ("[A] court cannot really spay its decision so that it will forever have no progeny."). But only a single citation—from a dissenting opinion—is offered in support of that assertion. *Id.* at 132 n.10 (citing Haddock v. Haddock, 201 U.S. 562, 631 (1906) (Holmes, J., dissenting)).

holding: "[W]e emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."[210] What deference, if any, do future courts owe to those statements?[211] Better-developed canons of precedential interpretation could help answer that question.[212]

3. Alternative holdings are binding

"Where a court makes alternative holdings to support its decision, each holding is binding precedent."[213] Courts invoke this concept with surprising frequency, and it appears across many jurisdictions.[214]

Yet this rule may be somewhat surprising given the discussion above. If a court cannot designate a certain portion of its opinion to be the holding, why

210. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2277-78 (2022); *see also Vidal*, 144 S. Ct. at 1524 (answering the narrow question as to a specific trademark rule based on history and tradition but declining to clarify the legal framework for evaluating content-based, viewpoint-neutral trademark rules going forward).

211. *See generally* Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1769-72 (2013) (illustrating the difficulty of cabining a decision's future precedential effects).

212. *See* Baude & Sachs, *supra* note 4, at 1091-92 ("There may be good reasons for a legal system to prefer one set of meanings to another. The authors are supposed to lay down rules and tell us what they are—so maybe their communicative intentions are what matter. Or maybe enforcing those hard-to-find intentions would make the law unpredictable or arbitrary, holding the audience responsible for things they shouldn't be expected to know. As we've each argued in prior work, different societies might make those choices differently, whether or not they agree with your favorite theory of meaning. But no matter how sensible or silly a society's choices, they're choices made as a matter of *law*, and not as a matter of *language*." (footnotes omitted)).

213. United States v. Ford, 703 F.3d 708, 711 n.2 (4th Cir. 2013); *see also* Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*."); Mejia-Alvarenga v. Garland, 95 F.4th 319, 326 n.2 (5th Cir. 2024) ("Alternative holdings are not dicta and are binding in this circuit.").

214. *E.g.*, *In re* Vista-Pro Auto., LLC, 109 F.4th 438, 442 (6th Cir. 2024), *petition for cert. filed*, No. 24-808 (U.S. Jan. 30, 2025); Leachco, Inc. v. Consumer Prod. Safety Comm'n, 103 F.4th 748, 754-55 (10th Cir. 2024), *cert. denied*, No. 24-156, 2025 WL 76435 (U.S. Jan. 13, 2025); United States v. Files, 63 F.4th 920, 926 (11th Cir. 2023); United States v. Wallace, 964 F.3d 386, 390 (5th Cir. 2020); United States v. Fulks, 454 F.3d 410, 434-35 (4th Cir. 2006); Whetsel v. Network Prop. Servs., LLC, 246 F.3d 897, 903 (7th Cir. 2001); Brazzell v. United States, 788 F.2d 1352, 1357 n.4 (8th Cir. 1986). *But see* Paxton v. Commonwealth, 898 S.E.2d 418, 427 (Va. Ct. App. 2024), *appeal granted*, No. 240326 (Va. Sept. 10, 2024) ("When an 'alternative justification for [a] ruling [is] unnecessary to the holding, . . . it is dicta.'" (alterations in original) (quoting Lofton Ridge, L.L.C. v. Norfolk S. Ry., 601 S.E.2d 648, 651 (Va. 2004))).

should it be able to multiply its precedential impact simply by reasoning in the alternative or resolving more issues than necessary to decide the case?[215]

The answer may be more practical than anything else. In the case of alternative holdings, a later court cannot discern which, if either, of the conclusions was more important—in other words, it cannot make anything more than a guess about which rationale the authoring court would have chosen, if forced to do so, as its sole reasoning. While some courts have looked for indications that the authoring court "actively *applied*" both conclusions in reaching its decision[216] or suggested that the first holding might be the primary one,[217] most simply accept both alternative holdings as binding.[218]

Note that we have jumped ahead to discussing alternative holdings before we have identified rules that clearly define the concepts of "holding" and "dicta." That is not unintentional.

The problem is that courts have not clearly defined these core concepts.[219] Some courts define the holding strictly as only the portions of the opinion that are logically necessary to reach the outcome.[220] Others adhere to the so-called "loose doctrine of precedent," in which resolution of any issue fully argued and adjudicated is binding, regardless of its logical necessity to the disposition reached.[221] Still others take a middle approach, in which individual advocates and judges have discretion to determine the appropriate boundaries.[222] And courts continue to struggle with this question.[223]

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215. *See* Freed v. Thomas, 976 F.3d 729, 738 (6th Cir. 2020) (recognizing this tension).

216. Wright v. Spaulding, 939 F.3d 695, 701 (6th Cir. 2019); *see also In re Vista-Pro Auto., LLC*, 109 F.4th at 442 (applying that standard).

217. State v. Lujan, 634 S.W.3d 862, 877 (Tex. Crim. App. 2021) (Keller, P.J., dissenting).

218. *See supra* note 214.

219. *See* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2003 (1994) ("[N]o universal agreement exists as to how to measure the scope of judicial holdings. Consequently, neither is there agreement as to how to distinguish between holdings and dicta." (footnote omitted)); *see, e.g.*, *Freed*, 976 F.3d at 738 ("What separates holding from dictum is better seen as a zone, within which no confident determination can be made whether the proposition should be considered holding or dictum." (quoting Leval, *supra* note 141, at 1258)).

220. GARNER ET AL., *supra* note 14, at 116.

221. *Id.* Garner suggests that this is the better view. *Id.* at 129.

222. *Id.* at 116.

223. As recently as 2023, the Eleventh Circuit struggled mightily to define its own understanding of the holding/dicta distinction, relying on Garner's treatise and other sources to explore the concept but ultimately failing to arrive at an articulable definition. *See* United States v. Files, 63 F.4th 920, 926-30 (11th Cir. 2023). In 2019, the Sixth Circuit attempted to "distill some working principles" about the holding/dicta distinction, arriving at a three-part test requiring that for an issue decided to constitute the holding, it "must contribute to the judgment," it must be clear the court "actively *applied* the conclusion to the case in front of it," and it must be clear the court

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Consequently, as to the precise definition of a holding—perhaps the key practical inquiry in precedential analysis—the case law offers no consistent answers.[224] This is an area, then, like the discussion of drafter intent above, where analogy to existing statutory and contractual canons might aid the development of rules of thumb for precedent.

4. Dicta can be binding or near binding, especially if it is well considered, recent, and from the Supreme Court

Several federal appellate courts have held that inferior federal courts "are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when . . . [the dicta] is of recent vintage and not enfeebled by any [later] statement."[225] Other courts have taken a gentler approach, declining to consider themselves "bound" by Supreme Court dicta but still affording it significant deference.[226]

The Ninth Circuit takes things further. It is bound by what others would call its own "dicta"—both from en banc and three-judge panels—when the panel "confronts an issue germane to the eventual resolution of the case, and

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"considered the issue and consciously reached a conclusion about it." Wright v. Spaulding, 939 F.3d 695, 701-02 (6th Cir. 2019).

224. *See supra* notes 219-23 and accompanying text; *see also* Stein v. Kaiser Found. Health Plan, Inc., 115 F.4th 1244, 1247-54 (9th Cir. 2024) (Forrest, J., concurring) (critiquing the Ninth Circuit's different approach to the holding/dicta distinction); Abramowicz & Stearns, *supra* note 122, at 959 (describing the difficulty in developing satisfying definitions).

225. Jones v. St. Paul Cos., 495 F.3d 888, 893 (8th Cir. 2007) (quoting City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554, 557 (8th Cir. 1993)) (alterations in original); *see also* EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 978 F.3d 418, 436 (6th Cir. 2020), *abrogated on other grounds by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Gaylor v. United States, 74 F.3d 214, 217 (10th Cir. 1996); Kozel, *supra* note 142, at 198-99 ("Supreme Court dicta receive substantial, and sometimes controlling, deference in the lower courts.").

226. *See, e.g.*, Off. Comm. of Unsecured Creditors of Cybergenics Corp. *ex rel.* Cybergenics Corp. v. Chinery, 330 F.3d 548, 561 (3d Cir. 2003) (en banc) ("Although the Committee is doubtless correct that the Supreme Court's dicta are not binding on us, we do not view it lightly. . . . '[W]e should not idly ignore considered statements the Supreme Court makes in dicta.'" (alteration in original) (quoting *In re* McDonald, 205 F.3d 606, 612 (3d Cir. 2000))); United States v. Montero-Camargo, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (en banc) ("We do not treat considered dicta from the Supreme Court lightly. Rather, we accord it appropriate deference. As we have frequently acknowledged, Supreme Court dicta 'have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold'; accordingly, we do 'not blandly shrug them off because they were not a holding.'" (citation omitted) (quoting Zal v. Steppe, 968 F.2d 924, 935 (9th Cir. 1992) (Noonan, J., concurring in the result in part and dissenting in part))); Nichol v. Pullman Standard, Inc., 889 F.2d 115, 120 n.8 (7th Cir. 1989) ("This Court should respect considered Supreme Court dicta."); *see also* Watford et al., *supra* note 43, at 576 & n.106 (discussing the power of dicta in influencing lower court decisions).

resolves it after reasoned consideration in a published opinion."[227] Under those circumstances, the ruling on that issue "becomes the law of the circuit, regardless of whether" resolution of the issue was "necessary in some strict logical sense."[228] Whether we call this "binding dicta" or whether we simply view the Ninth Circuit as having a more expansive view of the concept of a "holding," the practical implication is the same.[229] And these distinctions can be outcome-determinative.[230]

Accordingly, the binding or near-binding nature of some dicta makes clear that the text of a judicial opinion can hold far greater sway than merely the narrow scope of the disposition—or even the necessary "reasonings"—contained therein.[231] This, in turn, suggests that rules attempting to delineate holding from dicta (even if they could sharpen that fuzzy line) may not be sufficient to solve all of the interpretive problems that judicial opinions present.[232]

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227. United States v. Johnson, 256 F.3d 895, 914 (9th Cir. 2001) (en banc) (opinion by Kozinski, J.).

228. *Id.*; *see also* Barapind v. Enomoto, 400 F.3d 744, 750-51 (9th Cir. 2005) (en banc) (per curiam).

229. *See* Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. CHI. L. REV. 1551, 1554, 1567-74 (2020) (explaining that the Ninth Circuit has adopted a broader definition of "holding," which the article dubs the "adjudicative model").

230. *See id.* at 1574 ("Several [Ninth Circuit] judges said they could remember cases where their view of an issue had turned on the circuit's broad definition of a holding. Indeed, without going into specifics, two judges said they had pending cases that were like this." (footnote omitted)). The Ninth Circuit's somewhat unusual approach is not without its detractors. *See, e.g.*, Stein v. Kaiser Found. Health Plan, Inc., 115 F.4th 1244, 1252-53 (9th Cir. 2024) (Forrest, J., concurring) (contrasting the Ninth Circuit's approach with that of other circuits and asserting that the more expansive conception of "holding" violates Article III of the Constitution).

231. *See* GARNER ET AL., *supra* note 14, at 25 (acknowledging that an opinion's "reasonings" have "gravitational force"). *But see* SCALIA & GARNER, *supra* note 1, at 42 (asserting that precedent consists only of the disposition of an opinion, not the text or statements contained therein). Even the Supreme Court can be swayed by its own dicta. *See, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2165-66 (2023) (relying on dicta from *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003), suggesting that affirmative action would no longer be necessary in twenty-five years); *id.* at 2222 (Kavanaugh, J., concurring); *see also* Abramowicz & Stearns, *supra* note 122, at 1092-93 (discussing the twenty-five-years statement in *Grutter* and explaining why it should be characterized as dicta).

232. Plurality decisions pose an additional wrinkle. And in a world with few consistently articulated directives about precedent, the Supreme Court's guidance on that issue—the (in)famous *Marks* rule—deserves mention. In *Marks v. United States*, the Court explained that when no opinion garners a majority, the "holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)). The rule has spawned decades of confusion and criticism (indeed, the Supreme Court granted certiorari to reconsider it but resolved

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5. Unnecessary assumptions are not binding

Even in jurisdictions that adhere to a looser definition of precedent, conclusions that are both unconsidered (assumptions) and unnecessary lack binding force. In other words, "cases are not precedential for propositions not considered."[233] Where courts appear to implicitly accept a proposition but fail to "squarely address" or "discuss" it, the proposition likely carries less precedential force—especially if it was unnecessary to the disposition.[234]

But what about logically necessary assumptions? Here, approaches diverge. Recall the example from the introduction. In *Farmer*, a federal prisoner filed a *Bivens* claim[235] asserting that prison officials had been deliberately indifferent to the prisoner's safety.[236] The lower court granted summary judgment to the defendants, concluding that the prisoner's claim failed as a matter of law because the prisoners had not reported their safety concerns to prison officials before the incident at issue, so the officials lacked actual knowledge of the risk.[237] The Supreme Court reversed, concluding that failure to provide notice is not dispositive of actual knowledge, so the lower court applied the wrong

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that case on different grounds) and thus is perhaps not a great candidate for canon status. *See* Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1942, 1943-45 (2019); Hughes v. United States, 138 S. Ct. 1765, 1772 (2018). But the checkered legacy of the *Marks* rule illustrates two key points relevant to the inquiry here. First, appellate courts can create rules about precedent if they want to do so, and lower courts appear to deem themselves bound by those rules—for better or worse. Second, the failure of the *Marks* rule illuminates our current inability to consistently interpret individual opinions in a granular way. *See generally* Williams, *supra* note 140 (discussing the inception and pitfalls of the *Marks* rule).

233. Garcia v. Gateway Hotel L.P., 82 F.4th 750, 760 n.3 (9th Cir. 2023) (quoting United States v. Pepe, 895 F.3d 679, 688 (9th Cir. 2018)).

234. United States v. Kirilyuk, 29 F.4th 1128, 1134 (9th Cir. 2022) (quoting Brecht v. Abrahamson, 507 U.S. 619, 631 (1993)); United States v. Ped, 943 F.3d 427, 433-34 (9th Cir. 2019); *see also* United States v. Campbell, 22 F.4th 438, 448 (4th Cir. 2022) ("At best for the government, the issues before us today 'merely lurk in the record' of [the cases cited by the government], 'neither brought to the attention of the court nor ruled upon[.]' As we recently reiterated, such cases 'are not to be considered as having been so decided as to constitute precedents.'" (second alteration in original) (citation omitted) (quoting Richardson v. Kornegay, 3 F.4th 687, 706 n.13 (4th Cir. 2021))).

235. Implied causes of action against federal officials for certain constitutional violations are recognized in certain circumstances under a line of case law starting with *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *See* Bistrian v. Levi, 912 F.3d 79, 88 (3d Cir. 2018), *abrogated by* Egbert v. Boule, 142 S. Ct. 1793 (2022), *as recognized in* Fisher v. Hollingsworth, 115 F.4th 197 (3d Cir. 2024); *see also* Bulger v. Hurwitz, 62 F.4th 127, 135-36 (4th Cir. 2023).

236. Farmer v. Brennan, 511 U.S. 825, 830-31 (1994).

237. *Id.* at 831-32.

legal standard.[238] The Court remanded for further proceedings, which it suggested would entail additional factual development and findings.[239]

Years later, several circuit courts faced a related issue: Was the sort of claim the prisoner had brought in *Farmer* even cognizable as a *Bivens* claim at all? The Supreme Court had clearly assumed that it was; otherwise, remand, along with the Court's expressed expectation of possible discovery and further factual findings, would have made no sense. But the Court hadn't explicitly considered the issue. So, did *Farmer* recognize the viability of a *Bivens* claim this context?

The Third Circuit said yes. The court explained, "Although the *Farmer* Court did not explicitly state that it was recognizing a *Bivens* claim, it not only vacated the grant of summary judgment in favor of the prison officials but also discussed at length 'deliberate indifference' as the legal standard to assess a *Bivens* claim," which is "the standard by which all subsequent prisoner safety claims have been assessed."[240] Given that outcome, "[i]t seems clear, then, that the Supreme Court has, pursuant to *Bivens*, recognized a failure-to-protect claim under the Eighth Amendment."[241]

This approach—which appeared to accept "necessary" assumptions as binding—is not without support. Other cases have taken a similar tack.[242] And Garner's treatise generally endorses the view that "if a proposition's validity is logically necessary to the result of a given case, the case will generally be treated as standing for that proposition even if the point wasn't explicitly stated by the court."[243]

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238. *Id.* at 848-49.

239. *Id.* at 850-51.

240. *Bistrian*, 912 F.3d at 90-91 (citation omitted).

241. *Id.* at 91.

242. *See, e.g.*, United States v. Asad, No. 12-127, 2014 WL 1329937, at *4 (E.D. La. Apr. 2, 2014) ("The court in [a potentially controlling Fifth Circuit decision called] *Tapp* did not explicitly address the question of whether the defendant's *collateral challenge rights waiver* precluded his section 2255 motion, focusing instead on the merits of the issue raised by the section 2255 motion: whether the defendant's *appeal waiver* precluded him from bringing a *Flores-Ortega* claim. But, given that the Fifth Circuit reached the merits of the motion (and resolved them in favor of the defendant), this Court must assume that it answered the antecedent question in the negative.").

243. GARNER ET AL., *supra* note 14, at 120. Garner also notes an exception to this general rule, which provides that "[t]he rule concerning implicit holdings generally doesn't extend to jurisdictional questions." *Id.* at 121. Thus, even though the existence of jurisdiction might be considered a prerequisite to reaching the merits of an issue, the fact that a court did reach the merits will not create precedent as to the jurisdictional question unless it was actually addressed by the court. *Id.*; *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998) ("[D]rive-by jurisdictional rulings . . . have no precedential effect.").

Not all courts agree. In considering precisely the same *Bivens* question just two years ago, the Fourth and Seventh Circuits diverged from the Third Circuit.[244] Instead of considering whether the assumption seemed to be a logical prerequisite for the disposition reached, those courts focused on whether the *Bivens* issue had been raised by the parties in *Farmer* and well considered by the Court. It had not been.[245] And in reaching that conclusion, the courts looked outside the four corners of the *Farmer* opinion to the parties' briefing, which did not discuss the issue.[246]

Case law thus fails to resolve two key issues as to implicit holdings: (1) the importance or unimportance of logical necessity, and (2) the appropriateness of looking outside the opinion to the parties' briefing and the significance of whether an issue was raised there. For these questions, further development would be useful to promote consistency in precedential interpretation, at least regarding the applicable framework. And looking to existing canons of statutory and contractual construction might provide helpful guidance.

C. Canon Candidates from Analogy

Case law offers some consistently articulated rules for interpreting precedent. But it also leaves many questions unanswered. In particular, existing case law fails to advance a uniform or workable definition of dicta and holding. Nor does it make clear how much that distinction really matters, given the existence of binding or near-binding dicta in many circuits. It also fails to

244. *Compare Bistrian*, 912 F.3d at 90-91, *with* Bulger v. Hurwitz, 62 F.4th 127, 139 (4th Cir. 2023), *and* Sargeant v. Barfield, 87 F.4th 358, 364-65, 365 n.2 (7th Cir. 2023).

245. *Bulger*, 62 F.4th at 139; *Sargeant*, 87 F.4th at 364-65, 365 n.2.

246. Interestingly, none of the three circuits invoked or analogized the "jurisdiction" exception to the implicit holding rule discussed above. *See supra* note 243. Another interesting fact about this constellation of cases is the evolving attitude of the Supreme Court over the five years that elapsed between the Third Circuit's decision in 2018 and the contrary decisions in 2023. During that time, although the Supreme Court never addressed the precise *Bivens* question at issue, the Court did express increasing doubt about the propriety of implied causes of action. *See* Marquez v. Rodriguez, 81 F.4th 1027, 1029-30 (9th Cir. 2023) (discussing this shift). Accordingly, one way of understanding the later decisions in *Bulger* and *Sargeant* is as predictions about how the newly constituted Supreme Court would rule on the issue were it to be presented and well considered at this point in time. *Cf.* Caminker, *supra* note 31, at 16-22 (positing that lower courts sometimes rule based on their perceptions of how the higher court would currently decide the case rather than strictly adhering to precedent); Re, *supra* note 121, at 966-71 (explaining that the Supreme Court sometimes sends signals to lower courts that its precedent in a certain area should be construed narrowly). Ultimately, those courts were proven correct, and the Third Circuit very recently concluded that a 2022 decision by the Supreme Court abrogated *Bistrian*. *See* Fisher v. Hollingsworth, 115 F.4th 197, 203-06 (3d Cir. 2024) (discussing *Egbert v. Boule*, 596 U.S. 482 (2022)); *cf. Marquez*, 81 F.4th at 1030-31 (agreeing, in light of *Egbert*, with the Fourth and Seventh Circuits that *Farmer* did not establish the existence of a claim).

specify the scope of materials that can be consulted in resolving ambiguity as to whether a statement or conclusion from a prior opinion is binding. Are the parties' briefs fair play and are they important? What about an authoring judges' other opinions? And what about the role of consistency within a jurisdiction or with regard to a superior appellate court—does precedential interpretation proceed with an underlying normative presumption in favor of coherence? Finally, what about drafter intent, and assumptions about deliberateness, completeness, and consistency in drafting?

Interpretive canons help answer many of these questions for statutes and contracts.[247] Accordingly, we might look to those rules as analogues of canons that might exist—often unstated—in precedential interpretation[248] or as areas in which further development would be desirable.[249] Some representative, but by no means exhaustive, examples follow.

1. Whole act rule: An opinion must be read in its entirety

The whole act rule of statutory interpretation requires a reviewing court to consider "the language and design of the statute as a whole."[250] Its private-law analogue requires that "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."[251] "The Supreme Court of the United States has said that statutory construction is a 'holistic endeavor,' and the same is true of construing any document."[252]

247. *See* Gluck, *supra* note 29, at 793 ("[L]et us begin with contract interpretation, which implicates many of the same questions implicated in statutory cases, such as whether interpretation should aim to effectuate the drafters' subjective intent or what kind of extrinsic evidence might be consulted to assist in the interpretive effort. In fact, many rules of contract interpretation are similar—and, in some states, identical—to the rules of statutory interpretation.").

248. It is not unreasonable to think that courts might be applying interpretive rules of thumb without explicitly stating them. Even in the context of statutory interpretation, "often, courts employ principles of interpretation without identifying or labeling them at all." Zoldan, *supra* note 9, at 632; *see also* Anita S. Krishnakumar, *The Hidden Legacy of* Holy Trinity Church*: The Unique National Institution Canon*, 51 WM. & MARY L. REV. 1053, 1095-96 (2009) ("The Court routinely, for example, relies on the 'dog that didn't bark' canon, the *expressio unius* canon, and the whole act rule without identifying the canon on which it is relying or even necessarily indicating that the argument it is making is based on a canon." (footnotes omitted)).

249. *See* Baude & Sachs, *supra* note 4, at 1140 ("One good reason to have a law of interpretation is that people disagree on the correct interpretive rules.").

250. K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988); *see also* SCALIA & GARNER, *supra* note 1, at 167-69.

251. SCALIA & GARNER, *supra* note 1, at 167 (quoting CAL. CIV. CODE § 1641).

252. *Id.* at 168 (quoting United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988)).

The simplest analogue here is a rule suggesting that any word or phrase in an opinion be read in harmony with its entirety. This rule finds some support in the case law.[253] It also comports with practical experience—advocates are often criticized for taking some assertion out of context when other statements in the opinion cabin or clarify it.[254] Accordingly, most judges would likely agree that this is a common rule of thumb underlying precedential interpretation, even if it is not frequently articulated.

How far does this rule go? In the context of statutory interpretation, the related canon of *in pari materia* ("relating to the same subject") brings into consideration not only the act at issue but also other relevant statutes.[255] The rule is "a logical extension of the principle that individual sections of a single statute should be construed together, for it necessarily assumes that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject."[256]

How might such a rule work here? One way it could operate is to allow or invite particular consideration of an authoring judge's other opinions, especially on related matters, and place a thumb on the scale in favor of consistency and coherency between them.[257] This approach would be fairly unorthodox. Certainly, some advocates advance this line of argument (think, for example, of district court motions that highlight how that particular judge has resolved similar motions in the past). And it likely undergirds certain lines of argument in the Supreme Court, where certain Justices' positions or approaches may be well studied. But it rarely appears in appellate opinions.[258]

Another way to think of this idea is as a presumption of coherence within a jurisdiction or between superior and inferior courts. In other words, to the extent the Supreme Court, or prior panel opinions, have used a particular phrase to mean something in a certain context, later uses of that phrase in like

253. *See, e.g.*, United States v. Zenith Radio Corp., 562 F.2d 1209, 1212-13 (C.C.P.A. 1977) ("Opinions must be read in their entireties . . . ."), *aff'd*, 437 U.S. 443 (1978).

254. *See, e.g.*, Armour & Co. v. Wantock, 323 U.S. 126, 132-33 (1944) ("remind[ing] counsel" not to quote phrases from prior opinions without regard to context).

255. SCALIA & GARNER, *supra* note 1, at 252 ("Statutes *in pari materia* are to be interpreted together, as though they were one law.").

256. Erlenbaugh v. United States, 409 U.S. 239, 244 (1972) (footnote omitted).

257. *See, e.g.*, Re, *supra* note 79, at 26 (discussing the tendency for judges to "hew to their own past views" as "a powerful force in favor of constraint in the law").

258. *But see* Richard M. Re, Essay, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824, 826 (2023) (exploring the role of personal precedent, "or judges' presumptive adherence to their own previously expressed legal views," in Supreme Court jurisprudence); Hale v. Allinson, 188 U.S. 56, 64-67 (1903) (treating an opinion cautiously because of perceived inconsistences between it and an earlier opinion by the same judge).

context should be construed similarly.[259] This proposition seems better supported by existing interpretive practice as to precedent, and it relates to the presumption in favor of validity explored below.

2. Presumption of validity: Whenever reasonably possible, an opinion should be interpreted harmoniously with Supreme Court precedent

The presumption of validity, sometimes referred to as the canon of constitutional avoidance, directs that where a statute is subject to two interpretations, one of which raises questions about the provision's constitutionality, the other interpretation is preferred.[260] The private-law corollary provides that a contract should not be interpreted in a manner that renders it illegal whenever another interpretation is reasonably possible.[261] Both of these canons place a thumb on the interpretive scale in favor of the continuing validity of the underlying text.[262]

A direct precedential analogue to the statutory canon of constitutional avoidance appears to exist—although it is rarely cited—in the context of Supreme Court review of a state-court decision. There, if the underlying state court decision is ambiguous as to whether it rests on an adequate and independent state ground, the Court "should choose the interpretation which does not face [it] with a constitutional question."[263]

A somewhat broader precedential analogue would provide that, whenever reasonably possible, an existing precedent should be interpreted consistently with Supreme Court precedent.[264] The rule may extend further, directing courts to interpret existing case law in harmony with other binding cases from

259. This would essentially be the precedential analogue of the "whole code" rule, which invites "analogies and comparisons across statutes that contain similar words or phrases." Anita S. Krishnakumar, *Cracking the Whole Code Rule*, 96 N.Y.U. L. REV. 76, 77 (2021).

260. SCALIA & GARNER, *supra* note 1, at 66-68, 247-51. The avoidance canon has both traditional and modern variants. ESKRIDGE, *supra* note 38, at 310-22. The former is equivalent to the presumption of validity; the latter "militates against not only those interpretations that would render the statute unconstitutional but also those that would even raise serious questions of constitutionality." SCALIA & GARNER, *supra* note 1, at 247-48.

261. Leib, *supra* note 5, at 1129.

262. *See* SCALIA & GARNER, *supra* note 1, at 66.

263. Black v. Cutter Lab'ys, 351 U.S. 292, 299 (1956); *see also* Three Affiliated Tribes v. Wold Eng'g, P.C., 467 U.S. 138, 158 (1984).

264. *See, e.g.*, United States v. Hansen, 929 F.3d 1238, 1254 (10th Cir. 2019) ("[W]e must endeavor to interpret our cases in a manner that permits them to coexist harmoniously with overarching and controlling Supreme Court precedent and with each other.").

the same court.[265] This rule, like its statutory and contractual analogues, favors interpretive outcomes that preserve the validity of the underlying legal text—even when those outcomes may not represent the most natural reading. This presumption makes normative sense because it discourages interpretations that destabilize the underlying written law.

3. Rule against surplusage: The holding of a case should not be construed so that it renders most of the analysis superfluous

Canons of both public and private law provide that interpretations rendering superfluous portions of the legal text are disfavored.[266] A similar rule could apply to precedential interpretation. In assessing the precedential value of a prior decision, a court should avoid interpretations that render much of the substantive analysis superfluous or nonsensical.[267]

At least some courts have applied that presumption—although they usually haven't said so explicitly. For example, in considering whether to accept the government's narrow characterization of a prior in-circuit case, the Third Circuit explained, "if the [prior case's] holding were so narrow, the court's analysis of relevant precedent from the Sixth and Eighth Circuits would have been superfluous and the court would not have needed to reach the circuit split."[268] Because the government's proposed interpretation rendered superfluous most of the analysis, the court rejected it.[269] Similarly, the Supreme Court has opted to interpret a prior opinion to align with most of the analysis contained therein, criticizing the dissent's interpretation for rendering "many portions of the opinion to be incomprehensible."[270]

It is worth noting that this presumption squares functionally with the oft-applied rule that alternative holdings are binding. A contrary rule would make significant portions of the underlying opinion superfluous.

265. GARNER ET AL., *supra* note 14, at 300 (noting that where "decisions of equal authority" appear to be "discordant," then "[i]f at all possible, the opinions should be harmonized").

266. Stephen C. Mouritsen, *Contract Interpretation with Corpus Linguistics*, 94 WASH. L. REV. 1337, 1398 (2019); SCALIA & GARNER, *supra* note 1, at 174-79.

267. For this rule to be sensible in the context of precedent, it should focus on substantive analysis because judicial opinions tend to contain a fair amount of "surplusage" in the form of background context and expressive commentary or asides.

268. United States v. Young, 494 F. App'x 205, 209 n.2 (3d Cir. 2012) (per curiam).

269. *Id.*

270. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 518 (1993); *see also* Lemos, *supra* note 15, at 8 (discussing this case); *cf.* R.J. Reynolds Tobacco Co. v. FDA, 96 F.4th 863, 879 (5th Cir. 2024) ("[I]nstead of reading surplusage into the phrase ['purely factual information' in First Amendment precedent], we adopt the more natural reading."), *cert. denied*, 145 S. Ct. 592 (2024) (mem.).

4. Supremacy of text principle: The text of the opinion should govern over considerations from extrinsic sources

In both the contractual and statutory contexts, the words of the legal text are paramount. In the contract law context, the usual rule is that if the text is unambiguous, the court may not consult extrinsic evidence (i.e., sources of information outside the four corners of the relevant text).[271] The rule is similar in the context of statutory interpretation, although whether it is ever appropriate to consult extrinsic evidence like legislative history is a fiercely debated topic.[272] Regardless, the gist is that when clear meaning can be gleaned from the text itself, consideration of extrinsic evidence is discouraged.

But whether and when to look to extrinsic evidence, such as the parties' briefs, in interpreting precedent is much less clear. The usual practice seems to allow recourse to litigants' briefs "to supply whatever additional interpretive guidance is needed."[273] That tells us little about when such evidence is actually relevant or should carry particular weight.

A precedential analogue to the supremacy of text principle might help. For example, in determining the scope of the holding, the rule could proceed as follows. When it is clear from the text of the opinion that an issue was considered and resolved, courts should not look to the parties' briefing to determine whether the issue was raised.[274] When, however, the text of the opinion is ambiguous as to whether the court did, in fact, consider and resolve an issue, later courts may look to the parties' briefing and oral argument to see whether the parties raised it.[275] In such circumstances, a party's failure to raise

271. Mouritsen, *supra* note 266, at 1339.

272. William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 540-41 (2017); Gluck, *supra* note 29, at 764-65.

273. Vermeule, *supra* note 29, at 1349; *see, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747 (2007) (plurality opinion) (invoking, in an opinion involving the constitutionality of a plan to promote racial integration in public schools, the plaintiffs' briefing from *Brown v. Board of Education* to determine which of the parties' competing interpretations was "more faithful to the heritage of *Brown*"); *see also* Lazarus, *supra* note 29, at 431-32 (discussing the Chief Justice's extensive reliance on the litigants' arguments from *Brown v. Board of Education* to support his reading of that precedent in the *Parents Involved* plurality opinion).

274. Courts address unpresented issues more often than one might think. *See* Frost, *supra* note 30, at 461-69 (discussing the types of issues that courts frequently resolve sua sponte, and identifying several high-profile Supreme Court cases in which the key holding concerned a legal question never presented to the Court). *But see* Lazarus, *supra* note 29, at 428-29 (observing that the Supreme Court endorses the view that resort to the parties' briefing "is a fair basis for determining what the Court did and did not decide in a prior case, even when no ambiguity may otherwise be apparent from the text of the earlier opinion").

275. *See* Lazarus, *supra* note 29, at 432; *see also* Vermeule, *supra* note 29, at 1330 (noting that the Supreme Court has resorted to the parties' briefing and oral argument when doing

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an issue might militate against interpreting the resulting precedent as binding on that issue.[276]

A corollary of this rule might also help clarify which adjudicative facts mattered to the outcome of the case and whether extrinsic sources could supply them. Facts recited in the text of the appellate opinion might be relevant to—or even dispositive of—the outcome, and thus differing facts in a later case might provide grounds for distinguishing that precedent.[277] But facts from the underlying record that the authoring court chose not to mention in the opinion should not be construed as meaningful, and especially not as dispositive.[278] Accordingly, this rule would counsel against looking to extrinsic sources like the underlying record or parties' briefing to find additional facts because such extratextual facts would not usually provide a basis for distinguishing precedent.

III. The Question Why

The above analysis illustrates the possibility of identifying and proposing canons of precedential interpretation, either from existing case law or by analogy. If courts were to embrace this approach, real benefits could accrue. More well-articulated interpretive rules might increase consistency in precedential interpretation, at least for run-of-the-mill disputes in which a particular rule clearly applies.[279] Moreover, as Justice Scalia and Garner put it,

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so "sheds significant light on the character" of an otherwise ambiguous holding (quoting Cantor v. Detroit Edison Co., 428 U.S. 579, 585 (1976) (plurality opinion))).

276. *See* Lazarus, *supra* note 29, at 437-40.

277. *See* KARL N. LLEWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL 34 (Oxford Univ. Press 11th prtg. 2008) (explaining that the authoring judge will have "sifted through" the facts of the case and "picked a few which he puts forward as essential—and whose legal bearing he then proceeds to expound"); Monaghan, *supra* note 143, at 764 ("The relevant facts do not identify and classify themselves; criteria are needed to determine what the legally relevant facts are and at what level of generality they are to be specified. . . . Necessarily, what the Supreme Court *said* assumes paramount importance.").

278. *See* LLEWELYN, *supra* note 277, at 35 ("[J]udges will, in future cases, take account of what the opinion records pretty largely *as if* the opinion itself contained a true record of the events."); *id.* at 63-64 (noting that authoring court's decision to emphasize certain facts in opinion should help predict application of that precedent going forward). *But see id.* (encouraging students to look beyond the facts recited to better understand the context of the decision).

279. *See* Macey & Miller, *supra* note 8, at 656-67 (discussing usefulness of canons in reducing error as to statutory interpretation); William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66-67 (1994) (explaining that an "interpretive regime" can "render[] statutory interpretation more predictable, regular, and coherent").

canons "promote clearer drafting."[280] And clearer drafting has tangible upsides: less ambiguity as to the meaning of precedent going forward, greater clarity for the litigants, and an increase in the appearance of rigor and constraint in judicial analysis.[281]

These benefits, in turn, might ripple outward to improve at least two areas outside of legal practice itself: law teaching and, critically, public perception of the judiciary. As to the first issue, increased reliance on canons of precedential interpretation—and the resultant clearer drafting of new opinions—might help the case law approach to legal education feel less, for lack of a better word, "mushy," enabling students to more easily learn how to reason from precedent.[282] As to the second issue, judicial opinions that identify and apply legible rules when interpreting precedent might help dispel public concern that judges are simply making up the law as they go.[283] This potential upside is particularly important in a time of increasing concern about judicial legitimacy and political polarization.[284]

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280. SCALIA & GARNER, *supra* note 1, at 51; *see also* Watford et al., *supra* note 43, at 544-45 (discussing the possibility that clearer rules of precedential interpretation can be used to generate more clarity in new opinions); Staszewski, *supra* note 22, at 1032-42 (2018) (discussing the "role of precedent in facilitating reasoned deliberation").

281. *See* Staszewski, *supra* note 22, at 1020 ("Kozel believes that the absence of a consistent and uniform doctrine is particularly problematic because stare decisis is designed to promote the stability and impersonality of law. Yet stare decisis cannot perform these functions if every justice follows a different approach to precedent.").

282. *See* Merrill, *supra* note 16, at 1423 ("Precedent following is especially entrenched in American legal culture, given the prominence accorded to the common law in the first-year curriculum in law schools and the dominance of the case method of instruction even in courses about constitutional law and legislation.").

283. *See supra* note 23 and accompanying text; *see also* Merrill, *supra* note 16, at 1455-56 (arguing that the Supreme Court can increase or at least preserve institutional legitimacy by moving closer to what he calls "the integrity model of precedent, supplemented by a more explicit use of arguments from settled practice"); *cf.* SCALIA & GARNER, *supra* note 1, at xxviii ("The descent into social rancor over judicial decisions is largely traceable to nontextual means of interpretation, which erode society's confidence in a rule of law that evidently has no agreed-on meaning."); Varsava, *supra* note 15, at 86 ("To the extent that judges following a policy-based method of precedent appear to be unbound by legal sources, the judiciary's credibility will likely suffer. The primary role of the judiciary, as commonly understood, is to apply and interpret law, rather than make it up.").

284. *See* Patterson et al., *supra* note 23, at 24-26 (concluding that public trust in the Supreme Court and in the judiciary more generally has declined significantly in recent years); Merrill, *supra* note 16, at 1455-56 (explaining that to head off a crisis of legitimacy, the Court should strive to resolve cases "in accordance with objective decisional norms, meaning settled forms of argument," and that adherence to these objective norms is particularly critical with regard to precedent); *see also* Bayefsky, *supra* note 23, at 1379 (arguing, given the current state of political polarization, that "[j]udges ought to adopt an approach to deciding cases that meaningfully takes into account the aim of maintaining the court's effective authority").

But before we tinker—or even suggest tinkering—we should try to understand why things are the way they are. In particular, we should consider what latent benefits a change in the status quo might inadvertently undermine. It therefore behooves us to ask *why* it is that judges—generally so keen to develop and articulate interpretive methodological rules in other contexts—have largely declined to do so for precedent. The relative underdevelopment of interpretive rules for precedent may in fact serve institutional goals and, if so, any change should proceed cautiously with those countervailing interests in mind.

A. Precedential Plasticity

The value of interpretive canons has often turned on their ability to "systematically favor 'continuity over change.'"[285] The practice of using rules to hem in interpretive discretion arguably serves "the interlocking values of equality, efficiency, uniformity, predictability, and judicial restraint."[286] "Often, 'continuity over change' is promoted by applying canons that narrow possible meanings."[287] Some scholars believe that adherence to precedent promotes consistency, and that consistency is of high normative value in this context.[288]

But what if our system of precedent is actually intended to allow change—and to do so in more subtle ways than through explicit overruling?[289] Indeed, some have argued that precedent "ought to be unstable."[290] "[D]uring periods of social and economic change, a rule that served a particular policy goal previously might not continue to serve that goal presently."[291] In such

285. Tobia et al., *supra* note 98, at 287 (quoting Shapiro, *supra* note 8, at 925); *see also* Baude & Sachs, *supra* note 4, at 1110 ("These canons are designed, as Professor David Shapiro notes, to favor 'continuity over change' . . . ." (quoting Shapiro, *supra* note 8, at 927)).

286. Peters, *supra* note 124, at 401.

287. Tobia et al., *supra* note 98, at 287.

288. *See* Varsava, *supra* note 15, at 75; *see, e.g.*, Kozel, *supra* note 142, at 205 (arguing that broadly construing precedent "should lead to fewer lower-court anomalies that the Supreme Court will need to bring into line (or allow to linger)").

289. *See* Baude & Sachs, *supra* note 4, at 1140 ("Law's determinacy, like its content, depends on contingent social facts. If a given legal system has more gray areas or includes more discretion for judges or other officials, then that's just how this legal system works. All else being equal, indeterminacy might be something to avoid; but all else is rarely equal, and legal systems often privilege other goals." (footnote omitted)).

290. Easterbrook, *supra* note 15, at 423; *see also* Varsava, *supra* note 15, at 108 (suggesting that a multiplicity of interpretive methods for precedent best serves stare decisis values); Eskridge & Frickey, *supra* note 279, at 76-81 (arguing that the Supreme Court best promotes "rule-of-law values" by adopting a dynamic approach to interpretation aimed at achieving a politically acceptable equilibrium).

291. Varsava, *supra* note 15, at 84.

circumstances, outdated precedent could be overruled—but only by certain courts, and at a high cost in terms of public perception of stability.[292]

The alternative is to build in some "play in the joints."[293] Allowing courts greater latitude in interpreting precedent—while still using the rhetoric of stare decisis—permits the law to evolve over time without any discrete disruption of continuity. It reduces the need for higher court review to facilitate change, and it allows for iterative and experimental efforts in refining legal concepts without explicit overruling.[294]

This flexibility, or "precedential plasticity," may depend in part on the *absence* of articulated canons of precedential interpretation. Such precedential malleability "is possible because the precedent does not constrain the selection of which factors matter."[295] In other words, the existing interpretive system does not tell us how to parse holding from dicta, or "on point" from distinguishable.[296]

Scholars and critics often refer to the pliant nature of precedent—and the way that judges capitalize on that pliability—in pejorative terms. Judge Easterbrook refers to it as "manipulation."[297] Others have noted that judges "know how to mouth the correct legal rules with ironic solemnity while avoiding those rules' logical consequences."[298] And at least one scholar has characterized the practice as "subterfuge," explaining that "[c]onsiderable anecdotal evidence suggests that when judges care deeply about a particular legal issue but disagree with existing precedent, they often attempt to subvert the doctrine and free themselves from its fetters by stretching to distinguish the holdings of the higher court."[299] Inherent in these characterizations is an

292. *See* Farber, *supra* note 131, at 1180-84, 1194-98 (discussing the ways in which overruling precedent risks destabilizing judicial legitimacy).

293. Easterbrook, *supra* note 15 at 426.

294. Given that the Supreme Court accepts only a handful of cases per year, if the existing case law that needs to flex comes from a federal circuit court or from the Supreme Court itself, any change may be a long time coming. *See* GARNER ET AL., *supra* note 14, at 60 ("[The Supreme Court] picks through a menu of 8,000 to 9,000 cases, [and] chooses the 75 or 80 that seem to be most significant . . . .").

295. Easterbrook, *supra* note 15, at 425.

296. *See* Richard H. Fallon, Jr., Essay, *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 376 (2010) (arguing that "Justices must decide for themselves how much significance to afford the Court's precedents" and "how broadly or narrowly to read cases with which they disagree").

297. Easterbrook, *supra* note 15, at 424-25.

298. TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting) (quoting Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897, 907 (W. Va. 1991)).

299. Caminker, *supra* note 46, at 819; *cf.* Merrill, *supra* note 16, at 1453 ("Scalia's image of precedent following as a game of Scrabble thus presents a picture of the precedent-following adjudicator as an aggressive manipulator seeking to advance his or her legal and policy preferences."). *But see* Fallon, *supra* note 184, at 1299 ("[E]ven without an

footnote continued on next page

undercurrent of disapproval toward judicial disingenuousness and an implicit endorsement of transparency.[300] To the extent we accept these pejorative characterizations, we may favor further identification and development of interpretive canons in an effort to cabin this type of discretion.

But it is not entirely clear that this sort of variation results in a net negative. The risk in cabining interpretive discretion too much is that precedent becomes inflexible.[301] And, as the saying goes, what doesn't bend, breaks. Moreover, it is not entirely clear that judicial transparency is an unadulterated good.[302] If judges are transparent about their attempts to avoid binding precedent, the legitimacy of the system may suffer.[303] And if judges are transparent about their view that they find themselves bound by what they believe to be incorrect precedent, the only way to correct that quandary is for a higher court to overrule the errant case. But explicit overruling itself comes at a high cost of judicial legitimacy.[304] Accordingly, to the extent that precedent can bend—while judges still purport to respect and adhere to it—this flexibility may serve institutional goals.[305]

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agreed interpretive theory, current practice is far from a free-form exercise in which judges recurrently pick the outcome that best conforms to their ideological preferences. If we should want to introduce new, extralinguistic, legal constraints, it is not because the only alternative is a legal Tower of Babel or an Alice in Wonderland world in which legal provisions can mean whatever judges want them to mean. Our current practice—in which no categorical exclusion of linguistically eligible senses of meaning applies—attests otherwise.").

300. *See* Dorf, *supra* note 219, at 2060-66 (describing judicial candor as a virtue and exploring arguments about the relative importance of candor in interpretation).

301. *See* Amy J. Griffin, Essay, *"If Rules They Can Be Called": An Essay on* The Law of Judicial Precedent, 19 LEGAL COMMC'N & RHETORIC 155, 167 (2022) (suggesting that "putting [interpretive rules] into textual form makes them more rigid"); Re, *supra* note 121, at 927 (suggesting that maintaining "a substantial interpretive gray zone" for lower courts may be important for allowing them to "engage in a precedential dialogue with the Supreme Court" and limit the effect of outdated decisions).

302. *See* Bayefsky, *supra* note 23, at 1376-79 (questioning whether the public expects absolute transparency from courts and arguing that transparency in judicial decision-making, while a valid concern, "should not be treated as an absolute imperative").

303. *Cf.* Re, *supra* note 121, at 949 (suggesting that lower courts adopting a narrow view of relevant precedent should be candid in admitting that the precedent is ambiguous, but acknowledging that they would not usually need to "expressly state that they are rejecting the best reading of precedent").

304. Hellman, *supra* note 79, at 1110-11 ("[O]verruling itself seems to raise the specter of judicial illegitimacy. The more overruling there is, the less confidence the public may have in the correctness of current decisions." (emphasis omitted) (footnote omitted)); *see, e.g.*, Megan Brenan, *Views of Supreme Court Remain Near Record Lows*, GALLUP (Sept. 29, 2023), https://perma.cc/H8XU-WABS (discussing the impact of the Supreme Court's decision to overrule *Roe v. Wade* on public approval ratings).

305. *See* Bayefsky, *supra* note 23, at 1370 ("Keeping precedents formally on the books helps to maintain the public impression that the Court is staying the course.").

Yet canons of precedential interpretation, even if identified, developed, and applied, might not significantly threaten precedential plasticity. Yes, canons are seen as favoring "continuity over change."[306] Yes, they are meant to introduce methodological rigor into what can be a maddeningly amorphous task of textual interpretation.[307] But canons do not always produce consistent results.[308] And the choice of which canons to apply, and when, itself involves at least some discretion.[309] Thus, it could be that developing canons of precedential interpretation simply gives courts more tools in their interpretive and rhetorical toolbox.[310] Canons might allow courts to speak a consistent and coherent language of precedential interpretation—thereby increasing the public perception of legitimacy—while still allowing the law to evolve.

B. Judicial Mystique

Much of our discussion so far has treated the court as an institution. But it is worth remembering that both the primary creators and interpreters of precedent are in fact *people*. And those people are perfectly capable of articulating and applying interpretive canons in other contexts—when interpreting statutes or contexts—but have not done so for precedent. Why?

It may be that judges view interpretation of precedent as a uniquely judicial exercise—one that requires some measure of creativity and brilliance.

306. *See supra* note 285 and accompanying text.

307. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) (book review) (suggesting that more and better-defined canons might make textual interpretation more predictable).

308. *See* Baude & Sachs, *supra* note 4, at 1111 ("Interpretive defaults aren't a panacea. Even after we bring all our rules and canons to bear, legal language can still be unclear."); Mendelson, *supra* note 13, at 76-78, 123-31 (observing that the proposition that canons constrain decision-makers in interpreting statutes is unproven, and suggesting that the Supreme Court's invocation of canons has not rendered its decisions more predictable); *see also* Llewellyn, *supra* note 76, at 401-06 (providing the classic critique that, in the context of statutory interpretation, "there are two opposing canons on almost every point").

309. *See* Goldsworthy, *supra* note 75, at 1568-69.

310. *See* Randy J. Kozel, *Stare Decisis as Authority and Aspiration*, 96 NOTRE DAME L. REV. 1971, 1973 (2021) ("This commitment to the 'rhetoric' of precedent carries important ramifications for the doctrine's impact. When the Supreme Court confirms the foundational status of stare decisis, it sends a message to the lower courts and to the legal system more broadly. It also ensures that the doctrine remains salient and available to future Justices for invocation. The authority of precedent remains intact . . . ." (footnote omitted) (quoting Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 135)); *see also* Neil M. Gorsuch, Lecture, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 917 (2016) ("[W]hen judges pull from the same toolbox . . . we confine the range of possible outcomes and provide a remarkably stable and predictable set of rules . . . .").

In interpreting the words of their colleagues and transmuting those words into law, judges may be exercising some individual talent or imagination that defies a black-and-white system of interpretive rules. That general view of judging—particularly at the highest levels—is well supported both in scholarship and in popular belief.

Reasoning from precedent is often likened to analogical reasoning, but with a sort of mystical or creative twist. As Scott Brewer described it, "There is an art to making apt, instructive, compelling analogies—as there is to making apt, instructive, compelling metaphors."[311] "Analogy and precedent are the stuff of the law because they are the only form of reasoning left to the law when general philosophical structures and deductive reasoning give out, overwhelmed by the mass of particular details."[312] In essence, "[a]nalogy is the application of a trained, disciplined *intuition* where the manifold of particulars is too extensive to allow our minds to work on it deductively."[313]

In other words, there is something special about figuring out whether and how an existing case applies to the facts at hand. Doing so requires particular talent and independent judgment.[314] And the best judges—the "brilliant jurists"—experience "'an uncodifiable imaginative moment' in the process of precedential reasoning."[315]

But if judging instead appears to be mechanical or rote, these kinds of characterizations resonate less.[316] It may be, then, that in interpreting and applying precedent, judges seek to preserve for themselves a creative

311. Brewer, *supra* note 132, at 964.

312. *Id.* at 952 (quoting Charles Fried, Observation, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 57 (1981)).

313. *Id.* at 952-53 (emphasis added) (quoting Fried, *supra* note 312, at 57).

314. *See* Tokson, *supra* note 17, at 600 ("A sophisticated judge may decide a new case by discerning the unstated rationales of previous cases and using them to reach the optimal outcome."); Caminker, *supra* note 31, at 80 ("[A] judge who self-consciously tells herself and others that she is responsible for making law through the exercise of her independent legal judgment might well feel quite powerful; the judge is an oracle in her own right even if only in a constrained time and space.").

315. Varsava, *supra* note 15, at 88 (quoting Brewer, *supra* note 132, at 954); *see also* Richard M. Re, *Permissive Interpretation*, 171 U. PA. L. REV. 1651, 1655 (2023) ("[J]udges earn legalistic praise for logically extending precedential reasoning to new situations, even when stare decisis doesn't demand it.").

316. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2276 (2024) (Gorsuch, J., concurring) ("Today, the phrase 'common law judge' may call to mind a judicial titan of the past who brilliantly devised new legal rules on his own. The phrase '*stare decisis*' might conjure up a sense that judges who come later in time are strictly bound to follow the work of their predecessors.").

domain.[317] That domain allows for interpretive leaps, for intuition, for stretching and narrowing existing rationales to fit specific circumstances. Indeed, Justice Scalia once likened applying precedent to the game of Scrabble—judges must use the tiles in their hand and what they find on the board, but they nevertheless exercise significant creativity and discretion in deciding what word to play next.[318] Too many rules would ruin the game.[319]

Leaving a little room for creative genius might serve institutional goals as well. The respect the legal profession affords to individual judges—and the prevailing sentiment that there is such a thing as judicial genius—elevates the status of the judicial role. It therefore seems plausible that this element of judicial mystique is important for attracting and retaining top judicial talent (who, admittedly, could likely earn far larger salaries at big law firms or in other nonjudicial endeavors). This ethos of judicial mystique arguably adds prestige to the profession, and that prestige may help attract the most intelligent and capable members of the bar. Taken too far, the imposition of canons of precedential interpretation could, in theory, make judging appear too circumscribed, thereby impacting the quality and retention of judicial candidates.

Conclusion

Interpretive canons are a hot topic. But surprisingly little attention has been paid to whether interpretive canons exist—or whether they could be developed—to assist in interpreting judicial opinions. This Article has taken some initial strides into that largely unexplored terrain. By highlighting the omission of judicial opinions from the larger interpretive debate, I hope to encourage further dialogue. And by offering some concrete ideas for canons of precedential interpretation—arising out of both existing practice and by analogy to canons for other legal texts—this Article offers a starting point for developing more articulable rules of thumb. Given the significance of precedent in judicial decision-making, as well as the increasing public skepticism towards the judiciary, the time seems ripe to think carefully about how to make precedential reasoning appear more robust. Canons of precedential interpretation provide one possible answer.

317. *See* SCALIA & GARNER, *supra* note 1, at 10 ("Liberation from text is attractive to judges as well. It increases their ability to do what they think is good. . . . The quest for nontextual decision-making sometimes becomes a kind of mystical divination.").

318. *See* Merrill, *supra* note 16, at 1452-53.

319. *See* Dorf, *supra* note 219, at 2060-61 (espousing a broad view of what constitutes a "holding" and suggesting that such a "view of precedent appears to give judges less room for creativity than a narrower view of holdings would").