

When Is Legal Methodology Binding?

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ABSTRACT: Common-law interpretive methodologies are mostly nonbinding, but some interpretive methodologies are seen as binding precedent. This Article offers an explanation for this state of affairs. Whereas the extant scholarship on common-law interpretive methodologies offers descriptive accounts (often assuming that common-law methodologies are per se nonbinding) and normative analysis, this Article fills a gap in the literature by providing a realist explanation for the legal landscape of binding interpretive methodologies. It identifies whether a methodology is rule-like, and whether it increases judicial legitimacy and/or court power as “pull factors”—that is, incentives that might attract judges to recognize interpretive methodologies as binding. It also identifies high stakes (i.e., broad methodological scope) and constitutional argumentation over methodologies as “push factors”—that is, obstacles to finding methodologies to be binding. This approach explains the current landscape of interpretive methodologies and also enables predictions about the stability of existing binding interpretive methodologies.

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Senator Charles Grassley: “I want to know how important legislative history is to you. When is it appropriate to look to legislative history to interpret the statute . . . ?”¹

Judge Amy Coney Barrett: “Sure. So I’m very comfortable talking about the use of legislative history because that’s a matter of interpretive philosophy.”²

* * *

Senator Mike Crapo: “I disagree with [the *Chevron*] doctrine. I think that the courts ought to have the ability to interpret the statute. And if it’s ambiguous, they should interpret it as best they can. . . . Now, that’s just my opinion. So, the question that . . . you probably can’t answer is what’s your opinion?”³

Judge Amy Coney Barrett: “You’re right. I can’t answer, Senator Crapo.”⁴

1. *Senate Judiciary Committee Holds Hearing on the Nomination of Amy Coney Barrett to be an Associate Justice on the Supreme Court of the United States, Day 2 Before the S. Comm. on the Judiciary*, 116th Cong. (2020) (statement of Sen. Charles E. Grassley).

2. *Id.* (statement of Amy Coney Barrett).

3. *Id.* (statement of Sen. Michael D. Crapo).

4. *Id.* (statement of Amy Coney Barrett).

INTRODUCTION

Nominees to the U.S. Supreme Court typically do not respond to questions about legal issues that might come before the Court. Yet when asked about the propriety of referring to legislative history, then-Seventh Circuit Judge Amy Coney Barrett did not hesitate. Why? As she explained, to her this was not a legal issue that might come before the Court, but simply “a matter of interpretive philosophy.”⁵ Indeed, then-Judge Barrett proceeded to tout textualism as an interpretive tool.⁶

Yet then-Judge Barrett *did* refuse to answer Senator Crapo’s question about the desirability of the doctrine of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*—the 1984 case that established the methodology for courts to apply in deciding whether to defer to an agency’s interpretation of a statute.⁷ Why did then-Judge Barrett feel comfortable speaking about her preference not to rely on legislative history, but not about her views on the *Chevron* doctrine? Is not *Chevron* also a methodological device?

The distinction on which then-Judge Barrett (if implicitly) relied—between textualism on one hand and the *Chevron* doctrine on the other—has a strong pedigree. It maps onto the extent to which the Justices view each device as binding precedent. When the Supreme Court in *United States v. Mead Corp.* modified the *Chevron* test by adding the so-called “step zero”—thus limiting the reach of the basic *Chevron* methodology⁸—Justice Scalia’s response reflected his understanding that the Court’s decision was very much binding: “Today’s opinion makes an avulsive change in judicial review of federal administrative action.”⁹ And, indeed, the Court in *Mead* filled the gap left by its restriction on the basic *Chevron* methodology by incorporating instead the applicability of a methodology from the 1944 case of *Skidmore v. Swift & Co.*¹⁰ In so doing, the *Mead* Court emphasized the binding nature of at least this category of interpretive methodology: “*Chevron* did nothing to eliminate *Skidmore*’s holding”¹¹

5. *Id.*

6. *Id.* (“What governs, of course, is the text of the statute. So you know, the legislative history can never supersede the text, and it should never substitute for the text of the statute.”).

7. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984); *infra* text accompanying notes 69–82.

8. *See United States v. Mead Corp.*, 533 U.S. 218, 231–34 (2001). *See generally* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006) (“[P]rovid[ing] an understanding of the foundations and nature of the Step Zero dilemma and . . . suggest[ing] how that dilemma should be resolved.”).

9. *See Mead*, 533 U.S. at 239 (Scalia, J., dissenting).

10. *See id.* at 234–35 (majority opinion); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

11. *Mead*, 533 U.S. at 234. *But see* Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1154–57 (2019) (arguing as a normative matter that *Chevron* should not receive horizontal stare decisis effect).

In contrast, while one can find cases where all Justices have authored or joined opinions grounded in textualism,¹² the Justices nevertheless feel no compunction to adhere to a textualist approach in subsequent cases.¹³ The Court has never treated as binding applications of particular statutory interpretive methods.¹⁴

In short, it seems that the landscape of legal methodology is generally nonbinding, but with not insubstantial pockets of binding methodology.¹⁵ But

12. See Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), <https://youtu.be/dpEtszFT0Tg?t=509> [<https://perma.cc/Z7F8-VCNF>] (“I think we’re all textualists now in a way that just . . . was not remotely true . . . when Justice Scalia joined the bench.”).

13. See RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 173 (2018) (“[T]he Justices virtually never acknowledge changes of view about appropriate interpretive methodology.”); Note, *The Rise of Purposivism and Fall of Chevron: Major Statutory Cases in the Supreme Court*, 130 HARV. L. REV. 1227, 1237 (2017).

14. See, e.g., Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 1013 (2009) (“[T]he justices have seldom exhibited much interest in attempting to bind either themselves or each other, in advance, to the kind of general interpretive approaches [to constitutional adjudication] that academic theorists champion.”); HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (“The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.”); Philip P. Frickey, *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1971, 1971 (2005) (observing that Hart and Sack’s “conclusion remains true today”); 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, 36 (Amy Gutmann ed., 1997); James C. Thomas, *Statutory Construction When Legislation Is Viewed as a Legal Institution*, 3 HARV. J. ON LEGIS. 191, 208 (1966) (“[T]here are not too many legal scholars who would take the position that rules and maxims of statutory construction are legal rules.”). Commentators also debate whether higher or lower court judges are more likely to embrace binding precedent. Compare James J. Brudney & Lawrence Baum, *Protean Statutory Interpretation in the Courts of Appeals*, 58 WM. & MARY L. REV. 681, 762 (2017) (discussing “evidence that judges on the courts of appeals are more pragmatic and [more] eclectic than the [Supreme Court] Justices in their use” of interpretive methodologies involving reference to dictionaries and legislative history), with Aaron-Andrew P. Bruhl, *The Jurisdiction Canon*, 70 VAND. L. REV. 499, 550 (2017) (“The Supreme Court is unlikely to feel very constrained to follow the narrow-construction canon if the canon is inconvenient in a particular case or uncongenial to its preferences more generally. . . . The lower courts face a different, more constrained world.”).

15. Technically, *stare decisis* can take different forms within a judicial hierarchy. “Horizontal *stare decisis*” governs settings where the prior ruling of a court binds itself and other courts at the same level within the hierarchy, while “vertical *stare decisis*” applies where precedent from a higher court binds lower courts. See Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605, 1608 (1995). Professors James Brudney and Lawrence Baum argue that Supreme Court “Justices have stronger incentives to adopt distinctive interpretive methods” than do lower court judges because Justices have more time, and (given their status) greater incentives to do so. Brudney & Baum, *supra* note 14, at 756–58; see also Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 65 (2018) (summarizing how the Supreme Court and lower courts tend to deploy different interpretive methodologies). The examples of interpretive methodologies I discuss below, see *infra* Section II.B, generally have been seen to bind both the Supreme Court itself and lower courts, although

why should this be so? After all, across the broad run of their opinions, courts can often reduce the scope of their rulings—for example, by cabining them or announcing looser holdings. That task is even easier with interpretive methodologies, which are said to address second- and third-order questions, as compared to first-order questions that compose the substantive legal issues in a case.¹⁶ As such, courts can rather easily decline to enter a holding on the methodological point at all.

Beyond that, if the landscape of legal methodology includes pockets that are binding, how can we explain which methodologies will be binding and which will not? And can we predict which binding methodologies are unstable, i.e., may likely be overturned?

This Article takes on these questions. It adopts a realist approach to judicial motivations to develop a theory that explains the legal landscape. It identifies “pull factors”—i.e., factors that may pull judges toward binding holdings on interpretive methodologies—and “push factors” that push judges the other way. It identifies whether a methodology is rule-like, and whether it increases judicial legitimacy and/or court power as “pull factors.” As push factors, the Article identifies high stakes—i.e., broad methodological scope—and the existence of argumentation over methodologies arising out of the Constitution. In so doing, the Article offers a basis on which to judge which portions of the landscape may be unstable going forward.

In offering an explanation for the scope of binding legal methodology, and a basis to anticipate changes to the existing landscape, the Article fills a gap in the existing academic literature. Many scholars have commented descriptively on the landscape of binding interpretive methodologies. Most of them have focused on statutory interpretive methodologies and have observed the absence of binding methodologies.¹⁷ A few commentators have acknowledged the binding nature of *Chevron* methodology,¹⁸ though with others—some drawing on empirical evidence—arguing that it is not

the rule of *Michigan v. Long* applies by its terms only to the Supreme Court’s appellate jurisdiction. See *infra* text accompanying notes 91–94.

16. See Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1591 (2014) (noting the distinction “between what some scholars have identified as first-order, or primary, rules of legal conduct and second-order or third-order legal rules,” and explaining that, “[w]hile substantive law is composed primarily of first-order legal rules (e.g., no dogs allowed), interpretive methodology is composed primarily of second-order legal rules (e.g., interpret the statute by ascertaining the plain meaning of its text) and third-order legal rules (e.g., defer to an administrative agency’s reasonable interpretation of an ambiguous statutory text)”).

17. See, e.g., Gary E. O’Connor, *Restatement (First) of Statutory Interpretation*, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 333, 334 (2004); Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1811 (2010).

18. See, e.g., Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 613–14 (2014); see also Mark J. Richards, Joseph L. Smith & Herbert M. Kritzer, *Does Chevron Matter?*, 28 LAW & POL’Y 444, 455–64 (2006) (presenting empirical evidence that *Chevron* has to some degree constrained Supreme Court Justices’ votes).

binding.¹⁹ Recently, Professor Aaron-Andrew Bruhl has advanced a fuller description of the legal landscape, arguing that in fact there is substantial evidence of the binding nature of some statutory interpretive methodologies, especially in the lower courts.²⁰ Professor Bruhl takes a more felicitous view of binding interpretive methodologies, but even his approach does not explain *why* judges would be more open to treating certain methodologies as binding.

Other scholars have taken a normative approach to the question of binding interpretive methodologies. Again with a focus on statutory methodologies, many commentators lament the absence of binding law, and argue in favor of its adoption²¹; some scholars think the notion of common-law methodologies so unlikely that they advocate for action by legislatures, courts, or prominent legal organizations, in the area.²² A minority of normative commentators—most notably Professors Evan Criddle and Glen Staszewski—offer a normative defense of the dearth of binding interpretive methodologies.²³

Largely absent from the existing scholarly debate is discussion of *why* the existing legal landscape takes the shape that it does. Some commentators offer reasons as to why binding interpretive methodologies are absent or uncommon,²⁴ but these discussions are rarely sustained, and they often arise in analyses that go well beyond interpretive methodologies.²⁵ On the flip side,

19. See, e.g., Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 329 (2000) (“*Chevron* establishes a novel canon of construction: In the face of ambiguity, statutes mean what the relevant agency takes them to mean.” (footnote omitted)); Raso & Eskridge, *supra* note 17, at 1751–66 (presenting an empirical analysis suggesting that *Chevron* is often not relied upon, or even cited, in cases involving an agency interpretation of a statute).

20. See Aaron-Andrew P. Bruhl, *Eager to Follow: Methodological Precedent in Statutory Interpretation*, 99 N.C. L. REV. 101, 126–58 (2020).

21. See, e.g., Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 222 (2014) (“Although statutory methodologies do not generally receive deference as a matter of federal practice, such deference arguably could promote values such as stability, predictability, and respect for prior judicial statements” (footnote omitted)); O’Connor, *supra* note 17, at 334 (“[I]t is both surprising and disconcerting that there is still relatively little guidance for American judges and attorneys who face these issues.”); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2088 (2002) (“The interpretive status quo is cacophonous.”); Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1867 (2008).

22. See Rosenkranz, *supra* note 21, at 2140–56 (advocating for federal rules of statutory interpretation); O’Connor, *supra* note 17, at 349–64 (advocating for a Restatement of Statutory Interpretation). That said, there is evidence that courts may not in any event pay these codifications much heed. See, e.g., Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1785–97 (2010).

23. See generally Criddle & Staszewski, *supra* note 16.

24. See *infra* Section II.A.

25. See generally Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2005) (discussing how the multijudge nature of appellate decision-making affects how judges craft opinions and precedent); Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982) (explaining how the multijudge nature of appellate decision-making inevitably will lead to some inconsistencies).

the incentives that might lead to the generation of binding interpretive methodologies largely have gone unexplored.

Moreover, to whatever extent that reasons are offered for the absence, or presence, of binding interpretive methodologies, there is virtually no discussion in the literature about why one set of reasons might triumph over another in particular circumstances. In other words, there is no general theory about why we see binding interpretive methodologies when we do (and why we do not when we do not).²⁶ And, as a corollary, there is little discussion about which extant binding interpretive methodologies might be at risk of being overruled (other than threats to a methodology based on circumstances particular to that methodology, such as the questionable constitutionality of the practice).

This Article fills these gaps in the literature. It goes beyond mere description by explaining *why* the landscape looks as it does. And, while it does not delve into normative questions, it does provide guideposts by which to assess the stability of, and thus to make predictions about, the stability of extant binding methodologies.

This Article also goes beyond much of the existing commentary in that it takes a broad view of interpretive methodologies. It understands interpretive methodologies are tools that courts may use to aid their resolution of ultimate issues in a case.²⁷ Although many commentators restrict themselves to interpretive methodologies that examine particular legal authority—most often, the interpretation of statutes—this Article considers methodologies that purport to interpret not only statutes, but also judicial opinions and the Constitution.²⁸

Beyond the literature on interpretive methods, this Article contributes as well to two other areas of scholarship. First, there is a literature that considers the purposes and value of *stare decisis* writ at large. Commentators suggest

26. Some commentators suggest that the longevity, or “pedigree,” or an interpretive methodology may suggest continued durability. See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 176 (2010) (suggesting that the “pedigree” of a canon “gives it a stronger claim to legitimacy”); Bruhl, *supra* note 14, at 513 (explaining that “trac[ing] [a] canon’s development” is valuable in determining “whether it should survive as a matter of *stare decisis* or, less formally, because the canon has deep roots in the past that have generated practices and expectations that current courts should respect”). Below, I apply this notion in the notion of evaluating the continued vitality of binding interpretive methodologies. See *infra* text accompanying notes 238–42.

27. See *supra* notes 17–20 and accompanying text.

28. See Nina Varsava, *Stare Decisis and Intersystemic Adjudication*, 97 NOTRE DAME L. REV. 1207, 1214 (2022) (“The scholarly literature on interpretive methodology revolves around statutory and constitutional interpretation.”); see also Craig Green, *Turning the Kaleidoscope: Toward a Theory of Interpreting Precedents*, 94 N.C. L. REV. 379, 381 (2016) (“[M]ethodological questions of how to interpret judicial decisions are widely ignored.”). Some works do consider both statutory and constitutional matters, but do not focus on interpretive methodologies. For example, Professor Randy Kozel writes about precedent—both statutory and constitutional—but not precedent specifically arising out of methodological holdings. See RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* 28 (2017) (“[M]y analysis . . . will deal primarily, though not exclusively, with the Court’s constitutional decisions.”).

that factors such as predictability,²⁹ efficiency,³⁰ institutional legitimacy,³¹ and reliance³² justify binding precedent; precedent can also bolster the power of the issuing court.³³ This Article argues that judges may sometimes see these purposes as sufficiently desirable such that they justify affording precedential weight even to some interpretive methodologies.

Second, the literature on judicial decision-making identifies goals—such as reducing judicial effort devoted to onerous tasks,³⁴ increasing judicial efficiency,³⁵ increasing judicial legitimacy,³⁶ and aggrandizing court or judicial power³⁷—that may drive judges’ choices and rulings. This Article draws on those goals in developing a theory of the circumstances that may foster the creation—and abandonment—of binding interpretive methodologies.

This Article proceeds as follows. Part I begins by briefly summarizing what I mean by a “methodology,” and when I consider a methodology to be “binding.” Part II addresses the (often-overstated) dearth of binding interpretive methodologies. After first discussing arguments that commentators offer to explain the absence of such methodologies, it proceeds to identify examples of extant binding methodologies. It then identifies incentives that might explain the existence of binding methodologies.

Part III then returns to the general absence of binding interpretive methodologies and explains why—incentives to ensconce some interpretive methodologies as binding law notwithstanding—interpretive methodologies are generally *not* binding. Part IV uses the discussion in Parts II and III to analyze, and explain, the existing legal landscape, and to evaluate the stability of that landscape.

I. WHAT IS A METHODOLOGY, AND WHEN IS IT BINDING?

Before proceeding to the core of my argument, I think it important to explain what I mean by a methodology. As I have noted above, while traditional legal holdings answer primary questions, methodologies address secondary and tertiary questions.³⁸ To put it slightly differently, methodologies do not themselves resolve cases. In this sense, methodologies are of limited scope.

29. See, e.g., Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 597–98 (1987).

30. See, e.g., *id.* at 599; KOZEL, *supra* note 28, at 36–38.

31. See, e.g., Schauer, *supra* note 29, at 600–01; KOZEL, *supra* note 28, at 32 (“When a case’s result would have come out differently but for the existence of a precedent, the constraining function of precedent is on full display.”).

32. See, e.g., Schauer, *supra* note 29, at 601–02; KOZEL, *supra* note 28, at 47–49; Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 GA. L. REV. 1035, 1039 (2013).

33. See KOZEL, *supra* note 28, at 30 (“Courts at one level of the judicial hierarchy can use precedents to control the decision-making of courts at lower levels.”).

34. See source cited *infra* note 108.

35. See sources cited *infra* note 110.

36. See sources cited *infra* note 118.

37. See sources cited *infra* note 127.

38. See *supra* note 16 and accompanying text.

In another sense, however, methodological holdings (at least as I conceive of them here) are broad; they apply at least somewhat trans-substantively. After all, if a methodology applies only in one category of cases, then it likely might be determinative across the run of cases in which it applies. To put it another way, if a methodology has special application in a particular area of law, then one might see the methodological and ultimate legal questions as having merged together.

With the basic contours of a methodology set out, I turn to what makes a methodological holding binding. Here, the simple answer is that a court's methodological holding is binding to the extent that future courts—the issuing court if we are considering horizontal stare decisis, and lower courts if we are considering vertical stare decisis—understand that they are obligated to deploy the methodology where it applies.³⁹

II. THE OFTEN-OVERSTATED DEARTH OF BINDING INTERPRETIVE METHODOLOGIES

This Part examines expectations about the vitality of common-law interpretive methodologies. Section II.A lays out arguments that commentators have made to explain the dearth of such methodologies. Section II.B responds by identifying several extant examples of common-law methodologies. Section II.C then provides some explanation for why we do see at least some such methodologies by identifying “pull factors”—i.e., incentives that might lead judges to adopt binding methodologies.

A. PROFFERED REASONS FOR THE ABSENCE OF COMMON-LAW INTERPRETIVE METHODOLOGY

Many commentators are resigned to the fact that common-law interpretive methodology will not proliferate.⁴⁰ They offer several reasons for this conclusion (some of which I return to in the next Part, when I address judicial aversion to common-law interpretive methodology). First, a judge with responsibility for selecting (or not) a binding methodology—or, more appropriately, since appellate judges who create binding precedent sit in

39. See *supra* note 15. That is not to say that judges cannot disagree as to whether a binding methodology has application, or exactly how a binding methodology applies, in a given case. As with any binding law, judges can argue that precedential cases are distinguishable.

40. Some who support binding interpretive methodologies are so convinced that courts will never adopt them (at least effectively) that they have turned to the idea of having the legislature enact methodological statutes. See *supra* note 22 and accompanying text.

panels,⁴¹ a majority of judges⁴²—may lack any particular commitment to any methodology.⁴³

Second, even if judges do hold commitments to interpretive methodologies, they may hold commitments to different, competing methodologies, or indeed even if they have fealty to the same general interpretive methodology, they may subscribe to different variants of that methodology.⁴⁴ The likelihood that no majority will endorse a single interpretive methodology is exacerbated where there are more than two competing methodologies, or where minority factions support different versions of a methodology.

Indeed, where there are three or more competing interpretive methodological options and no option attracts the support of a majority of judges yet each option defeats another option in pairwise competition (in the language of social choice theory, the Condorcet criterion is not satisfied),⁴⁵ there is the possibility that the judges' preferences may cycle.⁴⁶ That means that, if a case reaches the court that presents a choice between two methodological options, one might think at first blush that majority adoption of one option might emerge; but on reflection the more likely result is that

41. See Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 82 (1986); Vermeule, *supra* note 25, at 555.

42. For discussion, see, for example, Jonathan Remy Nash, *The Majority That Wasn't: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements*, 58 EMORY L.J. 831, 849–58 (2009). The exceptional setting is where a majority of judges do not explicitly agree to binding precedent, but courts nevertheless follow the narrowest ground on which the opinions representing a majority coalition on case disposition agree. See *infra* notes 84–87 and accompanying text (discussing the rule of *Marks*).

43. See Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 388 (2005) (“[I]ndividual Justices, like the Court as a whole, seem to lack truly firm methodological [c]ommitments.”); Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 838 (2008) (“[T]he incentives for a judge to have a constraining interpretive theory seem fairly weak.”).

44. See Vermeule, *supra* note 25, at 556 (“As to methods, judges who emphasize the ordinary meaning of constitutional and statutory text criticize those who emphasize the purposes of framers or legislators, who in turn criticize devotees of specific legislative intentions; each of these groups itself fractures into competing variants.”) (noting that judges may “agree on high-level principles,” yet “find that they disagree about a wide range of particular interpretive canons, rules or problems”); cf. Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 880 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)) (“[E]ven when judges agree about the proper approach to statutory interpretation, they often disagree about the answer to any given question.”); Easterbrook, *supra* note 25, at 807 (“Doubtless the Court can agree on a result more easily than five or more Justices can agree on the many propositions of law and logical steps that make up a full opinion.”); Cass R. Sunstein, Commentary, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735–36 (1995) (arguing “that well-functioning legal systems often tend to adopt a special strategy for producing agreement amidst pluralism” under which “[t]hey agree on the result and on relatively narrow or low-level explanations for it,” but “[t]hey need not agree on fundamental principle”).

45. See Maxwell L. Stearns, *How Outcome Voting Promotes Principled Issue Identification: A Reply to Professor John Rogers and Others*, 49 VAND. L. REV. 1045, 1050–51 (1996).

46. See Vermeule, *supra* note 25, at 558–59.

judges who prefer a third option (not presented in the case) would not vote to ensconce any option.⁴⁷

Third, even if it is theoretically possible to assemble a majority coalition on an interpretive methodological question, it may be too costly to justify the effort. As Professor Margaret Lemos puts it, “[t]he notion that majority statements on methodology may be binding raises the temperature on methodological debates that are already overheated.”⁴⁸ As such, judges may choose to avoid the methodological issue (at least as a binding matter) in favor of resolving the case on the merits.⁴⁹

Fourth, commentators assert as a general matter that, were interpretive methodologies binding, they would box judges in too much; as such, judges opt not to vest interpretive methodologies with stare decisis effect.⁵⁰ Indeed,

47. See *id.* at 559 (“Under [some] distribution[s] of [judges’] views, the court’s method of constitutional interpretation will cycle endlessly or, if stare decisis applies to rules about interpretation, stop arbitrarily.”); Easterbrook, *supra* note 25, at 815–21. By way of illustration, consider the following stylized (if perhaps unlikely) example. In rank order, Judge *A* prefers textualism, next intentionalism, and then purposivism. Judge *B* prefers purposivism, next textualism, and last intentionalism. Judge *C* prefers intentionalism, followed by purposivism, and last textualism. Note that as a whole the judges’ preferences are intransitive. In pairwise competitions, purposivism beats textualism; textualism defeats intentionalism; but intentionalism triumphs over purposivism. Thus, if, say, a case were to arise presenting the choice between purposivism and textualism, one might at first expect a vote in favor of purposivism. But on reflection, if that result were seen to have binding effect, Judges *A* and *C*—both of whom prefer intentionalism to purposivism—well might refuse to go along.

48. Lemos, *supra* note 44, at 906.

49. See *id.* (“The better approach may be to emphasize the points of consensus that already exist, and the cases where judges are able to agree on outcomes while agreeing to disagree on methods.”); cf. David A. Skeel, Jr., *The Unanimity Norm in Delaware Corporate Law*, 83 VA. L. REV. 127, 147 (1997) (explaining that a norm in favor of unanimous court opinions “encourages the justices to adopt a combined approach that is acceptable to all three, rather than articulating their differing views on the appropriate doctrinal approach”).

50. Connor Raso and Professor William Eskridge, and Professors Evan Criddle and Glen Staszewski, make the point. Raso and Professor Eskridge assert that “statutory interpretation methodology does not seem susceptible to the rule-like approach of stare decisis” because it is “a web of considerations with different and varying weights rather than a set of hierarchical rules.” Raso & Eskridge, *supra* note 17, at 1811. Along similar lines, Professors Criddle and Staszewski explain:

[I]nterpretive methods substantially influence judicial reasoning and decision making in ways that would severely complicate the viability of a regime of stare decisis. It is one thing for courts to establish a substantive rule on a particular topic and require that judges apply the rule in subsequent cases under the doctrine of stare decisis, even if they would not agree with the rule as a matter of first impression. It is quite another thing, however, for courts to establish a binding interpretive methodology for a particular jurisdiction and hold that other judges are bound by that “rule about rules” in subsequent cases by the doctrine of stare decisis, even if it leads them to reach highly problematic or absurd results *in cases of first impression*. Our legal traditions plainly countenance the application of stare decisis in the former context, but federal courts have sensibly declined to extend the doctrine to the latter situation.

Criddle & Staszewski, *supra* note 16, at 1592–93.

the argument sometimes goes so far as to suggest that even judges who are supportive of particular interpretive methodologies might not accept the notion of interpretive methodologies as binding.⁵¹

Fifth, the literature on *stare decisis* highlights reliance as an important factor justifying binding precedent.⁵² However, while Congress may rely on interpretive methodologies in crafting statutes,⁵³ methodological issues are less likely to generate such reliance among other societal actors insofar as they do not directly decide ultimate legal issues.⁵⁴

B. EXTANT EXAMPLES OF BINDING INTERPRETIVE METHODOLOGIES

Despite commentators' emphasis on the myriad reasons binding interpretive methodologies will not arise, the reality is, as Professor Bruhl explains, that the legal landscape has pockets of binding interpretive methodologies.⁵⁵ I highlight several examples here.⁵⁶

51. Professors Criddle and Staszewski elucidate:

[I]t is one thing to require judges to follow binding substantive rules with which they disagree, but it is another thing to require judges to follow higher-order rules that force them to make decisions on issues of first impression in a manner that is contrary to their fundamental understanding of the role of federal courts in a constitutional democracy. It is hard to believe, for example, that Justice Scalia would agree to decide every future statutory case that comes before the Court in a purposive fashion merely because Justice Breyer was able to persuade a five-Justice majority to adopt this approach in the first case decided under a regime of methodological *stare decisis*.

Criddle & Staszewski, *supra* note 16, at 1593.

52. See *supra* note 32 and accompanying text.

53. See Bruhl, *supra* note 14, at 533–35 (noting, if dubiously, this possibility for the canon in favor of construing federal jurisdictional grants narrowly). An empirical study by Professors Abbe Gluck and Lisa Bressman draws in question the extent to which congressional drafters are even aware of, let alone apt to rely on, judicial interpretive methodologies. 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, 906–07, 926–30 (2013).

54. See Lemos, *supra* note 44, at 906 (“[E]xtending precedential effect to methodological issues may do more harm than good to the rule-of-law values of notice and predictability that the doctrine of *stare decisis* is designed to promote.”); Bruhl, *supra* note 14, at 529–32 (noting this point for the canon in favor of construing federal jurisdictional grants narrowly); *cf.* Payne v. Tennessee, 501 U.S. 808, 828 (1991) (“Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . . ; the opposite is true in cases . . . involving procedural and evidentiary rules.” (citations omitted)). To be sure, a particular interpretive methodology may make a particular outcome more likely, but not as much as a rule on the ultimate outcome itself. See *infra* Section III.B.2 (demonstrating that a judge who cares primarily about case outcomes will not benefit from adoption of a binding methodology unless that methodology guarantees the outcomes the judge prefers). For this reason, a ruling on interpretive methodology is less likely to generate reliance interests than is a substantive ruling.

55. See Bruhl, *supra* note 20, at 126–58.

56. Professor Bruhl includes in his survey some of the examples that I offer. See *id.* at 140, 146–47, 156 (presumption against extraterritoriality); *id.* at 134 (canon of constitutional avoidance); *id.* at 138–39 (federalism canon); *id.* at 143–44, 147, 150, 153–55, 157–58 (*Chevron*

Methodology limiting the extraterritorial reach of statutes.—The Supreme Court has adopted, as a methodology for determining the extraterritorial reach of statutes, a presumption against extraterritoriality. The Court enunciated the modern version of the canon⁵⁷ in its 1991 decision in *EEOC v. Arabian American Oil Co.*⁵⁸ (commonly called “*Aramco*”) and its 2010 decision in *Morrison v. National Australia Bank Ltd.*⁵⁹ The Court in *Aramco* explained that the presumption rests upon the “assum[ption] that Congress legislates against the backdrop of the presumption against extraterritoriality.”⁶⁰ *Aramco* elucidated the presumption as a clear-statement rule: “[U]nless there is ‘the affirmative intention of the Congress clearly expressed,’ . . . we must presume it ‘is primarily concerned with domestic conditions.’”⁶¹ As Justice Scalia’s opinion for the Court in *Morrison* succinctly put it, “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.”⁶²

Methodology limiting the interpretation of statutes to avoid serious constitutional questions.—The Supreme Court has adopted a methodological canon by which courts interpreting federal statutes should generally do so in a way, if possible, to avoid difficult constitutional questions: “[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 construction is plainly contrary to the intent of Congress.”⁶³

Methodology limiting the interpretation of statutes to avoid infringing traditional areas of state regulation.—The Supreme Court has adopted a methodological canon by which courts interpreting federal statutes should generally do so in a way, if possible, to avoid eroding traditional areas of state regulation unless—much like the canon of constitutional avoidance⁶⁴—congressional intent to the contrary is clearly expressed.⁶⁵

methodology). Of course, Professor Bruhl’s focus is on methodologies for the interpretation of *statutes*, so the examples I offer of methodologies that apply to interpret judicial opinions and the Constitution would not fall within the scope of his project.

57. For a historical overview of the canon, see generally Laura Phillips-Sawyer, *Jurisdiction Beyond Our Borders: United States v. Alcoa and the Extraterritorial Reach of American Antitrust, 1909–1945*, in *ANTIMONOPOLY AND AMERICAN DEMOCRACY* (Daniel A. Crane & William J. Novak eds., 2023).

58. *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 253–58 (1991).

59. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255–65 (2010).

60. *Aramco*, 499 U.S. at 248.

61. *Id.* (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957); and *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

62. *Morrison*, 561 U.S. at 255.

63. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *accord NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 501 (1979).

64. *See Edward J. DeBartolo Corp.*, 485 U.S. at 575.

65. *See U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837, 1849–50 (2020) (“Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private

Methodology favoring the interpretation of federal civil statutes to recognize concurrent state court jurisdiction.—The Supreme Court has adopted a methodology by which courts should presumptively interpret federal civil statutes to recognize concurrent federal and state jurisdiction; “the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.”⁶⁶

Methodology for determining whether statutory elements are jurisdictional.—The Supreme Court has introduced a methodology for determining when statutory elements are jurisdictional—meaning that the failure to comply with them will deprive a court of jurisdiction—or not. In its 2006 decision in *Arbaugh v. Y & H Corp.*, the Court announced: “[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.”⁶⁷

Methodology limiting the interpretation of federal jurisdictional statutes.—The Supreme Court has long held that courts strictly construe congressional grants of federal jurisdictional power.⁶⁸

The Chevron methodology.—As discussed above, the *Chevron* methodology governs when and how courts should defer to agency interpretations of statutes based on implied delegations of power.⁶⁹ The test as originally laid out contemplated two steps.⁷⁰ First, the court has to ask whether the pertinent statutory language is unambiguous⁷¹; if it is, then the court must afford the

property.”); *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991) (calling for clear language to justify interpreting a statute to “upset the usual constitutional balance of federal and state powers”).

66. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981); see *Tafflin v. Levitt*, 493 U.S. 455, 460 (1990).

67. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516; see *Boechler, P.C. v. Comm’r*, 142 S. Ct. 1493, 1497–1500 (2022) (deciding unanimously to apply *Arbaugh* and its progeny).

68. See, e.g., *Healy v. Ratta*, 292 U.S. 263, 269–70 (1934). For a historical discussion, see Bruhl, *supra* note 14, at 513–20. Professor Bruhl argues that the Court under Chief Justice John Roberts has used language drawing into question the continued vitality of this canon. See *id.* at 521–25. I return to this point below. See *infra* text accompanying notes 260–62.

69. Some commentators argue that the Supreme Court did not at the time see *Chevron* as altering governing doctrine in a substantial way. See Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481, 538 (2015); Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 275–76 (2014). Even if that is the case, the fact remains that the lower courts understood that *Chevron* was a precedent they were bound to follow, and they understood *Chevron* to have affected a significant doctrinal change. See Gary Lawson & Stephen Kam, *Making Law out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1, 59–60 (2013).

70. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

71. See *id.* at 842.

statute its unambiguous meaning.⁷² If it is not, then, at the second step, the court defers to the agency's interpretation if it is "permissible"⁷³ or "reasonable."⁷⁴

The Court's 2001 decision in *United States v. Mead Corp.*⁷⁵ introduced what is commonly called "*Chevron* step zero."⁷⁶ Step zero asks whether "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."⁷⁷ If so, then *Chevron*'s two-step test applies.⁷⁸ If not, then the agency interpretation may be entitled to respect under the test of *Skidmore v. Swift & Co.*⁷⁹ to the extent that it has sufficient "power to persuade."⁸⁰

Finally, this past Term, the Court confirmed the existence of a "major questions" exception to the *Chevron* framework.⁸¹ Under that doctrine, absent a clear statement from Congress, courts should not find an implied delegation to an agency—and thus should disallow an agency interpretation—in "extraordinary cases" where "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."⁸²

72. *Id.* at 842–43.

73. *Id.* at 843.

74. *Id.* at 845.

75. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

76. See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001) (describing a "step zero" in the *Chevron* doctrine" as consisting of "inquiry that must be made in deciding whether courts should turn to the *Chevron* framework at all, as opposed to the *Skidmore* framework or deciding the interpretational issue de novo"). For discussion, see, for example, Sunstein, *supra* note 8, at 194.

77. *Mead*, 533 U.S. at 226–27.

78. *Id.* The *Mead* Court elucidated:

It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force. Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication. That said, and as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure . . . does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded . . .

Id. at 230–31 (footnotes omitted) (citations omitted).

79. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

80. *Mead*, 533 U.S. at 235 (quoting *Skidmore*, 323 U.S. at 140). The *Skidmore* Court elucidated: "The weight of [the] judgment [of an administrative agency] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140.

81. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2609–10 (2022).

82. *Id.* at 2609. The major questions doctrine might itself be viewed as a standalone canon. I examine this point below in *infra* note 248.

Methodology for deciding whether a Supreme Court decision on the merits validates standing in the case.—The Supreme Court has over a long period consistently held that a decision of the Court on the merits that does not address standing should *not* be interpreted as a holding on standing in the underlying case.⁸³

Methodology for determining the binding holding of a fractured Supreme Court majority.—“The *Marks* rule,” as it is typically called,⁸⁴ provides a methodology by which later courts can interpret opinions in a case that has fractured the Supreme Court in order to arrive at a binding holding.⁸⁵ The Court explained in *Marks v. United States*—the case from which the principle’s name derives⁸⁶—that, “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds’”⁸⁷

Methodology for determining whether the Supreme Court has jurisdiction to hear the decision of a state court that is ambiguous as to the extent it relies upon state, as opposed to federal, law.—The Supreme Court in *Michigan v. Long* introduced a methodology to address the question of when the Court should interpret a state court decision to satisfy the requirements for appellate jurisdiction.⁸⁸ The law permits the Supreme Court to review state court decisions only for questions of federal law.⁸⁹ The Court further has held that it lacks jurisdiction to review the federal aspect of a state court decision where reversal of the federal issue will not change the outcome in the case because an independent and adequate state-law ground will nevertheless mandate the same result.⁹⁰

83. See, e.g., *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144–45 (2011) (“When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed.”); Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 DUKE L.J. 481, 539 (2017) (“According to the Supreme Court, unexamined assumptions of jurisdiction do not establish precedent that controls a later case in which the jurisdictional question is actually put into controversy.”).

84. Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1943, 1944 (2019).

85. Professor Maxwell Stearns observes that the rule of *Marks* binds lower courts, but not the Supreme Court itself. See Maxwell Stearns, *Modeling Narrowest Grounds*, 89 GEO. WASH. L. REV. 461, 477–97, 505–06 (2021).

86. According to Professor Stearns, “[r]ather than expressing a new rule, *Marks* recognized an existing judicial norm or practice.” *Id.* at 466.

87. *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). Professor Varsava notes that some Supreme Court decisions suggest that the “narrowest ground” should be determined by reference to dissenting opinions in addition to plurality opinions. Varsava, *supra* note 28, at 1223–24. Such an approach preserves the *Marks* rule, modifying only the definition of the “narrowest ground.” See *id.* at 1223.

88. See *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983).

89. See 28 U.S.C. § 1257(a) (2018); see also *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 633 (1874) (noting that the resolution of the question on statutory interpretation grounds “renders unnecessary a decision of the question whether, if Congress had conferred such authority, the act would have been constitutional”).

90. See *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) (noting “the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other

But how should the Supreme Court deal with a state court decision that is ambiguous as to the extent to which it rests on state law grounds? In the *Long* case, the Court announced its methodological solution:

[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.⁹¹

Methodology for determining whether the constitutional right to a jury applies in a case.—The Seventh Amendment to the U.S. Constitution provides that “the right of trial by jury shall be preserved.”⁹² The Supreme Court has consistently deployed a historically grounded, apparently originalist,⁹³ approach, explaining that, in determining that provision’s scope, “resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791.”⁹⁴

* * *

Most of the examples I offer that apply to statutory interpretation—the presumption against extraterritoriality, the canon of constitutional avoidance, the federalism canon, and *Chevron* methodology—are interpretive methodologies that Professor Bruhl,⁹⁵ and (though very unevenly) other commentators,⁹⁶ argue are (at least at times) treated as having stare decisis

non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment”).

91. *Long*, 463 U.S. at 1040–41.

92. U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .”). The amendment also provides that “no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” *Id.*

93. See Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811, 813 (2014) (noting that constitutional jury trial right provisions “seem to demand a method of interpretation that today we would call originalist,” and that “originalism has indeed been the method most state courts have used to interpret these provisions, from the time they were ratified”).

94. *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935). Many state constitutions include similar provisions, and state courts have developed similar historically oriented tests for them. See Lerner, *supra* note 93, at 812–13, 817–24.

95. See *supra* notes 55–56 and accompanying text.

96. Professor Abbe Gluck views *Chevron* as a canon, see Gluck, *supra* note 18, at 612, but also recognizes that courts generally treat *Chevron* and its progeny as binding precedent. See *id.* at 613–14. But—with the possible exception of the canon against extraterritorial application of statutes, *id.* at 614 n.29—she argues that *Chevron* is the *only* canon to receive this treatment. See *id.* at 613; see also KOZEL, *supra* note 28, at 76 (“The Court’s forays into administrative law are frequently governed by the two-step protocol set forth in the famous [*Chevron*] case In

effect. (Recall that then-Judge Barrett saw *Chevron* methodology as binding precedent at her confirmation hearing.⁹⁷) Two more statutory interpretation methodologies—the presumption in favor of concurrent state jurisdiction over federal civil claims and the presumption against the jurisdictionality of statutory elements—are clearly seen as binding.⁹⁸ The Supreme Court has continued to follow the rule of *Michigan v. Long* since it was propounded. Finally, while application of *Marks* may have fractured the lower courts, they nevertheless clearly feel bound by it.⁹⁹ Indeed, the Supreme Court recently granted a petition for certiorari to reconsider *Marks*; although the Court ultimately did not address that question, the Court’s grant of certiorari reflects a belief that, until it is overruled, it is binding precedent.¹⁰⁰

situations like these, doctrinal frameworks appear to exert binding force.”). *But see id.* at 155–57 (arguing that *Chevron* methodology *should not* have precedential effect and that it should only be retained to the extent it is persuasive).

Professor Gluck and Judge Richard Posner conducted interviews with forty-two federal circuit judges and found that judges uniformly believed that *Chevron* was binding precedent. *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1345 (2018) (“[W]hen asked in the very next question about *Chevron* deference—the interpretive rule that courts must defer to reasonable agency interpretations of ambiguous statutes—every interviewed judge told us this rule is binding even if they disagreed with it.”). Many respondents were dubious about the binding nature of other canons, although even there the canon of constitutional avoidance (along with the rule of lenity and the presumption against preemption of state law) was sometimes seen as having greater precedential effect. *See id.*

97. *See supra* text accompanying notes 3–4.

98. On the presumption of concurrent state court jurisdiction, see William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1524 (2020) (noting that “Supreme Court case law has long confirmed” the presumption); Ryan D. Doerfler, *Can a Statute Have More than One Meaning?*, 94 N.Y.U. L. REV. 213, 250 (2019) (noting that the presumption of concurrent jurisdiction absent clear intent to the contrary “applies often, since Congress rarely includes jurisdictional language of any kind”).

On the presumption that statutory elements are not jurisdictional, see Erin Morrow Hawley, *The Supreme Court’s Quiet Revolution: Redefining the Meaning of Jurisdiction*, 56 WM. & MARY L. REV. 2027, 2044–48 (2015) (describing how the Court has built upon the original test as expounded in the *Arbaugh* case). Professor Hawley argues that the extant test can lead to unpredictable results because it allows standards that predate the presumption to apply with respect to statutes that were enacted before the presumption was adopted. *See id.* at 2051–59. But one could alternatively say that the scope of the presumption (which is binding) is limited, or that the test (which includes the older standards) is perhaps less rule-like when those older standards apply. *See infra* note 132.

99. *See infra* notes 147–50 and accompanying text.

100. *See infra* notes 252–53 and accompanying text.

Professor Varsava notes remarks by Justice Stephen Breyer during oral argument in a Supreme Court case, to the effect that he does not believe that *Marks* is binding precedent. *See* Varsava, *supra* note 28, at 1261–62. The possible views of individual Justices aside, it appears that the Supreme Court, and judges on the lower courts, see *Marks* as binding precedent.

The Court in *Ramos v. Louisiana* divided over the applicability of the *Marks* rule to generate binding precedent based on a lone Justice’s opinion. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1403–04 (2020). The substantive legal issue in the case was whether to overrule precedent and conclude that the Sixth Amendment requires unanimous criminal jury verdicts even in state

A reader might object that some of the examples I have just provided are “mere” canons of construction that do not enjoy stare decisis protection and are inherently indeterminate.¹⁰¹ Indeed, some commentators go so far as to classify *Chevron* itself as a canon that ought not be seen as, and in practice often is not seen as, binding.¹⁰² I hope that such a reader will at least concede that, even if judges do not invoke these canons consistently, judges (when they *do* call upon the canons) apply the canons’ methodologies consistently.¹⁰³ It may be that judges do not invoke some of these canons uniformly; to put it

court; in the 1972 case of *Apodaca v. Oregon*, 406 U.S. 404 (1972), a fractured Court had concluded that states could allow convictions by nonunanimous juries, with a solo opinion by Justice Lewis Powell providing the decisive vote. *See id.* at 1397–99.

Writing for Justices Ginsburg and Breyer, Justice Gorsuch’s plurality opinion in *Ramos* noted that “no case has before suggested that a single Justice may overrule precedent.” *Id.* at 1403. But Justice Kavanaugh’s concurrence viewed the plurality’s statement as a limitation on *Marks* that was unwarranted:

Th[e] *Marks* rule is ordinarily commonsensical to apply and usually means that courts in essence heed the opinion that occupies the middle-ground position between (i) the broadest opinion among the Justices in the majority and (ii) the dissenting opinion. On very rare occasions . . . it can be difficult to discern which opinion’s reasoning has precedential effect under *Marks*. But even when that happens, the *result* of the decision still constitutes a binding precedent for the federal and state courts, and for this Court, unless and until it is overruled by this Court. As I read the Court’s various opinions today, six Justices treat the result in *Apodaca* as a precedent for purposes of *stare decisis* analysis. A different group of six Justices concludes that *Apodaca* should be and is overruled.

Id. at 1417 n.6 (Kavanaugh, J., concurring in part) (citations omitted).

Justice Alito’s dissenting opinion for himself and Chief Justice Roberts and Justice Kagan, conceded that “[t]he *Marks* rule is controversial,” *id.* at 1430 (Alito, J., dissenting), but then quickly noted that, until it is overruled, “that rule stands” as binding precedent. *Id.* And, as it applied in the case then before the Court, Justice Alito explained: “I am aware of no case holding that the *Marks* rule is inapplicable when the narrowest ground is supported by only one Justice. Certainly the lower courts have understood *Marks* to [sic] apply in that situation.” *Id.* at 1431.

For discussion of the Justices’ back-and-forth over *Marks* in *Ramos*, see Nina Varsava, *Precedent on Precedent*, 169 U. PA. L. REV. ONLINE 118, 123–25 (2020). For analysis suggesting that the various Justices’ statements in *Ramos* with respect to *Marks* are inconsistent with their conduct in *Ramos* and cases decided contemporaneously with *Ramos*, see Stearns, *supra* note 85, at 497–512.

101. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950) (“[T]here are two opposing canons on almost every point.”).

102. *See supra* note 19 and accompanying text.

103. For example, Chief Justice Rehnquist’s majority opinion and Justice Blackmun’s dissent agreed as to the methodological form of the canon of constitutional avoidance. *See* *Rust v. Sullivan*, 500 U.S. 173, 190–91 (1991); *id.* at 204–05 (Blackmun, J., dissenting). The two opinions disagreed only as to the application of the canon—specifically, whether the constitutional question at issue was serious enough to warrant affording the statute another interpretation. *Compare id.* at 191 (majority opinion) (asserting that the regulations in question did not raise serious enough constitutional questions to lead the court “to assume Congress did not intend to authorize their issuance”), *with id.* at 204–05 (Blackmun, J., dissenting) (arguing that the regulations in question do raise serious constitutional questions).

another way, their applicability is defeasible, i.e., subject to exception.¹⁰⁴ But there is an argument that no legal rule is indefeasible, and in the end it seems reasonable to classify these canons as *substantially* indefeasible.¹⁰⁵ In short, the examples are fairly understood to be binding interpretive methodologies.

C. “PULL FACTORS” THAT CREATE INCENTIVES FOR JUDGES TO RECOGNIZE BINDING INTERPRETIVE METHODOLOGIES

As the previous Section demonstrated, despite commentators’ emphasis on the myriad reasons binding interpretive methodologies will not arise, there are nevertheless extant examples of it. Why? The most obvious reason for a judge to want to adopt a binding interpretive methodology is that the judge herself holds a commitment to that methodology. That commitment impels the judge to the conclusion that the methodology should be ensconced in precedent.

But even a judge who is not committed to a methodology might be attracted to it because the judge believes it would further one (or more) of her other goals (or, similarly, a judge who is less wedded to the methodology might be swayed more strongly in its favor by other reasons). These “pull factors” might attract judges toward endorsing a binding interpretive methodology.¹⁰⁶

The extent to which the interpretive methodology is rule-like.—First, judges might be inclined to endorse interpretive methodologies that are more rule-like.¹⁰⁷ Judges are said to be interested in reducing the time they must devote to onerous tasks.¹⁰⁸ Seeking to benefit from recouping these opportunity

104. See Jonathan R. Nash, *Legal Defeasibility in Context and the Emergence of Substantial Indefeasibility*, in THE LOGIC OF LEGAL REQUIREMENTS: ESSAYS ON DEFEASIBILITY 377, 379–80 (Jordi Ferrer Beltrán & Giovanni Battista Ratti eds., 2012).

105. See *id.* at 383–400.

106. I bracket the question of exactly how, or how quickly, a methodology comes to bind. It may be that, in contrast to existing understandings of *stare decisis* (but consistent with older understandings of precedent, see generally Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28 (1959), and with the existing civil law practice of jurisprudence *constante*, see Vincy Fon & Francesco Parisi, *Judicial Precedents in Civil Law Systems: A Dynamic Analysis*, 26 INT’L REV. L. & ECON. 519, 520 & n.2 (2006)), it takes multiple court cases to establish binding *methodological* precedent. Cf. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (responding to the dissent’s accusation that the majority had “announc[ed]” the major questions doctrine out of thin air by citing earlier cases that had adhered to the major questions framework (quoting *id.* at 2633–34 (Kagan, J., dissenting))). Such an approach is consistent with the notion that methodological holdings are less likely to induce reliance. See *supra* text accompanying note 54.

107. For discussion of what makes a legal test rule-like, see Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992).

108. Cf. Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 31–39 (1993) (arguing that many intermediate court judges seek opportunities to reduce their workload).

costs,¹⁰⁹ a judge might adopt as binding an interpretive methodology that allowed the lower court judges to deploy resources more efficiently and that allow the higher court judge to monitor the lower court judges more cost effectively.¹¹⁰ On this account, one might expect to see emergent binding interpretive methodologies that are more rule-like. Relatedly, one might expect to see—especially with respect to methodologies that are more complex—courts adopt methodologies that have explicit tiers or steps.¹¹¹

A few nuances are worthy of note. First, as the foregoing suggests—and some commentators have noted—a high court may be more interested in developing a binding methodology that operates in a rule-like fashion on lower courts than on itself.¹¹² Indeed, one might think that a high court might deliberately embrace a rule-like methodology to facilitate the creation of an enduring precedent binding on the lower courts.¹¹³

Second, the tendency toward rule-like methodologies may be offset by other considerations. For one thing, it is more costly to develop successful rules—that is, rules that minimize Type I and Type II errors (i.e., false positive and false negatives)—than to develop standards.¹¹⁴ For another, judges may be concerned that a methodology that is too rule-like will prove too constraining and ultimately unworkable.¹¹⁵ Finally (and building on the first two points), it may be that agreement among a majority of judges to adopt the

109. See Richard Wolf, *Supreme Court's Chief Justice Seeks Faster, Fairer, More Efficient System*, USA TODAY (Dec. 31, 2015, 6:00 PM), <https://www.usatoday.com/story/news/politics/2015/12/31/supreme-court-chief-justice-roberts-rules/78144142> [<https://perma.cc/N4YU-J5GP>] (“Supreme Court Chief Justice John Roberts is on a mission to make the nation’s federal courts faster, fairer and more efficient.”).

110. See Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 VAND. L. REV. 509, 522 (2012) (“Rules are easier and less costly to apply; they thus conserve judicial and general legal resources.”); Foster, *supra* note 21, at 1893–94; Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. CHI. L. REV. 1551, 1555 n.18 (2020) (noting “the potentially stabilizing effects of doctrinal frameworks”); Kozel, *supra* note 21, at 223 (“If one ascribes great importance to preserving stability and disseminating guidance, one will be favorably inclined toward the inclusive paradigm of precedent.”); Rosenkranz, *supra* note 21, at 2142 (“A statutory interpretive regime may . . . provide a rule-of-law boon to the public, while lowering the costs of drafting statutes to the legislature.”).

111. See Bruhl, *supra* note 20, at 164–65; see also Mitchell Chervu Johnston, *Stepification*, 116 NW. U. L. REV. 383, 391–404 (2021) (discussing the general proliferation of step-based tests across the law over time).

112. See sources cited *supra* notes 14, 85.

113. Cf. Ethan Bueno de Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755, 765 (2002) (“Rules will be associated with periods of little substantive change punctuated, more frequently, by sudden breaks.”).

114. See *id.* at 759, 765.

115. See Nathan Richardson, *Deference Is Dead (Long Live Chevron)*, 73 RUTGERS U. L. REV. 441, 514–22 (2021) (arguing that *Chevron* has evolved and become more flexible in order to survive as a viable methodology). *But cf.* Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 823–24 (2002) (criticizing the majority and dissent in *Mead* for not having urged the adoption of a rule for step zero of the *Chevron* test).

methodology as binding can only be had by opting for something less rule-like.¹¹⁶ All of this said, even if we should not expect all binding methodologies to be perfect rules, the prediction here is that on the whole methodologies should be more rule-like than standard-like.

Third, the preexisting state of affairs may affect the likelihood that a court will adopt a binding interpretive methodology. The urge to adopt a binding rule-like interpretive methodology may be heightened to the extent that the prior interpretive regime had proven to be so standard-like as to leave the lower courts in disarray.¹¹⁷ Such confusion might provide an “extra pull” toward the creation of binding interpretive methodological precedent—though perhaps not its continuation, as memory of the preexisting regime fades in the temporal distance.

The extent to which the regime can be seen, or claimed, to enhance judicial legitimacy.—Second, judges are said to value the legitimacy of their court and of the judicial system more generally.¹¹⁸ In one sense of legitimacy, the fact that an interpretive methodology is more rule-like—as the previous discussion suggested it might be—will also bolster judicial legitimacy, at least when it comes to ancillary procedural matters, such as jurisdiction. Although standards¹¹⁹ offer their own benefits,¹²⁰ they are costlier to litigate.¹²¹ Ensconcing rules for ancillary determinations such as jurisdiction allows parties and their lawyers (as well as judges) to conserve their resources for adjudication on the merits.¹²²

116. See, e.g., Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. REV. 1271, 1316–20 (2008) (arguing that *Chevron* emerged as an undertheorized, pragmatic consensus among judges with different justifications).

117. For an example, see *infra* notes 140–44 and accompanying text.

118. See Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 184 (2013) (“For an institution like the U.S. Supreme Court to render rulings that carry authoritative force, it must maintain a sufficient reservoir of institutional legitimacy . . .”).

119. For discussion of what makes a legal test standard-like, see Sullivan, *supra* note 107, at 58–59.

120. See Nash, *supra* note 110, at 522–24.

121. See *id.* at 522.

122. See *id.* at 529–33. Indeed, jurisdictional rules guard against the expenditure of resources on merits adjudications that wind up a nullity. See *id.* at 530 (“[A] litigant may raise an assertion that a case in fact falls outside the federal courts’ subject matter jurisdiction at any time, even after judgment and while a case is on appeal. A belated decision that jurisdiction is lacking likely will render moot considerable time and expense on the part of litigants.” (footnote omitted)).

Here, however, I mean to advert to other aspects of legitimacy.¹²³ Consider first the notion that a court might defer to or express respect for another actor, or one court system might defer to or express respect for another.¹²⁴

Consider next that, as another way to further its legitimacy (at least as perceived), a court might want to adopt methodologies that enhance the logic and consistency of judicial rulings.¹²⁵ This might lead judges to embrace a methodology that avoids conflicting, seemingly irreconcilable conclusions.

Last, consider that judicial legitimacy might be furthered by methodologies that preserve the judiciary's independence and integrity.¹²⁶ Here, we might expect judges to adopt a methodology that guards against attempts by litigants and lawyers to exert control over the courts, and that preserves the orderly administration of justice.

On all these bases (even leaving efficiency to the side), a judge might be persuaded to adopt a binding interpretive methodology that she understood might likely enhance judicial legitimacy. Judges will inevitably assess the extent to which a proposed methodology enhances legitimacy against the prevailing status quo.

The extent to which the regime can be seen to enhance court or judicial power.—Third, some judges might be attracted to the notion of increasing the power of their court, or more generally of the judicial system.¹²⁷ This suggests that a judge might endorse an interpretive methodology as binding because it would be likely to aggrandize court or judicial system power. As with legitimacy, judges will judge the extent to which a proposed methodology enhances court or judicial power with an eye to the otherwise prevailing status quo.

The reader will have noticed that the second and third points—increasing judicial legitimacy and increasing judicial power—are often in tension with one another. In the end, as we will see shortly, judges may claim that a particular interpretive methodology bolsters the court's legitimacy in that it promotes deference to, or is motivated by respect of, another actor (including another court or court system), while dissenters and commentators assail such

123. Professor Richard Fallon helpfully disaggregates judicial legitimacy into sociological, moral, and legal legitimacy. Sociological legitimacy looks to the extent to which the public holds the legal system and its institutions as worthy of respect; moral legitimacy looks to whether the legal system and its institutions deserve respect; and legal legitimacy looks to the reputation of the legal system and its institutions among members of the legal community. See FALLON, *supra* note 13, at 21–36 (2018). The conception of legitimacy I discuss here is an amalgam of Professor Fallon's sociological and legal legitimacy.

124. See ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 183–288 (2006) (making the case for deference to other institutions).

125. See FALLON, *supra* note 13, at 130–31.

126. See *id.* at 44.

127. See, e.g., Diarmuid F. O'Scannlain, *Politicians in Robes: The Separation of Powers and the Problem of Judicial Legislation*, 101 VA. L. REV. ONLINE 31, 41 (2015) (“The temptation for judges to move beyond the constitutional bounds placed upon them is ever present . . .”); TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 75 (2003).

arguments as overstated or simply false, asserting that in fact the methodology in question serves to increase the court's (or the judiciary's) own power.¹²⁸

* * *

How do the examples of extant binding interpretive methodologies stack up against the incentives to embrace such methodologies? As Table 1 reflects and the subsequent discussion elucidates, the extant examples largely feature incentives that might draw judges toward adopting binding interpretive methodologies.

Table 1: Typology of Extant Binding Interpretive Methodologies, and the “Pull Factors”

Methodology	Subject of Interpretation	Rule-Like?	Claim to Enhance Judicial Legitimacy	Enhances Judicial Power?
Presumption against extraterritoriality	Statutes	Yes	Yes: comity	No
Canon of constitutional avoidance	Statutes	Somewhat	To a degree: deference to legislative understandings of constitutional limits	To a degree: arguably augments courts' power to interpret statutes beyond congressional intent
Federalism canon	Statutes	Yes	Yes: respect for federalism and state governments	No
Presumption in favor of concurrent state court jurisdiction	Statutes	Yes	Yes: respect for the capacity of state courts	No
Presumption against	Statutes	Yes	Not apparently	Arguably yes

128. See *infra* text accompanying notes 151–73.

One might object that the claim that a methodology enhances judicial legitimacy is too subjective—or manipulable—to be taken seriously in this context. I take the view, however, that certain features of a methodology—such as deferring to another branch of government—are generally seen as legitimacy enhancing, and moreover that at least some such claims are made in good faith and indeed accurate.

jurisdictionality of statutory elements				
Presumption favoring strict construction of federal jurisdictional statutes	Statutes	Yes	Yes: reinforces separation-of-powers	No
<i>Chevron</i> methodology	Statutes	Rather	Yes: deference to legislative delegations and agency choice	No
Rule that a Supreme Court decision solely on the merits is not a holding on the propriety of standing	Supreme Court opinions	Yes	Likely the most logical rule for this setting	Arguably augments the Court's power to resolve a merits dispute without addressing standing
Rule of <i>Marks</i>	Fractured Supreme Court opinions	Arguably not	Perhaps the sole rule that successfully aggregates judicial preferences for a large swath of cases	Augments the number of cases where Supreme Court binding precedent controls
Rule of <i>Michigan v. Long</i>	State court opinions	Yes	Perhaps: claim made that it respects state courts	Augments the Supreme Court's power to review state court decisions
Historical approach to the Seventh Amendment's protection	Constitutional provision	Somewhat	Yes: respect for jury decision-making	No

Consider first the incentive to reduce judges' workload. Here we might expect to find interpretive methodologies that are more rule-like. And, while the line between rules and standards is hardly dichotomous, most of the extant binding interpretive methodologies are readily characterized as quite rule-like. Most of the methodologies that install presumptions—the presumption against extraterritoriality, the presumption in favor of reading statutes not to displace traditional areas of state regulation, the presumption in favor of concurrent state court jurisdiction, the presumption against the

jurisdictionality of statutory elements, the presumption favoring strict construction of jurisdictional statutes, the rule that a judgment on the merits does not speak to standing, and the rule of *Michigan v. Long*—are easiest on this score.¹²⁹

Bolstering the idea that the rule-like nature of these methodologies made it easier for judges to adopt them is the fact that many of the opinions adopting the methodologies specifically contrast them with the highly standard-like, unpredictable nature of what governed before. Consider Justice Scalia’s lament in *Morrison v. National Australia Bank Ltd.*—which endorsed the presumption against extraterritoriality—that “disregard of the presumption against extraterritoriality” on the part of the lower courts “ha[d] produced a collection of tests for divining what Congress would have wanted, complex in formulation and unpredictable in application.”¹³⁰ Similarly, the rule the Court developed in *Michigan v. Long* stands in stark contrast to what preceded it, which the *Long* Court characterized (quite appropriately) as “ad hoc.”¹³¹ The predictability that the rule in *Long* offered thus was substantially different from what came before—almost like night and day.

The presumption in favor of reading statutes to avoid serious constitutional questions is less rule-like: Some of its constituent questions—whether application of the statute raises a *serious* constitutional question, and whether an alternate reading of the statute stretches things too far such that it is opposed to the intent of Congress—are not readily susceptible to easy,

129. I do not claim that these methodologies are pure rules (or close to pure rules), only that they are rule-like.

Professor Erin Morrow Hawley argues that the presumption against the jurisdictionality of statutory elements is not so predictable because *stare decisis* leaves in place some decisions that predate the presumption. See Hawley, *supra* note 98, at 2051–59. Of course, the prior tests could also be fairly rule-like, but even if they are not, the claim in the text is only that the new presumption is fairly (not entirely) rule-like. Moreover, a 2022 decision seems to make clear that the presumption against jurisdictionality is not overcome by the fact that Congress legislated against a backdrop of decisions by *lower courts* that had seen analogous statutory provisions as jurisdictional. See *Boechler, P.C. v. Comm’r*, 142 S. Ct. 1493, 1500 (2022). Thus, the scope of this “exception” to the canon is quite limited.

Along somewhat similar lines, Professor Bruhl observes that the canon of constitutional avoidance “has a rule-like cast, but the embedded triggering condition of ambiguity is itself vague and possibly ambiguous.” Bruhl, *supra* note 20, at 112. True though it may be that the constituent elements of the canon are somewhat vague, nevertheless, the methodology overall has “a rule-like cast,” which is consistent with the claim in the text.

130. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255–56 (2010).

131. *Michigan v. Long*, 463 U.S. 1032, 1038–39 (1983) (“Although we have announced a number of principles in order to help us determine whether various forms of references to state law constitute adequate and independent state grounds, we openly admit that we have thus far not developed a satisfying and consistent approach for resolving this vexing issue.” (footnote omitted)). Justice O’Connor’s opinion for the Court elucidated that the Court at various times had (i) dismissed the appeal, (ii) sought clarification from the state court, and (iii) taken it upon itself to “examine[] state law to determine whether state courts have used federal law to guide their application of state law or to provide the actual basis for the decision that was reached.” *Id.*

predictable resolution.¹³² At the same time, at least the canon is composed of readily identifiable steps: whether application of the statute raises a serious constitutional question, whether there is a clear statement that Congress intended the courts to confront the constitutional question, and whether an alternate reading of the statute stretches things too far such that it is opposed to the intent of Congress.¹³³

The *Chevron* methodology presents a more difficult case, but ultimately can be seen as rather rule-like. The original two-step *Chevron* test was quite rule-like,¹³⁴ though it does not in practice yield consistent, predictable results.¹³⁵ The addition of step zero—and perhaps especially the grafting of the *Skidmore* balancing test for respect of an agency interpretation—does seem, as Justice Scalia’s dissent in *Mead* suggested,¹³⁶ to render *Chevron* methodology less rule-like.¹³⁷ Not surprisingly, though it is only one reason, the uncertainty associated with the *Chevron* methodology—especially after the introduction of step zero—has been cited as a reason to jettison *Chevron*.¹³⁸ And the addition of the major questions doctrine may further muddy the waters.¹³⁹

At the same time, one can understand the initial emergence of *Chevron*, as it is certainly more rule-like than the regime that preceded it.¹⁴⁰ That regime rested on the holdings in two cases from 1944.¹⁴¹ As a leading casebook explains, it was initially possible to derive from the cases a framework that, “[w]hile not simple, . . . at least purported to supply a reasonably clear approach.”¹⁴² But whatever clarity was there dissipated

132. For disagreement over the question of whether the constitutional issue raised is a serious one, compare, for example, *Rust v. Sullivan*, 500 U.S. 173, 191 (1991), with *id.* at 204–05 (Blackmun, J., dissenting); for disagreement over the extent to which a court justifiably can stretch a statute to avoid a serious constitutional question, compare, for example, *NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 504–07 (1979), with *id.* at 511–18 (Brennan, J., dissenting).

133. See *supra* text accompanying note 63.

134. But see the sources cited in *supra* note 69, which argue that *Chevron*’s rule-like aspects were not immediately apparent.

135. See Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 810 (2010).

136. See *supra* text accompanying note 9.

137. See Beermann, *supra* note 135, at 784 (“The *Chevron* decision created uncertainty about when it applies, making it necessary for the Court to construct a doctrine to determine just that. This doctrine, referred to as *Chevron* Step Zero, is even more uncertain than the *Chevron* doctrine itself.”).

138. *Id.* at 828–29.

139. See Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent “Major Questions” Doctrine*, 49 CONN. L. REV. 355, 359–60 (2016).

140. See Richardson, *supra* note 115, at 443 (“*Chevron* . . . crystallized a central question in administrative law—when courts would defer to agency interpretations of statutes, replacing fuzzy, multifactor standards with rule-like clarity, at least in a broad swath of cases.”).

141. Those cases were *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

142. JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION: CASES AND MATERIALS* 1099 (4th ed. 2021). Professors Manning and Stephenson expound the basic *Hearst/Swift* doctrinal framework thus:

“[a]lmost immediately,”¹⁴³ with “[l]eading scholarly commentators . . . characteriz[ing] the doctrine on this standard-of-review question during these years [before *Chevron*] as puzzling, ad hoc, incoherent, and unpredictable.”¹⁴⁴

The historically grounded approach to applying the Seventh Amendment also is somewhat, but not entirely, rule-like. The questions of what common-law cause of action to which a modern claim bears resemblance, and whether that common-law cause of action would have been tried by jury in 1791, can lead to considerable disagreements that make prediction difficult.¹⁴⁵

Though called a “rule,” there is division over whether the *Marks* test deserves that moniker. Professor Richard Re observes that “the Court has not once but twice explained that the *Marks* rule is ‘more easily stated than applied’ and that it is ‘not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts.’”¹⁴⁶ In contrast, Professor Maxwell Stearns uses modeling to demonstrate that *Marks* functions very much in rule-like fashion where disagreement among judges in a case remains unidimensional, i.e., where the judges’ positions can be placed in rank order along a single dimension.¹⁴⁷ Professor Stearns

First, for pure questions of law, the reviewing court should resolve the issue de novo, without any special deference to the agency’s views. *Second*, for mixed questions of law and fact, if the agency announces its view in an authoritative, legally binding rule or order following some kind of formal process, then the reviewing court should defer to the agency, upholding its determination so long as it is reasonable. *Third*, if an agency announces its view of a mixed law-fact question in an informal and non-binding statement (e.g., an opinion letter, guidance document, interpretive rule, or litigation brief), then the court is not obligated to defer to the agency’s interpretation, but at the same time the court should treat the agency’s view with special respect in light of the agency’s unique expertise and experience (though the degree of respect depends on the thoroughness and persuasiveness of the agency’s reasoning).

Id.

143. *Id.*

144. *Id.* at 1101 (citing Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 974–75 (1992); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2082 (1990)); see *id.* at 1099–101.

145. See, e.g., Joan E. Schaffner, *The Seventh Amendment Right to Civil Jury Trial: The Supreme Court Giveth and the Supreme Court Taketh Away*, 31 U. BALT. L. REV. 225, 230 (2002). But see Lerner, *supra* note 93, at 815 (“A potential problem in applying an originalist test is that it can be difficult to determine what the original practice or law was concerning a particular question. This was seldom a problem in cases involving jury rights, however.”).

146. Re, *supra* note 84, at 1952 (footnote omitted) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003); and *Nichols v. United States*, 511 U.S. 738, 745–46 (1994)); see also Varsava, *supra* note 28, at 1223–24 (elucidating divisions among the lower federal courts); Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 806–19 (2017) (explaining the three approaches commonly taken by the lower courts).

147. See Stearns, *supra* note 85, at 517–19. As Professor Stearns explains, “[t]he narrowest grounds rule intuitively embraces the Condorcet criterion.” *Id.* at 519.

The one minor exception here is where there are four opinions that constitute the judgment majority, and the narrowest opinion does not correspond to the median opinion (that

concedes, however, that the *Marks* methodology breaks down where judicial disagreement extends to more than one dimension, since the multiplicity of dimensions makes it impossible to identify a clear narrowest ground.¹⁴⁸ It is in the limited multidimensional setting¹⁴⁹ that confusion over how to apply *Marks* can be expected and is justified.¹⁵⁰

Consider next the extent to which the interpretive methodology can be seen (or at least claimed) to enhance judicial legitimacy by vindicating some value (and in doing so thus maybe decrease the court's or judicial system's discretion), or in fact enhances the power of the court or the judiciary. Many of the examples do seem to increase judicial legitimacy and (if anything) decrease judicial power. Consider first the presumption of extraterritoriality, which the Court has observed enhances international comity.¹⁵¹ Next, the federalism canon is seen to vindicate traditional notions of state sovereignty.¹⁵² The presumption of concurrent state court jurisdiction rests on, and advances, the notion "that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States."¹⁵³ The presumption in favor of strict construction of jurisdictional statutes can be seen to enhance both vertical separation of powers (by respecting the power of state courts to resolve cases),¹⁵⁴ and horizontal separation of powers (by recognizing that it constitutionally falls to Congress, not the courts, to determine the federal courts' jurisdiction).¹⁵⁵

is, the opinion preferred by the median Justice). Professor Stearns argues that the *Marks* rule here should adopt the median opinion as binding precedent and shows that in fact lower courts tend to do exactly that when presented with the quandary. *See id.* at 519–22, app. B at 581–92. Professor Stearns describes this "imperfection" in the *Marks* rule as "relatively unimportant." *Id.* at 523.

148. *See id.* at 523–25.

149. *See id.* at 545 (noting that problems arise only in "a tiny subset of cases, a fraction (cases for which binary guidance is inadequate) of a fraction (cases thwarting one dimension) of a fraction (cases that fail to produce a majority opinion)").

150. *See id.* at 523 (describing this as a "problem" that is "both inevitable and intractable").

151. *See* EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 265 (1991) (Marshall, J., dissenting) (noting that the "presumption permits the Court to avoid, if possible, the separation-of-powers and international-comity questions associated with construing a statute to displace the domestic law of another nation").

152. *See* Gregory v. Ashcroft, 501 U.S. 452, 459 (1991) ("[T]here must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty."); *id.* at 460 (noting that, while "Congress may legislate in areas traditionally regulated by the States[,] [t]his is an extraordinary power in a federalist system," and "a power that we must assume Congress does not exercise lightly").

153. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

154. *See* Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning, 578 U.S. 374, 389 (2016) (noting that the Court has applied the canon "[o]ut of respect for state courts"); *see also* Bruhl, *supra* note 14, at 535–38.

155. *See, e.g.,* Cannon v. Univ. of Chi., 441 U.S. 677, 730 (1979) (Powell, J., dissenting) ("Under Art. III, Congress alone has the responsibility for determining the jurisdiction of the lower federal courts.").

Chevron methodology exalts agency power to the detriment of judicial power.¹⁵⁶ And the interpretive approach to the Seventh Amendment is designed to preserve the jury trial.¹⁵⁷

The rule that a merits holding does not resolve questions of standing can be seen to further judicial legitimacy in that it preserves the courts against outside manipulation. Commentators—especially Professor Stearns—have argued that standing doctrine is designed to limit lawyers’ and litigants’ ability to arrange the docket of a court to increase the likelihood of particular legal outcomes based upon the order in which cases and issues reach the court.¹⁵⁸ The absence of the existing rule would invite litigants and lawyers to suppress concerns over the existence of standing in order to obtain binding holdings with respect to standing, and also invite judges to resolve issues without briefing, and perhaps also to resolve those issues before they arise before other judges who might resolve them differently.¹⁵⁹ To the extent that holdings on issues are not apparent from the face of court opinions, the absence of the existing rule also might lead to inconsistent holdings over time. Indeed, the existing rule for standing aligns with the general norm that lawyers and litigants should not be allowed to raise issues that were not initially raised in a timely fashion.¹⁶⁰ On the other hand—that is, the judicial power side of the ledger—the rule that a merits holding does not implicate standing seems to empower the Court to decide cases on the merits while preserving its ability later to conclude that standing was lacking in such cases.

The canon of constitutional avoidance is also more complicated on this score. It is said that the “canon is followed out of respect for Congress,

156. See Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1873 (2015) (“The *Chevron* doctrine . . . is a judicially imposed limitation on the scope of judicial authority, a doctrine through which those in the judging business constrain the activities of the members of their own industry.”).

157. But see Lerner, *supra* note 93, at 828–69 (arguing that the federal and state tests for preserving the jury trial have in practice proven insufficient to the task).

158. See Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309, 348–404 (1995) (marshalling historical evidence and caselaw to support point that standing doctrines prevent manipulation); Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CALIF. L. REV. 1309, 1323 n.48 (1995) (“[C]ommentators have failed to identify the reason behind the general presumption against [ideological] litigation [that standing represents], namely that a contrary rule would enable ideological litigants to manipulate the critically important path of case presentation.”); see also Robert J. Pushaw, Jr., *Limiting Article III Standing to “Accidental” Plaintiffs: Lessons from Environmental and Animal Law Cases*, 45 GA. L. REV. 1, 11 (2010) (arguing that standing is best understood to limit court access to plaintiffs who have been injured because of chance events beyond their control).

159. See Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1022 (2005) (“In a legal system in which a judge could use any case as the vehicle through which to resolve issues of her choosing, some judges might race to resolve particular issues for which they hold particularly strong normative concern. Not only would such judges be less likely to be neutral, but the race itself might also reduce the care with which they address issues.”).

160. See *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952).

which we assume legislates in the light of constitutional limitations.”¹⁶¹ But that seems more true about the classic version of the canon—which looked to alternate interpretation only to avoid an actual conclusion of unconstitutionality—rather than the modern version (which empowers courts to avoid merely *deciding* serious constitutional questions).¹⁶² Indeed, the modern version can be, and has been, described as aggrandizing judicial power by enabling courts to redraft congressional statutes.¹⁶³

The rule of *Long* is also less clearly an example of a methodology that enhances judicial legitimacy. Justice O’Connor’s opinion for the Court tries to sell the Court’s new rule on legitimacy grounds, asserting that it adopted the rule “because of [its] respect for state courts.”¹⁶⁴ However, as Justice Stevens’s opinion dissenting on this point describes, if one preferred to ensconce a rule, the opposite rule—that is, a rule that the Court affirmatively *lacks* jurisdiction when the grounds of the state court decision below are unclear—would seem better to respect the state courts.¹⁶⁵ Instead, the rule of *Long* can readily be seen as a means to aggrandize Supreme Court power.¹⁶⁶

161. *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (citing *FTC v. Am. Tobacco Co.*, 264 U.S. 298, 305–307 (1924)).

162. See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 139 (2010).

163. See *NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 509 (1979) (Brennan, J., dissenting) (“[B]y strictly or loosely applying its requirement, the Court can virtually remake congressional enactments.”); cf. ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 29 (Amy Gutmann ed., new ed. 2018) (“The rule that statutes in derogation of the common law will be narrowly construed seems like a sheer judicial power-grab.”).

164. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983); see also *id.* at 1041 (“If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.”); *id.* (noting that the rule it adopted “avoids the unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court”).

165. See *id.* at 1067 (Stevens, J., dissenting) (“[A] policy of judicial restraint—one that allows other decisional bodies to have the last word in legal interpretation until it is truly necessary for this Court to intervene—enables this Court to make its most effective contribution to our federal system of government.”); *id.* at 1072 (describing as “thoroughly baffl[ing]” the Court’s assertion that its decision “show[ed] ‘[r]espect [to] the independence of state courts’” (quoting *id.* at 1040 (majority opinion))).

166. See Richard A. Seid, *Schizoid Federalism, Supreme Court Power and Inadequate Adequate State Ground Theory: Michigan v. Long*, 18 CREIGHTON L. REV. 1, 13–15 (1984) (criticizing the opinion in *Long* for having improperly deployed statements about the Court’s power to determine its own jurisdiction to expand the scope of the Court’s appellate jurisdiction); Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1293 (1986) (“*Michigan v. Long* takes a halting step forward in expanding federal review power”); *State v. Jackson*, 672 P.2d 255, 264–65 (Mont. 1983) (Shea, J., dissenting) (arguing that, “by holding that” state and federal constitutional law were “substantially identical,” the majority “would permit the United States Supreme Court to tell us what our state constitution means”); cf. *Long*, 463 U.S. at 1041 (“We believe that such an approach will provide state judges with a clearer opportunity

Much as the rule-like nature of the *Marks* rule is disputed,¹⁶⁷ so too are there two sides to the question of whether the rule enhances judicial legitimacy or judicial power. On one hand, Professor Stearns shows the *Marks* rule to be the logical, indeed natural, judicial reaction to cases that fracture along a single dimension,¹⁶⁸ a point seemingly confirmed by the frequency with which other jurisdictions have adopted a similar rule.¹⁶⁹ On the other hand, the rule of *Marks* can be seen to expand the universe of Supreme Court cases that have binding precedential effect¹⁷⁰ to include cases with fractured majorities,¹⁷¹ thus expanding the Court's power. And Professor Re suggests that the Supreme Court's adoption of the rule in *Marks* may have been motivated more by the desire of a few Justices to establish binding precedential effect for an earlier plurality opinion than any general aspiration toward a viable, desirable methodological rule.¹⁷²

Finally, the presumption that statutory elements are not jurisdictional does not seem to enhance judicial legitimacy. It can, however, be seen to unilaterally aggrandize federal court power since it may bring within federal court jurisdiction cases that Congress has not seen fit to authorize.¹⁷³

III. JUDICIAL AVERSION TO BINDING INTERPRETIVE METHODOLOGY

In this Part, I explicate judicial aversion to adopting binding common-law interpretive methodologies. Section III.A presents reasons that, regardless of preferences over possible interpretive methodological approaches, judges might shy away from voting on such matters as binding. Section III.B then discusses ways that divergent preferences may preclude a court from adopting an interpretive methodology as binding.

to develop state jurisprudence unimpeded by federal interference, and *yet will preserve the integrity of federal law.*" (emphasis added)); see also Richard W. Westling, Comment, *Advisory Opinions and the "Constitutionally Required" Adequate and Independent State Grounds Doctrine*, 63 TUL. L. REV. 379, 389–90 n.47 (1988) (calculating that 26.7 percent of Supreme Court decisions reviewing state court rulings proved to be advisory opinions in the four and one-half years following *Long*, compared to 14.3 percent in the five and one-half years preceding *Long*).

167. See *supra* text accompanying notes 146–50.

168. See *supra* text accompanying note 147.

169. See Stearns, *supra* note 85, at 466–67, 470–71 n.45.

170. Even now, cases that result in an evenly divided Court lack precedential effect. See, e.g., *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 264 (1960).

171. See Re, *supra* note 84, at 1997–2007 (noting that the effect of jettisoning the rule of *Marks* would be that "lower courts could freely set aside fragmented rulings that exhibit only 'judgment agreement'"); Williams, *supra* note 146, at 849.

172. Professor Richard Re speculates that Justice Powell, who authored the majority opinion in *Marks*, was motivated to incorporate the standard from a plurality opinion (of which he was one author) in *Gregg v. Georgia*, 428 U.S. 153, 158 (1976)—a death penalty case—in order to "retroactively suggest[] that his own preferred resolution in *Gregg* was the governing precedent." Re, *supra* note 84, at 1951.

173. See Hawley, *supra* note 98, at 2074–77 (raising the issue).

Sections III.A and III.B identify obstacles to the adoption of binding methodologies that arise across the broad run of cases and/or based on the preferences of judges. But they do not identify the types of situations when those preferences/situations are likely to control. Section III.C discusses when the objections to binding interpretive methodology might be heightened, identifying two “pull factors”—that is, factors that will tend to pull judges and courts away from the adoption of binding interpretive methodologies.

A. REASONS JUDGES MIGHT AVOID VOTES ON MAKING INTERPRETIVE
METHODOLOGIES BINDING

Even if judges on a court have strong preferences over possible binding interpretive methodologies—and indeed even if all else equal there might be majority support for ensconcing certain methodologies as binding—there are reasons that the judges might opt not to take action. One is judicial aversion to issue-based voting. Another is the penchant for judicial minimalism.¹⁷⁴

1. General Aversion to Issue-Based Voting

Even if there is a majority of judges who would in theory embrace a particular interpretive methodology as binding, a general aversion to issue-based voting could persuade judges not to vote to ensconce the methodology as precedent. Outcome-based voting—that is, casting votes based on the preferred outcome in a case¹⁷⁵—is the norm on courts.¹⁷⁶ Though it happens occasionally, issue-based voting—that is, casting votes in a case issue by issue¹⁷⁷—is by far the exception.¹⁷⁸ Indeed, issue-based voting has the potential to introduce a host of complications for multimember courts. For one thing, issue-based voting requires judges to decide the degree to which they should divvy up the primary questions to arrive at the relevant issues on which they should vote; but almost any issue can be decomposed into constituent subissues, and it is hard to know when to stop that process.¹⁷⁹ For another

174. While both of these phenomena may affect judicial decision-making with respect to substantive legal issues, they are more likely to have an impact where the issue in question is a meta-issue, i.e., an issue—like methodological issues—that the judges can elide when resolving the case.

175. See Jonathan Remy Nash, *A Context-Sensitive Voting Protocol Paradigm for Multimember Courts*, 56 STAN. L. REV. 75, 76 (2003).

176. David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743, 750 (1992) (“It is clear that courts most frequently utilize outcome-voting.”); see also Stearns, *supra* note 45, at 1047 (“[P]roposals to replace outcome voting with issue voting on appellate courts are misguided” (footnote omitted)); Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 141 (1999) (arguing that the “exception” of issue-based voting by individual Justices “far from legitimizing opinion-focused issue-by-issue voting, instead underscores the primacy of judgments and the correctness of the traditional [outcome-based] voting protocol”).

177. See, e.g., Nash, *supra* note 175, at 76.

178. See *id.* at 82–84.

179. See *id.*

thing, issue-based voting creates incentives for insincere and strategic voting.¹⁸⁰ The discussion below highlights these possibilities.¹⁸¹

Court procedures bolster this approach. Majority coalitions are assembled based upon agreement as to case outcome, not reasoning.¹⁸² This is not to say that reasoning does not matter¹⁸³; a majority coalition will strive to try to obtain a majority endorsement on reasoning as well, lest support for the court's reasoning be fractured¹⁸⁴ and even spread between majority and concurring judges.¹⁸⁵ However, the reality of coalition composition elevates the role of outcome in judicial deliberations. And having outcome as the focal point will make it less typical, and therefore likely more difficult, for judges seeking to attract majorities to ensconce interpretive methodologies.¹⁸⁶

2. General Fealty to Judicial Minimalism

A strong penchant for, if not fealty to, judicial minimalism¹⁸⁷ also helps to explain the relative dearth of binding interpretive methodologies. Many

180. See Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2323–24 (1999) (exploring instances in which a Justice may influence the Court's collective output through strategic voting behavior); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CALIF. L. REV. 1, 52–56 (1993) (identifying incentives for judges on multijudge panels to strategically engage in insincere behavior); Saul Levmore, *Conjunction and Aggregation*, 99 MICH. L. REV. 723, 755 n.68 (2001) (“[A] decent argument for outcome voting is that it removes the temptation to vote strategically. The more we ask for outcomes, the less room there is for strategic voting.”); Stearns, *supra* note 45, at 1062–64; Nash, *supra* note 175, at 129, 133–34.

181. See *infra* text accompanying note 210.

182. See David G. Post & Steven C. Salop, *Issues and Outcomes, Guidance, and Indeterminacy: A Reply to Professor John Rogers and Others*, 49 VAND. L. REV. 1069, 1074–77 (1996); John M. Rogers, “Issue Voting” by Multimember Appellate Courts: A Response to Some Radical Proposals, 49 VAND. L. REV. 997, 1014 (1996) (“There is no developed body of law on how issues must be divided for separate voting.”); Nash, *supra* note 175, at 127–28.

183. See Nash, *supra* note 175, at 85–88.

184. See *Supreme Court Procedures*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> [<https://perma.cc/3AJ5-A8Z2>] (“If a Justice agrees with the outcome of the case, but not the majority's rationale for it, that Justice may write a concurring opinion.”); Nash, *supra* note 175, at 87. For discussion, see James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 519–27 (2011); Caminker, *supra* note 180, at 2317–18 (discussing the downsides of fractured Court decisions).

185. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (describing that, where “no single rationale explaining the result enjoys the assent of five Justices,” lower courts should take as the binding holding of the Court “that position taken by those Members who concurred in the judgments on the narrowest grounds” (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976))).

186. The fact that judges well may disagree over methodologies is an argument that aligns with Professor Re's advocacy for permissive, as opposed to binding, interpretations. See Richard M. Re, *Permissive Interpretation*, 171 U. PA. L. REV. 1651, 1656–61 (2023).

187. See generally CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) [hereinafter SUNSTEIN, ONE CASE] (explaining and defending the minimalism form of judicial decision-making); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH.

courts—including, in particular, the Supreme Court operating under the stewardships of Chief Justices William Rehnquist and John Roberts—have striven and strive to decide cases minimally.¹⁸⁸ Professor Cass Sunstein identifies two dimensions along which a court can choose to decide cases and craft opinions minimally. First, courts can decide cases narrowly as opposed to widely, with narrow (but not wide) rulings “not ventur[ing] far beyond the problem at hand, and attempt to focus on the particulars of the dispute before the Court.”¹⁸⁹ Second, courts can decide cases in shallow as opposed to deep terms, with shallow (but not deep) rulings “attempt[ing] to produce rationales and outcomes on which diverse people can agree, notwithstanding their disagreement on or uncertainty about the most fundamental issues.”¹⁹⁰

In Professor Sunstein’s terms, the decision to include a methodological holding in a case would move the ruling in the case from shallow to deep (or at least along a spectrum in that direction). Such a move will not infrequently reduce the size of the majority supporting the decision. And anticipation of that result well might convince judges not to include the methodological holding in the first place.

B. WAYS THAT DIVERGENT PREFERENCES MIGHT PRECLUDE ADOPTION OF INTERPRETIVE METHODOLOGIES AS BINDING

Even if judges could be willing under some circumstances to embrace a binding interpretive methodology, there yet might be other obstacles to adoptions of a particular methodology. There could be disagreement among judges over the proper interpretive methodology to adopt; there could be judges who value freedom to decide based on outcomes who (as we shall see) may tend to oppose binding interpretive methodologies; and there could be disagreement among judges—who agree at a high level on a particular

L. REV. 353 (2006) [hereinafter Sunstein, *Burkean*] (recognizing Burkean minimalism in current court rulings).

188. See SUNSTEIN, ONE CASE, *supra* note 187, at 9–10 (describing the Rehnquist Court); Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 757 (2001) (“Under the leadership of Chief Justice William Rehnquist, the Supreme Court of the United States has generally been minimalist, in the sense that it has attempted to say no more than is necessary to decide the case at hand, without venturing anything large or ambitious.”); Sunstein, *Burkean*, *supra* note 187, at 362 (speculating early on about the Roberts Court); Donald A. Daugherty, Jr., *Last Hurrah for the Minimalist Court?*, 22 FEDERALIST SOC’Y REV. 80, 81 (2021) (“[T]he Roberts Court can be defined by its minimalistic, incremental approach, as reflected by, for example, the fact that it strikes down federal laws as unconstitutional and overturns precedent at a much lower rate than the Warren, Burger, and Rehnquist Courts did.”); Jamal Greene, *Maximinimalism*, 38 CARDOZO L. REV. 623, 625, 629 (2016) (describing Chief Justice Roberts as a “maximinimalist” whose “tenure has been marked by narrowness but not by shallowness”); *id.* at 629–46; Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1901–02 (2006) (“Because of her general commitment to particularized consideration, Justice O’Connor has stood as the Court’s most prominent minimalist, asking for narrow rulings rather than broad ones.”).

189. Sunstein, *Burkean*, *supra* note 187, at 362.

190. *Id.* at 364.

interpretive methodology—over the precise contours of that methodology. I discuss each of these in turn.

1. Excessive Disagreement Over the Proper Interpretive Methodology to Adopt

It will be difficult to come to agreement as to a binding interpretive methodology if there are multiple possible methodologies that could apply to the question at hand, and none commands a majority of the judges. Say, for example, that the U.S. Supreme Court consists of four Justices committed to textualism, three wedded to purposivism, and two who adhere to intentionalism. Assuming none of the Justices is open to compromise, no binding holding on methodology will be attainable.

2. Result-Oriented Judges Do Not Benefit from Binding Interpretive Methodologies

The last discussion assumed that every judge on the court was attracted to some binding methodology (even if they could not agree as a whole on a single preference). But the reality is that many judges may not uniformly endorse a particular methodology as a solution to a particular question. Commentators have observed that (broadly, if not always entirely accurately) speaking, judges may tend to prioritize—whether across the run of cases or in particular classes of cases—reasoning over results or results over reasoning.¹⁹¹ Although judges who care about reasoning over outcomes may be sympathetic to binding methodologies, judges who care about results will not be. As such, results-oriented judges may work to block adoption of binding methodologies.¹⁹²

An example illustrates the point. Let's say that there are three judges on the court. One, Judge T, always votes using textualism; the second, Judge P,

191. See Stephen J. Choi & G. Mitu Gulati, *Trading Votes for Reasoning: Covering in Judicial Opinions*, 81 S. CAL. L. REV. 735, 742 (2008) (“Some judges also care more about the voting outcome of a particular case . . . while other judges care more about the legal precedent established through the reasoning contained in the majority opinion accompanying the outcome”); cf. Joseph Isenbergh, *Activists Vote Twice*, 70 U. CHI. L. REV. 159, 160 (2003) (“An activist judge . . . gives effect to preference over the objective meaning of the law when they conflict. A neutralist follows the law without regard to personal preference.”); Caminker, *supra* note 180, at 2314 (“A Justice might care more about articulating the best rule to address a recurrent problem than about articulating the best rule governing an idiosyncratic statute that is about to sunset.”); Kornhauser & Sager, *supra* note 180, at 33 (“Our personal normative commitments implicate both reasons and outcomes, and the two can conflict.”); *id.* at 30 (arguing that judges on multimember courts should decide between issue- and outcome-based voting based on dominant commitment among the judges between issues and outcomes in the particular case).

192. Compare in this regard Professor Anita Krishnakumar's empirical finding that the Justices of the Roberts Court sometimes used substantive canons to reach outcomes *opposite* to those of their presumed political valences. See Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 859–64 (2017). Insofar as this shows that the Justices did not value outcome above all else, this tends to confirm that these Justices did not oppose the creation, or the continued deployment, of binding interpretive methodologies.

always votes using purposivism; and the third, Judge C, always casts votes that favor criminal defendants and those convicted of crimes. Say that textualism and purposivism each produce outcomes that are favorable to criminal defendants and those convicted of crimes fifty percent of the time, but they are independent, so they do not produce that outcome the same fifty percent of the time. With these assumptions, Table 2 summarizes how the judges' votes fall across the run of criminal cases. It will be readily apparent to Judge C that, without any binding methodology, she can obtain a procriminal defendant outcome three-quarters of the time.

Table 2: Interplay of Methodologically Minded Judges and Outcome-Focused Judges, Assuming that Outcomes Are Orthogonal to Interpretive Methodological Approaches

Fraction of Time	Procriminal Defendant Vote?			Outcome
	Judge T	Judge P	Judge C	
$\frac{1}{4}$	Y	Y	Y	In favor of criminal defendant
$\frac{1}{4}$	Y	N	Y	In favor of criminal defendant
$\frac{1}{4}$	N	Y	Y	In favor of criminal defendant
$\frac{1}{4}$	N	N	Y	Against criminal defendant

It is also readily apparent that the adoption of either binding methodology would make things worse for Judge C. By way of example, say (without loss of generality) that Judge C endorses the textualist approach, so that it will be binding in all future cases. Now going forward Judge C's preferred position will prevail only half of the time.

Nor is this result an artifact of the assumption that the use of purposivism or textualism is orthogonal to a prodefendant outcome. The example generalizes: say instead that Judge T votes in favor of criminal defendant T of the time, and against $1 - T$ of the time; Judge P with the criminal defendant P of the time, and against $1 - P$ of the time. Finally, assume without loss of generality that $T > P$.

Table 3 presents the fallout of votes. Now, the criminal defendant—and Judge C's position—will prevail $TP + T(1 - P) + (1 - T)P = T + P - PT$ of the time. In comparison, with issue-based voting, then Judge C's position will prevail T of the time. But (since T and P are both less than or equal to 1) it is

clear that T will never be larger than $T + P - PT$.¹⁹³ Indeed, the two will be equal only where (as is exceedingly unlikely) $T = 1$ (i.e., where textualism *always* produces a procriminal defendant outcome) or $P = 0$ (i.e., purposivism *never* produces a procriminal defendant outcome).¹⁹⁴ In short, Judge C will still prefer to avoid any binding interpretive methodology.

Table 3: Interplay of Methodologically Minded Judges and Outcome-Focused Judges, with Relaxed Assumptions About the Relationship Between Outcomes and Interpretive Methodological Approaches

Fraction of Time	Procriminal Defendant Vote?			Outcome
	Judge T	Judge P	Judge C	
TP	Y	Y	Y	In favor of criminal defendant
$T(1 - P)$	Y	N	Y	In favor of criminal defendant
$(1 - T)P$	N	Y	Y	In favor of criminal defendant
$(1 - T)(1 - P)$	N	N	Y	Against criminal defendant

3. Despite Agreement Over a Methodology, There Is Disagreement Over the Methodology's Contours

Even if there is a majority of judges who would in theory embrace a particular methodology as binding, disagreement over the contours of that methodology will work against the adoption of the methodology as binding.¹⁹⁵ The Supreme Court's 2020 decision in *Bostock v. Clayton County*, along with a

193. T will be larger than $T + P - PT$ if and only if $P(1 - T) < 0$. Since T and P are both positive and less than or equal to 1, that cannot be.

194. T will equal $T + P - PT$ if and only if $P(1 - T) = 0$. That can only happen if either $T = 1$, $P = 0$, or both.

195. See Victoria Nourse, *The Paradoxes of a Unified Judicial Philosophy: An Empirical Study of the New Supreme Court: 2020-22*, 38 CONST. COMMENT. (forthcoming 2023) (manuscript at 33-38), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3507&context=facpub> [https://perma.cc/N2N7-928W] (noting considerable disagreement and conflict over interpretation, even among the majority of Supreme Court Justices said to endorse constitutional and statutory interpretation based on original public meaning).

stylized understanding of the Justices' preferences, together provide an illustration.¹⁹⁶

The *Bostock* Court consisted of Chief Justice John Roberts and Justices Clarence Thomas, Ruth Bader Ginsburg, Stephen Breyer, Samuel Alito, Sonia Sotomayor, Elena Kagan, Neil Gorsuch, and Brett Kavanaugh. Let us assume that Justices Thomas, Alito, Gorsuch, and Kavanaugh are strong adherents of textualism and (all else equal) would support adopting it as binding precedent. Let us further assume that Justice Kagan, while not as strongly committed to textualism, does find the methodology attractive and could be convinced to vote to make it binding were she to believe that it provided sufficient clarity for future cases. Finally, we shall assume that the remaining Justices—Chief Justice Roberts, and Justices Ginsburg, Breyer, and Sotomayor—are strongly opposed to establishing textualism as binding precedent.¹⁹⁷

The *Bostock* case provides an interesting example because all three opinions in the case—a majority opinion and two dissenting opinions—all claimed the mantle of textualism.¹⁹⁸ The case raised the question of whether the prohibition in Title VII of the Civil Rights Act of 1964 against “discriminat[ion] . . . because of [an] individual’s . . . sex”¹⁹⁹ extends to discrimination against a lesbian, gay, or transgender individual.²⁰⁰ The majority opinion—authored by Justice Neil Gorsuch and joined by Chief Justice John Roberts, and Justices Ginsburg, Breyer, Sotomayor, and Kagan—concluded that it did.²⁰¹ And it did so by invoking the plain meaning of the statute, the *sine qua non* of textualism: “[T]o discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII’s plain terms”²⁰² At the same time, the two dissenting opinions—one authored by Justice Alito and joined by Justice Thomas, and another by Justice Kavanaugh—also invoked textualism, although they emphasized another aspect of that interpretive approach: ordinary meaning.²⁰³

196. See generally *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

197. One might argue about the validity of these assumptions. For the example to work, all that is required is that, while there is a majority of Justices sympathetic to textualism, there is no majority of Justices strongly committed to that interpretive approach, and the Justices strongly committed to textualism divide into two camps.

198. For discussion, see generally Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265 (2020).

199. 42 U.S.C. § 2000e-2(a)(1); see Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 241, 255.

200. *Bostock*, 140 S. Ct. at 1737.

201. *Id.*

202. *Id.* at 1743.

203. See *id.* at 1767 (Alito, J., dissenting) (“In 1964, ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity. The *ordinary meaning* of discrimination

As Professor Tara Leigh Grove has put it, “*Bostock* revealed . . . important tensions *within* textualism.”²⁰⁴ She describes the majority’s approach as “formalistic textualism”—that is, a textualist approach that “focus[es] on semantic context and downplay[s] policy concerns or the practical (even monumental) consequences of the case.”²⁰⁵ Meantime, she terms the dissents’ approach “flexible textualism”—that is, a textualist approach that “permits interpreters to make sense of . . . text by considering policy and social context as well as practical consequences.”²⁰⁶

Of what import is the disagreement over the contours of textualism to the question of whether the Court will be inclined to adopt textualism as a binding methodology? Let us begin our analysis of the example by asking whether, assuming the Court had not previously adopted textualism as binding precedent, the *Bostock* case would have been a viable vehicle for that to happen. The problem is that half the Justices in the majority coalition do not favor that result, and the traditional rule is that binding precedent emanates only from the majority coalition, as determined by outcome-based voting—that is, voting where each judge casts a vote based upon their preferred outcome in the case.²⁰⁷ On this basis, *Bostock* is a poor candidate to produce binding textualism.

There is the possibility that the Court (or one or more of the Justices) could resort to issue-based voting instead of outcome-based voting. But, as discussed above, judges use issue-based voting only rarely and in the breach.²⁰⁸ Even were some Justices inclined to invoke issue-based voting, the problems with issue-based voting would likely rear their heads here. For one thing, issue-based voting raises the question of how to decompose the case into constituent issues.²⁰⁹ Here, if voting were to take place as to whether to adopt textualism as a binding methodology, would voting then also take place as to whether to adopt formalistic, as opposed to flexible, textualism?

Issue-based voting also can invite strategic voting,²¹⁰ and that could be the case here: Were there a vote on the type of textualism to adopt, it seems that formalistic textualism would be victorious. Forced to choose, it seems that all the Justices in the actual majority in *Bostock* would endorse formalistic textualism. But, then, might at least one of the Justices who prefer flexible

because of ‘sex’ was discrimination because of a person’s biological sex, not sexual orientation or gender identity.”); *id.* at 1828 (Kavanaugh, J., dissenting) (“Both common parlance and common legal usage treat sex discrimination and sexual orientation discrimination as two distinct categories of discrimination—back in 1964 and still today.”).

204. Grove, *supra* note 198, at 266.

205. *Id.* at 267.

206. *Id.*

207. See *supra* text accompanying notes 175–76.

208. See *supra* text accompanying notes 177–78.

209. See *supra* text accompanying note 179.

210. See *supra* note 180 and accompanying text.

textualism anticipate that outcome, and—abhorring that result—strategically withhold his vote in favor of adopting textualism in the first place?

This discussion not only indicates that *Bostock* would be a poor vehicle out of which to emerge binding textualism, but also raises issues with a binding textualism precedent emerging at all. One can readily imagine a case (and indeed there were actual cases at that time) where all the Justices who are strongly committed to textualism (Justices Thomas, Alito, Gorsuch, and Kavanaugh) were in the majority along with the Justice who was attracted, if not strongly committed, to textualism (Justice Kagan). But we assumed above that Justice Kagan would vote to embrace textualism as binding only to the extent it promised to provide clear guidance in the future to courts and judges. If Justice Kagan anticipated future cases where (once textualism was binding on the courts) issues about the contours of that textualism—such as the question of formalistic or flexible textualism, or perhaps some other issues²¹¹—would divide the court, then her enthusiasm for textualism as precedent might be diminished.²¹²

C. “PUSH FACTORS” THAT INCREASE DISINCENTIVES AGAINST RECOGNIZING BINDING INTERPRETIVE METHODOLOGIES

The previous two Sections presented reasons that judges—based on their general preferences and dispositions—might be disinclined to vote for, and agree upon, binding interpretive methodologies. Missing from those discussions was an explanation of *particular scenarios* when those incentives would be heightened. The identification of such scenarios is especially important in light of the “pull factors” that spoke to particular scenarios with incentives *affirmatively to adopt* binding interpretive methodologies.²¹³ This Section identifies two “push factors” that likely will push judges in the opposite direction: high stakes and the presence of constitutional arguments.

The extent to which the interpretive methodology raises high stakes.—The stakes that a binding holding on methodology would implicate play an outsized role in determining whether a court likely will adopt that methodology as binding. To recall Professor Lemos’s point, “[t]he notion that majority statements on methodology may be binding raises the temperature on methodological debates that are already overheated.”²¹⁴ The statement presumes that a

211. For example, Justice Scalia famously adhered to the view that it was almost never appropriate to consider legislative history. See Jonathan H. Adler, *A Unanimous Opinion – Except for Three Footnotes*, WASH. POST (Apr. 29, 2014, 11:11 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/29/a-unanimous-opinion-except-for-three-footnotes> (on file with the *Iowa Law Review*).

212. Note that this example does not descend into cycling of preferences. See *supra* notes 45–47 and accompanying text. That possibility could make bringing judges together to endorse a methodology as binding even more challenging.

213. See *supra* Section II.C.

214. Lemos, *supra* note 44, at 906.

binding methodology will have a substantial impact across a large run of cases. But not every interpretive methodology will have a broad impact.

We might say that an interpretive methodology that applies in a small set of situations is likely to raise low stakes. Even if it is embraced as binding, its impact will be cabined. Thus, a judge (at least a judge who is on the fence) might be swayed to endorse the methodology as binding if it offers other benefits, such as if it is rule-like and enhances (or can be claimed to enhance) judicial legitimacy, or enhances judicial power.

On the other hand, an interpretive methodology that seems likely to apply across a large swath of cases—or is more trans-substantive—raises high stakes. It surely stands to reason as a broad proposition that a legal holding with broad scope is more likely to encounter resistance.²¹⁵ And, to the extent that some interpretive methodologies can have broad applicability, it might even be said that they have “much higher stakes than substantive rules of law.”²¹⁶

Additionally, one might say that a methodology that applies to resolve *important* cases raises high stakes, even if the pure number (or fraction) of such cases is small. In effect, the impact of the methodology will be large even though it is confined to a relatively small number of cases.

It quickly becomes clear that the higher the stakes, the greater some of the key obstacles (identified in the previous two Sections) to adoption of a binding interpretive methodology will be.²¹⁷ Consider first judge’s preference for judicial minimalism. In Professor Sunstein’s terminology, adding a binding methodological holding to a majority opinion makes the opinion *deeper*.²¹⁸ A minimalist might be willing to accept the deeper opinion if the benefits outweigh the costs. If, however, the methodological holding sweeps wide, then the resulting opinion will be both *deep and wide*.²¹⁹ It is more likely that an avowed minimalist would draw the line before joining such an opinion.

Second, a judge who is concerned about preserving their discretion to decide case outcomes as they see fit²²⁰ will be more troubled by a binding methodology that might broadly limit that discretion. In contrast, they might be convinced that the benefits of a methodology are worth it, if that methodology were sufficiently narrowly focused as to impinge their discretion across only a narrow range of cases (and especially if those cases were of less

215. See Caminker, *supra* note 180, at 2314 (“The more frequently the same or substantially equivalent issues will arise in the future, the greater the temporal ‘ripple effect’ created by the Instant Case . . .”).

216. Criddle & Staszewski, *supra* note 16, at 1592 (“[T]he rules of statutory interpretation have much higher stakes than substantive rules of law because interpretive rules are used to resolve disputes about the permissible application of countless statutes from across the entire policy landscape.”).

217. See *supra* Sections III.A–B.

218. See *supra* text accompanying note 190.

219. See *supra* text accompanying note 189.

220. See *supra* Section III.B.2.

concern to them). This also suggests that a judge will be more open to endorsing methodology that is binding vertically rather than horizontally.²²¹

Third, it seems logical that disagreement over the contours of a particular methodology²²² is more likely to arise where that methodology has broader scope. After all, a methodology that could apply across a broader run of cases is more likely to be called into application in more varied factual and legal settings. In contrast, we might expect judges to have fewer differences—and to set aside or more readily resolve the differences they did have—over a methodology that applies in a narrower class of cases.

The extent to which the interpretive methodology may implicate constitutional arguments.—The presence of constitutional arguments over the applicability of an interpretive methodology may be an obstacle to adopting the methodology as binding. There are three reasons for this. First, if a judge believes that the Constitution mandates (or precludes) a particular methodology,²²³ then that judge will not be open to the various factors that I identify below that otherwise might sway the judge to adopt, or reject, *stare decisis* status for an interpretive methodology. Second, even if a judge could be open to those factors in the constitutional context, the fact that a constitutional ruling cannot easily be overruled could dominate the judge's calculus.²²⁴ Finally, even if a judge favors voting for a constitutionally mandated interpretive methodology, other judges may not be willing to provide a majority. Put another way, the presence of the constitutional argument may reduce the bargaining space such that no agreement can be reached.²²⁵

This push factor suggests that binding methodology governing constitutional interpretation should be rare. And it should also be the case that other interpretive methodologies (i.e., methodologies governing the interpretation of statutes or cases) will rarely be binding where there are constitutional arguments justifying, or precluding, those methodological

221. See *supra* text accompanying note 112.

222. See *supra* Section III.B.3.

223. See Anthony J. Bellia Jr. & Bradford R. Clark, *The Constitutional Law of Interpretation*, 98 NOTRE DAME L. REV. 519, 576–603 (2022) (arguing that the Constitution adopts certain background interpretive rules, including some form of originalism).

224. Consider that the constitutional avoidance canon, under which courts read statutes to avoid serious constitutional questions absent a clear statement of congressional intent to confront those questions. See, e.g., *NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 501 (1979). Consider as well the Court's tendency to interpret language in the Constitution more broadly than identical language in statutes. See Jonathan Remy Nash, *State Standing for Nationwide Injunctions Against the Federal Government*, 94 NOTRE DAME L. REV. 1985, 2004 n.98 (2019); cf. KOZEL, *supra* note 28, at 27 (“While the Court leaves it to the legislative process to fix mistaken interpretations of statutes, the justices have described themselves as more willing to revisit their constitutional decisions.”); Jonathan L. Marshfield, *The Amendment Effect*, 98 B.U. L. REV. 55, 58 (2018) (noting theories that “posit that difficult amendment processes will generally result in more active judiciaries”); *id.* at 97–119 (finding limited empirical support for such theories).

225. Of course, if a majority of judges subscribe to a particular justification for (or against) a binding methodology, then a majority holding on that point may well be possible.

approaches. Thus, for example, to the extent that judges are opposed to resorting to legislative history to interpret a statute on the ground that resort to a statute's legislative history is unconstitutional,²²⁶ one would be less likely to expect a binding holding on the propriety of considering legislative history.

* * *

Consideration of the extant binding interpretive methodologies surveyed above confirms the important role these two push factors can play. Consider first the importance of the stakes at issue. Observe that all the methodologies surveyed above tend to apply in relatively narrow areas—i.e., where the stakes are low. Several of the methodologies are designed to resolve questions of statutory interpretation: whether to read a statute to apply extraterritorially, whether to read a statute to avoid serious constitutional questions, whether to read a statute to preserve traditional provinces of state regulation, whether to read a jurisdictional statute to confer power upon state courts, and whether to read statutory elements as jurisdictional. But these are all *narrow* questions of statutory interpretation; they are low stakes. They are but small subsets of the broad overarching question of statutory interpretive methodology, which raises high stakes.²²⁷

Most of the other extant binding interpretive methodologies discussed in Part I are also of relatively small stakes. The rule governing application of the Seventh Amendment applies by its terms only to a particular constitutional provision. And *Michigan v. Long* applies only to state court decisions that are ambiguous as to the extent to which they rely upon federal, as opposed to state law; and, even then, the *Long* rule applies only to determine jurisdiction, not the outcome of such cases.

The stakes raised by the *Marks* and *Chevron* methodologies are arguably higher. Considering the rule of *Marks* first, it is surely true that that methodology applies only with respect to rare cases where the Court cannot muster a majority coalition on reasoning.²²⁸ At the same time, however, cases

226. See, e.g., *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (“The greatest defect of legislative history is its illegitimacy. . . . ‘The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself. . . .’” (quoting *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845))).

227. Just as pockets of statutory interpretive methodologies (such as certain canons) might have binding effect while broad interpretive approaches do not, one might reasonably expect to find broad approaches adopted as binding *but only with respect to a single statute*. See, e.g., Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1411 (2015) (arguing that, prior to *Shelby County v. Holder*, 570 U.S. 529 (2013), the Supreme Court interpreted the Voting Rights Act such that “[s]tatutory meaning [wa]s not determined by the plain meaning of an unambiguous text; other considerations trump[ed]”).

228. See Adam H. Morse, *Rules, Standards, and Fractured Courts*, 35 OKLA. CITY U. L. REV. 559, 572 (2010) (“In the 2004 through 2007 October Terms of the Supreme Court, the Justices fractured on a total of twenty-three cases.”). While still small, the fraction of cases with plurality opinions has grown over time. See Spriggs II & Stras, *supra* note 184, at 519 (“Historically,

that divide the Court and result in plurality opinions may likely be important cases that raise salient issues.²²⁹

Turning to *Chevron*, that methodology applies only to cases where a court faces an agency-generated interpretation of a statute. Although this is not a huge portion of the universe of cases that come before the federal courts, especially as compared to the point in time when *Chevron* was adopted, it is not such a small swath of cases by any means,²³⁰ and the growth of the administrative state suggests that the set of such cases will only grow larger. Moreover—certainly today, as compared to the point in time when *Chevron* first came on the scene—the average stakes in such cases well may be large; in other words, these may be relatively important cases. Indeed, the potential for *Chevron* to raise high stakes in terms of substantive outcomes can be seen as the driving force behind the major questions exception to *Chevron*.²³¹

The arguably high stakes raised by *Marks* and *Chevron* may provide reason to anticipate that the Court might one day jettison those methodologies. I return to that point in the next Part.

Beyond predictions about the stability of existing methodologies, the extent of the stakes at issue explains a tension between commentators' predictions and the reality of binding interpretive methodologies. As discussed above, some commentators attribute the absence of binding interpretive methodologies in part to judges' preference—or need—for substantial leeway in applying interpretive methodologies.²³² At the same time, the survey of extant binding interpretive methodologies above revealed that most of these methodologies are substantially rule-like.²³³ The nonbinding standards that commentators predict and the reality of binding rule-like tests seem like polar opposites. But the fact that binding methodologies largely apply

plurality decisions by the Supreme Court have been relatively rare: during the 145 Terms between 1801 and 1955, the Supreme Court issued only 45 plurality decisions. However, during the 54 Terms from 1953 to 2006, the Supreme Court issued 195 plurality opinions, approximately 3.4 [percent] of the 5,711 total cases decided during the period." (footnotes omitted)); see also Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 551 (1998) (reviewing LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998)) ("Plurality opinions are not uncommon . . ."); J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CALIF. L. REV. 913, 921 (1983) (noting "the increasing prevalence of plurality opinions").

229. See Williams, *supra* note 146, at 799–800; Spriggs II & Stras, *supra* note 184, at 527; Morse, *supra* note 228, at 560; Pamela C. Corley, *Uncertain Precedent: Circuit Court Responses to Supreme Court Plurality Opinions*, 37 AM. POL. RSCH. 30, 32 (2009); Cross, *supra* note 228, at 551; Wallace, *supra* note 228, at 921; see also Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 800 (2015) ("[A]ny Supreme Court will probably seem divided in a significant number of important cases."); Easterbrook, *supra* note 25, at 805 ("[The Court's] certiorari jurisdiction allows it to select cases that seem interesting or important, the very cases most apt to produce divisions.").

230. See KOZEL, *supra* note 28, at 156 ("*Chevron* works like an interpretive methodology that applies across a large chunk of statutory cases.").

231. See *supra* notes 81–82 and accompanying text.

232. See *supra* notes 50–51 and accompanying text.

233. See *supra* text accompanying notes 129–50.

in low stakes settings explains this gap: Binding rule-like tests can govern in limited pockets, without interfering with judicial freedom more broadly.

Last, consider that the dearth of binding methodologies governing *constitutional* interpretation—not just among the extant examples of binding methodologies that I surveyed, but in general—is consistent with the notion that loci of constitutional arguments are unlikely to generate binding interpretive methodologies. Indeed, the one example of constitutional interpretation—in the context of the Seventh Amendment—seems to have arisen because the language of the Amendment specifically contemplates a particular methodological approach.²³⁴

IV. UNDERSTANDING THE LANDSCAPE OF BINDING INTERPRETIVE METHODOLOGIES

The pull and push factors identified in Parts II and III, respectively, help us to understand the landscape of binding interpretive methodologies. Consideration of the stakes at issue helps us to square the prediction with the reality. The notion of preserving judicial discretion to decide cases justly (or, perhaps more cynically, in line with judges' preferences) aligns with the discussion in Section III.B.2 above that broad binding interpretive methodologies are unhelpful to judges with a focus on outcomes. But more reliable and consistent outcomes are an attraction for binding methodologies, and when those are crafted on a smaller scale—i.e., raise lower stakes—judges may come around to support them. The added predictability and efficiency may outweigh a loss of control over outcomes in a sufficiently narrow set of cases. In the end, then, we should not be surprised to find a broad canvas of nonbinding interpretive standards with pockets of binding interpretive rather rule-like methodologies, especially outside the realm of constitutional interpretation.

Moving beyond the extant landscape, what predictions can we make about extant binding interpretive methodologies? Are some less stable than others? The pull and push factors, as well as the broader discussion above, suggest several factors that may indicate that a binding interpretive methodology is susceptible to abandonment (or at least substantial reform): (1) The methodology is now invoked in settings of high stakes; (2) the methodology has proven to be not very rule-like²³⁵; (3) the preferences of the Justices of the Supreme Court have shifted such that the methodology is fundamentally inconsistent with the current preferences; and (4) the

234. See *supra* note 92 and accompanying text.

235. It bears noting that, while a history of confusion over the proper methodological approach can prompt the emergence of a binding interpretive methodology, see *supra* text accompanying note 117, that history does not support the *maintenance* of that new interpretive methodology. That new methodology will stand, or fall, on its own. Thus, the fact that the methodological regime that preceded *Chevron* was not very rule-like by now has faded and provides no support for continuing *Chevron* as binding precedent. So, too, will any marginal gain the regime may have offered in the way of legitimacy or power over its predecessor likely have faded.

availability of an alternative rule-like methodology that is (or at least seems to be) workable and is compatible with the Justices' current preferences.

Beyond those extensions to the points identified above, commentators have suggested that a methodology's limited pedigree may render it more at risk.²³⁶ Although a methodology's lengthier pedigree may not generate the reliance interests that bolster *stare decisis* with respect to substantive holdings,²³⁷ still it may impose a greater cost to judicial legitimacy were the methodology to be overturned.

The foregoing allows us to identify existing binding interpretive methodologies that may be especially susceptible to modification or abandonment, and that—in the opposite direction—seem particularly stable. Let us begin with an existing methodology that seems destined to remain intact: The methodology holding that a decision of the Court on the merits that does not address standing should *not* be interpreted as a holding on standing in the underlying case. That methodology is likely to be stable because there seems to be no readily available, workable substitute.²³⁸ A methodology that allowed—or indeed required—precedent as to standing to arise in this way would introduce considerable confusion into standing doctrine, and potentially allow (and even encourage) litigants and lawyers to manipulate standing doctrine by concealing concerns over standing.²³⁹ And, it would raise the question, to the extent that a later holding that standing was absent in the circumstances of the first case, whether the merits holding in the first case survived. And, on top of all that, the existing methodology functions in quite a rule-like fashion, has a long pedigree,²⁴⁰ and does not raise particularly high stakes.

We turn next to methodologies that may be comparatively unstable. The foregoing discussion suggests that the *Chevron* methodology and the rule of *Marks*—both of which raise arguably substantial stakes—might be more likely to face modification or even outright abandonment.²⁴¹ In addition, Professor

236. See *supra* note 26.

237. See *supra* note 54 and accompanying text.

238. Other established methodologies do have viable alternatives. For example, the presumption of *Michigan v. Long* could be reversed, see *supra* note 165 and accompanying text, and the *Chevron* framework could be replaced with a rule that there are no implicit delegations to agencies to interpret statutes (i.e., agencies receive no deference and judicial interpretations govern). See *infra* text accompanying note 245.

239. See *supra* note 159 and accompanying text.

240. See *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (“[T]his Court has followed the lead of Mr. Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*.”).

241. One might think that the presumption against the jurisdictionality of statutory elements is also somewhat unstable. On the heels of having considered the issue in a string of cases over the last twenty years, the Supreme Court recently granted certiorari in another case raising the issue, *Boechler, P.C. v. Comm’r*, 967 F.3d 760 (8th Cir. 2020), *cert. granted*, 142 S. Ct. 55 (2021) (No. 20-1472). Still, it may be that the reason the Court was revisiting the issue so much may not have been confusion among the lower courts but instead resistance by the lower courts to

Bruhl has argued that the Roberts Court's treatment of the presumption in favor of strict construction of jurisdictional statutes suggests that that methodology might be precariously situated.²⁴²

Consider *Chevron* first. The current *Chevron* methodology is not exceedingly rule-like.²⁴³ Indeed, that is especially the case after the advent of *Chevron* step zero and the introduction/expansion of the major questions doctrine.²⁴⁴ Next, one can readily envision a competing approach to *Chevron* (and one that seems even more rule-like): Simply eliminate court deference to agency interpretations of implicit delegations, and reserve the interpretive role for the courts.²⁴⁵ Finally, while a couple of generations of lawyers have contended with *Chevron*, its pedigree is hardly longstanding.

To be sure, commentators and judges have identified other, unrelated reasons to question *Chevron*²⁴⁶—including in particular whether the methodology is constitutional.²⁴⁷ Still, the framework here suggests independent (or perhaps complementary) reasons to question *Chevron's* vitality.²⁴⁸

applying the Court's new standard. See Petition for Writ of Certiorari at *2, *Boechler, P.C. v. Comm'r*, 142 S. Ct. 1493 (2022) (No. 20-1472), 2021 WL 1578098 (“In recent years, the Court has granted certiorari nearly every Term to reaffirm those principles when lower courts have gone astray and, with only few exceptions, has declared a variety of legal rules nonjurisdictional.”). In any event, the Court's unanimous opinion in the case wound up reaffirming the presumption. See *Boechler v. Comm'r*, 142 S. Ct. 1493, 1497–500 (2022).

242. See Bruhl, *supra* note 14, at 521–25.

The extent to which the Court's rhetoric truly puts the canon at risk is subject to debate. In its 2016 opinion in *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 389 (2016), the Court noted that “this Court has time and again declined to construe federal jurisdictional statutes more expansively than their language, most fairly read, requires.” While acknowledging that the Roberts Court's *Merrill Lynch* opinion came “the closest” to the traditional “narrow-construction rule,” Bruhl, *supra* note 14, at 524, Professor Bruhl still notes the Court's avoidance of the words “strict” and “narrow,” emphasizing that “the Court's use of different wording was almost certainly not accidental.” *Id.* At the same time, the Court's description of the canon as constraining the scope of federal jurisdiction to the language of the governing statute is hardly inaccurate, especially in light of the Court's statements over the years in other cases that the federal courts surely have jurisdiction where Congress has explicitly extended it. See, e.g., *Meredith v. Winter Haven*, 320 U.S. 228, 234 (1943) (“[I]t has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment.”).

243. See Richardson, *supra* note 115, at 445, 452–72.

244. See *supra* text accompanying notes 136–39.

245. For an example of reasoning based on the Constitution that heads in this direction, see *infra* note 247.

246. See generally Beer mann, *supra* note 135, at 788 (arguing that *Chevron* has no doctrinal foundation and “is contrary to the statute that governs judicial review of agency action”).

247. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (“*Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design.”).

248. Alternatively, perhaps expanded use of the major questions doctrine (and other devices) will rein in *Chevron's* scope such that it no longer raises such high stakes. See *supra* text accompanying notes 81–82, 230; see also Richardson, *supra* note 115, at 514–22.

Consider next the rule of *Marks*. Two stories can be told about the *Marks* methodology: one, arising out of Professor Re's conception of the doctrine, that makes it a likely candidate for abandonment, and another, arising out of Professor Stearns's analysis, which suggests that the doctrine could be tweaked but is hardly likely to be overruled.

On Professor Re's account, the rule of *Marks* is surely not rule-like.²⁴⁹ Indeed, unlike other binding interpretive methodologies that arose out of a morass of uncertainty under what preceded them,²⁵⁰ the very origin of the rule of *Marks* at the Supreme Court may be grounded in an odd judicial power grab.²⁵¹ In addition, the rule's pedigree—dating back only to 1977—is, like that of *Chevron*, hardly longstanding.

It is hardly surprising, on Professor Re's account, that the Court in 2017 granted a writ of certiorari in a case that included questions presented about the continued vitality of *Marks*.²⁵² In the end, the Court resolved the case on the merits,²⁵³ thus obviating the need to reconsider *Marks*. It is perhaps the fact that the Court can always decide any case in which the lower court relied on *Marks* by resolving the merits, rather than the attractiveness of *Marks* as an interpretive methodology, that may preserve *Marks*.²⁵⁴

One also could choose to view the major questions doctrine as itself an emerging standalone canon. *Cf.* *West Virginia v. EPA*, 142 S. Ct. 2587, 2633–34 (2022) (Kagan, J., dissenting) (describing the majority as having “announce[d] the arrival of the ‘major questions doctrine’”). Viewed in this way, the canon would satisfy some of the pull factors but not others. At least in its current form, the major questions doctrine hardly seems rule-like. *See supra* note 139 and accompanying text. On the other hand, Chief Justice Robert's opinion for the Court describes the doctrine as enhancing judicial legitimacy by directing courts to defer to congressional wishes regarding delegation. *See West Virginia*, 142 S. Ct. at 2609; *see also id.* at 2616–18 (Gorsuch, J., concurring). And Justice Kagan's dissent accuses the majority of increasing judicial power at the expense of agencies. *See id.* at 2641–44 (Kagan, J., dissenting).

To the extent that the doctrine is indeed a binding methodology, the fact that the doctrine applies by definition to high-stakes cases—a key push factor—suggests that the doctrine may not have longevity, at least in its current form.

249. *See supra* text accompanying note 146.

250. For discussion of the *Chevron* methodology as an example, *see supra* notes 140–44 and accompanying text.

251. *See supra* note 172 and accompanying text.

252. *See* Petition for Writ of Certiorari at 543, *Hughes v. United States*, 849 F.3d 1008 (11th Cir. 2017), *cert. granted*, 138 S. Ct. 542 (2017) (No. 17-155), 2017 WL 3277403. The U.S. Solicitor General urged the Court to resolve the *Marks*-related questions. *See* Brief for the United States at *12, *Hughes*, 138 S. Ct. 1765 (2018) (No. 17-155), 2018 WL 1251863.

253. *Hughes*, 138 S. Ct. at 1772 (noting that, because of the resolution on the merits, it would be “unnecessary to consider” the *Marks*-related questions).

254. *Cf.* Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 720 (1984) (observing that “the Supreme Court is unlikely to provide guidance” on the vitality of a rule that, upon permissive transfer of venue, a transferee federal district court is to apply federal law as interpreted by the circuit within which the transferor court lies because “in any case where the issue of choice between transferor and transferee interpretation might be presented, the Court would presumably decide the case on the merits rather than by promulgating rules regarding choice of interpretation”); Jeffrey L. Rensberger, *The*

But Professor Stearns's understanding of *Marks* suggests that the doctrine is not in substantial danger of being overruled. Professor Stearns explains that *Marks* does perform with rule-like accuracy in one-dimensional cases.²⁵⁵ Moreover, while the Supreme Court only announced the *Marks* rule in 1977, Professor Stearns explains that “[r]ather than expressing a new rule, *Marks* recognized an existing judicial norm or practice.”²⁵⁶ In this light, the pedigree of the *Marks* rule seems far heftier.

Indeed, Professor Stearns's analyses suggest that—short of a rule affording no precedential effect in cases with no majority opinion (and leaving aside tweaks to the existing rule²⁵⁷)—there is no viable alternative to the rule of *Marks*. Professor Stearns explains that the rule that the Court announced in *Marks* “is a necessary, albeit partial, solution to an inevitable problem associated with decision making in an en banc court.”²⁵⁸ The point is supported by a survey of state courts that largely deploy *Marks*-like rules—rules at which they have arrived quite independently of the Supreme Court's holding in *Marks*.²⁵⁹ In short, on Professor Stearns's understanding, minor modifications are the most we should expect in the way of changes to the *Marks* rule.

Last, consider the presumption in favor of narrow construction of jurisdictional statutes. To the extent that (as Professor Bruhl contends) the Court is set on undermining, or at least altering the canon,²⁶⁰ one can see the situation as resulting from a shift in the Justices' preferences to (on this issue at least) being more outcome oriented: Professor Bruhl explains that the notion of expanding federal jurisdiction is consistent with the Justices' alignment with current business interests.²⁶¹ In addition, Professor Bruhl explains that, while the general presumption has been around for a while, “the jurisdiction canon's pedigree is a bit weaker and more contingent than one might guess.”²⁶²

CONCLUSION

In this Article, I have explored the legal landscape of interpretive methodologies, I have offered reasons for the emergence of some binding interpretive methodologies but also highlighted obstacles to broadly binding interpretive methodologies. I have explained that the scope of the stakes at

Metasplit: The Law Applied After Transfer in Federal Question Cases, 2018 WIS. L. REV. 847, 851 (noting that the split on this issue persists).

255. See *supra* text accompanying note 147.

256. Stearns, *supra* note 85, at 466.

257. See *supra* note 147.

258. Stearns, *supra* note 85, at 466.

259. See *id.* at 466–67, 470 & n.45.

260. See *supra* note 242 and accompanying text.

261. Bruhl, *supra* note 14, at 557–61.

262. *Id.* at 525; see *id.* at 513–25 (reviewing the canon's history).

issue will be a good predictor of whether an interpretive methodology will be binding. To put it another way, binding interpretive rules will tend to be either rather indeterminate or to have relatively narrow application.²⁶³ I have also suggested that the scope of the stakes, the extent to which the interpretive methodology may have proven to be more standard-like than rule-like, changes in the Justices' preferences, and limited pedigree may provide a window into the stability of the binding interpretive methodology.

²⁶³. I am grateful to Richard Re for this formulation.