

UNITED WE STAND, DIVIDED WE FALL?
AN INQUIRY INTO THE VALUES AND SHORTCOMINGS
OF A UNIFORM METHODOLOGY FOR STATUTORY
INTERPRETATION

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INTRODUCTION

How should courts interpret statutes? This question has fueled generations of debate. Some believe generally that legislative intent should be understood based on the greater purpose of the statute; others believe that would be “pure applesauce” and the legislative intent should be understood through the plain meaning of the statute as written.¹ Where one lands on that spectrum dictates the acceptable use of various tools for statutory interpretation, from legislative history to dictionaries. But, this is largely a theoretical exercise because statutory interpretation is messy in practice. The judiciary employs a variety of methodologies across cases, courts, time periods, and even within cases themselves.² Judges may align with a methodology in theory but depart from that methodology in everyday practice. As such, the scholarship regarding statutory interpretation does not fully illustrate the way that statutory interpretation actually takes place, especially in the lower courts.

Given that “American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation,”³ many have called for a uniform, singular methodology: “Our legal system must regain a mooring that it has lost: a generally agreed-on approach to the interpretation of legal texts.”⁴ Advocates argue that a uniform methodology would provide much-needed consistency in the

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1 See, e.g., *King v. Burwell*, 135 S.Ct. 2480 (2015).

2 See, e.g., *Yates v. United States*, 574 U.S. 528 (2015) (demonstrating a number of methodologies deployed within a single case).

3 James J. Brudney & Lawrence Baum, *Protean Statutory Interpretation in the Courts of Appeals*, 58 WM. & MARY L. REV. 681, 692 (2017) (quoting HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., Found. Press 1994) (1958)).

4 ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, at xxvii (2012).

field of statutory interpretation.⁵ It may promote separation of powers principles, inform the legislative approach to drafting, and enhance the rule of law by reinforcing objectivity. But, consideration of a singular methodology begs the question: Is there some value in the chaos? The more fundamental question in statutory interpretation may be whether there are greater benefits to a plurality of opinions and judicial eclectism.⁶

This Essay will consider the disconnect between theory and reality in the realm of judicial decisionmaking and statutory interpretation, explore solutions to close this gap, and reflect on whether those solutions are viable or desirable. Part I will explain the disconnect and examine the role of the federal judiciary today as it relates to a goal of uniformity. Namely, it will highlight differences in the approaches the Supreme Court and the courts of appeals take to using dictionaries, legislative history, and canons of interpretation. Part II will explain why a singular methodology may be a desirable goal. Part III will evaluate the following theories to unify and provide consistency to statutory interpretation: Federal Rules of Statutory Interpretation, Restatement of Statutory Interpretation, and judicial stare decisis. Part IV will explore the less studied topic of whether a unitary approach to statutory interpretation is possible or desirable, ultimately determining that the plurality of opinions and methods on the courts should be embraced.

I. THE MODERN DISCONNECT BETWEEN THEORY AND REALITY IN STATUTORY INTERPRETATION

There is a clear disconnect between the Supreme Court's use of statutory interpretation and the courts of appeals' methods, as outlined below.

A. *Dictionaries*

Theories of statutory interpretation have placed a great emphasis on the use of dictionaries in statutory interpretation. For textualists especially, the dictionary reflects the ordinary meaning of the word, which can clarify the legislative intent.⁷ Many purposivist interpretations also reference dictionaries.⁸ A study was

⁵ See, e.g., Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1767 (2010) (disagreeing over interpretive methods "wastes court and litigant resources; deprives Congress of an incentive to coordinate its behavior with the Court's interpretive methods; retains rather than eliminates another source of intracourt disagreement; and makes the Court appear result-oriented, because the governing principles change from case to case").

⁶ See Chad M. Oldfather, *Methodological Pluralism and Constitutional Interpretation*, 80 BROOK. L. REV. 1, 6 (2014) (examining three possible explanations and/or justifications for interpretive pluralism); Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 213–14 (2015) (rejecting calls for uniformity and advocating for pluralism based in part on protecting individuals from arbitrary state power and the benefits of practical reasoning).

⁷ See, e.g., Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1442–43 (1994).

⁸ See, e.g., John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 88 n.64 (citing *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 240–42 (1994)).

conducted of Supreme Court dictionary use from 2005–2010.⁹ In cases that were likely to require statutory interpretation, dictionary usage was cited by Justice Kagan in 50.0% of cases; Chief Justice Roberts in 35.7%; Justice Thomas in 35.7%; Justice Alito in 33.3%; Justice Scalia in 30.8%; Justice Breyer in 28.0%; Justice Sotomayor in 25.0%; Justice Ginsburg in 23.5%; and Justice Kennedy in 23.1%.¹⁰ These percentages show that dictionary use is more than a theory—it is clearly embraced by the Supreme Court.

But, the theoretical preference for dictionary usage is not necessarily reflected in practice on the courts of appeals. A recent survey of judges on the courts of appeals by Judge Posner and Abbe Gluck (“Posner-Gluck study”) showed that only seventeen of forty-two judges interviewed advocated for using dictionaries.¹¹ The other judges surveyed used dictionaries in limited circumstances if at all.¹² As a comparison, the judges with the most dictionary cites referred to dictionaries in only 29–32% of statutory interpretation cases.¹³ The median judge used dictionaries in only 10% of those cases.¹⁴ One judge noted, “[e]very now and then you refer to a dictionary in writing an opinion, but I’ve never relied on one in deciding an opinion.”¹⁵

B. Legislative History

The most heated debates in statutory interpretation typically revolve around the appropriate use of legislative history. Textualists strongly disavow legislative history.¹⁶ Judge Leventhal famously stated that when courts use legislative history, it is like “looking over a crowd and picking out your friends.”¹⁷ But, purposivists find legislative history useful,¹⁸ and many decisions have employed legislative history to some extent.¹⁹ The members of the Supreme Court have largely divided into these two camps,²⁰ keeping the debate over the proper role of legislative history very much alive both on the Court and academia.

(Stevens, J., dissenting) (noting that dictionaries can be “useful aids in statutory interpretation” if words are also considered in context)).

⁹ James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court’s Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483 (2013).

¹⁰ *Id.* at 522.

¹¹ Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1317 (2018).

¹² *See id.* at 1319.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION 29–37 (1997).

¹⁷ Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 845–46 (1992) (quoting Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting Judge Leventhal)).

¹⁸ *See id.* at 847–61.

¹⁹ *See, e.g.*, *Samantar v. Yousuf*, 560 U.S. 305 (2010).

²⁰ *Compare id.* (utilizing legislative history), *with id.* at 326–29 (Scalia, J., concurring in the

In stark contrast, all but one judge surveyed in the Posner-Gluck study used legislative history.²¹ The median judge used legislative history in 32% of cases.²² Additionally, use of legislative history in the courts of appeals has not been predominantly vertical (changes to the statutory text through amendments to the draft and modifications over time) as in the Supreme Court, but has been more traditional legislative history (floor speeches, committee reports, etc.).²³ Even where judges did not embrace the use of legislative history in their opinions, they were still exposed to it. As one judge noted, “I’ll look at almost anything in [the legislative history]—committee reports, floor statements. I’m skeptical of it, but I most certainly will look at it.”²⁴ Another judge described,

[h]ere is where the real world departs from the theoretical world. The bench memo will have looked at the statute. Many times it will have looked at the legislative history even if the statute isn’t particularly vague. It’s kind of a due diligence the clerk does to prepare a judge. The suggestion that you follow some kind of methodological rule in terms of looking at legislative history tends to be overly formalist and not in the real world.²⁵

The circuit judges found exposure to legislative history was necessary to do their jobs; to most adequately understand the issue they looked to as many sources as necessary—legislative history included. As a further note, Chief Justice Roberts, Justice Alito, and Justice Gorsuch all used legislative history while on the courts of appeals.²⁶

C. *Canons of Interpretation*

To create uniformity and consistency in statutory interpretation, canons of interpretation are widely utilized by the Supreme Court and their value is recognized in academia.²⁷ Proponents argue that by choosing canons of construction and applying them consistently, both courts and the legislature can be on notice of the judiciary’s approaches to interpretation and tailor their own approaches accordingly.²⁸

The usefulness of the canons . . . does not depend upon the Court’s choosing the “best” canons for each proposition. Instead, the canons may be understood as conventions, similar to driving a car on the right-hand side of the road; often

judgment) (opposing the majority’s use of legislative history); *see also* *King v. Burwell*, 135 S. Ct. 2480 (2015).

21 Gluck & Posner, *supra* note 11, at 1324.

22 *Id.* at 1325.

23 Brudney & Baum, *supra* note 3, at 688–89.

24 Gluck & Posner, *supra* note 11, at 1357.

25 *Id.* at 1325.

26 *Id.*

27 *See, e.g.*, *Yates v. United States*, 574 U.S. 528 (2015); Gluck & Posner, *supra* note 11.

28 *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 67 (1994).

it is not as important to choose the best convention as it is to choose one convention, and stick to it.²⁹

While many agree that canons are useful in statutory interpretation, the breadth of their use is not applied uniformly. Karl Llewellyn penned an important piece regarding the use of canons of interpretation that took stock of the canons in use at the time.³⁰ For every canon, he identified another canon that would allow a court to reach the opposite result.³¹ Because canons are necessarily developed on a case-by-case basis, there is no real opportunity for the Court to make a singular, clear rule of canon use.³² Therefore, canons are espoused and then eschewed in individual cases without much consideration to the canon system as a whole. This leads to a maze of canons that could be applied to both support and undermine an argument. For this reason, the Court has called canons “rules of thumb”³³ as opposed to binding authorities.³⁴

Many circuit judges use canons of interpretation in some fashion. Approximately one-third of the circuit judges in the Posner-Gluck study used canons as a supplement—many canons were used as “window dressing” or after the fact to bolster the opinion.³⁵ Twenty-six judges found canons useful in their decision-making process.³⁶ Further, there were some substantive canons (lenity and avoidance) that took on a special meaning and were cited more decisively.³⁷ Therefore, canons are useful for both the Supreme Court and the courts of appeals, but the degree of usefulness often depends on the circumstance.

II. STRENGTH IN UNITY: THE CASE FOR COHERENCY AND UNIFORMITY

To combat the discrepancies outlined above, many have advocated for a single, uniformly embraced approach to statutory interpretation.³⁸ Such a unified method followed by the courts and consulted by administrative agencies and legislatures could be normatively desirable for a variety of reasons. A unitary methodology would likely bring much needed coherence to the system. The different ways that courts interpret statutes cause confusion and increase the likelihood that the courts may not be truly identifying the congressional *intent*. As Justice Scalia noted, “[o]ur highest responsibility in the field of statutory construction is to read the laws in a

29 *Id.* at 67.

30 See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950).

31 See *id.* at 401–06.

32 See Gary E. O’Connor, *Restatement (First) of Statutory Interpretation*, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 333, 346 (2004).

33 *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992).

34 See Gluck & Posner, *supra* note 11, at 1328.

35 *Id.* at 1330.

36 *Id.*

37 *Id.* at 1331–32.

38 Cf. William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 679 (1999) (“Few would object to the overall goal of making the law more predictable, objective, and so forth.”).

consistent way, giving Congress a sure means by which it may work the people's will."³⁹ A unitary methodology would create an incentive for greater coordination among courts, Congress, agencies, and practitioners, clarifying congressional intent.

Advocates argue that a unitary methodology would lead to a more neutral and objective judiciary. Without uniformity, courts appear result-oriented, changing the rules on a case-by-case basis to achieve the desired result.⁴⁰ As such, "methodological flip-flopping undermines the public perception of the Court as a neutral body."⁴¹ When there is no clear methodology, it is easier to question the system itself. Is an outcome truly fair if a different judge would have reached a different result? Inconsistency and the negative public perception that follows undermines the rule of law and the legitimacy of court decisions. But, a unitary methodology would replace much of the judge's discretion by changing the rules of statutory interpretation to more objective, clear-cut rules. At least in theory, it would matter much less which judge hears a case, because the methodology would be applied in the same way to reach the same result across the bench. The clarity, predictability, and objectivity that would follow would reinforce a neutral, legitimate system of governance.⁴²

In theory, this system would also lessen opportunities for judicial overreach and judicial lawmaking.⁴³ As Judge Learned Hand noted, "[w]hen a judge tries to find out what the government would have intended which it did not say, he puts into its mouth things which he thinks it ought to have said, and that is very close to substituting what he himself thinks right."⁴⁴ Interpreting ambiguous statutes may necessarily require some form of lawmaking. But with clear, reliable, predictable rules to statutory interpretation, there would be less room for judges to step beyond the boundaries of their Article III power and legislate. Instead, the judge can simply "say what the law is."⁴⁵ In turn, this would maintain the appropriate separation of powers; if a specific canon were required for interpreting a feature of a statute, then there would be less room for the judiciary to apply a contradictory canon or otherwise maneuver around the rules to a desired result. The "ends justify the means" mindset is a tool of judicial lawmaking that a singular methodology would seek to reduce.

Separation of powers principles would be reinforced by allowing for a feedback loop to inform legislators of how a statute would be interpreted. Currently, legislators and legislative drafters are often unsure of both the rules surrounding

39 Staszewski, *supra* note 6, at 224 (alteration in original) (quoting *Chisom v. Roemer*, 501 U.S. 380, 417 (1991) (Scalia, J., dissenting)).

40 Gluck, *supra* note 5.

41 *Id.* at 1768.

42 See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)).

43 See Staszewski, *supra* note 6, at 213.

44 Henry J. Friendly, *The Gap in Lawmaking: Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 798 (1963) (quoting LEARNED HAND, *How Far is a Judge Free in Rendering a Decision*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 108 (2d ed. 1953)).

45 *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

statutory interpretation, and whether the rules will be applied in any given case.⁴⁶ With a singular methodology, legislators would be on notice of exactly how their statutes would be interpreted. With this understanding, legislators could draft accordingly to ensure that their statutes are interpreted exactly as they intended, leaving the legislating to the legislators.⁴⁷

In addition, a unitary methodology may promote judicial expediency and preserve precious judicial resources. Uniformity makes judicial processes simpler by not requiring the frequent reevaluation of methodologies—instead of consistently rehashing the same debate, the courts could simply apply the specified methodology. At least in theory, the rules would be easy to apply, saving time and resources on a full judicial docket. In sum, it is easy to see why coherence and uniformity are desired by many, given the fiery debate between evaluative methods and the disconnect between theory and reality in the courts.

III. ACHIEVING UNITY: THEORIES FOR A SINGULAR METHODOLOGY

Academics have advanced a variety of theories to achieve a coherent, unitary methodology for statutory interpretation. The most prominent of these theories will be examined below.

A. *The Federal Rules of Statutory Interpretation*

To bring a coherent, consistent approach to statutory interpretation, Nicholas Rosenkranz has proposed that the “Federal Rules of Statutory Interpretation” (“Federal Rules”) be adopted by Congress.⁴⁸ This approach would mimic the Rules Enabling Act,⁴⁹ which enabled the judicial branch to promulgate the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.⁵⁰ The codification of the rules largely settled the debate in these areas, which it may similarly do for statutory interpretation. Congress would need to pass the “Canons Enabling Act,” which would allow the judicial branch to propose the Federal Rules to Congress.⁵¹ The Federal Rules would provide a clear backdrop against which congressional drafters could draft and against which courts could interpret. The value of the Federal Rules would be less in the specific methodology selected and more in the fact that a singular methodology was selected at all.⁵²

This approach is attractive for a variety of reasons. As alluded to, it could create coherence in the system of statutory interpretation. The current ad hoc

46 See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 949–64 (2013).

47 See Staszewski, *supra* note 6, at 228.

48 See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

49 28 U.S.C. §§ 2071–2074 (2012).

50 Rosenkranz, *supra* note 48, at 2151.

51 *Id.* at 2152.

52 See *id.* at 2088.

approach to statutory interpretation is developed in the absence of clear, authoritative declarations by any of the main actors; Congress is largely silent and the nine divergent perspectives on the Court challenge the precedential or binding nature of singular methodology. A clear pronouncement by Congress would fill in this gap, becoming inherently binding on the Court and *requiring* unity and coherence. Similarly, this approach would eliminate the problem of competing canons and approaches for each viewpoint. Instead, notice and predictability would be bolstered.

Congress also may be the body best suited to evaluate interpretive methodologies.⁵³ Congress could illuminate a clearer path to its intent by specifically dictating how to interpret its statutes. Because statutory interpretation often has public policy implications, Congress may be the proper authority to mandate the interpretive regime. Likewise, the Federal Rules would eliminate what Rosenkranz calls the “bait and switch” problem, whereby a novel canon is applied to a statute that was written without any notice of the canon.⁵⁴ When the courts do the bait and switch, they are making, not interpreting, law. The Federal Rules would give those decisions back to Congress, reinforcing separation of powers principles.

Despite the goals in the Federal Rules, scholars have identified a variety of disadvantages, such as political feasibility.⁵⁵ This endeavor would require agreement by all three branches of government.⁵⁶ In the current political climate, agreement seems unlikely. Politics aside, the agreement of a majority of the Court may be exceedingly difficult due to the nature of the agreement requested.⁵⁷ Given the stakes and the fact that the Federal Rules would seriously limit judicial discretion in statutory interpretation, it is not clear whether the Justices or Congress would agree that such an interpretive mandate from Congress is desirable. Assuming the Justices could rally behind the idea of the Federal Rules, there are nine different opinions on how to approach statutory interpretation on the Supreme Court.⁵⁸ A battle royale would ensue over which methodology to choose. Even if an agreement were made, the compromise required would likely ensure a watered-down version of the rules. Assuming such a compromise were possible, it would not likely resolve the issues in a satisfactory or meaningful way.⁵⁹

In addition, Congress may not be the right body to definitively determine the methodology for statutory interpretation. To begin, the judiciary may have better expertise to find the “best” method. Political compromise may mean that the *best* method, whatever that may be, might not be selected. Concerns with politicization can be combated with limitations on congressional oversight. But, any legislative

53 *See id.* at 2145.

54 *Id.* at 2142–43 (quoting WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 284 (1994)).

55 *See, e.g.*, O’Connor, *supra* note 32, at 348.

56 *Id.* at 347.

57 *See id.*

58 *See id.* at 347–48.

59 *See* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 890 n.13 (2003).

oversight could derail a politically toxic, but normatively desirable, interpretive method. Ultimately, this approach may shift too much weight in favor of the singular methodology at the expense of fleshing out the “best” method.

Similarly, the Federal Rules would be difficult to amend. Although an initial pronouncement of interpretive methodology may be desirable, it would also be desirable to allow for a change in that methodology over time to avoid an unworkable, inequitable, or simply outdated methodology. Given how difficult it would be to garner an agreement initially, it would be increasingly difficult to change the rules once in place. If changing the rules were too difficult, then inefficient, inflexible, unjust, or simply bad rules would remain in place. Implementing judges would have no recourse beyond informing a stagnant Congress of the unusable nature of the rule.⁶⁰

There is also a separation of powers concern. The judiciary must be given enough latitude to properly perform its role: to say what the law is.⁶¹ Congressional oversight of the process of interpretation may turn into congressional overreach—telling the judiciary how to do its job. As Staszewski noted, the Court would not likely hold such a unitary methodological code unconstitutional *per se*.⁶² But it may maneuver around the rules and avoid conflicts to protect its power and avoid being constrained too much.⁶³ Were a codified regime to become too restraining, the Court might even find that it violates separation of powers principles.

Although the Federal Rules may seem like a lofty goal, every state legislature has enacted canons of construction.⁶⁴ These legislative pronouncements have been met with differing forms of resistance across state courts. For example, a Texas statute allowed courts to consider a statute’s purpose and legislative history.⁶⁵ Yet, the Texas Court of Criminal Appeals refused to apply this rule, opting instead for a rule in which, absent ambiguity, only the text would be considered.⁶⁶ If there was ambiguity, then the court could consider legislative history.⁶⁷ Given this example, it is unclear whether the Federal Rules, unless met with absolute support by the courts, would be effective at all, or simply rejected by nonconsenting courts.

Likewise, in *State v. Courchesne*,⁶⁸ the Connecticut Supreme Court banned the plain-meaning methodology, which would prevent extrinsic sources from being considered when there is no ambiguity.⁶⁹ Two weeks later, the Connecticut state

60 See Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 117 (1921) (“Codification is, in the main, restatement. What we need, when we have gone astray, is change. Codification is a slow and toilsome process, which, if hurried, is destructive. What we need is some relief that will not wait upon the lagging years.”).

61 See *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

62 See Staszewski, *supra* note 6, at 267.

63 See *id.*

64 Gluck, *supra* note 5, at 1786.

65 *Id.* at 1787.

66 *Id.* at 1788.

67 *Id.*

68 816 A.2d 562 (Conn. 2003).

69 Gluck, *supra* note 5, at 1791.

legislature introduced a bill that went on to expressly override that holding.⁷⁰ Despite this, the Connecticut Supreme Court has largely avoided applying that statutory override by construing it to apply only in very narrow circumstances; the court's rejection of the plain meaning rule has continued, even with an express statutory contradiction.⁷¹ This Connecticut example shows that the courts may fight back against a mandatory methodology that they do not agree with. In sum, Federal Rules are a positive idea in theory, but questions of feasibility and judicial adherence are cause for concern.

B. *A Restatement of Statutory Interpretation*

Another perhaps slightly softer approach to a unitary methodology would be the Restatement (First) of Statutory Interpretation. Restatements are developed by the American Law Institute (ALI), which is composed of judges, academics, and practitioners who work together to formulate rules. Restatements are not binding on courts. Specifically, the ALI notes,

[restatements] are also intended to reflect the flexibility and capacity for development and growth of the common law. That is why they are phrased in the descriptive terms of a judge announcing the law to be applied in a given case rather than in the mandatory terms of a statute.⁷²

To unify statutory interpretation, the ALI could adopt a Restatement as a guideline for future interpretation.

This approach is desirable for many of the same reasons that the Federal Rules are desirable. A Restatement would form a coherent background against which legislators could draft statutes and courts could draft opinions. A Restatement would introduce a unified methodology, which would remove some judicial discretion and reinforce separation of powers principles. With this approach, there would be no "bait and switch" problem, but consistency and coherency in the application of a method. It would also allow for the conservation of judicial resources, as the judiciary could look to the Restatement if there is ambiguity instead of debating over conflicting canons.

In addition, the ALI may be best equipped to articulate a unified theory. The ALI is comprised of a variety of lawyers, judges, and academics. Putting these perspectives together could lead to the best output. There would be a pipeline of communication creating a direct feedback loop between academia and the judiciary.⁷³ It would also give academics a greater ability to influence changes in statutory interpretation by giving adopted approaches legitimacy. This dialogue could allow for the best approaches to be considered. Further, the ALI may be better

⁷⁰ *Id.* at 1792.

⁷¹ *Id.* at 1797 ("The court's insistence on an exceedingly low ambiguity threshold—which allows it to ignore section 1-2z and instead apply *Courchesne*—has meant that the legislated rule has had almost no practical effect.").

⁷² *How the Institute Works*, A.L.I., <https://www.ali.org/about-ali/how-institute-works/> (last visited Nov. 29, 2018).

⁷³ *See* O'Connor, *supra* note 32, at 358–59.

able to reach a consensus than an overly polarized Congress or an entrenched judiciary.⁷⁴

Similarly, the nonbinding nature of the rules may make them more amenable to change and easier to garner a general agreement. This is also an obstacle.⁷⁵ After expending significant time and resources, a Restatement may emerge that is never truly embraced by the legal community. Instead, parts may be used sporadically, on a case-by-case basis. This is exactly the state of statutory interpretation today, so the project may be lauded as an academic exercise but not significant in a practical sense.

In addition, although the Restatement may not require congressional approval, it would require the approval of the ALI.⁷⁶ While there are many areas of middle ground in statutory interpretation that the ALI members can agree on, it would be difficult to choose a firm stance on the controversial subjects (such as legislative history). There are a few approaches that may solve this problem. First, the Restatement may opt to bypass the difficult issues and only espouse the agreed-upon notions. This would amount to a watered-down version of the rules that are already followed in courts today. Second, the Restatement may publish the rules with the most consensus, over strong dissents. Individuals who subscribe to the dissenting opinion would likely carry on with business as usual, ignoring the Restatement. It is certainly possible that the Restatement would change these individuals' minds and unify the profession around a rule of statutory interpretation. But given the passionate divide, this is unlikely. As such, statutory interpretation may not simply be distilled into a Restatement in a useful, practical way.⁷⁷ While it may promulgate some tried and true rules, it may be as useful in practice as the current ad hoc regime.

Another concern is that a Restatement could be used as a justification for judicial lawmaking, given the input of the judiciary in the ALI. This begs the question: Should judges be involved in a project defining the limitations on their power, or does this constitute judicial overreach? That question is beyond the scope of this Essay, but it is a relevant concern. Overall, the Restatement's solution to unity in methodology is laudable, but it also creates questions about the desirability and logistical underpinnings of such an approach.

C. Methodological Stare Decisis

Another approach to uniformity and coherence may be to give precedential effect to the Supreme Court's methodological choices in statutory interpretation. Currently, the Court's methods for interpreting statutes are not binding on lower courts. Instead, "diverse methodologies" are employed and "do little to predict, much less dictate, whether, how often, or to what extent judges should rely on dictionaries, canons, legislative history, or a statute's general purpose."⁷⁸

⁷⁴ See *id.* at 356–57.

⁷⁵ See *id.* at 360.

⁷⁶ See *id.* at 361.

⁷⁷ See *id.* at 362.

⁷⁸ Brudney & Baum, *supra* note 3, at 691.

To rein in the chaos, the methodologies invoked for statutory interpretation could become precedential and binding on lower courts through stare decisis. The hope would be that these precedents would build on one another and form a coherent doctrine for the courts. Proponents argue that stare decisis would garner the desired benefits of uniformity and coherence as discussed previously. Importantly, it may allow for a feedback loop to allow Congress to anticipate how the statutes will be read and adjust accordingly. For example, if the Court categorically were to deny legislative history as an interpretive tool, then Congress would be on notice to put all necessary components of the reasoning and intent into the statute itself.⁷⁹

Proponents argue that the Supreme Court is the best vehicle to expound a unitary methodology. The Supreme Court hears statutory interpretation cases and wrestles with the issues daily. It may therefore be the most well versed in the issues and consequences of each approach. Likewise, the Supreme Court sits with the same nine members for each case. This offers an opportunity for dialogue amongst colleagues on methodological consistency with some frequency. The Supreme Court also has the benefit of selecting its cases through certiorari petitions to provide statutory guidance in tough questions. Not only can it handpick cases that would promote its methodology and guide the future of interpretation, but it also has time to reflect on the methodologies to select the most effective, or the “best” methodology. In 2017, the Court issued opinions in just seventy-two cases.⁸⁰ With less pressure to decide a vast number of cases, the Court could consider the development of a coherent doctrine.

There is also an external pressure to create a uniform methodology in the Supreme Court. Given the contentious and highly political appointment process, there is an emphasis on the creation of a clear methodology by the Justices and nominees.⁸¹ This pressure has fueled productive discussions on an academic level.⁸² But, it could also be used to articulate a clear methodology for the Court moving forward, with a trickle-down effect.

In addition, methodological stare decisis would preserve the role of the judiciary in determining the proper interpretive techniques. Where the other approaches remove some of this discretion from the judiciary, methodological stare decisis would give that discretion fully to the Justices themselves. The judiciary itself could monitor the development of the interpretive methodology and adjust accordingly. In the long term this would promote judicial efficiency.

Although each Justice may favor a method of statutory interpretation, the Court has struggled to consistently apply one theory.⁸³ To create a clear methodological approach would be to *agree* on a singular approach. To reiterate a common theme,

79 See Oldfather, *supra* note 6, at 33.

80 Kedar S. Bhatia, *Stat Pack for October Term 2017*, SCOTUSBLOG 1 (June 29, 2018) http://www.scotusblog.com/wp-content/uploads/2018/06/SB_index_20180629.pdf. In contrast, in 2015, there was a mean of 253 cases per judge in the Tenth Circuit and 430 cases per judge in the Second Circuit. Brudney & Baum, *supra* note 3, at 695.

81 See Brudney & Baum, *supra* note 3, at 698.

82 See generally *id.*

83 See *id.* at 691.

consensus is difficult; the Supreme Court is a “they” not an “it.”⁸⁴ The Court contains nine distinct, divergent opinions, and statutory interpretation is a hotly disputed topic. Eleven judges in the Posner-Gluck study noted that the Court’s methodology is not binding simply because the Supreme Court has not determined a singular approach.⁸⁵ One scholar astutely noted,

[t]he Justices do not attempt to bind one another because they do not want to be bound themselves. Justice Scalia may find the Justices’ lack of methodological agreement lamentable, but it is unlikely that he would sign on to a regime of uniformity that did not comport with his originalist preferences. To agree to commit to a methodology carries with it the risk that one will have to commit to someone else’s methodology.⁸⁶

The ability to maneuver between methodologies and to apply an interpretive technique in any given circumstance is cherished by the Justices. Selecting one ideology would not only force a compromise that the Justices may not be willing to make, but it would remove the ability to pivot in many instances.

In addition, even if it were possible to distill the Court’s opinions into a singular approach, it is not clear that the Supreme Court even could prescribe methodological *stare decisis*. In the Posner-Gluck study, only six judges maintained that the Supreme Court could require adherence to methodological interpretations, while fifteen judges did not think that the Supreme Court even had that power.⁸⁷ Many circuit judges were pessimistic about the Supreme Court’s methodologies, “express[ing] more confidence in their own court’s abilities than in those of the Supreme Court.”⁸⁸ These judges simply did not want any further guidance from the Supreme Court.⁸⁹

There would also be concerns about the ease of amending and developing the method. An interpretive method may simply be unworkable in certain circumstances, or there may be unintended consequences. In that case, the Supreme Court would need to wait for an appropriate case or controversy to come before it. The case would need to be justiciable, the Court would need jurisdiction, and the case would need to be the appropriate vehicle to develop the methodology, among other barriers. While waiting for this perfect storm, many cases would be decided under the unworkable framework. *Certiorari* and the slow deliberations of the Court are therefore a double-edged sword, both allowing a coherent doctrine to develop, and precluding amendments to that doctrine once established.

Further, consider Michigan, which employs methodological *stare decisis*. “The state supreme court has . . . vacated and remanded lower court cases—without reviewing their substance—solely on the ground that the wrong methodology was

84 Oldfather, *supra* note 6, at 58.

85 Gluck & Posner, *supra* note 11, at 1346.

86 Oldfather, *supra* note 6, at 2–3.

87 Gluck & Posner, *supra* note 11, at 1344–45.

88 *Id.* at 1347.

89 *Id.* (“As of right now I am more comfortable getting less guidance from the Supreme Court because I don’t know what it would be.”).

applied by the lower court.”⁹⁰ While this develops and reinforces the method, it seems to waste judicial resources. By not answering the merits of the question presented, justice is delayed (and justice delayed is justice denied).

Given the nature of stare decisis, it is not clear whether a methodology mandated by precedent would present a clear road forward. Considering every possible contingency is not feasible with stare decisis. As such, precedent is scalar and not binary.⁹¹ It is adopted and applied in piecemeal depending on the specific set of facts. While precedent can offer a clear black-and-white choice, most decisions fall in the gray area. In this gray area, new facts are distinguished from or compared to precedent, and the degree of weight of any rule is shifted in consideration of the whole question. So, a binding methodology, required by the Supreme Court, could not possibly account for every circumstance; judges would still need discretion to determine many matters of statutory interpretation in the gray areas. This would leave judges in much of the same position that they are currently in.

Despite the challenges, methodological stare decisis has been successful in state courts. The Oregon Supreme Court unanimously adopted a binding methodology for statutory interpretation.⁹² The methodology was challenged by the Oregon legislature, but the courts refused to acknowledge that the statute could alter this precedent.⁹³ Because of this methodological stare decisis, the Oregon Supreme Court has enhanced predictability by reducing the number of the interpretive tools and using them consistently.⁹⁴ Therefore, effective methodological stare decisis may be more attainable than this Essay had previously considered. Ultimately, there is value in a methodological stare decisis, but there are very real concerns associated with the method.

IV. DIVIDE AND CONQUER—DISMISSING UNITY AND EMBRACING PLURALITY

Acknowledging the academic considerations examined above, there is a dearth of scholarship considering the baseline question of whether a unified approach is desirable. Many scholars take it for granted that a unified approach is preferable. But, this may not necessarily be the case. There are inherent and seemingly irreconcilable problems in the proposed methods, such as political feasibility, separation of powers principles, a tenuous amendment processes, and implementation or effectiveness in practice. This invites a critical question: If a singular approach to statutory interpretation is possible, is it desirable? If not, then a plurality-of-opinions approach or judicial eclecticism may be more appropriate.

This debate invokes the foundational question of the proper role of the judiciary in statutory interpretation. There is a fundamental difference of opinion

90 Gluck, *supra* note 5, at 1807–08 (emphasis omitted).

91 Oldfather, *supra* note 6, at 14–15.

92 See Gluck, *supra* note 5, 1777 (citing *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 859 P.2d 1143 (Or. 1993)).

93 See *id.* at 1783.

94 See *id.* at 1785.

on which body should authoritatively declare a methodology for statutory interpretation. The judiciary committee co-chair of Connecticut was asked what authority he had to tell the courts how to interpret the laws.⁹⁵ He responded, “[w]e are the law. We have the right . . . to . . . dictat[e] how the courts shall operate.”⁹⁶ But is this right? Each proposed method finds a different group best suited for this role: the Supreme Court, Congress, or the ALI. Simply selecting a group to fulfill this task will shift the balance of power in the system. Because it is not clear who would be best situated to determine the proper interpretive methodology, it may be unwise to select one at all. The interplay between all the bodies with a stake in the matter can lead to valuable discourse. This communication and disagreement can push the methodology forward and act as a check on each branch of government. Instead of adopting one unitary method, the diversity of methods could be embraced.

Because it is impossible to eliminate all ambiguity from statutes, discretion will always be required in the field of statutory interpretation. Given the variety of voices penning thousands of statutes, ambiguity in statutes arises in different ways all the time. There are three sources of ambiguity, which are not adequately addressed by the proposed solutions. First, the statute may be poorly drafted. The Court can incentivize Congress to draft more clearly and utilize many of the tools considered in Part I to interpret these statutes. But, finding the meaning of a poorly drafted statute may be more complicated than any mechanical rule could account for. Second, Congress may not have considered a specific circumstance, so the statute may not be tailored to those facts. “[I]f the core problem is that courts are often asked to apply statutes to situations that the legislature did not anticipate, then it is not clear that enabling the legislature to know what interpretive rules will apply in these cases purchases much in terms of interpretive clarity.”⁹⁷ Rules cannot be tailored to circumstances that the Court or Congress could not anticipate, so there will always be discretion required in these situations. Third, ambiguity may be an inevitable byproduct of the political process. For a politically volatile matter, Congress may intentionally leave the language ambiguous to invite judicial intervention and interpretation. The proposed solutions would not remove the judicial discretion, but require the discretion to operate within a narrower arena. Recognizing that judicial discretion will not be eliminated, it may be more desirable to allow the judiciary to act more freely within these areas of inherent ambiguity, without the narrow constraints of a unitary method.

Similarly, not all statutes should be interpreted in the same way.⁹⁸ Ignoring the distinctions would ignore the legislative intent of the statute. But, a singular methodology may not adequately account for these differences. It would be possible to avoid this concern, but that would require a very long set of rules, and deep consideration of each statute, which does not seem probable given the suggested

95 *Id.* at 1826.

96 *Id.* (omissions and second alteration in original).

97 Oldfather, *supra* note 6, at 36.

98 See Adam W. Kiracofe, Note, *The Codified Canons of Statutory Construction: A Response and Proposal to Nicholas Rosenkranz’s Federal Rules of Statutory Interpretation*, 84 B.U. L. REV. 571, 581 (2004).

approaches. Therefore, some legislative intent would be lost by perpetuating a singular analysis for statutes that were created in different eras, under different guidance, with different purposes and structures. Instead, by abandoning the unitary methodology, courts would be able to consider each statute independently and interpret it accordingly.

The plurality of opinions related to interpretive methodologies can also act as additional protection against the power of the state.⁹⁹ Through the systemic elimination or reduction of judicial discretion in pursuit of a unitary methodology, judges would give up a lot of maneuverability and discretion. But, the judiciary was created as a check on executive and congressional power. This is achieved by evaluating statutes to determine whether they are constitutional. By removing much of the ability of the judiciary to pivot and evaluate within a decision, courts are constrained. The judiciary may not be able to consider and evaluate a variety of arguments that may be vital to the success or failure of a statute. By not considering all angles of an argument, the courts are simply not doing their jobs to their fullest capacity, and overreach by other branches that are determining the rules becomes more likely. Likewise, if an unjust result is required by a binding methodology, then perhaps judges should be able to pivot within the framework to perpetuate justice. “Congress should be deliberative; agencies should be dynamic; and courts should be practical if we want to avoid arbitrary domination by the state.”¹⁰⁰

In addition, the art of judicial decisionmaking favors the plurality-of-opinions method. There is an argument that mechanical application of a unitary method should not be pursued because the analysis and consideration of the Justices and judges is desirable. Justices undergo such a rigorous confirmation process and the appointment of judges is an honor because their opinions, their discretion, and their abilities to think through problems are trusted and valued. This may be an overstatement. Not all judicial minds are brilliant in every case. But, these are aspirational, prestigious jobs that should not be sidelined to a simple checklist process. As one judge noted, “[y]ou could give someone a computer and they could do our job, you could feed in all the canons, rules, etc., and it could spit out an opinion. But the essence of being a judge is the human factor.”¹⁰¹ If the art of judging becomes merely applying a checklist through a hierarchy of canons, then the job takes on a mechanical role. The judiciary as a check on executive and congressional power would be diminished. Instead, judges’ opinions and perspectives should be embraced due to their expertise and in the interest of maintaining a robust judiciary.

As such, a plurality of opinions is normatively desirable in the constitutional arena. If the constitution does have a fixed meaning, then more opinions and more approaches lead to a better chance of uncovering that true meaning.¹⁰² If the Constitution does not have a fixed meaning, then a multitude of approaches and methods should be pursued to uncover a just reading. The same idea applies to

99 See Staszewski, *supra* note 6, at 237–42.

100 *Id.* at 262.

101 Gluck & Posner, *supra* note 11, at 1314.

102 See Oldfather, *supra* note 6, at 51.

statutes. Given the challenges of modern statutory drafting, more methods can help to identify the intent of Congress. Or, if a statute is truly ambiguous, these differing methods can be used to determine the best result.

Further, this “judicial eclecticism” is already embraced by the courts of appeals.¹⁰³ One circuit judge in the Posner-Gluck study noted, “I just keep reading until I get comfortable. If I have to start reading a secondary text . . . I will. I don’t necessarily rely on everything I have read but I do keep reading.”¹⁰⁴ Another commented, “[n]obody endorses any other method! That’s like asking me why I look at a map to get where I am going.”¹⁰⁵

Judges may approach statutory interpretation this way because they are merely disoriented and, lacking methodological guidance, they are doing the best that they can. This is not likely. As the Posner-Gluck study noted, judges likely approach statutory interpretation this way because they simply want to use the tools available to them to guide their ruling, or they use them to bulk up their argument for a given result. It may be their due diligence to use a plethora of methodologies to reach the best result. Because this eclectic approach is already embraced by the courts of appeals, a unitary methodology may be attempting to solve a problem that does not exist, and a create uniformity in a system that requires chaos. Therefore, there is a compelling argument for embracing the plurality-of-opinions approach.

CONCLUSION

The debate over best practices in statutory interpretation is very much alive. There is no clearly accepted methodology to guide the judiciary in its endeavor to interpret statutes. Any progress in this arena has come through trial and error and will continue in this manner for the foreseeable future. While aspiring to a singular methodology is a laudable goal, it is important to first comprehend the field and its limitations.

Because there is no clear consensus on methodology, a code of statutory interpretation, such as the Federal Rules, is not plausible now. Instead, a case-by-case approach is necessary to tease out what works and what does not work. Through this tedious consideration and reconsideration of methodologies and approaches, points of agreement will slowly emerge. From those points of agreement, exceptions and a nuanced understanding of statutory interpretation will arise to fill in any gaps. Ultimately, the statutory interpretation landscape will have more or less a generalized agreement. The Restatement could then expound the generalized agreement, guiding the discussion on those commonly understood and agreed upon pieces of interpretation. A Restatement could also recognize the areas of disagreement, spurring further discussion and further case-by-case considerations, which are the seedlings of future agreement. Over time, the Restatement would become sharper, more nuanced, and more specific, articulating an agreed upon singular methodology of statutory interpretation. Once an actual

103 See Gluck & Posner, *supra* note 11, at 1302.

104 *Id.* at 1313 (alteration in original).

105 *Id.* at 1313–14.

consensus is garnered through years of trial and error, the legal profession will be in better position to evaluate whether a codification of the rule is desirable.

At this time, judicial eclecticism and the plurality of methods should be embraced, so that the trial and error stage of the development of the methodology can flourish. The legal profession is at the very beginning of the long journey to a consensus. Rather than bracketing and containing the difference of opinions regarding methodology, these methods should be aired in the public sphere for debate and amendment until a polished methodology is decoded, ensuring the best, most just solution is reached in the maximum amount of cases. Until then, let the debate continue.