

5-2016

Precedent in Statutory Interpretation

Lawrence Solan

Brooklyn Law School, larry.solan@brooklaw.edu

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>



Part of the [Evidence Commons](#), and the [Legislation Commons](#)

Recommended Citation

94 N.C. L. Rev. 1165 (2015-2016)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

PRECEDENT IN STATUTORY INTERPRETATION*

LAWRENCE M. SOLAN**

In interpreting statutes, judges frequently refer to their obligation to avoid substituting their own policy preferences for those of the legislature. This principle, "legislative primacy," has been the most significant motivation for the movement against the use of such extrinsic evidence of legislative intent as a statute's legislative history. This history is not enacted and can be cherry-picked by judges or anyone else wishing to create a narrative that favors one side or the other.

This Article addresses another source of evidence that is not enacted and is subject to selective citation: judicial decisions. U.S. judges are relentless in citing each other as reasons for deciding statutory cases. On occasion, citations demonstrate that the issue before the court has already been decided. Most of the time, however, courts cite each other to demonstrate coherence with a legal narrative, whether the law's enactment history, the social history surrounding its enactment, the courts' jurisprudence concerning other issues involving that statute, or the relationship between the law in question and the corpus juris. Also included are citations to other cases that have employed the various canons of construction and even cases that have applied everyday language one way or another.

The goal of this Article is to evaluate these references in terms of which ones legitimately advance rule of law values. It does so by examining one five-to-three and two five-to-four United States

*. © 2016 Lawrence M. Solan.

** Don Forchelli Professor of Law, Brooklyn Law School. My gratitude goes to Quincy Auger, Steven Ballew, Myra Din, Stephanie Fields, Brendan Gibbons, Christopher Mikesh, and Shai Ornan for their valuable contributions as research assistants. Earlier drafts of this Article were presented at a symposium on statutory interpretation at the Notre Dame Law School in London and at faculty workshops at Pace Law School and Brooklyn Law School. I am grateful for the very valuable comments that I received at these presentations. I further benefitted greatly from comments from members of the 2016 Theories of Statutory Interpretation seminar at Yale Law School, and participants at the 2016 Roundtable on Statutory Interpretation at the Cardozo Law School. I wish to thank Aaron Bruhl, William Eskridge, Kent Greenawalt, Anita Krishnakumar, Marcin Matczak, Jeffrey Pojanowski, Lawrence Solum, Peter Strauss, and Deborah Widiss for important suggestions that made their way into this piece.

Supreme Court decisions in detail. Some citation practices, it argues, should be eliminated altogether. Others are legitimate if justified by analogical reasoning. Still others are legitimate as is. The Article further addresses the extent to which the use of citation is a by-product of common law reasoning infiltrating the statute-based legal system in which we now live.

INTRODUCTION	1167
I. STATUTORY STARE DECISIS: STABILITY IN THE INTERPRETATION OF LAWS.....	1175
A. <i>The Propensity Not to Overrule Statutory Decisions</i>	1175
B. <i>Two Scenarios</i>	1178
1. <i>Weak Reliance, Strong History</i>	1178
2. <i>Weak History, Strong Reliance</i>	1181
II. PRECEDENT AS METHOD IN STATUTORY INTERPRETATION.....	1184
A. <i>Why Courts Rely on Precedent in Statutory Cases Even When the Precedent Does Not Address the Ultimate Issue</i>	1185
B. <i>Three Examples of the Diffuse Reliance on Precedent</i>	1189
1. <i>Small v. United States</i>	1189
2. <i>Ledbetter v. Goodyear Tire & Rubber Co.</i>	1197
3. <i>Circuit City Stores, Inc. v. Adams</i>	1205
C. <i>Textualization of Precedent and the Development of Common Law Statutes</i>	1215
III. PRECEDENTIAL VALUES	1219
IV. USING TRADITIONAL COMMON LAW VALUES TO ENCOURAGE RESTRAINT	1228
CONCLUSION	1233

But though I have no quarrel with the common law and its process, I do question whether the attitude of the common-law process judge—the mind-set that asks, “What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?”—is appropriate for most of the work that I do, and much of the work that state judges do. We live in an age of legislation, and most new law is statutory law.

—Justice Antonin Scalia¹

INTRODUCTION

Justice Scalia was entirely right. We do indeed live in an age of statutes, with a judiciary of common law judges.² And in their role as statutory interpreters, judges, at least in principle, have less discretion than they do as the developers of the common law. Aware of this limitation, judges recognize the need to constrain themselves in statutory cases, reminding themselves and their readers of their proper role, which is subordinated to enforcing the decisions that the legislature has already made in enacting the statute under consideration. Thus, judges have frequently commented on their obligation not to substitute their own values for the decision of the legislature but rather to enforce the legislative will.³

Much of the discussion about judicial restraint in statutory cases has centered on the legitimacy of relying upon inferences of legislative intent⁴ and the dangers of considering the purpose of a law, except to the extent that the purpose can be inferred from the

1. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 13 (Amy Gutmann ed., 1997).

2. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 5–6 (1982); Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479, 495–97 (2013).

3. See, e.g., *H. J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 246 (1989); *FTC v. Cement Inst.*, 333 U.S. 683, 738 (1948) (quoting *Aetna Portland Cement Co. v. FTC*, 157 F.2d 533, 573 (7th Cir. 1946) (Burton, J., dissenting) (“We know of no criticism so often and so forcibly directed at courts, particularly Federal courts, as their propensity for usurping the functions of Congress.”)).

4. RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* 3 (2012); ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 87, 198–202 (2006); Scalia, *supra* note 1, at 16–18; John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 427–39 (2005).

language of the statute itself.⁵ Scalia himself argued that this lack of discipline is the result of common law judges failing to recognize that they now live in a statutory world that more resembles a civil law system.⁶

This Article does not further the debate over those issues but rather adds another consideration: the use of precedent.⁷ It is the unconstrained reliance on precedent—rather than the consideration of purpose or intent—that distinguishes how common law and civil law judges interpret statutes. In fact, civil law judges generally apply a purposive approach to statutory interpretation—“teleological interpretation”—tempered by limitations in the statutory language.⁸ That is, they regard their obligation as furthering the purpose of the statute without doing so to such an extent as to nullify the statutory language. Legislative intent, including intent gleaned from a review of both enactment history and context surrounding the enactment, is also fair game.⁹ For the most part, such principles of interpretation in civil law jurisdictions are found in treatises, but in some instances, they are codified. The Spanish Civil Code, for example, structures interpretation as follows:

Rules shall be construed according to the proper meaning of their wording and in connection with the context, with their historical and legislative background and with the social reality of the time in which they are to be applied, mainly attending to their spirit and purpose.¹⁰

5. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 20 (2012). For an excellent discussion of the purposive method in the U.S. courts, see Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1147–53 (2011).

6. See Scalia, *supra* note 1, at 13–14.

7. I note, though, that I have taken an intentionalist position on these issues elsewhere. See LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION* (2010). In particular, see chapters three and four.

8. See, e.g., REINHOLD ZIPPELIUS, *INTRODUCTION TO GERMAN LEGAL METHODS* 69–72 (Kirk W. Junker & P. Matthew Roy trans., 10th ed. 2006).

9. See *id.* at 70–71; Holger Fleischer, *Comparative Approaches to the Use of Legislative History in Statutory Interpretation*, 60 AM. J. COMP. L. 401, 408–09 (2012) (writing of German practice: “No one today argues for a ‘strict’ objective theory proscribing the use of legislative history, just as no one supports a ‘pure’ subjective theory which would forever bind the interpreter to historical legislative intent”).

10. C.C., ch. 2, art. III (1889) (Spain). A translation is available at *Spain*, WORLD INTEL. PROP. ORG., http://www.wipo.int/wipolex/en/text.jsp?file_id=221319 [<https://perma.cc/3SJH-VYW5>].

Other civil law legal systems make similar use of legislative history and purposive interpretation.¹¹ Moreover, the plain meaning rule plays a more subordinate role in civil law systems.¹² Thus, it may be too simplistic to say that when American judges consider legislative history or statutory purpose they fail to escape their common law orientation—after all, civil law judges follow a similar approach to statutory interpretation.

On the other hand, American judges are unrelenting in their citation of earlier decisions as a reason to construe a statute one way or the other. Civil law judges are generally not wedded to this approach. Moreover, while the selective use of legislative history in American courts has been a subject of concern to judges and commentators alike,¹³ the selective use by judges of judicial precedent in statutory cases has received less attention.

Recent scholarship on the interpretation of statutes by state courts suggests that the propensity of the federal courts—the Supreme Court in particular—to rely so much on their own words and so little on those of the legislature is all the more remarkable.¹⁴ Relatively little of the federal judiciary's work is common law based, at least not in the traditional sense of common law.¹⁵ Yet, when federal judges interpret statutes, the opinions often assume the tone and argument structure of common law judges, relying on case law as a principal form of argumentation.

11. See, e.g., Michel Troper, Christophe Grzegorzczuk & Jean-Louis Gardies, *Statutory Interpretation in France*, in INTERPRETING STATUTES: A COMPARATIVE STUDY 171, 183–85 (D. Neil MacCormick & Robert S. Summers eds., 1991) [hereinafter INTERPRETING STATUTES].

12. See Konrad Zweigert & Hans-Jürgen Puttfarcken, *Statutory Interpretation—Civilian Style*, 44 TUL. L. REV. 704, 713 (1970) (“Even the most authoritative, and, with due respect, most conservative treatise on German civil law gives a strongly worded warning against applying the plain meaning rule. However, in practice it does reappear now and then, and when it does, it usually meets with severe criticism.” (internal citation omitted)).

13. The most famous statement comes from Justice Scalia's quotation of Judge Leventhal saying that combing through legislative history for support is “the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends.” *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). I argue here that if legislative history comes from choosing friends at a cocktail party, citation of case precedent comes from a president choosing among friends at an inaugural ball.

14. See Pojanowski, *supra* note 2, at 480.

15. See Scalia, *supra* note 1, at 13. See generally EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING (1948) (describing this view, which makes much more of distinctions among holding, dicta, and justificatory argument than do contemporary American courts).

There has, indeed, been general debate about the role that the common law tradition should play in statutory interpretation. On one side, commentators and jurists including the late Justice Scalia argue that when judges sit as interpreters of statutes they should shed their common law mantles, take a back seat, and acknowledge the primacy of the legislature. This, the argument goes, requires courts to do less searching for the “best” interpretation based on considerations outside the legislation and to pay more attention to the text itself.¹⁶ A recent article by Jeffrey Pojanowski¹⁷ summarizes this discussion, with scholars such as Professors John Manning¹⁸ and Adrian Vermeule¹⁹ joining Scalia in warning against overreliance on common law reasoning. Judge Frank Easterbrook has similarly called for judges to stand back from their common law inclinations in statutory cases.²⁰ On the other side, writers including Professor William Eskridge,²¹ Judge Guido Calabresi,²² and Professor Peter Strauss²³ argue that embedding statutory interpretation into a larger framework that includes common law reasoning creates a balance between stability and dynamism that is appropriate for judicial decision-making.

Despite the sometimes vituperative debates over interpretive methods, judges from both camps rely on precedent to expand or contract their arsenal of interpretive tools. This ubiquity of precedent on both ends of the spectrum should not come as a surprise. Adherence to precedent furthers both uniformity and stability in the

16. Scalia, *supra* note 1, at 17.

17. Jeffrey A. Pojanowski, *Reading Statutes in the Common Law Tradition*, 101 VA. L. REV. 1357, 1374–75 (2015).

18. See, e.g., Manning, *supra* note 4, at 450; John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003).

19. Adrian Vermeule objects to courts’ use of canons of construction, since they are virtually all judicial constructs and judges are generally less competent than agencies to make interpretive decisions. See VERMEULE, *supra* note 4, at 200–02.

20. Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 544 (1983).

21. See WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 107–09 (1994) (arguing that judges should take into account reliance on earlier judicial decisions, among other changes in the legal landscape, in subsequent interpretations of a statute).

22. See CALABRESI, *supra* note 2, at 101 (1982) (arguing, as the title suggests, for judges to have the power to modify statutory language over time as language evolves and social context develops).

23. See Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 242–45 (1999) [hereinafter Strauss, *Common Law and Statutes*] (establishing a common law perspective on both legislating and interpreting legislation in the United States); Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 436–37 (1994).

law—important rule of law values.²⁴ And, compared with reliance on precedent in constitutional cases, reliance on statutory precedent produces less long-term risk. When a court makes a decision contrary to the intent of the legislature or contrary to values the legislature now cherishes, regardless of the intent of an earlier, enacting legislature, the legislature can override the court's decision and regain control of the statute's application.²⁵

Cutting across the various ways in which courts use judicial precedent in statutory cases, this Article looks at its use as a phenomenon in its own right. Indeed, specific judicial practices that rely on precedent have received attention. One such practice is the use of statutory *stare decisis*. Courts generally regard prior interpretations of a law as settled and do not review them. When they do review such precedent, they most often reaffirm earlier decisions as entrenched, whether they would be the best decisions today or, for that matter, were good decisions when initially made. In particular, a high court is unlikely to reverse itself once it has ruled on a question of statutory interpretation.²⁶ Similarly, there has been substantial discussion of the role that canons of construction should play in judicial interpretation of statutes.²⁷ Yet these—substantive and

24. These values are frequently articulated as motivation for legal decision-making. See, e.g., Margaret N. Kniffin, *Overruling Supreme Court Precedents: Anticipatory Action by United States Courts of Appeals*, 51 *FORDHAM L. REV.* 53, 80–88 (1982).

25. For discussion of the actual practice of overriding judicial interpretations of statutes, see generally Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 *TEX. L. REV.* 1317, 1319–20 (2014) (surveying congressional overrides during that period and noting a shift from “restorative overrides” to “policy-updating” overrides); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331, 334 (1991) (surveying congressional overrides of Supreme Court statutory interpretation cases and positing that “statutory interpretation decisions are more responsive to the expectations of the current Congress than to those of the enacting Congress,” but that “the Court is also responsive to its own institutional and personal preferences”); Victoria F. Nourse, *Overrides: The Super-Study*, 92 *TEX. L. REV.* 205 (2014) (commenting on Christiansen and Eskridge’s 2014 survey); Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 *NOTRE DAME L. REV.* 511, 512 (2009) (arguing that congressional overrides of Supreme Court statutory interpretation precedents are often construed narrowly, which “threatens legislative supremacy and undermines the standard rationales offered for adherence to precedent”).

26. William Eskridge has referred to this phenomenon as “super-strong” *stare decisis*. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 *GEO. L.J.* 1361, 1362 (1988).

27. The seminal, critical work is 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 (1950). Since then, there have been many positions taken on both the role of the canons generally and on the status of particular canons. For an excellent empirical study of the battles over the application of many of the canons, see Anita

grammatical canons alike—may also be seen as instances of judges acting authoritatively in a realm in which they profess to be subordinate.

Adherence to earlier interpretations of the same statute by a high court and reliance on the canons of construction are only the tip of the iceberg when it comes to reliance on precedent in statutory cases. Judges, in particular Supreme Court Justices, often rely on earlier judicial statements to justify just about every aspect of every argument in every case, from how a court construed a word of ordinary English decades ago to the assessment of historical fact set forth in an earlier case. Furthermore, such reliance is neither limited to nor more prominent among the more liberal, nontextualist judges.²⁸ All judges do it. While legal scholars and judges express concern about the judiciary overstepping its proper role by inserting judges' own values into the interpretation of a statute, absent from this discussion is a consideration of the vast extent to which courts rely upon their own judicial opinions in ruling on the meaning and application of laws.

This Article examines every precedent cited by Supreme Court Justices in one five-to-three decision and two five-to-four decisions dealing with statutory interpretation. What emerges is a picture of indiscriminate citation to judicial authority. The overarching goal of this methodology, I argue, is the quest for coherence. Judges care about demonstrating that one interpretation fits better with past practice than competing interpretations. Regardless of whether a current decision coheres with the social or political context surrounding a law's enactment, the statute's legislative history, its interpretation by prior courts, judicial interpretation of other statutes, the use of various interpretive principles, or other considerations, judges appear to concern themselves with demonstrating that their interpretation advances a narrative that is indisputably part of the American legal tradition.²⁹ However, because the narratives with

Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909 (2016); see also ROBERT A. KATZMANN, *JUDGING STATUTES* 51–54 (2014); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 279–80, 282 (1990); SCALIA & GARNER, *supra* note 5, at 51 (setting forth fifty-seven “valid” canons of interpretation); James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 1–7 (2005); Michael Sinclair, “Only a Sith Thinks Like That”: Llewellyn’s “Dueling Canons,” *One to Seven*, 51 N.Y. L. SCH. L. REV. 919, 919–21 (2006).

28. See *infra* Section II.B.

29. The narrative structure of legal decision-making has been widely discussed. For a seminal work, see generally ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000).

which a decision may cohere are many, the use of precedent in the service of these arguments is largely unconstrained.

It is easy enough to criticize this practice—and this Article does criticize it. Reliance upon random statements by a judge in an unrelated case; excessive reliance on grammatical canons of construction in the teeth of equally available argument to the contrary; the use of precedent to establish the meaning of an everyday word that has no fixed legal meaning; and the “textualization” of earlier precedent³⁰—replacing statutory language with the language used by judges who had earlier written about the statute—are all questionable practices. Moreover, such practices undermine the principle of legislative primacy because they are either based upon false assumptions about the legislative process³¹ or do not concern themselves with the legislative process at all. Instead, they place the judiciary at the center of the interpretive endeavor.

Yet legitimate reasons for referring to earlier decisions do exist. Among them are the practice of statutory stare decisis mentioned above; the establishment of certain canons of construction³² embodying generally accepted principles of statutory interpretation (albeit judge-made principles); and the desire to create a coherent body of law around language that is not sufficiently crisp to apply uniformly without further interpretation. By distinguishing legitimate and indiscriminate reliance on statutory precedent, this Article attempts to separate the wheat from the chaff—or at least begin to do so.

Part I briefly describes statutory stare decisis. Because this Article supports this doctrine, the discussion serves as a baseline for the more critical analysis of other applications of interpretation by precedent. It should be noted at the outset, however, that stare decisis is the quintessential principle of common law adjudication and is, for the most part, in tension with legislative primacy.³³ Its wide acceptance in the realm of statutory interpretation speaks volumes about the relationship between legislature and judiciary.

30. The expression comes from Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1188 (2007).

31. See 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, 928–30 (2013) (summarizing the results of an empirical study).

32. These largely include the substantive canons, such as the presumption that laws are intended to apply within the territory and not in foreign domains.

33. See *infra* Section I.A.

Part II discusses more fully the range of reasons for employing precedent as a method in statutory interpretation. In some ways this method reinforces the core value of legislative primacy, while in other ways it undermines that value. This Part then examines in detail the use of precedent in one five-to-three and two five-to-four statutory interpretation decisions of the U.S. Supreme Court,³⁴ each of which involves the interpretation of a linguistically ambiguous statute, requiring arguments beyond the law's plain language. The analysis examines every citation to a judicial opinion in each case, in one instance numbering almost one hundred. The conclusions drawn from that analysis paint a chaotic picture of how judges use precedent. In some cases, the Justices engage one another, both sides arguing about the same thing but disagreeing on the outcome. In other cases, the two sides refer to distinct bodies of precedent, like ships passing in the night. Sometimes Justices recognize that the case law does not give rise to a single answer. On other occasions, a Justice might cite only those precedents that support his or her position, either relying on the other side to bring out opposing precedent or simply appearing unconcerned about whether anyone notices.

Part II continues by comparing the conclusions drawn from these case analyses to the baseline principles articulated in the discussion of *stare decisis* in Part I. Precedent is used for *stare decisis* effect when the case is said to resemble an earlier decision that has already decided the issue at hand. As Part III reveals, however, precedent is also used to support a host of arguments, ranging from establishing the meanings of commonly used words, to the application of grammatical and substantive canons of construction, and, perhaps most interestingly, to the creation of narratives based on earlier holdings in an effort to demonstrate that a Justice's position better coheres with past practice than the opposing position.

Part III focuses on the judicial values of stability and coherence as explanations for courts' heavy reliance on precedent in statutory decisions.³⁵ Significantly, these values are prominent in both common

34. The cases are: *Small v. United States*, 544 U.S. 385 (2005); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007); and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

35. These values are frequently articulated as justification for a high court's issuing decisions that have binding precedential effect. See, e.g., Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 730 (2012) ("Having the final say entrenches the Court's role of helping to ensure stability, coherence, and unity in the legal system, a role that the Court has claimed (sometimes unsuccessfully) from the beginning.").

law and civil law theory.³⁶ For this reason, it would be a mistake to characterize the use of precedent in furtherance of these values as an instance of judges being unable to free themselves from their common law constraints in statutory cases. Rather, Part III posits that it makes more sense both to understand stability and coherence as general rule of law values, promoted in common law style, and to examine the extent to which comfort with precedent leads judges to extend their use of precedent in ways that cannot be justified by these values.

Part IV presents an approach to the use of precedent in statutory cases that begins by taking greater advantage of the traditional distinction between holdings and dicta to sort out what precedent *must* be adhered to and what is worth following only because it is persuasive. While the distinction has been rightly criticized as difficult to apply in some contexts, it can serve as a starting point in helping judges and lawyers conceptually separate precedent that must be followed from that which might be followed, if persuasive. In the service of deference to the legislature, Part IV argues that judges should justify reference to the persuasive precedent on substantive grounds, rather than merely on the basis of its having been previously said. In some ways, the distinction suggested here, while a foundational part of traditional common law reasoning, better resembles the approach to statutory cases used in many civil law jurisdictions, where legislative primacy is considered the norm and precedent is valued far less as a part of legal argument. Part IV then offers specific suggestions for implementing the approach presented, including the maintenance of statutory *stare decisis* and reduced deference to various canons of construction.

I. STATUTORY STARE DECISIS: STABILITY IN THE INTERPRETATION OF LAWS

A. *The Propensity Not to Overrule Statutory Decisions*

Often called “statutory *stare decisis*,” the principle that precedents in statutory cases are not to be overturned lightly is justified on several grounds.³⁷ Chief among these justifications is the

36. See Strauss, *Common Law and Statutes*, *supra* note 23, at 234–36 for a discussion of similarities and differences between the two types of systems with regard to statutory interpretation.

37. The term “*stare decisis*” is used in this context to refer to what Frederick Schauer calls “horizontal precedent,” the practice of a court’s adhering to earlier decisions even if it disagrees with them, for the sake of continuity and stability. See Frederick Schauer,

benefit that comes from knowing that the meaning of a statute is settled, and thus that its interpretation can be relied on by those to whom the statute applies. As Justice Brandeis once explained:

Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.³⁸

Brandeis articulates the standard account: *stare decisis* should be especially strong in statutory cases and especially weak in constitutional cases, with, supposedly, a middle ground in common law adjudication.³⁹

But this stance is not without its detractors. For instance, Professor Amy Coney Barrett, in an article criticizing lower courts for adopting the doctrine, focuses on two widely discussed justifications for statutory *stare decisis*: legislative acquiescence to the court's decision and separation of powers concerns, which make it more appropriate for the legislature than the court to alter policy in the wake of a court's erroneous interpretive decision.⁴⁰ Inferences of legislative agreement based on the legislature's failure to override an earlier court decision have been criticized widely.⁴¹ There are many reasons for a legislature not to act, only one of which is majority

Precedent, in THE ROUTLEDGE COMPANION TO THE PHILOSOPHY OF LAW 123, 124 (Andrei Marmor ed., 2012). "Vertical precedent," in contrast, refers to the obligation of lower courts to follow the precedents set by higher courts. *Id.* I return to the latter concept below.

38. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting) (citation omitted).

39. See generally, e.g., Brian C. Kalt, *Three Levels of Stare Decisis: Distinguishing Common-Law, Constitutional, and Statutory Cases*, 8 TEX. REV. L. & POL. 277 (2004) (articulating this account and calling for greater adherence to precedent in constitutional and common law cases).

40. Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 330–37 (2005).

41. See, e.g., *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2053 (2014) (Scalia, J., dissenting) ("Giving dispositive weight to congressional silence regarding a common-law decision of this Court effectively codifies that decision based only on Congress' failure to address it. This approach is at odds with our Constitution's requirements for enacting law."); Paul Stancil, *Congressional Silence and the Statutory Interpretation Game*, 54 WM. & MARY L. REV. 1251, 1252–54 (2013). For earlier discussion of the doctrine, see generally William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988).

acquiescence to a court's earlier interpretive decision.⁴² Moreover, such acquiescence, when it does occur, says nothing about whether the *enacting* legislature would have been pleased with how the judiciary applied its work.⁴³

More persuasive is the separation of powers rationale for the doctrine, attributable in different versions to Justice Hugo Black⁴⁴ and, more recently, Professor Lawrence Marshall.⁴⁵ Justice Black first recognized that courts must resolve ambiguities in statutes even when such resolution is inseparable from a policy decision that, in an ideal world, would have been the legislature's to make.⁴⁶ But he further argued that nothing excuses a court's revisiting its initial decision to create new policy later:

When the law has been settled by an earlier case[,] then any subsequent "reinterpretation" of the statute is gratuitous and neither more nor less than an amendment: it is no different from a judicial alteration of language that Congress itself placed in the statute.

Altering the important provisions of a statute is a legislative function. And the Constitution states simply and unequivocally: "All legislative Powers herein granted shall be vested in a Congress of the United States . . ."⁴⁷

Professor Marshall, expressing similar concerns, argues that imposing a rule of absolute statutory *stare decisis* is the best way to discipline both the courts (not to make legislative decisions beyond what is necessary under their Article III obligations) and the legislature (to override judicial decisions with which they disagree instead of waiting for the courts to do the work for them).⁴⁸

Yet, this bright-line argument fails to consider that statutory *stare decisis* is not a norm set in stone. As William Eskridge has pointed out, situations exist in which courts are less likely to give deference to earlier statutory decisions.⁴⁹ First, as Justice Frankfurter advocated, in some instances statutory precedents arise casually,

42. See Barrett, *supra* note 40, at 334.

43. See *id.*

44. *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 256–57 (1970) (Black, J., dissenting).

45. Lawrence C. Marshall, "Let Congress Do It": The Case for an Absolute Rule of Statutory *Stare Decisis*, 87 MICH. L. REV. 177, 182–83 (1989).

46. See *Boys Mkts., Inc.*, 398 U.S. at 256–58 (Black, J., dissenting).

47. *Id.* at 257–58 (quoting U.S. CONST. art. I).

48. See Marshall, *supra* note 45, at 183.

49. ESKRIDGE, *supra* note 21, at 252–57.

without sufficient analysis.⁵⁰ When that happens, further reflection may lead courts to change their minds. Second, as many have observed, some statutes are considered “common law statutes” whose doctrines develop over time through judicial decision-making.⁵¹ Finally, as Eskridge points out, the less reliance there has been on a precedent, the less problematic would be its reversal for good cause.⁵² These various factors play out in the two illustrations presented below.

B. Two Scenarios

1. Weak Reliance, Strong History

Consider the following history of cases interpreting the Federal Employers’ Liability Act (“FELA”).⁵³ The statute makes common carriers doing business in interstate commerce liable as a matter of federal law for the death or injury of their employees.⁵⁴ The statute creates liability for

injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.⁵⁵

Because the language merely says, “resulting in whole or in part from the [carrier’s negligence]” and “by reason of any defect or insufficiency, due to its negligence,” on several occasions courts have confronted the question of the statute’s standard of causation.

The first such case to reach the Supreme Court was *Rogers v. Missouri Pacific Railroad Co.*⁵⁶ in 1957. Rogers, the plaintiff, had been working on the tracks, burning weeds, when a column of air created by a passing train fanned the flames. Rogers covered his face and stepped backward, suffering a fall that caused him serious

50. See *Monroe v. Pape*, 365 U.S. 167, 220 (1961) (Frankfurter, J., dissenting).

51. See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 285–86 (1985). For the argument that relaxation of statutory stare decisis should be further extended to allow common law development of statutory doctrine in certain circumstances, see WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 299–302 (2010).

52. ESKRIDGE, *supra* note 21, at 255–57.

53. 45 U.S.C. § 51 (2012).

54. *Id.*

55. *Id.*

56. 352 U.S. 500 (1957).

injury.⁵⁷ Some of the fault for the accident may have been Rogers's own.⁵⁸ For that reason, after a jury verdict for Rogers in a Missouri trial court, the Supreme Court of Missouri reversed.⁵⁹ The U.S. Supreme Court then reversed the Missouri appellate court in a unanimous decision, holding:

Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. . . . The statute expressly imposes liability upon the employer to pay damages for injury or death due "in whole or in part" to its negligence.⁶⁰

In other words, contributory negligence is no bar to a case brought under FELA, and therefore proof of proximate cause is less demanding than under ordinary tort principles.

The same result ensued six years later in *Gallick v. Baltimore & Ohio Railroad Co.*⁶¹ A railroad employee, working on the railroad's right of way near a fetid pool of standing water containing, among other things, dead rats, received an insect bite.⁶² The bite eventually led to an infection that coursed through his system and required the amputation of both legs. He, too, sued in state court and found the trial court's judgment in his favor reversed for failure to establish proximate causation.⁶³ Again, the Supreme Court reversed in a unanimous decision, holding that the only issue was whether the defendant's negligence played *any* role in causing the plaintiff's injuries.⁶⁴ Congress did not require more exacting, common law proof of proximate causation, and state appellate courts, accustomed to reviewing jury instructions to determine their conformance with well-settled common law principles, should understand that their role is more constrained when enforcing a federal statute.⁶⁵

It took more than half a century for the issue to arise again in the Supreme Court, this time in *CSX Transportation, Inc. v. McBride*,⁶⁶

57. *Id.* at 502.

58. *Id.* at 503–04.

59. *Id.* at 501.

60. *Id.* at 506–07 (citations omitted).

61. 372 U.S. 108 (1963).

62. *Id.* at 109.

63. *Id.* at 112–13.

64. *Id.* at 116, 120–22.

65. *Id.* at 113–16.

66. 131 S. Ct. 2630 (2011).

decided in 2011. The basic story is similar to that of the earlier cases⁶⁷: McBride was a locomotive engineer for a freight train company. He was sent on a run between Indiana and Illinois, which required adding and removing railroad cars during a number of stops. An unusual configuration of the engines required that McBride use a hand brake to accomplish these tasks, which exposed him to additional risk of injury. Sure enough, his hand was severely injured by a handbrake that he had earlier complained was dangerous given the conditions of its use.

McBride sued in federal district court and won. The jury was given the standard Seventh Circuit instruction that accorded with the decision in *Rogers*.⁶⁸ In particular, there was no traditional common law instruction on proximate causation. Rather, the jury was instructed that the “Defendant ‘caused or contributed to’ Plaintiff’s injury if Defendant’s negligence played a part—no matter how small—in bringing about the injury.”⁶⁹ CSX appealed to the Seventh Circuit, which affirmed.⁷⁰ The Supreme Court affirmed again, this time in a five-to-four decision.⁷¹ Justice Ginsburg wrote the majority opinion, in which Justices Breyer, Sotomayor, and Kagan joined.⁷² Justice Thomas, the deciding vote, joined in most of the opinion and in the holding.⁷³ Chief Justice Roberts dissented, joined by Justices Scalia, Alito, and Kennedy.⁷⁴ Thus, apart from Justice Thomas, the Justices voted predictably along ideological grounds, the liberals favoring broader avenues for employees to sue an employer and the conservatives wishing to constrain such actions more tightly.

In justifying the tighter, FELA-specific standard of proximate cause, the majority opinion focused on the purpose and language of the statute and made strong use of the earlier decisions: “Countless judges have instructed countless juries in language drawn from *Rogers*. To discard or restrict the *Rogers* instruction now would ill serve the goals of ‘stability’ and ‘predictability’ that the doctrine of statutory *stare decisis* aims to ensure.”⁷⁵ The dissent accused the majority of breaking new ground and noted that the Court had, in the past, read the requirement of proximate causation into a statutory

67. *Id.* at 2635–36.

68. *Id.* at 2636.

69. *Id.* at 2635.

70. *Id.* at 2635–36; *McBride v. CSX Transp., Inc.*, 598 F.3d 388 (7th Cir. 2010).

71. *McBride*, 131 S. Ct. at 2644.

72. *Id.* at 2634.

73. *Id.*

74. *Id.* at 2644.

75. *Id.* at 2641.

scheme when the statute itself did not mention it.⁷⁶ The dissent further engaged in a lengthy parsing of *Rogers*, arguing that it was never intended to be as broadly interpreted as the majority would have it, but rather was limited to the facts of that case, which more concerned contributory negligence than proximate causation.⁷⁷

None of the Justices actually eschewed the principle of statutory stare decisis. The dissent, however, would have interpreted *Rogers* so narrowly as to make it largely irrelevant. Such a narrow reading of precedent is prototypical common law reasoning. A statute is interpreted by distinguishing cases that would have it construed otherwise—all in the name of legislative primacy.

2. Weak History, Strong Reliance

The overall story of *CSX Transportation* is very similar to that of *Flood v. Kuhn*,⁷⁸ the poster child of strong stare decisis in statutory cases. Some fifty years before the 1972 *Kuhn* decision, the Supreme Court had decided, in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*,⁷⁹ that baseball was not subject to the antitrust laws since it was not interstate commerce.⁸⁰ Thirty years later, in *Toolson v. New York Yankees*,⁸¹ the Court, in a per curiam decision, upheld *Federal Baseball Club*, not on the original ground, but because significant business reliance on the earlier decision had occurred in the interim and because only congressional action could make the antitrust laws apply to baseball.⁸² The Court further noted that in three decades Congress had never acted to override the earlier decision.⁸³

Thus, by the time Kurt Flood challenged his trade by the St. Louis Cardinals to the Philadelphia Phillies after the 1969 season, baseball's immunity from the antitrust laws had been entrenched for half a century and reaffirmed at approximately the half-way point. Flood challenged the so-called reserve clause, which would have given the Phillies (as designee of the Cardinals) the right to hold Flood to a one-year contract at eighty percent of his previous year's salary if he did not agree to the trade. The Court upheld the provision

76. *Id.* at 2646 (Roberts, C.J., dissenting).

77. *Id.* at 2648–49.

78. 407 U.S. 258 (1972).

79. 259 U.S. 200 (1922).

80. *Id.* at 200.

81. 346 U.S. 356 (1953).

82. *Id.* at 357.

83. *Id.*

because of the consequences that reversal of the earlier decision would have on the business of professional baseball.⁸⁴

As Professor Stephen Ross points out in his excellent essay on this case, the Supreme Court's reaffirmation of the baseball exemption was anything but a simple-minded application of stare decisis to a bad decision.⁸⁵ For one thing, it was a five-to-three decision. Justice Marshall's dissent succinctly describes the dividing issue:

This is a difficult case because we are torn between the principle of *stare decisis* and the knowledge that the decisions in *Federal Baseball Club v. National League*, 259 U.S. 200 (1922), and *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953), are totally at odds with more recent and better reasoned cases.⁸⁶

The majority decided that reliance on the earlier decision, combined with several failed congressional efforts to put baseball in the same position as other sports that lacked exemption from the antitrust laws, made stare decisis the better path, ultimately looking to Congress to change the law in the future if it so desired.⁸⁷ Acknowledging that baseball is indeed interstate commerce,⁸⁸ the majority concluded:

We continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.⁸⁹

Together, *CSX Transportation* and *Kuhn* tell a more subtle story of statutory stare decisis than does the standard account encompassing strong deference to judicial rulings in statutory cases. For one thing, both courts were divided. For another, the rationales were quite different. In *CSX Transportation*, most of the conservative judges wanted to overturn a precedent that they did not like, while the liberals wanted to preserve a precedent that they did like. The

84. *Id.*

85. Stephen F. Ross, *The Story of Flood v. Kuhn: Dynamic Interpretation, at the Time*, in STATUTORY INTERPRETATION STORIES 36 (William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett eds., 2011).

86. *Flood v. Kuhn*, 407 U.S. 258, 290 (Marshall, J., dissenting).

87. *Id.* at 276 (majority opinion).

88. *Id.* at 282.

89. *Id.* at 283–84.

liberals won.⁹⁰ In *Kuhn*, the dissenters were two liberal judges concerned chiefly about the inconsistency between the Court's exemption of baseball and the inclusion of other sports under the antitrust laws.⁹¹

Such battles are fought from time to time. The year after the Court decided *CSX Transportation*, it decided *Kurns v. Railroad Friction Products Corp.*⁹² The question there was whether the Federal Locomotive Inspection Act⁹³ preempted state tort law.⁹⁴ A decision from 1926, applying standards no longer in effect, gave the Federal Act broad preemptive priority over state law.⁹⁵ When a railroad employee was diagnosed with mesothelioma, he sued the manufacturer of the locomotive on which he worked, claiming that it was defectively designed and that he was not given adequate warning about the dangers of the asbestos used in the brake linings.⁹⁶ All nine Justices agreed that the Federal Act preempted the defective design claim brought under state law.⁹⁷ The majority, however, construed the earlier decision broadly to preempt and preclude the failure-to-warn claim as well.⁹⁸ Three dissenters would have construed the earlier decision more narrowly to allow this claim.⁹⁹ Here, again, the issue was not the viability of the doctrine of statutory stare decisis but rather how broadly to construe the earlier precedent relied upon—as is so often the case in common law jurisprudence.

In contrast to both *Kurns* and *CSX Transportation*, the debate in *Kuhn* was centered on the preservation of a decision that would surely have come out differently at the time of the later case and was probably a bad decision in the first place. The Court itself, however, had triggered such reliance in the business community that the majority believed it would be doing more harm than good to reverse itself at so late a juncture.

90. For an excellent study showing that the swing vote in many five-to-four decisions is made by a Justice who deviates from his or her ordinary political ideology because of special concerns in the particular case, see Peter K. Enns & Patrick C. Wohlfarth, *The Swing Justice*, 75 J. POL. 1089, 1103 (2013).

91. *Kuhn*, 407 U.S. at 291 (Marshall, J., dissenting).

92. 132 S. Ct. 1261 (2012).

93. 49 U.S.C. § 20701 (1992).

94. *Kurns*, 132 S. Ct. at 1264.

95. *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605 (1926).

96. *Kurns*, 132 S. Ct. at 1264. The plaintiff died before the litigation was completed, and his estate replaced him as plaintiff. *Id.* at 1264–65.

97. *Id.* at 1270.

98. *Id.* at 1268.

99. *Id.* at 1271 (Sotomayor, J., concurring in part and dissenting in part).

An important qualifying note: there are very few Supreme Court cases in which statutory *stare decisis* is expressly at issue.¹⁰⁰ This is not because the principle is irrelevant, but rather because the principle is sufficiently embedded in the jurisprudence of statutory interpretation that it is mostly beyond challenge.¹⁰¹ To illustrate, in 1993, the Supreme Court decided *Smith v. United States*,¹⁰² holding that trading a machine gun for illegal drugs constitutes “using a firearm” during and in relation to a drug trafficking crime.¹⁰³ While subsequent litigants may wish to test the breadth of the statute, which establishes an enhanced sentence for those who use a firearm while buying or selling illegal drugs, once the Supreme Court held that trading a machine gun for drugs comes within the purview of the statute, that question effectively became off-limits.¹⁰⁴ The Supreme Court has no reason to revisit the issue, and the lower courts are obliged to obey it. In short, statutory *stare decisis* is common law reasoning *per se*.

II. PRECEDENT AS METHOD IN STATUTORY INTERPRETATION

Notwithstanding the focus on maintaining stability in statutory interpretation by adhering to prior decisions, very few statutory decisions turn on whether a court should abandon an old interpretation of a statutory provision in favor of a new interpretation. This Part first explores various ways in which a court may use precedent in statutory cases beyond merely applying it to similar facts to produce consistent outcomes. It then discusses three Supreme Court cases in detail. The cases reveal that the Justices at times agree on the relevant case law but not on its relative importance. More often, however, each side cites its own case law in the service of creating a coherent narrative in which that side’s position follows more directly from what has previously been decided.

100. The Supreme Court first used the term “statutory *stare decisis*” in 2007 in *Rita v. United States*, 551 U.S. 338, 368 (2007) (Scalia, J., concurring in part and concurring in the judgment). Since then, it has used the term five more times (including in the cases discussed above). See *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409, 2413–14 (2015); *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1264 (2012) (Sotomayor, J., concurring in part and dissenting in part); *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2641 (2011); *Bilski v. Kappos*, 561 U.S. 593, 602 (2010); *Kimbrough v. United States*, 552 U.S. 85, 89 (2007) (Alito, J., dissenting).

101. See Schauer, *supra* note 37, at 127.

102. 508 U.S. 223 (1993).

103. *Id.* at 237; 18 U.S.C. § 924(c)(1) (2012).

104. See, e.g., *United States v. Kuehne*, 547 F.3d 667, 678–79 (6th Cir. 2008).

A. *Why Courts Rely on Precedent in Statutory Cases Even When the Precedent Does Not Address the Ultimate Issue*

Courts articulate four reasons for why they care about what earlier courts have said, even if what the earlier courts have said is not determinative of the case at hand or, in some instances, is not even determinative of the earlier case.

First, resolving uncertainty in light of decisions in cases that construed a similar statute or resolved a similar interpretive problem in a dissimilar statute can add coherence to the *corpus juris*, to use Justice Scalia's term.¹⁰⁵ Just as a judge will take into account related doctrines in contract law to decide whether to apply a disputed contract law doctrine narrowly or expansively, that same judge will attempt to avoid making a muddle out of a statutory regime in which the statute at hand is situated. More generally but with less conviction, the judge will also attempt to avoid making a muddle out of the set of interpretive devices used to interpret statutes.

All judges engage in this process, in line with Ronald Dworkin's position that judges, whether in common law or statutory cases, are obliged to make the law as good as it can be.¹⁰⁶ The appeal of such argumentation is increased by the fact that, as psychologists and philosophers have argued persuasively, people draw indirect inferences of intent from arguments about coherence.¹⁰⁷ If *d* coheres with *a*, *b*, and *c*, and an issue arises as to whether *d* comes within a statute that includes the other three, we are likely to infer that the legislature intended it to come within the statute by virtue of its seeming like the other items, assuming that the language permits such an inference. It should not be surprising, then, that judges categorize a quest for coherence as a legislative value, making it easy to substitute intent for coherence in judicial reasoning. Thus, one judge may refer to cases in which courts have narrowly construed statutes with features similar to the statute in the case at hand to show coherence with the legal tradition, often attributing the quest for such coherence to the enacting legislature. Yet another judge may, in the same case, rely on legislative history showing that the legislature

105. *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 100–01 (1991).

106. RONALD DWORKIN, *LAW'S EMPIRE* 411 (1986).

107. See GILBERT HARMAN & SANJEEV KULKARNI, *RELIABLE REASONING: INDUCTION AND STATISTICAL LEARNING THEORY* 10–11 (2007); Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 537–41 (2004). For further discussion, see SOLAN, *supra* note 7, at 150.

intended the statute to have a broad meaning, each side thus creating its own coherent historical narrative.¹⁰⁸

A second reason for heavy reliance on case law in statutory interpretation is to demonstrate that an argument falls within the culture of legal reasoning and is thus entitled to some level of deference. Reliance on grammatical canons of construction, such as *eiusdem generis*¹⁰⁹ and the rule of the last antecedent,¹¹⁰ fit into this category. It would be foolish, some sixty years after Professor Karl Llewellyn wrote his famous article on the malleability of the canons,¹¹¹ for anyone to argue seriously that the canons are applied uniformly in all cases in which they are relevant. To the best of my knowledge, no one does. Yet, as we shall see, judges continue to cite these canons, not as the starting point for justifying their application in a particular case, but rather for the purpose of suggesting that they are sufficiently authoritative because they were used in earlier cases. The same holds true for instances in which a court construes a statutory word used in its ordinary sense because other courts have similarly construed that word. Although recent literature suggests that the legislature does not have such prior judicial interpretations in mind when it drafts new code provisions,¹¹² earlier cases are frequently cited on the theory that the legislature does have these earlier constructions in mind.¹¹³

Third, courts may actually develop principles that they wish to follow so that interpretation proceeds in a path-dependent manner.¹¹⁴

108. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), is such a case. This Article returns to coherence as a legal value in Part IV.

109. The Supreme Court has defined the canon as follows: “[I]t limits general terms which follow specific ones to matters similar to those specified; but it may not be used to defeat the obvious purpose of legislation.” *Gooch v. United States*, 297 U.S. 124, 128 (1936). It is still accepted by judges and scholars of various political stripes. See SCALIA & GARNER, *supra* note 5, at 200, 211.

110. See LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 37–38 (1993). The Supreme Court recently applied this principle in *Lockhart v. United States*, 136 S. Ct. 958, 962–63 (2016).

111. Llewellyn, *supra* note 27, at 395. Perhaps the canons, when read fairly, are not as self-contradictory as Llewellyn argues; he makes his point by removing context from their application. See POSNER, *supra* note 27, at 281. Nonetheless, canons are certainly not reliable across-the-board principles of interpretation.

112. William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 225 (2000); Gluck & Bressman, *supra* note 31, at 905.

113. See *infra* Part III.

114. For a discussion of path dependency in statutory interpretation, see Stephanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin’s Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1166 (2005). Such interpretive principles need not be hard and fast rules, but may rather provide defaults, exceptions to which must

Such principles include substantive canons of construction, among them the rule of lenity,¹¹⁵ the rule of constitutional avoidance,¹¹⁶ and the rule that laws are to be construed as applying only within the territory.¹¹⁷ All of these canons are notoriously elastic and are applied so unevenly as to appear more as background values than as precise interpretive principles.¹¹⁸ Nonetheless, courts take them seriously, and they appear to influence the outcome of cases.

Fourth, courts may rely upon principles that limit judges to a certain set of methods that must be used in a prescribed order. Recent scholarship, led by the work of Professor Abbe Gluck, has characterized such methods under the rubric of “methodological *stare decisis*.”¹¹⁹ Gluck’s review of the methods of statutory interpretation used in five different states revealed that many states appear to have adopted a type of modified textualism, in which extratextual material is permissible when used to resolve uncertainty, but should not be consulted when the language of the statute is dispositive. Among the types of extratextual evidence used by courts when the language of the statute is found to be indeterminate are legislative history, grammatical canons of construction, substantive tie-breaking principles, and additional contextual information. Using Wisconsin as an example, Gluck traces the history of the state supreme court’s

be justified. See EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* 9–14 (2009).

115. See, e.g., Lawrence M. Solan, *Law, Language and Lenity*, 40 WM. & MARY L. REV. 57, 86–102 (1998) (discussing unevenness in the application of the lenity principle).

116. “[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such a construction is plainly contrary to the intent of Congress.” Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). The scope of this canon’s interpretation has also been controversial. Compare SCALIA & GARNER, *supra* note 5, at 247–51 (“A statute should be interpreted in a way that avoids placing its constitutionality in doubt.”), with Bertrall L. Ross II, *Against Constitutional Mainstreaming*, 78 U. CHI. L. REV. 1203, 1253–61 (2011) (“[C]onstitutional mainstreaming is neither a necessary nor proper prophylactic tool for the protection of the constitutional core.”).

117. See discussion *infra* Section II.B.1.

118. See, e.g., William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 590 (2013) (reviewing SCALIA & GARNER, *supra* note 5, and discussing the lack of precision in applying the canon of constitutional avoidance); Ross, *supra* note 116, at 1211.

119. See, e.g., Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1918–20 (2011); Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47, 47–49 (2010), <http://www.yalelawjournal.org/forum/the-costs-of-consensus-in-statutory-construction> [http://perma.cc/BKG7-T4NA].

establishment of this hierarchy of considerations.¹²⁰ Lower courts have adhered to this method, as have subsequent iterations of the supreme court itself—even the very justices who expressed disagreement with the method in the case in which it was established.¹²¹ Gluck further notes that, globally, the states vary to some extent with respect to the order in which these additional materials may be used.

Although the use of a received body of methodological precedent occurs more often in state courts than in federal courts, constraints on the order in which interpretive principles are applied appear in both. For example, it is fairly well established that the rule of lenity is applied only after other interpretive methods fail to clarify the meaning of a criminal law.¹²² Otherwise, any indeterminacy in linguistic meaning would result in a defendant's going free, no matter how remote such a result is from either a reasonable interpretation of the statute or the likely intent of the legislature (which are often the same).¹²³ This is a form of methodological stare decisis. For that matter, so is the well-quoted statement of the Supreme Court: "The task . . . begins where all such inquiries must *begin*: with the *language* of the *statute* itself."¹²⁴

Yet the consensus among the Justices is narrow. Rampant disagreement remains as to what the correct set of ordering principles should be, even in the midst of calls for uniformity¹²⁵ and even though consensus does exist on some points.¹²⁶ In her empirical study of statutory decisions in the Roberts Court, Professor Anita Krishnakumar notes that the number of cases in which the Justices "duel" over particular canons is relatively low.¹²⁷ She further observes that disagreement over both the basic tenets of textualism and the malleability of the canons even where judges agree on the order in

120. *State ex rel. Kalal v. Circuit Court for Dane Cty. (In re Criminal Complaint)*, 681 N.W.2d 110, 122–27 (Wis. 2004); Gluck & Bressman, *supra* note 31, at 965.

121. *Kalal*, 681 N.W.2d at 127–28 (Abrahamson, C.J., concurring); Gluck & Bressman, *supra* note 31, at 965.

122. *See Moskal v. United States*, 498 U.S. 103, 108 (1990).

123. Thus, courts continue to refer to Justice Frankfurter's approach to lenity, which is to apply it late in the analysis. *See Callanan v. United States*, 364 U.S. 587, 596 (1961).

124. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (emphasis added).

125. *See* Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1880–81 (2008); Gluck, *supra* note 119, at 1907–12.

126. *See* SOLAN, *supra* note 7, at 51–54, and Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 1 (2006), for discussion of the wide range of interpretive methods that appear to be well established.

127. Krishnakumar, *supra* note 27, at 934.

which to apply them are grounds for pessimism with respect to the establishment of uniform methodology in the federal courts.¹²⁸

B. Three Examples of the Diffuse Reliance on Precedent

Let us look more closely at just what the Supreme Court does when it references earlier decisions in deciding current cases. I have selected three close decisions in which the statutory issue presents reasonable opportunities for both sides to make persuasive arguments. In all three cases it is possible not only to analogize the issue to others the Court has decided but also to distinguish the case at hand from earlier cases. In the end, the Justices' varied reasoning all sounds very much like that of common law judges.

The first case, *Small v. United States*,¹²⁹ concerns whether a law prohibiting those convicted of a serious crime from owning a gun should be applied when the predicate crime occurred outside the United States. The second, *Ledbetter v. Goodyear Tire & Rubber Co.*,¹³⁰ concerns the interpretation of a civil rights law outlawing employment discrimination. The law includes a 180-day limitation period. The question presented was whether the limitation period expires 180 days after the initial decision to discriminate in salary has been made or whether, instead, each periodic payment constitutes a new act of discrimination, effectively resetting the limitation period. The third case, *Circuit City Stores, Inc. v. Adams*,¹³¹ involved the scope of an exemption to the Federal Arbitration Act ("FAA") for contracts of employment with employees "engaged in" interstate commerce. The case considered whether the exemption should be limited to transportation workers, who are expressly mentioned in the statute, or should be more broadly construed to extend the exemption to the furthest limits of the Commerce Clause.

1. *Small v. United States*

In *Small*, the question turned on the meaning of "any." Gary Small had been convicted and sentenced to five years in prison in Japan for violating Japanese gun laws. He had smuggled firearms into Japan by placing them in water heaters that he claimed to be importing into the country as gifts.¹³² When Small returned to the United States, he quickly bought a gun and was then prosecuted for

128. See *id.* at 981–89.

129. 544 U.S. 385 (2005).

130. 550 U.S. 618 (2007).

131. 532 U.S. 105 (2001).

132. *Small*, 544 U.S. at 395 (Thomas, J., dissenting).

violating a statute that makes it unlawful “for any person—who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess . . . any firearm.”¹³³ The trial court rejected Small’s argument that the term “any court” should be construed to refer only to domestic courts.¹³⁴ He was convicted, and the court of appeals affirmed.¹³⁵ The Supreme Court reversed in a five-to-three decision, with the majority opinion written by Justice Breyer.¹³⁶

How does one decide whether “any court” should be construed as applying only within the United States or as applying worldwide? The majority (correctly) held that the language alone cannot answer the question because it is perfectly reasonable, if applying the statute in isolation, to construe the language either way.¹³⁷ When a presidential candidate says he does not want to miss “any state” in his campaign tour, he means all fifty. But when, as the majority notes, after discussing films playing in local theaters, one friend says to the other, “I’ll see any film,” the friend is most likely referring to those films within the universe of films under discussion.¹³⁸ It would be strange to take someone up on that statement by insisting on seeing a film that hadn’t been discussed.

Thus, one might look to the purpose of the statute, any extrinsic evidence of intent, and existing custom with respect to interpreting statutes extraterritorially. The last of these may also be seen as a proxy for legislative intent or as an independently motivated principle of statutory interpretation, *viz.* a substantive canon of construction. In either case, some reference to the case law would be required to determine the custom or verify the rule.

What tipped the case in favor of a territorial interpretation of “any court” was the observation that conduct punishable in various countries may not be criminal at all in the United States; thus the majority defaulted to the presumption that laws are assumed to govern conduct within the territory, absent evidence to the contrary.¹³⁹ There is a canon of construction to this effect, but, as the

133. 18 U.S.C. § 922(g)(1) (2012).

134. See *United States v. Small*, 183 F. Supp. 2d 755, 770 (W.D. Pa. 2002), *aff’d*, 333 F.3d 425 (3d Cir. 2003), *rev’d*, 544 U.S. 385 (2005).

135. *Small v. United States*, 333 F.3d 425, 425 (3d Cir. 2003).

136. *Small*, 544 U.S. at 386–87.

137. *Id.* at 388.

138. *Id.*

139. *Id.* at 389–91. In this regard, the Court noted the absence of legislative history one way or the other that might have indicated whether Congress intended the law to include crimes committed outside the United States. *Id.* at 393.

majority concedes and the dissent exploits, Small was not convicted of committing a crime abroad.¹⁴⁰ Rather, he was convicted of committing a crime in the United States, an element of which occurred abroad.¹⁴¹

Other arguments raised by the majority were grounded in the structure of the statute taken as a whole, although the Court could instead have resorted to case law. There is indeed a canon of construction that tells courts that they should construe a statute so that it makes sense as a whole.¹⁴² But the Court did not bother referring to it. Instead, it noted:

For example, the statute specifies that predicate crimes include “a misdemeanor crime of domestic violence.” Again, the language specifies that these predicate crimes include only crimes that are “misdemeanor[s] under Federal or State law.” If “convicted in any court” refers only to domestic convictions, this language creates no problem. If the phrase also refers to foreign convictions, the language creates an apparently senseless distinction between (covered) domestic relations misdemeanors committed within the United States and (uncovered) domestic relations misdemeanors committed abroad.¹⁴³

The majority made additional arguments based on the statute’s references to domestic law in defining various enhancements and exceptions to the statute’s general scheme. The opinion acknowledged that the purpose of the statute (keeping guns out of the hands of firearm law offenders) would be better served by construing the law extraterritorially but took comfort in the fact that there have been very few cases over the years in which the statute could have been applied to an overseas offender.¹⁴⁴

The dissent, written by Justice Thomas, relied both on cases that broadly construe “any” in other contexts¹⁴⁵ and on the statute’s purpose of keeping guns out of the hands of those convicted of

140. *Id.* at 389 (“And, although the presumption against extraterritorial application does not apply directly to this case, we believe a similar assumption is appropriate when we consider the scope of the phrase ‘convicted in any court’ here.”); *id.* at 399 (Thomas, J., dissenting) (“In prosecuting Small, the Government is enforcing a domestic criminal statute to punish domestic criminal conduct.”).

141. *See id.* at 387 (majority opinion).

142. *See Richards v. United States*, 369 U.S. 1, 11 (1962) (arguing that the Court should consider statutory language in light of the entire act).

143. *Small*, 544 U.S. at 391–92 (citations omitted).

144. *See id.* at 394.

145. *See id.* at 396 (Thomas, J., dissenting).

serious crimes.¹⁴⁶ But Justice Thomas relied most heavily on the argument that the majority misapplied the canon disfavoring extraterritorial application of U.S. law. Rather than applying the canon correctly, he argued, the majority created a new “clear statement rule” that requires the legislature to indicate clearly its intent that a law contains elements that include conduct abroad, whatever may be the most reasonable interpretation and regardless of legislative intent.¹⁴⁷ Justice Breyer denied creating any such new rule,¹⁴⁸ and Justice Thomas rejected the denial.¹⁴⁹

In making these arguments, each side cited case after case. Sometimes, the citations were germane to the points being made. At other times, however, the citations appear to justify arguments having little to do with the usual uses of precedent—except to create the impression that if another judge has said it before, such use makes it more legitimate to act similarly now.

In all, the majority made seventeen citations to judicial decisions, and the dissent made twenty-four.¹⁵⁰ The table below shows how each side supported its arguments with case law.¹⁵¹

146. *See id.* at 397.

147. *Id.* at 398–99.

148. *Id.* at 390 (majority opinion).

149. *Id.* at 398–99 (Thomas, J., dissenting).

150. In a footnote, the dissent also attempted to distinguish three of the cases used by the majority, illustrating a narrow, contextualized understanding of “any.” *See id.* at 398 n.4 (first citing *Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004); then citing *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 540–41 (2002); and then citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 245–46 (1985)).

151. The tables tally both sides’ citations to earlier case law in support of particular arguments. In each of the three tables, the Court at times cites to the same case multiple times for the same proposition. This Article is more concerned with the number of times that the Court relies on precedent than with the number of cases cited. Thus, each citation is reflected in the numbers in the table.

Table 1—The Use of Precedent by the Majority and Dissenting Opinions in *Small v. United States*

Argument	Majority	Dissent
1. “Convicted in any court” may include foreign convictions; “any” is construed broadly in some instances.	2 ¹⁵²	4 ¹⁵³
2. “Convicted in any court” may not include foreign convictions.	2 ¹⁵⁴	0
3. “Any” (and other general words) should be understood in context.	6 ¹⁵⁵	1 ¹⁵⁶
4. Congress legislates with domestic concerns in mind.	4 ¹⁵⁷	10 ¹⁵⁸

152. *Small*, 544 U.S. at 387 (first citing *United States v. Atkins*, 872 F.2d 94, 96 (4th Cir. 1989); and then citing *United States v. Winson*, 793 F.2d 754, 757–59 (6th Cir. 1986)).

153. *Id.* at 396 (Thomas, J., dissenting) (first citing *United States v. Gonzales*, 520 U.S. 1, 5 (1997); then citing *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 130–31 (2002); then citing *Brogan v. United States*, 522 U.S. 398, 400–01 (1998); and then citing *United States v. Alvarez-Sanchez*, 511 U.S. 350, 356, 358 (1994)).

154. *Id.* at 387 (majority opinion) (first citing *United States v. Gayle*, 342 F.3d 89, 95 (2d Cir. 2003); and then citing *United States v. Concha*, 233 F.3d 1249, 1256 (10th Cir. 2000)).

155. *Id.* at 388 (first citing *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818); then citing *Nixon*, 541 U.S. at 132; then citing *Alvarez-Sanchez*, 511 U.S. at 357; then citing *Middlesex Cty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 15–16 (1981); then citing *Flora v. United States*, 362 U.S. 145, 149 (1960); and then citing *Gonzales*, 520 U.S. at 5).

156. *Id.* at 397 (Thomas, J., dissenting) (citing *Deal v. United States*, 508 U.S. 129, 132 (1993)).

157. *Id.* at 388 (majority opinion) (citing *Smith v. United States*, 507 U.S. 197 (1993)); *id.* at 389 (first citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949); then citing *Palmer*, 16 U.S. (3 Wheat.) at 631; and then citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 249–51 (1991)).

158. *Id.* at 399–401 (Thomas, J., dissenting) (first citing *Arabian Am. Oil Co.*, 499 U.S. at 248; then citing *Pasquantino v. United States*, 544 U.S. 349, 371–72 (2005); then citing *Smith*, 507 U.S. at 203–04; then citing *Arabian Am. Oil Co.*, 499 U.S. at 249–51; then citing *Foley Bros., Inc.*, 336 U.S. at 285–86; then citing *Palmer*, 16 U.S. (3 Wheat.) at 630–34; then citing *Smith*, 507 U.S. at 204 n.5 (1993); then citing *Arabian Am. Oil Co.*, 499 U.S. at 248; then citing *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993); and then citing *Palmer*, 16 U.S. (3 Wheat.) at 630–34).

Argument	Majority	Dissent
5. There is justification from the purpose of the statute for thinking Congress intended extraterritorial application.	3 ¹⁵⁹	0
6. Statute referring to "convictions" has no modifier and sets no limits.	0	2 ¹⁶⁰
7. Statutes must be construed to avoid absurd results.	0	3 ¹⁶¹
8. Court should adhere to unambiguous meaning instead of guessing intent.	0	2 ¹⁶²
9. Divining legislative intent should not be a court's goal.	0	2 ¹⁶³

The citations reveal some interesting patterns. Rows 1 and 2 show the majority's references to lower court cases splitting over the interpretation of a single statute as the basis for the *Small Court's* granting certiorari.¹⁶⁴ The majority also cited cases quoting the Supreme Court to the effect that "any" should be construed in context.¹⁶⁵ The dissent acknowledged this but also added to the list of cases in which the Supreme Court has construed "any" broadly in interpreting other statutes. One of these cases, relying on a dictionary

159. *Id.* at 393–94 (first citing *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 112 (1983); then citing *Lewis v. United States*, 445 U.S. 55, 60–62, 66 (1980); and then citing *Huddleston v. United States*, 415 U.S. 814, 824 (1974)).

160. *Id.* at 396 (Thomas, J., dissenting) (first citing *Lewis*, 445 U.S. at 60; and then citing *Gonzales*, 520 U.S. at 5).

161. *Id.* at 404 (first citing *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 470–71 (1989); then citing *Nixon v. Mo. Mun. League*, 541 U.S. 125, 141 (2004); and then citing *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 203 (1819)).

162. *Id.* at 405–06 (first citing *Beecham v. United States*, 511 U.S. 368, 368 (1994); and then citing *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 262 (1994)).

163. *See id.* at 406 (first citing *Beecham*, 511 U.S. at 374; and then citing *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 73 (2004)).

164. One basis for the Supreme Court accepting a case for review is a conflict among the courts of appeals. *Id.* at 387 (majority opinion) ("Because the Circuits disagree about the matter, we granted certiorari.").

165. *See* cases cited *supra* note 155.

to define “any,”¹⁶⁶ was quoted verbatim to suggest that the dictionary definition should have even more authority because the Court had previously used it.¹⁶⁷

Both sides cite many cases for the proposition that statutes should generally be construed to apply within the territory, albeit for opposing purposes. Breyer uses these cases to justify not giving an extraterritorial interpretation to the statute at hand.¹⁶⁸ Thomas uses similar cases to argue that Breyer abuses the principle.¹⁶⁹ The dissent further uses case law to criticize the majority for caring about legislative intent at all in the teeth of a statute whose language, as demonstrated both by earlier case law and dictionary definitions, is unambiguous on its face.

Small is a single case. Thus, no inferences about the general practices of these individual Justices should be drawn. Nonetheless, by examining a case that appears simple enough on its face, it quickly becomes clear that the Justices believe that reference to an earlier case in which a particular kind of argument was made lends credence to the use of that argument in the case before the Court. It is also important to note that there are a number of arguments on which both sides weigh in, while only Justice Breyer writes specifically about purpose (although Justice Thomas alludes to it), and only Justice Thomas makes various textualist arguments and refers to the absurd result rule.¹⁷⁰ Krishnakumar’s empirical study shows that the Justices duel far more often over Supreme Court precedent (sixty-three percent of contested cases)¹⁷¹ than they duel over substantive canons of construction (six percent of contested cases).¹⁷² *Small* contains disputes over both case law and canons.

There are several core issues in this case: Is the language of the statute susceptible to being understood and applied in more than one way? If so, should the statute be construed extraterritorially to include crimes committed abroad or confined to instances in which all

166. *Small*, 544 U.S. at 396 (Thomas, J., dissenting) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 97 (1976))).

167. Scholars have engaged in a great deal of analysis of the Supreme Court’s use of dictionaries, especially since the appointment of Justice Scalia to the Court in 1986. For an insightful recent work with reference to the literature on this issue, see generally James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court’s Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483 (2013).

168. *Small*, 544 U.S. at 387–94.

169. *Id.* at 399–406 (Thomas, J., dissenting).

170. Compare *supra* Table 1, Rows 2 & 5, with *supra* Table 1, Rows 6–9.

171. Krishnakumar, *supra* note 27, at 929 tbl.1.

172. *Id.*

of the statute's elements occur domestically? This question raises additional ones: Did the legislature intend extraterritorial application? Even if the legislature did not have any intent with respect to this narrow issue, would limiting the statute's domain undermine the legislature's purpose in enacting it? Should it matter whether the crime in the foreign country is also a crime in the United States? If so, how should the analysis of that issue occur? Will criminal conduct go undeterred if the law is construed narrowly? Will the Court create an incoherent jurisprudence if it decides the case one way or the other? Some of these questions are best answered by looking at earlier cases, but some are not. It should not matter that judges have construed "any" broadly in some cases and narrowly in others (although if courts construed the word uniformly in one direction or the other as a matter of legal policy, that would be relevant).¹⁷³

In fact, the only facts that should be relevant to the determination of this case are:

1. Lower courts disagreed about the interpretation of the statute in question, which is the basis for the Supreme Court's grant of certiorari; and
2. Courts prefer territorial interpretation of statutes.

Irrelevant to the resolution of the dispute are:

1. The use of the dictionary by courts in the past to define "any"; and
2. The absurd result rule, because neither side has taken a position that is absurd.¹⁷⁴

Yet there is legitimate room for debate about whether the statute should be applied to include conduct outside the United States. Justice Thomas is right: usually, that rule applies to situations in which the illegal conduct occurred abroad.¹⁷⁵ But the statute in

173. Not much has changed since the Court decided *Small*. In *Ali v. Federal Bureau of Prisons*, 552 U.S. 214 (2008), the Court revisited the meaning of "any" in the context of the Federal Torts Claims Act. This time, Justice Thomas wrote for the majority, again citing cases in which "any" was construed broadly to support the majority's position that it should be construed broadly in the context of that case as well. *Id.* at 218–20. Justice Breyer remarked in dissent that when he asks his wife if there is any butter, he asks not of the whole town, but merely of their refrigerator. *Id.* at 243–44 (Breyer, J., dissenting).

174. See *Small*, 544 U.S. at 404 (Thomas, J., dissenting) (noting that the absurd result doctrine does not apply to the dissent's interpretation).

175. *Id.* at 400 (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

question is different, and the majority's interpretation of the canon on territoriality does not fly in the face of prior decisions. The argument thus structured is about the interpretation of a canon whose application is subject to reasonable disagreement. In such a circumstance, courts should concern themselves with furthering the purposes of the statute and producing felicitous consequences rather than focusing on the use of precedent. In this regard, it is noteworthy that the Justices engaged in very little analogical reasoning.¹⁷⁶ The opinion contains little discussion of how particular precedents, while not dispositive, were well reasoned and on point with respect to the puzzle presented in this case.

What further makes *Small* interesting is that two legal values conflict openly. The most efficient application of the law to the facts is the majority's: it keeps a simple presumption that laws apply within the territory and avoids having to address the difficult question about which foreign laws to credit.¹⁷⁷ This result will likely cause fewer problems for law enforcement, since very few prosecutions have been brought where the predicate crime occurred in a foreign country.¹⁷⁸ On the other hand, there can be little doubt that the purpose underlying the legislation would be better served by adopting the dissenting opinion. When a person is imprisoned for smuggling firearms into a foreign country and immediately buys more weaponry upon his return, it is hard to imagine a more appropriate case for prosecution based on a law intended to keep firearms out of the hands of felons. Casting the issues in this light, much of the discussion about precedent appears to be a smokescreen designed to cloak policy disagreement in the garb of the judicially legitimate practice of following precedent. Under the guise of deference to the legislature, judges privilege their own preferences in interpreting statutes.

2. *Ledbetter v. Goodyear Tire & Rubber Co.*

Lilly Ledbetter worked for Goodyear, mostly as a supervisor, from 1979 until her retirement in 1998.¹⁷⁹ Shortly before her retirement, she filed a complaint with the Equal Employment

176. For a discussion of differences between analogical reasoning and adherence to precedent, see Schauer, *supra* note 37, at 123–34. Only in the former are the substantive merits of the argument relevant.

177. *Small*, 544 U.S. at 385.

178. See *id.* at 394 (“[A]ccording to the Government, since 1968, there have probably been no more than ‘10 to a dozen’ instances in which such a foreign conviction has served as a predicate for a felon-in-possession prosecution.”).

179. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007); *id.* at 643 (Ginsburg, J., dissenting).

Opportunity Commission ("EEOC"), a prerequisite for filing a lawsuit under the Civil Rights Act. She claimed that her salary had dipped significantly below those of men in the same position via a history of smaller-than-average raises based upon bogus performance reports.¹⁸⁰ The relevant statute, part of Title VII of the Civil Rights Act of 1964, makes it unlawful for an employer "to discriminate against any individual with respect to [her] compensation . . . because of such individual's . . . sex."¹⁸¹ She eventually filed suit in federal district court, and the case was tried before a jury.¹⁸² Ledbetter won, but the court of appeals reversed the judgment,¹⁸³ concluding that Ledbetter's case had not been filed "within one hundred and eighty days after the alleged unlawful employment practice occurred," as the statute requires.¹⁸⁴ The court of appeals held that the term "discriminate" in the statute refers to the initial willful act of deciding to pay an employee less because of sex (or race, ethnicity, or another protected category) and that the 180 days begins to run once that act of discrimination has occurred.¹⁸⁵ The court rejected Ledbetter's argument that each paycheck that paid her less because of her sex constituted a separate act of discrimination.¹⁸⁶

In a five-to-four decision, the Supreme Court affirmed. Writing the majority opinion, Justice Alito devoted much of the opinion to arguing that the weight of prior Supreme Court decisions construing Title VII of the Civil Rights Act in other contexts supported Goodyear's position. Goodyear had argued that the initial discriminatory decision defined the time from which the statute begins to run—rather than some later time when the plaintiff suffered harm as a result of the earlier decision.¹⁸⁷ The cases supporting Goodyear's position included a decision not to restore seniority to an individual who claimed to have been wrongfully dismissed several

180. *Id.* at 621–22 (majority opinion); *id.* at 643–44 (Ginsburg, J., dissenting).

181. 42 U.S.C. § 2000e-2(a)(1) (2012).

182. *Ledbetter*, 550 U.S. at 622 (majority opinion); *id.* at 644 (Ginsburg, J., dissenting).

183. *Ledbetter v. Goodyear Tire and Rubber Co.*, 421 F.3d 1169, 1172 (11th Cir. 2005).

184. 42 U.S.C. § 2000e-5(e)(1).

185. *Ledbetter*, 421 F.3d at 1182–83.

186. *Ledbetter*, 550 U.S. at 628–29. In "disparate treatment" cases of the kind that Ledbetter brought, intent is an element of the statute. 42 U.S.C. § 2000e-2(k)(3) ("[A] rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance [without authorization] . . . shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin."); *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (per curiam); *Griggs v. Duke Power Co.*, 301 U.S. 424, 432 (1971).

187. *Ledbetter*, 550 U.S. at 622.

years earlier;¹⁸⁸ a case involving a professor who was denied tenure but waited to file suit until his actual termination one year after the tenure decision;¹⁸⁹ and a case involving workers who were ultimately dismissed because of a seniority plan that they claimed had been adopted years earlier with discriminatory intent.¹⁹⁰ However, the Court ruled in another case that a series of acts creating a hostile work environment may all be included within the period of the statute of limitations, provided that the most recent act occurred within the 180-day statutory period.¹⁹¹ The majority distinguished that case from *Ledbetter's* situation, which did not include a claim of a hostile work environment.¹⁹²

Troublesome for the majority (and ipso facto helpful to the dissent) was the case of *Bazemore v. Friday*.¹⁹³ In *Bazemore* a company abandoned an earlier, discriminatory seniority scheme in favor of a nondiscriminatory one after the enactment of the civil rights laws.¹⁹⁴ Employees whose salaries remained depressed because they had not received raises under the old system sued. The employer argued that the statute of limitations had run, but the Supreme Court, consistent with Ms. Ledbetter's later position, held that each paycheck constituted a new act of discrimination.¹⁹⁵ In her dissent in *Ledbetter*, Justice Ginsburg relied heavily on this decision,¹⁹⁶ distinguishing the cases that the majority relied upon as involving discreet, identifiable acts of discrimination. Discrimination in salary, in contrast, may occur over a long period of time and may be very difficult to discover because employees do not always share with one another information about their earnings.¹⁹⁷ Justice Alito, in turn, responded to the dissent's argument by distinguishing *Bazemore*, because there, the earlier compensation scheme was intentionally discriminatory: "Because Ledbetter has not adduced evidence that Goodyear initially adopted its performance-based pay system in order to discriminate on the basis of sex or that it later applied this system

188. *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977).

189. *Del. State Coll. v. Ricks*, 449 U.S. 250 (1980).

190. *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in Ledbetter*, 550 U.S. 618.

191. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117-18 (2002).

192. *Ledbetter*, 550 U.S. at 638-40.

193. 478 U.S. 385 (1986) (per curiam).

194. *Id.* at 390-91 (Brennan, J., concurring); *id.* at 407 (White, J., concurring).

195. *Id.* at 395-96 (Brennan, J., concurring).

196. *Ledbetter*, 550 U.S. at 645 (Ginsburg, J., dissenting).

197. *Id.*

to her within the charging period with any discriminatory animus, *Bazemore* is of no help to her.”¹⁹⁸

Below is a table describing the use of precedent by the two sides. In total, there are ninety-nine citations to judicial decisions: forty-one by the majority and fifty-eight by the dissent. Many of the cases cited appear multiple times.

Table 2—The Use of Precedent by Majority and Dissenting Opinions in *Ledbetter v. Goodyear Tire & Rubber Co.*

Argument	Majority	Dissent
1. Filing period starts when a discreet discriminatory act occurs.	16 ¹⁹⁹	0
2. Demonstrating split among circuit courts.	2 ²⁰⁰	0
3. The central element in a disparate treatment claim is intent.	3 ²⁰¹	0
4. Congress adopted a multistep enforcement procedure for civil rights cases, and courts should apply the Act as written.	2 ²⁰²	0

198. *Id.* at 637 (majority opinion).

199. *Id.* at 621 (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002)); *id.* at 625–28 (first citing *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977); then citing *Del. State Coll. v. Ricks*, 449 U.S. 250, 257–58 (1980); then citing *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 907–08, 911 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in Ledbetter*, 550 U.S. 618; and then citing *Morgan*, 536 U.S. at 113); *id.* at 636 (citing *Morgan*, 536 U.S. at 113); *id.* at 639 (citing *Morgan*, 536 U.S. at 113); *id.* at 641–42 (citing *Int'l Ass'n of Machinists v. NLRB*, 362 U.S. 411, 416–17 (1960)).

200. *Id.* at 623 (first citing *Forsyth v. Fed'n Emp't & Guidance Serv.*, 409 F.3d 565 (2d Cir. 2005); and then citing *Shea v. Rice*, 409 F.3d 448 (D.C. Cir. 2005)).

201. *Id.* at 624 (first citing *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (per curiam); then citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); and then citing *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 1002 (1988) (Blackmun, J., concurring)). There is considerable overlap between Rows 1 and 3, with some cases being used to make both points.

202. *Id.* at 629 (citing *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 359 (1977)); *id.* at 630 (citing *Mohasco Corp. v. Silver*, 447 U.S. 807, 819 (1980)).

Argument	Majority	Dissent
5. The courts should not truncate Congress's deadlines.	5 ²⁰³	0
6. Statutes of limitation serve the function of establishing repose for employers.	5 ²⁰⁴	0
7. Agency has no special claim to deference in this context.	4 ²⁰⁵	0
8. Reference to other acts.	3 ²⁰⁶	0
9. Paychecks perpetuating past discrimination are actionable.	0	15 ²⁰⁷
10. Questions what constitutes an unlawful employment practice and when one has occurred.	0	1 ²⁰⁸

203. *Id.* at 630 (first citing *Int'l Bhd. Of Elec. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236–40 (1976); and then citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47–49 (1974)); *id.* at 632 (first citing *Mohasco Corp.*, 447 U.S. at 826; then citing *Morgan*, 536 U.S. at 109; and then citing *Elec. Workers*, 429 U.S. at 236).

204. *Id.* at 630 (first citing *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554–55 (1974); then citing *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (quoting *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 349 (1944)); then citing *Ricks*, 449 U.S. at 256–57; and then citing *Mohasco Corp.*, 447 U.S. at 825); *id.* at 642 (citing *Mohasco Corp.*, 447 U.S. at 825).

205. *Id.* at 642 n.11 (first citing *Morgan*, 536 U.S. at 111 n.6; and then citing *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 336 n.5 (2000)).

206. *Id.* at 641–42 (first citing *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 909 (1989)), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in Ledbetter*, 550 U.S. 618; then citing *Ford Motor Co. v. EEOC*, 458 U.S. 219, 226 n.8 (1982); and then citing *Int'l Ass'n of Machinists v. NLRB*, 362 U.S. 411, 416–17 (1960)).

207. *Id.* at 646–48 (Ginsburg, J., dissenting) (first citing *Bazemore v. Friday*, 478 U.S. 385, 395 (1986) (Brennan, J., concurring); and then citing *Morgan*, 536 U.S. at 111–12); *id.* at 648 (citing *Morgan*, 536 U.S. at 115); *id.* at 649 (first citing *Morgan*, 536 U.S. at 117; then citing *Bazemore*, 478 U.S. at 395–96; and then citing *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 n.15 (1968)); *id.* at 654–55 (first citing *Forsyth v. Fed'n Emp't & Guidance Serv.*, 409 F.3d 565, 573 (2d Cir. 2005); then citing *Shea v. Rice*, 409 F.3d 448, 452–53 (D.C. Cir. 2005); then citing *Goodwin v. Gen. Motors Corp.*, 275 F.3d 1005, 1009–10 (10th Cir. 2002); then citing *Anderson v. Zubieta*, 180 F.3d 329, 335 (D.C. Cir. 1999); then citing *Hildebrandt v. Ill. Dep't of Nat. Res.*, 347 F.3d 1014, 1025–29 (7th Cir. 2003); then citing *Cardenas v. Massey*, 269 F.3d 251, 257 (3d Cir. 2001); then citing *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167–68 (8th Cir. 1995) (en banc); then citing *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 347–49 (4th Cir. 1994); and then citing *Gibbs v. Pierce Cty. Law Enf't Support Agency*, 785 F.2d 1396, 1399–1400 (9th Cir. 1986)).

208. *Id.* at 645 (citing *Morgan*, 536 U.S. at 110).

Argument	Majority	Dissent
11. Cases distinguish between practices that are easy to detect and those which are cumulative.	0	5 ²⁰⁹
12. When a practice is cumulatively discriminatory, it doesn't matter that some of the events occurred before the statutory period.	1 ²¹⁰	5 ²¹¹
13. Employee salary information is usually not published.	0	2 ²¹²
14. The statute begins to run when a discreet act occurs.	0	5 ²¹³
15. Cutting off right to sue for salary discrimination is inconsistent with purpose of statute.	0	3 ²¹⁴

209. *Id.* at 645 (quoting *Morgan*, 536 U.S. at 114); *id.* at 647–48 (quoting *Morgan*, 536 U.S. at 110–15); *id.* at 651–52 (first citing *Lorance*, 490 U.S. at 902, 905; then citing *Ricks*, 449 U.S. at 253–54, 257–58; and then citing *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 554–57 (1977)).

210. *Id.* at 638 n.7 (majority opinion) (quoting *Morgan*, 536 U.S. at 117).

211. *Id.* at 648 (Ginsburg, J., dissenting) (quoting *Morgan*, 536 U.S. at 117); *id.* at 649 n.2 (quoting *Morgan*, 536 U.S. at 117); *id.* at 649 (first citing *Morgan*, 536 U.S. at 117; then citing *Bazemore*, 478 U.S. at 395–96; and then citing *Hanover Shoe*, 392 U.S. at 502 n.15).

212. *Id.* at 649–50 (first citing *Goodwin*, 275 F.3d at 1008; and then citing *McMillan v. Mass. Soc'y for the Prevention of Cruelty to Animals*, 140 F.3d 288, 296 (1st Cir. 1998)).

213. *Id.* at 647 (quoting *Morgan*, 536 U.S. at 110, 113); *id.* at 651 (first citing *Ricks*, 449 U.S. at 253–54, 257–58; and then citing *Evans*, 431 U.S. at 554–57); *id.* at 652 n.4 (citing *Int'l Ass'n of Machinists v. NLRB*, 362 U.S. 411, 412, 414 (1960); *id.* at 652 (citing *Lorance*, 490 U.S. at 902, 905)).

214. *Id.* at 654 (quoting *Morgan*, 536 U.S. at 119); *id.* at 660–61 (first citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 348 (1977); and then citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)).

Argument	Majority	Dissent
16. Courts of appeals have routinely supported employees' positions in these cases.	0	9 ²¹⁵
18. EEOC is due deference.	0	2 ²¹⁶
19. Employers are adequately protected from unfair suits.	0	7 ²¹⁷
20. Other statutes are not given such hurdles.	0	1 ²¹⁸

The distribution of arguments in *Ledbetter* is quite different from that in *Small*. In *Small*, the Justices generally agreed on the issues presented and the import of the relevant cases. The Justices disagreed only about how to weigh facts and values. Thomas relied heavily on the legitimacy of established canons, which, in his view, would be applied more or less mechanically as though they were themselves statutes.²¹⁹ Breyer, in contrast, concerned himself more with the consequences of the decision and was more willing to look at the canon as a rule of thumb whose application could be modified according to the circumstances of the case.²²⁰ Neither side had a strong argument on the plain language of the statute, although Thomas relied heavily on a dictionary definition (and on an earlier case citing that same definition with respect to another statute) in

215. *Id.* at 654–55 (first citing *Forsyth v. Fed'n Emp't & Guidance Serv.*, 409 F.3d 565, 573 (2d Cir. 2005); then citing *Shea v. Rice*, 409 F.3d 448, 452–53 (D.C. Cir. 2005); then citing *Hildebrandt v. Ill. Dep't of Nat. Res.*, 347 F.3d 1014, 1025–29 (7th Cir. 2003); then citing *Goodwin*, 275 F.3d at 1009–10; then citing *Cardenas v. Massey*, 269 F.3d 251, 257 (3d Cir. 2001); then citing *Anderson v. Zubieta*, 180 F.3d 329, 335 (D.C. Cir. 1999); then citing *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167–68 (8th Cir. 1995) (en banc); then citing *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 347–49 (4th Cir. 1994); and then citing *Gibbs v. Pierce Cty. Law Enf't Support Agency*, 785 F.2d 1396, 1399–1400 (9th Cir. 1986)).

216. *Id.* at 656 n.6 (first citing *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 (2002); and then citing *Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 518 (1986)).

217. *Id.* at 657–58 (first citing *Ricks*, 449 U.S. at 256–57; then citing *Morgan*, 536 U.S. at 121–22; and then citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982)).

218. *Id.* at 658 (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 208–10 (1974)).

219. See *Small v. United States*, 544 U.S. 385, 396–97, 399–400 (2005) (Thomas, J., dissenting).

220. *Id.* at 388–90 (majority opinion). For a discussion of this “pragmatic” approach to judging, see RICHARD A. POSNER, *HOW JUDGES THINK* 230–56 (2008).

concluding that the meaning of the statute was less subject to multiple interpretations than Breyer's opinion would suggest.

In *Ledbetter*, on the other hand, the opposing Justices—Alito and Ginsburg—operated from fundamentally different perspectives. Alito paid lip service to the language of the statute being more amenable to the majority's interpretation than to the dissent's, but most of his opinion was devoted to common law reasoning. The Court's opinions, he argued, were more aligned with Goodyear's position than with *Ledbetter*'s.²²¹ Ginsburg, in response, fought tit-for-tat on the case law analysis, but added powerful argumentation about the statute's purpose.²²² Note the number of rows in Table 2 in which only one of the two opinions has any entry at all. This reflects the importance that each side put on demonstrating that its position fit coherently with the past. They disagreed only over how to characterize the relevant past.

It should be noted that while Goodyear won the battle, employers lost the war. The case became a campaign issue in the 2008 race between Senators Barack Obama and John McCain.²²³ Within weeks of Obama's inauguration, Congress passed and the president signed the Lilly Ledbetter Fair Pay Act of 2009,²²⁴ reversing the results of the case. However, as Deborah Widiss points out, lower courts continued for some time to refer to *Ledbetter* as precedent, arguing that Congress did not fully override the decision, leaving the precedent as authority on which courts may rely.²²⁵

In essence, both of these cases suggest that courts are more aggressive in creating "common law statutes"²²⁶ than standard

221. *Ledbetter*, 550 U.S. at 628–29 (majority opinion).

222. *Id.* at 651–54 (Ginsburg, J., dissenting).

223. *Obama Highlights Support for Veterans, Working Women*, BOS. GLOBE, Aug. 19, 2008, at A5; David G. Savage, *Two Visions of the Supreme Court*, L.A. TIMES, May 19, 2008, at A8; Bob Egelko, *Next President Will Shape Supreme Court*, S.F. GATE (Oct. 20, 2008, 4:00 AM), <http://www.sfgate.com/news/article/Next-president-will-shape-Supreme-Court-3264700.php> [<http://perma.cc/6Y68-P3PG>].

224. Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended at 42 U.S.C. § 2000e-5 (2012)).

225. See Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 923 n.371 (2012). See Christiansen & Eskridge, *supra* note 25, at 1442–45, for a discussion of how courts routinely interpret statutory language to preserve previous decisions.

226. For early discussion of the concept of "common law statutes," including legislation such as the antitrust laws, see POSNER, *supra* note 51, at 285–88. For an argument that criminal statutes, in particular those defining various species of fraud, should be considered common law statutes, see Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 373–78. We return to the creation of common law statutes *infra* Part III.

accounts of statutory interpretation that focus on the primacy of the legislature would indicate—and they are certainly more aggressive than their own rhetoric of deference to the legislature would suggest. Judges focused on close questions, even with respect to narrow laws, pay a great deal of attention to prior judicial interpretation, while they often eschew legislative history as selective, irrelevant, or both.

3. *Circuit City Stores, Inc. v. Adams*

Sinclair Adams, an employee of Circuit City, sued his employer in a California state court under that state's antidiscrimination laws.²²⁷ However, upon joining the company, he had signed an agreement providing that disputes between him and Circuit City would be resolved through arbitration. Accordingly, the company filed suit in federal court under the Federal Arbitration Act, requesting that Adams' lawsuit be enjoined and that the matter be sent to arbitration for resolution.²²⁸ Circuit City won in the district court.²²⁹ The U.S. Court of Appeals for the Ninth Circuit reversed,²³⁰ and the Supreme Court reversed again in a five-to-four decision, reinstating the trial court's order that the case be arbitrated.²³¹ Justice Kennedy wrote the majority opinion; Justices Stevens and Souter wrote dissenting opinions.

At issue was the scope of an exemption under the Federal Arbitration Act for employment contracts in section 1 of that Act, and its relationship with the Act's principle provision in section 2, which requires that courts generally honor arbitration agreements.²³² Section 2 provides that

[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save

227. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109–10 (2001).

228. *Id.* at 110.

229. *Circuit City Stores, Inc. v. Adams*, No. C98-0365 CAL, 1998 WL 1797183, at *1 (N.D. Cal. May 4, 1998).

230. *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999).

231. *Circuit City Stores*, 532 U.S. at 124.

232. *Id.* at 109.

upon such grounds as exist at law or in equity for the revocation of any contract.²³³

The employment exception in section 1 states that the Act shall not apply “to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”²³⁴

At the time the Federal Arbitration Act was enacted, it was generally understood that the Commerce Clause would apply only to those workers who were actually working in the movement of goods from state to state.²³⁵ Thus, it is possible that section 1 was intended to apply only to transportation workers (as the majority held), construing the words “or any other class of workers engaged in foreign or interstate commerce” to mean other transportation workers by virtue of the canon *eiusdem generis*.²³⁶

But there is another possible reading of section 1. Congress may have intended the exception to extend to all workers over whom the Commerce Clause permitted federal legislation at the time that a lawsuit was brought. The workers mentioned specifically in the statute would then be classes of workers so identified. The ambiguity thus resembles that of class bequests in the law of wills. For example, if a testator says: “I leave \$100,000 to my grandchildren, to be shared equally among them,” the bequest can reasonably be thought to evince the intent either for the money to be shared by her, say, four grandchildren living at the time she wrote the will, or to be shared by however many grandchildren are living at the time she dies (say five).²³⁷ Similarly, the term “any class of workers” can be understood as shorthand for whatever other transportation workers then came within Commerce Clause regulatory power, or it can be understood to mean whatever the Commerce Clause includes at the time of a subsequent dispute. While the law of wills establishes a presumptive preference for the latter interpretation, in statutory interpretation

233. 9 U.S.C. § 2 (2012).

234. § 1.

235. See *Circuit City Stores*, 532 U.S. at 109.

236. Scalia and Garner describe the canon as follows: “Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned” SCALIA & GARNER, *supra* note 5, at 199. Although its applicability in particular cases may be disputed (as in *Circuit City Stores*), the principle is generally recognized as a legitimate canon of construction.

237. In the context of wills, the law presumes that a “class gift” was intended, unless context suggests otherwise, meaning that the second interpretation, in which the grandchildren alive at the time of the testator’s death inherit, prevails. See RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 13.1 (AM. LAW INST. 2011).

there is no such presumption, and ordinary tools of interpretation must be applied.²³⁸

The majority and dissenting Justices clashed over several issues. First, they fought over a nuance in the different words used in sections 1 and 2. Section 2 applies to contracts “evidencing a transaction involving commerce,” while section 1 excludes contracts of employment for those “engaged in” commerce. In an earlier case, cited many times by both sides,²³⁹ the Court held that section 2 was intended to be construed broadly to encompass the limits of congressional power under the Commerce Clause. That is, arbitration under the FAA is favored to the full extent the Constitution permits. “Engage in,” the majority held, is narrower in scope than “evidencing,” suggesting that the exception to the rule was intended to be more constrained than is the enforcement of arbitration agreements under section 2.²⁴⁰ It is here that *eiusdem generis*²⁴¹ comes into play, as the majority argues that the “other workers” referred to in the statute should be understood as being part of the same class of workers as those specifically mentioned: namely, transportation workers.²⁴² The dissent acknowledged these arguments, but rejected them more or less out of hand.²⁴³

Second, the Justices battled over history. The majority concerned itself with the fact that its position agreed with most circuit courts to have considered the question, the early history of the FAA (enacted to combat judicial hostility to arbitration), and Supreme Court

238. See Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 YALE L.J. 992, 995–98 (2008), for a discussion of this same ambiguity in the context of interpreting the Americans with Disabilities Act; see also Jill C. Anderson, *Misreading Like a Lawyer: Cognitive Bias in Statutory Interpretation*, 127 HARV. L. REV. 1521, 1522–27, 1574–75 (2014) (explaining by means of cognitive psychology the failure of courts to observe the ambiguity in many instances). See SOLAN, *supra* note 7, at 35–37, for further discussion of *Circuit City Stores* in the context of this ambiguity.

239. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995).

240. *Circuit City Stores*, 532 U.S. at 115–16 (citing *Dobson*, 513 U.S. at 277).

241. Black’s Law Dictionary defines “*eiusdem generis*” as

[a] canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed. For example, in the phrase *horses, cattle, sheep, pigs, goats, or any other farm animals*, the general language *or any other farm animals*—despite its seeming breadth—would probably be held to include only four-legged, hooved mammals typically found on farms, and thus would exclude chickens.

Eiusdem generis, BLACK’S LAW DICTIONARY (10th ed. 2014).

242. *Circuit City Stores*, 532 U.S. at 121 (citing *Tractor Supply Co. v. Thoesen Tractor Equip. Co.*, 109 F.3d 354, 358 (7th Cir. 1997)).

243. *Id.* at 138–40 (Souter, J., dissenting).

precedent favoring arbitration.²⁴⁴ The dissent, in contrast, focused on the legislative history of section 1 (which the majority rejected as irrelevant, having found the language clear) and the earliest cases interpreting the provisions, which tended to favor the dissenting view.²⁴⁵

Third, the Justices disagreed about how to determine the purpose of the statute. The majority cited the statute's motivating policy of encouraging arbitration by overcoming courts' hostility to alternative dispute resolution in 1925.²⁴⁶ The dissent instead focused on the protection of workers from a policy that would close the courthouse door to them.²⁴⁷

Table 3 tallies the number of cases cited by each side (the two dissenting opinions are combined) to make these and related points. In all, the majority employed forty-four citations to case law, the dissent forty-one.

244. *Id.* at 111–12, 119–23 (majority opinion).

245. *Id.* at 125–31 (Stevens, J., dissenting).

246. *Id.* at 111 (majority opinion).

247. *See id.* at 128–29 (Stevens, J., dissenting).

Table 3—The Use of Precedent by Majority and Dissenting Opinions in *Circuit City Stores, Inc. v. Adams*

Argument	Majority	Dissent
1. The FAA does not apply to employment contracts.	1 ²⁴⁸	2 ²⁴⁹
2. Strong circuit court support for not all employment contracts being excluded from the FAA.	9 ²⁵⁰	1 ²⁵¹
3. The FAA was a response to courts' hostility toward arbitration.	2 ²⁵²	0
4. The FAA is preemptive of state law and applies in state courts.	2 ²⁵³	0
5. FAA enacted under Commerce Clause and interpreted to allow Congress to exercise its commerce power to the fullest extent.	2 ²⁵⁴	0

248. *Id.* at 110 (majority opinion) (citing *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999)).

249. *Id.* at 128 (Stevens, J., dissenting) (citing *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 200, 201 n.3 (1956)); *id.* at 130–31 (citing *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 466 (1957) (Frankfurter, J., dissenting)).

250. *Id.* at 110–11 (majority opinion) (first citing *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 575–76 (10th Cir. 1998); then citing *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997); then citing *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 358 (7th Cir. 1997); then citing *Cole v. Int'l Sec. Servs.*, 105 F.3d 1465, 1470–72 (D.C. Cir. 1997); then citing *Rojas v. TK Commc'ns, Inc.*, 87 F.3d 745, 747–48 (5th Cir. 1996); then citing *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 596–601 (6th Cir. 1995); then citing *Erving v. Va. Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); then citing *Dickstein v. DuPont*, 443 F.2d 783, 785 (1st Cir. 1971); and then citing *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am.*, 207 F.2d 450 (3d Cir. 1953)).

251. *Id.* at 130 (Stevens, J., dissenting) (citing *Tenney Eng'g*, 207 F.2d at 452).

252. *Id.* at 111 (majority opinion) (first citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270–71 (1995); and then citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)).

253. *Id.* at 122 (first citing *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984); and then citing *Allied-Bruce*, 513 U.S. at 272).

254. *Id.* at 112, 116 (first citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967); and then citing *Allied-Bruce*, 513 U.S. at 277).

Argument	Majority	Dissent
6. Exclusion is limited to transportation workers.	1 ²⁵⁵	0
7. Securities case is not relevant because not under a contract of employment.	1 ²⁵⁶	0
8. Employment contract not a contract evidencing commerce at all.	1 ²⁵⁷	1 ²⁵⁸
9. This would render section 1 superfluous, violating canon.	1 ²⁵⁹	0
10. Earlier cases have read section 2 expansively.	2 ²⁶⁰	0
11. Ejusdem generis applies.	1 ²⁶¹	0
12. Ejusdem generis does not apply.	0	6 ²⁶²

255. *Id.* at 112 (citing *Cole*, 105 F.3d at 1471).

256. *Id.* at 113–14 (citing *Gilmer*, 500 U.S. at 20).

257. *Id.* at 113 (citing *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1085 (9th Cir. 1999)).

258. *Id.* at 128 (Stevens, J., dissenting) (citing *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 200, 201 n.3 (1956)).

259. *Id.* at 113–15 (majority opinion) (citing *Pa. Dep't of Welfare v. Davenport*, 495 U.S. 552, 562 (1990)).

260. *Id.* at 113–14 (first citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 279–80 (1995); and then citing *Gilmer*, 500 U.S. at 20).

261. *Id.* at 114–15 (citing *Norfolk & W. Ry. Co. v. Train Dispatchers*, 499 U.S. 117, 129 (1991)).

262. *Id.* at 138 n.2, (Souter, J., dissenting) (first citing *Norfolk & W. Ry.*, 499 U.S. at 129; then citing *Fort Stewart Sch. v. FLRA*, 495 U.S. 641, 646 (1990); then citing *Garcia v. United States*, 469 U.S. 70, 74–75 (1984); and then citing *Gooch v. United States*, 297 U.S. 124, 128 (1936)); *id.* at 140 n.4 (citing *Watt v. W. Nuclear, Inc.*, 462 U.S. 36, 44 n.5 (1983)).

Argument	Majority	Dissent
13. “Engaged in commerce” compared with “evidencing commerce” or “used in commerce” or “in commerce.”	8 ²⁶³	4 ²⁶⁴
14. Cases beginning in 1937 expanded Commerce Clause power.	1 ²⁶⁵	0
15. Employers’ Liability Act cases and other early cases showed narrow reach of Commerce Clause in employment.	3 ²⁶⁶	0
16. Argument from history does not expand Clayton Act’s scope beyond language.	1 ²⁶⁷	0
17. Statutory provisions do not necessarily have uniform meaning.	1 ²⁶⁸	0
18. No abstract formula can answer extent to which Congress has exercised its Commerce Clause powers.	1 ²⁶⁹	0

263. *Id.* at 115–18 (majority opinion) (first citing *Jones v. United States*, 529 U.S. 848, 855 (2000); then citing *Allied-Bruce*, 513 U.S. at 277; then citing *United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271, 279–80 (1975); then citing *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 199–202 (1974); then citing *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 350–51 (1941); then citing *Ill. Cent. R.R. Co. v. Behrens*, 233 U.S. 473, 477–78 (1914); then citing *Second Emp’rs’ Liab. Cases*, 223 U.S. 1, 48–49 (1912); and then citing *Emp’rs’ Liability Cases*, 207 U.S. 463, 498 (1908)).

264. *Id.* at 135–36 (Souter, J., dissenting) (first citing *Allied-Bruce*, 513 U.S. at 273–74; then citing *Wickard v. Filburn*, 317 U.S. 111 (1942); then citing *Hammer v. Dagenhart*, 247 U.S. 251, 271–76 (1918); and then citing *Emp’rs’ Liab. Cases*, 207 U.S. at 496, 498).

265. *Id.* at 116 (majority opinion) (citing *United States v. Lopez*, 514 U.S. 549, 556 (1995)).

266. *Id.* (first citing *Ill. Cent. R.R. Co.*, 233 U.S. at 477–78; then citing *Second Emp’rs’ Liab. Cases*, 223 U.S. at 48–49; and then citing *Emp’rs’ Liab. Cases*, 207 U.S. at 498).

267. *Id.* at 117 (citing *Gulf Oil Corp.*, 419 U.S. at 202).

268. *Id.* at 118 (citing *Am. Bldg. Maint. Indus.*, 422 U.S. at 277).

269. *Id.* (citing *A.B. Kirschbaum Co. v. Walling*, 316 U.S. 517, 520 (1942)).

Argument	Majority	Dissent
19. Do not use legislative history where the meaning is clear—Court cannot expand statute's reach based on history.	2 ²⁷⁰	0
20. Limiting section 1 to transportation workers is rational.	1 ²⁷¹	0
21. Advantages of arbitration do not disappear in employment context.	3 ²⁷²	0
22. Antidiscrimination laws apply in arbitrations.	4 ²⁷³	0
23. View that only transportation workers were exempt under section 1 arose in a 1954 case and was rejected by other courts.	0	2 ²⁷⁴

270. *Id.* at 119–20 (first citing *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994); and then citing *Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986)).

271. *Id.* at 121 (citing *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 358 (7th Cir. 1997)).

272. *Id.* at 122–23 (first citing *Egelhoff v. Egelhoff*, 532 U.S. 141, 149 (2001); then citing *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 275 (1995); and then citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 30–32 (1991)).

273. *Id.* at 123–24 (first citing *Allied-Bruce*, 513 U.S. at 275; then quoting *Gilmer*, 500 U.S. at 26; then citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); and then citing *Southland Corp. v. Keating*, 465 U.S. 1 (1984)).

274. *Id.* at 130 (Stevens, J., dissenting) (first citing *Elec. Workers v. Miller Metal Prods., Inc.*, 215 F.2d 211, 224 (4th Cir. 1954); and then citing *Tenney Eng'g, Inc. v. Elec. Workers*, 207 F.2d 450, 452 (3d Cir. 1953)).

Argument	Majority	Dissent
24. Earlier circuit courts were divided on whether collective bargaining agreements come within section 1.	0	8 ²⁷⁵
25. 1957 Supreme Court decision strongly implies support for proposition that section 1 applies generally to employment contracts.	0	1 ²⁷⁶
26. Broad Commerce Clause reading of section 2 says nothing about how to construe section 1.	0	5 ²⁷⁷
27. Over time, a majority of Justices have supported the broader reading of section 1.	0	2 ²⁷⁸

275. *Id.* at 129 nn.9–10 (first citing *Miller Metal Prods.*, 215 F.2d at 224; then citing *Elec. Workers v. Gen. Elec. Co.*, 233 F.2d 85, 100 (1st Cir. 1956), *aff'd on other grounds*, 353 U.S. 547 (1957); then citing *Lincoln Mills of Ala. v. Textile Workers*, 230 F.2d 81, 86 (5th Cir. 1956), *rev'd on other grounds*, 353 U.S. 448 (1957); then citing *Hoover Motor Express Co., Inc. v. Teamsters*, 217 F.2d 49, 53 (6th Cir. 1954); then citing *Elec. Ry. & Motor Coach Emps. v. Pa. Greyhound Lines, Inc.*, 192 F.2d 310, 313 (3d Cir. 1951); then citing *Mercury Oil Ref. Co. v. Oil Workers*, 187 F.2d 980, 983 (10th Cir. 1951); and then citing *Shirley-Herman Co. v. Hod Carriers*, 182 F.2d 806, 809 (2d Cir. 1950)); *id.* at 129–30 (citing *Gatliff Coal Co. v. Cox*, 142 F.2d 876, 882 (6th Cir. 1944)).

276. *Id.* at 130 (citing *Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957)).

277. *Id.* at 134 & n.1 (Souter, J., dissenting) (first citing *Allied-Bruce*, 513 U.S. 265; then citing *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1086 n.6 (9th Cir. 1999); then citing *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600–01 (6th Cir. 1995); then citing *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 311–12 (6th Cir. 1991); and then citing *Gatliff Coal*, 142 F.2d at 882).

278. *Id.* at 131 & n.13 (Stevens, J., dissenting) (first citing *Gilmer*, 500 U.S. at 36, 38–41 (Stevens, J., dissenting); and then citing *Textile Workers*, 353 U.S. at 466–68 (Frankfurter, J., dissenting)).

Argument	Majority	Dissent
28. Strong proarbitration stance of Court has pushed interpretation.	0	8 ²⁷⁹
29. Statute should be read as a coherent whole.	0	1 ²⁸⁰

Note that, like *Ledbetter* and unlike *Small*, there is very little overlap in the citations adduced by each side.

The three cases discussed precedent in overlapping ways, but there are also some interesting differences. *Small* was about both a semantic ambiguity that both sides acknowledged and the tension between the purpose of the statute (keeping guns away from convicted felons) and another legal doctrine—the doctrine that laws are generally not construed extraterritorially. Both sides in the debate recognized the issues, although they took opposite positions at the end of the day. The cases they cited reflected their preferences.

Ledbetter contrasted reliance on a linguistic nuance (the ordinary way to use the verb “discriminate” is with respect to volitional acts of discrimination) with reliance on the purpose of the statute and the intent of Congress in enacting it, which would have been unlikely to provide a permanent safe harbor for employment discrimination to those employers who did not get caught discriminating until their employees learned that they were being treated differently. Thus, each side referred to entirely different sets of precedent as each attempted to create coherent narratives in which its position was the better fit.

Finally, *Circuit City Stores* combined aspects of each of the other two cases. Both sides regarded the history of interpretation as important and used precedent to recite that history. Both sides also recognized that the Court had only recently read section 2 of the

279. *Id.* at 132 nn.14–15 (first citing *Gilmer*, 500 U.S. at 20; then citing *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); then citing *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987); then citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); then citing *Southland Corp. v. Keating*, 465 U.S. 1 (1984); then citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); then citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); and then citing *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997)).

280. *Id.* at 137 (Souter, J., dissenting) (citing *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)).

FAA expansively to include the full range of cases permitted under the Commerce Clause. But the two sides differed on the nature of the historical narrative they wished this case to supplement.²⁸¹ They further disagreed on which episodes in the interpretive history of these and related statutes they wished to emphasize. This resulted in some overlap in precedents cited, but also in a number of differences.

Others have noted that the citation practices of individual judges track their political ideologies.²⁸² This should not be surprising, since studies show that judges appointed by Democrats tend to make more liberal decisions than do those appointed by Republicans in cases concerning the validity of interpretations by administrative agencies, each side tending to support administrative decisions made by an administration of the same party that appointed the judge.²⁸³ The cases discussed above, however, show more than the Justices' propensity to rule consistently with their political values. These cases show relative uniformity in placing precedent above serious inquiry into legislative intent as a value in statutory interpretation. Other than Ronald Dworkin²⁸⁴ (to whose work we return in the next Part of this Article), it is difficult to find judges and scholars who openly espouse such a priority.

C. *Textualization of Precedent and the Development of Common Law Statutes*

Approximately a decade ago in an important article, Peter Tiersma wrote of "the textualization of precedent."²⁸⁵ This occurs when a court analyzes the language used by a prior court as though that language is a law.²⁸⁶ It is a significant part of today's common law reasoning, at least in American courts.²⁸⁷ However, it is a departure

281. See DWORKIN, *supra* note 106, at 228–32 (likening statutory interpretation to writing the next chapter in a chain novel). I return to Dworkin's metaphor in *infra* note 338 and accompanying text.

282. See Anthony Niblett & Albert H. Yoon, *Friendly Precedent*, 57 WM. & MARY L. REV. (forthcoming 2016) (manuscript at 1), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2268707 [<http://perma.cc/2DUX-LNSS>].

283. See, e.g., Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 825–27 (2006); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1091 (2008).

284. See DWORKIN, *supra* note 106, at 337–41.

285. Tiersma, *supra* note 30, at 1188.

286. *Id.* at 1243, 1247.

287. See, e.g., *id.* at 1247–62 (providing examples of how this textualization has occurred).

from classical common law analysis, in which the holding is considered to have precedential effect, but not the reasoning.

When applying traditional common law analysis, lower courts are obliged, and higher courts are presumptively inclined, to follow the holdings of earlier cases. But, as Edward Levi noted in his classic introduction to legal reasoning, the distinction between holding and dicta forced judges to take responsibility for making their own decisions in subsequent cases.²⁸⁸ Thus, appellate judges traditionally justified their decisions with analogical reasoning rather than by virtue of rule-like general pronouncements—or at least they did so more than they do today. Now, however, many judicial holdings sound more like statutes than they do like individual holdings. Compare this statement by the Supreme Court of California: “[W]e hold that golfers have a limited duty of care to other players, breached only if they intentionally injure them or engage in conduct that is ‘so reckless as to be totally outside the range of the ordinary activity involved in the sport[.]’ ”²⁸⁹ with this statement from the Supreme Court of Kansas: “We hold that Dan Borth assumed the risk of his employment as a matter of law.”²⁹⁰ The California court announced a rule of general application. The Kansas court decided a case.

But statutory cases are different. The reduction of precedent into authoritative text promotes the development of what amounts to common law statutes. Courts take their earlier language and regard it as authoritative text,²⁹¹ which, in turn, makes it desirable for a subsequent court to create a coherent body of law by elaborating on the language used by the earlier court. The result, almost of necessity, is a heavy emphasis on what judges wrote in prior cases interpreting a statute. I argue below that the practice is a good one when the reason for the textualization is respect for the merits of an earlier decision, but a bad one when precedent takes over as a justification for its own sake.

Consider the following example. In 1976, Judge Henry Friendly of the United States Court of Appeals for the Second Circuit developed a hierarchy of inherent trademark strength under the

288. See LEVI, *supra* note 15, at 7–8.

289. Shin v. Ahn, 165 P.3d 581, 590 (Cal. 2007).

290. Borth v. Borth, 561 P.2d 408, 416 (Kan. 1977).

291. See generally Frederick Schauer, *Opinions as Rules*, 53 U. CHI. L. REV. 682 (1995) (discussing this phenomenon in the context of constitutional adjudication).

Lanham Act, which governs U.S. trademark law.²⁹² The Supreme Court has summarized Judge Friendly's taxonomy as follows:

In the context of word marks, courts have applied the now-classic test originally formulated by Judge Friendly, in which word marks that are "arbitrary" ("Camel" cigarettes), "fanciful" ("Kodak" film), or "suggestive" ("Tide" laundry detergent) are held to be inherently distinctive.²⁹³

These categories receive automatic trademark protection and are distinguished from the "generic," which receive no trademark protection, and the "descriptive," which are eligible for protection only after acquiring secondary meaning.²⁹⁴ Friendly did not make up these categories entirely. Some of Friendly's language came from the common law of trademark, while other language came from the Lanham Act itself.²⁹⁵ Judge Friendly was comfortable with this partnership between the two branches of government:

The cases, and in some instances the Lanham Act, identify four different categories of terms with respect to trademark protection. Arrayed in an ascending order which roughly reflects their eligibility to trademark status and the degree of protection accorded, these classes are (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful.²⁹⁶

There was nothing radical about his opinion, which more or less summarized the case law of the time.²⁹⁷ But his taxonomy followed by the description of the meanings of these terms resonated with the community of trademark judges, lawyers, and scholars, and has lasted for some forty years—with no end in sight. His opinion has been cited in more than one thousand cases²⁹⁸ and is itself a central pillar of American trademark law.²⁹⁹ The *Abercrombie* categories (generic,

292. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9–11 (2d Cir. 1976).

293. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 210 (2000) (quoting *Abercrombie & Fitch*, 537 F.2d at 10–11).

294. See *Abercrombie & Fitch*, 537 F.2d at 9–11 (defining other categories).

295. See, e.g., 15 U.S.C. § 1052(e) (2012) (describing the ineligibility of descriptive marks for trademark protection).

296. *Abercrombie & Fitch*, 537 F.2d at 9.

297. See *id.* at 9 (referring to prior case law as the basis of the categorization of trademark distinctiveness).

298. Shepard's Citations reports 1060 case citations as of April 15, 2016.

299. See 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 12:2 (4th ed. 2015); 1 CHARLES E. MCKENNEY & GEORGE F. LONG III, FEDERAL UNFAIR COMPETITION: LANHAM ACT 43(a) § 3:3 (2015).

descriptive, suggestive, and arbitrary and fanciful) have been used in close proximity to each other in over 1700 cases.³⁰⁰

The case has stare decisis effect only in the Second Circuit. Thus, it should not be surprising that district courts within the Second Circuit refer to the case often, or that the Second Circuit itself refers to its earlier decision and has not overruled itself.³⁰¹ The case's influence, however, extends far beyond the Second Circuit. Not only has it been quoted by the Supreme Court, which has no obligation to refer to circuit court cases, but it has been widely cited by other courts of appeals.³⁰² Without question, Judge Friendly's characterization of trademarks is now fully textualized into American law.

Compare Judge Friendly's decision to the Supreme Court's analysis of the word "pattern" in *H.J. Inc. v. Northwestern Bell*,³⁰³ a 1989 case interpreting the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The Supreme Court was confronted with determining whether a small number of allegedly illegal acts conducted by a defendant as a single scheme to bribe officials constituted a "pattern of racketeering activity,"³⁰⁴ a prerequisite to finding RICO liability. A phone company in Minnesota had been bribing public officials to get favorable rates from regulators. When charged with a RICO violation, the company argued that it had engaged in only one illegal scheme and therefore had not engaged in a pattern, as the statute requires.³⁰⁵ The Court analyzed the language and determined that the offending conduct might constitute a pattern. A pattern, the Court held, requires both "continuity" and

300. Lexis search conducted April 15, 2016, in state and federal court databases (generic w/25 suggestive w/25 arbitrary w/25 fanciful).

301. See, e.g., *TCPIP Holding Co., Inc. v. Haar Commc'ns, Inc.*, 244 F.3d 88, 93-94 (2d Cir. 2001).

302. See, e.g., *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1350-51 (Fed. Cir. 2010); *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 41 (1st Cir. 2001); *Ashley Furniture v. SanGiacomo N.A. Ltd.*, 187 F.3d 363, 369 (4th Cir. 1999); *Windmill Corp. v. Kelly Foods Corp.*, Nos. 94-5874, 94-5890, 95-5137, 1996 WL 33251, at *3 (6th Cir. Jan. 26, 1996) (unpublished table decision); *Stuart Hall Co. v. Ampad Corp.*, 51 F.3d 780, 785 (8th Cir. 1995); *Union Nat'l Bank of Tex., Laredo, Tex. v. Union Nat'l Bank of Tex., Austin, Tex.*, 909 F.2d 839, 844 (5th Cir. 1990); *Beer Nuts, Inc. v. Clover Club Foods Co.*, 711 F.2d 934, 937 (10th Cir. 1983); *Surgicenters of Am., Inc. v. Med. Dental Surgeries, Co.*, 601 F.2d 1011, 1019 (9th Cir. 1979); *Miller Brewing Co. v. G. Heileman Brewing Co.*, 561 F.2d 75, 79 (7th Cir. 1977).

303. 492 U.S. 229 (1989).

304. 18 U.S.C. § 1961 (2012).

305. *H.J. Inc.*, 492 U.S. at 234.

“relatedness,”³⁰⁶ and it should be up to the trier of fact to determine whether these elements were present.

Since then, courts have engaged in more than 300 analyses of “continuity” and “relatedness” to determine RICO liability.³⁰⁷ The word “pattern” is mentioned but has dropped out of the analysis. It is not easy to tell whether, in many cases, a reasonable person’s concept of a “pattern” would match up with what she might consider to have “relatedness” and “continuity.” In short, the Court created its own common law of RICO and acknowledged that it was doing so:

The limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a “pattern of racketeering activity” exists. The development of these concepts must await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act’s intended scope.³⁰⁸

I include both of these examples to demonstrate that textualization is itself neutral as to whether it creates order or chaos. When a court elaborates on statutory language that is not sufficiently clear to inform citizens of their rights and obligations, it benefits the legal system. When a court substitutes judicial language for that of the legislature without clarifying the law, it distorts the legislative output. In either case, by textualizing prior cases and then analyzing these texts as law, courts have taken a significant step in shifting the balance of lawmaking from the legislature to the judiciary, despite purporting to do just the opposite.

III. PRECEDENTIAL VALUES

This Part discusses the values that appear to underlie the heavy reliance on precedent in statutory cases—especially a drive for coherence, which often takes priority over the professed value of legislative primacy in cases of statutory interpretation. The next Part suggests potential changes in judicial practice (and corresponding advocacy by lawyers).

306. *Id.* at 239 (quoting 116 CONG. REC. 18,940 (1970) (statement of Senator McClellan)).

307. A Lexis search shows 106 circuit court opinions using “continuity” and “relatedness” in close proximity, and 634 district court cases doing so as of April 15, 2016.

308. *H.J. Inc.*, 492 U.S. at 243.

In citing each other, judges signal to readers that “this is something that has been said before.” When they cite multiple cases, they are signaling, “this is something that has been said over and over again.” Neither statement necessarily says anything about legislative primacy, the value associated with statutory interpretation that courts purport to follow. Rather, two values undergird the use of precedent in statutory cases: stability and coherence.³⁰⁹ By stability, I refer to traditional notions of *stare decisis* and obedience by lower courts to the holdings of higher courts, sometimes referred to as adherence to horizontal and vertical precedent, respectively.³¹⁰ By coherence, I mean concern about the body of law governing a particular statute making sense as a whole and the body of law into which that statute fits making sense as a whole. When courts focus excessively on these values, they abdicate their responsibility to meet other important criteria, such as respect for legislative primacy, substantive rule of law values other than coherence, and concern about the consequences of their decisions. No wonder law students have difficulty moving past the citation of earlier cases to the strong substantive arguments needed to carry the day in close cases!

Yet it would be too simple to complain that judges focus on these values solely as an atavism of their common law roots. The civil law also favors stability³¹¹ and coherence,³¹² but it expresses its respect for these values without such extensive citation of earlier judicial decisions. Thus, a better explanation might be that the use of precedent in statutory cases emanates from basic rule of law values that U.S. judges express in a common law style. If so, then it should not be surprising that judges assure themselves—perhaps through the citation of precedent—that their decisions are not causing the law to be unstable, incoherent, or incapable of standing up to valid argumentation to the contrary.

Justice Scalia himself presented two reasons for judges to concern themselves with coherent decision-making in the realm of statutory interpretation. The first was that enacting legislatures have in the backs of their minds the need for new laws to make sense in the

309. See *supra* note 35 and accompanying text.

310. See *supra* note 37 and accompanying text.

311. See Zweigert & Kötz, *supra* note 12, at 716 (“Although the rule of *stare decisis* is not generally recognized in any civil law system, our courts’ attitude toward their own previous decisions is pretty much the same; and the higher a court, the greater will be its reluctance to overrule its own decisions.”).

312. See, e.g., ZIPPELIUS, *supra* note 8, at 61. See generally ALEKSANDER PECZENIK, ON LAW AND REASON (2008) (proposing a theory of legal reasoning in the civil law tradition with coherence as its centerpiece).

context of the larger legislative landscape into which they will be embedded:

The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we can assume Congress always has in mind.³¹³

This “benign fiction” may present itself in two different senses. The stronger sense is that in drafting laws the legislature specifically has in mind the current body of law and attempts to make the new law fit well within it. The weaker sense assumes that Congress generally, whether through carelessness or political expediency, enacts laws whose interpretations may be either marshaled into a coherent whole, or instead left to be applied inconsistently, and that the courts should assume that Congress prefers them to adopt the methodology that will make such laws coherent. For each version—strong and weak—how benign the fiction is depends upon the extent to which members of Congress really do have this compatibility in mind.

As for the strong version of Scalia’s legal fiction, it is likely to be somewhat elastic; true to some extent—especially with respect to immediately adjacent statutory provisions—and false to some extent—especially with respect to portions of a code remote from the provision being interpreted and even more so with respect to other regimes within the larger body of statutory law.

Scalia and Bryan Garner have recognized these nuances,³¹⁴ as has Professor Kent Greenawalt, who distinguishes between drawing inferences of coherence from different provisions in a single statute and drawing similar conclusions from statutes enacted at different

313. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

314. SCALIA & GARNER, *supra* note 5, at 173 (“If [the statute being compared to the one whose interpretation is at issue in a case] was enacted at the same time, and dealt with the same subject, the argument could even be persuasive.”).

times and regulating different subject matter.³¹⁵ Much of the case law applying Scalia's "benign fiction," however, does not. Rather, it engages in what Professor William Buzbee has called "the one Congress fiction,"³¹⁶ in that it assumes that a single Congress wrote the laws being compared in a single, code-like manner. Relying on historical material that appears to reflect the intent of Congress, Buzbee argues that the coherence arguments applied by the Court in several cases tended to demonstrate an undermining of legislative primacy, rather than an enhancement of it.³¹⁷ In other words, Scalia's fiction was not benign.³¹⁸

Similarly, in their important empirical study, Professors Abbe Gluck and Lisa Bressman interviewed 137 congressional staff members about which judicial doctrines they take into account when drafting laws.³¹⁹ Among them were the "whole act rule"³²⁰ and the "whole code rule."³²¹ The drafters claimed to be aware of these judicial doctrines but also claimed not to take them into account in their drafting activities simply because it is "impractical" for drafters to do so given the everyday rhythm of congressional work.³²²

Now consider the weaker sense in which Scalia's description of legislative intent may be accurate. Suppose that legislators do their best to be coherent but, under the circumstances, cannot make all laws consistent with each other either because of political realities

315. KENT GREENAWALT, *STATUTORY AND COMMON LAW INTERPRETATION* 27 (2013).

316. Buzbee, *supra* note 112, at 179–80.

317. See *id.* at 180–203 (discussing, principally, *Bennett v. Spear*, 520 U.S. 154 (1997); *Univ. Hosps., Inc. v. Casey*, 499 U.S. 83 (1991); and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)).

318. These are not the only problems with the rule's applications. Even when the judges agree upon the nature of the principle, they argue about which parts of the statute to apply it in for particular cases and whether to extend out of a single statute into the remainder of the code. See Krishnakumar, *supra* note 27, at 970–71 for discussion.

319. Gluck & Bressman, *supra* note 31, at 905–06.

320. See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."); see also SCALIA & GARNER, *supra* note 5, at 167 (endorsing the use of this canon); Ross, *supra* note 85, at 271–72 (recognizing the universality of the principle and criticizing it on grounds that it fails to reflect actual legislative practice).

321. For discussion of the whole code principle, which presumes coherence across the entire code, see Buzbee, *supra* note 112, at 221–25; Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 225–26 (2010); Widiss, *supra* note 225, at 874–75. Notably, Scalia and Garner express their reservations about the use of this interpretive strategy as well. SCALIA & GARNER, *supra* note 5, at 172–73.

322. Gluck & Bressman, *supra* note 31, at 954.

that limit fully coherent drafting or simply because, as with all laws, some of the circumstances in which the law will be applied are unforeseen at the time of enactment. Let us further assume that legislators, for the most part, understand that the courts are going to be left with the task of statutory interpretation and that they approve generally of judges caring about the laws being construed as mutually consistent. This perspective seems to be consistent with Gluck and Bressman's findings. The staffers interviewed did not seem to object to canons that impose coherent interpretation.

The weaker version of the coherence constraint on statutory interpretation assigns a lesser role to the legislature in setting the details of statutory law, because the generality of the legislature's instructions to the courts leaves much up to the judiciary. One can see it in action when courts speak of the "general intent" of the legislature. Thus, in *Moskal v. United States*,³²³ the Supreme Court decided that a "falsely made" security included a document made to contain false information, even though, at the time the relevant statute was enacted, "falsely made" was synonymous with "counterfeit."³²⁴ The statute in question criminalized the interstate trafficking of such documents.³²⁵ In support of its broad interpretation, the Court noted that this outcome was consistent with the statute's "general intent" and "broad purpose," which was to curb the kind of illegal activity at issue in the case at hand.³²⁶ That is, Congress would be satisfied with the Court's construing the statute to create a coherent jurisprudence around the law's general goals.³²⁷ Such cases both call for coherence and define the value (legislative purpose) around which decisions should cohere.

Let us now turn to Scalia's second defense of coherence, which did not take the legislative will into account at all. He argued that judges, when given the choice, should opt for sense instead of nonsense in statutory interpretation:

Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both

323. 498 U.S. 103 (1990).

324. *Id.* at 111.

325. 18 U.S.C. § 2314 (2012).

326. *Moskal*, 498 U.S. at 110.

327. See *Sullivan v. Stroop*, 496 U.S. 478, 496–97 (1990) (Stevens, J., dissenting) (relying on the "general intent" of welfare statutes to give broad construction to a statute providing certain benefits to children); *Brenner v. Manson*, 383 U.S. 519, 532 (1966) (examining the "general intent" of Congress in connection with the Patent Act).

previously and subsequently enacted law. We do so not because that precise accommodative meaning is what the lawmakers must have had in mind (how could an earlier Congress know what a later Congress would enact?), but because it is our role to make sense rather than nonsense out of the *corpus juris*.³²⁸

If we do not care what the legislature had in mind, then we must have some other reason for wanting to make sense out of the *corpus juris*. And, of course, we do. Whether or not the legislators had a coherent code in mind, the judges should care because the most basic rule of law values demand that a legal system make sense to the population that it governs. Recent empirical work by Tom Tyler and his colleagues supports this proposition by showing that people respond more positively to the legal system when they regard judges as having made decisions based on concerns that citizens regard as legitimate.³²⁹

The case from which Scalia is quoted illustrates the tension between legislative primacy and coherence as its own value. In *West Virginia University Hospitals v. Casey*,³³⁰ the question was whether a civil rights statute awarding “a reasonable attorney’s fee”³³¹ to a prevailing plaintiff included awarding the cost of expert fees. Scalia argued coherence on behalf of the majority.³³² A number of federal statutes make reference to expert fees, suggesting that statutes intended to include expert fees as part of attorney fees need do so expressly.³³³ On the other hand, as the dissenting opinion pointed out, Congress enacted the statute to override a Supreme Court decision that appeared to Congress to be excessively stingy in permitting fee-shifting. Accordingly, it would be surprising if Congress intended to exclude expert fees.³³⁴ The dissent had the last word when the statute was soon amended to include expert fees, overriding the Supreme Court a second time.³³⁵

328. *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100–01 (1991).

329. See, e.g., David B. Rottman & Tom R. Tyler, *Thinking About Judges and Judicial Performance: Perspective of the Public and Court Users*, 4 ONATI SOCIO-LEGAL SERIES 1046, 1049 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2541450 [<https://perma.cc/5DSB-JP9U>]. I thank William Eskridge for pointing out the importance of Tyler’s work in this regard.

330. 499 U.S. 83 (1991).

331. 42 U.S.C. § 1988(b) (2012).

332. *W. Va. Univ. Hosps.*, 499 U.S. at 101 (“[I]t is our role to make sense rather than nonsense out of the *corpus juris*.”).

333. *Id.* at 89–90.

334. *Id.* at 113 (Stevens, J., dissenting).

335. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1079 (codified as amended at 42 U.S.C. § 2000e-5(k)).

Coherence is deeply embedded in rule of law values, as many have noted. For example, Scott Shapiro bases his theory of “legality” on the relationship between lawmaking and interpreting on the one hand and “plan-making” and the execution of plans on the other.³³⁶ In developing this approach, Shapiro notes from the beginning that plans (and thus lawmaking) must be rational. He comments: “Rationality not only demands that we fill in our plans over time; it also counsels us to settle on plans of actions that are internally consistent and consistent with each other.”³³⁷ This rationality constraint applies generally, both to “bottom-up” planning—the stuff of common law reasoning—and “top-down” planning—the stuff of legislation. Returning to Scalia’s two justifications for judges concerning themselves with coherent interpretation when one interpretation of a law would make a provision incoherent with the larger body of law and the other would make it fit more rationally, it should be no surprise that judges choose the latter. This will be the case whether they assume that the enacting legislators would have wanted them to do so or, as institutional players, they have an independent obligation to prefer sense to nonsense in statutory interpretation—or both.

Similarly, Ronald Dworkin’s notion of integrity in law surely incorporates coherence. Dworkin used the metaphor of each new interpretation of a statute being the equivalent of a new chapter in a chain novel.³³⁸ The interpretation must simultaneously advance the interpretation of the statute to cover (or not cover) new situations consistent with the highest values of the law and yet be mindful of the statute’s past, which includes everything from the societal situation that gave rise to its enactment, including the law’s legislative history, to the language of the statute itself and thus to subsequent interpretations by courts and other institutional actors. Moreover, Dworkin’s concept of law as integrity has coherence embedded in its core. For law to have integrity, it must be sufficiently coherent to treat similar situations alike.³³⁹

Scholars writing in the civil law tradition also adduce coherence as an important value in decision-making. To a large extent, they also use precedent to demonstrate coherence, although they do so differently since civil law systems do not have *stare decisis* as a principle of binding law and cases are most often cited for their actual

336. SCOTT J. SHAPIRO, *LEGALITY* 155 (2011).

337. *Id.* at 123.

338. *See* DWORKIN, *supra* note 106, at 228–38.

339. *Id.* at 219–24.

holdings.³⁴⁰ Regardless of the practice concerning citation of precedent, coherence is respected as a legal value in its own right, often under the rubric of "systematic interpretation."³⁴¹ Civil law, moreover, tends to adopt both Scalia's weak legislative intent argument and his purely systemic argument. Quoting the nineteenth-century German legal scholar F.K. von Savigny, Reinhold Zippelius notes: "[O]nly when we are clear about what a statute's relationship with the overall legal system is, and how the statute is to work within the system,' can we understand the thoughts of the legislator."³⁴² He nonetheless further advocates for coherence as a value in its own right.³⁴³ And Aleksander Peczenik, a legal theorist writing largely in the civil law tradition, bases his entire theory of legal justification on the concept of coherence,³⁴⁴ linking coherence to rationality,³⁴⁵ as does Shapiro.³⁴⁶

Coherence, though, is a necessary but not a sufficient basis for statutory interpretation. Things can be similar or different in all kinds of ways, only some of which are relevant to how a legal system should be structured.³⁴⁷ As the philosopher Nelson Goodman pointed out, we do not judge similarity by counting the features that two things have in common but rather by judging the overall importance of those properties that are shared. He continues: "But importance is a highly volatile matter, varying with every shift of context and interest, and quite incapable of supporting the fixed distinctions that philosophers so often seek to rest upon it."³⁴⁸

340. See generally Robert S. Summers & Michele Taruffo, *Interpretation and Comparative Analysis* (examining the role of precedent in statutory interpretation in Western legal systems), in INTERPRETING STATUTES, *supra* note 11, at 461, 487-90.

341. See ZIPPELIUS, *supra* note 8, at 61-62; D. Neil McCormick & Robert S. Summers, *Interpretation and Justification*, in INTERPRETING STATUTES, *supra* note 11, at 511, 513-14.

342. ZIPPELIUS, *supra* note 8, at 61.

343. *Id.*

344. See PECZENIK, *supra* note 312, at 131-32.

345. See *id.* at 160-76.

346. See SHAPIRO, *supra* note 336, at 156.

347. In addition, we judge similarity in varying ways, sometimes caring about whether two things have shared features and sometimes caring about whether pairs of objects are similarly related to each other. See, e.g., Robert L. Goldstone, Douglas L. Medin & Dedre Gentner, *Relational Similarity and the Nonindependence of Features in Similarity Judgments*, 23 COGNITIVE PSYCHOL. 222, 248 (1991); see also Amos Tversky & Itamar Gati, *Studies of Similarity*, in COGNITION AND CATEGORIZATION 79, 81-82 (Eleanor Rosch & Barbara B. Lloyd eds., 1978) (accounting for similarity based on the number of shared and unique features and then weighing the features based on context).

348. NELSON GOODMAN, *Seven Strictures on Similarity*, in PROBLEMS AND PROJECTS 437, 444 (1972).

For Dworkin, the “important” values around which law should cohere are values that respect the rights of the population similarly at the level of abstraction at which those rights are best articulated.³⁴⁹ As Dworkin points out, a court with a coherent and consistent history of construing laws to grant minorities as few rights as possible within the confines of statutory language is indeed consistent and coherent, but is wrong-minded in some serious way.³⁵⁰ A coherent set of interpretations by definition must cohere around something, and respect for coherence without articulating what that something may be can lead a legal system to promote values that undermine the goals of the legislature. Once a court has developed precedents that value a particular set of principles, loyalty to those values may supersede loyalty to the value of legislative primacy, leading a court to elevate its own values over those of the enacting legislature. Because it accomplishes this through a means that receives little or no criticism—the citation of earlier judicial decisions—this strategy is likely to be successful—at least temporarily. Recall that this was precisely the criticism that the dissenting opinions offered in *Ledbetter*³⁵¹ and *Circuit City*.³⁵² *Ledbetter* was overridden by Congress.³⁵³ Yet the threat of override is a poor solution to the problem of judges placing their own values above those of the legislature in interpreting statutes. The possibility that disrespect for legislative intent can be repaired is a distant second to not disregarding the legislative will in the first place.³⁵⁴

This point is driven home by an empirical study conducted by Professors Stephanie Lindquist and Frank Cross.³⁵⁵ In an initial study, Lindquist and Cross found that ideology played a significant role in appellate decisions where the court identified the case as one of “first impression.”³⁵⁶ They then examined a large number of cases decided by U.S. Courts of Appeals in which the question was whether a government official had acted “under color of state law” for purposes

349. See DWORKIN, *supra* note 106, at 227–28.

350. See *id.*

351. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 660–61 (2007) (Ginsburg, J., dissenting).

352. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 132–33 (2001) (Stevens, J., dissenting).

353. See Lilly *Ledbetter Fair Pay Act of 2009*, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified in scattered sections of 29 and 42 U.S.C.) (overriding *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)).

354. Scholars have noted the difficulty in relying on the legislative process to override mistaken judicial decisions. See, e.g., ELHAUGE, *supra* note 114, at 248–51.

355. See Lindquist & Cross, *supra* note 114, at 1180–86, 1191–1201

356. *Id.* at 1183.

of § 1983.³⁵⁷ Their study covered the period from 1961, when the Supreme Court decided the seminal case of *Monroe v. Pape*,³⁵⁸ through 1990. Seven of the federal judicial circuits were included in the study. The goal was to determine whether the ideology of the circuit court judges played a diminishing role in the judges' votes as both Supreme Court and circuit court precedent developed.

The studies showed that precedent appeared to constrain judges for an initial period. Strikingly, as the amount of relevant precedent grew, its impact diminished and ideology came once again to the fore.³⁵⁹ Conservative judges began voting more conservatively, liberal judges more liberally. Apparently, as the opportunity to create various narratives increases, judges feel and act as though precedent constrains them less.³⁶⁰ To the extent that this is true, it reveals a serious problem with reliance on precedent in statutory cases, especially when the statute has generated a robust body of case law.³⁶¹ It suggests that the will of the judge increasingly supersedes the will of the legislature as the opportunity to do so expands by virtue of additional precedent.

IV. USING TRADITIONAL COMMON LAW VALUES TO ENCOURAGE RESTRAINT

All of the forgoing suggests that courts should rely less on precedent in statutory decisions. The hard question is how and where the line should be drawn. It would be unwise to argue that judges should hesitate to adopt the excellent reasoning of a judge in a prior case, creating a common law for particular statutes through respect for earlier reasoning. Judge Friendly's lasting impact on the language of trademark law illustrates the point well. Similarly, maintaining stare decisis as a matter of presumptively adhering to prior holdings—both by lower courts and by high courts in their respective roles—is a practice worth keeping, subject to taking seriously issues of

357. 42 U.S.C. § 1983 (2012).

358. 365 U.S. 167 (1961).

359. Lindquist & Cross, *supra* note 114, at 1194–95.

360. Others have noted this phenomenon. See, e.g., Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1400 (1995).

361. Lindquist and Cross also argue that the findings present a problem for Dworkin's theory of the chain novel, since he suggests that precedent should be progressively more restricting. They appear correct in this instance, but there are many statutes in which the political stakes are lower, and the system of refinement by precedent seems to work well. See SOLAN, *supra* note 7, at 123–28.

continuing reliance and changes in social circumstances that led to the earlier decision.³⁶²

Nonetheless, reliance on precedent to the extent that American courts engage in it is contrary to the stated goal of the courts to defer to the legislature in instances of statutory interpretation. If, as I have argued here,³⁶³ judges are often so embedded in a common law system that they cannot adequately stem their ardor for ruling on the basis of common law rather than statutory values, then it may be useful to look at the style of opinion writing in civil law jurisdictions where the detailed analysis of judicial decisions is less acceptable. Civil law judgments in statutory cases have two characteristics that may be instructive: they are short, and they do not generally make as much reference to case law.³⁶⁴ This is not to suggest that European judges are not aware of what courts within their jurisdictions have said or the basic principles of statutory interpretation. Rather, they write in a manner focused more on the legislature and less on themselves, taking seriously the civil law notion that judges do not make law.³⁶⁵ They only interpret and apply the law that the legislature has enacted.³⁶⁶

However, there are drawbacks to civil law interpretation as well. The cost of such an approach is a lack of transparency. It becomes easy to hide behind the illusion that statutory interpretation is a matter of applying agreed-upon tools to cases that can be definitively resolved. Moreover, as Peter Strauss points out so well, the differences in rhetoric about the degree of deference to the legislature between the civil law and common law approaches to statutory interpretation may be far more profound than differences in substance.³⁶⁷ While it may be worth investigating as a thought experiment, asking French judges to begin to sound like U.S. judges, or the converse, is unlikely to be a serious solution to the problems raised in this Article.

362. See *supra* text accompanying note 220.

363. See *supra* Part III.

364. See Robert S. Summers & Michele Taruffo, *Interpretation and Comparative Analysis*, in INTERPRETING STATUTES, *supra* note 11, at 461, 487–90. See generally Zweigert & Kötz, *supra* note 12 (discussing the numerous differences between civil and common law with respect to statutory interpretation).

365. For an excellent discussion of how this perspective leads not only to judges being taken seriously but also being given a back seat in the French legal system, see MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 172–73 (2009).

366. *Id.*

367. Strauss, *Common Law and Statutes*, *supra* note 23, at 234–36.

Thus, without pretending to have become civil law judges, common law judges should take far more seriously the question of whether and to what extent their reliance on earlier pronouncements by their own branch of government dominates the pronouncements of the legislative branch. I cannot propose a formula that will at once include all of the useful things that courts appropriately cite from earlier cases and exclude those that are more self-aggrandizing than intellectually valuable. Yet the core of such an approach should consider the difference between reasoning by analogy and adhering to precedent.³⁶⁸ As Schauer explains, the former requires that one establish the relevance of an earlier argument that one wishes to apply to a later case. The latter is a matter of obedience, even when one disagrees with the earlier decision or would not follow the reasoning that established the earlier precedent.³⁶⁹ I suggest below that many uses of precedent should require justification in each instance or should be dispensed with, while others (including horizontal stare decisis) may be applied simply because of their precedential status.

An initial step for judges to take in approaching the question is to separate holding and dicta along traditional lines. Much has been written about the difficulty in sorting out just what was necessary to the decision in a case and what was peripheral, the traditional way in which holding and dicta are separated.³⁷⁰ Nonetheless, accepting that there will be line-drawing issues, using these concepts to sketch out constraining considerations for reliance on precedent in statutory interpretation may orient judges away from relying upon incidental statements by judges in cases not closely related to the case at hand. A thoughtful and thorough article by Michael Abramowicz and Maxwell Stearns on the varying and inconsistent uses of the holding/dicta distinction makes the following suggestion:

A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to

368. For thoughtful discussion of the two methods of argument and their similarities and differences, see GREENAWALT, *supra* note 315, at 193–244.

369. See Schauer, *supra* note 37, at 125–27.

370. See, e.g., GREENAWALT, *supra* note 315, at 186–87; David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2048 (2013) (“Our evidence suggests that the distinction between holding and dictum is at once central to the American legal system and largely irrelevant.”); Kate O’Neill, *Against Dicta: A Legal Method for Rescuing Fair Use from the Right of First Publication*, 89 CALIF. L. REV. 369, 372 (2001); Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 223–24 (2010).

the judgment. If not a holding, a proposition stated in a case counts as dicta.³⁷¹

If, in a case concerning statutory interpretation, an earlier judicial decision meets all three criteria identified above, the court deciding the statutory case should be comfortable referring to the earlier decision for its precedential value. Because the definition is path-dependent, it is broad enough to include such procedural rulings as standards for summary judgment and standards for appellate review. It is also broad enough to include reasoning that led to the judgment based on analysis of the facts, such as Judge Friendly's reasoning in *Abercrombie & Fitch*.³⁷² However, it is not broad enough to include reference to cases that define ordinary words, cases that refer to canons, and cases that recite various historical narratives.

As for other references to earlier decisions, these should depend on the extent to which they further such values as legislative primacy, coherence, stability, and legitimacy. Courts should refer to them only as persuasive and should take on the burden of explaining why they are persuasive with respect to these and other rule of law values. This should not be seen as a hard-and-fast rule, but rather as an attitudinal posture, the goal of which is to assist judges in focusing less on what the bench has said and more on what the legislature had in mind, or on other substantive issues.

More specifically, I suggest that adoption of this approach would lead to the following:

1. Statutory stare decisis remains as a principle of interpretation. Disputes about how broadly to construe earlier decisions are inevitable. Thus, cases like *Flood v. Kuhn* are justified on grounds of precedent.³⁷³ By the same token, courts should remain free to rely upon cases that announce established rules of procedure, such as standards of review, the overall operation of dispositive motions, and so on. While these discussions often seem to be boilerplate pronouncements, they typically reflect well-settled principles of procedure important to the rule of law. Yet, when there is legitimate disagreement about the breadth of earlier decisions, judges should be candid in acknowledging it, which in turn will force courts to produce

371. Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1065 (2005). For a discussion of precedent as path dependency, see generally Lindquist & Cross, *supra* note 114.

372. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9–11 (2d Cir. 1976).

373. See discussion *supra* Section I.B.2.

substantive arguments supporting the selection of one approach over the other.

2. Courts should remain free to rely upon cases that articulate well-settled substantive canons of construction, including the rule of lenity and the rule that statutes are to be construed to avoid constitutional issues. The caveats stated above apply here as well. To the extent that there is reasonable debate about the applicability of a canon to the case at hand, the uncertainty should be acknowledged, and the position of the court (or dissent) should be argued for substantively—not as a matter of precedent. This may include the citation of earlier cases, but their relevance should be argued. Thus, using *Small v. United States* as an example, applying the rule that statutes are generally interpreted as regulating conduct within the territory³⁷⁴ would be justified only if the applicability of the canon was considered by the court in the light of countervailing considerations. In *Small*, the majority decision appears to have met that test.

3. Coherence is at the heart of judicial decision-making. In construing statutes, judges should be comfortable using earlier holdings to demonstrate that the decision (or dissent) coheres with a particular version of the history of the statute's enactment and interpretation, again, acknowledging and arguing against reasonable alternative narratives. Because the earlier precedents were not based on the facts of the case at hand, their applicability must be established through analogical reasoning. The competing histories in both *Circuit City Stores* and *Ledbetter* illustrate the need for such argumentation. Furthermore, coherence with historical narratives, such as reliance on legislative history or on the social or political circumstances that led to a law's enactment, often need not be centered around judicial opinions at all.

4. For the most part, the use of grammatical canons of construction should receive no precedential weight. Their application in any particular case should be defended on the merits—not by the bare fact that judges have used the canon in the past. The discussion of ejusdem generis in *Circuit City Stores* is a case in point.³⁷⁵ This is not to say that judges should not refer to the canons or to cases applying them. Rather, the application of a grammatical canon in a particular case should

374. See 544 U.S. 385 (2005); see also *supra* text accompanying notes 137–44.

375. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001).

be justified exclusively on the merits. Reliance upon earlier applications must be justified as sufficiently analogous. This position is similar to Judge Posner's suggestion that the canons are to be seen as rules of thumb to be justified by practical reasoning in each instance.³⁷⁶

5. Along these same linguistic lines, the meanings of ordinary words are not a matter of judicial precedent, and the use of a particular dictionary to define a statutory word in an earlier case has no status in subsequent decision-making. Thus, the various judicial pronouncements about the word "any" in *Small* have no place in judicial argumentation.

6. Finally, all other kinds of asides about earlier judicial decisions found in the cases detailed in this Article should be shed from the judicial repertoire to shift the center of attention from judges to legislatures.

These suggestions should help to shift the center of gravity in statutory decisions from the judiciary to the legislature. A focus on holdings should play an initial constraining role. The definitions of words in earlier cases are typically not based on the facts of the case; grammatical canons are almost never dispositive, and their use rarely engages the facts of a case. Other uses of precedent in decision-making about statutory interpretation fit the definition of holding, but should be constrained as suggested in order to promote judicial integrity.

CONCLUSION

Examining various doctrines concerning statutory interpretation as a whole, this Article argues that, in combination, they amount to a judicio-centric approach to statutory interpretation, rhetoric to the contrary notwithstanding. Although this Article makes some concrete suggestions, it is difficult to be absolute about the distribution of appropriate and inappropriate categories for citation on a wholesale basis. Rather, this Article attempts to provide a framework based on the familiar holding/dicta distinction for judges to use in deciding whether an earlier decision should be given any force beyond whatever persuasive weight the judge can justify. Judges should ask themselves each time they are tempted to justify their decision by reference to what an earlier judge has pronounced how such citation advances the values that they intend to advance. That is, perhaps, a

376. POSNER, *supra* note 27, at 81.

good question for judges and scholars alike to ask themselves in any event.

The proposals presented here are somewhat different from many that have preceded them. This Article does not call for the abandonment of the canons, for example.³⁷⁷ Rather, it calls for a shift from arguing from precedent to arguing by analogy—a shift that requires significantly more justification. This suggestion will not solve all of the problems of statutory interpretation, of course. Even in the cases discussed above, it is possible, within the framework presented here, to present cogent alternative narratives capable of furthering accepted values while providing sufficient analogy to past practice to be justified on grounds of coherence. Nonetheless, a serious reduction in the illusion of consistent past practice would lead the legal system toward a more candid and robust reliance on the legislative will as superseding the judicial will. And that is the principal stated goal of statutory interpretation, as practitioners of all political stripes agree.

377. See VERMEULE, *supra* note 4, at 289–90; Eskridge, *supra* note 118, at 582.