2-25-2013

Statutes in Common Law Courts

Jeffrey Pojanowski
Notre Dame Law School, pojanowski@nd.edu

Articles

Statutes in Common Law Courts

Jeffrey A. Pojanowski*

The Supreme Court teaches that federal courts, unlike their counterparts in the states, are not general common law courts. Nevertheless, a perennial point of contention among federal law scholars is whether and how a court's common law powers affect its treatment of statutes. Textualists point to federal courts' lack of common law powers to reject purposivist statutory interpretation. Critics of textualism challenge this characterization of federal courts' powers, leveraging a more robust notion of the judicial power to support purposivist or dynamic interpretation. This disagreement has become more important in recent years with the emergence of a refreshing movement in the theory of statutory interpretation. While debate about federal statutory interpretation has settled into a holding pattern, scholars have begun to consider whether state courts should interpret statutes differently than federal courts and, if so, the implications of that fact for federal and general interpretation.

This Article aspires to help theorize this emerging field as a whole while making progress on one of its most important parts, namely the question of the difference that common law powers make to statutory interpretation. This inquiry takes us beyond the familiar moves in federal debates on interpretation. In turn, it suggests an interpretive method that defies both orthodox textualism and purposivism in that it may permit courts to extend statutory rules and principles by analogy while prohibiting courts from narrowing the scope of statutes in the name of purpose or equity. Such a model accounts for state court practice at the intersection of statutes and common law that recent work on state court textualism neither confronts nor explains. This model also informs federal theorization, both by challenging received wisdom about the relationship between common law and statutes and by offering guidance to federal courts at the intersection of statutes and pockets of federal common law.

The framework this Article constructs to approach the common law question can also help organize the fledgling field of state–federal comparison more generally. With this framework, we can begin to sort out the conflicting

---

* Associate Professor of Law, Notre Dame Law School. For helpful comments and conversations, I thank Larry Alexander, Amy Barrett, A.J. Bellia, Aaron-Andrew Bruhl, Paolo Carozza, Jamie Colburn, Barry Cushman, Abbe Gluck, Randy Kozel, Mark McKenna, John Manning, Caleb Nelson, Arden Rowell, Dave Schwartz, Jamelle Sharpe, Stephen F. Smith, Kevin Stack, Verity Winship, and the participants at workshops at the University of Illinois, Notre Dame, and Washington University-St. Louis. Thanks to the able research and editorial assistance of Nathan Guinn, Isy LeBlanc, and Kevin O'Connor. The usual caveats apply. Especial thanks, as always, to Sarah Pojanowksi.

and overlapping strands of argument already in the literature while also having a template for future inquiries. At the same time, this framework can help us think about intersystemic interpretation with greater rigor—an advance that can aid state and federal jurisprudence alike.

Introduction

The revival of theory in statutory interpretation is one of the most significant events in American public law in the past three decades.[1] The field continues to develop and its participants continue to disagree about how to read statutes. Yet even among some of the partisans, there is a sense that where there was once wide-ranging debate, there is now a settled equilibrium, if not an argumentative rut. "The guns in the statutory interpretation wars," one commentator muses, "are now largely silent."[2] Another, a critic of academic textualism, finds a "strong consensus on the interpretive enterprise that dwarfs any differences that remain."[3] Existing debate, on this account, obscures "just how thoroughly modern textualism has succeeded in dominating contemporary statutory interpretation."[4]

The dust from the Thirty Years' statutory interpretation wars may have settled and, while textualism has not won an unconditional surrender in the Supreme Court, it appears to have gained substantial territory before its truce with purposivism. If this is so, the scope of interpretive argument at the Supreme Court has narrowed in recent decades. Thus, scholars that synthesize and criticize that jurisprudence on its own terms may have to focus on a correspondingly modest number of questions. Even assuming that the Court's equilibrium is stable, however, that agreement covers only a tip of the interpretive iceberg. Statutory interpretation scholars have filled shelves of law reviews while focusing almost exclusively on the Supreme Court in general and on its exposition of federal public law in particular.[5] This inquiry usually ignores the bulk of statutory interpretation cases in the United

---

1. *See* Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 250–56 (1992) (chronicling the rise of interpretation theory in the 1980s).

2. Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 732 (2010).

3. Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 2 (2006).

4. *Id.* at 36.

5. For salutary exceptions, see Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 318 (2005) (arguing that inferior courts have no sound basis for applying the Supreme Court's doctrine of statutory stare decisis); Aaron-Andrew P. Bruhl, *Hierarchy and Heterogenity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 433 (2012) (describing institutional differences between different courts in the appellate hierarchy and arguing that these differences "justify a heterogeneous regime in which courts at different levels of the judicial hierarchy use somewhat different interpretive methods"); Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 875 (1991) (exploring how modern common law judges, in light of the role of statutes as the primary source of law, should view their role in relationship to the legislature).

States, namely those resolved by state courts.[6] The question of whether federal and state court interpretive methodology should run parallel is important, hardly obvious, and rarely pondered.

Or at least that was so until very recently. In the past few years, a small number of legal scholars have begun to examine theories of interpretation with a lens wider than that of federal review.[7] This work, primarily by junior scholars, is the beginning of a fresh line of inquiry that promises insights not only on neglected matters of state court interpretation, but also on the received wisdom in federal interpretation and interpretive theory more generally. Two questions are prominent in this fledgling literature. First, whether state courts should interpret their statutes differently than how federal courts read federal statutes.[8] Second, if methods diverge, how to interpret statutes across the borders of jurisdictions with different methods.[9]

This Article pursues the first divergence question with hopes of also shedding light on both the second intersystemic question and federal interpretation more generally. It does so by taking up an important but underexplored problem: whether a state court with general common law powers should approach statutes differently than a federal court that, in the post-*Erie* era,[10] is understood to lack such powers. This question will also serve as a platform for building a more general framework for considering the divergence question. With this framework, we can begin to sort out the conflicting and overlapping strands of inquiry already in the literature while having a template for future inquiries. At the same time, this framework can help us think about the intersystemic question with greater rigor—an advance that will aid state and federal jurisprudence alike. In short, this Article aspires to help define and theorize a promising new line of inquiry as a whole while making progress on one of its more substantial parts.

---

6. *See* NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS iv (2010) (noting that approximately 95% of all cases filed in the United States are filed in state court); *see also* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1753 (2010) [hereinafter Gluck, *Laboratories*] ("The vast majority of statutory interpretation theory is based on a strikingly small slice of American jurisprudence, the mere two percent of litigation that takes place in federal courts—and, really, only the less-than-one percent of that litigation that the U.S. Supreme Court decides.").

7. *See, e.g.*, Gluck, *Laboratories*, *supra* note 6, at 1750 (discussing modern statutory interpretation in several state courts of last resort).

8. *See, e.g.*, Bruhl, *supra* note 5, at 439 (identifying several institutional differences that "militate in favor of interpretive divergences across courts").

9. *See, e.g.*, Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1991–92 (2011) [hereinafter Gluck, *Intersystemic*] (highlighting that federal and state courts do not consider whether they are required to apply one another's methodology when interpreting each other's statutes).

10. *See, e.g.*, City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981) ("Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision.").

Exploring the difference common law powers make in courts' treatment of statutes takes the inquiry beyond the familiar moves in debates about federal statutory interpretation. State courts assessing the interpretive implications of their common law powers should consider sources besides Supreme Court precedent on ordinary interpretation. Indeed, perhaps the most instructive body of precedent on this question can be found not in the United States Reports, but in the high courts of commonwealth jurisdictions like the United Kingdom and Australia which, like American state courts, must reconcile their general common lawmaking powers with a superior legislature's statutes. Finally, common law courts may have to confront jurisprudential questions about the interpretation of statutes and precedent that federal courts arguably can avoid.

All told, a plausible result of these inquiries is an interpretive method that defies both orthodox textualism and purposivism as we know it, a hybrid model that permits courts to extend statutory rules and principles by analogy while prohibiting courts from narrowing the scope of statutes in the name of nontextual purpose or equity. This common law/parliamentary hybrid accounts for state court practice at the intersection of statutes and common law that recent groundbreaking work on state court textualism neither confronts nor explains. Such a model can also inform federal theorization, both by challenging received wisdom about the relationship between common law and statutes and by offering guidance to federal courts when statutes and enclaves of federal common law meet.

I. Federal and State Statutory Interpretation

To set the stage for the broader argument, this Part summarizes the state of play in both federal and state statutory interpretation theory. In many respects, the state of scholarship in the two fields could not be more different. In the federal context, decades of sustained argument appear to have narrowed disagreement among scholars and judges to a smaller set of problems. If the revival of statutory interpretation theory in federal courts has settled down to a new equilibrium, theorization about interpretation outside the federal context is just starting to stir. This small but diverse body of work both hints at and calls out for a general framework for thinking about interpretation in state courts and across jurisdictions.

A. Federal Statutory Interpretation and Faithful Agent Equilibrium

Federal statutory interpretation theory is a natural baseline for comparison with the state context, if only because such work defines most of the conceptual space in which American courts and scholars operate. A review of recent case law and much of the scholarly literature suggests that encapsulating this federal jurisprudence is easier now than it was twenty years ago. A vigorous, wide-ranging debate between textualism and its critics appears to have stabilized and turned to a set of narrower, albeit

fundamental, questions about interpretation. At the Supreme Court, the assumed framework in recent decades is one of faithful agency to Congress, a framework in significant part constructed on textualist terms. Although the Court has not granted every item on the textualist wish list, the Court's jurisprudence appears to reject strong purposivist or dynamic approaches to interpretation.

If, as some have argued, "[t]he guns in the statutory interpretation wars are now largely silent,"[11] it is fair to ask how they quieted so. Professor John Manning's recent history of interpretive theory tells a story of dialectic and synthesis between textualism and purposivism in the Supreme Court's reading of statutes.[12] Starting in the early 1980s, founding textualists emphasized empirical challenges to the use of legislative history and the coherence of invoking a legislative body's "intent" or "purpose."[13] In response, textualism's critics drew on public choice theory to defend a moderated use of legislative history and to shore up the cogency and reliability of appeals to congressional intent and purpose.[14] At the same time, purposivists and intentionalists pointed out that textualists regularly relied on interpretive tools beyond the statutory text, such as canons of interpretation, common law understandings, and dictionaries.[15] Textualism, according to these criticisms, was premised on bad political science and was internally contradictory in its use of external sources.[16]

In response, Manning accedes that this criticism "clouded the cleanly intuitive appeal of the empirical claims" that early textualists made against legislative history, intent, and purpose.[17] Manning also agrees that texts are not self-revealing and that textualists can, do, and should use some extrinsic sources.[18] This is not because those extrinsic sources are authoritative, but because they are useful contextual evidence for identifying what a hypothetical legislator at the time of enactment would seek to convey to a

11. Monaghan, *supra* note 2, at 732.

12. John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287 (2010) [hereinafter Manning, *Second-Generation*].

13. *Id.* at 1291–92.

14. *See id.* at 1298–303 (discussing the responses of textualism's critics—including Farber and Frickey's specific critiques of textualists' interest group theory and social choice theory—to the practical assumptions underlying textualism). For a recent philosophical defense of collective, parliamentary intent, see generally Richard Ekins, *The Intention of Parliament*, 2010 PUB. L. 709.

15. *See, e.g.*, Molot, *supra* note 3, at 30–36 (praising textualism's recognition that language only has meaning in context); *see also* John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 79–85 (2006) [hereinafter Manning, *What Divides*] (discussing modern textualists' use of extrastatutory context as a means of discerning the objective intent of a statutory text).

16. *See* Molot, *supra* note 3, at 49–50 (explaining that when modern or aggressive textualists ignore a statute's context, they risk being judicial activists and disregarding congressional intent).

17. Manning, *Second-Generation*, *supra* note 12, at 1303.

18. *Id.* at 1308.

reasonable reader of legal English.[19] Finally, Manning accedes that when a text remains vague or ambiguous, textualists can justifiably make "rough estimates" of statutory purpose to resolve cases.[20] On the other hand, he notes that purposivists not only use similar extrinsic sources to understand statutes, but in recent years have focused increasingly on statutory text and structure.[21] Like textualists, "purposivists start—and most of the time end—their inquiry with the semantic meaning of the text."[22] Given these similarities, a sharp contrast between textualism and its rivals is hard to see, and much recent scholarship searches for that very distinction.[23]

On this question, Manning emphasizes nonempirical, constitutional arguments for textualism. He posits a theoretically simpler textualism that adheres to a more modest and basic tenet about statutory interpretation: when the semantic meaning of a statutory text is clear to the reasonable reader, a court must honor that meaning even when doing so appears to conflict with a statute's broader purpose or policy.[24] This choice between semantic meaning and conflicting policy, Manning explains, is the basic question dividing textualists and purposivists.[25] The textualist's prioritization of semantic meaning over broader purpose is controversial. Some purposivists call on academic textualists, who have "won" the interpretive "war" in the Supreme Court, to accept moderate deviations from this tenet, such as the canon against absurd interpretations.[26] Others claim that this apparently modest

19. *See* Manning, *What Divides*, *supra* note 15, at 79 (describing modern textualists' belief that language is only intelligible in its context); *see also* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2457 (2003) [hereinafter Manning, *Absurdity Doctrine*] (discussing modern textualism's emphasis on understanding language in its social context).

20. Manning, *What Divides*, *supra* note 15, at 84–85.

21. *Id.* at 85.

22. *Id.* at 87.

23. *Compare* Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347 (2005) (observing that prior scholarship has exaggerated the difference between the goals of textualism and intentionalism while underappreciating their differing attitudes towards rules and standards), *with* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419 (2005) (maintaining that textualists and intentionalists offer differing conceptions of legislative intent), *and* Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451 (2005) (reiterating that textualists and purposivists largely agree on the goals of interpretation); *compare* Molot, *supra* note 3 (rejecting the traditional line dividing textualists and purposivists and proposing a moderate version of textualism to appeal to both sides), *with* Manning, *What Divides*, *supra* note 15 (conceding that textualism and purposivism share more conceptual common ground than normally acknowledged but noting that textualism prioritizes semantic context while purposivism prioritizes policy context); *see also* Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 982–84 (2004) (arguing that textualism is most plausibly understood as rule-restricted intentionalism).

24. Manning, *Second-Generation*, *supra* note 12, at 1309–10; *see also* Manning, *What Divides*, *supra* note 15, at 76 (noting that textualists give semantic cues determinative weight even where conflicting evidence of policy exists).

25. Manning, *What Divides*, *supra* note 15, at 91.

26. *See* Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 119 (2009) (citing Molot, *supra* note 3) (noting purposivists' suggestions that textualists

tenet is textualism's Achilles' heel, a methodological weakness that will ultimately doom a theory that upholds increasingly absurd and outmoded interpretations.[27]

Yet disagreement on this basic point stands out among a broader convergence in both the Supreme Court and much recent scholarship.[28] Manning argues persuasively that the Supreme Court has now settled at an equilibrium in which it has reduced, rather than eliminated, its use of legislative history while also increasing its attention to statutory text at the expense of broader purposive inquiry.[29] Further, the disagreement at the Supreme Court concerns not whether the interpreter should be a faithful agent of Congress or a dynamic partner in governance, but whether Congress's faithful agent should adhere to text or purpose when the two conflict. Even the Court's more purposivist opinions take pains to ground their interpretations in both semantic meaning *and* overarching policy.[30] If there are any Calabresian judicial artists or metademocrats on the Court,[31] they are well-hidden.

This is not to judge the merits of strong purposivist or dynamic statutory interpretation, but to note that the Court does not approach statutes on those terms, or at least does not do so explicitly. If anything, Manning's assessment might understate textualism's recent strides at the Supreme Court. The last Court majority to rely on *Church of the Holy Trinity v. United States*[32]—the case famous for holding that a statute's literal textual meaning must yield in the face of absurd results—predates the fall of the Berlin Wall.[33] The practice of implying private rights of action to effectuate

---

should cease to advocate for an "aggressive textualism" and instead embrace the moderate approaches on which scholars and judges have agreed).

27. *Id.* at 121–22 (arguing that textualists cannot accept the more moderate approaches suggested by accommodationists such as Professors Molot and Nelson "without ceasing to be textualists").

28. *But see id.* at 119–20 (contrasting the view—shared by Professors Molot and Nelson—that textualism and intentionalism have generally converged, with his own position that textualists' adherence to a formalist axiom ensures that "their war with other methods can never cease").

29. Manning, *Second-Generation*, *supra* note 12, at 1307; *id.* at 1308 (citing Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568–69 (2005) as exemplifying the new equilibrium).

30. *Id.* at 1313 n.117 (citing Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 94–99 (2007) and Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 591 (2004)).

31. *See generally* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593 (1995) (identifying a new "metademocratic" conception of statutory interpretation whereby courts assign meaning to contested statutory terms via interpretive rules designed to produce democratizing effects); Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213 (1983) (characterizing Calabresi's activist conception of judges as artists capable of recasting the law).

32. 143 U.S. 457 (1892).

33. Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 454 (1989) (citing *Church of the Holy Trinity*, 143 U.S. at 459). The Court has, however, since invoked the absurdity doctrine to depart from textual meaning. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 429 (1998) (rejecting the government's novel reading of § 692 of the Line Item Veto Act because acceptance of such an

uncodified legislative intent and promote overarching legislative purposes has fared only slightly better.[34] In fact, one commentator read a recent Supreme Court opinion as signaling the complete victory of the new textualism over strong purposivism.[35] In *Astrue v. Ratliff*,[36] the Court gave force to the clear semantic meaning of a term in a fee-shifting statute despite arguments—grounded in legislative findings and history—that: (i) Congress would have preferred a different result had it considered that particular problem; and (ii) that the semantic meaning undercut the statute's remedial purpose.[37] Justice Sotomayor pressed these points in a concurring opinion joined by Justices Stevens and Ginsberg, but all three joined Justice Thomas's opinion of the Court *in full* because the textual analysis "compell[ed] the conclusion."[38]

In other words, nine Justices, including the last one to invoke *Church of the Holy Trinity*,[39] chose objective semantic meaning gleaned from text, structure, and linguistic canons over policy inferences and an imaginative reconstruction of what the enacting legislators *would* have wanted had they considered the issue.[40] Thus, when faced with the choice between semantic meaning and statutory purpose—Manning's dividing line between textualism and purposivism—the Court chose semantic meaning unanimously. In 1991, a similar question produced a foundational textualist decision, but in a 5–4

---

interpretation would "produce an absurd and unjust result which Congress could not have intended").

34. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 286 (2001) ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."); *cf.* Gonzaga Univ. v. Doe, 536 U.S. 273, 283–86 (2002) (foreclosing the plaintiff's action for violation of a federal statute because the statute did not manifest an unambiguous intent to create individual rights enforceable under 42 U.S.C. § 1983).

35. Frederick Liu, Astrue v. Ratliff *and the Death of Strong Purposivism*, 159 U. PA. L. REV. PENNUMBRA 167, 173 (2011) ("Interpretive consensus on the Supreme Court is not impossible. . . . If *Ratliff* is any indication, strong purposivism is dead . . . .").

36. 130 S. Ct. 2521 (2010).

37. *Id.* at 2530–31 (Sotomayor, J., concurring).

38. *Id.* at 2529–30.

39. *See* Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 107 n.3 (2007) (Stevens, J., concurring) (citing *Church of the Holy Trinity* to support his position that a literal reading of statutory text should give way when Congress's intent as to the precise issue before the Court is clear).

40. *See* Liu, *supra* note 35, at 170 (identifying a legislator's subjective intent as one of two kinds of "intent" a court should look for when interpreting statutes). *But see* Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) (arguing that the purposive approach of "imaginative reconstruction" is a model of faithful agency superior to textualism).

split with three separate dissents.[41] In *Astrue*, those with misgivings saw no option but appeal to Congress for textual amendment.[42]

B. State Court Statutory Interpretation

If federal disputes about statutory interpretation have stabilized, serious scholarship about interpretation in the state context has only just begun. This subpart reviews and synthesizes scholarship on statutory interpretation in state courts. The subpart focuses on the questions of whether state court interpretation should differ from federal court interpretation and the consequent question of whether interpretive method should travel with a statute across jurisdictional bounds. This growing body of scholarship both hints at and calls out for a more general framework for thinking about interpretation in state courts and across jurisdictions.

1. The Jurists.—Until recently, most modern theory on state statutory interpretation came via state judges' speeches later reprinted in the host institutions' law reviews. These works flag potential points of difference between state and federal court interpretation, such as state courts' general common law powers and the relevant similarities and differences in state and federal constitutional structures. These arguments, however, raise as many questions as they answer about state court interpretation.

The leading example of this genre is a lecture by Judith Kaye as chief judge of the New York Court of Appeals.[43] The touchstone of her argument for state court divergence is the fact that state courts "are the keepers of the common law."[44] Even in an age of statutes, state courts, unlike federal courts of limited jurisdiction, retain general common law powers.[45] Because of this, Judge Kaye argues, state law is a complex tapestry of common law and statute, making the court an interlocutor with the legislature, not just a passive interpreter of statutory commands.[46] This "common-law method compels courts" to depart from a statute's plain meaning when doing so leads

41. *See* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 101–03 (1991) (holding, based on plain language, that a federal statute conveyed no authority to shift expert fees, but with Justices Marshall and Stevens dissenting on the grounds that statutory interpretation should also involve extratextual considerations).

42. *See Astrue*, 130 S. Ct. at 2533 (Sotomayor, J., concurring) (quoting Bartlett v. Strickland, 556 U.S. 1, 44 (2009) (Ginsburg, J., dissenting)) ("While I join the Court's opinion and agree with its textual analysis, the foregoing persuades me that the practical effect of our decision 'severely undermines the [statute's] estimable aim . . . . The Legislature has just cause to clarify beyond debate' whether this effect is one it actually intends.").

43. Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1 (1995).

44. *Id.* at 6.

45. *Id.* at 20 (citing City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981) and Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640–42 (1981)).

46. *See id.* at 20–26 (describing the state legislative/judicial dialogue and surveying instances of legislative–judicial give-and-take).

to absurd results.[47] To bring this back to Manning's dichotomy, Kaye argues that her court's common law powers and tradition allow it to choose broader purpose over semantic meaning when the two conflict.

Judge Kaye does not point to specific examples on how a state and federal court might rule differently when faced with a similar statutory problem.[48] That said, her emphasis on the legitimacy of the state court's role in law and policy development suggests that her comparative target is federal textualism.[49] It is also not clear that she believes federal courts are barred from applying the common law method in statutory interpretation. If anything, her approving citations to federal scholars like William Eskridge, Daniel Farber, and Philip Frickey suggest the contrary.[50] In this light, a state court's common law *powers* (as opposed to method) may be a sufficient and additional justification for the dialogic purposivism she advances, but not a necessary feature.[51]

Connecticut State Supreme Court Justice Ellen A. Peters also addresses state statutory interpretation in her work distinguishing the state and federal traditions of separation of powers.[52] As with Judge Kaye, Justice Peters invokes the state court's common law powers, claiming them as an interpretive resource that federal courts lack.[53] Again like Judge Kaye, Justice Peters also is ambivalent on whether this cashes out in any methodological differences for state and federal judges facing similar statutory problems. She claims that "[m]ost state court judges, like most federal judges," hold the "mainstream view" rejecting federal textualism.[54] Although Peters notes other differences in the separation of powers in the states, she does not offer a strong link between them and an approach to statutory interpretation.[55]

---

47. *Id.* at 26.

48. She does note, however, that state courts have less access to legislative history than federal courts. *Id.* at 29–30. This difference appears to have narrowed in recent years. Gluck, *Laboratories*, *supra* note 6, at 1829 n.301, 1859 n.398.

49. *See* Kaye, *supra* note 43, at 9–11 (rejecting as a canard criticism of "judicial activism").

50. For example, Kaye cites Eskridge alone twelve times. *Id.* at 19 nn.106–08, 22 n.119, 23 n.124, 29 n.165, 30 n.167, 33 n.182, 34 n.185.

51. *See* Eric Lane, *How to Read a Statute in New York: A Response to Judge Kaye and Some More*, 28 HOFSTRA L. REV. 85, 86–87 (1999) (arguing that both federal and state courts use the "common law" method of interpretation Kaye describes).

52. Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543 (1997).

53. *Id.* at 1555–56.

54. *Id.* at 1555.

55. *See id.* at 1555–64 (detailing various differences between federal and state separation of powers and giving examples of their effect on statutory construction and on the day-to-day functioning of state courts, but failing to give a definitive link); *see also* Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1081–82, 1085 (1991) (observing that some state supreme courts offer advisory opinions, some state judges sit on law reform committees, and some informally lobby legislators); *cf.* Hans A. Linde, *Observations of a State Court Judge*, *in* JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 117, 128 (Robert A. Katzmann ed., 1988) (finding "no

Michigan Supreme Court Justice Robert Young, Jr., by contrast, embraces federal-style textualism and criticizes Judge Kaye's approach to statutory interpretation.[56] He argues that statutory interpretation is "not a branch of common-law exegesis" because the separation of powers requires the court to respect the legislature's expressed intent.[57] Like many federal textualists, Young would employ semantic canons, consult a limited set of nontextual sources, be suspicious of legislative history, and look beyond expressed intent only when a statute is ambiguous.[58] In doing so, he rejects the absurdity doctrine and notes that the Michigan Supreme Court only invokes particularly reliable forms of legislative history.[59]

Justice Young's approach tracks the faithful-agent equilibrium identified in federal practice.[60] Although he discusses a substantial amount of textualist Michigan precedent, he does not distinguish the federal and state contexts at the level of principle. His embrace of textualism on grounds that "ours is a constitutional republic" does not specifically refer to the constitution of either Michigan or the United States.[61] Presumably, the notions of legislative supremacy and separation of powers in Michigan that underwrite Justice Young's theory of statutory interpretation are no different than their federal counterparts, resulting in a unified methodology.

2. The Scholars.—The judges' writings offer kernels of arguments about federal–state divergence: the significance of state courts' general common law powers; the significance of distinct separation of powers arrangements; and, by contrast, the potential irrelevance of common law powers in the face of federal–state parallels in the judicial role and constitutional structure. According to recent accounts of litigated cases, moreover, many state judges assume that federal law and scholarship on

---

insurmountable legal obstacles to useful interaction between judges and legislators in the development of good policies" if there are "clear distinctions as to whether a judge speaks for the institutional concerns of the judicial branch, for the personal interests of judges as a group, or as an individual citizen").

56. *See* Robert P. Young, Jr., *A Judicial Traditionalist Confronts Justice Brennan's School of Judicial Philosophy*, 33 OKLA. CITY U. L. REV. 263, 268–69 (2008) (criticizing Judge Kaye's judicial philosophy, which views judges as having a "responsibility" to reshape society and to interpret statutes based on "perception[s] of the 'common good,'" as an "unfortunately . . . commonplace" notion); *see also* Lane, *supra* note 51, at 86–87 (challenging Judge Kaye's description of common law interpretive methods because she limits its reach to state courts and arguing instead that differences in interpretive methods do not align by jurisdiction but rather by "individual judicial sensibilities").

57. Young, *supra* note 56, at 280.

58. *Id.* at 280–82.

59. *Id.* at 281–82.

60. The Michigan Supreme Court, however, has not explicitly repudiated the absurdity doctrine, and Young's parsimony in identifying ambiguity may be stricter than current Michigan Supreme Court practice. *See id.* (finding statutes ambiguous if their provisions are in irreconcilable conflict or if competing interpretations are in equipoise).

61. *Id.* at 280.

statutory interpretation translate well to the state context.[62] Absent further judicial development, it falls to scholars to explore questions of comparative methodology. Yet even when the explosion of writing about statutory interpretation was at its apex, few considered such questions.[63] Even Robert Summers, one of the greatest comparativists in statutory interpretation, focused almost exclusively on Supreme Court decisions for his chapter on American methodology in a volume on comparative statutory interpretation.[64]

In the past five years, however, a handful of scholars began to take state interpretive methodology seriously. The earliest work hewed close to federal matters. Professor Alex Long, for example, considered interpretation of state discrimination statutes that parallel federal law.[65] He concluded that interests of judicial integrity, legislative efficiency, and respect for legislative intent recommend that state courts presumptively follow federal interpretations.[66] Professor Anthony J. Bellia then studied state court interpretations of federal statutes in the post-Ratification era.[67] There, Bellia asked whether state courts applied the doctrine known as the "equity of the statute" when interpreting federal statutes.[68] This common law doctrine allows courts to depart from a statute's clear text in light of the reason or "equity" of the legislation—either by extending the statute's applicability beyond its scope but within its purpose or by restricting the scope of a statute when the text applies to a matter but the purpose does not.[69] Bellia found state courts invoking the doctrine for state statutes while not equitably interpreting

---

62. *See* Gluck, *Laboratories*, *supra* note 6, at 1858 (observing that state courts "do not see institutional differences as substantial enough to pose barriers to the exchange of theory" between state and federal interpretive tools).

63. William Popkin is an early exception. Yet in both his general theorizing and his close study of a state court's opinions, his work assumes that state and federal cases are interchangeable for purposes of his theoretical analysis. *See* William D. Popkin, *Statutory Interpretation in State Courts—A Study of Indiana Opinions*, 24 IND. L. REV. 1155, 1158 (1991) (arguing that "[t]wo of the issues prominent in contemporary literature [on statutory interpretation] can be profitably explored in the context of state cases"). *See generally* WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION (1999) (providing a historical analysis of the evolution of statutory interpretation at the state and federal levels). This may be true, but, as we will see later, not obviously so.

64. Robert S. Summers, *Statutory Interpretation in the United States*, *in* INTERPRETING STATUTES: A COMPARATIVE STUDY 407, 407 (D. Neil MacCormick & Robert S. Summers eds., 1991).

65. Alex B. Long, *"If the Train Should Jump the Track . . .": Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469, 475–76 (2006).

66. *Id.* at 476.

67. *See generally* Anthony J. Bellia Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1529–52 (2006) (analyzing the practices of state courts in interpreting federal statutes from 1789 to 1820).

68. *Id.* at 1547.

69. *Id.* at 1508–09; *see also* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 29–36 (2001) [hereinafter Manning, *Equity of the Statute*] (summarizing the origins and scope of the doctrine in English courts).

federal statutes.[70] He ascribed this difference to the Supremacy Clause's limitation on state courts' federal lawmaking and its requirement of uniformity in federal law.[71] Equitable interpretation, Bellia explained, would contravene both requirements in the federal context.[72]

Professor Abbe Gluck has recently taken up the question of state court interpretation more generally. In her first work, Gluck studied interpretation in five states and identified a three-step interpretive approach she calls "modified textualism"—a method she claims is the controlling interpretative approach in the states studied.[73] Gluck finds this coalescence important because it shows that, unlike the conclusions put forward by many federal commentators, courts *can* agree on an interpretive method and treat it as a binding framework, even in the face of legislation to the contrary.[74] This consensus, Gluck argues, indicates that statutory methodology can itself be a form of *law*.[75] Gluck's second work asks whether interpretive methodology travels with a statute across jurisdictional lines.[76] Gluck finds an erratic federal practice, in which federal courts reading state statutes often ignore state interpretive methods.[77] She argues that, under *Erie*, a federal court interpreting a state statute should apply the state's method—such as modified textualism—if the state's courts consider that approach to be binding law.[78]

Finally, Professors Aaron-Andrew Bruhl and Ethan Leib have examined the implications of one notable difference between state and federal courts: the fact that most state court judges are elected.[79] They argue that elections should not matter in cases without valence in popular opinion or in cases easily resolved by traditional tools of interpretation.[80] By contrast, electoral accountability and its accompanying political knowledge may justify a more active judicial role interpreting legislation that (a) reflects stale popular

---

70. Bellia, *supra* note 67, at 1506–07. Bellia also notes that equitable interpretation of state statutes was increasingly less favorable as courts began to focus on legislative intent. *Id.* at 1507.

71. *Id.* at 1548–52.

72. *Id.* at 1552.

73. Gluck, *Laboratories*, *supra* note 6, at 1758. "Modified textualism" looks first to text, then legislative history, and then substantive canons. A court proceeds to the next step only if the prior leaves the question unresolved. *Id.*

74. *See id.* at 1787–91 (describing the Texas textualist courts' defiance of legislated rules of interpretation).

75. *See id.* at 1757–58 (arguing that state court practice "challenge[s] the prevailing theoretical resistance to [methodological consistency] and highlight[s] the possibility that [courts] might be receptive to consistent methodological frameworks"); *id.* at 1862 ("Is methodology 'law'? The Supreme Court does not act as if it is. The state courts studied here appear to conclude otherwise.").

76. Gluck, *Intersystemic*, *supra* note 9, at 1901.

77. *Id.* at 1905.

78. *See id.* at 1990–91 (arguing that the underpinnings of *Erie* point to the conclusion that state statutory questions should be decided by federal courts under state interpretive methodology or else deviations should be justified).

79. Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1215 (2012).

80. *Id.* at 1255–57.

preferences, (b) reflects special interests rather than popular preferences, or (c) violates minority rights in ways that are otherwise constitutional.[81] In this respect, Bruhl and Leib suggest that state courts are better situated than federal courts to engage in statutory updating of the kind advocated by some federal scholars.[82]

3. Moving Forward.—Widening the focus beyond the federal context also reveals what I call the divergence question: whether state courts should read their statutes as federal courts read statutes. Some scholarship has begun to explore parts of this large question, but even though these initial efforts are few, they adopt a dizzying array of lenses. State court judges, for example, point to common law powers and constitutional structure as possible points of departure.[83] Similarly, although Bellia examined state interpretation for its implications on federal practice, his emphasis on constitutional norms suggests that interpretation of state statutes could be distinct due to differences in federal and state constitutional structures.[84] Long's work focused only on discrimination statutes tracking federal law, but his analysis of the benefits of uniform interpretation may point to a broader argument about the desirability of interpretive divergence or convergence in general.[85] In particular, he points to complying with legislative preferences, promoting legislative efficiency, and preserving the reputation of the state judiciaries and moral authority of the Supreme Court.[86] Bruhl and Leib's argument for the difference elections make in state interpretation considers other variables, such as institutional competence, democratic legitimacy, and pragmatic considerations.[87] It is fair, even at this early point, to ask how these varying approaches interrelate and what they might be missing.

This possibility of divergence raises the second matter—the intersystemic question—about how to negotiate interpretation of statutes across jurisdictional lines. Gluck focuses on this second question, but shows ambivalence about the first. Both of her major works depend on interpretive divergence: The state court textualism she first identifies is "new" and "modified" *compared to* federal textualism.[88] The *Erie* question in statutory interpretation she addresses in her second work is most pressing only if state and federal courts adopt different methodologies—otherwise a federal court facing an open question of state statutory law would get to work much as it

81. *Id.* at 1258–67.

82. *Id.*

83. *See* Kaye, *supra* note 43, at 20–26; Peters, *supra* note 52, at 1555–56.

84. Bellia, *supra* note 67, at 1548–52 (discussing the effect the Supremacy Clause has on state interpretations of federal statutes).

85. *See* Long, *supra* note 65, at 476 (arguing for a presumption towards uniform construction when interpreting similar statutory language).

86. *Id.* at 507.

87. Bruhl & Leib, *supra* note 79, at 1223–30.

88. Gluck, *Laboratories*, *supra* note 6, at 1758.

would in ordinary course. Yet sometimes Gluck identifies potential sources of state–federal divergence only to downplay their relevance compared to cross-jurisdictional similarities.[89] The source of this tension, it seems, is a desire to establish the relevance of state court practice to the federal context and vice versa.[90] Gluck's claim of relevance seems correct, though it may hold even if there are substantial differences in the two contexts.

While Gluck's recognition of state–federal divergence does not require her to explain or justify it, this gap in the analysis may weaken confidence in the broader lessons she draws about interpretation more generally. Knowing whether and why state court interpretation should diverge from federal interpretation can shed light on whether interpretative method is in fact "law," what kind of "law" it is, and whether other tribunals are bound to respect it.[91] For example, Gluck's invocation of *Erie* treats interpretive method as a kind of positive, judge-made state law.[92] This understanding, however plausible, conflicts with practice in the very courts she studies.[93] These courts, as Gluck notes, repeatedly resist statutes that attempt to dictate interpretive methods to courts.[94] Aside from lawless intransigence, such resistance could suggest that courts treat interpretive method not as displaceable common law in the positivistic sense, but rather as a form of constitutional law.[95] Or it may suggest a belief that methods of interpreting statutes cannot be legislated any more effectively than the methods for understanding ordinary English.[96] These options—and their underlying reasons for interpretive divergence or convergence—may lead to very different answers to the intersystemic question.

This Article seeks to make progress on the divergence question while also shedding light on the intersystemic question. It does so by addressing a

---

89. *See, e.g.*, *id.* at 1858–59 ("I do not wish to understate the extent of potential intersystemic differences . . . . But there are at least two reasons why the states seem right not to allow these differences to prevent comparisons . . . . First, the most often noted differences between state and federal governments do not seem to be doing much work here.").

90. *See id.* at 1861 ("[I]nstitutional differences should not be used as a reason to discount the relevance of state court legisprudence for federal statutory interpretation . . . .").

91. *See id.* at 1862 n.409 (explaining that discovery of state methodology raises the related reverse-*Erie* questions she addresses in the second part of her project).

92. *See, e.g.*, Gluck, *Intersystemic*, *supra* note 9, at 1990 (observing that if federal courts apply state methodology, "it should be because . . . a sovereign's court chooses to apply them, not because they are ready to be plucked from the sky").

93. *See* Gluck, *Laboratories*, *supra* note 6, at 1862 ("Is methodology 'law'? . . . The state courts studied here appear to conclude otherwise.").

94. *Id.* at 1755–56, 1785–98.

95. Such a result might also trigger an *Erie*-like rule for federal courts. *But see* Bruhl & Leib, *supra* note 79, at 1268–69 (noting that the challenges of "crossover" interpretation possibly could "generate good reasons to reject interpretive divergence").

96. *Cf.* Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97, 100 (2003) ("[I]f the goal is to understand the intentions of authors and speakers, one cannot be artificially constrained by fixed meanings or rules.").

noted but underexplored aspect of the divergence question—the effect a state court's common law powers may have on its interpretation of statutes. As with judicial elections, these general common law powers may distinguish state courts from their federal counterparts. Unlike judicial elections, existing scholarship does not address the effects of these powers on state courts in a systemic fashion. The following analysis introduces the prospect of interpretive divergence due to a court's common law powers.

II. Approaching Statutes as "Keepers of the Common Law"

A state court's broad common law powers offer an intriguing point of comparison. At the threshold, analyzing the effect of state courts' common law powers may mitigate the dangers of comparing state courts in gross. Nearly every state court understands itself to possess some common law power, even after substantial movements for codification.[97] Courts may have different understandings about the nature of the common law and its interaction with statutes,[98] but at least here we have a feature that cuts across almost all states. Furthermore, the fact that state courts are "keepers of the common law," as Judge Kaye notes, offers a substantial, systemic contrast with the federal system.[99] Even many who accept the legitimacy of federal common law understand it to exist in limited enclaves, compared to the more expansive common law powers of state courts.[100]

This Part lays out a prima facie case for why a state court's broader common law powers could justify a different approach to statutes than in federal courts. For a comparative baseline, I will assume federal courts incline toward textualism, a possible oversimplification that nevertheless captures the thrust of the Supreme Court's jurisprudence in the past decade.[101] So put, the primary question is whether state courts have more flexibility in their treatment of their statutes than federal-style textualism affords. This Part draws on state court commentary and on broader theories of statutory interpretation to make a case for why that should be so.

---

97. *See* Kaye, *supra* note 43, at 6 (highlighting the integral role the common law plays in decision making at the state court level). A possible exception is Louisiana, whose civil law tradition separates it from other common law jurisdictions, though the practical difference of its civil law frame is contested. *See* J.-R. Trahan, *The Continuing Influence of* le Droit Civil *and* el Derecho Civil *in the Private Law of Louisiana*, 63 LA. L. REV. 1019, 1053–55 (2003) (chronicling the purported decline of the civil law system in Louisiana and subsequent attempts by the Louisiana legislature and law schools to reverse the trend in the mid-twentieth century).

98. For a fascinating discussion on this, see Michael Steven Green, Erie*'s Suppressed Premise*, 95 MINN. L. REV. 1111, 1126–27 & nn.88–90 (2011).

99. Kaye, *supra* note 43, at 6.

100. *See, e.g.*, Monaghan, *supra* note 2, at 758–59 ("The relatively freewheeling era of federal judicial lawmaking (akin to that of a state common law court) to 'fill in the gaps' in a federal statutory regime . . . is long gone. Most writers now posit a narrower sphere for judge-made common law." (footnote omitted)).

101. *See supra* subpart I(A).

A. The Importance of Common Law Powers

State jurists like Judge Kaye and Justice Peters who seek to separate state court statutory interpretation from federal textualism refer to the "common law" nature of their courts.[102] The state jurists' invocation of the "common law" is a broad one and it pays to winnow down that appellation to see what most plausibly distinguishes state and federal practice.

For example, Judge Kaye notes that state statutes codify common law causes of action and abrogate common law doctrines.[103] Federal legislation, however, also incorporates common law concepts and textualists have no problem reading such statutes in that light.[104] Federal statutes also abrogate judicial decisions at the intersection of common and statutory law.[105] As Lilly Ledbetter's experience attests, Kaye's reliance on the fact that the "state legislative/judicial relationship often takes the form of an open dialogue"[106] is also not a significant ground for distinguishing state and federal practice.[107] The same holds for Kaye's emphasis of provisions of state statutes that are often unclear and require judicial elaboration.[108] Proponents of both expansive and restrictive approaches to federal common law regard this interpretive leeway as a kind of common law, and a legitimate form at that.[109]

---

102. *See* Kaye, *supra* note 43, at 6 (describing state courts as the "keepers of the common law"); Peters, *supra* note 52, at 1155–56 (contrasting the large body of common law available to assist state courts in statutory construction with the much smaller amount of available federal common law).

103. Kaye, *supra* note 43, at 20–21.

104. *See, e.g.*, Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 613–15 (2009) (reading CERCLA liability apportionment in light of common law tort principles); *see also* Frank Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1913, 1913–14 (1999) (reading the common law defense of necessity into a criminal statute silent on that matter); John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1656 (2001) [hereinafter Manning, *Deriving Rules*] (discussing textualists' application of common law principles and terminology when construing a statute); Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 521–25 (2006) (cataloging the incorporation of common law concepts in the interpretation of statutes).

105. *See, e.g.*, NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968) (describing the congressional override of a decision holding that a statute abrogated the common law distinction between employees and independent contractors).

106. Kaye, *supra* note 43, at 23.

107. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting) (asking Congress to override the majority's interpretation); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (overriding *Ledbetter* because of its impairment of statutory protections); *see also* Astrue v. Ratliff, 130 S. Ct. 2521, 2533 (2010) (Sotomayor, J., concurring) (calling on Congress to clarify its statutory language).

108. Kaye, *supra* note 43, at 27–29, 32–34.

109. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983) ("[Sometimes a] statute plainly hands courts the power to create and revise a form of common law . . . ."); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 34–35 (1985) (discussing how the Supreme Court has sometimes ignored evidence of specific intention when construing vague statutory or constitutional provisions); Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 331–32 (1980) (concluding that a court serves the same function when engaging in statutory interpretation as it does when acting in a common law capacity).

Kaye also observes that challenging questions of statutory interpretation may require degrees of lawyerly skill, judgment, and creativity equal to those required for judging the arc of common law precedent.[110] Yet modern textualists do not claim that each statutory provision has a clear meaning.[111] To be sure, some textualists see less interpretive uncertainty than others, but they also advocate deference to administrative interpretation of unclear statutes because agencies are better equipped to make law through such decisions.[112] This gap-filling form of "common law" arising out of statutory vagueness or ambiguity does not brightly distinguish state and federal interpretation.

A more plausible point of common law differentiation is a state court's broad power to create and change law in areas where the legislature has not spoken at all, as opposed to having spoken unclearly.[113] Federal courts are less frequently seen creating common law actions, abandoning contributory negligence in favor of comparative fault,[114] newly recognizing living wills,[115] or updating common law rules in light of scientific advances.[116] By contrast, state courts, as Judge Kaye notes, can do so on their own initiative when the

---

110. Kaye, *supra* note 43, at 27–29.

111. *See* Homemakers N. Shore, Inc. v. Bowen, 832 F.2d 408, 411 (7th Cir. 1987) (Easterbrook, J.) ("An ambiguous legal rule does not have a single 'right' meaning; there is a range of possible meanings; the selection from the range is an act of policymaking."); Manning, *What Divides*, *supra* note 15, at 75 (observing that because modern textualists understand that the meaning of statutory language is dependent on context, they realize that the distinction between statutory text and congressional purpose is not always clear); Manning, *Absurdity Doctrine*, *supra* note 19, at 2408 (noting that textualists acknowledge that all statutory language is at least somewhat open-ended).

112. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting) (arguing for broad deference to the interpretations of the administrative agency charged with enforcing the statute); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 4 (2006) (contending that the legal system is at its best when the interpretation of an ambiguous statute is left to an administrative agency).

113. This argument assumes that state constitutions vest in or impliedly reserve for the judiciary general common law powers. Common law powers in many states might be understood as legislative grants via reception statutes that incorporate common law not inconsistent with state law. *See, e.g.*, WASH. REV. CODE ANN. § 4.04.010 (West 2005). This might limit a court's prerogative. *See* Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 346 (1992) (citing reception statutes as legislative justification for state common law). Yet courts often treated these statutes as merely declaratory of existing judicial powers. *See* Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 804 (1951) (noting that "where the passage of a reception statute came later in the development of a state or territory, it was deemed to be declaratory of existing law").

114. *See* Kaye, *supra* note 43, at 21 (discussing the judicial adoption of comparative fault by state courts). The Supreme Court will, however, make such changes in enclaves of federal common law, such as admiralty jurisdiction. *See* United States v. Reliable Transfer Co., 421 U.S. 397, 411 (1975) (abandoning the "divided damages" rule in admiralty jurisdiction in favor of comparative fault).

115. *See* Kaye, *supra* note 43, at 25 (noting New York Court of Appeals' willingness to recognize the concept of a living will without legislative action).

116. *See id.* (referencing the Supreme Judicial Court of Massachusetts's decision to overrule the common law "year and a day" rule in homicide prosecutions).

legislature has not acted.[117] It is this prerogative form of common lawmaking—as opposed to delegated lawmaking power—that raises the most substantial difference between the common law powers of state and federal courts.[118] Accordingly, Judge Kaye claims that this prerogative also allows state courts to work with statutes in a nontextualist fashion. She claims that sometimes the "common-law method" requires "plain meaning" to yield to "common-sense and substantial justice."[119] By contrast, federal textualists reject purposive or equitable interpretation. Similarly, advocates of common law differentiation will apply a statute beyond the fair construction of its textual terms when doing so comports with the purpose of the statute.[120] This filling of the *casus omissus*—treating an omitted statutory subject as included by analogy[121]—conflicts with the federal textualist's commitment to respecting the limits to which the legislature chose to pursue a given end.[122]

The challenging question, however, is how a court's freestanding common law prerogative changes the way in which that court should read or use statutes. Absent more argument about how to understand and integrate common law and statutes, it is not clear how judicial power to expound common law amid statutory silence also entails power to expand or contract legislative handiwork.[123] The task then, is to identify arguments that support the intuition that common law powers affect interpretive method. The following subparts begin that exploration.

---

117. *Id.*

118. *See* Merrill, *supra* note 113, at 347 (arguing that state reception statutes confer broad prerogative/common lawmaking powers on state courts).

119. Kaye, *supra* note 43, at 26.

120. *See* Kaye, *supra* note 43, at 31 (quoting Roger J. Traynor, *Statutes Revolving in Common Law Orbits*, 17 CATH. U. L. REV. 401, 405 (1968) [hereinafter Traynor, *Statutes Revolving*]) (hypothesizing a situation where a judge might deem it proper to extend a statutorily created right or duty to a person not expressly covered by the language of the statute when the extension falls in line with the purpose of the statute).

121. *See* Derek Auchie, *The Undignified Death of the* Casus Omissus *Rule*, 25 STATUTE L. REV. 40, 41–42 (2004) (discussing the *casus omissus* rule's gap-filling role); Hans W. Baade, *The* Casus Omissus*: A Pre-History of Statutory Analogy*, 20 SYRACUSE J. INT'L L. & COM. 45, 46 (1994) (summarizing the history and development of the differing views of the *casus omissus* in civil law and common law systems).

122. *See* Easterbrook, *supra* note 109, at 544 (proposing a framework wherein the domain of a statute should only extend to cases contemplated by the statute's framers); Manning, *Second-Generation*, *supra* note 12, at 1316 (asserting that textualists believe that judges should "respect the level of generality at which the legislature expresses its policies"); *cf.* Auchie, *supra* note 121, at 42 (explaining that the rule against statutory analogy in England "finds its roots in the doctrine of parliamentary sovereignty").

123. *Cf.* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 370 (1981) (stating that a court's power to make law when the legislature has been silent does not imply a similar ability to alter statutes).

B. Statutory Interpretation and the Constitution

Knowing the tenets of theories like textualism and purposivism is necessary for thinking about statutory interpretation beyond the Supreme Court. Yet in asking whether state and federal methods should diverge, it helps to consider reasons for adopting any particular approach. A first lens for viewing the question of interpretive choice focuses on the interpreter's role in the constitutional regime.[124] A constitution may impose duties or limitations on interpreters that affect their approach to legal texts.[125] A constitution could, for example, require or prohibit the judiciary from considering purpose in the event of semantic textual clarity.[126] Attempts to derive rules of statutory interpretation from the constitution play a prominent part in federal scholarship and can serve as starting points for analysis in the state context.[127] In fact, constitutional textualists have left open the possibility that arguments for federal textualism may not carry over to the state context.[128] This subpart picks up that thread to explain how some constitutional arguments in the federal context weaken the case for textualism in state courts when one considers common law powers.[129]

---

124. *See* Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988) ("Any theory of statutory interpretation is at base a theory about constitutional law."); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 76 (2000) (coining the handy phrase: "interpretive choice"). One must also interpret the constitution to derive norms for interpreting statutes. The question of interpretive choice in the constitutional context is beyond the scope of this Article, but some argue that the method might differ in constitutional and statutory contexts. *See* Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1, 4–5 (2004) (summarizing the factors that justify a divergence in interpretive methods).

125. Here I focus on written constitutions. Unwritten constitutions pose additional questions and arguably blur into the third category—considerations about the nature of law. *Cf.* Jeffrey Goldsworthy, *The Myth of the Common Law Constitution*, *in* COMMON LAW THEORY 204, 235–36 (Douglas E. Edlin ed., 2007) (describing the legal nature of unwritten constitutions in terms of official consensus).

126. *Cf. Acts Interpretation Act 1901* (Cth) s 15AA (Austl.) (giving preference to interpretations that would "best achieve the purpose or object of the Act"); *id.* s 15AB (codifying permitted use and sources of legislative history).

127. *See generally* Manning, *Deriving Rules*, *supra* note 104 (describing different aspects of the Constitution that might inform statutory construction).

128. *See* Kaye, *supra* note 43, at 28–34 (pointing to the lack of voluminous legislative history materials and the presence of multiple plausible interpretations of statutes at the state level as evidence of the greater ability of state courts to use the common law process to make policy determinations); John Copeland Nagle, *The Worst Statutory Interpretation Case in History*, 94 NW. U. L. Rev. 1445, 1468 (2000) ("The received wisdom suggests that state court judges have been more likely to follow textualist approaches than federal judges, but Popkin offers an insightful reason for why the opposite should be the case.").

129. I appreciate the dangers of talking about state constitutions in gross. Nevertheless, state constitutions also share features, and scholars of state constitutionalism address state separation of powers questions in general, see, for example, Stanley H. Friedelbaum, *State Courts and the Separation of Powers: A Venerable Doctrine in Varied Contexts*, 61 ALB. L. REV. 1417, 1457–60 (1998); Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1238–40 (1999); Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 107–08 (1998); G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*,

A good starting point is Professor Eskridge's argument that the original understanding of the "judicial Power" in Article III of the U.S. Constitution includes the equitable power to apply statutory provisions in light of statutory purpose and reason, even when doing so departs from the text's semantic meaning.[130] This historical argument relies on the practices of English common law judges between the years 1500–1800, as well as state court common law judges in the Founding and post-Founding eras.[131] Similar originalist arguments could apply to state courts with even greater force, at least for judiciary provisions framed around the time of the Founding.[132] Further, although Eskridge's evidence of practice in English and state courts with common law powers may be irrelevant for arguments about federal courts of limited jurisdiction,[133] this aspect of Eskridge's originalist case may be a feature, not a bug, for arguments about state court interpretation.

Differences in constitutional structure may also point away from state court textualism. Consider the argument for federal textualism based on constitutional structure. Manning argues that legislation is often a product of messy and possibly unknowable compromise; that legislative choices about textual *means* are significant, for they "reflect the price that the legislature was willing to pay" to achieve a given end; and that a legislative choice between rules and standards reflects that important decision about means.[134] Overriding clear text in the name of purpose risks upsetting these legislative compromises and the choices about means that instantiate them. Indeed, regular repair to purpose could impede compromise, for negotiators would always face the risk of courts abstracting away particular bargains in light of

---

59 N.Y.U. ANN. SURV. AM. L. 329, 340 (2003). *But see* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 238 (2009) ("State constitutional separation of powers questions also call for a *state-specific* form of analysis rather than one applying a more generalized, or universalist, American-constitutional separation of powers doctrine."). At this stage of the inquiry, I am content to follow suit of the majority.

130. *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1096–98 (2001) (arguing that interpretations of statutes necessarily encompass nontextual considerations).

131. *Id.* at 998–1008, 1010–30.

132. Perhaps it is no coincidence that some of the least originalist state courts, such as Kaye's New York and Peters's Connecticut, are charter members of the union.

133. *See* Manning, *Deriving Rules*, *supra* note 104, at 1662–63 (arguing that state judiciaries' inheritance of general common law powers may have made it more natural for state courts to treat statutes merely as starting points for further common law reasoning); Manning, *Equity of the Statute*, *supra* note 69, at 30–36 (discussing the origins of the equity of statute doctrine in England and noting that the English judiciary always felt significant freedom to engage in atextual interpretation, perhaps because of its significant conflation of lawmaking and judging authority); *see also* Bellia, *supra* note 67, at 1548 (arguing that state courts did not use equitable doctrines in their interpretation of federal statutes).

134. Manning, *Second-Generation*, *supra* note 12, at 1310–11; *see also* Frank H. Easterbrook, *The Role of Legislative Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 63–65 (1988) (emphasizing that the legislative process is essentially one of compromise; as such, any meaningful statutory interpretation must account for the means utilized by the legislature in getting a particular statute passed).

general purpose.[135] Avoiding such risks, Manning argues, honors the Constitution's structural norms. The bicameralism and presentment requirements of Article I, Section Seven, the protection of small states in the Senate, and internal legislative procedures place compromise at the center of the federal lawmaking process and create a supermajority requirement for passing legislation, thus giving political minorities the power to block legislation or exact compromise.[136] Article I's explicit and exclusive vesting of the legislative power in Congress also weighs against judicial revision of clear language emerging from such bargains.[137]

As Part III will discuss, many state constitutional structures also encourage compromise and separate the legislative and judicial power. Distinguishing features of state constitutional structure complicate this picture, however. First, the fact remains that state courts still have inherent lawmaking power that extends beyond filling gaps and resolving ambiguities in statutes—they can fashion common law in the absence of statutes.[138] The common law is a central point of contention in disputes between federal textualists and their critics. Proponents of dynamic statutory interpretation in federal courts emphasize the persistence of common lawmaking in substance, if not in name, in ordinary statutory interpretation.[139] Similarly, many scholars who criticize the Supreme Court's restrictive approach to *federal* common law also reject textualism and its formalist approach to separation of powers.[140] The limited, uncertain character of federal common law[141]

---

135. *See* Manning, *Second-Generation*, *supra* note 12, at 1314 (describing, in particular, how judicial resort to purpose can run the risk of bypassing the compromise-forcing structures that are an important part of the legislative bargaining process).

136. *Id.*

137. *Id.* at 1305–06.

138. *See* Kaye, *supra* note 43, at 5–6 ("The common law is, of course, lawmaking and policymaking by judges. It is law derived not from authoritative texts such as constitutions and statutes, but from human wisdom collected case by case . . . . That state courts—not federal courts—are the keepers of the common law has long been American orthodoxy." (footnotes omitted)). Many state courts also have legislative power to regulate court procedure and discipline the bar; moreover, some trial-level courts act like executive agencies in administering social services in family and drug courts. *Cf.* Peters, *supra* note 52, at 1554–55, 1561–62 (noting first that, in Connecticut and Minnesota, the legislature and judiciary occasionally clash over control of court procedure, and second that, in Connecticut, judicial officers often serve in a social-service capacity in family and drug courts).

139. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 383 (1990) (arguing that statutory interpretation is "fundamentally similar to judicial lawmaking in the areas of constitutional law and common law"); Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 225–26 (1999) (arguing that a fundamental commitment to a system of precedent is incompatible with the view that courts' only legitimate role in statutory interpretation is to seek textual meaning, because the reality of any common law system means that any judicial determination regarding a statute will affect that statute's subsequent interpretation).

140. *See, e.g.*, Martha A. Field, *The Legitimacy of Federal Common Law*, 12 PACE L. REV. 303, 317 (1992) (rejecting the Supreme Court's stance that federal common law violates the separation of powers, and instead embracing the view that federal common law operates to effect congressional intent); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 274–76

presents an obstacle to such arguments, however. The *leitmotif* of Justice Scalia's prominent defense of textualism is how federal courts are not common law courts—a tune Justice Young reprises in his defense of textualism in state courts.[142] Such objections fall away for state courts, which are undisputedly common law courts. The Supreme Court's parsimonious understanding of federal common law may relieve federal textualists from considering the implications of general common law powers on statutory interpretation. State court jurists have no such dispensation.

In considering this point, it is also worth noting that most state judges are elected or face executive reappointment.[143] This feature of state constitutional law originated in a wave of constitutional reform aimed at *weakening* powerful legislatures beholden to special interests.[144] Along with this broader aim of shifting power from the legislature to "the people," the embrace of judicial elections eliminated legislative appointment and reappointment in the hopes that the judiciary would check powerful, faction-driven legislatures by "protect[ing] property and individual rights."[145] Of course, judicial independence often connotes separation from politics, but one might understand judicial elections today as creating a politically accountable, policy-making corrective to legislative dysfunction.[146] If so, this could suggest a state law form of dynamic interpretation that links the

---

(1992) (criticizing the view that the text of the Constitution can be read to establish a strict separation of powers between the legislative and judicial branches); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 838–42 (1989) (arguing that a narrow view of federal common law—which purports to respect principles of separation of powers—instead reflects an unrealistic assessment of the nature of the judicial process, legal realism, and the character of American federalism). *But cf.* Boyle v. United Techs. Corp., 487 U.S. 500, 507–12 (1988) (Scalia, J.) (authoring an opinion creating a federal common tort law defense).

141. *See, e.g.*, City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981) (disavowing federal common law rule-making authority).

142. 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, 13 (Amy Gutmann ed., 1997); Young, *supra* note 56, at 281 (advancing the argument for textualism on the grounds that courts have no responsibility, absent constitutional violations, to remake poor legislative policy choices).

143. Bruhl & Leib, *supra* note 79, at 1217 n.1, 1253 n.149.

144. WILLIAMS, *supra* note 129, at 285. This reform movement also strengthened and gave independence to executive offices, citizen ballot initiatives and referenda, and procedural rules limiting legislative discretion. *See* James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819, 820 (1991) (discussing the introduction of new institutional devices, including the secret ballot, the initiative, and the referendum).

145. WILLIAMS, *supra* note 129, at 285; *cf.* Manning, *Equity of the Statute*, *supra* note 69, at 67–70 (discounting evidence of equitable interpretation in earlier periods because relevant courts were subject to legislative control).

146. Originalists might suspect this inference to be anachronistic. Advocates for judicial elections argued that the process would be best suited to select competent and impartial judges. Early advocates and opponents of judicial elections often shared a pre-legal realist understanding of the judge as an apolitical oracle or technician. Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 210–13 (1993).

common law tradition with political accountability to weave "common and statutory law . . . together in a complex fabric."[147]

In short, prerogative common law powers blur the separation of the legislative and judicial branches in state government as compared to in the federal Constitution. In general, this is an important datum for one seeking to derive interpretive principles from the Constitution. In particular, if equitable interpretation comes part and parcel with common law powers, many state courts undisputedly can claim these—and a measure of political legitimacy—in ways that federal courts might not.

C. Statutory Interpretation and Institutional Competence

A second, more empirical perspective on interpretive choice calibrates interpretive method with the practical competences of the interpreter. An adherent of the "institutional turn"[148] in interpretation first identifies or assumes a value or set of values, identifies the relevant interpreter, and then asks what interpretive methods are most likely to promote the desired values, given the interpreter's competences. Pure arguments from institutional competence assume that the Constitution does not mandate any particular approach to statutes, or at least permits interpretive choice along these lines.[149]

1. Institutional Arguments in Federal Scholarship.—Scholars have used institutional approaches to underwrite an array of interpretive methods. Professor Caleb Nelson grounds textualism in the belief that a rule-like approach to finding legislative intent will lead to fewer errors than reliance on legislative history or imaginative reconstruction.[150] Professor Adrian Vermeule is perhaps the most thoroughgoing institutional advocate of textualism. He argues that the federal judiciary's institutional limits recommend "wooden" interpretation that hews closely to the surface meaning of

147. Kaye, *supra* note 43, at 20 (quoting David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 937 (1992)); *see also* Bruhl & Leib, *supra* note 79, at 1258–59 (claiming that state judicial elections may legitimize updating statutory interpretation); Mashaw, *supra* note 124, at 1690; Popkin, *supra* note 63, at 194–97 (describing the republican statutory interpretation movement). *But see* Hans A. Linde, *The State and the Federal Courts in Governance:* Vive La Différence!, 46 WM. & MARY L. REV. 1273, 1286 (2005) ("I reject the thoughtless notion that a judge on an elective court should approach a legal issue differently from an appointed colleague in a neighboring state.").

148. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003).

149. *See* VERMEULE, *supra* note 112, at 33 (noting that decisions pertaining to interpretive methodology must necessarily be institutional because the Constitution cannot be read as suggesting one interpretive method over another).

150. Nelson, *supra* note 23, at 377, 403–16; *see* Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 254–56 (supporting textual statutory interpretation methods on the basis that the plain meaning of the text provides some common ground upon which individuals with divergent interests and abilities can approach a problem).

the particular clause in question.[151] Because judges cannot know whether rules or standards generally lead to better empirical results, courts should always choose rules in particular cases to minimize decision costs without losing expected accuracy.[152] For this reason, he concludes that a minimalist rule of plain meaning should trump background purpose or inferences from statutory structure and related statutes.[153]

Not all institutional arguments conclude in textualism. The regime textualism sought to displace—the purposivism of the Legal Process School—anchored its approach in the competences of various legal institutions.[154] In fact, the current institutionalism in interpretive theory seems a direct descendent of the Legal Process.[155] If so, institutional textualism does not oppose Hart and Sacks in principle, but rather disagrees with the purposive conclusions the Legal Process thinkers drew from their institutional assessment. Similarly, Judge Posner's defense of purposive interpretation points to the advantage courts have in smoothing the rough edges of blunt statutory rules.[156] In theory, legislative amendment exists to cure absurd or over- and under-inclusive mischief in statutory language, but given the familiar costs and hurdles of legislative action, judicial reliance on legislative amendment is either foolish or mulish. Imaginative reconstruction of congressional intent in particular situations, the argument goes, is far more likely to promote legislative intent than waiting for legislative intervention.[157]

2. Institutional Competence and Common Law Powers.—The analysis below considers plausible goals an interpreter would seek to achieve through interpretation and then asks, in light of those goals, how the addition of general common law powers should change what courts do with statutes.

---

151. VERMEULE, *supra* note 112, at 4.

152. *See, e.g.*, *id.* at 192–93 (discussing the high costs of using legislative history relative to the indeterminate benefits it provides).

153. *See, e.g.*, *id.* at 202–05 (concluding that enquiry beyond plain meaning provides little value and advocating for agency deference, as agencies are better suited than courts to delve into sources of collateral evidence regarding specific statutes). Such a "satisficing" approach "searches among options or choices until, but only until, one is found that meets preset aspiration level—until, but only until, the choice is 'good enough,'" as opposed to best or optimal. *Id.* at 176–77.

154. *See* Jeff A. King, *Institutional Approaches to Judicial Restraint*, 28 OXFORD J. LEGAL STUD. 409, 422–23 (2008) (describing the theories of the members of the Legal Process School that involved institutional competences).

155. *See id.* (linking the work of Vermeule and Sunstein with the Legal Process scholarship of Hart, Sacks, and Fuller).

156. Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189–90 (1986).

157. *See* Carlos E. González, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 608 (1996) (arguing that judges should imaginatively reconstruct legislative intent when the statute must be applied to situations the legislators did not foresee); Posner, *supra* note 40, at 817–18 (arguing that the judge should try to "imagine how [the enacting legislators] would have wanted the statute applied to the case at bar").

a. Historical Legislative Intent.—A common aim of statutory interpretation is giving effect to what the legislature intended at the time of enactment.[158] Here, general common law powers seem to offer only modest improvements in competence. If, as a matter of fact, common law concepts suffuse state statutes more than in federal legislation, a common law court may be more adept at inferring what the legislature meant in those instances. Accordingly, state judges may be more accurate in identifying an intended meaning that departs from a reasonably clear semantic meaning. But this also seems to say more about the mix of concepts in statutes than interpretive method itself.

This is not to deny other institutional differences between state and federal courts along this axis. Compared to federal judges, state court judges are more likely to consult legislative drafting, to have held political office themselves (perhaps at the time of passage), or to have greater familiarity with the workings of the state legislature.[159] These facts may increase a state judge's accuracy in assessing a majority of the legislature's actual or counterfactual intent. Nevertheless, while intent skepticism could be less justified in state courts, those institutional differences have little to do with being a keeper of the common law tradition.

b. Present Legislative Intent or Political Preferences.—Others argue that statutes should be interpreted to respect existing political preferences, whether they are reflected in the existing makeup of the legislature or the population more generally.[160] Here, the traditional idea of the common law reflecting social custom or shared communal understandings may support the notion that state courts better feel the pulse of the polity. Professor Eisenberg's claim that all common law doctrine turns

158. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479–80 (1987).

159. *See* G. ALAN TARR & MARY CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION 55 (1988) ("[O]ver 70 percent [of state judges] have held at least one nonjudicial political office prior to selection [as a judge], and most ha[ve] held two or more such offices."); Abrahamson & Hughes, *supra* note 55, at 1081–82, 1085 (noting that "[j]udges . . . participate in the formulation of proposed legislative policy through [formal] mechanisms" and informal mechanisms); Linde, *supra* note 147, at 1286 (explaining that elective state court members are more likely to have had legislative experience than the Supreme Court members and that judges in smaller states often consult with state legislators); Peters, *supra* note 52, at 1561 (observing that "[f]ederal courts . . . have much more limited opportunities to participate in institutional interventions" than state courts).

160. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 54–56 (1982) (insisting that "inconsistent, unprincipled, or preferential treatment" in lawmaking should be respected so long as it represents the wishes of the current majorities or coalitions of minorities and is constitutional); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 61 (1988) (proposing a "nautical theory" that would "treat statutes as if they were enacted yesterday"); Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2034 (2002) (supporting the proposition that judges should be constrained to maximize the extent to which statutory results accurately reflect the political preferences accepted in society).

on congruence with "social propositions"[161] suggests that sensitivity to popular norms is part of the daily work of a common law jurist in the way that it may not be for a federal judge. If common law practice offers a state court judge a more accurate gauge of societal norms than a federal judge can access, arguments over whether statutory "updating" is undemocratic or undermines legislative supremacy may be different in the state context.

Again, we find that different institutional considerations may bolster the claim of state court divergence. As Bruhl and Leib argue, the fact that many state judges face elections might—at least in some kinds of cases—give state judges an advantage over federal courts in identifying when contemporary popular preferences have outgrown text or historical intent.[162] One could make similar points about the fact that many judges face reappointment or are otherwise plugged in to state politics in ways that many federal judges are not.[163]

c. Good Policy.—A person assessing an interpretive methodology may consider not just faithful agency to statutory drafters or to contemporary opinion, but also desirable substantive results. We can ask which interpretive method is likely to produce the most good, however defined. If we think of the common law courts simply as bodies with general powers to make law through adjudication, state courts may have competence advantages over their federal court counterparts—advantages that may justify a more purposive or dynamic role in shaping policy via statutory interpretation.

In making the normative judgments that accompany shaping doctrine in fields like tort, contract, and property law, state court judges have more opportunities than their federal counterparts to develop skills useful for crafting "good" law. Common law courts also have greater opportunities to witness the consequences of their previous lawmaking actions, thus gaining the iterative experience of policy making over time and practice developing policy through adjudication.[164] Here we have a modern take on the classical common lawyer's claim that the discipline requires and produces judges "intimately familiar with the complex 'texture [of] human affairs,'" thus making its practitioners more apt in practical reasoning than the average

161. MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 2–3 (1988).

162. Bruhl & Leib, *supra* note 79, at 1250–53.

163. For a discussion of reappointment as opposed to re-election in state courts, see Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV. 839, 860–61 (2012) (discussing how, even in states where judges serve by appointment, "the vast majority [of high court judges] must also run in either a contested election or, more often, an uncontested public referendum in order to keep their jobs").

164. *Cf.* Stephen M. Johnson, *Competition: The Next Generation of Environmental Regulation?*, 18 SOUTHEASTERN ENVTL. L.J. 1, 36 (2009) (considering, in the context of administrative law, that it is better to rely on "case-by-case adjudications to develop . . . general agency rules" than through rule making).

person or, presumably, the mere follower of legislative fiat.[165] Such experience would be useful in making *ex post* adjustments to legislation that, due to the limits of foreknowledge and human language, is necessarily imprecise when drafted *ex ante*.[166]

To be sure, federal courts may have similar opportunities in constitutional law and in interpreting ambiguous or open-ended statutes, but state courts combine that experience with freestanding policy duties.[167] This argument presumes, controversially, that common lawmaking is a discipline indistinct from practical policy making. But in a private law tradition that includes Holmes and Posner, an assumption that merges common law with legislative judgment is not beyond the pale.[168] Just as one might respect the Delaware Court of Chancery's wisdom in matters of corporate governance or defer to the Second Circuit's in securities law, we might also find that common law judges are pragmatically wiser than their more constrained federal counterparts. For judges like Roger Traynor, such faith in their ability to make reasoned and reasonable policy from the adjudicative perch underwrites not only their approach to the common law but their aggressive approach to statutory interpretation as well.[169]

We can bolster this argument by pointing to other institutional advantages that state judges may have over their federal counterparts. Some state judges may have further experience in the policy-making trenches due to de novo review of administrative agencies, as well as loosened justiciability doctrines that allow courts to resolve generalized grievances, issue advisory opinions in some states, and adjudicate disputes that federal courts would classify as political questions.[170] Similar advantages may flow

---

165. Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD U. COMMONWEALTH L.J. 1, 3 (2003). The classical common lawyer would not agree that his discipline is a mere branch of legislation or applied philosophy. *See id.* at 3–11 (describing the common lawyer's conception of "artificial reason[ing]").

166. *Cf.* H.L.A. HART, THE CONCEPT OF LAW 128–36 (2d ed. 1994) (discussing the necessarily "open texture" of legislation).

167. Federal courts, in principle, are also supposed to defer to administrative agencies on many questions of statutory policy. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844–85 (1984). Only sixteen states give *Chevron*-strength deference to agency interpretations, while fourteen states use de novo review. D. Zachary Hudson, Comment, *A Case for Varying Interpretive Deference at the State Level*, 119 YALE L.J. 373, 374 (2009).

168. *But see* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 204, 206–08 (1995) (defending the autonomy of private law from public law); John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1661–62 (2012) (same).

169. *See* Traynor, *Statutes Revolving*, *supra* note 120, at 411 (explaining that American judges played a far more active—and creative—role than their English counterparts in developing a uniquely American common law). On Traynor's belief in his ability as a policymaker, see G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 243–66 (3d ed. 2007).

170. *See, e.g.*, WILLIAMS, *supra* note 129, 296–300 (pointing out significant state–federal distinctions such as "broad common-law powers of lawmaking," the ability to "render advisory opinions," and facility to litigate "issues that cannot be heard in federal courts because of the political question doctrine"); Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking*

from implementing many state constitutions' more robust guarantees of positive political and economic rights.[171] Finally, it is plausible that state judges' political accountability may lead to better policy making.

The argument so framed begins to resemble a familiar justification in the federal context for *Chevron* deference to administrative agencies' interpretations of statutes. One justification of *Chevron* points to administrative agencies' political accountability—a point Bruhl and Leib explore in their work on judicial elections.[172] A second justification, and the one most relevant here, is the agency's policy-making expertise compared to that of Article III judges.[173] Professor Cass Sunstein has tellingly argued that federal agencies are the contemporary equivalents of the common law courts that previously forged the path of American law.[174] Sunstein and Vermeule further argue that even if federal judges should be textualists, there is good reason for them to defer to purposive interpretations by agencies.[175] Agencies' institutional advantages help them know when "departures from the text actually make sense" and whether such departures will destabilize the statutory scheme.[176] If, like federal agencies, state courts' policy competence is superior to that of the federal courts, the argument for state court textualism is weaker than in federal jurisprudence.

III. The Potential Irrelevance of Common Law Powers

The previous Part identified how general common law powers can strengthen the constitutional and institutional arguments for more purposive or dynamic approaches to statutes by state courts. This Part will challenge those constitution- and competence-based arguments and introduce more

---

the Judicial Function, 114 HARV. L. REV. 1833, 1844–75 (2001) (explaining that, unlike federal courts, state courts can issue advisory opinions, adjudicate "political questions," and review administrative agency decisions); Linde, *supra* note 147, at 1274–75 (giving examples of state court decisions that would violate justiciability if ordered in federal courts).

171. *See, e.g.*, TARR & PORTER, *supra* note 159, at 51 (observing that some state constitutions offer "more detailed and extensive protections" than those contained in the federal Constitution); G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169, 1176–78 (1992) (identifying examples of substantive constitutional rights that implement specific policies).

172. Bruhl & Leib, *supra* note 79, at 1248–49; *cf.* Hudson, *supra* note 167, at 375–77 (explaining that state agency officials and federal judges are not as politically accountable as state judges).

173. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly, or explicitly, by Congress." (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974))); Sunstein & Vermeule, *supra* note 148, at 904 ("[I]f a high degree of technical expertise is required, judicial judgments might well be unreliable." (footnote omitted)).

174. Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1019 (1998); *see also* Hudson, *supra* note 167, at 377–78 (explaining that state courts, due to their common law origins, are capable of filling in the legal and practical gaps resulting from legislative processes).

175. Sunstein & Vermeule, *supra* note 148, at 928.

176. *Id.*

basic philosophical reasons to question the difference that the common law prerogative makes in the statutory context.

A. Common Law and the Constitution

Not all inferences from state constitutional rules and structure suggest that general common law powers allow greater judicial flexibility with enacted legislation. If common law powers are grants of authority for courts to make law through adjudication, a skeptic could object that it is simply a non sequitur to infer that lawmaking in one domain—adjudication where the legislature is silent—translates into lawmaking authority in another—applying statutes a legislature has enacted.[177] As Professor Monaghan has argued in a related context, "the fact that the courts can make law when the political organs are silent . . . does not legitimate a similar authority when the political organs have spoken."[178] Without some understanding about the division of authority and the hierarchical relationship between the legislature and the courts, we can say little about how courts should fill gaps in statutes, extend or restrict statutes, correct absurd statutes and scrivener's errors, or even update or override outdated statutes.

As noted above, the constitutional case for common law differentiation may depend on an originalist argument linking the judicial power with equitable interpretation that can expand or restrict the scope of statutes in light of common law reason. One problem with this argument is that even state champions of common law differentiation concede that legislation can override judge-made rules.[179] State law may be a dialogue between courts

---

177. Like the affirmative case, the skeptical case in this subpart assumes that common law adjudication is a form of positive lawmaking—a position that finds support on both sides of the purposivist–textualist divide. *See* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1247–49 (1996) (noting that federal courts engage in "interstitial 'lawmaking'" as part of the process of interpreting statutes and make positive law when they create federal common law rules); Kaye, *supra* note 43, at 11 ("[S]tate courts effectively 'make law,' and do so by reference to social policy, not only when deciding traditionally common-law cases but also when faced with cases that involve difficult questions of constitutional and statutory interpretation."); Kramer, *supra* note 140, at 267 (stating that courts make law when they articulate any rule "that is not easily found on the face of an applicable statute"). This last assumption is controversial and may not accord with how some state courts understand their common law jurisprudence. *See also* Anthony J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 898–901 (2005) (surveying state court decisions applying federal common law wherein the state courts, in creating new rules in federal common law cases, did not understand themselves to be making new law but rather were applying existing principles and precedent); Green, *supra* note 98, at 1126 (observing that some state courts understand common law in nonpositivist terms). Nevertheless, I hope to bracket jurisprudential questions about the nature of the common law until later.

178. Monaghan, *supra* note 123, at 370. For the record, Professor Monaghan voiced no objection to purposive interpretation. *See id.* ("We expect courts to interpret statutes, at least in their marginal applications, on the premise that the legislature seeks to promote the public good . . . .").

179. *See* Kaye, *supra* note 43, at 21 ("[L]egislatures at times express their disagreement by 'repealing' or 'vetoing' other common-law doctrines.").

and legislatures, but advocates of common law purposivism in state courts do not claim, for example, that a court can override legislative corrections of its previous interpretations.[180] If this is so, it is fair to ask why courts should have similar freedom with reasonably clear statutes when a legislature has not yet rebuked a court.[181]

Another problem with applying the originalist argument for equitable interpretation in the state context is the varying vintage of state compacts. It may be plausible to attribute a quasi-natural law, nonpositivistic understanding of judging as included in the "Judiciary Power" to a document like the 1780 Massachusetts Constitution.[182] Such an inference may be shakier for constitutions whose judiciary provisions were adopted or amended in a twentieth century where norms of legislative supremacy are comparatively stronger.[183] Accordingly, originalist arguments for equitable interpretation in many state courts could be vulnerable to a similar objection of anachronism raised by textualists in the federal context.[184]

Even setting these objections aside, other structural features of state constitutionalism suggest that common law powers should not play a strong role in the interpretation of statutes. As noted, constitutional arguments for federal textualism rely on text-based inferences in support of separation of powers formalism.[185] Many of the features textualists identify as separating the federal judiciary from Congress also exist in state regimes: bicameralism and presentment,[186] salary protection,[187] and the prohibition on bills of

180. *See id.* at 23 ("No one can question the legislature's authority to correct or redirect a state court's interpretation of a statute."). *But see* Gluck, *Laboratories*, *supra* note 6, at 1755–56, 1785–98 (describing state courts' refusal to follow legislated rules of statutory interpretation).

181. This objection also applies to theories that ascribe to federal courts similar common law powers. *See* Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 CALIF. L. REV. 919, 939 (1989) (reviewing WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (1988)) ("Nothing in Eskridge's theory explains the disjunction between using purely positivistic approaches to interpretation in the easy cases—where a recently-enacted statute speaks plainly and no strong policy choices counsel another result—and nonpositivistic approaches in other situations."); Monaghan, *supra* note 123, at 375 (highlighting tension in nonoriginalist theories of constitutional interpretation that adhere to the original meaning of "'recent' constitutional amendments").

182. MASS. CONST. pt. 2, ch. 3.

183. *See* Tarr, *supra* note 129, at 332 ("[T]oday's state constitutions were established at various points in the nation's history, reflecting the political ideas reigning at those particular points in time, . . . this in turn has affected the institutions that were created and the relationships established among them.").

184. *See* Manning, *Equity of the Statute*, *supra* note 69, at 8 (arguing that the English doctrine of equitable interpretation of statutes as an inherent judicial power was rendered obsolete and anachronistic by the ratification of the Constitution).

185. *See generally* Manning, *Second-Generation*, *supra* note 12, at 1290, 1304–06 (justifying textualism by reference to principles of separation of powers and the structure and function of Congress as conceived of by the Constitution); Manning, *Deriving Rules*, *supra* note 104, at 1649–50 (contending that the structure of the Constitution and specific separation of powers provisions agitate against equitable interpretation of federal statutes by federal courts).

186. All states except Nebraska have a two-chambered legislature and all states have an executive veto.

attainder and ex post facto legislation.[188] Scholarship in state constitutional law also notes—if only to decry—that state courts often follow formalist federal jurisprudence on separation of powers.[189]

If anything, the separation norms in many state constitutional regimes are stronger than in the federal context. One specific indicator of judicial caution is the "antifederalist" approach to separation of powers that a leading scholar of state constitutional law has identified in state jurisprudence.[190] That line of thought adopts the Whig tradition of strict separation of powers and legislative omnipotence, a combination hostile to a vigorous judicial role in statutory interpretation. Unlike the federal Constitution, many state compacts also have explicit and strict separation of powers provisions.[191] Some question the effect of these textual commitments in state jurisprudence,[192] but such provisions bridge a potential pitfall for federal separation of powers formalists.[193] This feature of state constitutional theory has been prominent in the administrative law context, where state courts are more willing than their federal counterparts to enforce a nondelegation doctrine.[194] Similarly, a notable departure in state courts from strict

187. *See Amended State Constitutional Provisions Regarding Reductions to Judicial Salaries (January 2009)*, NCSC, http://www.ncsconline.org/d_kis/salary_survey/provisions.asp (reporting that twenty-nine states clearly prohibit reductions in judicial salaries and that another five states permit reductions only if applicable to all public officers).

188. U.S. CONST. art. I, § 10.

189. *See* Schapiro, *supra* note 129, at 88–92 (surveying and criticizing state supreme court decisions relying on federal separation of powers doctrine in interpreting state constitutions).

190. *See* Rossi, *supra* note 129, at 1172 ("Like Antifederalist political science, many states, more than federal courts, view separation of powers as requiring complete separation of functions and most states see the legislature as the supreme lawmaker.").

191. WILLIAMS, *supra* note 129, at 236–37; Tarr, *supra* note 129, at 337–38. *Compare* THE FEDERALIST NO. 48, at 332 (James Madison) (Jacob E. Cooke ed., 1961) ("[P]owers properly belonging to one of the departments ought *not to be directly and completely administered* by either of the other departments." (emphasis added)), *with* IND. CONST. art. 3, § 1 ("The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and *no person, charged with official duties under one of these departments, shall exercise any of the functions of another*, except as in this Constitution expressly provided." (emphasis added)).

192. Rossi, *supra* note 129, at 1220 (questioning the explanatory power of textual interpretations of state separation of powers provisions in light of the wide divergence in separation of powers approaches amongst states with similar separation of powers clauses). *But see* Askew v. Cross Key Waterways, 372 So. 2d 913, 924 (Fla. 1978) (deriving a strong nondelegation doctrine from the Florida Constitution's Separation of Powers Clause); Tarr, *supra* note 129, at 338 ("[Such text] encourages an interpreter to employ . . . the formalist approach to the separation of powers . . . .").

193. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944 (2011) ("The Constitution contains no Separation of Powers Clause.").

194. *See* Jim Rossi, *Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards*, 46 WM. & MARY L. REV. 1343, 1359 (2005) (arguing that state nondelegation doctrine is "much more rigid" than in the federal context).

separation—tolerance of a legislative veto—is consistent with a constitutional commitment to legislative branch policy making.[195]

Many state constitutions also contain more compromise-forcing "vetogates" than the U.S. Constitution. Beyond preexisting bicameralism and presentment requirements,[196] many state constitutions have line item vetoes, detailed rules governing legislative procedure, single-subject and balanced-budget requirements, and shortened legislative sessions.[197] To be sure, many of these requirements arose out of a second wave of amendments in response to the excesses of legislatures, which were awarded disproportionate power under original constitutional arrangements.[198] While these amendments may mute the parliamentary character of state constitutions, they do not encourage functionalist blending of legislative functions across branches. If, as federal textualists claim, constitutional vetogates are compromise-forcing mechanisms that judges should respect while interpreting statutes,[199] the more finely calibrated procedures and limits in state constitutions further militate against judicial smoothing of sharp statutory corners.

B. Common Law and Institutional Competence

The institutionalist arguments against common law differentiation minimize the potential benefits that the practice of such powers brings to courts, while emphasizing the limits to judicial competence—limits that general common law powers do not diminish and might even exacerbate.

If the aim of statutory interpretation is discerning historical legislative intent, a court's common law powers are of modest import.[200] As noted above, if common law concepts are more common in state statutes, a state court may be marginally better at identifying background norms at odds with semantic textual meaning. On the other hand, a common law court may overestimate the extent to which common law concepts pervade statutes, given the salience that those concepts have for a court steeped in that tradition. Accordingly, state courts could be more likely to erroneously impute common law meaning. In any event, intent in statutes that abrogate

---

195. *See* Rossi, *supra* note 129, at 1217 (identifying "underenforcement of . . . restrictions on the legislative veto" in state constitutional law).

196. All states have a gubernatorial veto of some kind, and every state except Nebraska has two legislative chambers that must approve legislation.

197. *See* WILLIAMS, *supra* note 129, at 257–67 (exploring procedural restrictions state constitutions impose on the legislative process); Tarr, *supra* note 129, at 335 (surveying state constitutional restrictions on process and substance designed to check legislative abuses).

198. *Id.* at 334–35.

199. *See* Manning, *Second-Generation*, *supra* note 12, at 1314–15 (arguing that because of procedural mechanisms that promote compromise in the legislative process, courts should prefer clear text over legislative history in interpreting a statute in order to remain true to the political compromises presumably underlying the final text of the legislation).

200. *See supra* subsection II(C)(2)(a) (describing the limited improvements to competence in statutory interpretation provided by common law powers).

the common law or legislate in the absence of common law would not be intrinsically clearer to a common law court.

As with historical intent, one can argue that common law powers have little to do with gauging present legislative intent or more general political preferences. Even if one were to concede the (controversial) premise that common law courts more frequently must gauge social norms in adjudication,[201] it is fair to wonder whether practice makes more perfect in this context. Given that state judges, like their federal counterparts, are often part of the political and legal elite,[202] there are grounds for skepticism here, or at least there is reason to be more confident about judges' ability to estimate the current legislature's preferences, rather than those of the populace. Nor is it clear that any marginal advantage in gauging historical or present legislative intent or political preferences would justify a wholesale change in interpretive method. If the institutional textualist is convinced that a rule-like, plain meaning approach to interpretation will lead to significantly fewer errors over the long run in gauging intent,[203] she might ask for more than the concededly indirect gains that the advocate of common law difference offers her.

Finally, there are serious objections to the *Chevron*-inspired argument that, even if federal courts should be textualist, common law courts' superior policy-making expertise justifies their use of purposive or dynamic approaches.[204] State courts share many of the institutional infirmities that lead textualists to disfavor courts' interpretive policy making. Like federal courts, state courts lack expert staff and fact-finding abilities.[205] State courts must also take concrete cases as they come, rather than investigating and initiating general proceedings.[206] This case-based nature of adjudicative lawmaking limits a court's ability to control a policy agenda and to see the effects of policy over time. Adjudication's intense focus on the particular facts at hand rather than the broader picture may also lead to blinkered policy

---

201. *See supra* subsection II(C)(2)(b) (discussing the contention that state court judges must weigh social custom and communal understanding in exercising their traditional common law powers).

202. *See* TARR & PORTER, *supra* note 159, at 55 (noting that "often . . . [state] justices are the products of politically active families," "20 percent have served in the state legislature," "almost 20 percent have served in the state attorney general's office," and "over 70 percent have held at least one nonjudicial political office prior to selection").

203. *See supra* section II(C)(1).

204. *See supra* subsection II(C)(2)(c).

205. *See* Jeffrey A. Pojanowski, *Reason and Reasonableness in Review of Agency Decisions*, 104 NW. U. L. REV. 799, 836–37 (2010) (discussing agencies' comparative competence in fact gathering and policy making).

206. *See* WALTER F. MURPHY & JOSEPH TANENHAUS, THE STUDY OF PUBLIC LAW 65–66 (1972) (stating that courts are "usually passive instruments of government" lacking a "self-starter" and that "[n]ormally, someone outside of the judicial system has to bring a suit or invoke a set of special circumstances to transform judicial power from a potential to a kinetic state").

making.[207] As Lon Fuller also long ago noted, multidimensional policy problems—ones that are most likely to stretch courts beyond their familiar common law competence—may not be amenable to resolution through adjudication, including through the common law method.[208]

If we are looking to federal administrative law for guidance on this question, it pays to also consider how that body of learning is suspicious of adjudicative policy making by agencies—bodies with policy-making competences exceeding those of common law courts. There is doubt about whether *Chevron* deference applies to agencies that, like courts, have power to adjudicate but not promulgate legislative rules.[209] The deference that agency adjudications receive does not displace the longstanding criticism that scholars levy at agencies that eschew rule making in favor of adjudicative policy making.[210] Those concerns, if true and if extended by analogy to state courts, militate against purposivist or dynamic interpretation. A state legal system, just like a federal agency, has rule making and adjudicative outlets for policy making—the legislature and the courts, respectively. Purposive or dynamic interpretation by courts would be analogous to administrative policy making by adjudication: the adjudicative body—the courts—would develop and change general rules on a case-by-case basis, thus shifting the center of policy making gravity from legislation to adjudication. Textualism, by comparison, seeks to give primacy to a centralized lawmaker with broader perspective and fact-finding abilities.[211] If, as some have argued, a requirement that agencies use rule making in some instances is not judicially manageable,[212] it may also be challenging for a state court to decide whether de facto rule making (textualist) or adjudication (purposivist) is proper.

---

207. *See* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 884 (2006) (arguing that, if he or she only focuses on the facts of the case at hand, a judge may produce a suboptimal rule for later cases if the case at hand is not representative "of the full array of events that the ensuing rule or principle will encompass").

208. *See* LON L. FULLER, *The Forms and Limits of Adjudication*, *in* THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER 86, 111–21 (Kenneth I. Winston ed., 1981) (explaining why "polycentric" problems are frequently unsuited to solution by adjudication).

209. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 890 (2001) (noting the circuit split on the issue and arguing that the power to issue binding, self-executing adjudications is sufficient). *Compare* Edelman v. Lynchburg Coll., 535 U.S. 106, 114 (2002) (reserving judgment on question), *with id.* at 122 (O'Connor, J., concurring) ("We have, of course, previously held that because the EEOC was not given rulemaking authority to interpret the *substantive* provisions of Title VII, its substantive regulations do not receive *Chevron* deference . . . .").

210. For an encomium to the superiority of rule making, see RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.8 (5th ed. 2010).

211. From this perspective, barriers to action facing state legislatures may still leave state court updating a second-best option. *Cf.* Paul R. Verkuil, *Rulemaking Ossification—A Modest Proposal*, 47 ADMIN. L. REV. 453, 453 (1995) (bemoaning procedural obstacles to administrative rule making).

212. John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 894–95 (2004).

C. The Common Law and Concepts of Legal Interpretation

A philosophically inclined person might object that talking straight away about constitutional authority and competence skips a critical first step, namely having a theory about what it means to "interpret" a legal text at all. If, for example, the textualist separation of semantic meaning from purpose is conceptually impossible or if equitable correction of texts is not "interpretation," the constitution- and competence-based arguments above may confuse more basic issues about law and interpretation. A critic with such concerns would instead put two theoretical horses before the constitutional or competence cart. First, we need a theory about reading and understanding legal texts. Let's call these commitments the interpreter's hermeneutical framework. Second, because we are interpreting *legal* texts, beliefs about the nature of law in general—or statutes and common law in particular—may be similarly basic. Let's call these beliefs the interpreter's jurisprudential framework. In recent years, legal philosophers have increasingly explored links between hermeneutical and jurisprudential understandings, an inquiry that may raise corresponding inferences about how an interpreter handles statutes.[213]

Considering these foundational questions offers two very different but plausible arguments that common law powers are irrelevant to interpretive choice. Before presenting those arguments, however, it helps first to say more about these more basic frameworks.

1. First Principles.

a. Hermeneutical Framework.—This may all sound quite abstract, and the literature and arguments on this score are vast and complex. But we can get the feel for this aspect of interpretive choice by going back to the classic debate between H.L.A. Hart and Lon Fuller about an ordinance prohibiting "vehicles in the park."[214] An interpreter must decide whether the ordinance applies to things like roller skates, ambulances, or strollers.[215] Hart would approach this problem by distinguishing between the "core" and "penumbra" of a rule.[216] There will be situations—think of a Hummer

213. For a collection of works along these lines, see LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY (Andrei Marmor ed., 1995). In his Preface, Marmor notes that in arguments about interpretation "a close but controversial link emerges . . . between the concept of interpretation and the concept of law." *Id.* at vii; *see also* Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY, *supra*, at 203.

214. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

215. Hart, *supra* note 214, at 607.

216. *Id.*

zooming across the grass, blasting hair metal from tricked-out speakers[217]—that are easy cases. There, the law governs without much work for the judge besides recognizing the fit between the situation and the ordinance. But there will also be peripheral cases—think of a tricycle—where it is unclear whether the rule prohibiting "vehicles" applies. There, the judge must exercise discretion. The judge makes new law, drawing sharp lines in a region that the legislature left fuzzy. As we move from the core of a rule to the periphery, we move from the realm of legal *interpretation* to lawmaking *discretion*.[218]

Lon Fuller challenged the core and penumbra dichotomy.[219] In the apparently peripheral case of a tricycle, the argument goes, the interpreter does not exercise legislative discretion to include or exclude trikes within the category of "vehicles," but rather seeks to identify, articulate, and apply the purpose of the statute, which either includes trikes or does not.[220] Nor in the ostensibly "core" case of a jeep does an interpreter simply recognize and categorize a jeep as a qualifying "vehicle." A functioning yet immobile jeep placed in the park as a war memorial is as vehicular as it gets, but is not obviously classified as core or penumbral.[221] Legal rules, Fuller argues, are only comprehensible in light of their background purposes, which thus collapses the distinction between linguistic rule following at the core and discretionary legislation at the periphery.[222]

A version of this hoary squabble continues today. Contemporary textualism depends on a similar distinction between the core and periphery. Manning's central tenet of textualism—privileging semantic meaning over statutory policy in cases of conflict—presumes the Hartian claim that there are cases in which a core semantic meaning covers and thus decides a case.[223]

---

217. *See, e.g.*, MÖTLEY CRÜE, *Kickstart My Heart*, *on* DR. FEELGOOD (Elektra 1989) (exemplifying the genre).

218. *See* HART, *supra* note 166, 128–32 (arguing that courts must exercise discretion akin to that of rule-making bodies in difficult cases where there is no "one uniquely correct answer to be found, as distinct from an answer which is a reasonable compromise between many conflicting interests"); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 194–97 (1979) (explaining that legislators often pass "deliberately underdetermined rules" because they prefer to let the courts exercise discretion in filling in the gaps within the limits of a core general framework and giving rules referring to reasonableness, fairness, and just cause as examples).

219. *See* Fuller, *supra* note 214, at 661–69 (rejecting Hart's assertion that the only way to effectuate "the ideal of fidelity to law" is to adopt his theory of interpretation, which Fuller criticizes for its focus on the meaning of individual words rather than statutory purpose and structure).

220. *See id.* at 665–66 (stating that, in all situations, a judge should seek to decide whether a particular outcome is consistent with the purpose of the statute).

221. *Id.* at 663.

222. *Id.*

223. The cognate form of originalist textualism in constitutional interpretation relies on a similar distinction. *See generally* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 95–96 (2010) (distinguishing "interpretation" of the original and public semantic meaning of constitutional text from "construction" of the text when its meaning is underdetermined).

By contrast, collapsing the meaning–purpose dichotomy will strengthen arguments that dynamic or strongly purposive approaches are compatible with legislative supremacy—an interpreter has a constructive role not merely at the putative periphery, but in all cases. Related claims about the insufficiency of textual meaning or original intent also have more force if a sharp distinction between text and context is untenable.[224] On that ground, textualism is impossible.

b. Jurisprudential Framework.—Hermeneutic beliefs—commitments about what it means to "interpret" a legal text—may also form "natural alliances" with understandings about the nature of law.[225] For example, some intentionalists link their approach to statutory interpretation with forms of legal positivism. Professor Alexander argues that because law's task is to make moral decisions more determinate, law does not do its job when it points us to general moral standards. To succeed, law must offer rules announced in texts that communicate the authority's determinations and override the audience's moral judgment. The aim of legal interpretation, then, is to understand what the authority intended to communicate. Anything more complex, Alexander argues, is an act of re-authorship or moral judgment, not legal interpretation.[226] One could craft a similar positivist argument for textualism by shifting the locus of authority from the speaker's meaning (intentionalism) to the reasonable reader's meaning (textualism). If the function and nature of law is to provide authoritative guidance, textualism's adherence to a text's objective, semantic meaning avoids both the uncertainty (or incoherence) of searching for subjective intent and the indeterminacy and discretion of seeking a coherent, overarching purpose.[227]

---

224. *See, e.g.*, William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 618 (1990) ("[I]nterpreter and text are indissolubly linked as a matter of being; the text is part of the context that has formed the interpreter, and the interpreter is the agent of the text's continued viability."); Eskridge & Frickey, *supra* note 139, at 342–43 (noting the importance of both original and current context in textual interpretation).

225. Heidi M. Hurd, *Interpreting Authorities*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY, *supra* note 213, at 405, 406. Hurd's use of "alliances" is apt. The claim that a theory of law has necessary consequences for legal decision making is controversial. *See generally* Brian Bix, *Robert Alexy, Radbruch's Formula and the Nature of Legal Theory*, 37 RECHTSTHEORIE 139 (2006).

226. *See* Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY, *supra* note 213, at 357, 359–63 (explaining that "texts mean what their authors intend them to mean" and, therefore, when interpreting a text, a judge changes a text when he diverts from the author's intentions); *see also* Jeffrey Goldsworthy, *Legislative Intentions, Legislative Supremacy, and Legal Positivism*, 42 SAN DIEGO L. REV. 493, 518 (2005) (condemning natural law theories of judicial decision making on the basis that they lead to the usurpation of legislative supremacy).

227. *See* Manning, *Absurdity Doctrine*, *supra* note 19, at 2457–58 (articulating a reasonable reader's approach to meaning); *cf.* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1185 (1989) ("But when [a court] does not have a solid textual anchor or an established social norm from which to derive the general rule, its pronouncement appears uncomfortably like legislation.").

Critics of original intent and textualist interpretation of statutes also point to links between these theories of meaning and legal positivism.[228] Connections between nonpositivist theories of law and theories of statutory interpretation are similarly evident. Ronald Dworkin provides a classic example; the initial chapter of *Law's Empire* is entitled "What is Law?" and probes that question through examples of statutory interpretation.[229] His general jurisprudence understands "law" not as merely posited rules that apply or not, but as a practice of "interpretive judgments" in which we construct from legal materials and moral principles a theory of the law that makes it the "best it can be."[230]

From this general statement about the nature of law follows Dworkin's claim "that statutes must be read in whatever way follows from the best interpretation of the legislative process as a whole."[231] Thus, he highlights the New York Court of Appeals' decision in *Riggs v. Palmer*[232] to deny an inheritance to a testator's murderer, even though murder fell into none of the exceptions to inheritance in New York's statute governing wills.[233] By contrast, he criticizes as formalistic the Supreme Court's decision to halt the construction of a nearly completed, $100 million dam pursuant to a statutory prohibition on projects jeopardizing the "continued existence" of an endangered "three-inch fish of no particular beauty or biological interest or general ecological importance."[234] Against arguments that semantically clear text, when it exists, should trump background principles and policies, Dworkin rejects any sharp distinction between clear and unclear cases.[235] Echoing Fuller's discussion of vehicles in the park, Dworkin argues that easy statutory cases only *appear* to be solved by text alone because the text and moral principles in those situations are harmonious.[236] Dworkin's theory

228. *See, e.g.*, SCOTT J. SHAPIRO, LEGALITY 252–54 (2011) (describing critics of textualism's linkage of the theory to legal positivism); Hurd, *supra* note 225, at 413–18 (arguing that the theory of intentionalist interpretation is compelling only when the citizenry believes that the legislature functions as a practical authority, i.e., that "laws function as commands rather than requests"). As Shapiro and Hurd note, textualism or intentionalism may not inextricably flow from positivism.

229. RONALD DWORKIN, LAW'S EMPIRE 15–23 (1986); *see also* Hurd, *supra* note 225, at 425 (locating "the theoretical authority of law" primarily in legislative text, while judging all "interpretive techniques" by "their ability to conform our conduct to the demands of morality"); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 286–88 (1985) (propounding a natural law theory of adjudication as opposed to one rooted in legal positivism); Goldsworthy, *supra* note 226, at 510–18 (exploring the links between these theorists' jurisprudential and interpretive theories).

230. DWORKIN, *supra* note 229, at 53, 225.

231. *Id.* at 337.

232. 22 N.E. 188 (N.Y. 1889).

233. *Id.* at 190–91.

234. DWORKIN, *supra* note 229, at 20–21 (discussing Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978)).

235. *Id.* at 350–54.

236. *See, e.g.*, *id.* at 351 (arguing that the will statute in *Riggs* is unclear only "because we ourselves have some reason to think that murderers should not inherit").

about how to read legal texts and how to conceive of law are one and the same.

With this rough-and-ready introduction to hermeneutical and jurisprudential approaches to statutory interpretation in hand, we can now turn to two plausible arguments that the presence or absence of general common law powers is irrelevant to a court's approach to statutory interpretation.

2. The Argument from Semantic Belief and Common Law Skepticism.— This offered approach first assumes that an interpreter can disentangle the text's semantic meaning from policy context or background moral principles. Like Hart, a person adopting this framework believes legal language can have a "core," in which a statute obviously covers the facts at hand. These semantically "easy" cases—the Hummer blasting music as a "vehicle in the park"—contrast with "hard" cases where application of the core meaning creates uncertain results—the tricycle in the park. Like Manning and Alexander, such a theorist believes that it is possible for semantic meaning to be clear and knowable even if it runs at cross-purposes with the statute's likely purpose. Barring ice cream trucks or ambulances from a park might seem strange, but the "no vehicles" rule covers both.

This framework would also assume that all law, including common law precedent, is modeled on posited, authoritative legislation. I call this common law "skepticism" because it doubts the traditional common lawyer's claim that the law is comprised of unfolding reason, preexisting custom, or principles immanent in the case law. Instead, as Alexander argues, common law adjudication consists of creating, following, or amending rules that happen to be handed down by judges rather than legislators.[237] This is so even if judges exercise restraint through stare decisis or decisional minimalism.[238] This legislative understanding of common law features into discussions of federal common law by its champions and critics alike.[239]

---

237. *See* LARRY ALEXANDER & EMILY SHERWIN, DEMYSTIFYING LEGAL REASONING 25–26 (2008) (courts either "reason deductively from rules posited by others; or they posit law, relying on moral and empirical judgment, as any lawmaker must"); Pojanowski, *supra* note 205, at 814–20 (describing legislative understanding of common law); *see also* A.W.B. Simpson, *The Common Law and Legal Theory*, *in* OXFORD ESSAYS IN JURISPRUDENCE: SECOND SERIES 77, 89 (1973) (describing and criticizing this as the "school-rules" model of common law).

238. *See* RAZ, *supra* note 218, at 200–01 (noting that even the traditionally conservative lawmaking role of the courts involves partial reform measures that "introduce[] pragmatic conflict into the law").

239. *See* D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 468 (1942) (Jackson, J., concurring) (explaining that federal common law "to put it bluntly," allows the Court to "make our own law from materials found in common-law sources"); Clark, *supra* note 177, at 1247–49 (raising concerns about federal judicial lawmaking intruding on the powers of the legislature and of the states); Kramer, *supra* note 140, at 267 ("[T]he common law includes any rule articulated by a court that is not easily found on the face of an applicable statute.").

Many state court judges, including those who reject semantic limits in statutory interpretation, also speak of the common law in such a fashion.[240]

An interpreter with these twin assumptions would not view many hard legal questions as concerning the "interpretation" of statutes or precedent at all. The difference between a rule's solid core of meaning and the open texture of its periphery renders the term law-"making" more apt than law-"finding" in unclear precedential and statutory cases alike. In cases of first impression or where a statute's semantic meaning or authoritative intent run out, the law offers no single answer and the judge has authority to resolve the matter through discretion.[241] Similarly, when a judge reverses a precedent or refuses to apply the no vehicles rule to the ambulance, these are exercises of legislative power, not interpretation. In short, this arrangement collapses common law into the legislative idiom, with the difference between common and statute law turning on a rule's mode of origin—judge versus legislature—not substance.[242]

From this perspective, a state court's possession of general common lawmaking powers does not alone entail divergence from federal court approaches to statutes. Both state and federal courts can have delegated authority to "make law" within statutory gaps, while the state courts have the additional prerogative to "legislate" in the absence of statutory coverage. The delegated lawmaking powers that state and federal courts share with respect to statutes have little to do with actual "interpretation," as both courts make law in the gaps rather than find legal meaning.[243] So understood, a state court's additional, general lawmaking powers lead to divergence from federal practice *only* if that power *further* authorizes state courts to override a statute's clear semantic commands in a way that federal courts cannot. A court's exercise of this expanded prerogative involves a de facto amendment of the statute, not its interpretation. Whether a court has that power is a question of constitutional rules regarding lawmaking hierarchy, not an entailment of a freestanding power to make law where the legislature has not. If state and federal courts both accept similar forms of legislative supremacy,

240. *See* Kaye, *supra* note 43, at 10 ("In spite of the anxiety surrounding the legitimacy of judicial lawmaking, I believe that the inherent, yet principled flexibility of the common law remains the defining feature of the state court judicial process today."); Roger J. Traynor, *Reasoning in a Circle of Law*, 56 VA. L. REV. 739, 751 (1970) [hereinafter Traynor, *Reasoning in a Circle*] (characterizing judging as "the recurring choice of one policy over another" in the formulation of new rules).

241. *Cf.* HART, *supra* note 166, at 131–32 (contending that precedent, despite its binding force, often leaves the law open for judicial legislation).

242. *See* Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. (forthcoming 2013) (manuscript at 6) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021489## ("Modern lawyers . . . . tend to assume that the unwritten law of each state is fundamentally like the written law of each state, except that it is made by a different branch of the state government . . . .").

243. *See* Alexander, *supra* note 226, at 359–63 (asserting that texts only carry the meaning that was intended by their authors and that therefore any changes to that meaning are not actually interpretations of the text at all).

however, it is not clear that a state court's broader yet nevertheless defeasible lawmaking powers make any difference in the interpretation of statutes.

3. The Argument from Semantic Skepticism and Common Law Belief.— A competing approach reverses these premises about interpretation and law, but only to reach the same conclusion that a state court's common law powers do not create divergence from interpretation in the federal context.

First, the theorist will reject the notion that the interpreter's perception of clear semantic meaning or intent is separable from the statute or the legal system's background purposes. The theorist sides with Fuller in his debate with Hart about language and interpretation.[244] The answers for both "easy" and "hard" questions about "vehicles in the park" turn on an understanding of nonsemantic norms existing above or behind the words on the page. Answering a "hard" case is not an act of legislative discretion, but a disciplined practice with an inevitable appeal to nonsemantic matters like history, purpose, and moral principle.[245] An "easy" case, by contrast, only appears to be so because of a close fit between the semantic meaning and the background norms.[246] Second, this approach would also reject the understanding of common law as a system of posited rules. I call this common law "belief" because it accepts in some form the traditional common lawyers' argument that the rules and principles announced in judicial decisions and legal treatises are merely evidence of the common law on a question, which in fact exists independent of those texts.[247] In this respect, Dworkin's claim that law is not just a system of rules and his competing interpretive theory of law as integrity cast him as a descendant of the common law tradition.[248]

This framework regards the language of both statutes and precedent as signs pointing the interpreter to the reasoned purpose that is in fact the law. Such regard for legislation resembles the classical common lawyers' treatment of statutes as well as Ronald Dworkin's purposive approach to

---

244. Fuller, *supra* note 214, at 663–66. One can also see this premise in the statutory pragmatist's claim that it is impossible for interpreters to limit themselves to purely semantic sources when constructing the meaning of statutes. *See* Eskridge & Frickey, *supra* note 139, at 353–54 (describing the "funnel of abstraction," wherein the interpreter looks at a broad range of evidence which may support or contradict any particular meaning or understanding).

245. *See* DWORKIN, *supra* note 229, at 352 (arguing that when general principles of society conflict with the language of a statute, that statute may be unclear).

246. *See id.* at 353 (asserting that easy questions of law arise when general societal principles align with the statutory language).

247. *See* Gerald J. Postema, *Philosophy of the Common Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 588, 596 (Jules Coleman & Scott Shapiro eds., 2002) ("Classical common law jurisprudence resolutely resisted the theoretical pressure to identify law with canonically formulated, discrete rules of law.").

248. *See* Mark D. Walters, *Legal Humanism and Law-As-Integrity*, 67 CAMBRIDGE L.J. 352, 353, 363–64 (2008) (drawing parallels between Dworkin's thought and common law "humanists" like John Dodderidge and Francis Bacon); *see also* Goldsworthy, *supra* note 125, at 231–32 (echoing Walters's parallels with regards to Sir Edward Coke).

statutory interpretation.[249] This convergence also sounds in the calls of Roscoe Pound, James Landis, and Justice Stone for courts to use statutes as sources of fresh principles for the development of common law.[250] To be sure, classical common lawyers embraced supra-textual interpretation to integrate statutes into the superior common law, whereas twentieth-century jurists hoped progressive statutory principles would supplant the retrograde obscurities of their Blackstonian inheritance.[251] In both modes, however, judges have oracular power, whether by expounding the reason of judge-made law or principles immanent in legislation.

This second approach is the mirror image of the framework discussed above. It denies both the separation of semantic meaning from background purpose and the hard positivist understanding of common law and statute. Like its converse, it too collapses the distinction between common law and statute, though here it assimilates both into a model of law and legal reasoning reminiscent of nonpositivist common law theory. Its concept of "interpretation" is as capacious as its counterpart is narrow, so it emphatically maintains that broadening, narrowing, or extending statutes in common law fashion is in fact a matter of interpretation. Judge Kaye gestures at this approach, notwithstanding her concession to legislative supremacy. She claims the common law is derived "from human wisdom collected . . . over countless generations to form a stable body of rules"[252] and denies any "sharp break" in the statutory and precedential reasoning, for "there remains at the core the same common-law process of discerning and applying the purpose of the law."[253] Other arguments in favor of treating statutes like precedents have gestured at a similar interchangeability between the two modes of law, with a similarly central role for the jurist.[254]

---

249. *See* Heydon's Case, (1584) 76 Eng. Rep. 637 (K.B.) 638, 3 Co. Rep. 7a, 7b (announcing that statutes shall be interpreted in light of the mischief they sought to remedy); DWORKIN, *supra* note 229, at 337 (contending that statutes must be read in a way that best interprets the legislative purpose as a whole).

250. *See* James McCauley Landis, *Statutes and the Sources of Law*, *in* HARVARD LEGAL ESSAYS 213, 215 (1934) (discussing judges' use of the doctrine of equity to conform statutes to generally recognized aims of the law); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 614 (1908) (acknowledging that common law has failed to properly address certain modern issues and should draw on legislation for fresh principles of growth); Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12–14 (1936) (describing the treatment of statutes as sources of law which judicial decisions can extend).

251. William N. Eskridge, Jr., *The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell*, 61 GEO. WASH. L. REV. 1731, 1734–35 (1993).

252. Kaye, *supra* note 43, at 5.

253. *Id.* at 25.

254. *See generally* Traynor, *Statutes Revolving*, *supra* note 120, at 405, 425 (comparing the similarities between judicial interpretation of statutes and judicial interpretation of common law); Robert F. Williams, *Statutes as Sources of Law Beyond Their Terms in Common-Law Cases*, 50 GEO. WASH. L. REV. 544, 556 (1982) (arguing that, because the underlying statutory policy likely has significance beyond its text, courts should use statutes as persuasive authority in cases where the statute does not apply directly).

Yet under this approach, the case for state–federal divergence is perhaps even weaker than under assumptions of semantic belief and common law skepticism. If statutory interpretation proceeds in the fashion of precedential reasoning, and if common law reasoning in the absence of statutes is not a form of judicial legislation, then a state court's apparently distinguishing feature of common law powers turns out to be redundant to the claim of interpretive freedom. Strongly purposive or dynamic reading of statutes follows irrespective of whether a court had jurisdiction over common law causes of action. An absence of general common law authority matters only if one conceives of common law powers as authority for judicial legislation—a premise this framework rejects. In this light, Dworkin's interchangeable treatment of statutory interpretation in the New York Court of Appeals and the U.S. Supreme Court is a logical outgrowth of his vision of law and interpretation, not an oversight.[255] Both state and federal courts, from this perspective, should reject textualism for the same reasons.

IV. A Tentative Case for Divergence

Parts II and III provide and apply frameworks for considering the difference common law powers may make for state interpretive method compared to that of the federal courts. A satisfactory resolution of the preliminary arguments for and against divergence will require more work than has been expended thus far. Nevertheless, this Part offers a tentative proposal that attempts to account for and reconcile the competing constitutional, institutional, and conceptual claims concerning the effect of state courts' common law powers on statutory interpretation. This proposal suggests that while constitutional concerns may preclude state courts from *narrowing* the semantic meaning of a statute to fit its background purpose, these courts retain discretion to *extend* a statute beyond its linguistic scope in pursuit of the statute's purpose or broader coherence in the legal fabric. This approach mirrors neither federal textualism nor its purposive or dynamic rivals, but it does account for aspects of state court interpretation that existing commentary cannot explain.

A. The Proposed Hybrid Model and Its Assumptions

Recalling the federal context will help to understand this argument for state court divergence in interpretation. As Professor Manning argues, the dividing line between federal textualism and purposivism is the choice between a statute's semantic meaning and its background purpose when the two conflict.[256] Semantic meaning and purpose can conflict in two ways. A

255. *See* DWORKIN, *supra* note 229, at 15–23 (comparing a New York Court of Appeals' decision that relied heavily on the legislative purpose of a wills statute with a U.S. Supreme Court decision based on a literalist reading of the statute in question).

256. Manning, *What Divides*, *supra* note 15, at 76.

statute's semantic meaning may be overinclusive, covering matters not within the statute's apparent purpose. Or the semantic scope may be underinclusive, such that it does not extend to matters that, in light of statutory purpose and policy, ideally should be covered.

The federal textualist would stick to semantic meaning in cases of overinclusion and underinclusion. The federal purposivist, by contrast, would privilege purpose in both circumstances. My argument is that a court's general common law powers open a third path. Under this approach, courts with these powers should refuse to narrow the semantic scope of a statute—in short, be "textualist" on semantic overbreadth—but retain discretion to broaden a statute's coverage beyond its semantic borders—to be "purposive" or arguably even "dynamic" on semantic underbreadth. Here, courts regard the legal landscape as a tract of common law that the legislature has a plenary right to displace or develop through statutes—or to create new "tracts" of law where no common law had before existed. The legislature can preempt judicial development of the law but, absent affirmative indicia to the contrary, legislative inaction permits activity by courts, including extension of rules and principles originating in legislation. In this respect, the relationship between the state courts and the state legislature would resemble that between federal courts and Congress in the context of enclaves of federal common law or the federal courts' inherent, defeasible powers to make procedural rules, though the conceded nature of state courts' common law powers would lessen concerns about the constitutional source of such judicial authority.[257]

For similar reasons, a state court's common law powers may also suggest a different approach to vague or ambiguous statutes. If internal "gaps" in a statute do not displace the common law backdrop, a court interpreting a vague statute might not be required to estimate legislative intent or purpose in filling out the details. Comity, statutory coherence, and judicial humility may recommend faithful agency, but in the common law zone other considerations legitimately compete with those reasons. With this sketch in mind, a return to the criteria of interpretive choice will help in understanding and evaluating this tentative proposal.

1. Constitutional Inferences.—In line with federal textualism, this approach prohibits a state court from narrowing the ordinary meaning of a statute to avoid an awkward application or to preserve common law prerogative. This limit on purposive or equitable interpretation follows from constitutional norms of legislative supremacy and separation of powers discussed above. Common law is defeasible law that must yield when

257. For an example of a textualist identifying and providing an originalist justification for federal courts' inherent powers to craft procedural common law, see generally Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813 (2008).

statutory law covers a particular point of decision.[258] A similar conclusion follows from constitutional norms respecting legislative compromise. In systems with bicameralism and presentment and other vetogates, the means a legislature chooses to accomplish an end are as important as the goal itself. Judicial fine-tuning would upset those compromises. This result, it seems, can pertain whether we think of "common law" as positivist judicial legislation or in the nonpositivist terms of custom or reason. Statutes are jurisprudentially "solid" such that common law reasoning cannot justifiably chip away at their scope.

It is less clear, by contrast, that legislative supremacy and compromise prohibit judicial extension or supplementation of statutes by common law courts. The question is what default rule common law courts should use in cases of legislative silence. Does a statute's treatment of matter *x* in a situation preclude a court from treating analogous matter *y* the same way in the same situation?[259] For federal textualists, the answer is yes, in part to protect legislative compromise as discussed above.[260] But even those textualists will allow common law-like development when the legislature delegates such authority to courts.[261] This affirmative requirement of legislative delegation—and the corresponding negative inference from silence on judicial lawmaking—fall away when the legal backdrop assumes an interpreter with general, defeasible power to develop law where the legislature has not. In this context, silence alone is insufficient to raise the federal textualist's negative inference, though statutory text or other constitutional norms may do so expressly or through strong implication.[262]

This approach respects and reflects many differences between state and federal constitutions in terms of structure and lawmaking authority. State constitutions give courts more substantive lawmaking powers than their federal counterparts while embracing structural norms of separation of powers and legislative supremacy that are stricter than those contemplated by Madison.[263] These features of state separation of powers push in opposite

---

258. Farber & Frickey, *supra* note 5, at 888.

259. *See* Traynor, *Statutes Revolving*, *supra* note 120, at 405 (seeming to answer "yes" by arguing that judges can reason by analogy to extend the application of a statute to a circumstance not covered by its plain meaning).

260. *See generally* Easterbrook, *supra* note 109 (suggesting that unless the statute clearly gives courts the power to develop interstitial common law, judges should restrict the statute to situations clearly anticipated by its framers as expressed in the legislative process).

261. *Id.* at 544–45.

262. For example, statutory language indicating a legislative remedy was exclusive would prohibit extension, and due process notice norms would likely prohibit the purposive extension of criminal statutes.

263. *Cf.* WILLIAMS, *supra* note 129, at 313 (observing that because "state constitutions are different in a number of ways from the more-familiar federal Constitution . . . judicial interpretation of state constitutions can be quite different"); *see also* G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 857–58 (1991) (exploring how state constitutional interpretation may differ).

directions, but the hybrid approach respects both the judicial prerogative and legislative supremacy.

Overall, this approach resembles the arrangement arising in England with the ascent of Parliament, the separation of the courts from the Crown, and the consequent waning of equitable interpretation. There, too, common law courts, operating in the shadow of a supreme parliament, privileged text in statutory interpretation while assuming that common law governed on all matters of legislation left uncovered.[264] This approach continued into the twentieth century, with courts respecting legislation overturning particular decisions, while still treating the underlying principles as valid in other doctrinal pockets not addressed by the statute.[265] A similar approach was arguably held in Australia prior to the legislative codification of purposive interpretation.[266] Under their pre-statutory "common law" of interpretation, Australian courts would rely on purpose only when the text was ambiguous or inconsistent.[267] These commonwealth courts differed from my tentative proposal, however, in their hesitance to apply statutory rules beyond their scope and the courts' proclivity for overly narrow reading of statutes.[268] These practices, however, seem as much a product of distaste for statutes as respect for the legislature. Common law courts could give statutes "reasonable" rather than "strict" constructions[269] while also realizing that a legislature's failure to address one matter by statute does not always preclude a court from addressing it on its own. The familial resemblance between the proposed approach and English or Australian practice may not be a constitutional coincidence. Like state courts, the highest courts of appeal in commonwealth nations like the United Kingdom and Australia traditionally had to reconcile their undisputedly general common law powers with a system of legislative supremacy.

2. Institutional Competence.—Considerations of institutional competence suggest one threshold qualification to the hybrid model proposed above. When a statute addresses a subject not traditionally covered by the common law, courts should be more concerned about exercising their

---

264. *See* Baade, *supra* note 121, at 90–91 (discussing the interplay between rules of statutory construction and the common law).

265. *See* P.S. Atiyah, *Common Law and Statute Law*, 48 MOD. L. REV. 1, 12 (1985) (noting that courts tend to view the legislative reversal of judicial decisions as "not affecting the underlying principles of those decisions").

266. *See* D.C. PEARCE & R.S. GEDDES, STATUTORY INTERPRETATION IN AUSTRALIA 24–30 (5th ed. 2001) (discussing codified methodology).

267. *Id.* at 22 (citing *Mills v Meeking* (1990) 169 CLR 214, 235 (Austl.)). Australian courts traditionally allowed departure from text in cases of absurdity, although this exception appeared to be limited to drafting mistakes. *See id.* at 21–22.

268. *See* Atiyah, *supra* note 265, at 8–9 (observing the historical reluctance of British courts to fill in statutory gaps).

269. *Cf.* Scalia, *supra* note 142, at 23 (differentiating between reasonable textualism and strict constructionism).

inherent constitutional authority to extend statutory scope. The metaphor about statutes displacing a common law backdrop arguably breaks down when the legislature breaks new ground and, for example, enacts a comprehensive scheme regulating public utilities. At that point, judicial prudence may prioritize the search for legislative intent.[270]

Setting this qualifier aside, advocates of strong-form textualism or purposivism on institutional grounds are likely to be unhappy with this hybrid model. For them, there is no obvious reason why courts are more likely to be better or worse at discerning historical intent or purpose, identifying existing preferences, or making good policy when they *extend* rather than *narrow* the linguistic scope of a statute.[271] In that light, my tentative proposal is an arbitrary half measure in the eyes of institutional purists of all stripes. It is fair to ask whether considerations of institutional competence do any work in this model.

Against claims of across-the-board purposivism on institutional grounds, this model reflects an admittedly controversial prioritization of constitutional norms and structures over concerns for institutional competence. Even if courts are good at narrowing statutes to fit background purposes, constitutional inferences limiting what courts can do with statutes when the legislature has issued authoritative text may preclude this appeal to expediency. Such institutional considerations, however, could be germane when a legislature instructs or permits the court to consider purpose across the board, a point I bracket given the constitutional disputes surrounding such legislation.[272]

The answer to the institutional textualist must be different, for the proposed model presumes that extension of statutes is generally within constitutional bounds. Accordingly, any limits here will turn on prudential decisions in which competence considerations play a central role. I can only sketch the beginning of a response here, but it seems much will turn on the subject matter of the statute. As noted, in areas where a statute comprehensively supplants the common law or resolves problems

---

270. This is not to say such statutes completely displace the common law. For example, even complex regulatory regimes governing power rates will require courts to repair to common law principles governing contracts. *See* Nat'l Fuel Gas Supply Corp. v. Fed. Energy Regulatory Comm'n, 811 F.2d 1563, 1569 (D.C. Cir. 1987) (giving deference to the agency's interpretation of a contract when the issue is the simple construction of language); Pojanowski, *supra* note 205, at 808–09 (noting the difficulty that arises when common law rules are ambiguous and reviewing courts must decide between the agency's interpretation and the court's).

271. One may argue extension is less risky as a matter of policy because the legislature has chosen to act and selected the policy vehicle that the court applies elsewhere. That argument falsely presumes that using a good tool more often will lead to better solutions. More pulleying will not get the job done when you need a block and tackle.

272. *See, e.g.*, TEX. GOV'T CODE ANN. § 311.023 (West 2004) (instructing courts to engage in purposive interpretation of unambiguous statutes); Gluck, *Laboratories*, *supra* note 6, at 1771 (cataloging state courts' resistance to legislation governing interpretive method); Manning, *Absurdity Doctrine*, *supra* note 19, at 2441–45 (arguing that federal legislation requiring the absurdity doctrine would be unconstitutional self-delegation by the legislature).

surrounded by little common law precedent, hesitancy to expand statutory scope is understandable. Where a statute touches on or mingles with common law doctrine, such a presumption makes less sense. This occurs not only because a court's grasp of a statute's legal and practical context may improve its search for intent, purpose, current preferences, or good policy.[273] State courts are also better positioned to cultivate coherence where common law and statute overlap. The legislature's presumptive awareness of existing law may be a benevolent fiction in statutory interpretation, but it reflects the reality of a court approaching legislation interwoven with a broader body of common law. Courts are thus well positioned to decide whether it makes sense to extend a statute's scope in the name of coherence and consistency with existing common law.[274]

3. Common Law and Concepts of Legal Interpretation.—At the threshold, this proposal assumes the cogency of meaningfully separating expressed semantic meaning from background purpose. This assumption is controversial and its full defense is the work of a productive scholarly career, not the subsection of an article. Nevertheless, the rise of textualism in state court jurisprudence that Professor Gluck chronicles suggests that many common law jurists share this assumption with the increasingly textualist Supreme Court of the United States.[275]

A theorist who limits the concept of interpretation to understanding semantic meaning or intent of a text will also object that extension of a statute beyond its linguistic scope is not an act of "interpretation," but is rather legislation or something else.[276] For my purposes, little turns on the label. The primary inquiry here is whether a court should be allowed to narrow or extend the semantic scope of a statute, whatever you may call such tailoring. As a person with a restrictive understanding of "interpretation" would agree, this question concerns matters of constitutional law or practical consequences, not a debate about the definition of interpretation.[277]

This proposal is also agnostic about the nature of the common law. It is amenable to one who thinks of common law precedent as a form of posited law crafted by judges and defeasible by legislation.[278] It is also amenable to

---

273. *Compare supra* section II(C)(2), *with* subpart III(B).

274. *See, e.g.*, Traynor, *Statutes Revolving*, *supra* note 120, at 417–18 (discussing the example of *In re* Mason's Estate, 397 P.2d 1005 (Cal. 1965), involving the California Supreme Court's analogical extension of a probate code provision to a similar instance in the common law of guardianship not covered by statute).

275. Gluck, *Laboratories*, *supra* note 6, at 1775–811.

276. *See* Alexander & Prakash, *supra* note 96, at 98–99 (arguing that courts move beyond the realm of interpretation when they decline to follow statutory language).

277. Perhaps the danger of infelicitously labeling an activity "interpretation" is to load the rhetorical dice in favor of legitimacy. Judges are on safer ground if they are "interpreting" statutes than when they are making law or consulting the brooding omnipresence.

278. To believe this, one need not hold that common law is strictly analogous to legislation. *See* John Gardner, *Some Types of Law*, *in* COMMON LAW THEORY, *supra* note 125, at 51, 67–71

one who views the common law as a body of custom or principle that is distinct from legislative-type rules. One only needs to concede that common law, whatever its nature, must yield on matters that statutes expressly resolve. In other words, constitutional norms (and perhaps by extension nonposited norms of political morality) can require preexisting, nonposited common law to yield to authoritative legislative commands.

That said, there is an appealing jurisprudential ambidexterity in this model absent in other approaches that either understand all forms of law and interpretation in the statutory positivist idiom or submerge both statutes and precedent in a framework of purposive or moral reading. It permits an interpreter to embrace a principle-based theory of common law that does not reduce adjudication to interstitial legislation while also treating statutes in the fashion of posited rules that preempt judicial judgment with their scope. This dualist understanding of law's domains coheres with the intuitions of many thoughtful lawyers, including jurists in commonwealth countries who must integrate general common law powers with legislative supremacy.[279] Nor, more importantly, is it unprecedented in American jurisdictions that recognize general common law.[280] The intersection of two such domains marks a plausible point of differentiation for state and federal interpretation, and while negotiating this overlap poses challenges, theoretical complexity is not always a sign of error.

B. Explaining State Practice

This proposed model, however tentative, advances inquiry and understanding in the developing field of state statutory interpretation. This Article's work on the effect of common law powers explains features of state jurisprudence that existing scholarship does not. This is particularly so regarding one of Professor Gluck's most significant contributions—her identification of a state court interpretative method she calls "modified textualism."[281] In these "modified textualist" jurisdictions, one finds courts flouting textualism (modified or otherwise) in a manner Gluck has not

---

(arguing that although case law constitutes positive law, it differs from legislation because it is not expressly made and is the work of an individual agent, not an institutionalized group).

279. *See, e.g.*, *Brennan v Comcare* (1994) 50 FCR 555, 572 (Austl.) ("The judicial technique involved in constructing a statutory text is different from that required in applying previous decisions expounding the common law.").

280. As Professor Nelson explains, in the pre-*Erie* era, federal courts sitting in diversity would exercise independent judgment on matters of general law but not on state court interpretations of statutes. This deference extended to state legislation codifying or displacing what was previously within the realm of general law. *See* Nelson, *supra* note 242, at 3–4. To this date, Georgia still treats common law in the manner of *Swift v. Tyson*. *See* Green, *supra* note 98, at 1134–35. Even if Georgia is an outlier, Professor Green notes how the choice-of-law rules in every state today are *Swift*-ian in character. *See id.* at 1162–67. Nor do state courts appear to conceive of federal common law in terms of post-*Erie* positivism. *See* Bellia, *supra* note 67, at 1540–41.

281. Gluck, *Laboratories*, *supra* note 6, at 1758.

identified,[282] namely at the crucial intersection of common law and statutes. This Article's proposed model explains these deviations from textualism and provides a fuller understanding of state courts' treatment of statutes.

Under Gluck's "modified textualism," a court first considers statutory text, second considers legislative history, and third looks to background norms. Because such courts only take incremental steps when an earlier one does not decide the question, they resolve many cases on textualist grounds alone.[283] The model for "modified textualism" is the three-step inquiry the Oregon Supreme Court announced in *PGE v. Bureau of Labor & Industries*.[284] Gluck argues that this new approach is textualist, notwithstanding its use of legislative history.[285] Moreover, because it restricts the use of substantive canons like the absurdity doctrine, Gluck argues that the method can be more textualist than federal approaches, which allow for such correction.[286]

But even textualists with tolerance for legislative history may raise their eyebrows when they look closer at the law in "modified textualist" jurisdictions. Consider the Supreme Court of Oregon's decision in *Scovill v. City of Astoria*.[287] There, a woman's estate sued the city, claiming that its police department's failure to follow a statute requiring the officers to take her to a detoxification facility caused her death.[288] Invoking *PGE*, the city moved to dismiss because the statute provided no explicit private right of action or enforcement provision of any kind.[289] This strategy was understandable: the primacy of text over background norms in *PGE* recommends a similar refusal to supply a private right of action in statutory silence.[290] Hornbook textualism, at least in federal scholarship, holds that a legislative choice about textual means—here, no private right of action—

---

282. Gluck anticipates criticism from orthodox textualists regarding modified textualists' use of legislative history. *Id.* at 1758–59. This is not my concern and the "modified textualist" practice of using legislative history parallels the moderate use of such sources in federal practice. *See* Manning, *Second-Generation*, *supra* note 12, at 1288 (noting the "longstanding practice of using unenacted legislative history as authoritative evidence").

283. Gluck, *Laboratories*, *supra* note 6, at 1836–37.

284. 859 P.2d 1143, 1146–47 (Or. 1993); *see* Abbe R. Gluck, *Statutory Interpretation Methodology as "Law": Oregon's Path-Breaking Interpretive Framework and Its Lesson for the Nation*, 47 WILLAMETTE L. REV. 539, 540–41 (2011) (explaining the significance of the new test).

285. Gluck, *Laboratories*, *supra* note 6, at 1834–35.

286. *See id.* at 1758–59, 1851–52 (discussing modified textualism and federal courts' lack of a consistent methodological approach in use of substantive canons).

287. 921 P.2d 1312 (Or. 1996).

288. *Id.* at 1314.

289. *Id.* at 1318.

290. *Compare* J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) (holding courts should provide remedies to promote legislative purpose), *with* Alexander v. Sandoval, 532 U.S. 275, 288 (2001) ("We therefore begin (and find that we can end) our search for Congress's intent [to provide a private remedy] with the text and structure of Title VI.").

shows how the legislature values a goal vis-à-vis other considerations.[291] One would think "modified textualism" step one—taking clear text as broad or as narrow as drafted—would respect this choice.

Nevertheless, the *Scovill* court rejected the city's argument, but not because it rejected *PGE* and not because the statute's text and history were unclear enough to allow purposive interpretation. Instead, the court deemed *PGE* irrelevant because its framework concerned statutory interpretation, "not a change in substantive tort law."[292] Under tort law, *Scovill* explained, a *court* decides whether to create a private right of action for a statutory violation.[293] The court concluded that a tort action would promote the legislative purpose, particularly because the statute "does not specify other means for its enforcement."[294] Despite Oregon's purportedly textualist methodology and despite the plaintiff's reliance on a statute, the court invoked its inherent common law power to supply a remedy in the absence of an explicit prohibition.

Scovill is not an outlier. Consider the tort doctrine of negligence per se. There, a court uses a statutory rule to define the breach element in a negligence claim. This common law practice, which is embraced by the majority of jurisdictions, three of Gluck's four "modified textualist" states, and the current *Restatement of Torts*, looks puzzling through federal textualist eyes. A legislator willing to criminalize conduct at the cost of a minor fine may feel differently about a plaintiff using the statute to collect a substantial tort judgment.[295] Thus, the first problem for a textualist is the court's decision that the statute is relevant at all given the absence of any private right of action. This is similar to the worry the textualist has about *Scovill*, as evidenced by the *Third Restatement*'s recognition that negligence per se "reduces the significance" of inquiries about "implied statutory cause[s] of action."[296]

---

291. *See, e.g.*, Easterbrook, *supra* note 109, at 546 (arguing that courts should respect the particular means legislatures have chosen to pursue a given goal).

292. *Scovill*, 921 P.2d at 1318 n.8.

293. *Id.* at 1318; *see also id.* at 1319 (quoting RESTATEMENT (SECOND) OF TORTS § 874A cmt. c (1979)) (explaining that courts may create a tort remedy if doing so is "in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision").

294. *Id.* at 1319.

295. This worry is not new. *See* Charles L.B. Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361, 364 (1932) ("[I]t savors of absurdity to impute to the legislature an intention to create a civil liability, where it has manifested no intention of creating a civil remedy.").

296. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 cmt. b (2010); *accord* Lowndes, *supra* note 295, at 365 ("The difference between [the approaches of negligence per se and an implied cause of action] in a given case may be one of technique rather than result . . . ."); Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 865 n.19 (1996) ("Although . . . negligence per se . . . is not the same as an implied cause of action . . . the two claims get the plaintiff to the same place.").

A court that decides the statute is in play—textualist departure number one—then affirms a second textualist heresy: a purposive inquiry asking (a) whether the statute protects a defined class of people; (b) whether the plaintiff is in the protected class of people; (c) whether the injury was the kind of injury contemplated by the statute; and (d) whether the injury occurred in the way contemplated by the statute.[297] The resemblance to the "mischief rule" of purposive interpretation is unmistakable.[298] The fact that the proper-class and proper-injury tests are functional equivalents to the duty and proximate cause elements of the negligence tort further demonstrates that the court's primary concern is not the statute's semantic meaning.

From the perspective of orthodox textualism, both decisions (i) to create or infer from silence a private right to enforce a regulatory statute and (ii) to mold the scope of the statute in common law fashion are problematic. One can make similar arguments regarding state courts' treatment of statutes in other common law doctrines, such as the rule voiding the entirety of an otherwise valid contract if one term requires a party to violate a statute.[299] Oregon courts use the *PGE* method to determine if the contract calls for a statutory violation, but do not pause to ask whether the statute permits its use in such a broad fashion.[300] This juxtaposition of modern textualism with a classical common law extension of statutes[301] suggests that state court textualism is more modified than Gluck's work suggests.

Under the hybrid parliamentary/common law method of interpretation proposed here, however, the judicial supplementation of statutes in the face of silence that flouts federal textualism may be legitimate for state courts. Recall that one claimed difference that common law powers make is disabling the federal textualist's default rule against judicial lawmaking when a statute is silent about a matter within its orbit.[302] When the legislative backdrop encompasses common law courts, the potential "domain" of the statute may expand through judicial action absent contrary indicia in

297. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14, § 14 cmt. f (2010).

298. *See* Heydon's Case, (1584) 76 Eng. Rep. 637 (K.B.) 638, 3 Co. Rep. 7a, 7b (announcing the mischief rule).

299. *See, e.g.*, Staffordshire Invs., Inc. v. Cal-Western Reconveyance Corp., 149 P.3d 150, 156–57 (Or. Ct. App. 2006) (applying the *PGE* approach in the illegal contract context).

300. *Id.* at 157 (citing PGE v. Bureau of Labor & Indus., 859 P.2d 1143, 1146–47 (Or. 1993)).

301. *Id.* at 156–57 (analyzing enforceability of contract under *Uhlmann v. Kin Daw*, 193 P. 435 (Or. 1920)).

302. *See* Caroline Forell, *Statutory Torts, Statutory Duty Actions, and Negligence Per Se: What's the Difference?*, 77 OR. L. REV. 497, 514–15 (1998) (criticizing *Scovill* for failing to acknowledge that the court, not the legislature, created the tort action); *cf.* Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39–40 (1916) (citing 1 Comyn's Digest tit. (F)) (allowing a private damages suit for a violation of the federal act "according to a doctrine of the common law . . . . *Ubi jus ibi remedium*"); Harvey S. Perlman, *Thoughts on the Role of Legislation in Tort Cases*, 36 WILLAMETTE L. REV. 813, 834 (2000) ("The early common-law rule that every right deserves a remedy was not based on a finding of legislative intent; it was a common-law rule even when applied to protect a right created by statute.").

legislative text. For this reason, Ezra Ripley Thayer, the early twentieth-century tort theorist and son of noted constitutional formalist James Bradley Thayer, accepted the doctrine of negligence per se even though as a matter of statutory interpretation he was inclined to draw negative inferences from statutory omission of remedies.[303]

Now compare this judicial freedom in *broadening* statutes with the hybrid model's prohibition, articulated above, on common law courts *narrowing* statutes. We can now see why Oregon's *PGE* methodology allows for actions like judicial creation of private remedies or contract voidance while also joining academic textualists in rejecting the absurdity doctrine. The difference common law powers make dissolves this apparent tension in "modified" textualism and offers a more complete picture of state court interpretation. This framework's ability to explain Oregon's textualist/common law hybrid suggests that the structural differences between federal and state court textualism are even more significant than Gluck's work appreciates.[304]

C. Avenues for Further Inquiry

The preceding discussion argues that a court's inherent common law authority may sanction some departure from federal textualism, but it does not necessarily entail the wholesale purposivism advanced by federal scholars and some of their state counterparts. Actual state court practice, moreover, supports these theoretical arguments and in turn appears more comprehensible in light of these insights. At the very least, this analysis suggests caution before assuming that federal and state interpretive methods must walk in lockstep. Nor should advocates of interpretive divergence assume that the menu of options available to state courts is the same as those available to federal courts. That said, this model and its assumptions require further consideration, elaboration, and defense. A complete answer will depend on how the questioner regards the institutional, constitutional, and jurisprudential variables in interpretive choice—as well as the subquestions under each category. The remainder of this Part flags further lines of inquiry on state court interpretation arising from this Article's contribution so far.

First, the three-part framework in Part III can aid comparative analysis beyond the particular matter of common law powers. This analytical framework separates interpretive choice along three axes: constitutional,

---

303. *See* Ezra Ripley Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 320 (1914). Thayer's work on negligence per se and remedies anticipates by seventy years arguments offered by textualists like Judge Easterbrook. *See id.* ("Proper regard for the legislature includes the duty both to give full effect to its expressed purpose, and also to go no further. . . . Its omission [of a civil remedy] must therefore be treated as the deliberate choice of the legislature, and the court has no right to disregard it.").

304. *See* Gluck, *Laboratories*, *supra* note 6, at 1858–61 (noting differences between state and federal courts but arguing that federal law and scholarship can nevertheless draw broader lessons from state practice).

institutional, and conceptual criteria. Different theorists will include, exclude, and prioritize the three criteria differently, but considering those aspects directly can clarify these commitments and help indicate whether, why, and how a particular difference between court systems could translate into a different approach to statutes. In the state–federal context, for example, this framework can structure many inquiries, whether the points of differences concern methods of judicial selection,[305] judicial background, caseload and subject matter, or judges' quasi-legislative or executive duties. Accordingly, the work thus far has sought not only to build and apply a comparative framework for evaluating common law difference, but also to offer an analytical structure for an emerging yet undertheorized area of inquiry. Nor is its payoff limited to state–federal comparisons. The framework can also clarify questions of interpretive divergence *within* a given legal system[306] and between nations.

This latter point brings us to the second line of further inquiry, which flows from the recognition that interpretive theory concerning state courts may profit more from increased focus on the high courts of our commonwealth cousins and less on the U.S. Supreme Court. Although questions about the nature and extent of general federal common law powers may make reliance on the interpretive practice of commonwealth courts controversial, for state courts, the constitutional analogy is cleaner. As noted, both state and many commonwealth courts retain inherent common law powers despite the presence of a legislature supreme in its ability to trump judge-made law. In this respect, a rich vein of decisional law and scholarship sits unmined by American scholars.

That said, scholars and jurists interested in pursuing this line should note that the contextual translation may not be seamless. American states have written constitutions with judicially enforceable limits on legislative power. The United Kingdom famously does not,[307] leading many jurists there to regard the common law as the guarantor of rights. Thus, parliamentary supremacy has long dueled with a tradition of unwritten constitutionalism rooted in the common law.[308] Common law constitutionalism may partially explain these high courts' stinting construction of statutes even after parliamentary supremacy.[309] This faith in common law reason may also drive the broadly purposive statutory

305. *See generally* Bruhl & Leib, *supra* note 79.

306. *See generally* Bruhl, *supra* note 5 (comparing federal district and appellate courts).

307. *But see* Human Rights Act, 1998, c. 42, §§ 3, 8 (U.K.) (providing a judicial remedy for violations of the European Convention of Human Rights and requiring judges to interpret statutes, to the extent possible, to be compatible with the convention).

308. For a helpful overview of current debates on common law constitutionalism in the United Kingdom, see Thomas Poole, *Back to the Future? Unearthing the Theory of Common Law Constitutionalism*, 23 OXFORD J. LEGAL STUD. 435 (2003).

309. *See* Baade, *supra* note 121, at 90–91 (discussing how acts of Parliament that changed the common law became interpreted restrictively and led to an era of strict construction).

interpretation advocated by contemporary common law constitutionalists.[310] To the extent that the impulse to privilege common law is a substitute for written constitutional rights—as opposed to a thesis about the nature of the judicial function—this strand of thought may have less relevance to statutory interpretation in American states.

A closer analogue may lie even farther abroad. The High Court of Australia authoritatively interprets the nation's statutes and promotes and develops a unified, national system of common law.[311] Australia's "Washminster" form of government, which combines a written constitution and bicameralism with a parliamentary government,[312] suggests further parallels with American state constitutional structure.[313] Furthermore, as in many American states, the Australian parliament has partially codified a preferred method for statutory interpretation.[314] Unlike in many American states, the High Court also appears to take these statutes seriously.[315] Thus, while much federal jurisprudence on the relationship between statutes and common law debates the latter's legitimacy, Australian jurists are free to probe the deeper questions without threshold doubts about the enterprise.[316] Whatever the other differences in constitutional contexts, these more detailed Australian discussions seem more promising for a state judge than, say, arguments about *Erie*'s implications for federal common law.

In that vein, for state courts seeking federal guidance on statutory interpretation, particularly at the intersection of the common law, the most promising sources likely predate *Erie* and the lessons the Supreme Court has drawn from it in the past thirty years. For example, a state court's approach to the intersection of tort law and statutes might properly resemble the

---

310. *See, e.g.*, T.R.S. Allan, *Text, Context, and Constitution: The Common Law as Public Reason*, *in* COMMON LAW THEORY, *supra* note 125, at 190 ("The better attainment of the statute's general purposes is a good reason for its extension to the doubtful case.").

311. *See* JAMES CRAWFORD & BRIAN OPESKIN, AUSTRALIAN COURTS OF LAW 196–97 (4th ed. 1996) (detailing the Australian High Court's functions as a final appellate court).

312. *See, e.g.*, Elaine Thompson, *The Constitution and the Australian System of Limited Government, Responsible Government and Representative Democracy: Revisiting the Washminster Mutation*, 24 U. NEW S. WALES L.J. 657, 657–58 (2001) (outlining the structure of the Australian government). Despite Australia's federal system, its High Court is more analogous to state supreme courts than to the U.S. Supreme Court. The Commonwealth's integrated judicial system makes the High Court the court of final appeal for both federal and state questions. *See* CRAWFORD & OPESKIN, *supra* note 311, at 42 (outlining the Australian High Court's appellate jurisdiction).

313. American state governments are not parliamentary, as the executive branch is separate from the legislature. Nevertheless, state governments traditionally have had strong legislatures and weak or fragmented executives. WILLIAMS, *supra* note 129, at 247, 303.

314. *See Acts Interpretation Act 1901* (Cth) s 15AA (Austl.) (giving preference to interpretations that "best achieve the purpose or object of the Act"); *id.* s 15AB (codifying the permitted use and sources of legislative history).

315. *See* PEARCE & GEDDES, *supra* note 266, at 25–28, 63 (describing the High Court's implementation of its provisions); *cf.* Gluck, *Laboratories*, *supra* note 6, at 1755–56, 1785–98 (describing state court resistance to codified methods of statutory interpretation).

316. *See, e.g.*, *Brennan v Comcare* (1994) 122 ALR 555, 572 (Austl.) (analyzing the differences between interpreting statutes and common law precedents).

federal inquiry on private rights of action prior to the advent of increased restrictions.[317] Before then, the absence of an express provision of any right of private enforcement was not enough to stay the court's common law powers.[318] Nor did a court supplying a private action always understand its act as implementing legislative intent.[319] By contrast, courts would not recognize private rights when statutory text, fairly read, contradicted such a right or suggested a right would disturb a legislative scheme.[320] It is telling that this approach thrived in federal courts before *Erie*,[321] which challenged the legitimacy of federal common law and undermined this more liberal approach to private rights of action.[322]

One final point in further need of exploration is precisely how to negotiate the overlap between preexisting common law doctrine and legislation. The Article's proposal treats the state legal landscape as a tract of common law that the legislature has a plenary right to displace or modify through statutes. Assuming statutes can displace common law, the most challenging questions concern the borderland of a statute's domain. This Article presents an approach analogous to "conflict preemption" in federal law, allowing judicial development of law adjacent to legislation so long as the two are not in direct conflict.[323] Federal textualist assumptions, by contrast, would require a model akin to "field" or "obstacle" preemption in federal law: once a statute touches on a subject, concerns of institutional competence or constitutional compromise militate against extending the statute's norms beyond its semantic scope or otherwise supplementing the regime in common law fashion.[324]

The presence of common law powers softens the constitutional case for a broader preemptive approach in the state context, but does not settle the

317. *See* Alexander v. Sandoval, 532 U.S. 275, 291–93 (2001) (denying private right of action absent explicit textual provision).

318. *See* H. Miles Foy, III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501, 548 (1986) (stating that "[t]he plaintiff was entitled to an adequate remedy for legal wrongs, including wrongs defined by legislation").

319. *Id.*

320. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 426 (1964) ("Federal courts will provide the remedies required to carry out the congressional purpose of protecting federal rights.").

321. *See, e.g.*, Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39–40 (1916) (allowing for a private right of action because it was clearly implied in the context of the intended legislative scheme).

322. *See Sandoval*, 532 U.S. at 287 ("'Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.'" (citation omitted)).

323. *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 260 (2000) (stating that state law is only preempted when it "contradicts a rule validly established by federal law"); *cf.* Williams, *supra* note 254, at 554, 563 (arguing that a statute's failure to cover an area should not raise a "negative preemption" inference concerning common law extension of that statute by analogy).

324. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 424–25 (2003) (invoking the doctrine of "obstacle" preemption to override state law which frustrates, but does not formally conflict with, federal law or policy); English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) (discussing the doctrine of field preemption).

issue. A particular theory about the nature of certain common law doctrines, for example, may decide the practical wisdom of allowing judicial elaboration in the statutory periphery. If, as many contend or assume, private law subjects like torts, contracts, or property are merely "public law in disguise,"[325] the institutional competence objections to judicial supplementation of legislative policy through case-by-case adjudication could be substantial.[326] By contrast, if there is warrant for the traditional conception of private law as reasonably autonomous from public law, internally coherent, and normatively appealing—points reasserted by a number of recent theorists[327]—the case against displacing swaths of common law by negative implication is stronger. Ironically, it is private-law instrumentalists who have argued for broad judicial license with respect to legislation,[328] while those who defend the autonomy of private law have shown little theoretical interest in statutes.[329] The strongest case against broad statutory preemption of common law will need to attract the attention and draw on the resources of the right private law theorists.

V. Looking Beyond State Courts

A. Federal Courts

This Article's first contribution to federal interpretation is its suggestion that the relationship between textualism, purposivism, and the common law is more complex than those debates often assume. In the federal context, skepticism of federal common law runs in tandem with misgivings about

---

325. Leon Green, *Tort Law Public Law in Disguise*, 38 TEXAS L. REV. 1 (1959); *see also* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 71–72 (1972) (arguing that the purpose of tort law is to create incentives for efficient precaution); Fleming James, Jr., *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 BUFF. L. REV. 315, 334–37 (1959) (encouraging tort doctrine to spread the cost of accidents through enterprise liability).

326. *See* Sunstein & Vermeule, *supra* note 148, at 886 (arguing that statutory interpretation would be aided by a closer examination of institutional capacities and dynamic effects).

327. *See generally* WEINRIB, *supra* note 168, at 206 (arguing that private law is autonomous because of the self-regulative nature of its immanent rationality); Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 WM. & MARY L. REV. 1873, 1873–74 (2011) (arguing that private law is best understood as a means for individuals to exercise their moral enforcement rights); John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1661 (2012) (rejecting the theory that the norms of private law reduce to norms of public law).

328. *Compare* Traynor, *Reasoning in a Circle*, *supra* note 240, at 751 ("[Judging entails] the recurring choice of one policy over another [in the formulation of new rules]."), *with* Traynor, *Statutes Revolving*, *supra* note 120, at 401–03 (arguing for judicial freedom to narrow and extend statutes in light of common sense and sound policy); *see also* Robert E. Keeton, *Statutes, Gaps, and Values in Tort Law*, 44 J. AIR L. & COM. 1, 19 (1978) (arguing for policy-oriented interpretation of statutes intersecting with tort law).

329. Professor Zipursky, however, recently has demonstrated how non-instrumental private law theory can shed light on public law questions concerning constitutional limits on punitive damages and federal preemption of state law. *See* Benjamin C. Zipursky, Palsgraf*, Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757 (2012).

purposivism.[330] By contrast, belief in broad federal common law powers often runs with purposivist or dynamic interpretation.[331] The shared premise upon which these factions differ is that a grant of common law powers is an on–off switch between thoroughgoing purposivism and formalist approaches like textualism. Yet some plausible institutional or jurisprudential approaches discussed in Part III indicate that the connection between common law powers and purposive interpretation may be fragile or contingent. Indeed, given the tendency for many purposivist or dynamic theorists to blur the lines between interpretation of precedent and interpretation of statutes, a grant of common law powers may be redundant in the argument against textualist interpretation. Even if common law powers do make some difference, the proposal in subpart IV(A) also underlines how they may not entail thoroughgoing purposivism. A court's defeasible authority to make law on its own may be irrelevant when a superior legislator has spoken clearly. Accordingly, broad common law powers may only give federal courts the ability to extend a statute's coverage in the face of silence, and not the ability to contradict clear text. This is more than an orthodox federal textualist would allow, but less than a purposivist or dynamic interpreter would seek.

Second, this Article's analysis may inform federal courts' approach to statutes that intersect with federal common law. In particular, courts could modulate their approach depending on whether they are operating in a traditional enclave of residual common law powers—such as admiralty or interstate disputes—or making interstitial common law to protect federal interests.[332] Even for an orthodox federal textualist, subpart IV(A)'s proposed approach for state courts could apply for statutes intersecting with traditional enclaves, while the usual textualist worries about federal common lawmaking would pertain in the interstitial setting.[333]

---

330. *See, e.g.*, Merrill, *supra* note 113, at 352 n.92 (critiquing expansive approaches to federal common law that "would provide virtually no constraint on federal judicial lawmaking" and would impose "little more than a pleading barrier before federal courts could take off on an unguided exercise formulating new rules of decision based on perceptions of utility"); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 768–69 (1989) (critiquing judicial policy choices where a legislature has already indicated its own choice on the same subject).

331. *See, e.g.*, Field, *supra* note 140, at 317 (arguing that the creation of federal common law does not violate separation of powers principles); Weinberg, *supra* note 140, at 846–47 (celebrating living common law as "more closely in touch with the current political will than is the dead hand of an old code").

332. *See, e.g.*, Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943) (holding that in such cases, it "is for the federal courts to fashion the governing rule of law according to their own standards" in the absence of statutes).

333. This analysis would be similarly applicable to questions at the intersection of legislated rules of procedure and federal courts' inherent powers to craft procedural common law. *See generally* Barrett, *supra* note 257 (describing the procedural common law powers of federal courts).

We can understand this point by examining two controversial federal common law cases. In *Moragne v. States Marine Lines, Inc.*,[334] the Supreme Court modified its common law of admiralty to allow for a wrongful death action.[335] It did so in part to advance what it saw as a congressional policy in favor of such recoveries, as evidenced by federal legislation on maritime accidents that concededly did not govern the case.[336] Even Judge Posner, an avowed purposivist, has criticized *Moragne*'s modification of the common law for functionally amending the relevant legislation and making it harder for Congress to strike legislative bargains on maritime legislation in the future.[337] Next, in *Boyle v. United Technologies Corp.*,[338] the Court crafted a federal common law defense for military contractors facing state tort suits for injuries caused by allegedly defective products sold to the government.[339] There could be no liability when the equipment conformed to government-approved specifications and the supplier warned the government of known risks.[340] This defense for contractors was necessary, *Boyle* explained, in part to protect a federal interest, namely the government's "discretionary function" statutory defense to negligence claims under the Federal Tort Claims Act.[341] Dissenters and commentators criticized this holding on separation of powers grounds, arguing that the Court created a defense where the statutory text plainly had not.[342]

From the perspective of federal separation of powers textualism, both decisions are problematic. *Moragne*'s revision of maritime doctrine effectively expanded the scope of the Death on the High Seas Act and *Boyle* preempted state law because a dispute between two *private* parties might indirectly frustrate the aims of a *government* immunity statute not involved in the litigation. The proposed approach for state courts in subpart IV(A), however, suggests that criticism of *Moragne* is misplaced. Residual pockets of common law, like admiralty law, resemble state court realities more than the post-*Erie* federal universe of limited jurisdiction. For this reason, *Moragne*'s development of admiralty law to reflect the Court's—and Congress's—preferred policy on wrongful death suits is no more problematic

334. 398 U.S. 375 (1970).

335. *Id.* at 409.

336. *Id.* at 408–09.

337. Posner, *supra* note 156, at 203.

338. 487 U.S. 500 (1988).

339. *Id.* at 511–12.

340. *Id.* at 512.

341. *Id.* at 511; 28 U.S.C. § 2680(a) (2006).

342. *See Boyle*, 487 U.S. at 515–16, 526–29 (Brennan, J., dissenting) (arguing that the majority took on a legislative role when it created the government contractor defense in disregard of Congress's prior refusal to create a similar defense); *see also* Larry J. Gusman, Note, *Rethinking* Boyle v. United Technologies Corp. *Government Contractor Defense: Judicial Preemption of the Doctrine of Separation of Powers?*, 39 AM. U. L. REV. 391, 395 (1990) (asserting that the Court, in barring recovery for individuals harmed by a product designed by a government contractor, "functioned as the writer of laws, rather than the interpreter of laws").

than, for example, negligence per se in state courts. Given the Court's defeasible power to make maritime law, Congress's silence in this enclave of common law does not raise the negative inference it might in the run-of-the-mill federal setting. Matters appear differently outside of residual enclaves, leaving *Boyle* and other attempts to protect federal interests still vulnerable to the separation of powers criticism that the courts leaped from statutory interpretation to illicit statutory extension.[343]

B. Intersystemic Interpretation

Comparative statutory interpretation raises the question—posed by Gluck in recent work on state–federal statutory interpretation—of whether a court interpreting a statute from another jurisdiction should follow the interpretive method of the other jurisdiction's courts.[344] According to Gluck, this question also requires us to ask whether statutory interpretive methodology is "law."[345] Gluck answers both questions in the affirmative, pointing to (1) state courts' regard of their own interpretive methods as binding, (2) analogies to law governing other kinds of "interpretation," and (3) the post-*Erie*, positivist understanding of law.[346] The three-pronged analysis of interpretive choice described in Part III indicates that the answers to these questions turn on one's criteria for interpretive choice. In short, Gluck's answers may or may not be correct, but we cannot know without further inquiry.

For the institutional interpreter, wondering whether interpretation is "law" is not a particularly helpful exercise. Whatever "law" is, the central question is what approach to intersystemic interpretation fits the competences of the interpreter. For example, an institutionalist may conclude that a state court should be purposivist in interpreting state statutes and that a federal court should be textualist in interpreting federal statutes.[347] The analysis may further suggest, however, that a federal court's institutional limits are such that adopting the state court's purposivist stance in diversity cases may do more harm than good.[348]

Similar caution may also apply to interpretation across states lines. Institutional analysis could indicate that courts in State A should read State A's statutes purposively, that courts in State B should read State B's statutes purposively, but that courts in State A and State B may best promote relevant values by reading each other's statutes through a textualist lens. Or,

---

343. *Cf.* Merrill, *supra* note 113, at 347 ("The use of federal common law in admiralty cases and interstate disputes is harder to reconcile with an anti-prerogative framework.").

344. Gluck, *Intersystemic*, *supra* note 9, at 1903.

345. *Id.* at 1902.

346. *Id.* at 1972, 1976–77, 1988–89.

347. *Cf.* Sunstein & Vermeule, *supra* note 148, at 928 (suggesting that institutional considerations can illustrate why certain entities, such as agencies, should be either bound to a textualist approach to statutory interpretation or given the authority to abandon textualism).

348. VERMEULE, *supra* note 112, at 282–83.

as Bruhl and Leib have suggested, given the empirical uncertainty and the decision costs of trying to resolve this question, courts may be better off not even asking whether interpretive method should travel with the statute.[349] Under institutional analysis, the intersystemic decision is contingent on facts and capacities, which possibly does not allow for any ready, global solution.

Although constitutional regimes are also contingent, the constitutions that the federal government and the states already have may lead to a more fixed approach to methodological translation. Beyond the requirements that states have a republican form of government and forbid bills of attainder, the federal Constitution has little to say about particular separation of powers arrangements in the states. Constitutional values of federalism and state sovereignty, then, could suggest that federal courts should strive to apply state methodology in diversity cases, just as they would strive to follow the dictates of other forms of state law.[350] This appears to be so even if it requires federal courts to apply to state statutes methods that would violate federal separation of powers if applied to federal law. If a federal court can sometimes hear a case that would be justiciable under state, but not federal, law,[351] perhaps it can also apply interpretive methods derived from other constitutions. Thus, if the "law" of statutory interpretation is a refraction of constitutional law, federal courts under our constitutional order may have an obligation to respect methodological differences.

Finally, the intersystemic question may turn on the theorist's standpoint regarding the nature of interpretation and law. Echoing Gluck's approach, an interpreter who understands all law as posited law can treat another jurisdiction's interpretive method as binding doctrine that supervenes upon substantive rules of decision.[352] By contrast, a theorist like Dworkin may argue that a faithful interpreter has no choice but to read any statute in light of background purposes and the best reading of that community's principles of political morality.[353] Or, following Alexander, the theorist may limit "interpretation" to identifying legislative intent. If that task is harder for a

349. *See* Bruhl & Leib, *supra* note 79, at 1269 ("[T]hese challenging questions may very well generate good reasons to reject interpretive divergence."); Bruhl, *supra* note 5, at 494–95 (noting that differences in competence can militate against adoption of methodology across systems).

350. Gluck, *Intersystemic*, *supra* note 9, at 1990–91 (arguing that state and federal courts should engage in a "dialectical federalism" for statutory interpretation).

351. *Cf.* Asarco Inc. v. Kadish, 490 U.S. 605, 623–24 (1989) (applying Arizona standing principles to hear a controversy even if it would have been nonjusticiable under federal justiciability doctrine).

352. *Cf.* Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 112–13 ("Substance and process are intimately related. The procedures one uses determine how much substance is achieved, and by whom. Procedural rules usually are just a measure of how much the substantive entitlements are worth, of what we are willing to sacrifice to see a given goal attained."); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2108 (2002) ("Interpretive rules are substantive law, and they go hand in hand with the substantive statutes of the legislatures that create them.").

353. DWORKIN, *supra* note 229, at 87–88.

court to do from afar, the court will have to engage in more guesswork, or lawmaking and less interpretation. But the "interpretation" portion of decision making will be the same in substance—the distance works a difference of degree, not kind. Despite their differences, Alexander and Dworkin would agree that jurisdictional boundaries are irrelevant to the nature of interpretation. For them, treating interpretive method as "law" in the post-*Erie* sense is like trying to promulgate binding rules of grammar and syntax, or to amend our background principles of political morality. It is to take a metaphor too far.

In sum, the framework deployed in this Article suggests that the answer to the question of whether interpretive methodology is statute-trailing "law" turns on what you mean by "law." The answer varies depending on whether we conceive of the law of statutory interpretation as the product of pragmatic considerations, constitutional law, the concept of legal interpretation itself, or some combination of the three. Or perhaps this broader inquiry—identifying, prioritizing, or reconciling these three aspects—is itself the "law" of statutory interpretation.[354] Given this complexity within and among these aspects of interpretive choice, we should not be surprised that we find confusion and inconsistency in the courts' approaches to interpretation across legal systems. Appreciating this dynamic may be the beginning of wisdom.

Conclusion

A good way to gain new appreciation of your first language is to learn a second one. A good way to find something you have misplaced is to stand on a chair and view the room from another angle. Working through the interpretive implications of differences between state and federal courts is important in its own right. In doing so, we also rotate a crystal whose refractions cast federal and general interpretation in a different light. At a time when debate regarding interpretation in the federal context seems locked at a stalemate, fresh perspective is all the more welcome. This Article helps discern the effects of common law powers on a court's treatment of statutes, while also advancing the theory of intersystemic interpretation. It is not the last word on either, but it points the way forward to an improved understanding of state, federal, and general interpretation alike.

354. *See* HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 8 (1983) ("The law contains within itself a legal science, a meta-law, by which it can be both analyzed and evaluated.").