TEXTUALISM AND THE POLITICAL ECONOMY OF UNIFORM ACTS

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This paper develops a theory for interpreting state statutes that originate as Uniform Acts. These statutes govern all aspects of our lives, including birth, death, marriage, and adoption as well as billions of dollars in commercial transactions. But they have a unique political economy. Unlike ordinary statutes, uniform laws are first drafted and promulgated by the Uniform Law Commission, a quasi-public legislative body constituted by members appointed under state law. Drawing attention to a legislature’s choice to use off-the-rack—rather than bespoke—statutory language, we explore what we call the “explicit directives” and “implicit signals” state lawmakers send when they enact a Uniform Act. We contend that the text itself often obligates courts to look to the Uniform Law Commission’s expressions of legislative purpose via the comments that accompany the blackletter text of all Uniform Acts. We also contend that, even in cases where the text does not explicitly obligate courts to do so, the legislature implicitly signals that they should by adopting language from a Uniform Act. Put more provocatively, we contend that textualist theory obligates courts interpreting an enacted Uniform Act to consider what textualists would otherwise dismiss as legislative history. After illustrating interpretive payoffs, we present a series of puzzles and complications arising from blended or hybrid enactments of Uniform Acts. For example, what if a legislature modifies the text of a Uniform Act to prescribe a different policy choice than in the uniform version of the Act? By colliding textualist theory with the two-step political economy underlying state-enacted Uniform Acts, our analysis broadens our understanding of textualism and adapt it to an overlooked but crucially important category of statutes.

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The authors thank Ruth Bloch Rubin, Howell Jackson, Alex King, John Manning, Adrian Vermeule, and workshop participants at ALEA, Harvard, and ___ for helpful comments and suggestions, and ___ for superb research assistance.

In accordance with Harvard Law School policy on conflicts of interest, Sitkoff discloses certain outside activities, one or more of which may relate to the subject matter of this paper, at https://tinyurl.com/yceu88c. In particular, Sitkoff serves as a Uniform Law Commissioner from Massachusetts, and he served on the drafting committee for some of the Uniform Acts discussed in this article. The views expressed in this paper are those of the authors and do not necessarily reflect the views of the Uniform Law Commission.
INTRODUCTION

Every day, courts across the country interpret statutes that emerge from a distinctive two-step political economy. Unlike ordinary statutes, these laws are first written and promulgated by the Uniform Law Commission (ULC). A quasi-public legislative body constituted by members appointed under state law, the ULC drafts and then promulgates for enactment by the states model statutes “on subjects on which uniformity across the states is desirable and practicable.”1 State legislators then decide whether to adopt a Uniform Act as promulgated by the ULC: sometimes wholesale and other times with modifications.

While the ULC’s role in shaping state law through Uniform Acts has been overlooked in the literature on statutory interpretation, it is responsible for a diverse array of state statutes that structure our life cycles, from birth and adoption, to marriage, divorce, and death.2 Broadly adopted Uniform Acts govern, among other things, child custody, premarital and marital agreements, inheritance, and even the definition of what it means to be legally deceased.3 Our daily business dealings, too, are fundamentally shaped by the ULC’s work, including (among other laws) the Uniform Commercial Code, which regulates the sale of goods and secured transactions,4 and the Uniform Electronic Transactions Act, the foundation for billions of dollars in digital commerce.5 “Every day, when a person conducts business, enters a contract, makes a purchase or sale, obtains or transfers property, or takes care of a family matter, it is likely that a ULC law applies.”6

Given the ULC’s importance in shaping state law, the limited attention it has received from statutory interpretation theorists is lamentable, if understandable. After all, textualism—today’s reigning interpretive approach7— is rooted in a federal model of legislating. The federal Constitution sets the rules of the game, designating “Congress … the

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2 Recent editions of the Bluebook reflect increased attention within the academic community to the ULC’s role in statutory drafting. See, e.g., The Bluebook: A Uniform System of Citation 131 (Columbia L. Rev. Ass’n et al. eds., 21st ed. 2020) (providing that, “[w]hen citing to a uniform act itself, and not as the law of a particular state, cite it as a separate code. Indicate the author’s name parenthetically” and giving as an example “UNIF. TR. CODE § 105 (UNIF. L. COMM’N 2000)”.


4 See U.C.C., Articles 2, 9.


7 See, e.g., William N. Eskridge, Jr., The New Textualism and Normative Canons, 113 Colum. L. Rev. 531, 532 (2013) (“[V]irtually all theorists and judges are ‘textualists,’ in the sense that all consider the text the starting point for statutory interpretation and follow statutory plain meaning if the text is clear.”); Abbe R. Gluck, The
Turning a bill into law requires bicameralism and presentment—no more, no less. “Nothing but the text has received the approval of the majority of the legislature and of the President . . . . Nothing but the text reflects the full legislature’s purpose.” Yet when it comes to innovation in the practice of statutory interpretation, the action is increasingly at the state level. Accordingly, examining state interpretive practice can reshape the assumptions underlying the academic debate over statutory interpretation, “bring[ing] to the fore an entirely new category of methodological questions.”

By attending to the two-step political economy of state-enacted Uniform Acts, we make four fresh contributions. First, as a descriptive matter, from the vantage of political economy state-enacted Uniform Acts are meaningfully distinct from conventional statutes in ways that have gone unnoticed by most statutory interpretation scholars. Every Uniform Act includes a provision directing courts to give “consideration” to “promot[ing] uniformity of the law” in construing the text. And every Uniform Act is promulgated as an integrated package, comprising both blackletter text and explanatory comments. The comments elaborate how the text is supposed to operate, discussing the provision’s purpose and rejected alternatives. Our core claim is that these features importantly shape how these laws should be interpreted. But both scholars and courts must first to take notice of them.

Second, by colliding textualism with the two-step political economy underlying state-enacted Uniform Acts, we deepen our understanding of this now-ascendant interpretative approach. Consider that, in the two-step model, unlike in the ordinary drafting process, state legislatures must either accept the ULC’s off-the-rack terms or modify them—rather than craft bespoke statutory terms. Oftentimes, the legislature will simply incorporate the ULC’s language into the state’s statute books wholesale. Courts must give effect to this choice. On the conventional account, textualism rejects legislative history as an interpretive guide. For a Uniform Act, however, the statutory text will often explicitly direct courts to consider the ULC’s commentary—a form of legislative history.

But not always. A legislature may modify the ULC’s text, either in whole or in part. These custom modifications may be minor, such as tinkering with the ULC’s language to fit the state’s drafting conventions, or major, including explicit rejection of key...
statutory terms because of outright policy disagreement. In such a case, we argue, the statutory text charges courts with assessing the strength of the implicit signal the legislature sends by adopting some portion of the ULC’s language but not all of it.

Third, we develop a theoretical foundation for interpreting state statutes that originate in whole or in part as Uniform Acts. Presently courts are all over the map in applying textualism to state statutes that originate as Uniform Acts. While some judges recognize that the two-step political economy we describe has important interpretive consequences, others simply ignore the state legislature’s choice to rely on the ULC’s statutory language. We argue that a wooden textualism that fails to recognize the two-step political economy responsible for state-enacted Uniform Acts is inconsistent with textualism’s foundational commitments. Furthermore, by losing sight of the explicit directives and implicit signals a state legislature sends by enacting a Uniform Act in whole or in part, courts risk making easy cases hard. At worst, textualist courts that do not attend to the unique political economy of a state statute that originates as a Uniform Act are likely to reach answers that are inconsistent with the legislature’s intent in adopting the words of the ULC.

Finally, we present a series of puzzles and complications. Moving beyond the paper’s heartland of explicit directives and implicit signals to more uncharted territory reveals a series of challenging problems. These are blended or hybrid cases in which a legislature’s choice to draw on the ULC’s draft text abrades against other types of textual evidence. Consider a few examples. [Placeholder: to conform.] What if a state legislature adopts a provision of a Uniform Act as written, but provides explicitly that it is not to be interpreted to promote uniformity? What if the ULC promulgates a later clarifying amendment but the state doesn’t enact it? What if the ULC promulgates a later clarifying commentary? What if a state legislature combines provisions from a Uniform Act with its own bespoke provisions? What if a state legislature retroactively updates preexisting statutory language to bring it into conformity with a Uniform Act? These and other such provocative questions are complex admixtures, difficult to place on the spectrum from fully customized statutory language to wholesale adoption of the ULC’s statutory terms. For these questions, therefore, our aim is to identify and frame, teeing them up for further analysis.

The remainder of this paper proceeds as follows. Part I describes the political economy of state-enacted Uniform Acts, beginning with the ULC’s drafting process and ending with enactment at the state level. Part II provides a brief overview of textualist theory, identifying its foundational assumptions and focus on a one-step congressional enactment. Part III turns to the consequences of the two-step political economy of uniform laws for textualist theory. We focus first on a state legislature’s decision to enact a Uniform Act without modification, and then turn to the complications that result when lawmakers tinker with the ULC’s language. Part IV explores a series of challenging hybrid cases with an eye to framing new puzzles, problems, and tensions. A brief conclusion follows, revisiting the implications of our approach for our prevailing theories of statutory interpretation.
I. THE MAKING OF UNIFORM ACTS

We begin with a primer on the making of Uniform Acts, including key details about the ULC’s institutional structure and operating procedures. We then turn to an overview of the process of state enactment—the necessary second step for a Uniform Act to become a state statute.

A. The Origins and Influence of the ULC

The ULC’s influence is difficult to overstate. Often described as the ULC’s “crown jewel,” the Uniform Commercial Code emerged in the aftermath of the Supreme Court’s *Erie* decision and Congress’s subsequent failure to pass a federal statute governing interstate sales transactions.16 In the postwar era, the ULC has been responsible for helping to advance the development—and, crucially, the statutory codification—of laws governing marriage, divorce, reproduction, adoption, child custody, and inheritance along with crucial commercial infrastructure including for electronic transactions.17

Established in the late nineteenth century, the ULC “is best described as a legislative drafting consortium of the state governments, operating in fields of law in which multi-state contacts or multi-state concerns make uniformity desirable.”18 The organization owes its origins to the United States’ rapid industrialization in the postbellum period.19 In 1889, American Bar Association president David D. Field, whose work in spurring the codification of New York State procedural law is often credited with creating a distinctively American mode of trans-substantive civil procedure, created a “Special Committee on Uniformity of State Legislation.”20 In response, six states—New York, Pennsylvania, Michigan, Massachusetts, New Jersey, and Delaware—created commissions on uniform laws.21

These efforts bore fruit with the first meeting of the ULC, then known as the Conference of State Uniform Law Commissioners, in Saratoga, New York on August 24, 1892. Twelve representatives from seven states attended.22 Two years later, state representation had more than tripled, with representatives from twenty-two states attending the ULC’s

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17 See supra note ___ (giving examples of Uniform Acts).


19 Stein, More Perfect Union, supra note __, at 13; Robert A. Stein, *Strengthening Federalism*, supra note __, at 2255.


21 Stein, More Perfect Union, supra note __, at 15.

22 Id. at 16; Stein, Strengthening Federalism, supra note __, at 2256.
August 1894 meeting. In 1896, the ULC adopted its first legislative product, the Uniform Negotiable Instruments Law, ultimately enacted in every state, territory, and the District of Columbia. By 1900, the ULC boasted a membership of thirty-five states and territories, with all fifty states and continental territories, along with the Philippines, Hawaii, and Puerto Rico joining by 1913.

During its first several decades, several giants of American law and politics, among them, John Barr Ames, Louis Brandeis, Roscoe Pound, John Wigmore, Samuel Williston, and Woodrow Wilson served as commissioners. In later years, a new generation of luminaries have served in the post, including Chief Justice William Rehnquist and Associate Justices Sandra Day O’Connor and David Souter, as well as former Solicitor General Ted Olson.

**B. Step One: The ULC Drafting Process**

Formal authority to approve a Uniform Act lies with the ULC’s Commissioners, who are typically appointed by state governors, but occasionally by state legislatures or other state officials, as prescribed by state statute. States may appoint as many Commissioners as authorized by state law. On the floor of the ULC, however, each state (including the District of Columbia, Puerto Rico, and the U.S. Virgin Islands) is allocated only one vote. In any event, owing to their appointment by elected political officials, ULC Commissioners are, like federal judges, indirectly subject to the “electoral connection.”

The ULC’s norms and procedures differ from traditional lawmakers in several important ways. The process of drafting and promulgating a Uniform Act begins with the ULC’s Committee on Scope and Program, which has formal “responsibility to determine whether [a] subject merits consideration by the ULC.” The Committee thus provides “the initial screen for determining whether a subject merits consideration by the

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23 Stein, More Perfect Union, supra note __, at 17.
24 Id. at 18; Stein, Strengthening Federalism, supra note __, at 2257.
25 Stein, More Perfect Union, supra note __, at 19, 29; Stein, Strengthening Federalism, supra note __, at 2256.
26 Stein, More Perfect Union, supra note __, at 40.
27 Id. at 290–91, 294, 337.
30 See David R. Mayhew, Congress: The Electoral Connection (2004). Commissioners are, in the first instance, members of state-level Commissions on Uniform State Laws.
31 Uniform Law Commission, Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Uniform and Model Acts (on file with authors), at 4 [hereinafter, ULC, Statement of Policy] (“Whenever a subject for an act is proposed to the ULC, the proposal must first be submitted to the Committee on Scope and Program.”); see also Uniform Law Commission, FAQs: How are subjects for new acts selected?, https://www.uniformlaws.org/aboutulc/faq#How%20are%20subjects%20for%20new%20acts%20selected? (last accessed Feb. 19, 2020) (“The ULC Committee on Scope and Program welcomes proposals from state bars, state government entities, private groups, uniform law commissioners, and private individuals. The
ULC.”

The Committee solicits proposals twice a year, with the bulk coming from ULC commissioners.

Proposals must satisfy two main criteria. First, the subject matter “must be appropriate for state legislation in view of the powers granted by the Constitution … to Congress.”

Second, the subject matter “must be such that approval of the act … would be consistent with the objectives of the ULC … to promote uniformity in the law among the several … States on subjects where uniformity is desirable and practicable.” Several additional factors guide the Committee’s consideration, including: (1) “[w]hether there is a need for an act on the subject”; (2) the “probability” that, if promulgated, a Uniform Act on the subject either will be accepted and enacted into law by a substantial number of states or, if not, will promote uniformity indirectly”; and (3) possible benefits to the public, including “facilitating interstate economic, social, or political relations” and “avoiding significant disadvantages likely to arise from diversity of state law.”

Ultimately, proposals that receive the Committee on Scope and Program’s recommendation are forwarded to the ULC’s Executive Committee, which “must find that a proposed act: “(A) comports with the criteria of the ULC; (B) has the potential … of substantially contributing to the objectives of the ULC; and (C) will have adequate agenda time for its consideration.” If approved, a ULC Drafting Committee is formed.

1. Drafting Committees

ULC drafting committees are comprised of a chair (herself a ULC commissioner), several additional commissioners, and a reporter — typically, a member of the legal academy and an expert in the relevant subject matter. An advisor from the American Bar

Committee may assign a proposal to a Study Committee, which researches the topic and decides whether to recommend that an act be drafted. … An approved recommendation leads to creation of a ULC Drafting Committee.” Section 4.4 of the ULC Constitution provides that the Committee “shall recommend to the Executive Committee the work the Conference should undertake and the general plan and scope of its activities.” ULC Const., § 4.4. The Committee is appointed by the ULC’s president and consists of nine members. Id.

32 Uniform Law Commission, Committee Procedure Manual (on file with authors), at 1 [hereinafter ULC, Committee Procedure Manual].

33 Uniform Law Commission, Project Proposal Guidelines and Form (on file with authors), at 1 [hereinafter, ULC, Project Proposal Guidelines].

34 ULC, Statement of Policy, at 1.

35 Id. (internal quotation marks omitted).

36 Id.


38 Id.

39 ULC Reference Book, supra note __ at 13; Uniform Law Commission, FAQs: How is an act drafted?, https://www.uniformlaws.org/aboutulc/faq#How%20is%20an%20act%20drafted? (last accessed Feb. 19, 2020). As one account summarizes, “When the Commission does decide to draft a uniform law … [i]t appoints a drafting committee, composed of commissioners, to work with a reporter, who is commonly a specialist academic.” Langbein, Major Reforms, supra note __, at 6. Formally, the ULC’s Constitution provides that special committees are appointed by the president, who “specifies the number of their members, and designate[s] their chairpersons.” ULC Const. § 5.2.
Association (ABA) is usually assigned. The chair is responsible for coordinating with the drafting committee’s assigned ABA advisor, whose role “is to solicit input from all parts of the ABA that may have an interest in the act and to discuss the drafts of the act with those constituencies.”

Both to win the support of key constituencies and to tap into additional expertise, relevant interest groups are typically also invited to participate in the drafting process. As the ULC explains: “An important group or constituency that is not aware of the project may later oppose the act, while inclusion of all groups and constituencies will build consensus and facilitate enactment.” Committee chairs, often in concert with the reporter, are responsible for “ensuring that relevant stakeholder interests are represented through the active participation of observers.” Though not formally granted a vote, designated group-affiliated observers are urged to attend and participate in drafting sessions. To ensure representativeness, members of the drafting committee are encouraged “to review the list of observers and determine whether additional organizations should be invited to participate as observers and should also identify other organizations that are likely to support or may oppose the act being drafted.”

For critics of the drafting process, including Alan Schwartz and Robert Scott, interest group involvement constrains the scope of the ULC’s interventions, creating a “strong status quo bias” and raising the prospect of interest-group capture. Larry Ribstein and Bruce Kobayashi similarly suggest that the ULC “provides camouflage for interest group legislation.” In their view, “the drafting process may be biased toward business rather than consumer groups,” particularly because business—unlike consumer groups—are likely to benefit from “scope economies of representation.”

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40 See ULC Const., §§ 2.9(a) (“(a) The Executive Committee may appoint as advisory members of the Conference representatives from the American Bar Association, the American Law Institute, or governmental organization or agencies designated by the Executive Committee.”); 30.1 (“During the preparation of an Act, the Special Committee having it under consideration shall notify and confer with the appropriate committee or section of the American Bar Association or, in the absence of an appropriate committee or section, with the Secretary of the Association.”).

41 ULC, Drafting Chair Guidelines, supra note __, at 3; ULC, Committee Procedure Manual, supra note __, at 9 (“When a drafting committee is appointed, the president notifies the ABA staff liaison and requests ABA participation in an advisory capacity to the drafting committee.”).

42 Id. at 10.

43 Id. at 12. The ULC suggests that, “[f]or stakeholders who do not choose to participate as observers, the chair and other members of a study committee can make personal contacts with individuals and representatives of groups or organizations to obtain their views about the need for and viability of a potential project.” Id. at 21.

44 ULC, Drafting Chair Guidelines, supra note __, at 3.

45 ULC, Committee Procedure Manual, supra note __, at 10.


48 Id. Kathleen Patchel, too, argues that the “history of the [UCC] raises the concern that the uniform laws process simply may be unable to accommodate the interests of consumers at all because provisions protecting consumer interests routinely have been excluded to avoid the possibility that their inclusion would impair
Not all scholars view the involvement of interest groups in the enactment process as a negative, however. Some, such as John Langbein and Larry Waggoner, argue that interest group buy-in ensures that the ULC’s work achieves its intended goals. On their account, interest groups guarantee that “real lawyers [are] put in charge of the academicians.” 49 Because “Uniform laws are political orphans … [t]he ideal is to identify relevant interests and to satisfy their concerns … in order to have a legislative product that takes account of the real problems and that does not beget needless opposition in the subsequent state-by-state enacting process.” 50

In any event, once the committee is in place, drafting begins in earnest and ordinarily lasts at least two years. 51 Meetings take place twice a year — once in the fall and once in the spring — and typically involve a line-by-line discussion of the draft text. 52 The chair moderates the discussion, supported by the reporter, and usually decisions are reached by consensus. After the drafting process has reached an “advanced state,” the drafting committee presents the draft for plenary floor debate at one of the ULC’s annual meetings. 53 All the commissioners are present for this line-by-line reading. 54 A Uniform Act may be formally promulgated only after it has been read on the floor during two separate annual meetings. 55

Responsibility for drafting and revising the blackletter text and the accompanying comments falls to the reporter, who broadly serves as a “resource for drafting committees.” 56 The reporter also prepares notes to guide committee members in evaluating the draft. 57 Nevertheless, because the reporter is not typically a member of the ULC, she — like interest group-affiliated observers — is not afforded a formal vote in committee. 58 Indeed,

enactment.” Kathleen Patchel, Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code, 78 MINN. L. REV. 83, 92 (1993). Patchel adds that the ULC’s “focus on enactment, and the concomitant need to enlist the support of others in order to have its law enacted” fundamentally constrains the nature of ULC’s interventions. Id.

49 Waggoner & Langbein, supra note __, at 876.

50 Id. at 877.

51 Langbein, Major Reforms, supra note __, at 6.

52 STEIN, MORE PERFECT UNION, supra note __, at 198; Uniform Law Commission, Guidelines for Drafting Committee Chairs (on file with authors), at 4 [hereinafter ULC, Drafting Chair Guidelines].


56 STEIN, MORE PERFECT UNION, supra note __, at 198; Lawrence J. Bugge, Symposium: One Hundred Years of Uniform State Laws Tribute, 89 MICH. L. REV. 2073, 2074 (1991).

57 ULC, Drafting Chair Guidelines, supra note __, at 2; ULC, Committee Procedure Manual, supra note __, at 5 (“Notes on drafts are primarily to inform the members of the committee about issues and intentions.”)

58 ULC, Committee Procedure Manual, at 12.
the ULC is clear that, “[a]lthough the reporter is the principal draft of a uniform act, the process is based on the substantive decisions of, and collaboration with, the committee.”

Accordingly, the first step in the life cycle of a state-enacted Uniform Act resembles its more conventional counterpart. Just as in a traditional legislature, primary drafting responsibility falls to select individuals—here, the reporter, sometimes assisted by the chair. Next, a responsible committee performs an extensive mark-up, carefully scrutinizing the proposed draft line by line over the course of several meetings. Finally, the ULC’s plenary body—with authority to promulgate the act—conducts a broader review, making modifications as it deems necessary during a floor debate preceding a vote. This multiyear process is responsible for the ULC’s principal legislative outputs: the blackletter text and accompanying comments. Those outputs are typically followed by secondary commentary in the form of a summary article authored by the reporter, chair, or both.

2. Drafting Output

The ULC drafting process yields three types of output texts. First, the committee drafts the blackletter portion of a proposed Uniform Act. The blackletter text is subject to the ULC’s style manual, which governs the Act’s overall structure, as well as the word choice, syntax, and formatting of each provision. The blackletter text must be approved by the ULC, and is subject to the Commission’s majoritarian voting procedures. For the ULC to promulgate a Uniform Act, a majority of the states present (at minimum, twenty) must vote in favor.

Crucially, the blackletter text always contains a provision instructing courts that, “in applying and construing [the] ... Act, consideration must be given to promoting uniformity of the law with respect to its subject matter among States that enact it.” The ULC has included variations on this explicit directive in every Uniform Act since 1910. The blackletter text may also contain bracketed language signaling to enacting legislatures that...
some of it is “optional.”64 Enacting states may thus select either choice “without affecting uniformity.”65

Second, the committee drafts the official comments accompanying the blackletter text. Intended for “[l]egislatures, courts, practitioners, and others who are considering the act for enactment need to construe or apply it,”66 comments are required under the ULC’s constitution.67 A comment typically accompanies each provision. Written “primarily to inform ultimate users of the act about the committee’s intentions,”68 comments describe the ULC’s reasons for adopting the provision’s blackletter text, the meaning of key terms, the extent to which the blackletter represents a departure from the status quo, and potential criticisms.69 Courts, including the U.S. Supreme Court, routinely rely on the comments for insight into how the blackletter text is supposed to operate.69

64 See, e.g., Section 411(c) of the Uniform Trust Code. As the accompanying comments note, “[t]o indicate that a choice is given to the enacting state in adopting or omitting language, place all of the language affected by the choice within brackets.” Uniform Law Commission, Drafting Rules (on-file with authors), at 34 [hereinafter ULC, Drafting Rules]. Enacting states may, as a result, select either choice “without affecting uniformity.” Id.

65 Id.

66 Uniform Law Commission, Committee Procedure Manual (2019) (on file with authors), at 15. But “[c]omments should not be used as a substitute for or to modify any substantive provision in an act.” Id. Thus, “[t]he statutory text always governs any conflict or inconsistency between the text and the comments.” Id.

67 Section 28.4 of the ULC’s Constitution notes that a draft Act “must … be accompanied so far as practicable by historical, explanatory, and tentative official comments.” ULC Const. § 28.4 (emphasis added). The ULC’s practice of providing authoritative commentary began with Karl Llewellyn, the UCC’s reporter. Laurens Walker, Writings on the Margin of American Law: Committee Notes, Comments, and Commentary, 29 GA. L. REV. 993, 995 (1995). For Llewellyn, the comments were “[g]iven the intentional flexibility built into the Code … [t]he drafters designed them to provide a bridge between often confusing or sparse Code language and the facts of specific cases.” Sean Michael Hannaway, Note, The Jurisprudence and Judicial Treatment of the Commons to the Uniform Commercial Code, 75 CORNELL L. REV. 962, 967 (1990). Nevertheless, the indeterminate status of the comments to the UCC was reflected in a 1956 study by the New York Law Revision Commission —accepted by the UCC’s editorial board—which expressed great concern that elevation of the commentary to the status of blackletter law was “unnecessary and could lead to unprecedented use of the Comments to expand and qualify the text.” Id. at 1010–11.

68 ULC, Committee Procedure Manual, supra note __, at 6. By way of illustration, a portion of the comment to Uniform Directed Trust Act § 2 (2017) provides:

In using the term “administration,” the drafting committee intended a meaning at least as broad as that found in the context of determining a trust’s “principal place of administration,” such as under Section 3(b). The drafting committee also intended the terms “investment, management, or distribution” to have a meaning at least as broad as that found in Uniform Trust Code § 815(a)(2)(b) (2000), which specifies a trustee’s default powers. The comment to Section 6 provides examples of the kinds of specific powers that the drafting committee contemplated would fall within the definition of a power of direction.

As one observer has put it, comments “bear such a close relationship” to the Uniform Act as promulgated that “they appear, at least in a metaphorical sense, at the very margin, or between the lines, of American law.” Walker, supra note __, at 994; see also Hannaway, supra note __, at 962 (suggesting that comments “cannot accurately be described as legislative history in the traditional sense”).

The chair and reporter revise the comments throughout the drafting process to maintain their value “as legislative history.”70 Recall that an act’s text must receive two “reads,” one each at two consecutive annual meetings of the ULC plenary body. As a result, comments must be updated to conform to any amendments the full body may make to the blackletter text, including after the act is formally adopted following the second read. Indeed, ULC policy provides that that “[c]omments are subject to revision by the reporter and chair of the drafting committee with appropriate consultation … up to the time of their official publication,” which “takes place when Thomson Reuters publishes the text and comments.”71 Once the Uniform Act is published, however, comments are generally revised only for clarification.72 Given their importance in construing the blackletter text of the Uniform Act, particular comments may be subject to robust discussion and debate within the drafting committee.73 And they may even play a key role in the bargaining process, as drafting committee members condition their approval of certain blackletter text on the inclusion of certain language in the comments.74

Third, the drafting process commonly results in a summary article written by the drafting committee’s reporter, chair, or both. This article typically reflects the reporter’s view of the Uniform Act’s primary purpose.75 In seeking to provide additional “guidance to readers of the draft [text],”76 the reporter may describe the assumptions and debates animating the drafting process and provide additional context for the comments. True, the article reflects only the reporter’s (or the chair and the reporter’s) views, and thus “do[es] not necessarily serve the same function” or carry the same interpretive weight as the comments.77 Nevertheless, the summary article too can prove useful to courts charged with construing state-enacted Uniform Acts.78 [Placeholder: return to reporter’s article.]

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70 Uniform Law Commission, Policy on Revisions to the Comments of All Conference Acts (on file with authors), at 1 [hereinafter ULC, Policy on Revisions to the Comments of All Conference Acts]; ULC, Committee Procedure Manual, supra note __, at 15 (“The drafting committee chair is responsible for ensuring the acceptable completion of the official comments, although the reporter generally does the drafting.”); id. at 17 (similar).

71 ULC, Policy on Revisions to the Comments of All Conference Acts, supra note __, at 1; ULC, Committee Procedure Manual, supra note __, at 17.

72 ULC, Committee Procedure Manual, supra note __, at 17 (“After official publication, the reporter and chair … may revise comments to correct errors, update references, and make substantive changes…”).

73 [Get confirmatory email.]

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75 ULC, Committee Procedure Manual, supra note __, at 6 (“Ideally, once the act has been promulgated, a reporter will also prepare an appropriate article for publication discussing the act, its development, and the reasons behind its provisions.”); see also, e.g., John D. Morley & Robert H. Sitkoff, Making Directed Trusts Work: The Uniform Directed Trust Act, 44 ACTEC L.J. 1 (2018); Donald J. Weidner and John W. Larson, The Revised Uniform Partnership Act: The Reporters’ Overview, 49 BUS. LAWYER 1 (1993)

76 ULC, Drafting Chair Guidelines, supra note __, at 2.

77 Id.

C. Step Two: State Enactment

Once a Uniform Act is promulgated, legislators must decide state by state whether to enact it.\textsuperscript{79} At this stage, “commissioners advocate the adoption of [Uniform Acts] in their home jurisdictions.”\textsuperscript{80} Here, too, interest groups are often heavily involved, with some groups holding effective “veto power.” Lawmakers may choose to alter or amend the text as promulgated by the ULC.\textsuperscript{82}

Modifications to individual provisions run the gamut from cosmetic changes necessary to conform the text to state’s legislative conventions, to substantive changes designed to alter—or negate—how the ULC intended the provision to work. Recognizing variation in state drafting conventions, Uniform Acts sometimes contain legislative notes that provide guidance to states on how to absorb the promulgated act.\textsuperscript{83} States also differ as to whether the comments accompanying the blackletter text are included in the codified version of the final statute. North Carolina, for example, includes both the ULC’s comments as well as its own legislature’s comments,\textsuperscript{84} while Ohio includes only the ULC’s comments.\textsuperscript{85} Florida includes only the blackletter text.\textsuperscript{86}

Crucially, state legislatures often retain the ULC’s standard “promote uniformity” clause when enacting a Uniform Act.\textsuperscript{87} Some go further. These states have an omnibus

\textsuperscript{79} Some critics charge that the ULC has a checkered enactment record. By the mid-1990s, as Schwartz and Scott note, of “more than two hundred proposed uniform acts, 107 ha[d] been adopted in fewer than ten states; [and] seventy-seven ha[d] been enacted in less than five.” Schwartz & Scott, supra note __, at 602.

\textsuperscript{80} Id.; see also ULC const., § 6.1(5) (requiring Commissioners “to seek introduction and enactment of Uniform Acts promulgated by the Conference that are appropriate for their State”).

\textsuperscript{81} Langbein, Major Reforms, supra note __, at 6.

\textsuperscript{82} See infra, Part IV.X.

\textsuperscript{83} For example, the section 2 of the Uniform Directed Trust Act contains a legislative note, separate from the comments, providing instructions to states about how to incorporate the blackletter text depending on which portions of the Uniform Trust Act they have adopted (if any). See UNIF. DIRECTED TR. ACT § 2 (UNIF. L. COMM’N 2017) (“Legislative Note: A state that has enacted Uniform Trust Code (Last Revised or Amended in 2010) Section 103(18), defining ‘terms of a trust,’ or Uniform Trust Decanting Act (2015) Section 2(28), defining ‘terms of the trust,’ should update those definitions to conform to paragraph (8). A state that has enacted Uniform Trust Code Section 103(15) and (20) could replace paragraphs (6) and (10) of this section with cross-references to those provisions. A state that has not enacted Uniform Trust Code Section 111 should replace the bracketed language of paragraph (8)(B)(iii) with a cross reference to the state’s statute governing nonjudicial settlement or should omit paragraph (8)(B)(iii) if the state does not have such a statute.”) (emphasis removed).

\textsuperscript{84} See, e.g., N.C. GEN. STAT. ANN. § 36-C-4-401 (incorporating verbatim the comments accompanying UTC § 401).

\textsuperscript{85} See, e.g., OHIO REV. CODE ANN. § 5804.01 (incorporating verbatim the comments accompanying UTC § 401).

\textsuperscript{86} See, e.g., FLA. STAT. ANN. § 736.0401 (comments absent from Florida version of UTC § 401).

\textsuperscript{87} For example, all fifty state legislatures have instructed that the Uniform Interstate Family Support Act (UIFSA) must be interpreted in light of “the need to promote uniformity among states that enact it.” See UIFSA, § 901 (as amended in 2008); see, e.g., 750 ILL. COMP. STAT. 22/901 (adopting section 901 verbatim); MINN. STAT. ANN. § 518C.901 (same); MISS CODE. ANN. § 93-25-115 (same); N.H. REV. STAT. ANN. § 546-B (same); UTAH CODE ANN. § 78B-14-901 (same); TEX. FAM. CODE ANN. § 159.901 (same); WASH. REV. CODE § 16.21A.905 (same).
“promote uniformity” command that applies to all state-enacted Uniform Acts. For example, Texas directs: “[a] uniform act included in a code shall be construed to effect its general purpose to make uniform the law of those states that enact it.” 88 Pennsylvania similarly mandates that “[s]tatutes uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them.” 89 Illinois, Minnesota, North Dakota, South Dakota, and Wyoming all have similar rules, while Hawaii’s applies even to “provisions of uniform acts adopted by the State.” 90

To be sure, state lawmakers frequently rely on extra-legislative actors (often lobbyists) to draft legislation. To appease particular constituencies or interest groups, they may even enact language these groups supply. While this practice has superficial similarity with legislators’ reliance on the ULC, there are important differences. First, unlike lobbying groups, the ULC is a governmental body authorized by statute in each of the fifty states as well as several territories (and largely funded through state-level appropriations).

Second, language drafted by the ULC must receive formal approval within the drafting committee to be referred to the full body, and then it must be promulgated in accordance with the ULC’s formal state-by-state voting procedures. These formal, publicly available procedures differ substantially from the more ad hoc (and often secret) processes that govern most interest group drafting. Indeed, meetings of the ULC are open to the public.

Third, the ULC’s commissioners, as noted, are appointed by state governors or other elected officials. The ULC’s legislative products are thus different in kind from proposals authored by interest groups. Consequently, classifying the ULC as a legislative

90 See Haw. Rev. Stat. Ann. § 1-24 (providing that statutory provisions taken from Uniform Acts “shall be so interpreted and construed as to effectuate their general purpose to make uniform the laws of the states and territories which enact them); In re Marriage of Gulla & Kanaval, 917 N.E.2d 392, 399 (Ill. 2009) (noting that the Illinois Supreme Court has “long recognized that in construing uniform legislation, a court must interpret the statutory language so as to give effect to the beneficent legislative purpose of promoting harmony in the law”); Minn. Stat. Ann. § 645.22 (“Laws uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them.”); N.D. Cent. Code Ann. § 1-02-13 (“Any provision in this code which is a part of a uniform statute must be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.”); S.D. Codified Laws § 2-14-13 (“Whenever a statute appears in the code of laws enacted by § 2-16-13 which, from its title, text, or source note, appears to be a uniform law, it shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.”); Wyo. Stat. Ann. § 8-1-103 (“Any uniform act shall be interpreted and construed to effectuate its general purpose to make uniform the law of those states which enact it.”); see also Swaps, LLC v. ASL Properties, Inc., 791 S.E.2d 711, 713 (N.C. Ct. App. 2016) (“As with other uniform laws, the Uniform Declaratory Judgment Act ‘shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.’”) (emphasis added) (quoting N.C. Gen. Stat. § 1-266); State of Minn. ex rel. Monroe v. Monroe, No. 17042, 1995 WL 411393, at *2 (Ohio Ct. App. July 5, 1995) (“As a uniform act, URESA is to be interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.”) (citation omitted).
body (as opposed to a private charitable organization), Uniform Acts are democratically legitimate as a source of positive law in a way that interest group proposals are not.\textsuperscript{91}

II. TEXTUALISM: THEORY AND ASSUMPTIONS

Textualism is today’s dominant mode of statutory interpretation. In Justice Elena Kagan’s words, “We’re all textualists now.”\textsuperscript{92} The scholarly foundation for textualism, however, has been developed with reference to a one-step, federal model of lawmaking. By way of illustration, John Manning, the noted textualist scholar who is now Dean of Harvard Law School, frames the question thus: “in the case of statutory interpretation the challenge is how to decide what should count as Congress’s decision and to determine what creative license judges should have to build upon or repair Congress’s handiwork.”\textsuperscript{93}

To frame our adaptation of textualism for the unique two-step political economy of a state statute that originates as a Uniform Act, we review contemporary textualism’s foundational principles and assumptions. We first consider the primacy of statutory text as law. Next, we take up the fiction of legislative purpose. Finally, we discuss the foundational idea that courts must play the role of faithful agents to their legislative principals. As we shall see, each rests on a one-step Congressional model of lawmaking that does not align with the two-step political economy of a state statute that originates as a Uniform Act.

\textsuperscript{91} At the same time, it is important to acknowledge that the ULC occupies a gray area between constitutionally specified institutions like state legislatures and institutions that have neither constitutional nor statutory authority, like political parties or lobbying groups. Fully contextualizing the ULC on the dimension of political legitimacy, however, is beyond the scope of this Article.

\textsuperscript{92} See Harvard Law Sch., The Scalia Lecture | A Dialogue with Justice Kagan on the Reading of Statutes, YOUTUBE, at 8:28 (Nov. 17, 2015), https://www.youtube.com/watch?v=dpEtszFIOTg. As Jonathan Molot suggests, one way to appreciate textualism’s ascendance is to see how deeply textualist critiques have penetrated opponents’ own arguments and assumptions. Jonathan T. Molot, The Rise and Fall of Textualism, 106 COLUM. L. REV. 1, 2 (2006). Both textualists and purposivists “alike give every indication of caring both about the meaning intended by the enacting legislature and about the need for readers to have fair notice of that meaning, as well as about some additional policy-oriented goals.” Caleb Nelson, What Is Textualism?, 91 VA. L. REV. 347, 353 (2005). John Manning—arguably the leading contemporary exponent of textualist theory—similarly observes that contemporary purposivists all “pay close attention to text, structure, sources of technical or specialized meaning, and maxims of statutory construction.” John F. Manning, The New Purposivism, 2011 SUP. CT. REV. 113, 119 [hereinafter Manning, New Purposivism]. Abbe Gluck and Richard A. Posner suggest another way to measure the increasing influence of textualism. They note that younger judges—who went to law schools in the 1980s or later—are more subject to the “general influence of formalism” than their older colleagues. Abbe R. Gluck and 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, 1312 (2018). Gluck and Posner comment: “[T]rends in legal education, including the new courses in statutory interpretation that tend to highlight the influence of textualism on the field, alongside the virtual disappearance of legal process theory from most American law school curricula, are likely playing an important role in this generational shift.” Id.

\textsuperscript{93} John F. Manning, Without the Pretense of Legislative Intent, 130 HARV. L. REV. 2397, 2401 (2017) (emphasis added) [hereinafter Manning, Without the Pretense].
A. The Text is the Law

Textualists’ answer to Manning’s question of “how to decide what should count as Congress’s decision” is that the “words of the statute, and not the intent of the drafters,” count as “the ‘law.’” Grounded in the view that “[w]ords ... have a limited range of meaning,” textualism discourages adopting an “interpretation [of a statute] that goes beyond that range.” Textualists demand that judges “enforce the conventional meaning of a clear text, even if it does not appear to make perfect sense of the statute’s overall policy.” When contemporary textualists analyze the “meaning” of the statutory text, therefore, they seek to recover the meaning that “comes from the ring the words [of the statute] would have had to a skilled user of words at the time, thinking about the same problem.”

This rigorous formalism is grounded on the claim that “the text, and only the text” is constitutionally legitimate. The explicit point of reference here is a statute that Congress drafts and then enacts (as distinct from the two-step process that characterizes state-enacted Uniform Acts). In this model, “[b]ills take their final shape” within Congress, albeit that legislative process may involve a “complex dance that may include multiple committees, behind-the-scenes logrolling, the threat of a Senate filibuster or presidential veto, the need to fight for scarce floor time, the need for unanimous consent to expedite votes in the Senate, and countless other factors.”

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94 Id.
96 ANTONIN SCALIA, A MATTER OF INTERPRETATION 24 (1997).
97 John F. Manning, Textualism and the Equity of the Statute, 101 COLUM. L. REV. 1, 4 (2001) [hereinafter Manning, Equity of the Statute]; Easterbrook, Original Intent, supra note 61; see also Bostock v. Clayton Cty., 140 S. Ct. 1731, 1738 (2020) (“This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.”); Hively v. Ivy Tech Cnty. Coll. of Indiana, 853 F.3d 339, 361 (7th Cir. 2017) (Sykes, J., dissenting) (“Statutory interpretation is an objective inquiry that looks for the meaning the statutory language conveyed to a reasonable person at the time of enactment.”).
98 Easterbrook, Original Intent, supra note 61; see also Bostock v. Clayton Cty., 140 S. Ct. 1731, 1738 (2020) (“This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.”); Hively v. Ivy Tech Cnty. Coll. of Indiana, 853 F.3d 339, 361 (7th Cir. 2017) (Sykes, J., dissenting) (“Statutory interpretation is an objective inquiry that looks for the meaning the statutory language conveyed to a reasonable person at the time of enactment.”).
In other words, textualists emphasize the primacy of the “statutory text alone” because that text, unlike any “unenacted legislative intentions or purposes,” has “survived the constitutionally prescribed process of bicameralism and presentment.”

Giving effect to extratextual materials risks “bypass[ing]” the “gauntlet” of bicameralism and presentment, and so violates the process for making law the Constitution prescribes.

To be sure, textualists acknowledge that other materials may be necessary to interpret the text, including dictionaries and canons of construction. For example, as Manning writes, “modern textualism necessarily—and quite properly—draws upon contextual clues.” Interpreters must read a word or phrase against the backdrop of “specialized conventions and linguistic practices peculiar to the law,” including “the often elaborate (but textually unspecified) connotations of a technical term of art.”

Nevertheless, textualists fear that relying on extra-textual congressional statements of purpose—committee reports, for instance—“is tantamount to lawmaking by Congressional subgroups” and thus forbidden under INS v. Chadha and Bowsher v. Synar. In this sense, textualists seek to respect “Congress’s own procedural choice[]” to bring only the “dull, technical, formal final text to a floor vote,” rather than the “other texts that it generates … but chooses not to bring before the body as a whole.” It is Congress that “chooses to express its policies by drafting formal, technical, often turgid texts and then … voting on those texts rather than on broad policy outlines or bullet points.” And Congress cannot circumvent the duty to make law through the process set forth in Article I, section 7 by delegation to congressional committees or other subparts of the legislature.

B. The Fiction of Legislative Purpose

Textualists argue that bringing together a winning coalition within a legislature demands too many tradeoffs to generate a traceable, nontextual logic. Here, too, textualists assume that a statute is the handiwork of a single legislative body as compared to the two-step process that characterizes state-enacted Uniform Acts. On this account, assem-

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102 Herrmann v. Cencom Cable Assocs., Inc., 978 F.2d 978, 982 (7th Cir. 1992) (Easterbrook, J.).

103 Manning, Equity of the Statute, supra note __, at 71.

104 Manning, What Divides, supra note __, at 81.

105 Id.; John F. Manning, The Absurdity Doctrine, 116 HARV. L. REV. 2387, 2457 (2003) (“[T]extualists do believe that statutes convey meaning only because members of a relevant linguistic community apply shared background conventions for understanding how particular words are used in particular contexts.”) [hereinafter Manning, Absurdity Doctrine]; id. at 2465–66 (“[M]odern textualists unflinchingly rely legal conventions that instruct courts, in recurrent circumstances, to supplement the bare text with established qualifications designed to advance certain substantive policies.”).


107 Manning, Inside Congress’s Mind, supra note __, at 1947.

108 Manning, Without the Pretense, supra note __, at 2427.
bling a legislative majority requires a series of “awkward” drafting compromises that “attempt to split the difference between competing principles.” These compromises ultimately assure passage. As Judge Easterbrook explains: “Legislation is compromise. Compromises have no spirit; they just are.”

What’s more, textualist theory draws an important distinction between the legislature as a collective and the individual lawmakers that compose it. Textualists argue that, unlike those of any individual member, the preferences of the legislature as a whole “cannot realistically be aggregated into a coherent collective decision.” The consequence is that the content of a given statute results as much from arbitrary or idiosyncratic procedural sequencing, including how leaders choose to set the legislative agenda, as it does from the policy views of its members.

It follows, therefore, that courts must give up on the fiction that as outside observers they can identify the goal that animates a legislative majority. Rather, “given the opacity, complexity, and path dependency of the [legislative] process … [m]odern textualists urge judges to focus on what they consider the more realistic — and objective — measure of how a ‘skilled objectively reasonable user of words’ would have understood the statutory text in context.” Giving primacy to the statute’s text enforces the actual bargain the legislature struck. On this view, textualism’s main competitor, purposivism, “cannot deal adequately with legislative compromise.” The reason is that the words themselves — the “semantic detail[s]” of legislation — are “the only effective means that legislators possess to specify the limits of an agreed-upon legislative bargain.

In sum, “the text represents a delicate compromise between legislative objectives; attempts to extrapolate the ‘spirit’ of a law may upset this balance.” Or, as William Eskridge puts it, “[t]he statutes that result from the process of sequential deals and trade-offs tend to be filled with complex compromises which cannot easily be distilled into one overriding public purpose.”

C. Judges as Agents to Legislatures as Principals

Textualists also argue that textualist interpretation best conforms to the ideal that courts serve as the faithful agents of legislative principals. As Manning explains, “in our

109 Manning, Absurdity Doctrine, supra note __, at 2411.
110 Easterbrook, Original Intent, supra note __ at 68.
111 Manning, Absurdity Doctrine, supra note __, at 2412; Manning, Nondelegation Doctrine, supra note __, at 685.
112 Id.
113 John F. Manning, What Divides Textualists from Purposivists?, 106 Colum. L. Rev. 70, 74 (2006) [hereinafter, What Divides]: Manning, Absurdity Doctrine, supra note __, at 2410 (“The legislative process … is too complex, too path-dependent, and too opaque to allow judges to reconstruct whether Congress would have resolved any particular question differently from the way the clear statutory text resolves that question.”).
114 Manning, What Divides, supra note __, at 92.
115 Id.
116 Cross, supra note __, at 32.
system of government, federal judges have a duty to ascertain and implement as accurately as possible the instructions set down by Congress (within constitutional bounds).”¹¹⁸ Rooted in a robust conception of the separation of powers, this idea is closely related to the claim that Article III judges have a more tenuous claim on political legitimacy than directly elected lawmakers.¹¹⁹

Carrying out their duties as agents of the legislature requires that judges “respect not the legislature in the abstract, but rather the specific outcomes that were able to clear the hurdles of a complex and arduous legislative process.”¹²⁰ The alternative—a free-floating inquiry into Congress’s objectives—unduly “liberates” judges.¹²¹ On this view, “consideration of legislative history creates greater opportunities for the exercise of judicial discretion. … A focus on the text alone, it is argued, is a more concrete inquiry which will better constrain the tendency of judges to substitute their will for that of Congress.”¹²²

Textualists argue in a related vein that exclusion of legislative history improves predictability. For example, Justice Brett Kavanaugh has suggested that when “courts … seek the best reading of the statute by interpreting the words of the statute,” the result is that “each [judicial] umpire is operating within the same guidelines,” and so “we will need to worry less about who the umpire is when the next pitch is thrown.”¹²³ At the same time, limiting the interpretive inquiry to the statutory text promotes legislative supremacy. Textualism assures lawmakers that the “lines of inclusion and exclusion” they draw with their text will be enforced in court.¹²⁴

As this last point illustrates, these three foundational principles are closely related. For example, jettisoning the fiction of an identifiable extra-textual purpose both ensures respect for the presentment clause’s constitutional gauntlet and limits judicial discretion. So, too, constraining the possible scope of judicial interventions both promotes legislative supremacy and discourages the inevitably fruitless search for a legislative purpose.

¹¹⁸ John F. Manning, Textualism and Legislative Intent, 91 Va. L. Rev. 419, 430 (2005); Manning, Equity of the Statute, supra note __, at 61 (“[T]he sharp separation of legislative and judicial powers was designed, in large measure, to limit judicial discretion—and thus to promote governance according to known and established laws.”).

¹¹⁹ See, e.g., Scalia, supra note __, at 25 (arguing that looking beyond the words of a statute risks rendering “democratically adopted texts mere springboards for judicial lawmaking”); id. at 17 (”[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.”).

¹²⁰ Manning, What Divides, supra note __, at 108.


¹²² Eskridge, New Textualism, supra note __, at 674.


¹²⁴ Manning, Without the Pretense, supra note __, at 2424.
III. **Textualism Applied to Uniform Acts**

Having canvassed the political economy Uniform Acts and the foundational assumptions of textualism, we are now in a position to apply textualism to the unique circumstances of a state-enacted Uniform Act. We begin with the simple case. When a legislature enacts a Uniform Act including the ULC’s promote-uniformity clause, it *explicitly directs* courts to look to the comments accompanying the blackletter text for interpretive guidance (Section A). Put more provocatively, we contend that textualist theory obligates courts to consider in such a case what textualists would otherwise dismiss as legislative history.

We then complicate the story, examining the enactment of provisions from a Uniform Act but without the promote-uniformity command. Doing so, we argue, sends an *implicit signal* to reviewing courts to consider the Act’s official comments (Section B). The strength of that signal, however, varies with how much of the Uniform Act’s statutory text lawmakers decide to adopt. The more they enact the rest of the statute wholesale, the stronger the signal; the less, the weaker.

Finally, we illustrate the practical payoffs of these proposed canons of interpretation for state-enacted Uniform Acts by revisiting decided cases interpreting the Uniform Probate Code, the Uniform Trust Code, and the Uniform Trade Secrets Act (Section C). We defer until Part IV further puzzles, complications, and extensions such as if a state modifies the text of a Uniform Act to prescribe a different policy choice than in the uniform version of the Act.

*A. Explicit Directives*

We begin with the simplest case—an enactment by a state legislature of the entirety of a Uniform Act without modification. Such an enactment would include the ULC’s promote-uniformity clause, that is, the command that courts must give “consideration ... to the need to promote uniformity of the law” in construing Uniform Acts.\(^{125}\) For a textualist, this statutory command must be given effect. As one court put the point, this statutory text obliges courts to “adhere[] to the principles of uniformity and clarity that motivated the creation of [the Uniform Act], in light of the legislative directive that the [Act] be construed to make uniform the law among the jurisdictions enacting it.”\(^{126}\)

We contend that, on textualist terms, the *explicit directive* of the promote-uniformity clause points inexorably toward two actionable judicial imperatives. *First,* the promote-uniformity clause requires that courts differentiate between statutes that originate as Uniform Acts and those that do not.\(^ {127}\) The clause, after all, applies only to those statutes

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\(^{125}\) See supra Parts I.B-C.

\(^{126}\) Mortgage Specialists, Inc. v. Davey, 904 A.2d 652, 664 (N.H. 2006) (emphasis added). The force of such an explicit directive is especially strong when lawmakers adopt a global requirement that applies to all state-enacted Uniform Acts. See supra Part I.C.

\(^{127}\) See, e.g., State v. Davison, 900 N.W.2d 66, 69 (N.D. 2017) (“The statute is adopted verbatim from Section 7 of the Uniform Act on Prevention of and Remedies for Human Trafficking drafted by the National Conference of Commissioners on Uniform State Laws.”).
that begin life as Uniform Acts. Second, the promote-uniformity clause requires that courts must consider the Uniform Act’s statements of purpose as reflected in the official comments accompanying the blackletter text. They both of these imperatives follow from application of the foundational principles of textualism to the unique two-step political economy responsible for state-enacted Uniform Acts.

Consider first those states where the comments become part of the statute as codified. In these states, the comments—unlike committee reports or floor statements—have passed through that state’s constitutionally specified procedures. By including them in the final statutory text, the legislature has chosen to make them law. They are an inextricable part of the statutory text rather than a separate interpretive aid. Unlike the paradigmatic case of a congressionally drafted statute, where legislative subparts like conference committees or even individual legislators are often responsible for creating legislative history, these materials are external to the enacting legislature. In treating them as authoritative guides, reviewing courts do not risk “bypass[ing]” state constitutional requirements for what counts as law. Rather, the legislature has incorporated them directly into the final legislative text, just as it has done with the blackletter provisions promulgated by the ULC.

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128 See, e.g., Shire v. Unknown/Undiscovered Heirs, 907 N.W.2d 263, 272 (Neb. 2018) (“We must construe a statute in pari materia with other sections of the same act and in light of UTC comments when the Legislature has incorporated them.”); Hodges v. Johnson, 177 A.3d 86, 93 (N.H. 2017) (“We … rely upon the official comments to the Uniform Trust Code. When interpreting a uniform law, such as the Uniform Trust Code, the intention of the drafters of a uniform act becomes the legislative intent upon enactment.”) (citations and internal quotation marks omitted); In re Bradley K. Brakke Tr. dated Nov. 11, 2013, 890 N.W.2d 549, 554 (N.D. 2017) (similar); Gerber & Gerber, P.C. v. Regions Bank, 596 S.E.2d 174, 178 (Ga. App. Ct. 2004) (similar); Universal Motors, Inc. v. Neary, 984 P.2d 515, 517 (Alaska 1999) (similar).

To be sure, a Uniform Act’s comments do not carry the same legal weight as the blackletter text. As the ULC’s own drafting materials note, comments remain open to revision by the drafting committee’s reporter and chair until the Uniform Act is formally promulgated by the Commission. The ULC’s Policy on Revision to the Comments of All Conference Acts provides: “The value of the comments as legislative history must be preserved and so comments are subject to revision without restriction by the Reporter and Chair of the Drafting Committee with appropriate consultation only up to the time of their official publication” (emphasis added). ULC, Policy on Revision to the Comments of All Conference Acts, supra note __, at 1. Nevertheless, as described above, the comments accompanying a Uniform Act are, by design, an integral part of the statutory package the ULC offers state legislatures.

129 Pennsylvania is unique (as far as we know) among states in requiring consideration of comments, but only if the materials were available to the enacting legislature. See 1 PA. STAT. AND CONS. STAT. ANN. § 1939 (“The comments or report of the commission, committee, association or other entity which drafted a statute may be consulted in the construction or application of the original provisions of the statute if such comments or report were published or otherwise generally available prior to the consideration of the statute by the General Assembly, but the text of the statute shall control in the event of conflict between its text and such comments or report.”); Trust Under agreement of Taylor, 164 A.3d 1147 (Pa. 2017) (“The heading for section 7740.1 contains a reference to the corresponding UTC section number (UTC 411), and we may thus consider the UTC’s Uniform Law Comment as evidence of the General Assembly’s intent with respect to the proper application and scope of section 7740.1.”); Lessner v. Rubinson, 592 A.2d 678, 680 (Pa. 1991) (“Official comments are to be given weight in the construction of statutes.”).

130 Manning, Non-Delegation Doctrine, supra note __, at 722.

131 Cf. id. at 730 (“Just as the Sentencing Commission itself adopt both the Sentencing Guidelines and the official commentary accompanying them, Congress itself (as opposed to its agents) could more routinely enact official commentary that authoritatively explains the primary statutory text.”)
A similar logic extends to those states where the comments are not formally codified. To begin, recall that the ULC drafts the blackletter text with the expectation that interpreters will use the comments to inform their construction of that text. The ULC’s Committee Procedure Manual notes, for instance, that “[o]fficial publication [of the Uniform Act] takes place when Thomson Reuters publishes the text and comments.”\(^{132}\) Because the text is designed to work with the accompanying comments, legislators do not adopt the blackletter text in isolation from the supporting official comments when they enact a Uniform Act.\(^{133}\)

It is worth pausing here to acknowledge that this argument requires at least one inferential leap. With few exceptions, no legislature directly instructs courts in its jurisdiction to treat the comments as authoritative. But the inferential leap is a reasonable one. Recall that contemporary textualists rely on “contextual clues.”\(^{134}\) That means “giv[ing] effect to terms of art—phrases that acquire specialized meaning through use over time as the shared language of specialized communities.”\(^{135}\) It also means “draw[ing] on settled background conventions of the legal system.”\(^{136}\) The choice to adopt the ULC’s promote-uniformity command provides just this kind of linguistic context. Indeed, unlike other kinds of contexts, it is built directly into the statute, directing courts to interpret an identifiable species of statute to achieve specific ends. In this way, drawing on off-the-rack statutory text promulgated by the ULC is a “legal shorthand”: a way of communicating to reviewing courts that the enacting legislature has adopted this particular statutory text because of the additional explanatory packaging it comes with.

When it comes to the second, public choice-based rationale undergirding textualism, the stakes of drawing these distinctions are high. Ordinarily, textualists tell us, interpreters cannot discern the legislature’s intent because legislative “decisionmaking remains complex and path-dependent,” such that “idiosyncrasies of the process may sometimes shape the content of the legislation.”\(^{137}\) By contrast, when it comes to state-enacted Uniform Acts, we need not know “how most legislators ‘would have voted’ on issues they never actually considered,”\(^{138}\) or fear that they would not endorse a purpose a court later ascribed. Rather, we need know only that the legislature enacted a Uniform Act, adopting its text against the backdrop of official commentary comprising a holistic legislative scheme. By enacting the comments together with the blackletter text, courts can have certainty that the enacting legislative coalition endorsed the specific purposes set forth in the comments.

Treating comments as authoritative interpretive aids also promotes the model of courts as faithful agents of their legislative principals. Looking to the comments is the

\(^{132}\) See ULC, Committee Procedure Manual, supra note __, at 17 (emphasis added).

\(^{133}\) See Manning, Non-Delegation Doctrine, supra note __, at 730.

\(^{134}\) Manning, What Divides, supra note __, at 81.

\(^{135}\) Manning, Equity of the Statute, supra note __, at112.

\(^{136}\) Id. at 113.

\(^{137}\) Manning, Without the Pretense, supra note __, at 2415.

\(^{138}\) Eskridge, New Textualism, supra note __, at 643.
very mechanism that the ULC itself establishes for resolving difficult interpretive problems. And when a legislature adopts the ULC’s text, along with its promote-uniformity command, the most plausible inference for courts as faithful agents is that the legislature as principal intends for the courts to use the comments to find shared answers to the complex questions they confront.

Indeed, attending to the comments aids courts in achieving both substantive and procedural uniformity, as mandated by state legislatures. As to substantive uniformity, the comments provide important explanation and background context about how a particular provision is supposed to work, often describing rejected alternatives. In consequence, comments reduce the inferences a court must make about the statutory scheme. Aided by the ULC’s own explanations, courts are more likely to reach the right answer to an interpretive question for the right reasons. As the Connecticut Supreme Court has explained: “Only if the intent of the drafters of a uniform act becomes the intent of the legislature in adopting it can uniformity be achieved. Otherwise, there would be as many variations of a uniform act as there are legislatures that adopt it. Such a situation would completely thwart the purpose of uniform laws.”

An added advantage is increasing interpretive predictability. To return to Justice Kavanaugh’s metaphor, it helps reduce our concern that different umpires will set different strike zones. By looking to the statutory package in its entirety (including the comments), courts work from a rich, but nevertheless closed, set of materials. Relating the statutory text to a broader legal and policy context, comments provide a shared frame of reference for courts interpreting the same Uniform Act’s text. In other words, they can help to guarantee that courts all speak the same technical language. Making use of a common corpus in this way—and treating other jurisdictions’ interpretation of the same Uniform Act provision as highly persuasive, if not authoritative—can facilitate procedural

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139 See, e.g., UTC section 2-503, cmt. (“By way of dispensing power, this new section allows the probate court to excuse a harmless error in complying with the formal requirements for executing or revoking a will.”).

140 See, e.g., UTC section 105, cmt. (“During the drafting of the Uniform Trust Code, the drafting committee discussed and rejected a proposal that the ability of the settlor to waive required notice be based on the nature of the beneficiaries’ interest and not on the beneficiaries’ age.”); UTC section 505, cmt. (“Consequently, the drafters rejected the approach taken in States like Alaska and Delaware, both of which allow a settlor to retain a beneficial interest immune from creditor claims.”); UTC section 705, cmt. (“This section rejects the common law rule that a trustee may resign only with permission of the court, and goes further than the Restatements, which allow a trustee to resign with the consent of the beneficiaries.”)

141 Yale Univ. v. Blumenthal, 621 A.2d 1304, 1307 (Conn. 1993) (citations, alterations, and internal quotation marks omitted); see also id. (“[I]t is manifest that the legislature in enacting [the Uniform Management of Institutional Funds Act (“UMIFA”)] intended to implement the intention, meaning and objectives of the commission that drafted UMIFA.”); Mohs v. Aetna Cas. & Sur. Co., 349 N.W.2d 580, 583 (Minn. Ct. App. 1984) (“The intention of the drafters of a uniform act becomes the legislative intention upon enactment.”); Dupont v. Chagnon, 408 A.2d 408, 409–10 (N.H. 1979) (“Inasmuch as our statute was adopted from the Uniform Vehicle Code, it is important to consider the definition of the word ‘roadway’ as used by the drafters of that code. ... Even though our legislature did not adopt the definitional sections of the Uniform Vehicle Code, we may use them in construing a statute which codifies the verbatim language of that code.”).

142 See, e.g., Savage v. Zelent, 777 S.E.2d 801, 806 (N.C. Ct. App. 2015) (“Finally, for the sake of uniformity of interpretation, the legislature endorses examination of cases from other jurisdictions in interpreting the North Carolina Recognition Act.”) (citing N.C. Gen. Stat. § 1C-1859, the applicable version of the ULC’s promote-uniformity clause); Altavion, Inc. v. Konica Minolta Sys. Lab., Inc., 226 Cal. App. 4th 26, 41 (2014) (“In 1984, the Legislature ‘adopted without significant change’ the Uniform Trade Secrets Act (UTSA). Nearly all
uniformity across different jurisdictions, helping to ensure that the lines of inclusion and exclusion the legislature draws by adopting a Uniform Act will be enforced in court.

B. Implicit Signals

Now suppose that a state legislature enacts verbatim some portion of a Uniform Act—ranging from just one provision to the whole thing—but without the promote uniformity clause. In such a case, the legislature has indicated through formal, constitutionally prescribed means that it prefers the ULC’s language to some alternative text. This preference—expressed through lawmakers’ choice to adopt provisions from a Uniform Act—is an implicit signal to courts to construe those provisions in light of their accompanying official comments. The signal arises from the legislature’s choice to use the ULC’s words rather than some other statutory formulation. Put differently, that choice reflects type of specialized, technical context or legal shorthand, that textualists argue courts must honor when they interpret statutes.

The strength of this implicit signal depends on two factors: (a) the extent of the legislature’s borrowing from the Uniform Act, and (b) the extent of the textual modifications, if any, it makes. When state lawmakers adopt much of the Uniform Act unmodified, therefore, the absence of a promote uniformity instruction is not as consequential as it may at first seem. As we shall see, a negative inference from its absence is weak. On the other hand, when lawmakers take only a few stray provisions from a Uniform Act—or substantially modify the text of those provisions—the absence of the promote-uniformity command becomes much more significant. To see why, we consider first the logic of state enactment, and second the consequences of state enactment.

1. The Logic of State Enactment

Why might lawmakers choose to “buy” legislative language from the ULC rather than “make” it themselves? We propose three possibilities that are not mutually exclusive: uniformity, expertise, and efficiency. In a simple rational-choice framework, each of these offers important advantages to lawmakers motivated by reelection and career advancement.

To begin with, adopting off-the-shelf text from a Uniform Act rather than bespoke provisions allows legislators to tap into the positive network effects arising from the uniformity that the Uniform Act is designed to achieve. By definition, the subject matter of any proposed Uniform Act must be “such that approval of the act … would be consistent

\footnote{See, e.g., Ronald Coase, The Nature of the Firm, 4 Economica 386 (1937) (arguing that transaction costs may make it more efficient for a firm to produce goods or services in-house rather than contract out for them). In 1991, Coase was awarded the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel in part for this work.}
with the ULC’s goal of promoting “uniformity in the law.” And, as Ribstein and Kobayashi highlight, uniformity in state law can reduce the costs that otherwise result from differences in state laws, including inefficiencies stemming from “inconsistent mandatory rules,” lack of information about applicable law, choice-of-law issues and other “deadweight litigation costs” related to forum-shopping, uncertainty about the likelihood of legal chance, and externalities imposed on out-of-state actors. For these reasons, lawmakers may choose to shepherd a Uniform Act through the legislative process rather than draft a statute from scratch. In so doing, they can then claim credit with influential businesses or powerful interest groups for helping to eliminate costly jurisdictional differences.

Lawmakers may also enact provisions from a Uniform Act to benefit from the ULC’s expertise. As we have seen, the ULC’s drafting process brings together subject-matter experts—from the chair and reporter, to individual commissioners, representatives of key interest groups, and leading practitioners. The text that results from the ULC’s multi-year, intensive drafting process thus reflects extensive vetting not only by the Commissioners but also by subject-matter experts from across the country. For these reasons, lawmakers’ claims that “their proposals are well-designed and mainstream” are bolstered when they rely on the ULC’s handiwork. As Katerina Linos argues, “referencing [external] models ... can help politicians signal to voters that a proposal has been carefully vetted by disinterested outsiders and is not an ill-thought-out experiment or a giveaway to fringe ideologues or special interest groups.”

Finally, Uniform Acts also offer legislators efficiency in the form of a “legislative subsidy.” State lawmakers, and particularly those in less-professionalized legislatures, ...
have limited time and resources. They may therefore find an efficiency in deferring to the ULC’s vetted text, allowing them to invest their scarce legislative resources in other, more politically salient projects. The ULC’s drafting process provides cover in the form of a reasonable assurance that doing so is not an abdication of their legislative responsibilities. Lawmakers can feel secure that the text is a sensible solution to the regulatory problem at hand. And, because key interest groups have the opportunity to provide input into the content of the Uniform Act, legislators can rely on their continued buy-in during the state-enactment process—so long as the ULC’s language is adopted. Thus, just as political scientists Richard Hall and Alan Deardorff have suggested that lobbyists can “enlarge the resources that legislators have to work on behalf of their constituents,” so, too, the ULC can effectively subsidize the efforts of lawmakers pressed for time and resources, enabling them to concentrate on matters more visible or central to their constituents. At minimum, lawmakers can feel secure that voting for legislation that has already been through the ULC’s drafting process will not expose them to backlash from key groups.

2. The Consequences of State Enactment

When lawmakers intentionally choose the ULC’s statutory language over potential alternatives, they send an implicit signal to courts that the accompanying comments should be treated as authoritative interpretive guides. As before, this requires courts to first recognize that they are interpreting statutory language originally promulgated by the ULC. [Following paragraphs to be reframed more tightly to relate back to foundations of textualism.]

[To be reframed to connect more explicitly to “text as law” principle.] The text itself provides the key clue. It is no coincidence that the state enacted these words. They reflect lawmakers’ deliberate decision to enact specific off-the-rack statutory language—to give their constitutional imprimatur to both the text the ULC promulgated and the ULC’s role in drafting it. Fidelity to the text, in other words, requires courts to draw the inference that the legislature adopted the ULC’s language precisely because the ULC drafted it. Put differently, sacrificing the freedom to craft a customized legislative solution in favor of a prefabricated one is worthwhile only if lawmakers can benefit from the extratextual advantages that flow exclusively from enacting a Uniform Act: the prospect of achieving uniformity across state lines; codifying other states’ best practices; capitalizing on the political networks and expertise of the ULC’s commissioners, the Act’s reporter, and the interest groups that have shaped the Act; and the expediency of adopting non-bespoke legislation.

For this reason, the text is strong evidence that, in opting to forgo legislative customization, lawmakers intended to take advantage of the exclusive benefits of enacting the ULC’s legislative output. After all, it was the decision to use the ULC’s promulgated text rather than an alternative that secured a winning coalition in each chamber of the legislature and the signature of the state’s executive. Accordingly, courts can be reasonably confident that, by enacting verbatim some portion of a Uniform Act, lawmakers

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152 Id. at 81.
wished to secure for their states the benefits—including uniformity, efficiency, and expertise—that the ULC’s text offers.  

[To be reframed to connect more explicitly to “fiction of legislative intent” principle, and to point that comments are meant specifically to elaborate why/how of text. Also to bring above the line current quotes of courts below the line in support of argument.] As before, the upshot is that the judicial branch must respect that choice by looking to the comments. The comments are important interpretive aids. They help to ensure that the blackletter text is working as the ULC designed it to operate. And, both substantively and procedurally, they assist courts in coordinating their interpretive conclusions. As the Missouri Supreme Court summarizes: When construing uniform and model acts enacted by the General Assembly, we must assume it did so with the intention of adopting the accompanying interpretations placed thereon by the drafters of the model or uniform act.”

[To be reframed to connect more explicitly to “faithful agency” principle, and to distinction of closed set of materials.] Crucially, the strength of the implicit signal is variable. It depends first on how much of the promulgated Uniform Act lawmakers enact, even if they exclude the promote-uniformity instruction. Intuitively, the more of the ULC’s promulgated language a state incorporates, the stronger the signal. This is because courts can be especially confident that the legislature is deliberately speaking through the ULC when it enacts all—or most—of a Uniform Act. By contrast, the inference that lawmakers are relying on the Uniform Act as an integrated package is weaker when they enact less of the Act as the ULC promulgated it.

The strength of the signal also depends on the number of modifications (if any) lawmakers make to the text as promulgated by the ULC—and on the substantive extent of those modifications. Here, too, the less the legislature departs from the ULC’s text, the more legitimate the inference that the legislature wished to buy the Uniform Act rather than make an equivalent that would accomplish a similar result. In contrast, the more substantive and extensive the modifications, the less courts can be confident the legislature endorsed the ULC’s product.

In turn, the weaker the implicit signal, the less weight courts should give the ULC’s comments—and the more weight it should give the departures. As one court explains: “When a legislature models a statute after a uniform act, but does not adopt particular language, courts conclude the omission was deliberate, or intentional, and that the legislature rejected a particular policy of the uniform act.” But when a Uniform Act has

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153 Patchell, supra note __, at 139 (“After all, the whole idea behind the uniform laws process is for the states all to enact the same law.”).

154 In re Nocita, 914 S.W.2d 358, 359 (Mo. 1996).

“been adopted all but verbatim by the legislature,” the comments serve “as the most informed source explaining provisions of the original enactment.” Gaining even this much analytical traction, however, demands that courts evaluate the extent of the departure from the original Uniform Act as the ULC promulgated it.

C. Practical Payoffs

Setting aside the conceptual and theoretical merits of our claim that textualist theory obligates courts to consider the official comments to a Uniform Act when the state legislature has adopted the Act (or substantial provisions from it), doing so has significant practical benefits. Most obviously, drawing on the comments can bring consistency to interpretations of the same provisions by courts in different jurisdictions (or even in the same jurisdiction), as directed by the promote uniformity clause. More importantly, considering the comments can help courts to avoid making easy cases hard through maladroit application of textualist interpretive tools that do not fit the two-step political economy of a state enacted Uniform Act. We illustrate with three recent cases, two oblivious to the uniform law context for the question presented and one sensitive to it. [Revisit deleted footnote about other cases supporting our approach, and suggestion that they be integrated a little more above the line in the earlier text.]

Nevertheless, taking seriously the “promote uniformity” command necessitates important modifications to the standard textualist approach. Consider the familiar move of contrasting two or more statutory provisions to determine whether similarities or differences in their word choice and syntax shed light on their meaning. Ordinarily, courts undertaking this analysis would begin by identifying closely related provisions in their own state’s code. By assumption, commonality of authorship provides a baseline for comparison. Acknowledging that state-enacted Uniform Acts are in truth not authored by the state legislature makes this assumption deeply problematic. To draw meaningful inferences courts must instead identify and compare similar provisions in other Uniform Acts. Just as promoting uniformity demands that interpreters give like terms or phrases like meanings, they must also acknowledge different structures or syntax in provisions that are otherwise similar. We address further complications and puzzles arising from this claim in Part IV.

156 Holifield v. BancorpSouth, Inc., 891 So. 2d 241, 248 (Miss. Ct. App. 2004); Griffin v. S.W. Devanney & Co., 775 P.2d 555, 559 (Colo. 1989) (“In the case of a statutory enactment patterned after a uniform law drafted by the National Conference of Commissioners on Uniform State Laws, a court may properly consider the official comments as well as the published comments of the drafters as a source for determining the meaning to be attributed to an ambiguous provision.”).

157 See, e.g., Chemetall GMBH v. ZR Energy, Inc., No. 99 C 4334, 2002 WL 23826, at *3 (N.D. Ill. Jan. 8, 2002) (noting that the relevant provision of the Illinois Trade Secrets Act is “similar” to the corresponding provision “contained in Section 4 of the Uniform Trade Secrets Act” and, accordingly, examining the “commentary” accompanying that section); Cacique, Inc. v. Robert Reiser & Co., 169 F.3d 619, 623 (9th Cir. 1999) (observing that California’s version of the Uniform Trade Secrets Act “differs” materially from the Uniform Trade Secrets Act as to the circumstances in which a reasonable royalty may be imposed as damages).
1. Macool

We begin with In re Probate and Estate of Macool.\textsuperscript{158} Here is the relevant background (applicable to the next case, too). Traditional law requires the maker of a will to comply with a variety of statutory formalities that, taken together, indicate that she intended the specific written instrument at issue to be her will.\textsuperscript{159} By way of illustration, section 2-502 of the Uniform Probate Code requires a will to be in writing, signed by the decedent, and signed by two witnesses (a “formal” or “attested” will) or to be handwritten and signed by the decedent (a “holographic” will).\textsuperscript{160} Traditional law requires strict compliance with the statutory formalities. “Unless every last statutory formality is complied with exactly, the instrument is denied probate,” that is, it is deemed invalid, “even if there is compelling evidence that the decedent intended the instrument to be his will.”\textsuperscript{161}

To alleviate this harsh result, section 2-503 of the Uniform Probate Code reforms the strict compliance rule by prescribing a “harmless error” rule under which a “document or writing is treated as if it had been executed in compliance” with section 2-502 or other applicable statutory formalities “if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended [it] to constitute … the decedent’s will.”\textsuperscript{162} The official comment to section 2-503 explains that it is a reform meant to soften the formalism of the traditional strict compliance rule. “By way of dispensing power, this new section allows the probate court to excuse a harmless error in complying with the formal requirements for executing or revoking a will.”\textsuperscript{163} The harmless error rule thus provides an alternative path to validating a will. Even if the decedent did not strictly comply with the prescribed statutory formalities, the court may dispense with those formalities, and probate the will nonetheless if there is clear and convincing evidence that the decedent intended the instrument to be her will.

The comment also clarifies that section 2-503 was designed as a sliding scale. The “larger the departure” from the traditional rule, “the harder it will be to satisfy the court that the instrument reflects the testator’s intent.”\textsuperscript{164} For example, the absence of the decedent’s signature is a large departure from the statutory formalities, one that would therefore be difficult to overcome, but not impossible. Indeed, taking notice of how foreign courts had applied the harmless error rule, the comment observes that the rule could be invoked to “excuse[] signature errors,” in particular in a switched wills case, that is, “the recurrent class of cases in which two wills are prepared for simultaneous execution by two testators, typically husband and wife, and each mistakenly signs the will prepared for the other.”\textsuperscript{165}

\textsuperscript{158} In re Probate of Will and Codicil of Macool, 3 A.3d 1258, 1261 (N.J. Super. A.D. 2010).
\textsuperscript{160} UPC § 2-502(a)-(b).
\textsuperscript{161} Id. supra note __, at 162-63.
\textsuperscript{162} Id. § 2-503 (emphasis added).
\textsuperscript{163} Id. cmt.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
Against this backdrop, the court in \textit{Macool} was asked to decide as a matter of law whether New Jersey’s enactment section 2-503 permits a court to excuse the absence of the decedent’s signature on a purported will.\textsuperscript{166} To answer this question, the court emphasized in textualist fashion the need to “turn to the words \textit{chosen by the Legislature},”\textsuperscript{167} The court was oblivious to the facts that those words derived from Uniform Probate Code section 2-503 rather than bespoke drafting within the legislature, the official comment to section 2-503 addressed precisely the question presented, and the New Jersey probate code included the standard promote-uniformity command.\textsuperscript{168}

Instead, the court compared the specific text (the state’s enactment of Uniform Probate code section 2-503) to other nearby text in the state’s probate code (the state’s enactment of Uniform Probate Code section 2-502), a standard textualist technique that finds context from other duly enacted text. Specifically, because the state’s enactment of section 2-503 applied to the whole of the state’s enactment of section 2-502,\textsuperscript{169} because section 2-502 permits an unwitnessed holographic will in addition to a witnessed formal will,\textsuperscript{170} and because “the only conceivable relief” the harmless error rule could offer for an unwitnessed holographic will is dispensing with the signature requirement,\textsuperscript{171} the court held that a document “need not be signed by the testator in order to be admitted to probate” under the harmless error provision.\textsuperscript{172} While the court was right about the bottom line, its blinkered textualism and obliviousness to the accompanying comment added needless complexity and risk of error. To see why, suppose the state legislature had dropped the holographic will provision of section 2-502 from its enactment of that section—in other words, suppose the state recognized only formal, witnessed wills and not holographs. On the court’s reasoning, would that lead to the conclusion that section 2-503 does not allow a court to excuse the absence of the decedent’s signature? Why is the state’s authorization of an unwitnessed holographic will the determining factor for whether the harmless error rule can be involved to excuse the absence of a signature in a witnessed formal will?

The court was wrong, moreover, that “the only conceivable relief” under the harmless error rule for an unwitnessed holographic will is dispensing with the signature requirement. The state’s enactment of section 2-502, like the uniform version, permits a holograph if “the signature and material portions of the document are in the [decedent’s] handwriting.”\textsuperscript{173} On a textualist read, therefore, a purported holograph for which a “material portion” was not in the decedent’s handwriting would fail for want of strict compliance with section 2-502 but could be saved by the harmless error rule under section 2-503

\textsuperscript{166} Macool, 3 A.3d at 1265.

\textsuperscript{167} \textit{Id.} As Macool explained, holographic wills have two requirements: “all the material testamentary provisions [are] in the testator’s handwriting and the writing [is] signed by the testator.” \textit{Id.}

\textsuperscript{168} N.J. STAT. ANN. § 3B:12B-21 (“In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.”).

\textsuperscript{169} N.J. STAT. ANN. § 3B:3-3.

\textsuperscript{170} N.J. STAT. ANN. § 3B:3-2(b).

\textsuperscript{171} Macool, 3 A.3d at 1266.

\textsuperscript{172} \textit{Id.}

\textsuperscript{173} N.J. STAT. ANN. § 3B:3-2(b).
if there was clear and convincing evidence nonetheless that the decedent intended the
insufficiently handwritten instrument to be her will.

All told, Macool reached the result intended by the drafters of Uniform Probate
Code section 2-503, an intent that we contend was adopted by the state legislature when
it enacted that provision, among other reasons because the state also adopted the promote
uniformity clause. But the court reached this result via a blinkered textual analysis that
both was wrong on its own terms and bizarrely married the question of harmless error
for a signature to a formal will with whether the state recognized unwitnessed holo-
graphic wills. Rather than detour through the requirements of holographic wills, and try
to divine the meaning of section 2-503 by comparing it to section 2-502, the court need
only have looked to the comment to section 2-503 for a clear statement of the answer to
the question presented, and how to answer that question in a manner that would promote
uniformity, as commanded by the legislature.

2. Stoker

In re Estate of Stoker also involved Uniform Probate Code section 2-503. At issue
was a dispute over the estate of Steven Wayne Stoker that pitted his children from a pre-
vious relationship against a more recent ex-girlfriend. The ex-girlfriend was the beneficiary
of a will Stoker executed in 1997.174 The children had a 2005 document signed by
Stoker that purported to revoke his earlier will and stated his intention to leave them the
entirety of his estate.175 However, the 2005 document was not witnessed (as required for
a formal will) and was not in Stoker’s handwriting (as required for a holographic will).

At trial, a close friend of Stoker’s provided the key details about how the 2005
document was prepared. One night in 2005, as talk turned to “estate planning,” Stoker
asked her to “get a piece of paper and a pen” so that he could dictate a new will.176 The
friend testified that Stoker first signed the document, then stated it was his “last will and
testament.”177 For added emphasis, Stoker urinated on and then set fire to his copy of the
1997 will.178 Although the friend saw Stoker sign the paper, neither she nor the other wit-
ness present signed it themselves.

There was no dispute that the 2005 writing could not be probated as a formal will
(for want of witnesses) or as a holograph (for want of his handwriting).179 But could it be
probated under California’s enactment of section 2-503’s harmless error rule? The ex-girl-
friend argued no on the ground that “the Legislature never intended this provision to
apply to cases involving handwritten wills.”180

174 122 Cal. Rptr. 3d 529, 532 (Cal. Ct. App. 2011).
175 Id.
176 Id.
177 Id.
178 Id.
179 Id.
180 Id. at 534.
The court disagreed, holding that the harmless error rule could apply. However, it reached this result with a mishmash of textualist principles and hoary maxims. The court gave no acknowledgement of the provision’s origin in the Uniform Probate Code or its clear purpose as stated in its official comment. Instead, the court treated the provision as bespoke text created in isolation by the California legislature, although the California probate code includes the standard promote-uniformity command.\(^{181}\)

The court opened with standard textualist recitations of the need to discern “legislative intent underlying a statute” from “its language.”\(^{182}\) “Where the statute is inclusive,”\(^{183}\) the court explained, “containing no limiting or qualifying language to exclude persons from its scope, the words the legislators used should control.”\(^{184}\) In this case, “[t]he statute contains no language to indicate that the wills covered by this section are limited to typewritten wills. Consequently, handwritten non-holographic wills are not excluded from the scope of this statute.”\(^{185}\) The court bolstered this textualist interpretation with the statute’s ostensibly “broad and remedial goal to give preference to the testator’s intent instead of invalidating wills because of procedural deficiencies or mistakes.”\(^{186}\) Because section 2-503 was a “[r]emedial statute,” the court was obligated to construe it “broadly and liberally … to promote the underlying legislative goals.”\(^ {187}\)

Had the court taken notice of the provision’s origin in the Uniform Probate Code and looked to the official comments, it would not have had to stitch together textualism and hoary maxims of interpretation for a belt-and-suspenders justification of its divination of legislative intent. The comment states the intent of the provision as drafted by the Uniform Law Commission, an intent that the state adopted by enacting it. And the comment makes clear that a will may be probated so long as the proponent has clear and convincing evidence that the decedent intended the document—however prepared—to be his will. As in Macool, the court’s obliviousness to the origin of the provision at issue in a Uniform Act lead to needless interpretive gymnastics, making an easy case harder than it needed to be although decided in the shadow of an express promote uniformity command.

3. Darby

One final example, In re Trust D Under Last Will of Darby, brings together much of the analysis developed thus far.\(^ {188}\) Here is the relevant background. Section 411 of the

\(^{181}\) CAL. PROB. CODE § (“In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it, consistent with the need to protect individual civil rights and in accordance with due process.”). [GE: Need to confirm this is the right provision, and that it applies to entire code, including provision in Stoker.]

\(^{182}\) Id.

\(^{183}\) Id.

\(^{184}\) Id. (emphasis added).

\(^{185}\) Id.

\(^{186}\) Id. (emphasis added).

\(^{187}\) Id.

\(^{188}\) In re Trust D Under Last Will of Darby, 234 P.3d 793 (Kan. 2010).
Uniform Trust Code sets forth conditions for modifying or terminating a noncharitable trust in certain circumstances. Subsection (b) describes one such circumstance: a court may terminate a noncharitable trust “upon consent of all of the beneficiaries,” provided that “the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust.”\footnote{UTC § 411(b). This is the \textit{Claflin} rule, after Claflin v. Claflin, 20 N.E. 54 (Mass. 1889).} Subsection (c) provides that a “spendthrift provision,” a provision that protects a beneficiary’s interest from her creditors, “is not presumed to constitute a material purpose of the trust.”\footnote{Id. § 411(c) (emphasis added). On spendthrift provisions, see \textsc{Sitkoff and Dukeminier}, supra note \_, at 703-12.} The official comment explains that the purpose of subsection (c) is to confirm that a spendthrift clause, which is customary boilerplate, may but need not signal that the trust’s creator (the “settlor”) had a material purpose of creditor protection. Under subsection (c), therefore, discerning whether “spendthrift protection might have been a material purpose ... is ... a matter of fact to be determined on the totality of the circumstances,” rather than categorically presumed from the fact of such a clause.\footnote{Id. cmt.} When the Kansas legislature enacted the UTC, however, it deleted the word “not” from its version of section 411(c).\footnote{Other states have enacted section 411(c) with the bracketed “not.” See, e.g., In re Pike Family Trusts, 38 A.3d 329, 331-32 (Me. 2012) (albeit noting that, “[e]ven in the absence of any presumption, a court may conclude that a spendthrift provision was a material provision of the settlor”).} Responding to similar changes made by state legislatures across the county, the ULC ultimately made the provision “optional” by placing it in brackets.\footnote{UTC § 411(c) cmt.}

The court in was asked to determine whether the settlor’s daughter could modify her father’s trust by increasing the annual distributions she received from the trust. Crucially, her daughters (the settlor’s granddaughters), who were slated to receive distributions from the trust upon their mother’s death, consented to the change.\footnote{Darby, 234 P.3d at 796–97.} Even though they stood to receive less from their grandfather’s trust under the modification, they agreed with their mother that the money she was receiving from the trust (her primary source of financial support) was “longer sufficient to satisfy [her] basic living expenses.”\footnote{Id. at 789.} The court rejected the proposed modification. The trust contained a spendthrift provision. And “[i]n Kansas, a spendthrift provision is presumed to constitute a material purpose of the trust.”\footnote{Id. at 799–800.} Noting that this was “in material contrast to the Uniform Trust Code, which specifically negates any such presumption,” \textit{Darby} held that the modification sought by the daughter would be “inconsistent with the material purpose manifested by the spendthrift provision.”\footnote{\textit{Id.}}
Darby’s straightforward—and, in our view, correct—analysis flows directly from the court’s receptivity to the implicit signals sent by the state legislature when it enacted Kansas’s modified version of this provision of the Uniform Trust Code. The court recognized that the state legislature largely chose to adopt the ULC’s off-the-rack text. But the court also recognized that the legislature made a key modification, reversing the ULC’s rule that spendthrift provisions are not presumptive material purposes. These doctrinal moves reflect a textualism sensitive to the two-step political economy undergirding Kansas’s enactment of the Uniform Trust Code. Of course, that the Kansas Uniform Trust Code is not entirely “Uniform” is suggestive of broader puzzles, complications, and extensions, to which we turn next.

IV. PUZZLES, COMPLICATIONS, AND EXTENSIONS

As we have seen, taking seriously the explicit directives and implicit signals from a state legislature’s enactment of a Uniform Act necessitates important modifications to the standard textualist approach, most significantly taking notice of the official comments to the Uniform Act. Thus, in each of Macool and Stoker, the court complicated an easy case by relying on inference from textual comparisons and hoary maxims to divine a legislative intent that was stated clearly in the official comment to the provision at issue. In Darby, by contrast, the court was awake to the origin of the provision at issue in a Uniform Act, and gave meaning to the state legislature’s modification of that provision by comparing the modification to the original text.

Darby is suggestive of a broader set of puzzles, complications, and extensions arising from blended or hybrid cases in which a legislature’s choice to draw on the ULC’s text abrades against other types of textual evidence. In Darby, that evidence was a textual reversal of the ULC’s policy choice via the deletion of the word “not.” Other hybrid cases are not so easy, as they may be located anywhere on a spectrum between fully bespoke statutory language on the one end and wholesale adoption of the ULC’s statutory text on the other. We now consider an illustrative sampling of such cases, primarily involving uniform trusts and estates acts, that show the interpretive complexities that emerge from sustained attention to the two-step political economy of Uniform Acts and the often blended nature of their enactments.

A. Assimilation into Existing Statutes

In many instances, a state assimilates text from a Uniform Act into its existing statutes, updating those statutes with language from the newer Uniform Act. Such an assimilation results in a hodgepodge statute that blends legacy plus Uniform Act statutory text. The hybrid nature of this sort of blending muddles the explicit directives and implicit signals analysis suggested above. For example, if the legacy statutory text includes language that also appears in the later assimilated Uniform Act, should a court look to the comments to the Uniform Act to give meaning to that legacy text?
To illustrate, consider In re Estate of Javier Castro. Like Macool and Stoker, Castro involved statutory will formalities and the harmless error rule. Unlike those cases, however, at issue in Castro was an blended rather than free-standing enactment of the Uniform Probate Code versions of those rules.

The facts of Castro were as follows. A dying man asked his two brothers to help him make a will while hospitalized. At his direction, one of the brothers wrote out the text of the will with a stylus on the other brother’s Samsung tablet. The tablet captured the stylus movements as a digital image. The dying man then used the stylus to sign his name at the bottom, as did his two brothers plus a third witness. He died a month later. As is typical, Ohio’s will formalities statute requires that a will be “in writing.” The court was thus presented with the question of whether a digital image of stylus movements on a tablet was a “writing” within the meaning of the statute.

The statute did not define the term “writing” or specify “that the writing be on any particular medium.” Without clear guidance in the text of the statute, the court looked to how the term “writing” was used in other Ohio statutes. It identified a provision in the state’s criminal code that defined the term “writing” to include “any computer software, document, letter, memorandum note, paper, plate, data, film, or other thing having in it or upon it any written, typewritten, or printed matter.” Reasoning that “the stylus marks made on the tablet and saved by the application software” would satisfy this other criminal statute’s definition of a “writing,” the court held that the digital image was a “writing” for purposes of the will formalities statute. The court gave no explanation for why this definition from the criminal code was apt other than implied common authorship.

Now the wrinkle. Although Ohio’s will formalities rules did not originate as part of a Uniform Act, the state’s legislature amended them prior to Castro to add text from sections 2-502 and 2-503 of the UPC. Those amendments did not touch the already existing provision in the Ohio statute that required a will to be in “writing.” But they do provide some indication that lawmakers sought to align Ohio’s preexisting wills-execution statute with the UPC’s version. And of course, the UPC provisions also require a will

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199 Id.
200 Id.
201 Id.
202 Id.
203 Ohio Rev. Code Ann. § 2107.03 (emphasis added).
204 Castro, 27 QUINNIPIAC Prob. L.J. at 418.
205 Id. (quoting Ohio Rev. Code Ann. § 2913.01(F)).
206 Id.
to be in “writing.”  208 This matters, because the official comments to the UPC explain that “[a]ny reasonably permanent record is sufficient” to qualify as a “writing.”  209 Given that the uncontroverted evidence indicated that the digital image on the tablet was indeed unchanged from when the decedent signed it, 210 the image would appear easily to satisfy the requirement of reasonable permanence.

All of this raises an important question about the strength of the signal the Ohio legislature sent when it amended its will formalities statute. By changing other language in that provision to align with UPC section 2-502, and by also adopting a version of section 2-503, did the legislature implicitly signal a common meaning for overlapping provisions, such as the requirement of a “writing,” that were already reflected in the Ohio statute? At a minimum, given that the legislature assimilated into the Ohio statute language from the UPC, and that both the UPC and the legacy language in the Ohio statute require a will to be in “writing,” would not the UPC commentary on the meaning of “writing” be more instructive than the definition in an unrelated criminal provision? What if that definition had pointed the other way? Without awareness of the relationship of the Ohio statute to the UPC, the court did not consider these and related such questions.  [Placeholder: need to add discussion of the word “writing” in the harmless error provision, and connection to comment via that enactment.]

B. Simultaneous Enactment of Uniform and Bespoke Statutes

Courts often extract meaning from one statutory provision by comparing and contrasting it with a related one. This move is grounded in a sensible inference. When lawmakers include a particular word or phrase in one provision but leave it out of another, closely related provision, it follows that they are signaling a meaningful difference between the two. 211 But how does this principle apply when the comparison is between a bespoke statutory provision originating within a state legislature and one passed in the same legislative session but originating in a Uniform Act?

Consider In re Heller, a case from New York. 212 Here is the relevant context. Under traditional law, codified by the widely adopted Uniform Principal and Income Act, the distinction between “income” and “principal” is based on form rather than economic substance. 213 For example, interest, cash dividends, and rent are income, but appreciation in stocks, bonds, or land is principal. 214 In consequence, an “income” beneficiary prefers investments that provide returns that fall within the formal meaning of “income” and the

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208 UPC § 2-502(a)(1).
209 Id. cmt.
212 849 N.E.2d 262, 263 (N.Y. 2006).
213 See SETKOFF & DUKEMINIER, supra note __, at 669-71.
214 See id.
“principal” beneficiaries prefer investments that provide returns that fall within the formal meaning of “principal.” To satisfy the fiduciary duty of impartiality among the income and principal beneficiaries, trustees would sometimes adjust the trust portfolio to produce returns with the desired ratio of income to principal even if a different portfolio offered a better overall return but with a more lopsided income to principal ratio.\footnote{Id.}

To allow trustees to invest for maximum total return without regard to the form of that return, the Uniform Principal and Income Act was revised in 1997 to give trustees a power to adjust between income and principal.\footnote{Uniform Principal and Income Act § 104(a) (1997) (“A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust’s income, and the trustee determines, after applying the [formal principal and income rules], that the trustee is unable to comply with [the duty of impartiality].”)}. With this revision, a trustee could invest for maximum total return and then allocate those returns to income or principal in a ratio that satisfies the trustee’s duty of impartiality. The trustee would not need to skew the portfolio to produce a particular form of return. However, 1997 revision forbid a trustee who was also a beneficiary from exercising this new power of adjustment.\footnote{See id. § 104(c)(7).}

Another solution to the principal and income problem is a “unitrust.”\footnote{See SITKOFF & DUKEMINIER, supra note __, at 669-71.} Under this reform, which was not adopted by the ULC in the 1997 revision to the Uniform Principal and Income Act but was adopted with bespoke language by many states in the years since, the “income” beneficiary is paid a percentage of the value of the trust corpus. By transforming the “income” interest into a percentage claim on the total value, the unitrust reform aligns the interests of the income and principal beneficiaries and allows the trustee to invest for total return.\footnote{See id. [ULC finally adopted unitrust last year in ...]}

At issue in \textit{Heller} was a trust established to provide “income” to the decedent’s second wife for life, with the remainder “principal” to pass to his children from his first marriage. The case arose after the man’s two sons from his first marriage succeeded his brother as trustee.\footnote{Id.} After assuming the trusteeship, the sons sought to invoke New York’s unitrust statute to transform their stepmother’s “income” interest into a unitrust percentage interest.\footnote{N.Y. Est. Powers & Trusts Law § 11-2.4(e)(1)(B).} The problem was that the statutory unitrust percentage was such that their stepmom’s yearly distributions would be substantially reduced and the value of the remainder interest substantially enhanced—and the sons were two of the trust’s four remainder beneficiaries.\footnote{In re Heller, 849 N.E.2d at 263.}

The stepmother challenged the sons’ unitrust election, arguing that the change unlawfully enriched them by reducing her income from the trust by more than half.\footnote{Id.} More
specifically, the stepmother argued that the unitrust conversion by the sons was self-dealing in violation of the fiduciary duty of loyalty.\textsuperscript{224} Under the trust law duty of loyalty, unauthorized self-dealing and other conflicts of interest are categorically prohibited, and a conflicted transaction is voidable by the beneficiary.\textsuperscript{225}

The court disagreed. It observed that the New York legislature had enacted both a unitrust conversion statute and an adjustment power statute in the same legislative session.\textsuperscript{226} The adjustment power statute “expressly prohibits a trustee from exercising this power if ‘the trustee is a current beneficiary or a presumptive remainderman of the trust.’”\textsuperscript{227} So, as remainder beneficiaries, the sons were explicitly barred from exercising this power. But, “[t]ellingly,” the “Legislature included no such prohibition in the simultaneously enacted optional unitrust provision.”\textsuperscript{228} Instead, lawmakers set forth “a list of factors to be considered by the courts in determining whether unitrust treatment should apply to a trust.”\textsuperscript{229} Based on this textual comparison of the two statutes, \textit{Heller} inferred that that “the Legislature did not mean to prohibit trustees who have a beneficial interest from electing unitrust treatment.”\textsuperscript{230} The court therefore concluded that the sons had the power to convert the trust to a unitrust, that is, they were not categorically prohibited from converting by their conflict. However, as trustees who benefited from the conversion, their decision to convert would “be scrutinized by the courts with special care.”\textsuperscript{231}

What the court did not acknowledge was that, while New York’s unitrust law was indeed a product of the New York legislature, the adjustment provision, including the relevant prohibition, was a two-step statute adopted verbatim from the 1997 revision to the Uniform Principal and Income Act. Given that the unitrust statute was a one-step statute and the adjustment statute was a two-step Uniform Act, was \textit{Heller’s} negative inference sound?

The question is difficult to answer. On the one hand, as \textit{Heller} reasoned, textualist principles suggest that courts must take the two statutes as they come. What matters is that one statute contains a restriction absent from the other. And, of course, the two statutes at issue in \textit{Heller} were enacted by the same legislature during the same legislative session, and they concerned the same subject matter. On the other hand, did the distinction the court seized on as “telling” reflect a considered judgment to include the prohibition in one statute and not the other? Or did the distinction reflect nothing more than the provisions’ different authorship? Because the court did not consider that one of the two statutes was bespoke and the other was a Uniform Act, it did not consider this complication to the standard textualist approach.

\textsuperscript{224} \textit{Id.} at 264.
\textsuperscript{225} See Restatement (Third) of Trusts § 78 (2003).
\textsuperscript{226} \textit{Id.} at 265.
\textsuperscript{227} \textit{Id.} at 266 (quoting N.Y. Est. Powers & Trusts Law § 11-2.3(b)(5)).
\textsuperscript{228} \textit{Id.}
\textsuperscript{229} \textit{Id.}
\textsuperscript{230} \textit{Id.}
\textsuperscript{231} \textit{Id.}
An interesting wrinkle is that background common law and policy considerations both support the result in *Heller*. The common law categorical prohibition of conflicted action by a trustee does not apply to a conflict that is authorized by the settlor; instead, such a conflict is subject to enhanced scrutiny.232 By naming his sons as remainder beneficiaries and successor trustees, the decedent impliedly authorized the relevant conflict. Moreover, in contrast to the highly discretionary adjustment power, the fixed formula of a unitrust confers limited freedom of movement on the trustee. Once converted to a unitrust, the formula allocates the returns between the “income” and “principal” beneficiaries. For this reason, it makes sense to channel structurally conflicted trustees like the sons in *Heller* to resolve the principal-income problem with a unitrust. The court did not consider this common law background, however, much less the policy context, because it focused on the textualist move of negative inference from presumptive common authorship.

C. Omission of Provision that Codifies Common Law

State statutes often abut the common law. Indeed, multiple of Llewellyn’s famous canon and counter-canon couplets address the relationship of statutes to related bodies of common law.233 The same is true for Uniform Acts that codify a body of common law, displacing some of that law with reform, but otherwise leaving the common law intact. To confirm that the common law abides to the extent not modified or displaced, many Uniform Acts include a provision such as this one from the Uniform Trust Code (UTC): “The common law of trusts and principles of equity supplement this [Code], except to the extent modified by this [Code] or another statute of this State.”234

In *Darby*, this provision was not at issue, because the state legislature deleted the word “not,” leaving no room for the common law and no doubt about the rule it intended. But suppose instead the legislature had deleted the provision it found objectionable and replaced it with nothing. Under the express directive of the provision just quoted, the common law rule should apply. On textualist reasoning, in other words, omission of a provision leaves a gap to be filled by the common law rather than signaling a rejection of the omitted provision.

*Wilson v. Wilson* is illustrative of the problem.235 Here is what happened. A settlor established a trust for the benefit of his two children. In the trust instrument, he provided that the trustee would “not be required by any law, rule or regulation to prepare or file for approval any inventory, appraisal or regular or periodic accounts or reports with any court or beneficiary.”236 Instead, the trustee could “from time to time present his accounts

232 See Restatement (Third) of Trusts § 78 cmt. c(2) (2003).
234 UTC § 106. Other Uniform Acts that codify the common law with some changes contain similar provisions. See, e.g., [list: marital agreements, directed trust, etc.]
235 690 S.E.2d 710, 714 (N.C. App. Ct. 2010).
236 Id. at 711.
to an adult beneficiary.”\textsuperscript{237} The beneficiaries later sued the trustee, alleging that he had squandered the trust’s assets in a series of “highly speculative” business ventures and requesting “a full, complete, and accurate accounting” of the trusts.\textsuperscript{238}

Under the common law, “the terms of the trust may regulate the amount of information which the trustee must give and the frequency with which it must be given,” but “the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust.”\textsuperscript{239} UTC section 813 codifies a similar duty to provide information. Specifically, a trustee is obligated to “keep the qualified beneficiaries … reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.”\textsuperscript{240} The accompanying comments explain that this provision commits the trustee to providing the beneficiary with “information about the administration of the trust that is reasonably necessary to enforce the beneficiary’s rights.”\textsuperscript{241} \textit{[section 105 and mandatory]}

[To come: Remainder of Wilson discussion to come (Greg and Rob not yet on the same page).]

\textbf{D. Enacted Uniform Act Later Amended by ULC}

We have argued that when lawmakers enact a Uniform Act, they implicitly signal to courts their intent to benefit from the uniformity, expertise, and efficiency the ULC confers. How much weaker is that signal when the ULC later amends a Uniform Act, but the state legislature does not adopt the updated text? That is, should courts look to the ULC’s \textit{unenacted} amendments when they are charged with interpreting the older, \textit{enacted} version?\textsuperscript{242}

To illustrate this scenario, consider a case from the Delaware Court of Chancery, authored by then-Vice Chancellor Leo Strine, later Chief Justice of the Delaware Supreme Court.\textsuperscript{243} Here are the relevant facts. In a memo the testator appended to her will, she directed the executor to give specific pieces of her personal property to individuals named in the memo.\textsuperscript{244} The memo provided that any property not so listed was “to be auctioned” and the proceeds distributed to the same recipients.\textsuperscript{245} The testator’s niece and a friend

\begin{itemize}
\item \textsuperscript{237} \textit{Id.}
\item \textsuperscript{238} \textit{Id.}
\item \textsuperscript{239} Restatement (Second) of Trusts § 173 cmt. c (1959).
\item \textsuperscript{240} UTC § 813(a).
\item \textsuperscript{241} UTC § 813(a), cmt.
\item \textsuperscript{242} In some states, the answer is unequivocal. The New Hampshire Supreme Court, for instance, has held: “we have considered later amendments to UIFSA when they provide insight into the intended meaning of New Hampshire’s existing statute.” In \textit{re Ball}, 123 A.3d 719, 722 (N.H. 2015) (internal quotation marks omitted).
\item \textsuperscript{243} In \textit{re Last Will and Testament of Moor}, 879 A.2d 648 (Del. Ch. 2005). Strine retired from the Delaware Supreme Court in 2019.
\item \textsuperscript{244} \textit{Id.} at 649.
\item \textsuperscript{245} \textit{Id.} at 650.
\end{itemize}
challenged this directive. Were it invalidated, both would receive whatever remained of her estate after the pieces of property identified in the memo were distributed.

In both Delaware (where the testator died) and Florida (where she executed her will and the accompanying memo), the governing law was supplied by section 2-513 of the Uniform Probate Code.246 Delaware’s version provided: “A will may refer to a written statement or list [like the memo] to dispose of items of tangible personal property not otherwise disposed of by the will, other than money[.]”247 The Florida version was “substantially similar.”248 The plaintiffs conceded that, under both states’ versions of section 2-513, a memo could be used to direct particular pieces of property to named recipients. But, they argued, the testator could not use it to “direct that specific personal property be sold and the proceeds of the sale [then] be distributed to specific persons.”249 In the language of section 2-513, that would be using a document other than a will to “dispose of” money.

The court disagreed, holding that the challengers “would read into the statutory text words of restriction that were not included by the relevant legislatures.”250 Moor reasoned that “[b]oth the Delaware and Florida statutes use the broad term ‘dispose’ of … to refer to an elastic range of activities.”251 In fact, the text “precluded” only “intangible property … from being devised through a separate writing.”252 In this case, however, the court held that “[a]ll of the property covered” by the memo was “tangible.”253 The only wrinkle was that the testator directed that the tangible property first be sold, and then the proceeds transferred to those identified in the memo. As the court put it, she “‘disposed of’ her personal property by directing her executors to sell that property and distribute the proceeds to specific persons.”254

This is where things get interesting. As Moor noted, although Florida adopted the ULC’s 1990 amendments to section 2-513, Delaware did not.255 It opted to retain the 1969 version.256 This was significant because the older version contained a much longer list of tangible property that could not be “disposed of” in a separate document, including “money, evidences of indebtedness, documents of title, and securities, and property used in a trade or business.”257 The newer version substantially shortened the list, deleting all

246 Id. at 653 n.9.
248 Id.
249 Id. at 651.
250 Id.
251 Id. & n.7 (citing various statutory provisions of each state’s statutory code).
252 Id. at 653.
253 Id.
254 Id.
255 Id. at 653 n.9.
256 Id. at 653.
257 Id.; see UPC § 2-513 cmt. (1990).
of the exceptions other than “money.” As the ULC explained in the comments accompanying the update, the change was designed “to permit the disposition of a broader range of items of tangible personal property.” In so doing, the ULC made clear that the amendment was designed to liberalize the older regime and to allow testators a wider range of options when laying out how their estates should be administered.

Should a textually inclined court (like Moor) applying Delaware law consider the ULC’s subsequent amendment—and the accompanying policy discussion—in construing its version of section 2-513? Here, as with Heller, different strands of our argument lead to different conclusions. On the one hand, we have argued that lawmakers choose to enact a Uniform Act so their state can accrue the many benefits the ULC provides, including uniformity. On this ground, a court should follow the crowd, as it can best promote uniformity by identifying and adopting the majority rule—regardless of whether it is the older or newer version. On the other hand, we have also observed that state lawmakers sometimes make the considered choice not to adopt Uniform Acts (or their amendments) wholesale. The stronger the evidence that lawmakers disagreed with the ULC’s liberalizing direction when they refrained from updating Delaware’s version of section 2-513, the more important it is for the court to respect that policy choice.

[fill out –

- The New Hampshire Supreme Court, for instance, has held: “we have considered later amendments to UIFSA when they provide insight into the intended meaning of New Hampshire’s existing statute.” In re Ball, 123 A.3d 719, 722 (N.H. 2015) (internal quotation marks omitted).

- Moor can also illustrate the question of legislative history within the ULC drafting process, which the ULC disclaims as not authoritative.]

E. Other Puzzles – [to be flagged]

[This section will flag without case study a serious of other illustrative puzzles, e.g.,:

- State has enacted Uniform Act A, but Uniform Act B, which the state has not enacted, contains similar language (or different language) that would shed light on Uniform Act A. Look to B to understand enactment of A?

- Suppose a Uniform Act is later amended by technical amendment to fix a textual nit. Should a court look to that later amendment? Or suppose a Uniform Act is later amended to update/revise the Act on policy grounds

\[258\] Id.; see UPC § 2-513 cmt. (1990).

or to reject a court decision. The committee says its revisions are designed only to better implement the original Act’s purpose. Look to the amendment? Does it matter if the state has a nondelegation rule?

- Suppose the comments to the Uniform Act are amended after enactment to reject a court decision or to clarify purpose. Look to the amended comments?

- Reporter’s article?

**CONCLUSION**

[To come]