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# The Jurisdiction Canon

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# The Jurisdiction Canon

*Aaron-Andrew P. Bruhl\**

*This Article concerns the interpretation of jurisdictional statutes. The fundamental postulate of the law of the federal courts is that the federal courts are courts of limited subject-matter jurisdiction. That principle is reinforced by a canon of statutory interpretation according to which statutes conferring federal subject-matter jurisdiction are to be construed narrowly, with ambiguities resolved against the availability of federal jurisdiction. This interpretive canon is over a century old and has been recited in thousands of federal cases, but its future has become uncertain. The Supreme Court recently stated that the canon does not apply to many of today's most important jurisdictional disputes. The Court's decision is part of a pattern, as several cases from the last decade have questioned the canon's validity, a surprising development given what appeared to be the canon's entrenched status.*

*This state of flux and uncertainty provides an ideal time to assess the normative merits and the likely future trajectory of the canon requiring narrow construction of jurisdictional statutes. This Article undertakes those tasks. First, it conducts a normative evaluation of the canon and its potential justifications. The normative evaluation requires consideration of several matters, including the canon's historical pedigree, its relationship to constitutional values and congressional preferences, and its ability to bring about good social outcomes. Reasonable minds can differ regarding whether the canon is ultimately justified, but the case for it turns out to be weaker than most observers would initially suspect. Second, the Article attempts, as a positive matter, to identify the institutional and political factors that have contributed to the canon's recent negative trajectory and that can be expected to shape its future path. These factors include docket composition, interest-group activity, and the Supreme Court's attitude toward the civil justice system.*

*This Article's examination of the jurisdiction canon has broader value beyond the field of federal jurisdiction because it sheds some incidental light*

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\* Professor of Law, William & Mary Law School. For helpful comments on earlier versions, I thank Arthur Hellman, Michael Herz, Lonny Hoffman, Anita Krishnakumar, Richard Re, and participants at the Legislation Roundtable sponsored by Cardozo Law School and St. John's Law School. I thank Paul Hellyer for tracking down some obscure sources. I thank Benjamin Holwerda for research assistance.

*on the more general questions of why interpretive rules change, how methodological changes spread through the judicial hierarchy, and how the interpretive practices of the lower courts vary from those of the Supreme Court.*

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## INTRODUCTION

The cardinal principle of the law of the federal courts is that the federal courts are courts of limited subject-matter jurisdiction. Countless cases stand for that principle, including what is perhaps the most renowned case in all of American law, *Marbury v. Madison*.<sup>1</sup> Although *Marbury* is famous for its broad pronouncements about the power of judicial review, the Supreme Court's more specific ruling was that a federal statute had given the Court a type of jurisdiction that was not authorized by Article III of the Constitution.<sup>2</sup> Article III empowers the federal courts to hear only certain categories of disputes, and, as *Marbury* reminds us, it provides the first and most fundamental limitation on federal judicial power. But the Constitution is not the only constraint. In addition, and much more important as a matter of daily practice, a federal court's exercise of authority must comply with the jurisdictional statutes, which usually confer much less jurisdiction than the Constitution would allow.<sup>3</sup> Thus the federal courts are courts of limited jurisdiction twice over.

This Article concerns an important corollary to the limited-jurisdiction principle. That corollary holds that the statutes setting forth federal subject-matter jurisdiction are to be narrowly construed.<sup>4</sup> That is, when the meaning of a jurisdictional statute is ambiguous, vague, or otherwise uncertain, the courts are to interpret the statute so as to err on the side of restricting federal judicial authority. This interpretive rule is one of the established presumptions or

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1. 5 U.S. (1 Cranch) 137 (1803).

2. *Id.* at 173–76.

3. *See, e.g.,* *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (“Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute . . .”). An exception to the rule that jurisdiction requires both a constitutional and a statutory basis, though not a practically significant exception today, involves the Supreme Court's original jurisdiction. That constitutional grant of authority is regarded as self executing. *See California v. Arizona*, 440 U.S. 59, 65 (1979); 13 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3525 (3d ed. 2008).

4. *See, e.g.,* *Healy v. Ratta*, 292 U.S. 263, 270 (1934) (“The policy of the statute [setting forth a required amount-in-controversy for federal jurisdiction] calls for its strict construction.”); *Grosvenor v. Qwest Corp.*, 733 F.3d 990, 995 (10th Cir. 2013) (“We strictly construe statutes conferring jurisdiction. . . . [I]f there is ambiguity as to whether the instant statute confers federal jurisdiction over this case, we are compelled to adopt a reasonable, narrow construction.” (internal quotation marks and citations omitted)); *Kresberg v. Int'l Paper Co.*, 149 F.2d 911, 913 (2d Cir. 1945) (“[T]he well established rule [is] that federal jurisdiction is not to be extended beyond the scope permitted by a strict construction of the statute upon which it rests.”); *Surface Am., Inc. v. United Sur. & Indem. Co.*, 867 F. Supp. 2d 282, 286 (D.P.R. 2012) (“As courts of limited jurisdiction, federal courts are bound to construe jurisdictional grants narrowly.”); *Fed. Deposit Ins. Co. v. Howse*, 802 F. Supp. 1554, 1567 (S.D. Tex. 1992) (referring to “the canon that a congressional grant of jurisdiction should be read narrowly”).

“substantive canons” governing statutory interpretation. Leading authorities on federal practice call the narrow-construction canon a “familiar proposition,”<sup>5</sup> and the federal courts recite some version of this canon in hundreds of rulings every year.<sup>6</sup> That makes it one of the most frequently cited substantive canons in the federal courts’ interpretive toolkit.<sup>7</sup>

Despite its seemingly solid footing in the federal courts, the rule of narrow construction has lately come under threat. Just because a rule of federal practice has been familiar to courts, litigants, and commentators for decades, and has been repeated thousands of times, does not mean it is immune from abrogation. Recall the fate of the practically sacred language governing dismissal of a complaint for failure to state a claim: the complaint should not be dismissed, as generations of lawyers learned, “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>8</sup> That formulation, despite its familiarity to virtually every litigator in the country, was “retired” by the Supreme Court in 2007 in *Bell Atlantic Corp. v. Twombly*.<sup>9</sup>

If the Supreme Court’s treatment of the jurisdiction canon over the last decade or so is any guide, the canon may be headed for a similar fate. The canon has not (yet) been forced into retirement, but

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5. See 13E WRIGHT ET AL., *supra* note 3, § 3602.1, at 135 (3d ed. 2009) (“It is a familiar proposition that the constitutional policy of limited jurisdiction requires that the statutes granting subject matter jurisdiction to the federal courts be strictly construed.”); see also WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 1206 (5th ed. 2014) (citing a canon of “[n]arrow construction of federal court jurisdictional grants that would siphon cases away from state courts”).

6. It is impossible to give a precise figure, in part because electronic databases do not include every district court opinion. See Elizabeth Y. McCuskey, *Submerged Precedent*, 16 NEV. L.J. 515, 519–25 (2016). Nonetheless, one can find hundreds of invocations of the canon in federal cases by running a search such as “federal /p jurisdiction /s (strict! or narrow!)” in West’s All Federal Cases (ALLFEDS) database. For 2014, this search returns nearly one thousand results. Many of the results are false positives, but reviewing a sample of the results allows one to conclude that the number of true hits is in the hundreds. The canon is especially prevalent in federal decisions involving attempts to remove cases from state court to federal court.

7. Precise rankings are impossible because of the imprecision of word searches and the incompleteness of databases. The rule of lenity, probably the other leading contender for most frequently cited substantive canon, also appears hundreds of times a year in federal decisions. And unlike the jurisdiction canon, the rule of lenity appears frequently in state cases as well. State courts only rarely interpret federal jurisdictional statutes, such as when a federal statute provides for jurisdiction exclusively in the federal courts. Such situations have sometimes led state courts to cite the narrow-construction canon. *E.g.*, *State v. F/V Baranof*, 677 P.2d 1245, 1252–53 (Alaska 1984); *Appalachian Ins. Co. v. Betts*, 518 P.2d 385, 387 (Kan. 1974).

8. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

9. 550 U.S. 544, 562–63 (2007) (stating that the “no set of facts” language had “earned its retirement” and should be forgotten).

the Court's December 2014 decision in *Dart Cherokee Basin Operating Co. v. Owens*<sup>10</sup> counts at least as a demotion to part-time status. The Court stated in *Dart Cherokee* that the narrow-interpretation canon does not apply in cases involving removal to federal court under the Class Action Fairness Act ("CAFA"), which is the most important new jurisdictional statute of this century.<sup>11</sup> Had the Court stopped there, its ruling would have been significant but not especially surprising, for CAFA's purpose was to expand jurisdiction, and, as the Court explained, Congress apparently wanted the new jurisdictional provisions to be interpreted generously.<sup>12</sup> But the Court did not stop there. Rather, the Court also referred, ominously, to the presumption against federal jurisdiction in its more general form as merely a "purported" rule whose very existence was up for grabs.<sup>13</sup> Though less explicit than *Dart Cherokee*, other Supreme Court cases from roughly the last decade have also cast doubt on the jurisdiction canon's validity, and not only in CAFA cases.<sup>14</sup> Perhaps the canon has enough history and inertia behind it to survive, albeit in a diminished state, but this moment of flux provides an opportunity to study the jurisdiction canon in a comprehensive way.

This Article undertakes that comprehensive study by assessing the jurisdiction canon both normatively and descriptively. The normative analysis will consider whether the canon is justified and, if it is, on what grounds. This requires examination of several kinds of possible justifications, including those rooted in history, policy, constitutional values, and congressional intent. The normative evaluation shows that the case for the jurisdiction canon is shakier than one might guess given the canon's familiarity. Because the case for the jurisdiction canon is close and contestable, whether the canon is justified may depend on how highly one values stability and, concomitantly, how heavy a burden one puts on proponents of change.

The descriptive analysis will seek to explain what has put the canon under threat in recent times and, tentatively, to predict its future trajectory. The canon has faced some headwinds lately: recent congressional activity has mostly favored expanded federal jurisdiction, and influential business groups have campaigned against the canon in an effort to increase their access to the federal courts. At

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10. 135 S. Ct. 547 (2014).

11. *See id.* at 554; *see also infra* Sections II.C, III.C (discussing CAFA's goals and significance).

12. *See* 135 S. Ct. at 554.

13. *See id.*

14. *See infra* Section II.A.1.b (discussing Supreme Court cases that questioned or neglected the narrow-construction canon).

the same time, the canon will likely retain a base of support in the lower courts due to its familiarity and its tendency to serve those courts' interests in reducing caseloads. One difficulty in predicting the canon's future at this particular moment is that debates over access to the civil litigation system are quite politicized, perhaps increasingly so. The jurisdiction canon may have become a topic, like abortion and affirmative action, regarding which the political commitments of new Justices can make a difference.

This Article aims to yield at least two types of payoffs. First, comprehensive study of one of the most frequently cited substantive canons is useful in its own right, especially when the canon is in a period of uncertainty and potential reevaluation. Indeed, this canon would particularly benefit from study because, as a canon used mostly by the lower courts, it tends to escape the notice of Supreme Court-oriented scholarship (i.e., most statutory interpretation scholarship).<sup>15</sup> Second, the discussion sheds light on some broader debates in statutory interpretation, such as whether the canons are binding "law,"<sup>16</sup> why interpretive rules emerge and evolve,<sup>17</sup> and how changes in interpretive methodology spread through a judicial hierarchy composed of courts with somewhat differing roles and interests.<sup>18</sup>

Before proceeding with the analysis, it is worth addressing a source of skepticism about the canons generally. Although the various canons and maxims of interpretation are constantly invoked by courts, there is the nagging worry that these purported rules—like other rhetoric found in judicial opinions but to an even greater degree—are mere post hoc rationalizations for decisions that were actually reached

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15. See Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How To Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 436–38 (2012) (explaining that scholarship in the field of statutory interpretation has traditionally focused almost entirely on the U.S. Supreme Court).

16. See, e.g., Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 YALE L.J. 1898, 1907–18, 1968–90 (2011) (discussing the nature of interpretive methodology); see also *infra* Section II.A.2 (explaining that lower courts treat the jurisdiction canon as precedential in ways that challenge the conventional account of the jurisprudential status of the canons).

17. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992) (discussing the development of new canons in the Rehnquist Court); Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149 (2001) (seeking to explain interpretive change on the basis of shifting expectations of actors in the interpretive system); see also *infra* Section II.A.1 (discussing how the jurisdiction canon developed), Part III (discussing structural and ideological factors that are influencing the trajectory of the jurisdiction canon).

18. See, e.g., 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, 546–58 (2015) (discussing how changes in interpretive methodology are transmitted from the Supreme Court to the lower courts); see also *infra* Sections III.A–B (explaining why lower courts may be more favorably disposed toward the jurisdiction canon than is the Supreme Court).

for other reasons. This view finds its most famous expression in Professor Karl Llewellyn's classic article on the canons, with its chart pairing many of the canons of interpretation with competing canons pointing the opposite direction, which was meant to show that the canons themselves could not direct decisions.<sup>19</sup> More recent work, proceeding in a more systematic empirical fashion, has likewise cast doubt on the ability of the canons to constrain judicial preferences, at least in certain contexts.<sup>20</sup>

The skeptical account has some force to it, but the strongest versions of the skeptical view of the canons go too far in disparaging the canons' role. At a minimum, the prevailing interpretive rules and frameworks make certain decisional pathways easier to follow by providing ready-made intellectual shortcuts and fostering habits of mind that favor certain outcomes over others.<sup>21</sup> Especially in cases with low ideological stakes or in situations in which the time available to reach a decision is limited, presumptions favoring one outcome probably do guide decisions to an important degree.<sup>22</sup> Those conditions—of low stakes and little time—tend to be the norm in lower courts.<sup>23</sup> So even if the canons (and other legal doctrines, for that matter) are employed sporadically and opportunistically in the Supreme Court, which tends to be the skeptics' focus, the canons can have some real bite in the lower courts, which is where the vast bulk of cases are decided. Moreover, even setting aside case outcomes, the canons affect how judges must justify their decisions and how attorneys must fashion their arguments, both of which are important in their own right.<sup>24</sup>

If the strongest forms of canon skepticism are overstated, that does not mean we should swing to the other extreme and adopt the

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19. 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, 401–06 (1950).

20. See, e.g., James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 96–108 (2005).

21. See Philip P. Frickey, *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1971, 1976 (2005) (stating that methodological propositions are dicta rather than binding holdings but that they are nonetheless practically important in shaping later decisions).

22. See, e.g., Brian Sheppard, *Judging Under Pressure: A Behavioral Examination of the Relationship Between Legal Decisionmaking and Time*, 39 FLA. ST. U. L. REV. 931 (2012) (providing experimental evidence that reducing the time available for decisionmaking increases the likelihood that decisionmakers will follow legal constraints).

23. See LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 9–10 (2013).

24. See Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 13 (1998). Even Llewellyn said that the canons “are still needed tools of argument.” Llewellyn, *supra* note 19, at 401.

naïve view that the canons are wholly autonomous external constraints that follow their own timeless logic. Although the skeptics' goal is presumably to direct our attention away from the canons altogether and instead toward the "real" determinants of judicial decisions, crediting the skeptical account with some truth actually makes the canons interesting in new ways. Particular canons move into and out of vogue, expand or contract, as a result of various contextual influences, including evolving judicial attitudes. Thus, if the Supreme Court becomes more inclined to favor expansive federal jurisdiction, then it will tend to ignore or reject the narrow-construction canon. That does not mean the canon has no significance. On the contrary, the use (or disuse or modified formulation) of the canon helps to convey, to litigants and lower courts, the high Court's preferences regarding the scope of federal jurisdiction in a way that transcends the outcome of a particular case. In other words, we can think of changes in the use of a canon as an expression of the balance of forces of the day and as a means of communicating changes through the judicial system.<sup>25</sup>

The Article is organized as follows. Part I sets the stage for what follows by providing some brief introductory remarks about the jurisdiction canon. The normative and descriptive aspects of the study are found in Parts II and III respectively. The Conclusion provides some broader observations about statutory interpretation and interpretive change.

## I. DEFINING THE JURISDICTION CANON

It is useful to begin by explaining more clearly what the narrow-construction canon is and what role it plays in statutory interpretation.

### *A. Various Aspects of the Presumption Against Federal Subject-Matter Jurisdiction*

As noted at the outset, the fundamental postulate of the federal courts is that they are courts of limited subject-matter jurisdiction. Growing out of that proposition is a cluster of ideas regarding procedure, evidence, and statutory interpretation. This collection of ideas is sometimes called the presumption against federal

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25. See generally Bruhl, *supra* note 18, at 546–58 (discussing how changes in interpretive methodology are transmitted to the lower courts).

jurisdiction<sup>26</sup> or, in the removal-jurisdiction context in particular, the presumption against removal.<sup>27</sup> For purposes of analysis, we need to disentangle the various components of this presumption.

To begin with, one aspect of the presumption against jurisdiction is the proposition that courts should assume that a case lies outside of federal subject-matter jurisdiction until jurisdiction is established. The need to establish jurisdiction then requires various procedural rules for how to overcome the initial presumption: who bears the burden of establishing jurisdiction, using what documents, at what stage of the case, and so on. Today, most of those procedural rules reinforce the initial no-jurisdiction starting point by placing various obstacles in the way of jurisdiction: for example, a plaintiff filing in federal court must allege jurisdictional facts in the complaint and then be prepared to prove them if challenged, the parties cannot consent to jurisdiction, and a defect in jurisdiction can be raised for the first time on appeal.<sup>28</sup>

In addition to functioning as a starting point, a presumption against jurisdiction can also act as a factual tie-breaker. In civil disputes that reach trial, the plaintiff bears the burden of proving his or her case on the merits by a preponderance of the evidence, and if the fact-finder believes the evidence is in equipoise on any element, the plaintiff should lose.<sup>29</sup> Similarly, when a jurisdictional fact must be proven by a preponderance, jurisdiction fails when the evidence is evenly balanced.<sup>30</sup>

The topic of this Article is a different aspect of the presumption against jurisdiction, namely a rule of statutory interpretation. It is conventional to divide interpretive canons into several categories, most prominently textual canons and substantive canons, the latter being a collection of background principles and presumptions that

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26. See, e.g., *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Renne v. Geary*, 501 U.S. 312, 316 (1991); *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974).

27. See, e.g., *Russell Corp. v. Am. Home Assurance Co.*, 264 F.3d 1040, 1050 (11th Cir. 2001); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992); Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 636–37 (2004).

28. FED. R. CIV. P. 8(a)(1), 12(h)(3); *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 188–89 (1936); WRIGHT ET AL., *supra* note 3, § 3522, at 122.

29. 32A C.J.S. *Evidence* § 1627 (2016).

30. See *Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1199 (9th Cir. 2015); *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 540 (7th Cir. 2006). Note that jurisdictional facts that overlap with the merits may be subject to lenient, prima facie standards of proof in order to prevent an early judicial inquiry into jurisdiction from determining the plaintiff's ultimate entitlement to relief on the merits. See Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 1006–11 (2006).

promote certain interests or policies.<sup>31</sup> The canon calling for narrow construction of jurisdictional statutes is a substantive canon that promotes a policy of limiting federal judicial authority. Substantive canons are often phrased as interpretive presumptions—the presumption against retroactivity, the presumption that Congress does not pass statutes violating international law, etc.<sup>32</sup> In order to distinguish the interpretive canon governing jurisdictional statutes from the other aspects of the presumption against federal jurisdiction described above, I will typically refer to it as “the jurisdiction canon,” “the narrow-construction rule,” or the like.

To provide an example of the jurisdiction canon in operation, consider the following scenario: a plaintiff sues a defendant in state court, and the defendant then impleads a third party who, according to the original defendant, is required to reimburse the defendant if the defendant is found liable to the plaintiff. This new party, the third-party defendant, wishes to remove the suit to federal court. If the requirements for federal jurisdiction are otherwise satisfied, can this party remove even though the original defendant did not? If binding precedent within the relevant jurisdiction did not already provide an answer, a court’s analysis of the question would certainly give careful consideration to the text of the removal statute, which provides that “the defendant or the defendants” may remove.<sup>33</sup> One obvious question is whether the third-party defendant is a “defendant” within the meaning of the statute. Purely as a linguistic matter, the answer is probably *yes and no*: the third party is a defendant on the impleader claim but is not an original defendant in the plaintiff’s complaint. In light of this uncertainty, the court might rely on legislative history, precedents that address related situations, practical consequences, or, most relevantly here, a substantive canon. It is unclear whether this kind of party is a “defendant,” the court could reason, and so the court should read the statute *narrowly*—that is, against federal jurisdiction—so as to permit only an original defendant, but not a third-party defendant, to invoke the court’s removal jurisdiction.<sup>34</sup> This is of course just one illustration; the canon features prominently in many disputes over the scope of the jurisdictional statutes.<sup>35</sup>

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31. See ESKRIDGE ET AL., *supra* note 5, at 1195–1215 (categorizing canons this way).

32. See *id.* at 691–92 (listing examples of substantive canons phrased as presumptions).

33. 28 U.S.C. § 1441(a) (2012).

34. See *First Nat’l Bank of Pulaski v. Curry*, 301 F.3d 456 (6th Cir. 2002) (relying heavily on the narrow-construction canon to reach the result described in this paragraph).

35. See, e.g., *Baldy v. First Niagara Pavilion, C.C.R.L., LLC*, 149 F. Supp. 3d 551, 557–63 (W.D. Pa. 2015) (repeatedly citing the narrow-construction canon in addressing an unsettled question of removal procedure).

A different formulation of the presumption against jurisdiction also deserves mention. Courts very often make statements to the effect that all “doubts” should be resolved against federal jurisdiction or, specifically in the context of removal jurisdiction, that all doubts should be resolved in favor of remand to state court.<sup>36</sup> When opinions say this, sometimes they appear to be invoking a tie-breaker rule for close factual disputes or a procedural rule allocating the burden to the party invoking jurisdiction.<sup>37</sup> Other times they appear to mean that uncertainties about the interpretation of the jurisdictional statutes should be read against jurisdiction (i.e., they are invoking the jurisdiction canon).<sup>38</sup> And in many instances it is just hard to know which rule or combination of rules courts mean to invoke when they say doubts are resolved against jurisdiction. Because of this ambiguity about the meaning of the “doubts” formulation, I generally avoid it.

A final point: I have been speaking of *the* jurisdiction canon, in the singular, as a rule applicable to the interpretation of jurisdictional statutes generally. That is how courts have usually understood the canon. (Courts invoke the canon with particular frequency when it comes to removal jurisdiction,<sup>39</sup> but that is just a particular manifestation of the broader rule.) One could imagine an alternative interpretive regime in which different jurisdictional statutes carry with them different interpretive rules (this statute interpreted broadly, this one narrowly, this one neutrally, etc.). In fact, the jurisdiction canon seems to have gained its initial prominence, more than a century ago, as a rule about the interpretation of the 1887 amendments to the jurisdictional statutes, and then it generalized from there.<sup>40</sup> Further, it may be that we are headed toward a world in which the jurisdiction canon becomes fractured into multiple, varying rules applicable to different jurisdictional statutes; that possibility is a topic to which we will return later.<sup>41</sup>

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36. *E.g.*, *Vantage Drilling Co. v. Hsin-Chi Su*, 741 F.3d 535, 537 (5th Cir. 2014); *Salton v. Polyock*, 764 F. Supp. 2d 1033, 1035 (N.D. Iowa 2011). Electronic database searches reveal many, many examples.

37. *E.g.*, *Rindels v. Tyco Integrated Sec., LLC*, No. CV 14-6536 RSWL (CWx), 2015 WL 469013, at \*5 (C.D. Cal. Feb. 4, 2015).

38. *E.g.*, *Transit Cas. Co. v. Certain Underwriters at Lloyd’s of London*, 119 F.3d 619, 625 (8th Cir. 1997).

39. *See Haiber, supra* note 27, at 636 (“[R]arely does a decision concerning removal not begin with some variation of the axiom dictating strict construction of removal jurisdiction.”).

40. *See infra* Section II.A.1.a.

41. *See infra* Sections II.G, III.E.

*B. The Meaning and Significance of Narrow Construction  
of Jurisdictional Statutes*

Courts sometimes describe the jurisdiction canon as one calling for “narrow” construction of jurisdictional statutes, but it is more common for them to speak of “strictly” construing such statutes. What, if anything, is the distinction between narrowness and strictness?<sup>42</sup>

In the abstract, it is a bit unclear what it means to read a legal text “strictly.”<sup>43</sup> The notion of strict construction sometimes has been used as a crude synonym for reaching politically conservative results, especially in the context of constitutional law.<sup>44</sup> In part because of such political connotations, it might be advisable not to use the terminology of strict construction at all. Nonetheless, courts and commentators often use such language, and when they say that jurisdictional statutes are to be construed strictly, that means that jurisdictional statutes are to be read so as to resolve uncertainties against the existence of jurisdiction—that is, to give a *narrower rather than a broader scope* to federal judicial jurisdiction. Judicial usage confirms this rough equivalence between strictness and narrowness, as courts using the jurisdiction canon sometimes switch between the two terms.<sup>45</sup> And, of course, the notion of strict construction has an ancient pedigree in statutory interpretation. One of the oldest rules of

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42. One might also wonder whether there is a difference between *strict/narrow interpretation* and *strict/narrow construction*. Especially in constitutional theory, commentators sometimes distinguish between the two activities, defining interpretation as the discovery of semantic meaning and construction as the imputation of legal content. This distinction is not often made by legislation scholars or by courts using the jurisdiction canon, and so following their lead I will use the terms “interpretation” and “construction” interchangeably. If, however, one does attend to the distinction, it is probably more appropriate to categorize the jurisdiction canon as a rule of construction rather than interpretation. In that regard it resembles most other substantive canons, though it is possible that some substantive canons can reflect or become conventions that bear on semantic meaning. See Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 111–14 (2010).

43. Cf. Lawrence Solum, *Legal Theory Lexicon: Strict Construction and Judicial Activism*, LEGAL THEORY BLOG (Mar. 8, 2015), <http://lsolum.typepad.com/legaltheory/2015/03/legal-theory-lexicon-strict-construction-and-judicial-activism.html> [<https://perma.cc/8T6Z-UYTT>] (providing several possible meanings of the concept of strict construction in the context of constitutional law).

44. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1 n.\* (1980).

45. *E.g.*, *Grosvenor v. Qwest Corp.*, 733 F.3d 990, 995 (10th Cir. 2013) (“We strictly construe statutes conferring jurisdiction. . . . [I]f there is ambiguity as to whether the instant statute confers federal jurisdiction over this case, we are compelled to adopt a reasonable, narrow construction.” (internal quotation marks and citations omitted)); *Robinson v. Ortho-McNeil Pharm., Inc.*, 533 F. Supp. 2d 838, 842 (S.D. Ill. 2008) (stating that removal statutes “must be strictly and narrowly construed”); see also *ESKRIDGE ET AL.*, *supra* note 5, at 1206 (referring to the jurisdiction canon as a rule of “[n]arrow construction”).

interpretation, the rule of lenity, is often stated as a rule that penal statutes are to be strictly construed.<sup>46</sup> Many other substantive canons have likewise traditionally been phrased as rules of strict construction—statutes in derogation of the common law are strictly construed, for example—and this is understood to mean those statutes should be read narrowly rather than expansively in close cases.<sup>47</sup> So, strict construction of jurisdictional statutes is, for our purposes, interchangeable with narrow construction.

Still, one might wonder how exactly one is to know the difference between a narrow/strict reading on the one hand and a broad/liberal reading on the other, much less how one is to distinguish either one from a merely “normal” reading. The old treatise writers filled many pages discussing such questions, as they had to, given that so much of traditional statutory interpretation consisted of designating certain classes of statutes as subject to either strict interpretation or liberal interpretation.<sup>48</sup> This is not to say the old writers, or even modern ones, have arrived at a precise, fully satisfying resolution. At a minimum, statutes subject to strict construction are not subject to purposive expansion—that is, reading them beyond their terms in order to reach cases that present the same mischief.<sup>49</sup> A different way to express the idea of strict construction, which one also finds in the treatises, is to say that a statute subject to strict construction is triggered only when purpose and language coincide: “[N]o cases shall be held to fall within [the strictly construed statute],” the treatise writer William Maxwell explained, “which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment.”<sup>50</sup> Still another way to capture the idea is to say that words subject to strict interpretation should be limited to their prototypical applications (a sparrow is a prototypical bird, shooting a gun is a prototypical way to “use” a gun) rather than encompassing cases that may fit within definitional criteria but are located at the periphery of the concept (like a penguin as an example

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46. See *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); 1 WILLIAM BLACKSTONE, COMMENTARIES \*88.

47. See ESKRIDGE ET AL., *supra* note 5, at 690–91.

48. *E.g.*, JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION §§ 191–240 (Bos., Little, Brown & Co. 1882); THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 291–383 (N.Y.C., John S. Voorhies Law Bookseller & Publisher 1857); J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 346–431 (Chi., Callaghan & Co. 1891).

49. SIR PETER BENSON MAXWELL, ON THE INTERPRETATION OF STATUTES 243–44, 246–47 (London, William Maxwell & Son 1875).

50. *Id.* at 238.

of a bird or trading a gun for drugs as “using” a gun).<sup>51</sup> A further difficulty in defining the jurisdiction canon concerns its relationship to textual clarity and other interpretive considerations. A powerful form of the canon would be capable of overriding the most natural reading of the text in favor of a less natural (but still plausible) reading, while a weak version would apply only when two competing meanings remain roughly equally plausible after considering all permissible resources.

We should not worry too much about the difficulties inherent in expressing the precise meaning of narrow construction or explaining how exactly it fits into the process of interpretation. Those difficulties are not unique to this canon; on the contrary, knowing which cases a canon covers, at what stage it should be applied, how much weight to give it, and so forth are problems that afflict interpretation generally. Such questions have not yielded simple, consistent answers.<sup>52</sup> Perhaps in the end some canons of interpretation are best understood as directions to approach a statute in a certain mood, with an attitude of generosity on the one hand or stinginess on the other. In any event, as stated at the outset, the use of a canon can act as a signal of a court’s mindset and as a means of communicating its attitudes to other courts and litigants. From that point of view, the precise technical operation of a canon is not so important; what matters is whether it tends to be mentioned and affirmed on the one hand or ignored and questioned on the other.

## II. NORMATIVE ASSESSMENT OF THE JURISDICTION CANON

The jurisdiction canon has been repeated thousands of times, but its justifications are rarely stated, much less scrutinized. Is the canon defensible? If so, why? Only because it has been repeated so often? This Part explores those questions.

There are several potential justifications for an interpretive rule that loads the dice against exercises of federal judicial jurisdiction. The justification could rely on a descriptive claim about what Congress wants (or would probably want if it thought about the matter). Or the justification could be more openly normative, appealing to judicial notions of sound policy whether or not Congress endorses them. Or perhaps we could understand the canon as a softer

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51. See LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES* 62–74 (2010) (discussing the linguistic concept of prototypical meaning).

52. See CALEB NELSON, *STATUTORY INTERPRETATION* 226–30, 367–75 (2011); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 117–18 (2010).

form of constitutional law, a rule that has the power to push statutes away from the outer bounds of Article III authority. This Part of the Article will canvas and evaluate a variety of potential justifications for the jurisdiction canon, including arguments of the sort just mentioned. I should state at the outset, however, that some of the arguments about the canon do not lend themselves to easy resolutions, as they reflect abiding disagreements about the role of the federal courts and the relative importance of stability versus other values. Yet even when ultimate verdicts are hard to reach, it is still useful to lay out the competing considerations in a systematic way.

The normative analysis does not begin with a blank slate. Ours is a system based on precedent and tradition, and so history can settle a matter even if it would be resolved differently as a *de novo* matter today. Therefore, one should begin with what has come before.

### *A. Precedent and History*

This Section traces the jurisdiction canon's development and asks 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. Recounting this history also has independent value because the story of the development of the canon is not widely known.

#### 1. A History of the Jurisdiction Canon

The canon of narrow construction of jurisdictional statutes has been cited so much that one might assume it to be ancient and unchanging. Some canons may be that way—such as linguistic maxims that capture some of the truth of ordinary usage—but many canons are neither timeless nor immutable. On the contrary, they evolve: federalism presumptions bulk up into clear-statement rules,<sup>53</sup> canons regarding agency deference expand to new domains,<sup>54</sup> and so on.<sup>55</sup> The jurisdiction canon too has a history. And the history is shorter and more uneven than many would suspect.

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53. See Eskridge & Frickey, *supra* note 17, at 619–29.

54. *E.g.*, *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 57–58 (2011) (holding that *Chevron* deference doctrine applies to judicial review of Treasury regulations).

55. See Barrett, *supra* note 52, at 127 & n.84 (citing examples of substantive canons that evolved over time); Bruhl, *supra* note 18, at 507–46 (discussing various instances of canonical change).

*a. The Slow Development of the Canon*

We can begin with the canon's English antecedents. The mother country did not have parallel federal and state courts as we do, but it did have a multiplicity of courts of varying jurisdiction and a legislature that could create, alter, or abolish those jurisdictions.<sup>56</sup> The courts tended to disfavor legislative tinkering with jurisdiction, and this disfavor generated what we could call substantive canons of interpretation. The judges presumed that Parliament did not create novel jurisdictions by implication, and they accordingly read jurisdictional grants narrowly, against jurisdiction in cases of doubt.<sup>57</sup> At the same time, in the same conservative spirit, the courts also applied a rule disfavoring implied ousters of established jurisdiction.<sup>58</sup>

Although this history provided the materials that one could imagine being translated in this country into an interpretive canon disfavoring federal jurisdiction, the now-familiar narrow-construction canon did not immediately spring into life in anything resembling its current form. It is true that the federal courts were recognized, very early, to be courts of limited jurisdiction and, concomitantly, that they were presumed to lack jurisdiction until its existence was shown.<sup>59</sup> That much should sound familiar, for modern courts say the same things.<sup>60</sup> Nonetheless, many familiar features of modern law that are thought to follow from those basic propositions—such as the rule that jurisdiction can be questioned at any time,<sup>61</sup> the rule that the party invoking jurisdiction must prove jurisdictional facts if challenged,<sup>62</sup>

56. See generally W.S. HOLDSWORTH, 1 A HISTORY OF ENGLISH LAW (A. L. Goodhart & H. G. Hanbury eds., rev. 7th ed. 1956) (discussing the development and jurisdictions of England's many courts).

57. FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES: THEIR RULES OF CONSTRUCTION, AND THE PROPER BOUNDARIES OF LEGISLATION AND JUDICIAL INTERPRETATION 652 (London, William Benning & Co. 2d ed. 1848); MAXWELL, *supra* note 49, at 110–12, 264–66.

58. DWARRIS, *supra* note 57, at 652; MAXWELL, *supra* note 49, at 105–10.

59. For an early example, consider *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8 (1799), in which the Court observed:

A circuit court [i.e., the federal trial court at the time] . . . is of limited jurisdiction: and has cognisance, not of cases generally, but only of a few specially circumstanced . . . And the fair presumption is (not as with regard to a court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without its jurisdiction, until the contrary appears.

*Id.* at 10.

60. *E.g.*, *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (“Federal courts are courts of limited jurisdiction. . . . It is to be presumed that a cause lies outside this limited jurisdiction . . .” (citing *Turner*, 4 U.S. at 11)).

61. FED. R. CIV. P. 12(h)(3); WRIGHT ET AL., *supra* note 3, § 3522, at 122.

62. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 188–89 (1936).

and so forth—were not embraced at the beginning.<sup>63</sup> Rather, the early federal practice, which was partly influenced by the limitations of common law procedure, provided that proper *pleading* of jurisdictional requisites created a prima facie case for jurisdiction that the other side bore the burden of factually rebutting and, further, that a party could forfeit the chance to object to jurisdiction by failing to make a timely objection.<sup>64</sup> Some of these pro-jurisdiction procedural rules, which seem foreign to us now, persisted for quite some time.<sup>65</sup>

As for interpretations of the scope of the subject-matter jurisdiction provided by the Judiciary Act of 1789 and other early statutes, the Supreme Court's record was mixed. In some cases, one sees narrow constructions of jurisdictional statutes, such as in the famous early case of *Strawbridge v. Curtiss* (1806), which concerned the interpretation of the ancestor of the modern diversity statute.<sup>66</sup> Chief Justice Marshall interpreted the statute to require what we would today call “complete” diversity of citizenship, that is, that each plaintiff be diverse from each defendant. The opinion was very brief. It did not cite any interpretive canon, or other interpretive tools for that matter, but the fame of *Strawbridge* might lead some to think that narrow construction was the uniform practice all along. Yet that is not the case. Some other early cases, which unlike *Strawbridge* are mostly forgotten today, favored broad interpretations of federal jurisdiction, including the diversity jurisdiction of the lower federal courts.<sup>67</sup> In any event, one does not find in the early Republic a well-established interpretive canon of narrow construction of the sort one finds constantly repeated in lower-court cases today.

After the foundational Judiciary Act, the next critical period in the development of federal jurisdiction came during and shortly after the Civil War. In response to the War and its aftermath, Congress enacted a string of statutes expanding the federal courts' jurisdiction,

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63. See generally Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1830 (2007).

64. *Id.* at 1839, 1876–77.

65. *Id.* at 1870–71. Collins suspects that these practices persisted not just because of the strictures of common-law pleading rules but because the Supreme Court wished to broaden access to federal courts. *Id.* at 1882–83.

66. 7 U.S. (3 Cranch) 267 (1806).

67. See G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835*, at 837 (1988) (stating that the Court took a “relatively aggressive stance” in construing certain aspects of diversity jurisdiction, though the Court was cautious in other respects); see also *id.* at 843–45 (providing examples of expansive interpretations of the diversity jurisdiction of the lower federal courts). In one of the cases cited by White, an attorney argued for a canon of liberal interpretation of diversity jurisdiction; Chief Justice Marshall's terse opinion ruled in favor of jurisdiction but did not cite such a principle. *Young v. Bryan*, 19 U.S. (6 Wheat.) 146, 149, 151–52 (1821).

including removal provisions aimed at protecting federal officials, Union supporters, freedmen, and others who could not expect fair treatment from the state courts in the South.<sup>68</sup> Later, in 1871, Congress enacted new legislation providing federal remedies and jurisdiction for violations of civil rights.<sup>69</sup> But the Civil War and Reconstruction period also saw jurisdictional expansion motivated by quite different goals, namely congressional Republicans' plan to promote economic development by (among other things) expanding commercial interests' access to national courts.<sup>70</sup> The era's most significant enactment, from the jurisdictional perspective, was the landmark 1875 statute that gave the federal courts their now-familiar jurisdiction over cases arising under federal law and further expanded opportunities for removal from state courts.<sup>71</sup>

New statutes require interpretation, and one would expect the interpretive activity occasioned by the new jurisdictional legislation to provide an opportunity for the development of interpretive canons. Yet while there was plenty of interpretive activity occurring, no clear interpretive canon for jurisdictional statutes developed. In some cases, the Supreme Court responded sympathetically to the legislative goal of expanding access to the national courts, especially for railroads and other national enterprises.<sup>72</sup> Indeed, the Court at times described the legislature's expansions of federal jurisdiction as "remedial" in nature and, according to the traditional rule for remedial statutes, gave the statutes a liberal construction in order to accomplish Congress's goals.<sup>73</sup> Treating the statutes as remedial in this way would, of course, run directly contrary to the modern notion that jurisdictional statutes

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68. FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 61 (1928); STANLEY I. KUTLER, *JUDICIAL POWER AND RECONSTRUCTION POLITICS* 147–54 (1968).

69. See, e.g., 13D WRIGHT ET AL., *supra* note 3, § 3573, at 547, 554 (discussing the Ku Klux Klan Act of 1871).

70. See KUTLER, *supra* note 68, at 157–60; Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 516–17 (2002); William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863–1875*, 13 AM. J. LEGAL HIST. 333, 342 (1969).

71. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470; FRANKFURTER & LANDIS, *supra* note 68, at 64–65.

72. See KUTLER, *supra* note 68, at 156–58; Gillman, *supra* note 70, at 518–19; see also Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 729–30 (1986) (explaining that the Supreme Court and lower courts gave the removal provisions of the 1875 Act a broad and enthusiastic reading). A notable broad reading of the defendant's right to remove came in the *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885), which interpreted the 1875 Act to permit defendants to remove state-law claims based on the defendants' federal corporate charter.

73. *E.g.*, *Home Life Ins. Co. of Brooklyn v. Dunn*, 86 U.S. 214, 224 (1873) (“[T]he [1867 removal] statute is remedial, and must be construed liberally.”).

should be construed narrowly. Yet in other cases the Justices responded with caution to some of Congress's boldest jurisdictional innovations, reading the statutes to preserve established limitations that Congress might have intended to overturn.<sup>74</sup> All in all, the Court's record in the post-bellum years was hardly uniform in one direction or the other.<sup>75</sup> In any event, the Court's response to the jurisdictional statutes of the 1860s and 1870s does at least belie any notion that narrow construction is a long-standing, deeply rooted policy of the law.

As further evidence that the modern idea of strict construction of federal jurisdiction is a relatively late arrival, consider G.A. Endlich's 1880s American revision of Maxwell's famous British treatise on statutory interpretation. Drawing on Maxwell's teachings but adding support from American (mostly state) jurisprudence, Endlich initially recites both the presumption against ousting existing jurisdiction and the presumption against creating new jurisdiction.<sup>76</sup> Coming then to the particularly American problem of federal courts, Endlich writes:

The presumption against the extension, or creation of new jurisdictions is one of considerable practical importance as affecting the powers of federal courts. The federal courts have, strictly speaking, no common law jurisdiction; and as their jurisdiction is special and not general, there can be no presumption of jurisdiction in their favor and the record must disclose all the facts necessary to give them cognizance of the case under the various acts of Congress. *In the construction of these acts, however, a reasonable liberality is not to be denied to their language.*<sup>77</sup>

Endlich was unusual in directly addressing the issue of federal subject-matter jurisdiction. Other nineteenth-century treatises on statutory interpretation focused on state courts and general principles, often reciting an unhelpful mix of canons—for example, that statutes creating jurisdictions not recognized at common law are strictly construed, except when they are not, such as when the

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74. In the 1873 *Case of the Sewing Machine Companies*, the Supreme Court did not cite a narrow-construction rule, but the Court did say that it should not read the recent removal statutes to override long-standing restrictions on removal unless their language unmistakably so required. 85 U.S. (18 Wall.) 553, 584–87 (1873); *see also* KUTLER, *supra* note 68, at 153–54 (arguing that the Court failed to honor congressional intent in that case).

75. *See, e.g.*, EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958*, at 87–147 (1992) (describing the Court's shifting approaches to diversity jurisdiction and diversity removal cases).

76. G.A. ENDLICH, *COMMENTARIES ON THE INTERPRETATION OF STATUTES* 211, 217–19, 488, 736 (Jersey City, N.J., Frederick D. Linn & Co. 1888).

77. *Id.* at 221–22 (emphasis added).

statutes are deemed remedial.<sup>78</sup> Treatises on federal jurisdiction from the early 1880s do not state a rule of strict construction.<sup>79</sup>

All of this leaves us with this surprising finding: almost one hundred years into the life of the federal courts, there was no canon of strictly construing federal jurisdiction or, at least, nothing resembling the well-established and oft-repeated canon we see today.

Things would soon begin to change, however, both in the courts and in Congress. Traces of the modern narrow-construction rule began to appear in lower-court opinions in the 1880s. The statutes of the 1860s and 1870s had led to massively swollen federal dockets,<sup>80</sup> and some federal judges began to react against generous grants of jurisdiction. In one 1885 case, Judge Brewer, who would later be appointed to the U.S. Supreme Court, wrote:

[I]t must be remembered that in questions of doubt as to jurisdiction, the federal courts should remand. They should not be covetous, but miserly, of jurisdiction. . . . The overburdened docket of this court should not be loaded with removed cases, unless its jurisdiction is clear and the mandates of the law imperatively require it.<sup>81</sup>

In 1887, Congress enacted important legislation that cut back on jurisdiction, especially removal jurisdiction. Shortly thereafter, a leading authority of the day explained the change in congressional policy reflected in that statute and how the courts responded to it:

The history of the Federal jurisdiction is one of constant growth; slow, indeed, during the first half-century and more, but very rapid within the last few years. . . . But a strong reactionary tendency has been manifested in the latest enactment of Congress upon this subject, [namely the 1887 statute.] . . . Its apparent design is to stem the tide of litigation pouring into the Federal courts. . . . In fact the courts hold that the intention of the act to restrict the removal of causes is so clear that it must be strictly construed against anyone seeking to evade the additional requirements which it puts upon the right of removal.<sup>82</sup>

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78. See BISHOP, *supra* note 48, at 190–91. The treatise writer most remembered today, because his treatise lives on in modern editions, is Sutherland. His 1891 first edition included several sections that present historically familiar canons applicable to jurisdictional statutes, including a presumption against ouster of established jurisdictions and a rule that limited jurisdictions should be construed strictly, but it did not address federal courts in particular. SUTHERLAND, *supra* note 48, §§ 421, 504–07, 561. Another treatise from the same era also repeats these familiar twin presumptions, but it likewise does not have anything to say about federal courts in particular. HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 123–24 (St. Paul, W. Publ'g Co. 1896).

79. GEORGE W. FIELD, A TREATISE ON THE CONSTITUTION AND JURISDICTION OF THE COURTS OF THE UNITED STATES (Phila., T. & J.W. Johnson & Co. 1883); WILLIAM E. MILLER & GEORGE W. FIELD, FEDERAL PRACTICE (Des Moines, Mills & Co. 1881).

80. FRANKFURTER & LANDIS, *supra* note 68, at 60–65, 77–78, 86–87.

81. *Kansas v. Bradley*, 26 F. 289, 292 (C.C.D. Kan. 1885).

82. HENRY CAMPBELL BLACK & JOHN F. DILLON, REMOVAL OF CAUSES FROM STATE COURTS TO FEDERAL COURTS 2–4 (St. Louis, Cent. Law Journal Co. 5th ed. 1889) (emphasis omitted); *see*

Another treatise, written at the turn of the century, observed that some older cases, presumably those interpreting the 1860s and 1875 statutes, had stated or implied that removal provisions should be liberally construed. “But,” the treatise cautioned, “that is not the present practice”; instead, “[removal] statutes should be strictly construed.”<sup>83</sup> In the waning years of the nineteenth century and the early years of the twentieth, one can find quite a number of statements in lower-court cases referring to a purportedly well-established practice of construing the removal statutes narrowly.<sup>84</sup>

The authorities just cited focused on removal jurisdiction, in some cases referring to the congressional policies behind the 1887 Act in particular, and these cases are not much cited today as sources for the narrow-construction canon in its more general form. For the source of the modern rule, which has been understood to apply to jurisdictional statutes generally, one must look a bit later. When one examines today’s lower-court invocations of the canon and traces the line of authority back through the sedimented layers of circuit precedent, one usually ends up with one of two Supreme Court cases: *Healy v. Ratta* (1934)<sup>85</sup> or *Shamrock Oil & Gas Corp. v. Sheets* (1941).<sup>86</sup> *Healy* addressed the issue of how to measure the amount in controversy in a dispute over a license fee. If the relevant amount was the small fee immediately due, the jurisdictional amount was not satisfied; if the proper amount was the reduction in the value of the

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*also* Tennessee v. Union & Planters’ Bank, 152 U.S. 454, 462 (1894) (referring to the 1887 Act’s “general policy” of “contract[ing]” jurisdiction).

83. B.C. MOON, THE REMOVAL OF CAUSES 47, 48 n.5 (1901). From reading the relevant sections of Moon’s treatise, it is plain that he was a booster of the narrow-construction canon, not just a dispassionate reporter. Given the concrete stakes involved in forum choice, it is not surprising to see, then or now, that observation and prescription can blend.

84. *E.g.*, *W. Union Tel. Co. v. Louisville & N.R. Co.*, 201 F. 932, 945 (E.D. Tenn. 1912) (referring to a “well-settled rule” of remanding when jurisdiction is unclear); *Heller v. Ilwaco Mill & Lumber Co.*, 178 F. 111, 112 (C.C.D. Or. 1910) (referring to a “tendency . . . to construe [the 1887 act] strictly against the right of removal”); *Shane v. Butte Elec. Ry. Co.*, 150 F. 801, 812 (C.C.D. Mont. 1906) (stating that “the federal courts have recognized that the statutes of removal should be construed not in a way to authorize the exercise of jurisdiction where the question is doubtful”); *Crane Co. v. Guanica Centrale*, 132 F. 713, 713 (C.C.S.D.N.Y. 1904) (remanding where authorities were split regarding whether the amount sought in a counterclaim could be added to the plaintiff’s claim in order to satisfy the jurisdictional amount and stating that “where a substantial doubt exists as to the jurisdiction of the federal court the case should be remanded”); *Dwyer v. Peshall*, 32 F. 497 (C.C.S.D.N.Y. 1887) (“The amendments of 1887 were plainly meant to restrict removals from state to federal courts. . . . The intention of the act is so clear that it should be strictly construed against any one seeking to evade the additional limitations which it puts upon the right of removal.”); *see also* Haiber, *supra* note 27, at 624 (identifying judicial interpretations of the 1887 statute as the source of the rule of strictly construing removal).

85. 292 U.S. 263 (1934).

86. 313 U.S. 100 (1941).

business caused by the licensing requirement, the jurisdictional amount would be met.<sup>87</sup> The Court ruled that the former measure was proper and ordered dismissal for lack of jurisdiction.<sup>88</sup> In reaching that conclusion, the Court stated:

Not only does the language of the statute point to this conclusion, but the policy clearly indicated by the successive acts of Congress regulating the jurisdiction of federal courts supports it. . . . [T]he jurisdiction of federal courts of first instance has been narrowed by successive acts of Congress, which have progressively increased the jurisdictional amount. The policy of the statute calls for its strict construction. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.<sup>89</sup>

The other frequently cited source for the canon, especially as regards removal jurisdiction, is *Shamrock Oil & Gas*. That case addressed whether a plaintiff who had filed in state court could remove to federal court when faced with a counterclaim that satisfied the requirements for diversity jurisdiction.<sup>90</sup> The Supreme Court ruled that the plaintiff could not remove. The Court reasoned that the then-current removal statute restricted removal to “the defendant or defendants” and that this language was narrower, and was intended by Congress to be narrower, than the prior version of the statute, which had referred to “either party.”<sup>91</sup> The Court then added: “Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation.”<sup>92</sup> One might observe that here, as in *Healy*, the reference to an interpretive presumption came after the Court had already mentioned other factors that pointed in the same direction; the presumption was, therefore, arguably unnecessary to the result.<sup>93</sup> Such are the relative trickles of authority that eventually became the daily flood of support, in lower-court citations, for the general rule of narrow construction.

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87. 292 U.S. at 265–66.

88. *Id.* at 272.

89. *Id.* at 269–70 (citations and footnote omitted).

90. 313 U.S. at 102–03.

91. *Id.* at 104–08.

92. *Id.* at 108. The Court concluded this paragraph with a quotation and citation to *Healy*. *Id.* at 109.

93. More broadly, one could argue that interpretive rules are never necessary, that they are always dicta. The precedential status of the canons is addressed below. *See infra* Section II.A.2.

*b. The Supreme Court's Recent Neglect and Negativity*

Recent history has not been kind to the jurisdiction canon. Endorsements of the canon at the Supreme Court level have become rare.<sup>94</sup> More common is neglect. In one 1999 case, which interpreted the timing requirements for removal, one of the main points of Chief Justice Rehnquist's brief dissent was to accuse the majority of "depart[ing] from this Court's practice of strictly construing removal and similar jurisdictional statutes."<sup>95</sup> One might have expected the majority to respond, perhaps by explaining that the canon had been overcome by other considerations, but the majority did not mention the canon at all.<sup>96</sup> To be sure, any particular omission of the canon can be deemed insignificant. Yet, as the following paragraphs explain, the Supreme Court's cases show a pattern of negative treatment that is hard to ignore.

When the modern Court does mention the jurisdiction canon, what it says is often ambivalent or even hostile. In 2003, the Court cited *Shamrock Oil & Gas* and referred (at least in paraphrasing a party's argument) to a "federal policy of construing removal jurisdiction narrowly."<sup>97</sup> The Court nonetheless went on to hold that there was removal jurisdiction and—in a passage that looks portentous in retrospect—questioned the validity of the narrow-construction rule, at least in certain types of removal disputes, in light of post-1941 amendments to the removal statute.<sup>98</sup> Read for all it is worth, this passage could be taken to mean that narrow construction of jurisdiction is not a general policy of the law but merely a function of the legislative goals behind certain jurisdictional enactments, which of course Congress can and does change from time to time.

Since then, the Court has gone further to marginalize—and arguably abrogate—the canon. In 2005, in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, the Court had what is probably its most

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94. For one of those rare invocations of the canon, see *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 (2002) (stating that "statutory procedures for removal are to be strictly construed" and citing four cases from the 1920s through 1940s).

95. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 357 (1999) (Rehnquist, C.J., dissenting).

96. The Court's rather short opinion relied largely on traditional practice and pragmatic considerations. See 526 U.S. at 351–56.

97. *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697 (2003) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941)).

98. *Breuer*, 538 U.S. at 697–98. In 1948, after *Shamrock Oil & Gas*, the removal statute was amended to provide that suits within the district courts' original jurisdiction were removable "[e]xcept as otherwise expressly provided by Act of Congress," (emphasis added), which the Court in *Breuer* understood to put the burden on the party resisting removal to identify such an express exception to the general rule of removability. See *id.*

important encounter with the canon in a non-removal case this century.<sup>99</sup> Both of the courts of appeals in the consolidated cases under review in *Exxon Mobil* had cited the narrow-construction rule in their opinions.<sup>100</sup> And in the briefing to the Supreme Court, the parties opposing jurisdiction used the narrow-construction canon in their arguments.<sup>101</sup> The Supreme Court upheld jurisdiction in both cases and, more importantly, set out the interpretive principles in the following way:

We must not give jurisdictional statutes a more expansive interpretation than their text warrants, but it is just as important not to adopt an artificial construction that is narrower than what the text provides. No sound canon of interpretation requires Congress to speak with extraordinary clarity in order to modify the rules of federal jurisdiction within appropriate constitutional bounds. *Ordinary principles of statutory construction apply.*<sup>102</sup>

Especially in light of the way the case was briefed, the Court's admonition to use "ordinary principles" of interpretation sounds like a retreat from the narrow-construction canon.<sup>103</sup> The passage above could even be taken as an abrogation of the canon: courts should use "ordinary principles," with no presumptions or tie-breakers against jurisdiction.

John Roberts joined the Court as Chief Justice shortly after the *Exxon Mobil* decision, and since then support for the jurisdiction canon has further weakened. The first opinion written by the newly appointed Chief Justice, which concerned the standard for awarding fees for improper removal, gave no hint that removal was a disfavored, strictly construed device; if anything, the opinion's repeated invocations of the defendant's congressionally conferred "right to remove" suggested the contrary.<sup>104</sup> This is not to say that the Roberts

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99. 545 U.S. 546 (2005).

100. *Rosario Ortega v. Star-Kist Foods, Inc.*, 370 F.3d 124, 142 (1st Cir. 2004) ("The Supreme Court . . . has repeatedly admonished that in light of the burgeoning federal caseload, diversity jurisdiction must be narrowly construed."), *rev'd sub nom. Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005); *Allapattah Servs., Inc. v. Exxon Corp.*, 362 F.3d 739, 757 (11th Cir. 2004) (Tjoflat, J., dissenting from denial of rehearing en banc) (urging the Supreme Court "to give guidance in applying the 'substantive' canons of statutory construction . . . includ[ing] the directive to construe jurisdictional grants narrowly").

101. Brief of Petitioner at 12, *Exxon Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) (No. 04-70), 2004 WL 2812088; Brief for Respondent at 36, *Rosario Ortega v. Star-Kist Foods, Inc.*, 545 U.S. 546 (2005) (No. 04-79), 2005 WL 139840.

102. 545 U.S. at 558 (citation omitted) (emphasis added).

103. I am not the only one to read the passage this way. See Debra Lyn Bassett, *Statutory Interpretation in the Context of Federal Jurisdiction*, 76 GEO. WASH. L. REV. 52, 86 (2007) ("Although some prior Court decisions had expressed favor for interpreting jurisdictional statutes narrowly, *Allapattah* opined that jurisdictional statutes should presumptively be read neither broadly nor narrowly." (footnotes omitted)).

104. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 137, 140 (2005).

Court consistently rules in favor of expanded federal jurisdiction. Sometimes it does, sometimes it does not. Here we are considering not the outcomes of particular cases (i.e., jurisdiction exists or not) but rather whether the Court's reasoning shows that the narrow-construction canon is a vital tool. For the most part, the Court's reasoning does not use and endorse the canon. One could discuss many examples of cases in which the canon might have been cited but was not, but I will describe two cases—cases that contain the Roberts Court's most considered statements about the canon. One is highly negative on the canon and the other is at best equivocal.

The Court's most unfavorable statement came in the December 2014 decision in *Dart Cherokee Basin Operating Co. v. Owens*.<sup>105</sup> In that case, the Court rejected use of the jurisdiction canon in cases involving CAFA and cast doubt on the canon's validity as a more general matter. *Dart Cherokee* involved a routine matter of removal practice, namely whether a notice of removal had to be accompanied by evidence (not just allegations) establishing the existence of necessary jurisdictional facts. The Court easily answered in the negative: the notice of removal only need include sufficient allegations; evidence might be required only later, if the allegations were challenged. Given the fairly obvious error in the lower court's understanding of removal requirements,<sup>106</sup> it was probably unnecessary for the Court to address the role of background policies and presumptions. But the Court did:

[The lower court] relied, in part, on a purported "presumption" against removal. We need not here decide whether such a presumption is proper in mine-run diversity cases. It suffices to point out that no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court.<sup>107</sup>

To drive the point home, the Court then cited a portion of CAFA's legislative history stating that the statute's "provisions should be read broadly"<sup>108</sup>—i.e., *contrary* to the traditional canon.

The Supreme Court's rejection of the jurisdiction canon's use in CAFA cases was contrary to the understandings of lower courts, which had mostly applied the canon to CAFA cases,<sup>109</sup> but for our purposes that is not the most important aspect of the decision. The more

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105. 135 S. Ct. 547 (2014).

106. Although the Court divided 5-4 in *Dart Cherokee*, the dissenters did not endorse the lower court's interpretation of the removal statute. Rather, they contended that the Supreme Court could not properly reach the issue at all. *Id.* at 558–59, 562 (Scalia, J., dissenting).

107. *Id.* at 554 (majority opinion).

108. S. REP. NO. 109-14, at 43 (2005), *quoted in Dart Cherokee*, 135 S. Ct. at 554.

109. *See infra* note 242 and accompanying text.

significant thing is that the Court took the quite unnecessary step of referring to the presumption against removal *in its more general form*—despite the presumption’s prior endorsement by the Supreme Court and thousands of citations in the lower courts—as merely a “purported” rule! That sort of dismissive treatment is a bad omen for the jurisdiction canon, especially when it follows a decade of rude neglect.

In my estimation, the closest the Roberts Court has come to expressing the narrow-construction rule is *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, which concerned the interpretation of a jurisdictional provision of the Securities Exchange Act of 1934.<sup>110</sup> The Act provides exclusive federal jurisdiction over suits “brought to enforce any liability or duty” created by the Act. The question in *Merrill Lynch* was whether that jurisdictional grant applied when a plaintiff alleged violations of the Act’s duties but sought relief only on state-law theories. The Court held that there was no federal jurisdiction, reasoning that the Act’s jurisdictional provision did not go beyond 28 U.S.C. § 1331’s general grant of jurisdiction over claims that “arise under” federal law, a jurisdictional grant that the parties agreed did not encompass the plaintiff’s claim.<sup>111</sup> Near the end of its opinion, after discussing the Act’s text and the relevant precedents interpreting it and similarly worded statutes, the Court turned to considerations of policy. The opinion stated that “this Court has time and again declined to construe federal jurisdictional statutes more expansively than their language, most fairly read, requires”<sup>112</sup> and observed that the Court had been reluctant to “expand the jurisdiction of federal courts through a broad reading of jurisdictional statutes.”<sup>113</sup> This language clearly rejects any rule of *broad/liberal interpretation*, but it stops short of embracing the traditional rule of *narrow/strict interpretation*. To be sure, the difference between narrow, normal, and broad interpretation is elusive in practice.<sup>114</sup> But the Court’s use of different wording was almost certainly not accidental. The passage at issue quoted language from *Healy* and *Shamrock Oil & Gas* about the need to give due regard to the role of state courts,<sup>115</sup> but it did not quote those cases’ much-cited and canon-generative adjacent language

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110. 136 S. Ct. 1562 (2016).

111. *Id.* at 1567, 1575.

112. *Id.* at 1573.

113. *Id.* (quoting *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 379 (1959)).

114. *See supra* Section I.B.

115. 136 S. Ct. at 1573.

that refers to “strict construction.”<sup>116</sup> Further, the lower court under review in *Merrill Lynch* had used the traditional language of strict construction.<sup>117</sup>

The Supreme Court’s attitude toward the canon over roughly the last decade, which has ranged from neglect to ambivalence to hostility, has not yet made much of an impression on the lower courts in non-CAFA cases.<sup>118</sup> As observed at the outset, they cite the canon hundreds of times every year.<sup>119</sup> This divergence between the practices of courts at the different levels of the judicial hierarchy is a point to which we will return later, in the descriptive assessment of the canon’s trajectory.<sup>120</sup>

## 2. Precedential Analysis

Armed with an understanding of the jurisdiction canon’s history, we can consider whether the jurisdiction canon is justified as a matter of precedent. As the history revealed, the jurisdiction canon’s pedigree is a bit weaker and more contingent than one might guess given the frequency with which lower courts now cite it. Of course, our modern notion of precedent does not require much to make law. If the Supreme Court says something once, that statement becomes the law of the land until overruled, at least as far as lower courts are concerned.<sup>121</sup> One published opinion by a court of appeals generally

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116. See *supra* text accompanying notes 85–93 (discussing these cases’ roles as sources for the jurisdiction canon). The same paragraph of *Merrill Lynch* also quoted *Romero*, but again not *Romero*’s own quotation, two sentences before, of *Healy*’s “strict construction” language.

117. *Manning v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 772 F.3d 158, 162 (3d Cir. 2014), *aff’d*, 136 S. Ct. 1562.

118. See 16 GEORGENE VAIRO, MOORE’S FEDERAL PRACTICE—CIVIL § 107.05 (3d ed. 2016) (“Recent developments have cast some doubt on the axioms that removal is strictly construed and that a presumption exists against removal . . . . Nevertheless, federal courts continue to recite these axioms [i.e., of narrow construction.]”); Bruhl, *supra* note 18, at 532–33 (noting that lower courts largely ignored the Supreme Court’s negative statements about the canon in *Exxon Mobil*). For an example of a rare lower-court opinion that saw *Exxon Mobil* as diminishing the canon, see *Palisades Collections LLC v. Shorts*, 552 F.3d. 327, 341–42 (4th Cir. 2008) (Niemeyer, J., dissenting).

119. *Supra* note 6 and accompanying text.

120. See *infra* Sections III.A–B. A forthcoming study by Anita Krishnakumar shows that the Supreme Court uses substantive canons less often than most of us would have guessed. Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. (forthcoming 2017). As this Article illustrates, courts at different levels of the judicial system can show quite different frequencies of use for different canons. The jurisdiction canon is heavily used in the lower courts but plays a smaller role in the Supreme Court. Other canons show the opposite pattern. See Bruhl, *supra* note 18, at 554–55.

121. See *Hart v. Massanari*, 266 F.3d 1155, 1168 (9th Cir. 2001) (referring to “[t]he modern concept of binding precedent—where a single opinion sets the course on a particular point of law and must be followed by courts at the same level and lower within a pyramidal judicial

makes law for the district courts in that circuit and the court of appeals itself unless the en banc court overrules it.<sup>122</sup> Further, *stare decisis* is said to protect statutory-interpretative precedents with even greater than usual force, because, unlike constitutional precedents, they can be corrected by Congress.<sup>123</sup>

Nonetheless, a precedent-based defense of the jurisdiction canon is subject to two important counterarguments. The first counterargument holds that a canon, and interpretive methodology more generally, is not the sort of thing that can enjoy precedential effect as a formal matter. The second counterargument assumes that the jurisdiction canon could have precedential force (either formally or in the looser sense that settled practices presumptively ought to be honored) but nonetheless holds that the canon does not deserve much protection because abrogating it would neither upset private reliance interests, nor frustrate congressional expectations, nor unsettle the judicial system. The following Subsections elaborate on these points and conclude that history and precedent can provide at best modest support for the canon.

#### *a. Canons as Precedents*

Suppose a court rules in a case (call it case *C*) that a particular jurisdictional statute *S* does not provide jurisdiction over a certain dispute *D*. Along the way to that outcome, the court cites several considerations in support of its interpretation of the jurisdictional statute, including the jurisdiction canon. “Our reading of the statute’s text is reinforced and confirmed,” we could imagine the court writing, “by the rule that statutes conferring subject-matter jurisdiction are to be narrowly construed.”

Which aspects of case *C* enjoy precedential effect? Surely such effect attaches at least to the result that statute *S* does not confer jurisdiction over dispute *D* and the category of disputes that are indistinguishable from *D*. (Whether a particular dispute fits within that category may well be debatable, of course, but that is always part of the ordinary process of applying and distinguishing precedent.)

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hierarchy”); see also Frederick Schauer, *Opinions as Rules*, 53 U. CHI. L. REV. 682, 683–84 (1986) (“In interpretive arenas below the Supreme Court, one good quote [from the Supreme Court] is worth a hundred clever analyses of the holding.”).

122. Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 794–804 (2012); see also John B. Oakley, *Precedent in the Federal Courts of Appeals: An Endangered or Invasive Species?*, 8 J. APP. PRAC. & PROCESS 123, 125–29 (2006) (discussing the development of today’s strict “peremptory” law of the circuit).

123. *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2403 (2015).

Whether other aspects of case *C*, such as the narrow-construction canon, have precedential status is far less clear.

One initial complication is that the canon was presented, in the hypothetical above, as one aspect of the rationale supporting the outcome, but the canon was not the only consideration. In this respect the hypothetical is realistic, as any single interpretive source is usually just one part of the justification for a result.<sup>124</sup> Indeed, the leading Supreme Court invocations of the jurisdiction canon could reasonably be characterized as cases in which use of the canon was unnecessary (though this did not stop those cases from being widely cited as sources for the canon).<sup>125</sup>

There is a second, deeper problem. Suppose the hypothetical were modified so that the canon represented the decisive reason for the outcome in case *C*. Even so, it is not at all clear that the canon would therefore achieve precedential status for all disputes involving jurisdictional statutes or even all disputes arising under statute *S*. That is because interpretive methodology presents a difficult and disputed question about the proper “scope” of precedent.<sup>126</sup> In part the uncertainty can be laid at the feet of the age-old dispute over how broadly to define a case’s holding and how much of the court’s reasoning becomes transferable binding law as opposed to non-binding dicta. But the canons of interpretation arguably present a special case within that debate. Indeed, the question of interpretive methodology’s legal status has attracted enough scholarly attention of late to form its own subcategory of jurisprudential inquiry.<sup>127</sup> Although the normative question of how methodology should be treated is a complex one, there is something approaching a conventional wisdom within the field of legislation that questions of methodology generally do not, as a descriptive matter, enjoy ordinary precedential status in federal practice, especially not in the Supreme Court.<sup>128</sup>

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124. Even the strongest supporters of the canons recognize that canons are not rigid rules that, taken individually, conclusively demonstrate meaning. Rather, different canons and other indications of meaning need to be synthesized and reconciled through sound judgment. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 51, 59–62 (2012).

125. See *supra* text accompanying notes 85–92.

126. See Randy Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 222–23 (2014) (discussing whether matters of interpretive methodology fall within the binding portion of a prior decision).

127. See, e.g., William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017); Gluck, *supra* note 16, at 1907–18, 1968–90; Jennifer M. Bandy, Note, *Interpretive Freedom: A Necessary Component of Article III Judging*, 61 DUKE L.J. 651 (2011).

128. See, e.g., Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1872–84 (2008) (explaining that the Supreme Court does not give decisions about interpretive methodology ordinary binding effect); Abbe R.

For my own part, I believe that the precedential effect of the canons has generally been underestimated. I think this has happened for two reasons. First, an assessment of whether the canons are binding needs to take into account the nature of the canons as non-conclusive contributors to meaning. This topic requires further development in future work,<sup>129</sup> but let us suppose that being binding, *for a canon*, just means that the canon is a mandatory contributor to the resolution of an interpretive problem when the conditions for its applicability are satisfied.<sup>130</sup> Second, scholars' low estimate of the canons' force is also the result of the typical focus on the U.S. Supreme Court, which is indeed cavalier about disregarding interpretive rules (or any other rules) when they would be inconvenient.

When one looks to the lower courts, some glimmers of binding force come into view. To be sure, one rarely sees the matter of methodological *stare decisis* directly debated, because interpretive methodology tends to be implicit and unnoticed. Nonetheless, lower courts do sometimes speak as if the canons were binding on them in the sense that they are non-optional inputs when their triggering criteria are satisfied.<sup>131</sup> That is, the courts apply the canons and give them weight because a higher court, or prior precedent from the same court, has commanded it. And this is true for the jurisdiction canon in particular. In a noteworthy example, a recent decision from the Court of Appeals for the Eleventh Circuit read the Supreme Court's decision in *Dart Cherokee* as establishing "binding precedent" on *how* to interpret all provisions of CAFA.<sup>132</sup> As a result, the Eleventh Circuit repudiated prior circuit law that had employed the narrow-

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Gluck, *The States As Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1754 (2010) (stating that "[m]ethodological *stare decisis*—the practice of giving precedential effect to judicial statements about methodology—is generally absent from the jurisprudence of mainstream federal statutory interpretation"); Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 385–89 (2005) (observing that "*stare decisis* effect attaches to the interpretation that the Court gives to a statute, but the Court does not adhere to the interpretive methods used to reach that interpretation").

129. See Aaron-Andrew P. Bruhl, What Would It Mean to Have Methodological Precedent (and Do We Already Have It)? (Dec. 15, 2016) (unpublished manuscript) (on file with author).

130. I realize that referring to a canon's conditions of applicability elides some tough questions. For any given canon, it might not be clear—or indeed, it might be hotly contested—whether the canon must always be considered at the start of the analysis, whether the canon takes precedence over some other source like legislative history, etc. This sort of dispute does not mean the canon is not a mandatory contributor, just that its triggering conditions are unclear or unsettled. The same can be true of substantive precedents, of course.

131. See Bruhl, *supra* note 18, at 489 n.21 (providing examples from various contexts).

132. *Dudley v. Eli Lilly & Co.*, 778 F.3d 909, 912 (11th Cir. 2014) ("Applying this binding precedent from the Supreme Court [i.e., the *Dart Cherokee* case], we may no longer rely on any presumption in favor of remand in deciding CAFA jurisdictional questions.").

construction canon.<sup>133</sup> This does not necessarily mean that specific jurisdictional outcomes will change, but the Eleventh Circuit is saying that its interpretive regime has changed in a non-optional way. Similarly, the Court of Appeals for the Ninth Circuit expressly rejected an argument that *Dart Cherokee's* statement about interpretive presumptions was dictum; instead, the Ninth Circuit stated that the Supreme Court's new "instruct[ions]" abrogated prior circuit law to the extent circuit law had applied the narrow-construction canon to CAFA cases.<sup>134</sup>

The lower courts' tendency to treat the canons as binding even if they are arguably dicta in a technical sense should not really surprise us. Despite the traditional importance of the holding-dicta distinction, today's lower courts make little use of it.<sup>135</sup> They tend, instead, to look to the Supreme Court as a source of broadly applicable rules to be followed, not a source of narrow holdings to be distinguished.<sup>136</sup>

The discussion above provides some evidence of lower courts treating the jurisdiction canon as precedential—evidence that tends to undermine the conventional view that canons lack such status—but the brief treatment here is not meant to be definitive. The discussion does not attempt to establish that the courts would be correct, as a matter of first principles, to give methodology such effect. Whether they should do so is, as noted already, a complex and controversial question. But for the sake of further argument, we can assume that the jurisdiction canon does and should enjoy precedential status under the doctrine of *stare decisis* (not just as a matter of traditionalist respect for settled practices). That is, lower courts are absolutely bound by the Supreme Court's rulings about the canon and the Court itself must give them presumptively binding effect. As the next Sections show, even these assumptions are probably not sufficient to justify the canon's perpetuation.

### *b. Reliance*

Whether the jurisdiction canon has formal precedential status is not determinative of the question whether history justifies the

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133. *Id.*

134. *Jordan v. Nationstar Mortg. LLC*, 781 F.3d 1178, 1182–84 & n.2 (9th Cir. 2015).

135. David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2025–26, 2032–42 (2013); Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 240 (2010).

136. Neal Devins & David Klein, *The Vanishing Common Law Judge?*, 165 U. PA. L. REV. 595 (2017).

canon. Stare decisis is not absolute even in the statutory context.<sup>137</sup> In determining whether to reject prior law, one crucial factor—probably the most important factor—is whether there has been reliance on the prior law.<sup>138</sup> That is, the court being asked to overrule precedent asks whether private parties or institutions of government have made decisions premised on a certain state of the law and whether upsetting those expectations would lead to unfairness or disutility. Indeed, as a more general matter, *any* institution that is considering changing the law, *even in the absence of a formal doctrine of precedent*, should consider the effects of historically based expectations. (Legislatures are not bound by stare decisis, but that does not mean they should alter the law willy-nilly.) Therefore, whether or not one gives formal precedential status to canons, we should consider matters such as private reliance interests (explored in this Section), as well as congressional expectations (taken up afterward, in Section II.A.2.c) and judicial reliance (Section II.A.2.d).

Private reliance interests provide at most meager support for retaining the jurisdiction canon. The situations that trigger the most powerful reliance interests are typically situations in which parties make investments and otherwise order their affairs based on the existence of substantive entitlements, such as the various rights that come along with contractual relations or the ownership of property.<sup>139</sup> Matters of procedure and evidence are usually different. To choose an extreme example, people typically do not arrange their primary conduct (buying houses, changing jobs, etc.) based on such things as whether, in a hypothetical future lawsuit, the trial judge would be allowed to tell the jury of his or her view of the weight of the evidence. The matter of which court, state versus federal, might resolve a potential future dispute is more important than that last example, but there are a number of ways in which our system flattens differences across courts and thereby suppresses the influence of forum availability on primary conduct.<sup>140</sup> And here we are a further step

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137. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 695 (1978).

138. See generally Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459 (2013) (examining the role of reliance arguments in the doctrine of stare decisis); Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 GA. L. REV. 1035 (2013) (same).

139. *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.”).

140. For example, the *Erie* doctrine means that the substantive law applied in federal and state court will generally be the same, at least in principle. Similarly, Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure means that the federal courts will typically exercise the same personal jurisdiction as the state courts, so that access to federal court does not expand the number of states in which suit could be brought.

removed from serious reliance interests because we are not dealing with the fate of particular established jurisdictional propositions (e.g., disputes of type *D* must be heard in state court) but instead with an interpretive rule that *might* have *some* effect on the resolution of *unsettled* jurisdictional questions.

We can find some illumination on these points in the Supreme Court's decision in *Pearson v. Callahan*,<sup>141</sup> which overruled a prior decision about the manner in which courts were supposed to analyze government officials' assertions of the defense of qualified immunity in suits under 42 U.S.C. § 1983. Prior law had imposed a sequencing requirement according to which courts were required first to address whether the defendant had violated the law and, if so, whether the law had been so clearly established at the time of the defendant's conduct that any reasonable officer would have recognized the illegality.<sup>142</sup> In overruling that requirement, the Court emphasized that the sequencing requirement was a form of procedural rule that did not engender serious reliance interests.<sup>143</sup> Moreover, in response to the argument that change could be left to Congress, the Court explained that the sequencing requirement was a judge-made rule regarding how courts go about making decisions, such that the judiciary was actually the most appropriate initiator of change.<sup>144</sup> In light of those factors, the Court dispensed with the usual need to find egregious error or unworkability before overruling precedent.<sup>145</sup>

The reasoning of *Pearson* is applicable by analogy here. Although the jurisdiction canon involves statutory interpretation, it involves judicial methodology (i.e., procedure). And although one could claim that the canon, like most established canons, has won congressional blessing through acquiescence, interpretive canons are typically not the sort of thing that Congress expressly regulates and repudiates.<sup>146</sup>

In sum, even if the jurisdiction canon is theoretically eligible for precedential effect, it would be vulnerable to overruling because it does not engender the sorts of reliance interests that provide the strongest support for following precedent.

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141. 555 U.S. 223 (2009).

142. *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

143. 555 U.S. at 234.

144. *Id.* at 242.

145. *See id.* at 234.

146. *Cf.* Nicholas Q. Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002) (arguing that Congress should take a more active role in governing the interpretive regime).

I should close this Section by noting an important assumption upon which it is based. The discussion of reliance has been assuming that settled interpretations of jurisdictional statutes—the diversity statute requires complete diversity, limited liability companies are treated like partnerships rather than corporations for diversity purposes, etc.—will remain in place even if the jurisdiction canon is abandoned. To be sure, that is not the only way to carry out a shift in methodology: one could instead treat all prior outcomes as up for grabs, to be considered afresh in light of the new interpretive approach. Such an approach would threaten extreme disruption. My assumption that courts would honor previous interpretations comports with the way the U.S. Supreme Court has usually behaved, namely by preserving prior holdings even when they are out of step, as a matter of interpretive methodology, with current approaches. “Principles of *stare decisis*,” the Court has written, “demand respect for precedent whether judicial methods of interpretation change or stay the same.”<sup>147</sup> In the related context of private rights of action, the Supreme Court’s approach has seriously changed from one in which the Court freely created causes of action where necessary to achieve Congress’s regulatory objectives to one in which the Court focuses on whether the statutory text demonstrates that Congress itself created such a remedy.<sup>148</sup> Yet the Court generally has not gone back and overruled the prior cases that created such remedies, though some members of the Court would read those prior cases narrowly so as not to further expand the relief available.<sup>149</sup>

A side effect of leaving existing interpretations in place is that the jurisdiction canon, even if abolished, could continue to exercise influence from beyond the grave. Courts try to make new enactments (and new interpretations of old enactments) cohere with the existing body of law.<sup>150</sup> To the extent that the existing body of (non-CAFA) precedents reflects a history of reading jurisdiction narrowly, coherence-based interpretation and reasoning by analogy would tend to push new interpretations in that same direction, canon or no.

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147. *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 457 (2008); see also *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (refusing to overrule precedent that was out of step with newer presumption about how to interpret limitations periods for claims against the government).

148. See *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001) (describing the change in approach).

149. See *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 77–78 (1992) (Scalia, J., concurring in the judgment).

150. See Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 LEWIS & CLARK L. REV. 1565, 1569–71 (2010) (describing the ubiquity of the “integrative” mode of interpretation).

*c. Congressional Expectations*

Even if private parties are unlikely to have serious investment-backed expectations in a rule about how to interpret jurisdictional statutes, other actors or institutions might have relied on the canon in ways worth protecting. One entity that might have an interest in the continued use of the jurisdiction canon is Congress.<sup>151</sup>

Prior interpretations of the jurisdictional statutes provide the status quo baseline against which Congress legislates.<sup>152</sup> Changing the existing interpretations that Congress takes for granted when it legislates could render some of its handiwork superfluous or even counterproductive. But, again, the relevant question here is instead whether Congress relies on existing interpretive *methodologies and canons*, not existing interpretations, when it drafts legislation.

It is conceivable that Congress relies on canons in ways that are worth respecting. Indeed, one potential strategy for justifying the canons is to cast them as a coordinating regime that provides background rules against which Congress can legislate with some confidence about how courts will fill gaps and resolve ambiguities.<sup>153</sup> If Congress knows, for example, that statutory uncertainties will be read in favor of criminal defendants, against preemption of state law, against extraterritorial effect, and against federal subject-matter jurisdiction, then it should legislate with particular clarity when it wishes to impose criminal liability, preempt state law, legislate extraterritorially, or expand subject-matter jurisdiction.

The Congress-centered justification for the jurisdiction canon is subject to several objections. Perhaps the most obvious objection is that the coordination-related benefits of an interpretive regime cannot materialize if the canons are applied too erratically to generate a stable set of background expectations against which Congress can act. Further, even if courts are reliable enough in their use of the jurisdiction canon (which they may well be, compared to the way they use other canons), the justificatory strategy requires that Congress consider the jurisdiction canon when it legislates. On this matter the evidence is mixed. A recent study by Professors Abbe Gluck and Lisa

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151. See Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 454 (2010) (“Like private citizens, our legislative and executive branches of government rely on the Supreme Court’s rulings as setting the rules of the road.”).

152. See, e.g., H.R. REP. NO. 112-10, at 6–18 (2011), as reprinted in 2011 U.S.C.C.A.N. 576, 580 (providing extensive discussion of existing interpretations of jurisdictional and venue statutes as part of the justification for why certain amendments were desirable).

153. See William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 65–67 (1994) (discussing this potential coordinating benefit of an interpretive regime).

Bressman demonstrated that congressional drafters have at best uneven awareness of many aspects of judicial interpretive practice,<sup>154</sup> though, to be clear, the Gluck and Bressman study did not ask the survey participants about the jurisdiction canon in particular. At the same time, although the jurisdiction canon is not as famous as some canons, there is some evidence that Congress knows about the canon. Congress has mentioned it in committee reports<sup>155</sup>—and one could read the CAFA legislative history as attempting a partial abrogation of it.<sup>156</sup> Those signs of awareness might not be flukes; the Judiciary Committees and their staffs tend to include even more lawyers than average, and it would be reasonable to suspect that those committees think about judicial interpretive approaches more than most.<sup>157</sup> So it is at least conceivable that Congress does rely upon the canon and may have some expectations thwarted if the courts reject it. At the same time, CAFA and other recent legislative efforts show that today's Congress might prefer a more expansive approach to jurisdictional statutes.<sup>158</sup> It is not obvious which should carry more weight for the modern interpreter: a possible congressional assumption that courts engage in narrow interpretation or an apparent current congressional preference for broad interpretation.<sup>159</sup>

It is also possible that Congress has indirectly relied on the jurisdiction canon's presumed tendency to restrict federal dockets in

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154. 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, 926–29 (2013); see also Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002) (showing that legislative decisionmaking is driven more by the need to achieve agreement than by the goal of ensuring optimal judicial interpretation).

155. *E.g.*, S. REP. NO. 97-275, at 19 (1981), as reprinted in 1982 U.S.C.C.A.N. 11, 29 (“It is a canon of construction that courts strictly construe their jurisdiction.”). The dissenting views accompanying the House Judiciary Committee report in favor of the proposed Fraudulent Joinder Prevention Act of 2016 invoked the canon numerous times in arguing that the bill's expansion of jurisdiction was contrary to principles of federalism. H.R. REP. NO. 114-422, at 19, 21, 26 (2016).

156. S. REP. NO. 109-14, at 43 (2005) (stating that CAFA's provisions “should be read broadly”).

157. See Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 752–53, 755, 792 (2014) (finding mixed support for greater emphasis on canons on the Judiciary Committee); Nourse & Schacter, *supra* note 154, at 581–82 (“Of all committees, [the Senate Judiciary Committee] is the one where staffers are most likely to be schooled in the rules of clarity, canons of construction, and statutory interpretation.”).

158. See *supra* Section II.C (discussing congressional preferences regarding the scope of jurisdiction).

159. *Cf.* Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2084 (2002) (arguing that ambiguities should be interpreted to satisfy the discernible preference of the current government rather than those from the time of enactment).

making decisions about the size and staffing of the federal judiciary. Potential docket impacts of altering the canon are taken up below.<sup>160</sup>

*d. Judicial Familiarity*

Whether or not a canon can enjoy stare decisis effect as a formal matter, and whether or not private parties or even Congress have relied on the canon in the strict sense, it is nonetheless worth considering that the judiciary itself has become familiar with the canon and highly accustomed to using it. The canon is cited in judicial opinions hundreds of times a year.<sup>161</sup> If the canon were abolished, judges would have to learn the new rule and break their old habit. Lawyers would need to adjust, and treatises would need to be updated. Some mistakes would occur, at least in the short term, until the new rule became the new habit.

These sorts of switching costs are worth considering whenever legal change is proposed,<sup>162</sup> but considered from the long-run perspective they are fairly minor. Most invocations of the canon in judicial opinions are standard boilerplate that do not involve much thought and often do not even directly bear on the issues before the court,<sup>163</sup> so making the switch could be accomplished by updating the boilerplate.

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In sum, even if the jurisdiction canon is law entitled to stare decisis effect—which is itself debatable—overruling it would not be very disruptive. It is therefore necessary to think carefully about the canon’s contemporary merits. The next several Sections consider various virtues the canon might be thought to possess.

*B. The Canon as Quasi-Constitutional Law*

Statutes that conflict with the Constitution are subject to invalidation, but the Constitution can also influence the interpretation of statutes in less drastic, but still important, ways. A general principle of statutory interpretation is that statutes should be read, whenever reasonably possible, so as to avoid interpretations that

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160. See *infra* Section II.E.

161. See *supra* note 6.

162. See generally Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789 (2002) (discussing various costs that accompany legal transitions, including loss of certainty, the need to learn new rules, and increased risk of error).

163. See *infra* Section III.A.

would present difficult constitutional questions.<sup>164</sup> As a result, many canons operate as a form of “quasi-constitutional law”<sup>165</sup> by expanding the effective reach of certain constitutional provisions or principles through presumptions that bend statutes away from the protected territory. This Section considers whether the jurisdiction canon can be understood, and justified, in this way.

The constitutional values potentially served by the jurisdiction canon are respect for Article III’s limits and respect for broader principles of federalism. We have already observed the foundational character of Article III’s requirement that federal courts confine themselves to limited categories of cases.<sup>166</sup> As for federalism more broadly, *Healy v. Ratta*, one of the sources of the jurisdiction canon, said that strict construction was appropriate in order to recognize “the rightful independence of state governments” and to respect the “power reserved to the states [under the Tenth Amendment] to provide for the determination of controversies in their courts.”<sup>167</sup> Federalism is a constitutional value highly generative of interpretive canons, and so the jurisdiction canon stands alongside a number of other federalism canons, such as those that protect state treasuries and core state functions from federal interference.<sup>168</sup> As the Supreme Court recently stated in *Bond v. United States*, “[I]t is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute.”<sup>169</sup>

The constitutional considerations above provide some support to the jurisdiction canon, but not overly much. At least two factors undermine the link between constitutional values and the canon. First, the jurisdiction canon protects state interests of a different sort than the interests protected by other federalism canons. The jurisdiction canon does not protect state treasuries from potentially crippling monetary liability, as do the clear-statement rules inspired by the Eleventh Amendment.<sup>170</sup> Nor does the canon protect state authority to regulate particular subjects through substantive law, as does the presumption against preemption.<sup>171</sup> Rather, the jurisdiction canon concerns only *adjudicative* jurisdiction: the question of which

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164. See, e.g., *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

165. Eskridge & Frickey, *supra* note 17, at 619–29.

166. See *supra* text accompanying notes 2–3.

167. 292 U.S. 263, 269–70 (1934) (citations and footnote omitted).

168. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 460–64 (1991).

169. 134 S. Ct. 2077, 2090 (2014).

170. See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242–46 (1985).

171. See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

government's courts may decide disputes that arise under substantive law that is either state or federal regardless of which court hears the case. And, of course, the existence of federal adjudicative jurisdiction does not even displace state adjudicative jurisdiction, as concurrent rather than exclusive federal jurisdiction is the normal rule.<sup>172</sup>

Second, and more importantly, the vast majority of disputes about the meaning of the statutes setting forth federal subject-matter jurisdiction do not implicate any close questions of constitutional law. The constitutional balance between federal and state adjudicative authority is struck in Article III, which gives Congress power to confer federal jurisdiction within various categories of cases, and the jurisdictional statutes enacted pursuant to that authority are generally well inside the constitutional boundary. How to identify a corporation's principal place of business,<sup>173</sup> how to handle the thirty-day deadline for removal when defendants are served at different times,<sup>174</sup> how to allocate the burden of proof on factual predicates for removal<sup>175</sup>—all of these have been or still are important disputed questions under the jurisdictional statutes, but none of these questions generates constitutional worries in even the most anxious interpreter.

A rare exception—a dispute in which the pro-jurisdiction reading would have raised constitutional doubts—is *Mesa v. California*.<sup>176</sup> The case concerned whether the statute permitting federal officers to remove state criminal prosecutions<sup>177</sup> requires that the federal officer assert a federal defense or whether status as a federal officer is itself sufficient to satisfy the statute. The Court required the assertion of a federal defense and, as part of its rationale, said that dispensing with that requirement would raise “serious doubt” about the statute's constitutionality under Article III.<sup>178</sup> But again, this makes the case unusual among jurisdictional-interpretive disputes. In the rare case in which the interpretation of an ambiguous jurisdictional statute raises a serious constitutional question, the

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172. See *Tafflin v. Levitt*, 493 U.S. 455, 458–60 (1990).

173. See *Hertz Corp. v. Friend*, 559 U.S. 77, 92–96 (2010).

174. See *Barbour v. Int'l Union*, 640 F.3d 599 (4th Cir. 2011) (en banc) (discussing the circuit conflict over this issue). The split discussed in *Barbour* has now been settled by amendments to 28 U.S.C. § 1446(b)(2)(C), which allow later-served defendants to remove the suit if they can persuade the earlier-served defendants who failed to timely remove to change their mind and join the later removal.

175. See Lonny Sheinkopf Hoffman, *Burdens of Jurisdictional Proof*, 59 ALA. L. REV. 409, 411 (2008).

176. 489 U.S. 121 (1989).

177. 28 U.S.C. § 1442(a)(1) (2012).

178. 489 U.S. at 136–37.

statute should be interpreted to avoid the questionable zone, as with any other kind of statute presenting constitutional doubts.<sup>179</sup> Yet that hardly justifies an anti-jurisdiction canon that applies—as the jurisdiction canon does—to *every* jurisdictional question, the overwhelming majority of which do not remotely raise any constitutional difficulties.

None of this is to say that interpretations of jurisdictional statutes—and allocation of judicial authority more generally—cannot implicate important *policy* debates, including some that draw their force from constitutionally tinged values such as judicial restraint and respect for state authority. Whether the jurisdiction canon is good policy is a separate matter taken up below.<sup>180</sup>

### C. Effectuating Congressional Preferences

Although canons are wielded by courts, their content can sometimes be justified with reference to congressional intent. That is, for some canons at least, one can make a plausible case that they generally point toward the outcome that Congress would prefer.<sup>181</sup> If we think that Congress typically favors veterans' interests, then reading an ambiguous veterans-benefits law in a pro-veteran direction would help achieve the likely congressional goal.<sup>182</sup> If we think that Congress probably does not wish to impose unexpected liabilities, then we should read statutes not to have retroactive effects when they are ambiguous regarding their temporal scope.<sup>183</sup> To be clear, it is not the case that all substantive canons reflect, or could even be plausibly argued to reflect, actual congressional desires.<sup>184</sup> Sometimes courts create canons that favor what they think Congress *should* want or,

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179. Although it is not our focus here, it is worth noting that a statute that abolishes or severely restricts an established jurisdiction can raise constitutional worries, on the ground that Congress is abridging due process or interfering with the essential function of the federal courts. Courts require that congressional withdrawals of jurisdiction be clearly stated, especially where constitutional claims are involved. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 298 (2001); *Miller v. French*, 530 U.S. 327, 336 (2000); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1550 (2000).

180. *See infra* Section II.E (discussing potential policy justifications for the jurisdiction canon).

181. *See generally* Elhauge, *supra* note 159 (noting many canons that could be justified in this way).

182. *See, e.g.*, *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 441 (2011).

183. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 272 (1994) (“Because it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations.”).

184. *See generally* Barrett, *supra* note 52 (discussing the tension between judicial canons and congressional preferences).

more aggressively still, canons that stand in the way of legislative objectives that the courts think are unhealthy.<sup>185</sup> But some canons at least plausibly advance congressional aims, and the discussion here considers whether the jurisdiction canon is one of those canons.

The courts sometimes say that the canon furthers congressional desires. In an oft-cited passage in *Healy v. Ratta*, the Supreme Court relied on a congressional “policy” of jurisdictional restrictiveness in order to impose a “strict construction” on the then-current statute setting forth the jurisdictional amount.<sup>186</sup> Some lower courts today continue to state that congressional intent supports a rule of narrow jurisdiction.<sup>187</sup>

To decide if the jurisdiction canon furthers congressional aims, we need to know what Congress wants regarding jurisdiction, which is not easily ascertained. Any attempt to discern congressional preferences on any topic runs into some familiar difficulties, such as the fact that Congress is a multimember body that might lack a cohesive intent on a question. But determining congressional intent is unusually difficult when it comes to jurisdiction, for legislative preferences are not as deeply rooted or well formed regarding jurisdictional matters as they are regarding substantive policy outcomes. Legislators tend to view jurisdiction in instrumental terms. To take a recurring example, when members of Congress fervently oppose some doctrine but cannot substantively change it because it is constitutional in status (like the Supreme Court decisions restricting school prayer or allowing abortion), they might advocate stripping the federal courts of jurisdiction over such cases with the hope that state courts will rule differently.<sup>188</sup> But such episodes do not necessarily reveal any general view about the proper tie-breaker rule for close questions about the scope of federal jurisdiction in the ordinary run of cases.

Attempts to discern congressional intent when interpreting a particular piece of legislation require a choice about the time at which

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185. See *infra* Section II.D (considering whether the jurisdiction canon can be justified on such grounds).

186. 292 U.S. 263, 269–70 (1934).

187. See, e.g., *In re Gen. Motors LLC Ignition Switch Litig.*, 69 F. Supp. 3d 404, 409 (S.D.N.Y. 2014) (“In fact, in light of the congressional intent to restrict federal court jurisdiction, as well as the importance of preserving the independence of state governments, federal courts construe the removal statute narrowly, resolving any doubts against removability.” (internal quotation marks and brackets omitted)).

188. See Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 900–16 (2011) (citing examples of such efforts).

to assess intent,<sup>189</sup> but in the jurisdictional context we face the timing difficulty in an especially acute form, for Congress revisits jurisdiction frequently, often with changed attitudes about its proper scope. In *Shamrock Oil & Gas*, the Court was interpreting the 1887 amendment to the jurisdictional statutes in which Congress did indeed hope to restrict jurisdiction, but the jurisdictional rules being restricted in 1887 were those that had been created by the 1875 statute, which (like other statutes of that period and the preceding decade) had the goal of “greatly liberaliz[ing]” access to federal court.<sup>190</sup> So the congressional policy revealed by jurisdictional enactments flipped in the space of a decade. Both of those enactments, of course, were more than a hundred years in the past, which leaves plenty of time for many subsequent shifts.

The difficulties of discerning congressional preferences about jurisdiction may well suggest that congressional preferences do not provide the steadiest foundation for a substantive canon. Nonetheless, if courts are going to continue to enlist congressional desires as a justification for the canon, it is only current preferences that could provide the necessary support. The jurisdiction canon might have developed from the intent behind a particular nineteenth-century congressional enactment,<sup>191</sup> but today the canon purports to govern a general *category* of statutes enacted and amended at various times (just like substantive canons governing criminal statutes, statutes affecting Indian tribes, statutes raising constitutional difficulties, federal statutes regulating matters of traditional state concern, etc.). If a single canon is to govern a temporally dispersed category of statutes, the relevant time period for measuring intent cannot be any particular time of enactment. If today’s canon of narrowly construing jurisdictional statutes is to be justified by congressional preferences, it would need to be today’s congressional preferences.<sup>192</sup>

So what is Congress’s jurisdictional policy today, if there is one? It seems that if Congress currently has any preferences regarding the scope of federal adjudicatory jurisdiction, the desire is to expand it. Certainly that is the lesson of CAFA, the most recent major alteration of federal jurisdiction. CAFA was expressly intended to expand federal jurisdiction because state courts were regarded as

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189. See Elhauge, *supra* note 159, at 2081–84 (summarizing several arguments for using contemporary preferences rather than enacting-period preferences).

190. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 106 (1941).

191. See *supra* text accompanying notes 82–84.

192. For the possibility that today’s general canon could fracture into separate canons governing different types of jurisdiction, see *infra* Sections II.G, III.E.

inappropriate fora for interstate class actions.<sup>193</sup> In fact, the legislative history expressly directs courts to read CAFA's new jurisdictional grant broadly, that is, *contrary* to the traditional canon.<sup>194</sup> Since then, Congress has enacted several modest amendments to the jurisdictional statutes, almost entirely in an expansionary direction.<sup>195</sup> The House of Representatives (but not the Senate) recently passed a bill—the Fraudulent Joinder Prevention Act—that would, if enacted, significantly expand removal jurisdiction for diversity cases.<sup>196</sup> The Act's prospects have probably brightened due to the 2016 election results.

At the same time, one should not run too far with the idea that Congress has a strong preference for broad jurisdiction. CAFA, the most powerful recent statement, was a jurisdictional statute, but it was enacted for very specific substantive reasons, namely (as discussed more fully below) to reduce the liability exposure of businesses.<sup>197</sup> It was tort reform more than just jurisdictional reform, and for that reason it makes sense that the vote was largely along party lines. It is worth noting that the very next statute enacted after CAFA was the act creating jurisdiction and special procedural rules for a federal case to be brought by the parents of Terri Schiavo, the woman suffering in a persistent vegetative state whose sustenance was ordered removed by a Florida state court and whose plight attracted national media attention.<sup>198</sup> Surely that statute does not tell us much about broader congressional views of federal jurisdiction, except that jurisdiction was regarded as a tool for achieving other ends. As those ends shift, so does jurisdictional policy.

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193. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 5 (findings and purpose clauses).

194. S. REP. NO. 109-14, at 43 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 41.

195. *E.g.*, Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 19(a)–(c), 125 Stat. 284, 331 (2011) (expanding original jurisdiction and removal jurisdiction in certain intellectual-property cases); Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545 (expanding federal-officer removal); SPEECH Act, Pub. L. No. 111-223, § 3(a), 124 Stat. 2380, 2381 (2010) (providing jurisdiction over suits involving enforcement of foreign defamation judgments). The Federal Courts Jurisdiction and Venue Clarification Act of 2011 made many minor changes, some slightly expanding jurisdiction and others slightly curtailing it. *See* Arthur Hellman, *The Federal Courts Jurisdiction and Venue Clarification Act Is Now Law*, JURIST (Dec. 20, 2011, 5:00 PM), <http://jurist.org/forum/2011/12/arthur-hellman-jvca.php> [<https://perma.cc/R339-LCT5>] (describing the JVCA's provisions).

196. H.R. 3624, 114th Cong. (2d Sess. 2016); *see* Arthur D. Hellman, *The "Fraudulent Joinder Prevention Act of 2016": A New Standard and a New Rationale for an Old Doctrine*, 17 FEDERALIST SOC'Y REV. 34 (2016) (describing the bill's provisions and purposes).

197. *See infra* text accompanying notes 257–258.

198. Act of Mar. 21, 2005, Pub. L. No. 109-3, 119 Stat. 15; *see* Michael P. Allen, *Congress and Terri Schiavo: A Primer on the American Constitutional Order?*, 108 W. VA. L. REV. 309, 317–21 (2005) (describing the statute).

All of this discussion of congressional desires leaves us, frankly, without much clear guidance. CAFA demonstrates that Congress desired to expand jurisdiction in particular ways and also to foster expansive interpretations of that jurisdiction, but it is hard to say how much the desires behind CAFA should be used to interpret non-CAFA jurisdictional questions. What is clearer is that there is not any strong, recent evidence of congressional desire *in favor* of the current canon of narrow construction, apart from the fact, the interpretation of which is most uncertain, that Congress has not tried to repeal the canon wholesale.<sup>199</sup> If the jurisdiction canon is to be justified, we probably need to look elsewhere than to congressional desires.

#### *D. Counteracting Congressional Pathology*

The previous Section explained that some canons might be justified on the grounds that they advance congressional preferences. A very different, almost opposite, sort of justification is also possible: courts might use canons that resolve ambiguities *against* likely congressional preferences, either because providing Congress with an undesired result can prod it to express its preferences more clearly or, even more aggressively, because the courts regard Congress's likely preferences as the products of a dysfunctional process.<sup>200</sup>

A pathology-combatting justification for the jurisdiction canon is conceivable. Congress, one could plausibly argue, is too inclined to federalize things. This worry about federalization has found its strongest expression in the context of federal criminal law, where many observers have identified a problematic tendency of Congress to turn everything it sees into a federal case.<sup>201</sup> One might see CAFA as a

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199. The committee report on the proposed Fraudulent Joinder Prevention Act of 2016 rejects any special presumptions against removal for cases covered by the bill, but the report does not take a position on whether there should be presumptions against removal in cases that do not implicate fraudulent joinder. H.R. REP. NO. 114-422, at 11 & n.17 (2016). The committee members who *opposed* the bill heavily relied on the canon of narrowly construing removal statutes, arguing that the bill conflicted with this long-standing policy. *See id.* at 19, 21, 26.

200. *See, e.g.,* Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002) (arguing that courts should sometimes use canons that conflict with likely legislative preferences in order to induce the legislature to state its preferences more clearly); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 264-66 (1986) (arguing that courts should favor canons that promote the broad public interest and disfavor canons that make it easier for Congress to benefit narrow interests).

201. *See, e.g.,* TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 14-17 (1998) (observing that federal criminal law expands because expansion is politically popular, not because the evidence shows the need for it).

civil-jurisdictional manifestation of the same disease.<sup>202</sup> A judicially enforced canon of narrow construction would serve to resist this arguably unhealthy tendency.

Under conventional premises of legislative primacy, Congress's preference for federal jurisdiction would need to be *highly* problematic in order to justify such an aggressive move as establishing a canon to thwart it. But has Congress really gone so badly astray? As for CAFA in particular, it is not clear it should be regarded as an example of unnecessary, much less pathological, federalization. There are important national interests at stake in large cases with multistate elements, and prior law did allow plaintiffs, through manipulation of prior jurisdictional rules, to keep some of those cases of genuine national significance out of federal court.<sup>203</sup> And agree or disagree with CAFA's expansion of subject-matter jurisdiction, Congress is not treading close to constitutional boundaries.<sup>204</sup> Further, and somewhat ameliorating worries about imbalanced legislative influence, there are institutional forces that can be expected to lobby Congress against proposed expansions of jurisdiction: namely the federal judiciary, which has in fact fought against expansion and in favor of curtailment in the past.<sup>205</sup> For these reasons, my view is that it is too early to declare an epidemic of pathological jurisdictional expansionism serious enough to justify the strong medicine of a counter-canon aimed at suppressing it.

### *E. The Canon as Good Policy*

Congress is the primary policymaker in fields governed by statutory law, but questions of policy present themselves for judicial resolution when Congress leaves them open. Indeed, because there is no administrative agency charged with implementing jurisdictional statutes, any congressionally unresolved policy choices are left for judicial decision, subject as always to the possibility of congressional revisitation. A substantive canon can reflect a judicial determination (independent of legislative preferences) that a certain outcome is

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202. Cf. Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: "The Political Safeguards" of Aggregate Translocal Actions*, 156 U. PA. L. REV. 1929, 1934–36 (2008) (discussing various positive and negative appraisals of CAFA's relationship to federalism).

203. See Stephen C. Yeazell, *Overhearing Part of a Conversation: Shutts as a Moment in a Long Dialogue*, 74 UMKC L. REV. 779, 780, 794–95 (2006) (presenting a critique of CAFA according to which it does *too little* to federalize cases of national significance).

204. See *supra* Section II.B.

205. See *infra* text accompanying notes 232–233.

beneficial and that the outcome's desirability is regular enough that the policy choice can be made, not in every case afresh, but in the form of a generally applicable interpretive presumption. Whether the jurisdiction canon can be justified in this fashion therefore depends on whether it promotes good outcomes.<sup>206</sup> Needless to say, whether the canon has a good effect is a hard, multi-dimensional question. One must consider what values the canon might serve and how those benefits match up against corresponding losses on other dimensions.

The jurisdiction canon is usually justified through appeals to the value of preserving state authority,<sup>207</sup> but first let us briefly deal with another value. Restricting federal jurisdiction might be thought to advance the goal of judicial restraint.<sup>208</sup> As the Supreme Court has often emphasized in the related contexts of standing and justiciability, courts should play a limited role in a democratic society, with more authority properly residing with the more representative branches of government.<sup>209</sup> Still, the goal of judicial restraint cannot by itself justify the narrow-construction canon, as restricting federal judicial jurisdiction generally just expands the authority of state judges. Judicial power is exercised either way. One therefore needs to explain why it is important to restrain *federal* judges in particular. In other words, an argument based on judicial restraint naturally leads back to an argument about federalism, particularly federalism in its judicial dimension.

Is it valuable to restrict the jurisdiction of the federal courts in order to preserve state authority? The answer depends on one's assessment of the relative qualities of the federal and state courts and what one thinks the federal courts are for. If, as some have argued, the federal courts are *better* in important respects, if they are critically important in certain kinds of cases,<sup>210</sup> then we ought to err on the side of greater access, such as by reading jurisdictional statutes broadly or at least neutrally. But of course whether the federal courts are

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206. Cf. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 412 (1989) ("When interpretive norms are contested, and when neither the Constitution nor the Congress has specified the proper norms, there is no alternative but to base the inevitably value-laden choice among them on their role in improving or impairing governmental performance.").

207. See, e.g., *Healy v. Ratta*, 292 U.S. 263, 270 (1934).

208. See Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1937–39 (2008).

209. E.g., *Allen v. Wright*, 468 U.S. 737, 750 (1984).

210. See, e.g., Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Martin H. Redish & Jennifer Aronoff, *The Real Constitutional Problem with State Judicial Selection: Due Process, Judicial Retention, and the Dangers of Popular Constitutionalism*, 56 WM. & MARY L. REV. 1 (2014).

better—and what criteria are appropriate for judging quality—would make a good topic for an unending debate, for every supposed virtue of the federal courts can be recast as a vice. Are federal courts superior because they provide high-caliber judging that is free from local prejudices, or are they too remote (in multiple senses) from the people and too favorable toward the well-heeled? The answers to those questions depend on whom one asks, as well as the era in which one asks them.

Another policy consideration, less lofty but probably more practically important, concerns caseload. If broad interpretations of jurisdictional statutes would threaten to overwhelm the federal courts' limited capacity, that provides a reason to adopt rules that tend to restrict their jurisdiction and shrink their dockets. There are objective facts one can consult on these points—case filings per judge, time to disposition, and so forth—and one can compare those figures (suitably weighted and contextualized) to the corresponding figures in the state courts today or the federal courts of past eras. But the meaning of those facts, once again, depends on what the federal courts are *for* and which cases have a claim on their time. Are federal courts supposed to be a small, elite body giving special treatment to special cases, or are they meant to operate as a broadly available parallel system of adjudication?

If we think sound policy requires reduction of federal caseloads, we still face some tricky institutional questions about the relative primacy of legislative versus judicial policymaking. As a general matter, the legislature's discernable choices and policies should be paramount in statutory domains, with the judiciary's own assessments of policy playing a subsidiary role. But jurisdiction arguably presents a special case. On the one hand, the risk that judicial self-interest may assert itself militates in favor of greater deference to legislative decisions about caseload. On the other hand, if the proper functioning of the federal courts is threatened by docket pressures, and if the judiciary rather than Congress is well positioned to appreciate the threat, then judicial self-help might be warranted. As stated in the previous Section, it seems that the judiciary has meaningful access to the legislative process. To that extent, courts should not aggressively assert their own preferences about jurisdiction in the course of adjudicating disputes over the scope of the legislature's statutes.

It is worth observing that one could fashion different policy-based interpretive rules for different types of jurisdiction. One might believe that federal-question cases, as compared to diversity cases, have a stronger claim on federal judicial resources. If so, it is

conceivable that one could have a narrow-construction rule for certain categories but not others. I return to this possibility of a splintered canon below and express some doubts about its viability.<sup>211</sup>

The discussion of policy has so far assumed that the jurisdiction canon makes a meaningful difference to the allocation of cases between judicial systems, such that abandoning the canon would mean more cases in federal court. A skeptic would doubt that the canon, like judicial rhetorical conventions generally, has much of an effect on outcomes. And even the devout legalist recognizes that canons are important only at the margin in the close cases that are not clearly resolved by text or precedent.<sup>212</sup> Further, the vast majority of disputes are settled, often very early in the proceedings, so changing the jurisdictional rules could affect the terms on which cases settle more than it affects how much work federal judges must do. Still, the lower courts receive many thousands of cases, and so even if the canon affects only a small minority of them, that could still have a meaningful effect on federal caseloads (albeit a less meaningful effect than, say, a decision to leave more drug prosecutions to state courts).

There are other considerations that cannot be evaluated simply by calculating the canon's practical impacts on case allocation. Continuing to embrace the canon—or even more so, *rejecting* it—has symbolic value as a manner of expressing the system's attitudes about the proper role of the federal and state courts. Expressive effects are valid considerations in the policy calculus.

### *F. Reducing Decision Costs*

Another sort of justification for the canons, also policy based but focused inward at the judiciary itself, is that canons can act as shortcuts that reduce the complexity of judicial decisionmaking.<sup>213</sup> Suppose a judge's initial examination of the most directly relevant interpretive materials (the text, binding precedent) does not yield a clear answer to an interpretive problem. When this happens, the judge can always engage in further research and thinking about which interpretation is best, an effort that might result in a slight increase in the quality of the decision. Alternatively, the court could turn to a

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211. See *infra* Section II.G.

212. Recall that our assumption is that abandoning the jurisdiction canon would not mean overturning long-standing, solidly entrenched precedents such as the "complete diversity" interpretation of the diversity statute. See *supra* note 147 and accompanying text.

213. See ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 179–80, 201–02 (2006); Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 657–60 (1992).

canon that directs the court to pick one outcome rather than another and be done with it. This latter approach would reduce the cost of making the decision. If courts consistently take this approach, then litigants might be able to spend less time researching every conceivable interpretive argument and might even be able to predict outcomes more reliably.

The decision-simplifying potential of a substantive canon depends on the interpretive contributions and costs associated with the sources of meaning it would replace, and in that light the jurisdiction canon does not seem especially valuable. True, the general jurisdictional grants, such as 28 U.S.C. § 1331's grant of federal-question jurisdiction and 28 U.S.C. § 1332(a)'s grant of diversity jurisdiction, are phrased in broad but imprecise language that leaves many questions textually unanswered. But these jurisdictional statutes are also so old that there is abundant precedent, which even when not directly controlling still provides powerful analogues. Precedent is not so plentiful for new enactments, but for those newer statutes the statutory purposes and legislative history might be clear enough to lessen the need for the shortcut represented by a substantive canon.<sup>214</sup>

If a canon's chief function is to serve as a decisionmaking shortcut, the direction in which the canon points is only of secondary importance. A canon governing jurisdictional statutes could point toward either liberality or strictness as long as it does so clearly. But because the current narrow-construction canon for jurisdiction coheres with various federalism-protecting substantive canons and other interpretive rules limiting judicial power,<sup>215</sup> perhaps the current canon is a better choice than a contrary rule, from the perspective of simplifying decisionmaking.<sup>216</sup> And because the anti-jurisdiction canon is pretty well entrenched now, there would be some hassle involved in switching the system over to a canon that pointed the opposite direction. Some error and uncertainty would attend the transition period. The prospect of such transition costs would provide some grounds not to undertake the switch.

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214. See *supra* text accompanying notes 193–196 (discussing recent congressional enactments and proposals aimed at expanding federal jurisdiction).

215. See *supra* notes 168–171 and accompanying text (citing examples of canons that promote federalism).

216. See, e.g., Anita S. Krishnakumar, *The Anti-Messiness Principle in Statutory Interpretation*, 87 NOTRE DAME L. REV. 1465 (2012) (explaining that the Supreme Court often seeks to avoid interpretative approaches that will prove difficult for the lower courts to administer).

*G. Summary of Normative Considerations*

We have considered a variety of potential justifications for the jurisdiction canon. It is now time to try to bring together the various threads of analysis.

To begin with, it is well to remember that most questions under the jurisdictional statutes, especially in the lower courts, have already been settled. In considering whether the canon is justified, and on what grounds, one should therefore think primarily about its role in construing new and recent enactments and in resolving lingering uncertainties in old statutes.

Several considerations that frequently support substantive canons provide at best meager support for the jurisdiction canon. The canon is not necessary, except rarely, to avoid close constitutional calls or to provide a margin of safety around a constitutional boundary; in those rare instances in which it is, one could simply rely on the more general canon of avoiding constitutional doubts. Neither does the jurisdiction canon advance congressional preferences in a significant way: to the limited extent congressional preferences are discernible, today they probably favor expansive interpretations of the close calls in federal jurisdiction.

Precedent supplies only modest support for the canon. This is true even setting aside questions about whether interpretive methodology is the sort of thing that can be binding law in the formal sense. Even if methodology can be, or already is, that sort of thing, the jurisdiction canon is not law that generates much reliance. To the extent there would be costs associated with abrogating the canon, they would mostly be temporary switching costs of the sort that accompany any shift in law (the burden of learning the new rules, updating language in boilerplate motions, changing treatises, etc.).

Potentially the strongest support for the jurisdiction canon comes from policy considerations of various sorts. If it is a good thing for federal courts to exercise less rather than more authority, then the canon is valuable. Whether one thinks that *is* a good thing is likely to depend on deeper ideological commitments that are themselves the subject of abiding disagreement. As Professor Richard Fallon explained, the law of the federal courts contains two long-persisting but incompatible ideologies—one Federalist and one Nationalist—each of which captures some of the truth but neither of which is able to vanquish the other.<sup>217</sup> That sort of conflict does not make for a

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217. Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1142–45 (1988).

stable foundation on which to rest a canon of interpretation. Without a solid normative consensus supporting it, the canon is vulnerable to the forces of the moment. Caseload considerations might provide a sturdier, less contentious policy basis for the canon, at least if we believe all of the following: that federal caseloads would significantly increase without the canon, that this would be a bad thing on net, and that the courts may exercise self-help in the form of an interpretive canon.

One might hope to reach a more definitive (if complex) conclusion on the canon's value by disaggregating different types of jurisdiction. The jurisdiction canon has traditionally applied to jurisdictional statutes generally, and to removal most especially, but one could retain the canon for some types of jurisdiction and abolish it for others. *Dart Cherokee* has already moved us in this direction by abrogating the canon in CAFA cases. Yet creating multiple and divergent canons from one canon does not seem especially attractive. Continuing to slice up the jurisdictional statutes into favored and disfavored groups will add complexity and uncertainty, which would run contrary to the coherence-promoting and cost-reducing functions of the canons.

Different readers may evaluate the various potential justifications differently, but my own sense is that the case for the jurisdiction canon presents a close call. If it is close, then the outcome may depend on how one assigns the burden of justification. For some, substantive canons are inherently suspect, given their status as atextual judicial creations. Others, especially those whose temperaments are cautious and conservative, will linger long over the fact that the canon has been employed for many years without consequences so notably bad as to justify the risks of upending settled patterns of jurisprudence.

### III. EXPLAINING AND PREDICTING THE JURISDICTION CANON'S PATH

Having examined the jurisdiction canon's uncertain normative merits, we turn next to some positive matters: explaining the forces that have been shaping the canon's path and that can be expected to do so in the future.

The normative and positive inquiries are linked, of course. If there are powerful normative arguments for the canon—for example, a strong case based on *stare decisis* or a compelling policy rationale—then those can be expected to help the canon's standing, because at least some courts would recognize the force of the normative arguments. By the same token, if the precedent-based argument

crumbles under scrutiny, Congress disavows the canon, and the canon is terrible as a policy matter, courts should recognize that too. But courts, like other institutions and agents, are motivated by a variety of factors, and there is no guarantee they will follow the normatively correct course even where there is one. And here, as we have just seen, the normative case is itself uncertain.

The following pages will consider factors that can help to explain and predict the federal courts' treatment of the jurisdiction canon. For most of the Roberts Court era, the canon has faced some structural and ideological headwinds. Some of those features remain in place, but the canon's future is hard to predict at the moment given that the Supreme Court is set to experience some potentially important changes in personnel. Strange as it may seem, the jurisdiction canon could be a subject, like abortion and the Eleventh Amendment, regarding which the political commitments of new appointees can make a difference.

### *A. Precedent and Inertia*

Precedent was one consideration in the normative evaluation of the jurisdiction canon, and precedent, along with the simple inertia of the status quo, also figures in the positive analysis. In predicting the canon's fate, and particularly in assessing the role of factors like precedent in determining that fate, it is important to distinguish between the likely actions of the Supreme Court on the one hand and the lower federal courts on the other hand. Both types of courts play a role in methodological change, but they play their roles differently.

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. Even if canons enjoy precedential effect, the Court has the power to narrow or outright overrule its own precedents.<sup>218</sup> Further, the Court's own pronouncements over the last decade or so—questioning the canon's continued validity in *Breuer*, stating that “ordinary principles” apply in *Exxon Mobil*, and calling the canon merely a “purported” rule in *Dart Cherokee*<sup>219</sup>—have shown a distinct lack of commitment to the canon.

The lower courts face a different, more constrained world. If the Supreme Court expressly repudiates the canon, then we could

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218. See *Patterson v. McLean Credit Union*, 485 U.S. 617, 618 (1988) (listing examples of statutory precedents that were overruled).

219. See *supra* notes 97–108 and accompanying text.

expect the lower courts to follow suit. But what about in the meantime? Can we expect the lower courts to take the lead in overthrowing the jurisdiction canon? Through its statements questioning and narrowing the canon, the Supreme Court has invited lower courts and litigants to unsettle the status quo.<sup>220</sup> Yet there are good reasons to expect the lower courts to be reluctant to accept that invitation. Instead, they will mostly continue to embrace the narrow-construction canon, except in CAFA cases (where *Dart Cherokee* expressly abrogated it). The lower courts will do this, as the following paragraphs explain, regardless of whether they regard interpretive rules and canons as precedentially binding in the formal sense (a matter of significant controversy, as discussed above<sup>221</sup>).

First, if lower courts *do* regard canons as precedential in the normal ways, then the canon should remain binding in non-CAFA contexts. Although the Supreme Court in *Dart Cherokee* abrogated the canon in CAFA cases and questioned whether there is a presumption against removal in other cases, the Court expressly refrained from repudiating the canon in non-CAFA contexts.<sup>222</sup> As noted above, there are older Supreme Court cases stating such a canon, and there is certainly plenty of circuit precedent embracing one.<sup>223</sup> The lower courts lack power to overrule Supreme Court decisions even when the Supreme Court has hinted at their vulnerability,<sup>224</sup> and a court of appeals panel probably cannot overturn circuit law embracing the canon based merely on the Supreme Court's statement that the Court regards the question as open.<sup>225</sup> Therefore, the canon should persist in non-CAFA contexts, and that is what I have observed in the initial decisions responding to *Dart Cherokee*.<sup>226</sup>

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220. Cf. Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 785–89 (2012) (observing that one way the Supreme Court can initiate doctrinal change is by inviting litigants to challenge a precedent or Congress to overrule it); Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 956, 967 (2016) (explaining that the Supreme Court sometimes invites lower courts to read its precedents narrowly in order to provoke doctrinal change).

221. See *supra* Section II.A.2.a.

222. *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014) (“[The lower court] relied, in part, on a purported ‘presumption’ against removal. We need not here decide whether such a presumption is proper in mine-run diversity cases.” (citation omitted)).

223. See *supra* notes 4–6 and accompanying text.

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

225. There are different ways to phrase the standard for overruling circuit precedent in light of new Supreme Court cases, with some phrasings more stringent than others. See *Mead*, *supra* note 122, at 797–98 (citing examples).

226. See, e.g., *Johnson v. Twin City Fire Ins. Co.*, No. CV15-00202-PHX-DGC, 2015 WL 1442644, at \*2 n.2 (D. Ariz. Mar. 27, 2015) (stating that *Dart Cherokee* did not alter the normal

Second, if canons are not treated as precedent, and even if the canons are denied the force of some sort of persuasive dicta, there is *still* ample reason to suppose that the jurisdiction canon will have significant staying power in the lower courts merely by virtue of inertia. Judges are human, after all, and we humans are creatures of habit. Certain legal issues arise so frequently that the rules for resolving those issues, along with the habits of mind that accompany them, become routinized and virtually automatic. Standards of review and other common legal frameworks are often set forth in boilerplate language that is simply copied from one decision to the next.<sup>227</sup> Statements of the general principles of federal jurisdiction are also frequently needed (in theory, jurisdiction is necessarily considered in every case), and so jurisdictional principles naturally lend themselves to copying from one case to the next. In fact, I have found copious evidence of such jurisdictional boilerplate in district court decisions; lots of judges use the same language over and over in setting forth the basic rules of jurisdiction, including the rule that federal jurisdiction is narrowly construed.<sup>228</sup> To be clear, using such boilerplate language is not necessarily a bad practice: there is little reason for a judge (or law clerk) to reinvent the wheel by drafting a new version of the standard for granting summary judgment in every case, and the same thing is true here.

The discussion above provides some reasons to expect the lower courts largely to adhere to the jurisdiction canon despite its weakness in the Supreme Court, but it is worth remembering that the lower courts are a “they” rather than an “it”—and a big and diverse “they” at that. Although most post–*Dart Cherokee* lower-court decisions have tended to downplay or ignore the Supreme Court’s invitations to reconsider the canon in non-CAFA cases, some cracks in the canon’s foundations have started to appear.<sup>229</sup> It does not take much to further

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presumption in non-CAFA cases); *Madison v. U.S. Bancorp*, No. C-14-4934-EMC, 2015 WL 355984, at \*2 (N.D. Cal. Jan. 27, 2015) (stating that “nothing in *Dart* calls into question or undermines existing Ninth Circuit precedent that in a [non-CAFA case] the court must resolve all ambiguity in favor of remand” (internal quotation marks and citation omitted)).

227. See Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 255–56 (2009); Brian Soucek, *Copy-Paste Precedent*, 13 J. APP. PRAC. & PROCESS 153, 169 (2012).

228. To pick just one example, a number of decisions of Magistrate Judge James of the Northern District of California contain the same or similar passages reciting basic jurisdictional rules. See, e.g., *Deutsche Bank Nat’l Tr. Co. v. Chappell*, No. C 11-4640 MEJ, 2011 WL 5150699, at \*1 (N.D. Cal. Oct. 7, 2011); *Abitsch & Abitsch LLC v. Wanigatunga*, No. C 11-4833 MEJ, 2011 WL 4715159, at \*1 (N.D. Cal. Oct. 7, 2011).

229. See, e.g., *Mitchell v. City of Okmulgee*, No. 15-CV-470-JHP, 2016 WL 2944667, at \*1 n.1 (E.D. Okla. May 20, 2016) (applying the narrow-construction canon but noting that “the United States Supreme Court has called this rule of construction into question”); *Bruning v. City*

unsettle the law. If a few lower courts begin rejecting the canon or some lower-court judges write separate opinions calling on the Supreme Court to clarify its status, those actions will provide ready fodder for petitions for certiorari and amicus briefs that, in turn, encourage the Court to opine once more on the canon's contemporary validity.

### B. Caseload Considerations

To the extent the jurisdiction canon affects the workload of the federal courts—narrow interpretation of jurisdictional statutes should reduce caseloads, other things equal—it affects the judiciary's own interests. Those caseload-related interests are conflicting, however. On the one hand, more expansive jurisdiction has the potential to increase judicial authority, such that one might expect a self-aggrandizing judiciary to favor a canon of broad interpretation. On the other hand, a rule of narrow construction is attractive for a judiciary that has an interest in limiting its workload.<sup>230</sup> Recall in this regard that caseload concerns helped to get the narrow-construction canon off the ground in the late nineteenth century.<sup>231</sup> Higher caseloads threaten—or at least the federal judges believe they threaten—the quality of Article III adjudication and the prestige of the federal judiciary.<sup>232</sup> The federal judiciary has at times officially advocated curtailment of jurisdiction and has lobbied Congress against creating new federal claims.<sup>233</sup>

In assessing where these contending forces for and against jurisdiction come to rest, it is useful to remember that the federal judiciary is not a monolith. The modern Supreme Court most certainly

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of Guthrie, 101 F. Supp. 3d 1142, 1145–46 (W.D. Okla. 2015) (questioning the continued vitality of the presumption against removal jurisdiction and suggesting that the Tenth Circuit reconsider its jurisprudence).

230. See Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 63 (2015) (stating that limiting caseloads is “central to [the federal courts’] conception of [their] institutional interest”); Stephen I. Vladeck, *The Increasingly “Unflagging Obligation”*: *Federal Jurisdiction After Saudi Basic and Anna Nicole*, 42 TULSA L. REV. 553, 570–71 (2007) (observing that docket pressures may lead lower courts to “under-interpret jurisdictional statutes and to over-interpret doctrinal exceptions thereto”).

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

232. See Jason Mazzone & Carl Emery Woock, *Federalism As Docket Control*, 94 N.C. L. REV. 7, 53–69 (2015) (discussing the Judicial Conference’s 1995 Long Range Plan for the Federal Courts and its emphasis on maintaining the quality of the federal judiciary by limiting caseloads); William H. Rehnquist, *Chief Justice’s 1991 Year-End Report on the Federal Judiciary*, THIRD BRANCH, Jan. 1992, at 3–4 (arguing that the federal courts were meant to have a “limited role reserved for issues where important national interests predominate”).

233. See Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269 (2000).

shows a strong interest in limiting the number of cases *it* hears. Its jurisdiction is almost entirely discretionary, and it uses that discretion to hear fewer cases than it used to.<sup>234</sup> Beyond restricting the number of cases it hears, it uses various devices to limit and shape the precise questions that it decides.<sup>235</sup> Because of the Court's discretion to limit and control its docket, it can insulate itself from caseload pressures in the lower courts. Broader jurisdiction merely increases the "menu" from which the Court can choose in selecting whatever small number of cases it wishes to decide. The courts of appeals and district courts, by contrast, largely exercise jurisdiction that parties can invoke as a matter of right. Given this asymmetry, the Supreme Court's caseload need not bear any close relationship to the lower courts' caseloads; an expansion of federal jurisdiction need not burden the Supreme Court at all.

The analysis above suggests that the Supreme Court and the lower courts might have somewhat different views regarding what kind of jurisdiction canon advances their respective institutional interests. The lower courts might prefer narrow interpretations of jurisdictional statutes in order to prevent themselves from being overwhelmed. The Supreme Court, while not insensitive to the plight of its Article III colleagues below, has a countervailing interest in broader interpretations that expand its pool of potential candidates for the exercise of discretionary power. In fact, the courts' behavior may reveal these divergent preferences in action. As described above, the lower courts embrace the narrow-construction canon with a degree of gusto that seems rather extreme given the Supreme Court's mild encouragements; more recently, they have been a bit slow to catch on to the Supreme Court's skepticism toward the narrow-construction canon.<sup>236</sup> The existence of some foot-dragging in this context is consistent with other research showing that lower courts tend to resist changes in the legal status quo that have the effect of increasing their workload.<sup>237</sup>

The analysis of caseload considerations comes to a conclusion similar to the conclusion reached above in connection with stare

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234. The Justices were not merely passive bystanders to legislative acts reducing the Court's mandatory docket in favor of discretionary jurisdiction. Rather, they lobbied for those changes. See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000).

235. See Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 683–711 (2012).

236. See *supra* Section II.A.1.

237. See Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. CHI. L. REV. 901, 912–13, 934–40 (2015).

decisis: lower courts may have grounds to preserve the narrow-construction canon, but the Supreme Court does not necessarily respond to the same forces.

### *C. Litigation Environment*

The path of the law can shift one way or the other depending on which subset of potential disputes ultimately make their way to the courts. For example, one could expect a rule to migrate in a pro-plaintiff direction if the cases in which courts are called upon to apply and further refine the rule are cases featuring the “best” plaintiffs, that is, the plaintiffs with the strongest legal arguments or the most compelling factual circumstances.<sup>238</sup> Something similar can be true of interpretive canons: they are partly products of their environment, with their development being helped or hindered depending on the diet of interpretive questions the courts ingest. Although Congress rarely seeks to dictate interpretive canons directly,<sup>239</sup> the laws it enacts indirectly influence the prospects of different canons by shaping the types of questions that will be litigated.

The nature of the jurisdictional disputes that have been coming before the federal courts for the last decade could be expected, other things being equal, to favor broad understandings of federal jurisdiction. Most of the recent legislative activity in the field of jurisdiction has been in the direction of expansion, with CAFA representing the most significant example.<sup>240</sup> CAFA creates a bad environment for the flourishing of the narrow-construction canon. Congress intended CAFA to expand federal jurisdiction and even directed courts to interpret the new jurisdictional provisions broadly.<sup>241</sup> Even before *Dart Cherokee*, a few courts saw CAFA as changing the normal rules of strict interpretation.<sup>242</sup> Now that the

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238. See generally Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006) (explaining that the particularities of individual disputes can distort the process of rule formation).

239. But cf. Linda D. Jellum, “Which Is To Be Master,” *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 847–54 (2009) (citing instances in which Congress has enacted various types of interpretive directions).

240. See *supra* Section II.C.

241. See *supra* text accompanying notes 193–194.

242. E.g., *N.J. Carpenters Vacation Fund v. HarborView Mortg. Loan Tr.* 2006-4, 581 F Supp. 2d 581, 584–85, 588 (S.D.N.Y. 2008) (explaining that courts should interpret CAFA’s exceptions narrowly because Congress intended to expand jurisdiction). A larger number of courts disagreed and ruled that CAFA did not alter the interpretive landscape; these courts applied the traditional rule that jurisdiction should be construed narrowly even in CAFA cases. E.g., *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 336 n.5 (4th Cir. 2008); *Miedema v.*

Supreme Court has emphasized CAFA's jurisdiction-expanding purpose and even quoted the legislative history calling for broad interpretation,<sup>243</sup> the playing field has shifted, at least in CAFA cases.<sup>244</sup>

The existence of CAFA, with its pro-jurisdiction thrust, is bad news for the narrow-construction canon more generally, even outside of CAFA cases. CAFA was the most important and far-reaching amendment to the jurisdictional statutes in recent history, and, like most important and complicated statutes, it is generating plenty of interpretive disputes in its early years.<sup>245</sup> As a result, many of the tough, unresolved jurisdictional questions reaching the courts today stem from CAFA. The Supreme Court has already heard a few CAFA cases,<sup>246</sup> but it probably is not done with them, and the lower courts are certainly not done sorting out CAFA's complexities.<sup>247</sup> To be sure, it is possible to decide CAFA cases without abrogating the narrow-construction canon in its more general non-CAFA applications. But to the extent that many of the novel jurisdiction-related cases will involve CAFA or other jurisdictional expansions that may be forthcoming, the canon will find little sustenance in the near to medium term.

The flow of cases into the federal courts is not only a feature of the laws Congress enacts. Strategic selection of cases by savvy litigators and certiorari-wielding Justices plays a role too, as the next Section explores.

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Maytag Corp., 450 F.3d 1322, 1328–30 (11th Cir. 2006); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1097 & n.7 (10th Cir. 2005).

243. *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014).

244. *See, e.g., Dudley v. Eli Lilly & Co.*, 778 F.3d 909, 912 (11th Cir. 2014) (“Applying this binding precedent from the Supreme Court [i.e., the *Dart Cherokee* case], we may no longer rely on any presumption in favor of remand in deciding CAFA jurisdictional questions.”).

245. *See* Michael D. Y. Sukenik & Adam J. Levitt, *CAFA and Federalized Ambiguity: The Case for Discretion in the Unpredictable Class Action*, 120 YALE L.J. ONLINE 233, 234 (2011) (“Millions of dollars in legal fees, along with a great deal of litigants’ and judges’ time, have been spent trying to unravel CAFA’s statutory framework and its practical meaning.”).

246. In addition to deciding *Dart Cherokee*, the Court decided a CAFA case in each of the previous two terms. *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014) (interpreting CAFA’s “mass action” provision in the context of a case brought by a state); *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013) (applying CAFA’s amount-in-controversy provision to a plaintiff’s pre-certification stipulation that the proposed class will seek less than the jurisdictional amount).

247. *E.g., Allen v. Boeing Co.*, 784 F.3d 625, 630 (9th Cir. 2015) (noting split with Third Circuit over interpretation of CAFA’s local-event exception).

*D. Judicial Ideology and Business Interests*

Is judicial decisionmaking the product of law or politics? Any reasonably subtle observer recognizes that it is some combination of both.<sup>248</sup> The relative contribution of each input depends on such factors as the clarity of the formal legal materials, the salience of the issue, and the nature of the court. Policy and values generally play a greater role, and formal legal constraints a lesser role, as one moves up the judicial hierarchy.<sup>249</sup>

The usual blending of law and ideology applies to courts' use of substantive canons and presumptions in statutory interpretation. Although substantive canons often find inspiration in constitutional emanations, statutory policies, or other public values external to the judiciary, in a meaningful sense the canons are judicial inventions.<sup>250</sup> After all, there are lots of policies and values to choose from, but the judiciary decides which ones are actually realized as canons and what form the canon takes. Moreover, although certain canons eventually become established aspects of the interpretive regime, possessed of some law-like grip independent of the whims of any particular judge, the nature of canons is such that individual cases often afford significant wiggle room regarding whether to invoke a canon and how much force to give it. In making those choices, just like other choices, judges are influenced by their own interests and preferences—and this is especially true on the Supreme Court, where legal constraints are looser.<sup>251</sup> So, in studying the path of the jurisdiction canon, we might ask what judges, and Justices in particular, want when it comes to jurisdiction.

The scope of federal subject-matter jurisdiction has ideological significance along several dimensions. Jurisdiction is power, and thus interpretations of the jurisdictional statutes affect the judicial dimension of federalism, the principle regulating the allocation of

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248. See, e.g., RICHARD A. POSNER, *HOW JUDGES THINK* 78–92 (2008) (describing judges as “occasional legislators”). The classic dichotomy is of course a simplification on a number of fronts. Other factors play a role as well: the idiosyncratic experiences of individual judges, path dependencies, sheer chance, etc. And distinguishing between law and politics is not straightforward either.

249. See EPSTEIN, LANDES & POSNER, *supra* note 23, at 9–10.

250. See, e.g., Macey & Miller, *supra* note 213, at 649 (arguing that “the canons can be understood best as devices that were designed to serve the self-interest of their inventors—the judiciary”).

251. See FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 159–79 (2009) (showing the influence of ideology in statutory interpretation); Brudney & Ditslear, *supra* note 20 (showing that canon use is influenced by the Justices' policy preferences).

authority between the nation and the states.<sup>252</sup> Judges with a principled commitment to the primacy of state governments, or a principled commitment to restraints on the unelected federal judiciary, should favor principles that tend to reduce the scope of federal jurisdiction. Judges who are suspicious of local authority and fear that state judges are unduly accountable will prefer the centralization and relative insulation of the federal judiciary. But federal jurisdiction also has political stakes in the somewhat less lofty sense that the availability of the federal forum helps some identifiable types of litigants and hurts others. Federal jurisdiction has always been a tool for advancing social and economic interests—at the Founding, during the Civil War, at Reconstruction’s end, in the New Deal<sup>253</sup>—and so we should not be surprised to see it remain so today.

The preferred forum for any particular group shifts over time as social circumstances and the composition of the judiciary changes.<sup>254</sup> In the 1960s and 1970s, federal court was generally regarded as the superior forum for those seeking to advance civil rights, sue manufacturers of defective products, or pursue other “liberal” goals.<sup>255</sup> In more recent times, some of those preferences have changed. Although generalizations are perilous, today the federal court has become the preferred venue for business defendants trying to fight off consumer class actions, employment-discrimination cases, and similar civil suits.<sup>256</sup> Businesses and their advocates therefore naturally tend to favor laws and doctrines that expand access to that favored federal forum. Business interests succeeded in expanding diversity jurisdiction in 2005 through CAFA.<sup>257</sup> The debate over CAFA was in part a debate about procedural values of fairness and efficiency, but it was also thoroughly political, including in the partisan sense. Business interests lobbied heavily for the law, and

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252. HENRY M. HART & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* xi (1953) (“The jurisdiction of courts in a federal system is an aspect of the distribution of power between the states and the federal government.”).

253. *See, e.g., supra* notes 68–84 and accompanying text (discussing political influences on jurisdictional policy stemming from the Civil War and Reconstruction).

254. *See* PURCELL, *supra* note 75, at vii (explaining that “litigation strategies and patterns, like other social phenomena, are historically specific”).

255. Alan B. Morrison, *Removing Class Actions to Federal Court: A Better Way to Handle the Problem of Overlapping Class Actions*, 57 *STAN. L. REV.* 1521, 1528–29 (2005); Neuborne, *supra* note 210, at 1109–10; Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 *U. PA. L. REV.* 1823, 1849–50 (2008).

256. *See* Morrison, *supra* note 255, at 1529 (“[T]he general perceptions about state and federal judges are now quite the opposite of what they once were. . . . [I]n general, defense counsel look on having a federal judge in a case as a plus, whereas counsel for plaintiffs, not surprisingly, take the opposite view.”).

257. Purcell, *supra* note 255, at 1856–57.

almost all congressional Republicans voted in favor; consumer groups, environmental organizations, unions, and other traditionally left-leaning interest groups mostly opposed the law, as did most Democrats.<sup>258</sup> Jurisdiction became another avenue for tort reform.

A judge's preferences regarding the extent of federal jurisdiction can be internally conflicted, as when a judge values state authority as a matter of constitutional principle but also prefers a civil-liability system that protects business interests. On the Supreme Court today, when it comes to high-stakes matters involving the civil litigation system, the lower politics of consumers-and-employees-versus-business clash with and sometimes trump the higher principles of federalism. In important preemption cases, for example, disputes often pit a consumer or employee seeking to rely on plaintiff-protective state law versus a business invoking the preemptive effect of a weaker federal standard.<sup>259</sup> When the Court closely divides on these issues, the Court's more conservative members tend to favor federal authority and protection of business, while the more liberal members tend to support state power and protection of plaintiffs.<sup>260</sup> While it would go too far to say that principles such as federalism are mere rhetorical devices to be cast aside when inconvenient, the driving force in many close cases about civil litigation is the politics of whether one favors larger and surer recoveries for consumers and employees on the one hand or limited liability for the members of the Chamber of Commerce on the other.

Given the political nature of disputes over jurisdiction, it is perhaps understandable that the traditional canon of narrow construction of jurisdictional statutes can itself become politicized. That the jurisdiction canon is unfavorable to business interests probably helps to explain the Supreme Court's skepticism toward the canon over the last decade or so. The Chamber of Commerce does not win every time, but the Roberts Court has been unusually receptive to its interests.<sup>261</sup> A Supreme Court that is concerned about the plight of corporate defendants in state courts can therefore be expected, in the

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258. *Id.* at 1861–63.

259. *E.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (considering whether the Federal Arbitration Act preempts California rule restricting use of class arbitration waivers in consumer contracts); *Wyeth v. Levine*, 555 U.S. 555 (2009) (considering whether FDA approval of a drug's warning label preempts a state-court jury's finding that the drug maker was liable for inadequate warnings).

260. *See generally* Brooke D. Coleman, *Civil-izing Federalism*, 89 TUL. L. REV. 307 (2014) (showing that the Justices on both sides of the Court frequently abandon their commitments to federalism in cases involving civil litigation).

261. *See* Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1472 (2013).

close cases, to favor broader federal subject-matter jurisdiction and (whether as cause or effect) downplay the jurisdiction canon. Such a preference for federal jurisdiction is, to be clear, wholly consistent with the “restrictive ethos” that commentators have identified in the Supreme Court’s recent decisions in areas such as pleadings, personal jurisdiction, arbitration, and class certification.<sup>262</sup> If the federal courts are less likely to certify classes, more likely to enforce arbitration agreements, and otherwise more favorable to civil defendants, then greater access to federal jurisdiction means lower odds of recovery for plaintiffs.<sup>263</sup>

Of course, the Court’s inclinations toward business interests depend on its membership, so one cannot be certain of the future. President Trump will appoint at least one Justice. A Republican president would ordinarily be expected to appoint pro-business jurists, but it is conceivable that he might favor judicial populists or persons with unexpected attitudes toward federal jurisdiction.

The Court does not act in a vacuum, and so it is also relevant to the jurisdiction canon’s future that the canon has attracted opponents outside of the courts. In particular, the canon has become the target of an interest-group campaign. In *Dart Cherokee*, the recent case about removal procedure discussed above,<sup>264</sup> the Washington Legal Foundation and other pro-business groups filed an amicus brief in order to “urge the Court to strongly disavow the existence of a presumption against removability.”<sup>265</sup> Continuing the campaign in a more public forum, an op-ed piece written by one of the brief’s authors stated that the case “provides the Court an ideal opportunity to end the rule of construction whereby federal courts continue to narrowly construe federal removal statutes against the party seeking

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262. The phrase comes from A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353 (2010).

263. See Edward A. Purcell, Jr., *From the Particular to the General: Three Federal Rules and the Jurisprudence of the Rehnquist and Roberts Courts*, 162 U. PA. L. REV. 1731, 1748–49 (2014).

264. *Supra* text accompanying notes 105–108.

265. Brief of Washington Legal Foundation, International Association of Defense Counsel, and Federation of Defense & Corporate Counsel as Amici Curiae in Support of Petitioners at 24, *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014) (No. 13-719), 2014 WL 2361914; see also *id.* at 2 (“Amici are concerned that unless the Court uses this case not only to overturn the decision below but also to explain that the lower courts’ recognition of a presumption against removal is unfounded, many federal courts will continue to adhere to such a presumption.”). This was not the group’s first run at the canon; it had (unsuccessfully) urged the Court to repudiate the canon before. See Brief of Washington Legal Foundation as Amicus Curiae in Support of Petitioners at 2, 6, *Lincoln Prop. Co. v. Roche*, 546 U.S. 81 (2005) (No. 04-712), 2005 WL 1210236.

removal.”<sup>266</sup> An amicus brief filed by an organization of defendant-side civil litigators similarly urged the Court to repudiate the canon.<sup>267</sup> As discussed above, the advocacy effort succeeded in part: the Court expressly rejected a presumption against removal in the CAFA context and questioned its validity more broadly.<sup>268</sup>

The industry campaign for easy access to federal court, managed by sophisticated repeat players, can be expected to continue. As long as federal courts take a more restrictive approach to class certification, demand more of plaintiffs at the pleadings stage, or grant summary judgment more willingly than the corresponding state courts, then business should favor broad access to federal subject-matter jurisdiction.

### *E. Summary of Predictive Considerations*

In light of the analysis above, what is in store for the jurisdiction canon? Predictions are always perilous, but some comments are possible.

First, the lower courts have noticed the partial abrogation of the jurisdiction canon in *Dart Cherokee*, but they are unlikely to act boldly to repudiate the canon in non-CAFA cases. The canon is supported by too much precedent, which the lower courts find powerful even if the Supreme Court does not, and whatever the canon’s legal status, it has the forces of inertia and habit behind it. Moreover, the narrow-construction canon serves the lower courts’ interests in reducing their workload.

Second, the canon faces some serious structural headwinds at the moment. CAFA will continue to provide a stream of opportunities for the Supreme Court to address open questions of subject-matter jurisdiction, and CAFA itself is hostile to the canon. Moreover, influential business interests have turned against the canon, and

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266. Rich Samp, *High Court Should Not “DIG” Dart Cherokee Basin Case*, FORBES (Oct. 21, 2014, 11:33 AM), <http://www.forbes.com/sites/wlf/2014/10/21/high-court-should-not-dig-dart-chokeee-basin-case/> [<https://perma.cc/4VLQ-USJG>].

267. Brief of DRI—The Voice of the Defense Bar as Amicus Curiae in Support of Petitioners at 3, 11, *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014) (No. 13-719), 2014 WL 2465971. Briefs from business groups in a few other recent cases have made similar pleas. *E.g.*, Brief of Amici Curiae Access to Courts Initiative, Inc., and National Association of Manufacturers in Support of Respondents at 34, *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (No. 12-1036), 2013 WL 4829339 (arguing that the “Court should repudiate” the presumption against removal).

268. *Dart Cherokee*, 135 S. Ct. at 554 (“We need not here decide whether such a presumption [against removal] is proper in mine-run diversity cases. It suffices to point out that no antiremoval presumption attends cases invoking CAFA . . .”).

these groups have tended to be successful in communicating their message to Congress and the contemporary Supreme Court.

Third, although the jurisdiction canon faces threats, it is possible that it will be fragmented rather than abolished. That is, it may be that in the future we will have not one jurisdiction canon that applies to all jurisdictional statutes but different rules that apply to different statutes. For example, CAFA and potential future expansions could be interpreted broadly or at least neutrally, while older aspects of diversity jurisdiction could continue to be interpreted narrowly; different kinds of federal-question claims might be subject to varying rules based on the claims' perceived importance and number. Given the dangers the canon faces, this might be the best future for which the canon can reasonably hope.

### CONCLUSION

The canon of narrowly construing jurisdictional statutes has a century of history and thousands of citations behind it, but what lies ahead of it is not as clear. Whether we ought to have such a canon is debatable. The canon does not indirectly enforce the Constitution, it probably does not reflect current congressional preferences, and reliance interests supporting it are slight. Whether it is desirable depends largely on a policy judgment about whether the balance between federal and state judicial authority and workloads should shade a bit one way or the other. That conflict is hard to resolve and harder still to keep resolved, which means it is a shaky foundation for a substantive canon.

However one assesses the jurisdiction canon's normative merits, the canon faces some headwinds purely as a predictive matter. The canon faces an environment in which many of the day's pressing jurisdictional questions arise from a statute—CAFA—that was expressly designed to expand federal jurisdiction.<sup>269</sup> Future legislative action seems more likely to involve similar expansions rather than curtailments of jurisdiction. Influential pro-business interest groups are attacking the jurisdiction canon and lobbying for broader access to the federal forum.<sup>270</sup> And the Supreme Court has not shown much sympathy for the canon over the last decade.<sup>271</sup>

The analysis of the jurisdiction canon sheds some light on broader issues regarding the nature of interpretive methodology.

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269. *Supra* Section III.D.

270. *Supra* Section III.C.

271. *Supra* Section II.A.1.

First, the canon's recent history provides some data for the important debate over whether interpretive methodology is binding law. The lower courts' responses to the Supreme Court's decision in *Dart Cherokee* provide some reason to question the prevailing view that canons are not law-like: the lower courts treated the Supreme Court's partial abrogation of the canon like binding precedent, and they overruled their own prior interpretive canons in response.<sup>272</sup> Second, the divergence between the lower courts' heavy use of the canon on the one hand and the Supreme Court's sparing use and skepticism on the other hand illustrates that statutory interpretation need not look the same throughout our diverse judicial system. Third, the analysis illuminates the connection between interpretive canons and legal change. Some canons might be timeless, but others evolve with the times, much like substantive law. That canons change with the times does not show, as the skeptic might think, that they are meaningless. On the contrary, canon evolution shows that canons do play a meaningful role in legal reasoning, not just because the canons themselves directly cause certain outcomes (though sometimes they do, especially in lower courts), but because they reflect shifts in the Supreme Court's attitudes and help to communicate those changing attitudes through the judicial system. In this regard the canons can play a more complicated role than either legalists or skeptics imagine.

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272. See *supra* Section II.A.2.a.