STATUTORY INTERPRETATION METHODOLOGY AS "LAW": OREGON'S PATH-BREAKING INTERPRETIVE FRAMEWORK AND ITS LESSONS FOR THE NATION

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INTRODUCTION

The new frontlines in the statutory interpretation battles are the states. And the most interesting part is that, in at least some states, the battles don't seem to be battles at all. Whereas on the federal side, the now-stale fight between textualist and purposivist statutory interpreters continues to repeat,[1] some state courts seem to be engaged in an entirely different and more productive set of conversations about interpretive predictability—conversations that

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1. The U.S. Supreme Court remains divided over the interpretive tools that should be applied to construe federal statutes, with the debate centering primarily on the relative merits of two methodological theories: textualism and purposivism. In the most general terms, textualism centers on the primacy of enacted text as the key tool in statutory interpretation. Purposivism is distinguished by its more expansive approach, aimed at "interpret[ing] the words of the statute . . . so as to carry out the purpose as best [they] can," HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994), and purposivists' willingness to consider an array of extrinsic interpretive aids to do so, including legislative history, which many federal textualists will not consider. As a few examples of the vast literature discussing this debate, *see*, *e.g.*, STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Gluck, *States as Laboratories*, *supra* note †, at 1761-67; John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006).

are relevant not only to the states having them, but to federal interpreters as well.

Lest there be any doubt about the significance of these state developments, consider the fact that most academics and federal judges long ago resigned themselves to the inevitability of judicial disagreement over the rules of statutory interpretation. It has gone virtually unnoticed, however, that a number of state supreme courts have reached precisely the kind of interpretive consensus that those on the federal side have assumed impossible: some state courts have settled on a single approach, a controlling interpretive framework for all statutory questions. What's more, whereas the U.S. Supreme Court does not treat federal statutory interpretation principles as "law"—the Court's methodological statements do not get stare decisis effect and do not bind the lower courts[2]—in many states, the courts do treat their state rules of statutory interpretation as "real" legal doctrine, i.e., as state common law that receives precedential effect. Clearly, these developments have importance even for those scholars and judges interested exclusively in federal law.

As is often the case when it comes to state-level legal innovation, at the very front of these new frontlines stands Oregon. In 1993, the Oregon Supreme Court announced a controlling statutory interpretation regime[3]—a text-based hierarchy of interpretive rules—that has been followed religiously by all of the State's courts and treated as "real" law. Other state courts have proceeded in like fashion, and I have told similar stories about them elsewhere.[4] Oregon, however, offers a particularly rich example of this phenomenon, and so shall be this essay's focus.

My goals in this brief discussion are twofold. First, I wish to shine a spotlight on Oregon's path-breaking statutory interpretation framework—the so-called "*PGE* test." *PGE* is significant in and of itself simply because it exists—the fact that a court of last resort actually has agreed on a controlling interpretive approach is, alone, remarkable, and something we have not seen on the federal side.

2. *See* Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863 (2008); Gluck, *States as Laboratories*, *supra* note †; Gluck, *Intersystemic Statutory Interpretation*, *supra* note †.

3. Portland General Electric Co. v Bureau of Labor and Industries (PGE), 859 P.2d 1143 (Or. 1993).

4. Gluck, *States as Laboratories*, *supra* note † (describing similar developments in Connecticut, Michigan, Texas, and Wisconsin).

But *PGE* also is noteworthy because it provides an example of a new compromise methodology, a "modified textualism," that has made Oregon statutory interpretation more predictable not only for the State Supreme Court but also for the other players in the system—i.e., the legislators who must draft the State's statutes and the lower courts and litigants that must interpret them. Part I elaborates on these aspects of *PGE*.

The second goal of the essay is to explore more broadly the import of *PGE* for federal statutory interpretation. Why is it that, unlike some state courts, the federal courts do not treat the rules of statutory interpretation as real "law"? In the U.S. Supreme Court, five votes in agreement about methodological principles do not generate a precedent that carries over to the next case[5]—but in Oregon, they do.

One important difference is that Oregon has made theoretical connections between statutory interpretation and other kinds of interpretive methodologies that the federal courts have not made. Federal courts, for example, treat many analogous decision-making methodologies—including contract interpretation, choice-of-law regimes, burden allocation devices, and even some aspects of constitutional interpretation—as real "law", but statutory interpretation methodology does not receive that treatment.[6] Oregon on the other hand, long ago realized that, analytically, all of these different kinds of interpretation are more alike than different. And so the Oregon Supreme Court set out to create a series of interpretive frameworks across many areas of law, including statutory interpretation.[7]

As such, a look at national statutory interpretation through the eyes of Oregon exposes an enormous jurisprudential question that somehow—despite the forests that have been laid waste in service of three decades' worth of academic and judicial discourse about federal statutory interpretation—has flown entirely under the radar: what is, or should be, the legal status of statutory interpretation methodology? Are the rules of statutory interpretation law,

5. See sources cited *supra* note 2.

6. This distinction is detailed at length in Gluck, *Intersystemic Statutory Interpretation*, supra note †.

7. *See, e.g.*, Yogman v. Parrott, 937 P.2d 1019, 1021 (Or. 1997) (contracts); Ecumenical Ministries v. Or. State Lottery Comm'n, 871 P.2d 106, 110-11 (Or. 1994) (initiatives); Priest v. Pearce, 840 P.2d 65, 67-69 (Or. 1992) (original constitutional provisions); Hoffman Constr. Co. v. Fred S. James & Co., 836 P.2d 703, 706 (Or. 1992) (insurance).

individual judicial philosophy, or something in between? Viewed in the light of Oregon's approach, and compared to the federal courts' more lawlike treatment of other similar methodologies, one has to wonder whether federal statutory interpretation really is sufficiently different from these other areas of law to merit its special treatment. At a minimum, explicit judicial acknowledgement of the distinction and a justification for it seem to be in order.

Finally, this inquiry also reveals an important and overlooked question about the relationship between state and federal courts in statutory interpretation. Namely, if some states treat their methodological rules as law, shouldn't federal courts also apply those state methodologies when federal courts are asked to construe state statutes? This question derives from the *Erie* doctrine, that central rule of state-federal judicial relationships, which obligates federal courts to apply state legal principles to state law questions.[8] It may come as some surprise to learn that federal courts do not routinely treat state statutory interpretation methodologies as "law" subject to *Erie*, and so often bypass state methodology when they interpret state statutes. This practice likely derives from the fact that the federal courts do not treat their own methodologies as law either. But given that states like Oregon do, *Erie* arguably counsels that the current federal-court approach to such cases is incorrect.

One last introductory word about the relationship between state courts and federal statutory law is in order. The federal courts hear less than two percent of all American cases,[9] but almost all of the academic attention in the statutory interpretation context has focused on their interpretive approaches. Indeed, even the lower federal courts have been given short shift, as scholars really seem consumed solely by the practice of the U.S. Supreme Court.[10] The remaining ninety-eight percent of cases, of course, are heard in

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

9. *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2007 REPORT OF THE DIRECTOR 46 tbl. S-1, 84 tbl. A-1 (2008); COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2007 13 (2008).

10. One notable exception is FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 180-200 (2009) (providing the first preliminary study of statutory interpretation in the lower federal courts).

the state courts, the underappreciated trenches of American law. And in fact, more federal statutory cases are adjudicated in state courts than in federal courts, simply because there are so many more state courts.[11] This is only to say that a great deal of theory has been generated about statutory interpretation based on the very small, and likely highly skewed, sample offered by the U.S. Supreme Court's docket. But, as we shall see, some of the most important questions about statutory interpretation are being raised on the ground, in the state and lower federal courts, and it is long past time to broaden our perspective to account for these other judicial actors.

I. METHODOLOGICAL STARE DECISIS: OREGON CONTRASTED WITH THE U.S. SUPREME COURT

To appreciate the novelty of Oregon's approach to statutory interpretation, we must first understand the baseline against which Oregon's moves should be understood, and that is the U.S. Supreme Court and, by extension, the lower federal courts.[12] The U.S. Supreme Court does not have a consensus methodology for statutory interpretation, and it does not give stare decisis effect to its interpretive statements. So assume, for example, that the Court is interpreting whether the term "employee" in Title VII of the Civil Rights Act includes unpaid interns. The Court has a choice of statutory interpretation tools to resolve that question—the textual meaning of the word "employee," the legislative history of the Civil Rights Act, the more than one hundred canons of construction (e.g., the canon of constitutional avoidance, the rule against superfluities, etc.), and so on. Assume that the Court in this case holds that it must construe Title VII broadly in conjunction with its legislative history, and so includes interns in the definition. The holding in the case—that interns are employees—is of course the "law" and is treated as a precedent for future cases involving Title VII. But, under current practice, the methodological principle that the Court uses to decide the case—

11. *See* Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 362 (2002).

12. Because of the dearth of academic research about the statutory interpretation practices of the lower federal courts, one must assume that the lower federal courts approach statutory interpretation in the same fashion as the U.S. Supreme Court. There is always the possibility, however, that some of the state court developments also are afoot in the lower federal courts.

that it must construe Title VII broadly in conjunction with its legislative history—is not. As a result, the very next day the Court could construe a different question about the meaning of Title VII (indeed, even another question about the meaning of the term "employee" in Title VII), and the Court could hold, without any need to justify its different approach, that legislative history should not be consulted in answering that question. The methodological principles in one case do not carry over to the next, even where the same statute is being construed.

I have argued at length in other work that this absence in the U.S. Supreme Court of what I will call "methodological stare decisis" is troubling. Among other things, it leads to repetitive fights among the Justices over the same interpretive choices; it wastes resources; it makes it difficult for lower courts and litigants to anticipate what tools the Court will find most relevant; and it deprives Congress of any incentive to coordinate its statutory drafting with the rules of interpretation because the dominant rules change from case to case. I am not alone in making these arguments. Academics have been lamenting the presumed impossibility of clarity and consensus in federal statutory interpretation for decades.[13] It is against this background that the significance of the efforts to increase predictability in states like Oregon becomes clear.

A. Oregon's PGE *Framework*

Oregon's special approach to statutory interpretation—the so-called *PGE* framework—is familiar territory to Oregon litigators, legislators, and judges (and I am told it is required learning for many first-year law students in Oregon law schools!). As such, this section offers only a brief summary of *PGE* for the uninitiated, with further elaboration available elsewhere.[14]

13. There are, of course, some scholars who think the Court's practice is determinate enough. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 353, 364 (1990).

14. *See* Gluck, *States as Laboratories*, *supra* note †; Steven J. Johansen, *What Does Ambiguous Mean? Making Sense of Statutory Analysis in Oregon*, 34 WILLAMETTE L. REV. 219, 228-31 (1998); Jack. L. Landau, *The Intended Meaning of "Legislative Intent" and Its Implications for Statutory Construction in Oregon*, 76 OR. L. REV. 47, 50 (1997) [hereinafter *Intended Meaning*]; Jack L. Landau, *Some Observations About Statutory Construction in Oregon*, 32 WILLAMETTE L. REV. 1 (1996); Robert M. Wilsey, Comment, *Paltry, General & Eclectic: Why the Oregon Supreme Court Should Scrap* PGE v. Bureau of Labor & Industries, 44 WILLAMETTE L. REV. 615 (2008).

The watershed case, *PGE v. BOLI*,[15] was decided in 1993 and announced a three-part test–a tiered interpretive hierarchy–for all statutory questions. Notably, *PGE* not only listed the relevant interpretive tools, it also ranked them in three steps.[16] First, *PGE* instructed courts to consider only the statutory text and the "textual canons"[17] of construction. Second, and only if ambiguity remained after the first step, courts could consult legislative history. And, third, and only if ambiguity still remained after the first two steps, courts could consider the default policy presumptions, the so-called "substantive canons" of construction.[18] *PGE*'s ambiguity thresholds were strict. That is, if the court found that the text was clear, it would not look to legislative history at all—even to double check its interpretation. And likewise, if text plus legislative history gave clarity, the court would not even consider the third-level tools, the substantive canons of interpretation, such as lenity and avoidance.

The remarkable thing is not only that the Oregon Supreme Court was able to reach this consensus, but that the new

15. Portland General Electric Co. v Bureau of Labor and Industries, 859 P.2d 1143 (Or. 1993).

16. *Id.* at 1146 .

17. Textual canons, such as the rule against superfluities, and *exclusio unius*, "assist the statutory interpreter in deriving probable meaning from the four corners of the statutory text." WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 845-848 (4th ed. 2007).

18. As stated in full by the Oregon Supreme Court, the three-part *PGE* test proceeds as follows:

> [1] In this first level of analysis, the text of the statutory provision itself is the starting point for interpretation . . . . In trying to ascertain the meaning of a statutory provision . . . the court considers rules of construction of the statutory text that bear directly on how to read the text . . . for example, the statutory enjoinder "not to insert what has been omitted, or to omit what has been inserted." . . .
>
> Also at the first level of analysis, the court considers the context of the statutory provision at issue, which includes other provisions of the same statute and other related statutes. . . .
>
> [2] *If, but only if*, the intent of the legislature is not clear from the text and context inquiry, the court will then move to the second level, which is to consider legislative history . . . . If the legislative intent is clear, then the court's inquiry into legislative intent . . . is at an end . . . .
>
> [3] If, after consideration of text, context, and legislative history, the intent of the legislature remains unclear, then the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty.

PGE, 859 P.2d at 1146 (internal case citations omitted) (emphasis added).

methodological regime stuck.[19] The Court applied the *PGE* methodology "religiously" for sixteen years after its announcement,[20] and did so without a single dissenting opinion from any member of the court arguing that the methodology was not "real" law or that it did not control as a matter of stare decisis.[21] Indeed, *PGE* is the most-cited decision in the State's history.[22]

Part II elaborates on the relevance of the *PGE* for federal judicial practice, but first it is worth mentioning what distinguishes *PGE* as a methodology, and also what has happened to the interpretive hierarchy that it established.

1. PGE *as "Modified Textualism"*

One important aspect of the *PGE* story is the actual methodology that it adopted. I have called that methodology—text, then legislative history, then canons—a special kind of textualism, a "modified textualism," because it differs from the textualism of federal judges like Justice Scalia. The primary difference is that the *PGE* methodology carves out a place for legislative history, which federal textualism does not. Indeed, the use of legislative history has been one of the major divisions between federal textualists and other federal interpreters, and it may well be that the Oregon Supreme Court's willingness to compromise on legislative history—to allow it but to cabin its use—is one important reason that it was able to reach methodological consensus in the first place (and, in fact, a number of other states that likewise have reached interpretive consensus also have done so through modified textualism[23]).

The second important difference is that *PGE* virtually banished the substantive canons of construction from Oregon practice—because they are relegated to tier three of the inquiry. In contrast, federal textualists rely on those canons heavily, and those

19. *See* Landau, *Intended Meaning*, *supra* note 14, at 50.

20. *See id.*

21. *See* Gluck, *States as Laboratories*, *supra* note †, at 1775 n. 80 (compiling cases).

22. Jack L. Landau, *The Mysterious Disappearance of* PGE, 2009 OREGON APPELLATE ALMANAC 153, 153.

23. *See* Gluck, *States as Laboratories*, *supra* note † (detailing modified textualism in Texas, Wisconsin, and Michigan and noting that other states also appear to have adopted it).

canons often are criticized for injecting subjectivity and unpredictability into federal statutory interpretation.[24]

Despite these differences, I have argued that the federal textualists have much to learn from the Oregon example. I have made this claim because, as applied by the Oregon Supreme Court, the modified textualism embraced in *PGE* resulted in precisely the kinds of outcomes that the federal textualists have been trying to achieve for thirty years with much less success: namely, interpretive predictability, dramatic decline of legislative-history use, and an increase in sophisticated textual analysis.[25] I have gone into great detail previously about just how *PGE* accomplished this,[26] and so here will provide just a few illustrative examples.

Perhaps most significant is the dramatic drop in the Oregon Supreme Court's use of nontextual tools of statutory construction—a drop that is directly associated with the adoption of the *PGE* test. Between 1993 and 1998, for example, out of 137 statutory interpretation cases, the Oregon Supreme Court looked at legislative history only thirty-three times, finding it "useless" in one third of those cases. It consequently reached tier three—non-textual canons—only eleven times during the same period.[27] Even more strikingly, between 1999 and 2006, the court applied the *PGE* framework 150 times and only reached tier two (legislative history) nine times. Not a single case during that period reached tier three.[28] And across the sixty-five cases in which *PGE* was cited between 2005 and 2009 legislative history was applied eight times, and a substantive canon only once.[29]

24. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 27-28 (1998) (noting that use of the canons —"these artificial rules"—"increase[s] the unpredictability, if not the arbitrariness, of judicial decisions."); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) (arguing for every canon there is a countercanon that undermines it).

25. *Accord* Jack Landau, *Oregon as a Laboratory of Statutory Interpretation* 47 WILLAMETTE L. REV. 4, 566 (2011) ("[*PGE*] has brought a predictable order of analysis to Oregon statutory construction. Second, it has resulted in what I regard as an entirely appropriate emphasis on the importance of the statutory text.").

26. Gluck, *States as Laboratories*, *supra* note †, at 1779-82, 1835-37.

27. *See* Johansen, *supra* note 14, at 244 n.169.

28. Wilsey, *supra* note 14, at 616-17.

29. Gluck, *States as Laboratories*, *supra* note †, at 1799 (conducting this study); *cf.* Wilsey, *supra* note 14, at 615-616 (arguing *PGE* caused "the near total disappearance of legislative history in the decision-making of the Oregon Supreme Court").

In contrast, in the U.S. Supreme Court, despite the indisputable influence that the textualists have had on the text-centricity of the Court's interpretive approach, legislative history is still employed in 42 percent of majority opinions.[30] In other words, the Oregon Supreme Court has been more effective at restraining the use of the legislative history through a compromise approach than federal textualists have been by their not-always-successful insistence on the total exclusion of legislative history.

Moreover, under *PGE*, the Oregon Supreme Court was fairly consistent with respect to which interpretive tools it relied upon—a fact that made it easier for lower courts, legislators, and litigants to predict which tools the State Supreme Court would favor. For example, the same eight types of textual tools were each used in roughly half of the cases over the five-year period ending in 2009: "plain meaning," dictionaries, state-court precedents, close readings of statutory definition sections, analysis of related statutes, analysis of the contested term's place in the statutory scheme, historical evolution of the statute itself,[31] and textual canons.[32] The only additional tools used in more than three cases

30. *See* CROSS, *supra* note 10, at 145 (empirical study of U.S. Supreme Court interpretation from 1994-2002).

31. This is to be distinguished from legislative history. Oregon's reference to statutory history entails textual and structural examination of earlier *enacted* versions of the statute or related statutes.

32. Specifically, over fifty-eight cases across that five-year period, the court relied on "plain language" analysis in thirty-four cases; dictionary definitions in twenty-four cases; statutory definition sections in nineteen cases; other statutes in twenty-three cases; statutory context (historical evolution/statutory structure) in twenty-eight cases; state-law precedent in twenty-three cases; and textual canons in twenty-one cases. It relied on rules of grammar in ten cases; on law review articles and treatises in two cases; federal-law precedents in three cases; other textual tools in six cases (specifically, the legislative acquiescence rule (two cases); the presumption that statutes incorporate common law concepts (two cases); the borrowed statute rule (one case); and the presumption that amended statutes incorporate intervening judicial decisions (one case)); legislative history in eight cases; legislative "purpose" in two cases; agency construction in two cases; other states' laws in two cases; consequences in two cases; substantive canons (here, the rule against implied repeals) in one case; "common sense" in one case and did not rely on executive construction, public policy, or "dynamic" interpretive methods in any cases. With respect to the textual canons, the court applied the same eight canons repeatedly throughout the cases in which textual canons were used. Four cases relied on *exclusio unius*; three on the presumption of consistent usage; four on the rule against superfluities; three on the rule that presumes a different meaning to different terms used in the same statute; three on the rule that courts should not insert what has been omitted (similar to *exclusio*); three on "specific controls the general"; four on *ejusdem generis*; one on *in pari materia*; and one on the rule that specialized terms shall be given their trade/specialized meaning. *See* Gluck, *States as Laboratories*, *supra* note †, at 1799.

were rules of grammar in ten cases and legislative history in eight cases, making the list of the eight types of tools described above the fairly complete universe of basic tools of Oregon statutory interpretation. All but six of the opinions over the five-year period were unanimous.

Finally, another important product of the *PGE* approach is the level of sophistication in the textual analysis that it encouraged. To determine the meaning of a contested statutory term, the Oregon Supreme Court routinely examines the whole statutory scheme, related statutes, and the evolution of the statute from previously enacted versions.[33] This is precisely the kind of rich textual work that leading textualists appear to have in mind when they defend their theory against charges that it is "simpleminded,"[34] but notably, is not always the hallmark of the kind of textualist analysis employed in majority opinions in the U.S. Supreme Court.[35]

2. PGE*'s Coordination and "Rule of Law" Benefits*

By many accounts, *PGE* also made statutory interpretation more predictable for the other players in the system. Litigants followed the three-step framework in their briefs.[36] Government

33. *See id.*

34. SCALIA, *supra* note 22, at 23.

35. For example, in the 2008 and 2009 Supreme Court Terms, looking only to textualist majority opinions authored by Justices Scalia and Thomas (the Court's two most textualist Justices), there were twelve statutory interpretation opinions that attracted a majority of votes including the vote of at least one purposivist Justice. Seven of those cases were unanimous. Out of all twelve cases, seven utilized only the simplest of textual tools—some combination of "plain text," dictionary definitions, and precedent. *See* Gluck, *States as Laboratories*, *supra* note †, at 1837 n. 331 (collecting cases). Three other cases relied on these same tools plus a few canons. *See id.* n. 332. There were five other majority statutory interpretation opinions authored by Justices Scalia or Thomas that divided the Court across the usual "liberal"/"conservative" lines. In those cases, one was decided relying on solely on precedent, and the remaining four relied on a still quite simple combination of plain meaning, dictionary definitions, precedent, and one or two canons. *See id*. n. 333.

36. For example, eighty-seven of the Oregon Supreme Court briefs available in the Westlaw database between 2007and 2008 expressly cited *PGE* as the controlling framework. Many of the briefs were structured in three sections to match the three-step *PGE* test. *See, e.g.*, Brief on the Merits of Petitioners on Review, Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n, 212 P.3d 1243 (Or. 2009) (No. S055915), 2008 WL 4144169 [hereinafter Brief, *Friends of the Columbia Gorge*]; Brief on the Merits of Petitioners on Review, MAN Aktiengesellschaft v. DaimlerChrysler AG, 208 P.3d 964 (Or. 2009) (No. S055861), 2008 WL 4144166 [hereinafter Brief, *MAN Aktiengesellschaft*]; Brief on the Merits of Respondent on Review, Oregon Dep't of Justice, *MAN Aktiengesellschaft*, 208 P.3d 964

attorneys in the State have said that it made their jobs more efficient, by putting less emphasis on legislative history, which can be difficult, time consuming, and sometimes expensive to research. There also is some anecdotal evidence that the framework was useful to lower-court judges and to legislators, who could coordinate their opinions and statute-drafting with the expected methods of interpretation.[37] And in fact, all of these benefits are precisely the benefits one would expect from a stable set of clear interpretive rules.

In contrast, consider the five years before *PGE* was decided. There was no single approach. More than half of the cases resorted immediately to legislative history or policy analysis without prior consideration of text alone, and without the tiered hierarchy of sources that *PGE* later imposed.[38] One Oregon Supreme Court Justice called the pre-*PGE* period a "legislative history free-for-all."[39] And, in his contribution to this volume, another Justice, Justice Jack Landau, who describes himself as having "a 'love-hate' relationship with *PGE*," agrees. Prior to *PGE*, he writes, "few paid any attention to statutory construction analysis, and, as a result, the cases were pretty much a mess."[40] *PGE*, Justice Landau notes, "was designed to bring order to the chaos. And it must be said that it largely delivered."[41]

(No. S055861), 2008 WL 5415648; Brief on the Merits of Petitioner on Review, O'Hara v. Bd. of Parole & Post-Prison Supervision, 203 P.3d 213 (Or. 2009) (No. S055839), 2008 WL 4525138. Many also extensively engaged the question whether the lower courts had applied the *PGE* test correctly to their cases and often argued that failure to do so was reason for reversal. *See, e.g.*, Brief, *Friends of the Columbia Gorge*, *supra*, at *6; Respondent on Review's Brief on the Merits, Liles v. Damon Corp., 198 P.3d 926 (Or. 2008) (No. S054734), 2007 WL 4542009 at *10; Brief of Amicus Curiae Bureau of Labor and Indus., Gafur v. Legacy Good Samaritan Hospital and Medical Ctr., 185 P.3d 446 (2008) (No. S055175), 2008 WL 5721672 at *5. For more examples, *see* Gluck, *States as Laboratories*, *supra* note †, at 1782 n. 110.

37. Email Interview with Jack L. Landau, Judge, Oregon Court of Appeals (Jan. 5, 2010).

38. *See* Gluck, *States as Laboratories*, *supra* note †, at 1780 n. 101 and accompanying text.

39. Telephone interview with Justice Virginia L. Linder, Oregon Supreme Court, July 16, 2009 (referring to her perspective, as an attorney, of the pre-*PGE* caselaw during her time as a lawyer, not as a judge).

40. Landau, *supra* note 22, at 566–567.

41. *Id.* at 568.

B. PGE *as Modified by* Gaines *and the Future of Methodological Stare Decisis in Oregon*

All that said, *PGE* is no longer the law. In 2009, the Oregon Supreme Court modified *PGE* in a case called *State v. Gaines*.[42] *Gaines* removed *PGE*'s prohibition on consulting legislative history even when the text was clear,[43] but retained *PGE*'s stricter prohibition on consultation of substantive canons.[44] The *Gaines* decision was ambiguous—perhaps intentionally so—as to whether some restrictions still might be imposed on legislative-history use even within the new framework, and so initially it was not known how great a change the case would work on state judicial interpretive practice.[45]

But now, two years later, the result of *Gaines* is clear. Since *Gaines*, the Court has looked to legislative history in almost every

42. State v. Gaines, 206 P.3d 1042 (Or. 2009). *Gaines* was decided at least in part in reaction to a 2001 Oregon state statute enacted in direct response to *PGE*'s strict prohibition on legislative-history use when the text was clear. The statute stated: "A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate." Or. Rev. Stat. § 174.020(3) (2009). Although on its face, the statute did not appear to contradict *PGE*, the legislative history (ironically) indicated that the statute was intended to loosen the *PGE* prohibition. For eight years—until *Gaines* was decided—the Oregon Supreme Court refused to even acknowledge the possibility that the statute amended the *PGE* test. Instead, it ignored litigants' repeated requests that the Court apply it, and adhered to its three-step regime. This particular phenomenon—state legislative attempts to control judicial methods of statutory interpretation and judicial resistance to such control—is also on display in a number of states, and raises fascinating separation of powers issues that are beyond the scope of this essay. *See* Gluck, *States as Laboratories*, *supra* note †, at 1785-97, 1824-29, for a more detailed discussion of this power struggle over methodological choice.

43. See *Gaines*, 206 P.3d at 1050-51 (concluding that the Legislature had intended to amend *PGE* to move consultation of legislative history to the first step of the analysis, but leaving it to the courts to decide how much weight to give to legislative history once consulted).

44. *Id*. at 1051.

45. Early cases applying *Gaines* illustrated the confusion. *Compare* State v. Parkins, 211 P.3d 262 (Or. 2009) (retaining *PGE* progression of looking to text as first step and then proceeding to legislative history after going through textual analysis and finding it ambiguous), *and* State v. White, 211 P.3d 248 (Or. 2009) (same), *with* State v. Ritchie, 208 P.3d 981, 985 (Or. Ct. App. 2009) (finding text clear and so reviewing only legislative history proffered by party and consulting no additional history), *and In re* Marriage of A.C.H. & D.R.H., 210 P.3d 929 (Or. Ct. App. 2009) (same), *with* Ram Technical Servs., Inc. v. Koresko, 208 P.3d 950, 960-61 (Or. 2009) (using legislative history to confirm conclusions reached from textual analysis), *and* State v. Williams, 209 P. 3d 842, 844-45 (Or. Ct. App. 2009)(same).

case.[46] As such, one question raised by *Gaines* is whether all of the efficiency and coordination benefits of *PGE* are lost, or whether it is still possible to obtain those benefits with an interpretive framework that liberally admits legislative history.

But the bigger-picture question raised by *Gaines* is whether the case represents only a shift in the court's view about what the right methodology is, or whether it actually represents a more significant sea-change in the way the State Supreme Court views the legal status of statutory interpretation methodology (Is it still "law"?) and in how the Court views the value of predefined interpretive frameworks. One reason this question arises is because the Oregon Supreme Court recently granted review of a case in which it will be examining another one of its three-part tests, in an area outside of statutory interpretation—this time its framework for insurance interpretation—again with a focus on when to admit extrinsic evidence.[47] And so the outside observer has to wonder whether the Oregon Supreme Court is questioning the boundaries of its tiered interpretive frameworks and seeking more flexibility as a general matter.[48] The related question of course is, even if the Oregon Supreme Court stands by its view that all of these frameworks are in fact real law, whether more flexible interpretive doctrines can still bring with them the kind of predictability, stability and coordination benefits that have been associated with the more structured approach exemplified by *PGE*.

C. Analogous Interpretive Frameworks Across Many Areas of Law

One final point about the Oregon experience before explaining its significance for the federal courts. As noted,

46. *But see* Landau, *supra* note 24, at 572 (arguing that *Gaines* has not eviscerated *PGE*).

47. *See* Bresee Homes Inc. v. Farmers Ins. Exch., 206 P.3d 1091 (Or. App. 2009), *review granted*, 347 Or. 543 (2010); Robert M. Wilsey, 71 OR. ST. B. BULL. 29, 29 (Oct. 2010). The case below had relied on the leading case establishing the state's three-step interpretive framework for insurance contracts, *Hoffman Constr. Co. v. Fred S. James & Co.*, 836 P.2d 703, 706 (Or. 1992), in which extrinsic evidence is not permitted in the first step of the inquiry. *See Bresee Homes*, 206 P.3d at 1093, 1095. The Oregon Supreme Court asked the parties on appeal to brief, *inter alia*, "[w]hether extrinsic evidence, particularly that which can be characterized as an admission, may be introduced to create an ambiguity, or submitted to the factfinder under proper instruction." Oregon Supreme Court, Media Release, Jan. 21. 2010, *available at* http://www.ojd.state.or.us/sca/WebMediaRel.nsf/Files/01-21-10_Supreme _Court_ Conference _Results_Media_Release.pdf/.

48. *Cf.* Wilsey, *supra* note 47.

Oregon's more lawlike approach to interpretation extends far beyond the realm of statutes. In Oregon, as well as other states, there are similar interpretive frameworks for many other areas of legal interpretation.[49] *PGE* itself was part of the Oregon Supreme Court's larger project in the 1990s to set forth clear, step-by-step rules to guide lower courts and litigants in interpretation for many areas of law, including constitutional, initiative, and contractual interpretation.[50] These developments are noteworthy because they illustrate how, in contrast to the federal perspective, the state courts do not view the legal status of statutory interpretation methodology differently from they way that they view other types of decision-making and interpretive rules. Instead, the state courts seem to be linking the question of interpretive determinacy across different substantive areas in ways that have not yet penetrated the federal consciousness. And so another interesting question to consider is what it is about state courts, and state law, that gives them this different perspective.

Space does not permit an in-depth discussion of this question here,[51] but, in brief, my sense is that several institutional features of state courts are responsible for the difference. Salient among these is the fact that state supreme courts have enormous docket pressures—a burden that likely makes them more focused on helping their lower courts decide cases consistently and efficiently. State courts also generally have closer relationships to the legislative branch than do the federal courts. Those relationships, and the more constant interaction between the branches in the states, may encourage state courts to make the statutory drafting and interpretation enterprise a more coordinated one. Indeed, it probably is no coincidence that Oregon's Chief Justice during the time that all of the State's methodological frameworks were created, Wallace Carson, was both a legislator and a trial judge

49. *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 194–99 (1998); Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 926 n.1 (2010) (noting that thirty-eight states follow a "formalist" approach to contract interpretation).

50. *See supra* note 7 and accompanying text; Jack L. Landau, *Of Lessons Learned and Nearly Lost: The Linde Legacy and Oregon*, 43 WILLAMETTE L. REV. 251, 261 (2007) ("With three-part interpretive templates for constitutions, statutes, contracts, and insurance policies, the Oregon Supreme Court began to systematize its thinking about all matters interpretive.") (citations omitted); Robert Williams, *Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189 (2002) (discussing states, including Oregon, that have adopted special frameworks for constitutional interpretation).

51. *See* Gluck, *States as Laboratories*, *supra* note †, for a deeper discussion.

prior to joining the court, and so had particular appreciation for the effects of unclear judicial doctrine on the lower courts and coordinate branches of government.[52]

II. TRANSLATING THE OREGON EXPERIENCE TO FEDERAL STATUTORY INTERPRETATION

Cases like *PGE* should matter to federal-court watchers for a number of reasons. At the broadest level, *PGE* highlights the fact that our jurisprudential understanding of federal statutory interpretation is quite under-theorized. Seen in the light of *PGE*, it seems puzzling that, despite the fact that the vast majority of federal law is statutory law, the federal courts do not have the same kind of clear understanding of the legal status of their interpretive rules that some state courts seem to have. At a more specific level, once we realize that states like Oregon do have these distinct approaches to statutory interpretation, one has to ask if the federal courts are aware of them, and whether they are applying them to state law questions. This is more than an academic inquiry: federal courts interpret state statutes every day, under both the diversity and the federal question jurisdiction. What's more, the *Erie* doctrine requires federal courts to apply state law to state legal questions. Yet, as we shall see, the federal courts do not approach state statutory interpretation in this manner, most likely because the federal courts do not generally view their own statutory interpretation principles as law.

A. Statutory Interpretation and the Erie *Doctrine*

This is the *Erie* question as applied to statutory interpretation: must the Ninth Circuit apply the *PGE* test to Oregon statutory questions? Or, taking an example from another state, may the Sixth Circuit consult legislative history when construing a

52. Carson was generally frustrated by the unpredictability occasioned by the lack of clear interpretive methodology in the federal courts. *Cf.* Wallace P. Carson, Jr., *"Last Things Last:" A Methodological Approach to Legal Arguments in State Supreme Courts*, 19 WILLAMETTE L. REV. 641, 646 (1983) (quoting Justice Blackmun's "continuing dissatisfaction and discomfort with the [U.S. Supreme] Court's vacillation"). His former law clerks reported that Carson "understood the need for clarity and stability in appellate decisions as a means to assist trial courts in the consistent and correct implementation of law. . . . [He] also appreciated the need for clear and consistent judicial decisions to assist legislators in drafting statutes." Lisa Norris Lampe, Sara Kubaka & Sean O'Day, *Chief Justice Wallace P. Carson, Jr.: Contributions to Oregon Law*, 43 WILLAMETTE L. REV. 499, 501 (2007).

Michigan statute even if the Michigan Supreme Court's methodology would prohibit it?[53]

One might be surprised to learn that our federal courts, including the U.S. Supreme Court, have no consistent answer to questions of this nature. As I have detailed at great length in a recent article,[54] federal courts do not typically look to state interpretive principles when they interpret state statutes. Instead, they usually cite only U.S. Supreme Court cases for the interpretive principles that they choose—even though in some cases it is clear that the state supreme court would have employed a different interpretive rule.[55] And even in certain contexts in which we do see federal courts acknowledging that a state court applies a particular interpretive rule, federal courts often still refuse to apply the state rule, usually on the ground that federal courts are "incompetent" to interpret state law in certain ways or that to do so would violate principles of federalism.[56]

(I should note here that, once again, Oregon offers something of an exception. Perhaps because *PGE* offers such a clear standard, the Ninth Circuit does apply the *PGE* framework when it interprets an Oregon statute under the diversity jurisdiction. Although this is an exception that does not generally carry over to other federal courts, it does give us a glimpse of how the right approach would look.)

So why should we care about this? As a doctrinal matter, we should care about this because the federal courts' common practice

53. *See* Gluck, *States as Laboratories*, *supra* note †, at 1803-11 (describing modified textualism in the Michigan Supreme Court).

54. Gluck, *Intersystemic Statutory Interpretation*, *supra* note †.

55. *Id.*

56. There are various examples of this phenomenon. For example, the Second Circuit on occasion has acknowledged that the state of Connecticut uses a much more purposive approach than the Second Circuit generally, but the Second Circuit feels uncomfortable applying that purposive approach itself when it interprets Connecticut statutes. *See* Gluck, *Intersystemic Statutory Interpretation*, *supra* note †, at 1946 n. 166**.** There is also a very puzzling trend when it comes to the constitutional avoidance canon, which counsels federal courts, when choosing between two possible constructions of a statute, one of which raises constitutional questions, to choose the construction that avoids the constitutional inquiry. Despite the fact that federal courts routinely apply this canon to federal statutes, and despite the fact that all of the state courts also apply this rule to their own statutes (although Oregon is the one state that almost never uses it), when federal courts are interpreting state statutes, there is a clear line of cases from a variety of courts that take the position that federal courts cannot freely construe state statutes to avoid constitutional questions in the same way they would otherwise. *See id.* for a more detailed discussion.

of bypassing state statutory interpretation methodology in state statutory cases is, I submit, just plain wrong. It flies in the face of the basic assumptions underlying both *Erie* and the grants of concurrent jurisdiction: the assumption that federal courts are capable of ascertaining and applying state law in the same way that state courts are, and that, in fact, they have a constitutional duty to do so. And as a practical matter, we should care about this for all of the reasons that we have the *Erie* doctrine in the first place. There are fairness concerns when litigants' cases are adjudicated under different principles depending on the court in which they appear. Different state and federal methodological practices, if they lead to different case outcomes, also might encourage forum-shopping and facilitate the inequitable administration of state law.[57]

Of course, the *Erie* principle is not absolute. *Erie* applies only insofar as the federal Constitution allows.[58] As such, if the application of a state interpretive rule would pose a conflict with federal law—if, for example, a state adopts a "racist" canon of interpretation or a canon that requires courts to give advisory opinions about federal law[59]—there may be a federal constitutional

57. There are possible counterarguments to this doctrinal conclusion, although none I think ultimately persuasive. For example, one such argument might be that a federal judge's choice of interpretive methodology is inherent in the individual judge, or emanates from the Article III federal judicial power, such that where federal judges go—including the state-law realm—their interpretive methodologies go with them. The weakness in this argument is that, to the extent that scholars and judges have argued that certain statutory interpretation methodologies are constitutionally compelled, those arguments are all grounded not in Article III (the judicial power) but in Article I (the legislative power) of the Constitution. Federal textualists, for example, base their opposition to legislative-history use on the rationale that that the only evidence that judges can use to interpret statutes is law that has passed through the bicameralism and presentment process set forth in Article I. But Article I is irrelevant when *state* legislation is at issue. Similarly, statutory interpretation arguments based on the Congress/Court relationship are grounded in federal separation of powers principles, but those principles are not in play when one is talking about the relationship between federal courts and *state* legislatures. Indeed, the separation of powers paradigm looks very different in a number of states than it does on the federal side.

58. The Seventh Amendment presents an example of an area in which the Court already has held that *Erie* controls only up to a point and that state substantive law sometimes must give way to other constitutional norms—in that context, the right to a jury trial. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996).

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

principle that tells federal courts in those specific situations that the *Erie* principle does not carry the day and that state methodology should not be applied in that particular case. But, critically, the federal courts are not actually invoking such arguments in practice to justify their decisions to bypass state methodology. Federal courts are not operating under the assumption that the general rule is to apply state methodology to state statutes but that in certain circumstances there might be a strong, federal-law reason to do something different. Instead, federal courts appear to be applying a blanket presumption that methodological choice somehow isn't related to the sovereign—the state—whose law is being applied.[60]

Oregon's *PGE* test seriously challenges this federal-court position on choice of methodology. And in a way, this is a twist on Oregon Supreme Court Justice Hans Linde's legacy. Justice Linde made Oregon famous in the constitutional-law realm for the idea that state constitutions have importance as independent sources of law, and are not necessarily the same as the federal Constitution.[61] In a parallel vein, *PGE* tell us the same thing about state statutory interpretation—it might be different in the states. *Erie*, in my view, requires federal courts to pay more attention to those differences than they currently do.

60. Space does not permit discussion of the "reverse-Erie" context, when state courts interpret federal law. Note, however, that because the U.S. Supreme Court has not created a common law of federal statutory interpretation, state and lower federal courts have a menu of interpretive rules from which to choose when interpreting federal statutes—a menu that can lead to intraregional inconsistency of federal statutory law sometimes based on the diverging methodological choices of geographically-linked state and federal courts. These cases raise the same uniformity and fairness concerns that animate the *Erie* doctrine and may be reason alone for the Court to consider a more lawlike approach. *See, e.g.*, Providence Health Plan v. McDowell, 385 F.3d 1168, 1173 (9th Cir. 2004) (diverging from earlier interpretation of Oregon state courts in an ERISA preemption case based on choice of interpretive rules); *id*. at 1174 (Thomas, J., dissenting from denial of rehearing en banc) (noting that "[W]e are now faced with the conundrum of federal courts in Oregon . . . forced to allow state remedies and state courts . . . in those areas holding those same state remedies federally preempted"); *cf.* Liberty Northwest Ins. Corp. v. Kemp, 85 P.3d 871, 875 (Or. App.), *review denied*, 93 P.3d 71 (Or. 2004). For further elaboration on the reverse-*Erie* question as it pertains to statutory interpretation methodology, *see* Gluck, *Intersystemic Statutory Interpretation*, *supra* note †, at 1960-68.

61. Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980).

B. Federal Statutory Interpretation Methodology as Law

Another important distinction between state and federal practice that is illuminated by the Oregon example is the linkages that some states are making between statutory interpretation and other kinds of interpretive and decision-making regimes. As noted, the Oregon Supreme Court created not only the *PGE* test for statutory interpretation, but also similar tests for other areas, including constitutional, contract, and initiative interpretation.[62] In so doing, the Oregon Supreme Court treats all of these methodologies alike as a matter of legal status. All are "law." All get stare decisis effect. On the federal side, however, the U.S. Supreme Court has not made the same connection between statutory interpretation and other methodologies.

Consider, for example, the fact that the federal courts uniformly hold that *Erie* applies to contract, will, and trust interpretation.[63] When federal courts interpret contracts made under state law, they always ask what the home state's rules of contract interpretation are. They always ask whether the state applies the parol evidence rule.[64] But federal courts rarely ask the analogous questions when they are interpreting state statutes. For example, they rarely ask whether the state supreme court routinely consults legislative history—which is essentially the statutory-interpretation equivalent of parol evidence (i.e., extrinsic evidence).

Moreover, there is such a thing, even on the federal side, as "federal rules of contract interpretation"—a federal common law of contracts unquestionably exists. These are interpretive principles that the U.S. Supreme Court holds must be used to interpret contracts governed by federal law. Those principles are

62. *See supra* note 7 and accompanying text; *see also supra* note 50.

63. *See* Gluck, *Intersystemic Statutory Interpretation*, *supra* note †, at 1970-75 (elaborating and collecting cases).

64. *See, e.g.*, Ungerleider v. Gordon, 214 F.3d 1279, 1282 (2000) ("Florida law, of course, recognizes the parol evidence rule. . . . The rule is one of substantive law, not evidence, so it is applied by federal courts sitting in diversity."); Wilson Arlington Co. v. Prudential Ins. Co., 912 F.2d 366, 370 (9th Cir. 1990) (explaining that the outcome of cases would be different if the court applied California's version of the parol evidence rule as opposed to that of Virginia); Schilberg Integrated Metals Corp. v. Cont'l Cas. Co., 819 A.2d 773, 794 (Conn. 2003) (characterizing the parol evidence rule as substantive law); RESTATEMENT (SECOND) OF CONTRACTS § 213 cmt. a (1981) (same); Alfred Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66, 107 (1955).

treated as "law" and are precedential.[65] But again, we have no judicially articulated federal common law of statutory interpretation.[66]

As perhaps an even more illuminating example, consider federal constitutional law. As has been widely discussed by others, the U.S. Supreme Court has created a variety of legal doctrines to guide itself and lower courts in interpreting and implementing different parts of the Federal Constitution.[67] We have the tiers of scrutiny, the three-pronged dormant Commerce Clause test, all the different decision-making frameworks for various First Amendment claims, and so on. All of those decision-making rules are indisputably viewed as "real" doctrine, and state and lower federal courts uniformly hold that they are bound to apply those

65. *See, e.g.*, Bethlehem Steel Corp. v. United States, 270 F.3d 135, 139 (3d Cir. 2001) (holding that federal contract law governs the interpretation of federal contracts); Kennewick Irrigation Dist. v. United States, 880 F.2d 1018, 1032 (9th Cir. 1989) ("Federal law controls the interpretation of a contract entered pursuant to federal law when the United States is a party."); Seaboard Lumber Co. v. United States, 15 Cl. Ct. 366, 370 (1988) ("[F]ederal contract law is not just a branch of the common law of contracts, but is a separate tree."); O'Neill v. United States, 50 F.3d 677, 684-85 (9th Cir. 1995) (arguing that the U.C.C.'s narrowing of the parol evidence rule "is a source of federal common law and may be relied upon in interpreting a contract to which the federal government is a party" and rejecting the government's reliance on other cases because they involved state, not federal, common-law principles of contract interpretation); Mohr v. Metro E. Mfg. Co., 711 F.2d 69, 72 (7th Cir. 1983) (holding, in construing a contract under the federal Labor Management Relations Act, that the court was "obliged to apply a uniform national parol evidence rule rather than the parol evidence rule of a particular state"). For more examples, *see* Gluck, *Intersystemic Statutory Interpretation*, *supra* note †, at 1970-75.

66. Numerous other examples abound. For example, the U.S. Supreme Court held long ago in *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), that in a diversity case, *Erie* requires that the forum state's choice-of-law principles—which are, of course, decision-making methodologies—govern the federal-court decision-making process. The Court also has held that *Erie* requires federal courts to apply state burden allocation regimes in state-law cases. Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208, 212 (1939); *see also* Palmer v. Hoffman, 318 U.S. 109, 117 (1943) (citation omitted) ("[T]he burden of establishing contributory negligence is a question of local law which federal courts in diversity . . . cases must apply."); John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 714 (1974) ("[S]tate rules controlling things such as burden of proof, presumptions, and sufficiency of evidence should be followed when they differ from the federal court's usual practice . . . ."). *See* Gluck, *Intersystemic Statutory Interpretation*, *supra* note †, at 1976-80 for elaboration.

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

constitutional rules to federal constitutional questions.[68] No one disputes, for example, that the Oregon Supreme Court must use the tiers of scrutiny when it adjudicates an equal protection claim under the 14th Amendment. Why should statutory interpretation be any different?

To be clear, the point is not that the U.S. Supreme Court has decided with finality on an overarching interpretive methodology for the Constitution (e.g., originalism). It has not. Likewise, in the statutory interpretation context, we do not have to conclude—and we might not want to conclude—that the U.S. Supreme Court (or the Oregon Supreme Court) should pick textualism or purposivism and call that "law." The point, rather, is that even the U.S. Supreme Court has imposed binding decision-making rules for specific areas of the Constitution, and so, for statutory interpretation, the Court could settle some of the more specific, lower-stakes disputes that repeatedly arise and continue to divide the Justices. For example, the Court could resolve definitively which interpretive methods should apply to specific statutes (such as Title VII), or whether legislative history should generally be consulted before application of the various substantive canons of construction. These narrower questions cause repeated disagreements among the Justices and continue to cause uncertainty for litigants, lower courts, and legislative drafters. Thus, even if the Justices continue to resist deciding on a single overarching interpretive approach, they could increase interpretive predictability by finally resolving some of these more limited disputes.

Nor must it be the case that the interpretive rules that courts might adopt for statutory interpretation need to be rigid or uniform

68. *See, e.g.*, Ark. Tobacco Control Bd. v. Santa Fe Natural Tobacco Co., 199 S.W.3d 656, 660 (Ark. 2004) ("The United States Supreme Court has adopted a two-part test in analyzing state regulations under the dormant Commerce Clause."); Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust, 206 P.3d 481, 495 (Idaho 2009) ("In order to withstand intermediate scrutiny, gender classifications must serve 'important governmental objectives' and the 'discriminatory means employed [must be] substantially related to the achievement of those objectives'" (alteration in original) (quoting United States v. Virginia, 518 U.S. 515, 533 (1996))); *In re* Warner, 21 So. 3d 218, 246 (La. 2009) ("Except for a few well-defined exceptions, . . . a content-based regulation will survive a constitutional challenge only if it passes the well-established two-part strict scrutiny test."); State v. Bussmann, 741 N.W.2d 79, 94 (Minn. 2007) ("[T]he official acts of state judicial officers must satisfy the three Establishment Clause requirements articulated by the Supreme Court in *Lemon v. Kurtzman* . . . .").

across different areas—after all, we don't require courts to use the tiers of scrutiny to adjudicate Commerce Clause claims. So, for example, the Court might develop some special interpretive rules for particular statutes, or some rules about what kind of legislative history is most reliable. The argument is not that there needs to be a "one size fits all" statutory interpretation methodology, but rather that these principles should be treated in the same "lawlike" way that other interpretive principles are or, at a minimum, that the Court should justify the distinction.

And, in fact, in a few limited areas of statutory interpretation, the Court does treat methodology as law. The most salient example is the *Chevron* deference doctrine.[69] *Chevron*, after all, is a canon of interpretation that tells courts when to defer to the extrinsic evidence of agency statutory interpretations. But courts always discuss the two-step methodological framework that *Chevron* creates as a "precedent."[70] Other examples exist in the ERISA and FELA contexts, specific statutes for which the Court has announced some predefined interpretive rules.[71] But the Court never acknowledges that these special areas of statutory interpretation get more lawlike treatment than others, and it certainly never explains the reasons for the differentiation.

CONCLUSION

There is an enormous world of statutory interpretation beyond the U.S. Supreme Court. And it is a world, as this essay hopefully has shown, that makes possible a variety of fresh inquiries that

69. Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, 467 U.S. 837, 842–43 (1984). Other cases, together with *Chevron*, make up the Court's entire deference regime regarding agency statutory interpretation. *E.g.*, United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (explaining when *Chevron* applies); Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944) (applying less deferential standard).

70. *But cf.* Connor Raso and William N. Eskridge, Jr., *Chevron as a Canon Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727 (2010) (arguing the Court does not follow *Chevron* consistently, but not disputing the point that judges describe the *Chevron* rule as a precedent).

71. Consol. R.R. v. Gottshall, 512 U.S. 532, 541–42 (1994) (outlining the FELA interpretation test); McBride v. CSX Transp., Inc., 598 F.3d 388, 397–98 (7th Cir. 2010) (applying *Gottshall* for FELA interpretation); Overby v. Nat'l Ass'n of Letter Carriers, 595 F.3d 1290, 1295 (D.C. Cir. 2010) (quoting the Supreme Court for the principle that "ERISA . . . follows standard trust law principles" (citation omitted)); Buce v. Allianz Life Ins. Co., 247 F.3d 1133, 1142 (11th Cir. 2001) ("[T]he District Court ruled—correctly—that when a federal court construes an ERISA-regulated benefits plan, the federal common law of ERISA supersedes state law.").

have the potential to shed new light on the Court's own approach. Indeed, looking at federal statutory interpretation in the shadow of just one state supreme court illuminates that what is perhaps the field's most fundamental jurisprudential question—whether statutory interpretation methodology is, or should be, "law"—not only remains a puzzle, but is a puzzle the very existence of which long has been overlooked. And Oregon is just one state. All of our state and lower federal courts are virtually unexplored real-world laboratories of statutory interpretation. Their study offers great potential for the next generation of statutory interpretation theory and doctrine, should scholars and judges be receptive to it.