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The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism

ABSTRACT. This Article offers the first close study of statutory interpretation in several state courts of last resort. While academics have spent the past decade speculating about the “death of textualism,” the utility of legislated rules of interpretation, and the capacity of judges to agree on a single set of interpretive rules, state courts, as it turns out, have been engaging in real-world experiments in precisely these areas. Several state courts have articulated governing interpretive regimes for all statutory questions. Methodological *stare decisis*—the practice of giving precedential effect to judicial statements about methodology—is generally absent from federal statutory interpretation, but appears to be a common feature of some states’ statutory case law. Every state legislature in the nation has enacted certain rules of interpretation, which some state courts are, in an unexpected twist, flouting. And, far from textualism being “dead,” what emerges from these state cases is a surprisingly strong consensus methodology—what this Article terms “modified textualism”—a theory that shares textualism’s core components but has broader potential appeal. These state developments offer a powerful counter-paradigm to that of the U.S. Supreme Court, where persistent interpretive divides and a refusal to treat methodological statements as precedential have made interpretive consensus seem impossible. They also highlight that, for all the energy that the statutory interpretation wars have consumed, the legal status of methodology itself—whether it is “law” or something “less”—remains entirely unresolved.

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INTRODUCTION

Some say that textualism is dead.¹ Others believe that the inherent difficulty of interpreting statutory language means that judges will never be able to reach consensus on a single, overarching methodological framework for all statutory cases.² Still others believe that existing methodological differences are not important enough to merit the attention that has been devoted to them. Clearly, none of these naysayers has accounted for state courts.

The vast majority of statutory interpretation theory is based on a strikingly small slice of American jurisprudence, the mere two percent of litigation that takes place in our federal courts – and, really, only the less-than-one percent of that litigation that the U.S. Supreme Court decides.³ The remaining ninety-eight percent of cases are heard in the netherworld of the American legal system, the state courts.⁴ And yet it would likely surprise most academics and many judges to learn that, while academics have spent the past decade speculating about the “posttextualist era,”⁵ or the utility of congressionally legislated rules of interpretation,⁶ or the capacity of judges on multimember

1. See, e.g., Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 2 (2006) (“Textualism has outlived its utility as an intellectual movement.”). Others have argued, less dramatically, that the major battles in statutory interpretation are largely over. See Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. (forthcoming Apr. 2010) (manuscript at 1, on file with author). *But cf.* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 77 (2006) (acknowledging that “serious and thoughtful commentators have wondered of late whether there is anything left of textualism” but arguing that critical differences remain).
2. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term – Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 57 (1994); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2088 (2002); Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2005).
3. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 REPORT OF THE DIRECTOR 46 tbl.S-1, 84 tbl.A-1 (2008).
4. See COURT STATISTICS PROJECT, NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2007: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 13 (2008). The vast majority of the state court caseload is statutory. See Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 3 (1995).
5. Molot, *supra* note 1, at 5.
6. Linda D. Jellum, “Which Is To Be Master,” *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837 (2009); Gary E. O’Connor, *Restatement (First) of Statutory Interpretation*, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 333 (2004); Rosenkranz, *supra* note 2.

courts to agree on a single set of interpretive rules,⁷ many state courts have been engaging in real-world applications of precisely these concepts.

Several state courts have implemented formalistic interpretive frameworks that govern all statutory questions.⁸ Methodological stare decisis—the practice of giving precedential effect to judicial statements about methodology—is generally absent from the jurisprudence of mainstream federal statutory interpretation,⁹ but appears to be a common feature of some states’ statutory case law. Every state legislature in the nation has enacted into law certain rules of interpretation, which some state courts are, in an unexpected twist, flouting. And far from being “dead,” Justice Scalia’s textualist statutory interpretation methodology has taken startlingly strong hold in some states, although in a form of which the Justice himself might not approve. Clearly, these developments are relevant to the mainstream debates about predictability and methodological choice, and yet federal scholars and jurists have hardly noticed them.

This Article is the first to examine this intersection of modern state and federal general statutory interpretation theory.¹⁰ It also is the first close study

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7. See, e.g., Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74 (2000); sources cited *supra* note 2.
 8. By “formalistic,” I mean clearly defined, *ex ante* interpretive rules arranged to be applied in a consistent order. But the characteristics of the particular rules chosen (for instance, whether and when legislative history may be consulted) need not themselves be rigid. Cf. Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 638 (1999) (“[F]ormalist strategies . . . entail three commitments: to promoting compliance with all applicable legal formalities (whether or not they make sense in the individual case), to ensuring rule-bound law . . . and to constraining the discretion of judges . . .”).
 9. See Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863 (2008); Jordan Wilder Connors, Note, *Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology*, 108 COLUM. L. REV. 681 (2008).
 10. For related work, see Anthony J. Bellia, Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501 (2006), which discusses early American state court approaches to state and federal methodology; Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2057–58 (2002), which discusses some state-legislated interpretive rules; Jellum, *supra* note 6, at 844–45, which discusses legislated interpretive rules in Connecticut and Delaware as examples for a broader separation-of-powers discussion; and Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010), which is the first attempt to catalogue all states’ legislated rules but does not examine court responses to them. Alex B. Long’s work is a notable exception in that it looks at modern state cases, but in the limited context of “borrowed” federal employment statutes. Alex B. Long, *“If the Train Should Jump the Track . . .”: Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469 (2006). In addition, a chapter in a forthcoming book by Lawrence Solan discusses some

of modern statutory interpretation in several state courts of last resort. Thinking about statutory interpretation in the world beyond the U.S. Supreme Court is long overdue.¹¹ So, too, is the recognition that state court methodological developments may be used to inform and change *federal* statutory theory and practice. Indeed, federal courts are exposed to state statutory interpretation all the time: the reality of concurrent jurisdiction means that state and federal courts are continuously interpreting the other system's statutes, and so their interpretive theories intersect regularly in both state and federal court. The state courts studied as part of this project have taken advantage of their exposure to federally oriented thinking about statutory interpretation; as we shall see, they aggressively deploy (but do not copy) federal interpretive theory as they elaborate their own, unique methodological rules—rules that are intended to improve upon the federal experience. Federal theorists, too, should recognize that methodology is already moving across the systems, and that state court developments may be changing the terms of the statutory interpretation debate in ways that may be far more productive than anything currently happening in the federal arena.

Lest there be any doubt as to the importance of the statutory interpretation events underway in some states, let us consider the following scenarios, which highlight key questions about the utility of some of the proposals most commonly advanced by mainstream academics to bring more predictability to statutory interpretation:

- (1) The supreme court unanimously announces a new methodology for statutory interpretation to govern future cases. All subsequent decisions apply it, and even justices who disagree with it consider themselves bound by it under principles of *stare decisis*.
- (2) The legislature enacts an interpretive rule encouraging reference to legislative history when courts construe statutes. The supreme court disagrees with the rule and refuses to apply it.
- (3) The supreme court issues an opinion forbidding use of the “plain meaning” rule, which prohibits consideration of nontextual sources in the absence of statutory ambiguity. The legislature immediately

state legislated rules, and Norman J. Singer's famous treatise references an extraordinary number of state cases. NORMAN J. SINGER, *SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION* (6th ed. 2000); LAWRENCE SOLAN, *THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION* 6-23 to -50 (forthcoming 2010).

11. There has likewise been very little study of statutory interpretation in the lower federal courts. See FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 180-200 (2009) (providing the first preliminary study of statutory interpretation in the lower federal courts).

overrides the case with a statute that reinstates the rule. The supreme court evades the newly legislated rule at every turn.

- (4) The supreme court, which passionately describes itself as “textualist” in the mold of Justice Scalia, prioritizes legislative history over substantive canons of interpretation.

Merely hypothetical scenarios? No, indeed. These are, rather, descriptions of statutory interpretation developments underway in Oregon, Texas, Connecticut, Michigan, and Wisconsin. And some of these developments appear to be occurring across a broader array of states, too. Seventeen years ago, the Oregon Supreme Court announced a controlling interpretive framework to govern all statutory questions.¹² Texas’s highest criminal court is in apparent defiance of the state legislature’s enacted law that endorses the use of legislative history.¹³ Every state legislature in the nation, in fact, has enacted into law some rules of interpretation, which many state courts are refusing to implement.¹⁴ Some of these legislated rules, like Connecticut’s text-focused regime, were enacted in direct response to what the legislature perceived as an inappropriate judicial power grab over interpretive methodology.¹⁵ And, in four of the five states studied—including Michigan and Wisconsin, where the state supreme courts are marked by deep internal divisions—methodological *stare decisis* appears to be a common feature, as does, quite intriguingly, a variation of textualism that appears to have more traction than its federal archetype.¹⁶

These state cases illustrate that the statutory interpretation ferment is not over; it just may have changed. Not only the venue, but the nature of the conversation itself seems to be in transformation. Throughout the states studied, both courts and legislatures are participants in unanticipated efforts to increase predictability in statutory interpretation. This very fact—that state courts and legislatures are in this *together*, that they appear to share this impulse to impose clarity—is another occurrence entirely absent from the federal experience. What’s more, these developments highlight that, for all the energy that the statutory interpretation wars have consumed, the legal status of methodology itself—whether it is “law” or something “less” or “different”—remains entirely unresolved.

12. See *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 859 P.2d 1143 (Or. 1993); *infra* Subsection II.B.1.

13. See *infra* note 133 and accompanying text.

14. See *infra* notes 125, 279-285 and accompanying text.

15. See *infra* notes 286-288 and accompanying text.

16. See *infra* Part II.

Not incidentally, these state efforts also respond directly to the leading academic proposals advanced to make federal statutory interpretation more determinate. Legislated interpretive rules, suggested in one prominent proposal,¹⁷ do not appear to be the answer, given the number of courts already actively resisting them. The resulting interbranch power struggles, in turn, raise new questions about separation of powers in statutory interpretation, shifting the debate away from what has been the prevailing question—which methodology best respects the respective roles of court and legislature—to the entirely different question of which branch gets to choose it.

Another path to determinacy, however, long thought remote, now seems more possible in light of the state experiences. These state supreme courts have exercised interpretive leadership: they have imposed, both on themselves and on their subordinate courts, controlling interpretive frameworks for all statutory questions. This is a powerful counter-paradigm to that of the U.S. Supreme Court, where persistent interpretive divides and a refusal to treat methodological statements as precedential have made interpretive consensus seem impossible. Indeed, methodology seems to be an entirely different animal in these state courts. In these states, it is possible for one judge to bind another judge's methodological choice. And in fact, federal judges, too, readily assent to this conception of methodology in other areas of law, like contract interpretation. Yet these principles have failed to translate to the federal statutory interpretation context, without much explanation of why statutory interpretation should be any different.

The mainstream statutory interpretation scholarship, too, may be overstating the intractability of methodological divides and the “softness” of interpretive methodology. Its near-exclusive focus on U.S. Supreme Court cases is the culprit: the Court's often-divisive statutory cases (and personalities) have become the theoretical paradigm. To be sure, it may well be that, in hard cases, judges will disagree regardless of whether they generally employ the same interpretive approach. But that doesn't mean that the game isn't worth the candle. In less politically charged cases, consistent methodological rules may make the interpretive process more predictable, performing a coordinating function for the many parties affected—legislators who must negotiate and draft statutes, citizens who must act and litigate under them, and lower courts that must interpret them. There also are important expressive and fairness values attendant to having judges agree in advance on the nature of the project and decide all litigants' cases using the same legal principles. The state cases challenge the prevailing theoretical resistance to

17. Rosenkranz, *supra* note 2.

these concepts and highlight the possibility that, even putting the Court aside, many lower courts (both state and federal) might be receptive to consistent methodological frameworks, and that, in fact, more courts than we realize already may be implementing them.

Finally, the state cases also challenge prevailing assumptions about textualism, the text-centric methodology that, despite its significant impact on modern statutory interpretation, has failed to emerge as the dominant methodology in the U.S. Supreme Court's interpretive battles. Of late, debates have raged in the academy over whether a methodological compromise between textualists and purposivists is possible. The prognosis has been pessimistic, as most scholars have assumed that textualism is too rigid a methodology to be the basis of a broader consensus that also includes nontextualists and, alternatively, that the textualists themselves will not bend to meet other judges halfway.¹⁸ But in the states studied, textualism is more than merely alive and well; it is the *controlling* interpretive approach—the consensus methodology chosen by the courts. That said, this state textualism is clearly not identical to its federal model. It is instead, I argue, a compromise version of textualism, what might be called “modified textualism,” a theory that retains the fundamental text-first formalism of traditional textualism and yet still appears multitextured enough to offer a middle way in the methodological wars.

Modified textualism has two salient differences from the original: it ranks interpretive tools in a clear order—textual analysis, then legislative history, then default judicial presumptions—and it includes legislative history in the hierarchy. The individual components here are not new. Many jurists (though it has been assumed, not many self-proclaimed textualists) employ such a text-plus-legislative history approach. But what is new is the “tiering” concept and the order itself. The strict hierarchy emphasizes textual analysis (step one); limits the use of legislative history (only in step two, and only if textual analysis alone does not suffice); and dramatically reduces reliance on the oft-used policy presumptions, the “substantive canons” of interpretation (only in step three, and only if all else fails).

To be sure, some textualist purists might not consider this theory “textualist” at all. Textualists generally have eschewed use of legislative history and do widely employ the substantive canons. Such a rush to judgment against

18. See Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 50-52 (2007) (proposing a compromise methodology); see also Manning, *supra* note 1, at 75, 94-95 (arguing textualists would not accept the Molot compromise); Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PENN. L. REV. 117 (2009) (arguing textualists are too formalist to compromise).

modified textualism, however, would be a mistake. These state cases illustrate both that traditional textualist theory is capacious enough to accommodate this moderate heterogeneity and that, in fact, this accommodation may be textualism's best chance to accomplish its core theoretical goal of implementing a predictable, text-centric approach to interpretation.

And because this methodology is the basis for broader agreement in the states studied, it also has implications for purposivism, the other dominant modern theory, and the broader literature about methodological compromise. Purposivists typically embrace a more flexible approach, an approach from which modified textualism's strict interpretive hierarchy is a departure. But, arguably, modified textualism offers purposivists what might be called a more "disciplined" version of their current method—a way to legitimize the use of legislative history and concretize their approach so that it can be applied consistently, and repeatedly, by lower courts. It is intriguing to see at least some purposivist judges attracted to this structured approach—an approach that, unlike other compromise proposals advanced in the scholarship, still appeals to textualism on its own theoretical terms.

This Article proceeds in five parts. Part I summarizes the current stalemate between the U.S. Supreme Court's "textualist" and "purposivist" statutory interpreters and the academic proposals that have been advanced to move past it. Part II describes related methodological developments in five states: Oregon, Texas, Connecticut, Wisconsin, and Michigan.¹⁹ Part III considers the implications of the drive to interpretive clarity in the states studied, efforts that not only shed light on the academic proposals but that also challenge the conventional wisdom about interpretive determinacy and raise new questions about the legal status of methodology. Part IV advances the new theory of modified textualism, and argues that it *is* textualism, but a textualism that nontextualists might be willing to accept. Part V offers a normative defense of consistent interpretive approaches more generally.

The Article concludes by suggesting areas for further investigation, including where federally oriented theorists might apply the lessons of the state experiences to their own efforts. Even if the U.S. Supreme Court remains resistant to the state examples, what about the lower federal courts? Might the Seventh Circuit take a page from Wisconsin's book and adopt methodological *stare decisis*, the Sixth Circuit adopt modified textualism, and the Fifth Circuit

19. See *infra* Section II.A. for a description of state selection and how the case studies were compiled.

implement an entirely different, purpose-oriented, controlling framework?²⁰ Perhaps a consensus approach—be it modified textualism or something else—would emerge among the federal courts, or perhaps the Supreme Court would intervene and, finally, select a unifying approach. At a minimum, this kind of experimentation, together with the state developments, would generate valuable information about the utility of the various methodologies for use by scholars and jurists on all points of the interpretive spectrum.

Lastly, a word about what this Article does not discuss. The uncharted ground of this inquiry and vast landscape of the state cases necessitate a relatively narrow scope at this first step. This Article therefore confines its consideration mostly to state supreme court cases and omits the hundreds of thousands of cases decided annually by the unsung workhorses of the American judiciary, the intermediate state courts, which are worthy of separate study.²¹ In addition, we must not forget that state and federal courts do more than merely inform each other's statutory work: state and federal courts interact even more directly when they interpret one another's statutes. As I show elsewhere, these "crossover" cases, too, are flying completely under the radar and require closer examination and doctrinal clarification.²² This Article's goals, however, are more introductory, aiming to lay the foundation for this future work. As such, I confine myself mostly to the details of the new state court terrain, and raise, but do not fully answer, the larger normative and theoretical questions that arise from employing this new, "intersystemic"²³ perspective on statutory interpretation.

20. Cf. Vermeule, *supra* note 7, at 109-110 (arguing that uniformity concerns would prevent such decentralization).

21. See COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, 2007, at 152 tbl.10 (2008). For present purposes, my interest is in what the controlling state rule is, and therefore it is appropriate to look to the court of last resort for the articulation of controlling law. The largest comparative methodological study to date has likewise limited its scope only to highest court opinions. See Zenon Bankowski et al., *On Method and Methodology*, in INTERPRETING STATUTES: A COMPARATIVE STUDY 9, 14 (D. Neil MacCormick & Robert S. Summers eds., 1991) (justifying their international comparative study's restriction to high court decisions because "written opinions of higher courts . . . are normally the best legal examples available of . . . confronting, in a methodologically self-conscious fashion, the problems of justifying decisions on the interpretation of statutes").

22. See Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodological Choice and the Erie Doctrine* (unpublished manuscript, on file with author). Other separate categories worthy of consideration concern the work of state agencies and the interpretive rules that apply when states "borrow" statutes from the U.S. Code.

23. *Id.* at 1.

I. A BRIEF OVERVIEW OF THE MAINSTREAM DEBATES

The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.

– Henry M. Hart & Albert M. Sacks²⁴

A half century has passed since Henry Hart and Albert Sacks thus accused the American courts of methodological disarray in statutory interpretation, and the U.S. Supreme Court still is divided over which interpretive tools, in what order, should be used to resolve statutory questions.²⁵ This is a problem different from resolving the underlying statutory questions themselves. As an illustrative example, consider the famous hypothetical statute, “No vehicles shall be allowed in the park,” and the question of whether a child’s bicycle triggers the prohibition.²⁶ The court will decide “yes” or “no,” and thereby resolve the statutory question. However, how the court gets there is a matter of interpretive methodology. One court might choose to focus on the word “vehicle” and examine its definition in dictionaries; another might mine the legislative history to divine the purpose of the statute; still another might employ a default rule, a “canon” of statutory construction, such as the rule of lenity or the rule against interpreting statutes to bring about absurd results. It is by no means clear that each method will lead to the same conclusion with respect to the bicycle. How courts should go about making such a “methodological choice”²⁷ is one of the central questions of statutory interpretation, and one the U.S. Supreme Court has never definitively resolved.

Over the past two decades, the federal debate over this question has centered primarily on the relative merits of two methodological theories.²⁸ The rise to prominence in the 1980s of the “new textualist”²⁹ philosophy had the

24. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

25. See Foster, *supra* note 9, at 1866 & n.19; Philip P. Frickey, *Interpretive-Regime Change*, 38 *LOY. L.A. L. REV.* 1971, 1971 (2005); Rosenkranz, *supra* note 2, at 2088.

26. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 606-08 (1958) (crafting this hypothetical).

27. Vermeule, *supra* note 7, at 76 (calling this a problem of “interpretive choice”).

28. I make this point only with respect to statutory interpretation in general. In some specific areas, most notably the agency-deference area, the U.S. Supreme Court has articulated special regimes. See *infra* Subsection III.A.1 (discussing *Chevron*’s relevance to these broader questions).

29. William N. Eskridge, Jr., *The New Textualism*, 37 *UCLA L. REV.* 621, 623 (1990).

effect of drawing clear lines between federal judicial interpreters, dividing “textualists” from “purposivists.”³⁰ This Part summarizes in very broad terms the central features of this federal methodological debate and the unpredictability that has resulted from the Court’s failure to resolve it.³¹ Against this backdrop, we can see more clearly the relevance of the apparent drive to interpretive clarity in the states studied.

A. *Textualism Versus Purposivism*

The textualist approach, which is associated most closely with Justice Scalia’s legisprudence,³² centers on the primacy of enacted text as the key tool in statutory interpretation. Textualists advance their theory through three main types of arguments—institutional, constitutional, and structural³³—which result in an interpretive approach that emphasizes textual analysis, interpretive predictability, and cabined judicial discretion.

Institutionally, textualists take a “realist” view of Congress, which translates to their rejection of the notion that a multimember legislative body can have a single, discernable “intent”;³⁴ their recognition that statutes are difficult to enact and that statutory language is often the product of a legislative compromise that courts should not disturb;³⁵ and their cynicism about the reliability of legislative history, given the incentives that “losing” legislative

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30. See *id.* at 624; Manning, *supra* note 1, at 71-75. Additional interpretive theories, such as “imaginative reconstruction,” Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817-18 (1983), and “intentionalism,” Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 227 (1999), have been advanced that add to the mix.
 31. The vast literature on this debate cannot be done justice here. *E.g.*, WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 689-846 (4th ed. 2007); KENT GREENAWALT, *LEGISLATION: STATUTORY INTERPRETATION* (1999); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1997); Eskridge, *supra* note 29; Frickey, *supra* note 25; Manning, *supra* note 1; Molot, *supra* note 1; Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 372 (2005); Strauss, *supra* note 30; Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 917-19 (2003).
 32. See SCALIA, *supra* note 31, at 23-25. I use the term “legisprudence,” as Eskridge does, *supra* note 29, at 624, to refer to “the jurisprudence of legislation.”
 33. These concepts have been fully developed elsewhere. See, *e.g.*, Molot, *supra* note 1, at 25-29 (describing textualism’s “interpretive theory,” its “constitutional theory,” and its “institutional analysis”).
 34. See SCALIA, *supra* note 31, at 16-23.
 35. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001).

parties have to manipulate it if they know courts will look to it.³⁶ As a result, textualists place a heavy emphasis on text and text-based interpretive rules (for example, dictionary definitions, textual “context,” and the so-called “linguistic” or “textual” canons—default presumptions based on common rules of grammar and word usage³⁷) rather than looking for other, extrinsic evidence of what, in their view, is an illusory “legislative intent.”³⁸

Constitutionally, textualists argue that statutory “purpose” as evinced by legislative history (committee reports, floor statements, etc.) is not permitted to trump enacted text because only enacted text is “law”—that is, only enacted text goes through the constitutionally prescribed process of bicameralism and presentment.³⁹ Some textualists also argue that reliance on legislative history works an unconstitutional delegation of lawmaking authority to subportions of Congress (committees), or worse, congressional staffers (who write the reports).⁴⁰ As a result, strict textualists will not consider legislative history to resolve statutory ambiguity. Instead, if textual analysis cannot resolve the statutory question, textualists will rely on “substantive” canons—default presumptions based on constitutional or policy values such as federalism (i.e., the presumption that ambiguous statutes will not be interpreted to intrude on traditional state powers) or lenity (i.e., the presumption that due process requires that ambiguous criminal statutes be interpreted in favor of defendants).⁴¹ And, structurally, textualists’ strong conceptions of separation of powers lead them to advocate a very limited judicial role in statutory interpretation, in which judicial discretion must be cabined through clear rules, as judges strive to “interpret” but not “make” law.⁴²

36. See SCALIA, *supra* note 31, at 30–36.

37. “Context” generally refers to how the contested term fits into the statutory scheme as a whole—e.g., how it is used in other statutes, or later in the same statute. The “textual canons” all find “meaning from the words of the statute and nothing else.” ESKRIDGE ET AL., *supra* note 31, at 849. Some typical such canons include the “rule against superfluities” (construe words so as not to render other statutory terms superfluous), *ejusdem generis* (interpret general term in list of statutory terms to be “of the same type” as the other terms), and *exclusio unius* (presume from inclusion of enumerated terms that omitted terms are intentionally excluded).

38. See SCALIA, *supra* note 31, at 32.

39. See U.S. CONST. art. I, § 7; SCALIA, *supra* note 31, at 35.

40. John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 698–99 (1997).

41. See SCALIA, *supra* note 31, at 27–29; Manning, *supra* note 1, at 82–83; Nelson, *supra* note 31, at 384–85.

42. See SCALIA, *supra* note 31, at 23–37; Manning, *supra* note 35; Sunstein, *supra* note 8, at 652–53.

On the other side of the divide are the purposivists, whose approach has historically been associated with the Legal Process movement⁴³ and has been advanced on the modern Court most ardently by Justices Stevens and Breyer.⁴⁴ Purposivists' salient difference from textualists is their focus on "interpret[ing] the words of the statute . . . so as to carry out the purpose as best [they] can"⁴⁵ and their willingness to consider an array of extrinsic interpretive aids, including legislative history, to do so. In contrast to textualists, many purposivists urge a more expansive judicial role in statutory interpretation, in which courts act in partnership with the legislature in the elaboration of statutory meaning.⁴⁶ As a result, unlike textualists, purposivists generally feel freer to go beyond the confines of statutory text and will not necessarily find that text trumps contradictory evidence of purpose. There are different stripes of purposivists,⁴⁷ but, as relevant to this project, what unites them is this emphasis on pluralistic sources of statutory meaning and interpretive flexibility over formalistic methodological rules.

B. Textualism's Limited Success and the Problem of Interpretive Indeterminacy

There was a period during textualism's early ascendancy when some predicted that it might eventually dominate the federal courts.⁴⁸ That did not come to pass. Apart from Justices Scalia and Thomas, no other Justices have fully accepted textualism's absolute prioritization of text or its prohibition on legislative history.⁴⁹ This is not to say that textualism has not been extremely influential. As others have demonstrated, textualism has had a significant

43. See Peter L. Strauss, *The Courts and Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242 (1998).

44. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 86 (calling Justices Stevens and Breyer "the Court's most committed purposivists").

45. HART & SACKS, *supra* note 24, at 1374.

46. Strauss, *supra* note 30, at 243.

47. See, e.g., WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 125 (1994) (advancing an aggressive brand of purposivism, arguing that courts should update statutes to deal with modern problems).

48. Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 357, 373 (1994); see also Eskridge, *supra* note 29, at 641 (predicting that textualism's influence might expand).

49. Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205; Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1103 (1992).

impact across the spectrum, leading “even nonadherents to give great weight to statutory text.”⁵⁰

But still, textualism has never taken hold as the Court’s single, controlling interpretive method. This is particularly problematic for textualism because, as a matter of textualist theory itself, one cannot be a “real” textualist only *some* of the time. While a purposive interpreter like Justice Breyer can, consistent with his interpretive philosophy, interpret some cases by relying on plain text, others by giving paramount weight to legislative history, and still others by deferring to policy norms (the substantive canons), textualism is grounded in a different premise: the value of rule-based (and hence predictable) interpretation.⁵¹ A judge who acknowledges the importance of text but still takes various positions from case to case regarding whether text trumps other interpretive tools is not a textualist. Thus, textualism’s overarching vision remains unrealized if its text-is-prime philosophy is applied only in some cases. Hence, the arguments that textualism is dead, or at least gravely ill.

The difficulty for textualists, however—and anyone else concerned with methodological consistency—is that the U.S. Supreme Court is simply not in the practice of picking a single interpretive methodology for statutes. Indeed, the Court does not give stare decisis effect to *any* statements of statutory interpretation methodology.⁵² The interpretive rule used in one case (“purpose trumps text” or “committee statements are not reliable legislative history”) is not viewed as “law” for the next case. The Justices appear not to believe that they can bind other Justices’ (and future Justices’) methodological choices. Scholars across the spectrum who divide on the question of whether this way of approaching statutory interpretation is problematic nevertheless all agree both that a single controlling approach does not currently exist and that prior

50. Molot, *supra* note 1, at 3; see Manning, *supra* note 1, at 78; see also James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History?: Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 229 (2006) (discussing the reduced use of legislative history as a result of Justice Scalia’s influence); cf. Zeppos, *supra* note 49, at 1103 (finding that “text is a dominant source of authority” in statutory interpretation cases).

51. See SCALIA, *supra* note 31, at 25 (“[O]f course it’s formalistic! The rule of law is about form.”); Nelson, *supra* note 31, at 375-76.

52. Rosenkranz, *supra* note 2, at 2144-45 (“[T]he Justices do not seem to treat methodology as part of the holding [M]any cases feature clear majorities that explicitly ratify the use of legislative history. But Justice Scalia never concedes that he is bound to that methodology by stare decisis.” (internal citation omitted)); Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 389 (2005) (“[S]tare decisis effect attaches to the ultimate holding . . . but not to general methodological pronouncements, no matter how apparently firm.”). This claim applies only to general statutory interpretation methodology. I argue, *infra* Subsection III.A.1., that the *Chevron* regime is an important specific exception.

methodological statements do not carry into future cases with the force of precedent.⁵³

The direct effect of this absence of “methodological stare decisis” is that, although a case’s substantive holding (e.g., whether the prohibition against “vehicles in the park” includes bicycles) receives the “super strong” stare decisis weight the Court accords to substantive statutory precedents,⁵⁴ how the Court gets there (e.g., whether it relies on dictionaries or legislative history) has no import for future cases. There is an indirect effect, too: the absence of methodological stare decisis enables the interminable repetition of what are essentially the same methodological debates. When can extrinsic evidence of legislative purpose be consulted, and when can such evidence trump statutory text?⁵⁵ When text is unclear, to which source should courts turn next—legislative history, or a canon of construction?⁵⁶ When multiple canons are applicable, how should we select among them?⁵⁷ Such are the kinds of questions that are continually debated, but never definitively resolved, in modern Supreme Court statutory interpretation.⁵⁸

53. See, e.g., Eskridge & Frickey, *supra* note 2, at 57; Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149, 149 (2001).

54. The Court applies heightened stare decisis to substantive (as opposed to methodological) statutory precedents. See, e.g., CBOCS W., Inc. v. Humphries, 128 S. Ct. 1951, 1958 (2008) (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989)) (observing that stare decisis “ha[s] special force in the area of statutory interpretation”).

55. See Zuni Pub. Sch. Dist. v. Dep’t of Educ., 550 U.S. 81 (2007); Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004); see also Carcieri v. Salazar, 129 S. Ct. 1058, 1068–71 (2009) (Breyer, J., concurring) (emphasizing legislative history omitted by the textualist majority); Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 243 (2008) (Breyer, J., dissenting) (“I write separately to emphasize . . . that the relevant context extends . . . well beyond purely textual devices.”).

56. See, e.g., Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498 (2009) (raising the question whether courts can use legislative history to clarify text and so prevent application of the agency deference canon, as argued by the dissent); United States v. Hayes, 129 S. Ct. 1079 (2009) (debating with the dissent whether legislative history or the rule of lenity best resolves statutory ambiguity); Ali, 552 U.S. at 214 (debating with the dissent whether textual canons or legislative history best resolves ambiguity). The division among the Justices about the use of legislative history is of course part of this ongoing debate. Some Justices, like Justice Stevens, will consider it whenever useful; others, like Justice Scalia, generally eliminate it entirely; still others, like Chief Justice Roberts and Justice Alito, will consider it but only in a very limited fashion. See *infra* notes 307–308 and accompanying text.

57. See Fla. Dep’t of Revenue v. Piccadilly Cafeterias, Inc., 128 S. Ct. 2326, 2338 (2008); cf. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 498 (1989) (arguing that canons should be ranked to make interpretation more predictable).

58. Divisions also remain over when particular canons apply in the first place. For differing approaches to the use of the *ejusdem generis* and *noscitur a sociis* canons, see Ali, 552 U.S. at

These debates are no longer useful. Their very repetitiveness undermines arguments made by others that the Court's methodological approach is consistent *enough*—that the fact that there is a generally accepted array of interpretive tools makes interpretation sufficiently determinate.⁵⁹ How can this be when the different Justices still take distinct approaches to the various tools available? Moreover, failure to reach final resolution on these questions has other negative consequences. It wastes court and litigant resources; deprives Congress of an incentive to coordinate its behavior with the Court's interpretive methods; retains rather than eliminates another source of intracourt disagreement; and makes the Court appear result-oriented, because the governing principles change from case to case.

To be sure, not everyone agrees that one of the goals of statutory interpretation should be the development of an approach that employs the tools of interpretation in the same way in every case. Some scholars instead prefer a variety of approaches which, they argue, generates a valuable multiplicity of views about statutory meaning from which judges can select the “best” result.⁶⁰ Yet even vocal defenders of interpretive pluralism recognize that a consistent approach would advance “rule-of-law” values. They acknowledge that a consistent methodology might make interpretation more predictable, and facilitate systemic coordination, making clear to “lower court judges, agencies, and citizens . . . what presumptions will be entertained as to statutes’ scope and meaning, and what auxiliary materials might be consulted to resolve ambiguities,” thus lowering the costs of both litigating over and drafting statutes.⁶¹ Admittedly, these kinds of effects may be difficult to prove. But there also may be less tangible benefits to methodological consensus that

230-31 (Kennedy, J., dissenting); and *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 495 (2006) (Thomas, J., dissenting). For differing approaches to the applicability of the presumption against preemption, see *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 & n.3 (2009); *id.* at 1229 n.14 (Thomas, J., concurring); and *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 256 (2004).

59. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 353, 364 (1990) (arguing that their model of the Court's array of interpretive tools illustrates that interpretation is consistent enough, even though their model weighs, but does not rank, the tools, and instead calls for a “to and fro movement among the considerations”).

60. *Id.* at 353.

61. Eskridge & Frickey, *supra* note 2, at 66-67; Amanda L. Tyler, *Continuity, Coherence and the Canons*, 99 NW. U. L. REV. 1389, 1418-21 (2005); cf. EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 235 (2008) (arguing that a set of default rules of construction would decrease “legal uncertainty and the costs of ascertaining what the law says . . . [and] control discretionary choices by lower courts”); Foster, *supra* note 9, at 1892-94 (making the same point with respect to methodological stare decisis).

may be easier to observe; for example, the expressive value of having judges *act* like judges when they decide cases according to pre-established principles. Litigants bringing like claims expect to have their cases decided under the same legal standards, and methodological flip-flopping undermines the public perception of the Court as a neutral body.⁶²

Finally, it is important to remember that, in providing the decision-making framework, the chosen interpretive methodology plays a critical role in shaping the terms of the debate.⁶³ Even if one cannot prove that methodology dictates outcomes in cases, it surely affects opinion writing. It may be a very different judicial opinion that seeks the interpretation that produces the most pragmatic result from one that instead seeks the resolution that would have been adopted by the enacting legislators. The normative texture of the law is shaped through these opinions, so it matters whether or not judges agree on the interpretive lens.

I will elaborate on these and other arguments for and against interpretive consensus in Part V. For present purposes, it suffices to note that many scholars and jurists have embraced this goal of interpretive predictability. Indeed, it is one of the main theoretical aims of textualism itself.⁶⁴ But the federal textualists have not been able to garner enough consistent support to achieve it—i.e., to impose theirs as the single approach. And related academic proposals, discussed below, have not yet translated into action.

C. *Proposals for Interpretive Determinacy and the Relevance of the State Cases*

Academic proposals aimed at making methodological choice more consistent have been numerous and generated much responsive debate. For example, Nicholas Rosenkranz, who has little faith in the Court to resolve the interpretive stalemate for itself but believes that consistency still must be

62. See Foster, *supra* note 9 (arguing same in *stare decisis* context); cf. William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2072 (2006) (reviewing ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* (2006)) (arguing that strict textualism's apparently objective framework might make "the public . . . perceive the federal courts to be less political").

63. Cf. Bankowski et al., *supra* note 21, at 17 (stating that attention to "stated justifications" in statutory cases "is in fact worthy of study itself, since . . . it represents an effort at self-conscious public justification [and] . . . enables us to understand what are regarded as satisfactory and publicly acknowledgeable grounds for decision making").

64. See, e.g., Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 63-64 (1994) (arguing that "understandable commands, consistently interpreted" and "predictability" are two of the objectives that give rise to textualism).

imposed, has suggested that *Congress* impose the order the Court has lacked, by enacting “Federal Rules of Statutory Interpretation.”⁶⁵ Adrian Vermeule at one point suggested that courts might be capable of reaching the answer for themselves, and urged the Justices to “eschew ambitions towards perfection,” and “embrace a formalist approach to statutory interpretation, one that uses a minimalist set of cheap and inflexible interpretive sources.”⁶⁶ Related are more recent proposals arguing that if the Court changed its practice and began giving *stare decisis* effect to its methodological statements, it would increase consistency and predictability.⁶⁷

Until now it has been assumed that, because of a lack of real-world experience with these concepts, thinking of this order must take place on a purely theoretical level.⁶⁸ This is where the state cases come in. All of the suggested reforms—legislated rules, *ex ante*-defined interpretive frameworks, and methodological *stare decisis*—are in play in various states, and I discuss the implications of five states’ experiences with these concepts in the parts that follow. But these state cases offer more than a mere testing ground for the utility of the proposed academic solutions. Indeed, they offer a powerful counter-paradigm to the U.S. Supreme Court’s resistance to resolving the methodological-choice question. As detailed in the next two Parts, in these

65. Rosenkranz, *supra* note 2, at 2087, 2156. For responses, see O’Connor, *supra* note 6; and Scott, *supra* note 10.

66. Vermeule, *supra* note 7, at 74. *But cf.* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY (2006) (arguing later that judges should follow clear text and, if text is unclear, defer to agency interpretations).

67. *See* Foster, *supra* note 9; Connors, *supra* note 9. The three proposals are not uncontroversial. The Rosenkranz approach raises separation of powers concerns. *See* Jellum, *supra* note 6, at 840; Rosenkranz, *supra* note 2, at 2102; Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1501 (2000). Other concerns are intrabranched in nature, for example, can the 2010 Congress enact rules that control the interpretation of legislation enacted by future congresses? *But cf.* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1697-98 (2001) (arguing that if any objections to legislated rules should be made, they should be made on separation-of-powers, not “entrenchment,” grounds). The *stare decisis* approach raises similar questions about whether courts today can bind the reasoning processes of future courts. Foster, *supra* note 9, at 1900. The formalistic approach poses the problem of how courts should actually choose the governing methodological framework. Vermeule, *supra* note 7, at 100.

68. *See* Vermeule, *supra* note 7, at 100 (calling “interpretive choice an exercise in decisionmaking under conditions of severe empirical uncertainty”); *cf.* Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952, 965-66 (2003) (doubting the feasibility of earlier-proposed state court empirical studies, but also asking whether there is any real-world data on state use of the “absurd-results exception to strict construction”).

states, both courts and legislatures appear to be in the midst of an entirely different conversation than the players in the federal arena, one focused instead on establishing transparent, consistent interpretive regimes.

In this regard, and as a final preliminary, it is important to acknowledge another significant strand of literature that goes to the difficulty of considering consistent interpretive regimes. As some have argued, even assuming the normative benefits of interpretive predictability, it may be extremely difficult if not impossible for multimember courts to actually apply a consensus interpretive rule consistently.⁶⁹ Because methodology (or any legal doctrine, for that matter) always can be manipulated, it is not clear whether consistent interpretive rules actually make case outcomes more transparent. And there are different ways one might choose to measure predictability. For example, judges operating under consensus regimes may use a more predictable and more limited array of interpretive tools; as we shall see, this kind of consistency is observable in some of the states studied. But we cannot know from these cases what is going on inside the judges' minds, or how often judges manipulate the interpretive framework to reach favored results. I offer some preliminary thoughts on this issue in Part V, but it should be emphasized at the outset that this Article's focus is on something slightly different. My aim is not to prove that methodology dictates outcomes, but rather, to establish the importance of these debates about methodological consensus and address the necessarily antecedent questions of: (1) Why courts—and why certain courts more than others—might try to install single governing regimes for statutory interpretation; (2) What kinds of factors (Methodological *stare decisis*? Legislated rules? Tiered interpretive hierarchies?) might increase stability when such regimes are in fact attempted; (3) What experiments of this nature tell us about the legal status of statutory interpretation methodology; and (4) Whether there is a particular type of interpretive framework that might have broad enough appeal to generate at least an expressed interpretive consensus on more multimember courts. That the state courts studied respond to these questions, and, in fact, at least consistently *articulate* controlling interpretive regimes—itself long thought an impossibility—are important developments regardless of whether one is a believer in their ultimate constraining effect. And, as I have stated, it is worth exploring the notion that methodological consensus generates normative benefits wholly apart from outcome predictability. The states studied offer an unmined resource for theorists on all sides of this debate to test such claims.

69. This literature has been largely informed by social choice theory. See, e.g., Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 823-31 (1975); Vermeule, *supra* note 2.

II. THE STATE LEGISPRUDENCE

Despite proclamations to the contrary, textualism's moment is far from over—at least in some of the states. This Part describes the experiences of five states that are in the midst of intense conversations about whether formalistic interpretive regimes are possible, whether methodology is precedential, and whether legislatures have a role to play in defining the rules of statutory interpretation. And figuring most prominently here is textualism, which, in these states at least, is at the center of all of these efforts.

But this is not Justice Scalia's textualism, despite the fact that the state courts expressly claim to have derived their interpretive rules directly from his theory. This matters why? It matters because these state methodologies, which might instead be called "modified textualism," offer the most successful attempt yet to generate methodological consensus on multimember courts. The salient difference—and likely the key to the methodological compromise—is the state textualists' willingness (still within a text-based and relatively formalistic regime) to consult legislative history. As I argue in Part IV, this state variation pushes the boundaries of both traditional textualism and purposivism in ways far more productive than anything happening on the federal level.

The consensuses observed in the states studied have other implications, too. As detailed below, each of the state courts has used this methodological agreement to establish (to different degrees of strength and stability) a *controlling interpretive framework*—a clearly defined, *ex ante* hierarchy of interpretive rules for all statutory cases. Four of the state courts studied protect their new frameworks by giving their choice of methodology *stare decisis* effect. Many state legislatures, too, have enacted statutes that explicitly direct the state courts' interpretive processes. But many state courts are resisting or even ignoring those legislative directions. In so doing, these cases advance a vision of *courts*, not legislatures, as the institutional actor with dominant authority over interpretation—and one in which legislatively enacted "Rules of Statutory Interpretation" are likely to be of little utility.

A. State Selection and Case-Study Methodology

1. State Selection

The five states chosen for focused study—Oregon, Connecticut, Texas, Wisconsin, and Michigan—were chosen following a preliminary review of state statutory interpretation across the highest courts of all fifty states and the District of Columbia, and they were selected because their interpretive moves

were particularly explicit, both in terms of clearly identifiable interpretive developments underway and the extensive discussions, in the cases themselves, of those developments.⁷⁰ My initial focus was on identifying courts with internal divides over methodological choice and states in which the legislatures had passed laws concerning interpretive rules. Texas and Connecticut were chosen once it became apparent that both states' courts, despite different methodological preferences, were engaged in similar dialogues with their legislatures over which branch controls the rules of interpretation. Michigan and Wisconsin were originally chosen because those states' supreme courts are internally divided and methodological choice is often heatedly debated in opinions. Oregon was chosen simply because of the surprise of identifying a sixteen-year controlling interpretive regime that has gone virtually unnoticed by the academy. My aims in state selection, moreover, did not include identifying methodological *stare decisis*, consensus regimes, or modified textualism. The state courts' convergences on those themes emerged, and subsequently became the focus of the Article, only after I had selected the states and completed a deeper analysis of their case law. The five states are also geographically and demographically diverse and employ different methods of judicial selection.

I do not contend that these five states' methodological experiences are representative of the other forty-five, and my claims do not depend on the generalizability of the developments I have identified. It is impossible to closely study all fifty states at once, and concerns about studying only a small number likely have deterred others. But one must start somewhere. With respect to methodological *stare decisis* and the possibility of consensus interpretive regimes, my goal is simply to discredit the long-standing impossibility hypothesis attendant to both concepts. One state alone would suffice for this purpose, and this Article offers multiple examples. With respect to the interbranch power struggles I have identified, other scholars have documented examples from many more states of courts disobeying legislated rules of interpretation, and so this phenomenon is more easily generalizable.⁷¹ Finally, with respect to the particular consensus methodology that these five states converge upon—modified textualism—there are certain states, including New

70. In initially surveying the fifty states, I used the Westlaw “key numbering” subject-matter classification system and searched state highest court opinions over the previous decade within the Westlaw “Statutes/Construction and Operation” key number. Also searched were all federal court of appeals and state highest court cases in the Westlaw “State Law as Rules of Decision” key number, the Westlaw “Comity in General” key number, and the Westlaw “Suits involving Validity or Construction of State Statutes” key number.

71. See *infra* notes 279–285 and accompanying text.

York and the District of Columbia, that clearly eschew this kind of structured interpretation.⁷² But there is also some initial evidence, discussed in Part IV and which must be further investigated, that more states may be proceeding down a similar, modified textualist path. In relaying these developments, my purpose is not to argue that, because five states have engaged in these efforts, all courts do or should. My purpose, rather, is to establish the importance of the questions that these developments raise—questions ranging from the legal status of methodology, to the potential benefits of methodological consensus, to what it means to be a “textualist”—and to illustrate how a concentrated focus on the U.S. Supreme Court has skewed the conversation.

2. Case-Study Method

The descriptive analysis below is based on close readings of the entire population of highest court cases from each of the five states over the past decade, located through the search strategies described in the margin.⁷³ I chose

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72. See, e.g., *District of Columbia v. Fitzgerald*, 953 A.2d 288, 299-300 (D.C. 2008) (holding that interpretation must accord with policy and that legislative history may be considered at outset); *Samiento v. World Yacht Inc.*, 883 N.E.2d 990, 994 (N.Y. 2008) (holding that legislative history may be viewed even where a statute’s text is clear).
73. For those five states, I have read the entire population of cases located through the following search strategies. For four of the five states, I have read all of the state highest court cases over the past decade (ending July 1, 2009) in the Westlaw “Statutes” key number (185 cases for Oregon; 256 cases for Wisconsin, but with particular attention to the 135 Wisconsin cases decided after the 2004 leading statutory interpretation opinion; 218 cases for Michigan; and 238 for Texas, but with particular focus on the 120 Texas cases in which legislative history, the “Code Construction Act,” or the relevant section of that Act is referenced). For Connecticut, I have focused on the 244 cases decided after the 2003 leading opinion establishing a new interpretive methodology. I have also read a number of cases from each state decided prior to the decade studied, where necessary to trace the evolution of a particular doctrine; and additionally searched for statutory cases in ways other than through the key number system (e.g., using search terms such as “legislative history”) to ensure that the cases within the “Statutes” key number comprised most or all of the relevant cases. Student researchers have cross-checked the conclusions I have drawn from the Michigan and Wisconsin cases, all of the Connecticut and Texas cases referencing legislative history or the legislated rule on which this Article focuses with respect to those states, and additionally read all of the Oregon cases over the past five years (two previous studies by others, discussed *infra* text accompanying notes 96-100, compiled data on Oregon from 1993 to 2006 against which I could compare my own observations for those years). We also conducted detailed case readings for Oregon cases from 1988 to 1992. In addition, I have interviewed justices from all five state supreme courts and members of the states’ attorneys general’s offices to further confirm the observations I have drawn from the decisions.

Since state supreme court review is discretionary in all five states studied, the cases studied here are necessarily drawn from a pool that the high courts have selected, rather

this method—close readings of cases from a limited number of states over a defined period of time—because, although other scholars have made empirical claims concerning interpretive methodology by counting cases that appear when certain search terms are entered into the Westlaw database without close reading, such a method may not provide complete information.⁷⁴ Because both state and federal courts often refer to terms such as “legislative history” without relying on it or refer to “plain text” without espousing what most scholars would call “textualism,” relying on numerical returns from the Westlaw database may not provide full information about the methodology actually chosen.⁷⁵ Moreover, my focus is on the reasoning used—the *weight* given to different interpretive factors, rather than the question of which factors are consulted—and so case readings were essential. This methodology is intended to complement, not substitute for, other types of empirical research in the field.⁷⁶

than the total state court caseload. See CONN. R. APP. P. § 84-1; MICH. C.R. 7.301; OR. R. APP. P. 9.07; TEX. R. APP. P. 56.1(a), 66.2; WIS. R. APP. P. 809.62(1). But this limitation should be of minimal concern. My focus is on the creation of *generally applicable* statutory interpretation regimes—i.e., regimes that apply to all state statutory cases, regardless of subject matter. Whether a state supreme court tends to grant review of a certain type of statutory case more than others should not be of much concern in that regard. Further to that end, my interest is in what the controlling state rule is, and therefore it is appropriate to look to the court of last resort. The limitation to highest court cases is hardest to assess, however, in the area of methodological stare decisis. I obviously cannot draw conclusions about state lower appellate court practice without reviewing such cases. For this reason, I have tried to distinguish, wherever possible, between *horizontal* methodological stare decisis—when the state supreme court itself follows its own previous methodological statements from case to case—and *vertical* methodological stare decisis, which involves the relationship between higher and lower courts. A limited focus on state supreme court opinions still allows one to observe horizontal stare decisis, and, indeed, the literature about the lack of methodological stare decisis has for the most part focused on the horizontal element. See Foster, *supra* note 9. Any observations I make about lower court treatment of state supreme court opinions are far more tentative, as they are based on lower court citations to those opinions or concepts stated therein and not a full study of lower court interpretive practice.

74. But see CROSS, *supra* note 11, at 183-84 (relying on, in empirical study about federal statutory methodologies, the number of cases in the Westlaw database that contain specific search terms, such as “legislative history”).
75. Cf. Jason J. Czarnezki & William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretation*, 65 MD. L. REV. 841, 865 (2006) (noting “lingering concerns about . . . coding for . . . the plain meaning rule . . . because many judges reference the ‘plain’ or ‘unambiguous’ text without clearly following or rejecting the rule”). But see CROSS, *supra* note 11, at 183-84, 187 (arguing that “careful opinion reading” is unrealistic given the number of federal court cases).
76. Cf. Jack Knight, *Are Empiricists Asking the Right Questions About Judicial Decisionmaking?*, 58 DUKE L.J. 1531, 1532-33, 1542 (2009) (arguing that “empirical studies . . . had focused too

In making comparisons between state and U.S. Supreme Court statutory interpretation practice, I acknowledge that there are institutional differences between the state and federal systems that should not be understated. At the same time, as elaborated in Part V, the realities of concurrent jurisdiction mean that interpretive methodology is already flowing across systems, and state and federal courts share more cultural and legal context with one another than federal courts share with many other countries that have already been the focus of comparative study; institutional differences therefore should not deter our interest. Finally, although the Article discusses the Supreme Court's practice, the same full-population case-study analysis was not conducted for Supreme Court cases. Because many scholars have already covered that terrain, I rely, in describing Supreme Court practice, to a great extent on the work of others, and instead have focused my own efforts on the new area of research, the state jurisprudence.

B. Oregon's Controlling Interpretive Framework

In 1993, the Oregon Supreme Court took the problem of interpretive choice into its own hands. In the watershed case, *Portland General Electric Co. v. Bureau of Labor and Industries (PGE)*,⁷⁷ the court unanimously announced a three-step methodology to control all future statutory interpretation questions. Even more notably, the new methodological regime stuck.⁷⁸ The court not only applied the methodology "religiously"⁷⁹ in the sixteen years following its announcement, it did so without a single dissenting opinion from any member of that court arguing that the methodology did not control as a matter of stare decisis.⁸⁰ *PGE* "is the single most frequently cited case decision in the state's

narrowly on the disposition of the case" and urging "a broader conception of the elements of judicial choice . . . the arguments in support of their votes" and "the ways in which judges balance the various causal factors" that produce the decision).

77. 859 P.2d 1143 (Or. 1993).

78. See Jack. L. Landau, *The Intended Meaning of "Legislative Intent" and Its Implications for Statutory Construction in Oregon*, 76 OR. L. REV. 47, 50 (1997).

79. *Id.*

80. A Westlaw search of all Oregon Supreme Court opinions since the 1993 *PGE* decision reveals only twenty dissenting opinions in which the *PGE* methodology is discussed and, in each case, the dissenting justice is in agreement that the framework applies and only disagrees with respect to its case-specific application, e.g., whether the text in question is in fact ambiguous. See *Bergmann v. Hutton*, 101 P.3d 353, 361 (Or. 2004) (Kistler, J., dissenting); *In re Marriage of Weber*, 91 P.3d 706, 714 (Or. 2004) (Durham, J., dissenting); *Mabon v. Myers*, 33 P.3d 988, 991 (Or. 2001) (Durham, J., dissenting); *King Estate Winery, Inc. v. Dep't of Revenue*, 988 P.2d 369, 374 (Or. 1999) (Riggs, J., dissenting); *Shasta View*

history.”⁸¹ The announced methodology even remained controlling despite legislation enacted in 2001 aimed at overruling part of it.⁸² Indeed, it was not until April 2009—eight years after the legislation was enacted—that the Oregon court even was willing to consider whether the legislature could amend the court-imposed framework.⁸³

The *PGE* case and its implications for interpretive indeterminacy have gone completely unnoticed outside of Oregon.⁸⁴ The case and its progeny offer a perhaps unparalleled example of a judicially imposed, consistently applied interpretive regime for statutory cases that remained in place unaltered for a sixteen-year period. For this reason, it is worth bracketing for a moment the Oregon Supreme Court’s recent opinion concerning the legislative attempt to amend *PGE* (which muddies the waters somewhat), and examining in detail the three-step *PGE* test.

Irrigation Dist. v. Amoco Chems. Corp., 986 P.2d 536, 543 (Or. 1999) (Durham, J., concurring in part and dissenting in part); State v. Hall, 966 P.2d 208, 211 (Or. 1998) (Durham, J., dissenting); Schultz v. Bank of the W., C.B.C., 934 P.2d 421, 426 (Or. 1997) (Graber, J., dissenting); State v. K.P., 921 P.2d 380, 386 (Or. 1996) (Graber, J., concurring in part and dissenting in part); Owens v. Maass, 918 P.2d 808, 817 (Or. 1996) (Unis, J., dissenting); Atiyeh v. State, 918 P.2d 795, 796 (Or. 1996) (Fadeley, J., dissenting); Or. State Police Officers’ Ass’n v. State, 918 P.2d 765, 790 (Or. 1996) (Gillette, J., concurring in part and dissenting in part); GPL Treatment, Ltd. v. La.-Pac. Corp., 914 P.2d 682, 690 (Or. 1996) (Graber, J., dissenting); State v. Guzek, 906 P.2d 272, 288 (Or. 1995) (Graber, J., dissenting); Errand v. Cascade Steel Rolling Mills, Inc., 888 P.2d 544, 552 (Or. 1995) (Graber, J., dissenting); SAIF Corp. v. Allen, 881 P.2d 773, 790 (Or. 1994) (Graber, J., concurring in part and dissenting in part); State v. Arnold, 879 P.2d 1272, 1278 (Or. 1994) (Fadeley, J., dissenting); *id.* at 1279 (Durham, J., dissenting); State v. Stevens, 879 P.2d 162, 169 (Or. 1994) (Van Hoomissen, J., dissenting); Marks v. McKenzie High Sch. Fact-Finding Team, 878 P.2d 417, 426 (Or. 1994) (Unis, J., dissenting); To v. State Farm Mut. Ins., 873 P.2d 1072, 1079 (Or. 1994) (Graber, J., dissenting); Stanley *ex rel.* Griffin v. Tri-County Metro. Transp. Dist., 870 P.2d 808, 816 (Or. 1994) (Unis, J., dissenting).

81. Jack L. Landau, *The Mysterious Disappearance of PGE*, 2009 OR. APP. ALMANAC 153, 153.

82. See OR. REV. STAT. § 174.020 (2007).

83. See *infra* note 117 and accompanying text.

84. The framework has been discussed in one article and one comment in the *Willamette Law Review*, and several writings by Oregon Court of Appeals Judge Jack Landau. See Steven J. Johansen, *What Does Ambiguous Mean? Making Sense of Statutory Analysis in Oregon*, 34 WILLAMETTE L. REV. 219, 228-31 (1998); Landau, *supra* note 78; Landau, *supra* note 81; Jack L. Landau, *Some Observations About Statutory Construction in Oregon*, 32 WILLAMETTE L. REV. 1 (1996); Robert M. Wilsey, Comment, *Paltry, General & Eclectic: Why the Oregon Supreme Court Should Scrap PGE v. Bureau of Labor & Industries*, 44 WILLAMETTE L. REV. 615 (2008). It never appears to have been cited in a general article about statutory interpretation.

1. *The PGE Framework*

The Oregon framework not only lists relevant interpretive factors, it orders and ranks them. As *PGE* held:

[1] In this first level of analysis, the text of the statutory provision itself is the starting point for interpretation In trying to ascertain the meaning of a statutory provision . . . the court considers rules of construction of the statutory text that bear directly on how to read the text . . . for example, the statutory enjoiner “not to insert what has been omitted, or to omit what has been inserted.” . . .

Also at the first level of analysis, the court considers the context of the statutory provision at issue, which includes other provisions of the same statute and other related statutes. . . .

[2] *If, but only if*, the intent of the legislature is not clear from the text and context inquiry, the court will then move to the second level, which is to consider legislative history If the legislative intent is clear, then the court’s inquiry into legislative intent . . . is at an end

[3] If, after consideration of text, context, and legislative history, the intent of the legislature remains unclear, then the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty.⁸⁵

Although the *PGE* framework gives text precedence, it is decidedly different from Justice Scalia’s textualism. *PGE*’s first, text-only, tier would certainly appeal to textualists. The Oregon Supreme Court made clear that the only interpretive rules permitted in this first step are the so-called “textual” canons,⁸⁶ which “assist the statutory interpreter in deriving probable meaning from the four corners of the statutory text.”⁸⁷ If the textual aids do not achieve clarity, however, the *PGE* framework mandates an antitextualist turn⁸⁸: legislative history is the second step of the inquiry. Only where ambiguity persists after consideration of text and legislative history, does the Oregon court allow for resort to all the remaining “general maxims of statutory construction.”

85. *PGE*, 859 P.2d 1143, 1146 (Or. 1993) (emphasis added) (internal citations omitted).

86. See *ESKRIDGE ET AL.*, *supra* note 31, at 849.

87. *Id.* at 848; see *supra* note 37 (explaining textual canons).

88. See *Wilsey*, *supra* note 84, at 624 (noting that the Oregon Supreme Court has firmly held that legislative history may not be consulted if text is clear).

Textualists in Justice Scalia's vein would not look to legislative history in any event and often *do* consider the various substantive canons of interpretation that the Oregon court considers "general maxims," including the rule of lenity and the canon of constitutional avoidance.⁸⁹ In contrast, Oregon has significantly diminished the importance of these canons by relegating them to the third tier of the *PGE* analysis. The *PGE* framework has caused the near-elimination of the rule of lenity and the canon of constitutional avoidance from Oregon Supreme Court cases.⁹⁰ In addition, Oregon's highest court has expressly excluded from the "level one" textual analysis the rule against absurdities.⁹¹ That rule has been the main escape valve for Scalia-style textualists, who invoke it to justify departure from clear statutory text if a literal reading would work absurd results. The Oregon Court's rationale for demoting the rule—"we would be rewriting a clear statute based solely on our conjecture that the legislature could not have intended a particular result"⁹²—echoes the main criticism that academics have levied at the textualist jurists on the federal side who still employ the canon,⁹³ and also upends some academic assumptions that courts would never compromise on a text-based methodology without that escape valve.⁹⁴

PGE also differs from purposivism or a more eclectic approach. The test's tiered hierarchy is strict: it prioritizes text over purpose in all situations, prohibits consultation of legislative history absent a threshold finding of ambiguity, and eschews an all-things-considered approach in favor of a formalized step-by-step process. Indeed, the Oregon Supreme Court devised

89. See SCALIA, *supra* note 31, at 27; Manning, *supra* note 1, at 82; Nelson, *supra* note 31, at 385.

90. The Oregon Supreme Court has relied on the canon of constitutional avoidance only *once* in statutory cases since *PGE*. See *Westwood Homeowners Ass'n v. Lane County*, 864 P.2d 350, 359 (Or. 1993). But the Oregon Court of Appeals looks to the avoidance canon occasionally as part of the third tier of the *PGE* test. See, e.g., *State v. Bordeaux*, 185 P.3d 524, 530 (Or. Ct. App. 2008); *State v. Soreng*, 145 P.3d 195, 197 (Or. Ct. App. 2006). The Oregon Supreme Court has not applied the rule of lenity in a statutory construction case since *PGE* was decided, recently cast doubt on whether it ever existed, and broadly read a recent statutory enactment to eliminate it entirely. See *Bailey v. Lampert*, 153 P.3d 95, 98 (Or. 2007).

91. *State v. Vasquez-Rubio*, 917 P.2d 494, 497-98 (Or. 1996).

92. *Id.*; see also *Young v. State*, 983 P.2d 1044, 1048 (Or. Ct. App. 1999) ("*PGE* relegated the absurd-result maxim to the third level of statutory analysis . . .").

93. See, e.g., William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1555 (1998); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2393-95 (2003).

94. See Siegel, *supra* note 18, at 151-52.

the *PGE* regime at least partially in direct response to the uncertainty occasioned by the federal courts' eclectic approach.⁹⁵

Three preliminary studies, including one conducted as part of this project, have collected data on how the *PGE* regime has been implemented since its installation. One clearly observable effect of the regime is that it has reduced the number of interpretive tools employed by the Oregon Supreme Court and so made it easier to predict which tools the court will rely on to decide cases. "The court resolves the vast majority of statutory issues at level one," i.e., the text-based tier.⁹⁶ Between 1993 and 1998, for example, out of 137 statutory interpretation cases, the court looked at legislative history only thirty-three times, finding it "useless" in one third of those cases. It consequently reached tier three—nontextual canons—only eleven times during the same period.⁹⁷ Even more strikingly, between 1999 and 2006, the court applied the *PGE* framework 150 times, and only reached tier two (legislative history) nine times. Not a single case during that period reached the other-maxims tier (tier three).⁹⁸ And, in a study conducted as part of this project, across the thirty-five cases in which *PGE* was cited between 2006 and May 2009,⁹⁹ legislative history was applied six times and a substantive canon only once.¹⁰⁰

95. The Oregon Chief Justice when *PGE* was decided (but not the case's author) was Wallace P. Carson, Jr., who was generally frustrated by the unpredictability occasioned by the lack of clear interpretive methodologies in the federal courts. See Wallace P. Carson, Jr., "Last Things Last": *A Methodological Approach to Legal Argument in State Courts*, 19 WILLAMETTE L. REV. 641, 646 (1983) (quoting Justice Blackmun and expressing accord with his "continuing dissatisfaction and discomfort with the [U.S. Supreme] Court's vacillation"); *id.* at 649. It should come as no surprise that Carson was the only justice on the Oregon court who also had been a state legislator and one of the few who had previously served as a trial court judge. His former law clerks reported that Carson "understood the need for clarity and stability in appellate decisions as a means to assist trial courts in the consistent and correct implementation of law. . . . [He] also appreciated the need for clear and consistent judicial decisions to assist legislators in drafting statutes." Lisa Norris-Lampe, Sara Kobak & Sean O'Day, *Chief Justice Wallace P. Carson, Jr.: Contributions to Oregon Law*, 43 WILLAMETTE L. REV. 499, 501 (2007). Carson is credited with implementing methodological frameworks across several other areas of state law as well, including constitutional and contract cases. See *id.* at 502-03.

96. Johansen, *supra* note 84, at 227-28.

97. *Id.* at 244 n.169, 247.

98. See Wilsey, *supra* note 84, at 616-17.

99. The Oregon Supreme Court decides relatively few merits cases per year: it decided seventy-four merits cases in 2008 and seventy-nine merits cases in 2007. See Or. Judicial Dep't, Supreme Court Slip Opinions, <http://www.publications.ojd.state.or.us/supreme.htm#2007ops> (last visited Feb. 11, 2009) (excluding opinions answering requests for mandamus, petitions for reconsideration, and requests for certifications of ballot titles). To check for whether a different methodology was being used in cases in which *PGE* was

Compare the five years before *PGE* was decided. There was no single approach: more than half of the cases resorted immediately to legislative history or policy analysis without prior consideration of text alone, and without the tiered hierarchy of sources that *PGE* later imposed.¹⁰¹ One justice called the pre-*PGE* period a “legislative history free-for-all.”¹⁰²

In contrast, under *PGE*, the court is fairly consistent with respect to which interpretive tools it relies upon. Over the four-and-a-half year period ending in May 2009, the following eight types of textual tools were used in roughly half of the cases: “plain meaning,” dictionaries, state court precedents, close readings of statutory definition sections, analysis of related statutes, analysis of the contested term’s place in the statutory scheme, historical evolution of the statute itself,¹⁰³ and textual canons.¹⁰⁴ With respect to the textual canons, the

not cited, a student researcher also read every Oregon Supreme Court case decided in 2007 and 2008 within the Westlaw “Statutes” key number. Of those cases, only twenty-three did not cite *PGE*, and all twenty-three of those cases faithfully applied the *PGE* methodology and were not distinguishable from the *PGE*-citing cases in substance or result.

100. Wilsey, *supra* note 84, at 616 & n.11 (arguing *PGE* caused “the near total disappearance of legislative history in the decisionmaking of the Oregon Supreme Court”).
101. As part of this project, a student researcher and I read every Oregon Supreme Court case decided from 1988 to 1992 in both the Westlaw “Statutes” key number and, additionally, any case (even outside the key number) in which the term “legislative history” appeared. Of the 156 cases found, fifty-one were not relevant (e.g., they were constitutional, initiative, or agency cases, or a statute was mentioned only tangentially); thirty-four applied something close to the *PGE* methodology (e.g., they either used only textual analysis, or used an implicit or explicit ambiguity threshold before consultation of legislative history); and seventy-one looked to legislative history or substantive canons at the outset to bolster textual analysis, even if text was declared clear.
102. Telephone Interview with Virginia L. Linder, Justice, Or. Supreme Court (July 16, 2009) (recalling her impression of the pre-*PGE* case law as an attorney, before she became a judge).
103. This is to be distinguished from legislative history. Oregon’s reference to statutory history entails textual and structural examination of earlier *enacted* versions of the statute.
104. Specifically, over fifty-nine cases across that five-year period, the court relied on “plain language” analysis in thirty-six cases; dictionary definitions in twenty-four cases; statutory definition sections in nineteen cases; other statutes in twenty-seven cases; statutory context (historical evolution/statutory structure) in thirty-one cases; state law precedent in twenty-three cases; and textual canons in twenty-six cases. It relied on rules of grammar in ten cases; on law review articles and treatises in two cases; federal law precedents in three cases; other textual tools in seven cases (specifically, the legislative acquiescence rule (two cases); the presumption that statutes incorporate common law concepts (two cases); the borrowed statute rule (one case); reference to subsequently enacted legislation (one case); and the presumption that amended statutes incorporate intervening judicial decisions (one case)); legislative history in nine cases; legislative “purpose” in two cases; agency construction in two cases; other states’ laws in two cases; consequences in two cases; substantive canons

court applied the same eight canons repeatedly throughout the cases in which textual canons were used.¹⁰⁵ The only additional tools used in more than three cases were rules of grammar (ten cases) and legislative history (nine cases), making the list of the eight types of tools described above the fairly complete universe of Oregon statutory interpretation principles.¹⁰⁶ All but six of the opinions over the five-year period were unanimous.

Moreover, all of the Oregon judges and justices agree that *PGE*'s application is mandatory. Even those Oregon judges who disagree with aspects of the framework, or the results dictated by it in particular cases, concede that they must use it.¹⁰⁷ There are examples of cases in which legislative history likely would have dictated the opposite result, but the Oregon courts confined themselves to a different, text-based decision because of *PGE*.¹⁰⁸ The

(the rule against implied repeals) in one case; "common sense" in one case; and did not rely on executive construction, public policy, or "dynamic" interpretive methods in any cases.

105. Five cases relied on *exclusio unius*; five on the presumption of consistent usage; five on the rule against superfluities; five on *eiusdem generis*; four on the rule that presumes a different meaning to different terms used in the same statute; three on the rule that courts should not insert what has been omitted (similar to *exclusio*); three on "specific controls the general"; two on the rule that specialized terms shall be given their trade/specialized meaning; and one on *in pari materia*. One study has attempted to count every textual canon the court has ever used in *PGE*'s first tier. See Wilsey, *supra* note 84, at 625-28 (counting seventeen textual canons total, but several overlap). All of the rules identified can fairly be said to be the uncontroversial "classic" textual canons recognized by federal courts and commentators alike, typified by the rules referenced above.
106. A recent student comment is critical of the Oregon Supreme Court's inclusion of what the court calls "context"—i.e., precedents, the text of other statutes, and the evolution (previously enacted versions) of the statute—in step one, and argues that it muddies its clarity. See Wilsey, *supra* note 84, at 638-40. But such contextual evidence is commonly used by federal textualists as well.
107. *Young v. State*, 983 P.2d 1044, 1050 (Or. Ct. App. 1999) (Haselton, J., concurring) (disagreeing with *PGE*'s holding that the absurd results rule should not apply in textual analysis, stating "fidelity to *PGE* has driven our court to patently silly results," but conceding that "*PGE* is authoritative"); *Grijalva v. Safeco Ins. Co. of Am.*, 956 P.2d 995, 1002 (Or. Ct. App. 1998) (Haselton, J., concurring) ("Under *PGE* . . . our construction . . . is 'correct'—and, indeed, inevitable. But in the real world . . . that construction defies common sense . . ."); see *State v. Chilson*, 182 P.3d 241, 242-43 (Or. Ct. App. 2008) (same); *Dockins v. State Farm Ins. Co.*, 963 P.2d 119, 120 (Or. Ct. App. 1998) (Wollheim, J., concurring) (following concurrence in *Grijalva*).
108. See, e.g., *Jones v. Gen. Motors Corp.*, 939 P.2d 608, 614-15 (Or. 1997) (refusing to consider legislative history, which advocates argued pointed to an opposite conclusion than statutory text); *Deluxe Cabinet Works v. Messmer*, 915 P.2d, 1053 1056-57 (Or. Ct. App. 1996) (refusing to rely on legislative history even where the statutory text failed to accomplish the overruling of the court decision intended by the legislature). Not incidentally, *Jones* precipitated the legislature's enactment of the statute intended to partially override *PGE*. Email Interview with Jack L. Landau, Judge, Oregon Court of Appeals (Jan. 5, 2010).

framework survived the turnover of almost the entire state supreme court; only one justice who was on the court when *PGE* was decided remains.¹⁰⁹ Litigants tailor their briefs to match the three-step regime.¹¹⁰ The Ninth Circuit, when called upon to interpret Oregon statutes, recognizes that Oregon's "statutory interpretation methodology [was] set out in . . . *PGE*,"¹¹¹ which "remains controlling."¹¹²

2. *The Legislative Response to PGE*

While the idea of a single interpretive regime appears to have taken firm root in Oregon, what that regime should look like remains a live issue. In 2001,

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109. Oregon Blue Book: Oregon Supreme Court Members, <http://bluebook.state.or.us/state/judicial/judicial02.htm> (last visited Feb. 8, 2010). Nine justices joined the court post-*PGE*, most of them long before it considered amending the *PGE* test last year: one in 1994, one in 1997, one in 1998, two in 2001, one in 2003, one in 2006, and one in 2007. *Id.*
110. For example, eighty-seven of the Oregon Supreme Court briefs available in the Westlaw database between 2007 and 2008 expressly cited *PGE* as the controlling framework. Many of the briefs were structured in three sections to match the three-step *PGE* test. *See, e.g.*, Brief on the Merits of Petitioners on Review, *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 212 P.3d 1243 (Or. 2009) (No. S055915), 2008 WL 4144169 [hereinafter Brief, *Friends of the Columbia Gorge*]; Brief on the Merits of Petitioners on Review, *MAN Aktiengesellschaft v. DaimlerChrysler AG*, 208 P.3d 964 (Or. 2009) (No. S055861), 2008 WL 4144166 [hereinafter Brief, *MAN Aktiengesellschaft*]; Brief on the Merits of Respondent on Review, Oregon Dep't of Justice, *MAN Aktiengesellschaft*, 208 P.3d 964 (No. S055861), 2008 WL 5415648; Brief on the Merits of Petitioner on Review, *O'Hara v. Bd. of Parole & Post-Prison Supervision*, 203 P.3d 213 (Or. 2009) (No. S055839), 2008 WL 4525138; Petitioner's Brief on the Merits, *Oregon v. Kuznetsov*, 199 P.3d 311 (Or. 2008) (No. S055487), 2008 WL 2520898; Petitioner's Brief on the Merits, *State v. Fries*, 185 P.3d 453 (Or. 2008) (No. S055136), 2007 WL 4778720; Petitioner's Brief on the Merits, *Gafur v. Legacy Good Samaritan Hosp. & Med. Ctr.*, 185 P.3d 446 (Or. 2008) (No. S055175), 2007 WL 5029553; Appellant's Brief on the Merits, *State v. Hankins*, 151 P.3d 149 (Or. 2007) (No. S52438), 2007 WL 4778726. Many also extensively engaged the question whether the lower courts had applied the *PGE* test correctly to their cases and often argued that failure to do so was reason for reversal. *See, e.g.*, Brief, *Friends of the Columbia Gorge, supra*, at *6; Respondent on Review's Brief on the Merits at *10, *Liles v. Damon Corp.*, 198 P.3d 926 (Or. 2008) (No. S054734), 2007 WL 4542009; Brief of Amicus Curiae Bureau of Labor and Indus. at *5, *Gafur*, 185 P.3d 446 (No. S055175), 2008 WL 5721672.
111. *Nike, Inc. v. McCarthy*, 379 F.3d 576, 581 n.4 (9th Cir. 2004); *see also Young*, 983 P.2d at 1048 ("[T]o the extent that *PGE* established a statutory-construction methodology that is inconsistent with cases that predate *PGE*'s publication date, *PGE* controls.").
112. *Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1114 n.7 (9th Cir. 2003); *see also Dep't of Env'tl. Quality Or. v. Spar Inv. Co.*, 64 F. App'x 648, 649 (9th Cir. 2003) (quoting *PGE* for the proposition that the "Oregon Supreme Court has instructed that '[i]f the legislature's intent is clear from [an] . . . inquiry into text and context, further inquiry is unnecessary,'" and refusing to look at legislative history of statute in question).

the Oregon legislature enacted a statute in direct response to *PGE*. The statute stated: “A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate.”¹¹³ Although on its face, the statute does not appear to contradict *PGE*, the legislative history (ironically) makes clear that the bill “addresses the Oregon Supreme Court’s three-level approach to statutory interpretation as announced in [*PGE*],” was enacted with the purpose of bringing legislative history into the first tier of analysis, and would “allow a party to offer legislative history to the court to aid in its pursuit of the legislature’s intent, regardless of whether the meaning of a statute is clear from its text and context.”¹¹⁴

For eight years, the Oregon Supreme Court refused to even acknowledge the possibility that the statute amended the *PGE* test. Instead, it ignored litigants’ repeated requests that the supreme court apply it,¹¹⁵ and adhered to its three-step regime. As a result, the lower state courts consistently read the statute as in conflict with *PGE* and so refused to give the statute any effect. Every court to consider the issue—including the Ninth Circuit—assumed that *PGE* controlled and so refused to even consider legislative history in Oregon cases if the text was clear.¹¹⁶

113. OR. REV. STAT. § 174.020(3) (2009).

114. ANDREA SHARTEL, STAFF MEASURE SUMMARY, S. 71-HB 367 A (Or. 2001); Testimony of Philip Schradle, Special Counsel to the Att’y Gen., House Judiciary Comm. (Apr. 11, 2001) (“[U]nder this bill, every case where the meaning of a statute is involved would require extensive research through the legislative history.”). The irony of course is that this legislative attempt to overrule *PGE*’s textual focus involved a statute whose text did not contradict *PGE*. See note 118, *infra*, for details on how the court dealt with this twist.

115. Even a casual review of available online Oregon Supreme Court briefs (not currently available before 2007) reveals a substantial number that addressed the possible conflict between the legislated rule and *PGE*. See, e.g., Brief, *MAN Aktiengesellschaft*, *supra* note 110, at *14 & n.9 (arguing that the court of appeals erred by consulting legislative history under *PGE* because text was clear and that section 174.020 does not trump *PGE*); Brief on the Merits of Insurers Amici Curiae at 3, *Mid-Century Ins. Co. v. Perkins*, 195 P.3d 59 (Or. 2008) (No. S054652), 2007 WL 6120819 (arguing that section 174.020 “liberalized the rules of construction”); Respondent Friesen Lumber Co.’s Brief on the Merits at *15-19, *Weston v. Camp’s Lumber & Building Supply, Inc.*, 160 P.3d 633 (Or. 2007) (No. S54085), 2007 WL 4471114 (offering extended discussion of whether section 174.020 overrules *PGE*’s text-only first step).

116. See, e.g., *Nike*, 379 F.3d at 581 n.4 (following approach of lower courts and assuming “the amendments . . . did not alter the [*PGE*] statutory interpretation methodology”); *Or. Advocacy Ctr.*, 322 F.3d at 1114 n.7 (“[W]e assume that the *Portland General Electric* framework remains controlling.”). The Oregon Court of Appeals remarked on the apparent conflict in *State v. Rodriguez-Barrera*, 159 P.3d 1201, 1204 (Or. Ct. App. 2007), which stated that “[f]or the most part, we appear to have ignored [the statute], reciting instead the

All the more puzzling, then, is what happened next. In a case decided in April 2009, *Gaines v. State*, the Oregon Supreme Court unexpectedly requested briefing on the relevance of the statute.¹¹⁷ The ensuing decision—even as the opinion insists that *PGE* still governs—contains confusing language about when the court will now consider legislative history.¹¹⁸ The court held that *PGE*'s text-only first step remains the same but that the parties are free to “proffer” legislative history, and that the court will consult it regardless of ambiguity, but only “where that legislative history appears useful.”¹¹⁹ The court also held, however, that even clear contradictory evidence of purpose will not trump plain text.¹²⁰ The opinion left many open questions, and it is too soon to predict its lasting effect,¹²¹ but one immediate effect is remarkable:

familiar rule of *PGE*”; and in *State v. Boatright*, 193 P.3d 78, 82 (Or. Ct. App. 2008), where the court “[a]ssum[ed] without deciding” that the statute allowed it to consult legislative history. It is also worth noting that the *PGE* framework itself subordinates other enacted legislated interpretive rules. For example, the Oregon Supreme Court expressly stated in *PGE* that Oregon’s legislated rule that “[w]here a statute is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to prevail,” belongs in level three because it is a nontextual maxim. 859 P.2d 1143, 1147 (Or. 1993) (quoting OR. REV. STAT. § 174.030). In practice, this means that the court virtually never applies it, and that other *court-preferred*, *court-created* interpretive rules (i.e., all the textual canons as well as legislative history) trump.

117. *State v. Gaines*, 155 P.3d 61 (Or. Ct. App.), *review granted*, 169 P.3d 1268 (Or. 2007) (table decision).
118. *State v. Gaines*, 206 P.3d 1042 (Or. 2009). The court first noted that the text of the statute, because it provides only that a court “may” consult legislative history, could be unambiguously read not to affect *PGE*. *Id.* at 1047. However, the court decided to apply an unprecedented exception to *PGE* given the ironic circumstances of the case (the question being whether the legislated rule intended to require consideration of legislative history even in the face of clear text), and so consulted the legislative history of the legislated rule absent a finding of ambiguity. *Id.* at 1048. Based on that history, the court concluded that the legislature intended to amend *PGE* to move consultation of legislative history to the first step of the analysis, but left it to the courts to decide how much weight to give to legislative history once consulted. *Id.* at 1049. The court also reconfirmed that substantive canons may be employed only in the last step. *Id.* at 1051.
119. *Id.* at 1050.
120. *Id.* at 1051 (finding that when text is clear, “no weight can be given to legislative history that . . . even confirms . . . that legislators intended something different” (emphasis added)).
121. Early cases applying *Gaines* have illustrated the confusion. Compare *State v. Parkins*, 211 P.3d 262 (Or. 2009) (retaining *PGE* progression of looking to text as first step and then proceeding to legislative history after going through textual analysis and finding it ambiguous), and *State v. White*, 211 P.3d 248 (Or. 2009) (same), with *State v. Ritchie*, 208 P.3d 981, 985 (Or. Ct. App. 2009) (finding text clear and so reviewing only legislative history proffered by party and consulting no additional history), and *In re Marriage of A.C.H. & D.R.H.*, 210 P.3d 929 (Or. Ct. App. 2009) (same), with *Ram Technical Servs., Inc. v. Koresko*, 208 P.3d 950, 960-61 (Or. 2009) (using legislative history to confirm

fifteen of the sixteen Oregon Supreme Court cases that since have cited *Gaines* looked to legislative history¹²²—a dramatic turnaround from the near-disappearance of legislative history use in the state under *PGE*. One wonders if a backlash and contraction will follow.

The *PGE* test might prove to be an enduring framework or only a sixteen-year experiment. But, either way, the Oregon Supreme Court's experience with it refutes the claim, made in the mainstream scholarship, that methodological consensus is impossible. What the court did was more than just articulate a preferred standard; it applied it in virtually all statutory cases.¹²³ What's more, it appears to have applied it with a fair degree of consistency, creating a small and predictable universe of interpretive tools, producing very few intracourt fights about whether cases are to be decided at step one, two, or three, and giving rise to apparently not a single dissenting or concurring opinion claiming the court was manipulating its methodological framework to reach preferred results. Indeed, although *Gaines* may ultimately change what the controlling framework looks like, it will not change the more important development from a theoretical standpoint, namely, that the Oregon Supreme Court remains committed to having a single approach for all statutory questions and treats its methodological statements as binding precedents.

C. *Texas and Connecticut: Courts React to Legislated Interpretive Rules*

The Oregon experience illustrates how judges themselves—by announcing interpretive rules and treating them as “law”—can create controlling interpretive frameworks. But what about legislatures? In this area, too, the state developments outpace those of their federal counterpart. Congress, it is true, has legislated some rules of construction, but they are the most simplistic and uncontroversial; they are essentially only definitional (e.g., “words

conclusions reached from textual analysis), and *State v. Williams*, 209 P. 3d 842, 844-45 (Or. Ct. App. 2009) (same). A comprehensive review of all statutory interpretation cases decided after *Gaines* was not conducted as part of this project, but would be informative.

122. This information is current as of February 27, 2010.

123. Even according to its critics, the *PGE* framework was applied “religiously,” Landau, *supra* note 78, at 50. But I have not verified its application in every case across the entire sixteen-year period. The *Gaines* opinion identifies several cases in which, it argues, *PGE* may have been applied less strictly. The opinion identifies four cases in which legislative history was used to confirm textual analysis without an explicit ambiguity finding, and it identifies four other cases in which *PGE* was applied, but with a less explicit ambiguity finding than typical; in each case the court conducted textual analysis then looked to legislative history to remove any “doubt” left by textual analysis. See *Gaines*, 206 P.3d at 1049 n.6; see also, e.g., *Ware v. Hall*, 154 P.3d 118, 122 n.6 (Or. 2007).

importing the plural include the singular” and “[t]he word ‘county’ includes a parish”¹²⁴).

By contrast, what the states have done is far more interesting. Every state legislature in the nation has enacted a number of canons of construction.¹²⁵ These legislated rules of interpretation range from the text-based, “intrinsic” canons, such as *exclusio unius*, to far more controversial rules telling courts which extrinsic aids to interpretation they may use and when they may use them.¹²⁶ That the state courts are not always receptive to these rules—and this is a trend observable well beyond the states studied here¹²⁷—may have important implications both for academic proposals to enact them in the federal arena¹²⁸ and for more general thinking about separation of powers in statutory interpretation. The state cases indicate that courts will find ways around legislated methodological rules they do not like, and that judges may be unwilling to relinquish authority over interpretive methodology. They also illustrate how, even as we see these courts and legislatures apparently sharing an impulse to impose interpretive clarity, the result of their overlapping and perhaps conflicting efforts can itself be destabilizing.

This Section describes court-legislature power struggles over interpretive rules in two very different states, Texas and Connecticut.¹²⁹ The particular focus is on the states’ legislated rules concerning the use of legislative history—the issue conventionally thought to most strongly divide textualists from purposivists.

124. 1 U.S.C. §§ 1-2 (2006).

125. See generally Scott, *supra* note 10 (cataloging the legislated canons).

126. See *infra* note 359 and accompanying text.

127. Evidence of this broader trend is discussed *infra* notes 279-285 and accompanying text.

128. See Rosenkranz, *supra* note 2.

129. Texas and Connecticut differ not only in size and demography but also institutionally: Connecticut’s highest court judges are appointed, while Texas’s are elected; the Connecticut General Assembly meets every year, while Texas’s is by law allowed to meet only every other year. See THE COUNCIL OF STATE GOV’TS, BOOK OF THE STATES 81-82, 286-87 (Audrey S. Wall et al. eds., 2008) [hereinafter BOOK OF THE STATES]; JOINT COMM. ON LEGISLATIVE MGMT., OFFICE OF LEGISLATIVE RESEARCH, CONN. GEN. ASSEMBLY, THIS IS YOUR GENERAL ASSEMBLY 1 (2009), available at http://www.cga.ct.gov/asp/Content/This_is_Your_General_Assembly.pdf; The Handbook of Texas Online, Texas Legislature, <http://www.tshaonline.org/handbook/online/articles/TT/mkt2.html> (last visited Feb. 24, 2010). Both states’ legislatures are essentially the same size: the Connecticut Assembly has 187 members, and the Texas Legislature has 181. See BOOK OF THE STATES, *supra*, at 85.

1. *Texas: Express Judicial Disagreement with Legislated Interpretive Rules*

Texas’s legislated interpretive rules, codified in the state Code Construction Act, contain a key provision that arguably overrides a textualist approach:

§ 311.023. Statute Construction Aids

In construing a statute, *whether or not the statute is considered ambiguous on its face*, a court may consider among other matters the:

- (1) object sought to be attained;
- (2) circumstances under which the statute was enacted;
- (3) legislative history;
- (4) common law or former statutory provisions, including laws on the same or similar subjects;
- (5) consequences of a particular construction;
- (6) administrative construction of the statute; and
- (7) title (caption), preamble, and emergency provision.¹³⁰

Thus, the Act specifically allows courts—even in the face of a clear text—to consider, among other things, the statute’s purpose and legislative history. Even more explicitly, other statutory sections direct that courts must “liberally constru[e]” all statutes “to achieve their purpose and to promote justice,”¹³¹ “diligently attempt to ascertain legislative intent and *shall . . . consider at all times* the old law, the evil, and the remedy.”¹³² Thus, although the Act states that courts “may” consider legislative history regardless of ambiguity, it also *requires* that they *shall* consider at all times the purpose (the “evil”) of the legislation and construe statutes liberally. Inconsistent with this statutory scheme would be a rule that says courts can *never* consider legislative history absent ambiguity. And yet, that is precisely the Texas courts’ rule.

130. TEX. GOV’T CODE ANN. § 311.023 (Vernon 2005) (emphasis added).

131. *Id.* § 312.006(a) (entitled “Liberal Construction”).

132. *Id.* § 312.005 (emphasis added) (entitled “Legislative Intent”). Although section 312 is part of a subchapter that applies specifically to civil statutes, the Texas Penal Code specifically provides: “Unless a different construction is required by the context, Sections 311.011, 311.012, 311.014, 311.015, and 311.021 through 311.032 of Chapter 311, Government Code (Code Construction Act), apply to the construction of this code.” TEX. PENAL CODE ANN. § 1.05(b) (Vernon 2003). In addition, the Penal Code states that “[t]he rule that a penal statute is to be strictly construed does not apply to this code. The provisions of this code shall be construed according to the fair import of their terms, to promote justice and effect the objectives of the code.” *Id.* § 1.05(a). Thus, as in Oregon, the Texas Legislature has arguably abolished the rule of lenity.

Texas has two highest courts: the court of criminal appeals and the state supreme court. The court of criminal appeals refuses to apply the Code Construction Act as it relates to extrinsic interpretive aids.¹³³ Instead, that court has adopted a rule similar to Oregon's *PGE* test: absent a finding of ambiguity, it will consider only textual tools. Thus, legislative history may not be considered at the first step of the inquiry, but may be considered once ambiguity is found.

The court of criminal appeals justifies its rejection of the Code Construction Act on the ground that it is safeguarding the legislature's lawmaking authority: "the text of the statute is *the law* in the sense that it is the only thing actually adopted by the legislators, probably through compromise."¹³⁴ Thus, an "act must be carried into effect according to its language, or the courts would be assuming legislative authority."¹³⁵ More broadly, the court has opined that legislated interpretive rules, in general, unconstitutionally infringe on judicial authority.¹³⁶ The Texas court's resulting instruction—that legislative history may not even be considered where the text is clear—receives both "vertical" stare decisis effect (adherence by the lower state courts) and "horizontal" stare decisis effect (adherence by the court of criminal appeals itself in later cases); both cite this two-step approach as "precedential" and consider themselves bound by it.¹³⁷

133. See *Boykin v. State*, 818 S.W.2d 782 (Tex. Crim. App. 1991) (leading case holding that court would not follow the rule); see also, e.g., *Williams v. State*, 273 S.W.3d 200, 215 (Tex. Crim. App. 2008) (holding that the court will only consult extratextual sources when the plain language of a statute is ambiguous or when the text would lead to absurd results); *Ex parte Noyola*, 215 S.W.3d 862 (Tex. Crim. App. 2007) ("[W]e may consult 'extra-textual factors such as legislative history only when the plain language of the statute is ambiguous or when a literal interpretation would lead to absurd results.'" (quoting *Ex parte Spann*, 132 S.W.3d 390, 393 (Tex. Crim. App. 2004))); *Ex parte Medellin*, 223 S.W.3d 315 (Tex. Crim. App. 2006) (same); *Ex parte Spann*, 132 S.W.3d 390 (Tex. Crim. App. 2004) (same).

134. *Boykin*, 818 S.W.2d at 785.

135. *Id.* at 786 n.4 (quoting *Sparks v. State*, 174 S.W. 351, 352 (Tex. Ct. App. 1915)).

136. *Boykin*, 818 S.W.2d at 786 n.4 ("[I]nterpretation statutes that seek[] to control the attitude or the subjective thoughts of the judiciary violate the separation of powers doctrine." (internal quotation marks omitted)).

137. See, e.g., *Ex Parte Hernandez*, 275 S.W.3d 895, 898 n.14 (Tex. Crim. App. 2009) ("[W]e are obligated to construe a statute in accordance with the plain meaning of its text unless the plain meaning leads to absurd results that the Legislature could not have possibly intended." (citing *Boykin*, 818 S.W.2d at 785)); *Fielding v. State*, 266 S.W.3d 627, 633 (Tex. App. 2008) (same); *State v. Young*, 242 S.W.3d 926, 928 (Tex. Crim. App. 2008) (same); *State v. Colyandro*, 233 S.W.3d 870, 875 (Tex. Crim. App. 2007) ("[O]ur decision in *Boykin v. State* . . . established our principal rules for statutory interpretation . . ."); *State v. Cowsert*, 207 S.W.3d 347, 350 (Tex. Crim. App. 2006) ("[U]nder *Boykin*, we must follow the plain meaning of the text. Analysis of the legislative history is neither required nor

It is particularly interesting that the court of criminal appeals has relied almost exclusively on *federally* focused sources in making these arguments. The leading Texas case on point, apart from citing the Texas Constitution's separation-of-powers provision,¹³⁸ relies entirely on text-centric U.S. Supreme Court opinions, mainstream academic scholarship, and general treatises.¹³⁹ The Texas court has not highlighted any institutional differences between state and federal governments as obstacles to drawing on the federal materials and, to the contrary, quite clearly assumes the same considerations apply across systems.¹⁴⁰ And yet, as in Oregon, the Texas court is willing to diverge from the federal textualist model by accepting legislative history as a second-level interpretive tool.

The other Texas highest court, the state supreme court (the civil court of last resort), is inconsistent but often reaches the same result, albeit more diplomatically. Many Texas Supreme Court opinions include a footnote or a sentence citing the Code Construction Act's permissive views about extratextual sources, but then still decline to employ extratextual sources absent ambiguity.¹⁴¹ (And in some cases, the Texas Supreme Court does reference legislative history.)

permitted"); *Getts v. State*, 155 S.W.3d 153, 157 (Tex. Crim. App. 2005); ("Boykin instructs us to follow the literal text if it is unambiguous and not absurd, and that is what we do in this case. There is no basis here for proceeding to extra-textual factors such as legislative intent.").

138. *Boykin*, 818 S.W.2d at 785 (citing TEX. CONST. art. II, § 1).

139. *Boykin*, 818 S.W.2d at 786 & n.4 (citing, inter alia, *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83 (1991); *Demarest v. Manspeaker*, 408 U.S. 184 (1991); *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440 (1989) (Kennedy, J., concurring); *Caminetti v. United States*, 242 U.S. 470 (1917); 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, *SUBSTANTIVE CRIMINAL LAW* § 2.2 (1986); SINGER, *supra* note 10, §§ 46.01-46.07); James C. Thomas, *Statutory Construction When Legislation Is Viewed as a Legal Institution*, 3 HARV. J. ON LEGIS. 191, 211 n.85 (1966)). But the court also sometimes references other legislated rules to which it has not objected. See, e.g., *Ex parte Keller*, 173 S.W.3d 492, 500 (Tex. Crim. App. 2005) (using a different provision of the Code Construction Act to resolve an incorporation-by-reference question).

140. *Boykin*, 818 S.W.2d at 786 & n.4.

141. See, e.g., *City of Rockwall v. Hughes*, 246 S.W.3d 621, 626 (Tex. 2008) ("When a statute's language is clear and unambiguous, it is inappropriate to resort to rules of construction or extrinsic aids to construe the language."); *id.* at 626 n.6 (citing the Code Construction Act in a footnote as permitting the court to look to legislative history even if there is no ambiguity, but concluding that legislative history would not be useful in that case); Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 209 S.W.3d 644, 651-52 (Tex. 2006) ("[E]nacted language is what constitutes the law, and when a statute's words are unambiguous . . . the judge's inquiry is at an end."); *id.* at 652 n.4 ("[W]hile the Code Construction Act expressly authorizes courts to use a range of construction aids, including legislative history, Tex.

Both Texas courts also appear willing to evade other legislated rules. For example, the Code Construction Act provides that “[t]he common law rule requiring strict construction of statutes in derogation of the common law does not apply to the Revised Statutes.”¹⁴² The Texas Supreme Court, however, has expressly held the opposite, namely, that “[a]brogating common-law claims is disfavored” and that a “statute that deprives a person of a common-law right will not be extended beyond its plain meaning or applied to cases not clearly within its purview.”¹⁴³ As another example, the Texas Legislature has abrogated the rule of lenity by statute.¹⁴⁴ The effect of that abrogation appears to be that it has *discouraged* the Texas courts (most of these cases are heard in the court of criminal appeals) from applying the rule of lenity, but not stopped that practice entirely.¹⁴⁵

The lower Texas state courts have recognized that the Code Construction Act “poses a potential conflict with the leading [state] case on statutory construction” with respect to legislative history use. They therefore go out of their way to avoid the conflict by aggressively searching for ambiguity in statutes; this allows the lower courts to consider extratextual sources as the Act urges without running afoul of the highest courts’ practice of not using such sources when the text is clear.¹⁴⁶ Of further interest (and in the same vein as

Gov’t Code § 311.023 . . . [i]f the text is unambiguous, we must take the Legislature at its word and not rummage around in legislative minutiae.”).

142. TEX. GOV’T CODE § 312.006(b) (Vernon 2005).
143. *Energy Serv. Co. of Bowie v. Superior Snubbing Servs., Inc.*, 236 S.W.3d 190, 194 n.17 (Tex. 2007) (internal quotation marks omitted). See *infra* notes 281-282 and accompanying text for a discussion of the national trend of evading this kind of legislated rule.
144. TEX. PENAL CODE § 1.05(a) (Vernon 2005) (“The rule that a penal statute is to be strictly construed does not apply to this code.”).
145. See, e.g., *Ex parte Forward*, 258 S.W.3d 151, 154 n.19 (Tex. Crim. App. 2008) (noting that the Texas Code of Criminal Procedure contains an even more strongly worded abrogation of the rule of lenity, but stating that “even if the ‘rule of lenity’ applies” it does so only when the statute is ambiguous); *State v. Johnson*, 219 S.W.3d 386, 388 & n.9 (Tex. Crim. App. 2007) (stating that the rule applies to all statutes outside the Penal Code); *Cuellar v. State*, 70 S.W.3d 815, 819 n.5 (Tex. Crim. App. 2002) (declining to apply the rule of lenity due to a lack of ambiguity, not due to statutory prohibition); *Vineyard v. State*, 958 S.W.2d 834, 837-38 (Tex. Crim. App. 1998) (same); *Iglehart v. State*, 837 S.W.2d 122, 127 n.5 (Tex. Crim. App. 1992) (same); Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 904 (2004) (“Courts in several states—Arizona, Idaho, New Hampshire, North Dakota, South Dakota, and Texas—continue to employ the rule of lenity despite statutes directing them not to.”).
146. *State v. Neesley*, 196 S.W.3d 356, 361 (Tex. Crim. App. 2006) (holding it may “easily avoid the conflict . . . [with the] *Boykin* rule by finding ambiguity when the parties took polar opposite interpretations of the text”); *Allen v. State*, 11 S.W.3d 474 (Tex. Crim. App. 2000) (same).

the Ninth Circuit with respect to the similar power struggle in Oregon), the Fifth Circuit, when construing Texas statutes, does so in accordance with the preference of the Texas *courts* rather than the dictates of the Code Construction Act. Like the Texas courts, the Fifth Circuit holds that consideration of extratextual evidence in Texas statutory cases “is *improper* when the interpretation of a statute is self-evident from its text.”¹⁴⁷

In this regard, it is questionable what utility the Texas legislated rule has had. The rule has resulted in at least three different judicial approaches: the criminal court (and the Fifth Circuit, generally) ignores it, the Texas Supreme Court evades it, and the lower state courts forthrightly find statutes ambiguous in order to accommodate both the rule and the highest courts’ objection to it.

2. *Connecticut: Legislative Override of the Court-Chosen Approach*

Connecticut has witnessed a similar court-legislative battle over the application of a text-based methodology, but with the players reversed. In a March 2003 capital case, *State v. Courchesne*, the Connecticut Supreme Court announced that it was banning the plain-meaning methodology—by which the court meant a rule that prevents consideration of extrinsic sources in the absence of ambiguity—from Connecticut statutory interpretation.¹⁴⁸ As in

147. *In re CPDC, Inc.*, 337 F.3d 436, 438 (5th Cir. 2003) (emphasis added); see *Wright v. Ford Motor Co.*, 508 F.3d 263 (5th Cir. 2007) (refusing to even examine legislative history in a Texas products liability law dispute because the “statutory language [wa]s clear”); *CenterPoint Energy Houston Elec. LLC v. Harris County Toll Road Auth.*, 436 F.3d 541 (5th Cir. 2005) (same). Indeed, the Fifth Circuit sometimes goes out of its way to cite the Code Construction Act for legislated interpretive rules to which the Texas courts have not objected, but then expressly omits the legislative history provision over which there is conflict. For example, in a 2004 case involving the construction of a Texas car-dealer statute, the Fifth Circuit recited what it deemed to be “Texas principles of statutory interpretation,” and cited both Texas case law and the Code Construction Act. Nevertheless, two paragraphs later, the court squarely rejected appellants’ request that it consider “legislative and statutory history” on the ground that “[u]nder Texas principles of statutory interpretation . . . legislative history *cannot* be used to alter or disregard the express terms of a code provision when its meaning is clear from the code.” *Int’l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 723-24 (5th Cir. 2004) (emphasis added); see also *In re Rippstein*, 195 F. App’x 200, 202 (5th Cir. 2006) (“If a statute is unambiguous, a court may not employ other rules of construction to create ambiguity . . .”). *But see* *Jones v. City of Palestine*, 266 F. App’x 320, 322 (5th Cir. 2008) (stating atypically that “[r]egardless of ambiguity, courts can also consider other factors to determine the Legislature’s intent”).

148. 816 A.2d 562, 578, 582 (Conn. 2003) (“We now make explicit [that] . . . in performing the process of statutory interpretation, we do not follow the plain meaning rule in whatever formulation it may appear” and instead will “consider all relevant sources of meaning of the

Oregon, the Connecticut majority cited a lack of prior methodological consistency as its motivation for announcing a clear governing regime, and stated that its new methodology would bind courts in future cases.¹⁴⁹ As in Texas, in support of its decision, the Connecticut court cited a series of academic articles and judicial opinions concerning interpretation in the *federal* courts, including writings by Lon Fuller and Justices Stevens, Breyer, Frankfurter, and Cardozo in favor of a purposive approach. The Connecticut court concluded that the plain-meaning rule “is fundamentally inconsistent with the purposive and contextual nature of legislative language.”¹⁵⁰ Within just two weeks, however, a bill was introduced in the Connecticut state legislature to expressly override *Courchesne*.¹⁵¹ By June 2003, the overriders had succeeded, and the legislature had enacted a new plain-meaning statute, Connecticut General Statute section 1-2z, which prohibits any consideration of “extratextual evidence” if the “text is plain and unambiguous and does not yield absurd . . . results.”¹⁵²

a. The Connecticut Supreme Court’s Preference for an Eclectic Approach

Prior to the legislative override, the Connecticut majority had advocated a nontextual, eclectic approach in which courts, without the prerequisite of ambiguity, “look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter.”¹⁵³ The

language at issue . . . without first having to cross any threshold of ambiguity of the language.”).

149. See *id.* at 577-78. The court went to pains to emphasize that although one justice dissented from part of the holding on the death penalty statute at issue, she joined the opinion as it related to methodology, and “[t]hus, this court, by a vote of five to two, endorsed the process of statutory interpretation that we outline herein. . . . Thus, resolution of those questions will affect, not only the present case, but other pending and future cases, and will give guidance to the bar.” *Id.* at 576 n.18.

150. *Id.* at 582.

151. See H.R. 5033, 2003 Gen. Assem., Reg. Sess. (Conn. 2003); see *id.* (stating that the statute is a direct response to *Courchesne*).

152. 2003 Conn. Pub. Acts 154 (codified at CONN. GEN. STAT. § 1-2z (2003)) (“The meaning of the statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.”).

153. *Courchesne*, 816 A.2d at 568 (internal quotation marks omitted).

court recognized that its banning of the plain-meaning rule put it in the “minority” of state courts.¹⁵⁴ Indeed, the court could point to only two other states which it believed likewise would look to legislative history even in the face of clear text.¹⁵⁵ The Connecticut Supreme Court’s criticisms of the plain-meaning rule were sophisticated, and they largely echoed criticisms that have been levied at textualism in the federal academic literature.¹⁵⁶ And, as in the other states, in making its arguments, the court drew no institutional or constitutional distinctions between the roles of state and federal courts in interpretation; to the contrary, it assumed that the numerous federally focused academic articles and federal cases it cited were of direct relevance to Connecticut as well.

In opposing the majority opinion, *Courchesne*’s lengthy dissent likewise freely drew from federal textualist cases and academic articles,¹⁵⁷ and made no distinction between state and federal courts in relying on the federal theory.¹⁵⁸ Yet, like Oregon’s and Texas’s textualists, Connecticut’s dissenting textualists did not advocate an approach that directly mimicked the federal textualist approach. They, too, favored an interpretive hierarchy, and one that, as in Oregon, preferred legislative history over the substantive canons. Specifically,

154. *Id.* at 576 n.19.

155. *See id.* (“Alaska . . . specifically has rejected ‘the plain meaning rule’ . . . [and] by statute, Texas specifically provides that . . . ‘whether or not the statute is considered ambiguous . . . a court may consider . . . other matters’” (citing TEX. GOV’T CODE ANN. § 311.023 (Vernon 1998))). Notably, its citation to Texas was based only on the Texas Code Construction Act which, as we have seen, has not been followed consistently by the Texas courts.

156. For example, the court refused to enter “a semiotic debate . . . about whether a group such as a legislature can have an ‘intent,’” noting instead the legislature’s own frequent statutory references to the “‘intent of the General Assembly,’” *id.* at 578 n.21 (citing CONN. GEN. STAT. § 47-210(a)), argued the hypocrisy of textualism’s “absurd results” exception, *id.* at 586, emphasized the manipulability of any ambiguity threshold, *id.* at 583, and disputed that a purposive approach implicates any separation-of-powers concerns on the ground that “there is nothing in either the federal or the Connecticut constitutional doctrine . . . that compels any particular method . . . of statutory interpretation,” *id.* at 588.

157. *Id.* at 605 n.8, 611-12 (Zarella, J., dissenting). The dissent also cited to the mainstream public choice literature for the proposition that legislation is more often the product of compromise than of single legislative intent. *Id.* at 610.

158. *See id.* at 609-19. The dissenters also quoted Justice Scalia at length in arguing that the fact that “only the text of a statute formally has been approved by the legislature and signed into law by the executive” constitutionally requires a textual approach, *id.* at 612-13, and stated they were “particularly troubled by [the majority’s] approach because [they] agree[d] with John M. Walker, Jr., the chief judge of the United States Court of Appeals for the Second Circuit who recently assessed the lack of usefulness of the purposive method of statutory interpretation,” *id.* at 609.

the Connecticut dissenters advocated a five-step progression, one that moved from textual analysis, to elimination of any interpretation that results in absurdities, to context, to legislative history, and then to substantive canons.¹⁵⁹ Although the Connecticut textualists noted Justice Scalia's objections to legislative history, they nevertheless concluded that it "may have some usefulness under circumstances in which the other tools of interpretation fail to produce a single, reasonable meaning."¹⁶⁰

The legislative response to *Courchesne* was swift and direct. The stated purpose of the legislation overriding the decision was "to reaffirm the plain meaning rule for statutory interpretation"¹⁶¹ and rebuke the court for what the legislature saw as an inappropriate judicial power grab. As one of the bill's proponents testified: "This makes it clear, I think, what our role is and what we say . . . should play the prominent position in terms of the interpretation of the statute."¹⁶²

b. The Connecticut Supreme Court's Resistance to the Legislated Rule

Despite the clear legislative reaction, the Connecticut Supreme Court has been very reluctant to apply the overruling statute, Connecticut General Statute section 1-2Z. The court had occasion to apply the statute within two months of its effective date but declined to do so, and did not ultimately apply it for the first time until June 2004.¹⁶³ The court has continued to cite favorably to *Courchesne*—the decision the legislature overrode—in more than fifty cases since the statute's enactment, still treating it as good law so long as the

159. *Id.* at 617-18. The Connecticut textualists also support the "legislative acquiescence" doctrine, which has been strongly critiqued by federal-side textualist judges and scholars. See *State v. Salamon*, 949 A.2d 1092, 1147-48 (Conn. 2008) (Zarella, J., dissenting). Unlike the Oregon justices, however, Connecticut's dissenters viewed interpretive principles as "judicial philosophy, not . . . substantive law," and refused to be bound by the methodological aspects of the opinion. *Courchesne*, 816 A.2d at 610 (Zarella, J., dissenting). Thus, it is questionable how constraining the *Courchesne* rule would have been had it not been legislatively overruled.

160. *Courchesne*, 816 A.2d at 618 n.23 (Zarella, J., dissenting).

161. Conn. Joint Judiciary Comm., Report on Bills Favorably Reported by Committee, H.R. 5033 (2003), available at <http://www.cga.ct.gov/2003/jfr/h/2003HB-05033-R00JUD-JFR.htm>.

162. Conn. H. Tran. 79 (May 20, 2003) (statement of Rep. Fox, Member, H. Comm. on the Judiciary), available at <http://cga.ct.gov/asp/menu/Search.asp>.

163. See *Goodyear v. Discala*, 849 A.2d 791, 796 (Conn. 2004) (applying the statute for the first time, in June 2004); *Dinto Elec. Contractors, Inc. v. City of Waterbury*, 835 A.2d 33, 39 & n.10 (Conn. 2003) (mentioning the statute for the first time but declining to apply it). The statute went into effect in October 2003.

statutory text is ambiguous.¹⁶⁴ In those cases, the court applies the *Courchesne* approach, considering simultaneously, in addition to the statute's text, its legislative history, the policy the legislation was intended to advance, and the statute's relationship to other laws and related common law principles.¹⁶⁵ The court also construes section 1-2z's exception for "absurd" results very broadly, further enabling easy access to extratextual materials.¹⁶⁶ The court expressly has held that section 1-2z does not diminish the precedential value of any pre-section 1-2z statutory interpretation cases.¹⁶⁷

It should therefore come as no surprise that, as long as the parties are arguing over statutory meaning, as litigating parties are likely to do, the Connecticut Supreme Court finds the text ambiguous and holds section 1-2z inapplicable.¹⁶⁸ In 2008 alone, the court was asked to consider the application of section 1-2z thirty-eight times; in twenty-seven of those cases, the court

164. The court has concluded that section 1-2z only "kicks in" once the court does not find ambiguity. See, e.g., *Bell Atlantic Nynex Mobile, Inc. v. Comm'r of Revenue Servs.*, 869 A.2d 611, 617-18 & n.13 (Conn. 2005) (also quoting *Courchesne* for the applicable approach to statutory interpretation); *Wiseman v. Armstrong*, 850 A.2d 114, 118 n.10 (Conn. 2004) ("[I]n the present case, the relevant statutory text and the relationship of that text to other statutes is not plain and unambiguous. Accordingly, our analysis does not involve this new legislation."); *Cahaly v. Benistar Prop. Exch. Trust Co.*, 842 A.2d 1113, 1116 n.4 (Conn. 2004) (same). There are of course exceptions, a few cases in which the court recites the language of section 1-2z at the outset of its statutory discussion, but these references are typically little more than formulaic recitations of the rule that one begins an interpretive task with the text. See, e.g., *In re William D.*, 933 A.2d 1147, 1152 (Conn. 2007) (stating that the court "begin[s], as directed by General Statutes § 1-2z, with the relevant text" but then, even admitting "that the definition of child [in another subsection] could be applied literally to" the section at issue, "eschew[ing] such a mechanistic application of the definition given internal inconsistencies and consequences that would ensure in clear contravention of the broader purposes of the delinquency scheme," and so looking to extrinsic sources). Ironically, the court found that the word "text" in section 1-2z was itself ambiguous and therefore looked to the overruling statute's own legislative history to construe it. *Hummel v. Marten Transp., Ltd.*, 923 A.2d 657, 670 (Conn. 2007).

165. See, e.g., *Goldstar Med. Servs., Inc. v. Dep't of Soc. Servs.*, 955 A.2d 15, 24-25 (Conn. 2008); *State v. Jenkins*, 954 A.2d 806, 812 (Conn. 2008).

166. E.g., *Rivers v. City of New Britain*, 950 A.2d 1247, 1247-59 (Conn. 2008) (construing the exception to include a situation in which an "important public safety feature of [the statute] is thwarted" by plain-text interpretation).

167. *Hummel*, 923 A.2d at 671.

168. See, e.g., *Lombardo's Ravioli Kitchen, Inc. v. Ryan*, 842 A.2d 1089, 1095 (Conn. 2004) ("Because the parties in the present case do not claim that the relevant statutory text, along with the relationship of that text to other statutes, is plain and unambiguous, our analysis is not limited by this new legislation."); see also, e.g., *R.C. Equity Group, LLC v. Zoning Comm'n*, 939 A.2d 1122 (Conn. 2008) (disregarding section 1-2z because neither party contended it constrained the court's interpretation).

found ambiguity and considered extratextual sources.¹⁶⁹ Indeed, because the

169. See *Weems v. Citigroup, Inc.*, 961 A.2d 349, 355 (Conn. 2008) (looking to extratextual evidence because text was “subject to two different reasonable readings”); *Heim v. Zoning Bd. of Appeals*, 960 A.2d 1018, 1023 n.7 (Conn. 2008) (rejecting, without explanation, view of plaintiffs that text was unambiguous); *Heim v. Zoning Bd. of Appeals*, 953 A.2d 877, 881 & n.7 (Conn. 2008) (disagreeing with plaintiffs’ claim that text was clear); *State v. Jenkins*, 954 A.2d 806, 812 & n.12 (Conn. 2008) (same); *State v. DeJesus*, 953 A.2d 45 (Conn. 2008); *Stiffler v. Cont’l Ins. Co.*, 950 A.2d 1270 (Conn. 2008); *Rivers v. City of New Britain*, 950 A.2d 1247, 1259 (Conn. 2008); *Location Realty, Inc. v. Colaccino*, 949 A.2d 1189, 1202 (Conn. 2008) (finding “strong[] support[]” in the plain text, but without “express[] and unambiguous[]” evidence, “turn[ing] to its legislative history for clarification”); *State v. Salamon*, 949 A.2d 1092, 1109-10 (Conn. 2008); *State v. Peters*, 946 A.2d 1231, 1235 (Conn. 2008); *Comm’r of Envtl. Prot. v. Mellon*, 945 A.2d 464 (Conn. 2008); *State v. Winer*, 945 A.2d 430, 436 (Conn. 2008); *State v. Cote*, 945 A.2d 412, 468 n.7 (Conn. 2008); *Curry v. Allan S. Goodman, Inc.*, 944 A.2d 925 (Conn. 2008); *State v. Marsh & McLennan Cos.*, 944 A.2d 315 (Conn. 2008); *Esposito v. Simkins Indus.*, 943 A.2d 456 (Conn. 2008); *Levesque v. Bristol Hosp., Inc.*, 943 A.2d 430 (Conn. 2008); *Harpaz v. Laidlaw Transit, Inc.*, 942 A.2d 396 (Conn. 2008); *Jim’s Auto Body v. Comm’r of Motor Vehicles*, 942 A.2d 305, 317 (Conn. 2008) (“We find both parties’ interpretations to be reasonable, thereby demonstrating the ambiguity of the term . . . and we are, therefore, permitted to consider extratextual sources in construing it.”); *Caruso v. City of Bridgeport*, 941 A.2d 266 (Conn. 2008); *Cambodian Buddhist Soc’y of Conn., Inc. v. Planning & Zoning Comm’n*, 941 A.2d 868 (Conn. 2008); *R.C. Equity Group, LLC*, 939 A.2d at 1128 n.13 (declining to apply the plain-meaning rule because “[n]either party contends . . . that § 1-2z limits our review”); *Am. Promotional Events, Inc. v. Blumenthal*, 937 A.2d 1184, 1191 n.16, 1193 (Conn. 2008) (citing *Courchesne* for guidance on when a court may consider the rule of lenity); see also *Salamon*, 949 A.2d at 1136 (Borden, J., concurring) (noting that the majority looked at extratextual materials after finding “a slim but adequate reed on which to base a finding of ambiguity”); *Fish v. Fish*, 939 A.2d 1040, 1052 (Conn. 2008) (not citing section 1-2z but, after finding the text “not defined,” looking to legislative history); *Evanuska v. City of Danbury*, 939 A.2d 1174, 1179 n.5 (Conn. 2008) (finding the text ambiguous and so holding that extratextual sources may be consulted, but noting there was no legislative history available).

For cases finding the text clear, and therefore that section 1-2z applies, see *Smith v. Andrews*, 959 A.2d 597 (Conn. 2008); *Goldstar Medical Services, Inc. v. Department of Social Services*, 955 A.2d 15 (Conn. 2008); *Earl B. v. Commissioner of Children & Families*, 952 A.2d 32 (Conn. 2008); *State ex rel. Gregan v. Koczur*, 947 A.2d 282 (Conn. 2008); *McWeeny v. City of Hartford*, 946 A.2d 862 (Conn. 2008); *Testa v. Geressy*, 943 A.2d 1075 (Conn. 2008); *Town of Groton v. Mardie Lane Homes, LLC*, 943 A.2d 449 (Conn. 2008); *Vincent v. City of New Haven*, 941 A.2d 932 (Conn. 2008); *State v. John F.M.*, 940 A.2d 755 (Conn. 2008); *Town of Bloomfield v. United Electric*, 939 A.2d 561 (Conn. 2008); and *Felician Sisters of St. Francis of Connecticut, Inc. v. Historic District Commissioner of Enfield*, 937 A.2d 39 (Conn. 2008). See also *First Nat’l Bank of Litchfield v. Miller*, 939 A.2d 572 (Conn. 2008) (declining to mention section 1-2z but using the same analysis).

But see *Jellum*, *supra* note 6, at 844-46. *Jellum* contrasts the story of section 1-2z with *Evans v. State*, 872 A.2d 539 (Del. 2005), in which the Delaware Supreme Court struck down a legislated rule. *Jellum* argues that, in contrast to Delaware, Connecticut meekly submitted to section 1-2z. But just because Oregon, Texas, and Connecticut’s legislated rules remain on the books, it does not mean their highest courts have submitted to them.

court rarely deems that section 1-2z applies, it has been able to avoid, for the full six years since its enactment, the question whether the statute unconstitutionally infringes on judicial authority, despite various hints in dicta that it might.¹⁷⁰ In this regard it is telling that, in the five years since section 1-2z was enacted, the Second Circuit has not cited it in a single diversity case.¹⁷¹ The federal district courts have cited it in only three.¹⁷² Presumably, this reflects the lack of influence and visibility that the Connecticut Supreme Court has given the legislated rule.

Connecticut's example underscores that resistance to legislated rules is not a textualist-only phenomenon; it is Connecticut's purposivist majority that eschews the plain meaning approach that section 1-2z attempts to legislate. The court's insistence on an exceedingly low ambiguity threshold—which allows it to ignore section 1-2z and instead apply *Courchesne*—has meant that the legislated rule has had almost no practical effect.

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170. See *Pasquariello v. Stop & Shop Cos.*, 916 A.2d 803, 809 n.8 (Conn. 2007) (noting but declining to reach the constitutional issue on the ground that the statutory text was ambiguous and so section 1-2z did not constrain the court from using the *Courchesne* methodology); *Teresa T. v. Ragaglia*, 865 A.2d 428, 434 n.6 (Conn. 2005) (holding that although “[b]oth parties filed supplemental briefs addressing whether [section 1-2z] violates the doctrine of separation of powers . . . [the court’s] conclusion that the language of [the statute in question] is ambiguous, however, makes it unnecessary . . . to determine the constitutionality” of section 1-2z). For concerns about the constitutionality of section 1-2z, see, for example, Justice Borden’s concurring opinion in *Kinsey v. Pacific Employers Insurance Co.*, 891 A.2d 959, 970-71 (Conn. 2006) (Borden, J., concurring), which states that “[i]t can be seriously argued that § 1-2z . . . governs a subject matter lying exclusively within the judicial power.”
171. The number of diversity cases from Connecticut alone during that period is difficult to determine, but the Second Circuit typically hears between 250 and 320 civil diversity cases each year. Approximately 300 to 350 cases of all kinds per year come to the Second Circuit from Connecticut, compared with approximately 3000 from New York. See [USCourts.gov, Judicial Business of the United States Courts, http://www.uscourts.gov/judbususc/judbus.html](http://www.uscourts.gov/judbususc/judbus.html) (tables B-3 and B-7 for the years 2003 to 2008) (last visited Dec. 12, 2009).
172. See *Baghdady v. Baghdady*, No. 3:05-cv-1494, 2008 WL 4630487, at *5 (D. Conn. Oct. 17, 2008); *Great N. Ins. Co. v. RLJ Plumbing & Heating, Inc.*, No. Civ.A.3:04CV899, 2006 WL 1526066, at *7 (D. Conn. May 25, 2006); *Mason Capital, Ltd. v. Kaman Corp.*, No. 3:05CV1470, 2005 WL 2850083, at *8 (D. Conn. Oct. 31, 2005).

D. Wisconsin and Michigan: Methodological Frameworks Despite Internal Divisions

Wisconsin and Michigan are among the most sharply divided state supreme courts on the issue of methodological choice. These divisions have resulted in self-conscious intracourt debates over the kinds of questions about statutory interpretation—questions such as the respective merits of textualism and purposivism, or the legal status of methodology—generally perceived to be mostly theoretical to federal court watchers. These debates are all the more interesting because, despite the state courts' internal divisions, many of their justices still exhibit the same motivation to impose interpretive clarity evident in the less divided courts. Thus, we see key developments in Wisconsin and Michigan that are very much like those we have seen in the other states studied, namely, methodological statements being given precedential weight and efforts to impose the same structured, text-centric approach—what I have called modified textualism—as the single controlling methodology.

In implementing these developments, the Wisconsin and Michigan cases are particularly instructive on three related points. First, these cases offer examples of different ways that methodological stare decisis might be operationalized. They illustrate both how courts may apply overarching interpretive frameworks across all statutory cases and also how what might be called “mini” methodological stare decisis could work: in addition to imposing overarching frameworks, these courts are making final decisions about the utility of particular interpretive rules that might be applied within those general frameworks (such as the utility of the “legislative acquiescence” presumption or the “rule against absurdities”). These mini-methodological statements, too, are given precedential weight.

Second, internal divisions on these courts more explicitly highlight the fact that a consensus on interpretive methodology cannot entirely eliminate normative disputes in statutory interpretation cases. Looking at Michigan in particular, where the justices have used both the installation of a new methodological regime as well as the results of judicial elections as opportunities to revisit, and overturn, statutory precedents, one wonders to what extent even an apparently neutral methodological regime can constrain courts with major internal divisions.

Third, these state cases are noteworthy examples of what Vicki Jackson has called, in the international constitutional law context, an “engagement” rather

than “convergence” approach to outside sources of interpretive theory.¹⁷³ Wisconsin and Michigan’s courts forthrightly seek out and engage federal interpretive theory as the foundation for their own arguments about state statutory interpretation. Yet, like the other state courts studied, the Wisconsin and Michigan courts do not merely “copy” the federal example; rather, they freely diverge from federal theory and practice in significant aspects, most notably in their emphatic adoption of a “textualism” that uses legislative history.¹⁷⁴

1. *Wisconsin: Federal Sources, Modified Textualism, Methodological Stare Decisis*

Wisconsin’s chief justice, Shirley Abrahamson, has argued that state courts can bring “stability” to law by developing their own, consistently applied jurisprudence that does not “change[] each time the United States Supreme Court changes its decisions.”¹⁷⁵ She has suggested that the state courts are better suited than the U.S. Supreme Court to develop new legal regimes given that “the Supreme Court of the United States is . . . most remote from the problems of everyday concern for the administration of justice . . . and is less able to make a determination of the practical appropriateness of a new rule.”¹⁷⁶ And she has urged that a consistent statutory interpretation methodology will have systemic coordination benefits for a state’s lower courts, legislators, and litigants.¹⁷⁷

In part because of the chief justice’s push for interpretive consistency, the Wisconsin Supreme Court, like the other state courts studied, has installed a controlling interpretive framework¹⁷⁸—although not the one that the chief

173. VICKI JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* 11-12, 39, 71 (2010).

174. The issues we have seen regarding legislated rules of construction do not come into play in Wisconsin and Michigan because Wisconsin’s chapter on “Construction of Statutes” and Michigan’s enacted “General Rules of Construction” do not legislate any interpretive methodology; they simply define uncontroversial items such as use of singular and plural. MICH. COMP. LAWS ANN. §§ 8.3-8.3u (West 2004 & Supp. 2007); WIS. STAT. ANN. §§ 990.01-.08 (West 2007 & Supp. 2009).

175. Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 966 (1982).

176. *Id.*

177. See *State ex rel. Kalal v. Circuit Court*, 681 N.W.2d 110, 127-28 (Wis. 2004) (Abrahamson, C.J., concurring) (“It is important . . . that litigants, lawyers, legislators, courts, and the people of Wisconsin know and understand our approach to legislative interpretation.”).

178. See *id.* at 123 (majority opinion) (“Wisconsin’s statutory interpretation case law has evolved in something of a combination fashion, generating some analytical confusion. . . .

justice herself, who prefers a more inclusive approach, might have chosen. Like Oregon's and Texas's regimes, the Wisconsin framework is a text-centric hierarchy that prohibits consultation of extrinsic sources absent a threshold finding of ambiguity.¹⁷⁹ And, as in the other states, Wisconsin's leading methodological case, *State ex rel. Kalal v. Circuit Court*, is saturated with references to U.S. Supreme Court textualist opinions and federally focused law review articles.¹⁸⁰ Justice Scalia's methodological approach is credited by the court as its inspiration.¹⁸¹

Wisconsin's textualist approach also is treated as precedential. *Kalal* is consistently cited by the state supreme court as the controlling interpretive approach.¹⁸² So too, apparently, in the state's lower courts, where *Kalal* has

Accordingly, we now conclude that the general framework for statutory interpretation in Wisconsin requires some clarification.”).

179. *Id.* at 124.

180. *Id.* at 122, 126 n.9, 128 n.3 (citing Justices Holmes, Frankfurter and Jackson, as well as various Supreme Court cases and law review articles discussing statutory interpretation in the federal courts by scholars including Justice Scalia and Professors Cass Sunstein, Daniel Farber, Philip Frickey, and Burt Neuborne). The justices who disfavor *Kalal*'s rule that ambiguity must be found before legislative history may be consulted have cited as many federal sources in support of their own approach as does the majority in support of textualism. Abrahamson based her *Kalal* concurrence on a prior opinion that relied almost exclusively on the opinions of Justices Scalia, Breyer, and Frankfurter, and federal Judges Richard Posner and Abner Mikva; and on federally focused academic writings by Professors T. Alexander Aleinikoff, Ronald Dworkin, William Eskridge, and Max Radin; and endorsed the Connecticut Supreme Court's rejection of the plain-meaning rule in *Courchesne*. See *id.* at 136 (Abrahamson, C.J., concurring) (relying on *In re Commitment of Byers*, 665 N.W.2d 729, 738-42 (Wis. 2003)). Two other Wisconsin Supreme Court justices also have urged a more elastic interpretation of the *Kalal* framework. See, e.g., *State v. Grunke*, 752 N.W.2d 769, 780-81 (Wis. 2008) (Bradley, J., concurring); *State v. Hayes*, 681 N.W.2d 203, 218 (Wis. 2004) (Bradley, J., concurring); *Kalal*, 681 N.W.2d at 137 (Bradley, J., concurring); *Byers*, 665 N.W.2d at 742-43 (Bablitch, J., concurring); *State v. Peters*, 665 N.W.2d 171, 180-81 (Wis. 2003) (Bablitch, J., concurring).

181. *Kalal*, 681 N.W.2d at 126.

182. See, e.g., *State v. Doss*, 754 N.W.2d 150, 158 (Wis. 2008) (unanimous opinion) (holding “questions of statutory interpretation . . . are reviewed de novo under the standards set forth by” *Kalal*); *Grunke*, 752 N.W.2d at 774-75; *Town of Madison v. County of Dane*, 752 N.W.2d 260 (Wis. 2008) (majority, concurring opinion of C.J. Abrahamson, and dissent all agreeing that the *Kalal* plain-meaning approach governs); *Teschendorf v. State Farm Ins. Cos.*, 717 N.W.2d 258, 263 (Wis. 2006) (“[T]his court adheres to the proposition that statutory interpretation begins with the language of the statute, and if the meaning there is plain, the inquiry ordinarily ends.” (citing *Kalal*)); *All Star Rent a Car, Inc. v. Wis. Dep’t of Transp.*, 716 N.W.2d 506 (Wis. 2006) (majority opinion, joined by Abrahamson, C.J., and Bradley, J.) (stating that “[w]hen we interpret a statute, we rely on the criteria set out in . . . *Kalal*”); *Kontowicz v. Am. Standard Ins. Co. of Wis.*, 714 N.W.2d 105, 121 (Wis. 2006) (referring to Wisconsin's rules of statutory construction as “the *Kalal* methodology”); James Cape &

been cited in several hundred published lower court cases and appellate briefs as the “standard of review” or the “framework” for statutory interpretation.¹⁸³

Indeed, despite the fact that several of the Wisconsin justices disfavor the more restrictive approach to legislative history that *Kalal* imposes, what may be

Sons Co. v. Mulcahy, 700 N.W.2d 243, 249 (Wis. 2005) (stating in unanimous opinion that “[t]he court clarified the appropriate analysis for statutory interpretation in [*Kalal*]”); *Hayes*, 681 N.W.2d at 226 n.1 (Sykes, J., concurring); *State v. Aufderhaar*, 700 N.W.2d 4, 10-11 (rejecting the argument that the court may apply the approach preferred by Justice Abrahamson over the *Kalal* majority approach), *aff’d*, 700 N.W.2d 4, 10-11 (Wis. 2005) (unanimous decision) (“For our interpretation of these statutes, we rely on the criteria of statutory interpretation set out in . . . *Kalal*.”). In 2008 alone, the state supreme court expressly referred to *Kalal* as providing the governing framework in seventeen cases. See *Doss*, 754 N.W.2d at 158; *Hefty v. Strickhouser*, 752 N.W.2d 820, 831 (Wis. 2008); *Sands v. Whitnall Sch. Dist.*, 754 N.W.2d 439, 445 (Wis. 2008); *Grunke*, 752 N.W.2d at 774; *Larry v. Harris*, 752 N.W.2d 279, 286 (Wis. 2008); *Town of Madison*, 752 N.W.2d at 266; *Watton v. Hegerty*, 751 N.W.2d 369, 377 (Wis. 2008); *State v. MacArthur*, 750 N.W.2d 910, 914 (Wis. 2008); *C. Coakley Relocation Sys., Inc. v. City of Milwaukee*, 750 N.W.2d 900, 905 (Wis. 2008); *In re Doe Petition*, 750 N.W.2d 873, 886 (Wis. 2008); *State v. Duchow*, 749 N.W.2d 913, 917 (Wis. 2008); *State v. Popenhagen*, 749 N.W.2d 611, 642 n.56 (Wis. 2008); *Richards v. Badger Mut. Ins. Co.*, 749 N.W.2d 581, 587 (Wis. 2008); *Estate of Matteson v. Matteson*, 749 N.W.2d 557, 567 (Wis. 2008); *State v. Quintana*, 748 N.W.2d 447, 452 (Wis. 2008); *Stuart v. Weisflog’s Showroom Gallery, Inc.*, 746 N.W.2d 762, 767 (Wis. 2008); *State v. Schaefer*, 746 N.W.2d 457, 472 (Wis. 2008). Reviewing all state supreme court cases in the Westlaw statutes key number since January 1, 2004, *Kalal* is cited for the court’s methodological approach in 103 of 145 cases; in the remaining forty-two cases, twenty-three concerned statutory interpretation (the others were agency deference or cases in which the question at issue was not one of statutory construction). Twelve of the twenty-three recited and applied the *Kalal* formula (without citing *Kalal* itself); six focused only on plain language (and so were consistent with *Kalal* but did not specifically recite the methodology with respect to extrinsic evidence). The remaining five, all of which were authored by *Kalal*’s main opponents, Justices Abrahamson and Bradley, began with text but moved to extrinsic sources without an express finding of ambiguity and without discussing whether they were proceeding under *Kalal*.

183. Conclusions about lower courts are more tentative, as there are many more cases in the lower courts and many are unreported. But searching the Westlaw database for lower court cases that cite *Kalal* reveals 232 Wisconsin appellate court opinions and more than 300 online state appellate court briefs that rely on *Kalal* for the methodological approach. Searching a different way, searching all Wisconsin appellate court opinions in the Westlaw “Statutes” key number between the date of the *Kalal* decision and July 1, 2009, *Kalal* is cited for the governing approach in 113 out of 195 reported cases. Of the remaining eighty-two cases, twenty-five are agency deference cases and so use Wisconsin’s special agency deference regime; eleven are not statutory interpretation cases (they are cases about matters such as standards of review or proper procedural enactment of statutes); and two do not discuss methodology. Of the remaining forty-four—the basic statutory interpretation cases—all but one applied the *Kalal* framework: specifically, in twenty cases the framework was recited; and in twenty-three the court applied plain-language analysis consistent with the *Kalal* framework without reciting it.

most significant is that most of the court's disputes are about *how* the *Kalal* framework should be applied, not *whether it controls*. For example, although Chief Justice Abrahamson, along with her colleague Justice Ann Walsh Bradley, occasionally write separately to urge a more comprehensive approach (that includes nontextual sources), they have essentially conceded that *Kalal* is the controlling approach and generally dispute only its case-specific application. They have argued, for example, that certain interpretive tools (such as previous versions of the statute) are not properly considered as part of a plain-meaning analysis and should instead be recognized as "step two" tools; or that the majority's conclusion of a lack of ambiguity was erroneous;¹⁸⁴ or that a particular dictionary definition does not offer the type of "ordinary" meaning *Kalal* requires the court to adopt;¹⁸⁵ or simply that the majority is misinterpreting certain words or history.¹⁸⁶ But they do not appear ever to argue that *Kalal* does not control and in many cases do, in fact, join lead opinions that explicitly state the court applies the "*Kalal* methodology" to all statutory cases.¹⁸⁷ Indeed, out of the eighteen cases decided between January 1, 2008 and March 20, 2009 in which the court expressly referenced *Kalal* as providing the framework for Wisconsin statutory interpretation, Justices Abrahamson and Bradley joined eight cases without comment;¹⁸⁸ concurred or

184. See, e.g., *Grunke*, 752 N.W.2d at 780 (Abrahamson, C.J., concurring); *id.* (Bradley, J., dissenting); *Lornson v. Siddiqui*, 735 N.W.2d 55, 76 (Wis. 2007) (Crooks, J., joined by Abrahamson, C.J., and Bradley, J., concurring in part and dissenting in part) ("Under *Kalal*, since the plain meaning of [the contested statutes] . . . are evident . . . [another statute] is not relevant here, nor is the supposed legislative history.").

185. *Noffke v. Bakke*, 760 N.W.2d 156, 172-73 (Wis. 2009) (Abrahamson, C.J., concurring) (arguing dictionary definitions of "sport" and "team" do not resolve whether cheerleading is a "sport involving amateur teams" within ordinary meaning as required by *Kalal* and instead looking to the enacted statement of statutory purpose).

186. See, e.g., *Warehouse II, LLC v. State Dep't of Transp.*, 715 N.W.2d 213, 226 (Wis. 2006) (Abrahamson, C.J., dissenting).

187. See, e.g., *Sands*, 754 N.W.2d at 445 (joining majority opinion using *Kalal* as governing framework); *Town of Madison*, 752 N.W.2d at 266 (same); *MacArthur*, 750 N.W.2d at 914 (same); *id.* at 924 (Bradley, J., concurring) (arguing that the plain text supported the majority's reading even though it was uncertain that the textual approach comported with actual legislative intent); *Duchow*, 749 N.W.2d at 917 (unanimously applying *Kalal* framework); *Quintana*, 748 N.W.2d at 452 (same); *State v. DeLain*, 695 N.W.2d 484, 488 (Wis. 2005) (stating unanimously that "plain meaning" rule is "required by" *Kalal*).

188. *Sands*, 754 N.W.2d at 439; *Doss*, 754 N.W.2d at 150; *MacArthur*, 750 N.W.2d at 910 (majority opinion, joined by Abrahamson, C.J., but not Bradley, J.); *C. Coakley Relocation Sys.*, 750 N.W.2d at 900; *Duchow*, 749 N.W.2d at 913; *Matteson*, 749 N.W.2d at 557; *Quintana*, 748 N.W.2d at 447; *Stuart*, 746 N.W.2d at 762 (Abrahamson, C.J., joining the majority on the statutory interpretation issue, and concurring in part on another point). In another case not included in the totals in the text, *Hefty v. Strickhouser*, 752 N.W.2d 820, 831 (Wis. 2008),

dissented in nine cases, not on the ground that the *Kalal* framework was applied but, rather, based on how it was applied;¹⁸⁹ and in only one case wrote to object generally to the lack of a more eclectic approach.¹⁹⁰ The willingness of these Wisconsin jurists to acknowledge the presence of and work within an interpretive regime favored by a majority of their court (even if not by those jurists themselves) distinguishes them significantly from what we typically see at the U.S. Supreme Court.

2. Michigan's Textualism Revolution

In Michigan, the past decade has seen a revolution on the subject of interpretive methodology. In 1998 and 1999, Governor John Engler nominated

Kalal was cited for the proposition that interpretation begins with the plain text, but not for an overarching framework; the court applied a strictly literal interpretation, and Abrahamson and Bradley joined.

189. *Noffke*, 760 N.W.2d at 172-73 (Abrahamson, C.J., concurring) (disagreeing with majority's view that the dictionary definitions accurately set forth "ordinary meaning" of the words "team" and "sport"); *County of Dane v. Labor & Indus. Review*, 759 N.W.2d 571, 584 (Wis. 2009) (Abrahamson, C.J., concurring) (disagreeing with the majority's view that prior enacted versions of statutes are part of *Kalal* textual analysis); *Wis. Dep't of Revenue v. Menasha Corp.*, 754 N.W.2d 95, 131 (Wis. 2008) (Abrahamson, C.J., dissenting) (disagreeing with the majority's interpretation of text but not the majority's citation to *Kalal* for its support for a plain-meaning interpretation of an administrative rule); *Grunke*, 752 N.W.2d at 780 (Abrahamson, C.J., concurring) (disagreeing with the majority's view that the text was clear); *id.* (Bradley, J., dissenting) (same); *Larry v. Harris*, 752 N.W.2d 279, 292 (Wis. 2008) (Abrahamson, C.J., concurring) (writing separately to make a point about retroactive notice, not reliance on *Kalal*); *Town of Madison*, 752 N.W.2d at 273 (Abrahamson, C.J., concurring) (arguing that "[t]he majority opinion applies [the statute] according to its literal text, a well-accepted approach to statutory interpretation," but urging the legislature to amend the statute); *MacArthur*, 750 N.W.2d at 924 (Bradley, J., concurring) (arguing that the text was clear but expressing doubt as to whether the text was consistent with legislative intent); *Richards v. Badger Mut. Ins. Co.*, 749 N.W.2d 581, 597 (Wis. 2008) (Abrahamson, C.J., dissenting) (arguing that the text was clear); *State v. Schafer*, 746 N.W.2d 457, 481 (Wis. 2008) (Abrahamson, C.J., concurring) (chiding the majority for moving beyond textual analysis to theories about criminal law).
190. *See Watton v. Hegerty*, 751 N.W.2d 369, 384 (Wis. 2008) (Abrahamson, C.J., concurring) (urging reliance on more interpretive tools "without deceptively characterizing its analysis as a 'plain language' analysis"). Even in that case, Abrahamson does not advocate overruling *Kalal*, and it is unclear whether her argument for a more eclectic approach was based on the fact she believed the specific text was unclear or was intended to be an argument for a new general approach. Earlier, in 2006, Abrahamson had more forthrightly urged the court to abandon the ambiguity threshold. *Teschendorf v. State Farm Ins. Cos.*, 717 N.W.2d 258, 276 (Wis. 2006) (Abrahamson, C.J., concurring) ("A better approach to statutory interpretation would be to drop the ambiguous/unambiguous/literal/plain meaning pretense and instead take a comprehensive view . . ."). Abrahamson has not argued for such a change since.

four justices to the seven-justice state supreme court,¹⁹¹ each of whom is a self-described textualist and three of whom have since served as chief justice. In a 2004 speech entitled *Textualism in Action*, one of those newly appointed textualists, Justice Maura Corrigan, argued that courts should adopt textualism to “eliminate unpredictability and confusion” from interpretive methodology and install “a disciplined interpretive approach.”¹⁹² Another of the textualists is Justice Stephen Markman, who, as head of the Reagan Administration Justice Department’s Office of Legal Policy, was widely credited as one of the key implementers of the Administration’s vision of a new generation of textualist judges.¹⁹³ A *Wall Street Journal* guest columnist praised Michigan’s new textualist majority as “an unusually thoughtful, sophisticated and articulate group.”¹⁹⁴ The newly appointed textualist jurists took office with a mission to change the way the state court approached statutory interpretation.¹⁹⁵ It may therefore come as no surprise that, according to several reports, the first five years of the Michigan textualist majority saw more overrulings of precedential statutory opinions than any period in the state’s history.¹⁹⁶

As in the case of the other states’ justices, the Michigan justices see no difference between the respective roles of federal and state judges in statutory interpretation and routinely argue aggressively that the reasons for supporting textualism in the federal courts are equally applicable in the state court context.¹⁹⁷ A 1999 Michigan Supreme Court opinion banning the “legislative

191. The governor appoints justices to fill vacancies with unexpired terms, but the justices must run in nonpartisan elections for their full terms. BOOK OF THE STATES, *supra* note 129, at 286.

192. Maura D. Corrigan, *Textualism in Action: Judicial Restraint on the Michigan Supreme Court*, 8 TEX. REV. L. & POL. 261, 263-64 (2004).

193. See, e.g., CORNELL W. CLAYTON, THE POLITICS OF JUSTICE 151 (1992); T.R. Goldman, *The Flower of the Reagan Revolution*, LAW.COM, Aug. 3, 2005, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005544676>.

194. Abigail Thernstrom, Op-Ed., *Trial Lawyers Target Three Michigan Judges Up for Election*, WALL ST. J., May 8, 2000, at A43.

195. See Corrigan, *supra* note 192, at 264; Clifford W. Taylor, *A Government of Laws, and Not of Men*, 22 T.M. COOLEY L. REV. 199, 208 (2005); sources cited *infra* note 222.

196. See Nelson P. Miller, “Judicial Politics”: *Restoring the Michigan Supreme Court*, MICH. B.J., Jan. 2006, at 38, 38; Todd C. Berg, *Marilyn Kelly Named New Michigan Supreme Court Chief Justice*, MICH. LAW. WKLY., Jan. 12, 2009 (noting the court overruled sixty-one precedents between 2000 and 2005, compared with eighteen in the prior five-year period); see also *People v. Hawkins*, 668 N.W.2d 602, 618, 622 (Mich. 2003) (Cavanagh, J., dissenting) (chastising the court for disregarding “the strong presumption that a high court’s construction of a statute should be given a heightened stare decisis effect”).

197. See Corrigan, *supra* note 192, at 263; Taylor, *supra* note 195, at 201.

acquiescence” interpretive canon provides an example.¹⁹⁸ Even though that case concerned the interpretation of a state statute, the Michigan textualists’ opinion was based almost entirely on generalized theories about government, and specific evidence about the *federal* government. In particular, the opinion relied on scholarly analyses of legislative acquiescence in the *U.S. Congress*¹⁹⁹ to justify abandoning it in Michigan.²⁰⁰ And the court has insisted that its methodological holding (banning the legislative acquiescence rule) was “the holding of this Court” and “precedent – for future opinions.”²⁰¹

But Michigan’s textualists, although drawing on federal examples and Justice Scalia’s arguments, diverge significantly from federal textualist theory. Since the Michigan textualists’ appointments, the state supreme court has rejected not only the legislative acquiescence rule,²⁰² which most federal textualists also reject, but the rule against absurdities²⁰³ and the *Chevron* doctrine,²⁰⁴ both of which have been associated with Justice Scalia’s textualism. As in the other states, the Michigan textualists diverge most dramatically from their federal counterparts by permitting consideration of legislative history once ambiguity is found and holding that substantive canons (for example, the rule of lenity) may be applied only as a “last resort.”²⁰⁵

198. The legislative acquiescence rule is generally used by courts to impute legislative assent to a court’s interpretation of a statute from the failure of legislative action aimed at overriding the decision.

199. *Donajkowski v. Alpena Power Co.*, 596 N.W.2d 574, 582 (Mich. 1999).

200. *Id.* at 582–83. Not to be outdone in comparative analysis, the purposivists, in defending the legislative acquiescence rule, also invoked federal cases and data regarding U.S. congressional responses to the rule. See *Hawkins*, 668 N.W.2d at 619 (Cavanagh, J., dissenting).

201. *Paige v. City of Sterling Heights*, 720 N.W.2d 219, 232 (Mich. 2006) (characterizing dissenter’s argument in favor of reinstating legislative acquiescence rule as “ignor[ing] the holding of this Court in *Donajkowski*” and “reveal[ing] how little fidelity he has to precedent”); *People v. Gardner*, 753 N.W.2d 78, 89 (Mich. 2008) (arguing that the acquiescence rule was “squarely rejected by this Court” in *Donajowski*).

202. See, e.g., *Dimmitt & Owens Fin., Inc. v. Deloitte & Touche (ISC), L.L.C.*, 752 N.W.2d 37 (Mich. 2008); *Lash v. City of Traverse City*, 735 N.W.2d 628, 633 (Mich. 2007); *Renny v. Mich. Dep’t of Transp.*, 734 N.W.2d 518, 521 (Mich. 2007); *Paige*, 720 N.W.2d at 231; *Donajkowski*, 596 N.W.2d at 577.

203. *People v. McIntire*, 599 N.W.2d 102, 107 n.8 (Mich. 1999) (finding that the rule against absurdities cannot be applied when the text is clear); see also Corrigan, *supra* note 192, at 264–65 (summarizing decisions in which the court “rejected” absurd results and legislative acquiescence rules).

204. See *In re Complaint of Rovas Against SBC Mich.*, 754 N.W.2d 259, 265–72 (Mich. 2008).

205. See, e.g., *Mich. Fed’n of Teachers v. Univ. of Mich.*, 753 N.W.2d 28, 33 (Mich. 2008) (“If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the

In rejecting Justice Scalia's arguments against legislative history, the Michigan Supreme Court's primary justification has been that, if the text is ambiguous, they still may find probative evidence of objective legislative intent elsewhere, namely, through "high quality" legislative history (from which they exclude staff-made history such as legislative analyses).²⁰⁶ It is only when these two steps fail that the Michigan court holds that its goal of discerning intent is "fruitless" and moves instead to the substantive canons.²⁰⁷ This is a significant difference from mainstream textualism, which generally relies on canons as the second-best solution to problems of textual ambiguity.

In 2008, the Michigan court also expressly rejected importing into state practice the U.S. Supreme Court's *Chevron* approach to judicial review of administrative agency statutory interpretations, and instead articulated its own (less deferential) *de novo* approach.²⁰⁸ One of the Michigan court's justifications reads as if it was intended to convey a message to the U.S. Supreme Court about the lack of clarity in the Court's *Chevron* jurisprudence: "While the *Chevron* inquiries are comparatively simple to describe, they have proven very difficult to apply. . . . The vagaries of *Chevron* jurisprudence do not provide a clear road map for courts in this state to apply. . . ." ²⁰⁹ The Michigan

legislative intent and judicial construction is not permitted." (quoting *Herald Co. v. Bay City*, 614 N.W. 2d 873 (Mich. 2000)); *Ernsting v. Ave Maria Coll.*, 742 N.W.2d 112, 112 (Mich. 2007) (denying leave to appeal but publishing an order to chide the appellate court for using the canon); *Mayor of Lansing v. Mich. Pub. Serv. Comm'n*, 680 N.W.2d 840, 846 (Mich. 2004) ("A finding of ambiguity, of course, enables an appellate judge to bypass traditional approaches to interpretation . . . and engage in a . . . reading of 'legislative history.'"); *In re Certified Question*, 659 N.W.2d 597, 600 n.5 (Mich. 2003) ("This Court has recognized the benefit of using legislative history when a statute is ambiguous and construction of an ambiguous provision becomes necessary." (internal citations omitted)); *Koontz v. Ameritech Servs., Inc.*, 645 N.W.2d 34, 42 (Mich. 2002) (citing Justice Scalia's book and calling canons "dice-loading" rules); *Crowe v. City of Detroit*, 631 N.W.2d 293, 300 (Mich. 2001) ("[I]f the statutory language were ambiguous, our first duty is to attempt to discern the legislative intent underlying the ambiguous words. Only if that inquiry is fruitless, or produces no clear demonstration of intent, does a court resort to the remedial preferential rule"); *Corrigan*, *supra* note 192, at 265 (summarizing decisions in which the court held that "resorting to legislative history is never proper where a statutory text is unambiguous" and that "so-called preferential rules of interpretation should only be used as a last resort"); Maura D. Corrigan & J. Michael Thomas, "Dice Loading" Rules of Statutory Interpretation, 59 N.Y.U. ANN. SURV. AM. L. 231, 233 (2003) (detailing problems with substantive canons and noting that Michigan has "moved away" from them).

206. See *Crowe*, 631 N.W.2d at 300.

207. See *Koontz*, 645 N.W.2d at 42.

208. See *Rovas*, 754 N.W.2d at 265, 271-72. The *Chevron* doctrine had previously been "approvingly cited" by the Michigan Supreme Court in some cases. *Id.* at 271 n.63.

209. *Id.* at 271-72.

court emphasized that *Chevron*-type arguments in the state jurisprudence had “added to confusion in this area of the law,” and that the purpose of its opinion was to rectify the court’s prior “failure consistently to use the same articulation of the proper standard.”²¹⁰ The lower state courts immediately began citing the opinion as the new “proper standard” of review in agency cases.²¹¹

The Michigan court’s 1999 decision to ban the rule against absurdities, because it is “nothing but an invitation to judicial lawmaking,” likewise marked a divergence from the approach of federal textualist judges.²¹² And like the court’s other methodological statements, it too, has been treated as precedential.²¹³ Indeed, even as a four-justice majority recently came to the view that the rule should be reinstated, the case in which they took that view argues for the overruling of a precedent, not merely a change in nonbinding judicial philosophy.²¹⁴

Michigan’s controlling methodological framework, however, has been only partially stabilizing. It is true that those state justices who dislike the majority’s approach concede that “[h]oldings of the Michigan Supreme Court require lower Michigan courts to generally adhere to a rigidly literal application of the language of Michigan statutes.”²¹⁵ The state supreme court has even vacated and remanded lower court cases – without reviewing their substance – solely on

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210. *Id.* at 267, 269. The other primary justification was that *Chevron*-type deference worked a delegation of judicial authority that was impermissible under the state constitution. *Id.* at 270, 272. The state rule now is that courts should not “defer” to agency constructions but that such constructions receive “the most respectful consideration and ought not to be overruled without cogent reasons.” *Id.* at 276 (citation and emphasis omitted).
211. *Hanner v. City of Dearborn Heights*, No. 277957, 2008 WL 4274427, at *2 (Mich. Ct. App. Sept. 18, 2008); *see, e.g.*, *Priority Health v. Comm’r of Office of Fin. & Ins. Servs.*, 770 N.W.2d 457, 459 (Mich. Ct. App. 2009); *Mich. Envtl. Council v. Mich. Pub. Serv. Comm’n*, 2008 WL 4958719, at *3 (Mich. Ct. App. Nov. 20, 2008); *In re Application of Consumers Energy Co.*, 761 N.W.2d 346, 349, 351 (Mich. Ct. App. 2008); *Buckley v. Prof’l Plaza Clinic Corp.*, 761 N.W.2d 284, 289 (Mich. Ct. App. 2008); *Alvan Motor Freight, Inc. v. Dep’t of Treasury*, 761 N.W.2d 269, 272, 277 (Mich. Ct. App. 2008).
212. *People v. McIntire*, 599 N.W.2d 102, 107-08 & n.8 (Mich. 1999) (quoting SCALIA, *supra* note 31, at 21).
213. *See, e.g.*, *Township of Casco v. Sec’y of State*, 701 N.W.2d 102, 121-22 (Mich. 2005) (Young, J., concurring in part and dissenting in part); *Piccalo v. Nix*, 643 N.W.2d 233, 233 (Mich. 2002) (per curiam) (vacating and remanding the lower court opinion expressly in light of *McIntire*’s rejection of the absurd results rule).
214. *Cameron v. Auto Club Ins. Ass’n*, 718 N.W.2d 784 (Mich. 2006); *see also* *Detroit Int’l Bridge Co. v. Commodities Exp. Co.*, 760 N.W.2d 565, 573 (Mich. Ct. App. 2008) (describing *Cameron* as “binding precedent”).
215. *Cameron*, 718 N.W.2d at 822 n.56 (Kelly, J., dissenting) (emphasis added).

the ground that the wrong *methodology* was applied by the lower court.²¹⁶ But the bickering over methodological choice continues among the justices themselves. Many of the Michigan highest court statutory interpretation cases still contain an explicitly federal-theory-inspired purposivism versus textualism debate.²¹⁷ In one remarkable case, a justice authored a decision for a unanimous court using the controlling textualism-based hierarchy, and then issued a concurrence to her own majority opinion using instead a purposivist analysis.²¹⁸

Indeed, the prospect of long-term legisprudential stability seems weaker in Michigan than in some of the other state courts, and this is likely because methodology there seems more transparently normative, more intertwined with politics. One manifestation of this is visible in the way in which *stare decisis* in Michigan has been operationalized. Unlike in Oregon and Connecticut (where the courts did not disturb pre-existing case law in adopting new interpretive frameworks²¹⁹), some justices in Michigan appear to view change of methodology as an opportunity to change underlying substantive precedent. Since commanding the majority in 1999, the Michigan textualists overruled a significant number of the court's prior statutory cases simply because they were based on a purposivist, rather than textualist, approach.²²⁰

The Michigan purposivists may be headed down the same road. The court's methodological wars have carried over into its political wars. In

216. See, e.g., *Dan De Farms, Inc. v. Sterling Farm Supply Inc.*, 633 N.W.2d 824, 824 (Mich. 2001) (per curiam) (vacating and remanding in lieu of granting leave to appeal) (“Without finding an ambiguity in the statutory language, the Court of Appeals considered extra-textual ‘evidence’ of intent, including legislative history. On remand . . . [t]he Court of Appeals must begin by examining the language of [the statute]. If it is unambiguous, then the Court is to apply the statute as written. The Court may engage in further judicial construction only if it determines that the statutory language is ambiguous.”).

217. See *People v. Gardner*, 753 N.W.2d 78, 95 (Mich. 2008) (Cavanagh, J., dissenting); *Nat'l Pride at Work, Inc. v. Governor*, 748 N.W.2d 524, 548 n.34 (Mich. 2008) (Kelly, J., dissenting); *Cameron*, 718 N.W.2d at 821-22.

218. *Haynes v. Neshewat*, 729 N.W.2d 488 (Mich. 2007); *id.* at 495 (Kelly, J., concurring).

219. See *Hummel v. Marten Transp.*, 923 A.2d 657, 671 (Conn. 2007); *Mastriano v. Bd. of Parole*, 159 P.3d 1151, 1154-55 (Or. 2007).

220. See, e.g., *Gardner*, 753 N.W.2d at 78 (overruling holding that counting prior felonies for habitual offender statutes must arise from separate criminal incidents because prior cases relied on legislative history rather than plain text); *People v. Hawkins*, 668 N.W.2d 602, 609, 615 (Mich. 2003) (overruling prior construction of state exclusionary rule because prior opinions did not apply a literal approach).

November 2008, what had become a very hostile public debate²²¹ peaked when textualist Chief Justice Clifford Taylor suffered a surprise reelection defeat by a purposivist judge who actively campaigned against, among other things, his textualist interpretive methodology.²²² Purposivists now control a majority of votes on the court, and the question is how Michigan's controlling interpretive regime will fare going forward.

The first pertinent cases decided under the new majority offer conflicting hints.²²³ Despite the Michigan purposivists' earlier emphatic assertions that "super strong" stare decisis applies to substantive statutory interpretation

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221. Over the past several years, the methodological debate had grown increasingly politicized, and the justices began taking their views to the voting public. See, e.g., Corrigan, *supra* note 192; Corrigan & Thomas, *supra* note 205; Marilyn Kelly & John Postulka, *The Fatal Weakness in the Michigan Supreme Court Majority's Textualist Approach to Statutory Construction*, 10 T.M. COOLEY J. PRAC. & CLINICAL L. 287 (2008); Taylor, *supra* note 195; Clifford Taylor, *Who Is in Charge Here? Some Thoughts on Judicial Review*, 77 MICH. B.J. 32 (1998); Clifford W. Taylor, *Who's in Charge: A Traditional View of Separation of Powers*, 1997 DET. C.L. REV. 769; see also *Paige v. City of Sterling Heights*, 720 N.W.2d 219, 230 (Mich. 2006) (arguing a nontextualist "find[s] a way, no matter how tendentious . . . to declare that which he wishes to be ambiguous . . ."); Memorandum from Elizabeth A. Weaver, Justice, Michigan Supreme Court, Dissent to Election of Chief Justice Clifford Taylor as Chief Justice (Jan. 5, 2007) (publicly objecting to Taylor's reelection as chief justice in memorandum styled as a dissent).
222. See Todd C. Berg, *Michigan Supreme Court Chief Justice Taylor Defends His Court's Rulings*, MICH. LAW. WKLY., Oct. 27, 2008 (quoting Taylor, who said that "[w]e're remaking the legal culture . . . saying what the law is and not what it ought to be"); Editorial, *Taylor for Another Term on the Michigan Supreme Court*, BAY CITY TIMES (Mich.), Oct. 14, 2008, at A7; David Eggert, *Judge Challenges Chief Justice for High Court*, GRAND RAPIDS PRESS, Oct. 19, 2008, at A24 (describing the challenger's campaign-trail criticism of Taylor's interpretation of the term "any person" in an environmental law case); *GOP Can't Be Supremely Sure About Court Seat*, FLINT J. (Mich.), Nov. 2, 2008, at A11 ("Critics say the court's strict interpretation of Michigan statutes has closed the courthouse doors to those seeking justice and the lawyers who represent them."); Zachary Gorchow, *State Supreme Court: Chief Justice's Challenger Pulls Off Upset*, DETROIT FREE PRESS, Nov. 5, 2008, at 7 ("[B]usiness interests and Republicans said Taylor and his fellow conservatives have taken a more literal interpretation of the law that has created a better climate to do business in Michigan."); Pat Shellenbarger, *Stakes Spending High in Michigan Supreme Court Race Between Taylor, Hathaway*, GRAND RAPIDS PRESS (Mich.), Oct. 31, 2008, at A1, available at http://blog.mlive.com/grpress/news_impact/2008/10/stakes_spending_high_in_michig/print.html.
223. The ten-year period studied as part of this project ended July 1, 2009, and by that date no statutory cases had been decided by the new purposivist majority altering the framework. My analysis of the two more recent cases is therefore based only on readings of those two cases and not on a broader reading of all statutory cases decided since July 1, 2009.

precedents,²²⁴ a few months after taking control, the new purposivist majority chose to rehear—and overrule, without additional briefing—a controversial statutory interpretation case originally decided two days before the composition of the court changed.²²⁵ The new opinion after rehearing essentially reproduced the former dissent (reversing the outcome but notably still using the tiered textual interpretive regime).²²⁶

Ten days later, the newly composed court decided another relevant case, *Petersen v. Magna Corp.*²²⁷ In that case, the majority opinion (authored by the new, purposivist chief justice) argued for a new definition of statutory ambiguity. The majority emphasized the importance of that definition: “a finding of ambiguity has important interpretive ramifications” in Michigan, because it allows for consideration of nontextual evidence.²²⁸ In other words, the definition of ambiguity was critical because even the new purposivist majority did not dispute that the tiered textual interpretive regime still controlled.²²⁹ Indeed, in a section of the opinion entitled “Stare Decisis,” which was joined only by one other justice, the chief justice took the position that the “tools of statutory interpretation, such as the definition of ‘ambiguity,’ are not ‘binding’ in the same sense as is the holding . . . and stare decisis does not

224. See *People v. Gardner*, 753 N.W.2d 78, 100 n.12 (Mich. 2008) (Cavanagh, J., dissenting) (“Principles of *stare decisis* . . . demand respect for precedent whether judicial methods of interpretation change or stay the same.” (quoting *CBOCS W., Inc. v. Humphries*, 128 S. Ct. 1951, 1961 (2008))). Stare decisis for statutory precedents is not the same as stare decisis for interpretive methodology. The former concerns outcomes of cases, the latter the tools used to reach them. The U.S. Supreme Court generally gives extra precedential weight to substantive statutory precedents (which are different from methodological statements). See *supra* note 54.

225. *U.S. Fidelity Ins. & Guar. Co. v. Mich. Catastrophic Claims Ass’n*, Nos. 133466, 133468, 2009 WL 2184822 (Mich. July 21, 2009), *rev’d on reh’g*, 759 N.W.2d 154 (Mich. Dec. 29, 2008).

226. See *id.* at *10 (Young, J., dissenting) (“The facts have not changed. . . . The parties’ arguments have not changed. And the rationale advanced in the opinions of this Court has not changed. Yet, within a matter of months, a decision of this Court, thoughtfully briefed, argued, and considered by seven justices, is no longer worth the paper it was written on. . . . The reason is obvious: On January 1, 2009, the composition of this Court changed.”). Also of note is the fact that, even when styled as a dissent prior to the court-composition change, the opinion adhered faithfully to the text-based interpretive hierarchy that governed (and in fact used only textual analysis). When the opinion was reproduced after the election as a majority opinion, it retained essentially the same textual analysis, although it added additional policy arguments supporting the textual analysis in conclusion. *Id.* at *9.

227. 773 N.W.2d 564 (Mich. 2009).

228. *Id.* at 567.

229. *Id.* at 579–80.

apply to them.”²³⁰ She acknowledged, however, that her view had not carried the day, noting “this Court, as well as the Court of Appeals has treated [the former majority’s] definition of ‘ambiguity’ like any other binding precedent” and for that reason, she decided to “apply a stare decisis analysis” to her argument for overruling the prior definition of ambiguity.²³¹ Thus, despite the divisions on the court, and the change of control, it is notable that the majority of the court still employs methodological stare decisis and appears to support having a controlling interpretive framework.

III. THE DRIVE TO INTERPRETIVE CLARITY

Can one judge bind another’s judge’s choice of methodology? Can the legislature? Is narrowing courts’ interpretive options in this manner sensible? The state cases studied provide a real-world context for these questions—questions previously raised in academic proposals,²³² but widely assumed untestable in the real world (with the possible exception of legislated rules²³³). And contrary to views that uncertainty or irregularity in statutory interpretation is not troublesome or that concerns about it are overstated, these state actors appear to be responding to what they perceive as a real *problem*.

This Part discusses their response, the surprising gravitation by both state courts and state legislatures toward *ex ante* articulated rules for statutory questions. Specifically, this Part considers the implications of the three different manifestations of this drive to interpretive clarity seen in the states studied—court-created interpretive frameworks, methodological stare decisis, and legislative efforts to control the rules of interpretation. Federal statutory interpretation, both in practice and in theory, also might draw on these developments. Instead, the near-exclusive focus on the most difficult U.S. Supreme Court cases has created a distorted picture of the possibilities and so impoverished that conversation.

Indeed, these state developments highlight what, for all the methodological talk, has been a largely overlooked but actually quite central theoretical question for the field, namely, whether statutory interpretation methodology is law, individual judicial convention, or something in between. And this

230. *Id.* at 570 & n.36 (citing *Fluor Enters. Inc. v. Dep’t of Treasury*, 730 N.W.2d 722, 732 n.4 (2007) (Kelly, J., concurring)).

231. *Id.*

232. See *supra* Section I.C.

233. Jellum, *supra* note 6; Rosenkranz, *supra* note 2, at 2088 n.10; and Scott, *supra* note 10, all recognize, and to a varied degree engage with, the existence of legislated rules in the states.

question—how similar statutory interpretation methodology is, or should be, to other legal methodologies (for example, the decision-making frameworks that govern areas such as contract and will interpretation, or First Amendment analysis)—may itself lead to richer theoretical terrain. Thinking about it points to a path away from what has become an unproductive debate about the “single best” methodology toward, instead, fresh questions about how methodology is operationalized on the ground and what, if any, constraining effect it actually has.

The state jurisprudence also pushes the boundaries of conventional thought about textualism, embracing textualist theory while at the same time advancing a variation on it that seems to pave the way for a consensus approach long elusive in the federal context. This Part brackets the implications of this emerging “modified textualism”; Part IV offers a theoretical analysis of it and considers the implications of forging such a middle way.

Finally, it should be emphasized that conclusions about this drive to clarity in the studied states cannot neatly be tied up. As we have seen, things get *messy* when courts and legislatures get in this game together. And so the questions—how to impose interpretive frameworks, who gets to impose them, whether they should be imposed in the first place—are very much *live* questions. Far from being over, the most interesting aspect of the methodological debate seems only to have just begun.

A. Court-Led Efforts To Impose Controlling Interpretive Frameworks

Looking first to the efforts of just the studied courts (and not their legislatures), the ability of all five state courts to reach a relatively stable methodological consensus—from Oregon to even Michigan, where the text-based tiered framework has thus far survived electoral changes—is significant. These developments upend the conventional wisdom that courts (or at least majority-forming coalitions on courts) will never be able to agree on a single interpretive approach.²³⁴ And, in some ways, these developments also upset expectations about state courts themselves.

A number of state-specific institutional factors might lead one to expect that state courts would adopt more expansive interpretive approaches than

234. See VERMEULE, *supra* note 66, at 125; Eskridge & Frickey, *supra* note 2; cf. Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1613 (2008) (arguing that courts could never systemically “standardize interpretation of federal law . . . but rather must address statutory ambiguity piecemeal”). In fact, the Oregon and Connecticut Supreme Courts announced their new regimes in single opinions, *sua sponte*. See *infra* note 247 and accompanying text.

federal courts. The state court common law tradition,²³⁵ the fluid interbranch paradigm in state government,²³⁶ the democratic mandate of elected state court judges,²³⁷ and the political and administrative work that are integral parts of the state judge portfolio²³⁸ have led many scholars to assume that state judges have diminished countermajoritarian concerns and increased license for a more policy-oriented approach.²³⁹

So, too, the risks of judicial interpretive activism are generally thought to be lower in the states than on the federal side because state legislatures are assumed to better monitor state courts than Congress monitors the federal judiciary.²⁴⁰ State legislatures are closer to the judicial branch than is Congress, and typically they enact statutes much more quickly. Because only one authoritative court system exists in each state, state legislatures thus can easily monitor judicial opinions and quickly overrule those they deem erroneous,²⁴¹ removing some of the concerns attendant to overreaching judicial decisions.

Yet, despite these institutional factors, we see attempts to constrain judicial discretion in the states studied. Nor is this observation limited to text-based

235. See Frickey, *supra* note 25, at 1994-95.

236. See Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1887 (2001); G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169 (1992).

237. Twenty-two states elect their judges; thirteen (including D.C.) use appointment (by either the governor, the legislature, or a nominating commission); the remaining sixteen use a combination of initial appointment and retention elections. Terms range from life (which is rare) to initial terms of office as short as one year prior to a retention election. See BOOK OF THE STATES, *supra* note 129, at 286-87; Am. Judicature Soc'y, *Judicial Selection Methods in the States*, http://www.ajs.org/selection/sel_state-select-map.asp (last visited Feb. 8, 2010). Specifically with respect to the states studied, Connecticut's justices are appointed; Texas's are elected in partisan elections; and Oregon's, Michigan's, and Wisconsin's are elected in non-partisan elections. BOOK OF THE STATES, *supra* note 129, at 286-87.

238. Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1169 (1999) (discussing the policy work of even unelected state judges as an "essential aspect of the judicial role"); Long, *supra* note 10, at 500-03; see Christine M. Durham, *The Judicial Branch in State Government: Parables of Law, Politics, and Power*, 76 N.Y.U. L. REV. 1601, 1622 (2001) ("State courts are, willy-nilly, players in an arena in which policy, power, politics, and law can be difficult or impossible to distinguish . . .").

239. See Hans A. Linde, *Observations of a State Court Judge*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 117, 117-18 (Robert A. Katzmann ed., 1988); Long, *supra* note 10, at 502-03.

240. See, e.g., Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislatures and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045 (1991) (summarizing the mechanisms for court-legislative interaction in various states).

241. Kaye, *supra* note 4, at 23 (noting that "the state legislative/judicial relationship often takes the form of an open dialogue"); Long, *supra* note 10, at 501-02.

state court regimes. Even Connecticut's purposivist supreme court sought a single controlling interpretive framework for all cases.²⁴²

And this desire for clearly articulated interpretive frameworks may extend beyond the realm of statutory interpretation. *PGE* itself was just one part of the Oregon Supreme Court's larger project, in the 1990s, to set forth clear step-by-step rules to guide lower courts and litigants in interpretation for many areas of law, including constitutional, initiative, and contractual interpretation.²⁴³ Wisconsin, too, has a controlling tiered approach for constitutional interpretation.²⁴⁴ Other scholars also have observed that more states likewise appear to be moving toward formalistic interpretive regimes for state constitutional questions,²⁴⁵ and new work being done on similar questions concerning contractual interpretation across the fifty states points to the same conclusion.²⁴⁶ These developments are noteworthy not only because of how they diverge from the U.S. Supreme Court's approach to statutory interpretation, but also because they indicate that state courts may be linking the question of interpretive determinacy across different substantive areas in ways that have not yet penetrated the federal court/scholarship consciousness.

242. That Connecticut's justices prefer a purposivist approach while the four other states prefer a textualist approach highlights that institutional differences exist across the states themselves, too. One possible explanation for the difference might be that, of the five states, only Connecticut's justices are appointed. But detailed explanations of interstate differences are beyond the scope of this project, and must be left to other experts and future work. See, e.g., Nat'l Conf. of State Legislatures, Full- and Part-Time Legislatures, <http://www.ncsl.org/?tabid=16701> (last visited Feb. 8, 2010) (stating that Michigan and Wisconsin have full-time legislatures and are "more similar to Congress," whereas legislators in Oregon, Texas, and Connecticut "spend more than two-thirds of a full time job being legislators," but generally have outside employment). See generally *THE BOOK OF THE STATES*, *supra* note 129 (providing detailed statistical data about all fifty state governments).

243. See, e.g., *Yogman v. Parrott*, 937 P.2d 1019, 1021 (Or. 1997) (contracts); *Ecumenical Ministries v. Or. State Lottery Comm'n*, 871 P.2d 106, 110-11 (Or. 1994) (initiatives); *Priest v. Pearce*, 840 P.2d 65, 67-69 (Or. 1992) (original constitutional provisions).

244. See *State v. Beno*, 341 N.W.2d 668, 675 (Wis. 1984).

245. See G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS 194-99* (1998); Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015 (1997). Williams identifies a trend across state courts "in what seems like a teaching opinion, [to] set[] forth a list of . . . criteria . . . under which it says it will feel justified in interpreting its state constitution more broadly than the Federal Constitution. These criteria, then, are used by advocates . . . and judges to decide claims . . ." Williams, *supra*, at 1021.

246. See Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 928 n.1 (2010) (noting that thirty-eight states follow a "formalist" approach to contract interpretation.).

It is no small detail that in Oregon, Connecticut, and Wisconsin, the courts imposed their statutory interpretation regimes *sua sponte*. Litigants had not raised the possibility, or briefed arguments about the merits of installing a single regime, much less what one should look like. The announced regimes were a complete surprise in all three states. They came about purely as a result of the courts' interpretive leadership; the courts had a desire to impose determinate frameworks and sought vehicles through which to do it.²⁴⁷

1. *Explaining the Difference: Frameworks as “Case Management” and the Link to Chevron*

What accounts for this difference between state and federal courts? One can only speculate (recognizing too, that all states are not identical), but it seems likely that at least some of the difference may be explained by the distinctive institutional pressures—including resource limitations and the necessity of supervising large court systems—that state supreme courts face. State supreme courts do much more than decide cases; they actively *administer* sprawling judicial systems with enormous dockets.²⁴⁸ From this perspective—that of state courts as pragmatic systemic managers—clear interpretive rules

247. Landau, *supra* note 84, at 13 (“The adoption of a particular methodology for construing statutes was not at issue in *PGE* and was not the subject of briefing by the parties. Clearly, the court intended to present such a fully developed methodology for some time, and it was simply waiting for the appropriate vehicle by which to do so.”); Telephone Interview with David Rice, Assistant Att’y Gen., Wis. Att’y Gen.’s Office (Jan. 7, 2009) (interviewee argued *Kalal*).

248. See Hershkoff, *supra* note 236, at 1871-75. Statistics available from 2006 provide a picture of the enormity of the state court docket. In 2006, 102.4 million cases (in all kinds of courts, including traffic, domestic, and juvenile, which make up a large portion of the docket) were filed, reactivated or reopened in all state courts combined; subtracting traffic, domestic and juvenile cases left 21.6 million criminal and 17.3 million civil cases. In the five states studied, the trial courts (all kinds of courts) in Connecticut disposed of 517,942 cases that year; Michigan, 4.3 million; Oregon, 612,855; Texas, 11.9 million; and Wisconsin, 1.5 million. The intermediate court totals for 2006 were: Connecticut, 1097; Michigan, 8283; Oregon, 3502; Texas, 11,784; and Wisconsin, 3132. COURT STATISTICS PROJECT, *supra* note 21, at 107, 154 tbls.2 & 11. In contrast, in 2008, the combined civil and criminal filings for all the federal district courts totaled 338,153 and, for all the federal courts of appeals, 61,104. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 11 (2009). In 2006, the number of non-highest court judges in each state was approximately: Connecticut, 323; Michigan, 614; Oregon, 450; Texas, 3222; and Wisconsin, 503. COURT STATISTICS PROJECT, *supra* note 21, at 96 fig.G. The docket sizes of the state supreme courts are somewhat more comparable to that of the U.S. Supreme Court, with, for 2006, state highest courts issuing the following number of merits decisions: Connecticut, 158; Michigan, 50; Oregon, 96; Texas supreme, 84; Texas criminal, 243; and Wisconsin, 158. *Id.* at 197 tbl.17. However, the state highest courts generally have fewer staff.

have strong attractions. A single interpretive regime for all courts might make trial court case management and appellate review more efficient. Further testing of this hypothesis is required before conclusions can be reached, but perhaps such regimes shorten decision times or reduce the number of dissents, reversals, or lower court splits.

It may also be the case that state courts, as the nation's contract and will interpretation experts, are simply more comfortable with the idea of using *ex ante* articulated interpretive rules to decide cases involving written language drafted by others. There is a long history of state court-developed governing interpretive rules for will and contract cases,²⁴⁹ and so perhaps it is not surprising to see some state courts perceiving the task of statutory interpretation as similar or even identical.²⁵⁰

The smaller world of state government also may help to explain some differences. State supreme court justices frequently interact with legislators and members of the state bar at professional, political, and social functions, and with ordinary citizens at election-related events in a way that U.S. Supreme Court justices do not. These interactions may make state justices more aware of the practical effects of their decisions and the complaints arising from inconsistent or indeterminate law. Their intimate knowledge of state government might also simply make state justices more comfortable imposing the strictures of interpretive frameworks on the legislative process. And, of course, the fact that many state judges are elected might give them an additional incentive, absent from the federal context, to favor *ex ante* defined interpretive rules: predefined interpretive rules may provide "political cover" to state judges making potentially controversial statutory decisions.²⁵¹

249. See, e.g., 1 KENT GREENAWALT, LEGAL INTERPRETATION, OTHER DISCIPLINES AND PRIVATELY CREATED TEXTS (forthcoming 2010) (manuscript of chapter 8, on file with author); Schwartz & Scott, *supra* note 246.

250. See, e.g., *Thomas v. Progressive Cas. Ins. Co.*, 749 N.W.2d 678, 684 n.5 (Iowa 2008) ("Cases interpreting language in statutes are persuasive authority in interpreting contractual language. In both situations, the court strives to determine intent . . ."); *Tackney v. U.S. Naval Acad. Alumni Ass'n*, 971 A.2d 309, 318 (Md. 2009) ("It is a fundamental principle that the rules used to interpret statutes, contracts and other written instruments are applicable when construing corporate charters . . ." (quoting *Gentle v. SinglePoint Fin., Inc.*, 788 A.2d 111, 113 (Del. 2003))); *Petersen v. Magna Corp.*, 773 N.W.2d 564, 603 (Mich. 2009) (Markman, J., dissenting) (listing interpretive factors for statute and contract interpretation as interchangeable and providing a single list of factors as equally applicable to both); *Horse Creek Conservation Dist. v. State ex rel. Wyo. Att'y Gen.*, No. S-08-0200, 2009 WL 4021664, at *11 (Wyo. Nov. 23, 2009) ("As statutory and contract interpretation principles make clear, the plain and ordinary meaning of the word governs.").

251. I am indebted to Bill Eskridge for this point. *But see infra* note 402 and accompanying text (making a counterargument). It may also be, as Richard Briffault suggested to me, that

The U.S. Supreme Court, by contrast, is far more removed from day-to-day case management concerns and the real-world effects of indeterminate decisions. These differences may help to explain the Court's apparent lack of motivation to settle on a single approach for statutory cases.²⁵² But this does not mean the Court is not *capable*, as some have assumed, of reaching agreement on methodological rules, or that such rules, if adopted, would not have the same type of systemic or "case management" benefits that may explain their attraction for the state courts.

Indeed, in the administrative law context, as Peter Strauss has argued,²⁵³ the Supreme Court has attempted to do precisely this: the Court has recognized the need for the uniform interpretation of federal law, but also has recognized it does not have the resources to coordinate (or review) the work of lower courts. How has the Court handled this problem? It has adopted a *controlling methodological framework*—the *Chevron* regime—which dictates a two-step process for courts to use in deciding when to defer to agency interpretations of federal statutes.²⁵⁴ And strikingly—although something not typically noted in the scholarship about *stare decisis* and statutory interpretation—the Court *does* apply methodological *stare decisis* in this unique context: *Chevron* is precedential for much more than its mere substantive (environmental law) holding;²⁵⁵ far more significant has been the *methodology* it sets forth for all future potential deference cases.²⁵⁶

reaching consensus is easier in the states because the generally shorter terms of state court justices may result in more similarly minded people (i.e., people relatively close in age and perhaps political affiliation) sitting on the same court. In contrast, because of life tenure, federal judges appointed decades apart, by different presidents, must hear cases together.

252. See Abrahamson, *supra* note 175, at 966 (suggesting that state courts take the lead in making law more coherent because "the [U.S.] Supreme Court . . . is the court most remote from the problems of everyday concern for the administration of justice").
253. Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987).
254. *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). Other cases, together with *Chevron*, make up the Court's entire deference regime regarding agency statutory interpretation. *E.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (explaining when *Chevron* applies); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944) (applying a less deferential standard).
255. The question in *Chevron* was whether the "EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble' [was] based on a reasonable construction of the [Clean Air Act] term 'stationary source.'" 467 U.S. at 840.
256. A forthcoming article by Bill Eskridge and Connor Raso takes some issue with my conclusion on this point. William N. Eskridge, Jr. & Connor N. Raso, *Chevron as a Canon, Not a Precedent: An Empirical Test of What Motivates Judges in Agency Deference Cases*, 110

In terms of its role as a methodological regime for interpreting statutes (as opposed to the specific contours of the two-step deference framework itself), *Chevron* differs from regimes like *PGE* only in the fact that it covers a subset, rather than all, statutory interpretation cases. *Chevron*, seen through the lens of the state developments, therefore sits as a counterweight to the assumption that the Court is not capable of agreeing on an interpretive approach for statutory cases and giving it precedential effect. But why stop at *Chevron*? The same need for federal law uniformity in a world of limited Supreme Court review exists with respect to *all* statutory questions, not just statutory questions in which there is an administrative agency involved.²⁵⁷

To be sure, critics have argued that the *Chevron* regime is too easily manipulated by the Supreme Court and so does not increase predictability.²⁵⁸ It is possible such claims are overstated. But, even if true, that does not mean that *all* interpretive frameworks will be of little utility (or even that *Chevron* is

COLUM. L. REV. (forthcoming 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1440392. They argue that, in practice, the Justices do not treat *Chevron* as “binding.” However, they concede my point that the Justices “believe that the proper interpretation of *Chevron* . . . is binding on the Supreme Court and lower courts . . . [and the] Court has repeatedly said or acted as though *Chevron* is binding as a matter of *stare decisis*.” *Id.* at 24 (emphasis added). Moreover, they do not claim that the Court would not be *capable* of following any consensus regime; rather they imply that the wide spectrum of deference regimes currently applied by the Court would have to be simplified to become more transparent and predictable. *Id.* at 57–58.

257. The docket pressures on the Supreme Court greatly limit its capacity to provide uniform national guidance on all questions of federal law. In the administrative law context, it is true, there exists a national body—the agency—that can give federal law uniform meaning. As Strauss observes, *Chevron* transfers considerable decisional authority away from lower courts to national agencies in the interest of such uniformity, thus making *Chevron* “a device for managing the courts of appeals that can reduce . . . the Supreme Court’s need to police their decisions.” Strauss, *supra* note 253, at 1121. In contrast, in nonagency statutory cases, the Court alone does not have the resources to provide the same kind of substantive guidance to lower courts that agency interpretations may provide; but this does not mean that some Court-articulated guidance as to how the interpretive *process* should occur would not also have beneficial lower court coordinating effects. Indeed, during the period of textualism’s early ascendancy, Frederick Schauer made a similar “case management” argument about the benefits of Supreme Court coordination around a text-based statutory interpretation methodology. Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 255 (arguing that a text-based rule would relieve the Justices and their clerks of the need to “become truly internally expert in every subject,” bring more “institutional stability,” and, from a normative standpoint, have the desirable benefit of furthering intracourt agreement).
258. See, e.g., William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006).

always so). Here, too, we see a difference in the state cases studied. In Oregon and Texas, for example, no debate exists over whether the interpretive framework applies in the first place (it always does) and there is very little debate over whether the courts should answer the statutory question at “step one” or “step two” of the interpretive hierarchy.²⁵⁹ In contrast, these types of questions have been at the center of many of the battles over *Chevron* and have led to arguments about its manipulability. One can speculate as to the reasons for this difference. But, most obviously, *Chevron* is simply not the same kind of test, in substance, as the kind of tiered interpretive regime employed in the states studied;²⁶⁰ nor is it the *only* framework available to the Court for agency cases (a fact that gives rise to more opportunities for manipulation).²⁶¹

2. The “Hard Cases” Paradigm and the Constraining Effect of Legal Frameworks

It also must be recognized that even those who criticize the manipulability, in highly politicized cases, of *Chevron* or other legal regimes acknowledge that such regimes can have a “constraining effect” and can promote rule-of-law

259. See *infra* Section IV.B (discussing illustrative data from close studies of Oregon).

260. Under the modified textualist regimes in the states studied, courts first determine whether textual analysis alone can answer the statutory question. In contrast, under *Chevron*, the Court looks for something arguably more vague: whether, under *any* principles of statutory construction—which can include more than textual analysis—the statute *forecloses* agency discretion or instead whether the statute has a “zone of indeterminacy.” Kenneth A. Bamberger & Peter L. Strauss, *Chevron’s Two Steps*, 95 VA. L. REV. 611, 624 (2009); see Peter L. Strauss, *Overseers or “the Deciders” – The Courts in Administrative Law*, 75 U. CHI. L. REV. 815, 820 (2008) (“Beyond its cryptic reference to ‘traditional tools of statutory interpretation,’ *Chevron* does not say how the courts are to perform their customary, independent role of law definition.” (citation omitted)).

261. See *supra* note 254. The existence of other frameworks arguably enables more manipulability because there is the initial question of whether *Chevron* even applies, before consideration of *how* it is applied. But notably this fact has not led scholars to argue that *Chevron* is not worth preserving. To the contrary, it has led to arguments for even clearer, more rigid rules governing when it applies. See Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 580 (2002) (arguing that the Court should adopt a canon “about which kinds of delegations should sustain *Chevron* deference,” which “would function like a presumptive rule, and rules are generally better than broad standards for exercising control over subordinate actors in a hierarchy”); Strauss, *supra* note 253. Other differences also may be relevant, e.g., differences in the politics and personalities of various courts as well as differences in the ways in which judges approach questions of agency deference and “straight” statutory interpretation.

values in other, perhaps even most, cases.²⁶² These arguments are familiar across all areas of law. Legal doctrine constrains some of the time, but sometimes it doesn't. The fact that "ideology" is a factor in judicial decisionmaking does not necessarily mean that ideology is the only factor or that legal doctrine is not the salient one. Nevertheless, the more skeptical version of this story seems to be the dominant one in statutory interpretation theory. And it seems likely that at least one reason for this is what has been the almost exclusive focus on the U.S. Supreme Court in development of that theory. The Court's docket generally has more normatively difficult, high-stakes cases than the lower federal courts, and perhaps more than state supreme courts.²⁶³ More importantly, these types of cases are the focus of legal scholarship, law teaching, and public attention.²⁶⁴ In such difficult cases, even

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262. See Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 844 (2008) ("In most domains, the division between Republican and Democratic appointees, while significant, is far from huge; the law, as such, seems to be having a constraining effect. . . . We are speaking, moreover, of the most contested areas of the law, where political differences are most likely to break out For those who believe in the rule of law, and in the discipline imposed by the legal system . . . [t]he glass is half empty, perhaps, but it is also half full."). See also Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1514 (2003), which offers an empirical analysis and concludes that "[a]cknowledging a material role for politics or strategy in judicial decisionmaking does not mean that legal reasoning is necessarily meaningless. The law may moderate the effects of political leanings in some cases or supplant them entirely in others. The presence of ideological or other determinants in some cases leaves a considerable role for the accurate operation of the traditional legal model."
263. This is likely the case even though all five state supreme courts studied in this Article have discretionary jurisdiction. Cf. Elizabeth Garrett, *Preferences, Laws and Default Rules*, 122 HARV. L. REV. 2104, 2127 (2009) (reviewing EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* (2008)) (arguing that Elhauge "uses only Supreme Court cases as evidence of what the judiciary is doing . . . and so he selects among an already skewed sample of all statutory interpretation cases").
264. See, e.g., ESKRIDGE ET AL., *supra* note 31 (using the *Griggs/Weber/Johnson* trilogy of discrimination/affirmative action cases as the three principal cases in first 123 pages of leading textbook, and using those cases to outline the fundamental questions of the field). Along with some less divisive cases, later principal cases include: *Gonzales v. Oregon*, 546 U.S. 243 (2006) (considering assisted suicide statute); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (considering whether FDA can regulate nicotine as a drug); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (considering whether a university with a racially discriminatory admissions policy based on religious principles may receive a federal charitable tax exemption); *TVA v. Hill*, 437 U.S. 153 (1978) (famous "snail darter" case pitting the Endangered Species Act against the one-hundred million dollar Tellico Dam project); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) (discussing a widow who fell into a rare loophole that potentially prevented her from recovering for her longshoreman-husband's death); *Palm Beach County Canvassing Bd. v. Harris*, 772 So.2d 1220 (Fla. 2000) (the decision underlying *Bush v. Gore*).

consistently applied methodological regimes are likely to result in divided courts.

This Supreme Court-focused lens has created a “hard cases” paradigm for statutory interpretation, one that may overemphasize the intractability of interpretive differences and underemphasize the constraining effect of legal rules. This may very well be the *wrong* paradigm for most cases, and for most lower courts. This possibility seems implicit in the arguments made by leading *Chevron* scholars about lower courts, namely, that a primary goal of clear regimes in the administrative law context is to coordinate and harmonize the work of those lower courts.²⁶⁵ Indeed, recent empirical work examining the tension between ideology and doctrine in other areas points to this same notion, namely, that politics may interfere with the constraining effects of the law less in the lower courts than in the U.S. Supreme Court.²⁶⁶ Numerous federal appellate judges attest to this, and some have argued that, in fact, what the lower courts need most is not more interpretive flexibility, but rather clear decision-making rules to help them decide cases more efficiently and consistently.²⁶⁷ Thus, even if a *PGE*-type test adopted by the U.S. Supreme

265. See Merrill & Watts, *supra* note 261; Strauss, *supra* note 253.

266. See, e.g., Cross, *supra* note 262, at 1459 (providing an empirical study of federal appellate decisions that “find[s] that legal and political factors are statistically significant determinants of decisions, with legal factors having the greatest impact”); Miles & Sunstein, *supra* note 258, at 859 (“[W]hen a circuit court applies *Chevron*, the influence of panel composition on judicial decisionmaking appears largely cabined to politically unified panels. These patterns suggest the possibility that *Chevron* is succeeding in eliminating the influence of circuit judges’ political preferences in review of agency decisions, at least within the domain of politically mixed panels.”); Miles & Sunstein, *supra* note 262; cf. Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 315 (2002) (arguing that constraining effects of “jurisprudential regimes” in freedom of expression cases show that “[l]aw matters” even in Supreme Court decisionmaking).

267. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 862 (1992) (“[U]nlike lower courts, the Supreme Court frequently interprets statutory provisions arising out of serious political disagreement. . . . Federal courts of appeals, however, consider many more cases each year, and many more less important cases. . . . Their workload includes many unclear statutory provisions where lack of clarity does *not* reflect major political controversy. Such cases usually do not involve conflicting legislative history; in fact, the history itself often is clear enough to clarify the statute”); Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt To Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1901 (2009) (“[M]y Colleagues and I are committed to applying the law and adhering to controlling precedent, not giving vent to our personal political and ideological leanings, and . . . we achieve this goal most of the time.”); Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 235 (1999) (criticizing a study asserting that ideology drives most judicial decisions).

Court did not do work in every Supreme Court case,²⁶⁸ it still might have utility for some of its cases as well as, perhaps, for much lower court decisionmaking. Part V returns to this question of the value of interpretive consensus.

B. Methodological Stare Decisis

It is one thing for judges to announce an interpretive framework. It is another thing for them to stick with it. Because interpretive rules do little to improve predictability if they are constantly changing, a discussion of consensus interpretive regimes naturally leads to the idea of methodological stare decisis.²⁶⁹ Methodological stare decisis, in effect, turns a set of interpretive rules into a controlling interpretive framework.

268. It is worth noting that, even in the U.S. Supreme Court, a significant number of statutory interpretation cases are decided unanimously, a fact that indicates that not all of these cases are so normatively difficult that it is implausible to imagine that the Justices could settle on a consistent interpretive approach. Cf. Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CAL. L. REV. 975, 1004 (2009) (“Unanimous opinions provide some evidence that justices of otherwise diverse ideological outlooks acknowledge the existence of rules capable of dictating legally correct outcomes—not chosen on the basis of ideological preferences—when those rules clearly apply.”). There were twelve unanimous statutory interpretation decisions in the 2008 Term and nine in the 2007 Term. See *Nijhawan v. Holder*, 129 S. Ct. 2299 (2009); *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230 (2009); *Republic of Iraq v. Beaty*, 129 S. Ct. 2183 (2009); *Abuelhawa v. United States*, 129 S. Ct. 2102 (2009); *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 129 S. Ct. 1862 (2009); *United States v. Navajo Nation*, 129 S. Ct. 1547 (2009); *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2009); *Kansas v. Colorado*, 129 S. Ct. 1294 (2009); *United States v. Eurodif S.A.*, 129 S. Ct. 878 (2009); *Kennedy v. Plan Adm’r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009); *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788 (2009); *Jimenez v. Quarterman*, 129 S. Ct. 681 (2009); *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131 (2008); *Allison Engine Co. v. United States*, 128 S. Ct. 2123 (2008); *Cuellar v. United States*, 128 S. Ct. 1994 (2008); *Burgess v. United States*, 553 U.S. 124 (2008); *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1 (2008); *Boulware v. United States*, 552 U.S. 421 (2008); *Knight v. Comm’r*, 552 U.S. 181 (2008); *Logan v. United States*, 552 U.S. 23 (2007); *CSX Transp. Inc. v. Ga. State Bd. of Equalization*, 552 U.S. 9 (2007).

269. This discussion focuses only on methodological stare decisis in the statutory context. It is possible that different considerations apply in the constitutional context, where the nature of the question is different—i.e., how to interpret a difficult-to-amend, old document versus how to interpret statutes that still may be drafted or amended *after* precedential methodological regimes are imposed. Indeed, it is because of this difference—that statutes are much easier to enact and amend in response to court decisions than are constitutional amendments—that courts generally attach different levels of *substantive* stare decisis to constitutional and statutory precedents, giving stronger precedential effect to statutory decisions. See *supra* note 54.

The U.S. Supreme Court does not apply methodological stare decisis, either in the context of articulating binding statutory interpretation frameworks or in the more particular context of reaching final resolution on questions concerning the utility of subrules (e.g., *exclusio unius* or the rule against absurdity) within such frameworks. Yet, in four of the states studied, methodological stare decisis is already the norm.²⁷⁰ Judges concur to say they would decide cases differently were they not constrained by the interpretive framework;²⁷¹ lower court cases are being vacated and remanded solely on the ground that they were decided using the wrong methodology.²⁷² In these states, the courts have refuted yet another impossibility hypothesis, and so answered one of the questions posed at the outset of this Part: these judges *can* and *do* bind other judges' methodological choices, in the same way they bind one another with respect to substantive precedents.

These state studies thus enable us to move to the next question, namely, how methodological stare decisis should be operationalized. Some commentators already have addressed this question, and argued that the best way to minimize the "transaction costs" associated with moving from an eclectic approach to a precedential methodological regime²⁷³ is to start the game over; i.e., not to give stare decisis effect to substantive decisions made prior to the installation of the new controlling regime.²⁷⁴ The state cases, however, suggest that a different approach might in fact be preferable.

Both the Oregon and Connecticut Supreme Courts specifically have rejected the idea that, simply because a court adopts new interpretive rules, it has *carte blanche* to revisit old substantive precedents. Those state courts instead have held that the introduction of their new frameworks created a roadmap for answering *new* statutory interpretation questions, but did not undermine the strength of prior substantive precedents. And both courts had smooth transitions to their new frameworks.²⁷⁵ This is unsurprising. If one goal in adopting a controlling interpretive framework is to make interpretation more predictable, methodological stare decisis should not be deployed in a

270. Connecticut is less clear on this, as evidenced by the *Courchesne* dissent's argument that interpretive principles are "judicial *philosophy*, not . . . *substantive law*." 816 A.2d 562, 610 (Conn. 2003) (Zarella, J., dissenting).

271. See, e.g., sources cited *supra* note 107.

272. See *supra* note 216 and accompanying text.

273. Foster, *supra* note 9, at 1898.

274. See *id.*

275. See *Hummel v. Marten Transp.*, 923 A.2d 657, 671 (Conn. 2007); *Mastriano v. Bd. of Parole*, 159 P.3d 1151, 1154-55 (Or. 2007).

fashion that is itself destabilizing.²⁷⁶ In contrast, the Michigan Supreme Court has generated much more legal and political controversy—and in the process called into question the bona fides of the neutrality of its interpretive regime—by using the introduction of a new methodology as an opportunity to revisit and reinterpret statutes construed under the prior interpretive approach.²⁷⁷

C. Legislated Interpretive Rules

Juxtaposed against the imposition of methodological *stare decisis* is the apparent willingness—a trend visible in many more state courts than the five studied here²⁷⁸—to avoid rules of interpretation that have been legislated by statute. That this conflict has arisen is somewhat counterintuitive in light of the other, court-driven efforts toward interpretive clarity. In particular, the fact that these courts treat their own methodological statements as “law” might lead one to expect that they would treat legislated methodology in like fashion.

Nor does this judicial resistance seem confined to legislated rules concerning the use of legislative history. For example, Einer Elhauge points out that many state legislatures have passed statutes “opting out of the rule of lenity.”²⁷⁹ My preliminary research across the fifty states supports Elhauge’s conclusion that, nevertheless, “such general statutes have not been much of an obstacle to application of the rule of lenity” by the courts in those

276. Cf. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988) (arguing that one purpose of *stare decisis* is to promote stability).

277. A closely related question was also recently considered by the U.S. Supreme Court. See *CBOCS W., Inc. v. Humphries*, 128 S. Ct. 1951, 1961 (2008) (holding that 42 U.S.C. § 1981 (2006) encompasses retaliation claims, and interpreting the provision consistently with the 1969 interpretation of § 1982, even though the earlier precedent was decided using a much less text-centric methodology than the Court would use today); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 135, 137 (2008) (rejecting the suggestion that the adoption, in 1990, of “a more general rule to replace our prior *ad hoc* approach for determining whether a Government-related statute of limitations is subject to equitable tolling” overruled several nineteenth-century precedents interpreting the Court of Claims limitation statute as “more absolute [in] nature”). In both cases, the Court held that changes in methodology do not “justify reexamination of well-established prior law. Principles of *stare decisis* . . . demand respect for precedent whether judicial methods of interpretation change or stay the same.” *CBOCS W.*, 128 S. Ct. at 1961. The alternative, the Court held, was too unsettling, because it “threaten[s] to substitute disruption, confusion, and uncertainty for necessary legal stability.” *John R. Sand & Gravel Co.*, 552 U.S. at 139.

278. See *infra* notes 279–282 and accompanying text.

279. Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2203 (2002).

jurisdictions.²⁸⁰ He also correctly points out that many state legislatures have enacted laws expressly abrogating the long-standing interpretive principle that statutes in derogation of the common law be strictly construed.²⁸¹ And yet, based on my review, it appears that many of these same states' courts also have undercut such legislated rules by creating a new "clear statement" presumption to construe all statutes *in favor* of the common law unless there is an indisputable statement to the contrary.²⁸²

Some state courts go beyond avoidance; they forthrightly refuse to apply legislated rules. We saw this in Oregon, where, for the first eight years of the existence of the legislated rule enacted to partly override *PGE*, the court deflected all attempts by advocates to apply it.²⁸³ And we saw it in Texas, where the court of criminal appeals declines to apply the legislated rule concerning legislative history and has opined that "interpretation statutes that seek[] to control the attitude or the subjective thoughts of the judiciary violate the separation of powers doctrine."²⁸⁴ On similar grounds, the Delaware Supreme Court has struck down a statute requiring a textual approach because, *inter alia*, it encroached on the judicial prerogative to "say what the law is."²⁸⁵

280. *Id.* at 2204; see SOLAN, *supra* note 10, at 6-45 to -50; Price, *supra* note 145, at 904 (reaching the same conclusions about legislated lenity rules).

281. Elhauge, *supra* note 279, at 2268 (citing ARIZ. REV. STAT. ANN. § 1-211 (1995); CAL. CIV. PROC. CODE § 4 (West 1982); IDAHO CODE ANN. § 73-102 (1999); IOWA CODE ANN. § 4.2 (West 2001); KY. REV. STAT. ANN. § 446.080 (LexisNexis 1999); MO. ANN. STAT. § 1.010 (West 2000); MONT. CODE ANN. § 1-2-103 (2001); N.M. STAT. ANN. § 12-2A-18 (LexisNexis 1998); N.D. CENT. CODE § 1-02-01 (1987); OKLA. STAT. ANN. tit. 25, § 29 (West 1987); 1 PA. CONS. STAT. ANN. § 1928 (West 1995); S.C. CODE ANN. §§ 14-1-60, 15-1-10, 18-1-170, 19-1-10 (1977); S.D. CODIFIED LAWS § 2-14-12 (1992); TEX. GOV'T CODE ANN. § 312.006 (Vernon 1998); UTAH CODE ANN. § 68-3-2 (2000); and WASH. REV. CODE ANN. § 1.12.010 (West 2001)). Legislatures oppose the canon for the obvious reason that they do not want their statutory enactments unduly narrowed based on outdated presumptions about the dominance of the common law.

282. *E.g.*, Hayes v. Continental Ins. Co., 872 P.2d 668, 676-78 (Ariz. 1994); Brodie v. Workers' Comp. Appeals Bd., 156 P.3d 1100, 1107 (Cal. 2007); Thomson v. City of Lewiston, 50 P.3d 488, 493 (Idaho 2002); State v. Dullard, 668 N.W.2d 585, 595 (Iowa 2003); Sunburst Sch. Dist. No. 2 v. Texaco, Inc., 165 P.3d 1079, 1091 (Mont. 2007); Burke v. Webb Boats, Inc., 37 P.3d 811, 814 (Okla. 2001); Everhart v. PMA Ins. Group, 938 A.2d 301, 307 (Pa. 2007); see also Estate of Williams v. Williams, 12 S.W.3d 302, 307 (Mo. 2000) ("Where doubt exists about the meaning . . . of words in a statute, the words should be given the meaning which makes the least, rather than the most, change in the common law.").

283. See *supra* note 115.

284. Boykin v. State, 818 S.W.2d. 782, 786 n.4 (Tex. Crim. App. 1991) (internal quotation marks omitted).

285. Evans v. State, 872 A.2d 539, 500 (Del. 2005) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). *Evans*, which is discussed in Jellum, *supra* note 6, at 844-46,

This argument is not one sided. Legislatures have had a mirror reaction. Recall the Connecticut legislature's strong rejection of the interpretive framework announced in *Courchesne* and the words of one legislator: "This makes it clear . . . what our role is and what we say . . . should play the prominent position in . . . interpretation of the statute."²⁸⁶ Or, as the judiciary committee co-chair—in response to the question "what authority do we have in statute to tell the Supreme Court how they are to interpret our laws?"²⁸⁷—put it: "We are the law. We have the right . . . to . . . dictat[e] how the courts shall operate."²⁸⁸

There is a power struggle going on here. And that struggle not only is central to the potential efficacy of legislated rules, but it also raises new questions about which branch—judicial or legislative—primarily controls methodological choice. Until now, the central separation-of-powers question in statutory interpretation has been which *methodology* best respects the respective roles of judge and legislature, but not which *branch* gets to choose it.²⁸⁹ Indeed, many scholars have simply assumed that textualists on the federal side, as self-styled "faithful agents"²⁹⁰ of the legislature, would follow most legislated interpretive rules if Congress enacted them.²⁹¹ But the state judges

involved a previous statutory interpretation opinion by the Delaware Supreme Court holding that a convicted rapist, who was sentenced to life, could nevertheless be given a conditional release date. The Legislature enacted a statute overriding the decision and prohibiting courts from "interpret[ing] statutes . . . when the text is clear." DEL. CODE ANN. tit. 10, §§ 5402-5403 (2005). The Delaware Supreme Court declared the new law unconstitutional. *Evans*, 872 A.2d at 549-50.

286. Conn. H.R. Tran. 79 (May 20, 2003) (statement of Rep. Fox), available at <http://cga.ct.gov/asp/menu/Search.asp> (follow "Advanced Legislative Document Search hyperlink; then search in "Session Transcripts" database).
287. Conn. S. Tran. 44 (May 29, 2003) (statement of Sen. Kissel), available at <http://cga.ct.gov/asp/menu/Search.asp> (follow "Advanced Legislative Document Search hyperlink; then search in "Session Transcripts" database).
288. Conn. S. Tran. 44-45 (May 29, 2003) (statement of Sen. McDonald).
289. A notable exception is Jellum, *supra* note 6, who focuses on this new separation-of-powers question.
290. Manning, *supra* note 35, at 7.
291. See Nelson, *supra* note 31, at 355; Rosenkranz, *supra* note 2, at 2138; Siegel, *supra* note 67, at 1491. Manning argues that textualists would accept most legislated interpretive rules but—and here he diverges from others—would not accept a particular rule that ordered courts to admit legislative history. See John F. Manning, *Putting Legislative History to a Vote: A Response to Professor Siegel*, 53 VAND. L. REV. 1529, 1533 (2000). In Manning's view, Congress has no more authority than courts to order the impermissible circumvention of Article I's bicameralism/presentment process. See *id.* at 1541. But the state courts generally do not justify their objection to legislated rules based on legislative history-specific reasons; rather, they object generally to legislative interference with the judicial function.

who reject the legislated rules also are self-proclaimed textualists. What's more, these state judges claim they are textualists for the same reasons that Justice Scalia is. The same separation-of-powers principles that dictate a primacy-of-text approach, these state courts say, also prevent legislatures from telling courts how to interpret statutes. In other words, inherent in the power to "say what the law is" may be the power to say how it is interpreted.

We cannot know whether federal courts would have the same reaction as state courts to legislated interpretive rules. But it seems relevant that similar judicial resistance to such rules has been observed in other countries.²⁹² There is at least an intuition here, on the part of a lot of judges, that these methodological rules do not "feel" like other types of substantive law. Perhaps because some judges view interpretation as a core aspect of the judicial function, they may believe such rules intrude on what is exclusively judicial terrain. At a minimum, the state cases raise the possibility that federal textualists, too, with their emphasis on separation of powers, might not blithely follow legislated rules if enacted by Congress. They also point to the reality that, if courts do not *agree* with particular legislated rules (recall Texas's reaction to the legislated rule on legislative history use and Connecticut's reaction to the legislated plain-meaning rule), they will seek ways around them. Of course, as we have seen, the state court versions of textualism are not identical to the federal version, and their responses to legislated rules may be another area of divergence. But the state trends do make us question prior assumptions.

It is difficult to predict where this trend is going. Perhaps, as a matter of practice, these initial periods of dialogue and struggle will eventually give rise to a more stable equilibrium, one in which both sides agree on how the legislated rules will be integrated with other, judge-crafted interpretive principles. Similar experiences in Australia, Singapore, and New Zealand offer examples of such an evolution.²⁹³ As a matter of doctrine, however, the proper result is not immediately apparent. One difficulty that arises is whether those

292. See D. Neil MacCormick & Robert S. Summers, *Interpretation and Justification*, in INTERPRETING STATUTES, *supra* note 21, at 511, 543 (noting that many countries have tried to enact legislated rules but "there is little evidence [they] . . . have had very positive effects"); Kate Tokeley, *Interpretation of Legislation: Trends in Statutory Interpretation and the Judicial Process*, 33 VICTORIA U. WELLINGTON L. REV. 545, 549 (2002) (observing that New Zealand courts "for a long time failed to consistently apply the statutory mandate"); Goh Yihan, *A Comparative Account of Statutory Interpretation in Singapore*, 29 STATUTE L. REV. 195, 214-17 (noting that the High Court of Australia took ten years to firmly incorporate a legislative rule as the authoritative methodology and that Singapore similarly "took some time to interpret [a legislative rule] in its correct spirit").

293. See sources cited *supra* note 292.

state courts that already treat methodology as “law” (by giving methodological statements the weight of precedent) are wrong to draw the line they have at legislative intervention. Legislative acts, after all, can override common law decisions.²⁹⁴ It also may be hard to reconcile these courts’ resistance to legislated rules with similar restrictions that courts already widely accept in other methodological areas. For example, in contract law, courts allow legislatures to dictate interpretive methodology in areas traditionally dominated by the common law; provisions in the Uniform Commercial Code, for instance, tell courts what interpretive rules to apply to contracts covered by it.²⁹⁵

These questions are even harder to answer for those courts, like the U.S. Supreme Court, that do not treat statutory interpretation methodology as law. But it is worth noting that, on the federal side, too, courts already do accept some legislative guidance concerning the rules of interpretation. Some federal statutes, for example, have sections requiring them to be “liberally construed.”²⁹⁶ The Federal Dictionary Act defines various statutory terms.²⁹⁷ The Civil Rights Act of 1991 specifies which legislative history courts are permitted to consider in construing it.²⁹⁸ These questions deserve their own sustained treatment elsewhere, and recent consideration of them by other scholars is a welcome development.²⁹⁹

294. This assumes of course that the underlying legislated rule itself is constitutional. *Cf.* Manning, *supra* note 291 (arguing that a legislated rule authorizing legislative history use is unconstitutional not because Congress has no authority to issue legislative directions but because, in his view, reliance on legislative history is unconstitutional).

295. *See* U.C.C. § 2-202 & cmt.1 (1977) (codifying the parol evidence rule and rejecting the plain-meaning rule); *id.* § 1-303 & cmt.1 (adopting a contextualist approach and rejecting a plain-meaning methodology). This Article discusses only legislated rules that apply to entire state codes but, like the UCC, there are also state statutes that dictate rules of interpretation for specific parts or sections of a state code.

296. *See, e.g.*, 21 U.S.C. § 854(d) (2006) (penalizing investment of illicit drug profits and directing that the “provisions of this section shall be liberally construed to effectuate its remedial purposes”). RICO’s statement of findings, enacted in the public law and codified as a note to the statute, has the same direction. Pub. L. No. 91-452, § 904(a), 84 Stat. 922 947 (1970) (codified at 18 U.S.C. § 1961 note).

297. 1 U.S.C. §§ 1-7 (2006).

298. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(b) (codified at 42 U.S.C. § 1981 (2006) (“No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record § 15276 . . . shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act.”); *see* SOLAN, *supra* note 10, at 6-34, 6-42 to -43 (providing more examples).

299. Linda Jellum has done the most recent extensive study. She conducts functional and formalist analyses and concludes that definitional legislated rules are constitutionally

It also should be emphasized that these questions are more than merely academic and affect more than just the state players involved. It should be clear—but isn’t—whether federal courts interpreting state statutes and state courts interpreting federal statutes are obligated to employ one another’s methodology. The answer depends on how “law-like” methodology is, and, to the extent there is a court-legislature conflict, which branch’s chosen methodology, if any, binds the outside world. The *Erie* doctrine looms large here. I address these matters elsewhere;³⁰⁰ but they are only some of the new questions implied by these state court developments.

IV. MODIFIED TEXTUALISM

Not incidentally, the drive to interpretive consensus in each of the states studied centers around the same text-based methodology, a “modified textualist” approach that the state courts expressly derive from Justice Scalia’s textualism, but which clearly is not identical to it. This is of particular interest because, in the federal context, textualism has been widely viewed as incapable of generating such a broad consensus.

But are these state judges really “textualists”? Many of the state judges we have seen certainly consider themselves so. And yet they give legislative history a solid second place in their interpretive hierarchies, and demote the substantive canons favored by the federal textualists.³⁰¹ For this reason, Justice Scalia and other purists might read these cases as exemplifying something entirely different.

This would be a mistake. Modified textualism has been much more successful than the original: it has emerged in the states studied as the *only* approach. Yet its components—a formalized approach that restricts judicial discretion and in which textual analysis trumps all other factors—are precisely

permissible, but that legislated rules that tell judges how to construe statutes “are likely unconstitutional when enacted to apply generally to many statutes, but not when enacted to apply specifically to just one.” Jellum, *supra* note 6, at 841-42; *see also* Alan R. Romero, Note, *Interpretive Directions in Statutes*, 31 HARV. J. ON LEGIS. 211, 223 (1994) (arguing for a distinction between “specifying the appropriate guiding principles or interpretive attitude (strict or liberal construction)” and “insisting that courts consult or not consult certain sources” on the ground that the former types of rules are permissible because they are “just evidence of legislative intent”); sources cited *supra* note 291 (arguing that Congress has the authority to legislate rules of interpretation).

300. Gluck, *supra* note 22.

301. Most states now do produce legislative history, and the variety and accessibility of the documents continue to improve; few, however, have legislative history operations comparable to Congress’s. *See infra* note 398.

what “pure” textualism itself aims to advance. The legislative history-versus-text question is a red herring here. Not only is that question essentially moot (most judges now agree that text trumps nearly all of the time), but also, as I argue below, as a matter of pure textualist theory, use of legislative history in the *second step* of a text-always-first interpretive hierarchy is entirely consistent with even the “canonical” textualism of theorists like Justice Scalia and John Manning.

This Part considers the differences and similarities between these two textualisms. I argue that traditional textualist theory, is, in fact, capacious enough to accommodate this moderate heterogeneity—and that it should. The Part first compares the kind of textual analysis actually performed in an Oregon-style regime with the kind typically used in the U.S. Supreme Court, then moves to the theoretical question of legislative history’s “fit” in a hierarchy-based textualist approach, and finally considers modified textualism’s attractions for nontextualists. The Part concludes with some preliminary evidence that more states than the five studied may be implementing modified textualist regimes.

* * *

Before proceeding further, it is important to emphasize that I do not contend that the individual components of modified textualism are revolutionary. Some aspects of it are actually quite familiar. For example, modified textualism may remind some people of the old “soft plain meaning rule,” the approach that typified the way the U.S. Supreme Court generally approached statutory interpretation before the rise of textualism.³⁰² (Under the soft plain-meaning approach, courts consulted legislative history in almost all cases, even in the face of clear text, to confirm textual meaning.)³⁰³ Likewise, at first glance, modified textualism might resemble a more recent trend in Supreme Court statutory interpretation identified by the empirical scholarship: the movement, by the nontextualist Justices, toward a more text-based approach and a less frequent use of legislative history.³⁰⁴

But these are not the same things. Modified textualism’s complete exclusion of legislative history if the text is clear; its refusal to allow evidence of

302. Eskridge, *supra* note 29, at 626.

303. *Id.* at 626-27.

304. Brudney & Ditslear, *supra* note 50; Michael H. Koby, *The Supreme Court’s Declining Reliance on Legislative History: The Impact of Justice Scalia’s Critique*, 36 HARV. J. ON LEGIS. 369, 386 (1999); Merrill, *supra* note 48, at 354.

purpose to trump clear text; its near rejection of the substantive canons of construction;³⁰⁵ and its clear hierarchical ordering of interpretive tools in the *same* progression, in *every* case distinguish it significantly from both the soft plain-meaning theory and the more recently observed contraction of legislative history use.³⁰⁶ Inattention in the scholarship to the federal courts of appeals makes it impossible to confirm whether a practice that looks like modified textualism is frequently employed in those courts (it would not be surprising if it were). But modified textualism does mark a departure from the practice of all of the current Justices on the U.S. Supreme Court. Chief Justice Roberts and Justice Alito, although not strict textualists, rarely consult legislative history;³⁰⁷

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305. *Contra* Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 18 (1998) (showing that judicial “policy norms” were used by the majority opinion in seventy-three percent of statutory cases and canons of construction were used in fifty-six percent of majority opinions for the 1996 Term, by textualists and purposivists alike).
306. The empirical scholarship acknowledges that even these moderating Justices continue to use many substantive canons. Further, while the scholarship shows there has been a reduction in legislative history use, what it does *not* show is that this means these Justices consistently approach all cases using the same progression or hierarchy of sources. *See supra* notes 304–305.
307. Searching the Westlaw database for all of Roberts’s and Alito’s majority opinions in which legislative history was mentioned in any opinion in the case revealed seven opinions for Alito and one for Roberts. Of the Alito opinions, three consider proffered history but find it unpersuasive. *Richlin Sec. Serv. Co. v. Chertoff*, 128 S. Ct. 2007, 2015–18 (2008); *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1939 (2008); *James v. United States*, 550 U.S. 192, 201 (2007). One looks to history to confirm textual analysis. *Zedner v. United States*, 547 U.S. 489, 501–02 (2006). And three engage in something similar to modified textualism. *Boyle v. United States*, 129 S. Ct. 2237, 2246 (2009) (refusing to address purpose, legislative history, or lenity arguments “[b]ecause the statutory language is clear”); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 629–30, 642–43 (2007) (refusing to engage in policy analysis in light of Title VII’s text and precedents; acknowledging legislative history but arguing that it does not help the dissent); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 304 (2006) (“[W]here everything other than the legislative history overwhelmingly [supports the outcome], the legislative history is simply not enough.”). In the Westlaw “Statutes” database there are three additional Alito opinions, with no reference to legislative history, decided purely on textual analysis. *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2009); *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007); *BP Am. Prod. Co. v. Burton*, 549 U.S. 84 (2006); *see also* Elliot M. Davis, Note, *The Newer Textualism: Justice Alito’s Statutory Interpretation*, 30 HARV. J.L. & PUB. POL’Y 983, 983–84 (2007) (arguing that Alito will consult legislative history, even without ambiguity, for evidence of context or to confirm textual analysis). The sole Roberts opinion in a case that mentions legislative history is *Dean v. United States*, 129 S. Ct. 1849 (2009), which was decided based on textual analysis alone, as were all of the Roberts opinions in the Westlaw “Statutes” database in general. *See Knight v. Comm’r*, 552 U.S. 181 (2008); *CSX Transp. Inc. v. Ga. State Bd. of Equalization*, 552 U.S. 9 (2007); *Hinck v. United States*, 550 U.S. 501 (2007); *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47

Justice Kennedy employs it more, but does not appear generally to use it as a second-step choice.³⁰⁸ Justices Stevens, Ginsburg, and Breyer routinely consult legislative history without any ambiguity requirement (as did Justice Souter), and have resisted formalizing their approach into anything structured.³⁰⁹

If anything, modified textualism most resembles the “strict” plain-meaning rule that some courts employed before the modern interpretive era.³¹⁰ In rediscovering this plain-meaning rule, however, the state courts have justified it on entirely new grounds – Justice Scalia’s grounds. What, one wonders, is at stake for these courts in updating and emphatically recasting this approach as “textualism,” even as the approach itself is more inclusive and less controversial than textualism has been?

A. Labeling

Labels are unfortunately important in statutory interpretation. Although a textualist methodology need not necessarily lead to conservative results and a

(2006). However, Roberts will join opinions by others in which legislative history is referenced. *See, e.g., Zedner*, 547 U.S. 489.

308. *Compare Boumediene v. Bush*, 128 S. Ct. 2229, 2266 (2008) (observing that “legislative history confirms what the plain text strongly suggests”), *with* *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring) (objecting to the use of legislative history to trump text, stating that “[w]here . . . the unambiguous language of a statute embraces certain conduct . . . it does not foster a democratic exegesis for the Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation”).
309. *See, e.g., United States v. Hayes*, 129 S. Ct. 1079 (2009) (Ginsburg, J.) (holding that the text was clear, but also looking to practical considerations and legislative history to confirm the interpretation); *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.* 550 U.S. 81, 89 (2007) (Breyer, J.) (consulting legislative history and purpose before engaging in a textual analysis); *id.* at 106 (Stevens, J., concurring) (“There is no reason why we must confine ourselves to, or begin our analysis with, the statutory text if other tools of statutory construction provide better evidence of congressional intent with respect to the precise point at issue.”); *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 643 (2006) (Souter, J.) (using legislative history to corroborate text read as clear); *Scheidler v. Nat’l Org. for Women, Inc.*, 547 U.S. 9, 19–20 (2006) (Breyer, J.) (consulting the legislative history after concluding that the statute was clear); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 572 (2005) (Stevens, J., dissenting) (“I remain convinced that it is unwise to treat the ambiguity *vel non* of a statute as determinative of whether legislative history is consulted.”); *Gen. Dynamics v. Cline*, 540 U.S. 581 (2004) (Souter, J.) (looking to legislative and social history before engaging in a textual analysis).
310. *See, e.g., Caminetti v. United States*, 242 U.S. 470, 485 (1917) (“Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.”). I am indebted to Phil Frickey for this insight.

purposivist methodology to liberal results, these labels have taken on these ideological associations,³¹¹ and this may be yet another impediment to consensus. In the states studied, therefore, it is interesting to see courts perhaps beginning to put aside the ideological connotations of these identifiers. When the Oregon Supreme Court unanimously established its modified textualist regime in *PGE*, the court comprised both Democratic and Republican appointees.³¹² *PGE* itself was what some might call a “liberal” substantive decision, broadly construing a parental leave statute, even as it announced the new text-based regime.³¹³ The Connecticut Supreme Court that rejected the text-based plain-meaning rule in *Courchesne* had three Republican appointees, three Independent Appointees, and one Democratic appointee,³¹⁴ and the *Courchesne* opinion itself was what some might deem a “conservative” (but interpretively purposivist) opinion, holding that a state double-murder statute should be broadly construed to include a crime admittedly not covered by its plain text.³¹⁵ The Texas Court of Criminal Appeals has had shifting majorities,³¹⁶ and the leading textualist opinion refusing to follow the

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311. See Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 19 (2004); cf. Jack M. Beermann, *Common Law Elements of the Section 1983 Action*, 72 CHI.-KENT L. REV. 695, 698-99 (1997) (arguing that most ideologically conservative interpretations of 42 U.S.C. § 1983 (2006) have not been textualist).
312. Because Oregon justices are elected through nonpartisan elections, it is difficult to conclusively identify elected justices as “Republican” or “Democrat.” However, most justices first take their seats through gubernatorial appointment due to vacancy. At the time *PGE* was decided, three Oregon justices had been appointed by a Republican governor, two by a Democrat governor, and two had been elected outright. The court now has four justices appointed by a Democrat, one by a Republican, and two elected outright. See OREGON SECRETARY OF STATE, ARCHIVES DIVISION, 2009-2010 OREGON BLUEBOOK 321 2009.
313. *PGE*, 859 P.2d 1143, 1144 (Or. 1993) (construing the statute to allow an employee to take accrued paid sick leave as part of parental leave).
314. See Connecticut Supreme Court Historical Society, *Justices of the Connecticut Supreme Court*, <http://www.jud.state.ct.us/HistoricalSociety/justices/default.htm> (last visited Mar. 5, 2010).
315. *State v. Courchesne*, 816 A.2d 562, 569 (Conn. 2003) (“We acknowledge that, if we were to apply the . . . language literally . . . the defendant’s contention probably carries more weight.”).
316. See, e.g., Elected Officials Directory, *The Texas Tribune*, Elected Officials Directory, <http://www.texastribune.org/directory> (last visited Feb. 20, 2010) (noting that all judges were Republicans in 2010); TEXAS STATE DIRECTORY: THE COMPREHENSIVE GUIDE TO THE DECISION-MAKERS IN TEXAS GOVERNMENT 121-22 (2003) (noting that all judges were Republicans in 2003); TEXAS STATE DIRECTORY: THE COMPREHENSIVE GUIDE TO THE DECISION-MAKERS IN TEXAS GOVERNMENT 117-18 (1997) (noting that three judges were Democrats and six judges were Republicans in 1997); TEXAS STATE DIRECTORY: THE COMPREHENSIVE GUIDE TO THE DECISION-MAKERS IN TEXAS GOVERNMENT 111-12 (1992) (noting that all judges were Democrats in 1992); TEXAS STATE DIRECTORY: THE

legislative direction to consult legislative history was an opinion arguing for a pro-defendant construction of a state criminal drug statute.³¹⁷ In Michigan, of course, the methodological wars have been more politically charged, but even so, the court there has managed to impose a relatively stable consensus around this tiered textual approach.

It thus seems possible that, by embracing “textualism,” at least some of these state courts are trying to signal something other than ideological association. The attraction seems instead to be textualism’s “rule-of-law” norms, its emphasis on a predictable, formalized approach that can clarify the interpretive process for legislatures, lower courts, and litigants. That text comes first in this approach, to be sure, is a significant feature. But one would be hard pressed to find any courts that today, in practice, do not look to text first, even if they do not call themselves “textualist.” Far more distinctive in these cases is their emphasis on tiered interpretation. Contrary to the views of some academics that textualism’s formalism “is why textualism is ultimately doomed to lose the interpretation wars,”³¹⁸ the formalist virtues of predictability and transparency are precisely the principles that these state courts invoke in establishing their controlling interpretive regimes. And these principles seem to be at the heart of what these courts call “textualism.”

B. Modified Textualism Is “Textualism”

To the extent that the complete excision of legislative history is a *sine qua non* of American textualism, modified textualism is not textualism. But a single-minded focus on the use of legislative history *vel non* seems misguided. Manning argues that the primary philosophical distinction between textualists and purposivists is not use of legislative history, but rather, the *prioritization* of text-based evidence over policy-based evidence.³¹⁹ Others, like Caleb Nelson, argue that much of the difference between textualists and purposivists can be explained by textualists’ preference for clear interpretive rules, while purposivists prefer more flexibility.³²⁰ Clearly, modified textualism, particularly

COMPREHENSIVE GUIDE TO THE DECISION-MAKERS IN TEXAS GOVERNMENT 111-12 (1988) (noting that all judges were Democrats in 1988).

317. *Boykin v. State*, 818 S.W.2d 782, 785-86 (Tex. Crim. App. 1991) (refusing to hold that a defendant’s reference to the slang term “rock” sufficed for conviction under a statute requiring express reference to a controlled substance).

318. Siegel, *supra* note 18, at 175.

319. Manning, *supra* note 1, at 93.

320. Nelson, *supra* note 31, at 373.

when supported by methodological *stare decisis*, shares what both Manning and Nelson view as these defining textualist characteristics.

Even with respect to legislative history, closer examination illustrates how a tiered methodology with a second-step place for legislative history can, in fact, fit comfortably within mainstream textualist theory. As this Section will illustrate, textualism's core components—primacy of text; rule-bound interpretation; emphasis on legislative supremacy and the formal/constitutional requisites of the legislative process—are all advanced by this variation. In other words, the difference between a textualism that some claim is “dead” and a textualism that is the governing method of statutory interpretation in whole jurisdictions may be a compromise solution that actually requires almost no compromise from textualists at all.

1. *Text Versus Legislative History: Modified Textualism in Practice*

Pure textualists are not literalists.³²¹ Their theory aims to be far more sophisticated than that. Textualists “believe that language has meaning only in context,” and so they purport to use a host of rich “semantic cues” to derive statutory meaning.³²² Inherent in this view is a faith that this type of analysis, without resort to extrinsic evidence, is often capable of resolving hard statutory questions. Indeed, if more judges adhered to this view—namely, that this mode of analysis generally sufficed to resolve cases—it might reduce reliance, in practice, on legislative history.

Let us put aside the federal textualists for a moment and look to Oregon, where data is available concerning legislative history use under the *PGE* framework (prior to the April 2009 case that perhaps muddied it).³²³ Between 1993 and 1998, for example, the Oregon Supreme Court consulted legislative

321. SCALIA, *supra* note 31, at 24 (“[A] good textualist is not a literalist . . .”).

322. Manning, *supra* note 1, at 76-77.

323. Two studies have collected statistics concerning the application of the *PGE* framework, including legislative history, covering the period from *PGE*'s creation in 1993 through 2006. See Johansen, *supra* note 84 (covering 1993 to 1998); Wilsey, *supra* note 84 (covering 1999 to 2006). In addition, as part of this project, all Oregon Supreme Court cases between 2005 and April 30, 2009 in which *PGE* was cited (fifty-nine total) were read closely and coded for numerous factors, including specific interpretive tools used. (To confirm that using cases in which *PGE* was cited provided an appropriate sample, all Oregon Supreme Court cases coded in the Westlaw key number “Statutes” decided in 2007 and 2008 were reviewed; all but twenty-three cited *PGE*, and the twenty-three that did not still applied the three-step framework.) This discussion excludes all post-*Gaines* cases. See *supra* note 118 and accompanying text.

history thirty-three times out of 137 cases;³²⁴ between 1999 and 2006, only nine times out of 150 cases.³²⁵ And, between 2006 and April 2009, the court referenced legislative history in only six out of thirty-five cases that cited *PGE*.

Thus one potential on-the-ground effect of a consistently applied modified textualist approach, even as it admits legislative history, may be that it actually *reduces* its total use. Further testing across a number of states is required before one can make any definitive assertions,³²⁶ and much obviously depends on how ambiguity is defined.³²⁷ But it certainly seems possible that a consistently applied modified textualist regime sees, in total, less consideration of legislative history than a system that oscillates between applying methodologies based on “pure” textualism (in which legislative history is never considered) and purposivism (in which legislative history is more frequently consulted than it would be in a modified textualist system). Indeed, a recent empirical study of the U.S. Supreme Court (which adopts the oscillating approach) reveals that although use of legislative history has declined from its pre-textualist-era peak, legislative history is still employed by the Supreme Court in forty-two percent of majority statutory interpretation opinions.³²⁸ In other words, the pure textualists’ insistence on the total exclusion of legislative history has not done much to eliminate it because the pure textualists do not have a stable majority for their methodological approach.

Looking again to Oregon (and recognizing the limits of just one state’s experience), it is clear that the reason legislative history use has diminished so much is that, under *PGE*, the court simply resolved the vast majority of statutory questions using textual analysis alone. Close readings of all cases in which the *PGE* framework was referenced over the past five years³²⁹ revealed a healthy level of sophistication in the kind of textual analysis the Oregon Supreme Court was doing; more than half the cases examined the whole statutory scheme, related statutes, or the evolution of the statute from

324. Johansen, *supra* note 84, at 221 n.9, 244 n.169.

325. See Wilsey, *supra* note 84, at 616–17.

326. In particular, it would be useful to examine information from a more politically polarized bench, such as Michigan’s. But we have to start somewhere, and Oregon, because of *PGE*’s long history and relatively apolitical supreme court bench, provides a good foundation for this work.

327. Cf. Ward Farnsworth, Dustin F. Guzier & Anup Malani, *Ambiguity about Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS (forthcoming 2010) (manuscript at 24), <http://ssrn.com/abstract=1441860>.

328. See CROSS, *supra* note 11, at 142–48 (providing an empirical study of U.S. Supreme Court interpretation from 1994 to 2002).

329. See *supra* note 323.

previously enacted versions. This is precisely the kind of rich textual work that leading mainstream textualists appear to have in mind when they defend their theory against charges that it is “simpleminded.”³³⁰ It seems possible that a tiered approach like Oregon’s may focus courts on conducting a more thorough text-only inquiry in the first instance.

Compare now some recent textualist opinions that have garnered broad support at the U.S. Supreme Court. Looking only to textualist majority opinions authored by Justices Scalia and Thomas over the past two completed Terms, there were twelve statutory interpretation opinions that attracted a majority of votes including the vote of at least one purposivist Justice. Seven of those cases were unanimous. Out of all twelve cases, seven utilized only the simplest of textual tools—some combination of “plain text” (ordinary reading of the statute), dictionary definitions, and precedent.³³¹ Three other cases relied on these same tools plus a few canons.³³² The remaining two relied on a somewhat richer analysis of dictionaries, grammar, statutory structure and one nontextual canon.³³³ This comparison, although very limited, at least raises the

330. SCALIA, *supra* note 31, at 23. *But see supra* note 106 (discussing a student comment arguing that this type of multifaceted textual analysis undermines the predictability of the *PGE* framework).

331. *See* Arthur Andersen LLP v. Carlisle, 129 S. Ct. 1896, 1900 (2009) (relying only on statute’s “clear and unambiguous terms”); Carlsbad Tech., Inc. v. HIF BIO, Inc., 129 S. Ct. 1862 (2009) (relying on the precedents and dictionaries defining “subject matter jurisdiction”); United States v. Navajo Nation, 129 S. Ct. 1547 (2009) (relying on plain language and the precedent established by an earlier opinion in the same case); Jimenez v. Quarterman, 129 S. Ct. 681, 685 (2009) (relying on “plain language” and precedent); Bridge v. Phoenix Bond & Indemnity Co., 128 S. Ct. 2131 (2008) (relying on plain text); Cuellar v. United States, 128 S. Ct. 1994, 2000 (2008) (relying on plain text of the money laundering statute and the dictionary definition of word “designed” therein); Riegel v. Medtronic, Inc., 128 S. Ct. 999, 1008 (2008) (relying on “normal meaning” and previous opinions interpreting the term “state ‘requirements’” to include common law duties, and looking to agency view for confirmation).

332. *Cuomo v. Clearing House Ass’n*, 129 S. Ct. 2710 (2009) (relying on plain text, precedent, a dictionary, common law practice, and absurd results canon); *Atl. Sounding Co. v. Townsend*, 129 S. Ct. 2561 (2009) (looking to common law backdrop and three canons: broad construction for remedial statutes, Congress is aware of prior cases when it legislates, and *exclusio unius*); *United States ex rel. Eisenstein v. New York*, 129 S. Ct. 2230 (2009) (relying on two textual canons: the rule against superfluities and *exclusio unius*). Both *Atlantic Sounding* and *Cuomo* are atypical because, in each, the textualist opinion writer (Thomas in the former and Scalia in the latter) is joined only by the Court’s four “liberal”/purposivist Justices.

333. *See* Republic of Iraq v. Beaty, 129 S. Ct. 2183 (2009) (discussing the absurd results canon); Fla. Dep’t of Revenue v. Piccadilly Cafeterias, Inc., 128 S. Ct. 2326, 2338 (2008) (applying the “federalism” canon). There were five other majority statutory interpretation opinions authored by Justices Scalia or Thomas that divided the Court across the usual

question whether the *kind* of textual analysis being done in an Oregon-style modified-textualist regime is more multitextured than the typical “pure” textualist U.S. Supreme Court opinion – and, if so, why?

It is, indeed, surprising to see these U.S. Supreme Court cases resolved through such simple analysis. Presumably, the Court would not give space on its limited docket to these cases unless the cases proved too difficult for consistent lower court resolution. But it is hard to believe that this simple textualism is driving outcomes or that opinions written in this style are performing any real teaching function for lower courts. How often can the Court sensibly resolve such cases with sweeping language that the text is unmistakably clear when these cases come to the Court because lower courts have divided on them? This underutilization of textual interpretation may be the cause (or perhaps the effect) of the perception of some Justices that textualism is not sophisticated enough for the difficult cases. And anyone who has that perception will never believe that textualism could satisfactorily be the single, governing approach.

But might more Justices be interested in a more complex version of textualism? There are of course Supreme Court cases that do employ more sophisticated textual analysis and that do command the support of purposivist judges (and are often written by them), without any reference to legislative history.³³⁴ And, as already mentioned, recent scholarship has illustrated that

“liberal”/“conservative” lines. In those cases, one was decided relying on solely on precedent, and the remaining four relied on a still quite simple combination of plain meaning, dictionary definitions, precedent, and one or two canons. *See* *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343 (2009) (relying on text, dictionaries, precedent, and the presumption that congressional amendment of one provision indicates intent not to amend another); *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009) (relying on dictionary definition, use of term elsewhere in Act, plain language and agency deference); *14 Penn Plaza, LLC v. Pyett*, 129 S. Ct. 1456 (2009) (relying on precedent); *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009) (relying on ordinary meaning, dictionary usage, precedent, *exclusio unius* textual canon, and the substantive canon that repeals by implication are not favored); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214 (2008) (relying on plain language, a dictionary definition, and the use of the term “any” in other statutes). Three of these cases had dissents or separate concurrences that expressly attacked the Court’s refusal to examine legislative history and purpose. *See Entergy*, 129 S. Ct. at 1512 (Breyer, J., concurring in part and dissenting in part) (looking to legislative history for evidence of purpose); *Carcieri*, 129 S. Ct. at 1068 (Breyer, J., concurring) (writing separately to emphasize that he was persuaded to join the majority not by textual analysis but because of evidence in the legislative history); *Ali*, 552 U.S. at 243-47 (Breyer, J., dissenting) (turning to legislative history for evidence of purpose). Another accused the majority of ignoring legislative intent and cited legislative history in support. *See Gross*, 129 S. Ct. at 2353 (Stevens, J., dissenting).

334. A nice example from the most recent Term is Justice Breyer’s complex textualist analysis for a unanimous Court in *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009).

one of textualism's greatest impacts has been in moving *nontextualist* Justices toward an approach that almost always begins with textual analysis and tries to use legislative history in a more limited fashion, or eliminates it entirely in an effort to attract more votes.³³⁵ This trend supports the idea that the Court is capable of employing a richer version of textualism and that, even in some difficult cases, the Justices are sometimes content to rely only on rich textual analysis, and not consult legislative history.

2. *Legislative History Versus Canons: Modified Textualism in Theory*

The most significant difference between modified textualism and the pure version, of course, occurs once textual inquiry is exhausted. Modified textualism's progression—from text, to legislative history, to canons—contrasts starkly with pure textualism's text-then-canons-only approach and, at first, seems incompatible with textualism's long-standing opposition to legislative history. But, actually, modified textualism poses a slightly different—and, in reality, probably more pertinent—question about legislative history than the one most textualism scholarship has been answering. The pure textualists' focus primarily has been directed at arguments that legislative history evidence can *trump* textual evidence. But once we are talking about a tiered approach, in which text unquestionably is first, these arguments are mostly moot. Even federal textualists recognize that, when statutes are ambiguous, “[u]nless interpreters are willing to hold [them] void for vagueness, they need some way to finish the job.”³³⁶

So the critical question is actually about the *second*, not the first, step. And this changes everything. In fact, there is a strong argument to be made that, once text is found inconclusive, relying on legislative history better effectuates textualist theory—and is a more sensible approach generally—than relying on the canons. Take, for example, the common textualist criticism that, because there is often legislative history available for both sides of any point, reliance on it gives judges unfettered discretion to reach personally preferred results. If the alternative is to allow judges to freely select among the roughly *sixty* policy-based substantive canons, confining the judges to the legislative history books may in fact better limit judicial discretion.³³⁷ It is far easier for legislatures to

335. Brudney & Ditslear, *supra* note 50; Koby, *supra* note 304; Merrill, *supra* note 48.

336. Nelson, *supra* note 31, at 394.

337. ESKRIDGE ET AL., *supra* note 31, app. B, at 29-41 (listing substantive canons used by the Court); cf. Zeppos, *supra* note 49, at 1092 (“[E]lasticity in interpretation may, in fact, come about because there are so many available sources of authority from which to choose. . . .

control the contents of legislative history than to dictate which of the many substantive canons courts should select. There are often numerous canons that can be applied to a particular statutory question, they often conflict with one another, and courts are not constrained in selecting among them.³³⁸ For this reason, even Justice Scalia notes that use of the canons—“these artificial rules”—“increase[s] the unpredictability, if not the arbitrariness, of judicial decisions.”³³⁹

Courts also might try to make legislative history use less manipulable by articulating standards about what makes it reliable. The U.S. Supreme Court’s stalemate over *whether* legislative history should be used at all has prevented a more productive conversation from emerging about *when* legislative history is actually helpful. In contrast, in the modified-textualist states studied, one does see such efforts, as those courts make statements—which are then given stare decisis effect—about which types of legislative history are useful.³⁴⁰ Interestingly, the same contrast emerges from another comparative study, James Brudney’s comparison of legislative history use in the United States and Great Britain.³⁴¹ As Brudney observes, the English debate over legislative history “goes to weight rather than admissibility,” as British judges “grapple

[T]he range of sources relied upon by the Court sheds some light on the question of constraint in statutory interpretation.”).

338. Cf. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) (arguing that for every canon of interpretation there is a competing canon that undermines it). The Court also could try to rank the canons. Cass Sunstein suggested decades ago that “it should be possible to achieve a more precise understanding of statutory construction—both as a descriptive and as a normative matter—by generating a hierarchy of interpretive principles.” Sunstein, *supra* note 57, at 498.
339. SCALIA, *supra* note 31, at 27-28; see Manning, *supra* note 93, at 2473 (“One must acknowledge that the more particular background conventions endorsed by textualists often vest the judiciary with a range of discretion that is not apparent from the statutory text.”).
340. See, e.g., *In re Certified Question*, 659 N.W.2d 597, 600 n.5 (Mich. 2003) (“[A]ctions of the Legislature intended to repudiate the judicial construction of a statute . . . or actions of the Legislature in considering various alternatives in language in statutory provisions before settling on the language actually enacted” are among the “highest quality” legislative history whereas “[o]f considerably diminished quality as legislative history are forms that do not involve an act of the Legislature,” such as “staff analyses.”); State *ex rel.* Kalal v. Circuit Court, 681 N.W.2d 110, 131-36 (Wis. 2004) (Abrahamson, C.J., concurring) (cataloging and discussing the respective merits of thirteen different types of legislative history ranging from statutory historical notes to executive veto messages).
341. See James C. Brudney, *Below the Surface: Comparing Legislative History Usage by the House of Lords and the Supreme Court*, 85 WASH. U. L. REV. 1, 60 (2007). Until 1992, England’s House of Lords had a complete ban on the consultation of legislative history. See *Pepper v. Hart*, [1993] 1 All E.R. 42 (H.L.) (U.K.) (lifting ban); Brudney, *supra*, at 2.

with different ways in which [it] might or might not assist.”³⁴² In contrast, Brudney writes, the U.S. debate is “relatively impoverished,” a fact he attributes to the Court’s “all-or-nothing” manner of thinking about legislative history.³⁴³

Another textualist criticism of legislative history has been that reliance on these background materials may lead courts to interpretations that upset the congressional “deal” memorialized in the enacted statute itself. But here, too, the canons appear to be the greater risk. Legislative history actually is related to the statute under consideration, whereas canons are not. And legislative history is the work product of legislators (or their staff); canons are judicial creations wholly divorced from the legislative process. Nor can it plausibly be argued that legislative history is further removed from the bicameralism/presentment process than the judge-made canons.³⁴⁴ It is also worth noting that the substantive canons themselves are the product of the common law tradition, and were developed—by judges, not legislatures—during an era in which statutory law was the exception to the rule of the common law. Today, when the circumstances are starkly reversed, it makes sense to see some diminution in the importance of these common law default rules.³⁴⁵

This issue about the respective merits of legislative history and the canons, while likely a common one in practice, has received rather little scholarly attention. Modified textualism’s tiered approach highlights this question, because the hierarchy requires a choice not only at step one but, also, at step

342. Brudney, *supra* note 341, at 63.

343. *Id.* at 60, 63. For Brudney, however, who has argued not only for more subtle variations in weight given to different types of legislative history but also for more complex variations (such as different interpretive conventions for statutes addressing different subject areas), the states’ middle ground might not be enough without further refinement.

344. Once judges are forced to go beyond statutory text (the only thing that goes through the bicameralism/presentment process), each of the remaining interpretive tools is equally outside the process. Likewise, Manning’s argument that treating legislative history as “authoritative” violates the nondelegation doctrine (an argument not widely embraced by other textualists in any event) loses much force when legislative history is formally subordinated to textual analysis in all cases, because Manning’s main objection in this context is to legislative history being treated as “authoritative,” not to it being used at all. See Manning, *supra* note 40; see also Elhauge, *supra* note 10, at 2071 (explaining this aspect of Manning’s critique and arguing that “Manning’s argument, if credited, would thus explain why such legislative statements should not be given authoritative weight, but not why they should be ignored altogether”).

345. It seems relevant here that the use of substantive canons is much less frequent in many of the European civil code (as opposed to common law) systems. See Robert R. Summers & Michele Taruffo, *Interpretation and Comparative Analysis*, in *INTERPRETING STATUTES*, *supra* note 21, at 461, 473.

two. In light of the empirical work suggesting that most judges agree that text almost always comes first, the days of the text versus purpose debate are perhaps now past. And although as a theoretical matter it may be true that part of “what divides textualists from purposivists”³⁴⁶ is the text-versus-legislative-history question, as a practical matter, that is not where the difference seems to lie anymore. In fact, the Supreme Court seems engaged, albeit more implicitly, in precisely the same kinds of questions that the states’ modified textualism brings to light—namely, how ambiguity is discerned and, once found, whether legislative history or canons come next. To be sure, differences among individual judges run deeper than this, but at least part of what divides textualists from purposivists on the modern U.S. Supreme Court seems to be that textualists put canons second, whereas purposivists choose legislative history most of the time.³⁴⁷ If my argument is plausible, however, that second-step legislative history is actually compatible with textualism, then a focus on these differences as fundamental or constitutional seems misplaced.

C. *Modified Textualism as “Structured Purposivism”?*

Finally, in a way, these state cases are also about purposivism. One of the most notable features of the state regimes is the fact that not only the self-proclaimed textualists but also some nontextualist judges accept them. This consensus-building quality of modified textualism has critical practical implications, because it is what enables modified textualism to emerge as the one and only approach. This, in turn, better advances textualism’s rule-of-law goals than the methodological oscillation on the federal side.

So what might be in this for purposivists? Perhaps one attraction lies in legitimizing the use of legislative history as the second-best evidence of statutory purpose in a judicial atmosphere in which it can no longer seriously be contested that text is primary. Legislative history, when of good quality, can be an excellent source of information about statutory purpose, and so formalizing it as the second step and limiting its use (which addresses some concerns about its manipulability) may be appealing to judges who generally value it.

For at least some judges, there also may be attractions in modified textualism’s modest formalism, what some might even call a “structured purposivism.” Purposivism is generally flexible, and so the path it takes in a

346. Manning, *supra* note 1.

347. This observation merits more attention than space here permits, and I am developing it in a separate project.

particular case may be difficult to predict in advance. This leaves purposivism open to (often unfair) charges of activism, or lack of discipline. Textualism, in contrast, has been extremely effective at monopolizing the “rule-of-law” mantle.³⁴⁸ But it certainly seems plausible that there are “rule-of-law purposivists” out there, judges who wish to retain a multifactor approach, but who wish to concretize it into something that can be described in advance and consistently applied time and again by lower courts. Let’s remember, after all, that despite the label, this “textualism” likely approximates what many judges who call themselves purposivists generally *do*.³⁴⁹ There is nothing antithetical to purposivist theory about looking first to the statutory text for evidence of purpose.³⁵⁰ Of course, there will always be cases on the margins—cases where the text is clear on its face but also starkly at odds with evidence of intended meaning in legislative history.³⁵¹ But no legal theory works perfectly at the margins. It seems unproductive to reject a workable compromise based on the marginal cases, particularly if, as discussed in Part V, one accepts the benefits of methodological consensus and recognizes the implausibility of reaching it through any approach that does *not* put text first.

Indeed, even the Supreme Court’s most flexible statutory interpreters today do not openly embrace the idea of a wholly unstructured inquiry, or the idea that courts should have a broad menu of interpretive options from which to select the “best” result. Instead, they strive to show that their statutory readings, too, are dictated by the rules of interpretation. The many years of Republican judicial appointments and the influence of textualism may be partially responsible for this. Today, even eclecticians argue that their decisions are “compelled” by evidence in text, legislative history or other “neutral” concepts such as precedents and canons.³⁵² Everyone appears to be trying to

348. Cf. Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 664 (2009) (arguing that, in the constitutional context, originalism has been a public relations success in positioning itself as “more consistent with constitutional democracy than are its competitors”).

349. See sources cited *supra* note 304.

350. It is for this reason that scholars like Jonathan Siegel believe purposivists will win the methodological wars and ultimately improve their theory to engender broad consensus. Siegel, *supra* note 18, at 176 (“[P]urposivism [does not] cease to be purposivism[] by accepting these accommodations. . . . [E]ven intentionalists and purposivists can, and often will, recognize that following statutory text may be the only solution to a particular case.”).

351. *But see id.* at 174-75 (arguing that the existence of such cases will prevent textualism from engendering broad compromise).

352. See, e.g., *Gross v. FBL Fin. Servs., Inc.* 129 S. Ct. 2343, 2356 (2009) (Stevens, J., dissenting) (arguing that the majority “ignore[s] the conclusion compelled by this interpretation of the Act: [precedential] construction of ‘because of’ remains the governing law for ADEA claims”); *Fla. Dep’t of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2341-43 (2008)

play by *some* rules of the game. This mindset suggests at least the possibility of broader appeal for a structured approach.

D. Evidence of a Broader Trend?

In terms of sheer numbers, the vast majority of the nation's declared "textualists" may actually look more like Oregon's textualists than Justice Scalia's. State courts handle ninety-eight percent of the nation's caseload, and a very preliminary canvass of state supreme court rulings on legislative history use indicates that the majority of state courts may now routinely apply the basic modified textualist rule: first step, text only; if ambiguity is found, then second step, legislative history.³⁵³ These observations are extremely tentative; close readings of cases across the fifty states are required to confirm them and to determine if the courts are acting consistently. But the Connecticut Supreme Court made a similar observation when it noted that its attempt to ban the plain-meaning rule put it in the "minority" among state courts.³⁵⁴ The

(Breyer, J., dissenting) ("The statute's purpose is apparent on its face. . . . [T]he majority . . . [has] fail[ed] . . . to work with this important tool of statutory interpretation"); *United States v. Williams*, 128 S. Ct. 1830, 1847 (2008) (Stevens, J., concurring) ("First, I believe the result to be compelled by the principle that 'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'"); Frost, *supra* note 234, at 589 n.76 ("Although sometimes courts will candidly admit that a law is susceptible to more than one interpretation, more often they will claim that the text, structure, and legislative history compels the result.").

353. See, e.g., *In re Mental Health Ass'n of Heartland*, 221 P.3d 580, 583 (Kan. 2009) ("Only if the statutory language is not plain and unambiguous are the courts called upon to resort to canons of statutory construction or consult legislative history."); see also *Miklosy v. Regents of Univ. of Cal.*, 188 P.3d 629 (Cal. 2008); *Stamp v. Vail Corp.*, 172 P.3d 437 (Colo. 2007); *Abdulkadir v. State*, 610 S.E.2d 50 (Ga. 2005); *State v. Hickman*, 191 P.3d 1098 (Idaho 2008); *O'Casey v. Children's Home & Aid Soc'y*, 892 N.E.2d 994 (Ill. 2008); *Empire Props., LLC v. Hardy*, 873 A.2d 1187 (Md. 2005); 81 *Spooner Rd. LLC v. Town of Brookline*, 891 N.E.2d 219 (Mass. 2008); *Miss. State Univ. v. PETA*, 992 So.2d 595 (Miss. 2008); *Ravalli County v. Erickson*, 85 P.3d 772, 774 (Mont. 2004); *Pizzullo v. N.J. Mfrs. Ins. Co.*, 952 A.2d 1077 (N.J. 2008); *Reopelle v. Workforce Safety & Ins.*, 748 N.W.2d 722 (N.D. 2008); *Wellington v. Mahoning County Bd. of Elections*, 882 N.E.2d 420 (Ohio 2008); *Commonwealth v. Fedorek*, 946 A.2d 93 (Pa. 2008); *Slama v. Landmann Jungman Hosp.*, 654 N.W.2d 826, 828 (S.D. 2002); *In re Det. of Martin*, 182 P.3d 951 (Wash. 2008); *Parker Land & Cattle Co. v. Wyo. Game & Fish Comm'n*, 845 P.2d 1040, 1043 (Wyo. 1993). New York and D.C. are typically less strict. See, for example, *District of Columbia v. Fitzgerald*, 953 A.2d 288, 300 (D.C. 2008); and *Samiento v. World Yacht Inc.*, 883 N.E.2d 990, 994 (N.Y. 2008), which are discussed *supra* note 72.
354. *State v. Courchesne*, 816 A.2d 562, 569 (Conn. 2003). Alan Tarr has observed a similar dominance of textualism in state constitutional rulings. See TARR, *supra* note 245, at 195. The

Connecticut court could point to only two states that it thought likewise would consult legislative history even in the face of clear text.³⁵⁵ It seems worth investigating further whether this modified textualist methodology is now dominating state statutory interpretation across the nation. Finding such an emerging consensus has, in other areas of law, given courts comfort about “the practical wisdom of following the approach.”³⁵⁶ It means something about the development is likely working.³⁵⁷

Similarly relevant would be evidence that many state *legislatures* approve of a particular interpretive approach. As we have seen, there has been much activity on the part of state lawmakers in legislating rules of construction. To the extent that those legislated rules can be viewed as an indication of legislative preferences, their numbers are informative. Most state legislatures have enacted statutes requiring that various textual canons be applied.³⁵⁸ But these legislatures do not appear to prefer a “pure” textualist approach either. At least one-fifth of all state legislatures also have enacted statutes authorizing courts to reference legislative history and, among these, only Oregon’s and Texas’s allow reference to legislative history without a prior threshold finding of ambiguity.³⁵⁹ It does not appear that any state legislature has banned

relationship between statutory and constitutional methodologies is intriguing, but must be explored elsewhere.

355. Although not referenced by the Connecticut Supreme Court, the New York and D.C. highest courts also at times use a purposivist or eclectic approach. See *Fitzgerald*, 953 A.2d at 300; *Samiento*, 883 N.E.2d at 994.
356. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (Breyer, J., dissenting); *id.* at 2853 (noting that most state highest courts have used the same standard of review for gun law cases with “surprisingly little variation,” and “[w]hile these state cases obviously are not controlling, they are instructive. . . . [a]nd they thus provide some comfort regarding the practical wisdom of following the approach” (internal citation omitted)).
357. Sunstein and Posner have argued in favor of references to foreign law based on the simple intuition (illuminated through their discussion of the Condorcet Jury Theorem) that if a majority of similarly situated governments reach the same result, that result, more likely than not, is correct. The following example from their article is clearly relevant: “[T]he Supreme Court of Texas is deciding whether to adopt rule A or instead rule B. Suppose too that the vast majority of states have adopted rule A. If we assume that each state is more likely than not to make the right decision, in the sense of being well motivated and more likely than not correct in its beliefs, then there is good reason to believe that the Supreme Court of Texas should, in fact, adopt rule A.” Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 142 (2006).
358. See Scott, *supra* note 10, at 11–28.
359. See *id.* at 353 tbl.7 (citing COLO. REV. STAT. § 2-4-203(c) (2008); CONN. GEN. STAT. § 1-2Z (2007); HAW. REV. STAT. § 1-15(2) (1993); IOWA CODE § 4.6(3) (2004); MINN. STAT. § 645.16(7) (2008); N.M. STAT. § 12-2A-20(c)(2) (2005 & Supp. 2008); N.D. CENT. CODE, § 1-02-39 (1996); OHIO REV. CODE ANN. § 1.49(c) (Lexis Nexis 1990); OR. REV. STAT. ANN.

legislative history use entirely.³⁶⁰ In contrast, very few state legislatures have enacted any statutes referencing the substantive canons, apart from those *banning* the application of various canons, such as the lenity or derogation of common law canons already discussed.³⁶¹ Without further research, it is impossible to know the legislative motivations for these choices, but there does appear to be an indication that a fair number of legislatures endorse legislative history use, but perhaps only in the rather controlled way that modified textualist regimes permit. This legislative endorsement also provides a powerful counterweight to some of the pure textualist arguments for a complete legislative history ban; it is harder to argue that judicial reference to legislative history harms the legislative process when the legislatures themselves authorize it.³⁶²

V. THE VALUE OF INTERPRETIVE CONSENSUS

The purpose of the foregoing pages has not been to argue that the studied state courts can provide “the right” answer to all of our methodological problems, or that modified textualism is the only possible, or “best” answer. Rather, the goal has been to illustrate what we have lost by our single-minded

§ 174.020(1)(b) (West 2007 & Supp. 2009); 1 PA. CONS. STAT. §§ 1921(c)(7), 1939 (2006); and TEX. GOV'T CODE ANN. § 311.023(3) (Vernon 2005)). Cf. DEL. CODE ANN. tit. 10, § 5403 (2009) (same but struck down by the state supreme court, *see supra* note 285). A separate Pennsylvania statute creates an exception to allow consultation of a report prepared by the commission or committee that drafted the statute, provided the report was generally available before passage of the statute, but also notes that “the text of the statute shall control in the event of a conflict” 1 PA. CONS. STAT. ANN. § 1939 (West 2008). Further, although, not widely known, the National Conference of Commissioners on Uniform Laws approved, in 1995, a Uniform Statute and Rule Construction Act for the states. Strikingly, to date, only New Mexico has adopted the Act, *see* N.M. STAT. ANN. § 12-2A-1 to -20 (Michie 2004). This fact may be attributable to its limited utility, given the drafters’ decision, because “all of the generally recognized theories of construction have been justifiably criticized,” UNIF. STATUTE AND RULE CONSTR. ACT, 14 U.L.A. 57 (1995) Pref. Note, not to impose any single controlling interpretive framework, but instead to “provid[e] a broad range of aids and principles.” *Id.* Notably, however, even that Act recommends a “step-by-step” process that recommends first consultation of, *inter alia*, text and intrinsic aids, and, second, where meaning remains uncertain, legislative history and other aids. *Id.* §§ 18-20.

360. *See* Scott, *supra* note 10, at 34-38; *cf.* *Handle with Care, Inc. v. Dep't of Human Servs.*, 406 N.W.2d 518 (Minn. 1987) (disregarding legislative rule prohibiting courts from relying on taped proceedings for proof of intent in light of state statute authorizing consultation of “contemporaneous legislative history” when statute is ambiguous, MINN. STAT. § 645.16(7)).

361. *See* Scott, *supra* note 65, at 41, 43; *supra* notes 279-282.

362. Of course, the textualists’ constitutional arguments would remain; legislative approval of an unconstitutional practice does not make that practice constitutional.

focus on U.S. Supreme Court statutory interpretation. The problems of interpretive predictability and methodological consensus have seemed particularly intractable looking through the lens of Supreme Court cases, and the middle-ground consensus found by the states studied has proved elusive, unattractive, or perhaps unnecessary, to the Court. But the ability of the state courts studied to articulate a single methodological approach—and so to treat methodology as “law”—is not unique. Highest courts in other countries, too, have implemented controlling interpretive regimes.³⁶³ Ignoring these other court developments seems to be skewing the conversation in unproductive ways.

The focus on the Supreme Court, for instance, has given statutory interpretation methodology in the federal courts something of a *sui generis* quality. But this should not necessarily be the case, and the state developments offer potentially fruitful comparisons. Statutory interpretation methodology can be analogized to more than just the controversial *Chevron* regime. Other interpretive frameworks—such as frameworks for contract and will interpretation, even constitutional frameworks such as the tiers of scrutiny—have long been conceived as more “law-like” than statutory interpretation methodology and treated as precedential. Concerns about judicial manipulation of legal doctrine have not prevented those frameworks from “sticking” or led most to question their end-of-the-day utility. The state cases raise the question of why statutory interpretation methodology should be treated differently. As a matter of interpretive theory, this distinction remains

363. See Acts Interpretation Act, 1901, §§ 15AA, 15AB (Austl.) (setting forth Australian purposive/contextual approach and listing which extrinsic aids may be considered); RUTH SULLIVAN, SULLIVAN AND DRIEDGER ON THE CONSTRUCTION OF STATUTES (4th ed. 2002) (detailing Canada’s controlling purposivist approach, called the “modern principle”); James R. Maxeiner, *Legal Certainty: A European Alternative to American Legal Indeterminacy?*, 15 TUL. J. INT’L & COMP. L. 541, 544 (2007) (arguing that the European experience challenges assumptions based on the American experience “that high levels of legal indeterminacy are inevitable” and that, for example, German statutory interpretation is more determinate); Yihan, *supra* note 292, at 201-02 (arguing that the lack of a “tolerably consistent approach to statutory interpretation” led, in Singapore, Australia, and New Zealand, to legislatively enacted “authoritative direction in the face of conflicting approaches”). See generally Nial Fennelly, *Legal Interpretation at the European Court of Justice*, 20 FORDHAM INT’L L.J. 656 (1997) (describing the European Court of Justice’s “teleological” approach as focused on uniformity and harmonizing European law, even if extratextual means are required to do so). Though international comparisons are far beyond the scope of this Article, it also is interesting to note that statutory interpretation in civil law countries, where almost all law is code-based, is more open-ended, a fact some attribute to the very general language of the comprehensive codes, which therefore must be construed broadly by judges. See Konrad Zweigert & Hans-Jürgen Puttfarcken, *Statutory Interpretation – Civilian Style*, 44 TUL. L. REV. 704, 707 (1970).

unjustified—or perhaps just unnoticed—in the legisprudence and the literature.

Moreover, the implications of these comparisons do not depend on whether the state interpretive trends can be generalized across a majority of states. Once we train our focus on discerning the legal status of statutory interpretation methodology, it becomes clear that the question is very much an “everyday” question; it goes, for example, to the relationship between judicially articulated rules of interpretation and legislated interpretive rules, and to what, if any, methodology state and federal courts must use when interpreting one another’s statutes. And it inevitably highlights the skepticism over whether or how much statutory interpretation methodology really “matters.”

In this final Part, I offer some concluding, but intentionally preliminary, thoughts on these issues, particularly the value of methodological consensus. I also address the utility of “tiered” interpretive frameworks, such as those we have seen in the states, and more generally the importance of recognizing how state and federal courts can contribute to the development of one another’s legisprudence. Throughout, I try to anticipate and answer some possible objections to arguments I have made. There are surely some I do not address, but this project is just the first step on a long road.

A. *Why Consensus?*

A premise of this Article has been that settling on a consistent approach is a worthy goal for statutory interpreters. There are many thoughtful scholars who will undoubtedly disagree. Some of these disagreements stem from differences of opinion about the proper role of judges in statutory interpretation. Some scholars argue that judges should be active shapers, and sometimes reshapers, of law, using the interpretive process to generate an “open dialogue that notes the virtues of various positions and explains why one of them is preferable.”³⁶⁴

Yet even if one agrees that the role of the judge described above is the ideal one for judges in most situations, there is an argument to be made that statutory interpretation is different. The role of the judge is arguably more cabined—and more cabinable—when it comes to statutory interpretation than common law or constitutional interpretation. This is both because of the superior role of the legislature³⁶⁵ (which distinguishes it from common law

364. Eskridge & Frickey, *supra* note 59, at 371.

365. See Peter L. Strauss, *Statutes That Are Not Static: The Case of the APA*, 14 J. CONTEMP. LEGAL ISSUES 767, 772 (2005) (“Scholars writing about interpreting statutes disagree about much,

judging) and because of the nature of legislation itself (which distinguishes it from constitutional law). Statutes are amendable, detailed documents directed at specific situations; the Constitution is nearly impossible to amend, and intentionally drafted at a level of generality that makes wide-ranging interpretation perhaps inevitable. Statutory interpretation is also more dialogic. A court-announced interpretive framework can be incorporated into legislative practices going forward; the Constitution, in contrast, cannot practically be redrafted to coordinate with a new judicial interpretive regime. Indeed, it is for these very reasons that the Supreme Court has already recognized that *stare decisis* applies differently to statutory and constitutional precedents.³⁶⁶ The Court gives “super-strong” *stare decisis* effect to its substantive statutory interpretations, because the legislature can change them. Constitutional precedents receive less weight, on the ground that the Court most often has the final word on constitutional matters and so must retain some flexibility. These principles are translatable to the question of interpretive methodology. Also for these reasons, the benefits of a consistently applied, *ex ante*-announced interpretive methodology might outweigh the costs of loss of flexibility in the statutory context, even if one thinks a more formalistic approach would be inappropriate in the common law or constitutional context.

Other arguments, too, may be levied against consistent methodological regimes. One type of argument might stem from a more romantic vision of judging, one that views statutory interpretation as a “craft,” and, as such, a task ill-suited for constraining rules. But such an argument can be made about all law, not just statutory interpretation. Those who believe that *all* law is an “art” or craft such that no single set of rules can suffice for *any* legal question will find little convincing in this Article—and this Article is not directed toward them. Rather, this Article is directed at those who accept without much resistance the idea that law-like rules of interpretation are useful for other areas of law, and simply asks: why single out statutory interpretation? Statutory interpretation is not necessarily more of a “craft” than other areas of law. Take, for example, contract and will interpretation. The tasks in all three areas—interpreting language drafted by others in unforeseen situations—are in many ways essentially identical. For that reason, many state courts already treat the rules of statutory, will, and contract interpretation interchangeably.³⁶⁷ So, too, even the U.S. Supreme Court has recognized the value of controlling interpretive frameworks to assist other areas—areas not necessarily less

yet generally agree on some propositions. . . . [F]ew assert that judges are superior or even equal law-makers to the legislature.”).

366. See *supra* note 54.

367. See *supra* note 250 and accompanying text.

complex than statutory interpretation. As a few (vastly oversimplified) examples, in addition to *Chevron*, the Court has reached consensus on an interpretive framework to decide when a law violates the dormant commerce clause; the three-tier “scrutiny” regime for equal protection challenges provides another illustration.³⁶⁸ Indeed, the salient difference between statutory law and common law or constitutional law – the involvement of the legislative branch – makes the statutory context the *strongest* case for interpretive frameworks, because of frameworks’ coordinating function and the desire to respect the legislature’s domain.

Finally, as to the strand of argument that all law is politics, or that legal doctrine has no constraining effect on judicial decisionmaking,³⁶⁹ this Article too makes only limited claims. This type of argument also undercuts the value of *any* legal regime, not just statutory interpretation methodologies, and it cannot be fully addressed or refuted here. Rather, this Article assumes, as its starting point, the validity of familiar arguments about the constraining effect of the law and simply seeks to apply them to statutory interpretation. Acknowledging that ideology plays a role in judicial decisionmaking does not mean that the role of law should completely be discounted. As already elaborated, empirical and anecdotal accounts (particularly with respect to the lower courts) support the idea that legal doctrine constrains judges at least some of the time – and often, much of the time.³⁷⁰ This is not to say that methodology *dictates* outcomes. But it is to posit that, in all or even in most cases, the methodology chosen can *affect* outcomes; it can narrow the range of permissible outcomes and might rule out some entirely. It also establishes the terms of the debate, which has its own significance wholly apart from the outcome question. Beginning with these premises, the question is what more, if anything, might be gained from methodological consensus.

368. Other examples might include the now-defunct four-part test, articulated by the Court in *Cort v. Ash*, 422 U.S. 66, 78 (1975), concerning when to imply a private cause of action, or the four-part test used to determine whether a stay should be granted, *see, e.g.*, *Nken v. Holder*, 129 S. Ct. 1749 (2009).

369. Much of this comes from the so-called “attitudinalist” political science literature, among the most well known of which are JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002); and JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 228 (1993).

370. *Supra* Section III.A; *see also* Fallon, *supra* note 268, at 978 & n.16 (2009) (collecting studies and noting that “[p]olitical scientific studies that attempt to account for judges and justices being motivated by a sense of legal obligation . . . have not yet attracted the attention in legal scholarship that they deserve”).

1. *Instrumental Rule-of-Law Benefits from Consistent Regimes*

Part I summarized some of the most common arguments in favor of a consistent interpretive approach, and they will not be repeated here at length. These arguments derive primarily from “rule-of-law” values of the kind typically associated with *stare decisis*,³⁷¹ namely, that a consistent approach would increase predictability and systemic coordination for the many parties involved in statutory interpretation—legislators who must negotiate and draft statutes, citizens who must act and litigate under them, and lower courts that must interpret them. The same principle is deeply embedded in other areas of legal interpretation, such as the notion that parties “contract in the shadow of the law.” Most commentators agree that a consistent approach, if followed, would reduce costs for all systemic players,³⁷² as well as render the process and outcomes more legitimate to the public.³⁷³ It may be true, as one empirical study contends, that Congress does not currently pay much attention to the rules of statutory interpretation.³⁷⁴ But the fact that Congress has not yet paid attention does not tell us whether it would do so if the Court actually adopted a single set of rules. It seems possible that Congress now rarely focuses on the rules of interpretation because it has no incentive to do otherwise.

a. *Instrumental Benefits for Federal Courts*

These rule-of-law attractions, of course, are not foreign to the federal courts. But they have received relatively short shrift in statutory interpretation theory because of the overemphasis on the Supreme Court, the venue least likely to showcase rule-of-law values in this context. So, too, as some have argued, the uniqueness of the Court’s role, personalities, and resources might make a consistent methodological approach there unnecessary or impractical.³⁷⁵

371. Cf. Monaghan, *supra* note 276, at 748 (“[A]dherence to precedent is defended by pointing to the important values in decisionmaking that are promoted thereby: consistency, coherence, fairness, equality, predictability and efficiency.”).

372. See *supra* note 61 and accompanying text.

373. See *supra* note 62 and accompanying text.

374. See Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 600-01 (2002).

375. See, e.g., T. Alexander Aleinikoff & Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning*, West Virginia University Hospitals, Inc. v. Casey, and *Due Process of Statutory Interpretation*, 45 VAND. L. REV. 687, 702 (1992) (“[G]iven the number of clerks and briefs available to the Court, it seems that a Justice can rather quickly ‘get up to speed’ on a difficult statute. There is also no reason why individual justices might not specialize in

But this perspective discounts the lower courts. Even if many legal players know where the nine U.S. Justices stand on most interpretive (and ideological) issues, and thus if the indeterminacy problem is somewhat overstated with respect to the Supreme Court, how does that type of transparency translate to the venue in which most federal appellate court statutory interpretation actually occurs, the federal courts of appeals? There are more than 250 federal appellate judges,³⁷⁶ and litigants do not know which judges will hear their case until after the case is briefed. Without a consistent methodology it will not be possible for litigants (or legislatures) to predict which interpretive approach will be used in a particular case in the lower courts.

Indeed, as Part III described, even those who argue that *Chevron* does not always make cases more predictable in the Supreme Court, nevertheless agree that a controlling regime is still necessary “to facilitate control of the *lower federal courts* by the Supreme Court” and to “allow lawyers to provide more accurate advice to clients.”³⁷⁷ And the lower federal courts might very well welcome this kind of guidance. As Judge Richard Posner has observed, the emphasis in those courts is often on deciding as many cases as possible “with reasonable dispatch,” not on using the more romanticized model of “protracted” “judicial deliberation,” sometimes emphasized in academic scholarship.³⁷⁸

Let’s not forget, either, that *state* courts also interpret federal statutes. That means there are many more judges than just the 250 federal appellate judges interpreting federal statutes. Indeed state supreme and lower federal courts, located in the same cities, routinely decide identical federal statutory questions. In these “reverse-*Erie*” cases, however, the courts do not always interpret the

particular areas of the law and be delegated the responsibility for writing the opinions of the Court in cases arising in such areas. . . . The Court is not a football team that needs to get its signals straight in order to compete effectively. . . .”

376. See 2 THE ALMANAC OF THE FEDERAL JUDICIARY 2-6 (Megan Rosen et al. eds., 2010).

377. Merrill & Watts, *supra* note 262, at 580-81 (emphasis added); see Strauss, *supra* note 253. Judge Posner has similarly observed that “[m]ore of the work of [the federal appellate] courts really is technical. . . . [M]ost of the appeals they get can be decided uncontroversially by the application of settled principles. . . . The institutional role is more easily played at the court of appeals level.” RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 367 (1999).

378. Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1051 (2006); Vermeule, *supra* note 2, at 582 (arguing that the “portray[al] of judging as a creative activity . . . [in which] statutory interpretation . . . is merely an extension of common-law adjudication . . . [pays] little attention . . . to the collective structures of adjudication”). Posner, however, does not advocate for consistent interpretive regimes but, rather, favors a judicial pragmatism/intuition model that is only sometimes formalistic. See Posner, *supra*, at 1053.

federal statute in the same way. As I illustrate elsewhere, these different substantive outcomes are often based on (or at least justified through) diverging choices of *methodology*,³⁷⁹ a result made possible by the failure of the Court to offer clear – and binding – interpretive direction.

b. Observable Effects in the States Studied

Of course, it is far easier to hypothesize that methodological consensus will increase interpretive predictability than to prove it. And it is particularly difficult to discern what role nonmethodological factors (like ideology) play in the “every day,” less politicized cases that are this Article’s paramount concern. There may, however, be some other effects that are more easily observable. For example, in Oregon, Connecticut, and Texas (and maybe even Wisconsin and Michigan), a large area of potential intracourt disagreement – i.e., which methodology governs – is clearly off the table. This has an “agenda limiting”³⁸⁰ effect which is stabilizing. Further, because the methodology chosen by these states is a tiered regime, with a clear hierarchy of interpretive tools, it may now be clearer to at least some litigants and lower courts which interpretive rules the highest court will use. As elaborated in Part III, close study of Oregon’s practice over the past five years reveals that the state supreme court used the same eight types of textual rules to decide most cases under *PGE*.³⁸¹ There are readily observable differences between the style of pre- and post-*PGE* Oregon statutory interpretation opinions, and the range and types of interpretive tools used before and after the installation of the *PGE* tiered regime.³⁸² So, too, we saw Oregon litigants tailoring their briefing practices to the three-step *PGE* regime.³⁸³ There is also anecdotal evidence that *PGE* led the Oregon legislature to pay closer attention to the drafting of statutory text.³⁸⁴

Predicting methodology is obviously different from predicting results. It is possible that statutory interpretation outcomes in Oregon (and elsewhere) are just as unpredictable as ever, only now the judges are disagreeing through different language. And the answer may change depending on the particular politics and personalities of different courts. These are difficult questions that require their own study, and the outcome-effect question might never

379. See Gluck, *supra* note 22.

380. Monaghan, *supra* note 276, at 744-45.

381. See *supra* notes 104-105 and accompanying text.

382. See *supra* notes 101-102 and accompanying text.

383. See *supra* note 110 and accompanying text.

384. Interview with Jack L. Landau, *supra* note 108.

satisfactorily be answered. But there may be other, less direct, ways to get at whether predictability is actually being advanced in these cases. For example, it would be significant to confirm that legislative drafting techniques have changed in the states studied to accommodate and coordinate with the new interpretive regime,³⁸⁵ or that there are “case management” effects, such as fewer dissents, fewer reversals, or faster decision times. Perhaps one might also observe that lower courts have experienced similar developments—coalescence around the same few interpretive rules, with fewer dissents, faster decision times, and so on. What judges *say* matters too. More opinions, like some we have seen in Oregon, in which judges declare they would have decided a case differently but for the constraints of the interpretive regime, tell us the regime is doing something. Many judges interviewed as part of this project contend that the regimes do, in fact, constrain them; some even complained that they are unduly restricting. Still, more research is required.

2. “Expressive” Rule-of-Law Benefits

Part I alluded to the idea of a more subtle set of “expressive” benefits that interpretive consensus might generate, even if we can never get at the outcome-effect question. These benefits are also rule-of-law benefits, but of a different sort. There are symbolic, legitimacy-enhancing benefits to having judges *act* like judges when they decide cases according to a set of pre-established legal principles.³⁸⁶ Litigants are entitled to expect that substantially similar cases will be decided using the same governing legal rules and it matters—not only for fairness perceptions but also for the development of law itself—when they aren’t. By way of illustration, let us consider the following hypothetical scenarios. Litigants *A* and *B* have two identical contract claims, to be decided in the same courthouse on the same day. They are told that litigant *A* will have hers adjudicated using the parol evidence rule; litigant *B*’s will not use the parol evidence rule. Litigants *C* and *D* have identical discrimination claims. They are told litigant *C*’s will be decided under strict scrutiny analysis; litigant *D*’s under rational basis review. Do these four litigants care about these differences? Most people, I venture, would say yes. Do they care even if they are assured the results in their cases will be the same? Again, I would argue, yes. But why?

385. Oregon Court of Appeals Judge Jack Landau, who has written more about *PGE* than any other jurist or scholar cites anecdotal evidence that the Oregon legislature has, in fact, paid closer attention to its drafting practices since *PGE*. *See id.*

386. *See* Monaghan, *supra* note 276, at 753.

The reason is that judicial *opinions* matter. The norms generated through justificatory opinions form the fabric of the law, and interpretive methodology offers the “process rules,” the language through which the opinions are written. This is why law professors, and many lawyers, care more about case reasoning than case outcomes. And this is why methodology matters (after all, the parol evidence rule and the tiers of scrutiny are methodologies too), even if we cannot prove that it affects outcomes. Methodological choice sets the terms of the debate. It is a different opinion, a different conversation, and a different set of legal norms that are created when a judge approaches her task of statutory interpretation with the goal of reaching the most pragmatic result, as opposed to the goal of reaching the result the legislature would have intended had it considered the matter, as opposed to the goal of reaching the result that adheres most closely to modern linguistic understanding. The results may be the same in each of these cases, but the law that is created may differ. Methodological consensus puts everyone in the same conversation.

At a perhaps less abstract level, resolving these big-picture methodological questions may also have the benefit of allowing judges to focus on refining the interpretive rules that remain. This phenomenon was observed in the states studied, where courts focus not on *whether* legislative history is admissible but, rather, on what *kind* is most reliable, and resolve with finality questions about the continuing applicability of individual interpretive rules (e.g., the rule against absurdities or the legislative acquiescence rule). This kind of intraregime refinement, in turn, may make the courts’ interpretive processes even more predictable.

Finally, there may be some aspirational benefits to an expressed methodological consensus. The very act of having judges repeatedly articulate the same governing interpretive principles, and justify each opinion using the same framework, may in fact serve as a reminder to judges of the rules themselves. Perhaps ideology is less salient and the rules themselves do more work, in at least some cases, because of this constant reminder. In this fashion, the act of expressing the consistent rules may have a performative function.³⁸⁷

B. Why Tiered Interpretation?

Arguments for controlling interpretive frameworks are somewhat independent of conclusions about what theory such frameworks should

387. Cf. Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 252 (1983) (“[R]equiring judges to justify their decisions according to a fairly formal rhetoric will at least reduce the excesses of result orientation to some degree.”).

espouse. There might just as easily be a purposive framework as one based on modified textualism. Indeed, a purposive framework is exactly what the Connecticut Supreme Court imposed in *Courchesne* before the legislature tried to override it, and there undoubtedly would be value in observing a longer period of court experimentation with such a framework. That said, the state cases do point to the idea that the *content* of the chosen framework matters, that an acceptable middle ground must be found around which a majority of judges can agree.

In this regard, my argument is not that modified textualism is the “single best” or only possible model for other state courts, or for federal courts. My argument, rather, is about identifying a methodology that is both normatively attractive as a matter of interpretive theory and also likely to generate consensus. To use Frederick Schauer’s terminology—which, not incidentally, comes from his argument that a “plain language” methodology might be the optimal coordinating device for statutory interpretation—the search may be for a theory of the “second best.”³⁸⁸ This is important because it shifts the inquiry away from the idea that there is a single “ideal” way to ascertain the meaning of a statute—a question much more likely to divide judges and scholars—to, instead, the question of whether there is a sufficiently satisfying theoretical compromise that will also enhance coordination and stability in a complex and (for lower courts) overworked legal system.³⁸⁹

This brings us back to the concept of tiering, a salient feature of the state-chosen methodologies. Their emphasis on ordering is not surprising; tiering likely enhances the predictability benefits that are the goal of establishing a controlling interpretive approach in the first place. Ranking interpretive tools and limiting the number of tools that may be used in the successive steps of the inquiry is probably the way most likely to offer clarity to lower courts, litigants, and legislators and therefore to increase predictably and maximize coordination. In contrast, a more eclectic approach (or even a tiered one that established a preference, in the first step, for more general types of tools such

388. Schauer, *supra* note 257, at 232.

389. This concept of the “second best” also responds to some of the literature that uses cycling and other coordination theory to argue that judges on multimember courts will never be able to agree on a single interpretive framework; even that literature acknowledges that cycling might be able to stop, at least for some period, if the goal is not to stop in a place considered “first best” by all participants. Vermeule, *supra* note 2, at 559 (“Even if coordination on some particular interpretive approach would be best for all concerned, judicial disagreement about which approach is indeed best will sometimes produce voting cycles, in turn creating the potential for institutional instability.”).

as policy considerations) could be harder to administer predictably.³⁹⁰ An eclectic approach also is unlikely to form the basis of a compromise that includes textualists. Leading textualist scholars already have rejected proposed consensus approaches that do not unequivocally privilege textual analysis or provide a transparent and predictable structure.³⁹¹

There are, of course, drawbacks to a tiered approach. There will always be the exceptional case in which consultation of extrinsic evidence reveals information not evident in a text that, on the surface, appears clear. And so one might consider whether the hierarchy alone – without the exclusivity – achieves enough of the benefits, by making clear *ex ante* which tools will get the most weight. If so, perhaps judges need not be absolutely prohibited from reviewing all of the evidence before them.³⁹² (Oregon, however, offers a cautionary tale; recall that the recent softening of the exclusivity of the *PGE* hierarchy has resulted in legislative history now being consulted in nearly *every* case, arguably diminishing much of the efficiency and predictability of the former regime.)

There is also the danger that a tiered regime might give rise to reductionist tendencies. In Oregon, as we have seen, under *PGE*, the state supreme court held fewer statutes textually ambiguous over time. This may be because the legislature changed its drafting practice; and it may be because the court engaged in more thorough textual analysis; but it may also be because the court (and litigants), as a result of the emphasis on tiered interpretation, put a premium on discerning textual clarity and so was more willing to convince itself that text was clear.³⁹³ Deeper analysis across more states is required before we can know which theory has more explanatory power.

390. Indeed, the leading treatise on Canadian statutory interpretation argues that Canada's all-things-considered purposive framework, although considered to be the official, controlling framework, has done little to make the interpretive process more predictable. See SULLIVAN, *supra* note 363; cf. Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 887 (1988) (arguing that the "open-ended" interpretive model proposed by Farber and Frickey "will not reassure anyone who would like to think that the decisions in tough cases reflect more than the judges' personal values").

391. See, e.g., Molot, *supra* note 18, at 51 (proposing "a balanced version of textualism," under which courts would consider all possible interpretive sources at the outset, but give more weight to text the more powerful the textual evidence). *But see* Manning, *supra* note 1, at 75, 94-95 (arguing that textualism's strong conceptualization of legislative supremacy requires a hierarchy in which text always trumps purpose and policy and an approach not as "holistically inclusive").

392. Indeed, in other contexts – such as bench trials in which judges must also decide evidentiary motions – we trust judges to review but then set aside certain evidence as not relevant or not appropriate to their decisionmaking.

393. See Landau, *supra* note 81, at 155 (making the same observation).

Related is the potential concern that structured interpretive frameworks will impede statutes from evolving with time and/or create unnecessary work for legislatures.³⁹⁴ But the simple fact that an interpretive regime uses a ranking does not necessarily mean it eschews dynamic interpretation. Some courts using a text-based hierarchy might look, for example, to the meaning of words as they have evolved in later-enacted statutes to ascertain textual meaning. Whether tiering results in an overly static interpretive methodology, and/or results in more legislative overrides, are also empirical questions worth pursuing.

Finally, it should be acknowledged that even if a consistent regime were adopted, it is unlikely any such regime would last forever. Vermeule's insights about the "cycles of statutory interpretation" may very well be on display in Oregon.³⁹⁵ But there is likely a difference, in terms of systemic stability, efficiency, and coordination, between a precedential framework in place for sixteen years, such as Oregon's, and no framework at all, as we see in the U.S. Supreme Court. The question is how long is long enough for the benefits of consistent regimes to inure? In answering this question, it would be useful to study how much "lag time" legislators, lower courts, and litigators require to absorb and implement new regimes.

C. *Intersystemic Judicial Difference*

One final word about state and federal differences. Although there are many possible reasons why mainstream theorists have overlooked state court developments in statutory interpretation, of particular relevance are likely "intuitive" perceptions about institutional differences between state and federal governments. Yet the state courts studied import without distinction federal-textualist institutional and constitutional arguments and expressly assume that the same justifications hold for the states as well. These courts do not see institutional differences as substantial enough to pose barriers to the exchange of theory.

I do not wish to understate the extent of potential intersystemic differences (or differences among the states themselves). But there are at least two reasons why the states seem right not to allow these differences to prevent comparisons, at least in the context of this Article's focus on textualism and

394. See Strauss, *supra* note 365, at 779, 782.

395. Vermeule, *supra* note 53, at 150 (arguing that "interpretive doctrine displays a regular tendency to oscillate" as a result of, *inter alia*, judges and legislators continuously adjusting their expectations about the other's behavior).

interpretive consensus. First, the most often noted differences between state and federal governments do not seem to be doing much work here. For example, the fluidity of interbranch relationships in state government is often cited as a major institutional difference from the federal government. But in recent years, many state courts have begun to pay closer attention to relatively new separation-of-powers provisions in their own state constitutions³⁹⁶ and the courts studied have seized on those new provisions in the statutory interpretation context to argue that the same principles that constrain federal textualists constrain them, too.³⁹⁷ Similarly, the notion that most state legislatures do not produce real legislative history is now outdated, and so can no longer account for its absence from state cases or explain different methodological approaches.³⁹⁸ This is not to say that, particularly in smaller states, it may not be easier for state courts to monitor the quality of legislative history, or that state judges might not be more familiar with the textual intricacies of their statutes because of institutional memory or the simple fact that there are fewer state statutes. It may also be the case that the richness of legislative history at the federal level has made it a resource many federal judges are unwilling to live without, whereas state judges may be willing to

396. See Tarr, *supra* note 236, at 1173.

397. See *supra* notes 134–136, 197, 210, 285.

398. Some states still do not produce “official” legislative histories, but it is possible to individually retrieve relevant items in most states. See, e.g., AM. SOC’Y OF LEGISLATIVE CLERKS & SEC’YS, *INSIDE THE LEGISLATIVE PROCESS* 8–23 (2007) (noting that “most legislative bodies record committee meetings [and floor debates] in some format,” and that state responses to a national survey indicate that “[d]etermining legislative intent is another reason that 30 legislative bodies record floor sessions”); WILLIAM H. MANZ, *GUIDE TO STATE LEGISLATIVE AND ADMINISTRATIVE MATERIALS* (2002). In the five states studied, for example, available items include bill versions, house and senate journal bill analyses, fiscal analyses, testimony, audio tapes of floor and committee hearings/debates, committee and other reports, and correspondence. See CONN. STATE LIBRARY, *GUIDE TO CONNECTICUT LEGISLATIVE HISTORY*, available at <http://www.cslib.org/leghis.asp> (last visited Feb. 8, 2010); LEGISLATIVE REFERENCE LIBRARY OF TEX., *COMPILING TEXAS LEGISLATIVE HISTORY*, available at <http://www.lrl.state.tx.us/legis/intent/legintntbrochure.pdf> (2008); OR. STATE ARCHIVES, *OREGON LEGISLATIVE RECORDS GUIDE*, available at http://www.sos.state.or.us/archives/legislative/legislative_guide/legal.html (last visited Feb. 8, 2010); WISCONSIN LEGISLATIVE REFERENCE BUREAU, *RESEARCHING LEGISLATIVE HISTORY IN WISCONSIN*, available at <http://www.legis.state.wi.us/lrb/pubs/wb/06wb10.pdf> (2006); Mich. State Univ. Libraries, *Sources of Michigan Legislative History*, http://www.michigan.gov/documents/leghist_43770_7.pdf (last visited March 5, 2010). For a listing of all state legislative history resources, see Ind. Univ. Law Library, *State Legislative History Guides on the Web*, <http://www.law.indiana.edu/lawlibrary/research/guides/statelegislative/index.shtml> (last visited March 5, 2010).

forgo consultation of their more limited history.³⁹⁹ But these differences are relevant to *which* interpretive methodology is chosen – not the fact of consensus around *some* methodology.

Even the most significant institutional difference between state and federal judiciaries—that many state judges are elected—does not appear to be an obstacle to the cross-systemic exchange of methodology. This is because there are plausible arguments on both sides for the proposition that formalistic interpretive regimes are likely to have more appeal to elected or, alternatively, unelected, judges. As already noted,⁴⁰⁰ such regimes might be attractive to elected judges who must defend their decisions in increasingly contested campaigns; the apparent neutrality of such regimes and the way in which they purport to limit judicial discretion may help judges to defend against political charges of activism.⁴⁰¹ But other scholars have predicted that *unelected* judges are the ones most likely to be drawn to text-based, formalistic frameworks. The “counter-majoritarian anxiety” of unelected judges, the argument goes, may “establish a compelling case for the interpretation based upon ‘objective’ evidence.”⁴⁰² These concerns—that life-tenured judges should exercise particular restraint and not “make law”—have less salience when judges are elected. Yet the elected state supreme courts we have seen have sought discretion-confining rules anyway.⁴⁰³

The second reason the state courts studied seem right to minimize differences—and what they appear to have recognized in drawing on the federal examples—is the common nature of this enterprise.⁴⁰⁴ The kinds of questions that arise in these cases, regardless of whose court or whose statute it is, are often very similar, regardless of differences that may distinguish judicial institutions. Why does it matter to Michigan’s purposivists and textualists that each side thinks the U.S. Supreme Court would side with their particular

399. Or, relatedly, perhaps the former paucity of legislative history materials created a stronger state court tradition of and comfort level with relying only on textual analysis.

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

401. See Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589, 1602, 1604-05 (2009).

402. Eskridge & Frickey, *supra* note 59, at 364, 378.

403. Indeed, several states that appear resistant to a text-based approach (New York, the District of Columbia, Alaska) have appointed, not elected, highest court benches. See THE COUNCIL OF STATE GOVERNMENTS, *supra* note 129, at 267-96.

404. Cf. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993). Kahn argues that, in the constitutional context, “[s]tate courts should be talking with each other, as well as with the federal courts and even with academics. All are engaged in a search for the meaning of common concepts.” *Id.* at 1163.

approach?⁴⁰⁵ Why does Wisconsin Chief Justice Abrahamson look to state and federal courts across the nation and also in Canada in making her methodological arguments?⁴⁰⁶ These cases are not authoritative in state courts. Nonetheless, the state justices recognize their relevance because all of these courts are essentially engaged in the same endeavor.

None of this means, of course, that the particularities of a state's (or the federal) government might not have an impact in specific cases. But it does mean that institutional differences should not be used as a reason to discount the relevance of state court jurisprudence for federal statutory interpretation as well. Yet it remains a striking fact that there has been more comparative work between American Supreme Court and European and Canadian statutory interpretation methodology than comparative work examining our own state courts.⁴⁰⁷

CONCLUSION AND NEXT QUESTIONS

The terrain of state statutory interpretation is vast, but enormously promising. That there are state courts out there implementing methodological theories long assumed untestable in the real world is likely a phenomenon not confined to the areas that this Article discusses, and so illustrates the rich potential of further research. Yet even in the limited areas within this Article's scope, these state developments deliver powerful rebuttals to some of the core assumptions of mainstream statutory interpretation theory, particularly assumptions about the intractability of interpretive divides and textualism's diminishing impact.

The state courts studied also pose a normative challenge for statutory interpretation theory in general. They question whether a "hard cases" paradigm—the paradigm for federal statutory interpretation that has emerged because of the near-exclusive focus on U.S. Supreme Court cases—actually provides the "right" paradigm for most statutory interpretation. The federal courts of appeals' interpretive practice is essentially unknown, but it would be

405. See *supra* note 217 and accompanying text.

406. See *State ex rel. Kalal v. Circuit Court*, 681 N.W.2d 1110, 127-37 (Wis. 2004) (Abrahamson, C.J., concurring).

407. See, e.g., Bankowski et al., *supra* note 21 (comparing methodology among the United States, United Kingdom, Argentina, Germany, Finland, Italy, Poland, and Sweden); cf. Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 359 ("[T]he differences between the relevant state constitutions and the federal constitution are much smaller than the differences involved in the transnational comparisons that are a staple of comparative constitutional law.").

unsurprising to find some manifestations of a drive to clarity—perhaps some “mini” methodological *stare decisis*—already present.⁴⁰⁸ And one can imagine more radical possibilities: the Ninth Circuit agrees on a single, purposivist framework; the Fourth, on a textualist one; and the Seventh on a modified textualist approach. Perhaps the Supreme Court intervenes and finally resolves the question. Perhaps, however, it allows the experimentation to continue. Even if this scenario is unrealistic, at a minimum, a long-overdue study of court of appeals statutory interpretation might raise similar challenges—as these state cases have—to the perceived “softness” of methodology and the apparent inevitability of interpretive disagreement that have arisen under the Supreme Court paradigm.

Finally, training our focus on the states also brings to the fore an entirely new category of methodological questions that have previously flown under the radar. Thinking about the relevance of the state cases for federal interpretation reminds us how frequently state and federal courts interpret one another’s statutes. But does the Ninth Circuit know about Oregon’s *PGE* framework? Is the Ninth Circuit required to apply it to all Oregon law cases? Must the Fifth Circuit, in Texas law cases, follow the Texas highest courts’ refusal to consult legislative history, or must it follow the Texas legislature’s statutory rule dictating the opposite? Is methodology “law”? The Supreme Court does not act as if it is. The state courts studied here appear to conclude otherwise. These are much more complex questions than merely whether the other system’s interpretive theory is informative. Related to them are the reverse-*Erie* questions alluded to earlier. I address these questions in the second part of this project, in a separate article.⁴⁰⁹ But it may be surprising to learn that most of the answers remain unsettled. It seems likely that these questions have been overlooked because of the same themes I have sounded repeatedly here: namely, the focus on the U.S. Supreme Court to the exclusion of most other courts (state and federal), and the failure of the Court to resolve its own interpretive debate.

These themes, as this Article has shown, have wide-ranging implications for statutory interpretation, and they show what is to be gained from thinking about it intersystemically. The state courts studied seem far richer for embracing that perspective. It is time for federal jurists and scholars to join the conversation.

408. For example, a circuit court may have opined on the utility of the rule against absurdities and courts in the jurisdiction may be adhering to that rule.

409. See Gluck, *supra* note 22.