State Statutory Interpretation and Horizontal Choice of Law

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ABSTRACT

Consider this situation. A brings suit in State X, based on a statute promulgated in State Y. State X is a textualist court that doesn't believe in legislative history. State Y looks to legislative history and A thinks the legislative history points in her favor. Should the court in State X interpret the statute like courts in Y would, or should it stick to its textualist guns?

This problem is really hard. It brings together basic questions of statutory interpretation—outside the federal context where most of the scholarship lies. It also raises questions about whether interpretive method is a kind of "law" and if so what respect states should give to sister jurisdictions' interpretive methods when reading foreign statutes.

This Article explores the theoretical underpinnings of this question and proposes a doctrinal solution. Rather than offer a uniform approach, however, this Article contends that each state should decide for itself which state's statutory interpretation methodology controls in any given case. The common thread is that states should subject their choice of statutory interpretation methodology to their own horizontal choice-of-law regimes. The reason—as this Article shows—is that state statutory interpretation methodology, as either state statutory or common law (or both), is one kind of substantive "law." Like other kinds of conflicting substantive law, therefore, conflicts between competing state statutory interpretation methodologies are ripe for resolution according to a state's currently employed choice-of-law regime. This Article concludes by discussing the implications of this approach for how state and federal courts alike should think about state statutory interpretation methodology.

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INTRODUCTION

A plaintiff brings suit in Illinois based on a statute promulgated in Oregon.[1] Illinois courts are purposivist and often rely on legislative history.[2] Oregon courts, on the other hand, look primarily to a statute's text and context.[3] Should the Illinois court interpret the statute like courts in Oregon would, or should it stick to its purposivist guns?

This problem is really hard. It implicates basic questions of statutory interpretation. It also raises questions about whether interpretive method is a kind of "law," and if so, what respect states should give to sister jurisdictions' interpretive methods when reading foreign statutes.

This problem is further complicated by the fact that most of the statutory interpretation commentary lies in the federal context. Modern statutory interpretation scholarship centers on how certain constitutional principles, such as the separation of powers and the requirement of bicameralism and presentment, inform the federal judge's role. Scholars have paid considerably less attention to the many statutory interpretation questions unique to the state court context—questions to which debates about Congress's relationship to the judiciary and the import of Article I, Section 7 contribute precious little.[4]

One such question is the connection, if any, between a state's choice-of-law regime and its interpretation of state statutes. Specifically, when a state court determines that it must apply a sister state statute in a particular case, whose statutory interpretation methodology controls the interpretation of the sister state's statute? The forum state's, the sister state's, or something else? The answer—based on the dearth of scholarship addressing it and the varying experiences of state courts of last resort—is far from settled.[5] Indeed, this "horizontal" question about whether a state should give effect to a sister state's statutory interpretation principles is one that not many courts have explicitly considered in the first place.

To be sure, commentators have thoughtfully addressed related "vertical" questions on how choice of law and statutory interpretation

1. *See, e.g.*, Magee v. Huppin-Fleck, 664 N.E.2d 246, 251 (Ill. App. Ct. 1996).

2. *See* Steven J. Macias, *Survey of Illinois Law: Statutory Interpretation*, 37 S. ILL. U. L.J. 845, 861 (2013) ("[I]t appears that the Illinois Supreme Court turns to legislative history for reasons beyond the resolution of ambiguity.").

3. At least they did when *Magee* was litigated. *See infra* notes 59–66.

4. *But see, e.g.*, Zachary B. Pohlman, Note, *Stare Decisis and the Supreme Court(s): What States Can Learn from* Gamble, 95 NOTRE DAME L. REV. 1731 (2020); Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479 (2013).

5. *See infra* Part II.

methodology do and ought to interact in the federal-state context. For example, Professor A.J. Bellia has shown that in the decades following the Constitution's ratification, state courts, presumably obliged by the Supremacy Clause, interpreted federal statutes with the understanding that they were bound to give effect to "manifest congressional expectations."[6] Bellia identifies "an apparent constitutional presumption that a federal statute should have the same meaning in the first instance whether enforced in a state or a federal court."[7] He thus notes that it would be consistent with this principle for state and federal courts to apply similar interpretive methodologies.[8] Relatedly, Professor Abbe Gluck has made the normative claim that, under the *Erie* doctrine, federal courts should use state statutory interpretation methodologies to render consistent interpretations of state statutes across state and federal courts.[9] In both cases, these scholars argue that courts interpreting a statute promulgated by a different sovereign's legislature have used or should use the statutory interpretation methodologies of the foreign sovereign's courts. It's worth asking, then: If Bellia and Gluck are right in the vertical context, does it follow that state courts ought to adopt the same approach in the horizontal context?

As is so often the case in our federalist system, this Article proposes that "it depends." Rather than offering a blanket solution to horizontal intersystemic statutory interpretation methodology,[10] this Article contends that each state should decide for itself which state's statutory interpretation methodology controls in any given case. The common thread is that states should subject their choice of statutory interpretation methodology to their own horizontal choice-of-law regimes. The reason—as this Article shows—is that state statutory interpretation methodology, as either state statutory or common law (or both), is one kind of substantive "law" for horizontal choice-of-law purposes. Like other kinds of conflicting substantive law, therefore, conflicts between competing state statutory interpretation methodologies are ripe for resolution according to a state's currently employed choice-of-law approach. Interestingly, as applied, the two most popular choice-of-law regimes lead to the same conclusion—

6. Anthony J. Bellia, Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1558 (2006).

7. *Id.* at 1554.

8. *Id.*

9. Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898 (2011) [hereinafter Gluck, *Intersystemic*].

10. "Intersystemic statutory interpretation" is a term coined by Abbe Gluck that describes when one sovereign's courts interpret another sovereign's statutory law. *Id.* at 1906. In the context of this Article, it refers to one state's courts interpreting another state's statutes.

state courts, when interpreting a sister state statute, should interpret the statute using the statutory interpretation methodology of the sister state's courts.

This Article proceeds in five Parts. Part I briefly outlines the dominant choice-of-law regimes that states use to resolve conflicts of law. Part II reviews the different ways in which state courts (and legislatures) treat statutory interpretation methodology and how those various commitments play out in state courts. Part III lays the groundwork for a workable doctrine by taking up two undertheorized questions of state statutory interpretation methodology—namely, whether it is "law," and if so, whether it is substantive or procedural. Building upon the theory developed in Part III, Part IV analyzes the intersystemic interpretation question under the leading choice-of-law regimes, concluding that state courts should apply the statutory interpretation methodology of the enacting state's courts, at least under the traditional and *Second Restatement* choice-of-law approaches. Lastly, Part V considers some implications of this approach for state and federal courts alike.

I. STATE CHOICE-OF-LAW APPROACHES

The Constitution grants states considerable leeway in choosing a horizontal choice-of-law regime.[11] None of the regimes currently employed by states, however, specifically addresses how conflicts regarding statutory interpretation methodologies should be resolved. Because a state court will apply a sister state's statute as the rule of decision only when its choice-of-law rules require that result, a reasonable place to start this Article's inquiry is to examine some choice-of-law approaches themselves. When does a state apply another state's statutory law? What are the motivating factors that underlie the various choice-of-law approaches? Understanding how and why courts make such choice-of-law decisions will inform the big-picture question: whether statutory interpretation methodologies are one kind of conflicting "law" that ought to be resolved according to normal choice-of-law principles.[12]

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11. *See, e.g.*, Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) (holding that, consistent with the Full Faith and Credit and Due Process Clauses, a state may apply its own statute of limitations to a claim governed by another state's substantive law); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818, 823 (1985) (understanding the Full Faith and Credit and Due Process Clauses to impose only "modest restrictions" on a state's power to tell its courts to apply the state's own law).

12. *Cf.* Abbe R. Gluck, *Statutory Interpretation Methodology as "Law": Oregon's Path-Breaking Interpretive Framework and Its Lessons for the Nation*, 47 WILLAMETTE L. REV. 539, 540 (2011) ("[W]hereas the U.S. Supreme Court does not treat federal statutory interpretation principles

This Part thus provides a brief overview of the two most popular choice-of-law approaches used by state courts today. It's not comprehensive, but it's not intended to be. Most salient to the statutory interpretation question is not so much the specific rules of each choice-of-law approach but the various animating principles of each—principles that lead to very different choice-of-law inquiries.[13] Accordingly, this Part first explains the traditional choice-of-law approach before briefly discussing the *Second Restatement*, the latter of which is currently used by nearly a majority of states.[14]

A. Traditional Approach

As of 2019, nine states used the traditional approach for conflicts of law concerning torts, and eleven states used the traditional approach for conflicts concerning contracts.[15] This is a far cry from the pre-1930 landscape, when every state adhered to the traditional approach for both torts and contracts, at least to some degree.[16] Yet, despite the ongoing trend away from traditional choice-of-law rigidity, states sticking with the traditional approach have cited its simplicity, consistency, and accompanying judicial candor.[17] These states have come to rely upon the

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as 'law' . . . [,] 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." (footnote omitted)).

13. Throughout, I use "rules" and "approaches" interchangeably to describe choice-of-law "approaches." More precisely, though, the "choice-of-law revolution" that began in the 1950s has seen "the American conflicts experiment . . . move[] radically from . . . rigid and arbitrary 'rules' to . . . flexible 'approaches.'" Hillel Y. Levin, *What Do We Really Know About the American Choice-of-Law Revolution?*, 60 STAN. L. REV. 247, 249 (2007) (reviewing SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE (2006)).

14. Admittedly, this Article does not deal with the *Draft Restatement (Third) of Conflict of Laws*, which the American Law Institute began drafting in 2015. *See The American Law Institute Announces Four New Projects*, AM. L. INST. (Nov. 17, 2014), https://www.ali.org/news/articles/american-law-institute-announces-four-new-projects [https://perma.cc/ET7B-SNVH]. Though beyond the scope of this Article, it is worth noting that the *Draft Restatement (Third)* calls for a "two-step" inquiry, the first step of which is to discern the scope of the competing laws, which requires ordinary statutory construction. *See* Lea Brilmayer & Daniel B. Listwa, *Continuity and Change in the* Draft Restatement (Third) of Conflict of Laws*: One Step Forward and Two Steps Back?*, 128 YALE L.J.F. 266, 270 (2018). This development in conflicts of law has already been the source of debate among those interested in both conflicts and statutory interpretation. *Compare id.*, *with* Kermit Roosevelt III & Bethan R. Jones, *The Draft* Restatement (Third) of Conflict of Laws*: A Response to Brilmayer & Listwa*, 128 YALE L.J.F. 293 (2018).

15. Symeon C. Symeonides, *Choice of Law in the American Courts in 2019: Thirty-Third Annual Survey*, 68 AM. J. COMP. L. 235, 258–59 (2020) [hereinafter Symeonides, *2019 Survey*].

16. *See* Gary J. Simson, *An Essay on Illusion and Reality in the Conflict of Laws*, 70 MERCER L. REV. 819, 820–21 (2019).

17. For a strong (and lively) defense of the traditional approach, see *Paul v. National Life*, 352 S.E.2d 550 (W. Va. 1986). *See also* Coon v. Med. Ctr., Inc., 797 S.E.2d 828, 829 (Ga. 2017) (rejecting modern choice-of-law approaches).

Restatement (First) of Conflicts of Law, published in 1934, which systematized the traditional approach, giving effect to its primary animating principles: territoriality and sovereignty.

The *First Restatement* assumes that "the only law that could operate in a foreign territory [is] the law of the foreign sovereign."[18] The theoretical basis for the traditional approach is the concept of vested rights.[19] Developed in America by Joseph Beale, the *First Restatement*'s reporter, the vested rights theory posits that legal rights "vest" under a specific jurisdiction's laws at a specific point in time; the forum court must then discover whose law governed the set of facts that gave rise to the vested right.[20] Once a person obtains a right under one jurisdiction's laws, it "may be enforced wherever the person may be found"—that is, in any court of competent jurisdiction.[21] *First Restatement* jurisdictions must therefore apply the law of the state where the right vested.

Generally, a legal right vests where the "last event necessary" to create the cause of action takes place.[22] This is most on display in the tort context. The last event necessary to create a cause of action in tort is a legal injury, so one's legal right in tort vests in the *lex loci delicti*: the law of the place of the injury.[23] Moreover, whether the cause of action accrues pursuant to a state's common law or statutory law makes no difference under the traditional approach. As then-Judge Cardozo put it, "If a foreign statute gives the right, the mere fact that we do not give a like right is no

18. William M. Richman & David Riley, The First Restatement of Conflict of Laws *on the Twenty-Fifth Anniversary of Its Successor: Contemporary Practice in Traditional Courts*, 56 MD. L. REV. 1196, 1197 (1997).

19. Prior to the vested rights rationale, applying a foreign state's law was justified based on sister state comity. *See generally* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834). Critics of the comity theory argued that it was both overbroad and too narrow. *See, e.g.*, R.D. Carswell, *The Doctrine of Vested Rights in Private International Law*, 8 INT'L COMP. L.Q. 268, 269 (1959) ("The weaknesses of the comity theory . . . were, first, that it imposed no restriction on the extent to which a court could apply foreign law, and, secondly, that it imposed no binding duty on the court to apply foreign law at all.").

20. 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 1.1, at 1 (1935); *see also* Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1194–95 (1987).

21. Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120, 126 (1904); *see also* Loucks v. Standard Oil Co. 120 N.E. 198, 201 (N.Y. 1918) ("A foreign statute is not law in this state, but it gives rise to an obligation, which, if transitory, 'follows the person and may be enforced wherever the person may be found.'").

22. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (AM. L. INST. 1934) [hereinafter FIRST RESTATEMENT]. For conflicts concerning contract disputes, the law of the place of contracting governs the validity of the contract, while the law of the place of performance governs contract performance. *Id.* §§ 332, 358.

23. Carlos M. Vázquez, *Out-Beale-Ing Beale*, 110 AJIL UNBOUND 68, 68 (2016); *see also* Ala. Great S. R.R. Co. v. Carroll, 11 So. 803, 805 (Ala. 1892) ("[T]here can be no recovery in one state for injuries to the person sustained in another, unless the infliction of the injuries is actionable under the law of the state in which they were received.").

reason for refusing to help the plaintiff in getting what belongs to him."[24] Thus, the *First Restatement* offered a seemingly straightforward set of rules that all but guaranteed uniformity and predictability. Yet scholars critiqued the traditional approach from two different angles. First, critics argued that uniformity and predictability in themselves lacked the normative force to sustain a virtuous choice-of-law regime; and second, critics argued that the *First Restatement* was not as predictable as promised because of characterization problems and other "escape devices."[25]

Of particular import to the statutory interpretation question is the *First Restatement*'s distinction between substance and procedure. Perhaps unsurprisingly, given the recondite nature of that distinction,[26] the *First Restatement* does not purport to provide general guidance to courts deciding what counts as "substance" and what counts as "procedure."[27] Rather, in an arguably circular fashion, the *First Restatement* directs the forum court to make that determination "according to its own Conflict of Laws rule."[28] Once that determination is made, the rule-centric *First Restatement* provides that procedural matters are governed by forum law, while substantive matters are governed according to the forum's choice-of-law rules.[29] Also unsurprisingly, the traditional approach's reliance on the substance-procedure distinction is one characterization problem that has been a ripe ground for further critiques of the *First Restatement*.[30]

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24. *Loucks*, 120 N.E. at 201.

25. William H. Allen & Erin A. O'Hara, *Second Generation Law and Economics of Conflict of Laws: Baxter's Comparative Impairment and Beyond*, 51 STAN. L. REV. 1011, 1017–19 (1999). For the classic critiques of the *First Restatement*, see generally BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963); ERNEST G. LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS (1947); WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942).

26. *See* Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 334–35 (1933); *see also infra* notes 186–87 (collecting recent substance-procedure scholarship).

27. The *First Restatement* does, however, classify certain types of law as procedural—e.g., the competency and credibility of witnesses and the admissibility of evidence. FIRST RESTATEMENT, *supra* note 22, §§ 596–97.

28. *Id.* § 584.

29. *See id.* § 585.

30. *See, e.g.*, CURRIE, *supra* note 25, at 138–39; Cook, *supra* note 26; Aaron D. Twerski & Renee G. Mayer, *Toward a Pragmatic Solution of Choice-of-Law Problems—At the Interface of Substance and Procedure*, 74 NW. U. L. REV. 781, 784 (1979) ("In the era that preceded the policy-centered approach to choice-of-law problems, the procedural-substantive dichotomy was often utilized as an escape mechanism to arrive at a result that was consistent with sound interest analysis.").

B. Second Restatement

Sustained critiques of the *First Restatement* eventually gave rise to the "choice-of-law revolution." Led initially by Walter Wheeler Cook and later by Brainerd Currie, the academic assault on the *First Restatement*—rooted largely in legal realist assumptions—took aim at the theory of vested rights.[31] Starting in the 1950s, state courts bought into the critiques and gradually departed from the traditional approach.[32] But the rejection of the *First Restatement* presented a new problem: What should take its place?

A perceived need for a modern, systematized choice-of-law approach reverberated throughout the academy, and in 1952 the American Law Institute began drafting the *Restatement (Second) of Conflicts of Law*.[33] The finished product, published in 1971, was initially lauded as "the most impressive, comprehensive and valuable work on the conflict of laws that has ever been produced in any country, in any language, at any time."[34] And its influence has withstood the test of time. As of 2019, twenty-five states used it for torts and twenty-four states used it for contracts, making it the most popular horizontal choice-of-law regime by far.[35] Despite its popularity though, more recent commentators have described it, among other things, as "anarchy,"[36] "mush,"[37] and a "flabby, amorphous, and sterile product."[38] So what gives?

The alleged merits and demerits of the *Second Restatement* revolve

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31. *See, e.g.*, William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1380 (1997). *But see* Lea Brilmayer & Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 IOWA L. REV. 1125, 1129 (2010) (arguing that the *First Restatement*'s single-controlling-contact approach, rather than a legal realist rejection of vested rights, better explains the conflicts revolution).

32. *See generally* Willis L. M. Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548 (1971).

33. *See* Willis L. M. Reese, *Conflict of Laws and the* Restatement Second, 28 LAW & CONTEMP. PROBS. 679, 680 (1963).

34. J.H.C. Morris, *Law and Reason Triumphant, or How Not to Review a Restatement*, 21 AM. J. COMP. L. 322, 330 (1973) (reviewing RESTATEMENT (SECOND) OF CONFLICT OF LAWS (AM. L. INST. 1971)).

35. Symeonides, *2019 Survey*, *supra* note 15, at 258–59. For those keeping score, the remaining states not adhering to either the *First* or *Second Restatements* use one of the following choice-of-law approaches: significant contacts, interest analysis, *lex fori*, better law, or a combination of modern approaches. *See id.*

36. Symeon C. Symeonides, *The Judicial Acceptance of the* Second Conflicts Restatement*: A Mixed Blessing*, 56 MD. L. REV. 1248, 1250 (1997) [hereinafter Symeonides, *Judicial Acceptance*].

37. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 253 (1992).

38. ROGER C. CRAMTON, DAVID P. CURRIE & HERMA HILL KAY, CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS 300 (4th ed. 1987).

around its "most significant relationship" test. In short, courts are to apply the law of the state that has the most significant relationship to the parties and occurrence based on a set of dispute-specific rules.[39] The malleability of this approach is introduced, however, by "one of the most repeated phrases in the entire Restatement (Second)"[40]—namely, that choice of law is presumptively territorial "unless . . . some other state has a more significant relationship under the principles stated in [section] 6."[41] The result of compromise, the *Second Restatement*—and section 6 specifically—reflects a balance between a general presumption of territorialism and modern interest analysis.[42] The section 6 factors implore courts to consider, *inter alia*, "the needs of the interstate and international systems"; the policies of the forum, other interested states, and field of law; the "protection of justified expectations"; certainty, predictability, and uniformity of results; and ease in application.[43] Because of the capaciousness and generality of the section 6 principles, courts "following" the *Second Restatement* differ in the weight given to each factor, making it somewhat difficult to generalize how *Second Restatement* jurisdictions resolve conflicts of law.[44]

It is also worth noting that the *Second Restatement* departs from the *First Restatement* in that it does not explicitly rely on the substance-procedure distinction. Instead, *Second Restatement* jurisdictions are to "face directly the question whether the forum's rule should be applied."[45] The *Second Restatement* does not object in principle to the categories of substance and procedure, noting that such characterizations are "harmless in themselves."[46] Indeed, *Second Restatement* jurisdictions themselves often adhere to it.[47] Rather, the drafters abandoned formal reliance on the

39. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 188 (AM. L. INST. 1971) [hereinafter SECOND RESTATEMENT] (stating general rules and factors for torts and contracts conflicts, respectively).

40. Symeonides, *Judicial Acceptance*, *supra* note 36, at 1270.

41. SECOND RESTATEMENT, *supra* note 39, §§ 146–55, 175, 189–93, 196.

42. *See* LEA BRILMAYER, JACK L. GOLDSMITH & ERIN O'HARA O'CONNOR, CONFLICT OF LAWS: CASES AND MATERIALS 250 (7th ed. 2015); *see also* William A. Reppy, Jr., *Eclectism in Choice of Law: Hybrid Method or Mishmash*, 34 MERCER L. REV. 645, 662 (1983) (observing that § 6 was "a sop tossed . . . to members of the American Law Institute who were unhappy with a purely territorial methodology.").

43. SECOND RESTATEMENT, *supra* note 39, § 6(2).

44. *See* Patrick J. Borchers, *Courts and the* Second Conflicts Restatement*: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1233–34 (1997); *see also* Symeonides, *supra* note 36, at 1270 ("[T]he Restatement (Second) allow[s] the judge wide latitude in choosing the applicable law, ranging from mildly limited to virtually unlimited discretion.").

45. SECOND RESTATEMENT, *supra* note 39, § 122 cmt. b.

46. *Id.*

47. *See infra* note 111 and accompanying text.

distinction to "avoid encouraging errors" in situations where a certain law could receive a different substance-procedure characterization in the choice-of-law context than it might in other contexts.[48]

II. STATE STATUTORY INTERPRETATION: CURRENT PRACTICES

Once a state court has chosen to apply a sister state's statute as the rule of decision pursuant to its choice-of-law approach, it must then interpret and apply said statute. If the sister state's courts have previously construed the statutory provision in question, that construction controls. But where the sister state's courts have not previously interpreted the disputed provision, state courts first decide—whether consciously or not—which state's statutory interpretation methodology to use.[49]

At the federal level, debates over statutory interpretation focus on the proper role of the federal courts in relation to Congress.[50] At the state level, however, the relationship between the courts and the legislature is not always characterized by similar separation of powers concerns, and that relationship, whatever it may be, is bound to vary by state.[51] As a theoretical matter, then, states could, consistent with their state constitutions, vary in their respective approaches to statutory interpretation.[52] As an empirical matter, they do.[53] The diversity of

48. SECOND RESTATEMENT, *supra* note 39, § 122 cmt. b ("[F]or example, a decision classifying burden of proof as 'procedural' for local law purposes, such as in determining the constitutionality of a statute that retroactively shifted the burden, might mistakenly be held controlling on the question whether burden of proof is 'procedural' for choice-of-law purposes.").

49. Another option could be to certify the question to the enacting state's high court, if that state allows for state-to-state certification. While most states permit courts of sister states to certify questions to their state supreme courts, however, state-to-state certification is hardly ever used in practice. *See* John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411, 431 (1988).

50. *Compare, e.g.*, William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001) (arguing based on historical evidence that "the judicial Power" includes the power of equitable interpretation), *with* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 57–58 (2001) (interpreting history to support the argument that federal courts are Congress's faithful agents, not its cooperative partners).

51. Pohlman, *supra* note 4, at 1743 ("[T]he strict separation of powers lines drawn at the federal level are often relaxed at the state level, as many state courts are involved in rulemaking, political questions, and the administration of criminal cases."); *cf.* Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1239 (2012) ("The 'judicial power' is not monolithic.").

52. *Compare* Pohlman, *supra* note 4, at 1759 (arguing that state courts should interpret state statutes as textualists), *with* Pojanowski, *supra* note 4, at 482 (arguing that state courts should interpret state statutes according to a "hybrid model" of orthodox textualism and purposivism).

53. *See infra* Section II.A; *see also* Gluck, *Intersystemic*, *supra* note 9, at 1919 (highlighting differences in statutory interpretation methodologies among the states).

statutory interpretation methodologies among the states—along with their various theoretical underpinnings—is precisely the reason that statutory interpretation methodology matters in the choice-of-law context. An ambiguous statute could receive one interpretation under state *A*'s statutory interpretation principles and a contrary interpretation under state *B*'s.

In short, which statutory interpretation methodology a court applies can make an outcome-determinative difference in how a case is resolved. This Part thus analyzes current state court practices by breaking down state statutory interpretation methodology in two ways. First, it examines how state courts characterize statutory interpretation by comparing states that afford stare decisis effect to their methodology to those that do not. This discussion also highlights differences in state statutory interpretation approaches along typical interpretive lines—that is, textualist versus purposivist jurisdictions. Second, this Part takes a look at the statutory interpretation methodologies that modern state courts use in interpreting nonforum statutes, and whether and how that choice is connected to the state's choice-of-law regime. This Part concludes by analyzing three potential explanations for current state court treatment of the intersystemic interpretation question.

A. Methodological Stare Decisis

Every state legislature in the country has enacted at least some rules of statutory interpretation.[54] And some state courts have further systematized statutory interpretation by giving precedential effect not only to the substance of a statutory construction but also to the methodology used to interpret the statute—a practice generally known as "methodological stare decisis."[55] Methodological stare decisis is formalist in the sense that jurisdictions adhering to it use "clearly defined, ex ante interpretive rules arranged to be applied in a consistent order," though the content of the rules themselves need not be formalist (e.g., textualist).[56] How state courts apply methodological stare decisis, in addition to the content of the underlying rules, is an informative data point in considering

54. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1754 (2010) [hereinafter Gluck, *Laboratories*]; Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 350 n.35 (2010).

55. Gluck, *Laboratories*, *supra* note 54, at 1754; *see also* Pohlman, *supra* note 4, at 1750–52 (discussing methodological stare decisis for stare decisis itself).

56. Gluck, *Laboratories*, *supra* note 54, at 1754 n.8.

the theoretical and practical dimensions of interpreting sister state statutes. Moreover, states not adhering to methodological stare decisis provide a useful comparison and—when combined with the varying choice-of-law approaches among the states—further raises the question whether giving effect to sister state statutory interpretation methodologies is in fact a uniform inquiry. Accordingly, this Section discusses states that take each approach to methodological stare decisis.

Before diving in, one theoretical caveat is in order. This Article is indifferent about the nature of the common law. It is, in other words, "amenable to one who thinks of common law precedent as a form of posited law crafted by judges and defeasible by legislation. It is also amenable to one who views the common law as a body of custom or principle that is distinct from legislative-type rules."[57] States that have explicitly adopted methodological stare decisis take a more statute-like approach to the common law; states that do not use methodological stare decisis view the common law through the lens of custom or principle (or general law[58]). All courts acknowledge that common law, whatever its nature, is displaceable by legislation.

When it comes to statutory interpretation, it is theoretically possible that courts of all stripes have well-defined and consistently applied interpretive methodologies, even though not all courts treat interpretive methodology as legislative-like precedent. In other words, where a state falls on the continuum of having a settled law of interpretation is not necessarily tied to its decision to adopt methodological stare decisis. Nonetheless, for demonstrative purposes, I distinguish between states that have explicitly adopted methodological stare decisis from those that have not. Courts that rely on methodological stare decisis in statutory interpretation cases make for an especially useful case study, since their interpretive methodologies are clearly defined in the cases. And as the examples in this Section illustrate, states that adhere to methodological stare decisis tend to use more consistent interpretive rules than those that do not, further justifying reliance on the distinction, differing approaches to the common law notwithstanding.

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57. Pojanowski, *supra* note 4, at 527–28 (footnote omitted). For more on the relationship between general jurisprudence and intersystemic adjudication, see generally Nina Varsava, *Stare Decisis and Intersystemic Adjudication*, 97 NOTRE DAME L. REV. (forthcoming 2022).

58. *See, e.g.*, Michael Steven Green, Erie*'s Suppressed Premise*, 95 MINN. L. REV. 1111, 1126–27 nn.89–90 (2011) (explaining Georgia's pre-*Swift*ian view of the common law).

1. States That Have Adopted Methodological Stare Decisis

The first state that formally adopted methodological stare decisis remains the archetypal example of successfully implementing the practice. In 1993, a unanimous Oregon Supreme Court announced a three-part methodology it would use for future statutory interpretation questions in *Portland General Electric Co. v. Bureau of Labor and Industries* (*PGE*).[59] The *PGE* framework has Oregon courts consider the following:

> [1] First, the court examines the text and context of the statute. If the legislature's intent is obvious from that first level of analysis, "further inquiry is unnecessary." [2] "If, but only if," the legislature's intent is not obvious from the text and context inquiry, "the court will then move to the second level, which is to consider legislative history[.]" [3] If the legislature's intent remains unclear after examining legislative history, "the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty."[60]

And, strikingly, this "new methodological regime stuck."[61] As Abbe Gluck has noted, in the sixteen years following its implementation, not one dissenter on the Oregon Supreme Court did so on grounds that the *PGE* framework should not control as a matter of stare decisis.[62]

In 2009, however, the Oregon Supreme Court reversed course in *State v. Gaines* and held that the Oregon legislature had modified the *PGE* framework by statute.[63] The preempting statute calls on Oregon courts to give "appropriate" weight to legislative history in statutory interpretation.[64] Oregon courts apparently understood "appropriate" to mean "more." In the immediate aftermath of the decision, the Oregon Supreme Court referred to legislative history much more often than it previously had under *PGE*'s text-based approach, citing it in fifteen of its first sixteen statutory interpretation decisions after *Gaines*.[65] In her article documenting the rise and modification of *PGE*, published just after *Gaines*

59. 859 P.2d 1143 (Or. 1993).

60. State v. Gaines, 206 P.3d 1042, 1046 (Or. 2009) (en banc) (alterations in original) (citations omitted) (quoting *PGE*, 859 P.2d at 1145–47).

61. Gluck, *Laboratories*, *supra* note 54, at 1775; *see also* Jack L. Landau, *The Intended Meaning of "Legislative Intent" and Its Implications for Statutory Construction in Oregon*, 76 OR. L. REV. 47, 50 (1997).

62. Gluck, *Laboratories*, *supra* note 54, at 1775.

63. *See Gaines*, 206 P.3d at 1046.

64. OR. REV. STAT. § 174.020(3) (2020) ("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.").

65. Gluck, *Laboratories*, *supra* note 54, at 1784–85.

was decided, Abbe Gluck thus asked whether the "*PGE* test might prove to be an enduring framework or only a sixteen-year experiment."[66] We now know.

Since *Gaines*, Oregon courts have routinely "appl[ied the] familiar principles set out in *PGE* . . . [and] *Gaines*."[67] The *PGE* test still influences where Oregon courts begin statutory interpretation—namely, with the text—but it almost never dictates where they end. As the Oregon Supreme Court recently explained,

> [a]s with all issues of statutory construction, we seek to discern what the legislature intended by applying the methodology described in *State v. Gaines*. Under that statutory construction methodology, we give primary consideration to the text and context of the pertinent statutes and consider the legislative history "for what it's worth."[68]

The trend that Gluck identified in the earliest post-*Gaines* cases has continued, with Oregon courts almost always considering legislative history when engaging in statutory construction. Indeed, in 2020 alone, of the seventeen cases in which the Oregon Supreme Court employed the *Gaines* methodology, it referenced a statute's legislative history eleven times; in the remaining six cases, the court went out of its way to justify its decision *not* to consider a statute's legislative history.[69]

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66. *Id.* at 1785.

67. Dowell v. Or. Mut. Ins. Co., 388 P.3d 1050, 1053 (Or. 2017).

68. Portfolio Recovery Assocs., LLC v. Sanders, 462 P.3d 263, 268 (Or. 2020) (citation omitted); *cf.* Couey v. Atkins, 355 P.3d 866, 884–85 (Or. 2015) ("[I]n *Gaines*, this court abandoned the strictly sequential requirements of *PGE*. . . . Now, as in the case of statutory construction, when construing constitutional amendments adopted by initiative, we 'consider the measure's history, should it appear useful to our analysis,' without necessarily establishing the existence of multiple reasonable constructions of the provision at issue." (citation omitted)).

69. To determine when the Oregon Supreme Court was engaged in statutory construction, I ran a Westlaw search for 2020 decisions of the Oregon Supreme Court that cited *Gaines*, which yielded sixteen cases. The cases that explicitly cite legislative history are *State v. Haltom*, 472 P.3d 246, 253 (Or. 2020); *In re Compensation of Arvidson*, 467 P.3d 741, 747 (Or. 2020); *Kinzua Resources, LLC v. Oregon Dep't of Envtl. Quality*, 468 P.3d 410, 416 (Or. 2020); *M.A.B. v. Buell*, 466 P.3d 949, 954 (Or. 2020); *Elkhorn Baptist Church v. Brown*, 466 P.3d 30, 46 (Or. 2020); *McCormick v. State by & through Oregon State Parks & Recreation Dep't*, 466 P.3d 10, 16 (Or. 2020); *Portfolio Recovery*, 462 P.3d at 268; *Matter of Validation Proceeding to Determine the Regularity & Legality of Multnomah County Home Rule Charter Section 11.60 & Implementing Ordinance No. 1243 Regulating Campaign Financial & Disclosure*, 462 P.3d 706, 723 (Or. 2020); *Citizens for Responsible Development in the Dalles v. Wal-Mart Stores, Inc.*, 461 P.3d 956, 961 (Or. 2020); *State v. Iseli*, 458 P.3d 653, 666 (Or. 2020); and *Eddy v. Anderson*, 458 P.3d 678, 684 (Or. 2020). The remaining 2020 cases that cited *Gaines* but did not rely on legislative history are *Jones v. Four Corners Rod & Gun Club*, 456 P.3d 616, 624 n.9 (Or. 2020) ("There is no traditional legislative history available to inform our understanding of what the legislature intended when it adopted the phrase 'diminish or enlarge the right of any person to assert and enforce a lawful set-off or counterclaim' because legislative records

The experience in Oregon is noteworthy for at least a few reasons relevant to this Article. First, implicit in the court's decision in *Gaines* is that statutory interpretation methodology is displaceable common law. Though the Oregon Supreme Court first announced the *PGE* framework, it did not question the legislature's authority to amend it by statute.[70] Moreover, and very much related, the change in methodology had tangible effects on how the Oregon Supreme Court actually interpreted statutes. The *PGE* framework was one of "modified textualism,"[71] but the *Gaines* methodology is, by all standard accounts, purposivist.[72] The drastically different rates at which the Oregon Supreme Court cited legislative history under each methodology proves the efficacy of the change in methodology. Lastly, the experience in Oregon shows that regardless of a court's ideological bent—be it textualism (as under *PGE*) or purposivism (as under *Gaines*)—methodological stare decisis for statutory interpretation methodology can provide a consistent framework that dictates how a state court engages in statutory interpretation in case after case.

Other states that adhere to fixed statutory interpretation principles have done so through a similar "rulemaking back and forth" between the state high court and the state legislature.[73] Unlike the experience in Oregon, however, not all state high courts are as receptive to legislative

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concerning the history of state laws passed prior to 1935 were destroyed in the 1935 fire that burned down the state capitol."); *State v. Haji*, 462 P.3d 1240, 1246 n.3 (Or. 2020) (not considering legislative history because "neither party present[ed] legislative history concerning the enactment of ORS 132.560"); *Pulito v. Oregon State Bd. of Nursing*, 468 P.3d 401, 405 n.3 (2020) ("No legislative history sheds light on the meaning of the term 'time limitations' in ORS 183.645."); *State v. Payne*, 468 P.3d 445, 451 (Or. 2020) (finding no "useful legislative history"); *State* ex rel *Rosenblum v. Nisley*, 473 P.3d 46, 52 (Or. 2020) ("Because the word 'ceases' is a term of common usage and is not specially defined for purposes of the statute, we assume that the legislature intended to use the term in a manner consistent with its plain, natural, and ordinary meaning.").

70. *But see* Gluck, *Laboratories*, *supra* note 54, at 1783–84 ("For eight years, the Oregon Supreme Court refused to even acknowledge the possibility that [OR. REV. STAT. § 174.020(3)] amended the *PGE* test. Instead, it ignored litigants' repeated requests that the supreme court apply it, and adhered to its three-step regime. . . . All the more puzzling, then, is what happened next.").

71. *See id.* at 1772.

72. *See, e.g.*, *Portfolio Recovery*, 462 P.3d at 268 ("Here, the text of ORS 12.430 does not specify how a court is to determine whether a claim is 'substantively based' on the law of a state other than Oregon, but the legislative history points to the answer."); *Elkhorn Baptist Church*, 466 P.3d at 46 ("One of the reasons that the ORS chapter 433 emergency statutes were enacted was to give the Governor an option for responding to a public health emergency by taking a step short of declaring a state of emergency under chapter 401. The legislative history of the chapter 433 statutes . . . makes that clear."); *see also* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1291 (2020) ("[T]he Court's purposivist Justices . . . continue to employ traditional purposive interpretive tools—including legislative history . . . to identify the statutory reading that best fulfills a statute's broad overarching goals.").

73. Pohlman, *supra* note 4, at 1751.

overrides of statutory interpretation methodology. For example, in Texas, the legislature has enacted purposivist interpretive rules,[74] yet both of Texas's high courts routinely disregard or (arguably) reject them in favor of a textualist approach.[75] The resulting, largely textualist methodology nonetheless receives stare decisis effect. The Texas Supreme Court does not reject the legislature's authority to promulgate binding interpretive rules, but through a narrow construction of the state's Code Construction Act itself, it rarely resorts to extratextual evidence to interpret statutes.[76] Texas's other high court—the Court of Criminal Appeals—explicitly rejects the Code Construction Act, or at least commentators have so argued.[77] The Code Construction Act provides that "[i]n construing a statute, whether or not the statute is considered ambiguous on its face, a court *may* consider [extratextual evidence]."[78] While the Court of Criminal Appeals is even more rigorous in its textualism than the Texas Supreme Court,[79] it's not clear that the Court of Criminal Appeals interprets statutes in a way inconsistent with the Code Construction Act. That court acknowledged in the case in which it supposedly rejected the Act that "[a]lthough Section 311.023 of the Texas Government Code invites, but does not require, courts to consider extratextual factors when the statutes in question are *not* ambiguous, such an invitation should be declined."[80] This acknowledgment accomplishes two things for purposes

74. TEX. GOV'T CODE ANN. § 311.023 (West 2005).

75. *See* Gluck, *Laboratories*, *supra* note 54, at 1788–91. *But see* Ojo v. Farmers Grp., Inc., 356 S.W.3d 421, 440 (Tex. 2011) ("[The concurrence] at once espouses methodological stare decisis, that our interpretive rules merit precedential effect, yet declines to embrace it. It reaffirms our concretized rule that 'extrinsic aids are inappropriate to construe an unambiguous statute,' yet allows legislative history a 'general background' and 'non-interpretive' role.").

76. Gluck, *Laboratories*, *supra* note 54, at 1789.

77. *Id.* at 1788.

78. TEX. GOV'T CODE ANN. § 311.023 (West 2005) (emphasis added).

79. *Cf.* Boykin v. State, 818 S.W.2d 782, 786 n.4 (Tex. Crim. App. 1991) (opining in dicta that "interpretation statutes that 'seek[] to control the attitude or the subjective thoughts of the judiciary' violate the separation of powers doctrine." (citing James C. Thomas, *Statutory Construction When Legislation is Viewed as a Legal Institution*, 3 HARV. J. LEGIS. 191, 211 n.85 (1966) (modification in original))).

80. *Id.* Abbe Gluck cites other sections of the Texas code that use mandatory as opposed to permissive language in arguing that the Texas Court of Criminal Appeals has explicitly rejected the legislature's override. Gluck, *Laboratories*, *supra* note 54, at 1787 & nn.131–32. Gluck cites *Boykin*, 818 S.W.2d at 782, as the case that established that the Court of Criminal Appeals would not follow these statutory rules. But two years later, the Court of Criminal Appeals "eviscerated its *Boykin* rule by finding ambiguity when the parties took polar opposite interpretations of the text" and explicitly relied upon the Code Construction Act. Allen v. State, 11 S.W.3d 474, 476 (Tex. App. 2000), *aff'd*, 48 S.W.3d 775 (Tex. Crim. App. 2001); *see also* Lanford v. Fourteenth Ct. of App., 847 S.W.2d 581, 587 (Tex. Crim. App. 1993) (utilizing legislative history to interpret a statute). The Court of Criminal Appeals has not explicitly addressed the code sections that use mandatory language, but at least since

of this Article. First, it concedes that the legislature *can* impact a court's interpretive approach. Presumably, if the Code Construction Act required the court to consider legislative history, it would do so. And second, the acknowledgement clarifies the Court of Criminal Appeals' own textualist interpretive methodology—one that now receives stare decisis treatment.[81]

A similar but opposite phenomenon occurred in Connecticut. There, the state legislature—in response to the Connecticut Supreme Court's adopting a purposivist interpretive methodology[82]—enacted a law that required its courts to use the plain meaning rule.[83] Since its enactment, that legislation has been effectively ignored, again through a narrow understanding of what the statute required.[84] Indeed, in 2008 alone, the Connecticut Supreme Court was asked to apply the statutory plain meaning rule thirty-eight times; "in twenty-seven of those cases, the court found ambiguity and considered extratextual sources."[85] While the similar yet distinct experiences in Texas and Connecticut certainly shed light on important debates regarding uniform rules of statutory interpretation and which branch is better suited to promulgate them,[86] their implications for the horizontal choice-of-law context are straightforward: statutory interpretation methodologies, at least in some states—whether promulgated by the legislature, the courts, or both—can and do receive precedential treatment as such.[87]

Lanford, it has not questioned on formalist grounds the legislature's institutional capacity to legislate rules of statutory interpretation.

81. *See* Gluck, *Laboratories*, *supra* note 54, at 1788 n.133 (gathering Court of Criminal Appeals cases applying the textualist methodology).

82. *See* State v. Courchesne, 816 A.2d 562, 582 (Conn. 2003) ("We now make explicit what is implicit in what we have already said: in performing the process of statutory interpretation, we do not follow the plain meaning rule in whatever formulation it may appear. We disagree with the plain meaning rule as a useful rubric for the process of statutory interpretation for several reasons.").

83. CONN. GEN. STAT. § 1-2z (2003) (prohibiting consulting "extratextual evidence" if the "text is plain and unambiguous and does not yield absurd . . . results").

84. Gluck, *Laboratories*, *supra* note 54, at 1795 ("[A]s long as the parties are arguing over statutory meaning . . . the Connecticut Supreme Court finds the text ambiguous and holds section 1-2z inapplicable." (footnote omitted)).

85. *Id.* at 1795–96.

86. *Compare generally* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002), *with* Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97 (2003).

87. *Cf.* Aaron-Andrew P. Bruhl, *Eager to Follow: Methodological Precedent in Statutory Interpretation*, 99 N.C. L. REV. 101, 126–59 (2020) (arguing that methodological precedent, especially in the lower federal courts, may be more prominent than previously thought).

2. States That Have Not Adopted Methodological Stare Decisis

Not all states have formally adopted methodological stare decisis. But even among those that have not, general principles of statutory interpretation expounded in earlier cases are often cited favorably in later cases in a way that much resembles the experiences of the states that consciously give stare decisis effect to statutory interpretation methodology. For example, while neither the Kansas Supreme Court nor the Kansas legislature has imposed a mandatory interpretive methodology,[88] the Kansas Supreme Court consistently adheres to a "modified textualism" approach that is similar to Oregon's. It has explained that

> "[i]t is a fundamental rule of statutory construction . . . that the intent of the legislature governs if that intent can be ascertained. The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted."
>
> At the same time, where "the face of the statute leaves its construction uncertain, the court may look to the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished, and the effect the statute may have under the various constructions suggested."[89]

Though not binding as a matter of statutory law or stare decisis, Kansas courts regularly cite and apply this interpretive approach.[90]

On the other side of the statutory interpretation spectrum, Nebraska espouses a more purposivist approach. "When construing a statute," Nebraska courts look to "the statute's purpose and give[] to the statute a reasonable construction that best achieves that purpose, rather than a

88. The Kansas legislature has enacted certain rules of statutory construction, but these one-off rules do not amount to a statutory interpretation "methodology." *See* KAN. STAT. ANN. § 77-201 (2014).

89. McIntosh v. Sedgwick Cnty., 147 P.3d 869, 874 (Kan. 2006) (first quoting State *ex rel.* Stovall v. Meneley, 22 P.3d 124 (Kan. 2001); and then quoting Robinett v. Haskell Co., 12 P.3d 411 (Kan. 2000)).

90. *See, e.g.*, State v. Arnett, 413 P.3d 787, 791 (Kan. 2018) ("When interpreting a statute, we must give effect to its plain and unambiguous language. We will not read into the statute words not readily found there. If the language of the statute is unclear or ambiguous, we turn to canons of statutory construction, consult legislative history, or consider other background information to ascertain the statute's meaning."); Matter of Sw. Bell Tel. Co., 460 P.3d 377, 380 (Kan. Ct. App. 2020) ("The primary aim of statutory interpretation is to give effect to the legislature's intent, expressed through the plain language of the statute. We therefore do not add or ignore statutory requirements, and we give ordinary words their ordinary meanings." (citations omitted)).

construction that would defeat it."[91] Like Kansas courts, Nebraska courts are not legally bound to apply a purposivist interpretive methodology, despite references to its purposivist "rules of statutory interpretation."[92] While Nebraska courts consistently invoke their purposivist norms by citing prior cases, the lack of a formalized methodological approach appears to leave the door open to the occasional opinion based on more textualist assumptions.[93] In states that adhere to methodological stare decisis, the courts dispute "how the . . . framework should be applied, not whether it controls";[94] in states like Nebraska that do not use uniform and legally binding statutory interpretation rules (and, most notably, in the federal courts[95]), the methodology used to interpret a statute is itself a potential source of dispute.

B. Interpreting Sister State Statutes

Before considering whether choice-of-law and statutory interpretation methodologies should be connected—and if connected, what that should look like—we must first consider whether they already are. That is, when a state decides that it must apply a sister state's statute as the rule of decision, how does it interpret that statute? And if a state court uses a sister state's statutory interpretation methodology, what is its theoretical or doctrinal basis for doing so?

What's clear enough is that if a state has previously interpreted one of its statutes, the construction given by the home-state court controls in every state in which the statute is implicated in litigation. This result is compelled under each of the varying choice-of-law regimes, but even in the absence of such choice-of-law rules, giving effect to a sister state's

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91. State v. Jedlicka, 938 N.W.2d 854, 858 (Neb. 2020); *see also* State v. Thompson, 881 N.W.2d 609, 612 (Neb. 2016) (quoting the same).

92. *See* Dean v. State, 849 N.W.2d 138, 148 (Neb. 2014).

93. *See, e.g.*, Brown v. State, 939 N.W.2d 354, 359 (Neb. 2020) ("Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous."); State v. Garcia, 920 N.W.2d 708, 714–15 (Neb. 2018) ("When interpreting a statute, the starting point and focus of the inquiry is the meaning of the statutory language, understood in context. Statutory language is to be given its plain and ordinary meaning." (citations omitted)); State v. Valentine, 936 N.W.2d 16, 28 (Neb. Ct. App. 2019) ("Only if a statute is ambiguous or if the words of a particular clause, taken literally, would plainly contradict other clauses of the same statute, lead to some manifest absurdity, to some consequences which a court sees plainly could not have been intended, or to a result manifestly against the general term, scope, and purpose of the law, may the court apply the rules of construction to ascertain the meaning and intent of the lawgiver.").

94. Gluck, *Laboratories*, *supra* note 54, at 1802.

95. *See, e.g.*, Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265 (2020) (explaining the divide between "formalist" and "flexible" textualists).

judicial interpretation of one of its statutes is constitutionally required under the Full Faith and Credit Clause.[96] The question of which state's statutory interpretation methodology is used thus arises when the home-state court has not previously construed the statute in a way that resolves the current litigation.

States vary in their approaches to this question, but one feature remains constant among the states that have confronted it: "[M]ethodological choice in interpreting sister state statutes suffers from conceptual looseness, as courts rarely justify their selection of interpretive frameworks."[97] Whether the state gives effect to the sister state's interpretive principles or applies its own interpretive methodology, the reasons given for that decision are often doctrinally unsatisfying.[98] And that goes for states that acknowledge that a methodological choice must be made in the first place. While this question of statutory interpretation methodology comprises an understandably narrow set of cases, states that have addressed it—whether explicitly or implicitly—break down into two main camps: those that give effect to sister state methodology and those that do not. But even this distinction is not so clear cut. Even for those states that have previously used a sister state's statutory interpretation principles, the precedential weight of the prior analysis is often unclear, leaving later courts free not to follow suit. Nonetheless, distinguishing between state courts that generally give effect to sister state interpretive methodology and those that do not helps paint a picture of current state court practices.

1. Giving Effect to Sister State Interpretive Methodology

Some states—once they have decided to apply a sister state's law and have determined that statutory construction is necessary—have explicitly

96. *See* Chi. & Alton R.R. v. Wiggins Ferry Co., 119 U.S. 615, 622 (1887) ("Without doubt the constitutional requirement, Article IV, Section 1, that 'full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state,' implies that the public acts of every state shall be given the same effect by the courts of another state that they have by law and usage at home."). The Supreme Court has, however, recognized a limited "public policy" exception to this rule. *See* Pac. Emps. Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 502 (1939).

97. Grace E. Hart, Comment, *Methodological Stare Decisis and Intersystemic Statutory Interpretation in the Choice-of-Law Context*, 124 YALE L.J. 1825, 1831 (2015).

98. *See id.* at 1831–32 ("One court adopted sister state methodology as the most relevant means for 'ascertaining substance,' and another reasoned that applying a different interpretive methodology would be 'illogical.' These courts, however, largely fail to identify the sources of these vague notions and do not offer supporting authorities." (citations omitted) (first quoting Magee v. Huppin-Fleck, 664 N.E.2d 246, 251 (Ill. App. Ct. 1996); and then quoting Carbone v. Nxegen Holdings, Inc., No. HHDCV136039761S, 2013 WL 5781103, at *4 n.4 (Conn. Super. Ct. Oct. 3, 2013))).

applied the sister state's statutory interpretation principles.[99] For example, the Connecticut Appellate Court stated plainly that "[w]e use Maine's rules of statutory interpretation . . . because we are interpreting Maine law."[100] And a Texas court of appeals likewise noted, "Appellee contends the Advertising Agreement is illegal under Virginia law and is therefore unenforceable. Accordingly, we look to Virginia law on statutory construction."[101] Both courts then listed rules of statutory interpretation, which they derived from prior statutory constructions of the Maine and Virginia high courts, respectively.[102] Interestingly, Maine adheres to a seemingly mandatory methodology for statutory interpretation,[103] but Virginia does not.[104] While the Connecticut and Texas appellate courts applied the statutory construction rules of the state where the statute was enacted, neither court gave a reason for their decisions, nor did they cite an authority for doing so.[105]

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99. *See, e.g.*, *Huppin-Fleck*, 664 N.E.2d at 251 (applying Oregon's *PGE* framework to an Oregon statute in Illinois court); People *ex rel.* Shults v. Lombard, 398 N.Y.S.2d 932, 933 (N.Y. Co. Ct. 1977) ("The decision of the foreign court of last resort is controlling on the question to be decided by a court of this State, and this is especially true when a question arises with respect to the statute and constitution of the foreign state." (citations omitted)); Rumpf v. Rumpf, 237 S.W.2d 669, 671 (Tex. Civ. App.), *rev'd on other grounds*, 242 S.W.2d 416 (Tex. 1951) ("Where the statutes of another State are pleaded and proven, as here, the courts of this State will refer for construction to the reports and decisions of such other State."); King v. Klemp, 57 A.2d 530, 533 (N.J. Ch. 1947) ("[W]here the construction of a foreign statute is involved, our courts will accept as controlling the interpretation placed thereon by the courts of that state."); Roubicek v. Haddad, 51 A. 938, 939 (N.J. 1902) ("In seeking the true interpretation of the statute of a sister state, as applied to a contract like the one in question, the court will be governed by the rules and principles relating thereto as laid down by the courts of that state.").

100. Mariculture Prods. Ltd. v. Those Certain Underwriters at Lloyd's of London Individually Subscribing to Certificate No. 1395/91, 854 A.2d 1100, 1107 (Conn. App. Ct. 2004).

101. Autonation Direct.com, Inc. v. Thomas A. Moorehead, Inc., 278 S.W.3d 470, 473 (Tex. App. 2009).

102. *See Mariculture Prods.*, 854 A.2d at 1107–08; *Autonation Direct.com*, 278 S.W.3d at 473.

103. *See* State v. McLaughlin, 189 A.3d 262, 265 (Me. 2018) ("Our standard for interpreting statutes is well established."); State v. Dubois Livestock, Inc., 174 A.3d 308, 311 (Me. 2017) (same); MaineToday Media, Inc. v. State, 82 A.3d 104, 108 (Me. 2013) (explaining the standard based on precedent).

104. *See, e.g.*, Brown v. Commonwealth, 733 S.E.2d 638, 640 (Va. 2012) (reciting general but nonmandatory principles of statutory interpretation); Auer v. Commonwealth, 621 S.E.2d 140, 143 (Va. Ct. App. 2005) (same).

105. The Connecticut court in *Mariculture* did cite 73 AM. JUR. 2D *Statutes* § 82 (2001). That section, however, is silent on a state's choice of statutory interpretation methodology and discusses only the role that legislative inaction and legislative history play in statutory interpretation. In support of its decision to apply Maine's rules of statutory interpretation, the Connecticut court also cited *Nettles v. Walcott*, 107 F.2d 738, 741 (2d Cir. 1939), which states that "[t]he courts of South Carolina are final as to the meaning of the statutes of that state." But *Nettles* likewise provides no doctrinal grounding. First, the *Nettles* court applied prior statutory interpretations of the South Carolina court themselves, not South Carolina's general principles of statutory construction. And second, *Nettles*

A Connecticut trial court, however, more recently addressed the same question because it "could find no Connecticut authority concerning what rules of construction should apply in interpreting the meaning of another state's statute."[106] Like the Connecticut Appellate Court, the Connecticut trial court applied Delaware's rules of statutory construction to a Delaware statute.[107] Justifying its decision, the court opined that

> it would be illogical for a Connecticut statute to determine how a Delaware statute should be interpreted. It is presumed that each set of legislators had their own rules of statutory interpretation in mind when drafting their respective statutes, so their own rules of statutory interpretation should be applied to best implement the intended meaning of the statute.[108]

The Connecticut trial court then applied Delaware rules of construction, which it derived from both Delaware statutory and case law.[109]

While the Connecticut trial court offered more of an explanation for using Delaware statutory interpretation methodology than did the Connecticut and Texas appellate courts, it falls short of providing a strong doctrinal rationale. Perhaps it is "illogical" for courts to use forum interpretive methodology if state legislatures expect their statutes to be interpreted according to their state's rules of statutory interpretation. Yet, as discussed below, many—if not most—states reject this reasoning and apply their own statutory interpretation methodologies. Any of the choice-of-law regimes currently used by states may compel a forum court to apply a statute from another state—in fact, applying a sister state's statute as the rule of decision is constitutionally required in some circumstances.[110] So while the Delaware legislature may reasonably assume that Delaware courts will most often interpret Delaware statutes—interpretations that are authoritative in all other courts—it must also assume that other courts will regularly pass upon what Delaware statutes mean. Indeed, despite the fact that the Connecticut trial court viewed the question of interpretive

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was a federal diversity suit, such that the Second Circuit applied South Carolina's prior interpretations under *Erie*, whose federalism considerations are not implicated in the horizontal choice-of-law context.

106. Carbone v. Nxegen Holdings, Inc., No. HHDCV136039761S, 2013 WL 5781103, at *4 n.4 (Conn. Super. Ct. Oct. 3, 2013).

107. *Id.* at *4.

108. *Id.* at *4 n.4.

109. *Id.* at *4 (citing DEL. CODE ANN. tit. 1, §§ 301, 303 (2013); Sussex Cnty. Dep't of Elections v. Sussex Cnty. Republican Comm., 58 A.3d 418, 422 (Del. 2013)).

110. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); *cf.* Home Ins. Co. v. Dick, 281 U.S. 397 (1930) (disallowing the forum to apply forum law under the Full Faith and Credit Clause).

methodology as a matter of first impression, the Connecticut Supreme Court had reasoned in an earlier case that "[a]lthough we apply the substantive law of Delaware[,] . . . procedural issues such as how this court interprets statutes are governed by Connecticut law."[111] Again, maybe the substance-procedure distinction the Connecticut Supreme Court alludes to provides a sound rationale for its decision[112]—but it fails to say why that's so.

2. Applying Forum State Interpretive Methodology

The confusion in Connecticut and elsewhere is unsurprising given the lack of a doctrinal or theoretical basis upon which questions of competing interpretive methodologies are typically resolved. States that have used their own statutory interpretation methodology when interpreting sister state statutes, then, often fare no better in justifying that choice. Some have applied forum methodology without acknowledging the question at all.[113] Others, "recognizing similarities between forum-state and sister-state approaches to statutory construction," have cited both states' interpretive approaches.[114] And others yet have applied forum methodology after concluding that the sister state's methodology is unclear or unsettled.[115] By definition, those in the first group did not explain their decision to apply forum methodology. Perhaps the sister state's statutory interpretation principles were the same as the forum's, perhaps they differed radically, and perhaps that difference was even outcome determinative: we simply don't know. Conversely, courts that cite both forum and sister state interpretive methodology could just as easily be characterized as applying the sister state's statutory interpretation principles. In theory, if two states share an interpretive methodology, a statutory construction rendered under the forum court's methodology would mirror one rendered under the sister state's, thus giving effect to both states' statutory interpretation methodologies.

The last group of decisions—those that apply forum methodology when the sister state's methodology is unclear—is of particular import for the interplay between choice of law and statutory interpretation. Consider,

111. Weber v. U.S. Sterling Secs., Inc., 924 A.2d 816, 823 n.5 (Conn. 2007).

112. *See infra* Section III.B.

113. Hart, *supra* note 97, at 1830 (first citing Wilgus v. Est. of L., No. 94C-11-199-WTQ, 1996 WL 769335, at *4 (Del. Super. Ct. Dec. 27, 1996); then citing Wooley v. Lucksinger, 14 So.3d 311, 414 (La. App. 1 Cir. 2008), *aff'd in part, rev'd in part on other grounds*, 61 So.3d 507 (La. 2011); and then citing Sholes v. Agency Rent-A-Car, Inc., 601 N.E.2d 634, 638 (Ohio Ct. App. 1991)).

114. Hart, *supra* note 97, at 1830.

115. *Id.* at 1830–31.

for example, *Ferrell v. Allstate Insurance Co.*, in which the New Mexico Supreme Court considered whether to certify a fifteen-state class, a decision that turned on the meaning of "premium" under each of the relevant states' statutory law.[116] If "premium" had a substantially similar definition among the states, the putative class would satisfy the common question of law requirement, and the class would be certified.[117] Appellate courts of some but not all of the relevant states had "definitively construed" the statutory meaning of "premium."[118] For those that had not—after finding that their statutory law was "unsettled or unclear"—the New Mexico court applied "New Mexico's statutory definition of premium to plaintiffs from other states [because] doing so would not run afoul of [the Constitution]."[119] The *Ferrell* court thus decided that because it constitutionally *could* construe its sister states' statutes under New Mexico statutory interpretation principles, it *would* do so.

To be sure, the New Mexico court's decision was primarily motivated not by statutory interpretation considerations but by choice-of-law and class-action concerns of "judicial economy and fairness to the parties."[120] And it's not clear whether the sister states' statutory interpretation principles or their definitions of "premium" were the "unsettled or unclear law." But the point remains: without a definitive statutory ruling by the enacting-state court or its adherence to mandatory rules of statutory interpretation (none of the relevant states adhered to methodological stare decisis), the forum court can—and oftentimes does—resort to its own rules of statutory construction.[121]

C. Potential Explanations for Current Practices

Though the state courts themselves are mostly silent about their reasons for choosing one interpretive methodology over another, one might expect one of three patterns to emerge from the case law. First, whether a state gives its statutory interpretation stare decisis effect could factor into other states' willingness to apply that methodology. That is, if a state court determines that it must interpret and apply a sister state's

116. Ferrell v. Allstate Ins. Co., 188 P.3d 1156, 1160 (N.M. 2008).

117. *Id.* at 1161.

118. *Id.* at 1170.

119. *Id.* at 1171.

120. *Id.* at 1169.

121. *See, e.g.*, ROC-Century Assocs. v. Giunta, 658 A.2d 223, 226 (Me. 1995) ("[I]f New York law is unclear or unsettled, it is appropriate to . . . apply[] the law of Maine as the forum state."); Am. Honda Fin. Corp. v. Bennett, 439 N.W.2d 459, 462 (Neb. 1989) ("Where another state's law is unclear or undecided, we assume its law to be the same as ours and apply Nebraska's law to the dispute.").

statute, it may be more likely to use the sister state's statutory interpretation methodology if the enacting state's high court or legislature has declared its methodology to be mandatory "law." A court faced with such a situation might reason that the sister state's interpretive methodology should follow the statute as part of that state's statutory law. And applying a formalized statutory interpretation methodology would be a simpler task for state courts than would gleaning a foreign state's approach to statutory interpretation by stringing together principles from various statutory constructions. It is also an exercise with which state courts are familiar. Just as state courts apply substantive statutory precedents of the enacting state's courts, so too could they apply precedents that establish the enacting state's binding interpretive methodology.

Attaching such formal stare decisis weight to statutory interpretation methodology, however, has not proven to increase the likelihood with which foreign state courts apply that methodology. During its sixteen-year heyday, only one court outside of Oregon applied the *PGE* framework, arguably the most formalized interpretive methodology, in interpreting an Oregon statute.[122] No courts outside of Oregon have cited Oregon's current methodology.[123] Likewise, no courts outside of Texas or Connecticut have cited the leading cases that established those states' formalized approaches to statutory interpretation.[124] One would assume *a fortiori*—and the lack of contrary examples bolsters the assumption—that applying a sister state's statutory interpretation methodology occurs even less frequently when the sister state's statutory interpretation methodology is not formalized or given stare decisis effect.[125]

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122. *See* Magee v. Huppin-Fleck, 664 N.E.2d 246, 251 (Ill. App. Ct. 1996).

123. A November 23, 2021, Westlaw search of *Gaines*'s citing references showed that *Gaines* had been cited 1,034 times by Oregon courts but not at all by courts of any other jurisdiction.

124. *Boykin v. State*, 818 S.W.2d 782 (Tex. Crim. App. 1991), is the leading case that established that the Texas Court of Criminal Appeals would adhere to a textualist approach, one that has been given methodological stare decisis effect in Texas. *See* Gluck, *Laboratories*, *supra* note 54, at 1788 n.133. A Westlaw search run on November 23, 2021, showed that no courts outside of Texas have cited *Boykin*. Similarly, *State v. Courchesne*, 816 A.2d 562 (Conn. 2003), is the leading case that established Connecticut's purposivist approach. While a Westlaw search run on November 23, 2021, revealed that it has never been cited in a majority opinion outside of Connecticut, it has twice been cited by other state courts. A concurrence by Chief Justice Abrahamson of the Wisconsin Supreme Court and a dissent by Justice Kelly of the Michigan Supreme Court each cited *Courchesne* in calling upon their respective courts to adopt a similar purposivist approach to statutory interpretation. *In re* Commitment of Byers, 665 N.W.2d 729, 740–42 (Wis. 2003) (Abrahamson, J., concurring); Cameron v. Auto Club Ins. Ass'n, 718 N.W.2d 784, 820 (Mich. 2006) (Kelly, J., dissenting), *overruled by* Regents of Univ. of Mich. v. Titan Ins. Co., 791 N.W.2d 897 (Mich. 2010).

125. *But see supra* notes 100–04 and accompanying text. Interestingly, on one occasion during

A second pattern that could explain the state court practice would be a connection between a state's choice-of-law approach and its willingness to apply a sister state's statutory interpretation methodology. Take, for example, Connecticut. Though the Connecticut Supreme Court later disagreed, two lower courts in that state applied the statutory interpretation methodology of the enacting state to the laws that needed statutory construction.[126] Connecticut uses the *Second Restatement*'s "most significant relationship" test.[127] Neither of the lower Connecticut courts that applied the statutory interpretation principles of a sister state justified that decision on the basis of choice-of-law considerations. Interestingly, the Connecticut Supreme Court—in applying *Connecticut's* statutory interpretation methodology—did, by classifying statutory interpretation as procedural.[128] The unspoken premise of that decision is that under the *Second Restatement*—and indeed, under *all* choice-of-law approaches and the Constitution—the forum may always apply its procedural rules.[129] But because the substance-procedure distinction is common to all choice-of-law regimes, it's difficult to ascertain any *Second Restatement*–specific principles from the Connecticut examples that could provide a more reasoned explanation for *Second Restatement* courts' decisions generally. The differing outcomes among the Connecticut Supreme Court and lower

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the years that the *PGE* framework dominated statutory interpretation in Oregon, an Oregon court did not use the *PGE* framework to interpret an out-of-state statute. Relying on precedent that predated *PGE*, the Oregon Court of Appeals, in interpreting a Montana statute, stated clearly that "[i]f we identify no Montana decision regarding an aspect of the statute that is significant here, we determine the proper meaning and application of that portion of the statute in accordance with Montana's general rules of statutory construction." Kahn v. Pony Express Courier Corp., 20 P.3d 837, 849 (Or. Ct. App. 2001) (citing Peterson v. Ely, 569 P.2d 1059 (Or. 1977)).

126. *See supra* notes 100–08 and accompanying text; *see also* Kolberg v. Sullivan Foods, Inc., 644 N.E.2d 809, 812 (Ill. App. Ct. 1994) (citing Wisconsin's plain meaning rule while interpreting a Wisconsin statute but without connecting that interpretation to Illinois's *Second Restatement* choice-of-law approach).

127. *See* Jaiguay v. Vasquez, 948 A.2d 955, 972 (Conn. 2008) ("[W]e have moved away from the place of the injury rule for tort actions and adopted the most significant relationship test found in §§ 6 and 145 of the Restatement (Second) of Conflict of Laws.").

128. Weber v. U.S. Sterling Secs., Inc., 924 A.2d 816, 823 n.5 (Conn. 2007).

129. Recall that while the *Second Restatement* does not formally rely on the substance-procedure distinction, doing so is generally "harmless" and allowable. *See supra* notes 45–48 and accompanying text; *see also supra* notes 26–30 and accompanying text (explaining the *First Restatement*'s reliance on substance-procedure characterizations). Under interest analysis and comparative impairment choice-of-law regimes, it is assumed that the foreign state has no interest in applying its procedural rules outside of its state courts. *See* 16 AM. JUR. 2D *Conflict of Laws* § 118. "Better law" choice-of-law states likewise adhere to the substance-procedure distinction. *See, e.g.*, Davis v. Furlong, 328 N.W.2d 150, 153 (Minn. 1983) ("[T]he [better law] choice-influencing considerations provide a rational framework in which to decide conflict-of-law questions involving arguably procedural rules . . . [and] matters of procedure and remedies [are] governed by the law of the forum state."). Constitutionally, a state "may apply its own procedural rules to actions litigated in its courts." Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988).

courts, along with the seeming silence of *First Restatement* jurisdictions on similar questions,[130] further complicates reliance on choice-of-law methodology as a likely candidate for assessing how courts decide whether to apply a sister state's statutory interpretation principles.

A third possible explanation is a connection between the substance of the forum's statutory interpretation methodology and its willingness to apply a sister state's statutory interpretation methodology. One might, for example, expect a textualist court to rely on its own statutory interpretation methodology more often than a purposivist court. After all, such states look for authoritative statutory meaning in the "the plain meaning of the statutory text," even if that meaning appears to be at odds with "the legislative purpose."[131] Seemingly, states adhering to the plain meaning rule might not resort to the panoply of statutory interpretation devices as often as, say, purposivist states.[132] A textualist state court might, therefore, in accordance with its textualist approach, conclude that a sister state statute is clear on its face, while a purposivist court could find that same statute ambiguous and invoke the various tools of statutory construction in interpreting it.[133] When self-identifying textualist jurisdictions have encountered ambiguous sister state statutes, they have not always used sister state statutory interpretation methodology to interpret such statutes in the same way.[134] Purposivist jurisdictions appear to lack consistency in their approaches as well.[135] Therefore, the substance of a state's statutory interpretation methodology likewise does not seem to explain—either experientially or doctrinally—when or why a state court uses the statutory interpretation methodology of a sister state.

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130. *See, e.g.*, *In re* Marriage of Doetzl, 65 P.3d 539, 540, 543 (Kan. 2003) (applying Kansas rules of statutory construction to a Missouri statute without explanation); *see also* Symeonides, *2019 Survey*, *supra* note 15, at 24 (identifying Kansas as a traditional choice-of-law jurisdiction).

131. Hoesli v. Triplett, Inc., 361 P.3d 504, 511 (Kan. 2015).

132. *See, e.g.*, Graham v. Dokter Trucking Grp., 161 P.3d 695, 701 (Kan. 2007) ("If the statute's language is clear, there is no need to resort to statutory construction.").

133. *Cf.* ANTONIN SCALIA, A MATTER OF INTERPRETATION 18–20 (Amy Gutmann ed., 1997) (citing Church of the Holy Trinity v. United States, 143 U.S. 457 (1892) as an example of this phenomenon).

134. *Compare In re* Marriage of Doetzl, 65 P.3d at 541, 543 (applying Kansas rules of statutory construction to a Missouri statute without explanation), *with* Shutts v. Phillips Petroleum Co., 732 P.2d 1286 (Kan. 1987) (interpreting statutes from Texas, Oklahoma, and Louisiana according to those states' principles of statutory interpretation). *See also supra* note 125 (explaining that while under Oregon's textualist *PGE* framework, the Oregon Court of Appeals applied the statutory interpretation methodology of Montana when interpreting a Montana statute).

135. *Compare* Weber v. U.S. Sterling Sec., Inc., 924 A.2d 816, 823 n.5 (Conn. 2007) (applying Connecticut rules of statutory construction to a Delaware statute), *with* Mariculture Prods. Ltd. v. Those Certain Underwriters at Lloyd's of London Individually Subscribing to Certificate No. 1395/91, 854 A.2d 1100, 1107 (Conn. App. Ct. 2004) (interpreting Maine's statute according to Maine's principles of statutory interpretation).

III. STATE STATUTORY INTERPRETATION: THEORY

The above analysis reveals that the current state of horizontal intersystemic statutory interpretation is quite messy. State courts take a variety of methodological approaches both to internal statutory interpretation and to their interpretations of sister state statutes. Neither the statutory interpretation methodologies nor choice-of-law regimes that state courts use, however, consistently explains how decisions regarding the interpretation of out-of-state statutes are made. Additionally, many state courts provide no rationale in making that decision, and of the states that at least acknowledge that a methodological choice has to be made, the justifications given have been less than satisfying. Given the doctrinal uncertainty, a theoretical foundation upon which state courts should base this important methodological decision is needed.

This Part attempts to fill that theoretical void. In so doing, it lays the foundation for a normative solution to the question this Article poses: How *should* state courts interpret sister state statutes? Whatever the answer may be, hopefully one thing is clear: "[C]ourts should, at the very least, provide explicit justification for their choice of interpretive methodology."[136] Not only would greater judicial candor in this realm provide guidance to litigants about what the law requires, but it would also allow the states to function as "laboratories of democracy,"[137] which would foster more acute doctrinal development and scholarly debate, regardless of how state courts initially resolve these issues.

On the merits, some have proposed a uniform approach, arguing that state courts should always apply the statutory interpretation methodology of the enacting state's courts because that "would be most consistent with choice-of-law principles."[138] But this raises multiple questions: Why should statutory interpretation methodology track choice of law in the first place? And moreover, *which* choice-of-law principles dictate that result? The principles of the *First* and *Second Restatements*, for example, are quite different—the former is concerned with territoriality and sovereignty, while the latter is concerned with the parties' and dispute's relationship to the forum state. Conversely, some courts, as outlined above, classify statutory interpretation methodology as procedural law and would thus always apply the forum court's preferred methodology.[139] But,

136. Hart, *supra* note 97, at 1832.

137. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

138. Hart, *supra* note 97, at 1833.

139. *See supra* note 111 and accompanying text.

again, no court to date has adequately justified that classification.[140] In fact, Abbe Gluck, who has addressed the substance-procedure debate regarding statutory interpretation methodology in the federal court context, has come to the opposite conclusion: that it's substantive (at least under *Erie*).[141]

Given the widespread confusion, this Part lays the groundwork for a new solution—one that explicitly connects state statutory interpretation methodology and horizontal choice of law. In short, state statutory interpretation methodology is one kind of substantive "law" for choice-of-law purposes. Like other laws that conflict among the several states, state statutory interpretation methodology should thus be subject to each state's choice-of-law regime. While this gives rise to the possibility that states could reach different conclusions on the intersystemic interpretation question, a doctrinal application of the theory shows that *First* and *Second Restatement* jurisdictions alike should reach the same result: that courts should apply the statutory interpretation methodology of the enacting state's courts. This Part lays the theoretical groundwork for the approach, and Part IV derives and applies the doctrine in each choice-of-law context.

A. State Statutory Interpretation Methodology as "Law"

In many ways, horizontal choice-of-law decisions are analogous to vertical choice-of-law decisions posed by *Erie*. It might make sense then, that statutory interpretation methodology fits into each picture in a similar way. In both situations, before statutory interpretation methodology becomes the kind of thing subject to choice of law at all, an underlying antecedent question must be answered: Is state statutory interpretation methodology "law" in the first place?

Professor Abbe Gluck has answered this question in the affirmative for *Erie* purposes.[142] Gluck wades deep into "*Erie*'s murky waters"[143] to argue that state statutory interpretation methodology is "law" because it

140. To be fair, courts have historically treated it as procedural, *see infra* subsection III.B.2, but there's no agreed upon doctrinal rationale for why this should be, *see infra* Section III.C.

141. Gluck, *Intersystemic*, *supra* note 9, at 1980–82.

142. *See* Gluck, *Intersystemic*, *supra* note 9, at 1902 ("[S]tatutory interpretation's most fundamental jurisprudential question—whether statutory interpretation methodology is 'law,' individual judicial philosophy, or something in between—remains entirely unresolved."). Not all agree, however, that the question that Gluck poses in the vertical context and that this Article poses in the horizontal context is so straightforward. Pojanowski, *supra* note 4, at 541 ("[T]he answer to the question of whether interpretive methodology is statute-trailing 'law' turns on what you mean by 'law.'").

143. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398 (2010).

affects primary conduct,[144] provides a rule of decision,[145] and is "bound up with" the substantive law implemented[146]—all factors relevant to an *Erie*-specific inquiry. Gluck bolsters this assessment by analyzing, in a more general way, the federal courts' consistent application of state law principles that are analogous to state statutory interpretation methodology. For example, federal courts sitting in diversity will apply, without hesitation, a state's rules of interpretation for contracts, wills, and trusts—instruments that, like statutes, require textual analysis.[147] Federal courts sitting in diversity will also apply other ex-ante-defined reasoning processes, similar to statutory interpretation methodology, that include choice of law, stare decisis, and state constitutional law frameworks.[148] Gluck concludes that because these other state-promulgated principles are applied as "law" under *Erie*, state statutory interpretation methodology should also be characterized as "law."

Despite all their similarities, *Erie* and sister state choice of law are not identical. One difference is, of course, the courts that then apply that law—federal courts in the vertical context and state courts in the horizontal context. The structural differences between these courts and the different choice-of-law considerations in each context may require a departure from Gluck's conclusion—perhaps statutory interpretation methodology is not "law" for horizontal choice-of-law purposes, even if it is under *Erie*. For one, *Erie* is either constitutionally or statutorily mandated (or both),[149] while the Full Faith and Credit Clause places relatively few restrictions on a state court's choice of law in any given case.[150] That is, for all their differences, the various state choice-of-law regimes are based primarily on policy preferences, not on constitutional or federal preemption grounds.[151] Moreover, while federal judges exercise "the judicial Power" under the federal Constitution, state judges are empowered by fifty unique state constitutions.[152] Therefore, "[t]extually

144. Gluck, *Intersystemic*, *supra* note 9, at 1980–82.

145. *Id.* at 1982–83.

146. *Id.* at 1984.

147. *See id.* at 1970–72, 1975 & nn.252–54.

148. *Id.* at 1976.

149. *See* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 696 (1974) (recounting the standard view that "although [*Erie*] first revealed itself in statutory form, it has an unmistakable, if only vaguely definable, aspect of the constitutional about it").

150. *See, e.g.*, Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) (holding that, consistent with the Full Faith and Credit and Due Process Clauses, a state may apply its own statute of limitations to a claim governed by another state's substantive law).

151. *See generally supra* Part I (explaining policy motivations driving the various horizontal choice-of-law regimes).

152. *See* Pohlman, *supra* note 4, at 1753–54.

and historically, it would be unfair to assume that each state's judicial power . . . tracks that vested in the federal courts by Article III."[153] Indeed, "state courts *are* common-law courts";[154] federal courts are not.[155]

Yet, while differences certainly exist, both horizontal choice of law and *Erie* must answer the same preliminary question: whether *state* statutory interpretation methodology is law. Thus, the real question is whether any of the differences make a difference when considering state statutory interpretation methodology's status as "law" in the horizontal context. They do not. In both the vertical and horizontal contexts, statutory interpretation methodology's status as "law" is determined by its unique state-level origins, not by the court, be it federal or state, where the conflict is resolved. This is most easily illustrated by states that have enacted certain statutory rules of interpretation. If a state legislature enacts a statute that says "courts in this state will interpret statutes in a textualist way" (and the courts so interpreted statutes), one would be hard pressed to argue that textualism was not the "law" of that state. Whether *Erie* or a state's choice-of-law regime would then require that that "law" be applied by a federal court or sister state court when interpreting a statute enacted by the textualist state is a different question. The point, for now, is simply that what solidifies state court statutory interpretation methodology's status as law is that it is promulgated by a state legislature or recognized by a state court. That fact does not change when the methodology is applied in the horizontal, as opposed to the vertical, choice-of-law context.

Statutory rules of interpretation, when applied without modification by state courts, are the easy cases, however. As we saw above, attempts to implement statutes that prescribe mandatory rules of interpretation can be met with resistance by state courts of last resort.[156] Thus, the more likely and more complicated scenarios in which statutory interpretation methodology's status as law is questioned are ones in which (1) the state legislature enacts a certain interpretive methodology to override the court-promulgated methodology and the state courts apply it, as in Oregon; (2) the state legislature enacts a certain interpretive methodology and the state courts resist it, as in Connecticut and Texas; or (3) the state courts abide by certain nonmandatory rules of statutory interpretation, as in Nebraska and Kansas. It's easy enough to see why Oregon's interpretive

153. *Id.*

154. *Id.* at 1745.

155. *But see* Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 384, 405–21 (1964) (identifying pockets of so-called federal common law).

156. *See supra* notes 74–85 and accompanying text.

methodologies are "law." The former *PGE* approach was applied as common law in case after case, just as a state's rules of contract interpretation are. Oregon's current *Gaines* methodology is applied just as consistently. The only difference is that the *PGE* methodology was court promulgated, while the *Gaines* methodology applies a statutory rule of construction. Both are clearly "law." The other scenarios, however, present more difficult situations and are not the least complicated by the fact that "[s]ome states might treat interpretive methodology as law, and others might not."[157]

Professor Jeff Pojanowski questions whether classifying statutory interpretation methodology as law in these remaining states makes sense. He levies his primary critique not on states that have failed to promulgate binding interpretive rules but on states like Connecticut and Texas, where the state courts have resisted applying a legislatively directed interpretive methodology.[158] If a statutory interpretation methodology really were "law" in a positivist sense, then it could come about in two ways—either by legislative enactment or by state common law.[159] But when a state court refuses to interpret a statute in accordance with a duly enacted state law,

> 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. Or it may suggest a belief that methods of interpreting statutes cannot be legislated any more effectively than the methods for understanding ordinary English.[160]

If the latter option is correct, such that the statutory interpretation methodologies in place in Connecticut or Texas are not law, then there is even less of a case to be made that statutory interpretation methodology should be classified as law in a state where neither the legislature nor the courts have promulgated a binding interpretive methodology.[161]

What's important to the theoretical debate, though, is what Connecticut and Texas have *not* done—namely, explicitly reject their legislatures' authority to regulate statutory interpretation methodology. Rather, the high courts in both states have taken a narrow view of when

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157. Gluck, *Intersystemic*, *supra* note 9, at 1907.

158. Pojanowski, *supra* note 4, at 493 n.93 ("Is methodology 'law'? . . . The state courts studied here appear to conclude otherwise." (quoting Gluck, *Laboratories*, *supra* note 54, at 1862)).

159. *See id.* at 493.

160. *Id.* (footnote omitted).

161. *See id.* ("These options—and their underlying reasons for interpretive divergence or convergence—may lead to very different answers to the intersystemic question.").

the statutory rules of interpretation apply. They have not gone so far as to refuse to apply the laws altogether.[162] In Connecticut, for example, the statutory plain meaning rule prohibits consulting "extratextual evidence" if the "text is plain and unambiguous and does not yield absurd . . . results."[163] Instead of deciding that the statute is unconstitutional or refusing to apply it on state separation of powers grounds, the Connecticut Supreme Court has taken an extremely narrow view of what makes a text "unambiguous,"[164] thus allowing it to consult extratextual evidence in a way consistent with the statutory framework.[165] Similarly, the Texas Supreme Court routinely cites its state's Code Construction Act, which is permissive of extratextual evidence. In practice, however, that court does not often look beyond the text when construing a statute.[166] Even the Texas Court of Criminal Appeals, which is admittedly skeptical of the purposivism the Code Construction Act espouses,[167] has not altogether rejected it.[168] Instead, both of Texas's high courts have homed in on the Act's permissive language—that "a court *may* consider" extratextual evidence[169]—to justify their textualism while maintaining the lawfulness of the Act itself.[170]

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162. *See supra* notes 74–85 and accompanying text. To be sure, Pojanowski likely would reject these courts' attempts to narrow the purpose of the statutory interpretive methodologies. Instead, Pojanowski argues that "while constitutional concerns may preclude state courts from narrowing the semantic meaning of a statute to fit its background purpose, these [common-law] 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." Pojanowski, *supra* note 4, at 522.

163. CONN. GEN. STAT. § 1-2z (2003).

164. Gluck, *Laboratories*, *supra* note 54, at 1795–96 ("[A]s long as the parties are arguing over statutory meaning . . . the Connecticut Supreme Court finds the text ambiguous and holds section 1-2z inapplicable. In 2008 alone, the court was asked to consider the application of section 1-2z thirty-eight times; in twenty-seven of those cases, the court found ambiguity and considered extratextual sources." (footnote omitted)).

165. *See supra* notes 82–85 and accompanying text.

166. Gluck, *Laboratories*, *supra* note 54, at 1789 ("Many Texas Supreme Court opinions include a footnote or a sentence citing the Code Construction Act's permissive views about extratextual sources, but then still decline to employ extratextual sources absent ambiguity. (And in some cases, the Texas Supreme Court does reference legislative history.)" (footnote omitted)); *see also supra* notes 82–85 and accompanying text; *cf.* Tex. Health Presbyterian Hosp. of Denton v. D.A., 569 S.W.3d 126, 136 (Tex. 2018) ("Although this section may grant us legal permission, not all that is lawful is beneficial." (footnote omitted)).

167. *See supra* notes 77–79 and accompanying text.

168. *See, e.g.*, Lang v. State, 561 S.W.3d 174, 180 (Tex. Crim. App. 2018) (interpreting an ambiguous statute in light of the Code Construction Act); Prichard v. State, 533 S.W.3d 315, 327 (Tex. Crim. App. 2017) (same); Baumgart v. State, 512 S.W.3d 335, 339 (Tex. Crim. App. 2017) (same); *see also supra* notes 77–80 and accompanying text.

169. TEX. GOV'T CODE ANN. § 311.023 (West 2005) (emphasis added).

170. *See, e.g.*, *Prichard*, 533 S.W.3d at 327 ("Having determined that the plain language is ambiguous, we may consider extra-textual factors." (first citing Chase v. State, 448 S.W.3d 6, 11 (Tex.

Functionally, both states evade the statutory directives; formally, both states acknowledge, at least implicitly, that interpretive methodology is something ripe for legislative interference.[171] That acknowledgement—tacit as it is—somewhat quells Pojanowski's concern that a positivistic conception of the common law and the experiences in Connecticut and Texas cannot be reconciled.[172] In other words, what these states recognize is that state statutory interpretation methodology *is* state common law.[173] As such, it can be legitimately displaced by ordinary legislation like the Code Construction Act.[174]

Moreover, the statutory rules of interpretation in place in Texas and Connecticut are pieces of legislation like any other. And like other pieces of legislation, statutory imprecision invites judicial interpretation (hence

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Crim. App. 1985); and then citing TEX. GOV'T CODE ANN. § 311.023 (West 2005))); BankDirect Cap. Fin., LLC v. Plasma Fab, LLC, 519 S.W.3d 76, 85 (Tex. 2017) ("The Code Construction Act does not stop at textual definitions, however. It also says judges 'may consider' a host of extrinsic 'Statute Construction Aids' beyond the Legislature's chosen language, 'whether or not the statute is considered ambiguous on its face.' . . . But we have resolutely refused the Act's entreaties to disregard plain language: 'We . . . do not resort to extrinsic aids . . . to interpret a statute that is clear and unambiguous.'" (footnotes omitted)).

171. *Cf.* Jeffrey A. Pojanowski, *Reading Statutes in the Common Law Tradition*, 101 VA. L. REV. 1357, 1399 (2015) ("If the common law courts 'refus[ed] to "receive" the legislation as law of the land,' a statute could remain formally valid but legally inert." (alteration in original) (quoting GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 24 (1986))).

172. To be sure, not all state courts that have considered the question have formally recognized the legislature's power to legislate statutory interpretation methodology. *See, e.g.*, Evans v. State, 872 A.2d 539, 550 (Del. 2005) (holding that a statute that "attempt[ed] to confer upon the General Assembly fundamental judicial powers" violated the state constitution's separation of powers). *Evans* is complicated, however, because the statute that the court decided was unconstitutional, in addition to asserting the legislature's "right and prerogative to be the ultimate arbiter of the intent, meaning, and construction of its laws," also declared an already-decided case "null and void." H.B. 31, 143d Gen. Assemb., Reg. Sess. (Del. 2005); *see also* Linda D. Jellum, *"Which Is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837 (2009). But this and other potential counterexamples do not weaken the point I make here. To the extent that courts decide that legislated rules of interpretation, like those that exist in all fifty states, violate a state's separation of powers, I would in most instances simply disagree with the result.

173. *See* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 5–6 (1995) ("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." (footnote omitted)); *see also* Pojanowski, *supra* note 4, at 493 (explaining that both a positivistic and common-law-as-custom conception of the common law is consistent with this approach, so long as common law, whatever its nature, is displaceable by legislation).

174. Based on certain dicta, Gluck argues that the Texas Supreme Court has expressly rejected the Code Construction Act's prohibition of strictly construing statutes in derogation of the common law. Gluck, *Laboratories*, *supra* note 54, at 1790. But here again, at least formally, the Texas Supreme Court acknowledges the legislature's power to override its common-law interpretive rules. *See, e.g.*, Abutahoun v. Dow Chem. Co., 463 S.W.3d 42, 52 (Tex. 2015) ("If anything, Chapter 95 is in derogation of the common law, and Texas courts do not strictly construe such statutes." (citing TEX. GOV'T CODE § 312.006(b) (West 1985))).

the field of statutory interpretation!). Inherently ambiguous, for example, is what counts as "ambiguous" or a word's "plain meaning," such that crafting legislative rules of statutory interpretation at higher levels of generality is at best an imperfect art.[175] As a result of this built-in ambiguity, where the statutory language regulating statutory interpretation methodology is imprecise, the court gets the final say on what exactly the legislation requires of the court itself.[176] For all intents and purposes, this allows a state court to craft its own interpretive methodology by broadly or narrowly construing legislation aimed at supplanting the status quo, while formally respecting the legislature's ability to override the common law of statutory interpretation methodology.

Because state statutory interpretation methodology is state common law, state statutory law, or some combination of both, it is easily characterizable as "law," regardless of which branch of a state government establishes or recognizes it.[177] In Texas and Connecticut, the methodologies are law as one species of statutory stare decisis; the way those state courts have interpreted and applied the legislative construction acts *is* the law of statutory interpretation in those states.[178] In Oregon, the *PGE* framework was state common law, and the *Gaines* methodology applies a statutory override of the common law.[179] But in states like Nebraska and Kansas, neither the legislature nor the state supreme court has declared a mandatory statutory interpretation methodology. This omission does not change the calculus. While those states' statutory interpretation methodologies do not receive overt stare decisis treatment, they are nothing other than state common law. Indeed, notwithstanding the lack of a formalized interpretive methodology, the courts themselves

175. *See generally* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013).

176. *Cf.* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result) ("We are not final because we are infallible, but we are infallible only because we are final."); Pojanowski, *supra* note 4, at 523 ("[L]egislative inaction permits activity by courts, including extension of rules and principles originating in legislation.").

177. *Cf.* Gluck, *Intersystemic*, *supra* note 9, at 1990 (arguing that in a post-*Erie* world, statutory interpretation methodology is law because "a sovereign's court chooses to apply them, not because they are ready to be plucked from the sky.").

178. The resulting methodologies in Texas and Connecticut could also be classified not as statutory interpretations but as the "gap-filling form of 'common law' arising out of statutory vagueness or ambiguity." Pojanowski, *supra* note 4, at 496. Whether the methodologies are more precisely common law or statutory interpretations does not, however, change their status as "law," especially since either can be supervened by ordinary legislation.

179. *See supra* notes 63–69.

treat their respective interpretive methodologies as state common law.[180] And they have every right to do so. As Pojanowski notes, a state court exercises a "prerogative form of common lawmaking" when "the legislature has not spoken at all."[181]

B. State Statutory Interpretation Methodology as Substantive and Procedural

To say that statutory interpretation methodology is "law" for horizontal choice-of-law purposes does not, however, get us across the finish line. Neither the Constitution nor any of the various choice-of-law regimes require that the entirety of a foreign state's law must apply in the forum court, even when the forum's choice-of-law considerations require that the foreign state's law governs. For example, renvoi (the practice of a forum court applying a sister state's choice-of-law principles) is largely disfavored,[182] and likewise, many state courts will not apply another state's burden shifting rules[183] or survival statutes.[184] This is because the Constitution requires only that states accord full faith and credit to a sister state's substantive but not procedural law.[185] And indeed, tracking this constitutional floor, under no circumstances would a horizontal choice-of-law regime compel a forum court to apply a sister state's procedural law. Stated positively, the forum always gets to abide by its own procedures. State courts, then, are not required to apply a sister state's burden shifting

180. Courts in Kansas and Nebraska cite and apply rules of statutory construction from prior cases in much the same way that courts with formalized methodologies do. *See supra* notes 88–95 and accompanying text.

181. Pojanowski, *supra* note 4, at 496–97.

182. *See, e.g.*, Milkovich v. Saari, 203 N.W.2d 408, 415 (Minn. 1973) (calling renvoi a "manipulative technique"); Clark v. Clark, 222 A.2d 205, 209 (N.H. 1966) (same); Haumschild v. Cont'l Cas. Co., 95 N.W.2d 814, 820 (Wis. 1959) ("The reason why the authorities on conflict of laws almost universally reject the renvoi doctrine (permitting a court of the forum state to apply the conflict of laws principle of a foreign state) is that it is likely to result in the court pursuing a course equivalent to a never ending circle."); *see also* Lea Brilmayer & Charles Seidell, *Jurisdictional Realism: Where Modern Theories of Choice of Law Went Wrong, and What Can Be Done to Fix Them*, 86 U. CHI. L. REV. 2031, 2093 (2019) ("The doctrine of renvoi, which allows the use of a state's choice-of-law rule to determine whether its law should be applied, is rejected by virtually all of the major theories of choice of law."); Ernest G. Lorenzen, *The Renvoi Theory and the Application of Foreign Law*, 10 COLUM. L. REV. 327, 344 (1910) ("The *renvoi* doctrine is . . . no part of the Conflict of Laws of the United States.").

183. *See, e.g.*, Chambers v. Dakotah Charter, Inc., 488 N.W.2d 63, 68 (S.D. 1992). *But see* O'Leary v. Ill. Terminal R.R., 299 S.W.2d 873, 877 (Mo. 1957) (applying Illinois's contributory negligence rule out of comity because Illinois characterized contributory negligence as bound up with the right itself).

184. *See, e.g.*, Grant v. McAuliffe, 264 P.2d 944, 949 (Cal. 1953).

185. Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988) ("[A state] may apply its own procedural rules to actions litigated in its courts.").

rules, survival statutes, and choice-of-law regime insofar as each has been characterized as procedural law in the choice-of-law context.

Therefore, to determine whether statutory interpretation methodology is the kind of law that should be subject to horizontal choice-of-law considerations, we must answer an additional question: Is state statutory interpretation methodology substantive or procedural? In short, "yes." While debates abound as to how exactly the substance-procedure line should be drawn,[186] almost all courts and commentators to consider the question agree on one thing—drawing that line is context dependent.[187] This raises the distinct possibility that a certain law is procedural in one context and substantive in another.[188] Such is the case for state statutory interpretation methodology. I argue in this Section that state statutory interpretation methodology is procedural for constitutional purposes but substantive in the horizontal choice-of-law context.

1. Procedural Under the Constitution

The primary constitutional provisions that regulate a state's horizontal choice of law are the Full Faith and Credit Clause and the Due Process Clause.[189] Doctrinally, the Supreme Court has collapsed the Due Process inquiry into the Full Faith and Credit Clause inquiry when determining if a state has made an impermissible choice of law.[190] Following the Court's lead, I therefore treat those Clauses as one in the same for purposes of this Article.

State statutory interpretation methodology should be characterized as

186. For a sampling of the more recent literature on the substance-procedure distinction, see, for example, Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801 (2010); Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013 (2008); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004).

187. *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 471 (1965) ("The line between 'substance' and 'procedure' shifts as the legal context changes."); Joseph Scott Miller, *Substance, Procedure, and the Divided Patent Power*, 63 ADMIN. L. REV. 31, 35 (2011) ("Procedure and substance are protean concepts; they 'carry no monolithic meaning at once appropriate to all the contexts in which courts have seen fit to employ them.'" (quoting Ely, *supra* note 149, at 724)); Thomas Fitzgerald Green, Jr., *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?*, 26 A.B.A. J. 482, 483 (1940) ("The answer to the question, 'What is procedure?' depends upon the answer to another question, 'Why do you want to know?'").

188. *See, e.g.*, Sampson v. Channell, 110 F.2d 754, 754 (1st Cir. 1940) (classifying contributory negligence as substantive under *Erie* but procedural for choice of law).

189. Additionally, the Commerce Clause, Equal Protection Clause, and Privileges and Immunities Clause "are of potential relevance to modern choice-of-law theory" but have not yet been used to limit horizontal choice of law in any meaningful way. BRILMAYER ET AL., *supra* note 42, at 296.

190. *See Sun Oil Co.*, 486 U.S. at 729 n.3.

procedural law under the Full Faith and Credit Clause. But this classification goes beyond the mere prescriptive. It's also a descriptive account of how state and federal courts have treated it. To start, no state court to date has precluded itself, on federal constitutional grounds, from using its own statutory interpretation methodology to interpret another state's statute. When a state court has applied a sister state's interpretive methodology to interpret a sister state statute, it has done so based on policy or "logic"—not because the court believed it was so constitutionally obliged.[191] To be sure, if we assume that state courts would rather apply their own statutory interpretation methodologies than that of another state, it's certainly in the state courts' interest to avoid asking the constitutional question in the first place.[192]

But the Supreme Court has not questioned the constitutionality of a state applying its own statutory interpretation methodology to a sister state statute under the Full Faith and Credit Clause either. Like the state courts, the Supreme Court's allowing this practice is implicit, as the Court has not squarely addressed whether state statutory interpretation is procedural under the Constitution. The Court's decision in *Sun Oil Co. v. Wortman*,[193] however, provides good reasons to believe that it is.

In the state court decision that led to *Sun Oil Co.*, the Kansas Supreme Court applied Kansas's statutes of limitations to hear actions that would have been time barred under the statutes of limitations in Texas, Oklahoma, and Louisiana, whose substantive laws provided the rules of decision.[194] The Supreme Court held that the Constitution did not prohibit Kansas from applying its own statutes of limitations to sister state statutes because a forum court is not required to apply another state's procedures under the Full Faith and Credit Clause.[195] The Court reached that result because statutes of limitations were considered procedural for choice-of-law purposes at the Founding and had been uniformly recognized as such until fairly recently.[196]

The methodology that the Court used to classify statutes of limitations as procedural in *Sun Oil Co.* likely leads to that same classification for statutory interpretation methodology. Justice Scalia's majority opinion

191. *See supra* subsection II.B.1.

192. *See supra* subsection II.B.2 (explaining that many courts apply their own statutory interpretation methodologies when interpreting sister state statutes without asking either the choice-of-law or constitutional question).

193. 486 U.S. 717 (1988).

194. *Id.* at 719.

195. *Id.* at 723.

196. *Id.* at 726.

was based on a blend of originalism and traditional practice. The former "maintains both that constitutional text means what it did at the time it was ratified and that this original public meaning is authoritative,"[197] and the latter is a method of constitutional interpretation that places "great weight" on "[l]ong settled and established practice."[198] Analyzing the issue in *Sun Oil Co.* through both lenses, Justice Scalia observed—in language directly relevant to the statutory interpretation question—that

> long established and still subsisting choice-of-law practices that come to be thought, by modern scholars, unwise, do not thereby become unconstitutional. If current conditions render it desirable that forum States no longer treat a particular issue as procedural for conflict of laws purposes, those States can themselves adopt a rule to that effect, or it can be proposed that Congress legislate to that effect under the second sentence of the Full Faith and Credit Clause. It is not the function of this Court, however, to make departures from established choice-of-law precedent and practice constitutionally mandatory.[199]

As with statutes of limitations, traditionally, statutory interpretation methodology has been regarded as procedural law. While the *Restatement (First) of the Conflicts of Law* was published well after the Founding, it codified the traditional choice-of-law approach used at the Founding.[200] Though technically silent on whether statutory interpretation methodology is substantive or procedural, it does provide that "[t]he court at the forum determines according to its own Conflict of Laws rule whether a given question is one of substance or procedure,"[201] and further that "[a]ll matters of procedure are governed by the law of the forum."[202] Looking also to traditional practice, if courts historically applied their own interpretive methodologies to interpret sister state statutes, that would be strong evidence that it is procedural under the Constitution. And until the few recent examples discussed above,[203] that's exactly what state courts did, even if due mostly to "the historical conceptualization of statutory

197. Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1921 (2017).

198. N.L.R.B. v. Noel Canning, 573 U.S. 513, 524 (2014) (alteration in original) (quoting Okanogan, Methow, San Poelis (or San Poil), Nespelem, Colville, & Lake Indian Tribes v. United States, 279 U.S. 655, 698 (1929)).

199. *Sun Oil Co.*, 486 U.S. at 728–29 (citations omitted).

200. *Cf.* Borchers, *supra* note 44, at 1232 (noting that the *First Restatement* "represented a synthesis of a stable . . . multilateral choice-of-law system whose American roots dated at least to Justice Story's 1834 treatise, and whose European ancestry predated Story by centuries.").

201. FIRST RESTATEMENT, *supra* note 22, § 584.

202. *Id.* § 585.

203. *See supra* subsection II.B.1.

interpretation methodology as universal."[204] Admittedly, to the extent that interpretive methodology was a matter of general law, interpretive methodology would have been understood to be universal, such that no interstate interpretive conflicts would have arisen.[205]

Perhaps a better reason to think that statutory interpretation methodology was historically regarded as procedural law has to do with the historical conception of foreign law as a matter of fact. A state court applying foreign law—both international law and sister state law—would find the content of foreign law just as it would find any other fact.[206] In doing so, a state court would apply its own law of evidence and procedure.[207] In this respect, interpretive methodology could be understood as one aspect of a state's local law of procedure, or evidence more specifically. A state would use its own interpretive methodology to determine the "fact"—i.e., the meaning—of foreign law.[208] The Full Faith and Credit Clause has never been interpreted to require a state to apply a sister state's evidentiary law because evidentiary law is not substantive. Because interpretive methodology, as a historical matter, was one of the evidentiary tools a court would use to determine the content of sister state law, it is rightly regarded as procedural law under the Full Faith and Credit Clause, not substantive law.

Bolstering this assessment is the fact that the revival of the field of statutory interpretation did not begin until the late 1970s,[209] and scholars began to suggest that interpretive methodology is substantive even more recently.[210] Of course, as Justice Scalia points out, states are free, as a matter of policy, to treat something that has been known as procedural law as substantive for choice-of-law purposes. There is thus no constitutional reason to prohibit states from classifying state statutory interpretation methodology however they like in the horizontal choice-of-law context. But the overall point remains this: how states classify statutory interpretation methodology today has no bearing on its constitutional

204. Gluck, *Intersystemic*, *supra* note 9, at 1987–88. That is, the mere possibility of distinctive statutory interpretation methodologies "never entered the minds of the Founders or of the Justices who decided *Erie*." *Id.* at 1988.

205. *See* Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921, 942 (2013).

206. Aaron-Andrew P. Bruhl, *Solving Statutory Interpretation's* Erie *Problem*, 98 NOTRE DAME L. REV. (forthcoming).

207. *Id.*

208. Thanks to Aaron Bruhl for helping to clarify this point.

209. See Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 241–42 (1992).

210. *See* Gluck, *Intersystemic*, *supra* note 9, at 1980–82; Hart, *supra* note 97, at 1833–34.

classification, which, given the historical practice, almost certainly is procedural.

The Court decided a second issue in *Sun Oil Co.* that likewise touches on the statutory interpretation question. The petitioner challenged, on constitutional grounds, the Kansas Supreme Court's statutory constructions of the interest rate statutes of Texas, Oklahoma, and Louisiana.[211] The Court rejected the petitioner's arguments, explaining that

> [t]o constitute a violation of the Full Faith and Credit Clause or the Due Process Clause, it is not enough that a state court misconstrue the law of another State. Rather, our cases make plain that the misconstruction must contradict law of the other State that is clearly established and that has been brought to the court's attention.[212]

One could argue that this holding in fact makes statutory methodology substantive. The argument goes like this: If a state court's statutory interpretation methodology could lead a forum to interpret a sister state's law in a way that violates the clearly established law of the sister state, then a forum's application of its own statutory interpretation methodology could violate the Full Faith and Credit Clause. Because a state can violate the Full Faith and Credit Clause only by applying its own substantive but not procedural law, statutory interpretation methodology must be substantive under the Constitution.

Clever, sure—but *Sun Oil Co.* does no such thing. Instead, it merely affirms what has always been true of the Full Faith and Credit Clause: a state cannot ignore the "judicial proceedings of every other state."[213] If another state's law is clearly established, then statutory interpretation is not needed at all. A state court needs to interpret an out-of-state statute only if the enacting state's high court has not previously construed the statute in a way that is dispositive for the pending case. If the enacting state's high court has, that interpretation controls in all other state courts as a matter of substantive law, and no further statutory interpretation by the forum court is necessary. At least for constitutional purposes, then, statutory interpretation methodology remains procedural.

211. Sun Oil Co. v. Wortman, 486 U.S. 717, 717 (1988).

212. *Id.* at 730–31.

213. U.S. CONST., art. IV, § 1.

2. Substantive Under Choice-of-Law Considerations

Assuming that state courts *can* treat state statutory interpretation methodology as substantive law, the question is whether they *should*. Just as constitutional precedent informed the Full Faith and Credit Clause characterization, the choice-of-law context must inform state statutory interpretation methodology's characterization for choice-of-law purposes. Given that all horizontal choice-of-law regimes are silent on how it should be classified, analogies to the vertical choice-of-law context are particularly apt for answering this question.

Abbe Gluck has made a compelling argument that state statutory interpretation methodology is substantive under *Erie*[214]—and her analysis is just as cogent when applied to the horizontal choice-of-law context.[215] She begins by distinguishing between substance and procedure in the choice-of-law context as Justice Harlan, and later John Hart Ely, did: substantive rules "affect conduct at the stage of 'primary private activity,' and procedural rules . . . relate to 'the fairness or efficiency of the litigation process.'"[216] It's easy enough to see why, for example, rules of contract interpretation are substantive under this definition. The parties' expectations about how the contract would be interpreted, though manifested through the exclusion of certain kinds of evidence in court, have an "effect on the conduct of contracting parties outside the courtroom."[217] Gluck argues that the same is true of statutory interpretation rules. "Just as contracting parties, before acting, seek legal advice concerning whether proposed behavior is consistent with their contractual obligations, other parties seek legal advice on countless statutory questions."[218]

The most challenging statutory questions, those relevant here, are ones in which the language is ambiguous—those in which a lawyer must predict how a court will interpret the statute.[219] In making that prediction, the

214. Technically, as Gluck notes, classifying statutory interpretation methodology as substantive or procedural for *Erie* purposes "applies only when courts must determine whether an enacted federal rule or statute can displace state law." Gluck, *Intersystemic*, *supra* note 9, at 1924. "Nevertheless," Gluck continues, "for many judges *Erie* is (as understood at a high level of generality) about substance and procedure," giving Gluck a reason to consider whether state statutory interpretation methodology is substantive or procedural in the choice-of-law context. *Id.*

215. *See id.* at 1980–85.

216. *Id.* at 1981 (first quoting Hanna v. Plumer, 380 U.S. 460, 475 (1964) (Harlan, J., concurring); and then quoting Ely, *supra* note 149, at 725).

217. AM Int'l, Inc. v. Graphic Mgmt. Ass'n, 44 F.3d 572, 576 (7th Cir. 1995).

218. Gluck, *Intersystemic*, *supra* note 9, at 1981.

219. *Id.*

lawyer must look to the statutory interpretation methodology of the relevant state.[220] The lawyer's interpretation and counsel—informed by that methodology—will affect her client's primary conduct.[221] Because statutory interpretation methodology thus affects primary conduct, it should be considered substantive law for choice-of-law purposes.[222] Moreover, state interpretive methodology necessarily affects primary conduct *before* the potentially ambiguous statute is litigated. Therefore, the above analysis applies the same regardless of whether a subsequent lawsuit is litigated in federal or state court. That is, Gluck's analysis is just as relevant to the horizontal choice-of-law context as it is for *Erie* purposes.

Whether or not a state court or legislature buys these theoretical arguments, it may still choose to recognize that its state's statutory interpretation methodology is substantive in the choice-of-law realm for purely policy-based reasons. A state legislature may, for example, seek to have sister state courts interpret its statutes in the same way that its home state courts do by legislating that its state's statutory interpretation methodology is part of its substantive law. Similarly, a state court may wish to formalize its interpretive regime by declaring that its interpretive methodology is substantive as a matter of common law. In *Sun Oil Co.*, the Court specifically stated that states may reclassify those types of law historically thought to be procedural as substantive: "If current conditions render it desirable that forum States no longer treat a particular issue as procedural for conflict of laws purposes, those States can themselves adopt a rule to that effect."[223] So, while there's a strong case to be made that state statutory interpretation methodology is essentially substantive law for choice-of-law purposes—this in spite of the historical assumption that it was procedural—states can solidify interpretive methodology's classification as substantive law through an act of legislation or through common lawmaking. While perhaps unnecessary if the state-interpretive-methodology-as-substantive-law theory is widely accepted, should a state declare that its interpretive methodology is substantive in its posited law,

220. It's worth noting that a lawyer would look to the relevant state's statutory interpretation methodology even if the relevant state did not consider its own methodology to be "law."

221. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66 (1994) ("An interpretive regime tells lower court judges, agencies, and citizens how strings of words in statutes will be read, what presumptions will be entertained as to statutes's scope and meaning, and what auxiliary materials might be consulted to resolve ambiguities.").

222. *See* 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.").

223. Sun Oil Co. v. Wortman, 486 U.S. 717, 729 (1988).

that declaration would clearly resolve the substance-procedure debate, at least in the choice-of-law context.

To summarize thus far, state statutory interpretation methodology is law. It is law in a few different senses, just as other kinds of law are. It is either state common law, state statutory law—or both. And like other kinds of state common law or statutory law, state statutory interpretation methodology is substantive or procedural—or, more precisely, both.

IV. STATE STATUTORY INTERPRETATION AND CHOICE OF LAW

Yet the question remains. When one state's court interprets the statute of another state, whose statutory interpretation methodology controls? On the basis of the preceding theoretical analysis, the inevitable conclusion is that state statutory interpretation methodology, like other species of conflicting substantive law, should be subject to each state's choice-of-law rules. Thus, whether a state court must apply the statutory interpretation methodology of a sister state turns on the rules of and policies underlying the forum's choice-of-law regime. In theory, then, states adhering to different choice-of-law approaches could reach different answers to this intersystemic interpretation question. But as this Part outlines, as applied, each of the dominant choice-of-law regimes used today points to the same outcome—that state courts should apply the statutory interpretation methodology of the state that enacted the statute.

A. Traditional Approach

Recall that the traditional approach, codified by the *First Restatement*, is most concerned with territoriality and sovereignty.[224] Under this theory, a legal right "vests" at a specific point in time. The forum court must decide when the legal right vested and apply the substantive law of that state, a rule most exemplified by the *lex loci delicti* doctrine in torts.[225] Part of the *First Restatement*'s allure is its simplicity,[226] and its application to the law of statutory interpretation methodology is no different. The state in which a plaintiff's legal right vests should provide the substantive

224. *See supra* Section I.A; *see also* Richman & Riley, *supra* note 18, at 1197 ("[T]he only law that could operate in a foreign territory [is] the law of the foreign sovereign.").

225. *See supra* sources cited in note 23 and accompanying text.

226. *See* Paul v. Nat'l Life, 352 S.E.2d 550, 554 (W. Va. 1986) ("[The *Second Restatement*] sounds pretty intellectual, but we still prefer a rule. The lesson of history is that methods of analysis that permit dissection of the jural bundle constituting a tort and its environment produce protracted litigation and voluminous, inscrutable appellate opinions, while rules get cases settled quickly and cheaply.").

law—statutory interpretation methodology included—regardless of whether the lawsuit is brought in that state or a sister state's court. To illustrate briefly, assume a plaintiff suffered a legal injury in tort in state *A* pursuant to a state *A* statute. Assuming state *B* adheres to the *First Restatement*, the state *B* court interpreting state *A*'s statute should use state *A*'s statutory interpretation methodology in doing so.

This result is compelled by simple application of *lex loci delicti*—the law of the place of the harm, state *A*, controls. Unsurprisingly then, application of a sister state's statutory interpretation methodology also advances the traditional approach's territoriality and sovereignty underpinnings. A state court that applies a sister state's interpretive methodology gives effect not only to the statute itself but also, presumably, to what that law definitively *means* within the borders of the enacting state. Indeed, as the traditional approach's seminal case explains, the "only true doctrine is that each sovereignty, state or nation, has the exclusive power to finally determine and declare what act or omissions in the conduct of one to another . . . shall impose a liability in damages for the consequent injury."[227] Operating upon this assumption, what could be more respectful of a sister state's sovereignty than asking not only what a sister state statute says but also how that state's courts would understand and apply it?

Additionally, the *Carroll* court links this sovereignty concern with territoriality: "[T]he conduct of such persons towards each other is, when its legality is brought in question, to be adjudged by the rules of the one or the other state, as it falls territorially within the one or the other."[228] In other words, a state has the right to control people and things within its borders. If the forum applies its own interpretive methodology to render an interpretation that the enacting state's courts would not, then the territoriality concern would be disserved. Unable to say how the statute should apply to an event that occurred within its borders, the enacting state would lose some aspect of its control over domestic events. Moreover, the traditional approach emphasizes territoriality in part to ensure an identical outcome no matter where the suit is litigated.[229] To the extent that varying statutory interpretation methodologies could give rise to divergent (and potentially outcome-determinative) interpretations, applying forum methodology to a sister state's statute cuts sharply against

227. Ala. Great S. R.R. Co. v. Carroll, 11 So. 803, 808–09 (Ala. 1892).

228. *Id.* at 808.

229. *See* Lauritzen v. Larsen, 345 U.S. 571, 591 (1952) ("The purpose of a conflict-of-laws doctrine is to assure that a case will be treated in the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum.").

the *First Restatement*'s respect for territoriality.

Therefore, the black letter law and animating principles of the traditional choice-of-law approach point in the same direction. When a state court that adheres to the traditional approach interprets another state's statute, it should apply the statutory interpretation methodology of the enacting state's courts.

B. Second Restatement

The *Second Restatement* inquiry looks a lot different. Whereas the traditional approach is blind to a state's policy interests with respect to individual cases or laws,[230] the *Second Restatement* combines the presumption of territoriality with a six-factor "most significant relationship" balancing test.[231] The *Second Restatement*, like all the choice-of-law regimes to come before it, does not specifically address statutory interpretation methodology as it does for torts and contracts.[232] When no statutory provision is on point, "the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems" and six policy-oriented factors.[233] *Second Restatement* jurisdictions give weight to the territoriality presumption and the section 6 factors in widely divergent ways.[234]

As with other kinds of conflicting law, perhaps *Second Restatement* jurisdictions won't agree on how to treat state statutory interpretation methodology. On the intersystemic interpretation question more broadly, Jeff Pojanowski has keenly observed that "[g]iven th[e] complexity . . . [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."[235] That's certainly true, and the "flabby, amorphous, and sterile" nature of the *Second Restatement* only compounds the potential for inconsistency.[236] But equally true is that "theoretical complexity is not always a sign of error."[237] We may have to settle for doctrinal uncertainty on the ground, but that does not mean that theoretical consensus—even

230. Save for the public policy exception. *See* FIRST RESTATEMENT, *supra* note 22, at § 612.
231. *See supra* Section I.B.
232. *See* SECOND RESTATEMENT, *supra* note 39, §§ 145, 188.
233. *Id.* § 6(2)(a).
234. *See supra* note 44 and accompanying text.
235. Pojanowski, *supra* note 4, at 541.
236. CRAMTON ET AL., *supra* note 38, at 300.
237. Pojanowski, *supra* note 4, at 528.

within as complex a framework as the *Second Restatement*—is not possible.

As applied to state statutory interpretation methodology, the *Second Restatement* should lead to the conclusion that states should apply the interpretive methodology of the enacting state's courts. Of the six section 6 factors, only two plausibly point toward applying the forum's interpretive methodology to sister state statutes: "(b) the relevant policies of the forum" and "(g) ease in the determination and application of the law to be applied."[238] As to (g), the forum will be much more familiar with its state's interpretive approach than that of another state, so ease of application will always point toward applying forum methodology.

Weighing section 6(b) is more complicated. *Second Restatement* courts must wrestle with the reality that a state's choice of statutory interpretation methodology—as a species of state common law or statutory law—is based on policy considerations or, at the very least, has certain policy ramifications. Thus, the reasons a state chooses say textualism over purposivism are relevant to the choice-of-law inquiry. A forum with a deeply ingrained interpretive approach—like Texas, which has a staunch commitment to textualism—may therefore have special reason to argue that its textualist methodology should control, especially when faced with the prospect of applying a sister state's purposivist methodology. But this won't always be the case, as the particularities of a state's interpretive approach may vary. If a statute specifies, for example, that "the acts of *this state* should be interpreted according to their purpose," that statute says nothing about how the forum court is to interpret statutes from *other* states.[239]

This analysis is complicated further by section 6(c), under which courts consider "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue."[240] Weighing (b) against (c) leads to the possibility that states without mandatory interpretive schemes might have their statutory interpretation methodologies applied less often than states that give stare decisis effect to their interpretive methodologies. All state statutory interpretation methodology is "law," yes. But how a state treats its own interpretive methodology matters for the *Second Restatement* balancing test. States with less of a pronounced commitment to their methodologies may have less of an argument that their interpretive methodologies

238. SECOND RESTATEMENT, *supra* note 39, § 6(2)(b), (g).

239. *See* Bruhl, *supra* note 206, at 31–32.

240. SECOND RESTATEMENT, *supra* note 39, § 6(2)(c).

constitute a strong forum policy. Similarly, under (c), foreign courts must determine (1) the policies underlying the enacting state's choice of interpretive methodology, and (2) that state's interest in having its methodology used to interpret its statutes. If the enacting state's courts have a malleable or even nonmandatory approach to statutory interpretation, the sister state court will be less likely to find that the enacting state has a strong policy interest in how its statutes are interpreted.

But consider also that the policies that motivate a particular interpretive approach will not always support a strong interest in having that methodology apply in sister state courts. If, for example, a state bars legislative history because it thinks that using legislative history expends too many judicial resources, the reason it bars legislative history is specific to that state's courts. A sister state court might not face the same procedural constraints in using legislative history. On the other hand, if a state bars legislative history because it thinks that "the text is the law," then that purpose would cut in favor of applying the enacting state's interpretive methodology. The point is that under section 6(b) and (c), the *reasons* that a state court adheres to a particular interpretive methodology are relevant to the choice-of-law analysis—just as the reasons that a state adopts any other substantive law factor into the analysis under the *Second Restatement*.

Regardless of the reasons a state chooses one interpretive approach over another or whether it considers that approach binding precedent, the weight of the remaining factors more clearly tips the scales in favor of applying the interpretive methodology of the enacting state's courts. As discussed above, statutory interpretation methodology affects primary behavior.[241] One of the section 6 factors also touches on primary behavior—namely, that courts are to consider "(d) protection of justified expectations."[242] A person has a justifiable expectation that the law of the state that governs his actions will be applied by the courts of that state. While potential litigants must be aware that lawsuits arising under one state's laws can be litigated in any court of competent jurisdiction, predicting how the enacting state's courts would interpret an arguably ambiguous statute is the most natural touchpoint for planning primary behavior. Without assuming that the enacting state's interpretive methodology would control, potential litigants would need to predict how the statute would apply in as many as fifty state courts and potentially

241. *Supra* subsection II.B.2.

242. SECOND RESTATEMENT, *supra* note 39, § 6(2)(d).

federal court. Protecting justified expectations points toward applying the statutory interpretation methodology of the enacting state—that most reasonably used by the litigant to define his statutory obligations in the first place.

Relatedly, like the *First Restatement*, the *Second Restatement* values "(f) certainty, predictability and uniformity of result."[243] Predictability and uniformity are served, and potential litigants would be more justified in their expectations, if the courts of every state interpreted a statute using the same statutory interpretation methodology. The most obvious methodology to use is that of the state where the statute originated. This also avoids the possibility of courts applying divergent statutory interpretation methodologies to reach conflicting interpretations of the same statute—an unfortunate consequence wherein similarly situated litigants could be subjected to statutory requirements that vary by state.

Lastly, courts are to consider "(e) the basic policies underlying the particular field of law."[244] Thanks to amplified scholarly attention in recent decades, courts and scholars have come to identify basic policies that pervade the field of statutory interpretation. Central to the field is the notion that the goal of statutory interpretation is to give effect to the legislature's intent[245]—a goal shared by purposivists and textualists alike.[246] In interpreting state statutes, it is the intent of the state legislature

243. *Id.* § 6(2)(f).

244. *Id.* § 6(2)(e).

245. Much of the scholarship addressing statutory interpretation focuses on the federal courts. While not explored in this Article, it's possible that state-level statutory interpretation could lead to a different motivating principle. *See* Pojanowski, *supra* note 171, at 1400 ("[T]he classical common lawyers' approach to legislation often resembled modern arguments that judges can update or reinterpret outmoded statutes in light of contemporary public values."). Despite this possibility, state courts of various methodological stripes have assumed that their task in interpreting state statues mirrors that of the federal courts: to give effect to the legislature's intent. *See, e.g.*, Gunn v. McCoy, 554 S.W.3d 645, 672 (Tex. 2018) ("Our primary goal in statutory construction is to give effect to the Legislature's intent. We rely on the plain meaning of the text as expressing legislative intent unless a different meaning is supplied by legislative definition or is apparent from the context, or the plain meaning leads to absurd results." (citations omitted)); Williams v. City of New Haven, 186 A.3d 1158, 1163 (Conn. 2018) ("'When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature.' . . . If, however, when considered in relation to other statutes, the statutory text at issue 'is susceptible to more than one plausible interpretation,' we may appropriately consider extratextual evidence." (alteration in original) (first citing Perez-Dickson v. Bridgeport, 43 A.3d 69, 69 (Conn. 2012); and then citing Lackman v. McAnulty, 151 A.3d 1271, 1277 (Conn. 2016))).

246. *See, e.g.*, Richard H. Fallon Jr., *Three Symmetries between Textualist and Purposivist Theories of Statutory Interpretation—And the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 686–87 (2014) ("'Purposivist' theories demand that judges [act as faithful agents of the legislature] by deciding statutory cases in accordance with the purpose or intent of the legislature. 'Textualist' theories agree, and sometimes affirm even more ardently, that judges should

that must be effectuated. State legislatures might reasonably expect their statutes to be interpreted primarily by their state's courts. Indeed, their state's courts are the only ones that can say definitively what the statute means. Therefore, in consideration of the policies underlying statutory interpretation, any court interpreting a state statute should do so in light of the environment in which the enacting state's legislature passed the law. What better way to do so than by using the statutory interpretation methodology of the enacting state's courts?

On balance, the overwhelming weight of the *Second Restatement*'s section 6 factors lead to the same conclusion reached under the *First Restatement*: state courts should apply the statutory interpretation methodology of the state that enacted the statute under consideration. This analysis is not exhaustive, however. State courts that employ other choice-of-law regimes—for example, "better law" or interest analysis jurisdictions—would need to evaluate conflicts regarding statutory interpretation methodology under their respective choice-of-law approaches.[247]

V. IMPLICATIONS

If multiple states, or perhaps even one, adopt the approach to conflicting statutory interpretation methodology that I offer above, that choice could have effects beyond the statutory interpretations rendered in any given state. The implications of tying statutory interpretation methodology to choice of law should not necessarily factor into a court's decision to adopt the approach I offer. Nonetheless, given the many moving pieces of our federalist system, it's worth considering the potential effects on judicial decisionmaking at both the state and federal levels should a state adopt the above approach as a matter of state law.

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strive to exclude their own values from the interpretive process."). While purposivists and textualists both agree that legislative intent should guide statutory interpretation, they differ in their views on the nature of legislative intent, a difference that leads to divergent statutory interpretation inquiries. *See* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424 (2005) ("[W]hereas intentionalists believe that legislatures have coherent an identifiable but unexpressed policy intentions, textualists believe that the only meaningful collective legislative intentions are those reflected in the public meaning of the final statutory text.").

247. A quick interest analysis shows that it also likely points in the same direction as the analysis under the *First* and *Second Restatements*, at least in many circumstances. Consider, for example, a state that rejects the use of legislative history because it violates that state's constitutional structure. Should that state interpret a statute from a state that does use legislative history, that would present a false conflict: the forum's policy against legislative history does not apply since its state constitution is not implicated by the sister state's statute. The forum would thus apply the sister state's interpretive methodology that allows the use of legislative history.

A. State Courts

The most obvious effect is that when statutory interpretation methodologies conflict, a state court would decide which methodology to use by subjecting that choice to its preexisting choice-of-law regime. As we've seen, at least in traditional and *Second Restatement* jurisdictions, that means applying the interpretive methodology of the enacting state's courts. This principled approach, as compared to the ad hoc approaches currently employed by state courts, would increase predictability in the law, giving actual and potential litigants a better sense of a statute's meaning before a court interprets it.

Additionally, if state courts know that their interpretive methodology might be applied in other states, state courts (and legislatures) would be incentivized to adopt a uniform statutory interpretation methodology and to explain it as clearly as possible. The more precise the methodological formulation, the more likely a sister state accurately applies it, and vice versa. Even more to the point, a state court or legislature could remove any doubt as to what its statutory interpretation methodology requires by giving it formal stare decisis treatment.

To see why this is the case, consider how horizontal choice of law works on the ground. A party seeking to apply state *B* law in state *A* court under state *A*'s choice-of-law approach must plead and prove the content of state *B* law.[248] Under general burden of persuasion and choice-of-law principles, if a forum court is not convinced that the party has met its burden of proving the content of the sister state's law—because state *B*'s law is sufficiently unclear or unsettled—then state *A* can resort to applying forum law. As "law," conflicts involving statutory interpretation methodology would work the same way: "[T]he rules of the state in which the statute was enacted should be followed if they have been pleaded and proved."[249] One way for states to ensure that their interpretive methodology is followed in sister state courts is to make them easy to identify. No one questions where to look for Oregon's approach; Nebraska and Kansas are trickier. A litigant seeking to apply Nebraska's purposivist (yet sometimes textualist) methodology, for example, faces a greater probative challenge than a litigant seeking to apply Oregon's *Gaines* methodology. For this reason, in addition to the reasons implicated

248. *See* 1 DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS 318 (15th ed. 2012) ("In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.").

249. 2 SUTHERLAND STATUTORY CONSTRUCTION § 37:5 (7th ed.) (Westlaw 2020).

by the *Second Restatement* inquiry,[250] a uniform and mandatory statutory interpretation methodology is the most likely approach to be applied by out-of-state courts.

What's interesting is that if a state adjusts or clarifies its interpretive approach because another state might apply it, the benefits for that state's citizens, from a notice perspective, are twofold. Not only will that state's residents know what their state law means in other states (at least those tying interpretive methodology to choice of law), but they will have a much better sense of how their own state courts will interpret the law. And while state courts apply out-of-state law all the time, it remains true that they most often apply their own state's law. Therefore, should one or more states adopt the approach I propose above, more states might clean up their otherwise undefined or inconsistent approaches to statutory interpretation methodology, a move that would bring predictability and consistency to both in- and out-of-state interpretations of their statutes.

B. Federal Courts

Federal courts would face a novel question under *Erie* if a state court, as a matter of law, subjected its choice of statutory interpretation methodology to its choice-of-law regime. Applying *Erie* to state choice of law, the Court in *Klaxon* held that federal courts exercising diversity jurisdiction are to apply the choice-of-law rules of the state in which the federal court sits, because choice of law is substantive under *Erie*.[251] So, if a state's choice-of-law rules require that conflicts regarding statutory interpretation methodology are to be resolved by its normal choice-of-law regime, must a federal court apply the state law as such? It would certainly seem so. As one commentator has observed, pursuant to *Erie* and *Klaxon* "federal court[s] should not be free to disregard a state's definition of the scope of its law, [including if] that definition is accomplished through . . . choice-of-law rules."[252] That is, under *Erie*, federal courts must apply a state's law as that state's courts interpret or promulgate it.[253] This includes, presumably, a state's choice to subject its choice of statutory interpretation methodology to its normal choice-of-law regime.

In light of this analysis, consider how a federal court sitting in

250. *See supra* Section IV.B.

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

252. Kermit Roosevelt III, *Choice of Law in Federal Courts: From* Erie *and* Klaxon *to* CAFA *and* Shady Grove, 106 NW. U. L. REV. 1, 20 (2012).

253. *Cf.* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 535 (1958) ("[F]ederal courts . . . must respect the definition of state-created rights and obligations by the state courts.").

diversity should interpret a state statute. The federal court would first need to decide whether the choice-of-law rules of the state in which it sits require the state courts to use a particular state's statutory interpretation methodology. If the state's choice-of-law regime would have it apply, say, a sister state's interpretive methodology, the federal court—as a simple application of *Klaxon*—would need to interpret the statute according to that state's methodology. Indeed, a federal court that ignores a state's choice-of-law rules—including rules that subject choice of statutory interpretation methodology to choice-of-law analysis—"is not really applying the law of that state."[254]

Such a result also seemingly advances *Erie*'s twin aims of discouraging forum shopping and avoiding inequitable administration of the laws.[255] The federal court's statutory interpretation would be based on the same interpretive methodology that the state court would have used had the suit been litigated in state court rather than federal court. If the federal court were to ignore a state's choice-of-law rules, choosing instead to apply federal statutory interpretation principles, it's possible that the state and federal courts could reach conflicting interpretations of the state law—a result that the *Erie* doctrine is aimed at preventing.

Doctrinally, this outcome makes sense, though it is accompanied by a tinge of irony. *Klaxon* held that state choice of law is substantive law and that federal courts must apply it under *Erie*. And as I've shown, this likely means that a federal court exercising diversity jurisdiction should apply the statutory interpretation methodology dictated by the choice-of-law rules of the state in which it sits—at least if the state's choice-of-law rules are used to resolve conflicts regarding interpretive methodology. The ironic part is that if a state does *not* subject conflicts regarding statutory interpretation methodology to its choice-of-law regime, then a federal court would have no reason, at least under *Klaxon*, to apply state statutory interpretation methodology. Now, perhaps the federal courts should do so as a matter of course under *Erie*, as Abbe Gluck has argued.[256] But the doctrinal problem with the *Erie* route is that state statutory interpretation methodology has not yet been classified as substantive under the Constitution or Rules of Decision Act, such that the question of whether a federal court is required to apply the interpretive methodology of the state in which it sits has not been called. Indeed, the federal courts do not seem to think that *Erie* requires them to apply state statutory interpretation

254. Roosevelt III, *supra* note 252, at 20.

255. Hanna v. Plumer, 380 U.S. 460, 468 (1965).

256. *See* Gluck, *Intersystemic*, *supra* note 9, at 1968–90.

methodology when interpreting state statutes.[257]

Conversely, *Klaxon* held that state choice of law is substantive under *Erie*, thus requiring federal courts to apply state choice-of-law regimes. Therefore, it's irrelevant whether state statutory interpretation methodology is substantive or procedural for *Klaxon* purposes: if a state resolves a certain conflict according to its choice-of-law rules, the federal courts must follow suit. This includes state statutory interpretation methodology. For further evidence that this is the case, consider that the *Klaxon* Court itself deferred to the state's determination that the issue of whether interest should be added to the recovery in a contract dispute was in fact procedural.[258]

This result is, no doubt, odd. A federal court would not have to use the statutory interpretation methodology of the state in which it sits if that state does not resolve conflicts of interpretive methodology according to its choice-of-law rules. If the state did, though, then the federal court would apply the methodology that the choice-of-law inquiry requires—and as I show above, that inquiry is likely to require applying *another* state's methodology. Thus, if a state like Oregon were to adopt the approach to interpretive methodology that I suggest, it'd be all but impossible for Oregon to get a federal diversity court sitting in Oregon to apply Oregon's methodology. How can that be right?

One answer could be simply that we must live with this oddity. Choice of law, particularly when blended with questions of federalism, often yields peculiar, path-dependent results. For example, consider that when a plaintiff files suit in a federal district court and initiates a venue transfer under 28 U.S.C. § 1404(a), the new district court must apply the choice-of-law rules of the initial forum state.[259] This could lead to the strange situation in which a federal district court would apply a different substantive law than a state court in the same geographic jurisdiction.[260] Another solution would be for federal courts to recognize that state statutory interpretation, even if procedural under the Constitution for choice-of-law purposes, is nonetheless substantive state law, thus calling the *Erie* question.[261] In this scenario, federal courts would apply the forum

257. *See* J. Stephen Tagert, *To* Erie *or Not to* Erie*: Do Federal Courts Follow State Statutory Interpretation Methodologies*, 66 DUKE L.J. 211, 232–47 (2016); *see also* Gluck, *Intersystemic*, *supra* note 9, at 1903–04. *But see* Bruhl, *supra* note 206, at 7–16 (arguing that federal courts already routinely use state methodology).

258. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 495–96 (1941).

259. Ferens v. John Deere Co., 494 U.S. 516 (1990).

260. *See id.* at 536 (Scalia, J., dissenting).

261. *See* Gluck, *Intersystemic*, *supra* note 9, at 1968–90.

state's statutory interpretation methodology under *Erie* if the forum state does not subject interpretive methodology to choice-of-law analysis; federal courts would instead apply a different state's interpretive methodology under *Klaxon*, in accordance with the forum state's choice-of-law regime, if the forum state does subject interpretive methodology to choice of law.

CONCLUSION

Courts and scholars have paid much more attention to debates over statutory interpretation methodology in recent years. Since the revitalization of the field in the 1970s, however, those debates have largely focused on the federal courts. More recently, scholars have just begun to analyze the many state-specific questions that state-level statutory interpretation poses. This Article contributes to that emerging field of statutory interpretation scholarship by asking and answering an important but largely underexplored question: When one state court must interpret a statute from another state, whose statutory interpretation methodology controls?

At a minimum, this Article has argued that state courts should make their choice of statutory interpretation methodology explicit. On the merits, when the forum state's methodology conflicts with a sister state's, the forum court should resolve that conflict according to its already employed choice-of-law approach. The reason, as this Article showed, is that statutory interpretation methodology is substantive law for choice-of-law purposes. While this means that each state may come to a different conclusion as to whether the forum or sister state methodology should be applied in any given case, under the widely used traditional approach and *Second Restatement*, the result should be the same—state courts should apply the statutory interpretation methodology of the enacting state's courts.