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ABBE R. GLUCK

Intersystemic Statutory Interpretation: Methodology as "Law" and the *Erie* Doctrine

ABSTRACT. Do the *Erie* Doctrine and its "reverse-*Erie*" mirror require state and federal courts to apply one another's statutory interpretation methodologies when they interpret one another's statutes? Surprisingly, the courts have no consistent answer to this question—even though state and federal courts constantly interpret one another's laws. What's more, exploring this application of *Erie* reveals that one of the most important jurisprudential questions about statutory interpretation also remains entirely unresolved: namely, are the rules of statutory interpretation "law," individual judicial philosophy, or something in between?

This Article argues that many federal courts are getting the *Erie* question wrong—or at least that they are unaware that the question exists in the first place. The *Erie* inquiry also makes clear that federal courts treat both state and federal statutory interpretation methodology as much less "lawlike" than they treat analogous interpretive principles, without acknowledging or justifying the distinction. Federal courts routinely bypass state interpretive principles when they interpret state statutes, but almost always look to other state methodological principles, including state rules of contract interpretation, choice of law, and constitutional interpretation. Further, unlike in those other areas, the U.S. Supreme Court does not treat even its own statements about federal statutory interpretation principles as "law" and does not give them precedential effect. This practice has licensed an interpretive freedom for state and lower federal courts when those courts interpret federal statutes—a freedom that facilitates federal-law disuniformity that the Court generally does not tolerate in other contexts. This Article challenges the notion that statutory interpretation is sufficiently different from other decisionmaking regimes to justify these distinctions.

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ARTICLE CONTENTS

INTRODUCTION 1901

I. INDETERMINACY IN STATUTORY INTERPRETATION AND FEDERALISM'S ARCHITECTURE OF CONCURRENT JURISDICTION 1907

A. The Unresolved Legal Status of Federal Interpretive Methodology 1909

1. Methodology as "Rules of Thumb" 1912
2. Methodology as Federal Common Law 1912
   a. Comparisons to Federal Common-Lawmaking for Constitutional Interpretation 1915
3. Methodology as Something in Between 1917

B. Different Questions Raised by Statutory Interpretation in the States 1919

C. The Architecture of Concurrent Jurisdiction and the *Erie* Doctrine 1921

1. The Asymmetrical Structure of Concurrent Jurisdiction 1921
2. The *Erie* Doctrine 1922

II. FEDERAL COURTS AND STATE STATUTES 1924

A. Three Ways in Which State Statutes Come to Federal Court for Interpretation 1926

B. Diversity Cases 1927

1. Problem 1: The Tools that Courts Will Use To "Predict" State Law 1927
2. Problem 2: Mixing Federal and State Methodology 1930
   a. Using Federal Methodology 1931
   b. Using Both Federal and State Methodology 1933
3. Problem 3: Conflicts Between State Courts and State-Legislated Interpretive Rules 1934
4. Problem 4: Dynamic Statutory Interpretation 1936

C. Federal-Question Cases Requiring State Statutory Interpretation 1940

1. In the U.S. Supreme Court 1942
2. In the Circuit Courts 1945
3. Special Treatment for Constitutional Avoidance 1948
   a. U.S. Supreme Court Origins of this Restrained Approach 1953
   b. Are the Constitutional Cases Justifiably Different? 1956
4. Exception: Voluntary Application of State Methodology 1958

III. STATE COURTS AND FEDERAL STATUTES 1960
A. State Courts Using Federal Methodology for Federal Statutes 1962
B. State Courts Using State Methodology for Federal Statutes 1964
C. Disuniformity of Federal Law 1965

IV. METHODOLOGICAL ANALOGIES AND *ERIE* 1968
A. Analogous Jurisprudential Principles 1970
1. Analogies to Rules on Interpretation of Texts: Contracts, Wills, and Trusts 1970
2. Analogies to Other Ex Ante-Defined Reasoning Processes: Choice of Law, Stare Decisis, and Constitutional Law Frameworks 1976
3. Analogies to Burden-Allocation Principles 1978
B. Applying the *Erie* Considerations to Statutory Interpretation 1980
1. The Contracts Argument: Statutory Interpretation and Primary Conduct 1980
2. Statutory Interpretation Methodologies as Rules of Decision 1982
3. Statutory Interpretation, Federal Interests, and Federal Judges 1985
C. A General Common Law of Statutory Interpretation? 1987

V. INTERSYSTEMIC STATUTORY INTERPRETATION 1990

CONCLUSION 1997

INTRODUCTION

Here is the puzzle: why do federal courts interpreting state statutes routinely look to U.S. Supreme Court cases for the appropriate principles of statutory interpretation rather than citing the interpretive rules of the relevant state? This, arguably, is where statutory interpretation theory should meet the *Erie* doctrine. *Erie*, after all, requires federal courts to apply state law to state legal questions.[1] But federal courts do not seem to think of statutory interpretation methodology as "law" in the first place, much less as law subject to *Erie*.

To put the point more concretely:

- Assume that the only question in a diversity case before the Sixth Circuit is how to interpret a Michigan tort statute. Assume also that the Michigan Supreme Court recently decided a case holding that the "rule against absurdities"—which directs courts not to construe statutes literally if doing so would bring about absurd results—should no longer be applied to Michigan laws. The federal courts, however, often apply that rule in interpreting federal statutes. Can the federal court apply the rule against absurdities to the Michigan statute?

- Now here is a twist: does the answer change if the exact same state-law question is presented in federal court, not under the diversity jurisdiction, but instead embedded as part of a federal-question case?

Despite decades of incessant talk about statutory interpretation, the federal courts have no answers to these inquiries. Indeed, the entire area is something of a doctrinal mess. Neither the federal nor the state courts have any consistent or well-articulated approach to the question of whether they are required to apply one another's interpretive methodologies to one another's statutes. What's more, this phenomenon has gone mostly unnoticed, or no one seems to care.[2]

1. Stated more formally, "*Erie* is . . . a limitation on the federal court's power to displace state law absent some relevant constitutional or statutory mandate." Henry P. Monaghan, Book Review, 87 HARV. L. REV. 889, 892 (1974); *see* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

2. For related work, see, for example, Anthony J. Bellia, Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501 (2006), which details state court approaches to state and federal statutory interpretation methodology during the Founding era; Wayne A. Logan, Erie *and Federal Criminal Courts*, 63 VAND. L. REV. 1243, 1254-55 (2010), which

And in fact, this *Erie* muddle makes apparent something even more important about statutory interpretation in general: namely, that statutory interpretation's most fundamental jurisprudential question—whether statutory interpretation methodology is "law," individual judicial philosophy, or something in between—remains entirely unresolved. The U.S. Supreme Court generally does not treat its statements about statutory interpretation methodology as law. Five votes in agreement with respect to the interpretive principles used to decide one case do not create a methodological precedent that carries over to the next case, even where the same statute is being construed. In contrast, some state courts do treat their rules of statutory interpretation like any other substantive legal doctrine,[3] a development that further complicates any understanding about the legal status of statutory interpretation methodology.

Interestingly, at least some of this uncertainty in statutory interpretation derives from the same kinds of jurisprudential ambiguities that motivated *Erie* itself. *Erie* culminated a sea change in how judges view law; it reflected a move from the idea of a body of "natural," general, or universal legal principles to a more positivistic understanding of law as something specific, a policy choice linked to a particular jurisdiction, and a choice that can vary from one

discusses federal court application of state criminal laws as first-order questions in Fourth Amendment cases and the relevance of *Erie* in that context; 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), which examines state interpretation of parallel or "borrowed" federal employment statutes; and Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use To Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1173-76 (1999), which shows how state courts interpret federal statutes independently from federal-court precedents. *See also* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 534-36 (1997) (questioning whether states must apply the *Charming Betsy* canon of interpretation); Kevin M. Clermont, *Reverse*-Erie, 82 NOTRE DAME L. REV. 1 (2006) ("[R]everse-*Erie* is the critical missing piece in the big puzzle of the relationship between state and federal law."); Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651 (1995) (exploring the "prediction" model of lower-court decisionmaking); *cf.* Paul J. Katz, *Standing in Good Stead: State Courts, Federal Standing Doctrine, and the Reverse*-Erie *Analysis*, 99 NW. U. L. REV. 1315, 1333-37 (2005) (describing how, in the special context of the Federal Employers' Liability Act, the Court has "provid[ed] the most extensive application of reverse-*Erie* principles"). An important exception is Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863 (2008), which directly addresses the Court's failure to give statutory interpretation methodology stare decisis effect.

3. I detail these developments in Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010).

jurisdiction to another.[4] But in the context of statutory interpretation, *Erie*'s jurisprudential impact has not been thoroughgoing.

Applying the *Erie* doctrine to statutory interpretation brings into focus these open questions about the legal status of methodology. *Erie* requires federal courts to consider whether a state legal principle is a "rule of decision" and, if it is, to apply that state principle in the absence of governing federal law.[5] And so we need to understand what statutory interpretation methodology is and how it affects cases.[6] In the opposite situation, often loosely called "reverse-*Erie*"—when state courts interpret federal law—the inquiry is slightly different and implicates the Supremacy Clause: state courts must ask whether there is any federal "law" on point that binds them.[7] And so, there, we need to know whether there is, could be, or should be a federal common law of statutory interpretation, compulsory under the Supremacy Clause, to control state courts' methodological choices when they construe federal statutes.

This Article examines a decade's worth of state and federal cases in which the courts interpreted one another's statutes,[8] and it submits that many courts, including the U.S. Supreme Court, are getting the *Erie* question wrong. Or, at a minimum, they are not sufficiently aware that the question exists in the first place. Consider some of the doctrinal inconsistencies that we shall identify: in diversity cases, federal courts sometimes apply federal statutory interpretation principles to state statutes but sometimes apply state principles, and they

4. *See* Guar. Trust Co. v. York, 326 U.S. 99, 101 (1945) ("*Erie* . . . did not merely overrule a venerable case. It overruled a particular way of looking at law . . . ."). This shift is, of course, but one aspect of the complicated *Erie* story, *cf.* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 3 (2000) (arguing that *Erie*'s "'philosophical' content" has been "overemphasized" and that the decision's "more vital concern lay in broader ideas about judicial lawmaking and separation of powers"), and some commentators have argued that the link between *Erie* and a new legal positivism is greatly overstated, *see* Jack Goldsmith & Steven Walt, Erie *and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998).

5. *See Erie*, 304 U.S. at 78. *Erie* construed the Rules of Decision Act, the federal statute that requires that "[t]he laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (2006).

6. The *Erie* inquiry furthers, but may not necessarily resolve, these inquiries. For example, a conclusion that *Erie* does not require the application of local methodology to local statutes would mean that statutory interpretation is not a "rule of decision" but not necessarily that it is not "law." Many legal doctrines that unquestionably are law—such as rules of procedure—fall outside of *Erie*.

7. *See* Clermont, *supra* note 2, at 20.

8. See *infra* Part II for elaboration of this Article's case-selection methodology.

almost never explain the basis for their choices. On the other hand, when state statutes are presented as part of federal-question cases, many federal courts routinely neglect state interpretive principles. But in many of these federal-question cases, the state statutory questions are analytically distinct from the federal-law issues, and so there is no reason that they should be interpreted in a manner that differs from how they would be interpreted in diversity cases.[9]

In still other cases, federal courts diverge from state practice for completely different reasons apparently grounded in federalism concerns, most notably the notion that they are not "equal" interpreters of state law. They often refuse, for example, to apply widely accepted statutory interpretation doctrines—most conspicuously, the canon of constitutional avoidance—to state-law questions, despite the fact that federal courts often apply those doctrines in federal cases and despite the fact that state courts themselves apply those canons in their own cases.

The other side looks very different. In federal statutory interpretation cases heard in state courts, the state courts aggressively assert their independent role in interpreting federal statutes. But this, too, raises concerns. Without a federal "law" of statutory interpretation handed down by the U.S. Supreme Court (which would bind state courts under the Supremacy Clause), most state courts feel free to select from a wide array of interpretive principles. The problem is that the regional federal courts of appeals are in the same position: they too must interpret federal statutes with only loose methodological guidance from the U.S. Supreme Court. As a result, state and federal courts within the same regional circuit can reach different interpretations of the same federal statute based on different chosen rules of interpretation. And because the state supreme courts are coordinate (not inferior) to the federal courts of appeals on matters of federal law, state courts have no obligation to harmonize their interpretive choices with the decisions of their local federal courts of appeals.[10] The consequence? Intentional disuniformity—different case outcomes—among geographically linked courts on identical federal statutory questions.

9. I do not mean to include in this reference to state statutes interpreted in federal-question cases the supplemental jurisdiction cases, which are more straightforward. Rather, I mean cases such as federal 42 U.S.C. § 1983 claims, alleging that a state official acted under color of state law, but in which there is a preliminary dispute about what the state statute actually says before the federal court can determine the federal-law question. *See, e.g.*, Dean v. Byerley, 354 F.3d 540 (6th Cir. 2004); *infra* notes 167-172 and accompanying text (discussing *Dean*).

10. *See* Colin E. Wrabley, *Applying Federal Court of Appeals' Precedent: Contrasting Approaches to Applying Court of Appeals' Federal Law Holdings and* Erie *State Law Predictions*, 3 SETON HALL CIRCUIT REV. 1, 18 (2006); Zeigler, *supra* note 2, at 1173.

Courts are usually far more careful than this. At a minimum, courts typically take pains to explain the basis for diverging from standard practice or for proceeding inconsistently. It is difficult to imagine, for example, the Seventh Circuit, in a Wisconsin contract-law case, ignoring the fact that Wisconsin has adopted a particular version of the parol evidence rule. And yet we routinely see analogous principles—for example, how a state treats extrinsic evidence such as legislative history—overlooked without justification when federal courts interpret state statutes.

It is possible that this practice is not the result of mere judicial oversight. Federal courts may be deliberately resisting a more lawlike approach to statutory interpretation methodology, perhaps to retain decisionmaking flexibility, or perhaps because they cannot agree on the governing principles themselves. At the same time, however, even if the federal courts are consciously avoiding a more lawlike conceptualization of their own interpretive principles, that does not fully explain why federal courts would nevertheless not follow state-court practice when they are interpreting state statutes. It may be just as likely that federal courts are simply not thinking about statutory interpretation in the same way in which they think about other types of interpretive and decisionmaking methodologies.

What follows, then, is an essential question: is statutory interpretation really all that different from other methodological principles? Consider not only contract interpretation but also other analogous interpretive or decisionmaking regimes such as trust interpretation, choice of law, and even specific doctrinal frameworks of constitutional law (such as the tiers of scrutiny).[11] Each of those areas shares similar characteristics with statutory interpretation methodology, but in those areas, the courts do recognize that the operative decisionmaking principles differ across state and federal systems, do carefully analyze them under the *Erie* doctrine when applied to state law, and do treat them as "real" law on the federal side. This Article submits that statutory interpretation should be no different.

The discussion proceeds in five Parts. Part I outlines the assumptions of the current system, including a summary of the principles underlying the *Erie* doctrine. Parts II and III use a large number of case studies to analyze

11. *See* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 5 (2001) ("A distinctive feature of the Supreme Court's function involves the formulation of constitutional rules, formulas, and tests, sometimes consisting of multiple parts."); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 167 (2004) (distinguishing "statements of judge-interpreted constitutional meaning from rules directing how courts should adjudicate claimed violations of such meaning" and calling the latter "constitutional decision rules"). This point is elaborated in Parts I and IV.

empirically the crossover cases and the problems that they cause. Part IV describes how analogous interpretive frameworks are viewed as more lawlike and argues that statutory methodology is more similar to those frameworks than it is different from them.

Part V moves beyond the Article's core questions about doctrinal accuracy and the legal status of methodology and begins to explore what it means to have a self-consciously "intersystemic" statutory interpretation paradigm.[12] That is, once we clarify which interpretive rules should apply in which cases, what kind of intersystemic relationship should develop? Is the answer to keep the worlds of state and federal interpretation as separate as possible (through, for example, aggressive use of allocation doctrines such as certification and abstention), or instead might there be an opportunity for a productive intersystemic conversation? The idea of such a "dialectical federalism"[13] has long been extolled in other contexts in which state and federal courts intersect[14] but seems mostly absent from statutory interpretation. Part V argues that the development of such a dialogue might profit both systems.

Two final points. First, this Article takes *Erie* as its starting place and accepts as valid the norm that *Erie* implements and the way in which courts have applied it to other types of methodologies. The Article's focus, therefore, is not on debating the merits of *Erie* or debating the deeper systemic question (one much broader than statutory interpretation) of whether any legal doctrine constrains judicial decisionmaking. Rather, the Article's focus is on why, given the presence of lawlike methodological doctrines across most analogous areas of law and their attendant subjection to *Erie*, statutory interpretation has remained outside the door. But this is not to say that *Erie* is always the dominant principle. *Erie* requires the application of state rules of decision only insofar as the Constitution allows, and so there will certainly be circumstances in which the *Erie* default rule—here, that federal courts should apply state rules

12. State and federal courts interpret one another's statutes every day. Indeed, some might be surprised to learn that most federal statutory interpretation takes place in state court. *See* Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 362 (2002).

13. Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

14. For examples of the extent of recent scholarly writing on the interaction of state and federal courts across many other areas of law, see WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM AND PUBLIC INTEREST ADVOCACY (Kathleen Claussen et al. eds., 2008); and Symposium, *The New Federalism: Plural Governance in a Decentered World*, 57 EMORY L.J. 1, 1-310 (2007).

of statutory interpretation to state law questions—should not apply.[15] The critical point is that no court is actually making those kinds of arguments to justify the inconsistent approaches that have developed, likely because the courts are not thinking of statutory interpretation methodology as real doctrine in the first place.

Second, it should be emphasized that the question of the legal status of statutory interpretation methodology need not be resolved in the same way across all courts. Some states might treat interpretive methodology as law, and others might not. And recognizing that a state court treats its own state interpretive methodology as law does not instruct whether the federal courts must do the same with respect to their methodology for federal statutes.[16] Because of the possibility of these differences, the Article's suggested answer to the *Erie* puzzle—that federal courts should apply state methodology to state statutes—illuminates but does not resolve the question of what the legal status of federal statutory interpretation methodology should be. Accepting the plausibility of more than one answer to that question, however, the Article aims to illustrate why, as a matter of both doctrine and theory, there are compelling reasons to reconceptualize federal statutory interpretation methodology as law.

I. INDETERMINACY IN STATUTORY INTERPRETATION AND FEDERALISM'S ARCHITECTURE OF CONCURRENT JURISDICTION

Until now, almost all of the academic and judicial talk about the rules of statutory interpretation has been about what their content should be[17] and not about the source of the judicial power to craft them or the legal status of the

15. The most obvious circumstance would be when a state interpretive rule conflicts with a federal constitutional principle. The Seventh Amendment presents an example of an area in which the Court already has held that state substantive law sometimes must give way to other constitutional norms—in that context, the right to a jury trial. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996).

16. Thanks to Judith Resnik for helping me clarify this point.

17. I include in this category arguments about what the proper role of judges should be in this endeavor—for example, whether they should be "faithful agents" of the legislature or "partners" in the elaboration of statutory meaning—as those arguments go directly to the content of the rules themselves. *Compare* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW (2010) (arguing that federal courts act in active partnership with Congress in elaborating statutory meaning), *and* Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 253-54 (1999) (same), *with* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) (arguing that the federal courts' role in interpreting federal statutes is to serve as faithful agents of Congress).

rules themselves. This Part introduces these latter topics and the current assumptions about them.

First, and most critically, the legal status of interpretive methodology remains unresolved. The U.S. Supreme Court generally does not treat its methodological statements as "law," and scholars talk about statutory interpretation methodology in a varied vocabulary in which the rules of interpretation are described along a spectrum ranging from rules of thumb to actual federal common law. At the same time, however, there has been something of a statutory interpretation revolution in the states in that at least some state courts and legislatures now explicitly treat statutory interpretation methodology as binding law.

Second, however, the issue of whether federal judges are permitted to create statutory interpretation principles does not appear to be in any dispute. This makes statutory interpretation very different from other debates in the literature about federal courts and the propriety of post-*Erie* federal common-lawmaking. *Erie* proclaimed the end of federal general common law—a fact that has called into question the validity of some pre-*Erie* principles (for example, the intense debate over whether customary international law is proper federal common law[18]). But no one has yet used those concepts to challenge the validity of statutory interpretation methodology. Indeed, Justice Scalia, one of the most vocal critics of federal common-lawmaking, is viewed by many as the creator of the "new textualist" statutory interpretation

18. For an overview of that debate, see, for example, Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, *Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869 (2007); Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT'L L. 513 (2002); and Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365 (2002). For an outline of the general debate over federal common-lawmaking, see RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM ch. VII (6th ed. 2009) [hereinafter HART & WECHSLER]. *Compare* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1454-55 (2001) (disputing the validity of much federal common-lawmaking and arguing that valid rules of that nature are best understood not as federal common law but rather as deriving from a constitutional requirement), *with* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 884 (1986) ("[T]he bounds of federal common law are potentially much broader than is generally supposed."), *and* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 3-7 (1985) (articulating a broad definition of federal common-lawmaking), *and* Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 838 (1989) ("[T]he fashioning of federal common law . . . not only cannot be illegitimate, but rather is within the clear contemplation of the supremacy clause.").

methodology.[19] He is certainly one of its most emphatic proponents and has never questioned judicial authority to create such rules of interpretation.

The problem here, rather, is of a different sort, occasioned by precisely this taking for granted of the judicial ability to create and apply rules of statutory interpretation. Because the legal status of those rules has not been explicitly considered, there remain open questions about whether judges should be subject to any methodological restrictions when they interpret statutes from jurisdictions other than their own.[20]

A. The Unresolved Legal Status of Federal Interpretive Methodology

The U.S. Supreme Court seems to accept, and perhaps prefers, the unresolved legal status of federal statutory interpretation methodology. The Court has never decided with finality what interpretive methodology applies to federal statutes[21] and does not treat its interpretive pronouncements as law. As a result, the same methodological debates continue to be repeated in case after case. When can extrinsic evidence of legislative purpose be consulted?[22] When

19. *See, e.g.*, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990). For a notable exception to Justice Scalia's objections to federal common-lawmaking, see *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504-13 (1988).

20. Two previous articles have briefly referenced the *Erie* question posed here. Both assumed that federal courts routinely apply state methodology to state statutes, *see* Foster, *supra* note 2, at 1888 n.119; Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2108 (2002), but Foster also posits that "adherence to this rule may not be uniform," Foster, *supra* note 2, at 1888 n.119.

21. *But cf.* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 352 (1990) (arguing that the Court uses a fairly predictable array of interpretive tools, even though it does not rank them and moves back and forth among them).

22. *See* Carcieri v. Salazar, 129 S. Ct. 1058, 1070 (2009) (Breyer, J., concurring) (stating that he was persuaded to join the Court's textual analysis "because an examination of the provision's legislative history convinces me"); 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."); Zuni Pub. Sch. Dist. v. Dep't of Educ., 550 U.S. 81, 106 (2007) (Stevens, J., concurring) ("There is no reason why we must confine ourselves to, or begin our analysis with, the statutory text if other tools . . . provide better evidence of congressional intent."); Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 590-91 (2004) (relying on "social history" and the legislative history of the Age Discrimination in Employment Act). For cases from the most recent completed Term in which the Justices wrote separate opinions to argue over the propriety of the use of legislative history, see *Samantar v. Yousuf*, 130 S. Ct. 2278, 2287 n.9 (2010); *id.* at 2293 (Alito, J., concurring); *id.* at 2293 (Thomas, J., concurring in part and concurring in the judgment); *id.* at 2293-94 (Scalia, J., concurring in the judgment); *Jerman v. Carlisle, McNellie, Rini,*

text is unclear, to which source should courts turn next—legislative history or a canon of construction?[23] When multiple canons are applicable, how should courts select among them?[24] These questions are often raised but, with limited exceptions,[25] never ultimately decided.[26]

The specific reason for this repetition is simple: the Court does not generally give formal stare decisis effect to its statements about statutory interpretation methodology. Even when a majority of Justices agrees on an interpretive principle in a particular case (e.g., "committee statements are not reliable legislative history"), that principle is not viewed as "law" for the next case. The Justices either believe that they cannot bind other Justices' (or future Justices') methodological choices[27] or have implicitly concluded that it would not be wise to do so.

Kramer & Ultrich, *LPA*, 130 S. Ct. 1605, 1626, 1627 (2010) (Scalia, J., concurring in part and in the judgment); *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1411 (2010) (Scalia, J., concurring in part and in the judgment); *id.* at 1412, 1414 (Sotomayor, J., dissenting); and *Milavetz, Gallop & Milavetz v. United States*, 130 S. Ct. 1324, 1341-42 (2010) (Scalia, J., concurring in part and concurring in the judgment).

23. *See, e.g.*, 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).

24. *See* Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 50-51 (2008); *cf.* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 498 (1989) (arguing that interpretive practices should be ranked to make interpretation more predictable). 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, for example, *Ali*, 552 U.S. at 230-31 (Kennedy, J., dissenting); *Dolan v. U.S. Postal Service*, 546 U.S. 481, 495 (2006) (Thomas, J., dissenting); and *Graham County Soil & Water Conservation District*, 130 S. Ct. at 1402-04. For differing approaches to the applicability of the presumption against preemption, see, for example, *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 & n.3 (2009); *id.* at 1229 n.14 (Alito, J., dissenting); and *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 541 U.S. 246, 256 (2004).

25. See *infra* text accompanying note 31 for a discussion of the exceptions.

26. Based on her first Term, Justice Sotomayor's appointment seems to have invigorated the interpretive debate and, in particular, highlighted the fact that the Justices still disagree about the use of legislative history and do not view prior Court statements about the validity of legislative history as law that binds them for the next case. *See supra* note 22.

27. *See* Rosenkranz, *supra* note 20, at 2144-45 ("[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." (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."). Along the same lines, see generally Foster, *supra* note 2.

I have previously argued that this state of affairs is problematic: among other things, it wastes resources, deprives Congress of an incentive to coordinate its drafting of statutes with the Court's interpretive methods, and provides little guidance to the lower courts.[28] Indeed, even when the Court does resolve a lower-court split related to statutory construction, the Court resolves only the specific statutory-law question (e.g., whether the statutory term "vehicle" includes a "bicycle") but does not make formal legal statements with respect to the statutory interpretation rules used to decide that question (e.g., whether text, legislative history, or canons of construction should be consulted and in what order).[29] As such, these decisions ensure no greater uniformity among lower courts choosing among the same interpretive rules in the next case. This makes statutory interpretation disputes different from ordinary substantive-law disputes, which the Court does at least attempt to resolve with some finality.[30]

This is not to say that there are not some interpretive canons on which the Court has implicitly reached agreement or even a few exceptional areas of law for which the Court has effectively settled on a single interpretive approach—like the *Chevron* regime, which sets forth when courts should defer to agency statutory interpretations, or the Employee Retirement Income Security Act (ERISA) and Federal Employers Liability Act (FELA) contexts, in which the Court has predefined the relevant interpretive principles for those specific statutes.[31] But the Court has never acknowledged that it distinguishes among different interpretive rules in this manner, has offered no coherent principle to explain why it has chosen to resolve the few areas it has, and has never provided any explicit statement that this limited set of interpretive rules is more binding than others. Indeed, even *Chevron*—perhaps the most clearly established canon of statutory interpretation—is itself exceedingly indeterminate because step one of the *Chevron* inquiry requires the courts to consult "traditional tools" of interpretation,[32] and the Justices remain divided over what those tools actually are.[33]

28. Gluck, *supra* note 3, at 1767.

29. *See* Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 76 (2000) (calling "interpretive choice" a "focus upon means, rather than ends").

30. See *infra* text accompanying notes 244-246 for further discussion of this point.

31. *See infra* Section IV.C.

32. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

33. *See, e.g.*, Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498, 1505-06 (2009); *id.* at 1516, 1518-20 (Stevens, J., dissenting) (arguing over whether courts can use legislative history to clarify text and so prevent agency deference).

1. *Methodology as "Rules of Thumb"*

Some interpreters (including, occasionally, the Court itself) contend that this state of affairs is exactly as it should be: that the rules of interpretation are mere "rules of thumb," and so the use of those rules in one case should not bind judges in any other case.[34] Under this logic, one could argue that as a formal matter, state and lower federal court judges are free to apply whatever interpretive principles they like, even ones different from the Court's. But as a practical matter, adopting such an approach—for example, if the Tenth Circuit or the Supreme Court of Ohio were to start giving more weight to committee reports than to statutory text—would be courting reversal.[35] There is at least some constraint at work.

2. *Methodology as Federal Common Law*

Others have implied instead that the Court's statutory interpretation principles are common law.[36] Yet no one has really addressed why this common law of statutory interpretation is not routinely deemed binding on other judges and other courts in the same way that common law ordinarily is. Instead, what these scholars (and perhaps the "rule of thumb" camp as well) really seem to be talking about is a form of general common law, a set of universal principles that apply across all courts and all cases. Federal courts themselves often refer to "universal" interpretive principles, or "traditional

34. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) ("[C]anons of construction are no more than rules of thumb . . . ."); *see* William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 662 (1990); Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 206 (1999); Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1687 (1988).

35. For this reason it also is unhelpful to think of the rules of interpretation as something that the Supreme Court hands down to the courts through its supervisory power (its power to fashion rules of evidence and procedures for the lower federal courts), because the Court holds a supervisory power over only federal courts, not state courts. *See* Sanchez-Llamas v. Oregon, 548 U.S. 331, 345 (2006).

36. Anthony J. Bellia, Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 832-33 (2005) (arguing that the definition of federal common law is broad enough "to encompass certain judicial determinations about the propriety of different methods of interpretation"); Merrill, *supra* note 18, at 5 ("[F]ederal common law is not qualitatively different from textual interpretation, but rather is an extension of it . . . ."); George Rutherglen, *Reconstructing* Erie*: A Comment on the Perils of Legal Positivism*, 10 CONST. COMMENT. 285, 294 (1993) ("The new federal common law can be defined as judicial decisions, subject to change by Congress, about how to implement basic principles of federal statutory or constitutional law.").

tools of statutory construction."[37] But *Erie*, of course, proclaimed the end of federal general common law,[38] and, although some have argued that there still may be a place for some limited general common law of the pre-*Erie* sort,[39] this is not the prevailing view.

In the post-*Erie* world, most agree that legal principles previously thought of as general common law must attach to a particular sovereign source—that is, they should be understood as "federal common law" and/or as fifty different bodies of state common law. Some, however, have understood the Rules of Decision Act (the statute construed in *Erie*) to severely limit federal-court power to create any federal common law, be it for state or federal legal questions. This strong reading of the Rules of Decision Act poses a question separate from whether local methodology follows local statutes—namely, whether federal courts even would have the power in the first instance to create federal common-law rules of statutory interpretation if they so desired.

As stated at the outset, the general principle that federal courts can devise statutory interpretation methodologies has never been earnestly contested[40] and is probably too deeply entrenched to challenge seriously.[41] But we do need to situate statutory interpretation within the debates about the general propriety of federal common-lawmaking because otherwise we cannot answer the key overarching jurisprudential question: namely, whether the Supreme Court's methodological statements might be thought of as "real" law that binds the state and lower courts.

It is useful as a thought experiment to accept the broadest reading of the Rules of Decision Act and assume that the U.S. Supreme Court does not have the authority to create any federal common law of statutory interpretation.

37. *See, e.g.*, *Chevron*, 467 U.S. at 843 n.9; Cooper v. FAA, 596 F.3d 538, 550 (9th Cir. 2010); Bruesewitz v. Wyeth Inc., 561 F.3d 233, 241 (3d Cir. 2009); United States v. Villanueva-Sotelo, 515 F.3d 1234, 1236 (D.C. Cir. 2008); Figueroa v. Buccaneer Hotel, Inc., 188 F.3d 172, 179 (3d Cir. 1999); Farish v. Courion Indus., 722 F.2d 74, 77 (4th Cir. 1983).

38. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

39. Young, *supra* note 18 (arguing that customary international law is best conceived as "general common law" of the pre-*Erie* variety). Part IV counters the argument that statutory interpretation methodology is, in fact, general common law.

40. Some specific canons, such as the application of the *Charming Betsy* canon in the customary international law context, seem to have been singled out for special (contested) treatment. *See* Craig Green, *Repressing* Erie*'s Myth*, 96 CALIF. L. REV. 595, 629 (2008) (noting that some charge that the canon gives "courts flexibility to interpret customary international law using techniques that look much like unauthorized common law").

41. *Cf.* Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 779 (2010) (describing the "conception of an unmoored 'general law'" as a "Lost World" that "has all but disappeared from our thinking").

What happens then? Under the Rules of Decision Act, if there is no federal law, state law provides the rule of decision. Thus, if there is no federal common law of statutory interpretation, the federal courts, including the U.S. Supreme Court, would look to state-created rules of interpretation even when interpreting federal statutes.[42] Hypothetically, there could be fifty different bodies of state common law of statutory interpretation, with the consequence that federal statutes could mean different things even within each federal circuit.[43] So, too, Congress might have to draft statutes with many potentially different interpretive regimes in mind.[44] The implausibility of this scenario and its intolerable on-the-ground effects help to prove why it cannot be so. In fact, these are precisely the kinds of circumstances in which the U.S. Supreme Court—and even most scholars who read the Rules of Decision Act broadly—have justified an exception to *Erie*'s prohibition on federal common-lawmaking.

Consider how well the Court's typical arguments justifying federal common-lawmaking apply to statutory interpretation methodology. There is a uniquely federal interest involved (the meaning of federal statutes); it is grounded in a federal source (federal statutes);[45] and there is a clear need for federal-law uniformity. As with other types of approved federal common-lawmaking, this type also would be restrained: it would be limited to filling interstitial gaps in a statutory scheme.[46] And, similar to arguments made for

42. *See* Bellia, *supra* note 36, at 886-88.

43. This possibility stems from the fact that there is more than one state per federal circuit. That said, it is highly unlikely there would be fifty state variations, but the ones that might exist could be significant.

44. To the extent that methodological choice would be viewed entirely as a state-law question, there might also be the anomalous result that such decisions would become effectively isolated from U.S. Supreme Court review, except perhaps as to questions of preemption. *Cf.* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1832 (1998) ("[T]o treat determinations of customary international law as questions of state law would have rendered both state court and federal diversity rulings effectively unreviewable by the U.S. Supreme Court[,] . . . rais[ing] the specter that multiple variants of the same international law rule could proliferate among the several states.").

45. *See* Bradley et al., *supra* note 18, at 879 ("[T]here is widespread agreement that federal common law must be grounded in a federal law source."); *see also* Field, *supra* note 18, at 887 (arguing for a broad understanding of federal common-lawmaking authority but still acknowledging that the "limitation . . . is that the court must point to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common law rule").

46. *See* Tex. Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) ("[T]he Court has recognized the need and authority in some limited areas to formulate what has come to be known as 'federal common law.' These instances . . . fall into essentially two categories: those in which a federal rule of decision is 'necessary to protect uniquely federal interests,'

common-law authority in other areas, the source of federal judicial authority to create these interpretive principles derives from the power—given to the federal courts by the jurisdictional statutes and Article III—to adjudicate statutory cases.[47] In fact, this same kind of inherent authority is used to justify the Court's methodological work in the constitutional law context.

a. Comparisons to Federal Common-Lawmaking for Constitutional Interpretation

Notably, however, the constitutional interpretation context looks very different. As has been pointed out by others, the Court has, in fact, created "real" legal doctrines to guide itself and lower courts in interpreting the Constitution. We have many decisionmaking frameworks that apply to subareas of constitutional law, including the tiers of scrutiny, the three-pronged dormant Commerce Clause test, and the various First Amendment frameworks. Whether one views these frameworks as defining substantive constitutional rights, as implementing constitutional norms,[48] as "constitutional common law,"[49] or as "constitutional decision rules,"[50] they are

and those in which Congress has given the courts the power to develop substantive law." (citations omitted)); Bradley et al., *supra* note 18, at 921 ("[T]his sort of statutory gap-filling, guided by congressional intent, is probably the most common (and uncontroversial) type of federal common law.").

47. *See* Rutherglen, *supra* note 36, at 294; *see also* Merrill, *supra* note 18, at 42-44 (calling this "implied delegated lawmaking"); *cf.* Note, *The Competence of Federal Courts To Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1090 (1964) ("The exercise of this judicial competence is premised on the inevitable incompleteness of legislation. . . . In these cases it is the task of the judiciary to fill in the legislative lacunae . . . .").

48. FALLON, *supra* note 11, at 5-6 ("A distinctive feature of the Supreme Court's function involves the formulation of constitutional rules, formulas, and tests, sometimes consisting of multiple parts. . . . [J]udicially prescribed tests do not . . . always reflect the Court's direct assessment of constitutional meaning, but sometimes embody the Court's judgment about an appropriate *standard of judicial review* . . . ."); *see also* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1316 (2006) ("Courts do not customarily divide their analyses into two parts, one involving constitutional meaning and the other doctrinal design. . . . But the failure of courts explicitly to bifurcate their analyses hardly demonstrates that no useful distinction exists between inquiries into constitutional meaning and the construction of doctrinal tests.").

49. Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975).

50. *See* Berman, *supra* note 11, at 9; *see also* Foster, *supra* note 2, at 1900-01 (pointing out that contract and constitutional interpretation offer examples of rules that "tell judges 'how to think'").

indisputably viewed as "real" doctrine and not an ultra vires exercise of improper federal common-lawmaking.

To be sure, the Court has not decided with finality on an overarching methodology for constitutional interpretation (for example, choosing definitively between originalism or living constitutionalism). But that is not the point. The point is that the Court certainly has made final decisions that set out reasoning regimes for many constitutional subareas like the ones outlined above. To make the analogy to statutory interpretation, then, our discussion of the legal status of methodology need not be about whether general interpretive theories such as textualism or purposivism could or should be treated as binding law. That question may be too broad or its stakes too high. Rather, as in the constitutional context, we can envision that the Court could act in a variety of more specific ways.

For example, the Supreme Court remains divided on whether legislative history can be considered to elucidate statutory meaning and so prevent application of the rule of lenity or *Chevron* deference (both of which the Court generally turns to only when the statute is ambiguous).[51] The Court could surely resolve that question and bring more clarity to those cases. So, too, the Court could make definitive pronouncements about the credibility of legislative history (or specific types of it), either in general or for particular statutes, thereby settling ongoing questions about when legislative history will be consulted. Some of these rules could be transsubstantive; some might be intrasubstantive. The possibilities are many, and they deserve their own separate treatment. The claim is not that the Court must apply any specific rules, or that they need to be formalistic, or even that they must be uniform for all statutory questions—after all, the Court does not require that we use the same considerations to adjudicate equal protection claims as we use to adjudicate public-forum doctrine claims. And fluid interpretive regimes would be as valid as formalistic regimes as candidates for a common law of statutory interpretation. The claim is simply that the Court has the power to decide these kinds of questions and also that the Court could take relatively small steps toward clarifying the doctrine without committing to a single overarching interpretive regime for all statutory cases.

There are, of course, deeper philosophical debates about the merits of doctrinal clarity or the ability of "judgment" or "interpretation" to be truly

51. *See* Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498 (2009); *id.* at 1518-20 (Stevens, J., dissenting); United States v. Hayes, 129 S. Ct. 1079 (2009).

objective.[52] Those debates go to all kinds of interpretation (not just statutory interpretation), and this Article does not engage them. That said, as Mitchell Berman has pointed out, one can believe in the indeterminacy of language but still accept the idea of doctrinal rules that tell judges how to go about engaging in their interpretive tasks consistently.[53] In fact, despite those philosophical debates about the character of law, we accept second-order rules that constrain judges all of the time outside the statutory interpretation context, in the public-law as well as the private-law context. Indeed, *Erie* itself rejected the idea that federal courts need unrestricted flexibility to reach the "right" decisions and instead favored a norm of consistent doctrinal decision rules. The goal of this Article is to ask why statutory interpretation does not fit into this landscape.

3. *Methodology as Something in Between*

Finally, let us acknowledge that the term "law" might be too monolithic to describe all of the different legal doctrines that judges create and follow. It is at least in part for this reason that constitutional law scholars have struggled with the nomenclature for the decision rules in that context.[54] In the statutory interpretation arena, likewise, perhaps we need not agree that the rules of interpretation are as lawlike as, say, the operative provisions of Title VII of the Civil Rights Act to acknowledge that they are more than matters of individual judicial preference.

Indeed, federal courts already approach law on something like a spectrum in the context of stare decisis. Federal courts give "super-strong" stare decisis effect to substantive statutory precedents (what federal statutes mean, not what methodology is used to interpret them) and a lower level of stare decisis to constitutional law holdings.[55] Methodological rules likewise might occupy a place on that spectrum of law, perhaps meriting lower precedential weight in

52. *Cf.* Eskridge, *supra* note 34, at 614 (applying Hans-Georg Gadamer's theory to statutory interpretation).

53. Berman, *supra* note 11, at 10.

54. *See supra* notes 48-50 and accompanying text.

55. *See, e.g.*, CBOCS W., Inc. v. Humphries, 128 S. Ct. 1951, 1958 (2008) (observing that stare decisis "'ha[s] special force in the area of statutory interpretation'" (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989))); WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 642-45 (4th ed. 2007).

order to give judges the ability to evolve interpretive doctrine over time and respond to changes in the legislative process[56]—but they might still be "law."[57]

The possibility that methodological rules are law, but of a different sort, also opens up inquiries about dicta and the relationship between interpretive rules and case holdings. The following Parts of this Article illustrate how methodological choice can be outcome-determinative and so affect case results. But the dicta question is something of a red herring: numerous other kinds of interpretive frameworks that some also might call dicta—not only constitutional frameworks but also Title VII's burden-shifting regime, the rules of federal contract interpretation, federal choice-of-law rules, interpretive regimes for admiralty, and so on[58]—are already viewed by state and federal courts alike as real federal law that binds them under the Supremacy Clause in federal-question cases.[59]

56. In other words, one can acknowledge that there may be a benefit to retaining some interpretive flexibility, *cf.* Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149, 152 (2001) ("[T]he expectations that legislators and judges develop about the behavior of other actors in the lawmaking system prove self-defeating rather than self-fulfilling, causing a cyclical pattern of continuous mutual adjustment that never reaches a stable equilibrium."), but still believe that the rules of interpretation should be conceived as law rather than mere judicial preference. There are plenty of legal standards that are flexible; this does not make them not law. And even if courts retain some flexibility to change a lawlike interpretive doctrine, what emerges after that change is still law, just new law. *Cf.* Robert Post, *Theories of Constitutional Interpretation*, REPRESENTATIONS, Spring 1990, at 13, 28 ("In the American legal system this authority [of the Constitution as law] appears both flexible and inevitable. It is not disabled even if in certain cases we deny its mandate and break with the principle of *stare decisis*. That is because when . . . precedent is . . . overruled, a new decision must be announced, and . . . will be respected in accordance with the principle of *stare decisis*.").

57. Mitchell Berman has made the same suggestion in the constitutional law context. *See* Berman, *supra* note 11, at 100 ("[I]t is at least plausible . . . that stare decisis should apply with different force to operative propositions and decision rules. Courts might feel themselves freer to be more avowedly experimentalist when announcing doctrine candidly described as decision rules." (citation omitted)).

58. *Cf.* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1264-65 (2006) (arguing that all such court-created frameworks are dicta).

59. *See also* Field, *supra* note 18, at 907, 910 (arguing that courts engage in federal common-lawmaking when they "creat[e] contract rules to govern section 301 labor disputes . . . [and] rules for interstate disputes" and also when the Court implies a federal cause of action); Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567, 1587-89 (2008) (discussing more federal common law regimes); *cf.* Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) (holding that not only federal but also state courts must be bound by uniform federal common-law principles when enforcing collective bargaining agreements).

B. Different Questions Raised by Statutory Interpretation in the States

Underlying the question of whether state and federal courts should apply one another's interpretive methodologies to one another's statutes is the assumption that there may be a difference between those methodologies. This question previously may have been given short shrift based on an intuition similar to the "general common law" gloss discussed above—namely, that all courts apply the same interpretive rules. That assumption, however, is mistaken. In a previous article,[60] I illustrated that some state courts have diverged from federal interpretive practice in significant ways. Some courts, for example, have imposed multistep frameworks that dictate what interpretive tools, in what order, courts should consult when they interpret statutes.[61] A number of state courts also give their methodological statements stare decisis effect. In Oregon, for example, the state supreme court has held that courts may not use a "substantive canon" of construction—such as the rule of lenity, the canon of constitutional avoidance, or the presumption against implied repeals—unless the court has first examined text and legislative history and still found the statute ambiguous. In contrast, many federal judges, particularly those who call themselves textualists, would, if left to their own devices, apply such a canon before (or to the exclusion of) consulting legislative history. As another example, in Michigan, between 1999 and 2006, use of the canon that statutes shall not be interpreted to reach absurd results (the rule against absurdities) was not permitted at all.[62] But the rule against absurdities was in play in the federal arena throughout the entire period.[63]

Another state development of particular note is the large number of state legislatures that have enacted statutes setting forth rules of construction to govern the state courts' statutory interpretation processes.[64] Most outsiders surely would regard such interpretive statutes as "law." And yet, in a surprising

60. Gluck, *supra* note 3.

61. *See, e.g.*, Petersen v. Magna Corp., 773 N.W.2d 564 (Mich. 2009); Portland Gen. Elec. Co. v. Bureau of Labor & Indus., 859 P.2d 1143 (Or. 1993), *modified*, State v. Gaines, 206 P.3d 1042 (Or. 2009); Boykin v. State, 818 S.W.2d 782 (Tex. Crim. App. 1991); State *ex rel.* Kalal v. Circuit Court, 681 N.W.2d 110 (Wis. 2004).

62. *See* Cameron v. Auto Club Ins. Ass'n, 718 N.W.2d 784 (Mich. 2006) (reinstating rule); People v. McIntire, 599 N.W.2d 102, 107-09 (Mich. 1999) (banning rule).

63. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2389 (2003) ("[T]he absurdity doctrine has been one of the few fixed points in the Court's frequently shifting interpretive regimes.").

64. *See generally* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010).

twist, many state courts are not following those legislative directives. One state court has opined that legislated interpretive rules violate separation of powers.[65] Many other state courts leave these legislated interpretive rules on the books but ignore them.[66]

Clearly, these state developments further confound the "what is methodology" question. The state courts that impose controlling interpretive frameworks and give their methodological statements stare decisis effect treat judicially articulated rules of interpretation as "real" common law. But the fact that there also are states that do not have such frameworks means that it might be the case that the legal status of statutory interpretation methodology currently differs across various states—a complicating factor for federal courts trying to apply state law.

So too, the existence of legislatively enacted principles of statutory interpretation demonstrates that at least some state legislatures conceive of these principles as law that can be legislated. But even in states that have made these moves, the legal status of methodology is not entirely clear. For example, if the state courts' rules of interpretation are ordinary common law, then state legislatures should be able to override them with legislated rules of interpretation. Indeed, this is precisely what the Uniform Commercial Code (U.C.C.) does: it overrides any contrary common law principles of contract interpretation and imposes its own interpretive rules. State courts do not object to this display in the U.C.C. of legislative interpretive authority. But in the state statutory interpretation context, legislated laws of statutory interpretation appear to be laws of which courts particularly disapprove.

65. Evans v. State, 872 A.2d 539 (Del. 2005).

66. *See* Gluck, *supra* note 3, at 1782-97 (describing the Oregon, Connecticut, and Texas supreme courts' evasion of legislated rules concerning extrinsic aids). For examples of many more state courts ignoring state statutes abolishing canons such as the rule of lenity and the presumption that statutes in derogation of the common law be strictly construed, see *Hayes v. Continental Insurance Co.*, 872 P.2d 668, 676-78 (Ariz. 1994); *Brodie v. Workers' Compensation Appeals Board*, 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 School District 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 Insurance Group*, 938 A.2d 301, 307 (Pa. 2007); and Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 904 (2004) (summarizing the responses of state courts to legislative abrogation of the lenity canon). *Cf.* Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2203-06, 2268 & nn.359-60 (2002) (summarizing the phenomenon of states legislating against the lenity and nonderogation canons and collecting statutes on nonderogation).

C. *The Architecture of Concurrent Jurisdiction and the* Erie *Doctrine*

Finally, to understand the courts' approach to statutory cases that involve a crossover between federal courts and state law, or vice versa, it is important to appreciate the baggage that courts bring to them. Many courts place what I will argue is an undue emphasis on the structural differences between the authoritativeness of state and federal courts when they interpret one another's statutes. This Section sets out those structural differences and provides a brief overview of what an *Erie* analysis of statutory interpretation methodology looks like.

1. *The Asymmetrical Structure of Concurrent Jurisdiction*

For most questions of statutory interpretation, state and federal courts share jurisdiction. As elaborated below, federal courts hear state statutory claims in many different postures, ranging from diversity cases in which no question of substantive federal law is presented to federal-question cases in which the dominant question is one of federal law but a state statutory question is embedded.[67] And state courts, with the limited exception of cases over which there is exclusive federal-court jurisdiction,[68] sit with equal authority and duty to hear any federal statutory claim, regardless of whether there is a state-law issue in the case.[69]

Yet despite this shared authority, there is an asymmetry in the procedural architecture that governs state and federal judgments in these crossover cases. There are two primary reasons for this. First, whereas state courts are as authoritative as federal courts on questions of federal law,[70] federal courts are inferior to state supreme courts on state-law questions[71] and "long have

67. *See, e.g.*, 28 U.S.C. § 1331 (2006) (federal-question jurisdiction); *id.* § 1332 (diversity jurisdiction); *id.* § 1367 (supplemental jurisdiction).

68. For areas of exclusive federal jurisdiction, see, for example, 18 U.S.C. § 3231 (2006) (federal criminal prosecutions); 28 U.S.C. § 1333 (admiralty); *id.* § 1334 (bankruptcy); and *id.* § 1338 (patents, copyrights, and trademarks).

69. *See* Testa v. Katt, 330 U.S. 386 (1947).

70. *See* Martin H. Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861, 890-91 (1985).

71. King v. Order of United Commercial Travelers of Am., 333 U.S. 153, 157 (1948); Angel v. Bullington, 330 U.S. 183, 186-87 (1947).

understood state courts to be the authoritative interpreters of state law."[72] That, of course, is one key holding of *Erie*.

Second, whereas a state supreme court's construction of a federal statute is reviewable by the U.S. Supreme Court, a federal court's construction of a state statute is not reviewable by the state court of last resort. State supreme courts do not have jurisdiction to review the rulings of federal appellate courts, even when those rulings are on state-law questions. Nor does the U.S. Supreme Court generally review questions of pure state law[73]—even when those questions are decided by lower federal courts.[74]

Of course, because the U.S. Supreme Court accepts so few cases for review, the practical effect of this asymmetry is quite small. In reality, state supreme courts, like the federal courts of appeals, are able to offer the last word in most federal-law cases, even though those decisions cannot bind the U.S. Supreme Court or other federal tribunals.[75] Yet despite this reality, as we shall see, state and federal courts alike give enormous weight to the formal structural differences: federal courts are sometimes extremely restrained state statutory interpreters, whereas state supreme courts are typically independent federal statutory interpreters.

2. *The* Erie *Doctrine*

The core components of the *Erie* doctrine and the problems it aims to address are familiar territory and so merit only a brief summary here. *Erie* and its progeny have established a bifurcated inquiry for cases in which federal courts are required to interpret state law. Where there is no federal statute or rule on point, federal courts face "the typical, relatively unguided *Erie* choice."[76] In this situation, courts follow the Rules of Decision Act, which provides that "[t]he laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they

72. Robert A. Schapiro, *Interjurisdictional Enforcement of Rights in a Post-*Erie *World*, 46 WM. & MARY L. REV. 1399, 1408 (2005).

73. *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874).

74. *Cf.* SUP. CT. R. 10 (listing the grounds for certiorari and not including questions of pure state law).

75. *See* James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 233 (2007) (stating that, because of the rarity of U.S. Supreme Court review, "state courts now exercise final authority in virtually every federal question case that comes before them").

76. Hanna v. Plumer, 380 U.S. 460, 471 (1965).

apply."[77] In deciding whether state law provides a "rule of decision," courts are to consider whether "the outcome of the litigation in the federal court [would] be substantially the same . . . as it would be if tried in a State court";[78] whether the state-law rule was "intended to be bound up with the definition of the rights and obligations of the parties";[79] and whether the application of state law would further "the twin aims of the *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of the laws."[80]

On the other hand, when there is a valid federal statute or promulgated rule on point, the federal statute or rule controls, provided that Congress has the power to enact it. Because Congress's rulemaking authority is limited by statute to procedural matters, the Court will apply an enacted federal rule if it can be rationally characterized as procedural.[81]

Two clarifying points are in order about how these principles apply to statutory interpretation methodology. First, the relevant question in this context is not what most people think of as the typical *Erie* statutory question. If a federal court hears a statutory tort dispute between citizens of New York and New Jersey, the *Erie* question that comes immediately to mind is whether the New York, New Jersey, or federal tort statute governs the dispute. But this Article's focus is on the next step, namely, what happens once whichever statute is chosen must be construed. Once the New York tort statute is chosen, for example, the question may arise whether the conduct at issue involves a "vehicle" as defined by that statute. This Article's concern is how, if at all, the *Erie* doctrine affects the federal court's decision whether to look to a dictionary, the legislative history, a canon of construction, or some other interpretive tool to decide that question.

77. 28 U.S.C. § 1652 (2006); *see* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1491 (1997); Adam N. Steinman, *What is the* Erie *Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 265 (2009).

78. Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945).

79. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 536 (1958).

80. *Hanna*, 380 U.S. at 468; *see also* Clark, *supra* note 77, at 1491 (quoting *Erie* and describing the doctrine).

81. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) ("Congress has . . . undoubted power to prescribe rules for the courts it has created, so long as those rules regulate matters 'rationally capable of classification' as procedure." (citing *Hanna*, 380 U.S. at 472)). The Rules Enabling Act provides: "The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . and courts of appeals." 28 U.S.C. § 2072(a).

As a second clarifying point, there are currently no "Federal Rules of Statutory Interpretation."[82] Thus, interpretation of state statutory law sits squarely within the first prong of the *Erie* doctrine—when there is no federal rule on point—and so the focus for *Erie* purposes is on whether state interpretive methodology provides a "rule of decision"; that is, whether it is outcome-determinative and whether applying it serves *Erie*'s "twin aims." As a matter of doctrinal precision, therefore, we need not now resolve whether a particular canon of interpretation is "substantive" or "procedural"—that inquiry, as previously noted, applies only when courts must determine whether an enacted federal rule or statute can displace state law. Nevertheless, because for many judges *Erie* is (as understood at a high level of generality) about substance and procedure, in Part IV, this Article offers some arguments supporting the view that many, if not all, rules of statutory interpretation are "substantive."[83]

II. FEDERAL COURTS AND STATE STATUTES

A lack of precision about the legal status of methodology and exaggerations about institutional differences have produced a vast doctrinal muddle on the ground. This Part uses a large number of case studies to illustrate the problem and its implications for intersystemic statutory interpretation.

Most importantly, the federal courts are wholly inconsistent about whether state or federal methodology applies to state statutes. They either do not seem aware that there is a choice to be made at all or are resisting the application of state methodology for reasons that they do not explicitly acknowledge. Moreover, even when federal courts do engage state methodology, other puzzles emerge. For example, even those federal courts that sometimes look to state methodology in diversity cases do not always recognize that many state statutory interpretation questions presented in nondiversity cases should be

82. *See* Rosenkranz, *supra* note 20. There is a Federal Dictionary Act, but it covers only the simplest interpretive conventions and its application is optional. *See* 1 U.S.C. § 1 (2006) (allowing the Act to be ignored if "the context indicates otherwise" and covering matters such as "words importing the plural include the singular; words importing the masculine gender include the feminine").

83. It is of course possible that some rules of statutory interpretation might be more substantive than others, although a canon-by-canon analysis is beyond the scope of this Article. Even so, such a conclusion would not diminish the point that courts should be engaging in the *Erie* analysis in the context of statutory interpretation methodology. Nor would a conclusion that some rules of statutory interpretation are more procedural than substantive mean that those rules are not "law." Many rules that are indisputably "law" are procedural for purposes of *Erie*.

interpreted in the same way, with reference to state interpretive principles. Nor do the federal courts seem to reflect on the implications of their state statutory work for their own federal interpretive efforts. For example, even when federal courts recognize that some states treat methodology as "law," they never seem to question why federal methodology does not get the same treatment.

The focus of this Part is descriptive and doctrinal; the Article takes up the theoretical implications of these cases in Part IV, as well as counterarguments to the view that *Erie* applies in this context. This Part likewise defers until Part IV the larger jurisprudential question of what statutory interpretation "is" and from where it "emanates"—because, notably, the courts themselves do not acknowledge that question as one that drives their behavior in these cases. In other words, the federal courts do not argue that methodology is not law or that it is rooted in Article III in order to justify their inconsistent approaches or their bypassing of state statutory interpretation methodology. Instead, the federal courts generally do not acknowledge that there is an inconsistency, much less an *Erie* question, to explain in the first place.

The Article's own methodological approach to these crossover cases is empirical but not comprehensive. Review of a decade's worth of crossover cases revealed significant inconsistencies in the ways in which the federal courts approached the *Erie* questions discussed.[84] The cases described in this

84. With the exception of limited earlier work on state courts, *see* Gluck, *supra* note 3; *see also* Elhauge, *supra* note 66 (discussing state-legislated rules), and one preliminary study of statutory interpretation by federal courts of appeals, *see* FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 180-200 (2009), there are no inclusive studies that generally describe the statutory interpretation practices of state and lower federal courts. As a result of my prior work, which identified distinctive interpretive methodologies in five states, the question naturally arose whether the corresponding five federal circuit courts had taken note of those distinctive approaches and were using them when interpreting state law themselves. Using the Westlaw Key Numbers database, I reviewed all federal appellate decisions for those five circuits (the Second, Fifth, Sixth, Seventh, and Ninth) over the past decade that Westlaw coded as both "Statutes" cases and "Federal Courts/State Laws as Rules of Decision" cases. Cases coded in this manner are generally those in which courts explicitly discuss statutory interpretation methodology. I also searched for relevant cases in different ways, including searching for any federal case that cited the leading statutory interpretation opinions from the five states as well as searching through the general Westlaw "Statutes" Key Number database for any case from those circuits referring to the five states' names in conjunction with the term "diversity." As a result of that research, I expanded my inquiry to all of the circuits and the U.S. Supreme Court, using the same search strategies, and to the state supreme courts for the reverse-*Erie* research. Two previous articles facilitated my reverse-*Erie* research. *See* Wrabley, *supra* note 10; Zeigler, *supra* note 2. Both discuss which states refuse to defer to the federal-law decisions of their corresponding federal circuit courts in making substantive-law decisions (not focusing on choice of interpretive methodology). For this Article's purposes, I examined the methodological choices in those state cases that considered federal statutory

and the next Part offer examples but not the full scope of such imprecision. At the same time, they do not appear to be outliers. Also included are examples of where the courts (in the author's view) got the *Erie* question right. The purpose simply is to show that the courts are approaching these cases inconsistently and, at least some of the time, incorrectly.

A. Three Ways in Which State Statutes Come to Federal Court for Interpretation

State statutes arrive in federal court for interpretation in many postures, but there are three basic case patterns that cover most of the relevant statutory interpretation terrain: diversity cases, federal-question cases that may turn on an issue of state law, and cases challenging the federal constitutionality of state statutes.[85] (There are other case patterns, such as state claims that are supplemental to federal questions, but most such cases can be analyzed under the framework of one of the three categories provided.[86]) It is important to remember that the *Erie* doctrine applies in federal-question and federal constitutional cases, just as it does in diversity cases, provided that an analytically separate question of state law is presented.[87]

In all three types of cases, notwithstanding their different jurisdictional postures, the underlying question—what the state statute *means*—remains the same. Thus, so should the interpretive method. In other words, if one agrees that, in the straight diversity case, state methodology should be used to interpret state statutes, then once we distill the fact that many nondiversity cases present essentially identical questions of state statutory interpretation, *Erie* makes clear that the same approach should apply. Current practice, however, does not reflect this intuition.

questions and also cited the state's leading reverse-*Erie* case (the case establishing what, if any, deference the state court accords federal court decisions on federal law).

85. Constitutional challenges are, of course, federal-question cases too, but as we shall see in Subsection II.C.3, in the context of methodological choice, these crossover constitutional cases often get different treatment.

86. For example, supplemental jurisdiction cases usually will be analyzed using the same template as diversity cases because the supplemental claim typically involves questions only of state law, even though the head of jurisdiction is the "arising under" (federal-question) jurisdiction. 28 U.S.C. § 1331 (2006).

87. *See* HART & WECHSLER, *supra* note 18, at 563; PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 21 (6th ed. 2008); 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4520 (2d ed. 1996 & Supp. 2010); Steinman, *supra* note 77, at 313.

B. Diversity Cases

At least four distinct methodological problems arise when federal courts interpret state statutes in diversity cases, and these problems sometimes arise simultaneously within a single case. First, some federal courts, in seeking to "predict" how a state court would decide the statutory question, use the same methodology that federal courts use for common-law cases—consultation of other jurisdictions' practices, treaties, etc.—rather than simply applying the state supreme court's statutory interpretation methodology. Second, some federal courts apply federal statutory interpretation principles or a mix of federal and state interpretive principles to construe state statutes. Third, federal courts often must navigate the difficult situation of interpreting a state statute when the state's highest court itself evades state-legislated rules of construction. And fourth, some federal courts refuse to interpret state statutes "dynamically"[88] (that is, to update them through interpretation to reach unforeseen problems), even in situations in which it is assumed that the state supreme court would do so.

1. Problem 1: The Tools that Courts Will Use To "Predict" State Law

In the most straightforward diversity case, in which there is no potentially applicable federal rule or statute to complicate matters, the Rules of Decision Act and the *Erie* line of cases require federal courts to apply state law. No federal court disputes this fundamental principle. If the state law at issue is a statute, and the state supreme court has previously decided the precise statutory question raised in the diversity case, there is universal agreement that federal courts must follow that state supreme court decision.[89] But when the state supreme court has not yet applied the relevant statute to the question at hand, the federal court must figure out how to do so itself, or utilize a procedural mechanism (such as abstention or certification, discussed later in the Article) to send the case to the state supreme court for decision. If they do not certify or abstain, most federal courts take the position that they must "predict" the result that the state supreme court would reach.[90]

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88. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

89. *See, e.g.*, World Harvest Church, Inc. v. GuideOne Mut. Ins. Co., 586 F.3d 950, 957 (11th Cir. 2009); Golden W. Ref. Co. v. SunTrust Bank, 538 F.3d 1233, 1237 (9th Cir. 2008); Savedoff v. Access Group, Inc., 524 F.3d 754, 762 (6th Cir. 2008); HOK Sport, Inc. v. FC Des Moines, L.C., 495 F.3d 927, 934-45 (8th Cir. 2007).

90. Although commentators dispute whether this "prediction" approach is the correct one, *see, e.g.*, Clark, *supra* note 77, at 1461; Dorf, *supra* note 2, at 705, the federal courts agree on it, *see,*

The first-order question here, as many federal courts see it, is what sources they should consult to help them in that predictive task. The federal courts have a long-established tradition of using for this purpose an eclectic set of materials, what is sometimes referred to as the "all available data" test.[91] Under that practice, federal courts look to:

> "decisions of state intermediate appellate courts, of federal courts interpreting that state's law, and of other state supreme courts that have addressed the issue," as well as to "analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand."[92]

It is questionable, however, whether such an eclectic methodology should be used for matters of state statutory interpretation. Unlike in common law interpretation (and perhaps not even there), neither state nor federal courts typically use so many extrinsic materials in statutory interpretation. Instead, it seems that the federal courts should ask whether the highest state court would look to those same extrinsic materials. Of course, using a state court's interpretive methodology is itself one way of predicting which sources the state courts will consider to decide a case.[93] But many federal courts do not approach the state cases in this way.

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e.g., Berrier v. Simplicity Mfg., Inc., 563 F.3d 38, 45-46 (3d Cir. 2009); Baltzell v. R & R Trucking Co., 554 F.3d 1124, 1130 (7th Cir. 2009); Pennington v. State Farm Mut. Auto. Ins. Co., 553 F.3d 447, 450 (6th Cir. 2009); Ashley Cnty. v. Pfizer, Inc., 552 F.3d 659, 665 (8th Cir. 2009); Andrew Robinson Int'l, Inc. v. Hartford Fire Ins. Co., 547 F.3d 48, 51 (1st Cir. 2008); STL 300 N. 4th, LLC v. Value St. Louis Assocs., L.P., 540 F.3d 788, 792 (8th Cir. 2008); Giles v. Gen. Motors Acceptance Corp., 494 F.3d 865, 872 (9th Cir. 2007); Wade v. Emcasco Ins. Co., 483 F.3d 657, 666 (10th Cir. 2007).

91. Dorf, *supra* note 2, at 697-98; *see* Benjamin C. Glassman, *Making State Law in Federal Court*, 41 GONZ. L. REV. 237, 264-67 (2005-06) (discussing and compiling cases); Logan, *supra* note 2, at 1254-55 (same).

92. Norfolk S. Ry. Co. v. Basell USA Inc., 512 F.3d 86, 92 (3d Cir. 2008) (quoting Koppers Co. v. Aetna Cas. & Sur. Co., 98 F.3d 1440, 1445 (3d Cir. 1996)). For other examples of substantially the same test, see *Paz v. Brush Engineered Materials, Inc.*, 555 F.3d 383, 392 (5th Cir. 2009); *Pisciotta v. Old National Bancorp*, 499 F.3d 629, 635 (7th Cir. 2007); *Giles*, 494 F.3d at 872; *Progressive Casualty Insurance Co. v. Engemann*, 268 F.3d 985, 988 (10th Cir. 2001); and *Leon's Bakery, Inc. v. Grinnell Corp.*, 990 F.2d 44, 48 (2d Cir. 1993).

93. *Cf.* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 20-21 (1994) ("[T]he federal courts frequently consult various predictive data beyond traditional sources of positive law within the relevant state, such as nonbinding dicta and law review articles.").

Consider, for example, *Combs v. International Insurance Co.*, in which the Sixth Circuit had to construe Kentucky's statute-of-limitations borrowing statute.[94] After setting forth that *Erie* required it to predict how the Kentucky Supreme Court would decide the statutory question, the Sixth Circuit articulated the all-available-data approach as the methodology that it would use to construe the state statute. The court then proceeded to examine (in order) a wide array of extrinsic interpretive aids: federal-court statutory interpretation precedents from other circuits; Idaho law; the common law history of statutes of limitations, various treatises and law reviews, several U.S. Supreme Court cases, and the laws of five other states with similar laws. It then engaged in a broad discussion about the purposes of borrowing statutes.[95] Only after that did the Sixth Circuit cite one Kentucky case for a possible methodology—namely, the proposition that courts should not add text that has been omitted. But unnoted by the Sixth Circuit was the fact that this very Kentucky case derived from a line of Kentucky Supreme Court cases prohibiting Kentucky courts from consulting nontextual evidence before first engaging in textual analysis and making a threshold finding of ambiguity.[96] The Sixth Circuit instead engaged in much wider-ranging nontextual analysis (the all-available-data test) than is typically used by the Kentucky Supreme Court. And it ultimately based its conclusion in the case on factors that the Kentucky Supreme Court likely would not have relied upon—namely, that "other state supreme courts have read [plaintiffs' suggested language] into borrowing statutes that lacked such express language."[97] Other federal courts likewise routinely apply the same type of common-law, eclectic approach to resolve state statutory questions.[98]

This federal-court approach is puzzling when state law itself provides the answer to the prediction question. If the state court already has set out its

94. 354 F.3d 568 (6th Cir. 2004).

95. *Id.* at 577-80.

96. *Id.* at 592 (citing Flying J Travel Plaza v. Commonwealth, 928 S.W.2d 344, 347 (Ky. 1996)); *see also* Delta Air Lines, Inc. v. Commonwealth, 689 S.W.2d 14 (Ky. 1985).

97. *Id.*

98. *See, e.g.*, Williams v. United Parcel Serv., 527 F.3d 1135, 1140-41 (10th Cir. 2008) (using "language, . . . decisions of other state appellate courts, and . . . the evident purposes of the statute" and first looking to ten other state courts' decisions before returning to the purpose of the Oklahoma statute at issue and citing an Oklahoma case for the proposition that a legislature's purpose is important); Vasquez v. N. Cnty. Transit Dist., 292 F.3d 1049, 1061 (9th Cir. 2002) (looking to treatises and laws of other states to interpret questions of state law); Fieger v. Pitney Bowes Credit Corp., 251 F.3d 386, 399 (2d Cir. 2001) (construing a Connecticut statute and considering as "[o]ther data . . . relevant case law from other jurisdictions" and scholarly writings).

decisionmaking process in the form of a predefined statutory interpretation methodology, then state law provides a path to approximating how the state's highest court would resolve the case.[99] And even if the state applies an eclectic approach, a federal court seeking to predict how that state's highest court would interpret a state statute should use precisely that approach; a different, less eclectic approach (e.g., textualism) is less likely to produce the same result.

Indeed, as Michael Dorf notes, "*Erie* has been generally understood to require federal court adherence to state 'meta' principles of law."[100] As an example (one used by Dorf as well), consider choice of law, a methodology that has important similarities to statutory interpretation. Like statutory interpretation rules, choice-of-law rules are decisionmaking (meta) regimes; they provide courts with a reasoning process to determine which state's laws control.[101] Of course, the U.S. Supreme Court held long ago in *Klaxon Co. v. Stentor Electric Manufacturing Co.* that, in a diversity case, *Erie* requires that the forum state's choice-of-law principles govern the federal-court decisionmaking process.[102] The driving notion behind *Klaxon* is the idea of state-/federal-court decisionmaking-process uniformity. This idea also has great purchase for statutory interpretation. In other words, at least in some cases, *Erie* is not only about reaching the same *result* as the home court, but also about using the home court's *methods*.[103]

2. *Problem 2: Mixing Federal and State Methodology*

Even in diversity cases in which the federal courts do not use the common-law all-available-data test, examples abound in which the federal court still relies on something other than state statutory interpretation methodology—usually federal statutory interpretation cases—to decide the applicable rules of construction. But these choices are not consistent, even within each circuit.[104]

99. Dorf, *supra* note 2, at 710.

100. *Id.* at 713.

101. In this sense, the choice-of-law inquiry is one step further removed from the ultimate decision than is the statutory-interpretation-methodology inquiry.

102. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

103. The importance of this principle is also evident in recent scholarly criticism concerning the practice of *states* not applying other states' choice-of-law regimes. *See, e.g.*, Michael S. Green, Erie*'s Suppressed Premise*, 95 MINN. L. REV. (forthcoming 2011) (criticizing that some states "do not use the predictive method when interpreting the unsettled law of sister states").

104. *Compare* Parish Oil Co v. Dillon Co., 523 F.3d 1244, 1248-54 (10th Cir. 2008) (holding that because the court was "sitting in diversity and construing a Colorado statute," it had to give the statute "the meaning it would have in the Colorado courts," but citing both state and

The Fifth Circuit is apparently the only court expressly and consistently to hold that *Erie* requires it to use state methodology for state statutes in diversity.[105] A few examples will illustrate the problem.

a. Using Federal Methodology

Consider, for example, the U.S. Supreme Court's most recent *Erie* decision, *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,[106] which overlooked the fact that there might be *Erie* questions related to the choice of statutory interpretation methodology in addition to and apart from the "regular" *Erie* question in the case. At issue in *Shady Grove* was a typical *Erie* question: a purported conflict between a New York statute and the Federal Rules of Civil Procedure. (Specifically, the question was whether a New York statute prohibiting class actions to recover state-law penalties conflicted with Federal Rule of Civil Procedure 23's class certification requirements.[107]) But a critical, initial aspect of the case actually turned on a question of state statutory interpretation: in order to decide which prong of the *Erie* framework was implicated in the case, the Court first had to decide whether there was a conflict between the New York statute and Rule 23. Both the majority and the dissent construed the New York statute in deciding that question.[108] Justice

federal statutory interpretation cases to justify its chosen rules of construction), *with* Ward v. Utah, 398 F.3d 1239, 1248 (10th Cir. 2005) (holding that the court must "interpret state laws according to state rules of statutory construction" and looking to state law to determine the governing rules). Some federal courts at times apply state methodology without explicitly stating that *Erie* is the reason that they do so. *See, e.g.*, *In re* W. Iowa Limestone, Inc., 538 F.3d 858, 863 (8th Cir. 2008); Volvo Trademark Holding Aktiebolaget v. Clark Mach. Co., 510 F.3d 474, 482 (4th Cir. 2007); Gershman v. Am. Cas. Co. of Reading, Pa., 251 F.3d 1159, 1162-63 (8th Cir. 2001).

105. *See In re* Whitaker Constr. Co., 439 F.3d 212, 222 (5th Cir. 2006); Occidental Chem. Corp. v. Elliott Turbomachinery Co., 84 F.3d 172, 175 (5th Cir. 1996) (relying on a passage from *Graham v. Milky Way Barge, Inc.*, 824 F.2d 376, 381 (5th Cir. 1987), itself expressly based on *Erie*). Other Fifth Circuit decisions do not explicitly cite *Erie* but nevertheless hold that the federal court is required to apply the state canons of construction in diversity cases. *See, e.g.*, Wright v. Ford Motor Co., 508 F.3d 263, 269-70 (5th Cir. 2007).

106. 130 S. Ct. 1431 (2010).

107. *See* N.Y. C.P.L.R. 901(b) (McKinney 2006).

108. This part of the opinion (Part II-A) garnered a majority, and the question that it was addressing should not be confused with Justice Scalia's arguments for a plurality in the next part (Part II-B) in which the inquiry was different and the importance of state statutory interpretation was in dispute. In the latter part, once Justice Scalia identified a conflict between the New York statute and the Federal Rule, he argued that any issues of state statutory construction were irrelevant and all that mattered for an *Erie* inquiry under the Rules Enabling Act was whether the Federal Rule "really regulat[es] procedure." 130 S. Ct.

Scalia's opinion for the Court gave the New York statute a textual reading and argued that such a reading put it in direct conflict with Rule 23.[109] Justice Ginsburg's dissent, in contrast, argued that, under a purposivist construction of the New York statute, there was no conflict; the statute's purpose, even if not its literal language, was only to restrict remedies and did not concern the question of class certification.[110] Neither side, however, considered whether New York's highest court would consult legislative history and purpose (as Justice Ginsburg did) or whether it would favor a literal approach (as Justice Scalia did). Instead, each looked only to federal statutory interpretation cases.[111]

In fact, Justice Scalia's reasoning for the Court in *Shady Grove* seems to challenge the entire premise of this Article, in that it implies that it might *never* be appropriate for federal courts to apply state interpretive methodology. In critiquing Justice Ginsburg's purposivist approach, Justice Scalia argued that, if consultation of state legislative intent were required, "federal judges would be condemned to poring through state legislative history—which may be less easily obtained, less thorough, and less familiar than its federal counterpart."[112] Indeed! Many state courts do routinely consult legislative history.[113] And if *Erie* requires federal courts to apply state interpretive methodologies to state

at 1442; *see id.* at 1444 (describing "the framework we apply—which requires first, determining whether the federal and state rules can be reconciled . . . and second, if they cannot, determining whether the Federal Rule runs afoul of [the Rules Enabling Act]," and disputing Justice Stevens's insistence, with respect to the second inquiry, that the character of the state law also should be considered); *id.* at 1444-47 (arguing that Justice Stevens's approach conflicts with *Hanna v. Plumer*, 380 U.S. 460 (1965) and *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941)). This aspect of the opinion (and of *Erie*) is not our concern here. Once a federal rule is found to be on point, as discussed in Part I of this Article, *supra* note 81 and accompanying text, the *Erie* inquiry changes and becomes a Rules Enabling Act inquiry, in which the focus is on the character of the federal rule (not the state rule), rather than a Rules of Decision Act inquiry. This Article is concerned with the kinds of questions presented in Part II-A of *Shady Grove*: the initial question—before the Rules Enabling Act is even implicated—about whether the state and federal laws are in conflict. Critically, both sides in *Shady Grove* construed the state statute to make that initial decision. But *Shady Grove* never directly faced this question about the relevance of state statutory interpretation methodology in diversity litigation.

109. *See* 130 S. Ct. at 1440 (focusing on the "literal" terms of the New York statute and refusing to allow statutory purpose to override textual evidence).

110. *Id.* at 1467 (Ginsburg, J., dissenting); *see id.* at 1465 ("The Court, I am convinced, finds conflict where none is necessary.").

111. *See, e.g.*, *id.* at 1440 (majority opinion); *id.* at 1469 (Ginsburg, J., dissenting).

112. *Id.* at 1441 (majority opinion).

113. *See generally* Gluck, *supra* note 3 (examining methods of statutory interpretation at the state level).

statutes, federal courts *should* be consulting state legislative history often because many state courts do.

As it turns out, Justice Ginsburg's dissent (although it did not cite the state cases) better approximated the generally purposive approach of the New York Court of Appeals. It therefore is not clear that the question of the purported conflict between the state law and federal rule—and so the outcome of the case—would have been resolved in the same way had the case been heard in state court instead or had the majority of the Court itself applied the *Erie*-based analysis advocated by this Article.[114] Cases like this may consequently present interesting legisprudential dilemmas for judges who, like Justice Scalia, forcefully defend the proposition that *Erie* requires federal courts to apply state law as they find it but may fundamentally disagree with what they find (such as routine recourse to evidence of purpose and legislative history).

b. Using Both Federal and State Methodology

Another typical scenario is one in which the federal court cites both federal and state cases for each of its methodological choices. From a doctrinal perspective, this practice of citing state and federal cases together is confusing. When, for example, the Ninth Circuit refuses to interpret a California statute to render part of it superfluous and cites directly to both a federal and a California case in support,[115] what is it telling us about the legal status of the rules of interpretation? Federal courts that follow this practice appear either to view the rules as universal or to feel the need to buttress their state methodological choices with federal authority—or perhaps are just uncertain about which court's rules apply.

A different kind of concern arises when federal courts, even as they do cite the state cases, cite cases that are outdated from a methodological perspective. A number of state courts, for example, are more textualist now than they were twenty years ago, and so older cases do not always accurately represent the

114. *Cf.* Kermit Roosevelt III, *Choice of Law in Federal Courts: From* Erie *and* Klaxon *to CAFA and* Shady Grove 67 (U. Pa. L. Sch., Pub. L. Res. Paper No. 10-28), *available at* http://papers.ssrn.com/abstract=1665092 (arguing that determining the meaning of the New York statute in *Shady Grove* effectively predetermined the outcome by deciding into which prong of *Erie* the case falls and stating that "*Shady Grove* is important because the way the Court interprets ambiguous state statutes will affect outcomes").

115. Golden W. Ref. Co. v. Suntrust Bank, 538 F.3d 1233, 1239 (9th Cir. 2008); *see also* Diaz-Ramos v. Hyundai Motor Co., 501 F.3d 12, 16-17 (1st Cir. 2007) (concerning the repeals by implication doctrine, citing one Puerto Rico case and three U.S. Supreme Court cases).

state's current methodology.[116] These citation choices are likely due to errors by law clerks or lawyers or to the tendency of courts to rely on the same (sometimes outdated) set of boilerplate precedents from case to case, and we should assume that they are unintentional. But there is always the remote possibility that something more is going on. Is it possible, for instance, that the federal courts are attempting to push back against state-court tendencies toward textualism by preferring older, less textual state precedents? (Admittedly, this is unlikely.) A more plausible alternative is that the federal courts are not training close attention on state interpretive methods because they do not view them as doctrine.

3. *Problem 3: Conflicts Between State Courts and State-Legislated Interpretive Rules*

The next problem arises when federal courts are confronted with a rule of interpretation that has been enacted as a statute by a state legislature but that the state's supreme court refuses to apply. So assume, for example, that a state legislature enacts a statute directing that legislative history always be consulted but the state supreme court ignores the legislated rule and does not consult legislative history if the statutory text is unambiguous. Assume now that the regional federal circuit court is asked, in a diversity case, to interpret a statute that the state supreme court has never before interpreted. Which side of the

116. For example, in *KLC, Inc. v. Trayner*, 426 F.3d 172, 175-76 (2d Cir. 2005), which construed a Connecticut judgment-lien statute, the Second Circuit began with a discussion of English common law and mainstream law review articles about homestead exemptions generally, then opined: "In determining the meaning of state law, we must carefully predict how the state's highest court would rule if confronted with the issue . . . ." The court then cited a mix of federal statutory and pre-2002 Connecticut cases in support of the purposive and eclectic methodology that it chose to apply, seemingly unaware that in 2003, the Connecticut Legislature overruled by statute the Connecticut Supreme Court's choice of a purposive approach. *See* CONN. GEN. STAT. § 1-2z (2009); *cf.* Gluck, *supra* note 3, at 1791-98 (describing the Connecticut Supreme Court's ostensible obedience to the legislated rule but also its efforts to evade the rule). Similar errors also appear in cases in which federal courts cite only state methodology. For example, in *Tammi v. Porsche Cars North America, Inc.*, 536 F.3d 702, 709-10 (7th Cir. 2008), the Seventh Circuit relied on an older line of Wisconsin cases emphasizing the importance of legislative intent, purpose, history, and substantive canons. In 2003, however, the Wisconsin Supreme Court had announced, with intended precedential effect, a new textualist approach—one that both the state supreme court and the state's lower courts have almost uniformly followed. *See* State *ex rel.* Kalal v. Circuit Court, 681 N.W.2d 110, 123-26 (Wis. 2004); Gluck, *supra* note 3, at 1799-1803. For another example, see *Combs v. International Insurance Co.*, 354 F.3d 568 (6th Cir. 2004), discussed *supra* notes 94-97 and accompanying text.

battle—legislative history or not—does the federal court choose? This is a live issue; such power struggles are currently underway in a number of states.

In the Fifth and Ninth Circuits, the federal courts follow the state supreme courts' practices rather than the interpretive instructions enacted by the state legislatures. Because the Texas Court of Criminal Appeals (Texas's highest criminal court) and the Oregon Supreme Court each has refused to apply its state's legislated rules regarding legislative history use, so have the Fifth and Ninth Circuits.[117] The Second and Eighth Circuits appear to be making the same kinds of choices with respect to other legislated rules of interpretation.[118]

To be sure, a federal court that views its *Erie* role as standing in the shoes of the state's highest court might justify this choice on the ground that disregarding a legislated interpretive rule is "what the state court would do." So, too, one can argue that state law is whatever the state's highest court says it is (indeed, the importance of state decisional law is one key holding of *Erie*, and to hold otherwise would encourage forum shopping). But perhaps it is not so simple. In Oregon, for example, the state supreme court never actually

117. *See, e.g.*, Int'l Truck & Engine Corp. v. Bray, 372 F.3d 717, 724 (5th Cir. 2004) (citing the Texas legislated rule for other propositions but not following it on use of extrinsic evidence and instead following holdings of Texas's highest courts); *In re* CPDC, Inc., 337 F.3d 436, 442, 445 (5th Cir. 2003) (same). There are a few instances in which the Fifth Circuit appears to apply (or at least cite) Texas's legislated rule, but they are atypical. *See, e.g.*, Jones v. City of Palestine, 266 F. App'x 320, 322-23 (5th Cir. 2008). From 1993 to 2009, the Oregon Supreme Court had an established statutory interpretation hierarchy that prohibited the state courts from consulting legislative history absent a threshold finding of ambiguity. Portland Gen. Elec. Co. v. Bureau of Labor & Indus., 859 P.2d 1143, 1146-47 (Or. 1993). Both the state courts and the Ninth Circuit faithfully followed this hierarchy—even while noting its conflict with the legislated rule—until the Oregon Supreme Court loosened the restrictions on legislative history use in a 2009 decision. State v. Gaines, 206 P.3d 1042, 1047-51 (Or. 2009). *See* Or. Advocacy Ctr. v. Mink, 322 F.3d 1001, 1114 n.7 (9th Cir. 2003) (assuming that the state-legislated rule did not alter the Oregon Supreme Court's statutory interpretation framework); *see also* Nike, Inc. v. McCarthy, 379 F.3d 576, 581 n.4 (9th Cir. 2004) (citing legislative history but assuming that it was in compliance with the Oregon Supreme Court's methodology because the statutory text was unclear). This saga is detailed in Gluck, *supra* note 3, at 1782-85.

118. For example, in Connecticut the state supreme court consistently evades a legislated rule that was enacted to override the court's purposive or eclectic approach. The Second Circuit has declared that it looks to the Connecticut Supreme Court for Connecticut rules of interpretation, Beason v. United Techs. Corp., 337 F.3d 271, 275-76 (2d Cir. 2003), and has never cited the legislated rule in a single diversity case and has cited it in only one federal-question case, Morenz v. Wilson-Coker, 415 F.3d 230, 236-37 (2d Cir. 2005). The Eighth Circuit has followed the lead of the Iowa Supreme Court in resisting application of a statute directing courts not to apply the presumption that statutes in derogation of the common law are to be strictly construed. *See* HOK Sport, Inc. v. FC Des Moines, L.C., 495 F.3d 927, 937 n.7 (8th Cir. 2007) (citing IOWA CODE § 4.2 (West 2007)).

struck down or held inapplicable the legislated interpretive rule; it just silently ignored it. So the legislated interpretive rule remained on the statute books and thus remained a valid, enacted direction concerning interpretive methodology. One therefore might argue that following that statute is precisely what the federal court should do—that federal courts have an independent duty to enforce state law and that the diversity jurisdiction offers a safety net for litigants when the state courts are not doing so.[119] At a minimum, these cases evince the particular quandary that federal courts face when the legal status of methodology is unresolved in the state whose law is being applied. Moreover, it seems an open question the extent to which *Erie* permits, or perhaps requires, a federal court to disregard state decisional law on the basis that it conflicts with state statutory law.[120]

4. *Problem 4: Dynamic Statutory Interpretation*

Juxtaposed against the cases discussed in the previous section are the diversity cases raising "dynamic statutory interpretation" questions.[121] Whereas in the cases involving power struggles between state courts and legislatures the federal courts seem willing to stand in state-court shoes, in the dynamic cases—where federal courts are asked to interpret state statutes to reach modern or unforeseen problems—the federal courts often take the opposite approach.

The Seventh Circuit, for example, has made numerous statements warning that "litigants . . . who seek to base their claims on an innovation in state law would be well-advised to file their claims in state court,"[122] and that "district courts are encouraged to dismiss actions based on novel state law."[123] That court also has stated that it would adhere to "this restrictive approach to a plaintiff's novel theory of liability under state law even where the plaintiff had

119. Some state courts have alluded to the idea that legislated interpretive rules raise separation-of-powers concerns under state constitutions, but thus far only the Delaware Supreme Court has struck down such a rule. Evans v. State, 872 A.2d 539, 549-50 (Del. 2005).

120. *Cf.* Jonathan F. Mitchell, *Reconsidering* Murdock*: State-Law Reversals as Constitutional Avoidance*, 77 U. CHI. L. REV. 1335, 1361 (2010) ("[T]here is a great distance between [*Erie*'s recognition of the importance of state decisional law] and the extreme legal-realist view that state law simply 'is' whatever the state supreme court declares, even when it deviates from constitutional or statutory text or misapplies its established common-law precedents.").

121. ESKRIDGE, *supra* note 88.

122. Hollander v. Brown, 457 F.3d 688, 692 (7th Cir. 2006).

123. Pisciotta v. Old Nat'l Bancorp, 499 F.3d 629, 636 (7th Cir. 2007) (quoting Insolia v. Philip Morris Inc., 216 F.3d 596, 607 (7th Cir. 2000)).

no choice but to litigate his claim in federal court,"[124] and even where defendants had clearly shopped for the federal forum precisely because they knew that the federal court would employ a less dynamic approach.[125] Similarly, the Third Circuit in a recent case narrowly construed the New Jersey Product Liability Act, noting that it exercised restraint in accordance with the well-established principle that where "'two competing yet sensible interpretations'" of state law exist, "'we should opt for the interpretation that restricts liability, rather than expands it, until the Supreme Court of [New Jersey] decides differently.'"[126] And the Sixth Circuit, in a case in which the plaintiff had urged an expansive and modern interpretation of a state borrowing statute, held that there was "no basis for even considering the pros and cons of innovative theories. . . . Federal courts hearing diversity matters should be extremely cautious about adopting 'substantive innovation' in state law."[127]

The implications of these seemingly innocuous decisions are potentially quite significant. At the most basic level, they are at least sometimes at odds with—because they are far more cautious than—the "prediction" approach that federal courts claim that they generally employ in diversity cases. Perhaps this is unproblematic. To some extent, we already accept this kind of practice—the idea that federal courts have discretion to carve out certain state-law cases that deserve a different approach—because we allow (and even encourage) federal courts to certify or to abstain from deciding some state-law questions.[128] But there is something discomfiting about a federal court choosing the narrowest possible reading of a state statute simply because it is a federal court and not for any substantive-law reason. This is perhaps even more problematic when

124. *Id.* at 636 n.5.

125. *Insolia*, 216 F.3d at 607 (noting that the plaintiffs were "in a predicament because state law in this area is stunted by the ability of tobacco companies to remove cases under diversity jurisdiction").

126. Travelers Indem. Co. v. Dammann & Co., 594 F.3d 238, 253 (3d Cir. 2010) (quoting Werwinski v. Ford Motor Co., 286 F.3d 661, 680 (3d Cir. 2002)).

127. Combs v. Int'l Ins. Co., 354 F.3d 568, 577-78 (6th Cir. 2004); *see also* Kurczi v. Eli Lilly & Co., 113 F.3d 1426, 1429 (6th Cir. 1997) (articulating the same rule against federal court innovation for common law claims); Dayton v. Peck, Stow & Wilcox Co. (Pexto), 739 F.2d 690, 694 (1st Cir. 1984) (same); Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1682-83 (1992) (making the same arguments).

128. *Cf.* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985).

the federal court acknowledges that the litigants have no recourse to state court, as the Seventh Circuit did in the case above.[129]

This is not to understate the difficulty for any court of predicting how a superior court or another jurisdiction's court will act when new circumstances press against old laws. But the assumed feasibility of such predictions is precisely what underlies both *Erie* and the constitutional and statutory grants of concurrent jurisdiction: the idea that federal and state courts are capable of ascertaining and applying one another's laws.[130] And, if anything, using the same decisionmaking rules as the other court—such as its rules of interpretation—should help in that prediction process. Indeed, this is precisely what federal courts already do in the choice-of-law context, where *Klaxon* dictates that *Erie* applies. In the choice-of-law context, federal courts use state-court decisionmaking processes to determine what a state court would do in the absence of any apposite state-court decisional authority.

Recall the U.S. Supreme Court's memorable statement that "[t]he very essence of the *Erie* doctrine is that the bases of state law are presumed to be communicable by the parties to a federal judge no less than to a state judge."[131] Consider, too, the Court's emphasis in *Meredith v. Winter Haven* that the unresolved nature of state law does not justify the federal courts' abdication of their jurisdictional duty in diversity cases.[132] And consider how at odds those statements seem with the Seventh Circuit's argument that erroneous interpretations of state statutes by federal courts in dynamic cases "inevitably skew the decisions of [those] who rely on them and inequitably affect the losing federal litigant who cannot appeal the decision to the state supreme

129. This will occur when the defendant is foreign to the state and can therefore always invoke diversity jurisdiction.

130. *See* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 73 (1984) (criticizing those who argue for abstention "as if we were attempting to establish, on a totally clean slate, the wisest system of judicial federalism, in total disregard of the detailed and carefully balanced existing statutory network").

131. Salve Regina College v. Russell, 499 U.S. 225, 238 (1991); *see also* Philip B. Kurland, *Mr. Justice Frankfurter, the Supreme Court and the* Erie *Doctrine in Diversity Cases*, 67 YALE L.J. 187, 217 (1957) ("[T]he very essence of the *Erie* doctrine is that a federal judge can find, if not make, the law almost as well as a state judge.").

132. 320 U.S. 228, 234 (1943) ("[T]he difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision."). This doctrine has been weakened over time by more frequent use of certification.

court."[133] Those concerns, if true, affect much more than dynamic cases, and there may be no limiting principle. Federal courts may be no more likely to interpret correctly an unresolved but nondynamic question of state insurance law. Under the logic of the cases discussed in this Subsection, federal courts should not be addressing any but the most straightforward of state-law questions. (Some commentators advocate precisely this result.[134]) But even accepting that there might be a limited number of cases in which certification or abstention might be appropriate, those mechanisms cannot be the answer in all cases involving interpretations of state law without effectively gutting the jurisdictional grants.[135]

Most importantly, it should be emphasized that certifying or abstaining is not what the federal courts always do in these cases. Instead, the courts often decide the case themselves but pick the narrowest possible answer, usually the one that does the least to change the status quo, regardless of its predictions of what the state court would do. Thus, even if one believes that certification or abstention in this context is ideal, once the federal courts accept the responsibility of jurisdiction over these cases and choose to render a decision, there is something unfair and improper about their reluctance to use the full range of their decisionmaking authority to decide the cases. As others have pointed out, such an interpretive strategy—taking the case but adopting an especially "static" interpretive approach—has serious problems: it explicitly encourages forum shopping and can lead to the stagnation of state-law development because the federal court's narrow decision is not reviewable by the state's high court.[136]

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133. Lexington Ins. Co. v. Rugg & Knopp, Inc., 165 F.3d 1087, 1092-93 (7th Cir. 1999) (quoting Sloviter, *supra* note 127, at 1681).

134. *See, e.g.*, Clark, *supra* note 77, at 1549-56 (suggesting presumption of certification).

135. *See Meredith*, 320 U.S. at 234-45 ("The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. . . . When . . . exceptional circumstances are not present, denial of that opportunity [to assert one's rights in federal court] by the federal courts merely because the answers to the questions of state law are difficult or uncertain . . . would thwart the purpose of the jurisdictional act."); *see also* Redish, *supra* note 130, at 78 (arguing that even partial abstention violates separation of powers because "[t]he fact that Congress theoretically *could* delegate to the courts the power to modify otherwise unlimited legislation . . . does not mean that Congress has actually done so").

136. *See* Clark, *supra* note 77, at 1541-42. Although Clark directs his argument mostly at the common-law context, the same considerations would seem to apply in the statutory context. *See also* Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267, 292-93 (1946) (arguing that this approach "lead[s] . . . to a falsification of the state law by erecting a single instance into a general principle to the point where, in all likelihood, the state court eventually would refuse to go").

C. Federal-Question Cases Requiring State Statutory Interpretation

State statutes also arrive in federal court as parts of cases in which the head of jurisdiction is federal—cases "arising under the Constitution, laws, or treaties of the United States"[137] rather than in diversity. But the overall federal tint of such cases seems to have obscured the fact that, at bottom, many of the questions of state statutory interpretation in these cases are analytically the same kinds of questions as the state statutory questions presented in diversity cases.

Most modern commentators agree that the *Erie* doctrine is not confined to diversity cases.[138] In many federal-question cases, one part of the case turns on an embedded and often preliminary question of state law. Just as in the diversity context, then, the federal court in such a federal-question case interprets a state statute in a decision that is unreviewable by the state supreme court. But also as in the diversity context, if the state-statutory question is separate from the federal question, then the ultimate expositor of that question is the state supreme court. For example, if a federal bankruptcy statute says that a debtor's total responsibility includes liens provided that the liens were perfected under state law, then before the federal court can decide the total liability, it must first look to state law and apply the state lien statute to the liens at issue. That initial inquiry—what the state lien statute says—is analytically separate from the ultimate federal-law question (the bankruptcy debtor's total responsibility). As a result, a later ruling by the state supreme court on the same question of state law would control, even if the prior federal case had been decided by the U.S. Supreme Court. Indeed, the fact that this last point is undisputed—that even in federal-question cases, there are state-law elements on which the state supreme court always has the last word—should crystallize the bottom line, which is that the state-law question here can look the same as it does in diversity even though the jurisdictional hook is different. Thus, as this Section argues, federal courts in such federal-question cases should proceed exactly as they do in diversity cases with respect to matters of statutory interpretation.

Keep in mind that the state statutory questions presented in these federal-question cases might be, but need not be, "independent and adequate" in the *Michigan v. Long* sense to implicate this Article's *Erie* arguments.[139] There are

137. 28 U.S.C. § 1331 (2006).

138. *See supra* note 87.

139. Of course, *Michigan v. Long* is not implicated here because we are discussing federal court, not state court, decisions concerning state law. *See* Michigan v. Long, 463 U.S. 1032, 1040

indeed some cases in which they are both—cases in which resolution of the state statutory question makes resolution of the federal question unnecessary. But the state-law question also can be antecedent and analytically separate from the federal-law question even if not "independent and adequate." For instance, in the bankruptcy example given above, the state statutory question (how liens are perfected under state law) is necessary to the federal case but its resolution cannot decide the case alone. At the same time, resolving that state statutory question involves no federal-law considerations whatsoever. Of course, there are other kinds of cases in which state law must be consulted as part of resolving a federal-question case but that do not actually involve separate questions of state statutory interpretation.[140] Those cases do not implicate this Article's concerns.

Although this Section focuses on the judicial handling of these cases, it should be noted that lawyers' briefing of them often is similarly imprecise. Many briefs in lawsuits of this nature do cite state statutory interpretation cases, a tendency that at least implies that the lawyers working on them recognize the state-law issue in the case. But the briefs almost always also provide federal citations to support their interpretive theory, likely due to the (accurate) perception that the federal courts pay more attention to federal interpretive principles than to state principles.

(1983) (holding that the U.S. Supreme Court should "refus[e] to decide cases where there is an adequate and independent state ground"); Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1947-57 (2003) (summarizing the doctrine of independent and adequate state grounds).

140. For example, some federal statutes require reference to state law but do not require federal courts themselves to construe or determine state law. *See* Monaghan, *supra* note 139, at 1934 (calling these "characterization" cases). The federal Armed Career Criminal Act, for instance, provides an enhanced penalty for persons three times previously convicted of a "violent felony." 18 U.S.C. § 924(e) (2006). Federal courts often must determine whether a state criminal conviction constitutes a "violent felony" for purposes of that federal statute. In those cases, federal courts may look to the state's criminal statute to understand the kind of conduct at issue (e.g., Was it violent?), but their task in such cases is not to construe the term "violent felony" as a state court would (after all, the term "violent felony" appears in the federal statute). Their task, rather, is to characterize the state-level conduct—that is, to determine whether the state crime for which the defendant was convicted is a "violent felony" in the sense that the federal statute intends. *See* Johnson v. United States, 130 S. Ct. 1265, 1269 (2010) ("The meaning of 'physical force' in [the violent felony provisions of the Armed Career Criminal Act] is a question of federal law, not state law."); United States v. Craft, 535 U.S. 274, 279 (2002) (holding that how the state labels the action in question is "irrelevant"). See Monaghan, *supra* note 139, at 1945, for additional discussion and examples.

1. *In the U.S. Supreme Court*

Consider first *Stenberg v. Carhart*,[141] in which the U.S. Supreme Court heard a federal constitutional challenge to Nebraska's late-term abortion statute. The basis of jurisdiction in that case was a federal question because of the constitutional challenge, but the Court had to determine *what the state statute meant* before it could decide whether the statute was constitutional. Specifically, the Court began its analysis by asking a state-law question: whether the Nebraska statute prohibited the two main types of late-term-abortion procedures or only one type. (Under the Court's precedent, the statute could survive the ultimate federal constitutional law challenge only if at least one method of performing the procedure remained available.[142]) The first question, therefore, as framed by the Court itself, was not whether the state statute was constitutional (that was the second question), but how to read the state statute.

Nevertheless, the Court treated the methodological issues attendant to that first question of state statutory interpretation as almost entirely federal.[143] To be sure, the politics of abortion are such that ideology rather than doctrine likely drives results in many of these cases, and so methodological choice might ultimately matter little. But while that reality might explain how the individual Justices chose to read the Nebraska statute (that is, whether it banned one or two methods of late-term abortion), it does not—at least as a matter of the appearance of doctrinal precision and solid opinion-writing—explain why the Court did not rely on state interpretive principles to justify its decision about what conduct the Nebraska statute prohibited.

For example, Justice Breyer's opinion for the majority looked to Nebraska law to determine whether the views of the state attorney general (who had offered a narrowing construction) bound Nebraska courts.[144] But apart from that, Justice Breyer did not cite a single Nebraska case in support of his chosen

141. 530 U.S. 914 (2000).

142. *Id.* at 938 ("Nebraska does not deny that the statute imposes an 'undue burden' *if* it applies to the more commonly used D & E [dilation and evacuation] procedure as well as to D & X [dilation and extraction].").

143. The other opinions in the case focused on *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), rather than on statutory interpretation. *See* 530 U.S. at 946 (Stevens, J. concurring); *id.* at 951 (Ginsburg, J., concurring); *id.* at 952 (Rehnquist, C.J., dissenting); *id.* at 953 (Scalia, J., dissenting).

144. *Carhart*, 530 U.S. at 941 (majority opinion). The majority also attached little importance to the Nebraska courts' practice of giving the state attorney general's construction "substantial weight" and essentially disregarded it because it was not "binding." *Id.*

rules of construction or indicate that he had considered Nebraska practice. Instead, for additional reasons to reject the state attorney general's construction, Justice Breyer relied on only federal cases for the following two propositions: (1) that "[w]hen a statute includes an explicit definition, we must follow that [term's] definition"[145]; and (2) that "[i]dentical words used in different parts of the same act are intended to have the same meaning."[146] Justice Breyer also refused to apply the canon of constitutional avoidance (which would have pointed in favor of a narrowing construction) but cited only federal cases to justify not doing so.[147] He did not inquire into whether the Nebraska Supreme Court routinely employs that canon (as in fact it does).[148]

Justice Kennedy's dissent, too, first cited only federal cases for the principles of "commonsense understanding"[149] and extra legislative "leeway when attempting to regulate the medical profession,"[150] as well as for the argument that the court was "required" to apply the canon of constitutional avoidance to the statute.[151] Justice Kennedy then cited a Nebraska precedent for the proposition that the Nebraska courts would narrow the statute if given the opportunity.[152] Justice Thomas's dissent referenced "ordinary rules of statutory interpretation" and cited numerous dictionaries,[153] a voluminous medical literature, federal district court cases from jurisdictions other than Nebraska, other states' laws, and a federal case for the main rule of construction that it used to counter the majority's argument: namely, the proposition that "the common understanding of 'partial birth abortion,' . . . no less than the specific definition, is part of the statute."[154] Justice Thomas then cited eight federal cases for the application of three canons: constitutional avoidance, the whole

145. *Id.* at 942 (citing Meese v. Keene, 481 U.S. 465, 484-85 (1987); Colautti v. Franklin, 439 U.S. 379, 392-93 n.10 (1979); W. Union Tel. Co. v. Lenroot, 323 U.S. 490, 502 (1945); Fox v. Standard Oil Co. of N.J., 294 U.S. 87, 95-96 (1935); 2A N. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 47.07 & n.10 (5th ed. 1992)).

146. *Id.* at 944 (quoting Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995)) (internal quotation marks omitted). He also used dictionaries to ascertain statutory meaning without citing any cases (state or federal) in support. *Id.*

147. *See id.* at 944-59.

148. *See, e.g.*, State v. Hookstra, 638 N.W.2d 829, 836 (Neb. 2002).

149. *Carhart*, 530 U.S. at 974 (Kennedy, J., dissenting) (citing McBoyle v. United States, 283 U.S. 25, 27 (1931)); *id.* at 976 (citing Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973)).

150. *Id.* at 976 (citing Kansas v. Hendricks, 521 U.S. 346, 359 (1997)).

151. *Id.* at 977.

152. *Id.* at 979.

153. *Id.* at 992, 999-1000 (Thomas, J., dissenting).

154. *Id.* at 992-93 (citing United States v. Morton, 467 U.S. 822, 828 (1984)).

act rule, and *noscitur a sociis*.[155] But he also cited three Nebraska cases for different propositions, namely that the state courts would apply the avoidance canon or the rule of lenity and that they would give "substantial weight" to opinions of the state attorney general.[156]

As another example, consider *Town of Castle Rock v. Gonzales*.[157] There, the question was whether a state-law restraining order gives rise to a "constitutionally protected property interest" in having the police enforce the order.[158] As framed by the Court, the definitive federal constitutional question was whether the restraining order conferred on its holder a "protected entitlement."[159] To decide that federal question, the Court had to understand the nature of the benefit conferred by the restraining order, and so it looked to the Colorado restraining order statute. Specifically, the Court said that it needed to know whether the police had discretion to enforce the order. Again, although framing the federal constitutional question in that way—did the Colorado police have discretion?—was certainly part of the federal-constitutional inquiry, answering it was not. It was a pure question of state statutory construction: does the state statute give discretion to police offers not to enforce restraining orders? Once the Court determined what the Colorado restraining order statute said, it would then take that understanding and decide, under federal principles, whether that bundle of rights was in fact a protected entitlement. As the Court itself acknowledged, "[r]esolution of the federal issue begins . . . with a determination of what it is that state law provides."[160]

But despite this acknowledgement, and despite the fact that the majority chided the lower federal court for not relying on Colorado law,[161] in undertaking its own analysis the majority did not cite any Colorado interpretive principles either. This omission is particularly striking because the author of the majority opinion, Justice Scalia—despite being the Court's primary textualist—wrote an opinion arguing that the literal text of the Colorado statute should not be followed. In support, Justice Scalia cited an *ABA Standards for Criminal Justice* treatise arguing that most states' "apparently

155. *Id.* at 997-99.

156. *Id.* at 997, 1004-05.

157. 545 U.S. 748 (2005).

158. *Id.* at 750-51.

159. *Id.* at 756-57.

160. *Id.*

161. *Id.*

mandatory arrest statutes . . . 'cannot be interpreted literally,'"[162] as well as a previous U.S. Supreme Court opinion in a case involving the Chicago police, which held that the police had discretion not to enforce a restraining order despite mandatory statutory language.[163]

Justice Stevens's dissent chastised the majority for not deferring to the Tenth Circuit's opinion,[164] but Justice Stevens would have certified the case to the Colorado Supreme Court instead of deciding it. Justice Stevens argued that the Colorado Supreme Court might have "better access to (and greater facility with) relevant pieces of legislative history beyond those that we have before us" and that the Colorado "court may also choose to give certain evidence of legislative intent greater weight than would be customary for this Court."[165] It is not clear why Justice Stevens assumed that a case that had been fully briefed both in the en banc Tenth Circuit and in the U.S. Supreme Court would not have included all relevant legislative history or explicated fully how the Colorado courts employ it.

2. *In the Circuit Courts*

We see the same pattern in the circuits, and so one example from the Sixth Circuit will suffice, with additional examples from other circuits set forth in the notes.[166] Consider *Dean v. Byerley*,[167] in which the Sixth Circuit had to construe

162. *Id.* at 760-61 (quoting 1 AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE § 1-4.5, cmt. 1-124 to 1-125 (2d ed. 1980)).

163. *See id.* at 761 (citing Chicago v. Morales, 527 U.S. 41 (1999)). Justice Scalia also indicated that, regardless, it was doubtful that an individual entitlement to enforcement of a restraining order could constitute a property interest within the ambit of the Fourteenth Amendment. *See id.* at 766-67.

164. *Id.* at 774 (Stevens, J., dissenting).

165. *Id.* at 777 n.4. Justice Stevens also relied extensively, in conducting his own analysis, on the interpretations of analogous statutes in other states. *Id.* at 784-88.

166. For example, *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141 (9th Cir. 2001), involved a federal constitutional challenge to a California statute prohibiting instruction in languages other than English in public schools. Before undertaking its First Amendment analysis, the Ninth Circuit had to determine an issue of state statutory construction—namely, "how much non-English will subject [teachers] to personal liability" under the statute. *Id.* at 1146. Curiously, the Ninth Circuit—which in diversity cases often looks to both state and federal interpretive methodology when construing state statutes, *see supra* note 115—looked only to federal interpretive principles in this case. Indeed, the court was rather explicit about that choice, stating: "A federal court's duty, when faced with a constitutional challenge such as this one, is to employ traditional tools of statutory construction to determine the statute's allowable meaning." *Cal. Teachers*, 271 F.3d at 1147 (internal quotation marks omitted). (The Tenth Circuit has made the same statement. *See* United States v. DeGasso, 369 F.3d 1139,

a Michigan picketing statute before determining whether a defendant had

1145-46 (10th Cir. 2004) (stating that the court was "bound to follow rules of statutory construction of criminal statutes embraced by the Oklahoma judiciary," but examining other state practices and then refusing to apply the rule of lenity because both the Tenth Circuit and the U.S. Supreme Court had "made clear that the rule of lenity applies only in cases of grievous ambiguity or uncertainty" (internal quotation marks omitted)).) Further, although the Ninth Circuit's majority and dissenting opinions in *California Teachers Ass'n* argued over whether the canon of constitutional avoidance could be applied to the statute, both sides looked only to federal precedent concerning the applicability of that canon, and neither side considered whether the California Supreme Court would apply it. *See* 271 F.3d at 1147 (citing Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 397 (1988); Nunez v. City of San Diego, 114 F.3d 935, 942 (9th Cir. 1997) (interpreting a California statute but also citing federal case law for precedent of applying narrowing construction)); *id.* at 1156-57 (Tashima, J., dissenting) (citing a Ninth Circuit case that cited *Grayned v. City of Rockford*, 408 U.S. 104 (1972)).

As another example, in the Seventh Circuit, two recent federal bankruptcy cases turned on the language of Wisconsin's wage lien statutes. In one, the court relied on only federal cases invoking various textual canons. *In re* Globe Bldg. Materials, Inc., 463 F.3d 631, 635 (7th Cir. 2006). Unnoted by the Seventh Circuit, however, was the fact that a majority of Wisconsin Supreme Court justices believes that courts must not apply any canons—even textual canons—without a threshold finding of textual ambiguity. *See* State *ex rel.* Kalal v. Circuit Court, 681 N.W.2d 110, 128 (Wis. 2004) (Abrahamson, C.J., concurring) (describing and critiquing the Wisconsin Supreme Court's restriction of textual canons). In the other case, the Seventh Circuit actually refused appellant's request to apply various canons of construction on the ground that "a court resorts to canons of statutory construction only when statutes are in conflict and the court cannot find an answer in the plain meaning of statutory language," but it cited only its own case law for this proposition. *In re* Baker, 430 F.3d 858, 860 (7th Cir. 2005). These cases stand in stark contrast to a different Seventh Circuit federal-question case, this one involving construction of the Wisconsin abortion statute, in which the Seventh Circuit said that it would "apply . . . Wisconsin principles of statutory construction," Karlin v. Foust, 188 F.3d 446, 457 (7th Cir. 1999), and cited only Wisconsin cases for its methodology, *see id.* at 470-71.

As a final example, consider *Sealed v. Sealed*, 332 F.3d 51 (2d Cir. 2003), a federal-question case in which the Second Circuit had to decide, as a preliminary (and, as the Second Circuit itself noted, separate) question of state law, whether a Connecticut child-welfare statute required the removal of a child from an unsafe environment. Just before the case was decided, the Connecticut Supreme Court handed down a watershed statutory interpretation decision, banning the "plain meaning rule" in Connecticut and announcing a new controlling purposivist and eclectic approach. State v. Courchesne, 816 A.2d 562 (Conn. 2003). The Second Circuit expressly recognized the new Connecticut approach but certified the case anyway (on its own motion) based on the apparent assumption that the state court would apply a different methodology—the state methodology—to the same case than would the federal court. The Second Circuit stated: "The Connecticut Supreme Court has recently indicated that it adopts a broad approach to statutory interpretation that looks beyond the statutory text . . . . Thus, the Connecticut Supreme Court may well exercise more flexibility and broader interpretive power than the federal courts in analyzing the meaning of [the state statute]." *Sealed*, 332 F.3d at 59 (internal quotation marks omitted).

167. 354 F.3d 540 (6th Cir. 2004).

violated the plaintiffs' federal constitutional rights for purposes of a § 1983 action. The case turned on "the scope of the ban on private picketing" set forth in the Michigan statute.[168] The Sixth Circuit cited only U.S. Supreme Court cases in support of the nontextual methodological approach that it chose to apply to the state statute: namely, that it would "not be guided by a single sentence or member of a sentence, but [would] look to the provisions of the whole law, and to its object and policy."[169] Unnoted by the Sixth Circuit, however, was the fact that the Michigan Supreme Court during that period had expressly rejected an approach to statutory interpretation that emphasized nontextual factors (such as purpose and policy).[170] The opinion prompted a strong dissent from Judge Sutton (a former Ohio state solicitor general), who argued for textual interpretive principles based on a mix of citations to U.S. and Michigan Supreme Court cases, but Judge Sutton also invoked the rule against absurdities in support of his reading.[171] In fact, the Michigan Supreme Court during that period had actually banned the rule against absurdities from state jurisprudence.[172]

* * *

A simple hypothetical illustrates the unworkable practical implications of the position that federal courts can disregard state interpretive principles in

168. *Id.* at 547.

169. *Id.* (quoting Richards v. United States, 369 U.S. 1, 11 (1962)) (citing Owasso Indep. Sch. Dist. v. Falvo, 534 U.S. 426, 434 (2002); Holloway v. United States, 526 U.S. 1, 7 (1999); Textron Lycoming Reciprocating Engine Div. v. UAW, 523 U.S. 653, 657 (1998)).

170. The Sixth Circuit also cited, in a footnote, a Michigan case in which the state court consulted a preamble, but that case was decided before the Michigan Supreme Court adopted its textual methodology. *See id. (*citing *Malcolm v. City of East Detroit*, 468 N.W.2d 479, 484 (Mich. 1991), and noting that *Malcolm* was cited with approval in *King v. Ford Motor Credit Co.*, 668 N.W.2d 357, 362-63 (Mich. Ct. App. 2003)). *Malcolm* was decided before the Michigan Supreme Court adopted its textualist interpretive methodology in the late 1990s. *King*, an intermediate court case, recited the correct current rule—"If the statutory language is unambiguous, appellate courts presume that the Legislature intended the meaning plainly expressed and further judicial construction is neither permitted nor required"—and cited *Malcolm* for the proposition that the preamble could be consulted only after a threshold finding of ambiguity. *King*, 668 N.W.2d at 362-63 (citing *Malcolm*, 468 N.W.2d at 479).

171. *Id.* at 565-67 (Sutton, J., dissenting). Judge Sutton cited a federal case and a Michigan intermediate case in support of his application of the rule, but in the Michigan case, the court declined to apply the canon and instead emphasized the need to follow plain text.

172. For a deeper discussion of Michigan statutory interpretation, see Gluck, *supra* note 3, at 1803-11.

federal-question cases even if at least some of those courts would apply them in diversity. Assume that two different panels of the Ninth Circuit are construing an identical Oregon statute in two different cases on the same day—one in a diversity case, one in a federal-question/state-law case. Under the rationale employed by the cases discussed in this Section, the same Oregon statute could be construed to mean two different things, even within the same federal circuit, solely on account of the procedural posture in which it was presented. Consider now what happens if the opinion in the federal-question case is released first. Would the later-released opinion—the one in the diversity case—have to harmonize itself to the first as a matter of intracircuit precedent even though the first did not look to state interpretive principles? Of course not. The impracticable consequences of this approach should help to illustrate why the same interpretive principles should apply to both kinds of cases.

3. *Special Treatment for Constitutional Avoidance*

In some of the cases discussed in the previous Subsection, the federal courts considered whether to apply the canon of constitutional avoidance, but they did so as a matter of federal law—the courts did not consider whether the state courts would apply the canon. Perhaps those cases can be explained by a lack of attention to the *Erie*-meets-methodological-choice issue. But there are other cases involving federal constitutional challenges to state statutes in which some federal courts appear to be making a conscious decision to adopt a different course entirely, looking neither to state law with respect to constitutional avoidance nor to their own familiar federal avoidance principles. In these cases, the federal courts seem to be concluding that, regardless of how the federal or state courts normally would handle avoidance on their own, in the special situation of federal-court constitutional review of state statutes, federal courts generally should not construe state statutes to avoid constitutional questions.

The avoidance canon, as John Manning has written, "instructs courts to interpret statutes to avoid serious constitutional questions if such an interpretation is 'fairly possible.' . . . This means that courts should never invalidate a statute if a plausible alternative interpretation would sustain the law."[173] Much ink has been spilled by academics both justifying and criticizing

173. John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 252-53; *cf.* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997) (distinguishing between "classical avoidance," in which "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [the Court's] plain duty is to adopt that which will save the Act," and "modern avoidance," in which "where an otherwise acceptable construction of a statute would raise

this canon,[174] and this Article will not enter that debate. The canon is indisputably entrenched in federal-court practice. But more important for our purposes, it also is entrenched in the state courts. Forty-nine state supreme courts have stated that they apply the canon of constitutional avoidance.[175] And

serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress" (internal quotation marks omitted)).

174. *See* Manning, *supra* note 173, at 253-54 (summarizing the debate).

175. Maladoni v. City of Mobile, 37 So. 3d 739, 747 (Ala. 2009); Bigley v. Alaska Psychiatric Inst., 208 P.3d 168, 184 (Alaska 2009); Scheehle v. Justices of the Supreme Court of Ariz., 120 P.3d 1092, 1098 (Ariz. 2005); Johnson v. Rockwell Automation, Inc., 308 S.W.3d 135, 139 (Ark. 2009); People v. Sutton, 227 P.3d 437, 453 (Cal. 2010); Catholic Health Initiatives Colo. v. City of Pueblo Dep't of Fin., 207 P.3d 812, 822 (Colo. 2009); Ziotas v. Reardon Law Firm, P.C., 997 A.2d 453, 459 (Conn. 2010); Hoover v. State, 958 A.2d 816, 821 (Del. 2008); Murray v. Mariner Health, 994 So. 2d 1051, 1057 (Fla. 2008); DeKalb Cnty. v. Perdue, 692 S.E.2d 331, 333 (Ga. 2010); State v. Raitz, 621 P.2d 352, 359 (Haw. 1980); Stuart v. State, 232 P.3d 813, 818 (Idaho 2010); Irwin Indus. Tool Co. v. Ill. Dep't of Revenue, 938 N.E.2d 459 (Ill. 2010); Founds. of E. Chi., Inc. v. City of East Chi., 927 N.E.2d 900, 904 (Ind. 2010); *In re* Young, 780 N.W.2d 726, 729 (Iowa 2010); State v. Engles, 17 P.3d 355, 357 (Kan. 2001); Stephenson v. Woodward, 182 S.W.3d 162, 168 (Ky. 2005); State v. Cunningham, 903 So. 2d 1110, 1116 (La. 2005); DaimlerChrysler Corp. v. Exec. Dir., Me. Revenue Servs., 922 A.2d 465, 471 (Me. 2007); VNA Hospice of Md. v. Dep't of Health & Mental Hygiene, 961 A.2d 557, 569-72 (Md. 2008); Commonwealth v. Disler, 884 N.E.2d 500, 510-11 (Mass. 2008); Grebner v. State, 744 N.W.2d 123, 125 (Mich. 2007); State v. Mauer, 741 N.W.2d 107, 115 (Minn. 2007); Gentry v. Town of Booneville, 24 So. 2d 88, 89 (Miss. 1945); Simpson v. Kilcher, 749 S.W.2d 386, 390 (Mo. 1988), *overruled on other grounds by* Kilmer v. Mun, 17 S.W.3d 545, 553 (Mo. 2000); Eklund v. Wheatland Cnty., 212 P.3d 297, 299 (Mont. 2009); State v. Hookstra, 638 N.W.2d 829, 836 (Neb. 2002); Mangarella v. State, 17 P.3d 989, 992 (Nev. 2001); Lamarche v. McCarthy, 965 A.2d 992, 996 (N.H. 2008); State v. Fortin, 969 A.2d 1133, 1139-40 (N.J. 2009); State *ex rel.* Regents of E.N.M. Univ. v. Baca, 189 P.3d 663, 666-67 (N.M. 2008); Matter of Jacob, 660 N.E.2d 397, 405 (N.Y. 1995); Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'rs, 681 S.E.2d 278, 282 (N.C. 2009); Seiler v. State of N.D. Dep't of Human Servs., 780 N.W.2d 653, 656 (N.D. 2010); State *ex rel.* Thompson v. Spon, 700 N.E.2d 1281, 1284 (Ohio 1998); Conaghan v. Riverfield Country Day Sch., 163 P.3d 557, 565 n.5 (Okla. 2007); *In re* F.C. III, 2 A.3d 1201, 1212 (Pa. 2010); State *ex rel.* Town of Westerly v. Bradley, 877 A.2d 601, 606 (R.I. 2005); State v. Pittman, 647 S.E.2d 144, 162 (S.C. 2007); Steinkruger v. Miller, 612 N.W.2d 591, 595 (S.D. 2000); Waters v. Farr, 291 S.W.3d 873, 917 (Tenn. 2009); HEB Ministries, Inc. v. Tex. Higher Educ. Coordinating Bd., 235 S.W.3d 627, 658 (Tex. 2007); Sisk v. State, 131 S.W.3d 492, 494 (Tex. Crim. App. 2004); State v. Moreno, 203 P.3d 1000, 1006 (Utah 2009); *In re* G.T., 758 A.2d 301, 308 (Vt. 2000); Commonwealth v. Doe, 682 S.E.2d 906, 908 (Va. 2009); State v. Eaton, 229 P.3d 704, 706 (Wash. 2010); State v. Mullens, 650 S.E.2d 169, 190 (W. Va. 2007); *In re* Termination of Parental Rights to Max G.W., 716 N.W.2d 845, 852 (Wis. 2006); Smith v. State, 199 P.3d 1052, 1068 (Wyo. 2009). Because the Oregon Supreme Court's interpretation hierarchy essentially eliminates substantive canons, that court has only used the avoidance canon once in the past seventeen years. *See* Gluck, *supra* note 3, at 1778 n.90. Oregon is therefore not included in the total tally.

with respect to avoidance's cousin, severability, forty-eight states have a statute, a judicial decision, or both requiring courts to apply a presumption of severability.[176]

And yet, apparently due to their concern about not being able to resolve state-law questions definitively (because the state supreme courts always have the last word), the federal courts claim that they are disempowered, even incompetent, to apply these rules—most often avoidance, but sometimes also severability—to state statutes. These federal courts rarely consider as relevant in making these decisions whether the state court would avoid or sever.[177] The basic claim of this Subsection is that, despite the presence of a federal constitutional issue, the state-law question in many of these cases is again simply one of state statutory interpretation. Thus, federal courts should be consulting those state interpretive principles.

Consider *Allstate Insurance Co. v. Serio*, which involved a First Amendment challenge to a New York insurance statute.[178] The Second Circuit began by stating: "It is axiomatic that the federal courts should, where possible, avoid reaching constitutional questions."[179] The Second Circuit cited only U.S. Supreme Court cases for that proposition and did not consider whether the New York Court of Appeals, the state's highest court, similarly applies the avoidance canon. (It does.) But the Second Circuit did not apply the avoidance canon either. Instead, it certified the question to the New York Court of Appeals for the confounding reason that although it was applying federal rules of construction, it seemed to think that the New York Court of Appeals might apply *state* rules of construction to the certified question and reach a different result:

> It is not the case . . . that certification is appropriate only where a federal court, applying federal rules of construction, can see a proper way to construe the relevant statute so as to eliminate any constitutional defect. It may well be that the courts of the relevant state are less constrained than is the federal judiciary with respect to statutory

176. *See* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 285 (1994); *see also* Scott, *supra* note 64, at 385-87 (finding that thirty-five state legislatures have enacted severability statutes and that no legislature has rejected the presumption).

177. *Cf.* Dorf, *supra* note 176, at 286 (recognizing that severability is a state-law question). *But see* David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639 (2008) (acknowledging that the "legislative intent" test currently governs severability but arguing that, while constitutional avoidance is properly viewed as a question of statutory interpretation, severability should no longer be treated as such).

178. 261 F.3d 143 (2d Cir. 2001) (concerning commercial speech).

179. *Id.* at 149-50.

> interpretation. It is possible, that is, that under the applicable state law, state courts have more flexibility and broader interpretive power than do the federal courts. In such circumstances, federal courts ought not to deprive the state courts of the opportunity to construe their own statutes, using the interpretive tools, presumptions, and standards they deem proper.[180]

This opinion curiously assumes that the same state statute, construed in the context of the same case, would be interpreted under different rules depending on which court hears the case.[181] To understand why this should not be so, consider that when a federal court certifies a state-law question to a state court, it does not change the posture of the federal case. It simply asks the state court how it (the federal court) should decide the question for purposes of the federal case. The state court, however, gives its answer based on state law and state interpretive principles, and the federal court uses that answer for the federal case. Because the state court gives an answer that the federal court was empowered to give in the first instance, it makes no sense to think that the act of certifying changes the interpretive framework—or that the federal court should be applying federal interpretive principles if the state court would apply state interpretive principles.[182]

The Sixth Circuit also has distinguished between the power of federal courts to apply the avoidance canon in federal statutory cases and their power to do so in state statutory cases. In *Eubanks v. Wilkinson*,[183] which concerned the constitutionality of a Kentucky statute requiring parental consent for abortion, the Sixth Circuit began by setting forth various precedents from both the Kentucky Supreme Court and the U.S. Supreme Court concerning when the use of the avoidance canon is appropriate.[184] But the Sixth Circuit then made a startling declaration: "A federal court must always be aware of the federalism concerns that arise whenever it deals with state statutes . . . . Federal

180. *Id.* at 152.

181. This was not a situation in which anyone was claiming that the state court might interpret the statute under its own state constitution (as opposed to the Federal Constitution) upon certification. But even if such a claim were being made, it would not be beyond the judicial power of the federal courts to narrow a state statute to avoid a conflict with a state constitutional provision.

182. Moreover, if the Second Circuit instead were implying that its own application of the avoidance canon is a matter of federal law, then state interpretive principles would seem irrelevant because the federal principle presumably would trump under the Supremacy Clause.

183. 937 F.2d 1118 (6th Cir. 1991).

184. *Id.* at 1122-26.

courts lack authority and power to give a limiting, narrowing construction to a state statute."[185] In another case, the Sixth Circuit concluded that even if it could identify "a limiting construction [that] will save the constitutionality of a state statute . . . and the statute or ordinance is fairly susceptible to such a construction," the only course that the federal court could follow would be to "abstain pursuant to the *Pullman* doctrine."[186]

The Sixth Circuit's position in these cases derives, in part, from the Fifth Circuit's opinion in *Hill v. City of Houston*.[187] In *Hill*, a sharply divided en banc court considered a First Amendment overbreadth challenge to a Houston ordinance that prevented interference with police-officer duties. The Fifth Circuit did not look to Texas law to determine whether the Texas courts would narrow the statute. Instead, it looked only to U.S. Supreme Court cases and stated: "It is textbook law that the ordinance would not be invalid for overbreadth if it were possible, applying well-established principles of statutory construction, for us to construe it narrowly so that it does not forbid protected speech."[188] But the Fifth Circuit went one step further and held that its powers were more limited because the law being construed was not a federal statute: "Federal courts . . . may not impose [their] own narrowing construction onto the ordinance if the state courts have not already done so."[189] As a result, the court struck the ordinance down. Seven judges dissented, arguing that the federal court should have saved the ordinance by construing it to avoid the constitutional difficulty. The dissenters opined:

> The notion that we are bound by authoritative state court constructions of a statute logically has no application until the state courts actually *do* give it some construction. . . .
>
> . . . Both the principle of federalism and our reluctance to decide constitutional questions when they can be avoided require us to proffer such constructions where possible and assume that the state courts will construe the ordinance consistently with the constitutional command.[190]

185. *Id.* at 1125.

186. Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916, 926 (6th Cir. 1980), *vacated on other grounds*, 456 U.S. 968 (1982).

187. 789 F.2d 1103 (5th Cir. 1986) (en banc).

188. *Id.* at 1111-12.

189. *Id.* at 1112 (citations and internal quotation marks omitted).

190. *Id.* at 1124 (Higginbotham, J., dissenting) (citation omitted).

The Eighth Circuit, too, recently upheld an injunction against the enforcement of a Lincoln, Nebraska sexual entertainment ordinance on overbreadth grounds, holding that "[l]imiting constructions of state and local legislation are more appropriately done by a state court or an enforcement agency."[191]

On the other side of the spectrum are the Fourth and Seventh Circuits, which do look to the relevant state court's practice in deciding whether to apply the avoidance canon to state cases in their courts.[192] And somewhere in the middle are those federal courts that apply the canon of constitutional avoidance to state statutes but seemingly do so as a matter of federal, not state, law. For those courts, the presence of a federal constitutional question apparently gives the avoidance question a federal flavor, and so the courts cite only federal case law for their authority to apply the canon to avoid constitutional claims.[193]

a. U.S. Supreme Court Origins of this Restrained Approach

Most of these appellate cases rely on U.S. Supreme Court precedents, but some of the cases relied upon are not exactly analogous. For example, courts often cite *Gooding v. Wilson*,[194] in which the Court struck down a Georgia statute as overbroad under the First Amendment. But although the *Gooding* Court did not look to whether the Georgia Supreme Court generally narrows statutes to avoid constitutional problems, it did look to how the Georgia courts had narrowed the statute in older cases and held that they had not narrowed it sufficiently.[195] Curiously, a number of courts also cite to *Grayned v. City of Rockford*, which involved an overbreadth challenge to Illinois's anti-noise and anti-picketing statutes, for the proposition that federal courts lack the "power

191. Ways v. City of Lincoln, 274 F.3d 514, 519 (8th Cir. 2001) (citing Ward v. Rock Against Racism, 491 U.S. 781, 795-96 (1989)).

192. *See In re* DNA Ex Post Facto Issues, 561 F.3d 294 (4th Cir. 2009); K-S Pharmacies, Inc. v. Am. Home Prods. Corp., 962 F.2d 728, 730 (7th Cir. 1992).

193. *See, e.g.*, IMS Health Inc. v. Ayotte, 550 F.3d 42, 61 (1st Cir. 2008) (addressing a challenge to a New Hampshire statutory ban on pharmaceutical data mining and looking to New Hampshire law to determine whether legislative history could be consulted but looking only to federal precedent to determine whether to apply the avoidance canon); Phelps v. Hamilton, 59 F.3d 1058, 1070 (10th Cir. 1995) (looking only to federal case law to determine whether the court could narrow a Kansas criminal defamation statute). In both cases, the federal court added a citation to state avoidance case law as additional, but not direct, support. *See Ayotte*, 550 F.3d at 63; *Phelps*, 59 F.3d at 1071-73.

194. 405 U.S. 518 (1972).

195. Indeed, on remand, the Georgia courts still could have narrowed the statute sufficiently to convict Gooding. *See* Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 23.

to construe and narrow state laws."[196] But in *Grayned*, the Court was reviewing a state supreme court's construction of its own statute; it was not discussing the federal courts' role where the relevant question appears for the first time in federal court.[197]

Nor can this restrained approach be justified as limited to the First Amendment overbreadth context, which some scholars have argued is unique.[198] The federal courts take this same restrained approach to narrowing state statutes outside the First Amendment context (and cite non-First Amendment cases from the U.S. Supreme Court in support), so the motivating factor cannot be the special considerations attendant to free speech.[199]

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196. 408 U.S. 104, 110 (1972). The Tenth Circuit cites *Grayned* for this proposition most frequently. *See, e.g.*, United States v. Vanness, 342 F.3d 1093 (10th Cir. 2003).

197. In another case, *Frisby v. Schultz*, the Court did in fact apply the canon of constitutional avoidance to save a Wisconsin picketing statute from overbreadth and chided the lower federal courts for running "afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties." 487 U.S. 474, 483 (1988). The Court, however, cited only federal cases for that "well-established principle" and did not inquire as to Wisconsin's own practice. *Id.*

198. There is an ongoing debate in the literature about the extent to which "constitutionally protected speech is likely to be 'chilled' by overbroad statutes." HART & WECHSLER, *supra* note 18, at 188 n.2. One concern is that, without an authoritative construction, courts cannot avoid the chilling effect that overbroad state statutes have on speech. *Compare* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 886 (1991) (arguing that deterrence will differ "depend[ing] on the nature of the statute involved"), *and* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970) (arguing that an aggressive overbreadth doctrine is necessary to protect First Amendment rights adequately), *with* Monaghan, *supra* note 195, at 37 (disputing that overbreadth is a special First Amendment doctrine). Thus, the argument goes, because state courts always have the last word as to the meaning of state statutes, a federal-court narrowing construction is inadequate to assure citizens that the law will not be enforced against them.

199. For example, *Stenberg v. Carhart*, the Nebraska partial-birth-abortion case, contains some statements that appear to single out state law generally for special treatment, such as the statement that federal courts are "without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent," 530 U.S. 914, 944 (2000) (quoting Boos v. Barry, 485 U.S. 312, 330 (1988)), when in fact the Court in other cases has indicated that the standard is the same for federal statutes, *see* United States v. Stevens, 130 S. Ct. 1577, 1590-91 (2010); *cf.* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 83 (1976) (refusing to sever the unconstitutional portion of a Missouri abortion statute but not consulting Missouri severability law in making that decision); *id.* at 100-01 (White, J., dissenting) (arguing that the majority "thereby attribut[ed] to the Missouri Legislature the strange intention of passing a statute with absolutely no chance of surviving constitutional challenge" and that the "question whether a constitutional provision of state law is severable . . is *entirely* a question of the intent of the state legislature"); David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 Nw. U. L. REV. 759, 766-67 (1979) (noting that the Court could have saved the statute in *Danforth*).

For example, courts also frequently cite *Arizonans for Official English v. Arizona*[200] in support of this restrained approach. That case involved a federal constitutional challenge to an Arizona state constitutional amendment making English the official state language. After holding that the decision below should be vacated on mootness grounds, Justice Ginsburg's opinion for a unanimous Court rebuked the Ninth Circuit for deciding the constitutional question itself rather than certifying the question to the Arizona Supreme Court. Interestingly, the Court took this position even as it predicted what the Arizona Supreme Court would likely do—narrow the statute to keep it within constitutional bounds:

> Federal courts, when confronting a challenge to the constitutionality of a federal statute, follow a "cardinal principle": They will first ascertain whether a construction . . . is fairly possible that will contain the statute within constitutional bounds. State courts, when interpreting state statutes, are similarly equipped to apply that cardinal principle. . . . [T]he federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court.[201]

Moreover, the Court's justification for its decision—that "[f]ederal courts lack competence to rule definitively on the meaning of state legislation"[202]—has caused confusion in the lower courts, which often quote it. Although it is true that federal courts are not authoritative on state law questions, the Court's statement has been read erroneously to imply that federal courts are sometimes incompetent to decide such questions. Of course, federal courts can decide state statutory cases—they do so all the time; and, for purposes of the individual parties in these cases, the federal courts' opinion is (unless vacated) the final word.[203]

200. 520 U.S. 43 (1997).

201. *Id.* at 78-79 (citations and internal quotation marks omitted).

202. *Id.* at 48.

203. Suppose, for example, that a federal court issues an injunction against enforcement of a state statute and that the state supreme court, in a later case, issues its own construction that moots the injunction. The parties to the earlier federal case, of course, could then go to federal court to have the injunction vacated. That said, the federal court still decides the case. *Cf.* Shapiro, *supra* note 199, at 759, 768 n.51 ("Although it is true that a federal court cannot render an authoritative construction of state law that will bind state courts as a matter of stare decisis, it is also true that a federal court does have authority to construe state law in the case before it in a manner that may avoid a constitutional issue or may significantly affect its contours.").

b. Are the Constitutional Cases Justifiably Different?

Do the federal constitutional questions lingering in the background make these state statutory interpretation questions more "federal"? Or do they somehow introduce a federal norm that trumps the *Erie* principle? Although such arguments might be raised to justify the federal court reluctance to apply state avoidance principles, they quickly raise questions.

Assume, for example, that the federal constitutional issues in these cases make the avoidance inquiry a federal interpretive inquiry and not a state interpretive inquiry. No one claims that the *Erie* rule is absolute. The Constitution is the ultimate authority and so clearly can limit the application of the *Erie* doctrine.[204] Thus, if the argument is that how or whether to construe a statute (state or federal) to avoid a constitutional question is in fact a matter of federal law, then it is possible that such a federal principle could supersede *Erie* in these cases. On this view, even if a particular state does not apply the canon of constitutional avoidance, if the avoidance principle is constitutionally required (or is some species of federal common law), we might see it even in cases in which *Erie* would otherwise counsel the application of state methodological rules.

But this is not what we see. If it were, we would see much more avoidance. Instead, as the cases illustrate, federal courts do not seem comfortable applying their own federal avoidance principles to state statutes either.

Thus, if there is an *Erie*-trumping federal principle in play in these cases, it must be a different principle, one apparently based on federalism and related concerns about political accountability, institutional competence, and the risk that federal courts might make incorrect but unreviewable decisions about state law. While these concerns are not trivial, one has to wonder where the boundary lies. Taking such concerns into account, when would the federal court not certify state-law cases? The same concerns about federalism, accountability, institutional competence, and the unreviewability of federal-court decisions on matters of state law apply to diversity cases as much as to those cases arising under the Federal Constitution. And so these arguments do not satisfactorily explain why only constitutional cases should be singled out for special treatment.

Indeed, the fear of getting a state statutory construction question wrong seems, if anything, particularly minimal in this context. Given that forty-nine state supreme courts have held that they will construe a statute to save it if a

204. *See supra* note 15.

constitutional construction is apparent,[205] the rule that state courts would apply is clear, and federal courts should be as capable of applying it as they are capable of applying state choice-of-law rules, state contract rules, and countless other state decisionmaking frameworks—perhaps even more capable, because federal courts are the purported experts on federal constitutional law.

One also has to ask whether this kind of federalism-inspired principle justifies the different outcomes that are being reached in at least some of these cases. If the federal court decides not to apply the avoidance canon, its choices are to decide the constitutional question or certify it. Federal courts certify many, but not all, of these cases, and putting aside for the moment arguments about whether they should certify more,[206] let us recognize the paradoxical consequence of the federal courts' current approach to deciding these cases: out of "respect" (that is, the refusal to apply the avoidance canon to save state statutes), federal courts are striking down as unconstitutional more state statutes than federal statutes[207]—not to mention more statutes than the state courts would.

To make the oddity of this approach as clear as possible, let us consider one last hypothetical. Assume that state statute *X* has been construed by its own state supreme court. That court viewed the statute as overbroad and so gave it a narrowing construction. In a separate case, *X* comes before the U.S. Supreme Court on an overbreadth challenge. The outcome in this case is now well-settled doctrine: the U.S. Supreme Court will not second-guess whether the state supreme court was correct to narrow the statute; it will take the already narrowed construction as law and then engage in federal constitutional analysis (inquiring whether the law, as already narrowed, is constitutional).[208] Now,

205. *See supra* note 175.

206. *See infra* notes 336-340 and accompanying text.

207. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 823 (2006) (concluding, in a study of all strict scrutiny cases published between 1990 and 2003, that "federal laws clearly survive more frequently than state and, especially local, laws"); *see also* Adam Winkler, *Free Speech Federalism*, 108 MICH. L. REV. 153, 154 (2009) ("[T]he level of government behind a speech law—federal, state, or local—affects the degree of constitutional protection."). Another argument might be that federal courts strike down state statutes more than they narrow them because of some entirely different principle—namely, some kind of implicit mistrust of state legislatures and the sense that it is the federal courts' role to rein them in. But if this were the case, that would actually be a very significant exercise of federal-court power and we would not expect to see such action justified with the vocabulary of federal-court deference.

208. *See* Osborne v. Ohio, 495 U.S. 103, 118-20 (1990) (holding that federal courts will not second-guess the narrowing of a state statute by a state supreme court, even if the state statute as literally read would not give litigants any notice of how the state court would

assume that the state supreme court never heard the overbreadth challenge and the U.S. Supreme Court gets it first. The underlying question is still the same: what does *state law* have to say about the narrowability of state statute *X*? This example should help to illustrate why these constitutional cases should be treated like any other state statutory interpretation cases.

4. *Exception: Voluntary Application of State Methodology*

There is one final twist. Some circuits hold that they are not required to look to state methodology in federal-question cases but do so voluntarily. The Fifth Circuit is an example. That court has explicitly held that "reference to [Texas interpretive rules] is not mandated by *Erie* . . . and its progeny [where] subject-matter jurisdiction today is based on a federal question, not on diversity of citizenship."[209] Nevertheless, the Fifth Circuit still applies state rules of construction in most federal-question/state-law cases because "[r]eason dictates" that "[i]t would make little sense . . . to proceed to an aberrant construction by refusing to apply state canons, canons which will in all probability govern any authoritative construction which the statute ever receives."[210] The Tenth Circuit likewise takes this middle view.[211]

It is important to recognize that even though these courts do use the state methodologies, the position that they take—that the federal court applies state interpretive methodology at its option or out of "common sense"—has different implications from a holding that *Erie* requires federal courts, even in federal-question cases, to apply state methodology to state statutes. Indeed, the position taken by these courts is, doctrinally, essentially the same as the position taken by a court that applies only federal methodology to state statutory questions. In both, the answer to the methodological-choice question is federal: the federal court decides, as a matter of federal law, that it has discretion to choose the applicable methodology. Whether the federal court decides to "borrow" the state methodology for pragmatic reasons, it is still a

eventually narrow it); Fallon, *supra* note 198, at 854; *see also* Shuttlesworth v. Birmingham, 394 U.S. 147, 155-59 (1969) (assuming that a state-court-narrowed construction of a statute was constitutionally valid even though the conviction obtained prior to the narrowing had to be vacated because the narrowing was not foreseeable); *cf.* Monaghan, *supra* note 195, at 26 ("Facial scrutiny by the Supreme Court in such cases does not extend beyond a consideration of whether the state rule, as authoritatively construed by the state courts, satisfies relevant constitutional standards.").

209. Batterton v. Tex. Gen. Land Office, 783 F.2d 1220, 1222 (5th Cir. 1986).

210. *Id.*

211. Phelps v. Hamilton, 59 F.3d 1058, 1070-72 (10th Cir. 1995).

federal decision, as much of one as a decision by a federal court to apply only federal methodological principles.

* * *

As stated at the outset of this Part, there is one additional set of considerations that this discussion has mostly not addressed—namely, the larger jurisprudential issues of what statutory interpretation "is" and how it relates to individual judges. For example, if one views textualism, or other interpretive rules, as required by Article III of the Federal Constitution or rooted in the individual judge, perhaps one could argue that federal judges cannot shed those interpretive rules when they interpret state statutes—that an Article III-based interpretive approach goes wherever federal judges go. At a more limited level, even if *Erie* effectuates a presumption that federal courts generally should apply state methodology to state statutes, there still might be specific state interpretive rules—e.g., a state court applies a "racist" canon of interpretation or a canon requiring the issuance of federal-law advisory opinions[212]—that federal courts arguably should not apply because of conflicting federal constitutional principles.

Part IV addresses these arguments directly. For now, and in the context of our empirical survey of the case law, the point to emphasize is simply that this is not the conversation that the federal courts are having. The possibility that certain constitutional considerations might justify a federal court's refusal to apply a specific state interpretive rule (or all of them) does not undermine the argument that, when not preempted, the baseline established by *Erie* is that federal courts will apply state legal principles in state-law cases. But, critically, the federal courts do not begin from—or even acknowledge—this baseline in choosing their interpretive methodology. Thus, even if one might raise such constitutional arguments to justify the courts' current practices, those arguments do not seem consciously in play in the cases themselves.

212. For instance, one can imagine a version of the avoidance canon that would require courts to render advisory opinions about the Federal Constitution. If a state supreme court applied such a canon, one might argue that Article III (because it prohibits federal courts from giving advisory opinions) might trump *Erie*'s requirement that the federal court apply that state's avoidance principles in that context.

III. STATE COURTS AND FEDERAL STATUTES

Things do not look the same on the flip side. The state supreme courts are unequivocally and unapologetically independent federal statutory interpreters.

Two key factors are responsible for this difference. First, as discussed in Part I, the U.S. Supreme Court has not given precedential status to most of its federal statutory interpretation principles, and so there is no prevailing understanding that state courts, when interpreting federal statutes, are bound under the Supremacy Clause by any particular federal interpretive rules.

Second, the state supreme courts are coordinate, not inferior, to the federal courts of appeals on matters of federal law. For this reason, most state supreme courts have held that they are not bound by their regional federal circuit court's interpretations of federal statutes.[213] Thus, without direction from the U.S. Supreme Court, a state supreme court can use different interpretive methods to reach an answer to a federal statutory question that differs from the answer of a federal appellate court (often in the same city) that already has decided the same question.[214] And these are divergences with real-world impact. State courts are more than occasional interpreters of federal statutes: simply by virtue of their numbers, state courts hear more federal-question cases than do federal courts, and so these state cases have a significant effect on the meaning of federal law.[215]

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213. *See* Wrabley, *supra* note 10, at 17 (counting twenty-nine states that hold this position); *see, e.g.*, Abela v. Gen. Motors Corp., 677 N.W.2d 325, 326 (Mich. 2004); State v. Burnett, 755 N.E.2d 857, 862 (Ohio 2001); Commonwealth v. Jones, 951 A.2d 294, 301 (Pa. 2008); *see also* Hall v. Pa. Bd. of Prob. & Parole, 851 A.2d 859, 863-64 (Pa. 2004) (compiling cases summarizing state supreme court approaches to this issue and concluding that "[a] vast majority of state supreme courts" treats "a decision of an inferior federal court . . . as persuasive, but not binding").

214. Some scholars and judges dispute that the state courts are correct in taking this approach. *See* Clermont, *supra* note 2, at 31. The Ninth Circuit has argued that state courts should be obligated to follow its federal-law decisions. *See* Yniguez v. Arizona, 939 F.2d 727, 736 (9th Cir. 1991). Some commentators have said that state courts, even if perhaps not required to, should voluntarily follow pronouncements of federal law by federal appellate courts. *See, e.g.*, Wrabley, *supra* note 10, at 28. Yet the prevailing view in the state courts is the one expressed by Justice Thomas's concurrence in *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (also cited by Justice Ginsburg in her unanimous opinion for the Court in *Arizonans for Official English v. Arizona*, 520 U.S. 43, 59 n.11 (1997)), namely, that state courts are as authoritative on questions of federal law as are the lower federal courts and have no obligation to defer to them.

215. A few states adopt a variation of this independent approach. *See, e.g.*, Dark-Eyes v. Comm'r, 887 A.2d 848, 856 (Conn. 2006) (giving Second Circuit precedent "'particularly persuasive weight'" for prudential reasons (quoting Szewcyck v. Dep't of Soc. Servs., 881 A.2d 259, 266 (Conn. 2005))); Inv. Co. of the Sw. v. Reese, 875 P.2d 1086, 1090 (N.M. 1994) (following

This Part addresses a particular subset of this reverse-*Erie* hodgepodge. Previous work has focused on matters such as divergent case outcomes—whether state courts should attempt to harmonize their federal-law case results with already decided cases in the lower federal courts.[216] This Part deals with a different question—namely, how courts approach the choice of methodology in these cases and how that choice can cause the divergent case outcomes that we see. This inquiry has three additional implications for this Article's broader concerns. First, despite the U.S. Supreme Court's agnosticism, some state courts clearly believe that there is something called "federal statutory interpretation." That is, these state courts identify what they view as methodological principles applied by the U.S. Supreme Court that are not universal or general law but, rather, are distinct from the interpretive methodology that the state courts apply to their own statutes. Second, it is not atypical to see state and federal courts each utilizing what they believe to be "federal" interpretive principles but choosing different principles, and so reaching different results. These diverging cases thus illustrate the practical effects of the Supreme Court's reluctance to clarify its own methodological choices. And third, in a related vein, the choice of interpretive methodology in some of these cases appears to be outcome-determinative, a detail of special relevance for the ordinary *Erie* context.[217]

To be clear, these cases pose problems different from those posed by the ordinary *Erie* cases (involving federal courts interpreting state law) already discussed. Most significantly, as a matter of pure doctrine, what the state courts are doing in the reverse-*Erie* context is unobjectionable: because there is no "law" of federal statutory interpretation, as a formal matter, these state courts are free to make methodological choices different from those of the lower federal courts. It is worth emphasizing, moreover, that there is no doctrinal reason that the legal-status question must be answered in the same

federal-court precedent but only if the circuits are in uniform agreement); Akin v. Mo. Pac. R.R., 977 P.2d 1040, 1052 (Okla. 1998) ("The voluntary deference we pay to our circuit's pronouncements prevents federal law from being dichotomized within the State of Oklahoma into different bodies of legal norms—that applied in Oklahoma courts and that which governs federal courts within this state."); Wrabley, *supra* note 10, at 22, 24.

216. *See* Clermont, *supra* note 2; Glassman, *supra* note 91; Wrabley, *supra* note 10; Zeigler, *supra* note 2; *cf.* Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 742 (2010) ("Aside from habeas corpus, Congress has not provided for review of state court decisions in the lower federal courts.").

217. As stated, in reverse-*Erie* cases, the inquiry centers around the Supremacy Clause: is there federal law that binds the lower courts? Outcome-determinativeness is not relevant here but is central in the ordinary *Erie* context. Clearly, however, evidence that the choice of methodology seems outcome-determinative in reverse-*Erie* cases informs the same conclusion in the ordinary *Erie* context.

way on the state and federal sides. It might be the case, for example, that a state court could treat its own interpretive rules as law but view the legal status of federal interpretive methodology differently because the U.S. Supreme Court does. Nevertheless, as this Part aims to illustrate, the on-the-ground effects of the Court's resistance to a more lawlike approach raise significant fairness and uniformity concerns—concerns that may justify the Court's reconsideration of its current views.

Indeed, the federal-law disuniformity facilitated by the Court's failure to treat federal interpretive doctrine as law is something that we do not tolerate in other methodological contexts. Would it, for example, seem equally probable that state courts might apply a liberal interpretive framework to imply private causes of action in federal statutes—in direct contrast to the much narrower framework that the U.S. Supreme Court currently uses?[218] Or could state courts devise their own, different, tiers of scrutiny for cases in which federal constitutional discrimination claims arise in state court? Both of these scenarios are implausible, not because state courts are more rebellious in statutory interpretation cases than in these other kinds of cases but, rather, because the U.S. Supreme Court has resisted giving the same definitive clarity to its statements about statutory interpretation methodology that it has given to these other methodological doctrines.

A. State Courts Using Federal Methodology for Federal Statutes

At least some state supreme courts distinguish between state and federal interpretive practices more self-consciously than federal courts generally do. The Connecticut Supreme Court, for example, voluntarily harmonizes its methodology in federal cases to what it believes is the Second Circuit's "plain meaning" approach on the basis of "principles of comity and consistency," even though the Connecticut Supreme Court has stated that a plain-meaning methodology is at odds with its own "contemporaneous renunciation" of that

218. *See* Alexander v. Sandoval, 532 U.S. 275 (2001); HART & WECHSLER, *supra* note 18, at 706 (describing the Court's recent "[r]etrenchment" in its willingness to imply private rights of action). Of course, *Sandoval*'s test for implying a private cause of action is itself a methodology for statutory interpretation; it guides courts in determining when to interpret an ambiguous statute to include a private cause of action. This area of law is therefore one of the limited exceptions—an area in which the Court does announce a precedential methodology for a specific context. *See id.* at 706-07 (describing the test articulated in *Sandoval* as precedential). Thanks to Peter Strauss for this example.

approach for Connecticut statutes.[219] The Connecticut court also has emphasized that the choice of methodology can be outcome-determinative and has noted in various cases that, were it applying its own methodology rather than the Second Circuit's, it would interpret the federal statutes differently.[220]

Other courts likewise recognize that divergent interpretive strategies can affect case outcomes but diverge nonetheless because they disagree with a federal court's earlier methodological choice. Consider, for example, the Oregon Supreme Court, which, as already discussed, has imposed a tiered statutory interpretation framework—the so-called *PGE* framework[221]—on itself and on the state's lower courts. The Oregon court refuses to apply the *PGE* framework to federal statutes and instead applies what it discerns as federal interpretive rules.[222] However, the Oregon courts and the Ninth Circuit do not always agree on what those federal rules are.[223]

In a recent ERISA preemption case, for example, the Oregon Court of Appeals held that the U.S. Supreme Court had "reject[ed]" the "literal textualism" that Oregon's *PGE* test would require for interpreting ERISA and "look[ed] instead to the objectives of the ERISA statute."[224] The Oregon court therefore used a purposive approach to decide that ERISA preempted the common law claim at issue. (The Oregon Supreme Court declined to review the case.) Eight months later, a case raising the identical question was filed in Oregon state court but this time was removed to federal court. The result was a

219. *Szewcyck*, 881 A.2d at 266 & n.10; *cf.* Gluck, *supra* note 3, at 1791-97 (documenting the Connecticut Supreme Court's prohibition of the plain meaning rule and its subsequent reluctance to apply a state statute seeking to restore the rule).

220. *See Szewcyck*, 881 A.2d at 274 (Borden, J., concurring) (agreeing that the court was bound to interpret the statute literally, because the Second Circuit did, but also arguing that "if [the court] were writing on a clean slate, it would be difficult . . . to characterize the term [at issue in the federal statute] as 'plain and unambiguous'"); *id.* at 274-75 (Sullivan, C.J., dissenting) (refusing to follow the Second Circuit and reaching a different result on the basis of legislative history); *accord* Turner v. Frowein, 752 A.2d 955, 974 n.17 (Conn. 2000) (stating that the court did "not write on a clean slate" and so following the Second Circuit's interpretation of federal law in another case, but noting that "reliance on the fundamental tenets of statutory construction" might support a different conclusion).

221. *See* Portland Gen. Elec. Co. v. Bureau of Labor & Indus., 859 P.2d 1143 (Or. 1993).

222. See *supra* note 117 and accompanying text for a discussion of the recent loosening of the *PGE* rules. The Oregon Supreme Court, however, still describes its current regime as the *PGE* framework and holds that it binds lower state courts. *Id.*

223. *See, e.g.*, Hagan v. Gemstate Mfg., Inc., 982 P.2d 1108, 1114 (Or. 1999) ("When this court construes a federal statute . . . we follow the methodology prescribed by federal courts.").

224. Liberty Nw. Ins. Corp. v. Kemp, 85 P.3d 871, 875 (Or. Ct. App.), *review denied*, 93 P.3d 71 (Or. 2004); *see* Jefferson-Pilot Life Ins. Co. v. Krafka, 57 Cal. Rptr. 2d 723 (Cal. Ct. App. 1996).

contrary decision by the Ninth Circuit, which—on the basis of different, more literal, interpretive principles—construed ERISA to reach the opposite result from Oregon's construction. The Ninth Circuit recognized that it had created a conflict with the preceding Oregon state court decision (as well as an earlier California state court decision).[225] In a dissent from the denial of rehearing en banc, six Ninth Circuit judges opined: "[W]e are now faced with the conundrum of federal courts in Oregon and California forced to allow state remedies and state courts in those areas holding those same state remedies federally preempted."[226]

In another example, the New York Court of Appeals diverged from the Second Circuit in its interpretation of whether the federal Davis-Bacon Act preempts state contract law claims for prevailing wages. The Second Circuit relied on what it called the "'elemental canon' of statutory construction that where a statute expressly provides a remedy, 'courts must be especially reluctant to provide additional remedies,'" whereas the New York Court of Appeals instead applied the presumption against preemption canon and relied on the legislative history and purpose of the federal statute in support.[227] Other states present similar examples.[228]

B. State Courts Using State Methodology for Federal Statutes

A few other state courts appear to believe that their own state interpretive rules should apply to federal statutes, but one wonders whether these states would maintain this position if the U.S. Supreme Court were to lay out clear and controlling interpretive rules. For example, the Alabama Supreme Court

225. Providence Health Plan v. McDowell, 385 F.3d 1168, 1173 (9th Cir. 2004).

226. *Id.* at 1176 (Thomas, J., dissenting from denial of rehearing en banc).

227. *Compare* Cox v. NAP Const. Co., 891 N.E.2d 271 (N.Y. Ct. App. 2008), *with* Grochowski v. Phoenix Constr. Co., 318 F.3d 80, 85 (2d Cir. 2003).

228. For example, the Alaska Supreme Court has diverged from the Ninth Circuit in interpreting the phrase "public lands" in the federal Alaska National Interest Lands Conservation Act to exclude "navigable waters." The state court based its decision on application of what the Alaska court called the federal "clear statement" canon, for which it cited numerous U.S. Supreme Court opinions and defined as the requirement that Congress may alter the balance between state and federal governments only in "unmistakably clear" statutory terms. Totemoff v. State, 905 P.2d 954, 966-68 (Alaska 1995). The Ninth Circuit had reached the contrary result based on its application of an agency-deference canon. Alaska v. Babbitt, 54 F.3d 549 (9th Cir. 1995), *withdrawn and superseded*, 72 F.3d 698 (9th Cir. 1995) (still relying on *Chevron* to reach the contrary result). For another example, see *Akin v. Missouri Pacific Railroad*, 977 P.2d 1040, 1053 (Okla. 1998), in which the Oklahoma Supreme Court diverged from the Tenth Circuit in construing the Federal Railroad Safety Act.

has interpreted the Interstate Agreement on Detainers (IAD) in light of its own state interpretive principles and has thereby created a square conflict with the Fifth Circuit. The Alabama court said that it "recognize[d] that some federal courts have ignored the plain meaning" rule for IAD interpretation but held that it was bound by its own "fundamental rule of statutory construction" on plain meaning.[229] In contrast, the line of Fifth Circuit cases rejected by the Alabama Supreme Court "decline[d] to apply [the section at issue] mechanically contrary to the stated purposes of the statute."[230]

Wisconsin, like Oregon, applies a tiered methodological approach to statutory interpretation. But Wisconsin's supreme court, unlike Oregon's, recently held that it will "employ the same methodology to interpret a federal statute as . . . a state statute."[231] (The main effect of this rule is to lessen the use of extrinsic materials such as legislative history and to minimize the use of canons.[232]) Wisconsin's chief justice disagrees with the majority's methodological-choice approach to these federal-law cases and has argued that the "majority ought to use federal methods of statutory interpretation of a federal statute" and "ought not impose [Wisconsin's] rules of statutory interpretation on a federal statute."[233] Iowa also appears to follow its own interpretive rules in federal statutory cases.[234]

C. *Disuniformity of Federal Law*

Uniformity concerns analogous to those that underlie the *Erie* doctrine have a normative punch in the reverse context, too, and long have animated the fundamental conception that most lawyers share that federal law is supposed to mean the same thing in every jurisdiction.[235] Anthony Bellia points out that the "core purpose of the Supremacy Clause was to prevent the states from

229. Bozeman v. State, 781 So. 2d 165, 169 (Ala. 2000).

230. Sassoon v. Stynchombe, 654 F.2d 371, 375 (5th Cir. Unit B Aug. 1981).

231. Nw. Airlines, Inc. v. Wis. Dep't of Revenue, 717 N.W.2d 280, 290 (Wis. 2006).

232. *Id.* at 302 n.15.

233. *Id.* at 303 n.20 (Abrahamson, C.J., dissenting).

234. *See, e.g.*, Top of Iowa Coop. v. Sime Farms, Inc., 608 N.W.2d 454, 460 (Iowa 2000); *accord* Mason v. Schweizer Aircraft Corp., 653 N.W.2d 543, 548 (Iowa 2002).

235. Clermont, *supra* note 2, at 36 ("Likewise under reverse-*Erie*, there is a federal interest in the uniformity of law applied in federal and state court. As to forum shopping, there should still be some desire to avoid shopping by plaintiffs or defendants between the two systems. As to inequitable administration of the laws, there is still an unfairness in that certain classes of people have a choice of court systems.").

interfering with the unified operation of federal law"[236] and that there is "an apparent constitutional presumption that a federal statute should have the same meaning in the first instance whether enforced in a state or a federal court."[237] The U.S. Supreme Court always has been assumed to be the primary guardian of this uniformity.[238]

Today, however, few would contend that the Court adequately serves this function.[239] Grants of certiorari are rare, and decisions to review cases from the state supreme courts in particular are rarer still.[240] And yet the purported availability of Supreme Court review appears to be driving at least part of the state courts' independence when it comes to federal statutory interpretation.[241]

But as a result of this unrealistic reliance on the ability of the Court to produce coherence, intra-American methodological divergences commonly thought impossible actually exist. A decade ago, Adrian Vermeule dismissed the intriguing idea that the various circuits could experiment with different statutory interpretation methodologies and thus percolate the question of the best methodology for the U.S. Supreme Court, on the ground that the "costs of disuniformity (and the perceived injustice and arbitrariness that accompany disuniformity) would probably prove intolerable."[242] Even those who have argued that federal jurisprudence need not be uniform across the nation typically assume that, within each region, the governing principles are.[243] But, in fact, the coordinate nature of state supreme courts and federal appellate

236. Bellia, *supra* note 36, at 902.

237. Bellia, *supra* note 2, at 1554; *cf.* D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 471-72 (Jackson, J., concurring) ("Federal law is no juridical chameleon, changing complexion to match that of each state wherein lawsuits happen to be commenced because of the accidents of service of process and of the application of the venue statutes.").

238. *See* Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1218-19 (2004); *see also* Letter from Chief Justice John Marshall to Sen. Dudley Chase (Feb. 7, 1817), *in* 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1246 (1953) ("[I]ndependent tribunals having concurrent jurisdiction over the same subject should concur in the principles on which they determine the causes coming before them.").

239. *Cf.* Friedman, *supra* note 238, at 1220 ("Today's panacea for the inadequacy of Supreme Court review is the idea of 'parity.'").

240. *See* Solimine, *supra* note 12, at 353.

241. *See, e.g.*, Akin v. Mo. Pac. R.R., 977 P.2d 1040, 1053 (Okla. 1998) (creating a split with the Tenth Circuit and expressing "faith that the Supreme Court will soon see fit to settle this").

242. Vermeule, *supra* note 29, at 110.

243. Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1606 (2008) (arguing that variations in interpretations are acceptable "[a]s long as the rules in various jurisdictions are clear").

courts, combined with the lack of a precedential methodology from the U.S. Supreme Court, has actually licensed this type of intraregional methodological disuniformity for federal statutory interpretation. And sometimes, as we have seen, such methodological differences cause case outcomes to diverge.

To be sure, the kinds of outcome-related disunformity occasioned by these cases pose problems for more than just statutory interpretation. The state courts that exercise their federal lawmaking independence generally do so across all areas of law, and so their divergent choices of interpretive methodology present just one of the various ways in which state courts can cause inconsistency in federal law. But statutory interpretation methodology differs from other areas of law in one fundamental way: the U.S. Supreme Court does not even try to impose uniformity in this context. In the common-law context (e.g., when the Court establishes a four-step framework to determine when a stay should be granted[244]), and even in much of the constitutional context (e.g., the three-pronged Establishment Clause test that the Court devised in *Lemon v. Kurtzman*[245]), Supreme Court review answers both the methodological and the specific legal question with some finality.[246] Thus, for example, if state and federal courts diverge in the application of strict scrutiny to a protected group in an equal protection case, Supreme Court review not only resolves the split but also decides for every future case what level of scrutiny that group receives. In contrast, when a state court and a federal court diverge in interpreting a federal statute based on the former's decision to give greatest weight to expressions of purpose in legislative history and the latter's alternative decision to apply a canon of construction, Supreme Court review resolves the substantive statutory question presented in that case (e.g., whether Title VII permits affirmative action); but even five votes in agreement as to the methodological principles applied offer no guidance to lower courts about how to handle the same conflict between legislative history and the canon in the future. Nor does Supreme Court review finally resolve that question even with respect to the statute at issue. Under the Court's current practice, the methodology that the Court applies to Title VII (or any

244. *See, e.g.*, Nken v. Holder, 129 S. Ct. 1749, 1756 (2009).

245. 403 U.S. 602 (1971).

246. *See* Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 315 (2002) (arguing that the constraining effects of "jurisprudential regimes" in freedom-of-expression cases show that "[l]aw matters" even in Supreme Court decisionmaking).

other statute) in one case does not carry over to the next case in which the same statute is interpreted.[247]

This all relates to the Court's resistance toward treating its methodological statements as precedential. One wonders whether the Court is aware of the trickle-down effects of that resistance. Disuniform interpretations of federal law enabled by an open menu of statutory interpretation methodologies might be reason enough for the Court finally to settle on some firm methodological principles. Indeed, doing so might be a modest way to increase federal-law uniformity, and perhaps the only way to do so absent a fundamental change in the overarching understanding of the equal constitutional standing of state and inferior federal courts.

Perhaps these splits are not happening frequently enough to ring alarm bells. But they are not so infrequent as to escape even a casual perusal of the crossover cases. Nor, it should be emphasized, are state courts the only ones that use methodological choice to create splits on the meaning of federal law. Federal courts, too, create circuit splits by construing federal statutes differently on the basis of different interpretive rules.[248] Those cases command the same need for either Supreme Court review or some kind of unifying direction from the Court on the question of methodological choice.

IV. METHODOLOGICAL ANALOGIES AND *ERIE*

How did we get here? And what is it about statutory interpretation that has made these questions more difficult to answer than they have been in other areas of law? This Part looks to other methodological frameworks, frameworks that, are, in contrast, both more comfortably situated within the *Erie* doctrine and more explicitly understood as real federal law. As we shall see, many of these other interpretive regimes—including rules of contract and trust interpretation, choice of law, and even some constitutional law regimes—share key characteristics with the rules of statutory interpretation. And so we must ask ourselves whether statutory interpretation really is different or whether there is something akin to path dependence that has prevented its alignment with other methodologies.

247. Elsewhere I have discussed at greater length how the Court's current approach is in tension with rule-of-law values and described the instrumental and expressive benefits that might be derived from a more lawlike approach. *See* Gluck, *supra* note 3, at 1848-55.

248. *See, e.g.*, United States v. Head, 552 F.3d 640, 642-44 (7th Cir. 2009) (creating a federal circuit split based on methodological choices, including by the refusal to adopt the same "nontextual interpretation" adopted by other federal courts or to apply the "clerical error" and "absurdity" exceptions to the plain meaning rule allowed by other circuits).

The answer, as this Part argues, lies somewhere in between. Like the principles of contract interpretation, the principles of statutory interpretation have long been familiar. But, unlike with contract, the idea of statutory interpretation as a separate "field" (a kind of "law" to be considered alongside the substance of the statute itself) postdates *Erie*. This and other factors discussed in this Part may explain why statutory interpretation has never had its crystallizing *Erie* moment.[249] But once attention is trained on the question, and in particular on the comparisons to other methodologies, it becomes difficult to understand a continuing exception for statutory interpretation—or at least difficult to accept it without some conscious justification from the courts for the distinction.

Moreover, regardless of whether one agrees with the particulars of the federal courts' *Erie* choices—e.g., the fact that federal courts apply state burden-allocation doctrine to state-law claims—there can be no dispute that federal courts are treating these other kinds of interpretive regimes as "law," not only for purposes of the *Erie* inquiry but also for purposes of federal-law cases.[250] Thus, the notion of a "law" of contract interpretation has meaning both because, in state-law cases, federal courts follow *Erie* and apply the state's rules of contract interpretation and also because, in federal-law cases, there is such a thing as "rules of *federal* contract interpretation" that bind courts under the Supremacy Clause. These comparisons thus also force the question why, in contrast, the legal status of statutory interpretation methodology has remained so ambiguous.

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249. *Cf.* Clark, *supra* note 77, at 1476 (arguing that *Swift* became more problematic as state courts developed specific "commercial doctrines as a matter of state law").

250. The one exception is stare decisis, as scholars continue to debate whether stare decisis is a rule of federal common law or rather an inherent aspect of Article III judicial power. *See* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 828-29 (2008) (describing this debate). *Compare* John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503 (2000) (arguing that stare decisis is usually a rule of federal common law), *and* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1540 (2000) (arguing that stare decisis is "a form of 'common law' followed by courts as a matter of judicial policy" and "may be displaced by an act of Congress"), *with* Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191 (2001) (arguing that stare decisis emanates from Article III authority and cannot be affected by congressional action), *and* Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 596 (2001) ("In light of longstanding acceptance and considerations of justice and prudence, stare decisis deserves recognition as a legitimate, constitutionally authorized doctrine beyond Congress's power to control."), *and* Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697 (1995) (identifying limits to Congress's power to prescribe court rules where such rules affect how cases are decided).

A. Analogous Jurisprudential Principles

The question of statutory interpretation methodology's legal status can be explored in a variety of ways. For example, statutory interpretation methodology can be conceived as a set of rules that helps parties and courts predictably to resolve disputes over ambiguous language in previously negotiated text. Contract, will, and trust interpretation provide obvious analogies to this conception. More generally, statutory interpretation methodology might be understood as a set of rules that provides courts with a reasoning process. That understanding invites comparisons to other predefined reasoning frameworks, both those related to textual interpretation—like the various constitutional decision rules—and those related to decisionmaking more broadly, including choice of law and stare decisis. Notably, all of those frameworks operate in the public-law context and thereby drive home the point that "laws" of methodology have not generally been confined to the private-law realm.

Yet another way to characterize statutory interpretation principles, though perhaps less obvious, is as burden-allocation devices. Many interpretive principles—ranging from the presumption against preemption to the rule of lenity to textual canons like *inclusio unius*—effectively establish default rules that the opposing party must overcome to prevail. On the basis of this conception, we might look for comparisons to other burden-allocation regimes, such as contributory negligence or the *McDonnell Douglas* test for Title VII cases.

The key point is that no matter which of these areas one believes to offer the most apt comparison, all of these methodologies already are treated as more lawlike than statutory interpretation, and *Erie* already applies to all of them. In comparing statutory interpretation to each of these different types of methodologies, this Section therefore aims to illustrate both that we need not start anew and that, even if we could, it would make little sense to do so.

1. Analogies to Rules on Interpretation of Texts: Contracts, Wills, and Trusts

Statutory interpretation, like the interpretation of contracts, wills, and trusts, entails the judicial interpretation of a text previously negotiated by others. Many of the same overarching questions arise in each of these contexts, such as whether interpretation should aim to effectuate the drafters' subjective

intent or whether a more objective interpretive perspective is warranted.[251] Indeed, many rules of contract interpretation are similar—and in some states identical—to the rules of statutory interpretation.[252] But federal courts routinely seek out the state rules of contract interpretation in diversity cases[253] and hold that state "rules of contractual interpretation . . . [are] considered substantive under the *Erie* doctrine."[254] Federal courts likewise adhere, when interpreting state contracts, to a state's adoption of the "four corners rule" ("if the meaning of a written contract can be inferred from its terms the judicial

251. My claim about the comparability of these tasks—and I am not the first to notice such connections—does not turn on whether ultimately all questions about the content of the interpretive rules themselves are answered alike in each context. *Cf.* Stephen J. Choi & G. Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129 (2006) (arguing that boilerplate contracts should be interpreted in accordance with statutory interpretation principles and not general contract interpretation principles); Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15 (1984) (describing an approach in which "the judge treats the statute as a contract"); Curtis J. Mahoney, Note, *Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties*, 116 YALE L.J. 824, 833 (2007) (arguing that textualism is incompatible with a "meeting of the minds" approach to contract interpretation). An important new book by Kent Greenawalt also compares the nature of interpretation across disciplines. *See* KENT GREENAWALT, LEGAL INTERPRETATION: PERSPECTIVES FROM OTHER DISCIPLINES AND PRIVATE TEXTS (2010).

252. Gentile v. SinglePoint Fin., Inc., 788 A.2d 111, 113 (Del. 2001) ("It is a fundamental principle that the rules used to interpret statutes, contracts, and other written instruments are applicable when construing corporate charters . . . ."); Thomas v. Progressive Cas. Ins. Co., 749 N.W.2d 678, 683 n.5 (Iowa 2008) ("Cases interpreting language in statutes are persuasive authority in interpreting contractual language."); 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); Horse Creek Conservation Dist. v. State *ex rel.* Wyo. Att'y Gen., 221 P.3d 306, 317 (Wyo. 2009) ("As statutory and contract interpretation principles make clear, the plain and ordinary meaning of the words governs.").

253. *See, e.g.*, T Street Dev. LLC v. Dereje & Dereje, 586 F.3d 6, 11 (D.C. Cir. 2009); Consumers Cnty. Mut. Ins. Co. v. P.W. & Sons Trucking, Inc., 307 F.3d 362, 365 (5th Cir. 2002); Harken Exploration Co. v. Sphere Drake Ins. PLC, 261 F.3d 466, 471 n.3 (5th Cir. 2001); AM Int'l, Inc. v. Graphic Mgmt. Assocs., 44 F.3d 572, 576 (7th Cir. 1995); Underwriters at Lloyd's, London v. Pike, 977 F.2d 1278, 1279 (8th Cir. 1992).

254. Coplay Cement Co. v. Willis & Paul Grp., 983 F.2d 1435, 1438 (7th Cir. 1993); *see* Progressive N. Ins. Co. v. McDonough, 608 F.3d 388, 390-91 (8th Cir. 2010); Admiral Ins. Co. v. Ford, 607 F.3d 420, 422 (5th Cir. 2010); Cooper Labs., Inc. v. Int'l Surplus Lines Ins. Co., 802 F.2d 667, 672 (3d Cir. 1986); Pastor v. State Farm Mut. Auto Ins. Co., No. 05 C 1459, 2005 WL 2453900, at *8 (N.D. Ill. Sept. 30, 2005) ("[T]he differences in states' breach of contract laws are important and may be outcome-determinative.").

inquiry stops there; extrinsic evidence . . . is inadmissible"), which is essentially the same as the "plain meaning" rule of statutory interpretation.[255]

The parol evidence rule presents another close analogy. That rule is basically identical to statutory interpretation doctrines that concern when courts may consider nontextual evidence.[256] But the state courts that adopt the parol evidence rule for contract actually adopt it: that decision is a "holding," is given stare decisis effect, and is clearly followed by all state and federal courts interpreting a contract under that state's law.[257]

To be sure, some may perceive a difference between regulating private rights, as most contracts do, and public rights, as some statutes do. Of course, some statutes regulate private rights as well. But, if anything, the public-rights distinction seems to tip the scale more heavily toward respecting state-court interpretive rules for statutory interpretation. To the extent that we view public rights as more policy-related than contractual rights, it seems even more important—and more appropriate—for federal courts to defer to the home state's rules in interpreting them.

The contract analogy is also useful in the reverse-*Erie* context, when state courts interpret federal law, simply because federal rules of contract interpretation unquestionably exist and are applied by lower courts to federal contracts.[258] Perhaps one reason for the clarity here is that the U.S. Supreme

255. *Coplay Cement Co.*, 983 F.2d at 1438.

256. RESTATEMENT (SECOND) OF CONTRACTS § 213 (1981) (setting forth the parol evidence rule); *see, e.g.*, Ungerleider v. Gordon, 214 F.3d 1279, 1282 (11th Cir. 2000) (defining the parol evidence rule to hold that "'[e]vidence of a prior or contemporaneous oral agreement is inadmissible to vary or contradict the unambiguous language of a valid contract'" (quoting Johnson Enters. of Jacksonville v. FPL Grp., Inc., 162 F.3d 1290, 1309 (11th Cir. 1998))); *see also* Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195, 199, 221-42 (1998) (arguing for the "recognition of the strong analogy between contract and statutory interpretation").

257. *See, e.g.*, *Ungerleider*, 214 F.3d at 1282 ("Florida law, of course, recognizes the parol evidence rule. . . . The rule is one of substantive law, not evidence, so it is applied by federal courts sitting in diversity."); Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1245 (10th Cir. 1990) ("Wyoming courts depart from the [parol evidence] rule only if the evidence is used to establish a separate and distinct contract, a condition precedent, fraud, mistake, or repudiation."); Wilson Arlington Co. v. Prudential Ins. Co., 912 F.2d 366, 370 (9th Cir. 1990) (explaining that the outcome of cases would be different if the court applied California's version of the parol evidence rule as opposed to Virginia's); Schilberg Integrated Metals Corp. v. Cont'l Cas. Co., 819 A.2d 773, 794 (Conn. 2003) (characterizing the parol evidence rule as substantive law); RESTATEMENT (SECOND) OF CONTRACTS § 213 cmt. a (1981) (same); Alfred Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66, 107 (1955).

258. *See, e.g.*, Miller v. Monumental Life Ins. Co., 502 F.3d 1245, 1248-49 (10th Cir. 2007) ("Our decision to apply federal common law is consistent with our precedent, and that of the vast

Court has made explicit rulings about it. The Court has held, for example, that "[w]hen a contract is a maritime one, and the dispute is not inherently local, federal law controls the contract interpretation."[259] Federal courts also have differentiated the application of the parol evidence rule on the basis of whether a federal- or state-law contract is at issue.[260] Numerous federal courts also have held that "federal common law principles" govern contract interpretation when a contract effectuates a settlement that "involves a right . . . derived from a federal statute," such as ERISA or Title VII (although a few hold the opposite).[261]

majority of other circuits."); Bethlehem Steel Corp. v. United States, 270 F.3d 135, 139 (3d Cir. 2001) (holding that federal contract law governs the interpretation of federal contracts); Kennewick Irrigation Dist. v. United States, 880 F.2d 1018, 1032 (9th Cir. 1989) ("Federal law controls the interpretation of a contract entered pursuant to federal law when the United States is a party."); Seaboard Lumber Co. v. United States, 15 Cl. Ct. 366, 370 (1988) ("[F]ederal contract law is not just a branch of the common law of contracts, but is a separate tree."); 1 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 9:7 (2d ed. 2010); *cf.* United States v. Ajugwo, 82 F.3d 925, 928 (9th Cir. 1996) ("[T]here is binding precedent in this circuit. In [an earlier case] we refused to consider parol evidence for the purpose of adding terms to or changing the terms of an integrated plea agreement." (internal quotation marks omitted)).

259. Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 22-23 (2004) (citing Kossick v. United Fruit Co., 365 U.S. 731, 735 (1961)).

260. *See, e.g.*, O'Neill v. United States, 50 F.3d 677, 684-85 (9th Cir. 1995) (arguing that the U.C.C.'s narrowing of the parol evidence rule "is a source of federal common law and may be relied upon in interpreting a contract to which the federal government is a party" and rejecting the government's reliance on other cases because they involved state, not federal, common-law principles of contract interpretation); Mohr v. Metro E. Mfg. Co., 711 F.2d 69, 72 (7th Cir. 1983) (holding, in construing a contract under the federal Labor Management Relations Act, that the court was "obliged to apply a uniform national parol evidence rule rather than the parol evidence rule of a particular state").

261. Williams v. Metzler, 132 F.3d 937, 946 (3d Cir. 1997); *see, e.g.*, Morais v. Cent. Beverage Corp. Union Emps. Supplemental Ret. Plan, 167 F.3d 709, 711 (3d Cir. 1999) ("[I]t is well settled that federal common law applies both to interpret the provisions of an ERISA benefit plan and to resolve issues of relinquishment of rights and waiver when such side agreements affect the benefits provided by an ERISA plan." (internal quotation marks omitted)); Snider v. Circle K Corp., 923 F.2d 1404, 1407 (10th Cir. 1991) ("Although Title VII settlement agreements are contracts, . . . [f]ederal common law governs the enforcement and interpretation of such agreements because the rights of the litigants and the operative legal policies derive from a federal source." (internal quotation marks omitted)). *But cf.* Dhaliwal v. Woods Div., Hesston Corp., 930 F.2d 547, 548 (7th Cir. 1991) (repeating "earlier expressed doubts that Title VII settlement agreements are in fact covered by general law—federal common law—rather than by state contract law"); Bellia, *supra* note 36, at 843 (compiling cases).

The comparisons here are obvious.[262] The Supreme Court's view that applying state rules of contract interpretation "would undermine the uniformity of general maritime law,"[263] for example, is quite analogous to the idea that applying state rules of statutory interpretation to federal statutes could undermine the uniformity of federal statutory law. And if a federal common law of contract interpretation applies to contracts derived from rights in federal statutes, why should there not also be a federal common law of statutory interpretation to interpret the statutes themselves?

Even the question of how the crossover cases should treat legislated rules of interpretation is addressed in the contractual context. The U.C.C., it is worth emphasizing, is precisely such a legislated rule. It dictates the rules of interpretation that courts should follow. For example, it codifies the parol evidence rule[264] and provides "general definitions and principles of interpretation."[265] Moreover, the U.C.C. overrides the common-law rules of contract interpretation that preceded it. Federal and state courts universally assume that legislatures have authority to enact such interpretive rules in the U.C.C. and dutifully follow them. The statutory interpretation context is a close, but not perfect, comparison. There may be greater separation-of-powers concerns about legislative interference with courts' interpretation of statutes than about legislative interference with contract interpretation; some may view statutory (as opposed to contract) interpretation as more central to the judicial function.[266] But, again, we have a line-drawing problem here: federal courts already have accepted some legislative interpretive guidance, ranging from

262. Indeed, others have noted the comparison between statutory and contract interpretation in service of different arguments. *See, e.g.*, Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2033 (2002) (applying the idea of contractual default rules to statutory interpretation); Elhauge, *supra* note 66 (same); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992); Ross & Tranen, *supra* note 256, at 221.

263. *Norfolk*, 543 U.S. at 28.

264. U.C.C. § 2-202.

265. U.C.C. art. 1.

266. Alternatively, whereas the U.C.C. governs private parties—contracting parties who had nothing to do with the U.C.C.'s drafting—legislated rules are enacted by legislatures to apply to their own legislative work product (statutes). As such, legislative power might be viewed as even more robust in the latter situation. *Cf.* John F. Manning, *Putting Legislative History to a Vote: A Response to Professor Siegel*, 53 VAND. L. REV. 1529, 1533-41 (2000) (arguing that a federal legislated rule authorizing legislative-history reliance would be an unconstitutional self-delegation but implying that other types of federal legislated rules of interpretation would be permissible).

definitional statutes to the Civil Rights Act of 1991's specification of which legislative history courts are permitted to consult in construing parts of it.[267]

The choice-of-methodology principles governing the interpretation of wills and trusts are almost identical to the law governing contract interpretation, so it suffices to note that it is well settled that, under *Erie*, state interpretive rules likewise govern federal-court construction of wills and trusts executed under state law[268] and that, like contract interpretation principles, many of the principles governing will and trust interpretation look very similar to the canons of statutory interpretation.[269] What's more, there is a clearly established

267. For examples of courts following the congressional directive that the interpretive memorandum of the Civil Rights Act of 1991 shall be its exclusive legislative history for purposes of construing the Act to apply to business necessity, Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(b), 105 Stat. 1071, 1075 (codified at 42 U.S.C. §1981 note (2006)), see *Graoch Associates # 33 v. Louisville/Jefferson County Metro Human Relations Commission*, 508 F.3d 366, 387 (6th Cir. 2007); and *El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232, 241 (3d Cir. 2007). For examples of courts following the federal Dictionary Act, see *Isaacson v. Dow Chemical Co.*, 517 F.3d 129, 135-36 (2d Cir. 2008) (applying the Act's definition of "person" to include a "corporation"); *United States v. Polizzi*, 500 F.2d 856, 907 (9th Cir. 1974) (same); and *In re Application of Foster*, 343 F.2d 980, 988 & n.9 (C.C.P.A. 1965) (applying the Act's rule that singular includes plural). For cases applying RICO's instruction that it be "liberally construed," see, for example, *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98 (1985); *Odom v. Microsoft Corp.*, 486 F.3d 541, 547 (9th Cir. 2007); and *United States v. McKinney* (*In re Assets of Billman*), 915 F.2d 916, 921 (4th Cir. 1990). *See also* 1 U.S.C. §§ 1-8 (2006) (defining how terms in federal statutes are to be interpreted); 21 U.S.C. § 854(d) (2006) (directing that a penalty on the investment of illicit drug profits "be liberally construed to effectuate its remedial purposes"); Civil Rights Act of 1991, § 105(b) ("No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S15276 . . . shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/alternative business practice."). RICO's statement of findings, enacted in the Public Law and codified as a note to the statute, has the same direction. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (codified at 18 U.S.C. § 1961 note (2006)).

268. *See, e.g.*, Patterson v. United States, 181 F.3d 927, 929 (8th Cir. 1999); Estate of Heim v. Comm'r, 914 F.2d 1322, 1325 (9th Cir. 1990); Wisely v. United States, 893 F.2d 660, 665 (4th Cir. 1990); Estate of Salter v. Comm'r, 545 F.2d 494, 497 (5th Cir. 1977); Teller v. Kaufman, 426 F.2d 128, 131 (8th Cir. 1970); Waterhouse v. Hoover, 203 F.2d 171, 173 (6th Cir. 1953) (per curiam); De Korwin v. First Nat'l Bank of Chi., 179 F.2d 347, 349 (7th Cir. 1949).

269. *See, e.g.*, *Heim*, 914 F.2d at 1325 ("Under California law, . . . [i]f extrinsic evidence renders the language of the will susceptible to two or more meanings, the will is said to be ambiguous . . . ."); Old Kent Bank & Trust Co. v. United States, 362 F.2d 444, 452 (6th Cir. 1966) ("[T]he term on repetition will be accorded the same construction throughout the will."); Strite v. McGinnes, 330 F.2d 234, 239 (3d Cir. 1964) ("In Pennsylvania . . . [the] intention is to be discovered from a consideration of all the language in the four corners of the instrument . . . or where legal or technical words are used and it is clear from their use

"federal common law of trust interpretation" that state and federal courts alike apply to federal law (most commonly, ERISA).[270]

2. *Analogies to Other Ex Ante-Defined Reasoning Processes: Choice of Law, Stare Decisis, and Constitutional Law Frameworks*

Another kind of comparison can be made between statutory interpretation and legal regimes that set forth a reasoning process, even if not always text-related. This comparison, moreover, is clearly visible in the public-law context, as well as the private-law context, and applies both transsubstantively and intrasubstantively. In areas ranging from choice of law to stare decisis to constitutional law, the courts have recognized the importance of following the home jurisdiction's decisionmaking processes. Presumably, underlying those conclusions is the idea not only that decisionmaking rules can be outcome-determinative—and therefore that not following them would undermine *Erie*'s goal of intrastate decisional uniformity—but also that they often reflect some kind of substantive policy judgment on the part of a state.[271]

Two familiar areas of transsubstantive, nontextual reasoning regimes are choice-of-law rules and stare decisis. *Erie* already applies to both. The analogy between choice-of-law rules and statutory interpretation was described in Subsection II.B.1—and recall that the Court in *Klaxon* long ago brought choice of law under *Erie*'s umbrella.[272] (What's more, the *Erie* decision itself, together with its progeny, sets out its own transsubstantive decisionmaking regime for choice of law.) With respect to stare decisis, the *Erie* question arises in the context of Louisiana's civil-law system. As the nation's only civil code state, Louisiana does not use stare decisis but rather employs the statute-based civil-

that the legal or technical meaning was intended."); *see also* Estate of Cavenaugh v. Comm'r, 51 F.3d 597, 601 (5th Cir. 1995) ("Texas presumes that a testator would not include useless expressions in her will."); *In re* Estate of Damon, 869 P.2d 1339, 1343 (Haw. 1994) ("[W]e are guided by principles relating to the interpretation of trusts as well as those relating to the interpretation of wills . . . . 'Each word, phrase, clause and sentence of the paragraph should be considered in relation to each other and the paragraph itself construed as a part of the will as a whole.'" (quoting Queen's Hosp. v. Hite, 38 Haw. 494, 505 (1950))).

270. *See* Monaghan, *supra* note 41, at 760 ("[F]ar more federal common law exists than the currently restrictive theories can account for; ERISA, for example, is soaked in a background federal common law of trusts."); *see also* Alex M. Johnson, Jr. & Ross D. Taylor, *Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contracts and Dynamic Interpretation to Cy Pres and America's Cup Litigation*, 74 IOWA L. REV. 545 (1989) (comparing charitable trust interpretation and dynamic statutory interpretation).

271. *See* WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 302 (3d ed. 2002).

272. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

law methodology. The Fifth Circuit has held that *Erie* compels federal courts to use Louisiana's unique approach to precedent in diversity cases involving Louisiana law.[273] This holding has been noted by a variety of commentators and does not appear ever to have been contested.[274]

Constitutional law provides perhaps the most important example of ex ante reasoning rules already subject to *Erie* and the Supremacy Clause, one that presents both transsubstantive and subject-specific manifestations. As a matter of transsubstantive decisionmaking, for instance, a number of state supreme courts have set forth controlling interpretive regimes dictating when courts should construe state constitutional provisions coextensively with analogous federal constitutional provisions and when courts should instead diverge and construe state constitutional provisions differently. Most federal circuits are aware of these regimes (often called "lockstep" or "criteria" approaches) and apply them when called upon to construe state constitutional provisions.[275]

Similarly, on the reverse side, state courts are well aware of the context-specific interpretive frameworks that the U.S. Supreme Court uses to interpret the Federal Constitution. When state courts adjudicate federal constitutional claims, they view themselves as bound under the Supremacy Clause to apply

273. Gen. Elec. Capital Corp. v. Se. Health Care, Inc. 950 F.2d 944, 950 (5th Cir. 1991); *see also* Dorf, *supra* note 2, at 713 (noting the same example); *cf.* John Burritt McArthur, *Good Intentions Gone Bad: The Special No-Deference* Erie *Rule for Louisiana State Court Decisions*, 66 LA. L. REV. 313 (2006) (criticizing the effects of federal court application of Louisiana's civilian methodology under *Erie* on the ground that it gives federal courts freedom to approach Louisiana legal questions de novo instead of deferring to Louisiana courts).

274. In the reverse context, it is not clear that Louisiana explicitly views stare decisis as binding under the Supremacy Clause when it interprets federal statutes, but the principle seems to apply. *See* Coutee v. Global Marine Drilling Co., 924 So. 2d 112, 117 (La. 2006) ("Generally, state courts exercising concurrent maritime jurisdiction are bound to apply substantive federal maritime statutory law and to follow United States Supreme Court maritime jurisprudence."). The legal status of stare decisis in federal courts also remains in dispute, as academics continue to debate whether it is federal common law or constitutionally required. *See supra* note 250.

275. *See, e.g.*, Gen. Auto Serv. Station v. City of Chi., 526 F.3d 991, 997 n.6 (7th Cir. 2008) (recognizing that "Illinois courts apply a limited version of the lockstep doctrine" and using it to resolve state constitutional claims); Esplanade Props., LLC v. City of Seattle, 307 F.3d 978, 983 (9th Cir. 2002) (applying "Washington law, [under which] courts consider six factors in determining the propriety of independent examination of a constitutional claim under the Washington Constitution"); Mixon v. Ohio, 193 F.3d 389, 402 n.11 (6th Cir. 1999) (noting that the Ohio Supreme Court construes the Ohio Constitution's equal protection clause identically to the Fourteenth Amendment); Marsden v. Moore, 847 F.2d 1536, 1544-45 (11th Cir. 1988) ("In relatively recent cases, the Alabama Supreme Court has indicated that article I, § 6 provides the same degree of protection as the Fifth Amendment."); Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499 (2005).

those federal constitutional decision rules, including the tiers of scrutiny used in equal protection claims; the dormant Commerce Clause test; and the various First Amendment interpretive regimes that control commercial speech claims, public forum doctrine, Establishment Clause claims, etc.[276]

The relevance of the comparison between statutory interpretation methodology and the decisionmaking frameworks that apply to specific parts of the Constitution was explored in Part I. Two points are worth briefly highlighting again here. First, one does not need to accept the idea that courts would or should confine themselves to a single overarching interpretive methodology for all statutory or constitutional questions, or to an especially formalistic methodology, to accept the idea that courts can and do adopt different methodological decision rules (each with different amounts of leeway) for various areas of constitutional law. Second, none of these constitutional decision rules seems "universal" in the way that most statutory interpretation principles do. And no one claims that these are mere rules of thumb. Rather, these other metaprinciples are viewed positivistically—as tied to a particular sovereign and related to specific areas of that sovereign's law.

3. *Analogies to Burden-Allocation Principles*

As a final analogy, many statutory interpretation principles are similar to commonly employed burden-allocation devices, although statutory interpretation is not typically described in this manner. The rule of lenity, for instance, requires courts to construe ambiguous statutes in favor of criminal defendants and so effectively creates a presumption in favor of the defendant,

276. *See, e.g.*, Ark. Tobacco Control Bd. v. Santa Fe Natural Tobacco Co., 199 S.W.3d 656, 660 (Ark. 2004) ("The United States Supreme Court has adopted a two-part test in analyzing state regulations under the dormant Commerce Clause."); Lehman Bros. Bank, FSB v. State Bank Comm'r, 937 A.2d 95, 107-08 (Del. 2007) ("To determine a statute's constitutionality under the Dormant Commerce Clause, the United States Supreme Court has consistently applied the *Complete Auto Transit, Inc. v. Brady* test." (footnote omitted)); Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust, 206 P.3d 481, 495 (Idaho 2009) ("In order to withstand intermediate scrutiny, gender classifications must serve 'important governmental objectives' and the 'discriminatory means employed [must be] substantially related to the achievement of those objectives.'" (alteration in original) (quoting United States v. Virginia, 518 U.S. 515, 533 (1996))); *In re* Warner, 21 So. 3d 218, 246 (La. 2009) ("Except for a few well-defined exceptions, . . . a content-based regulation will survive a constitutional challenge only if it passes the well-established two-part strict scrutiny test."); State v. Bussmann, 741 N.W.2d 79, 94 (Minn. 2007) ("[T]he official acts of state judicial officers must satisfy the three Establishment Clause requirements articulated by the Supreme Court in *Lemon v. Kurtzman* . . . ."); Turner v. Roman Catholic Diocese, 987 A.2d 960, 973-74 (Vt. 2009) (applying the three-pronged *Lemon* test).

shifting the burden to the government to prove the statute should not be so construed. Clear statement rules, such as the rule that statutes will not be construed to abrogate state powers absent a clear statutory statement, do much the same thing. These burden-shifting canons of statutory interpretation can be both specific to particular subject areas (for example, lenity for criminal statutes) and transsubstantive (for example, the canon against implied repeals, which requires a clear statement for any later statute to repeal part of any earlier statute).

But the Court's precedent is clear that state burden-allocation doctrines, unlike the rules of statutory interpretation, apply in diversity cases.[277] So, too, the "question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity . . . cases must apply."[278] And most federal courts reach similar conclusions with respect to burden-allocation schemes in discrimination cases.[279]

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277. Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208, 212 (1939) (reversing a lower court holding that the "question of how and by whom the facts shall be shown to the court" was "not within the decision in *Erie*" (internal quotation marks omitted)); John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 714 (1974) ("[S]tate rules controlling things such as burden of proof, presumptions, and sufficiency of evidence should be followed when they differ from the federal court's usual practice . . . .").

278. Palmer v. Hoffman, 318 U.S. 109, 117 (1943) (citation omitted).

279. Most circuits have held that state, not federal, burden-shifting standards apply in state-law discrimination cases. The Seventh Circuit disagrees and applies the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)—crafted by the U.S. Supreme Court for employment discrimination claims brought under Title VII of the Civil Rights Act of 1964—in state-law retaliatory discharge cases, a particularly odd result considering that some states in the Seventh Circuit, including Illinois, have explicitly rejected the *McDonnell Douglas* framework for state-law claims. *See* Bourbon v. Kmart Corp., 223 F.3d 469, 473 (7th Cir. 2000); Melissa Kotun, Note, *Applying the* Erie *Doctrine and the* McDonnell Douglas *Burden-Shifting Analysis when a Conflict with State Law Arises Through a Retaliatory Discharge Claim*, 35 GA. L. REV. 1251 (2001); Matthew M. Petersen, Note, *The* Erie *Doctrine and* McDonnell Douglas *Framework: Much Ado About Nothing or an Issue Worth Analyzing?*, 53 ST. LOUIS U. L.J. 927 (2009).

Some evidentiary rules are also analogous to statutory interpretation rules, but the analogy is not as direct because the Federal Rules of Evidence, unlike federal statutory interpretive principles, are enacted by Congress and so do not pose the "typical . . . unguided *Erie* choice." Hanna v. Plumer, 380 U.S. 460, 471 (1965). Nevertheless, it is interesting to note that even though the Federal Rules of Evidence are viewed as mostly procedural and so generally are applied in diversity, there are some state admissibility rules that are so intertwined with state substantive law that they are viewed as substantive. *See, e.g.*, Wray v. Gregory, 61 F.3d 1414, 1418 (9th Cir. 1995) (holding that the admissibility of medical malpractice screen panel findings is substantive); Hottle v. Beech Aircraft Corp., 47 F.3d 106, 110 (4th Cir. 1995) (holding that the admissibility of internal company procedures and rules to be substantive); *see also* Alex Stein, *Constitutional Evidence Law*, 61 VAND. L. REV. 65,

An important argument in favor of the application of *Erie* in these other burden-allocation contexts is that many of these "presumptions and allocations . . . include[] substantive preferences."[280] This argument also resonates for statutory interpretation. In particular, the substantive canons of statutory construction function as policy-infused presumptions, in addition to burden-allocation devices. The presumption against preemption, for example, entails a substantive preference for state law as the default rule. Similarly, the canon that ambiguous bankruptcy statutes are to be construed in favor of the debtor entails a substantive judgment that favors a fresh start for the debtor over the expectations of creditors seeking payment.[281] Virtually all of the substantive canons can be described in this manner. And they are used, just as are burdens of proof, presumptions, and allocation devices, "as handicaps . . . against the disfavored contention."[282]

B. Applying the Erie *Considerations to Statutory Interpretation*

Let us now directly apply the various *Erie* considerations to statutory interpretation. This Section first considers the arguments used to justify the *Erie* rule for contract cases, in order to make the most direct comparison to that context. The discussion then moves to the more general considerations that the Supreme Court has held to govern the *Erie* inquiry in the absence of a federal rule or statute: forum shopping, uniformity and fairness, federal interests, and outcome-determinacy.[283]

1. The Contracts Argument: Statutory Interpretation and Primary Conduct

The main argument advanced in the contract cases is that the rules of contract interpretation have an "'effect on the conduct of contracting parties outside the courtroom, even though the rules operate through limiting the

98 (2008) (noting that *Erie*'s "outcome-determinative category includes all decisional rules that fix the standards and allocate the burdens of proof" and that "[e]videntiary privileges that suppress probative evidence on confidentiality and privacy grounds fall into the same substantive category").

280. Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 721 (1975).

281. *See* Marrama v. Citizens Bank of Mass., 549 U.S. 365, 373 (2007).

282. Fleming James, Jr., *Burdens of Proof*, 47 VA. L. REV. 51, 61 (1961).

283. *See* HART & WECHSLER, *supra* note 18, at 590 (summarizing commentary on the role of federal and state interests in *Erie* analysis, in addition to the focus on outcome-determinacy, equal treatment of litigants, and forum shopping emphasized in *Hanna*).

kinds of evidence that are admissible.'"[284] This line of argument evokes the distinction between so-called substantive rules, which, as put by Justice Harlan (and later John Hart Ely), affect conduct at the stage of "primary private activity,"[285] and procedural rules, which relate to "the fairness or efficiency of the litigation process."[286]

So do the rules of statutory interpretation affect "primary private activity"? One difference from contract interpretation is immediately apparent: whereas a contract's signatories are typically the litigating parties, a statute's drafters (the legislators) almost always differ from the litigants. The question, then, is whether statutory interpretation rules nevertheless affect the private parties—the individuals, corporations, and governments—that must conduct their daily lives under statutes. Most practicing lawyers likely would argue that these rules do affect at least some such primary private conduct. Just as contracting parties, before acting, seek legal advice concerning whether proposed behavior is consistent with their contractual obligations, other parties seek legal advice on countless statutory questions. Is a certain expense tax-deductible under a state tax code? Is a type of employer behavior "retaliation" under a state discrimination statute? Is someone a "qualified individual" under a health insurance statute? These questions will be hardest to answer when the statutes are ambiguous, and so good lawyers, to advise their clients, will think about how courts will interpret those statutes (and how parties will take advantage of doctrinal uncertainties if there are two possible routes of interpretation). Similarly, most commentators agree that clear interpretive rules make evident 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."[287]

There is arguably another class of actors, absent from the "primary private conduct" formulation, whose conduct is affected by rules of statutory

284. *Bourbon*, 223 F.3d at 475 (Posner, J., concurring) (quoting AM Int'l, Inc. v. Graphic Mgmt. Assoc., 44 F.3d 572, 576 (7th Cir. 1995)).

285. Hanna v. Plumer, 380 U.S. 460, 475 (1964) (Harlan, J., concurring) ("[T]he proper line of approach in determining whether to apply a state or a federal rule, whether 'substantive' or 'procedural,' is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation."); *see* Ely, *supra* note 277, at 725.

286. Ely, *supra* note 277, at 725; *see also id.* at 722.

287. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66-67 (1994); *see also, e.g.*, EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 235 (2008) (arguing that a lack of clear interpretive rules "increases legal uncertainty and the costs of ascertaining what the law says").

interpretation—namely, legislators. Anecdotal evidence from Oregon, where the state supreme court already has imposed a controlling statutory interpretation methodology, suggests that the legislature now drafts statutes with those interpretive rules in mind.[288] Nevertheless, this notion—that rules of interpretation affect legislative drafting practice—is an empirical question about which we do not yet have sufficient information. On the federal side, for instance, one study a decade ago suggested that congressional drafters pay little attention to the rules of interpretation.[289] But it seems hard to imagine that congressional lawyers have not by now internalized at least some statutory interpretation rules in their drafting—particularly some of the high-visibility clear statement rules crafted by the Court—and even a casual perusal of some recent Congressional Research Service (CRS) reports reveals that CRS takes the Court's statutory interpretation seriously in analyzing statutory law.[290]

2. *Statutory Interpretation Methodologies as Rules of Decision*

As explained in Part I, the Supreme Court has outlined a number of factors for courts to consider in deciding whether state law provides a "rule of decision" for *Erie* purposes, including whether the application of the state rule would be outcome-determinative, discourage forum shopping, or avoid inequitable administration of the laws. The cases in Parts II and III amply illustrate how methodological choice implicates these factors. When federal and state courts use different canons to resolve the same legal questions, we see almost explicit encouragement of forum shopping, and we also see outcome-determinacy—both caused by the fact that litigants' cases are adjudicated under different principles depending on the court in which they appear. This

288. E-mail from Jack L. Landau, Judge, Oregon Court of Appeals, to author (Jan. 5, 2010, 1:55 PM) (on file with author).

289. 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). *But cf.* McNollgast, *supra* note 262, at 715 (applying contract theory to legislative bargains and arguing that "[i]nterpretive principles . . . are an integral part of the coalitional agreement about a statute").

290. *See, e.g.*, YULE KIM, CONG. RESEARCH SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS (Aug. 31, 2008); Congressional Distribution Memorandum from Jennifer A. Staman, Todd B. Tatelman & Ida Brudnick, Cong. Research Serv., Analysis of § 1312(d)(3)(D) of Pub. L. No. 111-148, The Patient Protection and Affordable Care Act, and Its Potential Impact on Members of Congress and Congressional Staff 1-4 (Apr. 2, 2010). Moreover, this is something of a chicken-and-egg problem: those who argue against regularizing the rules of interpretation argue that Congress does not follow them, but perhaps Congress does not follow them because the courts do not treat them as law.

Subsection will not further belabor these points except to anticipate one objection to the outcome-determinacy argument and to emphasize the connection between at least some rules of statutory interpretation and the substantive laws that they implement, a connection highlighted by the Court in *Byrd* as particularly relevant to the question of whether a state principle is a "rule of decision" for *Erie* purposes.[291]

Outcome-determinacy is controversial in statutory interpretation. There are some who believe that judges use statutory interpretation methodology as cover to effectuate their own personal preferences and that it has no constraining effect whatsoever. And it may be true that interpretive methodology is manipulated more often in statutory cases than in, say, contract cases, for the simple reason that statutory cases (like constitutional cases) are often more politicized. But this does not mean, as I have detailed elsewhere, that methodological principles do not confine judges' decisionmaking in at least some portion of cases, particularly outside the "hard cases" world of the U.S. Supreme Court.[292] Indeed, many lower-court judges contend that the "attitudinal" model of adjudication significantly understates the constraining effect of jurisprudential regimes and legal doctrine in most cases.[293]

Moreover, even those who dispute that statutory interpretation methodology drives case results are not likely to dispute that it importantly affects judicial opinion-writing.[294] This is because the reasoning employed in judicial opinions, often as much as the holding, establishes the governing legal norms. (And in at least some cases, if reasoning does not dictate outcomes, it may rule some outcomes out.) For example, it says something very different about the relationship between federal and state courts when a federal court does not construe a state statute narrowly to avoid a constitutional question because it says that it cannot, from when the federal court reaches the same

291. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 536 (1958) (listing as a relevant consideration in *Erie* cases whether the state-law rule was "intended to be bound up with the definition of the rights and obligations of the parties").

292. Gluck, *supra* note 3, at 1819-22, 1852-54; *see* Adrian Vermeule, *The Judiciary Is a They Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 557-58 (2005) (implying that the disproportionate number of "hard" cases before the Court may lead it to view interpretive rules as less outcome-determinative and thus underestimate the costs of uncertainty and disuniformity).

293. *See* Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt To Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1908 (2009); Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235 (1999) (disputing a study asserting correlations between judges' personal preferences and decision outcomes).

294. I have made this point at greater length elsewhere. *See* Gluck, *supra* note 3, at 1768, 1855.

result on the ground that it is acting in the same way as a state court would and on equal footing with that state court. Likewise, and more generally, it will be a very different opinion that aims to interpret a statute in a manner consistent with the intention of the enacting legislature from one that aims to interpret a statute using a cost-benefit analysis. In this important sense, the choice of statutory interpretation methodology goes directly to the idea (expressed by the Court in *Hanna*) that *Erie* is not only about the choice of regimes that affect the "result" of litigation but also about the choice of regimes that affect its "character."[295]

At a more specific level, a number of interpretive rules are "bound up with" the substantive law that they implement.[296] As discussed above, for example, the many subject-specific canons of interpretation embody clear policy choices. As just a few additional examples of such canons, we have those that protect Native American rights,[297] that tilt the scales against taxpayers claiming deductions,[298] that emphasize the importance of federalism and state government functions,[299] and that elevate the principle of notice before a purported criminal can be convicted.[300] This list of these so-called substantive canons goes on and on, and there is a reason that Justice Scalia calls them "dice-loading rules."[301]

Finally, in the minds of many, one's choice of statutory interpretation methodology is intimately related to one's vision of the constitutional role of judges and their relationship to the legislative branch.[302] Countless pages of academic articles and judicial opinions devoted to debating statutory interpretation rules on those constitutional and structural grounds attest to the importance of that aspect of methodological choice. This deep discourse, together with the other factors already discussed, indicates that, at least some

295. Hanna v. Plumer, 380 U.S. 460, 467 (1965) ("The *Erie* rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court.").

296. *Byrd*, 356 U.S. at 536.

297. *See* Hagen v. Utah, 510 U.S. 399 (1994).

298. *See* INDOPCO, Inc. v. Comm'r, 503 U.S. 79 (1992).

299. *See* Gregory v. Ashcroft, 501 U.S. 452, 461-64 (1991).

300. *See* McBoyle v. United States, 283 U.S. 25 (1931).

301. Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 28 (Amy Gutmann ed., 1997); *see* ESKRIDGE ET AL., *supra* note 55, app. B at 29-41 (listing approximately a hundred substantive policy canons).

302. *See, e.g.*, Mashaw, *supra* note 34, at 1686 ("Any theory of statutory interpretation is at base a theory about constitutional law.").

of the time, choices of interpretive methodology are much more substantive than decisions that relate only to litigation management or court-organizing "housekeeping" principles (principles that usually do not implicate *Erie*'s twin aims).[303] This does not mean that all of the canons are equally substantive, but if we can say that even some are, then we need to grapple with *Erie*.[304]

3. *Statutory Interpretation, Federal Interests, and Federal Judges*

The Court's modern *Erie* jurisprudence sometimes asks an additional question: whether there are strong federal interests that could be undermined by application of the state rule.[305] In the context of methodological choice for state statutes, however, it is difficult to discern a federal interest that could override the *Erie* rule absent an argument that a federal court's statutory interpretation methodology is constitutionally derived or compelled. Although there may be an interest in federal-court decisionmaking uniformity—that is, the idea that federal courts should apply the same interpretive principles in all cases, state or federal—there is a stronger federal interest (expressed in *Erie* as rising to the level of a constitutional interest[306]) in the uniform treatment of litigants in state and federal courts.

Of course, as Part II elaborated, *Erie* is not absolute. There may be cases in which specific federal-law norms trump the *Erie* rule and so preempt state methodology (for example, the hypothetical state supreme court's "racist canon" of interpretation). There may also be cases in which courts should not apply *Erie* to the full extremity of its logic. For example, Michael Dorf points out that a federal court's *Erie* goal of "predicting" state law might include assessing the ideologies of individual state supreme court justices.[307] Most people, however, would not go so far as to argue that federal courts should review state judicial campaign literature in determining how to interpret state

303. Hanna v. Plumer, 380 U.S. 460, 473 (1964) ("*Erie* and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules.").

304. One possible implication of this observation is that *Erie* might counsel the application of only certain such rules. In the evidence context, for example, some evidentiary principles are viewed as substantive for *Erie* purposes, while others are viewed as procedural. *See supra* note 279. Distinguishing among the statutory interpretation canons in this vein would be complex and requires separate treatment.

305. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 432 (1996); *supra* note 283 and accompanying text (summarizing the doctrine).

306. Erie R.R. v. Tompkins, 304 U.S. 64, 75, 77-78 (1938).

307. Dorf, *supra* note 2, at 681-82.

statutes. Doing so would undermine the legitimacy and objectivity of judicial decisionmaking, and the federal interest in those norms arguably would draw a line at that point.[308]

But putting aside those kinds of rarefied exceptions, the more fundamental question is whether there is a constitutional argument that somehow federalizes all federal-court statutory interpretation efforts. In other words, is statutory interpretation methodology somehow rooted in the character of the Article III judge, or inherent in the constitutional relationship between Congress and the federal courts, such that Article III judges cannot shed their interpretive methodology even when they interpret nonfederal law? Arguments in this vein have some attraction but quickly raise questions. For example, even if we believe that interpretive principles for federal statutes are not federal common law but rather derive from and are inherent in the federal judicial power, such that Congress could not enact Federal Rules of Statutory Interpretation—and note that this is not the majority view—does such an argument really have traction when federal courts are interpreting state statutes? Federal separation-of-powers principles should be irrelevant in that context if the federal courts conceive of their task (as virtually all apparently do) as approximating or predicting how the state courts would decide. Instead, state separation-of-powers principles, many of which encourage a more interactive relationship among the branches,[309] should control.[310]

Similarly, even to the extent that one believes that a particular federal statutory interpretation methodology is constitutionally compelled—as some federal textualist judges do believe—those constitutional arguments should be inapplicable once we are out of the federal statutory context. Textualism's constitutional arguments, for example, are grounded not in the Article III judicial power, but rather in the part of the Constitution that concerns legislative authority; namely, Article I, Section 7 of the Constitution and the resulting idea that the only "law" that exists is law that goes through the process of bicameralism and presentment. Some textualists also ground their disapproval of legislative history in Article I's nondelegation doctrine. Neither

308. *Id.* at 681 ("The concept of justice as impersonal occupies a central place in American law.").

309. *See* Gluck, *supra* note 3, at 1813 & n. 236.

310. *But see* Lawson, *supra* note 250, at 210-11 ("The judicial power of course includes the power to reason to the outcome of a case. . . . [S]o a grant of the judicial power must include a grant of the power to reason from facts and law to conclusions."). Although arguments of this nature would seem to prohibit *congressional* overrides of judicially determined statutory interpretation methodology, it is not clear that they necessarily affect *Erie*'s *judge*-made rule and its implications for the application of state interpretive methodology.

of those federal constitutional provisions, however, has any play in the state-law context.

Moreover, no one seems to be arguing that federal courts should apply their own federal constitutional interpretation principles to state constitutions. The reason for this difference likely is not that statutory interpretation is more inextricable from the federal judicial role than is constitutional interpretation, or that statutory interpretation principles are necessarily more universal, but rather that at least some specific constitutional decisionmaking principles have been more clearly defined by the courts.

C. A General Common Law of Statutory Interpretation?

Might it be possible, despite the foregoing, to argue that the rules of interpretation are general law? Under this view, federal courts that apply both federal and state methodological principles to state statutes—or that do not pay much mind to which they are applying—are simply recognizing this universality. Similarly, under such a view, no need would exist to develop a federal common law of statutory interpretation to guide state and lower federal courts in the federal-statutory, reverse-*Erie* context.

It is true that the historical pedigree of statutory interpretation methodology has a universal, even ancient, feel. Bill Eskridge has argued, for example, that "[t]he strongest hypothesis" as to the Founding period

> is that the delegates both assumed and accepted the traditional rules and canons of statutory interpretation and did not see the "judicial Power" to interpret statutes as deviating from the general methodology laid out in the traditional cases and treatises that were considered authoritative by the state judiciaries and that would have been known by most of the thirty-four delegates who had legal training. . . . Most . . . would have been familiar with Coke's *Institutes*, Bacon's *Abridgment* and its list of interpretive canons, Blackstone's *Commentaries* . . . [and] the mischief rule of *Heydon's Case* . . . .[311]

For this same reason—the historical conceptualization of statutory interpretation methodology as universal—it is likely that questions of the order

311. William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1036-37 (2001).

posed in this Article never entered the minds of the Founders or of the Justices who decided *Erie*.[312]

But conceptualizations can change. As noted at the outset of this Article, there is an interesting jurisprudential link between this Founding-era concept of widely understood and seemingly universal statutory interpretation principles and the pre-*Erie* conception of general universal common law, most famously espoused in *Swift v. Tyson*.[313] In *Erie*, the idea of positivism—and the possibility of distinctive laws for different jurisdictions—overtook the *Swift* principle. I would argue that a similar time has now come for statutory interpretation.[314]

Modern theory has turned statutory interpretation doctrine into something much more specific than it once was. The focus of jurists like Justice Scalia and Judges Posner and Easterbrook and academics like Eskridge and Frickey (building, of course, on earlier work, including Hart and Sacks's legal process materials and Sutherland's famed treatise on statutory interpretation[315]) has transformed statutory interpretation into a field of its own. There is now a discourse about statutory interpretation that is self-conscious, internally whole, and mostly divorced from the particulars of individual subject-matter areas. These developments, in turn, have created a generation of judges, academics, and lawyers who likewise speak about the methodology of interpretation as a topic unto itself. Indeed, *Erie* may have had something to do with this phenomenon, in that it trained the profession's focus on judge-made legal principles.

What's more, the canons of interpretation as understood by the Founders or even the *Erie* Court have not been frozen in time. The Supreme Court continues, even in the post-*Erie* universe, to generate new interpretive rules—for example, the federalism canon created out of whole cloth in *Gregory v. Ashcroft* in 1991,[316] or the presumption against preemption, first articulated in

312. *Cf.* Green, *supra* note 40, at 629 ("[W]hatever one thinks was wrong with *Swift* or right with *Erie*, it had nothing to do with general canons for interpreting federal statutes.").

313. 41 U.S. (16 Pet.) 1, 12 (1842).

314. Jonathan Molot has made an interesting and related argument about the move from purposivism to textualism as related to the move from *Swift* to *Erie*, *see* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 24-26 (2006), but my argument here does not depend on textualism's ascendance.

315. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION (1st ed. 1891).

316. 501 U.S. 452, 464 (1991).

1947.[317] Indeed, most scholars agree that the Court's entire approach to statutory interpretation has changed dramatically over the past thirty years, with textual analysis now predominating over purposivist interpretation.[318] The very existence of all of these changes—the fact that the law of statutory interpretation looks different today from how it looked even thirty years ago—furthers the idea of a more concrete conception of it than perhaps once prevailed.

Other factors are likely in play as well, complicating the ultimate resolution of the question of statutory interpretation methodology's legal status. The U.S. Supreme Court remains profoundly divided over what the proper judicial role in this context should be, and that surely is one factor that has prevented the Court from settling on an approach. Even apart from this divide, the Justices' own experience with judging, or with federal statutes, may be influencing their desire to retain more interpretive flexibility.

But the time has come. The modern jurisprudential and scholarly work has had a real impact. Today, we do have some state courts treating methodology differently from how federal courts treat it. And we do see state and federal judges labeling themselves as one or another type of statutory interpreter—be they textualists, purposivists, eclecticists, intentionalists, or pragmatists. Even the U.S. Supreme Court has articulated special rules of statutory interpretation in a few limited areas, including for the FELA and ERISA statutes; for implying private rights of action in federal statutes;[319] and, perhaps most

317. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see also* Richard A. Epstein, *What Tort Theory Tells Us About Federal Preemption: The Tragic Saga of* Wyeth v. Levine, 65 N.Y.U. ANN. SURV. AM. L. 485, 487 (2010) (stating that *Rice* "established a presumption against preemption").

318. *See* 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); Molot, *supra* note 314, at 3.

319. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275 (2001) (describing the criteria for implying a private right of action); Consol. R.R. v. Gottshall, 512 U.S. 532, 541-42 (1994) (defining the FELA interpretation test); Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-44 (1984) (defining the agency deference test); McBride v. CSX Transp., Inc., 598 F.3d 388, 397-98 (7th Cir. 2010) (applying *Gottshall* for FELA interpretation); Overby v. Nat'l Ass'n of Letter Carriers, 595 F.3d 1290, 1295 (D.C. Cir. 2010) (quoting the Supreme Court for the principle that "ERISA . . . follows standard trust law principles" (citation omitted)); Buce v. Allianz Life Ins. Co., 247 F.3d 1133, 1142 (11th Cir. 2001) ("[T]he District Court ruled—correctly—that when a federal court construes an ERISA-regulated benefits plan, the federal common law of ERISA supersedes state law."); Aswad v. Norfolk S. R.R., No. 04-2536, 2006 WL 1063297, at *8 (Va. Cir. Ct. Apr. 18, 2006) (holding that the court need not follow lower federal court interpretations of FELA but that it was bound to follow the U.S. Supreme Court's articulated interpretive principles for FELA).

significantly, for agency statutory interpretation (the *Chevron* regime),[320] all of which lower courts hold that they are bound to follow.

In short, there is enough differentiation—or at least sufficient possibility for differentiation—among interpreters today that these principles no longer should be conceived as universal. To be sure, there are rules that both state and federal systems will apply.[321] But when these rules are applied, it should be because, as *Erie* holds, a sovereign's court chooses to apply them, not because they are ready to be plucked from the sky.

V. INTERSYSTEMIC STATUTORY INTERPRETATION

By now, it should be evident that an intersystemic perspective captures the reality of how statutory interpretation is actually done in American courts far better than the federal-court-only (and really Supreme Court-only) model that dominates the literature and is the basis of most theory. And it has shown us some significant gaps in our theory and practice of statutory interpretation. As this Article has argued, the normative and doctrinal underpinnings of *Erie*, together with the way in which courts already treat analogous methodologies, point to the conclusion that federal courts should apply state statutory interpretation methodology to state statutory questions—or at least that they

320. Indeed, *Chevron* might be the most important exception to the Supreme Court's general resistance to methodological stare decisis; state courts universally state that they are bound to apply *Chevron/Mead* when they review federal agency interpretations, and the U.S. Supreme Court describes *Chevron/Mead* as a doctrinal framework that binds it and lower courts as a matter of stare decisis. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (setting out when courts should defer to agency federal statutory interpretations); *see also* United States v. Mead Corp., 533 U.S. 218, 226-27 (2001) (explaining when *Chevron* applies); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (setting forth the less deferential "power to persuade" standard); Gluck, *supra* note 3, at 1817-18 (describing *Chevron* as an example of methodological stare decisis). *But cf.* Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Test of What Motivates Judges in Agency Deference Cases*, 110 COLUM. L. REV. 1727 (2010) (noting that courts characterize *Chevron* in this way but disputing that the Justices treat it as controlling precedent in practice). At least one state court that has rejected *Chevron* for its own state law holds that *Chevron* binds state courts for federal-law purposes. *See Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 213 P.3d 1164, 1172 (Or. 2009) ("Although that sort of deference is foreign to the administrative law of this state, we are bound to apply it in our interpretation of federal statutes if the federal interpretive methodology so demands." (citation omitted)).

321. *Cf.* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503 (2006) (arguing that federal courts, in creating federal common law, still draw on "general law" as a source for those rules but that this does not mean that state and federal courts apply the same rules).

should justify the decision to proceed as inconsistently as they have.[322] Many of the same considerations challenge the continuing ambiguity of the legal status of federal statutory interpretation methodology and, in my view, urge its reconceptualization as law.

But in addition, an intersystemic perspective and the cases that this Article has discussed highlight the longstanding but under-studied relationship between American statutory interpretation and federalism. This critical relationship is continuously negotiated, as state and federal courts interpret one another's statutes on a daily basis, but its contours remain uncertain. Answering the *Erie* question, moreover, does not answer the question of what this intersystemic statutory relationship should look like. That is, even accepting the doctrinal conclusion that state methodology should be used for state statutes, there remains the distinct question of how much of one another's work state and federal courts should seek to do in the first place. These questions require separate treatment, but it is worth pausing briefly in this final Part to consider the various forms that this relationship might take and their implications for the jurisprudential questions that this Article has raised.

Our current system actually presents the option of avoiding the state-federal overlap in this context almost entirely: presumptive federal-court certification of state-law questions, as some scholars and judges favor, is a solution that acknowledges the opportunity for intersystemic statutory interpretation but strongly resists it. A more subtle form of resistance is visible in cases like the dynamic and constitutional avoidance cases discussed in Part II: in those kinds of cases, while state and federal courts accept their obligation to interpret one another's statutes, they still try to keep to their own corners as much as possible, even if that means using an interpretive approach that differs from that of the home jurisdiction.

The third option, however, is that our courts could seize this opportunity and embrace a "dialectical federalism"[323] for statutory interpretation—a conversation between state and federal courts that could shape the evolution of interpretive doctrine itself. At the moment that conversation does not exist. When federal courts overlook state methodology and apply only federal interpretive principles, they are not engaging with state practice. And even

322. An *Erie*-based rule for the choice of methodology also would likely give more state supreme courts—and perhaps even the U.S. Supreme Court—an incentive to clarify their own methodological rules for proper application by the outside world. In this manner, *Erie*'s application to statutory interpretation methodology might have the salutary effect not only of bringing coherence to current crossover court practice but also of encouraging courts to make their own, home-court statutory interpretation practices clearer and more predictable.

323. Cover & Aleinikoff, *supra* note 13, at 1048.

when they do recognize questions of state statutory interpretation, they often shy away from these questions or answer them without reflecting on whether there is anything in the state methodological developments that might be relevant for their own federal statutory work. Either way, they are not in a dialogue.

But imagine the possibilities. The Ninth Circuit might take a page from Oregon's book and apply methodological stare decisis; the Sixth Circuit might follow Michigan's lead and dramatically limit use of the substantive canons of construction. The Supreme Court's failure to resolve its own methodological debates with finality arguably licenses such lower federal-court experimentation with methodology, and such experiments might even percolate the question for the Court's own resolution, making concrete the choices available and their consequences.[324] Many state courts are actually ongoing laboratories of statutory interpretation, and the fact that state and federal courts already are engaged in a constant exchange of methodology means that there is a realistic possibility for cross-systemic pollination of interpretive theory, should the federal courts allow themselves to be receptive to it.[325]

Typically, suggestions for dialogue in law assume the value of "polyphony,"[326] and so this suggestion may seem at odds with the drive toward clarification that has animated this Article. But there is an important difference between saying that we need to be clear with respect to the rules that apply at any given time and saying that interjurisdictional learning might contribute to a better conclusion about what those consistently applied rules should be.[327] For example, taking one of the hypothetical scenarios from the preceding paragraph, if the Ninth Circuit adopted methodological stare decisis, that experiment might both clarify present Ninth Circuit doctrine and provide data for other courts considering the same move in the future. Trying out new interpretive rules does not necessarily imply messiness and, even if it did,

324. *See* Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 673-74, 678 (1981).

325. *See* Redish, *supra* note 70, at 866, 901 (arguing that "state-federal judicial dialogue places the state courts in a better position to understand the nuances of parallel federal law, thereby enabling them to enrich the development of their own state law," and that federal courts can learn from the "state courts' normative discussion of the competing policies surrounding an unresolved federal issue"); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 249, 315 (2005) (advocating "polyphonic federalism").

326. Schapiro, *supra* note 325, at 288.

327. Thanks to Adrian Vermeule for helping me clarify this point.

presumably such messiness would only be temporary if the goal is to settle on a final choice.

Even beyond using the state developments to improve their own federal practice, for a true dialogue to develop, the federal courts also should engage more directly in state statutory interpretation itself. The questions raised in all of these statutory interpretation cases, be they state or federal, are very much alike, and there is no reason to assume that federal courts are not capable of translating their already honed interpretive skills to the state-law context.[328] If anything, the federal courts are experts in this area. That expertise not only should give the federal courts confidence to apply state statutory interpretation methodology in state-law cases but it also suggests that the federal courts might have something more to contribute to the state cases.

For example, a federal-court opinion about state statutory interpretation might provide a new perspective on whether a certain state interpretive regime is unduly static or, alternatively, too flexible. Or a federal court might offer a different view of the application of interpretive principles common to both state and federal courts, such as constitutional avoidance. These federal-court interventions would perform a particularly valuable function given that most states have "unitary appeals system[s]" and so have no means to percolate new legal theories on their own.[329] And relatedly, litigants could bring state-law cases in the federal forum to try to influence and change the state methodology.

A more robust federal-court presence in state statutory interpretation also might help to harmonize differences between state and federal courts when both courts interpret federal statutes. This is because federal courts could use the state cases as additional opportunities to move state courts on questions related to the federal interpretive practices on which the state theories are based. Even Judge Guido Calabresi, a vocal advocate of certification, has argued that "having courts that are keenly aware of national law speak about

328. In fact, many state courts, in discussing their chosen interpretive methodologies, claim direct inspiration from federally focused academic scholarship and U.S. Supreme Court cases. *See* Gluck, *supra* note 3, at 1793; *see also* Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1163 (1993) ("State 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. The unique authority of each does not speak at all to the common substance of their interpretive effort."); David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 324-27 (1977) (arguing that one of the virtues of the diversity jurisdiction is the ability of federal courts to contribute to the development of state law).

329. Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CALIF. L. REV. 1409, 1445 (1999) (arguing that federal courts can help percolate questions of state constitutional law).

state law does have a unifying effect."[330] In fact, because the U.S. Supreme Court "rarely reviews a construction of state law agreed upon by the two lower federal courts,"[331] lower-federal-court engagement with state law takes on critical importance: it may be the only opportunity for a federal-court interpretive perspective.

On the reverse side, too, in the absence of finality from the U.S. Supreme Court, the state courts have a role to play in influencing the development of federal statutory interpretation. State-court trends toward textualism, for example, if also used by state courts construing federal law, surely will have an effect on how federal statutes are interpreted and might create additional momentum for broader adoption, across more courts, of a textualist approach. So, too, would a state-court focus on purposivist interpretation or an emphasis on particular canons or legislative history.[332] Justice Brennan famously argued that state courts could influence federal constitutional law through their own interpretations of federal constitutional provisions and analogous provisions in state constitutions.[333] Helen Hershkoff likewise has urged states to adopt a more activist and expansive approach to their own constitutional law.[334] Statutory interpretation offers the same possibilities for federal interpretive methodology and federal statutory law to be influenced "from the bottom up"—indeed, even more possibilities than in the constitutional cases, because there are so many more statutory cases.

In fact, we already have seen the state courts embrace some of these ideas. Some state courts have taken the lead in areas of statutory interpretation in which federal courts have lagged behind. Some state courts have tried to chart a new course toward interpretive determinacy, with controlling interpretive frameworks, methodological stare decisis, legislated rules, and the like. As we

330. Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1301 (2003); *see also* Schapiro, *supra* note 72, at 1428-29 ("The opinion of a federal court interpreting the same item might provide a useful perspective, perhaps compensating for the perceived unpopularity of following a particular course . . . . The different perspective of the federal court . . . might assist the state court in its search for the best interpretation.").

331. Stenberg v. Carhart, 530 U.S. 914, 940 (2000) (quoting Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 395 (1988)).

332. *See* Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 ARIZ. L. REV. 227, 231 (2008) (stating, in the constitutional context, that "there are many virtues in aggressive state interpretation of federal law" and that "[a] parsimonious reading of federal law by high state courts helps to make that idea a reality").

333. *See* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986).

334. Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999).

also have seen, the state courts have not shied away from their federal statutory work.[335] But this federalism cannot be "dialectical" if the conversation is going in only one direction.

* * *

At the other extreme, there are those who argue that the federal courts should stand down, that they should presume themselves less than competent to interpret state law and should certify state-law questions as often as possible. Brad Clark, Barry Friedman, and Judge Guido Calabresi adhere to this position, and the federal courts may be trending in this direction.[336] Clark argues that the federal courts are in a "precarious position" when interpreting state law;[337] Judge Calabresi contends that "it seems 'grabby' for the federal court to say what [a state] statute means."[338] Friedman suggests that, likewise, on the other side, state courts should stay out of federal-law business because "there is a federal interest in having novel or open federal questions resolved in federal courts."[339] And, according to a recent study, the Second Circuit now certifies more state-law cases on its own motion than on the motion of the litigants.[340]

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335. *See, e.g.*, State v. Burnett, 755 N.E.2d 857, 862 (Ohio 2001) ("[W]e are reluctant to abandon our role in the system of federalism . . . . Both inferior federal courts and state courts serve as 'laboratories for experimentation to devise various solutions where the best solution is far from clear.'" (quoting United States v. Lopez, 514 U.S. 549, 581 (1995))).

336. *See* Calabresi, *supra* note 330, at 1301-02 ("We should think of ourselves as an intermediate state court whose function it is to decide *provisionally* . . . . And then we should certify, so that the New York Court of Appeals is able to decide (1) not to take the case . . . or (2) to take it . . . ."); Clark, *supra* note 77, at 1549-56 (favoring a presumption of certification); Friedman, *supra* note 238, at 1255-56 (favoring a "sequencing" of federal and state claims so that each court hears its own case); *see also* Jonathan Remy Nash, *The Uneasy Case for Transjurisdictional Adjudication*, 94 VA. L. REV. 1869, 1879 (2008) (noting that "commentators advocate increased reliance upon, and development of new, transjurisdictional procedural devices"). Judge Calabresi's position, it should be noted, is harder to classify because at the same time that he asserts the inferiority of federal courts on state-law questions, he also believes that there is value to retaining at least some federal-court perspective in state-law cases. *See supra* note 330and accompanying text.

337. Clark, *supra* note 77, at 1461.

338. Calabresi, *supra* note 330, at 1305-06 n.41.

339. Friedman, *supra* note 238, at 1241.

340. *See* Memorandum from Advisory Grp. Comm. on Certification of Questions to the Court of Appeals to N.Y. State & Fed. Judicial Council (Sept. 17, 2008) (on file with author). Puzzlingly, many of these certification advocates do not call for the abolition of the diversity jurisdiction, and none seems to call for the abolition of concurrent jurisdiction more

To be sure, these debates about dialogue and separation extend far beyond the terrain of statutory interpretation to all areas of interaction between state and federal courts, and they implicate a deep literature well beyond the scope of this Article.[341] And I do not wish for this Article's more central points about the specific interaction between *Erie* and statutory interpretation and the question of the legal status of methodology to be lost in this broader landscape. Importantly, one need not agree with my resistance to the trend toward separation between state and federal courts to agree that, in the crossover cases that remain outside the certification or abstention pool, federal courts should actively engage the state statutory questions presented.

That said, it is important to recognize that considering whether a state court has a particular interpretive approach for statutory questions informs how we think about these broader questions of interactive federalism. Where state courts have settled on some rules of interpretation, that consensus makes it harder to argue that the workings of state law are a black box. And concurrent jurisdiction—as long as it continues to exist—is at least partially premised on the assumption that federal courts are capable of applying state-law principles much of the time.[342] That, of course, is also one legacy of *Erie*.

But, instead, many federal courts do not seem to begin from this assumption. And so it has become almost impossible to determine in advance when federal courts will try to interpret state statutes as state courts would; or when they will apply a different approach entirely; or when they will,

generally. That, however, seems to be one possible extension of their arguments, because underlying these arguments is the idea that federal and state courts do not really belong in one another's business in the first place. *Cf.* Redish, *supra* note 130 (arguing that federal courts do not have discretion to implement a partial abstention doctrine and that such changes require congressional amendment to the jurisdictional statutes). *Compare* Calabresi, *supra* note 330, at 1300-01 (arguing that diversity jurisdiction serves a valuable function and should be retained), *with* Clark, *supra* note 77, at 1564 (implying that Congress should abolish diversity jurisdiction).

341. For two of the central articles in this debate as it pertains to abstention, *compare* Redish, *supra* note 130 (arguing that broad judicial discretion to abstain conflicts with the statutory jurisdictional framework), *with* Shapiro, *supra* note 128, at 545 (arguing that Redish's view is "far too grudging in [its] recognition of judicial discretion in matters of jurisdiction").

342. Indeed, Clark (whose argument is mostly directed at federal courts deciding state common-law questions) appears to leave open this possibility, acknowledging in a footnote:

> State statutes that have not yet been interpreted by state courts may or may not be indeterminate as applied to various circumstances. Whether the application of a state statute yields a determinate answer to a particular legal question depends in large part on the language of the statute and the background rules of state law that govern the interpretation of state statutes.

Clark, *supra* note 77, at 1468 n.40.

alternatively, decide not to decide.[343] The result is that the way in which judicial federalism plays out in statutory interpretation is now something of a paradox. As First Circuit Judge Bruce Selya has argued, it seems "important as a matter of cooperative judicial federalism . . . [that] state courts cooperate by resolving questions of federal law while federal courts cooperate by passing the buck on questions of state law."[344]

Finally, one has to ask, if federal courts have so much trouble interpreting state statutes even in the face of some states' settled interpretive rules, how we can assume that state courts and lower federal courts can interpret federal statutes with much less methodological guidance from the U.S. Supreme Court. And do so they must—at least as long as the Court resists treating federal statutory interpretation methodology as law. After all, there is no reverse-certification or abstention option that allows state courts or lower federal courts to send statutory questions to the U.S. Supreme Court for mid-case resolution.

CONCLUSION

Exploring the link between *Erie* and statutory interpretation methodology reveals that many central questions about statutory interpretation remain undertheorized. This Article has aimed to resolve the doctrinal question as it pertains to *Erie*, and hopefully the reader is now convinced that *Erie* requires federal courts, in most cases, to apply state interpretive methodology to state statutory questions. More optimistically, perhaps the reader also is now persuaded that the federal courts do not currently treat statutory interpretation methodology as law but that it would be permissible, maybe even preferable, for them to do so—or, at a minimum, that it is curious that the federal courts have treated statutory interpretation differently from so many analogous interpretive regimes without any justification for that practice. Certainly, the reader should now be firmly aware that there is a large world of statutory

343. *Cf.* Clark, *supra* note 136, at 294 ("If the rule of thus deferring decision is to be applied uniformly, it must be applied in a very much greater number of cases, so much so that certain forms of federal administration, notably bankruptcy, must literally break down."); Shapiro, *supra* note 328, at 327 (observing that the increased use of certification could decrease federal-court influence "and may in fact mark the return to state courts of autonomy in deciding substantive state law questions").

344. Bruce M. Selya, *Certified Madness: Ask a Silly Question* . . . , 29 SUFFOLK U. L. REV. 677, 687 (1995); *see also id.* at 683, 689 (arguing that "[s]tate courts have absolutely no say in what questions federal courts choose to certify" and that "problems frequently arise because the question is not artfully presented or the record is insufficiently developed to permit a dispositive answer").

interpretation beyond the Supreme Court. Substantiating the importance and prevalence of these state-court and lower federal-court actors is the critical step toward reorienting our theory to include them. The remainder involves making sense of how state and federal courts do and should interact and how our landscape of intersystemic statutory interpretation coheres with both traditional statutory interpretation theory and broader theories of federalism.