Dear Colleagues,

I am attaching a piece called “The Rhetoric of Precedent” that just came out this week in a volume on *Rhetorical Processes and Legal Judgments* edited by Austin Sarat. Although this essay itself is no longer a draft, I am contemplating developing the techniques it discusses in a longer project surveying constitutional decisionmaking throughout the history of the Supreme Court. Hence I would love your feedback about what seems promising (or the opposite) in the approach. Thanks so much in advance for engaging with my work—I look forward to speaking with you in person!

Very best,

Bernie
BERNADETTE MEYLER
THE RHETORIC OF PRECEDENT

I FROM THE LEGAL IMAGINATION TO DISTANT READING

Over four decades ago, the publication of James Boyd White’s textbook *The Legal Imagination* launched the study of law and literature as a field of inquiry.\(^1\) White’s influential approach to the rhetorical analysis of judicial decision-making arguably found its most crystalline articulation in the 1985 essay “The Judicial Opinion and the Poem: Ways of Reading, Ways of Life.”\(^1\) In that piece, he insists throughout on a “personal” and “anti-bureaucratic” approach to both the poem and the judicial opinion. He also articulates two principal methods that would realize such a mode of reading in the legal as well as the literary sphere.

White continually juxtaposes the humanist subject with an alienated figure of bureaucracy, insisting that the judge take personal responsibility for the words he or she writes and that the reader similarly hold the jurist accountable:

> [T]he kind of reading I describe is profoundly antibureaucratic. It rejects the idea, for example, that the judge can properly make himself (or herself) merely an analyzer of costs and benefits, or merely a voice of authority, or merely a comparer of one case with another, or merely a policy-maker or problem-solver. The judge is always a *person* deciding a case the story of which can be characterized in a rich range of ways; and he (or she) is always responsible both for his choice of characterization and for his decision.\(^2\)

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Within this process of writing and reading, the emphasis falls neither on abstract ideas nor on measuring quanta of data but instead on hearing the voice of the writer. As White explains, “we will abandon the metaphors of language as code or machine, of meaning as bits of information, and of the reader as receptacle. Rather we shall seek to speak in our own voices to others, whom we address as knowing what we know they know.”

White’s insistence on voice opposes a notion of judging as the operations of an umpire or the application of a set of mechanistic techniques that yields an inevitable result; instead, the judicial opinion emanates from the work of an identifiable human being within a culture and tradition that the reader shares and represents an act of communication from one to the other.

Considering how to produce a strategy of reading that would realize this vision of the connection between judge and lawyer, as well as between the poet and her reader, White proposes two “point[s] of attention.” The first focuses on “the relation between the text and its cultural context”:

As a judicial opinion more or less explicitly reads, criticizes, accepts, and modifies earlier judicial opinions and other sources of the law, and reconstitutes them by giving these items a new order, in a new text, so also does the poem or novel act on its tradition: its culture, its language. . . . In both cases, the text can be seen as a kind of argument with its culture, or, better, as an argumentative reconstruction of it . . . .

According to White’s description, the judge’s opinion reformulates legal culture by interacting with its precedents just as the poem responds to the tradition from which it is emerging through citation and allusion.
Second, White suggests emphasizing “the rhetorical character of judicial opinions and of legal discourse more generally,” explaining that “legal literature is always produced by actual speakers in actual social contexts, addressing actual audiences whom they wish to persuade or influence. In so doing the speakers constitute, or reconstitute, through their performance, a social universe in which they and their audience are the principal actors . . . .” According to this vision of rhetoric, a rhetorical approach involves re-attaching the judicial opinion to the speech situation from which it emerged and imagining the audience members to which it was addressed and the tone in which it addressed them. This point returns to the personal investment of the judge and the connection that the opinion builds between the writer and reader as individuals.

A rhetorical treatment of the judicial opinion here connects it to contexts of production and reception that might seem absent when one considers the text as an artifact. Typologizing the varieties of scholarship within the “law and literature enterprise,” both Jane Baron and Julie Peters have identified White’s approach as humanistic. Baron emphasizes the “moral uplift” theme within the humanist scholarship of White and others while Peters points to such work’s “commitment to the human as an ethical corrective to the scientific and technocratic visions of law that had dominated most of the twentieth century.”

Given this humanist orientation, it might, on first glance, seem profoundly misguided to connect White’s stance on law and literature with the nearly contemporary writings of Paul de Man, who consistently engaged in a “rigorously antihumanist aesthetic practice.” Nevertheless, certain concerns that White and de Man shared suggest the possibility of a productive comparison. In particular, like White, de Man too opposed
a rhetorical approach to the literary work to several alternatives, including that of the code.

In “The Resistance to Theory” (1982), de Man traced the conflict among literary theoretical approaches back to the classical trivium of grammar, logic, and rhetoric.\(^{10}\) Whereas grammar—and its modern inheritor, semiotics—can, for de Man, sit comfortably with logic, problems arise with the effort to reconcile rhetoric with grammar. As de Man insists:

The uncertain relationship between grammar and rhetoric (as opposed to that between grammar and logic) is apparent, in the history of the trivium, in the uncertain status of figures of speech or tropes, a component of language that straddles the disputed borderlines between the two areas. Tropes used to be part of the study of grammar but were also considered to be the semantic agent of the specific function (or effect) that rhetoric performs as persuasion as well as meaning. Tropes, unlike grammar, pertain primordially to language. They are text-producing functions that are not necessarily patterned on a non-verbal entity, whereas grammar is by definition capable of extra-linguistic generalization. The latent tension between rhetoric and grammar precipitates out in the problem of reading, the process that necessarily partakes of both. It turns out that the resistance to theory is in fact a resistance to reading . . . \(^{11}\)

Tropes are at the core of the troubled relationship between grammar and rhetoric.

Whereas a grammatical or semiotic understanding of tropes—and of texts as a whole—aspires to a quasi-scientific generalizability, their rhetorical dimension interferes with that possibility. Although grammar’s efforts to achieve a complete system and an airtight
explanation are laudable, and the resulting “replacement . . . of interpretation by decoding” would “represent . . . a considerable progress,” they may be futile. As de Man suggests, “The argument can be made . . . that no grammatical decoding, however refined, could claim to reach the determining figural dimensions of a text.”

Writing further of the manner in which rhetoric impedes the closure of the semiotic system, de Man identifies the epistemological dimension of tropes as the key concern. Again in the “Resistance to Theory,” de Man argues that “Difficulties occur only when it is no longer possible to ignore the epistemological thrust of the rhetorical dimension of discourse, that is, when it is no longer possible to keep it in its place as a mere adjunct, a mere ornament within the semantic function.” This threat of the trope to become more than mere ornament has plagued thinkers from at least Plato onwards, the Greek term for ornament—kosmos—itself staging the possibility of the trope’s eruption into the universe itself. In the “Epistemology of Metaphor” (1978), de Man further elaborates upon the epistemological structure of one trope in particular and develops the contrast between semiotics and rhetoric:

The existence of literary codes is not in question, only their claim to represent a general and exhaustive textual model. Literary codes are subcodes of a system, rhetoric, that is not itself a code. For rhetoric cannot be isolated from its epistemological function, however negative this function may be. It is absurd to ask whether a code is true or false, but impossible to bracket this question when tropes are involved—and this always seems to be the case. Whenever the question is repressed, tropological patterns reenter the system in the guise of such formal categories as polarity, recurrence, normative economy, or in such grammatical
tropes as negation and interrogation. They are always again totalizing systems that try to ignore the disfiguring power of figuration. It does not take a good semiotician long to discover that he is in fact a rhetorician in disguise.\textsuperscript{15}

Literary codes are not useless here, merely incomplete. The suggestion seems to be that semiotics’ efforts at constructing a total explanation are misguided but that, if it could acknowledge its place within the rhetorical system and the disruption that that renders inevitable, coding could find its proper domain.

Returning to the epistemological dimension of tropes, de Man indicates in several essays that a tropological—rather than a literal—reading of a text, whether literary or philosophical, may reveal another narrative. Or, in a more profound \textit{mise en abîme}, the narrative itself may refer ultimately to its structure of tropes. In “The Concept of Irony,” irony stands in for the effects of rhetoric. There de Man describes the “narrative coherence” of the “allegory of tropes”: “The allegory of tropes has its own narrative coherence, its own systematicity, and it is that coherence, that systematicity, that irony disrupts.”\textsuperscript{16} Here a cognitive system can be generated by a rigorous analysis of the tropes of the text, yet a rhetorical reading insists upon the undecidability of the meaning of the allegory of tropes. The problem may be even deeper, however, as the referent of a narrative itself may not lie in the world but in its own tropological structure. As de Man writes in the conditional in “The Epistemology of Metaphor,” “If the referent of a narrative is indeed the tropological structure of its discourse, then the narrative will be the attempt to account for this fact.”\textsuperscript{17} Although this passage suggests that narrative will attempt to account for its tropological structure, de Man demonstrates again and again its failure in doing so.
Despite starting from extremely different theoretical premises, both White and de Man conclude that rhetoric impedes the functioning of codes as explanatory mechanisms. Under each reading, a totalizing understanding meets the resistance of the individual case through the operations of rhetoric. While de Man does not explicitly address law in the way that White does, his identification of similar properties of literary and philosophical texts could without too much difficulty be extended in a legal direction.

It seems at first blush harder to discern a connection between de Man’s account and White’s first “point of attention”—the relationship between a judicial opinion and its culture, or, more specifically, the precedents and other sources of law addressed. Precedent itself, however, could be conceived as a kind of trope, literally turning the reader from the facts of the present case to those from another setting. The invocation of precedent asks the lawyer to see the similarities between two disparate texts and to bring them within the same frame.

Those writing on the intersection between law and literature have often pointed out the connection between tropological reasoning and the role of precedent. Hence Ayelet Ben-Yishai observes that metaphor’s “exhortation to compare is also central to precedential reasoning.”18 Likewise, Linda Berger writes that “Analogical reasoning that compares case precedents is an obvious example of lawyers’ use of analogy to persuade.”19

The precise kind of trope that precedent represents is not relevant here; what is significant is precedent’s function as trope. The epistemological consequence is evident; the proposition that two cases are alike—or, in a set of string citations, that the present case is just like a whole series of prior precedents—has the inevitable effect of declaring
that the meaning of the immediate case is one thing and not another. Reconstructing the universe of precedents within a particular case could, therefore, lead to something like the systematicity of the allegory of tropes. So how might irony or rhetoric disrupt this?

Putting this question in abeyance for a moment, let us fast forward several decades to the critiques of close reading and the hermeneutics of suspicion that literary scholars have recently mounted. In their introduction to a 2009 special issue of *Representations* on “How We Read Now,” Stephen Best and Sharon Marcus focused on what they called “surface reading” as an alternative or supplement to the kinds of “symptomatic” reading that critics influenced by Marx and Foucault have tended to undertake. The practices they group under the rubric of surface reading share, as the phrase itself might suggest, a resistance to the dichotomy between surface and depth that characterized much of the hermeneutics of suspicion. As Best and Marcus describe it, “we take surface to mean what is evident, perceptible, apprehensible in texts; what is neither hidden nor hiding; what, in the geometrical sense, has length and breadth but no thickness, and therefore covers no depth. A surface is what insists on being looked at rather than what we must train ourselves to see through.” Within the group of essays they survey, the meaning of surface ranges widely, describing “the intricate verbal structure of literary language,” “a practice of critical description,” and “the location of patterns that exist within and across texts.”

If “surface reading” stands in opposition to the hermeneutics of suspicion, “distant reading” takes aim against the interpretive thrust of close reading. As Franco Moretti, who coined the term, described its aims in *Graphs, Maps, and Trees*: the “common purpose is to delineate a transformation in the study of literature,” principally “a shift
from the close reading of individual texts to the construction of abstract models.”

In a later essay, “The End of the Beginning,” defending *Graphs, Maps, and Trees* against Christopher Prendergast’s attack, Moretti elaborated on the preference he had expressed there “for the explanation of general structure over the interpretation of individual texts.” As he fleshes out, it is a pragmatic preference rather than a theoretical dismissal of interpretation. Explanation may presuppose interpretation, but interpretation in turn presupposes explanation, and whereas interpretations have proliferated, explanations have been lacking.

Within Moretti’s work, distant reading displays both synchronic and diachronic aspects. In some work, he draws upon evolutionary theory as a model for literary history, endorsing its capacity to “explain[] the extraordinary variety and complexity of existing forms on the basis of a historical process.” In the context of “Network Theory, Plot Analysis,” by contrast, he reaches conclusions about *Hamlet* by visualizing the interactions among the characters as a network. Lack of adequate techniques to mount a large-scale quantitative analysis of plot here led also to a qualitative discussion of *Hamlet* instead of a more general network theoretical account. Emphasizing retrospectively the spatial and visual aspects of the network, rather than the intricacies of network theory, Moretti reflected on this piece that “I didn’t need the theory; but I needed the networks. Though Horatio is an old fixation of mine, I had never fully understood his role in *Hamlet* until I looked at the play’s network structure. The keyword, here, is ‘looked’; what I took from network theory was its basic form of visualization: the idea that the temporal flow of a dramatic plot can be turned into a set of two-dimensional signs—vertices (or nods) and edges—that can be grasped at a single glance.” What appears is
crucial across surface reading and distant reading, but distant reading tends to avail itself of technologies of perception such as maps, graphs, and trees.

Following the path James Boyd White sketched out, the strand of law and literature scholarship devoted to rhetorical accounts of law has placed priority on interpretation of the individual case. It may, therefore, be time to consider how the techniques of surface and distance reading might contribute to reimagining the rhetorical analysis of law. What, in particular, might we gain from efforts to visualize or quantify figuration, and, even under a distant reading, does rhetoric impede the closure of the allegory of tropes?

II Precedent, Canons, and Conversations

Within constitutional law, there has been substantial discussion of the significance of canonical—and what have been called “anti-canonical”—cases. Although the Supreme Court is not bound by stare decisis in deciding constitutional issues, almost all of the justices, including those who identify as originalist, rely heavily on the Court’s prior interpretations of the Constitution. Furthermore, casebooks of constitutional law have tended to prioritize certain decisions over others; a 1993 survey by political scientists discovered that ten cases appeared in all the major constitutional law casebooks. Scholars have, however, largely focused on the significance of the canon for academics, law students, and the general public rather than its status within Supreme Court decision-making itself.

Hence Jack Balkin and Sandy Levinson’s classic—perhaps even canonical—article “The Canons of Constitutional Law” identifies three kinds of canonicity, including
first the “pedagogical canon,” or the “key cases and materials [that] should be taught in constitutional law courses and reprinted in constitutional law casebooks,” the “cultural literacy canon,” or the “key cases and materials any educated person should be aware of in order to participate in serious discussions about American constitutional development,” and, finally, the “academic theory canon,” or the “key cases and materials any serious legal academic—as distinguished from the ordinary lawyer or the well-educated generalist—should know and any serious theory of constitutional law must take into account.”  

It is striking here that none of these canons are those of the judge—perhaps intentionally as part of Balkin and Levinson’s point is that the canons of constitutional law have focused far too narrowly on judicial opinions.

Jamal Greene and Richard Primus, both examining what they designate the “anti-canon,” have come closest to assessing canonicity from within the purview of constitutional cases. As Primus argues in “Canon, Anti-Canon, and Judicial Dissent,” canonical cases may not simply stand on their own but constitute components of linked pairs: “[E]ach member of the canon is also linked to a text that stands outside the canonical set. Cases at law are always, or almost always, clashes between two opposing litigants, each urging the court to do a different thing, and every decision of a court is not just a decision to do X but a decision to do X and not Y.” The linked pairs that Primus describes may consist in a majority and dissenting opinion, or could emerge out of a subsequent court’s repudiation of an earlier opinion. Hence the majority and dissent in Plessy v. Ferguson as well as the Brown v. Board of Education and Plessy opinions could be considered as such pairs.

Studying the cases that compromise the “Anticanon,” which he discerns through
examination of negative Supreme Court citations, disavowals in Supreme Court confirmation hearings, law review treatments, and casebook inclusion, Jamal Greene argues both that there is a delimited set of anticanonical cases and that what is most striking about them is that they are “universally invoked,” “used by all sides of modern political and legal controversies.”35 As Greene contends, “the arguments against these cases span the ideological spectrum. Dred Scott is wrong both because it employs substantive due process and because it is overly positivist and originalist. . . .”36 He concludes that “These cases represent shared reference points not because they signal unanimity or consensus but because they enable discourse—‘dialogue’ would be too strong—amid dissensus.”37

What might indicate, building on this point, that dialogue is no longer available? Would any deployments of precedent signal that? If Greene is correct that the “shared reference points” of a constitutional anticanon “enable discourse . . . amid dissensus,” what should we make of justices’ refusal to engage with common precedents even when advancing views on the same issue in the same case? What kinds of invocation of precedent by majority opinions, concurrences, and dissents create such disparate narratives about the Constitution’s past that they close off dialogue rather than allowing it to flourish?

The vast literature political scientists have generated on judicial decision-making has addressed precedent but with a very different set of questions. Much of this writing has focused either on the way in which judges arrive at decisions or the effects of judges’ political priors on their opinions. More generally, the causal question is paramount. Hence scholars have asked questions such as: Can precedent constrain judges?; What
makes certain precedents more significant than others?, and; What does a judge’s use of precedent tell us about his or her ideology? Here precedent is measured as an index of something outside the opinion, a symptom of an extra-textual phenomenon. This focus resonates with something like the hermeneutics of suspicion; opinions are read not for what they say but for aspects of the justices’ identity that lie beneath. By contrast, there has been a dearth of attention directed at the rhetorical effects of the citation of precedent or the significance of precedents to the legitimacy of judicial decisions. Even less has this work considered the role precedent plays in generating the meaning of an opinion or the differential meaning of a set of opinions within a case.

For example, scholars have examined whether *stare decisis* influences the votes of Supreme Court justices.\(^{38}\) This inquiry focuses on the role precedent plays in the outcome of the justices’ deliberations, not on the rhetorical effect of the deployment and arrangement of precedents within judicial opinions. Using a form of network analysis, James Fowler and Sanjick Jeon likewise primarily ascertain the authority of various cases in “The Authority of Supreme Court Precedent.” They move somewhat closer to assessing the significance of the citation of precedents when arguing that “the Court is careful to ground overruling decisions in past precedent, and the care it exercises is increasing in the importance of the decision that is overruled.”\(^{39}\) Even under this account, however, the rhetorical effect precedent serves is simply to bolster the authority of a decision that deviates from the prior norm; the authors neglect the narrative that a pattern of precedents might tell and the significance of precedent as a form of dialogue between majority and dissenting opinions rather than simply a mode of justification for the side that has won.
More generally, while the availability of resources like the Supreme Court Database\textsuperscript{40} has rendered it straightforward to search for the prevalence of dissent on various issues or the relative frequency of 5-4 decisions, political scientists and law professors employing similar approaches have displayed little interest in understanding the internal contours of division on the Court or the significance of those contours for the legitimacy of Supreme Court decision-making. Although Cass Sunstein laments the lack of evidence of the effect of divided opinions on acceptance of Supreme Court decisions, his recent paper on “Unanimity and Disagreement on the Supreme Court” does little to fill the gap.\textsuperscript{41}

Surface and distant reading might suggest some techniques for illuminating the rhetoric of precedent in the Supreme Court’s constitutional decision-making in ways that a political science approach has not made available. In particular, they could allow us to reconstruct a narrative out of an opinion’s cluster of precedents and to visualize how that narrative intersects with or fails to meet up with the story told by another opinion in the case.

This analysis may, in turn, contribute to advancing the project of distant reading itself. In a moment of self-critique in the introduction to his essay on “Evolution, World-Systems, Weltliteratur” in \textit{Distant Reading}, Moretti laments the lack of attention to social conflict in the tools he has employed so far, explaining that “evolution has no equivalent for the idea of social conflict. Competition among organisms, or among similar species, yes; as well as arms races between predators and prey: but nothing like a conflict whose outcome may redefine the entire ecosystem. Nor is this a problem of evolution only; from what I understand complexity and network theory have exactly the same blind spot—
which, clearly, no theory of culture and society can allow.” Examining disparities among the patterns of precedent in majority, concurring, and dissenting opinions can help to demonstrate the dynamics of conflict within the Supreme Court as well as the relational emergence of meaning. If tragedy represents one fruitful site for examining social conflict, as Moretti posits in alluding to his forthcoming project on tragic collision and network theory, constitutional disagreement, this paper argues, furnishes another.

Although the analysis could furnish criteria for a more thorough-going empirical study of cases over time, the aim of the remainder of this paper is to examine how the rhetoric of precedent operates in several foregrounded cases and what the resulting “allegory of tropes” can tell us about the respective decisions.

III PUTTING TOGETHER THE PRECEDENTS

As many have observed, and John Orth crystallized in his brief book on How Many Judges Does It Take To Make a Supreme Court?, the respective levels of consensus on the Supreme Court have altered significantly over time, from the striking unanimity of the Marshall Court to the numerous 5-4 opinions of the Rehnquist Court. Even when dissents have proliferated, many have been penned by only one or two justices and represent the work of an analytic outlier. My interest here is in how precedent is invoked in cases in which several justices disagreed with the majority of the Court. What kinds of stories are told by the majority’s and dissent’s deployments of precedent? How do the most frequently cited cases diverge between majority and dissent and what can be gleaned from that divergence? Assessing differences within opinions’ citations of precedent adds a metric of divergence distinct from that obtained by

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measuring dissents or concurrences. Hence quantifying shifts in such differences could also clarify the nature of disagreement on constitutional issues.

This section focuses on examples from three distinct periods of divergence in citations by majority and other opinions—*NLRB v. Canning* (2014), *Adkins v. Children’s Hospital of DC* (1923), and the Passenger Cases, the consolidated decisions in *Smith v. Turner* and *Norris v. Boston* (1849). In each, examining the respective number of the citations of certain cases might indicate the bases for the majority’s, concurrence’s and dissent’s points of view while also suggesting other arguments that precedents might implicitly make.

In *Adkins*, the Court considered several consolidated cases challenging minimum wage laws for women and children. Of the cases cited more than once by Sutherland’s majority opinion, *Lochner v. NY* (1905) appeared seven times, *Muller v. Oregon* (1908) and *Wilson v. New* (1917) three times each, and *Coppage v. Kansas* (1918), *Adair v. United States* (1908), and *Holden v. Hardy* (1898) twice each. Within the dissents by Justices Taft and Holmes, only *Muller v. Oregon* and *Bunting v. Oregon* (1917) were cited two or more times. So what might one extrapolate from these citation patterns about the content of the opinions? *Muller v. Oregon* and *Wilson v. New*, each referred to three times by the majority, upheld wage and hours restrictions in particular contexts. Should that indicate some sympathy in the majority opinion for that outcome? How might one weigh the seven references to *Lochner*, that paradigmatic example of the use of substantive due process to uphold the freedom of contract against regulation, in light of the citations of *Muller* and *Wilson*? Perhaps unsurprisingly, the majority comes out in favor of a *Lochner*-type reasoning, distinguishing earlier cases that had accepted
regulation and maintaining that mandating a minimum wage interferes with Fifth
Amendment due process rights. The references to Muller and Wilson both served the
purpose of dismissing the relevance of those cases and maintaining the divergence of the
present fact situations. Similarly, the cases most cited by the dissents support a more
flexible approach to freedom of contract.

What is potentially more striking is the relationship between the majority’s
number of citations of Lochner and the dissenters’ almost complete silence on that case.
Although Justice Holmes does refer to the case once, Justice Taft ignored it entirely.
Apart from Lochner, the majority and dissent cite relatively similar cases.
What should we infer from this difference between the precedent that dominates the
majority opinion and the weight of authorities preferred by the dissenters?

To flesh out this question, let us turn to a more recent set of opinions, those of
Justice Breyer’s majority and Justice Scalia’s opinion concurring in the judgment in
NLRB v. Canning (2014). In NLRB v. Canning, the Court evaluated the scope of power
granted to the President by the Recess Appointments clause, determining whether it
permits appointments during intra- as well as inter-session recesses of Congress and
whether it allows the President to fill spots that became vacant before the recess
commenced. Justice Breyer cited to the Pocket Veto Case (1929) six times, McCulloch v.
Maryland (1819) and United States v. Ballin (1892) five times, Marbury v. Madison
(1801), Ex parte Grossman (1925), Youngstown Sheet (1952), Dames & Moore v. Regan
(1981) and Mistretta v. United States (1989) three times each, and Stuart v. Laird (1803),
McPherson v. Blacker (1892), US v. Midwest Oil (1915), Myers v. United States (1926),
and New Process Steel (2010) twice each. The classic and contested Marbury and
McCulloch both suggest a reliance on Chief Justice Marshall’s expansive understanding of federal power.

More initially mysterious are the references to several executive power decisions of the 1920s—the Pocket Veto Case, Ex parte Grossman, and Myers v. United States. The latter two were penned by Chief Justice Taft, the only person to have served as President and then as Chief Justice. The first was written by Justice Sanford, who usually sided with Justice Taft. Each supported an accretive and common law mode of interpreting the evolving powers of the President. These views accorded with Justice Breyer’s opinion in NLRB v. Canning, which relied heavily on established congressional and executive-branch practice in order to arrive at the determination that recesses included intra-session recesses and that the President’s appointment power could extend to vacancies that preceded a recess.

Justice Scalia’s concurrence in the judgment also cited precedents derived from a particular time period, but one that differed significantly from that favored by Breyer’s opinion. Clinton v. City of New York (1998)—and largely Justice Kennedy’s concurrence—appeared six times, while INS v. Chadha (1983) arose five times, and Bowsher v. Synar (1986) and Free Enterprise Fund (2010) were referred to on four occasions each. Bond v. United States (2011) and Freytag v. Commissioner (1991) featured twice. Strikingly, all of these cases had been decided within the thirty years prior to the opinion, unlike those most cited by Justice Breyer. Many of them stand for a fairly formalist understanding of the requirements of the separation of powers that is not susceptible to historical alteration. Even more remarkable may be the frequency with
which certain cases are alluded to by both majority and concurrence and the almost complete divergence between each opinion’s most influential precedents.

Returning to Jamal Greene’s claim about the possibility of dialogue amid dissensus with respect to anti-canonical cases, one might here find that dialogue is absent, precisely because of the refusal of a common ground of discussion. Whereas in Adkins, the majority devoted some attention to the precedents that the dissent favored, citing them several times, we find here that none of the cases mentioned more than once within the two opinions overlap. The disparate opinions’ citations of precedent should not be seen in isolation but instead stand in relation to each other. In the case of NLRB v. Canning, that relation is extremely strained.

The relatively few opinions in Adkins v. Children’s Hospital and NLRB v. Canning render it possible to consider their citations of precedent without techniques of visualization like graphing. The situation is rather different in the context of the Passenger Cases, which boasted eight opinions. Considering the validity of taxes New York and Massachusetts attempted to impose on alien passengers arriving in their states, five justices agreed that they were unconstitutional, while three dissented separately, Justice Nelson silently joining Chief Justice Taney’s opinion.

Graphing the citation patterns in these opinions immediately renders certain characteristics of the respective opinions apparent (see Figures 1, 2, and 3). First, the justices engage in citation with disparate frequency; whereas Justice Woodbury’s opinion boasts 56 references to precedent, Justice McKinley’s contains only one. This relative frequency relates partly to the length of the respective opinions, but only partly; whereas some of the justices emphasize reasoning from past judicial practice, others still make
arguments largely from constitutional text or structural principles of government. Any larger-scale quantitative analysis of precedents would have to take into account the justices’ differential reliance on precedent as well as how that reliance alters over time.

With respect to the particular precedents at issue in the *Passenger Cases*, most of the cases cited frequently—such as *Gibbons* and *Miln*—are cited often both by majority and dissenting justices. The *License Cases* represents a prominent exception and reveals the general thrust of the division between the sides. Decided two years earlier, the *License Cases* rejected a Commerce Clause challenge to state laws prohibiting the sale of liquor without a license, thereby maintaining state power over commerce in the absence of congressional legislation. The extent of the commerce power likewise constituted the central question of the *Passenger Cases*, which followed *Gibbons v. Ogden* in considering the transportation of persons a component of commerce and therefore deemed the New York and Massachusetts regulations an infringement on federal power.

*Prigg v. Pennsylvania,* which assumes slightly more significance for the dissenters than for those in the majority, furnishes an example of additional interest. In *Prigg*, the Supreme Court overturned the named petitioner’s conviction under a Pennsylvania law that prohibited anyone from removing a person from the State into slavery, holding that the Constitution endowed Congress with the exclusive power to legislate upon slavery. The outcome of *Prigg*, in which the federal statute trumped the state’s will, might seem to support a strong reading of national power and, hence, of the Commerce Clause. Instead, the dissenters refer to the conclusion of Justice Story’s opinion for the Court, which conceded a remainder of police powers to the state: “We
entertain no doubt whatsoever that the States, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds, and paupers. 64 It is striking that the members of the majority refrain from appealing to Prigg as a source of federal authority and instead only Justice Wayne comments on and summarily rejects the states’ and dissenters’ arguments based upon Prigg. Was their reticence to engage Prigg a symptom of the controversial character of the decision even in the late 1840s? Or did they view the federalism principles it articulated as too distant from the present case? With these questions, the narrative told by the precedents reaches an impasse and calls for a deus ex machina to arrive on the scene with an answer.
Passenger Cases (1849)
Passenger Cases Majority
**Conclusion**

My task here has been to discern what it would mean to move from the type of rhetorical analysis of the individual judicial opinion championed early in the law and literature movement to a form of distant reading of cases, without neglecting the figurative dimension of such cases. By looking at opinions’ sets of precedents, which I understand as tropes that literally turn the reader to another set of propositions and ask that reader to see the current issues in light of those other propositions, one can reconstruct the opinions themselves. When two opinions in the same case focus on radically disparate precedents, dialogue breaks down and two histories of constitutional law compete for dominance with hardly an acknowledgment of each other.


17 De Man, “Epistemology of Metaphor,” 44.


20 Rita Felski has usefully summarized the origins of the phrase “hermeneutics of suspicion”: “The ‘hermeneutics of suspicion’ is a phrase coined by Paul Ricoeur to capture a common spirit that pervades the writings of Marx, Freud, and Nietzsche. In spite of their obvious differences, he argued, these thinkers jointly constitute a ‘school of suspicion.’ That is to say, they share a commitment to unmasking ‘the lies and illusions of consciousness;’ they are the architects of a distinctively modern style of interpretation that circumvents obvious or self-evident meanings in order to draw out less visible and less flattering truths.” Rita Felski, “Critique and the Hermeneutics of Suspicion,” M/C Journal, 15, no. 1 (2012), url: http://journal.mediaculture.org.au/index.php/mcjournal/article/view/431.


22 Best and Marcus, “Surface Reading,” 10-12.

23 Franco Moretti, Graphs, Maps, and Trees

Much scholarly attention has recently been devoted to the normative question of whether originalist justices should adhere to precedent or, if so, under what circumstances and what kinds of precedents should be most persuasive. Within the past decade, for example, the Harvard Journal of Law and Public Policy has published papers coming out of several Federalist Society symposia that deal in part with the relationship between originalism and precedent. In 2010, the journal included four papers on “Originalism, Precedent, and Judicial Restraint,” while in 2008, it published five pieces under the rubric of “Originalism and Precedent.” Harvard Journal of Law and Public Policy 34, no. 1, 112-146 (2010); Harvard Journal of Law and Public Policy 31, no. 3, 947-987 (2008). One study has recently determined that empirically the fact that a case concerns constitutional questions has little effect on the Supreme Court’s treatment of precedent. As the authors conclude, “whether a precedent is constitutional plays only a small role (if that) in the Court’s decision to disavow it, despite longstanding Court policy to the contrary.” Lee Epstein, William Landes, and Adam Liptak, “The Decision to Depart (or Not) from Constitutional Precedent: An Empirical Study of the Roberts Court,” NYU Law Review 90, 1015-1148, 1118 (2015).


Primus, “Canon, Anti-Canon, and Judicial Dissent” 255.


As Sunstein writes, “On one view, the public cannot believe in the neutrality of law, or even in the rule of law, if [5-4] divisions are persistent. This objection [] raises empirical questions. To what extent is ‘the public’ aware of persistent divisions, and to what extent, and how, is it troubled by them? We lack informative evidence on such questions.” Cass R. Sunstein, “Unanimity and Disagreement on the Supreme Court,” Cornell Law Review 100, 770-822, 808 (2015).


Id.

John V. Orth, “How Many Judges Does It Take to Make a Supreme Court? And Other Essays on Law and the Constitution,” in How Many Judges Does It Take to Make a Supreme Court?, 1-22 (Lawrence: Kansas UP, 2006). For a recent study of disagreement and the argument that the jurisprudence of the Court can be divided into two eras, before and after 1941, see Cass Sunstein, “Unanimity and Disagreement on the Supreme Court.”


Adkins, 261 U.S.


Muller; Bunting v. Oregon, 243 U.S. 426 (1917).

With respect to *Muller*, the majority relies both on the difference between restrictions on the number of hours women could work and minimum wage requirements and on the changed circumstances of women following ratification of the Nineteenth Amendment.

As Justice Sutherland contends:

> [T]he ancient inequality of the sexes, otherwise than physical, as suggested in the *Muller Case* [] has continued ‘with diminishing intensity.’ In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point. In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships. *Adkins v. Children’s Hospital*, 399-400.
As Justice Holmes wrily notes, “after Bunting v. Oregon [], I had supposed . . . that Lochner v. New York [] would be allowed a deserved repose.” Adkins v. Children’s Hospital, 570 (Holmes, J. dissenting).

NLRB v. Canning.


Ex parte Grossman, 267 U.S. 87 (1925); Myers v. United States, 272 U.S. 52 (1926).


For example, in the *Pocket Veto Case*, Justice Sanford cites extensively to executive-branch practice as described in “[a] memorandum prepared in the office of the Attorney General showing the results of an exhaustive research of governmental archives for the purpose of disclosing the practical construction placed upon the constitutional provision here involved in reference to so-called ‘pocket vetoes.’” *Pocket Veto Case*, 279 U.S. 655, 690 (1929).

As Justice Breyer elaborated upon his methodology, “[I]n interpreting the [Recess Appointments] Clause, we put significant weight upon historical practice. For one thing, the interpretive questions before us concern the allocation of power between two elected branches of Government.” *National Labor Relations Board v. Canning* (Breyer, J.).


For example, in *Clinton v. City of New York*, Justice Kennedy’s concurrence explicitly contrasts his own formalist view of the separation of powers with Justice Breyer’s more flexible and functionalist account. As Kennedy writes “to respond to my colleague Justice Breyer, . . . [t]o say the political branches have a somewhat free hand to reallocate their own authority would seem to require acceptance of two premises: first, that the public good demands it, and second, that liberty is not at risk. The former premise is inadmissible. The Constitution’s structure requires a stability which transcends the convenience of the moment. . . . The latter premise,
too, is flawed. Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.” Clinton v. City of New York, 524 U.S. 417, 449-450 (Kennedy, J. concurring) (1998).


62 The License Cases, 46 U.S. 504 (1847).


64 Prigg v. Pennsylvania, 41 U.S. 539, 625 (1842).