

2014

Against Methodological Stare Decisis

Evan J. Criddle

William & Mary Law School, ejcriddle@wm.edu

Glen Staszewski

Repository Citation

Criddle, Evan J. and Staszewski, Glen, "Against Methodological Stare Decisis" (2014). *Faculty Publications*. 1717.
<https://scholarship.law.wm.edu/facpubs/1717>

ESSAY

Against Methodological Stare Decisis

EVAN J. CRIDDLE* & GLEN STASZEWSKI**

Should federal courts give stare decisis effect to statutory interpretation methodology? Although a growing number of legal scholars have answered this question in the affirmative, this Essay makes the case against methodological stare decisis. Drawing on recent empirical studies of Congress's expectations regarding statutory interpretation, we show that existing knowledge of Congress's expectations is insufficient to settle on one consistent approach to statutory interpretation. Moreover, Congress has almost certainly changed its expectations over time, and this raises serious problems for methodological stare decisis from the perspective of faithful-agency theories. We argue further that many theories and doctrines of statutory interpretation are based on constitutional norms and other public values that do not depend on Congress's meta-intent. Constitutional norms and public values also change, and interpretive methodology should remain dynamic so that the law can be responsive to changing societal norms. Finally, we argue that the value of extending stare decisis effect to interpretive methodology is unproven. Although treating prior methodological decisions as binding precedent could, in theory, promote the policies underlying stare decisis, the same would be true of extending that doctrine to virtually any rules. Yet interpretive methodology is different from first-order rules of law in significant ways, and freezing higher-order legal rules into place would pose special and perhaps overwhelming difficulties. We therefore conclude that federal courts should not extend stare decisis effect to methodological decisions without seriously grappling with these difficulties and demanding much stronger evidence that such a move would improve the operation of our legal system.

TABLE OF CONTENTS

INTRODUCTION	1574
I. RECENT PROPOSALS TO GIVE STARE DECISIS EFFECT TO INTERPRETIVE METHODOLOGY	1576

* Professor of Law, William & Mary Law School.

** The A.J. Thomas Faculty Scholar, Associate Dean for Research, & Professor of Law, Michigan State University College of Law. © 2014, Evan J. Criddle and Glen Staszewski. We would like to thank Neal Devins, Bill Eskridge, Abbe Gluck, Allison Larsen, Chad Oldfather, and Michael Sant'Ambrogio for valuable comments on a previous draft of this Essay.

II. RECENT EMPIRICAL WORK ON CONGRESS'S META-INTENT	1578
III. PROBLEMS WITH STARE DECISIS FROM THE PERSPECTIVE OF FAITHFUL-AGENCY THEORY	1581
IV. PROBLEMS WITH STARE DECISIS FROM THE PERSPECTIVE OF OTHER PUBLIC NORMS	1587
V. THE UNPROVEN VALUE OF STARE DECISIS	1590
CONCLUSION	1595

INTRODUCTION

Two of the most interesting and important developments in recent scholarship on statutory interpretation are calls to give stare decisis effect to interpretive methodology and empirical efforts to ascertain Congress's expectations regarding the interpretation of its work.¹ The implication of the former trend is that continuing to debate the same old questions about statutory interpretation in case after case is a waste of time and resources,² and that we should end the "interpretation wars" that have raged in the federal courts for more than a quarter century with the declaration of a "truce." In other words, federal courts should pick one approach to statutory interpretation and stick with it. Meanwhile, a clear lesson of the empirical work on Congress's expectations for statutory interpretation is that we still do not know very much about this topic, and that what we have learned from these valuable studies is merely a snapshot in time.

The thesis of this Essay is that these two strands in the literature are in tension, and that the recent empirical work on Congress's expectations for statutory interpretation helps to highlight why giving stare decisis effect to interpretive methodology would be a bad idea.³ We begin by describing the two strands in the literature and explaining why giving stare decisis effect to interpretive methodology would be undesirable if Congress's meta-intent on

1. 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, 1846–61 (2010); see also 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 (2013).

2. See Gluck, *supra* note 1, at 1767 (claiming that "[t]hese debates are no longer useful," and that the failure to settle on a consistent and predictable approach to statutory interpretation "wastes court and litigant resources; deprives Congress of an incentive to coordinate its behavior with the Court's interpretive methods; retains rather than eliminates another source of intracourt disagreement; and makes the Court appear result-oriented, because the governing principles change from case to case").

3. This Essay evaluates the possibility of giving stare decisis effect to interpretive methodology in statutory interpretation. We do not address whether methodological stare decisis would be a good idea in other areas such as constitutional interpretation. Cf. Chad M. Oldfather, *Interpretive Methodology, Stare Decisis, and the Constitution* (July 22, 2013) (unpublished manuscript) (on file with authors). We believe, however, that some of our arguments would have relevance for that debate.

such questions matters.⁴ Specifically, even if Congress has a coherent set of collective expectations regarding statutory interpretation (which we question), our existing knowledge of Congress's expectations is insufficient for federal courts to settle on one consistent approach to statutory interpretation if their goal is to serve as a "faithful agent" of the legislature. Moreover, Congress has almost certainly changed its expectations over time, and it would therefore be highly problematic to apply today's interpretive regime to statutes passed at different times. In short, it would be impossible at this time for federal courts to tailor their interpretive methodologies to the expectations of different congresses, and it would be undemocratic from a faithful-agency perspective for federal courts to impose today's preferred interpretive regime (even assuming, contrary to reality, that one exists) on statutes enacted in different eras.⁵ Thus, under the traditional view of statutory interpretation,⁶ the application of stare decisis effect to interpretive methodology should be rejected.

We proceed to explain that many theories and doctrines of statutory interpretation are based on constitutional norms and other public values that arguably should be respected regardless of Congress's meta-intent. Constitutional norms and public values also change, and interpretive methodology should remain dynamic so that the law can be responsive to changing societal norms.

Finally, we argue that the value of extending stare decisis effect to interpretive methodology is unproven. Although treating prior methodological decisions as binding precedent could in theory promote the policies underlying stare decisis (i.e., predictability, legitimacy, and efficiency), the same would be true of extending that doctrine to virtually any rules. Yet interpretive methodology is different from other rules of law in some significant ways, and freezing interpretive methodology into place would pose special and perhaps overwhelm-

4. By Congress's "meta-intent," we are referring to Congress's general intentions, expectations, or preferences regarding how its statutes are interpreted. Cf. Stephen F. Ross, *Statutory Interpretation as a Parasitic Endeavor*, 44 SAN DIEGO L. REV. 1027, 1036 (2007) (describing Congress's meta-intent as reflecting "an empirical claim about the general expectation of legislators"). We recognize that these concepts are subtly different, and it is not entirely clear which of them Gluck and Bressman have sought to capture, but these subtle differences are irrelevant for purposes of our analysis.

5. In this Essay, we take no position on whether it would be wise for Congress to impose a comprehensive regime for federal statutory interpretation. Cf. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002) (offering such a proposal).

6. See, e.g., John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 5 (2001) ("In our constitutional system, it is widely assumed that federal judges must act as Congress's faithful agents."); see also Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984) (claiming that as "honest agents of the political branches," courts "carry out decisions they do not make"). Although faithful-agent theory is widely accepted, we do not take a position in this Essay on the normative question of whether courts should necessarily follow this approach. It also bears noting that Gluck and Bressman question the viability of faithful-agent theory in the second installment of their project. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part II*, 66 STAN. L. REV. (forthcoming 2014). The tension we identify in this Essay would, of course, be most acute or problematic for someone who affirmatively embraces *both* faithful-agent theory *and* methodological stare decisis.

ing difficulties. We therefore conclude that federal courts should not extend stare decisis effect to methodological decisions without seriously grappling with these difficulties and demanding much stronger evidence that such a move would improve the operation of our legal system. Although we doubt that the application of stare decisis effect to interpretive methodology will ever be a good idea, we are certain that it is not a good idea today.

I. RECENT PROPOSALS TO GIVE STARE DECISIS EFFECT TO INTERPRETIVE METHODOLOGY

A prominent theme in recent scholarship on statutory interpretation is that the federal judiciary's current methodology is too complicated, inconsistent, and unpredictable. This is largely the case because federal courts do not treat interpretive methodology as a traditional form of "law," and federal judges are therefore permitted to use whichever interpretive methods they prefer to resolve each particular case. For example, a judge may examine the legislative history of a statute in case A, but decline to do so in case B. Similarly, a judge could utilize a textualist methodology in case X, an intentionalist methodology in case Y, and a purposive or dynamic approach in case Z. Not only are federal judges freely permitted to vacillate among competing approaches to statutory interpretation in different cases, but they are not generally expected to explain precisely why they have chosen to follow one approach rather than another in any particular case. Scholars have increasingly criticized this state of affairs and have offered proposals that would effectively require federal judges to follow a consistent and uniform method of statutory interpretation.⁷

In this regard, the Supreme Court has emphasized repeatedly in the substantive law context that "[s]tare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."⁸ Justice Brandeis famously embraced this policy "because in most matters it is more important that the applicable rule of law be settled than that it be settled right."⁹ Under the doctrine of stare decisis, the Court must adhere to its own precedent unless there is a "special justification" for departing from a previous decision, and lower courts must strictly follow the precedents of higher courts.¹⁰ Moreover, the conventional wisdom is that prior interpretations of statutes by federal courts are entitled to a "super-strong presumption of correctness," partly because Congress could amend a statute to override an erroneous or outdated judicial decision.¹¹ Despite wide-

7. See, e.g., Rosenkranz, *supra* note 5.

8. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (emphasis omitted).

9. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

10. See Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1864 n.3 (2008) (internal quotation marks omitted).

11. See William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988).

spread support for the doctrine of stare decisis on *substantive statutory issues*, federal courts generally do not give stare decisis effect to their *methodological decisions* in statutory interpretation cases.¹²

Several scholars have argued, however, that “the doctrine of stare decisis is tailor-made” to provide the consistency and predictability “that are notoriously lacking in statutory interpretation doctrine,”¹³ and they have therefore claimed that federal courts should give stare decisis effect to methodological decisions.¹⁴ Thus, Sydney Foster has argued that this course of action would provide the same benefits that are provided by the application of stare decisis to substantive decisions, and that giving stare decisis effect to interpretive methodology would serve a valuable coordinating function that is largely unnecessary in the substantive-law context.¹⁵ Accordingly, Foster claims that courts should give even stronger stare decisis effect to interpretive methodology than is provided to substantive decisions.¹⁶ Similarly, Professor Abbe Gluck has argued that “settling on a consistent approach is a worthy goal for statutory interpreters.”¹⁷ Based on her examination of the experiences of several states,¹⁸ Gluck claims that “judges *can* and *do* bind other judges’ methodological choices, in the same way they bind one another with respect to substantive preferences.”¹⁹ Both Foster and Gluck point out that the judiciary gives stare decisis effect to interpretive methodology in various other contexts, and they contend that rules of statutory interpretation should not be treated any differently.²⁰

One of the most fascinating aspects of Professor Gluck’s work on this topic is her observation that the legal status of interpretive methodology remains unresolved.²¹ She has focused on this question primarily in the context of the *Erie* problem and other situations where courts in one jurisdiction must interpret

12. See Foster, *supra* note 10, at 1866, 1872–84; Philip P. Frickey, *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1971, 1976 (2005) (noting that the Supreme Court’s use of one statutory interpretation theory rather than another in a particular case is not binding on the Supreme Court or even on lower courts in subsequent cases); Gluck, *supra* note 1, at 1765–66; Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 385–86 (2005).

13. Foster, *supra* note 10, at 1866.

14. See *infra* notes 15–20 and accompanying text; see also Jordan Wilder Connors, Note, *Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology*, 108 COLUM. L. REV. 681 (2008).

15. See Foster, *supra* note 10, at 1886–97.

16. See *id.* at 1867–69.

17. Gluck, *supra* note 1, at 1848; see also *id.* at 1846–61 (offering a normative defense of consistent approaches to statutory interpretation generally).

18. See *id.* at 1771–1811 (providing case studies of several states that have adopted “controlling interpretive frameworks” and given their methodological decisions stare decisis effect).

19. *Id.* at 1823.

20. See Foster, *supra* note 10, at 1900–01 (pointing out that certain rules of contract interpretation, evidence law, and constitutional interpretation are given stare decisis effect); Abbe R. Gluck, *Inter-systemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1968–90 (2011) (providing various examples of legal methodologies that are treated as “more lawlike than statutory interpretation” for purposes of the *Erie* doctrine).

21. See Gluck, *supra* note 1, at 1750.

statutes adopted by the legislature of another jurisdiction.²² The case law on these questions is unsettled, but the few scholars who have begun to address this question appear to agree that interpretive methodology is a form of “law,” and that the traditional hierarchy of legal sources can be used to identify a canon’s legal status.²³ The traditional hierarchy of legal sources maintains, in turn, that binding law in a constitutional democracy must stem from the Constitution, validly enacted statutes, or the common law (in that order of authority)—and that there is not a viable fourth alternative. Gluck and Foster therefore seem to assume that interpretive methodology should generally be viewed as a judicially created form of common law, and they argue that it should be given *stare decisis* effect just like most other common law judicial decisions.²⁴

II. RECENT EMPIRICAL WORK ON CONGRESS’S META-INTENT

Alongside these arguments for methodological *stare decisis*, scholars have begun to explore empirically whether the judiciary’s traditional tools for statutory interpretation are consistent with Congress’s preferred interpretive methodology.²⁵ In the latest and arguably most comprehensive study, Gluck teamed with Professor Lisa Bressman to conduct detailed interviews with 137 congressional counsels—the staff members who advise federal legislators on draft

22. See generally Gluck, *supra* note 20.

23. See, e.g., Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 444–47 & n.23 (2012) (recognizing that interpretive techniques may be required or prohibited by the Constitution, but concluding that the vast majority of interpretive choices “are essentially matters of common law in the sense that they could be changed by either courts or legislatures”); Rosenkranz, *supra* note 5, at 2092–2140 (developing an elaborate framework for assessing the constitutional status of interpretive techniques, but concluding that the vast majority of interpretive principles are judicially-created common law that could permissibly be displaced by a duly-enacted statute); see also *infra* note 24.

24. See Foster, *supra* note 10, at 1868–69 (claiming that “statutory interpretation doctrines can be classified according to whether they are derived from a statute, the common law, or the Constitution,” and arguing that the Court should give doctrines of statutory interpretation stronger *stare decisis* effect than the substantive decisions emanating from each of the respective legal sources); Gluck, *supra* note 20, at 1907, 1912–17 (arguing that “as a matter of both doctrine and theory, there are compelling reasons to reconceptualize federal statutory interpretation methodology as law,” and drawing an analogy to “federal common law”); Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 775–77 (2013) (exploring the possibility that interpretive methodology is a form of judge-made common law); Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 344 (2010) (claiming that canons of statutory interpretation “are nothing more than common law”). We take no position here on whether statutory interpretation should be understood as a form of common law.

Unlike Foster, who would accord “extra-strong” precedential weight to statutory interpretation methodology, Foster, *supra* note 10, at 1868, Gluck suggests that methodological rules “might occupy a place on that spectrum of law, perhaps meriting lower precedential weight in order to give judges the ability to evolve interpretive doctrine over time and respond to changes in the legislative process.” Gluck, *supra* note 20, at 1917–18.

25. See, e.g., Gluck & Bressman, *supra* note 1; Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627 (2002); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002).

legislation. Gluck and Bressman spoke with congressional counsels from both houses, including a near-equal balance of Democrats and Republicans.²⁶ In the course of their survey, Gluck and Bressman pursued two primary lines of inquiry. First, they sought to determine how much congressional counsels know about the tools federal judges use to interpret statutes. Second, they asked congressional counsels what interpretive approaches they use regularly when drafting and interpreting federal legislation. By comparing judicial and congressional interpretive approaches in this manner, the authors endeavored to discover the extent to which congressional counsels and judges agree on the proper methodology for interpreting federal legislation.

Perhaps it should come as no surprise that the Gluck–Bressman survey offers a mixed account of the congruence between judicial and congressional statutory interpretation. On some issues, Gluck and Bressman found considerable convergence. For example, among the congressional counsels surveyed, 82% were aware of the *Chevron* doctrine, which requires courts to defer to federal agencies' reasonable interpretations of ambiguous statutes in a variety of settings.²⁷ Most respondents reported that they used *Chevron* routinely in statutory interpretation.²⁸ Some judicial canons of statutory interpretation were unfamiliar to most congressional counsels, yet the canons closely matched the respondents' own preferred approach to statutory interpretation. For example, although most respondents “did not know the canon [of constitutional avoidance] by name, 69% . . . said that that their expectations about how the courts would rule on the constitutionality of statutes played a significant role in the drafting process.”²⁹ These and other findings of the Gluck–Bressman study suggest that some traditional judicial approaches to statutory interpretation track, or at least closely approximate, the methodological choices that congressional counsels favor in statutory interpretation.

In other areas, however, Gluck and Bressman uncovered marked divergences between judicial and congressional statutory interpretation. For example, the rule of lenity, which provides that ambiguous criminal statutes should be interpreted narrowly in favor of the defendant, was only known by name by 35% of the sixty-five respondents who had participated in drafting criminal legislation.³⁰ Respondents indicated that some other canons such as the rule against superfluities were familiar but “rarely” or “only sometimes” apply.³¹ Perhaps most striking, and in direct conflict with the views of some judges and legal scholars, congressional counsels from both parties overwhelmingly emphasized the importance of legislative history in statutory interpretation. Indeed,

26. Gluck & Bressman, *supra* note 1, at 905–06, 920–21.

27. *Id.* at 994; *see also* *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984) (articulating the eponymous doctrine of judicial deference).

28. Gluck & Bressman, *supra* note 1, at 994.

29. *Id.* at 948.

30. *Id.* at 946.

31. *Id.* at 934.

respondents rated legislative history as the most important interpretive tool other than the text itself, trumping judicial canons of statutory interpretation.³² To the extent that the views of congressional counsels may be understood to reflect Congress's preferred interpretive method, these findings of the Gluck–Bressman study may offer important lessons for judges who aspire to serve as faithful agents of Congress in statutory interpretation.

Yet despite its significant informational value and novel insights, the Gluck–Bressman study is unlikely to constitute the last word on congressional statutory interpretation. Framed as a guide to “congressional drafting” practice, the study’s value is compromised by the fact that it focuses primarily on congressional counsels, who (by the authors’ own admission) do not ordinarily take the lead in drafting statutory text.³³ This work is typically performed by attorneys in the nonpartisan Office of Legislative Counsel (OLC), and they do not appear to employ the same interpretive methodology as congressional counsel.³⁴ On the contrary, Gluck and Bressman emphasize the disconnect between “the professional, non-partisan drafters in the offices of Legislative Counsel who focus on text and court cases,” and “the other staff—and elected members—who create the policy and make the deals, but often do not draft text and are not as focused on the courts.”³⁵ To be sure, congressional counsels do participate in the drafting of statutory text, and they generally take the lead in composing legislative history.³⁶ Even when congressional counsels do not serve as the lead authors of legislation, they often shape the language of draft legislation as it moves from the drafting table through subsequent stages of the legislative process. Without doubt, congressional counsels’ interpretations of draft legislation also inform the voting decisions of the legislators whom they serve. All the same, once we acknowledge the polyphonic character of the legislative process, which includes not only the voices of congressional counsels, but also those of congressional committees, individual legislators (who may rely more on committee reports and “conceptual” documents than statutory text³⁷), nonpartisan OLC

32. *Id.* at 975.

33. *Id.* at 968.

34. *Id.*; see also Gluck & Bressman, *supra* note 6 (manuscript at 6–24) (describing “the immense variety and fragmentation of types of staff involved in the legislative process and their different goals and drafting practices,” as well as “the common disconnect between staffers who draft statutory text and staffers who craft the policy that underlies it (and the related disconnect between text and legislative history drafters)”).

35. Gluck & Bressman, *supra* note 6 (manuscript at 10). Interestingly, however, Gluck and Bressman also found that contrary to the expectations of other staffers and some scholars, “the Legislative Counsels [they] interviewed had no greater knowledge of most of the canons than the other respondents.” *Id.* at 17. Aside from their limited knowledge, Bressman and Gluck also observed that Legislative Counsels “do[] not appear to have the reach, the convening power or even the consistency of practice, to coordinate Congress’s drafting process.” *Id.* at 18.

36. Gluck & Bressman, *supra* note 1, at 968. It should perhaps come as no surprise, therefore, that congressional counsel overwhelmingly consider legislative history to be the most important tool in statutory interpretation. *Id.* at 975.

37. *Id.* at 968–69.

drafters, and many others, it is difficult to escape the feeling that the perennial “search for an author” in debates over statutory interpretation cannot be so easily resolved.³⁸ Indeed, there is compelling evidence that members of Congress sometimes deliberately inject ambiguity into statutes to facilitate compromise and enable legislators with sharply divergent views to plausibly declare victory.³⁹ Thus, although the Gluck–Bressman study is deeply illuminating, its limited scope and the diverse responses of congressional counsels simply underscore the confounding complexity of efforts to pinpoint Congress’s collective preferences for statutory interpretation.⁴⁰

This is not to suggest that there is little to be gained from empirical work on congressional drafting practices. The empirical turn in statutory interpretation scholarship is a welcome development to the extent that it has the potential to advance theories about the legislative process beyond mere intuition and conjecture into the realm of verifiable hypotheses. The Gluck–Bressman study illustrates the rich insights that may be gleaned from engagement with the real world of congressional practice. The study’s findings are particularly important because they provide a new point of entry into long-standing debates over Congress’s expectations for judicial statutory interpretation. For example, the Gluck–Bressman study lends ballast to some controversial judicial techniques that are based on Congress’s alleged meta-intent, including the *Chevron* and *Mead* doctrines from federal administrative law.⁴¹ If judges and executive-branch officers seek to serve as faithful agents of Congress, they cannot reasonably ignore such empirical findings—even if they share our doubts about whether Congress has a coherent, unitary meta-intent that can be fully captured by such studies.⁴² As future empirical studies build upon the pioneering work of Professors Gluck and Bressman, the complex dynamics of congressional statutory interpretation are likely to come into sharper focus over time.

III. PROBLEMS WITH STARE DECISIS FROM THE PERSPECTIVE OF FAITHFUL-AGENCY THEORY

The rise of empirical legal scholarship poses a problem for advocates of methodological stare decisis because it unsettles many of the assumptions on

38. See Gluck & Bressman, *supra* note 6 (manuscript at 27–28) (contrasting the divergent approaches and perspectives of different participants within the legislative drafting process).

39. See Grundfest & Pritchard, *supra* note 25, at 628–33 (providing an example from the Private Securities Litigation Reform Act of 1995).

40. Scholars have, of course, previously identified similar problems with the notion that Congress has a single, collective intent on many substantive issues that could be reliably ascertained by the judiciary. See, e.g., Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

41. See Gluck & Bressman, *supra* note 1, at 906–07, 995–1003.

42. Cf. Lisa Schultz Bressman, Essay, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2014 (2011) (arguing that by ignoring evidence of congressional interpretive practices, critics of the *Chevron* doctrine have given themselves “license to disregard the role of congressional delegation in evaluating how to allocate interpretive authority between courts and agencies”).

which their arguments may be thought to rest. The leading theories of statutory interpretation tend to accept the view that federal judges should ordinarily serve as faithful agents of Congress when interpreting federal legislation.⁴³ Under faithful-agency models of statutory interpretation, the argument for methodological *stare decisis* is strongest if Congress's meta-intent is either static and readily ascertainable, or dynamic but predictably responsive to judicial guidance. As the Gluck–Bressman study demonstrates, however, the real world of congressional practice does not conform to either of these ideal models. As one might expect, Congress's preferences regarding statutory interpretation do appear to evolve appreciably over time. But these preferences are not consistently responsive to judicial nudging. Thus, attempts to use *stare decisis* to lock in a general interpretive regime for federal legislation are likely to be counterproductive from a faithful-agency perspective.

Consider first the proposition that Congress's meta-intent is static and readily ascertainable. We have alluded already to the challenges associated with efforts to ascertain a collective legislative intent for interpretive methodology, given the multiplicity of participants and the absence of a uniform process for legislative drafting.⁴⁴ But even if we accept the assumption that the survey responses of congressional counsels illuminate Congress's collective intent, other difficulties remain. For example, what should faithful-agent judges do if congressional counsels disagree about the value of particular interpretive tools, as the Gluck–Bressman study suggests is nearly always the case? Should they accept the views of a bare majority of congressional counsels (51%) as an authoritative expression of Congress's collective meta-intent?⁴⁵ Or should they apply *stare decisis* only to interpretive methods that are supported by an overwhelming supermajority of congressional counsels? Might judges represent Congress more faithfully if they employ an eclectic approach that takes into account all of the diverse methodological approaches employed by congressional counsels? Or would courts best represent the diverse constituencies within Congress if individual judges and justices remain free to follow their own diverse methodological preferences? These questions do not yield straight-

43. See *supra* notes 4–6 and accompanying text; see also Foster, *supra* note 10, at 1888–89 (proposing methodological *stare decisis* as a response to coordination problems between Congress and the courts); Gluck & Bressman, *supra* note 1, at 913 (observing that the two leading schools of statutory interpretation, “purposivism and textualism, both claim consistency with a ‘faithful-agent’ vision of the judicial role”). As noted above, Gluck and Bressman question faithful-agency approaches to statutory interpretation on various grounds in the second installment of their empirical study. See Gluck & Bressman, *supra* note 6 (manuscript at 7).

44. See Nourse & Schacter, *supra* note 25, at 583 (“Our responses indicate quite strongly that there is no uniform process of legislative drafting followed in all cases. . . . [C]ourts and commentators should treat simple factual generalizations about congressional drafting with greater skepticism.”); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 924 (2003) (“In the United States . . . there is no centralized drafting body The drafters of legislation are multiple and uncoordinated.”).

45. See Gluck & Bressman, *supra* note 1, at 938 (“More than 50% of our respondents said that dictionaries are never or rarely used when drafting.”).

forward answers because the concept of collective congressional intent is not straightforward. As long as members of Congress and their staff are unable to reach consensus on a single favored regime for statutory interpretation, reasonable judges will continue to debate what it means for the courts to serve as Congress's faithful agent. It is therefore important to keep in mind that the Gluck–Bressman study does not establish the existence of a single, widely accepted interpretive regime within Congress. Nor is there any other evidence that a uniform interpretive regime of this nature exists.

Even if courts could readily ascertain Congress's preferred approach to statutory interpretation, there is little evidence that Congress's preferences are stable over time. If Congress's preferences were relatively static, then faithful-agency theory would arguably support using stare decisis to bind the courts to Congress's meta-intent prospectively, while also providing a consistent, predictable interpretive baseline for the executive branch and the public. Although the Gluck–Bressman study offers a detailed snapshot of congressional counsel preferences during a narrow five-month window in 2011–2012, it hazards no claims about the intertemporal dynamism of congressional statutory interpretation. Even so, the Gluck–Bressman study offers significant grounds for skepticism about the possibility that Congress's meta-intent might be sufficiently static to serve as the basis for a regime of methodological stare decisis. Many congressional counsels reported that they were aware of developments in judicial practice and had adjusted their own expectations in the drafting process accordingly. For example, substantial percentages of congressional counsel were familiar with and regularly used judicial canons of statutory interpretation such as the federalism and preemption canons—interpretive conventions that courts have developed within the previous three decades.⁴⁶ We strongly suspect that the high level of support that congressional counsels expressed for *Chevron* deference is also a relatively recent phenomenon. But even if judicial practice has not changed meaningfully over time,⁴⁷ it would be surprising if congressional practice has remained constant. Projecting into the future, Gluck and Bressman observe that “[c]anons that are unknown today may [become familiar] canons that affect congressional drafting ten years from now, if legal education has something to do with it.”⁴⁸ With continuous turnover in the membership of Congress and congressional staff, one would hardly be surprised to find that Congress's methodology for legislative drafting has shifted, and will continue to shift, measurably over time.

46. See *id.* at 942–44 (discussing federalism and preemption canons).

47. Studies suggest that judicial approaches to statutory interpretation have evolved considerably over time. See James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 5 (2005) (finding that “the [Supreme] Court’s reliance on both language canons and substantive canons in its majority opinions [between 1969 and 2003] has virtually doubled from the Burger to the Rehnquist eras, even as the Court’s reliance on legislative history has steadily declined” (footnotes omitted)).

48. Gluck & Bressman, *supra* note 1, at 1022.

At what point in time should courts, as faithful agents, set statutory interpretation methodology in the cement of methodological *stare decisis*? Applying *stare decisis* at any particular moment has the potential to place judicial practice in tension with the drafting practices of past and future Congresses. This problem of dynamic congressional preferences is analogous to Derek Parfit's allegory of a young Russian nobleman who declares his intention "to give [his] land to the peasants."⁴⁹ Concerned that the fire of his socialist ideals might burn less brightly later in life, Parfit's Russian nobleman:

signs a legal document, which will automatically give away the land, and which can be revoked only with his wife's consent. He then says to his wife, "Promise me that, if I ever change my mind, and ask you to revoke this document, you will not consent." He adds, "I regard my ideals as essential to me. If I lose these ideals, I want you to think that I cease to exist. I want you to regard your husband then, not as me, the man who asks you for this promise, but only as a corrupted later self. Promise me that you would not do what he asks."⁵⁰

If the wife makes this promise, what should she do if her husband later changes his mind and seeks her consent to revoke the document? Should the wife honor her promise? Or should she defer to her husband's present intentions and revoke the document?

Some might argue that the Russian nobleman's wife ought to keep her promise to the youthful husband. But this view would offend the principle, enshrined in agency law, that "the person to whom we are committed can always release us."⁵¹ Indeed, as Deborah DeMott has observed, the fiduciary duties that the Russian nobleman's wife, as agent, owes to her husband would require her to act always in a manner that is "consistent with her understanding of her principal's present statement of intentions. Although his preferences have changed, the principal's identity [is the same,] and his wife is the Russian nobleman's representative."⁵² By the same token, courts that seek to serve as faithful agents of Congress may not allow *stare decisis* to hinder them from applying Congress's evolving interpretive preferences to contemporaneous legislation—even if this may undermine the consistency and predictability of federal statutory interpretation to some extent.⁵³

One possible response to the Russian nobleman problem would be for courts to give *stare decisis* effect to the interpretive methodology that Congress

49. DEREK PARFIT, *REASONS AND PERSONS* 327 (1984).

50. *Id.*

51. *Id.* at 328.

52. Deborah A. DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* (Andrew S. Gold & Paul B. Miller eds.) (forthcoming 2014) (manuscript at 25).

53. Whether concerns for faithful agency are trumped by other public norms is a separate question, which we will take up in Part IV.

favored *at the time a particular statute was enacted*. After all, each two-year term brings a new Congress, which may not share the statutory interpretation preferences of its predecessor when it enacts new legislation. This approach, however, would require a familiarity with Congress's dynamic preferences that far exceeds the scope of current empirical knowledge and lies well outside the scope of judicial competence. Even if scholars could agree on the best empirical methodology for identifying Congress's preferred approach to statutory interpretation, constant monitoring would be required to document the state of these preferences at the time Congress enacts new legislation. These difficulties would only be compounded by the fact that most major legislation is amended over time by different Congresses, and it would be virtually impossible for courts to track the divergent interpretive preferences of different legislative bodies when they interpret different provisions of the same statute. Even if it were possible for the judiciary to obtain the requisite information about the meta-intent of the relevant Congress, such a fine-grained approach to methodological stare decisis would likely render the doctrine of limited practical value in advancing predictability, efficiency, and stability across time. It therefore seems impossible to satisfy the goals of both faithful-agency theory and methodological stare decisis simultaneously.

Another response to the problem of Congress's dynamic preferences is the idea that courts need not adhere slavishly to Congress's present preferences because their own methodological choices may be expected to shape Congress's drafting practices prospectively. If Congress uses the judiciary's interpretive methodology as a default backstop for its own legislative drafting, a strong argument can be made from principles of legislative supremacy that judges should use stare decisis to make their interpretive methodology as clear and consistent as possible. In theory, this approach could make it easier for Congress to anticipate how courts will respond to its drafting choices, facilitating a more harmonious working relationship between Congress and the courts.⁵⁴

Although this argument for methodological stare decisis might be appealing in the abstract, the empirical record suggests that judicial decisions do not consistently produce "feedback loops" that facilitate cooperative dialogue between Congress and the courts. According to Gluck and Bressman, congressional counsels are wholly ignorant or only dimly aware of a variety of important canons. For example, Gluck and Bressman found almost no evidence of a feedback loop for clear statement rules such as the presumption against congressional abrogation of state sovereign immunity.⁵⁵ In fact, "only six

54. See Foster, *supra* note 10, at 1887 ("[B]y clarifying the background rules against which Congress is legislating, interpretive regimes aid in effectuating congressional intent."); cf. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 277 (1994) ("As an agent of the legislature, the Court does its job best when it comes up with a transparent interpretive regime—a coherent and clear set of textual and substantive canons—for that allows legislators to coordinate their bargaining activities and predict the application of their statutes most easily.").

55. Gluck & Bressman, *supra* note 1, at 945.

respondents (4% of 137)” were able to identify correctly any clear statement rule applied by courts.⁵⁶ Perhaps even more startling, only a small minority of respondents who participate in drafting criminal legislation were familiar with the rule of lenity, one the oldest judicial canons of statutory interpretation.⁵⁷ Such findings suggest that judicial canons of statutory interpretation—even those that have been employed for centuries—do not necessarily represent a common baseline for judicial and congressional statutory interpretation. The resulting fissure between Congress and the courts becomes, in Bill Eskridge’s words, “a serious indictment” of judicial practice from a faithful-agency perspective.⁵⁸

Needless to say, the agency problems associated with untethered judicial interpretive methodology are even more troubling in contexts where the courts employ interpretive canons that Congress affirmatively rejects. Gluck and Bressman characterize the rule against superfluities, the presumption of consistent usage, and reliance on dictionary definitions as “rejected canons” because a majority of their survey respondents reportedly did not use these interpretive methodologies regularly when drafting statutes.⁵⁹ Given how rarely Congress overrides judicial statutory interpretation,⁶⁰ the continued use of these rejected canons raises particularly serious democratic-legitimacy concerns.

Advocates of methodological *stare decisis* might respond that these apparent agency problems do not negate the appeal of methodological *stare decisis*; they simply remind us that courts should take care to use interpretive tools that are consistent with congressional preferences. Yet this response fails to comprehend the depth of the problem. We cannot go back in time to recover the meta-intent of past congresses whose work is still the primary focus of today’s interpretive litigation. Moreover, even after the Gluck–Bressman study, it is remarkable how little we know about current congressional preferences for statutory interpretation. Further enlightenment about congressional preferences is likely to arrive only gradually as the empirical turn in statutory interpretation scholarship gains momentum. Yet future empirical studies will require continuous reassessment in light of Congress’s evolving attitudes and practices. And courts as faithful agents likewise will have to adjust their methodologies over time in response to developments in Congress. Perhaps most troubling, the Gluck–Bressman study suggests that Congress is “uninterested in coordinating with courts,” and is in any case currently “too fragmented” in its approach to statutory interpretation “to do so without some radical changes.”⁶¹ This shifting terrain is hardly promising ground on which to construct a doctrine of method-

56. *Id.*

57. See *supra* note 30 and accompanying text.

58. William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 538 (2013) (book review).

59. Gluck & Bressman, *supra* note 1, at 933–40.

60. *Id.* at 912 n.14 (citing empirical studies).

61. Gluck & Bressman, *supra* note 6 (manuscript at 10).

ological stare decisis.

IV. PROBLEMS WITH STARE DECISIS FROM THE PERSPECTIVE OF OTHER PUBLIC NORMS

The difficulties associated with methodological stare decisis are not merely products of faithful-agency theory. Although Bressman and Gluck focus primarily on Congress's expectations regarding statutory interpretation, they correctly recognize that some canons of statutory interpretation are best justified on normative grounds that do not depend upon (and may, in fact, contradict) Congress's meta-intent. This is true of relatively specific canons of statutory interpretation, as well as foundational theories. To the extent that these methods of judicial statutory interpretation are based on constitutional norms or other public values, courts should allow their methods to change once it is apparent that the public values upon which they rest have changed, and courts should generally retain the flexibility to decide which interpretive methodology will best promote the relevant constitutional norms and public values in any particular case.

Federal courts frequently employ substantive canons of statutory interpretation to promote constitutional norms and other public values that tend to be underenforced for institutional reasons during the process of judicial review. These canons do not derive their authority from congressional intent. For example, the rule of lenity is widely understood to promote constitutional norms of fair notice and nondelegation, which may well be justified even if a tough-on-crime legislature rejects this particular canon.⁶² Similarly, the avoidance canon, which provides that courts should interpret statutes to avoid serious constitutional doubts when fairly possible, is widely understood to prevent Congress from pushing the constitutional envelope unless legislators have carefully considered the problem at issue, in addition to preserving the judiciary's political capital. Although this canon is frequently defended based on assumptions about Congress's intent, its validity is unlikely to depend on what any particular Congress thinks about the matter.⁶³ More broadly, some commentators have argued that judicial reliance on legislative history to ascertain Congress's intent is unconstitutional,⁶⁴ whereas others have argued that it would raise serious constitutional difficulties for courts to refuse to consider legislative history given a constitutional structure that is designed to promote reasoned delibera-

62. See Gluck & Bressman, *supra* note 1, at 956–57 (recognizing that “drafter awareness actually relates little to the purpose of the rule of lenity,” and that “the rule serves as a constitutional backstop and is used by courts to interpret statutes in the light of concerns about due process and notice”).

63. See *id.* at 958 (“The constitutional avoidance rule seems of the same order as lenity, in terms of its actual dependence on drafter awareness.”).

64. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 386–88 (2012) (claiming that using legislative history to ascertain what the legislature intended “is not just wrong; it violates constitutional requirements of nondelegability, bicameralism, presidential participation, and the supremacy of judicial interpretation in deciding the case presented”).

tion by elected representatives.⁶⁵ If either of these arguments is correct, then Congress's expectations regarding the judiciary's use of legislative history are largely irrelevant. Finally, the foundational theories of statutory interpretation, which include textualism, intentionalism, and purposivism, are all thought to promote particular visions of the Constitution.⁶⁶ Indeed, Justice Scalia has argued that central aspects of his version of textualism, which seeks to ascertain what the law as enacted meant, are constitutionally required.⁶⁷ If he is correct, then it is irrelevant that "no one [in Congress] uses a freaking dictionary,"⁶⁸ or that members are often unfamiliar with the statutory text.⁶⁹

The prevailing views of the best methods of statutory interpretation have changed over time in response to evolving views of the Constitution and other public values. The conventional wisdom is that early American courts purported to follow the legislature's intent, but they generally eschewed dogmatic reliance on grand theories in favor of a relatively eclectic approach.⁷⁰ It is also widely accepted that federal courts generally followed the tenets of legal process theory from the time of the New Deal until approximately the late 1960s.⁷¹ In more recent years, we have witnessed the rise (and alleged fall) of the new textualism in statutory interpretation,⁷² and the alleged emergence of a "new purposivism."⁷³ In addition, the federal judiciary has responded to shifting constitutional norms and other public values over time by recognizing new substantive canons,⁷⁴ or by deploying old substantive canons in new ways,⁷⁵

65. See, e.g., Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1 (1999); Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242 (1998).

66. See Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47, 52 (2010), http://yalelawjournal.org/2010/7/30/leib_serota.html (recognizing that "the conventional schools of statutory interpretation are all based on legitimate constitutional values and highlight different normative concerns regarding the relationship between the judiciary, the legislature, and society").

67. See SCALIA & GARNER, *supra* note 64, at 345 ("[T]he very nature of the constitution requires the judges to follow the letter of the law." (emphasis omitted) (quoting BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS*, bk. VI, at 75 (Thomas Nugent trans., Hafner Publ'g Co. 1949) (1748))); *id.* at 397–98 (claiming that "[t]he traditional view is that an enacted text is itself the law," and "that it 'demean[s] the constitutionally prescribed method of legislating to suppose that its elaborate apparatus for deliberation on, amending, and approving a text is just a way to create some evidence about the law, while the real source of legal rules is the mental processes of legislators'" (quoting *In re Sinclair*, 870 F.2d 1340, 1344 (7th Cir. 1989))).

68. Gluck & Bressman, *supra* note 1, at 938 (quoting a survey respondent).

69. See *id.*

70. See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 691 (4th ed. 2007).

71. See *id.* at 721–22.

72. See, e.g., Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006).

73. See, e.g., John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113.

74. See, e.g., Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

75. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 611–45 (1992) (describing and criticizing the emergence of super-strong clear statement rules during the Rehnquist Court); Cass R. Sunstein, *Avoiding Absurdity? A New Canon in Regulatory Law*, 32 ENV'T L. L. REP. 11,126 (2002).

based on prevailing understandings of the Constitution and the development of the modern regulatory state. The most comprehensive empirical study of the Supreme Court's use of canons of statutory interpretation explicitly recognized "the uncertain weight and cyclical fashionability of certain substantive canons."⁷⁶ Each of these shifts in judicial methodology was inspired by federal courts' evolving views of the Constitution and related public values.

If prevailing attitudes about the theories and doctrines of statutory interpretation have changed in the past based on evolving constitutional norms and public values, chances are that they will continue to evolve in unpredictable ways in the future. Indeed, one of the conclusions that Gluck and Bressman draw from their survey of congressional drafting practices is that federal courts have focused on the wrong constitutional norms and public values when developing methodologies for statutory interpretation. Given the lack of empirical support for faithful-agency theories of statutory interpretation, Gluck and Bressman suggest that courts should consider abandoning the search for congressional intent and instead focus on constructing a rule-of-law model that would be more compatible with the real-world dynamics of congressional and judicial practice. This model would focus on "facilitating systemic coordination, predictability or coherence," and seek to "pragmatically effectuate the broad goals of the statute rather than specific legislative understandings."⁷⁷ By establishing clear interpretive baselines, the theory goes, federal courts could promote consistency and predictability in statutory interpretation across all three branches of government.⁷⁸ Thus, Gluck and Bressman's recommendation for a rule-of-law approach to statutory interpretation perfectly illustrates how the legal community's evolving views of constitutional norms and other public values may lead to new approaches to statutory interpretation.⁷⁹

76. Brudney & Ditslear, *supra* note 47, at 111; *see also id.* at 106–07 (recognizing that "the Court does not thoroughly engage the major aspects of a new congressional regulatory scheme until a decade or more has passed following enactment," and "there is the risk that legislators who debate and approve that scheme simply cannot foresee how the Court's substantive canon priorities are likely to evolve in the longer term").

77. Gluck & Bressman, *supra* note 6 (manuscript at 5).

78. *Id.* (manuscript at 60) (arguing that a rule-of-law model may provide the "common language" that "is necessary for the branches to interact"). Gluck and Bressman concede that "current doctrine does not perform that function," and they caution that the model's potential cannot be realized without a good faith commitment from all three branches. *Id.* (manuscript at 36).

79. Aside from these general contours, it is not entirely clear what the rule-of-law model that Gluck and Bressman envision would entail. To the extent that this approach to statutory interpretation would include methodological stare decisis, several fundamental questions would need to be answered to give (dare we say) "substantive content" to the underlying theory. For example, *which rules* of statutory interpretation should prevail? And, *why* should *they* be treated as binding precedent? Surely, the answer to these questions cannot be solely a function of "first in time, first in right." In the absence of persuasive answers to these questions, the rule-of-law approach would essentially boil down to a call to have (interpretive) rules, for the sake of having (interpretive) rules. Moreover, any serious effort to give substantive content to the binding rules of a rule-of-law regime would likely reproduce the very same interpretive wars that have already been raging for the past quarter century. A rule-of-law approach therefore strikes us as a nonstarter as a foundational theory of statutory interpretation unless its

Constitutional norms and other public values also influence how judges decide particular statutory cases in a more direct manner. This is true of the rule-of-law model, which encourages judges to consider which interpretive methods will best promote cooperation among the three branches and advance other important public values. It is also true under pragmatic theories of statutory interpretation, which openly consider evolving public norms and contemporary policy considerations to help resolve statutory ambiguities.⁸⁰ The insights of hermeneutics suggest that even textualist approaches inevitably take public values into account because the interpreter must always apply her own interpretive horizon to the historical text under consideration.⁸¹

Reasonable minds may disagree about whether, or in what way, constitutional norms and other public values are relevant to judicial statutory interpretation. It is not our intention to resolve those debates here. Our point is simply that if public values are relevant to statutory interpretation, interpretive methodology should remain dynamic so that it can respond effectively to our society's evolving understanding of those values and their application to public institutions. Accordingly, it would be a serious mistake for courts to declare one approach to statutory interpretation—or one set of canons—as “the winner” and freeze that approach into place through the application of stare decisis.

V. THE UNPROVEN VALUE OF STARE DECISIS

The arguments for giving stare decisis effect to interpretive methodology are superficially appealing because the principles of statutory interpretation seem like judicially-created common law,⁸² and the policies underlying stare decisis would seemingly be served by extending the doctrine to this area.⁸³ In particular, if courts were to treat their methodological decisions as binding precedent in future cases, there could eventually be a single set of uniform rules of statutory interpretation for the federal courts. A single set of uniform rules would, in theory, promote consistency and help ensure that like cases were treated alike.

proponents can provide persuasive answers to these questions, as well as to the related difficulties that would arise from giving stare decisis effect to interpretive methodology, which are described in Part V of this Essay.

80. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

81. See, e.g., William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990).

82. See *supra* notes 21–24 and accompanying text.

83. Some scholars have questioned whether the application of stare decisis to interpretive methodology would provide the intended benefits. They point out that courts could manipulate most binding methodological frameworks to achieve their preferred outcomes, and that methodological stare decisis would therefore merely be likely to undermine judicial candor and drive disagreement underground. See Eskridge, *supra* note 58, at 540–51 (claiming that Scalia and Garner's proposed canonical approach would not eliminate unpredictability or judicial policymaking from statutory interpretation, and describing “the constant temptation to fudge”); Leib & Serota, *supra* note 66, at 58–62. While we find these criticisms persuasive, our argument in this Part is that a regime of methodological stare decisis would be misguided even (or perhaps especially) if it worked as intended.

Federal litigation would be more efficient and less expensive because litigants and judges would no longer need to debate the niceties of statutory interpretation. The prevailing consensus would also promote legitimacy (or its appearance) because courts would no longer debate the appropriate interpretive methods or send mixed signals about the proper approach for deciding statutory cases. Upon closer examination, however, the fact that extending stare decisis to statutory interpretation methodology would plausibly advance the doctrine's purposes is not particularly impressive. The advantages of stare decisis could be achieved, at least in the short run, by the adoption of virtually any set of plausible rules.⁸⁴ At the same time, interpretive methodology is different from substantive rules of law in several fundamental ways, and it would be severely problematic for federal courts to attempt to freeze interpretive rules into place by applying stare decisis. A persuasive case for methodological stare decisis would therefore need to attend to the differences between interpretive methodology and other legal rules, as well as to the negative consequences that would result from giving methodological decisions stare decisis effect.

While a complete discussion of the relevant differences between substantive rules of law and interpretive methodology would undoubtedly require a much longer article, a simple catalogue of some of the most fundamental differences should suffice for our purposes, particularly since the advocates of methodological stare decisis have not seriously grappled with any of the resulting difficulties. The most basic distinction that underlies our analysis is between what some scholars have identified as first-order, or primary, rules of legal conduct and second-order or third-order legal rules, which are “rules about rules” or “rules about rules about rules” respectively.⁸⁵ While 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). This distinction, like any attempt to capture the essential differences between substance and procedure, may be slippery at the margins. Nonetheless, it reflects a key difference between substantive rules and interpretive methodology that has important implications for the viability of a stare decisis regime.

84. We suspect that blatantly illegitimate rules for resolving statutory disputes would lack the stability necessary to provide a viable regime of binding precedent and that stare decisis is unnecessary to enforce principles on which there is already widespread consensus. Accordingly, the rules of statutory interpretation that were adopted pursuant to a regime of stare decisis would presumably need to be plausible candidates among the various competing options. *See* Oldfather, *supra* note 3, at 13 (“It is only where there is, or has been, some question as to the appropriateness—and thus acceptance—of a legal rule that precedent comes into play.”). There is no shortage of theories or canons of statutory interpretation that fall within those parameters.

85. For an illuminating discussion of this distinction, see Jean Hampton, *Democracy and the Rule of Law*, in *NOMOS XXXVI: THE RULE OF LAW* 13, 13–44 (Ian Shapiro ed., 1994).

How is interpretive methodology materially different from substantive rules? First, the 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. One reason the interpretive wars have been so intense is that the operative rules of statutory interpretation play an extremely important role in defining the scope of many substantive statutory provisions. Although substantive decisions involving first-order legal rules such as those involving the Second Amendment, Fourteenth Amendment, and Clean Air Act may have a major impact, they do not necessarily spill over into other areas of law. If courts were to give methodological decisions *stare decisis* effect in statutory interpretation cases, however, those decisions would control every subsequent statutory dispute.⁸⁶ Thus, for example, if the Supreme Court held that legislative history was henceforth off-limits, it would be off-limits in every subsequent case. Similarly, if the Court held that its decisions would henceforth be governed by the principles articulated in Judge Frank Easterbrook's scholarship,⁸⁷ such a decision would have profound implications for every statutory dispute. Accordingly, when a bare majority of the Michigan Supreme Court purports to establish textualism as the only valid method of interpreting statutes within the state,⁸⁸ it is a big deal—and a much larger power grab *vis-à-vis* the future court and the state legislature than when that court engages in judicial activism to make any particular substantive decision.

Second, interpretive 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

86. Cf. Oldfather, *supra* note 3, at 33–34 (claiming that the application of *stare decisis* to methodological decisions could not be contained within workable bounds because all cases of statutory interpretation or constitutional interpretation share the relevant similarities). Although it is possible to imagine an approach in which courts would apply *stare decisis* more narrowly—for example, to foster methodological uniformity for a single statute or a single field of law—this would only lessen our concerns. See Gluck & Bressman, *supra* note 6 (manuscript at 70) (identifying a movement toward tailoring interpretive doctrine in various ways, and claiming that “these individual moves” may be “part of a trend toward a set of even more tailored interpretive principles organized around subject matters or individual statutory schemes”). This approach would not eliminate the spillover/heightened stakes problem, and all of the remaining difficulties that are described below would remain. Accordingly, while we are not opposed to the idea of tailoring interpretive doctrine toward particular subjects or statutory schemes, we are not persuaded that the relevant interpretive techniques should necessarily be given *stare decisis* effect. Indeed, as we explained above, when the rules become more varied, complex, and nuanced, the benefits that could be derived from a regime of methodological *stare decisis* are severely diminished. Cf. *supra* text accompanying notes 53–54. This is illustrated by the Court's deference doctrine in administrative law, which is not applied in a remotely consistent fashion in practice. See generally William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008).

87. See Rosenkranz, *supra* note 5, at 2087 (providing this example).

88. See Gluck, *supra* note 1, at 1803–11 (describing the recent textualist “revolution” in Michigan).

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. We therefore agree with Bill Eskridge and Connor Raso that “statutory interpretation methodology does not seem susceptible to the rule-like approach of stare decisis” because it is fundamentally “a web of considerations with different and varying weights rather than a set of hierarchical rules.”⁸⁹ We also share their suspicion that federal courts will not let methodological constraints lead them into making unreasonable legal or policy decisions, and that this creates a need for continuing flexibility in deciding how to decide statutory cases.⁹⁰

Third, methodological decisions are frequently intertwined with a judge’s most fundamental beliefs and commitments about the rule of law and democracy,⁹¹ and the application of stare decisis to interpretive methodology would in principle require judges to make what they view as unconscionable decisions. Once again, it 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. Nor would we blame Justice Scalia for his principled resistance, even if we might prefer Justice Breyer’s purposivism to Justice Scalia’s textualism.

Fourth, methodological decisions do not generally implicate reliance interests as strongly or directly as substantive legal decisions. Partly because most rules would provide the predictability, efficiency, stability, and perceived legitimacy that are promoted by stare decisis, the strength of the doctrine frequently

89. 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).

90. See *id.* at 1815–17 (claiming that proposals to establish a uniform set of binding interpretive rules are “unlikely to succeed” because norms necessarily play an important role in statutory interpretation).

91. See, e.g., Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1686–87 (1988) (claiming that “[a]ny theory of statutory interpretation is at base a theory about constitutional law,” which “must at the very least assume a set of legitimate institutional roles and legitimate institutional procedures that inform interpretation”); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 593–94 (1995).

depends in practice upon the degree of reliance that has been engendered, or will be promoted, by a precedent. While reliance interests are particularly strong when it comes to rules of property, contracts, and other means of facilitating private transactions, the legitimate reliance interests underlying most principles of statutory interpretation are relatively weak or nonexistent. For starters, federal courts have never given *stare decisis* effect to interpretive methodology. Moreover, the empirical evidence suggests that Congress frequently puts interpretive considerations on the back burner to get statutes enacted.⁹² Indeed, most people (including many judges) do not care very much about statutory interpretation methodology, and they place much greater value on substance than procedure.⁹³ To the extent that private citizens or public officials could legitimately rely on judicial consideration of certain information, such as the plain meaning of the text or the reasoned views of administrative agencies, those expectations tend to be reflected in existing legal doctrine. This is not to say that courts never upset the legitimate reliance interests of lawmakers or citizens. For example, the Gluck–Bressman study suggests that the Supreme Court’s retroactive application of clear statement rules and textualists’ disdain for legislative history may be particularly problematic from this perspective.⁹⁴ The point is a relative one; from the standpoint of reliance interests, the case for applying *stare decisis* is generally much stronger for substantive rules of law than for principles of statutory construction.

Finally, the flexibility that is provided by the current approach to statutory interpretation, and the broad range of arguments that are available to litigants and judges, provide affirmative benefits that improve the resolution of particular cases and make our legal system more responsive. Ethan Leib and Michael Serota have argued persuasively that the current menu of interpretive approaches “induces deliberative and transparent contestation” by forcing judges to “work hard to find compromises, render the strongest argument utilizing all credible sources available, and take seriously all types of arguments to achieve the best result within the range of permissible interpretations.”⁹⁵ Leib and Serota recognize that the broader range of relevant considerations that are brought into play by different theoretical perspectives “allows our legal system to absorb a mix of the values underlying various interpretive approaches that might not otherwise be produced in a unified interpretive regime.”⁹⁶ They predict that the adoption of a uniform method of statutory interpretation would drive disagreement underground, and they point out that there is no single approach that would be appropriate for the full range of legislative products, which includes common law statutes, criminal statutes, super-statutes, omnibus legislation, successful ballot initiatives, public-interested legislation, and narrow

92. See Nourse & Schacter, *supra* note 25, at 615; Raso & Eskridge, *supra* note 89, at 1809.

93. See Raso & Eskridge, *supra* note 89, at 1810.

94. See Gluck & Bressman, *supra* note 1, at 945, 975.

95. Leib & Serota, *supra* note 66, at 49.

96. *Id.*

rent-seeking deals.⁹⁷ For many of the same reasons, we believe that the existing approach to statutory interpretation affirmatively promotes republican democracy and a normatively attractive vision of the rule of law.⁹⁸ Adopting any single binding approach would therefore be fundamentally misguided.

We certainly do not intend for this brief catalogue of the relevant differences between interpretive methodology and substantive rules of law to be the last word on the subject. Nor do we mean to suggest that judicial decisions addressing interpretive methodology will never merit stare decisis effect. There may be great value, for example, in using stare decisis to protect the reliance interests that are generated by the core aspects of third-order legal rules such as *Chevron* and *Mead*—rules which allocate interpretive authority between courts and agencies.⁹⁹ Our point is simply that applying stare decisis to interpretive methodology writ large would raise serious and potentially overwhelming difficulties that cannot be lightly disregarded or ignored. Federal courts should therefore not extend stare decisis effect to methodological decisions without seriously grappling with these difficulties and demanding much stronger evidence that such a move would improve the operation of our legal system.

CONCLUSION

Recent calls for methodological stare decisis have a superficially seductive appeal. Proponents claim that giving stare decisis effect to interpretive methodology would advance rule-of-law values by enhancing the consistency and predictability of federal adjudication; it would advance democratic values by strengthening dialogue between Congress and the courts; and it would bolster federal courts' legitimacy by putting an end to the interpretation wars that have divided federal judges, invited academic criticism, and undermined public confidence in the federal courts.

In this Essay, we have argued that federal courts should resist the siren song of methodological stare decisis and allow the interpretation wars to continue. Although some level of consistency and predictability may be desirable in statutory interpretation, and we welcome recent efforts to clarify Congress's drafting practices, applying methodological stare decisis would likely do more harm than good. In particular, we are skeptical that the recent empirical turn in legal scholarship will resolve debates over Congress's intentions, expectations, or preferences as the "faithful principal" in the legislative process. Nor would it be wise to use stare decisis to freeze any particular Congress's interpretive

97. See *id.* at 53–58, 61–62.

98. See generally Glen Staszewski, *Statutory Interpretation As Contestatory Democracy*, 55 WM. & MARY L. REV. 221 (2013) (outlining and defending this vision).

99. See Raso & Eskridge, *supra* note 89, at 1811 (arguing that "the case for stare decisis is especially strong for the core *Chevron* proposition that when Congress delegates lawmaking authority to an agency, judges are required to defer to any reasonable agency interpretation, unless Congress has resolved the issue in the statute").

preferences into place when these preferences are sure to change over time. Arguments for methodological stare decisis also pay insufficient heed to the fact that statutory interpretation is shaped by normative principles, which can, will, and should continue to evolve over time. We therefore believe that it would be a serious mistake to give stare decisis effect to interpretive methodology—both now and, likely, forever.