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

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INTRODUCTION

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

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

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

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

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

My goals in this brief discussion are twofold. First, I wish to tatioC:8501Iers

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

I have argued at length in other work that this absence in the U.S. Supreme Court of what I will call "methodological stare decisis" is troubling. Among other things, it leads to repetitive fights among the Justices over the same interpretive choices; it wastes resources; it makes it difficult for lower courts and litigants to anticipate what tools the Court will find most relevant; and it "86c5(r)-2(ces;draftEMC 0.043-1(nruc 002 T0031e)5(6(i)4(pw -15.1150 next, e3t for lo2.7

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

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

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

16. *Id.* at 1146 .

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

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

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

1. PGE *as "Modified Textualism"*

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

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

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

20. *See id.*

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

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

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

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

Despite these differences, I have argued that the federal textualists have much to learn from the Oregon example. I have made this claim because, as applied by the Oregon Supreme Court,

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

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

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

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

33. *See id.*

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

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

36. For example, eighty-seven of the Oregon Supreme Court briefs available in the

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

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

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

42. State v. Gaines, 206 P.3d 1042 (Or. 2009). *Gaines* was decided at least in part in reaction to a 2001 Oregon state statute enacted in direct response to *PGE*'s strict prohibition on legislative-history use when the text was clear. The statute stated: "A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate." Or. Rev. Stat. § 174.020(3) (2009).

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

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

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

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

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

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

II. TRANSLATING THE OREGON EXPERIENCE TO FEDERAL STATUTORY INTERPRETATION

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

A. Statutory Interpretation and the Erie *Doctrine*

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

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

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

One might be surprised to learn that our federal courts, including the U.S. Supreme Court, have no consistent answer to questions of this nature. As I have detailed at great length in a recent article,[54] federal courts do not typically look to state interpretive principles when they interpret state statutes. Instead, they usually cite only U.S.

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

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

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

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

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B. Federal Statutory Interpretation Methodology as Law

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

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

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

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

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

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

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

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

65. *See, e.g.*, Bethlehem Steel Corp. v. United States, 270 F.3d 135, 139 (3d Cir. 2001) (holding that federal contract law governs the interpretation of federal contracts); Kennewick Irrigation Dist. v. United States, 880 F.2d 1018, 1032 (9th Cir. 1989) ("Federal law controls the interpretation of a contract entered pursuant to federal law unless federal law incorporates state law."); Jenkins v. Kennewick [illegible]

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

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

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

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

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