William & Mary Law Review

Volume *54 (2012-2013)*
Issue 3 *Law Without a Lawmaker Symposium*

Article 4

February 2013

The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes

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THE FEDERAL COMMON LAW OF STATUTORY INTERPRETATION: *ERIE* FOR THE AGE OF STATUTES

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TABLE OF CONTENTS

INTRODUCTION 755
I. WHY HAVE THE CANONS OF STATUTORY INTERPRETATION BEEN LEFT OUT OF THE DEBATE OVER POST-*ERIE* FEDERAL COMMON LAW? 760
A. Federal Common Law and the Charming Betsy *Canon* 760
B. Other Canons Fare No Better Under the Parameters of the Modern Debate 761
C. Arguments Based on Pedigree and the Constitution 765
D. Canons as Policy Choices 768
II. SOME PROOF THAT STATUTORY INTERPRETATION METHODOLOGY IS NOT UNDERSTOOD AS "LAW" 770
A. Under Current Doctrine, What Else Could It Be? 771
1. A More Common Type of Common Law 775
B. The Lack of Methodological Stare Decisis as Evidence That Statutory Interpretation Methodology Is Not Understood as Law 777

* Associate Professor of Law, Yale Law School. Many thanks to Michael Steven Green and the *Law Review* for inviting me to participate in this symposium and to all participants for their feedback. This piece builds on my previous article, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898 (2011), and I remain indebted to everyone who assisted with that piece, as well as to A.J. Bellia, Brad Clark, Meir Feder, Jeff Gordon, Emily Kadens, Caleb Nelson, Scott Shapiro, and Yale Law School students Nick McLean, Rebecca Wolitz, Tabitha Edgens, and Roman Rodriguez for new research assistance. Special thanks to Henry Monaghan, Bill Eskridge, and two outstanding Columbia Law School graduates, Michelle Diamond and Mallory Jensen, for three years of invaluable support as I developed these ideas.

C. Some State Courts Do Not Deem Themselves Bound by Federal Interpretive Principles When Interpreting Federal Statutes 779
D. Many Federal Courts Do Not View Statutory Interpretation Methodology as a "Rule of Decision" Subject to Erie 780
1. Diversity Cases 782
2. Federal Question Cases 785
3. Outcome Determinacy and the Procedure/Substance Divide 788
III. SOME COMPARISONS AND WHY *CHEVRON* SHOULD NOT BE SPECIAL 791
A. Analogous Principles in Other Contexts That Federal Courts Treat as Law 792
1. Contract Interpretation 793
2. Choice of Law and Constitutional Law Decision-Making Rules 795
3. Burden Allocation Regimes 797
B. Some Statutory Interpretation Principles That the Federal Courts Do Treat as Law 798
1. Chevron *Is Not Special* 799
2. Rules of Construction in the U.S. Code 801
IV. IMPLICATIONS AND ANTICIPATED OBJECTIONS 804
A. Red Herrings: Uniformity, Inflexibility, and Rules Versus Standards 805
B. The Expressive and Explanatory Power of a More Lawlike Approach 806
C. Spectrums of Precedent and Law 807
D. A Modern Erie*?* 809
CONCLUSION 811

INTRODUCTION

We do not have an *Erie* for the "Age of Statutes."[1] The *Erie* that we have addresses a world in which the common law dominated and in which federal courts could go about their daily work by recourse to state-court-created doctrine,[2] usually without creating "federal common law." Those understandings do not fit an era in which federally made statutory law dominates the legal landscape and the primary role of federal courts is to interpret it. But the creation of federal common law remains discouraged, thanks to *Erie*'s continuing vitality and the durability of the notion that *Erie* requires federal common law making to be "limited" and "restricted."[3] As a result, federal courts have spent the last century engaged in an under-the-radar enterprise of fashioning and applying what are arguably hundreds of federal common law doctrines to questions of federal statutory interpretation, without acknowledging that they are doing so and without explaining how their actions fit into the *Erie* paradigm.

From the rule that exemptions in the tax code should be narrowly construed, to the presumption that ambiguous federal statutes should not be interpreted to preempt state law, modern federal statutory interpretation is a field dominated by judicially created legal presumptions.[4] At the same time, the question of the legal status of statutory interpretation methodology remains unanswered and almost completely unexplored.[5] What *are* the rules of statutory

1. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 316 (1982). *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

2. *Erie* was about the status of state decisional law; the status of state statutory law was never in dispute.

3. Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 334 (1992) (quoting Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) and Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963)).

4. *See, e.g.*, WILLIAM N. ESKRIDGE ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY app. B (4th ed. 2007) (listing hundreds of judicially created interpretive rules). I acknowledge the possibility that some of these presumptions may not be judge-made —perhaps, for example, the time-honored grammatical presumptions. One purpose of this inquiry, however, is to ask what follows from recognizing at least some of these rules as judicial creations.

5. *See generally* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as*

interpretation? Almost all jurists and scholars resist the notion that they are "law." Instead, most contend that these tools, often called "canons" of interpretation, are "rules of thumb"—a legal category that seems to sit in between law and individual judicial philosophy.

This puzzle has implications far beyond academic explorations of *Erie*. Indeed, it goes directly to the role of courts in the modern legal era. *Erie* was about federal courts finding their place in a world of state common law.[6] *Chevron*, which Cass Sunstein has called our "modern *Erie*," was similarly about the place of federal courts in a world of federal executive administration.[7] Both doctrines shifted power from federal courts to other players—to states in the case of *Erie* and to federal agencies in the case of *Chevron*. But, along the way, we never had an analogous *Erie* for the statutory era: a canonical case that established the balance of power (when agencies are not in the picture) in a world of changing law-making institutions, and made clear what kind of authority federal courts have to create interpretive doctrines for statutory cases.

But why should this sort of federal doctrine making remain taboo when the entire legal landscape has changed? Most federal judges claim to espouse a particular model of the judicial role in statutory interpretation: a version of "faithful agency" in which the interpretive tools that courts employ generally are justified on the ground that they effectuate congressional intent or reflect how Congress actually works.[8] These assumptions are most certainly fictitious with respect to many of the canons.[9] Nevertheless, *Erie*'s ripple effect seems at least partially responsible for the persistence of these

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"Law" and the Erie *Doctrine*, 120 YALE L.J. 1898 (2011) (introducing this question); *cf.* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 346 (2010) (calling the canons "interpretive common law," but not situating them within debates over federal common law making or *Erie*).

6. *Erie*, 304 U.S. at 78; *see, e.g.*, Henry P. Monaghan, Book Review, 87 HARV. L. REV. 889, 892 (1974) ("*Erie* is ... a limitation on the federal court's power to displace state law absent some relevant constitutional or statutory mandate.").

7. Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2610 (2006) ("*Chevron* is our *Erie*, and much of the time, it is emphatically the province and duty of the executive branch to say what the law is."). *See generally* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

8. For elaboration, 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. (forthcoming 2013) (on file with authors).

9. *See generally id.*

justifications: interpretive rules explained as deriving from or as particularly connected to Congress seem less like "making law" than rules whose judicial source is more expressly acknowledged.

Exploring this possibility—that statutory interpretation methodology is some kind of judge-made law—allows for some significant doctrinal and theoretical interventions. A common-law conceptualization of interpretive methodology, for instance, implies that *Congress can legislate over it*, but courts and scholars continue to resist the notion that legislatures can control these interpretive rules.[10] A common-law conceptualization also would seem to imply that the rules of interpretation should receive *stare decisis effect*, but that idea has been rejected by all federal courts and most scholars.[11]

There is also the possibility that some of the canons might be federal common law, while others might not. Some, for example, might be understood as a special kind of law that enforces constitutional norms or implements the Constitution—a kind of judge-made law that has been given a variety of labels in the constitutional-law context, including "constitutional common law."[12] Other canons go back many centuries, seem like common sense, or otherwise seem not to be judicial creations at all. The canons are not typically dissected in this manner, but different canons might have different

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10. *See, e.g.*, Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?* 96 GEO. L.J. 1863 (2008); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1794-95 (2010) (describing state legislative efforts to enact rules of interpretation and judicial resistance to such rules). *Compare* 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, 872-79 (2009) (discussing separation of powers concerns with legislated interpretive rules), *with* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2156 (2002) (arguing that certain rules could be legislated). I take up the question, *see infra* Part I.C, whether there may be some specific canons that, because of their constitutional source, Congress could not revise.

11. *See generally* Gluck, *supra* note 5. Interestingly, a number of state courts give statutory interpretation methodology precedential effect. *See id.* at 1934-36 & nn.116-18 (describing methodological stare decisis in Oregon, Connecticut, Michigan, Wisconsin, and Texas).

12. Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975); *see* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 5 (2001); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 167 (2004). Not everyone who views the doctrines as judge-made views them as a type of common law. *See, e.g.*, Rosenkranz, *supra* note 10, at 2095 (preferring the label "constitutional starting-point rules").

jurisprudential bases and different places on the federal common law (or not) spectrum.

Analyzing the canons as a kind of "law" also draws attention to a different *Erie* question: whether federal courts should apply *state* rules of statutory interpretation to the myriad state-law questions that federal courts decide. Federal courts seem generally uninterested in this question and do not typically apply state methodology to state statutory questions—further proof that federal courts do not understand these principles as legal doctrines on par with many analogous decision-making rules.[13] In the context of both contract and constitutional interpretation, for instance, federal courts routinely create precedential, legal doctrines for federal questions and also apply the state versions of those doctrines to state-law questions.[14] But when it comes to statutory interpretation, federal judges seem particularly unwilling to relinquish—either to other federal courts, to state courts, or to legislatures—any power to dictate what rules of interpretation must be applied.

Finally, if the rules are not a form of law that already is familiar to legal doctrine (like common law), then we need an alternative explanation of what they are. This raises an entirely different set of questions. For example, if we agree that at least some interpretive presumptions are judicially created, then we might ask whether they are "law" simply by virtue of that fact. We also might ask if there is even a doctrinal space after *Erie* for judge-created federal decision-making rules that are something other than federal common law or Constitution-implementing law. Whence would the judicial power derive to create such law? Another question is what force such interpretive law would have. Might, for example, statutory interpretation methodology be "law," but not precedential, or less precedential, than other types of law?

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13. Gluck, *supra* note 5, at 1906-07, 1961.

14. There is, for example, a federal version of the parol evidence rule, and many doctrines that implement the Constitution, such as the tiers of scrutiny and the various First Amendment tests. *See* FALLON, *supra* note 12, at 5 ("A distinctive feature of the Supreme Court's function involves the formulation of constitutional rules, formulas, and tests, sometimes consisting of multiple parts."); Berman, *supra* note 12, at 167 (offering a different taxonomy that divides constitutional doctrines into "decision rules" and "operative provisions"); Gluck, *supra* note 5, at 1970-80 (offering analogies); Monaghan, *supra* note 12, at 3 (describing court-created constitutional implementation doctrines).

It should be evident that this inquiry into the legal status of methodology opens too many lines of investigation for resolution in a single Article. I have begun this work elsewhere[15] and will not finish it here, or even try. The goal of this Article is to frame a research agenda, and to begin to play out the implications of the different types of arguments that might be made.

Part I begins this exploration by situating these questions within debates over federal common law making in other contexts that have received much more attention. Part II offers support for the proposition that federal courts do not currently understand the canons as law, including the fact that there is no such thing as methodological stare decisis in the federal courts and the fact that federal courts do not seem to consider *Erie* as relevant to the choice of statutory interpretation methodology. Part III offers some comparative illustrations, describing how analogous decision-making rules in other contexts are treated as common law. Part III also highlights a few special statutory interpretation rules—like *Chevron* and some legislated rules of construction, such as savings clauses—that courts likewise treat as "real" law without any explanation for the distinction. Part IV examines additional implications of the methodology-as-law argument and also anticipates some objections, including the misunderstanding that a lawlike conception necessarily implies that interpretive doctrines must be uniform or inflexible. Along the way, the Article hopefully will reveal how many fundamental questions about statutory interpretation remain unresolved, despite common contentions that the field's most interesting battles are over.[16]

15. Gluck, *supra* note 5.

16. *See, e.g.*, Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 732 (2010) ("The guns in the statutory interpretation wars are now largely silent.").

I. WHY HAVE THE CANONS OF STATUTORY INTERPRETATION BEEN LEFT OUT OF THE DEBATE OVER POST-*ERIE* FEDERAL COMMON LAW?

The lack of attention to the jurisprudential question about the legal status of statutory interpretation methodology is especially noteworthy because a robust debate continues to rage among judges and scholars about the propriety of federal common law making in other contexts. This debate has played out prominently in two areas. The first context, on which I will not dwell, is "field preemption." The U.S. Supreme Court has taken a rather generous view of the extent to which complex federal statutory schemes are intended to displace any past or future judicial gap-filling efforts.[17] The second and much more controversial context involves the propriety of employing international law norms as tools of American statutory interpretation.[18]

A. Federal Common Law and the Charming Betsy *Canon*

The international law norms debate has centered, in part, on a specific canon of statutory interpretation, the "*Charming Betsy*" canon, which provides that federal statutes should not "be construed to violate the law of nations if any other possible construction remains."[19] That canon, as others have noted, not only has "common law" status—it is court created—but it also serves as an indirect

17. *See, e.g.*, Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2537 (2011) ("The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue.").

18. *See, e.g.*, Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, *Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 870-71 (2007); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1831-32 (1998); Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 366-67 (2002).

19. The canon takes its name from *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), but was first articulated in at least two earlier cases. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 134-35 (2010) (noting that the *Charming Betsy* canon originated in *Jones v. Walker*, 13 F. Cas. 1059, 1064 (C.C.D. Va. 1800) (No. 7507) and *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801)).

mechanism by which international law norms are applied to domestic questions.[20]

In a recent case from the D.C. Circuit that captured much of the debate, Judge Brett Kavanaugh's concurring opinion pinpointed the potential conflict between *Erie* and the use of such external policy norms in statutory interpretation:

> [I]n the post-*Erie* era, the canon does not permit courts to alter their interpretation of federal statutes based on international-law norms that have not been incorporated into domestic U.S. law ....
>
> *Erie* means that, in our constitutional system of separated powers, federal courts may not enforce law that lacks a domestic sovereign source.[21]

The opinion goes on to argue that it is Congress, and not the courts, that is responsible for incorporating such external norms into domestic law—in other words, that it is Congress, and not the courts, that properly serves as the "domestic sovereign source" of legal principles, including extralegislative policies used to interpret ambiguous federal statutes.[22]

B. Other Canons Fare No Better Under the Parameters of the Modern Debate

It is easy to read opinions like Judge Kavanaugh's and the pages of scholarly argument concerning the *Charming Betsy* issue and assume that this debate is one cabined to the international law context. And, for the most part, that is how the debate has been understood. But such an understanding is most certainly incorrect. Federal courts routinely apply *hundreds* of other canons of statutory

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20. *See, e.g.*, Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 483 (1998); *see also id.* ("[I]t is arguable that, '[w]hen actual congressional intent is ambiguous or absent,' applying the *Charming Betsy* canon 'is the same as creating a rule that the government regulatory scheme cannot violate international law.'" (quoting Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 675 (1986))).

21. Al-Bihani v. Obama, 619 F.3d 1, 10, 17-18 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc).

22. *Id.* at 18, 33.

interpretation on a much more frequent basis than they have applied the *Charming Betsy* canon,[23] and many of these other canons likewise bring external, judge-created legal norms into the decision-making process for statutory cases.

Most of these other interpretive canons do not fare any differently than the *Charming Betsy* under the *Erie*-related criticism that has been showered upon that rule. The only difference is that almost no one has seemed to notice. Justice Scalia, for example, once wrote that these other canons are a "judicial power-grab."[24] But, in practice, even though he is one of the most vocal opponents of federal common law making, he is one of the most prolific users of both textual and policy canons.

Indeed, Justice Scalia's new book and the attention that it has attracted offer the most recent evidence of the extent to which this issue has been glossed over. The book is a treatise-style examination of more than sixty of the canons and spans 400 pages, but it nowhere takes on the question of the legal status of the rules that it investigates.[25] Instead, the book contains scattered and conflicting statements on that topic. It contends at one point that the canons are not "law" or even "rules," but contends ten pages later that "statutory interpretation is governed as absolutely by rules as anything else in the law."[26] Later, the book argues briefly that legislative attempts to enact interpretive rules would "likely ... be an intrusion upon the courts' function of interpreting the laws,"[27] a statement that implies that the canons are not common law. But none of the already-robust scholarly commentary about the book has noted this imprecision or even the fact that there is a question deserving more precision in the first place.

Why has the *Charming Betsy* canon been singled out? The best possible explanation is that many judges simply do not like direct application of international law norms as domestic law and so have picked a jurisprudential fight to exclude them. Otherwise, it seems

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23. For a list of all of the canons, see ESKRIDGE ET AL., *supra* note 4, app. B.

24. Antonin Scalia, *Common Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 29 (Ann Gutmann ed., 1997).

25. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW (2012).

26. *Compare id.* at 51, *with id.* at 61 (quoting JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION § 2, at 3 (1882)).

27. *Id.* at 245.

that some other canons should go down with that ship. Consider, for example, the following "substantive" default presumptions, which run the gamut from transsubstantive rules, like the presumption against preemption, to subject-specific rules that apply only to certain statutory schemes.[28] Can each be better traced to Congress than the international law norms under more attentive dispute?

- The federalism canon—ambiguities in federal statutes should be construed not to interfere with traditional state functions;
- Presumption against preemption—federal statutes should not be construed to preempt state law absent clear language;
- The rule of lenity—ambiguities in criminal statutes should be construed in favor of defendants;
- Presumption against waivers of U.S. sovereign immunity;
- Presumption favoring enforcement of forum selection clauses;
- Presumption against inferring exceptions to antitrust laws;
- Presumption in favor of arbitration;
- Bankruptcy statutes should be construed to give a "fresh start" to the debtor;
- Remedial statutes should be construed broadly;
- Ambiguities in deportation statutes should be construed in favor of aliens;
- Presumption against diminishment of Indian lands;
- Presumption against statutory interference in labor and management disputes;
- Presumption against extraterritorial application of federal statutes;
- Especially strong presumption against extraterritorial application of federal patent law;
- Exemptions from federal taxation should be construed narrowly;
- Presumption against the taxpayer claiming a deduction;
- Presumption that Congress legislates consistent with common law usage of terms;
- Presumption against retroactive application of statutes;
- Presumption that Congress intends administrative agencies to resolve statutory ambiguities (*Chevron*).

28. *See generally* ESKRIDGE ET AL., *supra* note 4, app. B.

The leading textbook counts more than a hundred of these canons,[29] and they all do not seem "equal" from the perspective of the debate over federal common law making. Nor is it clear that we have the empirical information necessary to judge these canons under the kind of criteria that have been set forth in the *Charming Betsy* context.

Suppose, for example, that the "test" is whether Congress has incorporated these canons into its own drafting practice or otherwise has approved of them. Congress has not formally adopted any of these presumptions (for example, by statute or internal rule) and so the answer to this question turns on empirical work about Congress's awareness and use of the canons that has been almost entirely lacking. In a forthcoming article, Lisa Bressman and I present data that suggests that congressional drafters know and use some of the canons (or the assumptions underlying them) but do not know or use many others.[30] Broader work of this nature would be necessary if the canons' legitimacy depends on Congress's incorporation of them.[31]

This is not to say that some interpretive principles are not more closely linked to a congressional source than may be the international law norms brought in by the *Charming Betsy*. The use of legislative history—the reports, testimony, and other such materials generated during the legislative process—offers perhaps the best example because it is created by Congress itself. And yet legislative history—sometimes called an "extrinsic canon" of interpretation[32]—is the *most* contested tool of statutory interpretation and the one

29. *Id.*

30. *See* Gluck & Bressman, *supra* note 8 (manuscript at 2-3). For example, at least some congressional drafters seem to know the presumption against preemption and *Chevron*, but many do not seem aware of and do not use clear statement rules or the rule of lenity. *Id.* (manuscript at 27-29).

31. It is worth emphasizing that the very articulation of what "legitimates" a canon in the first place is itself a judicially determined standard. If courts determine that the canons are justified on the ground that they approximate how Congress drafts, that approximation principle is a legal standard (regardless of what one intuitively thinks about the canons that effectuate that standard, like the grammatical drafting presumptions that few regard as law). Thanks to Caleb Nelson for his insights on this point.

32. Canons are simply interpretive tools that courts use to decide ambiguous statutory questions. Legislative history is an "extrinsic" tool because it offers evidence outside of the text of the statute. *See* ESKRIDGE ET AL., *supra* note 4, at 971-1066.

least employed by the same judges who are most vocally opposed to federal common law making.

C. Arguments Based on Pedigree and the Constitution

Other types of normative and doctrinal justifications for the judicial creation and application of the canons might be offered. Some substantive canons, such as the rule of lenity (the rule that ambiguous criminal statutes be construed in favor of defendants) have been justified based on their pedigree.[33] Perhaps one can argue that such rules are so ingrained that they can be assumed to have been incorporated into congressional drafting practice—and, in fact, Justice Scalia makes precisely this argument.[34] But it is worth noting that at least some theorists have rejected similar pedigree-based arguments when it comes to international law norms.[35] Moreover, recent empirical work does not support the factual premise of this argument, at least with respect to the rule of lenity: many drafters are not aware of the rule and do not appear to incorporate it into their drafting practices.[36]

Arguments based on tradition also are of little help to the numerous canons created in modern times. Two of the most commonly employed canons—the presumption against preemption and *Chevron*—were invented by the Supreme Court within the last century.[37]

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33. *See* Barrett, *supra* note 19, at 128-29, 133-34; *see also* John F. Manning, *Clear Statement Rules and the Constitution,* 110 COLUM. L. REV. 399, 411 (2010) ("[T]he nonretroactivity canon might find an independently sufficient justification in its claim to an ancient pedigree.").

34. SCALIA & GARNER, *supra* note 25, at 31 (arguing that rules like the rule of lenity are "so deeply ingrained, [they] must be known to both drafter and reader alike so that they can be considered inseparable from the meaning of the text").

35. *See, e.g.*, Koh, *supra* note 18, at 1852-53 (stating that opponents of the use of international law norms accept their pedigree but still reject the norms themselves, but noting that "because federal courts have applied customary international law since the beginning of the Republic, 'one might think it was rather late to claim that judicial application of customary international law was in principle inconsistent with the American understanding of democracy'" (quoting Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 383 (1997))).

36. *See* Gluck & Bressman, *supra* note 8 (manuscript at 28).

37. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-44 (1984); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see also* Richard A. Epstein, *What*

Other specific canons might be viewed as rooted in the Constitution. For instance, the federalism canon and the presumption against preemption reinforce the Constitution's limits on the reach of federal legislative power against the plenary power of the states. The canon of constitutional avoidance supports the separation of powers between the judicial and legislative branches. The presumption against retroactive application of statutes was recently described by the Court as rooted in the Due Process, Contract, and Ex Post Facto Clauses.[38] Some argue that the rule of lenity also has constitutional underpinnings in the Due Process Clause.[39]

Whether that makes these canons "valid" federal common law or perhaps even constitutional law itself is a separate question. Some scholars have argued that federal common law making "derivative" of existing statutory or constitutional policy may still be valid after *Erie*.[40] So understood, these constitutionally derived canons may be a type of federal common law that many theorists already accept.

Others might understand these canons to resemble a special type of law (commentators divide over whether it is a species of common law) that many scholars long have argued is a legitimate means of implementing the Constitution.[41] This form of constitutionally derived law has been described by Henry Monaghan as "drawing … inspiration and authority from, but not required by, various constitutional provisions."[42] A particular branch of it has been described by others as "prophylactic rules" that are court-created

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Tort Theory Tells Us About Federal Preemption: The Tragic Saga of Wyeth v. Levine, 65 N.Y.U. ANN. SURV. AM. L. 485, 487 (2010) (stating that *Rice* "established a presumption against preemption").

38. Vartelas v. Holder, 132 S. Ct. 1479, 1486 (2012).

39. ESKRIDGE ET AL., *supra* note 4, at 907.

40. Bradley et al., *supra* note 18, at 880. *But cf.* Manning, *supra* note 33, at 404 (arguing that there are no freestanding constitutional norms and that the only legitimate canons are those directly grounded in the Constitution).

41. Monaghan, *supra* note 12. *But see, e.g.*, Joseph D. Grano, *Prophylactic Rules and Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985) (disputing the legitimacy of prophylactic constitutional common law); Keith Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 127-28 (2010) (putting this question in terms of the "interpretation-construction" divide and arguing that "the authority of the courts to construct constitutional meaning would not necessarily stand on the same footing as their authority to interpret the Constitution").

42. Monaghan, *supra* note 12, at 3.

and "can be violated without violating the Constitution itself."[43] Some canons seem to fit these descriptions well. If Congress violates the federalism canon by being inexplicit with respect to preemption, the "remedy" is not that the statute is struck down; a court will simply interpret the ambiguity in favor of state authority. A statute that is not as clear as the rule of lenity would require is likewise not necessarily unconstitutional; the lack of clarity may just force the court to confront a constitutional question that it otherwise would have preferred to avoid.

A few theorists, it should be noted, would likely view some of these canons as constitutional law plain and simple, and not a form of federal common law—even of the special, Constitution-implementing kind. Such scholars have argued that, to the extent that courts are required to enforce certain rules to maintain the Constitution's allocation of powers, those rules are constitutional rules.[44] Canons like the federalism canon might be regarded as constitutional law under such a (minority) view.

But regardless of how they are labeled, it is not entirely clear how one would decide which specific canons are sufficiently linked to the Constitution to merit inclusion in these special categories. John Manning, for instance, has implied that only lenity is constitutionally derived.[45] Others, as noted, would likely claim that the federalism canon is, too. Is the presumption against preemption the same? The presumption in favor of Native American rights seems more removed, but not entirely unrelated to constitutional text, and so on.

At the same time, there are a few canons that seem to be even more closely linked to constitutional law than the favorites that are most often singled out by scholars and discussed above. Consider, for example, the "clear statement rule" advanced by the Court in *Pennhurst State School & Hospital v. Halderman*, which provides that ambiguous federal statutes will not be construed to impose conditions on grants of federal money to the states without a clear

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43. Richard Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1303 & n.131 (2006) (quoting Joseph D. Grano, Miranda*'s Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 176-77 (1988)) (internal quotation marks omitted); *see also* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

44. Anthony J. Bellia & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729, 838 (2012).

45. Manning, *supra* note 33, at 406 & n.26.

statement to that effect.[46] *Pennhurst* is simultaneously a canon of interpretation—it tells courts how to interpret unclear statutes—and a direct constitutional rule; spending conditions in violation of it will be struck down.[47]

Fortunately, determining which canons might be constitutional law, which might be federal common law, and which might lie somewhere in between is not a task that we need to complete here. The point is that, understood in *any* of these ways, they would be something more than "rules of thumb." Constitutional law, constitutional decision rules, and federal common law are *all law*: they are precedential and bind the lower courts through the Supremacy Clause in a way that statutory interpretation rules have not been understood to do. To be sure, the ultimate categorization might affect the answers to questions such as whether certain canons are presumptively revisable by Congress,[48] but it would not change the fact that the canons would be understood as having a real legal status.

D. Canons as Policy Choices

Many of the remaining canons stand on even fuzzier jurisprudential ground and find no direct link to specific provisions of the Constitution. Some appear to have been fashioned almost entirely out of thin air, layering judicial policy preferences atop legislative enactments—for instance, the canon that exemptions from antitrust liability should not be lightly inferred.[49]

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46. 451 U.S. 1, 17 (1980).

47. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2605-06 (2012) (striking down the Medicaid expansion in the health reform statute on the ground that Congress did not make the possibility of such an expansion clear in the original Medicaid statute).

48. It may be the case that a few special rules of statutory interpretation are sufficiently constitutional in nature to be unamenable to congressional revision. *Cf.* Dickerson v. United States, 530 U.S. 428, 440 (2000) (holding that the common law rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), was "constitutionally based" and could not be overridden by Congress). But even some rules viewed as constitutionally derived might be revisable by Congress. For example, if Congress legislatively reversed the presumption against preemption either for one specific statute or for statutes in the aggregate, doing so would not interfere with the federal courts' power to decide whether such statutes unconstitutionally impinge on state power. The canon helps federal courts avoid the constitutional question but does not interfere with their ability to resolve it when presented.

49. In a striking omission, Justice Scalia's new treatise does not even mention most of the

Other canons seem designed to *push against* congressional practice or preferences. The canon that "remedial statutes are to be liberally construed," for instance, has been described as a buffer against pressures on Congress by special interests to narrow public interest statutes.[50]

As perhaps the starkest example of all, consider this canon, long a favorite of courts: "*statutes in derogation of the common law shall be narrowly construed*."[51] Why on earth should such a canon, as well as its first cousin—that courts presume Congress incorporates the common-law meaning of terms—remain default presumptions in the "Age of Statutes"?[52] It should come as no surprise that a large number of state legislatures have passed laws expressly aimed at abrogating this canon[53]—that is, asserting that statutory, not common, law is the modern default preference. One possible justification for the application of this canon is simply tradition. Another rests on the same kind of legal fiction on which the other canons rely—namely, that Congress knows the canon and drafts in its shadow.[54] But perhaps this canon is simply the most obvious manifestation of the way in which courts use interpretive methodology to retain some law-making power for themselves in a changing legal world.[55]

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subject-specific policy presumptions in its broad catalog of the canons. SCALIA & GARNER, *supra* note 25. The hole is a gaping one that begs the question whether the authors view those canons as unjustifiable but were unwilling to openly call for their abandonment.

50. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992). Some have offered constitutional bases for rules of this nature. *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 226 (1986) (arguing courts are constitutionally empowered to use statutory interpretation to make legislation more public-regarding).

51. *See, e.g.*, Rehberg v. Paulk, 132 S. Ct. 1497, 1502-03 (2012); United States v. Texas, 507 U.S. 529, 534 (1993); Badaracco v. Comm'r, 464 U.S. 386, 403 n.3 (1984) (Stevens, J., dissenting); Crescent City Estates, LLC v. Draper, 588 F.3d 822, 826 (4th Cir. 2009); Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 128 (2d Cir. 2001); Wolfchild v. United States, 101 Fed. Cl. 92, 99 (Fed. Cl. 2011).

52. CALABRESI, *supra* note 1.

53. *See* Scott, *supra* note 5, at 399.

54. *See generally* LON L. FULLER, LEGAL FICTIONS 57 (1967); Gluck & Bressman, *supra* note 8 (manuscript at 7-16).

55. *See* SCALIA & GARNER, *supra* note 25, at 318 (calling this canon "a relic of the courts' historical hostility to the emergence of statutory law"); Scalia, *supra* note 24, at 29 (calling this canon a "sheer judicial power grab"). Judge Posner also recently called the canon a "fossil remnant of the traditional hostility of English judges to legislation." Liu v. Mund, 686 F.3d

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It should be clear by now that assessing the validity of these judge-created interpretive rules depends in large part on one's views of the proper role of courts in the statutory era and the constitutional power of Article III judges.[56] Those who adhere to strong views of legislative supremacy might view the creation and application of only those interpretive rules that accurately reflect congressional intent or drafting practice as a legitimate exercise of the judicial power.[57] Others who take a broader view—for example, that courts have obligations to update obsolete statutes,[58] or to make them "more workable,"[59] or to reinforce constitutional norms[60]—may take a more generous stance toward how much canon making Article III permits in service of those goals. But no consensus has been reached on these matters, and they are rarely, if ever, discussed through this lens of federal common law-making power.

II. SOME PROOF THAT STATUTORY INTERPRETATION METHODOLOGY IS NOT UNDERSTOOD AS "LAW"

How do we know that the principles of statutory interpretation are not currently understood as law? This Part offers three types of evidence for that proposition from federal judicial practice: (1) federal courts do not give interpretive principles stare decisis effect; (2) some state courts do not consider themselves bound to apply federal interpretive principles, even in federal statutory cases; and (3) federal courts generally do not view themselves obligated by *Erie* to apply state methodology when interpreting state statutes. The next Part offers some comparisons to other contexts in which federal courts do, in fact, treat analogous interpretive rules as both

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418, 421 (7th Cir. 2012).

56. *Cf.* Jerry L. Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1673, 1686 (1988) ("Any theory of statutory interpretation is at base a theory about constitutional law.").

57. *See* John F. Manning, *Continuity and the Legislative Design*, 79 NOTRE DAME L. REV. 1863, 1864-65 (2004). *See generally* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419 (2005). Amy Coney Barrett's important work, *supra* note 19, at 110, has fleshed out in more detail the tension between the "faithful agent" model of judging and the application of the substantive canons of construction.

58. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 111-12, 116-17 (1994).

59. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 81-97 (2010).

60. *See supra* note 50 and accompanying text.

federal common law and state law, and also details a few limited statutory interpretation rules—most notably *Chevron*—that federal courts also treat as law.

To be clear, this discussion focuses on "law" in the formal, doctrinally recognized sense—common law, constitutional law, state law, statutory law, et cetera—and not on the philosophical question of whether interpretive principles might still be "law" even if they do not fit within any of those categories. That question requires sustained consideration of the possible linkages between jurisprudence scholarship and the inquiries posed here, and merits its own separate treatment.[61]

A. Under Current Doctrine, What Else Could It Be?

From the (perhaps limited) standpoint of current doctrine, courts are likely wrong about their jurisprudential conception of the canons. The best way to see this is to consider the alternatives.

It may be the case that statutory interpretation principles were once understood as "general law" rather than federal common law. Indeed, the canons are often described as "ancient" or "universal."[62] But *Erie* banished the general common law conception from all formal legal doctrine. Nor does the general law concept, even if still viable, seem to fit this context.[63] General law was understood to be

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61. *See, e.g.,* Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 23 (1967) (distinguishing between rules and principles); Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed, in* RONALD DWORKIN 22 (Arthur Ripstein ed., 2007) (discussing the famous Hart-Dworkin debate). Thanks to Scott Shapiro for preliminary conversations on this topic.

62. William Eskridge has argued, for example, that the Founders

> both assumed and accepted the traditional rules and canons of statutory interpretation ... laid out in the traditional cases and treatises that were considered authoritative by the state judiciaries and that would have been known by most of the thirty-four delegates who had legal training.... Most ... would have been familiar with Coke's *Institutes*, Bacon's *Abridgment* and its list of interpretive canons, Blackstone's *Commentaries*, ... [and] the mischief rule of *Heydon's Case*.

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

63. *Cf.* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 505-07, 568 (2006) (arguing that the general law continues to exist but suggesting that the courts use it to fashion modern rules of decision and to limit federal court discretion in creating new rules of decision, but not as a separate category from those rules).

precedential within the federal court system in a way that statutory interpretation methodology has never been understood.[64] At the same time, the federal court version of general law did not bind state courts,[65] but the notion that states might deviate from precedential, U.S. Supreme Court-created doctrines of statutory interpretation for federal statutes has never been suggested and makes little sense.

Moreover, the canons of interpretation, as understood by the Founders, or even the *Erie* Court, have not been frozen in time, and so the idea of "universal," time-honored rules of statutory interpretation does not cover the whole terrain. To be sure, there are some interpretive rules the courts have taken from traditional practice,[66] so it might be argued that those rules are derived from general law. But as noted, the Supreme Court also continues to generate *new* interpretive rules,[67] and most scholars agree that the Court's entire approach to statutory interpretation has changed dramatically over the past thirty years.[68] The very existence of all of these changes makes it possible to trace our current methodological practice directly to the modern Supreme Court, rather than to the "brooding omnipresence in the sky"[69] that *Erie* rejected in any event.[70]

If the rules are neither federal common law nor general law, what are they? I already have discussed the possibility that some canons might be a type of constitutional law. But that possibility cannot satisfactorily explain them all, particularly the policy-based canons that have no direct link to constitutional provisions. What is left, therefore, at least within the confines of current doctrinal parameters (assuming one is not open to exploring a different category of legal principle that we have yet to acknowledge as a general feature

64. *See* Monaghan, *supra* note 16, at 741.

65. *See id.* ("The modern conception of federal common law—judge-made law that binds federal and state courts—simply did not exist circa 1788."); Kermit Roosevelt III, *Choice of Law in Federal Courts: From* Erie *and* Klaxon *to CAFA and* Shady Grove, 106 NW. U. L. REV. 1, 5 (2012) ("Federal courts could come to their own conclusions about the content of the general common law, and so could the courts of the several states, with neither exerting any more than persuasive influence on any other.").

66. *See supra* note 33-34 and accompanying text.

67. *See supra* note 37 and accompanying text.

68. *See, e.g.*, John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 113 ("In the past quarter-century, the Court has rethought its approach to statutory interpretation.").

69. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

70. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

of modern legal doctrine[71]), is the category of state law.[72] But the notion that federal courts should be applying a state-based common law of interpretation to federal statutes is so implausible that it virtually dictates the opposite conclusion: namely, that rules that cannot be explained as a type of constitutional law should, in fact, be understood as federal common law.

If federal courts had to look to state interpretive rules to decide federal statutory cases, there could be fifty different bodies of state common law of statutory interpretation, with the consequence that federal statutes could mean different things even within each federal circuit.[73] Congress, moreover, would have to draft statutes with the many potentially different interpretive regimes in mind. It is one thing to say that Congress has the option to draft federal statutes that incorporate state law or that, in certain circumstances, federal courts should borrow from state law as the rule of decision in federal statutory cases.[74] But it is another thing entirely to say that federal courts do not have the power to *choose*, as a matter of federal law, which rules they will apply to federal statutes. In other words, even if the Supreme Court were to deem it advisable to use state interpretive methods in all federal statutory cases, that decision should be understood as a *federal* decision, not as one compelled by *Erie*.

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71. Here again, it is worth noting that the one place this question has come up is in the customary international law context, where some scholars are proposing a middle-ground conceptualization of what type of law it is. *See* Carlos M. Vázquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position,* 86 NOTRE DAME L. REV. 1495, 1498-1501 (2011) (summarizing the various middle-ground approaches that have been offered).

72. In the post-*Erie* world, most agree that legal principles previously understood as general common law must attach to a particular sovereign source—that is, they should be understood as "federal common law" and/or as fifty different bodies of state common law. *See* Anthony J. Bellia, Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 886-88 (2005).

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

74. *Cf.* Paul Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 804-05 (1957) (describing situations in which it might make sense for federal courts to select state law as the rule of decision in federal cases but not doubting that federal courts would do so as a matter of federal common law authority).

There might even be jurisdictional effects from the contrary conclusion. If methodological choice were viewed entirely as a state-law question, there might be the anomalous result that such decisions could be isolated from U.S. Supreme Court review.[75] The intolerable effects of all of these scenarios virtually prove why they cannot be so.

In fact, these are precisely the kinds of circumstances in which the Court, and even most scholars who read *Erie* and the Rules of Decision Act's prohibition on federal common law making broadly, has justified an exception to that prohibition.[76] There is a uniquely federal interest involved (the meaning of federal statutes); this federal interest is grounded in a federal source (federal statutes); and there is a clear need for federal law uniformity. Moreover, like arguments made for federal common law authority in other areas, the source of federal judicial authority to create these interpretive principles at least arguably derives from the power—given to the federal courts by the jurisdictional statutes and Article III—to adjudicate statutory cases.[77] (This same kind of inherent authority has been used to justify the Court's methodological work in the constitutional law context.[78]) The justification for federal common

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75. *Cf.* Koh, *supra* note 18, at 1832 ("[T]o treat determinations of customary international law as questions of state law would have rendered both state court and federal diversity rulings effectively unreviewable by the U.S. Supreme Court[,] .... rais[ing] the specter that multiple variants of the same international law rule could proliferate among the several states.").

76. *See* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) ("[T]he Court has recognized the need and authority in some limited areas to formulate what has come to be known as 'federal common law.' These instances ... fall into essentially two categories: those in which a federal rule of decision is 'necessary to protect uniquely federal interests,' and those in which Congress has given the courts the power to develop substantive law." (citations omitted)); Bradley et al., *supra* note 18, at 921 ("[T]his sort of statutory gap-filling, guided by congressional intent, is probably the most common (and uncontroversial) type of federal common law.").

77. *See* Bradley et al., *supra* note 18, at 879 ("[T]here is widespread agreement that federal common law must be grounded in a federal law source."); *see also* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 887 (1986) (arguing for a broad understanding of federal common law making authority but still acknowledging that the "limitation ... is that the court must point to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common law rule").

78. Whether one views those frameworks as defining substantive constitutional rights, as implementing constitutional norms, as "constitutional common law," or as "constitutional decision rules," they are indisputably viewed as "real" doctrine and not ultra vires exercises of improper federal common law making. *See* FALLON, *supra* note 12, at 5-6; Berman, *supra*

law making also may derive quite directly from the very fact that Congress has legislated in the area in the first place: by passing federal legislation, Congress makes the determination that federal law governs, or preempts, the covered terrain. As such, the decision rules used to implement that federal law arguably should be federal.[79]

1. A More Common Type of Common Law

Unlike most types of federal common law making that are viewed as acceptable, however, a federal common law of statutory interpretation would neither be rare nor confined to special "enclaves."[80] Statutory interpretation cases dominate the federal docket. A common-law conceptualization of statutory interpretation methodology would require more comfort with federal common law making than many modern jurists seem to have.

It also is important to distinguish between the two, arguably different, kinds of federal common law making that might be at issue in the context of statutory interpretation. The first kind is the one on which this Article has focused: the creation and application of the decision-making rules known as the canons of interpretation. This kind of potential federal common law making is pervasive. The second kind might be called "interpretive gap-filling," because it involves the application of statutes to unforeseen situations but does not always require consultation of the canons or any formal decision-making rules. Thomas Merrill calls this second type of activity an "extension" of textual interpretation, but not "qualita-

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note 12, at 9; Monaghan, *supra* note 16.

79. *Cf.* Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1028, 1078 (1967) (arguing that when Congress passed the Labor Management Relations Act, it evinced its intent for federal law to preempt the field, and so the Court by extension must fashion federal common law to implement that preemption).

80. Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004); *see* Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963); Bradley et al., *supra* note 18, at 880 (arguing that, post-*Erie*, federal "courts are to develop [common law] only in retail fashion to fill in the gaps, or interstices, of federal statutory or constitutional regimes.... [F]ederal courts ... do not possess a general power to develop and apply their own rules of decision" (internal quotation marks omitted)); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1265-66 (1996).

tively different" from it,[81] and deems it relatively innocuous on the spectrum of concerns about federal common law. Some scholars have justified this gap-filling work on the ground that Congress effectively delegates these questions to courts by leaving statutes ambiguous.[82]

The remainder of this Article will focus on the first type of potential federal common law making—the creation of both trans-substantive and subject-specific interpretive decision-making rules. But, with respect to the second type, it is worth noting that some empirical evidence contradicts the assumption that Congress thinks of judges as its delegates in the way that scholars like Professor Merrill describe.[83] Nor is it clear that those questions of "ordinary" interpretation are as removed from "real" law making as some have argued.[84]

Regardless, it seems indisputable that the first type of potential federal common law making—the creation of generally applicable, and often policy-based, interpretive doctrines—is precisely the kind of federal judicial law making that sits at the opposite, more controversial end of the federal common law "spectrum." This more recognizable type of judicial federal law making has typically required some explicit justification. And yet, in this context, virtually no one has seriously objected to it. Justice Scalia years ago raised the "question of where the courts get the authority to impose" the canons,[85] but he still actively deploys them and seems to have

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81. Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985); *see also* Bellia, *supra* note 72, at 832-33 (arguing that the definition of federal common law "is broad enough to encompass certain judicial determinations about the propriety of different methods of interpretation").

82. *See* Merrill, *supra* note 81, at 41-44 (calling this "implied delegated law making"); *cf.* Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1090 (1964) ("The exercise of this judicial competence is premised on the inevitable incompleteness of legislation.... In these cases it is the task of the judiciary to fill in the legislative lacunae.").

83. *See* Gluck & Bressman, *supra* note 8 (manuscript at 5) (presenting evidence from an empirical study that counsels in Congress do not think of courts as delegates).

84. Consider Sunstein's argument that the Court has developed its agency deference doctrines in recognition of the fact that interpretation involves policy making. Sunstein, *supra* note 7, at 2583-84. Indeed, Sunstein makes the explicit link to *Erie*, arguing that "the shift from independent judicial judgment to respect for reasonable interpretations by the executive rests on the same realistic commitments that led the federal judiciary to abandon 'general' federal common law in favor of respect for state law." *Id.*

85. Scalia, *supra* note 24, at 29.

abandoned that inquiry.[86] Justice Breyer has offered the most likely reason that courts routinely deploy the canons, whatever their source: courts need *something* to help them fill statutory ambiguities if judges are expected to resolve statutory cases using anything other than personal preference or common sense.[87] If courts are unwilling to turn to legislative history, and sometimes even if they are so willing, canons are the "obvious alternative."[88]

B. The Lack of Methodological Stare Decisis as Evidence That Statutory Interpretation Methodology Is Not Understood as Law

Despite the foregoing, the federal courts do not recognize the canons as having the status of law—of any kind.[89] One of the strongest pieces of evidence to this effect is the absence of any kind of system of precedent for statutory interpretation methodology. Even when a majority of the U.S. Supreme Court agrees on an interpretive principle in a particular case (for example, "floor statements are not reliable legislative history"), that principle is not viewed as "law" for the next case, even when the same statute is being construed.[90] The Justices either believe that they cannot bind other Justices' (or future Justices') methodological choices or have implicitly concluded that it would not be wise to do so. Instead, courts and scholars routinely refer to these canons as "universal" principles, "traditional tools," or "rules of thumb"[91]—a sharp

86. *See supra* notes 25-27 and accompanying text; *cf.* SCALIA & GARNER, *supra* note 25 (not examining this question).

87. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 869 (1992).

88. *Id.*

89. Part II.B-II.D.2 and Part III.A of this Article are substantially drawn from my previous article, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898 (2011).

90. *See* Gluck, *supra* note 5, at 1910-11; Gluck, *supra* note 10, at 1765.

91. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) ("[C]anons of construction are no more than rules of thumb."); Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) (directing courts to "employ[ ] traditional tools of statutory construction"); SCALIA & GARNER, *supra* note 25, at 5; William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 662 (1990); Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 206 (1999).

divergence from the way in which they treat analogous decision-making principles in other contexts.

I have elaborated on the efficiency-, coordination-, and legitimacy-related drawbacks of this absence of what I call "methodological stare decisis" elsewhere,[92] but for purposes of this Article, the nonprecedential aspect of statutory interpretation methodology highlights both the ambiguous nature of the legal status of methodology and also what is at stake in resolving that ambiguity. For example, must all legal doctrine be precedential?[93] To the extent one believes that it must be, judicial acknowledgment of statutory interpretation methodology as "law" should have the coordinate result of giving those methodological rules stare decisis effect.

Indeed, this potential linkage between a lawlike conceptualization of the canons and methodological stare decisis may at least partially explain the resistance to the lawlike conceptualization in the first place. There has historically been a fairly romanticized view of statutory interpretation as "not a science but an art," and as requiring a more fluid and creative judicial decision-making process than other areas of law.[94] Many judges, lawyers, and scholars believe that judges need to retain some interpretive flexibility,[95] and that belief may explain why most commentators seem content to rest with the nebulous nature of the canons' legal status.

It is worth pointing out, however, that this romanticized vision of the judicial role in statutory interpretation is a vision that is somewhat at odds with the perspective embraced by *Erie* and its progeny. An emphasis on judicial creativity and flexibility is more in line with a *common law* approach to judging, or at least an approach to

92. *See* Gluck, *supra* note 10, at 1767-68.

93. Not all legal *decisions* are precedential. For example, unpublished opinions and district court decisions are generally understood not to be binding. Decision-making rules, on the other hand, are rarely acknowledged to be nonprecedential.

94. *See generally* Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1269 (1947) (comparing interpreting legislation to interpreting music and addressing "judges' reluctance to admit their own creativeness"); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947); Todd D. Rakoff, Essay, *Statutory Interpretation as a Multifarious Enterprise*, 104 NW. U. L. REV. 1559, 1578 (2010).

95. For some, this view derives from institutional concerns—the idea that Congress is a limited institution that cannot foresee or agree on all possible scenarios—and a related vision of the courts as Congress's cooperative partners. *See generally* BREYER, *supra* note 59, at 96-97.

statutory law in which the courts themselves are also viewed as having some kind of law-making role. Many scholars and a few judges advocate precisely this more engaged approach to statutory interpretation,[96] and this Article expresses no view on its normative desirability. The point, rather, is that this is not an approach that naturally follows from *Erie*'s ripple effect or from the typical faithful agent model of judging that most practicing judges claim to espouse.[97] But it *is* an approach that could more expressly be justified by explicit acknowledgment of the judicial common law power to create and apply interpretive rules designed to shape and improve legislation—even though advocates of such an approach have resisted such a lawlike view.

More practically, another explanation for the resistance to both methodological stare decisis and a lawlike conceptualization may be the reality that judges *cannot agree* on the proper interpretive methodology, and so there is no consensus approach to which a majority of judges are willing to bind themselves. This does seem to be the case with respect to some interpretive rules, like the choice between textualism and purposivism and the debate over legislative history use. Almost all federal judges do apply the various substantive canons of interpretation, but disagreement remains over the order in which they should be deployed.

C. Some State Courts Do Not Deem Themselves Bound by Federal Interpretive Principles When Interpreting Federal Statutes

The "reverse-*Erie*" statutory interpretation cases provide a different lens through which to view the confusion that persists about the legal status of interpretive methodology. Those cases, in which state courts must interpret federal statutes, are a jurisprudential muddle.

As I have elaborated in previous work,[98] some state courts apply their own statutory interpretation principles to federal statutes,

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96. *See id*. at 97 (arguing that federal courts act in active partnership with Congress by elaborating statutory meaning); Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 253-54 (1999) (same).

97. *See* Gluck & Bressman, *supra* note 8 (manuscript at 7-16) (summarizing faithful agent theories).

98. Gluck, *supra* note 5, at 1960-68 (discussing cases on both sides).

even while acknowledging that the "federal" interpretive approach would be different.[99] The basis for this decision is presumably a conclusion by the state courts that there is no federal law of federal statutory interpretation, binding under the Supremacy Clause, that would require otherwise.

Other state courts proceed in precisely the opposite fashion. Those courts identify what they view as methodological principles applied by the U.S. Supreme Court that are not universal or general law but, rather, are distinct from the interpretive methodology that the state courts apply to their own statutes.[100] Implicit in that decision is a very different conclusion from that drawn by the other set of states: namely, that those rules are federal law, at least of some sort.

D. Many Federal Courts Do Not View Statutory Interpretation Methodology as a "Rule of Decision" Subject to Erie

Perhaps the most compelling proof of the current jurisprudential perspective may be found in the "ordinary" *Erie* cases: the vast number of cases in which federal courts must interpret state statutes.

Despite the fact that the Rules of Decision Act always has been interpreted to require federal courts to apply state statutes to resolve state-law questions, there is no general understanding, much less any consistent practice, concerning just how federal courts applying state statutes are to interpret them.[101] Federal courts rarely consider state rules of statutory interpretation.[102]

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99. *See, e.g.*, Bozeman v. State, 781 So. 2d 165, 169 (Ala. 2010) (expressly adopting the state supreme court's preferred interpretive rule, even while recognizing that the federal rule would likely be different); Nw. Airlines v. Wis. Dep't of Revenue, 717 N.W.2d 280, 290 (Wis. 2006) (same).

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

101. Thus, this "*Erie* question" is a different one from the type usually discussed. The *Erie* question of relevance to this Article involves choice of interpretive method, not choice of governing statutory law. If, for example, a federal court hears a statutory tort dispute between citizens of Texas and California, the *Erie* question that usually comes to mind is whether the Texas, California, or federal tort statute governs the dispute. But the *Erie* question as it arises in the context of statutory interpretation methodology focuses on the *next* step: namely, what happens once whichever statute is chosen must be construed.

102. *See generally* Gluck, *supra* note 5.

Instead, federal courts do not seem to think of choice of methodology as an *Erie* question in the first place. They generally apply the same interpretive rules to state statutory cases that they would apply to federal cases and do not offer any of the typical *Erie*-related justifications for diverging from state practice.[103]

To be sure, there are plausible reasons why federal courts might eschew state interpretive principles in a limited number of cases. There might be substantial federal interests in applying particular interpretive principles—for example, the rule of lenity, which some view as constitutionally derived—or concerns that the state principle at issue sits in tension with certain federal legal doctrines—for example, a hypothetical state presumption in favor of construing all gender-ambiguous statutes to include men only.[104] Or one could make arguments that statutory interpretation methodology, even if "law," is not law subject to *Erie*: perhaps it is not "outcome determinative" (although the cases indicate otherwise). Or perhaps it is more "procedural" than "substantive,"[105] and it certainly is possible that the canons might be divided between those two categories. But federal judges do not make such arguments to justify their methodological choices in state statutory cases.

There also might be more categorical, constitutional arguments that would explain why federal courts might ignore state methodology altogether. For example, if a federal judge views her interpretive methods as bound up in her character as an Article III judge, per-

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103. *Id.* at 1924.

104. *Erie* after all requires application of state rules of decision only insofar as the Constitution allows. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

105. In my view, the substance/procedure divide is not exactly the correct inquiry in any event, given that choice of statutory interpretation methodology almost always implicates the classic "unguided *Erie* choice," a scenario in which the Court has eschewed reliance on the substance/procedure divide. As is widely familiar, *Erie* and its progeny have established a bifurcated inquiry for cases in which federal courts are required to interpret state law. When there is no federal statute or rule on point, federal courts face "the typical, relatively unguided *Erie* choice." Hanna v. Plumer, 380 U.S. 460, 471 (1965). In this situation, courts must decide if state law provides a "rule[ ] of decision," 28 U.S.C. § 1652 (2006), which entails deciding whether application of the state law would further "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws," *Hanna*, 380 U.S. at 468, and perhaps also whether the state-law rule was "intended to be bound up with the definition of the rights and obligations of the parties," Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 536 (1958). *See also* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1490-91 (1997) (quoting *Erie* and describing the doctrine).

haps her interpretive methods go wherever she goes. Here, however, one would have to ask why statutory interpretation methodology would be singled out for special treatment when, as we shall see in the next Part, analogous interpretive rules from contract and constitutional interpretation do not similarly move with Article III judges to the state-law context.

Another argument might be that all statutory interpretation methods are constitutionally compelled. Under this view, a judge who believes it is unconstitutional to consider legislative history in federal cases might believe that she must take the same position in state cases. But virtually all Constitution-based arguments that have been made to justify interpretive choices have been *Article I*-based arguments or arguments about the federal, Article I-Article III (Congress-Court) relationship. Justice Scalia and Professor Manning, for example, have explicitly justified their textualist methodology with Article I-based arguments about bicameralism, presentment, and nondelegation.[106] Purposivists likewise justify their methodological choices on their vision of the proper relationship, which they often describe as a "partnership,"[107] between federal courts and Congress. But an Article I-based theory of statutory interpretation methodology obviously cannot explain why federal interpretive rules should apply when federal courts interpret statutes that are passed by *state* legislatures rather than by Congress.[108] The relevant institutional arrangements in that context could be entirely different.

1. Diversity Cases

Even in run-of-the-mine diversity cases, where the only question presented is the interpretation of a state statute, federal courts are

106. John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 684-89, 697 (1997); Scalia, *supra* note 24, at 24-25.

107. *See supra* note 96.

108. State statutes, after all, are promulgated under different (state) constitutions. Other theorists have made arguments that might apply across systems. For example, purposivist arguments that being a "faithful agent" judge means carrying out legislative intentions even if that requires recourse to interpretive tools beyond text, *see* BREYER, *supra* note 59, at 92-94, could be based on a "generic" (not federal) paradigm. *But see* Eskridge, *supra* note 62 (making a particular argument about faithful agency in American federal judges). Purposivists also have generally argued that no specific theory of interpretation is constitutionally compelled.

extremely irregular about whether they consult state interpretive principles. Only the Fifth Circuit has consistently held that *Erie* requires it to apply state interpretive methodology to state statutes in diversity.[109]

Many different examples of this phenomenon exist, but for this Article's purposes, one will suffice. Consider the U.S. Supreme Court's most recent *Erie* decision, *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*,[110] which grappled with a typical *Erie* question: a purported conflict between a New York class action statute and Federal Rule of Civil Procedure 23.[111] But a critical, initial aspect of the case actually turned on a question of state statutory interpretation: the Court first had to decide whether there was a conflict between the New York statute and the federal rule.[112]

Both the majority and the dissent construed the New York statute in deciding that question. Justice Scalia's opinion for the Court gave the New York statute a textual reading and argued that such a reading put it in direct conflict with Rule 23.[113] In contrast, Justice Ginsburg's dissent argued that, under a purposivist construction of the New York statute, there was no conflict.[114] Neither side, however, considered whether *New York's highest court* would consult legislative history and purpose, as Justice Ginsburg did, or whether it would favor a literal approach, as Justice Scalia did. Instead, each looked only to federal statutory interpretation cases.[115]

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

110. 130 S. Ct. 1431 (2010).

111. Specifically, the question was whether a New York statute prohibiting class actions to recover state-law penalties conflicted with Federal Rule of Civil Procedure 23's class certification requirements. *See* N.Y. C.P.L.R. § 901(b) (McKinney 2006).

112. *Shady Grove*, 130 S. Ct. at 1440.

113. *See id.* (focusing on the "literal" terms of the New York statute and refusing to allow statutory purpose to override textual evidence).

114. *Id.* at 1465, 1467 (Ginsburg, J., dissenting).

115. *See, e.g.*, *id.* at 1440 (majority opinion); *id.* at 1469 (Ginsburg, J., dissenting) (arguing that the statute's purpose, even if not its literal language, was only to restrict remedies and did not concern the question of class certification).

And in fact, Justice Scalia's reasoning for the Court in *Shady Grove* seems to challenge the entire premise of any argument that *Erie* applies to statutory interpretation methodology. In critiquing Justice Ginsburg's purposivist approach, Justice Scalia argued that, if consultation of state legislative intent were required, "federal judges would be condemned to poring through state legislative history—which may be less easily obtained, less thorough, and less familiar than its federal counterpart."[116] Many state courts do routinely consult legislative history,[117] and Justice Scalia's argument implies that it would never be appropriate for federal courts to apply state interpretive methodology in those circumstances, or perhaps, ever.[118] But *Erie* requires federal judges to take state law as they find it.

Similar examples abound, from both the U.S. Supreme Court and the lower federal courts.[119] There are also different kinds of cases, in which federal courts do not exactly ignore state methodology. For instance, the Ninth Circuit typically cites *both* state and federal precedents for the interpretive principles it applies to state cases—a practice that evinces either its confusion about which system's rules to apply or its understanding of these state and federal rules as interchangeable, and perhaps as general law.[120]

None of this is to understate the difficulty for any court to predict how a superior court or another jurisdiction's court will act. But, in other contexts, as Michael Dorf has noted, "*Erie* has been generally understood to require federal court adherence to state 'meta' principles of law."[121]

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

117. *See id.* As it turns out, Justice Ginsburg's dissent—although it did not cite the state cases—better approximated the generally purposive approach of the New York Court of Appeals. It therefore is not clear that the question of the purported conflict between the state law and federal rule—and so the outcome of the case—would have been resolved in the same way had the case been heard in state court.

118. *See generally* Gluck, *supra* note 10, at 1771-1811 (examining methods of statutory interpretation at the state level).

119. For more examples, see Gluck, *supra* note 5, at 1927-39.

120. *See id.* at 1933-34.

121. Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 713 (1995).

2. Federal Question Cases

Federal courts even more explicitly disregard state interpretive principles in federal question cases,[122] even though in many such cases one part of the case turns on an embedded and often preliminary question of state statutory law.[123]

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122. The *Erie* doctrine applies in federal question and federal constitutional cases, just as it does in diversity cases, provided that an analytically separate question of state law is presented. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 563 (6th ed. 2009). One can anticipate some counterarguments. Unlike in diversity cases, federal judges do not aim to "stand in the shoes" of state judges in federal question cases and that difference could potentially justify federal judges approaching state statutory questions in federal question cases from a federal, rather than state, interpretive perspective. But this is not the dominant doctrinal view with respect to other questions of state law that arise in federal question cases and so would require an argument for why statutory interpretation methodology should receive special treatment.

123. The state statutory questions presented in these federal question cases might be, but need not be, "adequate and independent" in the *Michigan v. Long* sense to implicate this Article's *Erie* arguments. (Of course, *Michigan v. Long* is not implicated because we are discussing federal court, not state court, decisions concerning state law. *See* Michigan v. Long, 463 U.S. 1032, 1040 (1983).) In some cases, the resolution of the state statutory question makes resolution of the federal question unnecessary. But the state-law question also can be antecedent and analytically separate from the federal law question even if not "adequate and independent." For instance, if a federal bankruptcy statute says that a debtor's total responsibility includes liens, provided that the liens were perfected under state law, then before the federal court can decide the total liability, it must first look to state law and apply the state lien statute to the liens at issue. That initial inquiry—what the state lien statute says—is analytically separate from the ultimate federal law question, the bankruptcy debtor's total responsibility. As a result, a later ruling by the state supreme court on the same question of state law would control, even if the prior federal case had been decided by the U.S. Supreme Court. The state statutory question—how liens are perfected under state law—is necessary to the federal case but its resolution cannot decide the case alone. At the same time, resolving that state statutory question involves no federal law considerations whatsoever.

There are other kinds of cases in which state law must be consulted as part of resolving a federal question case but that do not actually involve separate questions of state statutory interpretation. For example, some federal statutes require reference to state law but do not require federal courts themselves to construe or determine state law. The Federal Armed Career Criminal Act, for instance, provides an enhanced penalty for persons three times previously convicted of a "violent felony." 18 U.S.C. § 924(e) (2006). Federal courts often must determine whether a state criminal conviction constitutes a "violent felony" for purposes of that federal statute. In those cases, federal courts may look to the state's criminal statute to understand the kind of conduct at issue—for example, whether it was violent—but their task in such cases is not to construe the term "violent felony" as a state court would. After all, the term "violent felony" appears in the federal statute. Their task, rather, is to characterize the state level conduct; that is, to determine whether the state crime for which the defendant was convicted is a "violent felony" in the sense that the federal statute intends. *See* Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in*

Again, one of many possible examples should suffice. Consider *Stenberg v. Carhart*, in which the U.S. Supreme Court heard a federal constitutional challenge to Nebraska's late-term abortion statute.[124] The basis of jurisdiction in that case was a federal question because of the constitutional challenge, but the Court had to determine *what the state statute meant* before it could decide whether the statute was constitutional.[125] Specifically, the Court began its analysis by asking a state-law question: whether the Nebraska statute prohibited the two main types of late-term abortion procedures or only one type.[126] The Court, however, cited only federal interpretive principles to support its answer to that question.[127] The dissenting opinions likewise cited almost entirely federal methodological precedents.[128]

Constitutional Cases, 103 COLUM. L. REV. 1919, 1945 (2003). Those cases do not implicate this discussion's concerns.

124. 530 U.S. 914, 921 (2000).

125. *See id.* at 938.

126. Under the Court's precedent, the statute could survive the ultimate federal constitutional law challenge only if at least one method of performing the procedure remained available. *Id.*

127. Justice Breyer's opinion for the majority looked to Nebraska law to determine whether the views of the state attorney general—who had offered a narrowing construction—bound Nebraska courts. But apart from that, Justice Breyer did not cite a single Nebraska case in support of his chosen interpretation. *Id.* at 941-46. Among many other Nebraska rules that Justice Breyer's majority opinion overlooked, he refused to apply the canon of constitutional avoidance, which would have pointed in favor of a narrowing construction of the Nebraska statute, but cited only federal cases to justify not doing so. He did not inquire into whether the Nebraska Supreme Court routinely employs that canon, as in fact it does. *See id.* at 920-46; State v. Hookstra, 638 N.W.2d 829, 836 (Neb. 2002). The majority also attached little importance to the Nebraska courts' practice of giving the state attorney general's construction "substantial weight" and essentially disregarded it because it did not "bind the state courts." *Carhart*, 530 U.S. at 941. Instead, for additional reasons, to reject the state attorney general's construction, Justice Breyer relied on only federal cases for the following two propositions: (1) that "[w]hen a statute includes an explicit definition, we must follow that [term's] definition"; and (2) that "[i]dentical words used in different parts of the same act are intended to have the same meaning." *Id.* at 942, 944 (quoting Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995) (internal quotation marks omitted)). He also used dictionaries to ascertain statutory meaning without citing any cases—state or federal—in support. *Id.* at 944.

128. Justice Kennedy's dissent, too, first cited only federal cases for the principles of "commonsense understanding," *Carhart*, 530 U.S. at 974, 976-77 (Kennedy, J., dissenting) (citing McBoyle v. United States, 283 U.S. 25, 27 (1931)); *id.* at 976 (citing Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973)), and extra legislative "leeway when attempting to regulate the medical profession," *id.* at 976-77 (citing Kansas v. Hendricks, 521 U.S. 346, 359 (1997)), as well as for the argument that the court was "required," *id.* at 977-79, to apply the canon of constitutional avoidance to the statute. But Justice Kennedy did cite a Nebraska

Carhart is not an outlier. I have previously chronicled numerous examples of the same phenomenon.[129] There are also some cases in which federal courts hold explicitly that they are not required by *Erie* to look to state methodology in federal question cases but do so voluntarily. The Fifth Circuit offers an example, holding that "reference to [Texas interpretive rules] is not mandated by *Erie* ... [where] subject-matter jurisdiction today is based on a federal question," but that it would make "little sense" not to apply state rules of construction in most federal question/state-law cases.[130]

Of course, this intermediate position—that federal courts apply state interpretive methodology at their option—is doctrinally the same as the position that *Erie* does not require federal courts to apply state interpretive principles to state statutory questions at all.[131]

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I have focused at length on the application of *Erie* to statutory interpretation methodology because it provides a window into how federal courts think about the legal status of those interpretive principles. Presumably, if federal courts understood most methodology as common law (perhaps excluding any specific principles viewed as constitutionally compelled), they would at least consider *Erie* when choosing how to interpret state statutes.

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precedent for the proposition that the Nebraska courts would narrow the statute if given the opportunity. *Id.* at 979. Justice Thomas's dissent referenced "ordinary rules of statutory interpretation," *id.* at 992 (Thomas, J., dissenting), and cited numerous dictionaries, a voluminous medical literature, federal district court cases from jurisdictions other than Nebraska, other states' laws, and a federal case for the main rule of construction that it used to counter the majority's argument: namely, the proposition that "the common understanding of 'partial birth abortion,' ... no less than the specific definition, is part of the statute," *id.* at 992-93 (citing United States v. Morton, 467 U.S. 822, 828 (1984)). Justice Thomas then cited eight federal cases for the application of three canons: constitutional avoidance, the whole act rule, and *noscitur a sociis*. *Id.* at 992, 996-1000. But he also cited three Nebraska cases for different propositions—namely, that the state courts would apply the avoidance canon or the rule of lenity, and that they would give "substantial weight" to opinions of the state attorney general. *Id.* at 997, 1004-05.

129. *See* Gluck, *supra* note 5, at 1940-69.

130. Batterton v. Tex. Gen. Land Office, 783 F.2d 1220, 1222 (5th Cir. 1986); *see* Phelps v. Hamilton, 59 F.3d 1058, 1070-72 (10th Cir. 1995) (providing another example).

131. In both, the answer to the methodological-choice question is *federal*: if the federal court decides, in its discretion, to "borrow" the state methodology for pragmatic reasons, it is still a federal decision—as much of one as a decision by a federal court to apply only federal methodological principles.

The choice-of-law context offers an apt comparison. Like statutory interpretation rules, choice-of-law rules are decision-making, or meta, regimes; they provide courts with a reasoning process to determine which state's laws control. But choice-of-law rules are understood as common law and, as the Court held long ago in *Klaxon Co. v. Stentor Electric Manufacturing Co.*, *Erie* requires that the forum state's choice-of-law principles govern the federal court decision-making process.[132] As elaborated in the next Part, federal courts also uniformly hold that a state's interpretive preferences for contract interpretation govern when federal courts interpret state contracts.

3. Outcome Determinacy and the Procedure/Substance Divide

One plausible explanation for the deviation from *Erie* in the special context of statutory interpretation is that federal courts view their statutory interpretation methodology as *preemptive* federal common law—that is, law that applies to state statutes as well as federal statutes. Another explanation might be that federal courts do not view statutory interpretation methodology, even if "law," as the type of law subject to *Erie*. As to the former, there is no evidence that federal courts conceive of their interpretive rules as preemptive federal common law. State courts certainly do not view them that way; those courts routinely go about crafting their own different interpretive principles for state statutes.

As to the latter justification—that statutory interpretation methodology might be law but not law subject to *Erie*—the extent to which choice of statutory interpretation methodology is "outcome determinative" for *Erie* purposes is an empirical question that may be impossible to answer. It is difficult to tell when judges rely on interpretive rules actually to decide cases and when, instead, they use the rules as "cover" to reach the results they desire. This conundrum, of course, plagues all legal doctrine, not just statutory interpretation, but some lawyers and academics seem particularly skeptical that statutory interpretation methodology affects case outcomes as much as other legal rules.

132. 313 U.S. 487, 496 (1941).

But there are real differences between some state and federal interpretive rules. For instance, some states have virtually banished the use of the substantive canons; other states are more miserly about recourse to legislative history than many federal courts; and about a third of state supreme courts have held that state agency interpretations receive de novo review—in other words, that they receive no deference at all, an enormous difference from the federal *Chevron* regime.[133] These are differences that, if understood by litigators, should result in forum shopping and, in fact, it is clear that forum shopping on this basis has occurred.[134]

It is a separate question whether courts' choices of statutory interpretation rules actually affect legislative drafting practices.[135] And it is yet another question whether the effect on *that* additional audience—the legislature, as opposed to the private actors who litigate under the statutes—should be a relevant consideration in deciding whether those principles provide "rules of decision" for purposes of *Erie* in the first place.

To date, the *Erie* inquiry has focused only on primary private actors. The inquiry has focused, for example, on the effect of choice-of-contract interpretation rules on the actors who write and fight about contracts. Given that private law dominated the legal landscape when *Erie* was decided, this focus is unsurprising. But it is at least plausible that, when applied to statutory interpretation, *Erie* should take a broader, or different, approach to what it means to be "outcome determinative." The constant separation between the drafters of statutes and those who live under them makes the inquiry more complex; judicial choice of methodology might affect *both* litigants and congressional drafters.

William Eskridge and Connor Raso have adopted the more limited view of outcome determination in their response to my work on methodological stare decisis. They have argued that drafters do not place sufficient reliance on statutory interpretation rules to justify treating such rules as "law."[136] My recent empirical work

133. *See generally* Gluck, *supra* note 10, at 1771-1811 (describing all of these differences).

134. *See* Gluck, *supra* note 5, at 1936-39 (offering examples of cases in which federal courts refused to construe state statutes as "dynamically" as would state courts, even while acknowledging that refusal would lead to forum shopping).

135. *See generally* Gluck & Bressman, *supra* note 8.

136. Connor Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An*

with Lisa Bressman calls that assumption into some question.[137] It also is impossible to test that proposition without some efforts by courts to be consistent about interpretive methodology. Perhaps Congress would rely more if the courts were more predictable.[138]

Eskridge and Raso also have argued that ordinary "people care more about statutory substance than they care about interpretive process" and that this is another reason that interpretive methodology should not be understood as law.[139] But ordinary people also care less, if they know at all, about what tier of scrutiny applies in equal protection cases, or what burden of proof litigants have in Title VII cases, or what version of the parol evidence rules applies to contracts, than they care about being discriminated against or having a contract breached. This scale of public interest does not affect how the decision-making rules are treated as a matter of legal status in other areas.

To be sure, there may be differences among different types of statutory interpretation rules for purposes of an *Erie* inquiry. Some rules, like the textual presumption that a statutory term carries the same definition throughout an entire statute, may seem less "substantive" than the policy presumptions embodied by the substantive canons, although consistent application of such textual rules surely can be outcome determinative. It is also the case that underlying the application of *any* type of canon is a substantive policy choice about what the goals of interpretation should be. Choosing interpretive principles with the goal of construing statutes as ordinary people would is a different normative choice than choosing principles designed to enforce constitutional norms or to coordinate judicial behavior.

Empirical Study of What Motivates Justices in Agency Deference Cases, 110 COLUM. L. REV. 1727, 1810 (2010).

137. *See id.* at 1809 (relying on a small case study by Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 615 (2002) (relaying results of qualitative interviews of sixteen counsels on the Senate Judiciary Committee)); *cf.* Gluck & Bressman, *supra* note 8 (manuscript at 2) (asking 181 questions of 137 counsels across both houses and 26 congressional committees and calling some results of the Nourse/Schacter study into question).

138. Our empirical study provides some support for this proposition. *See* Gluck & Bressman, *supra* note 8.

139. Raso & Eskridge, *supra* note 136, at 1810.

But some canons are particularly substantive (they are called "substantive canons" for a reason!). Recall that the Court in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.* highlighted the idea that a policy-based connection—specifically, the extent to which a rule is "bound up with" the substantive law that it implements—can be relevant to the question of whether a principle is a "rule of decision" under *Erie*.[140] Policy-based interpretive presumptions like those directing courts to construe ambiguous tax statutes against those seeking deductions seem to fall quite naturally into that category. Courts have made similar substance/procedure distinctions among different types of rules for *Erie* purposes in other contexts, most notably in the context of the Federal Rules of Evidence, and so there would be a precedent for such a practice here.[141]

Finally, it should be understood that one could conclude that statutory interpretation methodology is "law" even if one is not certain that all (or any) of the various canons are "rules of decision" for *Erie* purposes. Similarly, the answer to the *Erie* question cannot definitely resolve the jurisprudential one. Recognizing that some states do already treat statutory interpretation methodology as common law suggests that federal courts should apply it in state statutory cases, but does not instruct whether federal courts should give their own methodology the same treatment. And indeed, the answer might be different across different courts.

III. SOME COMPARISONS AND WHY *CHEVRON* SHOULD NOT BE SPECIAL

Some comparisons are illuminating. Federal courts do not give the same ambiguous legal treatment to analogous interpretive and decision-making rules, including contract law, constitutional law, and burden allocation regimes. Perhaps even more incongruously, federal courts do treat a few exceptional statutory interpretation rules—like the *Chevron* doctrine—as federal common law, without any acknowledgement of or justification for the distinction. Moreover, the federal courts do follow some of Congress's enacted

140. 356 U.S. 525, 536 (1958) (listing as a relevant consideration in *Erie* cases whether the state-law rule was "intended to be bound up with the definition of the rights and obligations of the parties"); *see also* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 86, 89 (1938).

141. Gluck, *supra* note 5, at 1979-80 n.279.

"rules of construction," like statutory preemption and savings clauses, despite the common judicial view that interpretive methodology is not law that Congress can legislate.

A. Analogous Principles in Other Contexts That Federal Courts Treat as Law

Lest one jump to the conclusion that the ambiguity that this Article has identified applies to all interpretive methodologies and not just to statutory interpretation, it is important to recognize that federal courts do not approach other methodologies in the same way, as either a matter of *Erie*, federal common law making, or stare decisis. Little theoretical connection has been made across different types of interpretation in this manner, and in particular there seems to be an unfortunate divide between discussions of public law and private law interpretation that has masked some revealing comparisons.[142]

Analogous examples are myriad and available regardless of how one conceives of the statutory interpretation endeavor. For instance, if one conceives of that endeavor as the act of resolving disputes over ambiguities in previously negotiated text, then the areas of contract, will, and trust interpretation offer strong parallels. If, instead, one conceives of statutory interpretation methodology as a set of rules that provides courts with a decision-making process, then other reasoning frameworks, such as choice-of-law rules and the various constitutional decision rules—like the tiers of scrutiny and the various First Amendment tests—provide apt analogies. Burden-allocating regimes offer another comparison, since many of the canons effectively serve as default presumptions that shift the burden to the other side to prove a contrary interpretation.

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142. Kent Greenawalt's recent treatises are an important exception. *See* KENT GREENAWALT, LEGAL INTERPRETATION: PERSPECTIVES FROM OTHER DISCIPLINES AND PRIVATE TEXTS 215 (2010); KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION (2012). SCALIA & GARNER, *supra* note 25, at 42, also discuss certain canons as applying equally across all written instruments, and there has been some academic work comparing statutory interpretation and contract interpretation, *see, e.g.*, Stephen J. Choi & G. Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129, 1132 (2006); Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15 (1984). To date, however, none of these sources has brought out the kinds of jurisprudential differences on which this Article focuses.

1. Contract Interpretation

To offer just a few applications, let us begin with contract interpretation, which implicates many of the same questions implicated in statutory cases, such as whether interpretation should aim to effectuate the drafters' subjective intent or what kind of extrinsic evidence might be consulted to assist in the interpretive effort. In fact, many rules of contract interpretation are similar—and, in some states, identical—to the rules of statutory interpretation.[143] But federal courts routinely hold that state "rules of contractual interpretation ... [are] considered substantive under the *Erie* doctrine"[144] and apply them in state contract cases.[145]

Likewise, on the reverse side, federal and state courts agree that "federal law controls the contract interpretation" in cases involving federal or maritime contracts.[146] Federal courts also refer to these contract interpretation presumptions as "federal contract law principles"[147] and differentiate the application of the parol evidence

143. *See, e.g.*, Gentile v. SinglePoint Fin., Inc., 788 A.2d 111, 113 (Del. 2001) ("It is a fundamental principle that the rules used to interpret statutes, contracts, and other written instruments are applicable when construing corporate charters."); Thomas v. Progressive Cas. Ins. Co., 749 N.W.2d 678, 683 n.5 (Iowa 2008) ("Cases interpreting language in statutes are persuasive authority in interpreting contractual language."); Horse Creek Conservation Dist. v. State *ex rel.* Wyo. Attorney Gen., 221 P.3d 306, 317 (Wyo. 2009) (describing statutory and contract interpretation as embracing the "plain meaning" approach). For example, under the "four corners rule," "if the meaning of a written contract can be inferred from its terms, the judicial inquiry stops there; extrinsic evidence ... is inadmissible." Coplay Cement Co. v. Willis & Paul Grp., 983 F.2d 1435, 1438 (7th Cir. 1993). This is essentially the same as the "plain meaning" rule of statutory interpretation. As another example, the parol evidence rule is basically identical to statutory interpretation doctrines that concern when courts may consider nontextual evidence. Ungerleider v. Gordon, 214 F.3d 1279, 1282 (11th Cir. 2000) (defining the parol evidence rule to hold that "[e]vidence of a prior or contemporaneous oral agreement is inadmissible to vary or contradict the unambiguous language of a valid contract" (internal quotation marks omitted)).

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

145. *See, e.g.*, *Ungerleider*, 214 F.3d at 1282 ("Florida law, of course, recognizes the parol evidence rule.... The rule is one of substantive law, not evidence, so it is applied by federal courts sitting in diversity."); *Coplay Cement Co.*, 983 F.2d at 1438; Wilson Arlington Co. v. Prudential Ins. Co., 912 F.2d 366, 370 (9th Cir. 1990) (explaining that the outcome of cases would be different if the court applied California's version of the parol evidence rule as opposed to Virginia's); Schilberg Integrated Metals Corp. v. Cont'l Cas. Co., 819 A.2d 773, 794 (Conn. 2003) (characterizing the parol evidence rule as substantive law).

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

147. *See, e.g.*, Bethlehem Steel Corp. v. United States, 270 F.3d 135, 139 (3d Cir. 2001)

rule on the basis of whether a federal or state law contract is at issue.[148] Essentially the same story can be told about will and trust interpretation.[149]

Moreover, as additional evidence of the common law status of contract interpretation methodology, it is universally agreed that legislatures (as well as parties to a contract) can dictate to courts which interpretive principles to apply. The Uniform Commercial Code (U.C.C.) is precisely such an interpretive statute. It dictates the rules of interpretation that courts should follow, among other things codifying the parol evidence rule[150] and overriding the common law rules of contract interpretation that preceded it.[151]

To be clear, the point is not about the content of the rules. Although there are similarities between statutory and contract interpretation principles, arguments could be (and have been) made that, because of the potential differences between private law and public law, the rules should look different in each context.[152] My point, rather, is about the *legal status* of the rules. Those who have drawn distinctions between statutory and contract interpretation have focused mostly on what the rules should look like or on how much power courts should have over them, and not on whether one type should be understood as less lawlike than the other.

(holding that "federal contract law" governs the interpretation of federal contracts); Morais v. Cent. Beverage Corp. Union Emps.' Supplemental Ret. Plan, 167 F.3d 709, 711 (1st Cir. 1999) (applying federal common law to interpret the provisions of an Employee Retirement Income Security Act (ERISA) benefit plan); Snider v. Circle K Corp., 923 F.2d 1404, 1407 (10th Cir. 1991) (applying federal common law to Title VII settlement agreement contracts); Kennewick Irrigation Dist. v. United States, 880 F.2d 1018, 1032 (9th Cir. 1989) (same); Seaboard Lumber Co. v. United States, 15 Cl. Ct. 366, 370 (Cl. Ct. 1988) ("[F]ederal contract law is not just a branch of the common law of contracts, but is a separate tree."), *aff'd*, 903 F.2d 1560 (Fed. Cir. 1990); Bellia, *supra* note 72, at 842-43 (compiling cases on the extent to which federal contract law governs state contracts that affect settlements involving federal rights).

148. *See* O'Neill v. United States, 50 F.3d 677, 684-85 (9th Cir. 1995); Mohr v. Metro E. Mfg. Co., 711 F.2d 69, 71-72 (7th Cir. 1983).

149. *See* Gluck, *supra* note 5, at 1975-76.

150. U.C.C. § 2-202 (2012).

151. *Id.* § 1-103.

152. *Compare, e.g.*, Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 885 (1991) (arguing the distinction no longer holds), *with* Mark L. Movsesian, *Are Statutes Really Legislative Bargains? The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145 (1998) (arguing the distinction should affect the content of the rules).

2. Choice of Law and Constitutional Law Decision-Making Rules

The same story can be told in the context of other ex ante-defined reasoning frameworks. As already noted, the Court in *Klaxon* long ago brought choice of law under *Erie*'s umbrella and considers those principles common law.[153] Constitutional law provides another important example, both because constitutional decision-making rules are viewed differently from statutory interpretation rules for purposes of *Erie* and also because some of the debates about the validity of those constitutional rules have relevance to the statutory interpretation context as well.

Beginning with the *Erie* point, many federal courts are aware of and apply state constitutional interpretive regimes when federal courts interpret state constitutions. For instance, a number of state supreme courts have interpretive rules that dictate when courts should construe state constitutional provisions coextensively with analogous federal constitutional provisions and when courts should instead diverge.[154] Most federal circuits apply these so-called state "lockstep" and "criteria" approaches under *Erie* when called upon to construe state constitutional provisions.[155]

Similarly, on the reverse side, state courts are well aware of, and view as "law," the context-specific interpretive frameworks that the U.S. Supreme Court uses to interpret different provisions of the Federal Constitution—including the tiers of scrutiny used in equal protection claims, the dormant Commerce Clause test, and the various First Amendment interpretive regimes that control commercial speech claims. When state courts adjudicate federal constitutional claims, they view themselves as bound under the Supremacy Clause to apply those federal constitutional decision rules.[156]

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

154. *See generally* Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1501 (2005).

155. *See, e.g.*, Gen. Auto Serv. Station v. City of Chi., 526 F.3d 991, 997 n.6 (7th Cir. 2008); Esplanade Props., LLC v. City of Seattle, 307 F.3d 978, 983 (9th Cir. 2002); Mixon v. Ohio, 193 F.3d 389, 402 n.11 (6th Cir. 1999); Marsden v. Moore, 847 F.2d 1536, 1544-45 (11th Cir. 1988).

156. *See, e.g.*, Ark. Tobacco Control Bd. v. Santa Fe Natural Tobacco Co., 199 S.W.3d 656, 660 (Ark. 2004) (involving the Supreme Court's two-pronged dormant Commerce Clause test);

To be clear, this discussion does not include overarching theories of constitutional interpretation, like originalism or living constitutionalism. Those obviously have not been accorded the force of law. Similarly, in the context of statutory interpretation, my argument is not primarily about whether textualism and purposivism are law. My central argument is about the *individual doctrines*—the canons—that courts use to implement whatever theory that they choose.[157] In the constitutional law context, the relevant comparisons are doctrines like the tiers of scrutiny.[158]

Lehman Bros. Bank, FSB v. State Bank Comm'r, 937 A.2d 95, 107-08 (Del. 2007) (same); Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust, 206 P.3d 481, 495 (Idaho 2009) (explaining the application of the tiers of scrutiny); *In re* Warner, 21 So. 3d 218, 246 (La. 2009) (applying the First Amendment content-based regulation test); State v. Bussmann, 741 N.W.2d 79, 94 (Minn. 2007) (same); Turner v. Roman Catholic Diocese, 987 A.2d 960, 973-74 (Vt. 2009) (involving the three-pronged Establishment Clause test).

157. The reason my argument does not entirely exclude the overarching theories is that, in the *Erie* context, it seems to me that courts should apply the overarching interpretive method of the home jurisdiction in their efforts to predict how the state's high court would rule regardless of whether they would conceive of the methodology itself as common law. *See supra* note 121 and accompanying text. It is an interesting question for another day why individual interpretive rules seem more amenable to lawlike treatment than overarching methodologies.

158. Stare decisis offers another example, although one less settled. With respect to the intersection of stare decisis and *Erie*, we see theories of precedent treated as rules of decision in the context of Louisiana's civil law system. As the nation's only civil code state, Louisiana does not use stare decisis but rather employs the statute-based civil law methodology. The Fifth Circuit has held that *Erie* compels federal courts to use Louisiana's unique approach to precedent in diversity cases involving Louisiana law. *See, e.g.*, Gen. Elec. Capital Corp. v. Se. Health Care, Inc., 950 F.2d 944, 950 (5th Cir. 1991); *see also* Dorf, *supra* note 121, at 713 (noting the same example). And in reverse, Louisiana courts seem to apply "regular" stare decisis to federal law questions. *See* Coutee v. Global Marine Drilling Co., 924 So. 2d 112, 117 (La. 2006) ("Generally, state courts exercising concurrent maritime jurisdiction are bound to apply substantive federal maritime statutory law and to follow United States Supreme Court maritime jurisprudence."). But a debate does remain on the federal side with respect to the legal status of stare decisis. Scholars have disputed whether Congress could abrogate stare decisis by statute. *See* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 828-29 (2008) (describing this debate); *supra* note 10 and accompanying text. *Compare, e.g.*, John Harrison, Essay, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 505 (2000) (arguing that stare decisis is usually a rule of federal common law), *and* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535 (2000) (arguing that stare decisis is "a form of 'common law' followed by courts as a matter of judicial policy" and "may be displaced by an act of Congress"), *with* FALLON ET AL., *supra* note 122, at 591-92 (arguing that "the doctrine's entrenched status and its normative desirability" support the notion that it is constitutionally authorized, and the fact that it goes "to the heart of the judicial power to determine the constitutional law of the United States" points to the conclusion that it is not constitutional common law that Congress can override).

This is not to say that the status of these constitutional rules is uncontroversial. As noted in Part I, the constitutional decision-making frameworks have been typologized by a variety of scholars who have argued about where these rules sit on the federal common law/constitutional law spectrum. The difference, however, is that those efforts have given rise to an explicit debate about the source of the judicial power to create these constitutional doctrines[159]—a debate that has no parallel in the context of statutory interpretation.

3. Burden Allocation Regimes

The Court's treatment of burden allocation rules—court-related rules that range from regimes for negligence to regimes that effectuate statutory schemes like the Civil Rights Act's well-known *McDonnell Douglas* test[160]—follows the same pattern.[161] I will not repeat the analysis except to point out one important aspect of the comparison. An argument that has been made in favor of the application of *Erie* to burden allocation rules is that many of those "presumptions and allocations ... include[] substantive preferences,"[162] and that they therefore are rules of decision. But, of course, this argument also resonates for statutory interpretation. In particular, the substantive canons of statutory construction function as policy-infused burden-shifting devices. The presumption against preemption, for example, entails a substantive preference for state law as the default rule. Similarly, the canon that ambiguous bankruptcy statutes are to be construed in favor of the debtor entails a substantive judgment that favors a fresh start for the debtor over the expectations of creditors seeking payment. Virtually

159. *See, e.g.*, Berman, *supra* note 12, at 16-17 ("To carefully separate judge-announced constitutional doctrine into operative propositions and decision rules, then, is a first step toward identifying the full latitude that Congress should rightly enjoy in the shaping of in-court doctrine."); Fallon, *supra* note 43, at 1303 & n.130 (describing the debate inspired by these efforts to categorize constitutional decision rules as "a debate about the lawful authority, if any, for courts to promulgate 'prophylactic' rules"); Whittington, *supra* note 41 (questioning judicial power to develop rules of constitutional "construction").

160. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (effectuating Title VII).

161. *See* Gluck, *supra* note 5, at 1978-80.

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

all of the substantive canons can be described in this manner. And they are used—just like burdens of proof, presumptions, and allocation devices—"as handicaps ... against the disfavored contention."[163]

B. Some Statutory Interpretation Principles That the Federal Courts Do Treat as Law

Adding to the puzzle, there are some glimmers of a real, existing federal common law of statutory interpretation. These glimmers are evident in the few areas of law for which the Court has effectively settled on a single interpretive approach and given that approach precedential effect, and also in those areas in which the Court appears to follow congressionally legislated interpretive rules. But courts have not openly acknowledged that they distinguish these instances from other types of interpretive rules, or why they do so.

Most notable among these is the *Chevron* regime, which, although not often described in this fashion, is a rule of statutory interpretation: *Chevron* is a decision-making rule that sets forth when courts should resolve federal statutory ambiguities by consulting an extrinsic source—the interpretations offered by federal agencies.[164] *Chevron* is routinely referred to as a "precedent" by courts and scholars alike, and may now be the most cited U.S. Supreme Court case in history.[165]

In addition to *Chevron*, there are also some specific statutes for which the Court has agreed on a particular and consistent set of interpretive rules. For instance, the Court has predefined the relevant interpretive principles for the Employee Retirement Income Security Act (ERISA) and the Federal Employers Liability Act (FELA).[166]

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

164. *See generally* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

165. Raso & Eskridge, *supra* note 136, at 1730-31; *see also* Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 782 n.6 (2010) (counting more than seven thousand references in other cases).

166. *See* Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 541-42 (1994) (defining the FELA interpretation test); McBride v. CSX Transp., Inc., 598 F.3d 388, 397-98 (7th Cir. 2010) (applying *Gottshall* for FELA interpretation), *aff'd*, 131 S. Ct. 2630 (2011); Overby v. Nat'l

These examples illustrate the real-world possibility of a more lawlike conception of interpretive methodology than presently exists. They also illustrate what *kind* of law statutory interpretation methodology would likely be considered. It would be federal common law, not general law (putting aside the possibility of some constitutionally tethered principles), and it would not be preemptive. That is, it would be law that is precedential and that also binds state courts under the Supremacy Clause, but only when federal statutes are being construed. State courts always apply *Chevron* to questions about deference to federal agency interpretations of federal statutes. But state courts also are free to maintain their own different interpretive principles for *state* agency deference,[167] and many do.[168] If most other canons received similar treatment, such a law of statutory interpretation methodology would be a species of federal common law expressly tied to federal statutes in the same way that the federal common law of contract interpretation applies only to federal contracts.

1. Chevron *Is Not Special*

A few additional words about *Chevron* are in order. Some scholars have responded to my earlier work by making specific claims about *Chevron*. Eskridge and Raso, for example, have argued that *Chevron* is a "canon" not a "precedent," a dichotomy that implies that the two are mutually exclusive categories, and they use "precedent" as a

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Ass'n of Letter Carriers, 595 F.3d 1290, 1295 (D.C. Cir. 2010) (quoting the Supreme Court for the principle that "ERISA ... follows standard trust law principles"); Buce v. Allianz Life Ins. Co., 247 F.3d 1133, 1142 (11th Cir. 2001) ("[T]he District Court ruled—correctly—that when a federal court construes an ERISA-regulated benefits plan, the federal common law of ERISA supersedes state law."); Aswad v. Norfolk S. Ry. Co., No. 04-2536, 2006 WL 1063297, at *9 (Va. Cir. Ct. Apr. 18, 2006) (holding that the court need not follow lower federal court interpretations of FELA but that it was bound to follow the U.S. Supreme Court's articulated interpretive principles for FELA).

167. Except, of course, insofar as state law would constrain deference to federal agency interpretations.

168. *See* Ann Graham, Chevron *Lite: How Much Deference Should Courts Give to State Agency Interpretation?*, 68 LA. L. REV. 1105, 1109 (2008) ("Existing state models range along a continuum from express adoption of the *Chevron* doctrine to outright rejection of *Chevron*'s applicability."); Comment, *A Case for Varying Interpretive Deference at the State Level*, 119 YALE L.J. 373, 374 (2009).

proxy for "law."[169] Their primary evidence is that the Court does not always faithfully follow *Chevron*—that instead, the Justices are driven by ideology—and that when the Court does ignore *Chevron*, it does not justify its choice in the same way that it typically justifies its departure from a precedent.[170]

On the other side, several administrative law scholars also recently have made arguments that much of administrative law, with a particular focus on *Chevron*, is "common law."[171] I certainly agree. But *Chevron* and these other administrative-law examples are particularly visible instances of the broader jurisprudential point that I am making, not exceptions to the counterargument.

It is puzzling why *Chevron* has been singled out in this manner. With respect to the Eskridge/Raso argument that *Chevron* is not "law" because it is not consistently applied by judges, many "precedents" are not faithfully followed. Few people think that courts are nonideological in their application of precedents on workplace discrimination. But that does not make those controversial precedents "not law." (The Eskridge/Raso study did not test any such comparisons.)

The fact of the matter is that *Chevron* is an exceedingly poorly constructed legal rule. The Court has rested its application on a finding of "ambiguity" but has directed jurists to make that ambiguity determination with reference to "traditional tools of statutory construction"[172]—a category that is murky at best, because courts cannot agree on what the traditional tools of interpretation are and in what order they should be applied. *Chevron*'s manipulability may stem as much from its content as from its legal status.

In this regard, it is illuminating that Eskridge and Raso do not recommend eliminating *Chevron* or the other deference doctrines. Rather, they recommend reducing the number of deference rules to limit judicial discretion to deploy them inconsistently.[173] This recommendation offers some indication that the authors believe the

169. *See* Raso & Eskridge, *supra* note 136, at 1796.

170. *Id.* at 1793-94.

171. Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 2-3 (2011); Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1295 (2012).

172. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

173. *See* Raso & Eskridge, *supra* note 136, at 1817.

rules are more than mere judicial preference and are in fact doing some kind of work.

The "administrative common law" argument, on the other hand, correctly views *Chevron* as I have described it—as a court-created doctrine that counsels courts how to interpret ambiguous statutes. Some scholars advancing this view also have argued that Congress could overrule *Chevron* by statute.[174] What is curious, however, and this refers back to the debate about the *Charming Betsy* canon,[175] is why *Chevron* and other administrative-law canons (like *Mead*) have been singled out from the rest of the statutory interpretation landscape.[176] Although administrative law scholars have offered no justifications for drawing the line where they have, the explanation may simply be that administrative law scholars do not view agency deference principles as rules of "statutory interpretation." Indeed, virtually all administrative law scholars refer to *Chevron* as a "doctrine." Legislation scholars more typically refer to it as a "canon." But clearly, it is *both*. The broad acceptance of *Chevron* and *Mead* as common law should not be viewed as an exception but rather as a challenge to those who would argue that other statutory interpretation tools are something different.

2. Rules of Construction in the U.S. Code

There are also literally thousands of provisions known as "Rules of Construction" in the U.S. Code. These provisions are different from the Federal Dictionary Act, which has received more attention in statutory interpretation circles. The Dictionary Act's application is optional—it provides that it can be ignored if "context indicates otherwise"—and much of it covers very simple interpretive conventions, such as "words importing the plural include the singular."[177]

Rules of construction are entirely different. They are categorical, often apply to specific statutes rather than across the entire U.S.

174. *See* Rosenkranz, *supra* note 10, at 2130; Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 198 (2006).

175. *See supra* Part I.A.

176. Administrative law scholars tend to include other Court-created interpretive deference doctrines, like the one articulated in *United States v. Mead Corp.*, in arguments about common law. 533 U.S. 218 (2001).

177. 1 U.S.C. § 1 (2006).

Code, and are typically styled as mandatory—usually using the word "shall." A Westlaw search of the phrase "shall be construed," for example, returns more than 5200 results, of which the following randomly selected examples are representative:

- "Nothing in this subchapter shall be construed to establish a credit limitation on any Federal loan or loan guarantee program";[178]
- "Nothing in this section shall be construed to supercede State or local health regulations";[179]
- "Nothing in paragraph (1) shall be construed as affecting arrangements entered into between States and the Indian Health Service";[180]
- "Nothing in this chapter shall be construed to mean, or provide for, control of production or otherwise limit the right of individual egg producers to produce commercial eggs";[181] and
- "Nothing in this subsection shall be construed to prohibit a library from limiting Internet access."[182]

Federal courts routinely adhere to these kinds of rules of construction in statutory cases.[183] ERISA's preemption and savings clauses alone have dictated the results in hundreds of cases.[184] At the same time, scholars and judges have contested whether

178. 2 U.S.C. § 661f(a) (2006).

179. 42 U.S.C. § 1791(f) (2006).

180. *Id.* § 1320b-9 (Supp. III 2010).

181. 7 U.S.C. § 2701 (2006).

182. 20 U.S.C. § 9134 (2006).

183. For examples of reliance on savings clauses, see Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1973 (2011); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748-49 (2011); Williamson v. Mazda Motor of Am., 131 S. Ct. 1131, 1135-36 (2011). For examples of reliance on severability clauses, see Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2607 (2012) ("[The Medicaid statute] includes a severability clause confirming we need go no further."); Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987). For examples of reliance on preemption clauses, see Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965, 970 (2012); *Whiting*, 131 S. Ct. at 1977.

184. *See* 29 U.S.C. § 1144(a), (b)(2)(A) (2006). ERISA's savings clause has been cited in at least 26 cases in the U.S. Supreme Court, 53 cases in the state supreme courts, and 352 cases in the courts of appeals. Its preemption clause has been cited at least 15 times in the Supreme Court, 80 times in the state supreme courts, and 349 times in the federal courts of appeals. These figures are based on a Westlaw KeyCite search of 29 U.S.C. § 1144, limited to terms "savings" or "preemption clause."

Congress could constitutionally legislate "federal rules of statutory interpretation" in the first place.

Some scholars have argued that legislated interpretive rules violate the principle of separation of powers, a position that implies that canons are not common law. Other scholars have drawn lines between the kinds of rules that Congress can and cannot legislate. Many judges also have resisted the notion that legislators can dictate judicial interpretive methodology.[185]

But the questions raised in those debates are not so easily distinguishable from the question of whether courts should follow the rules of construction in the U.S. Code. After all, how different is ERISA's "savings clause," which states that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities,"[186] from the presumption against preemption? Is its mere statute-specificity enough to justify such a great jurisprudential difference?

In our recent study of congressional drafting practices, Lisa Bressman and I queried 137 congressional counsels about whether they had ever drafted or considered drafting instructions to courts on how to interpret statutes. Fifty-one respondents said that they had, and thirty-five specifically volunteered these kinds of legislated rules of construction—including preemption clauses, savings clauses, and severability clauses—as examples of how drafters give interpretive instructions to courts.[187]

Judges and scholars do not seem to be making the connection between these frequently applied, legislated interpretive rules and the separation of powers debate, much less between the existence of

185. *Compare*, *e.g.*, SCALIA & GARNER, *supra* note 25, at 244-45 (arguing that legislated rules applicable to all statutes may be more constitutionally problematic than ones that apply to a single statute), *and* Jellum, *supra* note 10, at 879 (same), *with* Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers,* 53 VAND. L. REV. 1457, 1461 (2000) (arguing that Congress could legislatively require recourse to legislative history), *and* Rosenkranz, *supra* note 10, at 2156 (arguing some rules could be legislated). These debates are currently playing out in the states: many state courts have actually refused to follow the increasing number of state statutes that attempt to dictate a particular statutory interpretation methodology. *Cf.* Scott, *supra* note 5, app. B (cataloging the state-legislated rules). *See generally* Gluck, *supra* note 10, at 1756 (detailing state judicial resistance to those legislated rules).

186. 29 U.S.C. § 1144(b)(2)(A).

187. Gluck & Bressman, *supra* note 8 (manuscript at 129 & n.652).

these legislated rules and the question of the legal status of methodology. Justice Scalia, for instance, recently called the separation of powers debate "academic" and claimed that, other than a few rules of construction requiring statutes to be "liberally construed" and state efforts to abolish the rule of lenity, such enactments directing judicial interpretation do not exist in the real world.[188] All evidence points to the contrary.

IV. IMPLICATIONS AND ANTICIPATED OBJECTIONS

Ultimately, what may be most at stake in reconceptualizing statutory interpretation rules as law would be a new understanding of who the "lawmaker" is. A common law frame for even some interpretive principles, for example, opens the door to legislated interpretive rules, stare decisis effect for canons, and perhaps the requirement that federal courts apply state interpretive principles to state statutes under *Erie*. The alternative—an understanding of statutory interpretation methodology as something different from common law, something bound up in the individual character of the judge, or law that is constitutionally derived, or perhaps some other category of legal principle altogether—might leave more power over interpretive principles in the hands of individual federal judges. Federal judges do seem much more reluctant to relinquish—either to fellow judges (through methodological stare decisis), to other judicial systems (through *Erie*), or to legislatures (through legislated interpretive rules)—interpretive power in this context than they do in other areas of law.

I already have offered some hypotheses about what might be driving that judicial resistance. The judicial desire to retain interpretive flexibility, the inability to reach consensus on a single set of interpretive rules, and a reluctance to acknowledge that what judges are doing is "making law" are some possibilities. Also at play may be the sense that an Article III judge's interpretive philosophy is inextricaby tied to her character and cannot be displaced by other institutional actors. Recognizing those considerations but putting them to the side for now, this Part responds to some other kinds of anticipated objections to a more law-oriented understanding. The

188. SCALIA & GARNER, *supra* note 25, at 245.

Part concludes with some tentative thoughts about how our understandings of law, precedent, and *Erie* might evolve in light of the foregoing analysis.

A. Red Herrings: Uniformity, Inflexibility, and Rules Versus Standards

There may be a misimpression that understanding the canons as law necessarily dictates an inflexible, "one-size-fits-all," or rule-like approach to how statutes should be interpreted.[189] But it is critical to separate out concerns about what statutory interpretation rules should *look like* from the jurisprudential question of what they *are*.

There is no reason, for instance, that a common law of statutory interpretation would necessarily require that interpretive rules be the same for all statutory questions. There already are different canons for different subjects, and conceptualizing the canons as federal common law (or constitutionally derived law) would not prevent more. Nor would treating the rules of interpretation as law necessarily mean, as some have contended, that all courts must apply the *same* interpretive rules.[190] A state's common law of statutory interpretation might be very different—and indeed, already is in some states—from the federal version. Different courts within a system—for example, trial and appellate courts—also could apply different sets of interpretive rules under a common law conceptualization.[191]

Nor is it the case that treating some interpretive rules as "law" necessarily means that all of them must be treated in that fashion. In the constitutional law context, the Court has not decided on an overarching interpretive methodology, but it has articulated with finality various decision-making regimes—for example, the three-pronged dormant Commerce Clause test and the various First

189. For an example of an argument to this effect, see Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47, 53 (2010), http://yalelawjournal.org/images/pdfs/900.pdf.

190. *Id.* at 48.

191. Some scholars embrace this idea of different interpretive rules at different court levels, *see* Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1217-18 (2012), but not this author. My resistance to those arguments, however, stems from pragmatic concerns and has nothing to do with whether interpretive rules are viewed as common law.

Amendment frameworks.[192] So too, in the statutory interpretation context, the Court might decide with finality some recurring and specific debates, such as the reliability of particular types of legislative history (either in general or with respect to specific statutes), or what canons may be consulted in the *Chevron* analysis. The Court could still leave unresolved larger disputes about the "best" overarching interpretation methodology.

This also is *not* a debate about rules versus standards. Scholars who have resisted the idea of methodological stare decisis have deployed in support of their position the argument that standards are better than rules for resolving statutory questions and that "canons" are more like standards than "laws" or "precedents" are.[193] But there are plenty of standards—think of the myriad balancing tests created by the Court—that are creations of the federal common law. Conflating the idea of a law of statutory interpretation with the necessity of bright-line rules is a distraction. If one prefers standards to rules,[194] then one should advocate for a federal common law of statutory interpretation that has more standard-like doctrines. It has nothing to do with the question of its jurisprudential source or stare decisis effect.

B. The Expressive and Explanatory Power of a More Lawlike Approach

Calling something a "law," of course, does not necessarily make courts apply it consistently. As such, even if courts were to reconceptualize interpretive methodology as federal common law, such a decision might not change anything about how judges deploy those tools. But it seems possible that such a reconceptualization could facilitate the kind of interpretive feedback loop between the Court and Congress that many have desired but some have thought impossible.

For instance, it may be easier for Congress to disregard interpretive rules that the Court itself treats as something akin to judicial philosophy. It may be harder for Congress to ignore rules that the

192. *See supra* note 154 and accompanying text.
193. *See* Raso & Eskridge, *supra* note 136, at 1813.
194. *See id.*

Court itself views as "law." My empirical work shows some support for this proposition.[195] Not incidentally, it also may be more difficult for *courts*—for expressive, appearance-related reasons—to continue their practice of inconsistent application of the canons if those rules are thought of as federal common law or, perhaps even more so, as constitutionally derived doctrines in certain circumstances.[196] In other words, the very idea that "canons" and "precedents" might be mutually exclusive may itself be doing some damage if calling a presumption a "canon" rather than "law" gives courts more leeway to disregard it.

A common law conception in particular also has potentially the greatest explanatory power for our current regime, especially with respect to how it is that new canons have been created in modern times. A theory that grounds the legitimacy of our interpretive tools in history and tradition might work for the rule of lenity and some of the textual canons, but it cannot explain from where the judicial power derives to create the canons that judges have invented within the past century. A common law conception would better explain the source of the judicial power to create those rules. It also would alleviate separation of powers concerns associated with their creation, because a common law of statutory interpretation would presumptively be revisable by Congress.[197]

C. Spectrums of Precedent and Law

This inquiry also may open up a more fluid conceptualization of "law" than is normally acknowledged in legal practice. Courts do not typically talk about "law" as existing on a spectrum and, to be sure, *Erie* and its progeny say nothing about such an option. (Federal common law, it is worth noting, has in fact been described as existing on a spectrum.[198]) But it seems likely that some of the

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195. *See* Gluck & Bressman, *supra* note 8 (manuscript at 13-14).

196. *Cf.* Frank, *supra* note 94, at 1271 ("[P]ublic acknowledgment by judges of their legislative power may well induce restraint in exercising it.").

197. *Cf.* Monaghan, *supra* note 12, at 19 (arguing that recognizing the body of constitutional common law "is the most satisfactory way to rationalize a large and steadily growing body of Court decisions"); *id.* at 24 ("Congressional power to revise constitutional common law vitiates any objection that the Supreme Court, in fashioning interstitial rules, violates separation of powers principles vis-à-vis Congress.").

198. See *supra* Part II.A.1.

reluctance toward acknowledging statutory interpretation principles as "law" is linked not only to a desire to retain interpretive flexibility but also to a belief that interpretive tools are not *as* lawlike as other legal mandates. As such, one wonders whether there is a more capacious conception of "law" that might bring some intuitive comfort to this terrain.

For example, not all laws need to be given the same force. Our legal system already employs a continuum of precedent. It is widely known that federal courts utilize a hierarchy of stare decisis for substantive decisions, giving statutory precedents more precedential weight than common law or constitutional law holdings.[199] The decisions of federal courts likewise have different precedential effect depending on the level of court involved.[200] In like manner, perhaps the doctrines of statutory interpretation might be conceived as precedents but perhaps not *as* binding as, say, the substantive provisions of the Dodd-Frank financial reform legislation[201] or any other enacted statute.[202]

The alternative—without accepting a full-blown federal common law (or constitutional law) conceptualization—would be to recognize a new jurisprudential category altogether for decision-making rules of this nature. What features such a category might have would require further consideration. But it is hard to see why statutory interpretation would be alone in that category. Much more work would have to be done to justify creating a special exception for statutory interpretation, while leaving analogous interpretive and decision-making rules in common law (or constitutional common law) territory.

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199. This hierarchy must be distinguished from stare decisis for methodological precedents, which does not exist. The substantive-case hierarchy applies to outcomes (for example, independent contractors are not covered by statute *X*) and not to the methodological process used to arrive there (for example, construing the word "employer" to mean the same thing across different statutes).

200. In general, district court holdings are not binding on any court, whereas circuit court holdings constitute intracircuit precedent, and Supreme Court holdings bind all lower courts.

201. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

202. *Cf.* Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 660 (1992) ("With the modern statutorification of law, canons increasingly serve the same alternative function as precedent does in the weak form of stare decisis.").

D. A Modern Erie*?*

Finally, we should end where we began; namely, by asking the question of *Erie*'s relevance to, and also its "fit" with, the Age of Statutes. Erie's animating concerns about forum shopping, outcome determinacy, and vertical uniformity still arise when federal courts decide what interpretive methodology applies to state statutes. But it should be clear by now that *Erie*'s other major contribution—its move from "federal general common law" to a more "specialized"[203] and cabined version of federal common law—poses greater difficulties for the statutory era.

Part of this difficulty relates to the fact that commentators cannot agree on precisely what kind of federal judicial law making *Erie* prohibits. Arguments range from the "broad position" that federal courts have the power to craft federal common law whenever federal interests are at stake,[204] to the narrower positions that federal common law making must be limited to specific areas like admiralty,[205] or must be based on some indication that Congress intended to "delegat[e] lawmaking powers to courts."[206]

It certainly is possible to fit the canons under the broad position. The intermediate positions—for example, those that focus on federalism as a constraint on federal common law making[207]—also find little difficulty in the federal statutory interpretation context. There has virtually never been any concern about the displacement of state interpretive methodology in favor of federal interpretive rules for federal statutes. Indeed, the typical structural arguments against federal common law making—particularly those based on federalism, separation of powers, and electoral accountability—seem more aptly met with a *common law* conception of interpretive methodology than with the status quo. That is because interpretive common law would presumptively be subject to congressional revision, whereas an understanding of methodology as entirely

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203. Henry Friendly, *In Praise of* Erie*—And of the New Federal Common Law,* 39 N.Y.U. L. REV. 383, 405 (1964).

204. FALLON ET AL., *supra* note 122, at 617.

205. Hill, *supra* note 79, at 1025.

206. Merrill, *supra* note 3, at 330-31.

207. *Id.*

under judicial control prevents those elected officials (who also represent states) from performing such a checking function.[208]

The narrower positions pose greater challenges for a common law conceptualization of interpretation methodology for the basic reason that those who take a narrower view generally regard federal common law making as *exceptional*. But *Erie*'s prohibition on federal common law making could rather easily be made more coherent for the modern statutory state with the simple acknowledgement that federal common law making is necessarily pervasive in the context of statutory interpretation. Such a reading might be the clearest and most systemically coherent explanation for the interpretive rules that we already have.

An entirely different move would be to continue along the *Erie*-to-*Chevron* path and focus on ways to transfer law-making power away from federal courts in the modern statutory era, rather than on how to justify the doctrine making in which those courts already have engaged. According even more deference to agency statutory interpretations is one obvious way to do this, and one advocated by some commentators, although not for the federal-common-law-related reasons that this Article suggests.[209] Reducing the number of canons and enabling their more predictable application would be another way to transfer power away from courts. A more extreme approach might be to banish the canons altogether.

The Supreme Court, however, has given no indication of going in any such directions. To the contrary, it has limited the breadth of *Chevron* in recent years by developing additional, more-tailored deference rules.[210] The Court also continues to add other new canons rather than to reduce and simplify the array that already exists. Nor has it given any indication of how it would resolve cases without the canons.[211]

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208. *See supra* text accompanying note 185; *cf.* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544-46 (1954) (arguing that the legislative process protects federalism better than judicial review because of state representation in Congress).

209. *See, e.g.*, ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 1 (2006) (arguing that courts should defer to agency interpretations in light of limited judicial competence to ascertain congressional intent).

210. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 226-27 (2001) (outlining when the Court applies *Chevron* deference versus *Skidmore*'s less deferential standard).

211. Legislative history cannot answer every question; nor is the idea suggested by

And of course, the judicial decision to take any of these paths would itself be a matter of federal common law making, just as the *Erie* rule itself is a federal common law doctrine. But it would be of the more limited sort than the continuing deployment of the canons in everyday interpretation.

CONCLUSION

Three decades ago, Judge Guido Calabresi suggested that one way for judges to maintain their relevance in the statutory era is to treat statutes themselves as common law—reasoning analogously from one statutory regime to another.[212] Federal courts have not adopted this suggestion, but nor have they faded out of the picture. Instead, federal courts have found their place in the statutory age by devising and applying hundreds of default presumptions that guide statutory interpretation. Federal courts also have refused to relinquish power over those presumptions to other courts, judicial systems, or legislatures, all the while without ever truly addressing the question of what kind of "law," if any, those presumptions are.

Scholars and judges have allowed this fundamental question to be glossed over for too long. The purpose of this Article has been to expose this gap and to begin to explore what might follow from a more lawlike conceptualization of those interpretive principles. But much remains to be done, and it should be done. The question of the legal status of statutory interpretation methodology will only become more important with time, as statutes continue to proliferate and ever more of the federal judiciary's attention is devoted to interpreting them.

Amanda Frost, that courts should "certify" statutory interpretation questions to Congress, practical unless confined to a limited number of particularly difficult cases. Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1, 5-6 (2007).

212. CALABRESI, *supra* note 1, at 2. Calabresi was not the first to make such an argument. *See, e.g.*, Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385 (1908).