REPAIRING THE REFERENCE CANON

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Interpretive canons had a big year at the Supreme Court, as might be expected of a court that claims to be textualist. While some of those canons are well known, a less well-known canon, the reference canon, played an important role in a major decision under the Armed Career Criminal Act, Brown v. United States.

The current iteration of the reference canon distinguishes between a law that makes a reference to some other general law and a law that makes a reference to some other specific law. It treats a general reference as a dynamic one, including subsequent amendments to the target law. But it treats a specific reference as a static one, not including subsequent amendments to the target law. In effect, under the specific branch of the reference canon, the target law is trapped in amber.

The reference canon is best understood as a textual canon rather than a substantive canon. It is an aid in determining the meaning of a text, not a device to push the law in a favored direction because of some other value—external to the text—thought to be particularly important. To be justifiable, it should match the ordinary understandings of those who write and read that text.

It may be that treating a referenced law as if it had been cut and pasted into a new law made sense in the past, based on the historical practices of the writers and readers of enacted law. And perhaps the distinction between general and specific references likewise made sense in the past. But neither treating references as static rather than dynamic nor the distinction between general and specific references makes sense

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any longer, at least as applied to the United States Code and the Federal Rules. Moreover, if taken seriously, the current iteration of the reference canon threatens to wreak havoc, particularly on the Federal Rules. With the Court giving the reference canon renewed attention, it is time to repair the canon before it does serious damage.

This Article describes the use of canons of interpretation by the Supreme Court in its 2023 term, showing that, across a wide range of cases, the justices invoke and rely on these canons. It then focuses on the reference canon and explains how the Court's use of the reference canon risks serious problems for the United States Code and the Federal Rules. After placing the current iteration of the reference canon in historical context, it suggests both ways to limit its potential for harm and appropriate repairs.

INTRODUCTION

Interpretive canons had a big year at the Supreme Court, as might be expected of a court that claims to be textualist.[1] While some of those canons are well known, a less well-known canon, the reference canon, played an important role in a major decision under the Armed Career

1. "Canons have grown in importance in recent years, likely due to the rise of textualism in statutory interpretation, which gives canons a privileged place in interpretation." Jarrod Shobe, *Congressional Rules of Interpretation*, 63 WM. & MARY L. REV. 1997, 2006 (2022) (footnotes omitted). Nonetheless, there are reasons to question the Court's consistency in its commitment to textualism and originalism. *See* Trump v. United States, 603 U.S. 593 (2024) (presidential immunity); Trump v. Anderson, 601 U.S. 100 (2024) (disqualification under section 3 of the Fourteenth Amendment); William Baude, *A Principled Supreme Court, Unnerved by Trump*, N.Y. TIMES (July 5, 2024), https://www.nytimes.com/2024/07/05/opinion/supreme-court-trump.html [https://perma.cc/G7T2-ZPM3]; Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221 (2023).

Criminal Act, *Brown v. United States*.[2] *Brown* resulted in an unusual 6-3 split in the Supreme Court: Justice Alito wrote for the majority, joined by Chief Justice Roberts and Justices Thomas, Sotomayor, Kavanaugh, and Barrett.[3] Justices Jackson, Kagan, and Gorsuch dissented.[4]

The current iteration of the reference canon distinguishes between a law that makes a reference to some other *general* law and a law that makes a reference to some other *specific* law. It treats a general reference as a dynamic one, including subsequent amendments to the target law. But it treats a specific reference as a static one, not including subsequent amendments to the target law. In effect, under the specific branch of the reference canon, the target law is trapped in amber.[5]

The reference canon is best understood as what scholars label a linguistic (or textual) canon, as opposed to a substantive canon.[6] It is an aid in determining the meaning of a text, not a device to push the law in a favored direction because of some other value—external to the text—thought to be particularly important.[7] To be justifiable, it should match the ordinary understandings of those who write and read that text.[8]

The reference canon has changed over time. It may be that treating a referenced law as if it had been cut and pasted into a new law made sense in the past, based on the historical practices of the writers and readers of enacted laws. And perhaps the distinction between general and specific references likewise made sense in the past. But neither treating references as static rather than dynamic nor the distinction between general and specific references makes sense any longer, at least

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2. Brown v. United States, 602 U.S. 101 (2024).

3. *Id*. at 104.

4. *Id*.

5. *Cf*. United States v. Rahimi, 602 U.S. 680, 691 (2024) (noting that the Court's Second Amendment precedents were "not meant to suggest a law trapped in amber").

6. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 117 (2010) ("Linguistic canons apply rules of syntax to statutes . . . [and] pose no challenge to the principle of legislative supremacy," while substantive canons "can challenge legislative supremacy insofar as their purpose is to promote policies external to a statute.").

7. *Id.* at 120 (noting that "substantive canons serve a variety of purposes, all of which are external to the statute before the court"); *id*. at 121 n.52 ("Because linguistic canons are rules of thumb about how English speakers use language, textualists find them valuable to the project of determining how a statutory provision would be understood by a skilled user of the language."); Biden v. Nebraska, 600 U.S. 477, 508 (2023) (Barrett, J., concurring) ("Substantive canons are rules of construction that advance values external to a statute.").

8. Barrett, *supra* note 6, at 117 n.29 ("If one could demonstrate . . . that Congress does not write statutes against the backdrop of these supposedly shared conventions, the rationale for their existence would evaporate."); *Biden*, 600 U.S. at 508 n.1 (Barrett, J., concurring) (noting that "linguistic or descriptive canons . . . are designed to reflect grammatical rules . . . or speech patterns").

as applied to the United States Code and the Federal Rules.[9] Moreover, if taken seriously, the current iteration of the reference canon threatens to wreak havoc, particularly on the Federal Rules. With the Court giving the reference canon renewed attention, it is time to repair the canon before it does serious damage.

This Article proceeds in four parts. Part I describes the use of canons of interpretation by the Supreme Court in its 2023 term, showing that, across a wide range of cases, the justices invoke and rely on these canons. Part II focuses on the reference canon and its significance in *Brown*. It explains how the Court's use of the reference canon risks serious problems for the United States Code and the Federal Rules. Part III places the current iteration of the reference canon in historical context, suggests a way to limit its potential for harm, and argues for making additional repairs. Part IV suggests appropriate repairs: All references to other statutes and Rules, whether general or specific, should be understood to include subsequent amendments to the target statutes and Rules. Special treatment is warranted if the referenced provision has been repealed, renumbered, relettered, or rearranged.

I. The Importance of Canons in Last Term's Decisions

Canons of interpretation were widely invoked by the Supreme Court during its 2023 term. So, too, was the modern treatise on such canons, written by Justice Scalia and Bryan Garner.[10] Appreciating the Court's use of these canons last term is important not only to frame and situate the reference canon—which Scalia and Garner do not discuss—but more generally to understand the interpretive approach of the current

9. To be clear, the term "dynamic" is used here to reflect the idea that when the target statute is amended, the reference is to the target statute *as amended* as opposed to the target statute as it stood at the time of enactment of the referring statute. It is not used in the sense of dynamic statutory interpretation, the idea that statutory meaning evolves over time. *See, e.g.*, William N. Eskridge, Jr., Dynamic Statutory Interpretation (1994); John Copeland Nagle, *Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. Pa. L. Rev. 2209, 2212 (1995) (reviewing Dynamic Statutory Interpretation) ("For Eskridge, this evolution should track current political trends . . . . Judges . . . may properly consider the interpretation preferred by the current legislature when deciding how to interpret a statute in particular circumstances."). One more point on terminology: Some authors describe a group of canons as "referential" canons, that is, "rules referring the Court to an outside or preexisting source to determine statutory meaning." William N. Eskridge, Jr., *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593, 595 (1992). That descriptive categorization of canons is not what the "reference canon" is about.

10. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012).

Court. Indeed, even when the Court relied on common sense, it spoke in the language of canons.[11]

A. *Ejusdem Generis & Noscitur a Sociis*

Purdue Pharma

In *Harrington v. Purdue Pharma*, the Supreme Court rejected what some claimed was the only way to bring some measure of relief to those hurt by the opioid crisis: a bankruptcy court order barring claims against members of the Sackler family in exchange for them paying billions of dollars. The difficulty with this solution was that Purdue Pharma was the bankrupt entity; the members of the Sackler family had not filed for bankruptcy.[12]

Relying on the *ejusdem generis* canon,[13] the Court held that a bankruptcy court lacks the power "to extinguish without their consent claims held by nondebtors (here, the opioid victims) against other nondebtors (here, the Sacklers)."[14] The relevant text, section 1123(b) of the Bankruptcy Code, provides that a chapter 11 reorganization plan may:

> (1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;
>
> (2) . . . provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under [§ 365];
>
> (3) provide for—
>
> > (A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or
> >
> > (B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;
>
> (4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;
>
> (5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's

11. Campos-Chaves v. Garland, 602 U.S. 447, 460 (2024) (alteration in original) (citation omitted) ("[T]here is no canon against using common sense in construing laws as saying what they obviously mean.").

12. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 209 (2024).

13. Scalia & Garner, *supra* note 10, at 199 ("Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned (*ejusdem generis*).").

14. *Purdue Pharma*, 603 U.S. at 220–21.

> principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and
>
> (6) include any other appropriate provision not inconsistent with the applicable provisions of this title.[15]

Those defending the reorganization plan relied on paragraph (6), contending that barring claims against the Sacklers was an "other appropriate provision not inconsistent with the applicable provisions of this title."[16]

The Court rejected this interpretation and held that, in accordance with the *ejusdem generis* canon, the paragraph (6) catchall had to be "interpreted in light of its surrounding context and read to 'embrace only objects similar in nature' to the specific examples preceding it."[17] It acknowledged, citing Scalia and Garner, that sometimes "it may be difficult to discern what a statute's specific listed items share in common."[18] But it saw an "obvious" common link among the first five paragraphs: all involve the debtor. For that reason, it concluded that "the catchall cannot be fairly read to endow a bankruptcy court with the 'radically different' power to discharge the debts of a nondebtor without the consent of affected nondebtor claimants."[19]

The dissent disagreed with the application of the canon, not with the canon itself.[20] Like the majority, the dissent cited Scalia and Garner—indeed, the dissent cited that book some half dozen times.[21] In particular, the dissent emphasized that "the *ejusdem generis* canon requires looking at the 'evident purpose' of the statute in order to discern a common thread" and argued that "the Court's purported common thread ignores (and indeed guts) the evident purpose of § 1123(b)."[22]

Fischer

The *ejusdem generis* canon also played an important role in the Court's decision limiting one of the statutes used to prosecute those

15. *Id.* at 215–16 (quoting the statute).

16. *See id*. at 229 (Kavanaugh, J., dissenting) ("Given the broad statutory text—'appropriate'—and the history of bankruptcy practice approving non-debtor releases in mass-tort bankruptcies, there is no good reason for the debilitating effects that the decision today imposes on the opioid victims in this case and on the bankruptcy system at large.").

17. *Id.* at 217 (majority opinion) (citation omitted).

18. *Id.* at 218 (citing Scalia & Garner, *supra* note 10, at 207–08).

19. *Id.* (citation omitted).

20. *Id.* at 258 (2024) (Kavanaugh, J., dissenting) ("But the Court's use of that canon here is entirely misguided.").

21. *Id.* at 258–60.

22. *Id.* at 260 (citation omitted) (quoting Scalia & Garner, *supra* note 10, at 208).

involved with the attack on the Capitol on January 6, 2021. That statute provides:

> (c) Whoever corruptly—
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> > (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
> >
> > (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.[23]

In *Fischer v. United States*,[24] the Court refused to read paragraph (2) as encompassing all forms of obstructive conduct beyond those listed in paragraph (1). Instead, it read paragraph (2) as tethered to the context of paragraph (1). "When the phrase 'otherwise obstructs, influences, or impedes any official proceeding' is read as having been given more precise content by that narrower list of conduct, subsection (c)(2) makes it a crime to impair the availability or integrity of records, documents, or objects used in an official proceeding in ways other than those specified in (c)(1)."[25]

In reaching this conclusion, the Court also relied on a related canon, *noscitur a sociis*, which "teaches that a word is 'given more precise content by the neighboring words with which it is associated.'"[26]

Justice Barrett, joined by Justices Sotomayor and Kagan in dissent, agreed that both of "these canons are valuable tools. But applying either to (c)(2) is like using a hammer to pound in a screw—it looks like it might work, but using it botches the job."[27] As far as she could tell, the Court had "never applied either of these canons to a statute resembling § 1512(c)."[28] For *ejusdem generis* to apply, there needs to be a "laundry list followed by a catchall," but "§ 1512(c) does not follow the laundry-list-plus-catchall pattern."[29] As for *noscitur a sociis*:

> Unlike the pattern to which the *noscitur* canon applies, § 1512(c) is not a list of terms that includes an ambiguous word. So the Court does not do what it does when applying *noscitur*: select between multiple accepted meanings of the words "obstructs," "influences,"

23. 18 U.S.C. § 1512.
24. Fischer v. United States, 603 U.S. 480 (2024).
25. *Id.* at 490–91.
26. *Id.* at 487 (citation omitted). *See* SCALIA & GARNER, *supra* note 10, at 195 ("Associated words bear on one another's meaning (*noscitur a sociis*).").
27. *Fischer*, 603 U.S. at 509 (Barrett, J., dissenting).
28. *Id.* at 510.
29. *Id.*

> and "impedes." Instead, it modifies those words by adding an adverbial phrase: obstructs, influences or impedes by "*impair[ing] the availability or integrity for use in an official proceeding of records, documents, or objects*."[30]

Once again, both the majority and the dissent cited Scalia and Garner.[31] So, too, did Justice Jackson's solo concurrence, albeit not so much for the canons themselves but for the idea that "they are valid indicia of Congress's purpose" because "their principles are consistent with how users of language—including legislators—convey meaning."[32]

Bissonnette

Ejusdem generis played a role in a unanimous decision under the Federal Arbitration Act ("FAA"), *Bissonnette v. LePage Bakeries*.[33] The Court had previously relied on that canon to conclude that the FAA's exception for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," is limited to transportation workers.[34] An employer engaged in the business of baking argued that the exception should be limited to those working in the transportation industry, contending that reading the exception to cover all transportation workers, even those who work for employers outside the transportation industry, would render the exception's inclusion of "seamen" and "railroad employees" superfluous. The Court responded, "That argument gets *ejusdem generis* exactly backwards. It is the specific terms 'seamen' and 'railroad employees' that limit the residual clause, not the residual clause that swallows up these narrower terms."[35]

Muldrow

Similarly, in rejecting a requirement of a significant employment disadvantage under Title VII, the Court in *Muldrow v. City of St. Louis* rejected an argument that *ejusdem generis* called for such a requirement.[36] Title VII provides that it is an unlawful employment practice for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

30. *Id.* at 509 (alteration and emphasis in original) (citation omitted).
31. *Id.* at 490 (majority opinion); *id*. at 509 (Barrett, J., dissenting).
32. *Id.* at 501 n.1 (Jackson, J., concurring).
33. Bissonnette v. LePage Bakeries Park St., LLC, 601 U.S. 246 (2024).
34. *Id*. at 252–53; Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).
35. *Bissonnette*, 601 U.S. at 255.
36. Muldrow v. City of St. Louis, 601 U.S. 346 (2024).

> compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .[37]

The employer argued that refusing to hire or discharging a person causes a significant disadvantage, so the subsequent "otherwise" phrase can apply only to things causing an equal level of harm. But the Court saw no reason to believe that "the presence of significant disadvantage must be part of the list's common denominator" because the "text itself provides a different shared trait" in that each involves "an employment action."[38]

B. Superfluity & Meaningful Variation

Kirtz

In concluding that the United States had waived its sovereign immunity for claims under the Fair Credit Reporting Act, the Court in *Department of Agriculture v. Kirtz* rejected an argument premised on the canon against superfluity.[39] It observed that the "canon against rendering statutory terms a nullity has a long lineage."[40] It agreed that "[p]roper respect for Congress cautions courts against lightly assuming that any of the statutory terms it has chosen to employ are 'superfluous' or 'void' of significance."[41] But it refused to conclude that this canon called for the adoption of a "new rule" that a "provision can waive sovereign immunity only if that provision would have no other role to play in the statutory scheme."[42] Avoiding superfluity is not the same as insisting that a statute can do only one thing.[43]

Pulsifer

The canon against superfluity did important work in a difficult case, *Pulsifer v. United States*, under the safety-valve provision of the

37. 42 U.S.C. § 2000e-2(a)(1).
38. *Muldrow*, 601 U.S. at 357.
39. Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz, 601 U.S. 42, 53–54 (2024). Scalia & Garner, *supra* note 10, at 174 ("If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.").
40. *Kirtz*, 601 U.S. at 54.
41. *Id.* at 53.
42. *Id.*
43. *Id.* at 54 ("But this Court has never endorsed the notion that a statute may effect a waiver of sovereign immunity only if that is the sole work it performs.").

federal sentencing laws.[44] That provision allows for a sentence below what would otherwise be a statutory minimum if, among other things:

> (1) the defendant does not have–
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> > (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
> >
> > (B) a prior 3-point offense, as determined under the sentencing guidelines; and
> >
> > (C) a prior 2-point violent offense, as determined under the sentencing guidelines . . . .[45]

The interpretive question was whether a defendant, to be eligible for safety-valve relief, must not have *any one* of the three listed requirements or instead must not have the *combination* of all three requirements.

This question divided the courts of appeals four to three.[46] It also divided the Supreme Court six to three. Justice Kagan (joined by Chief Justice Roberts and Justices Thomas, Alito, Kavanaugh, and Barrett) held that "a person fails to meet the requirement (and so cannot get relief) if he has any one of the three."[47] Justice Gorsuch (joined by Justices Sotomayor and Jackson) concluded that, "[g]iven the meaning of 'and,' an ordinary reader would naturally understand that a defendant is eligible for individualized sentencing if he 'does not have' trait A, trait B, *together with* trait C," so that "a court may issue an individualized sentence unless the defendant has all three traits."[48]

This statutory provision is akin to an ambiguous image, such as Rubin's vase or "My Wife and My Mother-in-Law."[49] That is, one can look at the statute and readily see it one way—thinking it obvious—but then see it the other way and think that way is just as obvious. Justice Kagan notes that, as a matter of grammar, both readings are possible. That is, "if all a reader has to go on is the stripped-down phrase 'the defendant does not have A, B, and C,'" then the phrase "might require the defendant not to have (A, B, and C)—*i.e.*, the combination of the three. Or it might require the defendant not to have A, and not to have

44. Pulsifer v. United States, 601 U.S. 124 (2024).
45. 18 U.S.C. § 3553(f)(1).
46. *Pulsifer*, 601 U.S. at 132, 132 n.1.
47. *Id.* at 127.
48. *Id.* at 162 (Gorsuch, J., dissenting).
49. *See Ambiguous Image*, WIKIPEDIA, https://en.wikipedia.org/wiki/Ambiguous_image [https://perma.cc/FH6P-NXZ9]. Examples of these images can be seen at the link above.

B, and not to have C—*i.e.*, each of the three."[50] The latter reading can be understood as implied distribution.[51]

One might think that the problem was caused by Congress using the word "and" rather than "or" to link the three requirements. But Justice Kagan notes that if Congress had used "or" rather than "and," this might have simply caused the parties to switch sides:

> The Government would have read the requirement that a defendant "does not have A, B, or C" to mean that he "does not have (A, B, or C)." So a defendant would get safety-valve relief only if he doesn't have any of the three listed criminal-history features. But Pulsifer, we suspect, would have read the same requirement to mean that a defendant "does not have A, does not have B, or does not have C." So he would get safety-valve relief as long as he doesn't have a single one of the listed features. That reading too is possible when viewed only as a matter of abstract grammar, divorced from any analysis of A, B, and C's content.[52]

Perhaps legislative drafters should consider using algebraic symbols, like the simple parenthesis above, to make clear when they want a list of requirements to be considered as a group. (Or, if parentheses do not make the point clearly enough, perhaps they could use angled brackets or braces.) More radically, perhaps legislative drafters could consider using curved arrows from the word being distributed to the recipients of the distribution to indicate the word's proper distribution.

Congress, of course, had not used either of these methods, so the Court turned to the canon against superfluity. The Court concluded that, read as the defendant would have it—so that a defendant is eligible for safety-valve relief so long as he does not have the combination of (A, B, and C)—subparagraph A would be superfluous. That's because any defendant who had B (a 3-point offense) and C (a 2-point violent offense), would inevitably have A (more than 4 points).[53]

The dissent, by contrast, turned to the meaningful-variation canon, which teaches that, when "Congress uses different terms in a statute, we normally presume it does so to convey different meanings."[54] Here, as the dissent put it, "When Congress sought a single word to indicate

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50. *Pulsifer*, 601 U.S. at 140 ("Really, it all depends.").
51. *See id.* at 140.
52. *Id.* at 138.
53. *Id.* at 142 ("3 + 2 = 5, and . . . 5 is more than 4," so "a defendant with a three-point offense . . . and a two-point violent offense . . . will necessarily have more than four history points. . . . Subparagraph A becomes meaningless: It does no independent work.").
54. *Id.* at 162 (Gorsuch, J., dissenting). *See* SCALIA & GARNER, *supra* note 10, at 170 ("A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning.").

that one trait among many is sufficient to disqualify an individual from safety-valve relief, it chose an obvious solution: not the conjunctive 'and,' but the disjunctive 'or.'"[55] The majority was unpersuaded, in part because the canon is "mostly applied to terms with some heft and distinctiveness, whose use drafters are likely to keep track of and standardize," so it would be novel to apply it "to words as ubiquitous and . . . sometimes context-dependent as 'and' and 'or.'"[56]

The dissent also relied on yet another canon, the rule of lenity, a substantive canon which "requires courts to interpret ambiguous 'penal laws,' including those concerning sentencing, in favor of liberty, not punishment."[57] The majority, however, did not view the provision as "genuinely ambiguous" because, while there are "two grammatically permissible readings of the statute when viewed in the abstract," the canon against superfluity, coupled with the statutory purpose, reduce the two possible readings to one, "leaving no role for lenity to play."[58]

Once again, both the majority and the dissent cited Scalia and Garner.[59]

C. Veterans & Indians

Rudisill

A case involving veterans' benefits, *Rudisill v. McDonough*,[60] led to considerable discussion of the veterans canon, which calls for statutes providing benefits to veterans to be construed in the veteran's favor.[61] The Court, in an opinion by Justice Jackson, ruled in favor of the veteran, finding no need to rely on the canon. Justice Jackson explained that "[i]f the statute were ambiguous, the pro-veteran canon would favor Rudisill, but the statute is clear, so we resolve this case based on statutory text alone."[62] Justices Kavanaugh and Barrett joined Justice Jackson's opinion for the Court but added a concurring opinion

55. *Pulsifer*, 601 U.S. at 162 (Gorsuch, J., dissenting).

56. *Id.* at 149 (majority opinion).

57. *Id.* at 185 (Gorsuch, J., dissenting). *See* Scalia & Garner, *supra* note 10, at 296 ("Ambiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor.").

58. *Pulsifer*, 601 U.S. at 152–53.

59. *Id.* at 149 (majority discussion regarding meaningful variation); *id*. at 180 (Gorsuch, J., dissenting) (regarding absurdity). *See* Scalia & Garner, *supra* note 10, at 234 ("A provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve.").

60. Rudisill v. McDonough, 601 U.S. 294 (2024).

61. *See, e.g*., Brown v. Gardner, 513 U.S. 115, 118 (1994) (unanimous opinion) (stating that "interpretive doubt is to be resolved in the veteran's favor").

62. *Rudisill*, 601 U.S. at 314.

calling into question the veterans canon.[63] Citing Scalia and Garner, they suggested that courts should not single out particular groups for favored or disfavored treatment.[64] Justices Thomas and Alito dissented, concluding that the text was clearly against the veteran's claim.[65] For that reason, they did not rely on the veterans canon either, but they did note that they "share Justice Kavanaugh's concern that the veteran's canon 'appears to have developed almost by accident,'" that "no explanation has been provided for its foundation," and that they "question whether this purported canon should ever have a role in our interpretation."[66]

San Carlos Apache Tribe

Perhaps the most significant exception to the importance of canons this past term involved the Indian Self-Determination and Education Assistance Act. The Court in *Becerra v. San Carlos Apache Tribe* construed the statute in a way that could require the government to furnish billions of dollars to tribes for certain health care costs, but it did not rely on or discuss the Indian canon, which calls for statutory ambiguities to be resolved in the Tribe's favor.[67] It failed to do so, even as it noted that the lower courts had relied on the Indian canon.[68] This might be an exception that proves the rule: perhaps the Court did not discuss the Indian canon because of some uncertainty whether ruling in the Tribe's favor in this case would ultimately benefit Indian tribes as a whole. That's because it was not clear whether Congress would respond to the ruling by increasing its overall annual appropriations for Indian health care. If not, the result of a decision in favor of the Tribe in this case "would shift money from one class of tribes to another class of tribes," probably from poorer tribes to richer tribes.[69] Or perhaps some members of the Court had doubts about the Indian canon similar to their doubts about the veterans canon.[70]

63. *Id.* at 315 (Kavanaugh, J., concurring) (noting that "the canon seems to stem from a loose judicial assumption about congressional intent," but that the "Court has never explained" the basis for that assumption).

64. *Id.* at 318.

65. *Id.* at 329 (Thomas, J., dissenting).

66. *Id. See also* Bufkin v. Collins, 145 S. Ct. 728, 747 (2025) (Jackson, J., joined by Gorsuch, J., dissenting) ("The veterans canon resolves whatever lingering doubt might remain.").

67. Becerra v. San Carlos Apache Tribe, 602 U.S. 222 (2024).

68. *Id.* at 231 (noting that "the Ninth Circuit applied the Indian canon and construed the statute in the Tribe's favor"); *id*. at 232 (noting that one of the judges on the Tenth Circuit panel "voted to reverse because 'the relevant statutory provisions are ambiguous, and the Indian canon of statutory construction resolves the ambiguity in the Tribe's favor.'").

69. *Id.* at 255–56 (Kavanaugh, J., dissenting).

70. *See* Arizona v. Navajo Nation, 599 U.S. 555, 572 (2023) (Thomas, J., concurring) (questioning the pro-Indian canon). *Cf*. Barrett, *supra* note 6, at 152 (observing that "the

In short, as this past term reveals, understanding the work of the current Supreme Court requires engagement with the canons of interpretation.[71] Many of the canons that the Court relies upon are well established and discussed in some detail in Scalia and Garner, even if their application is disputed in close cases. The reference canon, on the other hand, has existed for many years but is not discussed in Scalia and Garner. It not only causes difficulties in close cases but has itself changed over time.

II. *Brown* and the Reference Canon

The Armed Career Criminal Act ("ACCA") provides for a fifteen-year mandatory minimum sentence for defendants with certain criminal records who illegally possess firearms.[72] A defendant who has three previous convictions for a serious drug offense is subject to this mandatory minimum.[73] A "serious drug offense" includes:

> an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.[74]

This provision does not itself define a controlled substance, but instead cross-references another law, section 102 of the Controlled Substances Act, codified at 21 U.S.C. § 802. The Controlled Substances Act, in turn, defines "controlled substance" to mean "a drug or other

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Indian canon . . . jumped without discussion from the interpretation of treaties to the interpretation of statutes" but not taking a position on whether it is wrong to apply it to statutes).

71. *See also, e.g.*, Biden v. Nebraska, 600 U.S. 477, 507–21 (2023) (Barrett, J., concurring) (devoting an entire concurring opinion to arguing that the major questions doctrine should not be understood as a substantive canon but instead as an interpretive tool to understand a text in context). The developments that brought us to this place can be traced back a generation. *See* John F. Manning, *Legal Realism & the Canons' Revival*, 5 Green Bag 2d 283, 284 (2002) ("The real news, however, is, first, that a large and growing number of academics (and academics-turned-judges) now believe in the utility of canons of construction . . . and, second, that the newly faithful cover a broad philosophical spectrum.").

72. *See* 18 U.S.C. § 924(e)(1).

73. *Id.* ("In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).").

74. 18 U.S.C. § 924(e)(2)(A)(ii).

substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter."[75] Those schedules were initially established by Congress, but they are updated by the Attorney General, pursuant to statutory authority, on an annual basis.[76]

Because the schedules are updated each year, the question in *Brown* was which year's schedule was the proper target of the cross-reference. The government argued that the relevant schedule was the one in effect when the defendant *committed the state crime*. Brown argued that the relevant schedule was the one in effect when the defendant was *sentenced for the federal crime* of possessing a weapon. Jackson, the defendant in a companion case consolidated with *Brown*, argued that the relevant schedule was the one in effect when the defendant *committed the federal crime* of possessing a weapon.[77]

The importance of this question is increased significantly because the Court applies a categorial approach to determine whether an offense under state law involves a controlled substance as defined under federal law.[78] Under the categorial approach, a court does not ask whether the particular substance possessed by the particular defendant was prohibited by both state and federal law at the relevant time. Instead of looking at the facts of an individual case, the court looks at the elements of the crime, insisting on a categorical match between the crime as defined by both state and federal law.[79] "If the state-law statute sweeps more broadly than the federal [law] . . . no conviction under the statute is a predicate offense, regardless of the underlying facts."[80] For example, to argue that there was not a categorial match in their cases, Brown relied on federal law removing some low THC hemp from the federal definition of marijuana, while Jackson relied on federal law that legalized a radioactive cocaine derivative for use with Parkinson's disease. Under the categorical approach, it does not matter that the drug each was actually involved with had nothing to do with low THC hemp or a radioactive cocaine derivative. If federal law but not state law had these limitations at the relevant time, the state statutes would sweep more broadly than the federal law, enabling them to avoid the mandatory

75. 21 U.S.C. § 802(6).
76. 21 U.S.C. §§ 811(a), 812(a).
77. Brown v. United States, 602 U.S. 101, 108–110 (2024).
78. Shular v. United States, 589 U.S. 154, 160 (2020).
79. *Id.* at 160–61.
80. United States v. Jenkins, 68 F.4th 148, 151 (3d Cir. 2023). For lower court criticism of the "bizarre" and "upside-down" results this approach can produce, *see, e.g.*, *id*. at 155; United States v. Scott, 14 F.4th 190, 200–02 (3d Cir. 2021) (Phipps, J., dissenting).

minimum sentence.[81] The key question, then, was the relevant time at which to compare state and federal law: when the defendant committed the state crime, when the defendant committed the federal crime, or when the defendant was sentenced for the federal crime.

Defendant Jackson relied on the reference canon, which the Court described as a "helpful tool."[82] Just a few years previously, in *Jam v. International Finance Corp.*, the Court had explained the reference canon:

> According to the 'reference' canon, when a statute refers to a general subject, the statute adopts the law on that subject as it exists whenever a question under the statute arises. . . . In contrast, a statute that refers to another statute by specific title or section number in effect cuts and pastes the referenced statute as it existed when the referring statute was enacted, without any subsequent amendments.[83]

Defendant Jackson argued that ACCA's reference to the Controlled Substances Act should be considered a general reference, and therefore the relevant schedules were those in existence whenever a question under ACCA arose—which he contended was when the federal crime was committed.[84]

The Court rejected defendant Jackson's application of the reference canon. In doing so, it acknowledged that "cross-references sometimes refer to the law as it currently exists, but they may also incorporate a referenced statute as it existed when the cross-reference was enacted."[85] In this case, it explained, "[E]ven if we assume that there may be contexts in which references to specific statutory provisions may be considered 'general,' it is hard to see the phrase 'as defined in section 102 of the Controlled Substances Act' as anything but a specific reference."[86]

The dissent, on the other hand, accepted defendant Jackson's view, noting that the Controlled Substances Act itself refers readers to those drugs and substances listed on schedules I through V. As the dissent saw it, this "turns what appears to be a specific statutory reference

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81. *Brown*, 602 U.S. at 107–08, 114.

82. *Id.* at 116.

83. *Jam v. Int'l Fin. Corp.*, 586 U.S. 199, 209–10 (2019) (citing 2 J. SUTHERLAND, STATUTORY CONSTRUCTION §§ 5207–5208 (3d ed. 1943)). *See* NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 51:7 (7th ed.) (2024) ("A statute of specific reference . . . refers specifically to a particular statute by its title or section number. A general reference statute refers to the law on a subject generally. . . . Whether an incorporation by reference is specific or general determines the effect of amendments subsequent to the original enactment by incorporation. A general incorporation includes subsequent amendments, and a specific incorporation does not.") (footnotes omitted).

84. *Brown*, 602 U.S. at 115–16.

85. *Id.* at 118.

86. *Id.* at 116 (citations omitted).

into a more general one, since it is impossible to determine which substances fall under the statutory definition without knowing what the five schedules contain."[87] For the dissent, the "proper application of the reference canon here" leads to the conclusion that the reference in ACCA "incorporates drug schedules that are updated annually . . . thereby requiring sentencing courts to merely plug in the drug schedules in effect at the time of the defendant's federal firearms offense."[88]

Thus, in the past five years, the Court has twice appeared to endorse both branches of the reference canon. This past term, it appeared to particularly endorse the specific branch, whereby a reference to another statute "by specific title or section number in effect cuts and pastes the referenced statute as it existed when the referring statute was enacted, without any subsequent amendments." That is, while *Jam* recited both branches of the reference canon, it relied on the first branch, dealing with general references, to conclude that the referring statute referred to the target law generally and thus incorporated how that target law changed over time. In *Brown*, by contrast, the Court relied on the second branch, dealing with specific references, to reject an argument that relied on the first branch, refusing to interpret a reference to a specific section of a statute as a general reference.

If courts were to follow the Supreme Court's lead in relying on the second branch of the reference canon regarding specific references and refusing to read a reference to a particular section of a statute as a general reference, the result could be a disaster.

Most federal statutes that courts are called on to interpret are now codified in the United States Code, which contains, in codified form, "the laws of the United States, general and permanent in their nature."[89] That Code is organized by title, ranging from title 1 (general provisions) to title 54 (National Park Service and Related Programs).[90] Some titles

87. *Id.* at 131 (Jackson, J., dissenting).

88. *Id.* at 132.

89. 1 U.S.C. § 204(a). Private laws and temporary laws (notably appropriations) are not codified. *See* Office of the Law Revision Counsel, *About Classification of Laws to the United States Code*, U.S. HOUSE OF REPRESENTATIVES, https://uscode.house.gov/about_classification.xhtml [https://perma.cc/NH7V-R763] ("[A] provision defining a certain action as a Federal crime is general while one naming a post office is not.").

90. Most of the titles are in alphabetical order, from Title 7 (Agriculture) to Title 50 (War and National Defense). "Each title of the Code is subdivided into a combination of smaller units such as subtitles, chapters, subchapters, parts, subparts, and sections, not necessarily in that order. Sections are often subdivided into a combination of smaller units such as subsections, paragraphs, subparagraphs, clauses, subclauses, and items." Office of the Law Revision Counsel, *Detailed Guide to the United States Code Content and Features*, U.S. HOUSE OF REPRESENTATIVES, https://uscode.house.gov/detailed_guide.xhtml [https://perma.cc/WKV9-PARE]. *See, e.g.*, 26 U.S.C. §§ 1–1564; *id.* §§ 1–59(A).

of the United States Code have been enacted into positive law. For them, the text of the Code is "legal evidence of the laws contained therein," while for those titles not enacted into positive law, the Code "establish[es] prima facie the laws of the United States."[91]

The United States Code is full of references to other parts of the United States Code. Some statutes reference nearby provisions in the same section, part, or chapter. Others reference provisions further away but still in the same title, while still others reference provisions in different titles.

To take one example, consider the Federal Arbitration Act. Section 9, which is a part of chapter 1 of title 9, contains a reference to "sections 10 and 11 of this title"[92]—the immediately following sections in chapter 1. Section 9 provides for judicial enforcement of arbitration awards, "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11."[93]

Section 2, which is also part of chapter 1 of title 9, generally provides for the enforcement of arbitration agreements, except "as otherwise provided in chapter 4."[94] Chapter 4 is not far away; it consists of section 401 and 402 of title 9, and it provides that certain arbitration agreements involving sexual harassment or assault are enforceable at the election of the person alleging sexual harassment or assault.[95]

Section 10, which is also part of chapter 1, sets forth general criteria for vacating an arbitration award.[96] It provides that a district court may vacate an arbitration award that was issued by an administrative agency "pursuant to section 580 of title 5."[97] That reference is not to another section or chapter of title 9, but to a different title of the United States Code entirely. Section 10 also provides that a district court may vacate such an award "upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5."[98] Again, the reference is to another title of the United States Code.

Applying the specific branch of the reference canon to all of these references would mean that, if Congress were to amend one of the referenced statutes, the old version of the referenced statutory

91. 1 U.S.C. § 204(a).
92. 9 U.S.C. § 9.
93. *Id.*
94. 9 U.S.C. § 2.
95. 9 U.S.C. §§ 401–402.
96. 9 U.S.C. § 10(a).
97. 9 U.S.C. § 10(c).
98. *Id.*

provision—effectively trapped in amber for these purposes—would continue to apply when invoked by the referring statutory provision. So, if Congress expanded the grounds for vacating an award under section 10 of title 9,[99] those new grounds would not operate as an exception under section 9. Likewise, if Congress amended chapter 4 to list additional kinds of contracts where one party may elect against arbitration,[100] the amended version of chapter 4 would not operate as an exception to enforceability under section 2.

If Congress changed the details of an agency arbitration proceeding in section 580 of title 5, such as by changing the time at which an award becomes final,[101] the pre-amended version of section 580 would continue to govern district court review of administrative arbitration awards. The same would be true if Congress were to amend section 572 of title 5, which sets forth circumstances in which an agency "shall consider not using" arbitration, such as where "authoritative resolution of the matter is required for precedential value."[102] That is, if Congress were to amend section 572, to make arbitration either more or less appropriate in administrative agencies, those amendments would, under the specific branch of the reference canon, have no effect on the circumstances justifying district court vacatur of administrative arbitration awards.

Examples could be multiplied across various titles of the United States Code.[103]

The Federal Rules adopted pursuant to the Rules Enabling Act have a similar structure, albeit without the distinction between titles that have been enacted into positive law and those that have not been.[104]

Pursuant to statutory authorizations,[105] the Supreme Court has promulgated Rules of Appellate Procedure, Bankruptcy Procedure,

99. 9 U.S.C. § 10.

100. 9 U.S.C. §§ 401–402.

101. 5 U.S.C. § 580.

102. 5 U.S.C. § 572(b).

103. *See, e.g.*, 8 U.S.C. § 1226a(b) (providing that habeas corpus is the exclusive means of reviewing certain immigration determinations and that "Section 2241(b) of title 28 shall apply to" such habeas applications). Brown v. United States, 602 U.S. 101, 130 (2024) (Jackson, J., dissenting) ("Cross-references are legion in the U. S. Code, and cross-referenced statutes are regularly amended."). Consider the Internal Revenue Code. I.R.C. *See also* Stephen Migala, *The Vacancies Act and an Acting Attorney General*, 36 Ga. St. U. L. Rev. 699, 778–79 (2020) (arguing, based on the reference canon, that the designation of Acting Attorney General Matthew Whitaker was unlawful because the relevant reference was to a specific provision of the Vacancies Act as it stood in 1953, notwithstanding later amendments).

104. *See* 28 U.S.C. § 2072. The closest parallel is that some Federal Rules, notably the Federal Rules of Evidence, were directly enacted by Congress.

105. *Id.* (giving the Supreme Court "the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . .

Civil Procedure, Criminal Procedure, and Evidence. Each set of rules is divided into titles, articles, or parts, each consisting of individual rules. Those rules, in turn, may be subdivided into subdivisions, paragraphs, subparagraphs, and items.[106]

These, too, are full of references, sometimes to other parts of the same rule, sometimes to other titles, articles, or parts of the same set of rules, and sometimes to different sets of rules.

For example, Federal Rule of Civil Procedure 12(d) refers to other subdivisions in Rule 12 itself: Rule 12(b)(6) and Rule 12(c).[107] Federal Rule of Civil Procedure 6(b)(2), contained in title II, refers to Rules 50(b) and (d) and 52(b), contained in title VI, and to Rules 59(b), (d), and (e) and 60(b), contained in title VII.[108] Federal Rule of Civil Procedure 62.1(b) reaches beyond the Civil Rules and references the Appellate Rules, in particular Appellate Rule 12.1.[109] Similarly, Appellate Rule 4 not only references other parts of Rule 4,[110] but also provisions of the Civil Rules,[111] and provisions of the Criminal Rules.[112] Appellate Rule 6 references various Bankruptcy Rules of Procedure.[113] As with the United States Code, examples could be multiplied.

These various Federal Rules are designed to work together, both within a particular rule set and across rule sets. To treat references like these under the specific branch of the reference canon—as if the target rule were cut and pasted into the referring rule, so that amendments to the target provision have no effect when triggered by the reference—would make a hash of the operation of these rules.

A pending amendment to Appellate Rule 6, dealing with bankruptcy appeals, illustrates the close interaction among the sets of Federal Rules. It provides that "the reference in [Appellate] Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read as a reference to the time allowed for the equivalent motions under the Federal Rules of Bankruptcy Procedure,

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and courts of appeals"); 28 U.S.C. § 2075 (giving the Supreme Court "the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11").

106. *See* BRYAN A. GARNER, GUIDELINES FOR DRAFTING AND EDITING COURT RULES 3.2 (5th prtg. 2007).

107. Fed. R. Civ. P. 12(d).

108. Fed. R. Civ. P. 6(b)(2).

109. Fed. R. Civ. P. 62.1(b).

110. *See* Fed. R. App. P. 4(a)(5) (referring to Appellate Rule 4(a)(1)).

111. *See* Fed. R. App. P. 4(a)(4)(A) (referring to Civil Rules 50(b), 52(b), 54, 58, 59, and 60).

112. *See* Fed. R. App. P. 4(b)(3)(A) (referring to Criminal Rules 29, 33, and 34).

113. *See* Fed. R. App. P. 6.

which may be shorter than the time allowed under the Civil Rules."[114] This one sentence in the Appellate Rules refers to another Appellate Rule, certain Civil Rules, and certain Bankruptcy Rules. The Committee Note explains:

> The Bankruptcy Rules partially incorporate the relevant Civil Rules but in some instances shorten the deadlines for motions set out in the Civil Rules. See Fed. R. Bankr. P. 9015(c) (any renewed motion for judgment under Civil Rule 50(b) must be filed within 14 days of entry of judgment); Fed. R. Bankr. P. 7052 (any motion to amend or make additional findings under Civil Rule 52(b) must be filed within 14 days of entry of judgment); Fed. R. Bankr. P. 9023 (any motion to alter or amend the judgment or for a new trial under Civil Rule 59 must be filed within 14 days of entry of judgment).
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> Motions for attorney's fees in bankruptcy cases or proceedings are governed by Bankruptcy Rule 7054(b)(2)(A), which incorporates without change the 14-day deadline set in Civil Rule 54(d)(2)(B). Under Appellate Rule 4(a)(4)(A)(iii), such a motion resets the time to appeal only if the district court so orders pursuant to Civil Rule 58(e), which is made applicable to bankruptcy cases and proceedings by Bankruptcy Rule 7058.
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> Motions for relief under Civil Rule 60 in bankruptcy cases or proceedings are governed by Bankruptcy Rule 9024. Appellate Rule 4(a)(4)(A)(vi) provides that a motion for relief under Civil Rule 60 resets the time to appeal only if the motion is made within the time allowed for filing a motion under Civil Rule 59. In a bankruptcy case or proceeding, motions under Civil Rule 59 are governed by Bankruptcy Rule 9023, which, as noted above, requires such motions to be filed within 14 days of entry of judgment. . . .
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> Of course, the Bankruptcy Rules may be amended in the future. If that happens, the time allowed for the equivalent motions under the applicable Bankruptcy Rule may change.[115]

Nor are the Federal Rules and the United States Code isolated from each other. To the contrary, they each reference the other. For example, Federal Rule of Appellate Procedure 6 references section 158 and 1334 of title 28 of the United States Code.[116] And Federal Rule of Civil Procedure 5.1 references section 2403 of Title 28 of the United States Code.[117] The supplemental jurisdiction statute refers to Federal Rules of Civil Procedure 14, 19, 20, and 24.[118]

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114. Fed. R. App. P. 6 proposed 2025 amendment.
115. Fed. R. App. P. 6 advisory committee's note to proposed 2025 amendment.
116. *See* Fed. R. App. P. 6(a)–(b).
117. *See* Fed. R. Civ. P. 5.1(b).
118. 28 U.S.C. § 1367(b).

The law of civil procedure has been down a similar path before. The Process Act of 1789 and the Conformity Act of 1872, which called for federal trial courts sitting at law to conform their procedure to that used in the state where they sat, were interpreted to require static conformity. That is, a federal trial court was required, under that interpretation, to apply the state procedural law as it existed at the time the federal act was enacted, rather than the state procedural law as it changed over time. As Professor Hazard has explained:

> The Conformity Act of 1872 and the Process Act of 1789 conveniently provided that a federal district court should, for cases at law, generally follow the procedure of the state in which the court sat in these diversity cases. This policy allowed federal judges and lawyers to employ locally familiar practice.
>
> Even the emphasis on state procedure in diversity cases, however, did not lead to complete uniformity. The Process Act was interpreted to mean "static" conformity, only requiring federal practice to conform to state practice as it was at the time of the statute's enactment in 1789-1790. This gradually resulted in different procedure in federal courts than in the courts of the local state, and was considered very inconvenient. . . .
>
> Unsurprisingly, many states modified their procedures over the course of time, particularly after 1848 through wide adoption of the New York Field Code system. Under "static conformity" this made for increased technicality, esoteric procedure lore, and confusion. In 1848, for example, a federal court in New York would supposedly follow New York common law procedure of 1789, while the state courts used code pleading as prescribed and periodically revised by the New York legislature. This problem was solved when Congress enacted the Conformity Act of 1872 to provide for "dynamic" conformity; under that policy, the federal courts on the "law side" would use the procedure prescribed by current state law, not as it existed in 1789.[119]

The result of static conformity was not a happy one. Professor Burbank has suggested that federal courts adhering to static conformity

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119. Geoffrey C. Hazard, Jr., *Has the Erie Doctrine Been Repealed By Congress*?, 156 U. PA. L. REV. 1629, 1640–41 (2008) (footnotes omitted). *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 32 (1825) (holding that the proceedings are "to conform to the law of the State, as it existed in September, 1789. The act adopts the State law as it then stood, not as it might afterwards be made."); *see also* Conformity Act of 1872, ch. 255, § 6, 17 Stat. 196, 197; Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93; Gagliardi v. Flint, 564 F.2d 112, 125 (3d Cir. 1977) (Gibbons, J., concurring) (noting that the Process Acts of 1792, 1793, and 1828, provided for static conformity on the law side, and that the Conformity Act of 1872 provided for dynamic conformity on the law side).

probably caused more friction than the general common law doctrine of *Swift*.[120] We should not venture down this road again.

Indeed, it could be worse this time around. Any given static conformity statute pointed to one particular time. But with the specific branch of the reference canon, each specific reference in the United States Code or the Federal Rules would point to the version of the referred provision at the time the referring provision was enacted. And since at least some part of the United States Code and the Federal Rules are amended every year, there would be numerous possible times to which references would point.

Plus, at least in the case of the Federal Rules, there can even be a dispute about on which date the referring provision was enacted. That's because, when the Supreme Court issues an order amending a Federal Rule, the order typically includes only the part of the Rule that is being amended, along with sufficient neighboring text to make sense of the amendment.[121] If the referring language is not itself amended but is included in the order promulgating the amended text for context, does that count as a reenactment of the referring text so as to point to the current version of the referred provision? The reenactment canon—which states, "If the legislature amends or reenacts a provision other than by way of a consolidating statute or restyling project, a significant change in language is presumed to entail a change in meaning"[122]—does not help. That's because the relevant language of reference would not have changed.

The worst outcomes could be avoided by a sufficiently careful (some might say willful) application of the specific branch of the reference canon. Recall that, as formulated by the Supreme Court, the specific branch of the reference canon applies when a statute "refers to *another* statute by specific title or section number."[123] Sutherland's *Statutory Construction* makes a similar, but not exactly the same, point,

120. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015, 1037 (1982). *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), *overruled by* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

121. *See, e.g.*, Order Adopting Amendments to the Fed. R. App. P. (Apr. 2, 2024), https://www.supremecourt.gov/orders/courtorders/frap24_g204.pdf [https://perma.cc/34D4-3W2U].

122. Scalia & Garner, *supra* note 10, at 256. The logic of this canon might suggest that stylistic changes made to one part of a rule because of the happenstance that a different part of a rule was being amended should not be understood to change meaning. However, by its terms, the reenactment canon presumes a change in meaning except for "a consolidating statute or a restyling project," and not every stylistic change may count as a "restyling project."

123. Jam v. Int'l Fin. Corp., 586 U.S. 199, 209–10 (2019) (emphasis added).

describing the reference canon as applicable when a statute refers to "*another* act and incorporate[s] part or all of it by reference."[124]

Using the Court's phrasing, one needs to determine what counts as "another" statute, as opposed to the same statute. Provisions in the same statutory section, or the same Federal Rule, can readily be treated as part of the same "statute." To minimize the risks of the specific branch of the reference canon, each title of the United States Code, and each set of Federal Rules, might be viewed as a single "statute." This approach would leave the specific branch of the reference canon in play only when a reference crosses titles or sets of rules.[125]

There are nevertheless some difficulties with this approach. First, viewing an entire title as a single "statute" sits uncomfortably with the distinction between titles that have been enacted into positive law and those that have not. It is one thing to treat a title that has been enacted into a positive law as a single statute; after all, Congress enacted that title itself into law. But where the title exists as it does only because those who compile the United States Code have exercised their discretion to organize the various laws enacted by Congress in a certain way, treating that title as its own statute elevates the work of those classifiers into the work of lawmakers.

This incongruity highlights a deeper problem with this approach, one also reflected in Sutherland's use of the term "act" rather than "statute." An "act" of Congress is a particular text enacted at a point in time by the approving votes of both houses of Congress and the President's signature (or the supermajority passage of that text over a presidential veto).[126] An "act" of Congress is the text of an enrolled bill, published in the Statutes at Large.[127] Indeed, the very fact that the

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124. Norman J. Singer & Shambie Singer, Sutherland Statutes and Statutory Construction § 51:7 (7th ed. 2024) (emphasis added). *But see* Hassett v. Welch, 303 U.S. 303, 314 (1938) ("The weight of authority holds this rule [the specific reference canon] respecting two separate acts applicable where, as here, one section of a statute refers to another section which alone is amended.").

125. It would appear to leave the general reference canon in place only for such references as well.

126. *See* 1 U.S.C. § 101 ("The enacting clause of all Acts of Congress shall be in the following form: 'Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.'"); Office of the Law Revision Counsel, *supra* note 90 ("'Act' is used throughout this guide to refer to a bill or joint resolution that has passed both the U.S. House of Representatives and Senate and has been signed into law by the President, or passed over the President's veto, thus becoming a law.").

127. *See* Marshall Field & Co. v. Clark, 143 U.S. 649, 670 (1892) (refusing to "declare that an enrolled bill . . . which has been authenticated by the signatures of the presiding officers of the two houses of congress, and by the approval of the president, and been deposited in the public archives, as an act of congress, was not in fact passed

compilation of "Acts of Congress" is called "Statutes at Large" suggests that a "statute" should be understood to constitute a single "act," rather than an entire title of the United States Code.[128]

Under this understanding of "statute," what should matter in determining whether a provision is in "another" statute when applying the specific branch of the reference canon is whether the referring provision and the referred provision were enacted at the same time, in the same bill that was passed by Congress and signed by the President. By analogy, two rules promulgated under the Rules Enabling Act should count as part of the same "statute" only if contained in the same order of the Supreme Court adopting them.

Perhaps these problems are not sufficiently grave to dissuade one from treating each title of the United States Code as a "statute" or "act" and each set of Federal Rules (Appellate, Bankruptcy, Civil, Criminal, Evidence) as a "statute" or "act." That approach does solve some, but not all, of the problems with the specific branch of the reference canon.

But reflecting on the difference between the individual enactments of Congress and the United States Code invites a broader reevaluation of the reference canon.

III. The Need for Repairs

Prior to 1875, the laws of the United States were not codified. Instead, the laws of the United States appeared in the Statutes at Large, which "is the collection of every law, public and private, ever enacted by the Congress, published in order of the date of its passage."[129] Indeed, that publication, Statutes at Large, was itself not begun until 1845.[130]

The earliest forerunner of the Statutes at Large was authorized by Act of Congress in 1795.[131] It is commonly known as "Folwell's

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by the house of representatives and the senate, and therefore did not become a law"); Stephan v. United States, 319 U.S. 423, 426 (1943) ("The fact that the words of 18 U.S.C. § 681 have lingered on in the successive editions of the United States Code is immaterial. By 1 U.S.C. § 54(a) [now § 204(a)], the Code establishes 'prima facie' the laws of the United States. But the very meaning of 'prima facie' is that the Code cannot prevail over the Statutes at Large when the two are inconsistent.").

128. *See, e.g.*, Library of Congress, *Federal Statutes: A Beginners' Guide*, https://guides.loc.gov/federal-statutes [https://perma.cc/4D5F-74F3] ("Statutes, also known as acts, are laws passed by a legislature.").

129. Library of Congress, *Collection: United States Statutes at Large*, https://www.loc.gov/collections/united-states-statutes-at-large/about-this-collection/#:~:text=The%20United%20States%20Statutes%20at,the%20official%20source%20of%20legislation [https://perma.cc/VZ4S-HT9Z].

130. Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 Minn. L. Rev. 1008, 1010 (1938).

131. *Id.* at 1009. *See* Act of March 3, 1795, 1 Stat. at L. 443, ch. 50.

Statutes," although it was edited and compiled by Zephaniah Swift.[132] It originally consisted of three volumes, containing the Acts of Congress, in chronological order, from 1789 through March 3, 1797, omitting acts that had expired or been repealed, but its publication continued until 1815, comprising twelve volumes.[133]

In 1814, Congress provided for the Secretary of State to contract with certain publishers to publish what became known as the Bioren and Duane edition of the laws of the United States.[134] This 1814 Act called for a copy of the resulting publication to be delivered to various officials, including each federal judge.[135] It also provided for ongoing publication of the "act[s] passed at each succeeding session of Congress."[136] The plan was approved by the Attorney General and the Secretary of State and included, in its first volume, acts of "the old congress" that "are in any degree in operation, or affect real property at the present day."[137] It ultimately ran to ten volumes, reaching back to 1789, and included acts that had been repealed, as well as notations regarding repeal and amendment.[138] As with its predecessor Folwell's Statutes and its successor the Statutes at Large, it arranged the acts of Congress from 1789 forward chronologically.[139]

The Revised Statutes of the United States was authorized to be published in 1874 and first published in 1875.[140] Work on the United States Code began in 1919, and the project was finally approved in 1926.[141]

Every judge, lawyer, and law student living today has always had the United States Code (or one of its annotated reproductions, such as West's United States Code Annotated) as a ready source for determining the content of federal law. Most know that there is something called the

132. *The Laws of the United States of America*, WYTHEPEDIA, https://lawlibrary.wm.edu/wythepedia/index.php/Laws_of_the_United_States_of_America [https://perma.cc/26US-53DE].

133. *See* 12 LAWS OF THE UNITED STATES (Philadelphia, Authority 1796–1815). *Cf.* THOMAS HERTY, A DIGEST OF THE LAWS OF THE UNITED STATES OF AMERICA (1800) (arranging the laws from 1789 through March 1799 in alphabetical order by topic, then chronologically within each topic, noting amendments).

134. Dwan & Feidler, *supra* note 130, at 1009–10. *See* Act of April 18, 1814, 3 Stat. at L. 129, ch. 69.

135. Act of April 18, 1814, 3 Stat. at L. 129, ch. 69, sec. 2.

136. *Id*. at sec. 4.

137. *See* 1 JOHN BIOREN & W. JOHN DUANE, LAW OF THE UNITED STATES OF AMERICA v, vii (1815).

138. *See id.* at iii–vi.

139. *See id.* at 1.

140. Dwan & Feidler, *supra* note 130, at 1012.

141. *Id.* at 1018–21.

Statutes at Large, and many may know that, in the case of a conflict with a provision in the United States Code that has not been enacted into positive law, the Statutes at Large govern.

But it is hard for any of them to put themselves in the shoes of a judge, lawyer, or law student who needed to figure out the content of federal law—what is now almost always the easy first step in what may be a difficult process of interpreting a law—without the United States Code, or at least its predecessor, the Revised Statutes.

Before those codifications, judges, lawyers, and law students could draw on indices, marginal notes, and digests to figure out how the various enactments of Congress worked together. But they did not have a codification that integrated those enactments into a resulting document. The federal judges in this era who, pursuant to an act of Congress, received the Bioren and Duane edition of federal law would be working with a set of books on the shelves of their chambers that contained the Acts of Congress in the order in which Congress enacted them.

Lest there be any doubt of the wide gulf between (1) even very helpful marginal notes about the interaction of enactments over time in a chronologically organized book and (2) a codification that integrated such enactments, consider the explanatory words of those who put together the Bioren and Duane edition:

> [I]t will be seen by those who consult these volumes, that there are many acts, so intermingled in their provisions, and connected in so indirect a way with each other, that it would be difficult, with the space allotted on the margin, to specify, with the necessary degree of precision and clearness, the nature of the alternations that may have taken place in the law: Where this difficulty has occurred, references have been made to prior and subsequent acts, so as to form an intelligible connexion [sic] between provisions of law bearing on the same subject, and to admonish the reader that that part of the act is affected by something that precedes or follows it. Thus, although in some instances the precise state of the whole law will not appear on the same page, by marginal illustrations, yet, pursuing the references, the reader will be sufficiently guarded against erroneous impressions. Indeed, had the margin been more capacious, it would have been almost impossible to have compressed into, at the proper place, all the successive alterations and modifications of, and additions to, several of the acts of congress.[142]

142. BIOREN & DUANE, *supra* note 137, at xiii–ix.

In such a world, treating references as static may have made some sense. If Congress in 1832 referred to an Act, or a section of an Act, from 1815, the 1832 law could be read as incorporating that language as it stood in 1815. A judge in 1840 who pulled the book off his shelf containing laws enacted in 1832 and found that one of those 1832 laws included a reference to a law enacted in 1815 could then pull the book of 1815 laws off the shelf, place the books side by side, and read the 1832 law as if it included the referenced language of the 1815 law. And he wouldn't have to try to figure out whether the 1815 law had been amended or repealed.

Consider from this perspective one of the earliest Supreme Court cases cited to support the reference canon, *Kendall v. United States*.[143] At the end of February 1801, Congress created a circuit court for the District of Columbia and provided that it "shall have all the powers by law vested in the circuit courts and the judges of the circuit courts of the United States."[144] This was a reference to the Judiciary Act of 1801, enacted earlier that same month, that had abolished the original circuit courts created in 1789 and created new regional circuit courts with considerably broader jurisdiction.[145]

But in 1802, Congress repealed the Judiciary Act of 1801, abolished the newly created regional circuit courts, and restored the original circuit courts and their more limited jurisdiction.[146] However, Congress left in place the Circuit Court for the District of Columbia that it had created in 1801. The Supreme Court held that the jurisdiction of the Circuit Court for the District of Columbia was determined by the Judiciary Act of 1801, even though that Act had been repealed. Referring to state legislation that had received British statutes and the federal process and conformity acts, the Court noted that "such adoption has always been considered as referring to the law existing at the time of adoption; and no subsequent legislation has ever been supposed to affect it."[147] As the Court saw it, "such must necessarily be the effect and operation of such adoption. No other rule would furnish any certainty as to what was the law."[148]

143. Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524 (1838).
144. Judiciary Act of 1801, 2 Stat. 89, 105 (1801).
145. Act of Feb. 13, 1801; *see Kendall*, 37 U.S. at 624–25.
146. *See* Edward A. Hartnett, *Legislative Calibration of Constitutional Remedies*, 128 Penn St. L. Rev. 165, 173–76 (2023) (discussing this history); Edward A. Hartnett, *Not the King's Bench*, 20 Const. Commentary 283, 298–301 (2003) (explaining how the displaced circuit judges never obtained any relief).
147. *Kendall*, 37 U.S. at 625.
148. *Id.*

This was hardly the only possible reading of the legislation. As Chief Justice Taney argued:

> The obvious meaning of the words above quoted is, that the powers of this circuit court shall be regulated by the existing power of the circuits courts as generally established, so that the powers of this circuit court would be enlarged or diminished, from time to time, as congress might enlarge or diminish the power of the circuit courts in its general system.[149]

From that perspective, Congress intended to establish uniformity between the regional circuit courts and the Circuit Court for the District of Columbia.[150]

But in a world without a code that sought to textually implement amendments over time into a uniform whole, and where judges had to piece together the governing law from disparate enactments over time that sat on their shelves in chronological order, it is easy to see why judges might be inclined to do what the majority did: "We are then to construe this third section of the act of 27th of February, 1801, as if the eleventh section of the act of 13th of February, 1801, had been incorporated at full length."[151] And perhaps this approach still makes sense in situations where the applicable law is not codified, or in those states that have a constitutional provision limiting the ways in which statutory amendments may be carried out.[152]

The first edition of Sutherland's treatise on statutory interpretation cited *Kendall* and said:

> § 257. **Other statutes adopted by general reference.—**
>
> When so adopted, only such portion is in force as relates to the particular subject of the adopting act. Such adoption does not include subsequent additions or modifications of the statute so taken unless it does so by express intent. Nor will the repeal of the statute so adopted affect its operation as part of the statute adopting it. The effect may be thus comprehensively stated: Where a statute is incorporated in another, the effect is the same as if the provisions of the former were re-enacted in the latter, for all the purposes of the latter statute; and the repeal of the former statute does not repeal its

149. *Id.* at 635–36 (Taney, C.J., dissenting).

150. *Id.* at 636.

151. *Id.* at 625 (majority opinion). As Chief Justice Taney described the approach, "In other words, they propose to expound the act of February 27th, as if this section of the act of February 13th was inserted in it." *Id.* at 638 (Taney, C.J., dissenting).

152. *See, e.g.*, Cal. Const. art. IV, § 9 ("A section of a statute may not be amended unless the section is re-enacted as amended."); N.J. Const. art. IV, § 7, ¶ 5 ("No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of the act or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act.").

> provisions so far as they have been incorporated in an act which is not repealed . . . .[153]

Note that while the heading mentions "general reference," there is no attempt to distinguish between a reference to some general law and a reference to some specific law. Even more strikingly, all such references are treated "as if the provisions of the former were re-enacted in the latter" and "do[] not include subsequent additions or modifications of the statute so taken unless it does so by express intent." That is, all such references—including what later became known as general references—were treated the way later iterations of the canon treat specific references.

It was the second edition of Sutherland, published in 1904, that distinguished between general and specific references. The relevant section was changed:

> § 405 (257). **Statutes which adopt other statutes by particular or general reference.**
>
> Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute. When so adopted, only such portion is in force as relates to the particular subject of the adopting act, and as is applicable and appropriate thereto. Such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications of the statute so taken unless it does so by express intent. Nor will the repeal of the statute so adopted affect its operation as part of the statute adopting it. The effect may be thus comprehensively stated: Where a statute is incorporated in another, the effect is the same as if the provisions of the former were re-enacted in the latter, for all the purposes of the latter statute; and the repeal of the former statute does not repeal its provisions so far as they have been incorporated in an act which is not repealed . . . .
>
> There is another form of adoption wherein the reference is, not to any particular statute or part of a statute, but to the law generally which governs a particular subject. The reference in such case means the law as it exists from time to time or at the time the exigency arises to which the law is to be applied.[154]

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153. J. G. Sutherland, Statutes and Statutory Construction § 257 (1st ed., 1891) (footnotes omitted).

154. J. G. Sutherland, Statutes and Statutory Construction § 405 (257) (2d ed., 1904) (footnotes omitted). *See also* Hassett v. Welch, 303 U.S. 303, 314 (1938) (relying on the specific reference canon, as described in Sutherland's second edition, in

Notice the shift. Previously, all references were static. Now, references to the "particular provisions by a specific and descriptive reference" are static, but references to "the law generally which governs a particular subject" are dynamic.

That move was made over a hundred years ago.[155] But now that we are approaching the hundredth anniversary of the United States Code, and the Federal Rules have been with us for over eighty-five years, it is time to repair the reference canon, at least as it applies to those bodies of law.

The reference canon is showing several signs that it needs further repair. One sign, internal to the doctrine itself, is the treatment of specific references as if they were general references.[156] For example, the Court of Appeals for the Seventh Circuit once spent pages and pages of analysis before announcing that it was "persuaded toward the view that § 422(a) of the [Federal Coal Mine Health and Safety Act] is a general reference masquerading as a specific and descriptive reference."[157] In doing so, it relied on a Wisconsin Supreme Court decision where, as the Court of Appeals described it, the "Wisconsin court was clearly dealing with a statutory framework wherein the referenced law was referred to by specific section numbers," but "characterized the legislative reference as general rather than as specific."[158] For courts to characterize references to *specific* statutes and even *specific* section numbers as *general* references strongly suggests that something is driving the decision other than the

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combination with the canon that doubts in a tax statute should be resolved in favor of the taxpayer and the presumption of nonretroactivity).

155. *See* Culver v. People, 161 Ill. 89, 96 (1896) (stating that the static reference rule "seems to be strictly adhered to, where the prior act is particularly referred to in the adopting statute by its title," but if the adopting statute makes no reference to any particular act, by its title or otherwise, but refers to the general law regulating the subject in hand, the reference will be regarded as including, not only the law in force at the date of the adopting act, but also the law in force when action is taken or proceedings are resorted to"). The third edition of Sutherland reiterated the distinction between specific and general references but noted that the treatment of a specific reference to a particular statute by its title or section number as static could be overcome if "the legislature has expressly or by strong implication shown its intention to incorporate subsequent amendment." J. G. Sutherland, Statutes and Statutory Construction § 5208 (3d ed., 1943). Otherwise, "subsequent amendment of the referred statute will have no effect on the reference statute. . . . When the reference is made to a specific section of a statute, that part is taken as though written into the reference statute." *Id.*

156. Norman Singer & Shambie Singer, 2B Sutherland Statutory Construction § 51:8 (7th ed. 2023) ("Facially specific references can, and sometimes do, operate as general legislative references.").

157. Dir., Off. of Workers' Comp. Programs v. Peabody Coal Co., 554 F.2d 310, 319 (7th Cir. 1977).

158. *Id.* at 323–24 (citing George Williams College v. Village of Williams Bay, 7 N.W.2d 891 (Wis. 1943)).

characterization of a reference as general or specific—and that there is considerable discomfort with applying the specific branch of the reference canon.[159]

Consider *Brown* again from this perspective. The Armed Career Criminal Act rather specifically refers to "section 102 of the Controlled Substances Act (21 U.S.C. 802),"[160] but three dissenting justices thought that context "turns what appears to be a specific statutory reference into a more general one."[161] The majority was agnostic about whether references to specific statutory provisions may ever be considered general, but found it "hard to see the phrase 'as defined in section 102 of the Controlled Substances Act' as anything but a specific reference."[162]

Another sign is that the Scalia and Garner book doesn't mention the reference canon at all. That book includes fifty-seven canons that the authors considered "valid," leaving aside more than one hundred that they did not consider valid.[163] The reference canon did not make the cut.

The closest they come is a statement limited to statutorily defined terms. That would appear to be akin to a specific reference, but they call for the treatment that the reference canon would give to a general reference. In their explanation of the fixed meaning canon, they state, "A legal text referring to a statutorily defined term is understood to have a silent gloss, 'as the definition may be amended from time to time.'"[164] In making this point, they criticize a 1925 decision of the Supreme Court of Illinois that interpreted an 1887 Act requiring jury commissioners to create a jury list comprised of "electors" to not include women as electors, even though women in Illinois obtained the right to vote in 1913.[165] Although the

159. *Cf.* Barrett, *supra* note 6, at 121 (noting the courts frequently suggest "substantive canons capture what ordinary language means or what Congress would want" and that this "temptation to rationalize ostensibly substantive canons on this ground almost surely reflects discomfort with the application of substantive canons").

160. 18 U.S.C. § 924.

161. Brown v. United States, 602 U.S. 101, 131 (2024) (Jackson, J., dissenting).

162. *Id.* at 116 (majority opinion) (citation omitted).

163. Scalia & Garner, *supra* note 10, at 9 ("We believe that our effort is the first modern effort . . . to collect and arrange only the valid canons (perhaps a third of the possible candidates) and to show how and why they apply to proper legal interpretation.").

164. *Id.* at 90. *Cf. Brown*, 602 U.S. at 129–30 (Jackson, J., dissenting) (arguing that statutory cross-references are and should be treated the same way as statutory definitions); *id.* at 130 n.3 (suggesting that the "specific form of the canon" might apply only if there is "uncertainty about what, exactly, is being cross-referenced").

165. Scalia & Garner, *supra* note 10, at 88–90 (citing People *ex rel.* Fyfe v. Barnett, 150 N.E. 290, 291 (Ill. 1925)).

Illinois Court did not invoke the reference canon by name, its language is consistent with it:

> [I]t is evident that when the Legislature enacted the law in question, which provided for the appointment of jury commissioners . . . and imposing upon them the duty of making a jury list, using the words "shall prepare a list of all electors between the ages of twenty-one and sixty years, possessing the necessary legal qualifications for jury duty, to be known as the jury list," it was intended to use the words "electors" and "elector" as the same were *then* defined by the Constitution and laws of the state of Illinois.[166]

Subsequent amendments to those laws were irrelevant.

Finally, although *Brown*'s attention to the canon makes it important to reconsider the canon before it inflicts harm, *Brown* itself shows that the canon is in trouble. No one—not the justices in the majority, not the dissenting justices, not the United States, not either of the two defendants, each with their own interpretation—actually applied the specific branch of the reference canon. That is, no one thought that the right interpretation of the Armed Career Criminal Act was that it adopted the version of the drug schedules in effect in 1986 when the reference to section 102 of the Controlled Substances Act was enacted.[167] No one thought that the Armed Career Criminal Act should be read as if the schedules in effect in 1986 had been cut and pasted into the Act. Instead, all agreed that the reference to the drug schedules was dynamic rather than static. The only question was *which* of the post-1986 drug schedules was applicable.

IV. The Repairs

It might be thought best to follow the lead of Scalia and Garner and simply retire the reference canon, at least where the United States Code and the Federal Rules are concerned. That would leave interpreters to rely on other principles of interpretation, with no targeted guidance for dealing with references. That might well be an improvement over the existing situation with its forced distinction between general and specific references.

But there is value in the basic point made by the general branch of the reference canon—that such references include subsequent amendments. The problem is with the specific branch of the reference canon. At least where the United States Code and the Federal Rules are concerned, the specific branch of the reference canon should be jettisoned: All references should presumptively include subsequent amendments.

166. *Barnett*, 150 N.E. at 292 (emphasis added).
167. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-40.

In effect, the long-term progression of the reference canon so far has been:

1) All references are static.
2) Specific references are static, but general references are dynamic.
3) Specific references are static, and general references are dynamic, but some specific references can be considered general references and therefore dynamic.

And now it is time to take the next step:

4) All references are dynamic.

This fourth approach is a far better match for the way the United States Code and the Federal Rules are constructed—and the way contemporary readers are likely to read them.[168]

Amendments to titles of the United States Code that have been enacted into positive law are framed as amendments to that title of the Code. For example:

> Title 31, United States Code, is amended as follows:
>
> (1) Section 3553(b)(2)(A) is amended by striking out ''35'' and inserting in lieu thereof ''30''.
>
> (2) Section 3554 is amended—
>
> (A) in subsection (a)(1), by striking out ''125'' and inserting in lieu thereof ''100''; and
>
> (B) in subsection (e)—
>
> (i) in paragraph (1), by striking out ''Government Operations'' and inserting in lieu thereof ''Government Reform and Oversight''; and
>
> (ii) in paragraph (2), by striking out ''125'' and inserting in lieu thereof ''100''.[169]

With a title that has been enacted into positive law, and amendments made directly to that title, the result is a body of law that is fully integrated. There is no need to consider a series of acts because the Code itself stands as the law.[170] In these circumstances, treating references as

168. El Encanto, Inc. v. Hatch Chile Co., 825 F.3d 1161, 1164 (10th Cir. 2016) (treating a reference to "the Federal Rules of Civil Procedure" as a general reference and noting that "surely our job when interpreting statutes is to read them as an ordinary citizen might, not to lay spring traps for the unwary and force lay persons to become experts in the vestigial esoterica of every statute and federal rule").

169. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 698.

170. 1 U.S.C. § 204(a) ("The matter set forth in the edition of the Code of Laws of the United States current at any time shall . . . establish prima facie the laws of the

if they were a static and permanent cut and paste, rather than as dynamic so that references include amendments, makes no sense.

Amendments to titles of the United States Code that have not been enacted into positive law should be treated the same way. That's because of the nature of the editorial changes made in creating the United States Code for such titles. For such titles, Congress may include parenthetical citations to the United States Code, but Congress phrases its amendments of prior law as amendments of the enacted law, not the Code itself. However, the Office of the Law Revision Counsel inserts:

> bracketed citation information in the text following a cross reference. For example, in section 1440(c) of title 20, the bracketed citation "[42 U.S.C. 1396 et seq.]" was editorially inserted following a reference to title XIX of the Social Security Act. A reader can assume that almost every citation in the Code that is enclosed in square brackets ("[…]") was added by the Code editors and was not in the original act. When statutory text contains a Code citation in parentheses, however, that citation is almost always as it appeared in the underlying act.[171]

Similarly, the Office of the Law Revision Counsel can change the "actual text of the original act . . . known as a 'translation'."[172] One common kind of translation involves "changing a cross reference in an act into a reference to the corresponding provision in the Code."[173]

As a result, readers of the United States Code will see a text that includes references to other parts of that Code, even if those references were not in the text of the law enacted by Congress. Again, the result is a text that is fully integrated. A new edition of the United States Code is published as often as every five years, and a supplement is published each year.[174]

In the ordinary case, there is no need to consider a series of acts because the Code stands as prima facie evidence of the law.[175] Sure, in the case of a conflict between the Statutes at Large and a provision of

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United States, general and permanent in their nature . . . . Provided, however, That whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained . . . .").

171. Office of the Law Revision Counsel, *supra* note 90.

172. *Id.*

173. *Id.*

174. 1 U.S.C. § 202(a) (providing for the publication of a "supplement for each session of the Congress to the then current edition of the Code of Laws of the United States, cumulatively embracing the legislation of the then current supplement."); 1 U.S.C. § 202(c) (providing for the publication of "[n]ew editions of the Code of Laws of the United States . . . correcting errors and incorporating the then current supplement . . . not . . . oftener than once in each five years.").

175. *See supra* note 170.

the United States Code that has not been enacted into positive law, the Statutes at Large prevail. But it is a rare case when lawyers or judges find a need to go behind the United States Code. Indeed, it is uncommon for lawyers or judges to even need to look at the hard copy print version of the United States Code, as opposed to the latest version that appears on their computer screens via Lexis or Westlaw.

Thus, whether a title has been enacted into positive law or not, treating references as if they were a static and permanent cut and paste, rather than as dynamic so that references include amendments, makes little sense. In a world in which judges, lawyers, and law students routinely use the United State Code rather than the Statutes at Large, it makes far better sense to presumptively treat references, whether general or specific, as including subsequent amendments.

The same is true for the Federal Rules. Amendments are made directly to the existing rules, adding, deleting, and rearranging as appropriate. Redlines showing the changes are published.[176] They are drafted to operate, as nearly as possible, as an integrated whole, not just within a particular set of Rules but across all five sets of Rules. While the several Advisory Committees meet separately, they all report to the Standing Committee on Rules of Practice and Procedure.[177] The chairs and reporters for all the Advisory Committees attend and participate in the meetings of the Standing Committee, as do the style consultants who work on all sets of Federal Rules.[178]

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176. *See, e.g.*, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, AND CIVIL PROCEDURE (August 2023), https://www.uscourts.gov/file/77059/download [https://perma.cc/J3LN-VQCS]. Perhaps Congress could learn from the rule makers and enact the resulting text (for titles enacted into positive law) or show the resulting text (for titles not enacted into positive law), rather than simply the editing instructions to be implemented.

177. *See* 28 U.S.C. § 2073(b) (providing that the Standing Committee "shall review each recommendation of any other committees so appointed and recommend to the Judicial Conference rules of practice, procedure, and evidence and such changes in rules proposed by a committee appointed under subsection (a)(2) of this section as may be necessary to maintain consistency and otherwise promote the interest of justice."); JUDICIAL CONFERENCE OF THE U.S., GUIDE TO JUDICIARY POLICY § 440.30.10 (2011), https://www.uscourts.gov/file/document/procedures-committees-rules-practice-and-procedure-guidance#:~:text=§%20440.30.10%20Functions&text=(d)%20for%20proposed%20rule%20changes,and%20consideration%2C%20or%20reject%20them [https://perma.cc/D8FC-8SVX] (providing that one of the functions of the Standing Committee is "coordinating the work of the advisory committees").

178. *See* JUDICIAL CONFERENCE OF THE U.S., *supra* note 177 at § 440.30.20(b) ("The advisory committees' chairs and reporters should attend the Standing Committee meetings to present their committees' proposed rule changes and committee notes,

And each year, once any amendments take effect on December 1, the latest version of each set of Federal Rules is published, incorporating the latest amendments.[179]

Conceptually, there are two basic reasons why a legal drafter would refer to another law rather than copy the text of that referenced law. One would be if the referenced law had exactly the language desired in the new law and it would be more efficient to refer to that language rather than reproduce it in full. The second would be so that the new law would work together with the referenced law, both now and in the future. The first rationale would call for a static reference; the second rationale would call for a dynamic reference.[180]

In the past, there might have been significant efficiency reasons for using a reference rather than reproducing in full. Cutting and pasting was literally cutting and pasting: taking scissors (or another sharp object) to a piece of paper containing the existing language one wanted to use, cutting a chunk of that paper out, and pasting it with some adhesive onto the page of the new draft where it was desired to be included. And after such cutting and pasting, the new draft would have to be rewritten by hand, reprinted on a printing press, or retyped (once the typewriter came into use in the second half of the nineteenth century). A reference to a prior law rather than cutting, pasting, and reprinting could have real efficiency. From the consumer's side, saving the expense of additional pages of a printed volume, and the space it would take up in a law library, could also be a valuable efficiency.

Today, these efficiencies are nearly non-existent. Cutting and pasting favored language from an existing law into a proposed new one takes a few mouse clicks. Some printing and storage costs can still be saved by referring to pre-existing legal text rather than cutting and pasting old language into a new law. But it is no longer necessary to have access to physical books to find and read a law. Instead, laws can be accessed from a computer or smart phone from anywhere in the world. Plus, if a drafter wants to use preexisting language for efficiency and lock in that language, it is easy to do so: simply add a phrase to the reference such as "as it now exists on the date of enactment."

On the other hand, there are strong reasons for drafters to want various laws and pieces of laws to work with each other—and continue to work with each other in the future. As Judge Easterbrook has explained, "Writing a cross-reference rather than repeating the text to

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to inform the Standing Committee about ongoing work, and to participate in the discussions.").

179. *See, e.g.*, H.R. REP. NO. 118-9 (2024).

180. Note that neither maps onto a distinction between general and specific.

be incorporated is useful precisely because the target may be amended. A pointer permits the effect of a change in one section to propagate to other, related, sections without rewriting all of those related sections."[181]

It might be enough to repair the reference canon to state simply, "When a provision of a statute or rule refers to another statutory provision or rule, the reference should be understood to include subsequent amendments to that statutory amendment or rule." This would not mean that static references would be impossible. Not only could the text clearly indicate a static reference, as noted above, but canons of interpretation are helpful guides, not rules of law. As Scalia and Garner explain in their third fundamental principle, "No canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions."[182]

But there are two related aspects of references that call for specialized treatment, both of which stem from the ease with which references can be overlooked. First, a target provision might be repealed without anyone noticing that there was another provision that referred to that provision. Second, a target provision might be renumbered, relettered, or rearranged without anyone noticing that there was another provision that referred to that provision. This can result in references that "point to thin air" or to provisions that make little sense in context.[183]

These problems might be able to be handled by the canon against absurdity.[184] But they don't fit as neatly into that category as one might like. They aren't spelling errors, other typographical errors, or even blatant errors in word choice (such as "winning" rather than "losing" or "less" rather than "more").[185] To avoid the slippery slope that the

181. Herrmann v. Cencom Cable Assocs., Inc., 978 F.2d 978, 983 (7th Cir. 1992); *see* United States v. Head, 552 F.3d 640, 645–46 (7th Cir. 2009) (agreeing with this point and noting that a "categorical rule that compels courts to always read statutory cross-references as pointing to their original targets" would "make little sense").

182. Scalia & Garner, *supra* note 10, at 59.

183. *See Herrmann*, 978 F.2d at 983.

184. *See* Scalia & Garner, *supra* note 10, at 234 ("A provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve."). *E.g.*, United States v. Coatoam, 245 F.3d 553, 557–58 (6th Cir. 2001) (concluding "that Congress made a simple drafting error either when . . . it designated the mandatory condition for domestic violence offenders as subsection (a)(4) instead of (a)(5), or when it forgot to change all cross-references from § 3563(a)(4) to § 3563(a)(5).").

185. *See* Scalia & Garner, *supra* note 10, at 235–36 (positing a statute requiring the "winning" party to pay the other side's attorney's fees and citing Amalgamated Transit Union Loc. 1309 v. Laidlaw Transit Servs., Inc., 435 F.3d 1140, 1146 (9th Cir. 2006) ("striking a word passed on by both Houses of Congress and approved by the President [less], and replacing it with a word of the exact opposite meaning [more]")).

absurdity doctrine can be, Scalia and Garner insist that it apply only if the result would otherwise be one that "no reasonable person could intend," and that the error be "obviously a technical or ministerial one" that can be readily fixed textually.[186] "The doctrine," as they see it, "does not include substantive errors arising from a drafter's failure to appreciate the effect of certain provisions."[187]

It may be that the ease with which references can be overlooked makes it easier to conclude that the absurdity doctrine applies to such mistakes. But it is also possible that the ease with which such references can be overlooked calls for a more forgiving standard not readily captured by an insistence on absurdity or that an error not be substantive due to the failure to appreciate the effect of certain provisions.

For that reason, a repaired reference canon should also state that if the referenced provision has been repealed, its last effective version should be treated as the target of the reference. Similarly, it should also state that if the referenced provision has been renumbered, relettered, or rearranged, the reference should be treated as pointing to the prior provision as renumbered, relettered, or rearranged.

This approach is consistent with Judge Easterbrook's approach for such problems: "[T]reat the referring clause as continuing to point to its original target, even if that target moves or acquires a new number."[188] But it clarifies—and in this way differs from the specific branch of the reference canon—that the target isn't the one that was in effect when the referring provision was first enacted. Instead, in the case of a repeal,

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But see Amalgamated Transit Union Loc. 1309 v. Laidlaw Transit Servs., Inc., 448 F.3d 1092, 1094, 1097–98 (9th Cir. 2006) (Bybee, J., joined by five judges, dissenting from denial of rehearing en banc) (arguing that the judiciary had no authority to act as if a statute that said "less" had said "more," that there was no basis for finding a scrivener's error, and that the result was not absurd).

186. Scalia & Garner, *supra* note 10, at 237–38.

187. *Id.* at 238. *See also* United States v. Head, 552 F.3d 640, 643 (7th Cir. 2009) ("A statute might be absurd because it's linguistically incoherent; that's something we can fix. But when a statute's language is clear, we won't 'correct' the statute simply because it makes a bad substantive choice."); John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2459 n.265 (2003) (noting that while some justices view the scrivener's error doctrine as part of the absurdity doctrine, it might be possible to "distinguish[] a genuine scrivener's error doctrine," where the chance that a clerical mistake reflects a deliberate legislative compromise is remote, "from the absurdity doctrine, which focuses on putative mistakes of policy expression and therefore risks disturbing a legislative bargain over the precise way a given statutory policy should be articulated").

188. *Herrmann*, 978 F.2d at 983; *Head*, 552 F.3d at 647 (noting that on occasion the court of appeals has corrected cross-references and that "these corrections have generally been limited to technical repair work, such as fixing facially defective cross-references that point to unrelated provisions and render statutory schemes incoherent as written").

the target is the provision that was last in effect prior to repeal. And in the case of renumbering, relettering, or rearranging, the target is the provision as amended, even if in a new place. That is, it does not resurrect the specific branch of the current reference canon for these situations. Instead, it applies the approach of the general branch of the reference canon, but with an acknowledgment of the special situations that can arise when a target provision is repealed or in some way reorganized.

Difficult questions will still arise. Indeed, *Brown* itself remains a hard case. But the contest is not about whether a reference is general or specific, or whether a target provision remains trapped in amber. Instead, the hard question is akin to one of retroactivity: What is the "act or event that the statute is meant to regulate"?[189] As Justice Scalia once explained in that context:

> The critical issue, I think, is not whether the rule affects "vested rights," or governs substance or procedure, but rather what is the relevant activity that the rule regulates. Absent clear statement otherwise, only such relevant activity which occurs after the effective date of the statute is covered. Most statutes are meant to regulate primary conduct, and hence will not be applied in trials involving conduct that occurred before their effective date. But other statutes have a different purpose and therefore a different relevant retroactivity event. A new rule of evidence governing expert testimony, for example, is aimed at regulating the conduct of trial, and the event relevant to retroactivity of the rule is introduction of the testimony. Even though it is a procedural rule, it would unquestionably not be applied to testimony already taken—reversing a case on appeal, for example, because the new rule had not been applied at a trial which antedated the statute.[190]

For example, Federal Rule of Civil Procedure 50 governs motions for judgment as a matter of law.[191] And Federal Rule of Appellate Procedure 4 refers to the time allowed by Civil Rule 50(b).[192] Under the approach advocated here, the reference in Appellate Rule 4 to Civil Rule 50(b) does not fix the time at whatever number of days Civil Rule 50(b) provided when Appellate Rule 4's reference to it became law. Instead, the point of such a reference is to allow changes in the time allowed by Civil Rule 50(b) to flow through to Appellate Rule 4. If Civil Rule 50(b) is amended, then the new time allowed by the amended Rule 50(b) is what matters for Appellate Rule 4.

189. Scalia & Garner, *supra* note 10, at 263.
190. Landgraf v. USI Film Prods., 511 U.S. 244, 291–92 (1994).
191. Fed. R. Civ. P. 50(b).
192. Fed. R. App. P. 4(a)(4)(A).

But this does not mean that a court of appeals will always apply the latest version of Civil Rule 50(b). That's because while Appellate Rule 4 governs the time to appeal, the point of its reference to Civil Rule 50(b) is to have the Appellate Rule simply follow the timing in effect when the motion had to be filed in district court. Put somewhat differently, while the act or event that Appellate Rule 4 regulates is the time to appeal, the purpose of its reference to Civil Rule 50(b) is to let that aspect of Rule 4 turn on the act or event regulated by Civil Rule 50(b)—the motion in the district court.

For that reason, what would matter for Appellate Rule 4 is the version of Rule 50(b) that was in effect when the motion for judgment as a matter of law was filed in the district court.

This does not mean, as the dissenters in *Brown* fear, that "statutory cross-references [function] as a gateway to the multiverse," or that every amendment becomes "a jump ball."[193] Rather, it means that sometimes the best interpretation of a cross-reference is that it refers to the target law as it stood when some particular regulated event happened in the past.

So, the hard question in *Brown* was whether the point of the Armed Career Criminal Act's reference to the federal schedules was to judge the seriousness of the state offense at the time the state offense was committed, at the time the federal offense was committed, or at the time the defendant was sentenced for committing the federal offense. As the competing arguments between majority and dissent about precedent, statutory purpose, and the relationship of this provision to other parts of the statute reveal, this is indeed a hard question.[194] Does the statute embody a congressional judgment that a person who commits a crime that is regarded as serious at that time should be treated as a particularly serious wrongdoer if he later illegally possesses a gun—even if that crime is no longer considered serious? Or does the statute embody a congressional judgment that a person who commits a crime that may or may not have been regarded as serious at that time should be treated as a particularly serious wrongdoer if the prior offense is considered serious at the time he illegally possesses (or is sentenced for illegally possessing) a gun?[195]

193. Brown v. United States, 602 U.S. 101, 129–30 (2024) (Jackson, J., dissenting).

194. *Compare id.* at 112–14 (majority opinion) (comparing the provision governing prior federal offenses to the provision governing prior state offenses and considering the statutory objectives), *and id*. at 111–12, 120 (discussing McNeill v. United States, 563 U.S. 816 (2011)), *with id*. at 132–33 (Jackson, J., dissenting) (discussing *McNeill*, statutory context, and statutory goals).

195. If one were creating the law instead of interpreting it, it might be important to know why the target law was changed. A situation where a certain activity was highly

The reference canon did not resolve these hard questions in *Brown*. And the repairs to the reference canon suggested here do not resolve those hard questions either. But the suggested repairs do make clear that the relevant drug schedule was not trapped in amber when the reference was first added to the Armed Career Criminal Act. And they make clear that deciding which of the later schedules is relevant should not turn on whether that reference is a general one or a specific one.

Repairing the reference canon so that it better reflects the way legal texts today are written and read will avoid the chaos that could result if federal courts were to treat most references to specific statutory and Rule provisions in the United States Code and the Federal Rules as trapped in amber.

Conclusion

The reference canon as currently understood distinguishes between a law that makes a *general* reference to another law and a law that makes a *specific* reference to another law. It treats a general reference as including subsequent amendments to the referenced law but a specific reference as not including subsequent amendments to the referenced law.

Whether or not this distinction and the treatment of specific references made sense in the past, it no longer does, at least as applied to the United States Code and the Federal Rules. The reference canon has changed in the past; it should be changed again—before it does serious damage. And because the reference canon is a textual canon, it should be repaired to reflect the way statutes and Rules are written and read today.

All references to other statutes and Rules, whether general or specific, should be understood to include subsequent amendments to the target statutes and Rules. In addition, to acknowledge the ease with which references can be overlooked in the drafting process, if the referenced provision has been repealed, its last effective version should be treated as the target of the reference. If the referenced provision has been renumbered, relettered, or rearranged, the reference should be treated as pointing to the prior provision as renumbered, relettered, or rearranged. Textual canons such as the reference canon should match the ordinary understandings of those who write and read those texts, not send interpreters on a fruitless mission to draw unhelpful distinctions.

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dangerous at the time it was criminalized but circumstances have changed so that it no longer is dangerous might call for a rather different solution than a situation in which the legislature realized that it had been a mistake to ever criminalize the activity.