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State Courts and the Interpretation of Federal Statutes

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INTRODUCTION 1502
I. STATE COURTS, STATE STATUTES, AND THE FEDERAL SEPARATION OF POWERS 1507
A. *Equitable Interpretations* 1508
B. *State Courts and State Statutes* 1515
C. *The Separation of Powers Debate* 1525
II. STATE COURTS, FEDERAL STATUTES, AND FEDERALISM 1529
A. *How State Courts Interpreted Federal Statutes* 1530
1. Federal Statutory Language 1532
a. *Plain or Common Meaning* 1532
b. *Legal or Technical Meaning* 1535
c. *Meaning in Light of Linguistic Presumptions* 1536
d. *Meaning in Light of Other Statutory Provisions* 1536
2. Other Sources of Law 1538
a. *Meaning in Light of English Statutes* 1539

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b. Meaning in Light of Principles of the Common Law or Law of Nations 1540
3. Purposes and Consequences 1541
4. Tentative Observations 1547
B. Why State Courts Did Not Make Reason-Based Equitable Interpretations of Federal Statutes 1548
III. IMPLICATIONS FOR THE INTERPRETATION OF FEDERAL STATUTES BY FEDERAL COURTS 1552
CONCLUSION 1557

INTRODUCTION

In the debate over how federal courts should interpret federal statutes, "faithful agent" theories stand pitted against "dynamic" theories of statutory interpretation. The following questions lie at the heart of the debate: Is the proper role of federal courts to strive to implement the commands of the legislature—in other words, to act as Congress's faithful agents? Or, is the proper role of federal courts to act as partners with Congress in the forward-looking making of federal law—in other words, to interpret statutes dynamically? Proponents of faithful agent theories include both "textualists" and "purposivists." Textualists have argued that federal courts best fulfill their responsibility to serve as faithful agents of Congress by interpreting statutes according to the meaning that their texts most reasonably impart.[1] Certain purposivists have argued that federal courts best fulfill their responsibility to act as faithful agents of Congress by interpreting statutes according to statutory purposes, even where those purposes might contradict the most reasonable import of statutory text.[2] Proponents of dynamic theories of statutory interpretation reject the premise that federal courts should strive to act as faithful agents of Congress. Dynamicists cast federal courts as

1. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION 16-25 (1997) (arguing that textualism is the means by which judges should determine "'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris"); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 63 (1994) (arguing that textualism best enables judges to serve as faithful agents of legislatures).

2. *See, e.g.*, Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 626 (1949) ("The correction of obvious legislative errors or oversights is not to supplant the legislative will, but to make that will effective.").

"cooperative partners" with Congress in the federal lawmaking enterprise, rather than as Congress's agents.[3]

Scholars have debated the constitutional legitimacy of these interpretive theories in separation of powers terms: Which interpretive methodology best comports with the federal "judicial power" of Article III[4] relative to the federal "legislative powers" of Article I?[5] Most notably, Professors William Eskridge and John Manning have debated whether, as a matter of original understandings of the constitutional structure, the Article III "judicial power" of federal courts is a power to interpret statutes as "faithful agents" of Congress, or as agents of "the People," empowered to establish federal policy in partnership with Congress.[6]

This Article argues that how courts ought to interpret federal statutes is not only a "horizontal" question of the separation of powers between federal courts and Congress, but also a "vertical" question of the proper relationship between Congress and state courts—in other words, a federalism question. State courts play an important, often independent, role in the interpretation of federal statutes. Accordingly, the question of how they ought to interpret federal statutes should figure prominently in federal statutory interpretation debates. The answer to this question does not depend on what, as a

3. *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 7 (1987) (proposing "a new relationship between courts and statutes, a relationship that would enable us to retain the legislative initiative in lawmaking . . . while restoring to courts their common law function of seeing to it that the law is up to date"); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 11 (1994) (arguing that American courts are justified in interpreting statutes from a different perspective than the statute's because of "changed circumstances which give rise to unanticipated problems, developments in law and the statute's evolution, and different political and ideological frameworks"); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 62-63 (1988) (advocating approach to statutory interpretation under which courts supply "important direction to the development of law in a complex, changing society" and thus "serve, but are not subservient to, legislatures"); William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1522-23 (1998) (reviewing SCALIA, *supra* note 1, at 16-25) (arguing that federal courts may exercise certain common law inherent powers in interpreting federal statutes).

4. U.S. CONST. art. III, § 1.

5. *Id.* art. I, § 1.

6. *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990 (2001); John. F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648 (2001) [hereinafter Manning, *Rules of Statutory Interpretation*]; John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) [hereinafter Manning, *Equity of the Statute*]. In the last decade or so, other scholars, too, have examined the methods of statutory interpretation that prevailed in English and American courts around the time of the American Founding. *See* WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION (1999); John Choon Yoo, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L. J. 1607 (1992).

matter of separation of powers, constitutes the judicial power of the federal courts. It depends, rather, on what, as a matter of federalism, is the judicial power of state courts when they enforce federal statutes.

The important and independent role that state courts can play in the interpretation of federal statutes is evident in the structure of the Constitution. Article III vests "[t]he judicial Power of the United States" in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[7] There are various theories of the scope of congressional discretion in creating and regulating the jurisdiction of inferior federal courts in light of Article III.[8] It is generally accepted, however, that even if there are some constitutional limits on congressional power to regulate federal court jurisdiction, Congress has broad discretion to confer or withhold inferior federal court jurisdiction, and, correspondingly, to allow exclusive or concurrent state court jurisdiction over cases arising under federal law. The Supreme Court has long inferred from Article III that federal courts "created by statute can have no jurisdiction but such as the statute confers."[9] Congress has never conferred on inferior federal courts the full jurisdiction to which the Article III judicial power extends.[10] Accordingly, since the time that the Constitution was

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7. U.S. CONST. art. III, § 1.

8. Theories range from the view that Congress has near plenary jurisdiction to regulate federal court jurisdiction, Julian Velasco, *Congressional Control Over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671 (1997), to the view that Congress may not regulate federal court jurisdiction in such a way as to impermissibly burden the vindication of certain constitutional rights, Lawrence T. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981). Joseph Story famously argued in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), that Congress is obligated to rest jurisdiction of Article III "cases" (as opposed to "controversies") in some federal court, be the jurisdiction original or appellate. *See id.* at 328-36. Story also claimed that only federal courts could exercise jurisdiction of certain kinds of claims within the Article III judicial power, for example, federal penal action or actions within the admiralty and maritime jurisdiction. *See id.* at 337. Professor Michael Collins has argued that at the time of the American Founding and subsequent few decades, there was widespread understanding that there were certain enclaves of exclusive federal jurisdiction, most notably the penal cases and cases within the admiralty and maritime jurisdiction. Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 78-98.

9. Sheldon v. Sill, 49 U.S. 441, 449 (1850).

10. Inferior federal courts did not have general federal question jurisdiction until 1875. *See* Act of Mar. 3, 1875, § 1, 18 Stat. 470 (establishing statutory federal question jurisdiction in inferior federal courts for the first time). Thus, for decades after ratification, state courts, not federal courts, were responsible for interpreting many federal statutes in the first instance, if not the last instance as well. Today, state courts routinely exercise concurrent jurisdiction with federal courts over cases in which federal statutes provide a rule of decision (unless Congress has vested exclusive jurisdiction over a case in federal courts). Indeed, if a federal statute provides a rule of decision in a case but does not itself create or otherwise form a substantial part of a plaintiff's claim, state courts have exclusive jurisdiction over the case. Under 28 U.S.C. § 1331 (2000), federal district courts "have original jurisdiction of all civil actions arising under the

ratified, state courts have exercised concurrent or exclusive jurisdiction in countless cases involving the interpretation of federal statutes.[11]

When state courts interpret federal statutes, they act as more than mere adjuncts to the Supreme Court of the United States. The Constitution itself limits the Supreme Court's jurisdiction to review state court determinations of federal law.[12] Moreover, Congress has authority under the Constitution to limit the jurisdiction of the Supreme Court to review federal determinations made by state courts.[13] In reality, state court judgments resting upon the

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Constitution, laws, or treaties of the United States." As the Court has interpreted this statute, federal district courts lack jurisdiction over cases in which federal questions are involved but in which an assertion of federal law does not form part of the plaintiff's well-pleaded complaint. In Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908), the Court held that "a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution." In other words, as the Court explained more recently, "[a] defense that raises a federal question is inadequate to confer federal jurisdiction." Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 808 (1986) (citing *Mottley*, 211 U.S. 149). In its latest refinement of this doctrine, the Court explained in Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 125 S. Ct. 2363 (2005), that, to determine whether a federal court has statutory "arising under" jurisdiction, "the question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id.* at 2368.

11. And constitutionally so, as the Supreme Court explained relatively recently in Tafflin v. Levitt, 493 U.S. 455, 458 (1990): "[W]e have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States."

12. The Supreme Court has no jurisdiction to review a state court judgment unless a party with standing asks it to do so. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (explaining that "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III"). The Supreme Court also does not review state court judgments that rest upon "adequate and independent state grounds," a jurisdictional limitation that the Court has suggested is of constitutional dimension. In Herb v. Pitcairn, 324 U.S. 117 (1945), the Court explained that the concern with Supreme Court review of state court judgments that rest on adequate and independent state grounds is that the Court not "render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Id.* at 126. The Court explained that its role "is to correct wrong judgments, not to revise opinions." *Id.*; *see also* Michigan v. Long, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground.").

13. Article III provides that "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl.2. The extent of Congress's power to regulate and make exceptions to the Supreme Court's jurisdiction is widely debated and highly contested. Indeed, it is inextricably intertwined with the question of Congress's power to regulate the jurisdiction of inferior federal courts. *See supra* note 8 and accompanying text. It suffices to say, for present purposes, that Congress certainly has some authority to limit the jurisdiction of the Supreme Court to review state court judgments.

interpretation of federal statutes may—indeed, in the overwhelming majority of cases today, do—govern the rights and duties of parties subject to them without Supreme Court review. Unless and until the Supreme Court interprets a federal statute differently, state court judgments can constitute the final word on the meaning of federal law within a state court system, as the courts of many states do not consider themselves bound to follow the decisions of lower federal courts on questions of federal law.[14]

Thus, the following is a question of real constitutional significance: How should *state* courts interpret *federal* statutes? To put the question in terms of statutory interpretation debates, should state courts strive to act as faithful agents of Congress, or as partners with Congress in the forward-looking making of federal law?

Part I of this Article describes relevant practices of state courts in interpreting *state* statutes during the years immediately following ratification. Certain scholars have observed that during the Founding period state courts invoked doctrines such as "equity of the statute" in interpreting state statutes to enforce statutory meanings that expanded or limited the plain import of a statute's "letter." Scholars have disputed, however, whether the fact that state courts "equitably" interpreted state statutes in certain cases evidences a constitutional understanding that the judicial power of the United States is a power to interpret statutes dynamically, rather than as faithfully as possible to congressional directives. An important question, however, that has not yet factored into this debate is whether state courts interpreted federal statutes in the same ways that they interpreted state statutes. This Part undertakes an independent examination of the practices of state courts in interpreting state statutes during the Founding period and years immediately following ratification. Drawing upon the foundations of English practice, this Part discusses the role of legislative intent in state court interpretive practice and reveals significant distinctions among the ways in which state courts justified equitable interpretations. This Part lays the groundwork necessary for understanding how the practice of state courts in interpreting *federal* statutes differed from their practices in interpreting *state* statutes.

Part II explains how the practices of state courts in interpreting federal statutes differed from their practices in interpreting state statutes. In interpreting federal statutes, state courts did not invoke equity of the statute or other interpretive

14. *See* Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1153-57 (1999) (describing the varying weights that state courts give to different kinds of federal law determinations by federal courts).

principles to justify departures from the search for actual legislative intent. Rather, state courts employed a host of interpretive techniques that uniformly—by nature or by explanation of the court—were geared toward implementing congressional intent. State courts appear to have uniformly understood their role in interpreting federal statutes to be to abide by the directives of Congress, as best they could discern them—and this during decades when state actors and institutions often questioned the legitimacy of federal action. Part II further provides a possible explanation of why state courts uniformly strove to implement congressional directives without invoking doctrines of equitable interpretation that operated without regard for manifest legislative direction. Not only was there a trend in English and American state courts at the time favoring interpretations that implemented actual legislative intent, but state courts may have understood the Supremacy Clause to specifically require them to recognize congressional supremacy.

Part III tentatively examines the implications of this analysis for the debate over how federal courts should interpret federal statutes. Unless federal courts properly may approach the enterprise of interpreting federal statutes differently than state courts, an understanding that state courts must strive to implement actual congressional directives suggests that the federal judicial power entails the responsibility to strive to implement actual congressional directives as well. This Part explores, at least preliminarily, whether federal and state courts should be understood to have different powers when interpreting federal statutes. In other words, it explores whether the substance of federal law *should* vary in certain instances depending on whether a federal court or a state court is interpreting a federal statute.

I. STATE COURTS, STATE STATUTES, AND THE FEDERAL SEPARATION OF POWERS

"Equity of the statute"—a doctrine that courts invoked to apply statutes to cases not covered by their words—and other forms of equitable interpretation have figured prominently in debates over federal statutory interpretation. In the late eighteenth and early nineteenth centuries (and preceding centuries), courts invoked principles of equitable interpretation to justify statutory interpretations that differed from what the plain import of a statute's letter appeared to require. Like their English counterparts, Founding-era state courts in America employed this doctrine in certain cases involving the interpretation of state statutes. This Part addresses

three matters: first, how English courts and commentators employed and justified equitable interpretations; second, how state courts in America employed and justified equitable interpretations; and, third, how scholars have used state court practice of making equitable interpretations as evidence of what relevant actors understood the Article III "judicial power of the United States" to mean.

A. Equitable Interpretations

This Section explains how English judges and other writers employed and explained doctrines of equitable interpretation. First, this Section describes what constituted an equitable interpretation of a statute. Second, it describes how courts and commentators justified equitable interpretations from the sixteenth through the late eighteenth centuries: as effectuating the demands of reason and/or the intent of the legislature, real or presumed. Finally, it explains how, by the late eighteenth century, the concept of equitable interpretations as effectuating the demands of reason stood in tension with interpretive views more geared toward implementing actual Parliamentary directives.

"Equity of the statute" was a doctrine that courts invoked to extend the letter of a statute to apply to a case that the statute by its terms did not cover. In 1793, Charles Viner described the equity of the statute doctrine as follows: "Equity is a construction made by the judges, that *cases out of the letter* of a statute, yet *being within the same mischief*, or cause of the making of the same, shall be within the same remedy that the statute provides; and the reason thereof is, for that the *law-makers could not possibly set down all cases in express terms*."[15] Other English treatises and digests described equity of the statute in similar terms.[16] An "equitable" interpretation came to mean

15. 19 CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY 513 (2d ed. 1791).

16. *See* 4 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 649 (5th ed. 1786) ("By an equitable Construction, a Case not within the Letter of a Statute is sometimes holden to be within the Meaning, because it is within the mischief for which a Remedy is provided. The Reason for such Construction is, that the Law-maker could not set down every Case in express Terms."); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 61 (1765) ("For since in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of excepting those circumstances, which (had they been foreseen) the legislator himself would have excepted."); 1 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 24 (13th ed. 1788) ("Equitie is a construction made by the judges, that cases out of the letter of a stat., yet begin within the same mischiefe, or cause of the making of the same, shall be within the same remedie that the statute provideth: and the reason hereof is, for that the law-maker could not possibly set downe all cases in express terms."); THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND 9 (10th ed. 1772) ("[Statutes] may be construed according to Equity; especially where

not only one that extended a statute to apply to a case the letter did not cover, but also one that restricted a statute not to apply to a case that, by its terms, the statute did cover.[17] Plowden wrote in his famous note on the case of *Eyston v. Studd*[18] that equity "enlarges or diminishes the letter according to its discretion."[19] It diminishes the letter, for example, when a court does not apply a statute defining a felony to "a man of unsound mind,"[20] and it enlarges the letter, for example, when a court applies a statute governing actions against "executors" to actions against "administrators" as well.[21] As Plowden explained, "there is a great diversity between these two equities, for the one abridges the letter, the other enlarges it, the one diminishes it, the other amplifies it, the one takes from the letter, the other adds to it."[22]

There was tension among the explanations that writers offered from the sixteenth through the eighteenth centuries to justify equitable interpretations. St. Germain's famous sixteenth century *Doctor and Student* acknowledged both reason and intent as distinct justifications for equitable interpretations of statutes: "And thus it appeareth, that sometimes a man may be excepted from . . . the rigor of a statute by the law of reason, and sometimes by the intent of the makers of the statute."[23]

Some writers explained that equitable interpretations served to reconcile statutes with reason and equity. In his early seventeenth century work, *Law or a Discourse Thereof*, Henry Finch described it as a virtue that, through equity, courts should "amplify, enlarge, and add to the letter of the law" to encompass "mischiefs in the like degrees,"[24] as well as "abridg[e], diminish[], and tak[e] away the severity of it" to moderate the strictness of the law.[25] Charles Viner explained in 1793 that "[j]udges have sometimes expounded the words of an act of parliament merely *contrary to the text*, and sometimes have taken

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they give Remedy for Wrong; or are for Expedition of Justice, or to prevent Delays; for Law-makers cannot comprehend all cases.").

17. For a description of this development of the concept of equitable interpretations, *see* Samuel Thorne, *Introduction* to 'SIR THOMAS EGERTON, A DISCOURSE UPON THE EXPOSITION AND UNDERSTANDING OF STATUTES (Samuel E. Thorne ed., Huntington Library 1942).

18. (1574) 75 Eng. Rep. 688 (K.B.).

19. *Id.* at 695.

20. *Id.* at 696.

21. *Id.*

22. *Id.* at 699.

23. CHRISTOPHER ST. GERMAIN, DOCTOR AND STUDENT 49 (William Muchall ed., 17tb ed. 1787).

24. SIR HENRY FINCH, LAW OR A DISCOURSE THEREOF 20 (4tb ed. 1759).

25. *Id.* at 56.

things by equity of the text contrary to the text, *to make them agree with reason and equity.*"[26] Indeed, Bacon's 1786 *Abridgment* cited the case of *Sheffield v. Ratcliffe* for the proposition that "[t]he Power of construing a Statute is in the Judges; who have Authority over all Laws, and more especially over Statutes, to mould them according to Reason and Convenience to the best and truest Use."[27]

Other explanations of equitable interpretations invoked the "intent" of the legislature, sometimes in conjunction with considerations of reason and equity. In many cases, English courts did not justify equitable interpretations as effectuating actual legislative intent; rather, courts interpreted statutes equitably as a means of constructing a presumed legislative intent.[28] In parts, Bacon's *Abridgment* described equity of the statute as a means of implementing legislative intent through an exercise of imaginative reconstruction. As Bacon's 1786 edition stated:

> In order to form a right Judgment, whether a Case be within the Equity of a Statute, it is a good Way to suppose the Law-maker present; and that you have asked him this question, Do you intend to comprehend the Case? Then you must give yourself such Answer, as you imagine he being an upright and reasonable Man would have given. If this be, that he did mean to comprehend it, you may safely hold the Case to be within the Equity of the Statute: For while you do no more than he would have done, you do not act contrary to the Statute but in Conformity thereto.[29]

There are examples from the sixteenth century of English courts presuming legislative intent from the dictates of reason and equity along these lines. In *Stradling v. Morgan*,[30] it was explained that in making equitable interpretations, courts "have ever been

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26. 19 VINER, *supra* note 15, at 513. Sir Christopher Hatton set forth the earlier roots of this idea in his 1677 treatise on statutes:

All Statutes may be expounded by Equity so far forth as *Epicaia* goeth, that is, an exception of the Law of God; and Law of Reason from the general words of the Law of Man; for such cases are taken for understood, and what is understood is not out of the Law. By the Law of Reason, I mean, as the Author of the Book called, *The Doctor and Student*, doth the Law Eternal, or the Will of God, known to every man by the light of natural Reason.

SIR CHRISTOPHER HATTON, A TREATISE CONCERNING STATUTES, OR ACTS OF PARLIAMENT AND THE EXPOSITION THEREOF 31-32 (1677).

27. 4 BACON, *supra* note 16, at 643. In Sheffield v. Ratcliffe, (1616) 80 Eng. Rep. 475 (K.B.), the court explained it as follows:

If you ask me then, by what rule the judges guided themselves in this diverse explanation of the self-same word and sentence? I answer, it was by that liberty and authority which judges have over laws, especially over statute laws, according to reason and best convenience, to mould them to the truest and best use.

Id. at 486.

28. *See* Hans W. Baade, *The* Casus Omissus: *A Pre-History of Statutory Analogy*, 20 SYRACUSE J. INT'L L. & COM. 45, 77, 81 (1994) (explaining that seminal English cases referring to "intent" of the "makers" of an act did not mean "actual intent").

29. 4 BACON, *supra* note 16, at 649.

30. 1 Plow. 199, (1560) 75 Eng. Rep. 305 (Ex.).

guided by the intent of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion."[31] In *Stowel v. Zouch*,[32] it was reported that "counsel on the other side . . . have sought help from the intent of the makers of the act, which intent is not found in the express letter of the purview and exception, but is gathered from reason."[33] Likewise, in *Fulmerston v. Steward*,[34] the Court of King's Bench explained that "it cannot be reasonably taken that . . . the intent of the makers of the statute" was that which "would be against all reason and equity."[35] Accordingly, the court explained, "it is most reasonable to expound the words, which seem contrary to reason, according to good reason and equity."[36] Though there is some question whether the concept of legislative intent was doing any real work in determining statutory meaning where intent was presumed from reason,[37] there is no question that from as early as the middle of the sixteenth century through the eighteenth century, courts invoked the concept of legislative intent—even presumed intent—to justify their interpretations in light of the developing recognition of Parliamentary sovereignty.[38]

As the recognition of Parliamentary sovereignty coalesced from the sixteenth through the eighteenth centuries, judges appealed not only to presumed legislative intent but to actual legislative intent as well in order to justify equitable interpretations. *Heydon's Case*[39] provides a prominent example of this phenomenon. In a passage well cited in subsequent centuries, the Exchequer laid out "four things . . . to be discerned and considered" for "the sure and true interpretation of all statutes in general":

> 1st. What was the common law before the making of the Act.

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31. *Id.* at 315.

32. 1 Plow. 353, (1569) 75 Eng. Rep. 536 (Ex. Ch.).

33. *Id.* at 549.

34. (1553) 75 Eng. Rep. 160 (K.B.).

35. *Id.* at 171.

36. *Id. See also* Stowel v. Lord Zouch, (1569) 75 Eng. Rep. 536, 553 (C.B.) (explaining that to apply an act of the legislature to a person of unsound mind "would be very unreasonable, which is never to be presumed in the legislature").

37. Professor John Manning has argued that, to the extent that intent effectively meant that which was reasonable or equitable, recitations of the word intent in cases of equitable interpretations do not necessarily evidence an understood faithful agent jurisprudence. Manning, *Equity of the Statute*, *supra* note 6, at 34. Professor William Eskridge describes legislative intent mostly as something "imputed" by the court during the Founding period and subsequent years. *See* Eskridge, *supra* note 6, at 1083.

38. *See* Thorne, *supra* note 17, at 59.

39. (1584) 76 Eng. Rep. 637 (Ex.).

> 2nd. What was the mischief and defect for which the common law did not provide.
>
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
>
> And, 4th. The true reason of the remedy . . . .[40]

The court proceeded to explain "the office of all the Judges" as:

> always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the *true intent of the makers* of the Act, *pro bono publico*.[41]

This passage seemingly makes reference to a mischief of which Parliament actually was aware and that Parliament actually meant to remedy.

By the eighteenth century, judges often described legislative intent as determinative of statutory meaning. There is no need here to retrace in full the history of statutory interpretation in English courts from Tudor England through the late eighteenth century. Suffice it to say, as others have well explained, that Parliamentary sovereignty came to play a significant role in eighteenth century cases of statutory interpretation. Hans Baade and James Landis have argued that in Tudor and early Stuart England, "equity of the statute" doctrine was a means by which judges wrote sound policy into general statutory language.[42] By the eighteenth century, however, the legislative sovereignty of Parliament was established, and the King's judges could no longer justify equity of the statute doctrine as an exercise of royal prerogative.[43] As Samuel Thorne explained, "As acts of Parliament take on the attributes of modern legislation, the intention of the legislator must grow in importance and take the place of the equity, conjectured purpose or reason that had controlled earlier."[44] Accordingly, by Blackstone's day, "Parliament became the sovereign and the duty of the judge was recognized to be merely to determine what Parliament has said and to 'apply' it."[45]

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40. *Id.* at 638.

41. *Id.* (first emphasis added).

42. Baade, *supra* note 28, at 74-83; *see also* James M. Landis, *Statutes and the Sources of Law*, *in* HARVARD LEGAL ESSAYS 213, 216 (Roscoe Pound ed., 1934) (arguing that during this period, "exceptions dictated by sound policy were written by judges into loose statutory generalizations").

43. *See* Baade, *supra* note 28, at 83-91 (explaining evolution of equity of the statute doctrine from the Glorious Revolution througb the eighteenth century); Manning, *Equity of the Statute*, *supra* note 6, at 47-52(same).

44. Thorne, *supra* note 17, at 59.

45. *Id.*

This is not to say that English judges in the eighteenth century uniformly and unfailingly sought to implement actual legislative directives in cases involving acts of Parliament. But there are observable facts evidencing movement in that direction. First, certain eighteenth century writers described legislative intent as something real, not merely something to be presumed. For William Blackstone, the pursuit of legislative will justified all proper methods of statutory interpretation: "The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law."[46] Relatedly, certain writers described the concept of legislative purpose or object not as something to be discerned from the dictates of reason but as something actually willed by Parliament and existing apart from the dictates of reason. Blackstone, for instance, explained that "if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it . . . and . . . that where the main *object* of a statute is unreasonable the judges are [not] at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government."[47]

Second, certain judges came to emphasize the need for courts to enforce the letter of a statute over other means of determining legislative intent. In 1742, in *Colehan v. Cooke*,[48] the Lord Chief Justice of the Court of Common Pleas, Sir John Willes, wrote of legislative intent not as an empty vessel designed to hold the reason or equity by which judges would determine statutory meaning, but as a limitation on judicial discretion: "When the words of an Act are doubtful and uncertain, it is proper to inquire what was the intent of the Legislature: but it is very dangerous for Judges to launch out too far in searching into the intent of the Legislature, when they have expressed themselves in plain and clear words."[49] In 1793, in *Bradley v. Clark*,[50] Justice Francis Buller expressed a preference for the letter of a statute over its purposes in implementing legislative intent:

> With regard to the construction of statutes according to the intention of the Legislature, we must remember that there is an essential difference between the expounding of

46. 1 BLACKSTONE, *supra* note 16, at 59.

47. 1 BLACKSTONE, *supra* note 16, at 91 (emphasis added).

48. (1742) 125 Eng. Rep. 1231 (C.P.).

49. *Id.* at 1233; *see also* 4 BACON, *supra* note 16, at 652 ("But where the Meaning is plain no Consequences are to be regarded in the Constitution; for this would be assuming a Legislative Authority.").

50. (1793) 101 Eng. Rep. 111 (K.B.).

> modern and ancient acts of Parliament. In early times, the Legislature used (and I believe it was a wise course to take) to pass laws in general and in few terms: they were left to the Courts of Law to be construed, so as to reach all the cases within the mischiefs to be remedied. But, in modern times, great care has been taken to mention the particular cases within the contemplation of the Legislature; and, therefore, the Courts are not permitted to take the same liberty in construing them as they did in expounding the ancient statutes.[51]

Indeed, certain writers rejected the concept of legislative intent altogether as a means of assessing how judges should implement Parliamentary commands. In *Millar v. Taylor*,[52] the concept of "intention of the legislature" was rejected on the ground that legislators and various houses of legislatures cannot have a collective intention.[53] It was the rise of the idea that judges should acknowledge Parliamentary sovereignty that necessitated a critique of legislative intent as a useful juridical construct.

Notwithstanding the apparent movement of some judges toward interpretive methods designed to implement actual legislative directives, certain judges continued to engage in old-style reason-based equitable interpretations. The decision of King's Bench in 1785 in *Jones v. Smart*[54] illuminates the tension that came to exist between reason-based equitable interpretations and more directive-based views on the enterprise of statutory interpretation. The question in *Jones* was whether Smart was liable for killing game without being duly qualified under an Act of Parliament. The opinion of Justice Edward Willes typified the view that judges could employ the dictates of reason and equity to define the operation of a statute. Willes argued that "nothing can be more oppressive than the present system of game laws" and that "wherever a law is productive of tyranny, I shall ever give my consent to narrow the construction."[55] Justice Buller rejected this approach, arguing that "we are bound to take the Act of Parliament, as they have made it: a casus omissus can in no case be supplied by a Court of Law, for that would be to make laws; nor can I conceive that it is our province to consider, whether such a law that has been passed be tyrannical or not."[56] Lord Ashurst adopted a middling position, explaining that courts may "suppose what they meant to say" when legislatures found statutes upon reason, but that courts should "adopt what they have actually said" when legislatures

51. *Id.* at 113-14.
52. (1769) 98 Eng. Rep. 201 (K.B.).
53. *Id.* at 2332.
54. (1785) 99 Eng. Rep. 963 (K.B.).
55. *Id.* at 965 (Willes, J.).
56. *Id.* at 967 (Buller, J.).

enact "positive rules."[57] This case well illustrates how, by the time of the American Founding, the reason-based concept of the equitable interpretation was in tension with interpretive views more geared toward implementing actual legislative directives, discernable through the words or "real" object of an act.

B. State Courts and State Statutes

In the late eighteenth century, reason-based equitable interpretations stood in tension with more directive-based interpretative views in American state courts as well. This Section explains how American state courts employed and explained the concept of the equitable interpretation in construing state statutes. First, it describes how state courts, like English courts, justified equitable interpretations. State courts variously justified them on the basis of reason, on the basis of some conception of intent (real or presumed), or on the basis of both reason and intent (usually presumed to accord with reason). Second, it explains how, in many cases, state courts meant, by invoking legislative intent, to acknowledge legislative supremacy in lawmaking. From this, the tension that existed between, on the one hand, interpretation as effectuating the demands of reason and, on the other hand, interpretation as effectuating actual legislative directives becomes palpable.

In many cases in which state judges equitably interpreted state statutes, they said little to explain why they were interpreting them equitably (at least as their opinions were reported).[58] In other cases,

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57. *Id.* at 966 (Ashurst, J.).

58. *See, e.g.*, Williams v. Fitch, 1 Root 316, 316 (Conn. Super. Ct. 1791) (reporter's note) (holding that depositions taken without notice to plaintiff were inadmissible; concluding that though statute permitted depositions to be taken without notice if adverse party lived more than twenty miles away, "it is clearly within the reason and equity of the statute" to require notification of adverse party's known agent or attorney living within twenty miles); Borland v. Sharp, 1 Root 178, 178 (Conn. Super Ct. 1790) (reporter's note) (relieving debt contracted before war even though renewal of note after war placed debt outside of statute's literal terms); Oystead v. Shed, 8 Mass. (7 Tyng) 272, 272 (1811) (where statute provided that writ must be endorsed by plaintiff and plaintiff absconded after endorsing writ, holding that equity of statute embraced an order to furnish new endorser); Paine v. Ulmer, 7 Mass. (6 Tyng) 317, 318 (1811) (concluding that allowing administrator of estate to prosecute action against sheriff for deputy's failure to execute judgment on debt owed to deceased was within equity of the statute); Hastings v. Dickinson, 7 Mass. (1 Tyng) 153, 155 (1810) (where wife agreed, in exchange for promise of an annuity upon husband's death, not to claim any right of dower in estate, and insolvency of husband's estate deprived her of that annuity, holding that claim to a right of dower was within equity of statute recognizing such a right in other circumstances of failed consideration); Pitts v. Hale, 3 Mass. 321, 322 (1807) (allowing executor to pursue action of replevin because doing so was within the equity of the statute); Paine v. Gill, 2 Mass. 136, 136 (1806) (allowing new

however, state courts explained themselves by differing justifications. In some cases, they described equitable interpretation as a means of effectuating legislative intent, and in other cases they described it as a means of effectuating reason. The 1790 Maryland case of *Griffith's Lessee v. Ridgely*[59] illustrates these two approaches. In *Ridgely*, a Maryland court addressed whether a deed of land from Catharine Griffith to Charles Ridgely was ineffective because it was recorded in the wrong court. Maryland law generally required deeds to be first acknowledged in the Provincial (later known as General) Court and then filed in either the General Court or a County Court. A Maryland statute provided, additionally, that when a person "shall live remote from the *Provincial Court*," he or she could acknowledge and record a deed in the County Court where the person resided.[60] In *Ridgely*, Catharine Griffith acknowledged her deed before justices in Anne Arundel County and recorded it in the General Court, a method that the statute by its terms did not recognize.[61] The question for decision was whether the statute permitted a person who acknowledged a deed before a County Court to record it in the General Court.

The trial court equitably interpreted the statute to permit acknowledgment in a County Court and recording in the General Court on grounds that it was reasonable to do so. The court explained that "it is within the equity of the act, that the deed should be recorded in the General as well as the County Court, and no reason can be assigned why it should not."[62] The court explained that there was a reason why certificates of recording should not go from one county to another, specifically that "the Justices of one county had no cognisance of the powers of the other."[63] But, the court continued, since "the General Court Judges pervaded the whole," there was no reason why Griffith could not acknowledge in County Court and record in the General Court.[64] In line with the trial court's opinion in *Ridgely*, there are several reported cases from around this time in

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treasurer to be substituted as endorser on writ, on theory that doing so fell within the equity of the statute); Hann v. M'Cormick, 4 N.J.L. 109, 2 (1818) (allowing plaintiff to recover costs upon the reversal of judgment on certiorari on grounds that a proceeding on certiorari was "within the spirit and equity of the statute"); *In re* Roberts, 1 N.Y. Ch. Ann. 536 (1817) (concluding that compensation for committee of lunatic was within equity of statute providing for compensation of guardians, executors, and administrators).

59. 2 H. & McH. 418 (Md. 1790).

60. 1766 Md. Laws c. 14, § 3.

61. *Ridgely*, 2 H. & McH. at 451.

62. *Id.* at 434.

63. *Id.*

64. *Id.*

which state courts equitably interpreted state statutes to accord with considerations of reason.[65]

On appeal in *Ridgely*, the Court of Appeals affirmed the trial court's interpretation, but justified the interpretation on grounds that it comported with what the Maryland Legislature presumptively intended. The Court of Appeals agreed with the trial court that "[t]he act ought to receive a liberal construction,"[66] for "it cannot be presumed that the Legislature meant to confine the recording of such a deed to the County Court, when all others are permitted to be recorded in the Provincial (now General) Court."[67] In line with the Court of Appeals opinion in *Ridgely*, there are several examples of state courts equitably interpreting state statutes around this time to implement the presumptive intent of state legislatures.[68]

In some cases, state courts gleaned presumptive intent from the demands of reason. A pair of South Carolina cases illustrate this practice. In 1789, in *Ham v. McClaws*,[69] a South Carolina court construed an act prohibiting the importation of slaves into the state in certain circumstances. The court explained that "[i]n the present instance, we have an act before us, which, were the strict letter of it applied to the case of the present claimants, would be evidently against common reason." Accordingly, the court deemed itself

> bound to give such a construction to this enacting clause of the act of 1788, as will be consistent with justice, and the dictates of natural reason, though contrary to the strict letter of the law; and this construction is, that the legislature never had it in their contemplation to make a forfeiture of the negroes in question, and subject the parties to so heavy a penalty for bringing slaves into the State, under the circumstances and for the purposes, the claimants have proved.[70]

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65. *See, e.g.*, Smith v. Ruescastle, 7 N.J.L. 357, 361 (N.J. 1800) (explaining that general statutory language was "to be construed liberally, and to effectuate the purposes of justice"); Weatherhead v. Lessee of Bledsoe's Heirs, 2 Tenn. (2 Overt.) 352, 358 (1815) (explaining that in interpreting statutes of limitations, "courts are frequently led imperceptibly into a train of reasoning for the attainment of justice, without sufficiently regarding the policy of the law" and that "[h]ence arise constructions which will not bear the examination of cool and abstract reasoning"); *cf.* Mitchell v. Smith, 4 Yeates 84, 92 (Pa. 1804) (explaining that "[g]eneral principles of law and reason" can "apply in giving construction to" a statute, but that, in the given case, "the implied legislative construction contended for is expressly guarded against").

66. *Ridgely*, 2 H. & McH. at 452.

67. *Id.*

68. *See, e.g.*, Sumner v. Child, 2 Conn. 607, 619 (1818) ("[T]hough [the case in question] does not come within the literal construction, it is, unquestionably, within the equity of the statute; and if the legislature had contemplated the possible existence of such a case, they would have provided for it . . . .").

69. 1 S.C.L. (1 Bay) 93 (S.C. Com. Pl. Gen. Sess. 1789).

70. *Id.* at 98.

Similarly, in the 1803 South Carolina case of *State v. Harkness*,[71] the state indicted Harkness for receiving the meat of cattle that had been stolen. The question was whether the state could proceed against him under a 1769 South Carolina statute that punished receipt of stolen goods in certain circumstances "by fine, whipping, and standing in the pillory."[72] Harkness argued that the court should read a 1789 South Carolina statute punishing cattle stealing by a fine[73] to equitably limit the application of the 1769 act in cases involving cattle. The court agreed:

> [T]o subject the receiver of the meat of such beasts to fine, public whipping, and standing in the pilliary, all which the act of 1769 provides, as the punishment of the misdemeanor for receiving of stolen goods knowingly, would be disproportionate and unreasonable; and, therefore, could not have been intended by the legislature.[74]

Construing the 1769 act to apply to Harkness, the court concluded, "would be contrary to reason, and the general principles of law."[75]

Though these courts presumed a legislative intent from considerations of reason and justice, it is not necessarily the case that their appeals to legislative intent lacked any normative significance respecting the legitimacy of their decisions. In some cases in which courts interpreted statutes according to the legislature's presumptive intent, they made clear that what justified their decisions was the intent of the legislature. In *Lloyd v. Urison*, for example, Justice William Pennington of the Supreme Court of Judicature of New Jersey explained that "cases will arise, when the plain unequivocal words in a statute . . . may lead to gross absurdity or manifest injustice, which it cannot reasonably be supposed that the legislature intended. In such cases, courts have, but as I apprehend with much caution, departed from the strict letter and resorted to the next best evidence, of the intent of the law maker."[76] The reason for presuming an intent in such cases, Pennington set forth, was that there was "[n]o doubt but

71. 3 S.C.L. (1 Brev.) 276 (1803).

72. 1769 S.C. Acts 306.

73. 1789 S.C. Acts 139.

74. *Harkness*, 3 S.C.L. (1 Brev.) at 278.

75. *Id.*; *see also* Lloyd v. Urison, 2 N.J.L. 197, 200-01 (N.J. 1807) (Rossell, J.) (giving statute construction "which law and reason will best warrant" in order to discern legislative intent); People v. Platt, 17 Johns. 195, 216 (N.Y. 1819) ("[T]he legislature would, no doubt, have excepted the *Saranac* out of the operation of the statutes, had all the facts been known to them."); Bedford v. Shilling, 4 Serg. & Rawle 401, 403 (Pa. 1818) (Tilghman, C.J.) (explaining that "nothing less than positive expressions would warrant the court in giving a construction which would work manifest injustice," for "[i]t must not be supposed that the legislature meant to do injustice").

76. *Lloyd*, 2 N.J.L. at 223.

that the meaning and intention of the legislature is to govern the construction of statutes."[77]

In other cases, state courts justified equitable interpretations of state statutes on grounds of actual legislative intent. Courts equitably interpreting statutes often addressed themselves to the "mischief" or "inconvenience" that the statute was intended to remedy or the "object" that the statute was intended to achieve.[78] To be sure, a court might impute a legislative intent from the mischief or object that the court deemed it most reasonable for the statute to remedy or serve. In many cases, however, courts appear to have pursued an actual legislative intent rather than seeking to impute an intent to the legislature.

A South Carolina case again provides an interesting study. In *Wall v. Robson*,[79] the Constitutional Court of Appeals of South Carolina had to determine whether a statute of limitations enacted in 1712 applied to certain actions. The court considered the colonial legislature's actual intent and its presumed intent as distinct inquiries, both relevant to the question presented. The court first considered what the colonial legislature actually had in mind in 1712. "[C]an any man," the court explained, "bring himself to believe, that the Colonial Legislature of South-Carolina, at that day, say 1712, (108 years ago) could possibly have had it in contemplation to have regulated the nature of actions between foreign merchants and the citizens of South-Carolina" in the way alleged?[80] "Utterly impossible! The idea is too romantic to be indulged for a single moment."[81] The court then proceeded to perform an exercise in imaginative reconstruction of a presumed intent as a distinct inquiry:

> But to go one step further, and the more immediately to apply *Plowden's* rule; suppose for a moment it were possible to call up the members of the Legislature of 1712, from their slumbers in the tomb, and that they were present, and asked *Plowden's* question, did you intend that the Statute of Limitations, you have just passed, should bar foreign merchants of their actions for just debts, where they have been prevented by war from bringing suits for the recovery of them? I presume there is no man who hears the

77. *Id.* at 222.

78. Sanford v. Sanford, 5 Day 353, 357 (Conn. 1812) ("This practical construction seems, clearly, to be within the equity of the statute; the object of which was, a reasonable allowance to the innocent and unfortunate wife, out of the estate of an offending and unprincipled husband."); Davis's Ex'rs v. Fulton, 1 Tenn. (1 Overt.) 121, 135 (Super. Ct. L. & Eq. 1799)(Overton, J.) ("In order to understand the meaning and extent of the section we will consider the inconvenience which was intended to be remedied."); *id.* at 138 ("The equitable meaning of the Legislature is the object.").

79. 11 S.C.L. (2 Nott & McC.) 498 (S.C. Const. App. Ct. 1820).

80. *Id.* at 500.

81. *Id.*

question asked, would hesitate a moment in concluding, that the answer would be *una voce*, we had no such intention.[82]

State courts justified equitable interpretations as effectuating actual legislative intent when, in certain cases, they pursued the "true" intent of a statute. In *Whitney v. Whitney*,[83] the Supreme Judicial Court of Massachusetts explained that "[t]he language of a statute is not to be construed according to technical rules, unless such be the apparent meaning of the legislature. Therefore many cases, not expressly named, may be comprehended within the equity of a statute; the letter of which may be enlarged or restrained, *according to the true intent of the makers of the law*."[84] By "true" intent, a court could mean "true" because the intent was truly held by the legislature, or "true" because the court imputed the intent to comport with true reason. In some cases, it is clear that by "true" intent, courts unquestionably meant real or actual intent. In *Davidson's Lessee v. Beatty*,[85] for example, the General Court of Maryland explained in 1797 that "[t]he true and genuine construction of a statute, is to gratify the meaning and intention of the makers thereof; and the expositions of judges and lawyers cotemporary with the law in its origin, afford the strongest evidence of what that intention was."[86]

State courts also justified equitable interpretations as fulfilling actual legislative intent when, in certain cases, they referred to *the* reason or object of a statute, as opposed to reason itself. A common statement of equity of the statute doctrine was that "the construction of this statute should be taken largely, and by equity extended so as to embrace all cases within the mischief which it was intended to remedy . . . ."[87] In several cases, courts made clear that this principle of construction was geared toward effectuating actual legislative intent. In *Gates v. Brattle*,[88] the Superior Court of Connecticut described a statute as having two parts, "the letter and *the* reason,"[89] and that implementing the reason was implementing what the legislature actually directed: "However the legislature might have been induced, from many and various reasons, both of policy and justice, to make the law; the law when made, is the rule which must

82. *Id.*

83. 14 Mass. 88 (1817).

84. *Id.* at 92-93 (emphasis added).

85. 3 H. & McH. 594 (Md. Gen. 1797).

86. *Id.* at 623. In *Simpson v. Morris*, 3 Yeates 104 (Pa. 1800), Chief Justice Edward Shippen observed that "[t]he act is obscurely and incorrectly worded; but we must endeavor, as well as we can, to discover the plain and real intention of the legislature." *Id.* at 115.

87. Nichols v. Wells, 2 Ky. (Sneed) 255, 259 (1803).

88. 1 Root 187 (Conn. Super. 1790).

89. *Id.* at 189 (emphasis added).

govern the judges and the citizens. The question then is not, what the law ought to have been, or why it was made? but what it is."[90] Similarly, in *Overton's Lessee v. Campbell*,[91] Justice John Haywood of the Supreme Court of Errors and Appeals of Tennessee explained that courts must implement *the* spirit of the law, not the spirit that a law ought to have: "[I]t is our duty to ascend to the source and spirit of the law, and not rest the rights of the citizen upon any opinions whatever entertained by those not constitutionally intrusted to form them."[92] In certain cases, state courts explained that in equitably interpreting statutes they must determine *the* object of a statute, or the mischief it was designed to remedy, from the "true" intent of the legislature.[93]

Whether equitably interpreting statutes or not, state courts invoked the concept of legislative intent in countless cases involving statutory interpretation. Several state courts invoked the concept in express recognition of legislative supremacy. Some courts explained that the pursuit of legislative intent was the object of statutory construction. In *Martin v. Commonwealth*,[94] a case before the Supreme Judicial Court of Massachusetts, Justice Theodore Sedgwick explained that "[i]n construing statutes, the great object is to discover from the words, the subject matter, the mischiefs contemplated, and the remedies proposed, what was the true meaning and design of the legislature."[95] In other cases, state courts described the pursuit of

90. *Id. See also* Dash v. Van Kleeck, 7 Johns. 477, 486 (N.Y. 1811) (Spencer, J.) ("Statutes are to be so construed as may hest answer the intention which the makers had in view, and the intention is, sometimes, to be collected from the cause or necessity of making a statute; and a thing within the intention of the makers of a statute is as much within the statute as if it were within the letter.").

91. 6 Tenn. (3 Hawy.) 164 (Tenn. Err. & App. 1818).

92. *Id.* at 223.

93. *See, e.g.*, Preston v. Crofut, 1 Conn. 527, 551 (1811) (Reeve, J.) ("When we give a construction to a statute, if we find that such construction will probably defeat the object which the legislature had in view, we ought to be very jealous of it: nay, I lay it down as a sound rule, that it is not the true construction."); Collins v. Collins' Ex'rs, 4 N.C. (Car. L. Rep.) 301, 303 (1815) (Seawell, J.) ("In the exposition of all instruments, the intention of the makers is the only guide. And as regards statutes, it is a very ancient rule, to consider the old law, the mischief, and the remedy. And Lord Coke has ventured to assert, that it is the office of Judges always to make such construction as shall repress the mischief and advance the remedy, according to the true intent of the makers.").

94. 1 Mass. 347 (1805).

95. *Id.* at 390; *see also* Davidson's Lessee v. Beatty, 3 H. & McH. 594, 623 (Md. Gen. 1797) ("The true and genuine construction of a statute, is to gratify the meaning and intention of the makers thereof . . . ."); Seidenbender v. Charles's Adm'rs, 4 Serg. & Rawle 151, 164 (Pa. 1818) (Gibson, J.) ("The key of the construction of a statute, is the intention of the legislature, and I readily admit, that cases seemingly within the letter, have been excluded, and indeed, the act construed in direct opposition to the letter, to attain that intention, when it was clear beyond dispute."). In 1770, the Provincial Court of Maryland had written along similar lines that "[t]here is one rule of construction, however, which is universally applicable to all occasions and to all

legislative intent as the proper duty of courts. In *Stewart v. Foster*,[96] a case before the Supreme Court of Pennsylvania, Justice Jasper Yeates wrote that "in the construction of all statutes, it is the indispensable duty of courts of justice, to carry into execution the true intention of the lawgivers, and that in some instances, to attain this end, the words of the law have been enlarged, and in other instances, restricted."[97] In other cases still, courts offered a separation of powers justification for the pursuit of legislative intent in statutory interpretation. In *Fitch v. Brainerd*,[98] the Supreme Court of Errors of Connecticut pursued legislative intent on the ground that "[w]hether the refinements of the present age, require a departure from the ancient law upon this subject; or whether the supposed benefits of a change would countervail its obvious mischiefs, are legislative, not judicial questions."[99]

In furtherance of such ideas regarding legislative supremacy, there developed among certain state court judges, as among certain English judges, the view that the duty of courts was to give statutory text its plain import. In 1792, in *State v. Willingborough Road*,[100] the Supreme Court of Judicature of New Jersey construed a statute requiring that certain surveyors be the judges of a particular matter. In construing it, the court explained, "[n]ow, the words of the law are clear and explicit. . . . It is true, that in the case of sickness [of a surveyor] an inconvenience may happen, but this is exclusively a matter for legislative consideration."[101] In similar fashion, Chief Justice Ninian Edwards of the Court of Appeals of Kentucky derided

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times. Judges are to expound acts of Parliament in such manner as may be agreeable to the intent of the makers." Butler v. Boarman, 1 H. & McH. 371, 379 (Md. Prov. 1770).

96. 2 Binn. 110 (Pa. 1809).

97. *Id.* at 120; *see also* Boatright & Glaze v. Wingate, 7 S.C.L. (3 Brev.) 521, 547-48 (S.C. Const. App. Ct. 1814) (Bay, J.) ("It is a duty incumbent on the court to give such a construction on the whole, as was most consistent with the ends and designs of the law makers.").

98. 2 Day 163 (Conn. 1805).

99. *Id.* at 194; *see also* Fox v. Hills, 1 Conn. 295, 307 (1815) (Hosmer, J.) ("As a legislator I might consider it expedient to enact the matter now endeavoured to be assumed by construction; but I cannot believe, that the judiciary may overleap the authority delegated in terms clear and unambiguous, on reasons which, in my judgment, do not fall within their province."); *In re* Opinion of Justices, 7 Mass. (6 Tyng) 523, 524 (1811) ("The constitution is law, the people having been the legislators; and the several statutes of the commonwealth, enacted pursuant to the constitution, are law, the senators and representatives being the legislators. But the provisions of the constitution, and of any statute, are the intentions of the legislature thereby manifested."); Hubley's Lessee v. White, 2 Yeates 133, 146 (Pa. 1796) ("We cheerfully disclaim all legislative power; but it will not be denied that we possess the right of putting such construction on the acts of the legislature, as appears to us best to accord with their intention, either express or implied.").

100. 1 N.J.L. 128 (N.J. 1792).

101. *Id.* at 130.

the practice of equitable interpretations in the 1808 case of *Hardin v. Owings*.[102] In his words, judges

> have made the legislature mean anything, everything, and almost nothing, as suited the particular case before them; and this will ever be the case, while this arbitrary field of discretion is assumed and exercised by judges; and until the acts of the legislature, according to their plain and obvious import, unembarrassed by mere technical and artificial rules, are made the proper and governing rules of decision. If the law should prove to be defective, inadequate to the object of it, or oppressive in its operation, it is certainly more peculiarly the province of tbe legislature, than the judiciary, to supply or remedy those defects. In the judiciary the exercise of such a power is not warranted by the constitution under which we act; it is contrary to it, and must, therefore be an unjustifiable assumption of power.[103]

Of course, this was not a universal view. There were state courts that equitably interpreted statutes without any apparent regard for legislative intent. As already explained, in certain cases state courts made equitable interpretations simply on the basis of reason and justice.[104]

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102. 4 Ky. (1 Bibb) 214 (1808).

103. *Id.* at 216.

104. *See supra* notes 58-77 and accompanying text. In *Wallace v. Taliaferro*, 6 Va. (2 Call) 447 (1800), for example, a case before the Supreme Court of Virginia, Judge Spencer Roane distinguished the rule that "such construction is to be put upon a statute, as may best answer the intention the makers had in view," from the "rule of construction, which is, that the letter of an act of Parliament may be restrained, by an equitable construction, in some cases; in others enlarged." *Id.* at 467. At least one court explained tbat courts should effectuate legislative intent unless it was uncertain, in which case considerations of equity should determine statutory meaning. In *Kerlin's Lessee v. Bull*, 1 U.S. (1 Dall.) 175 (Pa. 1786), the Supreme Court of Pennsylvania explained in 1786 that "[w]here the intention of the Legislature, or the law is doubtful, and not clear, the Judges ought to interpret the law to be, what is most consonant to equity, and least inconvenient." *Id.* at 178; *cf.* Park's Lessee v. Larkin, 1 Tenn. (1 Overt.) 101, 104 (Tenn. Super. L. & Eq. 1799) (Overton, J.) ("In the construction of statutes such a meaning ought to be given to the law, not inconsistent with the words, as will if possible effectuate the intention of the Legislature."). In certain cases involving statutes governing judicial proceedings, courts justified equitable interpretations as a mere exertion of the power of the court. In *Simson v. Hart*, 14 Johns. 63 (N.Y. 1816), for example, the Supreme Court of New York addressed whether a judgment recovered by one party against an insolvent party could be set off against a judgment recovered by the insolvent party against the first party. In his opinion, which found that there was judicial power to direct the set-off, Justice Ambrose Spencer explained that "[i]n directing a set-off of judgments, Courts of law proceed upon the equity of the statute authorizing set-offs; for, confessedly, the case is not within the letter of the act." *Id.* at 75. In this context, Justice Spencer disclaimed any justification for an equitable interpretation that depended on legislative intent. Rather, he explained that the power of courts of law in this regard "consists in the authority they hold over suitors in their Courts; and it may be fitly said, that the exercise of the power is the exertion of the law of the Courts, rather than any known, express, and delegated power." *Id. See also* Bergen v. Boerum, 2 Cai. 256, 257 (N.Y. 1804) (argument of counsel that execution of judgment could be set aside on grounds that "courts of common law will extend the equity of a statute in cases like this, and *that* by virtue of their general controlling power over their own judgments" (emphasis added)).

The 1801 Virginia case of *Tomlinson v. Dillard*[105] well illustrates the tension that existed in turn-of-the-nineteenth-century state court jurisprudence between reason-based equitable interpretations and interpretative views that courts must strive to implement actual legislative directives. In *Tomlinson*, the Supreme Court of Appeals of Virginia had to interpret a 1792 Virginia act regulating descents. By the terms of the act, a mother who gave birth after her husband died would take no part of the husband's real estate after her infant died.[106] The act also provided that a personal estate should go to the persons entitled to the real estate.[107] The judges divided on how the statute should be construed. Judge Roane argued that the mother should succeed to the personal estate of the infant notwithstanding the plain letter of the act. Among other reasons, he asserted that "even an unequivocal expression, by the Legislature, may be controlled by consequences, and the reason of the law, taken on a general view."[108]

Judges William Fleming and Paul Carrington were more solicitous of statutory language on grounds of legislative supremancy. Judge Fleming disagreed that the scope of the statute should be so equitably limited. He argued that "if inconveniences follow from a literal construction, they must be redressed by the Legislature, and not by the Court; who are not to torture the words in order to discover meanings which the Legislature never had; but, are to pursue the plain import of the statute, without regard to the consequences."[109] Judge Carrington argued that a court might make an equitable interpretation when "the expression is doubtful, and a strict adherence to the letter might disappoint the intention of the Legislature."[110] In that case, "the latitude is allowed to support, and not to defeat the law."[111] "But here," he concluded, "the law is expressed in terms too plain to be misunderstood, and there is nothing which leads to a conclusion, that the Legislature intended any thing more than what they have explicitly declared."[112]

Tomlinson well illustrates how, at the time of the American Founding, reason-based equitable interpretations stood in tension with interpretive theories that courts should implement actual

105. 7 Va. (3 Call) 105 (1801).
106. *Id.* at 111.
107. *Id.*
108. *Id.* at 112.
109. *Id.* at 115.
110. *Id.*
111. *Id.*
112. *Id.* at 115-16.

legislative commands, as evidenced by text or other indicia of "real" legislative intent.

C. The Separation of Powers Debate

This Section explains how the practice of state courts equitably intepreting state statutes in certain cases around the time of the Founding has figured into separation of powers debates over the judicial power of federal courts. It explains, moreover, that the implications of state interpretive practices for these debates are complex. The justifications that state judges offered for equitable interpretations varied, and, indeed, some state judges rejected the concept of the equitable interpretation altogether. Finally, this Section explains that the practice of state courts which may be more relevant to federal judicial power debates is that of state court interpretations of federal statutes, not state statutes.

Scholars have debated whether the fact that state courts equitably interpreted state statutes in certain cases is relevant to the separation of powers question of how federal courts should interpret federal statutes. Most prominently, Professors William Eskridge and John Manning have examined what inferences, if any, about the federal judicial power should be drawn from the practice of equitable interpretation in English courts and American state courts during the Founding period and years following ratification. Eskridge and Manning agree that in certain cases decided in the late eighteenth and early nineteenth centuries, English and American courts construed statutes without regard for what the legislature may have actually directed.[113] What Eskridge and Manning dispute is whether the "judicial power of the United States," as provided in Article III, captures the power to interpret statutes in this way.

Manning argues that the Constitution's separation of powers between the legislative and judicial branches precludes the "judicial power of the United States" from being a power to interpret statutes "equitably."[114] Even though there are instances of early federal courts making equitable interpretations, Manning argues, the Constitution's system of separated powers and the judicial practice that in time

113. Manning classifies exercises of such powers collectively as "equitable interpretations" (interpretations that reached cases omitted by statutory text or implied exceptions to statutory text based upon the reason or spirit of the law but without particular regard to legislative intent). Manning, *Rules of Statutory Interpretation*, *supra* note 6, at 1657. Eskridge classifies exercises of such powers as "ameliorative, suppletive, and voidance" powers. Eskridge, *supra* note 6, at 996.

114. Manning, *Equity of the Statute*, *supra* note 6, at 56-105.

developed within that system supports a "faithful agent" theory of the judicial power—"that a federal court is responsible for accurately deciphering and implementing the legislature's commands."[115] For Manning, the practice of state courts in interpreting state statutes is not probative of what the "judicial power of the United States" was understood to mean. He deems it "most unlikely that the Founders would have taken the structural arrangements of any particular state or set of states to be an appropriate model for federal judicial power."[116] Finally, Manning argues, textualism is a better method of implementing a faithful agent theory than purposivism.[117]

Eskridge rejects Manning's separation of powers analysis. He argues that the background understanding of the federal judicial power during the Founding period was that federal judges were not in all circumstances "bound by the text or the actual expectations of the legislature."[118] Examining English cases, state court cases, ratification debates, and opinions of the Marshall Court, Eskridge argues that practices of the Founding period demonstrate a complex method of statutory interpretation that is consistent with neither the faithful agent theory nor textualism. "If anything," he explains, "the Framers practiced and preached a highly contextual approach which was open to revising, ameliorating, and bending statutory words in light of reason and fundamental law, including the law of nations."[119] For Eskridge, the method by which state courts interpreted state statutes during the Founding period—a contextual method open to departures from statutory text and actual legislative expectations—is probative of what the framers and ratifiers understood by the "judicial power of the United States."[120] In Eskridge's view, federal courts "(like the legislature) are ultimately agents of 'We the People,'" constitutionally empowered to act as partners with Congress in the forward-looking making of federal policy.[121]

It is worth noting the exact scope of the dispute between Eskridge and Manning. Eskridge and Manning describe a great deal of early American judicial practice of statutory interpretation in similar terms. They agree that state judges in the 1780s and 1790s

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115. *Id.* at 7.

116. Manning, *Rules of Statutory Interpretation*, *supra* note 6, at 1660; *see also* Manning, *Equity of the Statute*, *supra* note 6, at 86 n.336 (explaining considerations that "cast doubt on the relevance" of state court practice "to federal constitutional attitudes").

117. Manning, *Equity of the Statute*, *supra* note 6, at 15-22; Manning, *Rules of Statutory Interpretation*, *supra* note 6, at 1653 n.28.

118. Eskridge, *supra* note 6, at 1083.

119. *Id.* at 1087.

120. *Id.*

121. *Id.* at 992.

and federal judges from the time of ratification through the Marshall Court read the words of statutes in light of ordinary usage, other laws, canons of statutory construction, and the consequences of particular constructions.[122] Manning argues that these practices are consistent with the faithful agent theory, and, more specifically, a textualist implementation of it. To the extent, Manning argues, that "communication depends on a community's capacity to develop and decode shared linguistic and cultural conventions," textualism involves not only reading the text, but accounting for "the assumptions shared by the speakers and the intended audience, including the background legal understandings and conventions that a reasonably diligent lawyer would bring to a statute in context."[123] The dispute, in Manning's view, is whether federal judges constitutionally may "depart from the conventional meaning of an otherwise clear and specific text, simply because the result appears to deviate from the statute's apparent background purpose or produces a seemingly harsh outcome."[124]

Eskridge characterizes the dispute differently. For him, there is an antecedent question of whether the words of a statute can have a clear and specific meaning without regard not only for their legal and conventional understandings, but also for the statute's purpose and the outcomes different interpretations would produce. The lesson he draws "from the founding period is that what we today call a statutory 'plain meaning' does not preexist the judge's exploration of the statutory language in the context of the broader landscape of the law, the facts of the case, and (for the Supreme Court especially) the strategic context within which the interpretation occurs."[125]

There are two points to be made here regarding this debate. First, that state courts equitably interpreted state statutes in certain cases does not evidence a uniformly understood judicial power in state courts to construe statutes without regard for actual legislative commands—if we take seriously what judges professed to justify equitable interpretations. To be sure, in certain cases judges equitably construed statutes according to what they perceived the demands of reason to require. In other cases, however, state judges equitably interpreted statutes to make statutory scope comport with legislative intent, real or presumed. For many judges, legislative intent was the

122. *See id.* at 1083; *see also* Manning, *Rules of Statutory Interpretation*, *supra* note 6, at 1658-59.

123. Manning, *Rules of Statutory Interpretation*, *supra* note 6, at 1656 (internal quotation marks and footnote omitted).

124. *Id.* at 1657 (footnote omitted).

125. Eskridge, *supra* note 6, at 998.

touchstone of statutory interpretation in all cases. This is not to deny that legislative intent is a concept fraught with difficulties, not the least of which are (1) that legislatures cannot have a real intent, (2) that individual legislators often lack real intent regarding specific statutory applications, and (3) that statutory purposes, from which judges often glean intent, can be multifarious and malleable. Those difficulties, however, do not demonstrate by their existence that late eighteenth and early nineteenth century state judges invoking legislative intent could not have meant to implement it in a real way. To the contrary, as explained in the last Section, many state judges did mean to implement real legislative intent by equitably interpreting statutes. Moreover, certain judges who recognized the difficulties of legislative intent as a useful juridical construct fled not to the demands of reason as a substitute interpretive guide, but to the fair import of statutory language. In other words, for many judges, legislative intent did the work of acknowledging legislative supremacy. When those judges discerned difficulties with legislative intent as a meaningful concept in statutory interpretation, they pursued other means of acknowledging legislative supremacy, most notably adopting textual methods of interpretation.

Second, there is an important distinction to be drawn between state court interpretations of state statutes and state court interpretations of federal statutes. There are no reported cases of a state court interpreting a federal statute in the late eighteenth or early nineteenth century by invoking the doctrine of equity of the statute. In most cases, state courts interpreted the text of federal statutes according to recognized methods of textual interpretation. In those cases in which state courts did invoke the purpose of a federal statute or the consequences that would follow from a particular interpretation, they did so either in support of a textual interpretation or explicitly as a means of discerning congressional intent. In no case did a state court profess to interpret an act of Congress on the basis of reason set apart from actual congressional intent.

The distinctiveness of state court practice in interpreting federal statutes is relevant to the separation of powers debate over the judicial power of the federal courts in interpreting federal statutes. First, it demonstrates that state courts may not have viewed themselves as free to give federal statutes reason-based equitable interpretations. Second, it calls into question the relevance of state court practices in interpreting state statutes to what the "judicial power of the United States" was understood to be. Arguably, the distinct practices of state courts in interpreting *federal* statutes are

more probative than their practices in interpreting *state* statutes of how federal courts legitimately may interpret federal statutes.

II. STATE COURTS, FEDERAL STATUTES, AND FEDERALISM

This Part explains how the practices of state courts in interpreting federal statutes differed from their practices in interpreting state statutes. Specifically, it summarizes an analysis of 74 state court cases decided between 1789 and 1820 that involved a question of federal statutory interpretation. This set of cases emerged from a search for all reported cases involving a question of federal statutory interpretation that state courts decided during this period.[126]

Two points regarding methodology are in order. First, these 74 cases may not represent the complete set or a scientific sample of all cases involving the interpretation of federal statutes that state courts decided during this period. During this time, the reporting of state court decisions was neither as complete nor as accurate as it is today, and of course not all state court decisions were reported. The sample contains only cases that were reported, as they were reported. Second, the time period 1789 until 1820 encompasses not only the time of the Founding and the immediate decades thereafter, but also several difficult episodes of "federal-state relations." The purpose of this Part is to determine what, in light of the constitutional settlement, state courts understood their responsibility to be when faced with questions of federal statutory interpretation. Several federal statutes enacted during this period related to well known events that tested, if not defined, the strength of the Union: the establishment of a federal judiciary, the federal assumption of state debts, the establishment of the Bank of the United States, the Quasi-War with France, the acquisition of the Louisiana territory, and the War of 1812, to name a few. A state court practice in interpreting federal statutes that remained constant throughout the ebb and flow of such events, if indeed any such identifiable practice exists, would seem to constitute

126. I identified most of these cases by searching the Westlaw database "ALLSTATES-OLD" for "(act w/3 (cong!))" or "United States." During the relevant time period, state and federal courts conventionally referred to federal statutes as "acts of Congress," and state cases involving federal statutes commonly made reference, for one reason or another, to the "United States." The search, albeit greatly over-inclusive, appears to have served its intended purpose fairly well. It turned up hundreds of cases, which I reviewed to identify those involving the interpretation of federal statutes. Several subsequent searches using more focused search terms—based, for example, on the names or language of specific federal statutes—failed to turn up cases that the more general search did not identify.

good evidence of what state courts understood their responsibilities in interpreting federal statutes to be.[127]

This Part concludes by offering possible explanations of why state courts did not give federal statutes reason-based equitable constructions.

A. How State Courts Interpreted Federal Statutes

Of the seventy-four cases examined in this study, twenty-eight summarily stated the meaning of a federal statute without providing any significant analysis. Of those twenty-eight cases, twenty-one declared the meaning of a federal statute,[128] and eight declared the

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127. This is not to say that after 1820, federal-state relations normalized without ongoing difficulties. We know of course that that is not true. I selected 1820 as a cut-off on the theory that, even if state court practices in interpreting federal statutes changed after 1820, three decades of consistent state court practice following upon ratification of the Constitution would be more probative of historical constitutional understandings than any subsequent practices that may have developed.

128. *See* Bissell v. Edwards, 5 Day 363, 365-367 (Conn. 1812) (Swift, J. and Baldwin, J.) (declaring different interpretations of the Full Faith and Credit statute with respect to the applicability of the Act to records and judicial proceedings of justices of the peace); Nichols v. Ruggles, 3 Day 145, 158 (Conn. 1808) (Swift, J. and Smith, J., dissenting) (explaining that provisions of federal copyright act are directory and that the court cannot take intent of reprinting into consideration); Clarkson's Lessee v. Stevens, 2 Del. Cas. 27, 28 (Del. 1808) (stating that federal Full Faith and Credit statute "goes to prescribe one mode by which papers could be authenticated in the different states, but it does not abrogate those laws which had prescribed another mode"); Hart v. Strode, 9 Ky. (2 A.K. Marsh.) 115, 116 (1819) (stating that some provisions of the federal bankruptcy act create "exceptions to the general doctrine regarding the proof required to establish bankruptcy . . . [b]ut these provisions do not embrace the present case"); Haggin v. Squires, 5 Ky. (2 Bibb) 334, 335 (1811) (stating that "[t]he record in question . . . does not come within the provision of the [Full Faith and Credit statute]"); Edwards v. Coleman, 5 Ky. (2 Bibb) 204, 205 (1810) (observing "[t]hat the assignees have the sole and exclusive right to demand and sue for any part of the property thus vested in them, is obvious from the letter as well as the manifest spirit" of the federal bankruptcy act); New Orleans v. Casteres, 3 Mart. (o.s.) 673, 674 (La. 1815) (stating what the court deemed to be a "fair construction" of the act of Congress admitting Louisiana to the Union); Campbell v. Morris, 3 H. & McH. 535, 568 (Md. 1797) (reciting what an act of Congress establishing the District of Columbia as the national capital "expressly provides"); Bartlet v. Prince, 9 Mass. (8 Tyng) 431, 436 (1812) (reporting that "[t]he *Chief Justice* observed that he had always conceived that by insolvency, in the acts of Congress, was to be understood some overt and notorious act, which the laws of the state recognize as an insolvency"); Gelston v. Hoyt, 1 Johns. Ch. 543, 546-47 (N.Y. Ch. 1815) (stating that two small governments were not "foreign states" under an Act of Congress governing the seizure of vessels); Clarke v. Morey, 10 Johns. 69, 74 (N.Y. Sup. Ct. 1813) (stating that Enemy Alien Act is "a true exposition and declaration of the modern law of nations"); Brush v. Bogardus, 8 Johns. 157, 159 (N.Y. Sup. Ct. 1811) (explaining that Act of Congress exempting certain persons from militia duty exempted "all mariners actually employed in the sea-service" and that "[t]he plaintiff was certainly not a mariner within the purview of this act"); Parsons v. Barnard, 7 Johns. 144, 145 (N.Y. Sup. Ct. 1810) (explaining that as an Act of Congress gave federal circuit courts exclusive jurisdiction of patent cases, the state court had no jurisdiction); Wright v. Deacon, 5 Serg. & Rawle 62, 64 (Pa. 1819) (Tilghman, C.J.) (stating that "[i]t plainly appears, from the whole scope and tenor of the [Fugitive Slave Act] that the fugitive was to be

intent or object of Congress in enacting the statute.[129] The forty-six remaining cases determined the meaning of federal statutes in the following ways: (1) by examining specific statutory language; (2) by considering English statutes or background principles of common law or general law; and (3) by examining statutory purposes or the consequences of adopting a particular statutory meaning. Most often, state courts interpreted federal statutes based on some combination of these methods. This Section explains how state courts employed each of these methods of statutory analysis.[130]

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delivered up, on a summary proceeding, without the delay of a formal trial in a court of common law"); Downing v. Kintzing, 2 Serg. & Rawle 326, 335, 339-40, 343-44 (Pa. 1816) (opinions of Chief Justice Tilghman and Justice Yeates, and dissenting opinion of Justice Gibson, interpreting in summary fashion the meaning of an act of Congress affording a preference to the United States with respect to certain debts); Willing v. Bleeker, 2 Serg. & Rawle 221, 224 (Pa. 1816) (Tilghman, C.J.) (stating that "[t]he assignment . . . falls directly within the law" governing duties on imports and tonnage); Commonwealth v. Callan, 6 Binn. 255, 256 (Pa. 1814) (stating that "[t]he mother is a parent within [an Act of Congress governing enlistment of minors], and her consent is necessary"); Rush v. Cobbet, 2 Yeates 275, 276 (Pa. 1798) (stating that "the terms" of the federal removal statute "cannot be complied with"); Thompson v. Kendrick's Lessee, 6 Tenn. (5 Hayw.) 113, 115 (1818) (interpreting in summary fashion the meaning of federal removal statute in way that "would seem more reasonable and agreeable to the words of the law"); Luty v. Purdy, 2 Tenn. (2 Overt.) 163, 166 (1811) (stating that Act of Congress prescribing penalties for trading with Indians applied to persons who traded in Indian territories, not to persons who traded in the territory of the United States); Warren v. Russel, 1 D. Chip. 193, 198 (Vt. 1814) (stating what "appears to be the only fair and consistent construction to be put on" the federal law governing federal prisoners in state jails).

129. *See* Ogden v. Gibbons, 4 Johns. Ch. 150, 157 (N.Y. Ch. 1819) (stating that an Act of Congress regulating the enrollment and licensing of ships was "never meant to determine the right of property, or the use and enjoyment of it, under the laws of the states"); Aikin v. Dunlap, 16 Johns. 77, 84 (N.Y. Sup. Ct. 1819) (deeming it "plain" what section of Act of Congress governing the collection of duties "was intended" to effect); *Ex parte* Mason, 5 N.C. (1 Mur.) 336, 337 (1809) (stating that Court was implementing what Congress "no doubt thought" in enacting act regulating enlistments, regardless of what would have been decided at common law); Poindexter's *Ex'rs* v. Barker, 3 N.C. (2 Hayw.) 173, 173 (1802) (stating that the Full Faith and Credit statute "was not intended to prescribe one mode only of authentication in exclusion of all others"); Moore v. Houston, 3 Serg. & Rawle 169, 182 (Pa. 1817) (stating that it does "not appear to be intended by the act of Congress [governing courts martial] to vest the authority in state officers); Charleston v. Boyd, 8 S.C.L. (1 Mill) 353, 355-56 (1817) (stating what Act of Congress governing the hospitalization of foreign seamen "intended to control"); Foster v. Taylor, 2 Tenn. (2 Overt.) 191, 191 (1812) (stating that "the substance contemplated by the act of Congress is attained"); Buel v. Enos, 1 Brayt. 56, 58-59 (Vt. 1820) (summarily determining the "object of Congress" in act prescribing fines and forfeitures, but declining to give the question extensive consideration, as the Supreme Court of the United States might review it).

130. Where a state court case employed multiple methods of analysis, this section considers each method separately. Thus, several cases are discussed or noted in multiple sections. Where the opinions of individual judges forming a majority were reported seriatim, this section considers the opinion of each judge individually.

1. Federal Statutory Language

One way in which state courts determined the meaning of federal statutes was by analyzing statutory language. The methods of analysis they employed largely comport with how modern textualists define "textualism." Textualists argue that textualism is not "all about words," as "textualism does not, and could not, assume that the words of a statute will resolve every question that comes before a court."[131] Rather, textualists ask how "a skilled, objectively reasonable user of words" would have understood statutory language when the legislature enacted it.[132] To answer this question, textualists argue, judges must know "the assumptions shared by the speakers and the intended audience" regarding, among other things, "background legal understandings and conventions that 'a reasonably diligent lawyer' would bring to a statute in context."[133] Textualists are also willing to consider certain external values—such as avoiding serious constitutional questions or policies underlying clear statement rules—"as long as the text will bear the necessary meaning."[134]

The ways in which state courts worked with federal statutory language during the first decades following ratification generally comport with this conception of textualism. Specifically, state courts analyzed (1) the plain or common meaning of statutory language; (2) the legal or technical meaning of statutory language; (3) statutory language in light of linguistic canons of construction; and (4) statutory language in light of other statutory text.

a. Plain or Common Meaning

The most common method by which state courts interpreted federal statutes was to give statutory language its "plain meaning" or its meaning in "common parlance." By the late eighteenth century, certain well known English cases described courts as bound by the plain meaning of statutory language because of legislative sovereignty,[135] as did certain state court cases.[136] Bacon's 1786

131. Manning, *Rules of Statutory Interpretation*, *supra* note 6, at 1655.

132. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J. L. & PUB. POL'Y 59, 65 (1988).

133. Manning, *Rules of Statutory Interpretation*, *supra* note 6, at 1656 (quoting United States v. O'Gilvie, 519 U.S. 79, 98 (1996) (Scalia, J., dissenting)).

134. *Id.* at 1655.

135. *See, e.g.*, Colehan v. Cooke, (1742) 125 Eng. Rep. 1231, 1233 (C.P.) ("When the words of an Act are doubtful and uncertain, it is proper to inquire what was the intent of the Legislature: but it is very dangerous for Judges to launch out too far in searching into the intent of the Legislature, when they have expressed themselves in plain and clear words.").

Abridgement stated as one principle of interpretation that where statutory "Meaning is plain no Consequences are to be regarded in the Construction; for this would be assuming a legislative Authority."[137] Three examples will suffice to illustrate how state courts interpreted federal statutes according to their plain meaning.

In *Conroy v. Warren*,[138] the Supreme Court of New York had to decide whether the 1797 Act of Congress laying duties on stamped paper required a check to be stamped. The act required "any bonds, bills, single or penal, foreign or inland bill of exchange, promissory note, *or other note for the security of money*" to be stamped.[139] In particular, the court had to decide whether a check qualified under the category "other note for the security of money." The court held that a check did not qualify on grounds that "[a] check is not, in common parlance, and in mercantile language, a note for the security of money."[140]

In *Blythe v. Johns*,[141] the Supreme Court of Pennsylvania had to decide whether a certification of bankruptcy was conclusive evidence of a bankruptcy or merely prima facie evidence of a bankruptcy. The act of Congress establishing a uniform federal system of bankruptcy provided that such a certification was merely "prima facie" evidence of a bankruptcy."[142] In response to an argument that the court should deem a certificate conclusive evidence, Chief Justice William Tilghman wrote that "[s]uch a construction would be a violation of the plain meaning of the words" of the statute.[143]

Finally, in *Nelms v. Pugh*,[144] the Supreme Court of North Carolina had to decide whether a bankruptcy, declared after a debtor was arrested and imprisoned for more than two months, should have effect as of the time of the arrest. The governing provision of the 1800 bankruptcy act provided that certain persons "being arrested for debt, or having surrendered him or herself in discharge of bail, shall remain in prison two months, or more," and that "every such person shall be deemed and adjudged a bankrupt."[145] The court rejected the argument that it should interpret the act in light of English authorities

136. *See supra* notes 94-96 and accompanying text.

137. 4 BACON, *supra* note 16, at 653.

138. 3 Johns. Cas. 259 (N.Y. Sup. Ct. 1802).

139. Act of July 6, 1797, ch. 11, §1, 1 Stat. 527, 527 (repealed 1798) (emphasis added).

140. *Conroy*, 3 Johns. Cas. at 261.

141. 5 Binn. 247, 248 (Pa. 1812).

142. Act of Apr. 4, 1800, ch. 19, § 34, 2 Stat. 19, 31 (repealed 1800).

143. *Blythe*, 5 Binn. at 249 (Tilghman, C.J.).

144. 5 N.C. (1 Mur.) 149 (1807).

145. Act of Apr. 4, 1800, ch. 19, § 1, 2 Stat. 19, 21 (repealed 1803).

"introduced to shew that the bankruptcy is in England made to relate back to the arrest."[146] Specifically, the court explained that the issue before it could "only be settled by the statute itself," which declared in terms that "the arrest and imprisonment are both necessary to constitute the act of bankruptcy, and not that either independently of the other shall be sufficient."[147] These are but three examples of many cases in which state judges interpreted federal statutes according to the common or plain meaning of statutory language.[148]

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146. *Nelms*, 4 N.C. (1 Mur.) at 152.

147. *Id.*

148. *See also* Stephenson v. Bannister, 6 Ky. (3 Bibb) 369, 370-71 (1814) (holding that language of federal Full Faith and Credit Act, which requires certification by "the judge," does not permit certification by "any judge") (emphasis omitted); Commonwealth v. Newcomb, 14 Mass. (13 Tyng) 394, 395 (1817) (holding that Act of Congress exempting "mariners actually employed in the sea service" from militia duty required that person claiming exemption be "employed in the sea service"); Van Brunt v. Schenck, 13 Johns. 414, 416 (N.Y. 1816) (explaining that act of congress providing immunity "on account of such seizure" affords immunity "from an action on account of the seizure," but not from "any subsequent abuse of his authority"); Ogden v. Orr, 12 Johns. 143, 144 (N.Y. 1815) (holding that Act of Congress requiring owner of a vessel to pay money to "consul" created no obligation to pay money to a seaman rather than to the consul); Redmond v. Russell, 12 Johns. 153, 153-54 (N.Y. 1815) (holding that under federal removal statute, which requires that the defendant "shall, at the time of entering his appearance in the state Court, file a petition for removal," "[t]he entering an appearance, and filing the petition, are to be simultaneous acts"); Hitchcock v. Aiken, 1 Cai. 460, 481 (N.Y. 1803) (Kent, J.) ("The act of congress does not declare the record shall have the same *effect*, but only the same *faith and credit*, and there is a manifest and essential difference between the one mode of expression and the other."); Frew v. Graham, 4 N.C. (Taylor) 609, 609 (1817) (holding that an article was liable to federal taxation at two stages of production because "the act is explicit" that the Act of Congress lays a tax at two stages of production); Commonwealth v. Keeper of the Jail, 4 Serg. & Rawle 505, 506 (Pa. 1818) ("The meaning of this provision, appears to be confined to debts, taken in their common acceptation, created by contract between the soldier, and any other individual."); Duffield v. Smith, 3 Serg. & Rawle 590, 594 (Pa. 1818) (Tilghman, C.J.) ("The words of the act are, that the fine is to be determined and assessed *by a court martial*, and in the present instance, the fine was determined and assessed *by a court martial*, so that the case falls within *the words of the law*.") (emphasis added)"; Steele v. Bennett, 3 Serg. & Rawle 553, 555 (Pa. 1817) (Gibson, J.) ("By the letter of the act, the plaintiff is entitled; and I cannot agree to give a construction against the letter, on a mere conjecture respecting the motive of congress . . . ."); *id.* at 556 (Duncan, J.) ("There is no obscurity in this appropriation. Ingenuity cannot devise ambiguity from the language used."); Commonwealth v. Holloway, 1 Serg. & Rawle 392, 395 (Pa. 1815) (explaining that "[t]his act is, in its terms, confined to vessels bound from a port in the *United States* to any foreign port, or a from a port in one state to a port in any other than an adjoining state," and that, accordingly, it "would be highly improper to be applied to foreign vessels, with mariners shipped in foreign ports"); Commonwealth v. Lewis, 6 Binn. 266, 272 (Pa. 1814) (Tilghman, C.J.) (explaining that "when the meaning appears to be plain, it must govern the construction"); Commonwealth v. Barker, 5 Binn. 423, 429 (Pa. 1813) (Yeates, J.) (explaining that "words" providing for compensation of enlisted men between the ages of 18 and 45 "only relate to the compensation allowed to such officers, but do not prohibit the enlisting of minors under the age of eighteen"); Rugan v. West, 1 Binn. 263, 269-70 (Pa. 1808) (Yeates, J.) (reasoning that section of federal bankruptcy act "is not referable to an action of trover and conversion . . . [as] [t]he words 'any debtor' exclude suits founded in *tort*, from the operation of the clause; and in the interpretation of a law, we are not at liberty to drop any expressions made use of by the lawgivers") (emphasis in original); United States v. Nicholls, 4 Yeates 251, 260-61

b. Legal or Technical Meaning

State courts also interpreted federal statutes by discerning the "legal" or "technical" meaning of statutory language.[149] In the 1807 case of *Livermore v. Bagley*,[150] for example, the Supreme Judicial Court of Massachusetts had to decide whether a transfer of the rigging of a vessel was an act of bankruptcy under the federal bankruptcy statute. The statute provided that a person commits an act of bankruptcy if he or she "shall secretly convey his or her goods out of his or her house, or conceal them to prevent their being taken in execution, or make, or cause to be made, any fraudulent *conveyance* of his or her lands or chattels . . . ."[151] The court had to decide whether the transfer of the rigging was a "conveyance" within the meaning of the Act.[152] The court held that it had to read the term "conveyance" in its "technical sense" rather than in its "popular sense" because, "in making a statute, the legislature are understood to refer themselves to existing customs and rules; or, in other words, when using technical terms, to employ them in a precise and technical sense."[153]

In *Desbois' Case*,[154] the Superior Court of Louisiana had to determine whether, under an act of Congress, Desbois, who moved to New Orleans in 1806, became a citizen of Louisiana and the United States when Louisiana later was admitted as a state into the Union. The relevant 1811 Act of Congress provided that "the *inhabitants* of all that part of the territory or country ceded under the name of Louisiana, by the treaty made at Paris . . . between the United States and France . . . be, and they are hereby authorized to form for themselves a constitution and state government."[155] In holding that Desbois should be considered a citizen of Louisiana and the United States, the court sought "the meaning of the word ["inhabitants"] in the laws and usages of the country before the passage of the act."[156] In

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(Pa. 1805) (Brackenridge, J.) (determining that Act of Congress giving United States priority with respect to debts did not extend to cases where a state has a lien on grounds that "[t]he word *person* in common parlance does not mean a body politic, a state in its collective capacity") (emphasis added).

149. Blackstone illustrated the legitimacy of such interpretive techniques as follows: "Thus, when the law of England declares murder to be felony without benefit of clergy, we must resort to the same law of England to learn what the benefit of clergy is . . . " 1 BLACKSTONE, *supra* note 16, at 60.

150. 3 Mass. (2 Tyng) 487 (1807).

151. Act of Apr. 4, 1800, ch. 19, § 1, 2 Stat. 19, 21 (repealed 1803) (emphasis added).

152. *Livermore*, 3 Mass. (2 Tyng) at 509-12.

153. *Id.* at 44.

154. 2 Mart. (o.s.) 185 (La. 1812).

155. Act of Feb. 20, 1811, ch. 21, § 1, 2 Stat. 641 (emphasis added).

156. *Desbois' Case*, 2 Mart. (o.s.) at 192.

other cases as well, state courts determined the meaning of federal statutory terms according to what the terms meant "in law."[157]

c. *Meaning in Light of Linguistic Presumptions*

State courts also employed certain linguistic presumptions in interpreting federal statutes. For example, in *Rugan v. West*,[158] the Supreme Court of Pennsylvania had to interpret a section of the federal bankruptcy statute providing that "[i]n all cases where the assignees shall prosecute any debtor of the bankrupt," certain acts were conclusive of the bankruptcy.[159] The question for the court was whether this section applied to an action of trover.[160] In interpreting the relevant provision, the court employed the maxim that a court should not read a statute in such a way as to render any provision meaningless.[161] Justice Jasper Yeates, in his opinion for the court, explained that the words "any debtor" in the statute excluded "suits founded in tort" on the ground that the court was "not at liberty to drop any expressions made use of by the lawgivers."[162]

d. *Meaning in Light of Other Statutory Provisions*

Finally, state courts interpreted specific text of federal statutes in light of other federal statutory provisions—another means of discerning "the Meaning of the Makers."[163] First, state courts

157. *See* Holden v. Curtis, 2 N.H. 61, 64 (1819) (interpreting the word "principles" in Act of Congress governing patents in light of its common law meaning); Ashley v. Cornwell, 16 Va. (2 Munf.) 268, 270 (1811) (Roane, J.) ("The act of congress imposing a tax, in general terms, upon 'any charter-party,' must be taken to refer to the law-merchant to ascertain what a charter-party is.").

158. 1 Binn. 263 (Pa. 1808).

159. Act of Apr. 4, 1800, ch. 19, § 56, 2 Stat. 19.

160. *Rugan*, 1 Binn. at 263-65.

161. *Id.* at 269-70.

162. *Id.* In *Pesoa v. Passmore*, 4 Yeates 139 (Pa. 1804), the Supreme Court of Pennsylvania had to decide whether a bankrupt was legally exonerated from a creditor's demand while a certificate of discharge was pending before a judge. In resolving this question, Justice Yeates reasoned effectively that *expressio unius est exclusio alterius*: "Would the minutiae of privilege and discharge be gone into in so many important particulars, and this point be left open for conjecture and implication?" *Id.* at 140-41 (Yeates, J.).

163. Bacon's 1786 *Abridgement* explained that "[t]he most natural and genuine way of construing a Statute is to construe one Part by another Part of the same Statute: For this best expresseth the Meaning of the Makers . . . ." 4 BACON, *supra* note 16, at 643. There are many examples of state court opinions examining state statutory text in ligbt of other statutory text to ascertain legislative intent. *See, e.g.*, Ward v. Morris, 4 H. & McH. 330, 337 (Md. 1799) ("These acts must be considered together as forming one system, and such an exposition given as will effectuate the general intention of the Legislature, and to answer the ends of public benefit which they had in view."); Church v. Crocker, 3 Mass. 17, 21 (1807) ("But in this, as in all other

interpreted provisions of federal statutes in light of other provisions of the *same* statute. In the 1801 case of *Murray v. United Insurance Co.*,[164] the Supreme Court of New York had to decide whether a vessel was "American" for insurance purposes when a British subject had acquired an interest in the profits of the vessel. A 1789 Act of Congress provided in one section that to be registered as a vessel of the United States, a vessel must "belong wholly to a citizen or citizens thereof."[165] A later section of the act provided that to obtain an American register a person had to make an affidavit that no foreigner was interested in the vessel or the profits to be derived from it.[166] In resolving the question whether the vessel at issue was American, Justice James Kent explained in his opinion that "[t]he section in this act, prescribing the form of the oath, accordingly explains and illustrates the meaning of the other part, that the vessel must be wholly owned by *American* citizens."[167] Since a foreigner had an interest in the profits of the vessel, Kent concluded, the vessel had "sailed without being entitled to an *American* register, within the true intent and meaning of the act."[168] There are several other examples of state court cases interpreting provisions of federal statutes with reference to other provisions of the same statute.[169]

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cases, the intention of the legislature must govern; and to this intention a literal construction of any statute must yield; and to discover the true meaning of a statute, it is the duty of the Court to consider other statutes made in pari materiâ, whether they are repealed or unrepealed."); White v. Hunt, 6 N.J.L. 415, 417 (1798) (Kinsey, C.J.) ("[W]hen the legislature have made use of a particular expression, and given to it a plain and precise signification, the same word, when used in other proceedings, ought, unless the contrary appears manifestly right, to receive the same construction. It is unreasonable to presume that the legislature intended by the same words, to convey different ideas.").

164. 2 Johns. Cas. 168 (N.Y. 1801).

165. Act of Sept. 1, 1789, ch. 11, § 1, 1 Stat. 55.

166. *Id.* § 6.

167. *Murray*, 2 Johns. Cas. at 172 (Kent, J.).

168. *Id.*

169. *See* Coolidge v. Inglee, 15 Mass. (14 Tyng) 66, 67 (1818) ("Taking the two sections together, we have no doubt that the security, required to be taken by the twenty-second section, was meant to have reference to such damages and costs as sbould be adjudged pursuant to the twenty-third section."); Cotel v. Hilliard, 4 Mass. (3 Tyng) 664, 667-68 (1808) ("To suppose that the forfeiture expressed in the fifth section includes a desertion before the commencement of the voyage, the case which is provided for in the second section . . . is to suppose that the legislature in the same act has provided two distinct and unequal forfeitures for the same delinquency . . . ."); Duffield v. Smith, 3 Serg. & Rawle 590, 595 (Pa. 1818) (Tilghman, C.J.) (explaining, with respect to question whether Act of Congress contemplated courts-martials held under the authority of a state governor, that "there are not wanting passages in the act, which indicate an intention that the courts should be held by officers not subject to the orders of a state Governor"); Blythe v. Johns, 5 Binn. 247, 249 (Pa. 1812) (Tilghman, C.J.) (explaining that "where Congress meant the evidence to be conclusive, they have taken care to say so"); *id.* at 250-51 (Yeates, J.) (explaining that where Congress means the evidence to be conclusive, "they say so in precise terms"); United States v. Nicholls, 4 Yeates 251, 258 (Pa. 1805) (Yeates, J.) (explaining,

Second, state courts interpreted federal statutes with reference to the provisions of *other* federal statutes, another recognized means of discerning statutory meaning.[170] In *Commonwealth v. Murray*,[171] the Supreme Court of Pennsylvania had to interpret an Act of Congress authorizing a greater naval force for the United States. The second section of the Act authorized the President "to appoint, and cause to be engaged and employed as soon as may be, three hundred midshipmen, three thousand six hundred ahle seamen, ordinary seamen and boys . . . ."[172] The question before the court was whether a seventeen-year-old boy could validly contract to be a seaman when he had no father, master, or guardian to consent to the contract being made. Chief Justice Tilghman construed the act to allow the boy to make the contract, in part:

> because, on adverting to an act respecting the army passed 16th March 1802, I find it is provided that "no person under the age of twenty-one years shall be enlisted by an officer, or held in the service of the United States, without the consent of his parent, guardian or master first had and obtained, if any he have." This proviso is altogether omitted in the act respecting the navy . . . .[173]

For Chief Justice Tilghman, the absence of this proviso in the statute governing the case before the court supported the conclusion that Congress authorized the boy "to make a binding contract for engaging in the service of his country."[174]

In each of these cases, state judges discerned the meaning of federal statutes by analyzing text that Congress enacted. This kind of analysis was a paradigmatic way in which courts sought to discern and implement actual legislative directives.

2. Other Sources of Law

In several cases, state courts interpreted federal statutes with reference to English statutes or principles of the common law or law of

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with respect to question whether provision in Act of Congress applied to states, that "[n]o section or clause in any part of the act respects in the most distant manner the several states in their political and corporate capacities"); Davis v. Hall, 10 S.C.L. 292, 294 (1818) ("The proviso, in the act which immediately follows the above quoted clause, shows most emphatically, that the word 'persons' therein mentioned was not intended to exclude the right of such children . . . .").

170. *See* 1 BLACKSTONE, *supra* note 16, at 60 (describing "the comparison of a law with other laws, that are made by the same legislator" as a means of discerning statutory meaning).

171. 4 Binn. 487 (Pa. 1812).

172. Act of Jan. 31, 1809, ch. 11, § 2, 2 Stat. 514.

173. *Murray*, 4 Binn. at 492-93 (Tilghman, C.J.).

174. *Id.* at 493. For another example of a state court interpreting a federal statute with reference to another federal statute, *see* United States v. Nicolls, 4 Yeates 251, 259 (Pa. 1805) (Yeates, J.) ("The regulations and provisions in the bankrupt act of congress of 4th April 1800, strongly fortify in my mind the construction I have made of the act of 3d March 1797.").

nations. In these cases, one might expect to find examples of state courts "equitably" interpreting federal statutes that did not comfortably comport with familiar legal traditions. An examination of these cases reveals, however, that state courts did not purport to consult such sources as a means of shaping statutes to accord with reason; rather, in each instance in which a state court interpreted a federal statute with reference to an English statute or the law of nations, it made clear that the import of consulting such sources was to discern the intent of Congress. The theory was that Congress, in enacting a statute, understood itself to be referring to existing customs and rules.

a. Meaning in Light of English Statutes

Conroy v. Warren, discussed above, provides an example of a state court interpreting the meaning of a federal statute in light of an English statute.[175] In *Conroy*, the Supreme Court of New York referred to the English stamp act in interpreting the American stamp act.[176] The court, as explained, had to resolve whether the 1797 Act of Congress laying duties on stamped paper required a check to be stamped. After examining the language of the Act in light of common parlance and mercantile usage, the court observed that "[i]n the *English* stamp act, checks, drafts, and orders, are particularly mentioned . . . ."[177] This, the Court explained, "affords a strong presumption that they were not *intended* to be included in the act of congress."[178] The reason was that the English statute evidenced a "usage and practice" that Congress was understood to comprehend, and that, accordingly, could "afford an exposition of the construction of the statute."[179]

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175. 3 Johns. Cas. 259 (N.Y. Sup. Ct. 1802).

176. In his *Commentaries*, Blackstone described "the comparison of a law with other laws . . . that have some affinity with the subject, or that expressly relate to the same point" as a valid means of discerning statutory meaning. 1 BLACKSTONE, *supra* note 16, at 60.

177. *Conroy*, 3 Johns. Cas. at 261 (emphasis added).

178. *Id.* (emphasis added).

179. *Id. See also* Livermore v. Bagley, 3 Mass. 487, 510 (1807) (explaining that "in making a statute, the legislature are understood to refer themselves to existing customs and rules," and that "[i]n this respect the variance from the *British* statute operates against the construction contended for by the plaintiff"). *Cf.* Holden v. Curtis, 2 N.H. 61, 63 (1819) (explaining that the statute's "language resembles that in most statutes, concerning the record of deeds of real estate" and "[w]e see no reason against an adoption of the same rule under the act of Congress"); Rugan v. West, 1 Binn. 263, 270-71 (Pa. 1808) ("The resolutions under the *British* acts of bankruptcy throw no light on the present question" as "[t]hey vary in point of expression from our statute, as far as relates to the subject under consideration.") (emphasis added).

b. *Meaning in Light of Principles of the Common Law or Law of Nations*

In a few cases, state courts referred to the common law or law of nations in interpreting acts of Congress. English treatises and digests addressing statutory interpretation all recited in one form or another the principle that courts should interpret obscure statutes to accord with the common law.[180] Stated differently, the principle was that courts should not interpret statutes to be in derogation of the common law unless the statute derogated from it by express language.[181] This principle could suggest one of two things: one, that courts should make obscure statutes accord with the reason of the common law without regard for anything that the legislature may have intended, or two, that courts should make obscure statutes accord with the reason of the common law because legislatures, in enacting general language, intended such language to comport with the common law. In each case in which a state court invoked the common law or the law of nations in interpreting a federal statute, the court made clear that it was doing so as a means of discerning congressional intent. In other words, state courts presumed that Congress was aware of this interpretive principle and thus would use express language when it meant to displace a common law right.

For example, in *Commonwealth v. Cushing*,[182] the Supreme Judicial Court of Massachusetts had to interpret a section of the 1813 Act of Congress governing army enlistments. The statute provided that "no person under the age of twenty-one years, shall be enlisted . . . without the consent, in writing, of his parent, guardian, or master, first had and obtained, if any he have . . . ."[183] The question before the court was whether a minor who had no parent, guardian, or master could bind himself to an enlistment. The court interpreted the statute to prohibit such enlistments. Among other reasons, the court explained that "[i]nfants are, by the common law, incapable of making any contract binding on themselves, except in a very few instances. . . . The legislature ought not lightly to be presumed, in any case, thus to violate a fundamental principle of the common law."[184]

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180. *See, e.g.*, 4 BACON, *supra* note 16, at 647 ("An obscure Statute ought to be considered according to the Rules of the Common Law."); 19 VINER, *supra* note 15, at 520 ("*Obscure* statutes ought to be interpreted according to the rules of the common law.").

181. *See* 1 BLACKSTONE, *supra* note 16, at 89 (describing this principle).

182. 11 Mass. 67 (1814).

183. Act of Jan. 20, 1813, ch. 12, § 5, 2 Stat. 791, 792.

184. *Cushing*, 11 Mass. at 70; *see also* Champneys v. Lyle, 1 Binn. 327, 331-32 (Pa. 1808) (Tilghman, C.J.) ("It would have been an act of such extreme injustice to take away from sureties in custom-house bonds, that preference which had been assured to them . . . that nothing but the

A related principle of interpretation derived from the law of nations—indeed, "a maxim of political law"—was that "sovereign states," like individuals, "cannot be deprived of any of their rights by implication . . . ."[185] In *United States v. Nicholls*, the Supreme Court of Pennsylvania invoked this maxim in holding that a federal statute giving the United States a preference with respect to certain debts did not apply to cases in which a state was a creditor. After reciting the maxim, Justice Yeates explained that "[i]t would certainly require strong, clear, marked expressions, to satisfy a reasonable mind, that the constituted authorities of the union *contemplated* by any public law, the devesting of any pre-existing right or interest in a state . . . ."[186]

In each of these cases, a state court referred to the common law, the law of nations, or an English statute for the stated purpose of discerning and implementing congressional intent.

3. Purposes and Consequences

Finally, there are several cases in which a state court interpreted a federal statute with reference to the purpose of the statute or to the consequences of ascribing to it a particular meaning. As explained in Part I, these were commonly employed means of discerning statutory meaning in the late eighteenth and early nineteenth centuries.[187] These means could be part and parcel of a reason-based "equitable interpretation," or an interpretation meaningfully geared toward implementing legislative intent. As explained, English cases, digests, and treatises, as well as American state courts, variously justified such means of interpretation as rectifying statutes with the demands of reason, or as implementing

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clearest expressions could induce me to suppose that congress had such intention."); *see also* Livingston v. Livingston, 2 Cai. 300, 301 (N.Y. Sup. Ct. 1805) (explaining, after reading one provision of a federal statute in light of another to determine its "true construction," that "[i]t would require express words to take a party's pre-existing rights").

185. United States v. Nicholls, 4 Yeates 251, 258 (Pa. 1805) (Yeates, J.).

186. *Id.* (emphasis added).

187. Regarding statutory purpose, *see* 4 BACON, *supra* note 16, at 648 ("The Intention of the Makers of a Statute is at sometimes to be collected from the Cause or Necessity of making a Statute; at other Times from other Circumstances."); 1 BLACKSTONE, *supra* note 16, at 61 ("[T]he most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it."). Regarding the consequences of particular statutory interpretations, *see* 4 BACON, *supra* note 16, at 652 ("If the Meaning of a statute be doubtful, the Consequences are be considered in the Construction . . . ."); 1 BLACKSTONE, *supra* note 16, at 60 ("As to the effects and consequence, the rule is, where the words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them.").

legislative intent, real or presumed.[188] American state courts, in interpreting federal statutes, employed these means of interpretation either in support of textual analyses or as a means of otherwise implementing actual legislative intent, not to implement independent dictates of reason or equity.

In the overwhelming majority of cases in which state courts examined the purposes of federal statutes or the consequences of ascribing a particular meaning to a federal statute, they did so simply to confirm independent textual statutory analyses. Even state judges who believed that courts should interpret statutes according to the plain import of their language often explained how applying the letter served interests of reason and convenience. In *Hardin v. Owings*,[189] Kentucky Chief Justice Edwards, after protesting at length that ultimately judges should make "acts of the legislature, according to their plain and obvious import . . . the proper and governing rule of decision," observed that "[i]ndependent, however, of the binding and obligatory force of the act itself, whether it is wise or unwise; the rule it furnishes appears to be founded in reason, in convenience, and is justified by sound policy."[190] In interpreting federal statutes, several state courts followed textual analyses with a statement that the text served the reason of the law or avoided bad consequences of another interpretation.

In the 1818 Pennsylvania case *Commonwealth v. Keeper of the Jail*,[191] for example, the Supreme Court of Pennsylvania discussed the reason that Congress enacted a statute to confirm a textual analysis of it. An 1802 act of Congress provided "[t]hat no non-commissioned officer, musician or private shall be arrested, or subject to arrest, or to be taken in execution for any *debt* under the sum of twenty dollars, contracted before enlistment, nor for any debt contracted after enlistment."[192] The court had to decide whether this act shielded a soldier from having to answer to the charge of deserting his wife and children, leaving them without support. The court read the statutory language according to its meaning in common parlance, specifically, to extend only "to debts, *taken in their common acceptation*, created by contract between the soldier and any other individual."[193] The court proceeded to explain that "there was great reason" for Congress to prevent arrests only in the case of such debts: if Congress permitted

188. *See supra* Part I.A-B.

189. 4 Ky. (1 Bibb) 214 (1808).

190. *Id.* at 216-17.

191. 4 Serg. & Rawle 505 (Pa. 1818).

192. Act of Mar. 16, 1802, ch. 9, § 23, 2 Stat. 132, 136-37 (emphasis added).

193. *Keeper of the Jail*, 4 Serg. & Rawle at 506 (emphasis added).

arrests on contractual debts, "every soldier might be withdrawn from the army, by contracting a debt for that purpose."[194] Congress, the court continued, could not have "intended to prevent arrests in all cases of debt," including one that arose from a soldier's desertion of his family.[195] In several other cases, state courts similarly explained statutory purposes to support their readings of statutory language.[196]

The 1817 North Carolina case *Frew v. Graham*,[197] provides an example of how, in some cases, state courts supported textual analyses of federal statutes by noting the consequences of ascribing another meaning to the statute. An 1815 Act of Congress imposed duties upon a long list of goods, including one dollar per ton on "pig iron" and "bar iron."[198] The question for the Supreme Court of North Carolina was whether a person who made pig iron in his own furnace, and then worked it into bar iron at his own forge, was responsible for a duty at each stage of production.[199] The court determined that "the act is explicit" that "a *distinct* tax is laid upon the manufacture of iron in its two stages of *pigs* and *bars*."[200] Under the statute, the court explained, "it is the article, and not the manufacturer, that pays."[201] The court then proceeded to note the consequences of a contrary interpretation: "And it would seem strange, when the owner of a furnace makes pigs, one half of which he sells to a neighboring owner of a forge, to be made into bar iron, and the other half is manufactured into bars at his own forge, that in the former case two dollars should be paid per ton, and

194. *Id.*

195. *Id.*

196. *See* Commonwealth v. Newcomb, 14 Mass. (13 Tyng) 394, 396 (1817) (explaining the "reason" for what the language of the act requires); Van Brunt v. Schenck, 13 Johns. 414, 417 (N.Y. Sup. Ct. 1816) (supporting textual analysis with examination of "[t]he object which this act of congress had in view"); Ogden v. Orr, 12 Johns. 143, 145 (N.Y. Sup. Ct. 1815) (describing "the policy of" what the language of "[t]he act directs"); Clarke v. Morey, 10 Johns. 69, 72 (N.Y. Sup. Ct. 1813) (explaining that a doctrine contrary to "the evident construction of the act of congress . . . would be repugnant to sound policy"); Murray v. United Ins. Co., 2 Johns Cas. 168, 172-3 (N.Y. Sup. Ct. 1801) (Kent, J.) (explaining that construction contrary to text and "true intent and meaning of the act" would also be "contrary to the policy of our statute"); Commonwealth v. Barker, 5 Binn. 423, 429 (Pa. 1813) (Yeates, J.) (explaining that facts of case are "within the words and spirit of the act of congress"); Commonwealth v. Holloway, 5 Binn. 512, 515 (Pa. 1813) (explaining that there is "great reason" for what "appears to us to be the fair and genuine construction of the act of congress"); Blythe v. Johns, 5 Binn. 247, 249 (Pa. 1812) (Tilghman, C.J.) (explaining that "plain meaning" construction "accords with the spirit of the act of Congress").

197. 4 N.C. (Taylor) 609 (1817).

198. Act of Jan. 18, 1815, ch. 22, 3 Stat. 180 (repealed 1816).

199. *Frew*, 4 N.C. (Taylor) at 609.

200. *Id.*

201. *Id.*

in the latter, only *one!*"[202] In other cases as well, courts noted how good consequences would follow from textual interpretations, or how bad consequences that would follow from textual interpretations were Congress's responsibility.[203]

In some cases, state courts examined statutory purposes as an independent means of determining statutory meaning. If there are instances of state courts interpreting federal statutes without regard for actual legislative directives, they should, if anywhere, be found here. In each of these cases, however, the state court examined the purpose of the statute in order to determine what Congress intended.

The 1803 New York case of *Jenks v. Hallet*[204] provides an interesting example. In 1798, Congress enacted the Non-Intercourse Act, which prohibited commercial intercourse with France and her dependencies.[205] In *Jenks*, the sloop *Nancy*, on a voyage from Newport, Rhode Island to Havana, was forced by distress to land at Cape-François in Hispaniola, a French possession.[206] There, French officials seized some of the ship's cargo, and permitted the captain to sell the rest.[207] As payment, the *Nancy* took on and sailed with produce from Hispaniola.[208] An issue in the case was whether the *Nancy* violated

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202. *Id.* at 609-10.

203. *See* Stephenson v. Bannister, 6 Ky. (3 Bibb) 369, 370-71 (1814) (examining "[t]he only inconvenience that results" from "the correct construction of the act"); Coolidge v. Inglee, 15 Mass. (Tyng) 66, 68 (1818) (explaining that in light of textual interpretation of act, bad consequences of statutory meaning were Congress's responsibility); Livermore v. Bagley, 3 Mass. (2 Tyng) 487, 511 (1807) (explaining that "[t]he popular sense of a term, in opposition to the technical, is not to he adopted, where manifest inconveniences would be incurred"); Thurber v. Blackbourne, 1 N.H. 242, 245 (1818) (explaining that "these supposed consequences do not result from the construction we give to the words of the act," which reflects what act "intended"); Bartlett v. Wyman, 14 Johns. 260, 262 (N.Y. Sup. Ct. 1817) (explaining that argued construction of act would be "not only against the plain intention of the statute," but would also produce bad consequences); Frew v. Graham, 4 N.C. (Taylor) 609, 609 (1817) (explaining how construction contrary to "explicit" meaning of act would produce "strange" consequences); Duffield v. Smith, 3 Serg. & Rawle 590, 595 (Pa. 1818) (Tilghman, C.J.) (supporting textual interpretation by noting that "very inconvenient consequences might follow" from another interpretation); Commonwealth v. Murray, 4 Binn. 487, 493 (Pa. 1812) (Tilghman, C.J.) ("Such intention is entirely consistent with the words of the law, may be productive of good consequences, and is attended with no evil."); Rugan v. West, 1 Binn. 263, 271-72 (Pa. 1808) (explaining how counter textual interpretation would be "inconvenient"); Pesoa v. Passmore, 4 Yeates 139, 140-41 (Pa. 1804) (Yeates, J.) (explaining that certain consequences do not undermine the "intention" evident from textual analysis); Respublica v. Nicholson, 2 Yeates 9, 14-15 (Pa. 1795) (observing that consequences of counter textual interpretation of act of Congress "could never have been the intention" of Congress).

204. 1 Cai. 60 (N.Y. Sup. Ct. 1803), *aff'd* 7 U.S. (3 Cranch) 210 (1805).

205. Act of June 13, 1798, ch. 53, 1 Stat. 565.

206. *Jenks*, 1 Cai. At 60.

207. *Id.* at 61.

208. *Id.*

the Non-Intercourse Act by taking on and sailing with this cargo.[209] The court held the Act inapplicable to the *Nancy*'s actions.[210] It explained that the acts of the *Nancy* were "acts of necessity and coercion, and the laws of *congress* which suspended the commercial intercourse with *France* and her dependencies, cannot reasonably be construed to apply to a case of this description."[211] The "object" of the Act, the court explained, "was to prevent an intentional or *voluntary* traffic, and not to compel a sacrifice of property, or inflict a penalty in cases of distress or necessity."[212] The court concluded that construing the Act to inflict a penalty in such cases of distress would be "excessively severe" and contrary to the "intent" of Congress.[213]

In *Hammon v. Smith*,[214] the Constitutional Court of Appeals of South Carolina had to decide whether, under the federal full faith and credit act, one state had to give the same effect to the judicial proceedings of another state as would that other state.[215] The Act provided in relevant part that properly authenticated "records and judicial proceedings . . . shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken."[216] The plaintiff argued that state courts only had to regard a judgment of the courts of another state as they would regard judgments from the courts of foreign nations.[217] Judge Joseph Brevard explained, in response to this position, that he was "unable to perceive any other object or purpose the act of congress is calculated to answer, or any other meaning it can have," but to reject the plaintiff's position.[218] Indeed, he explained, "[U]nless the construction I give this act of congress, should prevail, it must be idle and vain."[219] There are a few other examples of state courts identifying statutory purposes as a means of discerning congressional intent.[220]

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209. *Id.* at 64.

210. *Id.* at 65.

211. *Id.*

212. *Id.*

213. *Id.*

214. 3 S.C.L. (1 Brev.) 110 (1802).

215. *Id.* at 110-11.

216. Act of May 26, 1790, ch. 11, 1 Stat. 122.

217. *Hammon*, 3 S.C.L. (1 Brev.) at 110.

218. *Id.* at 112 (Brevard, J.).

219. *Id.*

220. *See* Manchester v. Boston, 16 Mass. (Tyng) 230, 235 (1819) (stating, in dicta, what a statutory term "must be understood to intend" with reference to what "[w]ithout doubt, the object of Congress, in making this provision, was"); Oliver v. Smith, 5 Mass. (4 Tyng) 183, 189-91 (1809) (determining the "true construction of the act of Congress" by recognizing that under another proffered construction "the intentions of the act could not be carried into effect" and that it was

In only one state court case interpreting a federal statute did a judge follow the "spirit" as opposed to the "words" of the statute without specifically noting that the decision was giving effect to congressional intent. In *Commonwealth ex rel. Menges v. Camac*,[221] the Supreme Court of Pennsylvania had to interpret the 1813 Act of Congress providing "that no person under the age of twenty-one years shall be enlisted by any officer, or held in the service of the United States, without the consent, in writing, of his parent, guardian or master first had and obtained."[222] The question in the case was whether a minor who enlisted without the consent of his father, but whose father consented five or six days after the enlistment, was bound by the enlistment.[223] Chief Justice Tilghman concluded in his opinion that the minor was bound to the enlistment for the following reason: "The case is within the words, but not within the spirit of the law, which I take to be this: that no minor shall be detained without the consent of his parent."[224] Since the parent had given consent, Tilghman concluded that the minor was bound.[225]

It is unlikely that, in ruling in this way, Tilghman understood himself to be implementing a spirit of reason contrary to or in disregard of congressional intent. In opinions interpreting Pennsylvania state statutes according to statutory "objects" rather than statutory letter, Tilghman made clear that he was seeking to implement real objects of the state legislature. In 1811, he explained that "[a]s to the construction of statutes, it is certain they are not always to be construed according to the *letter*. General expressions may be restrained, where it clearly appears from the whole law, that it was the intention of the legislature to provide a remedy only for particular cases."[226] Indeed, he wrote "[t]he intention must be clear to

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"impossible to suppose that Congress" should be indifferent to matters bearing on the effectiveness of the act); Redmond v. Russell, 12 Johns. 153, 154 (N.Y. Sup. Ct. 1815) (determining whether putting in special bail in state court was an "appearance" under federal removal statute on the basis of (1) what Congress "intended" in requiring that a removal petition be filed at the time of appearance and (2) certain facts of wbich it supposed Congress was "aware"); *cf.* Redmond, 12 Johns. at 155 (Thompson, C.J., dissenting) (interpreting "appearance" in removal statute in light of other provisions of the removal statute).

221. 1 Serg. & Rawle 87 (Pa. 1814).

222. Act of Jan. 20, 1813, ch. 12, § 5, 2 Stat. 791, 792.

223. *Camac*, 1 Serg. & Rawle at 88-89.

224. *Id.* at 89 (Tilghman, C.J.).

225. *Id.*

226. Bank of N. Am. v. Fitzsimons, 3 Binn 342, 356-57 (Pa. 1811) (Tilghman, C.J.); *see also* Comm'rs of Allegheny County v. Lecky, 6 Serg. & Rawle 166, 168 (Pa. 1820) ("It has been said for the defendants, that this being a special authority, it should be construed *strictly*; on the contrary, I think that the *object* being to grant power to do a work beneficial to the county of *Allegheny*, the act of assembly should be construed *liberally for the attainment of its object* . . . .")

authorize the restraining of the enacting clauses."[227] Such opinions invoked the principle that, to give effect to the "Intention of the Makers of a Statute," courts should give effect to "the Cause or Necessity of making a Statute," even though "such Construction seem contrary to the Letter of the Statute."[228] Tilghman refused to implement the spirit as opposed to the words of an act when he determined that the words best reflected legislative intent. In *Crescoe v. Laidley*,[229] for example, Tilghman refused "to supply the omissions of the acts, by inserting what we may suppose to have been intended by the legislature" on the ground that the legislature must have "examined with great attention" the state of the law before enacting the statute in question and made "every alteration . . . which was thought necessary."[230]

4. Tentative Observations

The point of this analysis is that state judges interpreted federal statutes during the first three decades following ratification in ways geared toward implementing legislative directives. In not one case did a state court invoke the equity of the statute doctrine in interpreting a federal statute or otherwise expressly profess to be equitably interpreting one. Rather, state courts most often interpreted federal statutes according to the import of statutory language, a means understood to be geared toward the implementation of actual legislative directives. Where state courts employed less text-focused means of statutory interpretation (for example, by examining purposes or consequences), they did so either to support independent textual analyses or for the stated purpose of giving effect to congressional intent.

None of this is to deny that the concept of legislative intent, real or presumed, is one fraught with difficulties, nor that a court may say that it is pursuing legislative intent but in fact be pursuing other objectives, consciously or subconsciously. In determining what state courts historically understood their proper role to be in interpreting federal statutes, the germane fact is what state courts *professedly*

(emphasis added); Lyons v. Miller, 4 Serg. & Rawle 279, 280 (Pa. 1818) ("But to say, that this act of assemhly, which was manifestly *intended* to promote justice, and to prevent the sacrifice of substance to form, should be so construed as to uphold form at the expense of substance, would be to defeat its *object*, and convert that into a mischief which was *designed* for a remedy.") (emphasis added).

227. *Fitzsimons*, 3 Binn. at 359 (Tilghman, C.J.).

228. 4 BACON, *supra* note 16, at 648.

229. 2 Binn. 279 (Pa. 1810).

230. *Id.* at 286.

understood their role to be, not that in certain cases they *really* acted contrary to that understanding (because they subordinated legislative intent to other designs, or because in some cases pursuing legislative intent was a practical impossibility). It suffices for present purposes to observe that state courts generally understood their proper role in interpreting federal statutes to be that of discerning and enforcing the directives of Congress. How courts can best fulfill this role, and how helpful the concept of legislative intent is to answering this question, is beyond the scope of this Article. The point for now is that state courts did not manifest an understanding that their role in interpreting federal statutes was to act as agents of "We the People of the United States," empowered to make federal law accord with reason or policy in forward-looking ways without regard for discernable expectations of Congress.

B. Why State Courts Did Not Make Reason-Based Equitable Interpretations of Federal Statutes

This Section suggests a possible explanation of why state courts did not make the kind of reason-based equitable interpretations of federal statutes that they sometimes made of state statutes. As explained in Part I, there was movement on the part of some (perhaps a predominance of) English and American state judges at the time of the American Founding toward interpretive principles understood to implement the law as made by the legislator. One theory behind this movement, as explained, was respect for legislative supremacy. If the supremacy of state legislatures was a disputed matter among some state judges, the supremacy of Congress when it properly exercised its enumerated powers under the Constitution may have been deemed indisputable in light of the Supremacy Clause. The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[231]

The Supremacy Clause has two implications for the interpretation of federal statutes by state courts. First, the Supremacy Clause references federal lawmaking procedures that state courts would jettison if they interpreted federal statutes in ways self-consciously designed to make or develop new federal law. The

231. U.S. CONST. art. VI, cl. 2.

Supremacy Clause provides that "the Laws of the United States *which shall be made in Pursuance thereof*" constitute "the supreme Law of the Land."[232] For each category of federal law that the Supremacy Clause references, the Constitution provides a specific lawmaking procedure.[233] The Constitution became federal law by "the Ratification of the Conventions of nine States,"[234] with amendments to become law by proposal of two thirds of both houses of Congress and ratification by three fourths of the states.[235] A federal statute becomes law after the House of Representatives and the Senate have passed it, and the President has signed it.[236] A treaty becomes law after the President has made it, and the Senate has ratified it.[237] The Supremacy Clause expressly provides that state judges shall be bound by federal laws made pursuant to these procedures, including acts of Congress.

Professor Brad Clark has argued that in light of the text, structure, and history of the Constitution, the lawmaking procedures that the Constitution specifies for the "Constitution," "Laws," and "Treaties" of the United States to become law are the exclusive means by which government actors may make the federal "supreme Law of the Land."[238] On this theory, for state courts to self-consciously interpret federal statutes to make new federal law in forward-looking ways would jettison the specific procedures by which the Constitution provides that new federal law may be made. It is possible that, on this understanding, state courts more uniformly strove to interpret federal statutes to implement actual legislative directives than they strove to interpret state statutes.

The second implication of the Supremacy Clause for the interpretation of federal statutes by state courts is that "supremacy" characterizes a valid form of federal law. For a state court to interpret a federal statute in such a way as to self-consciously make "new" policy for the Union would be to deny to law so made such supremacy.

By rendering federal law "the supreme Law of the Land," the Supremacy Clause fairly implies that a federal law, by its nature, means the same thing in one state as it means in another.[239] John Jay

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232. *Id.* (emphasis added).

233. For an analysis of the Supremacy Clause and federal lawmaking procedures as they relate to concepts of separation of powers and federalism, *see* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001).

234. U.S. CONST. art. VII.

235. *Id.* art. V.

236. *Id.* art. I, § 7.

237. *Id.* art. II, § 2.

238. Clark, *supra* note 233, at 1331-72.

239. This does not mean that federal law may not govern activities in only one state. A federal law provides, for example, that a portion of a canal "located in the City of Buffalo, State

made this point in April 1787, just months before the Federal Convention commenced. Under the Articles of Confederation, certain states notoriously "interpreted" the 1783 Treaty of Paris, ending the American Revolutionary War, in ways that contradicted its clear and specific meaning. In March 1787, the Continental Congress passed a resolution recommending that, in all cases "arising from or touching the said treaty," state courts "shall decide and adjudge according to the *true intent and meaning* of the same, any thing in the said acts or parts of acts to the contrary thereof in any wise notwithstanding."[240] In support of this resolution, John Jay argued that it is "irrational" that "the same Article of the same treaty might by law be made to mean one thing in New Hampshire, another thing in New York, and neither the one nor the other of them in Georgia."[241] The recognized purpose of the Clause during ratification debates was to prevent a "part" from controlling the "whole."[242] Absent the dictate of the

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of New York, is declared to be a nonnavigable waterway of the United States." 33 U.S.C. § 59q-1 (2000). A law may govern activities in only one state and still be the law of the land. Indeed, it is the law not only in Buffalo but also in the United States as a whole that this canal in Buffalo is a nonnavigable waterway. Federal laws imposing obligations in a particular state are common, as is state participation in the development of such state-specific federal law. It would be irrational for federal law in New York to be that this particular canal in Buffalo is nonnavigable but in Pennsylvania to be that this particular canal in Buffalo is navigable. The supreme law of the land cannot be both.

240. Resolution of Continental Congress, Mar. 21, 1787, *reprinted in* 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 125 (Roscoe R. Hill ed.) (emphasis added). This language—"true intent and meaning"—was familiar not only from its use in judicial decisions interpreting statutory language, but also from its use in instruments defining the power of governing bodies. For example, the charters of several colonies variously provided that governing authorities or individuals were to act according to the "true intent and meaning" of laws to which they were subject. *See, e.g.*, Connecticut Charter of 1662, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 252, 255 (2d ed., 1878) (providing that various forms of law "as shall be so made by the Governor, Deputy-Governor, and Assistants . . . shall carefully and duly be observed, kept, performed, and put in Execution, according to the true Intent and Meaning of the same"); Delaware Charter of 1701, *reprinted in* 1 *id.* at 270, 272 (providing that "no Act, Law or Ordinance whatsoever, shall at any Time hereafter, be made or done, to alter, change or diminish the Form or Effect of this Charter, or of any Part or Clause therein, contrary to the true Intent and Meaning thereof"); Rhode Island Charter of 1663, *reprinted in* 1 *id.* at 1595, 1599 (providing that certain forms of law "shall bee carefully and duely observed, kept, performed and putt in execution, accordinge to the true intent and meaning of the same"). The apparent purpose of such provisions was to keep governing authorities and individuals in the colonies from disregarding laws to which tbey were subject. Along these lines, James Madison explained in *The Federalist No. 44* that if Congress exceeded its powers as warranted by the "true meaning" of tbe Constitution, the people should have redress for that usurpation of authority. THE FEDERALIST NO. 44, at 305 (James Madison) (Jacob E. Cooke ed., 1961).

241. John Jay, Continental Congress (Apr. 13, 1787), *in* 4 THE FOUNDERS' CONSTITUTION 589, 590 (Philip B. Kurland & Ralph Lerner eds., 1987).

242. In the North Carolina ratifying convention, for example, William McClaine argued with reference to the Supremacy Clause as follows: "Shall a part control the whole? To permit the local laws of any state to control the laws of the Union, would be to give the general government

Supremacy Clause, as James Madison put it, "the world would have seen . . . the authority of the whole society every where subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members."[243]

A state court that made "new" federal law in a forward-looking way in interpreting a federal statute would be purporting to make "the *supreme* Law of the Land" only if it employed the same normative metric for determining what that law should be as every other court reasonably would employ in the same circumstances. Dynamic theories of interpretation, however, suggest that judges are justified in making law on the basis of the kinds of strategic considerations that can move a legislature to make new law. Unless such considerations claim to be *the* considerations upon which a court must act and claim to necessarily lead to *the* law a court has made, a state court acting pursuant to such considerations would not be making law that meaningfully was operational as the supreme law of the land.

On the other hand, when state courts historically sought to implement actual legislative directives, they purported to employ a metric that every other court, state or federal, should employ if interpreting the same statute in the same context. This is not to say that courts seeking to implement actual legislative directives have always settled upon the same interpretation of a statute. They may dispute, for example, whether a textual or purposive methodology is best geared toward implementing what the legislature has enacted. If they employ a textual methodology, they may dispute the reasonable import of words. If they employ a purposive methodology, they may dispute the appropriate level of generality at which to discern a purpose. In such cases, judges may "make" law in a real sense, but in a different sense than they make law when they purport to act as a deputy legislature or legislative partner in the strategic making of federal law. In attempting to discern actual legislative directives, a judge may make law as a *consequence* of attempting to enforce the

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no powers at all. If the judges are not to be bound by it, the powers of Congress will be nugatory. This is self-evident and plain." 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 181 (Jonathan Elliot & Burt Franklin eds., 2d ed. 1888). Governor Samuel Johnston similarly argued in the North Carolina ratifying convention that "[t]he laws made in pursuance thereof by Congress ought to be the supreme law of the land; otherwise, any one state might repeal the laws of the Union at large. Without this clause, the whole Constitution would be a piece of blank paper." *Id.* at 187-88.

243. THE FEDERALIST NO. 44 (James Madison). More than forty years later, James Madison would write that it was to protect the "authority of the whole" from "the parts separately and independently" that "dictated the clause declaring that the Constitution & laws of the U.S. should be the supreme law of the Land, anything in the constn or laws of any of the States to the contrary notwithstanding." James Madison, Notes on Nullification (1835-36), *in* 4 FOUNDERS' CONSTITUTION, supra note 241, at 632.

dictates of existing law. This kind of lawmaking is inevitable given the limitations of language and the "open texture" of law. When a state judge "makes" federal law in this way, the judge attempts to discern and apply the federal rule of decision that every court should apply in the same case—a rule that purports to be the "supreme Law of the Land." In contrast, when a state judge self-consciously makes federal law in a strategic way, the judge fails to employ an interpretive metric that all state and federal judges could reasonably be expected to employ, and thereby cannot purport to be making "federal" law that has the quality of being the "supreme Law of the Land." It is possible that, on this understanding, state courts more uniformly strove to interpret federal statutes to implement actual legislative directives than they strove to interpret state statutes.

III. IMPLICATIONS FOR THE INTERPRETATION OF FEDERAL STATUTES BY FEDERAL COURTS

This Part tentatively examines the implications of this analysis for the historical debate over how federal courts should interpret federal statutes. At first glance, it might appear that this analysis has no implications for the interpretation of federal statutes by federal courts. If the propriety of the interpretive methodology that a court employs depends on the identity of the interpreter, it might be argued that the Article III "judicial power" of federal courts is to act as "cooperative partners" with Congress in the making of federal law, while, under the Supremacy Clause, the duty of state courts is to act as Congress's faithful agents. Indeed, it might be argued that just as state courts historically interpreted "their own" statutes "more freely" than they interpreted federal statutes, federal courts may interpret "their own" statutes "more freely" than state courts. In the American constitutional structure, however, the propriety of different methods of interpretation is not solely a function of the "judicial power" of federal courts. Rather, the Supremacy Clause and the lawmaking procedures that it references have implications for statutory interpretation by federal courts as well as state courts.

First, if the procedures by which the Constitution provides that federal law may be made are the exclusive means by which government actors may self-consciously make federal law in strategic, forward-looking ways, those procedures limit the lawmaking authority of federal courts to the same extent that they limit the lawmaking authority of state courts. When state courts recognize the exclusivity of these procedures, they respect the supremacy of federal law in its proper domain. When federal courts recognize the exclusivity of these

procedures, they respect state authority to govern in areas in which no validly enacted federal law precludes or preempts state governance. As Brad Clark has argued, "Although federal lawmaking procedures are generally regarded as 'integral parts of the constitutional design for the separation of powers,' they also preserve federalism both by making federal law more difficult to adopt, and by assigning lawmaking power solely to actors subject to the political safeguards of federalism."[244] In particular, Clark points out, the Constitution calls for the participation of the Senate, "the federal institution in which the states had the greatest influence,"[245] in the making of all forms of federal law. "Permitting the federal government to avoid these constraints," Clark argues, "would allow it to exercise more power than the Constitution contemplates, at the expense of state authority."[246] Accordingly, the exclusivity of federal lawmaking procedures that would restrain the authority of state courts to make federal law in order to protect the lawmaking prerogatives of proper federal authorities would also restrain the authority of federal courts to make federal law in order to protect the lawmaking prerogatives of proper state authorities.

Second, for inferior federal courts strategically to make federal law in forward-looking ways in statutory interpretation would deny the law so made the characteristic of being "the supreme Law of the Land." The Supremacy Clause's characterization of federal law as the "supreme Law of the Land,"[247] fairly implies that at an appropriate level of generality federal law should have a uniform meaning in any state or federal court.[248] During ratification debates, various actors pointed out that a reason the Constitution established a federal judiciary was to maintain uniformity in the interpretation of federal laws. Most prominently, Alexander Hamilton argued in *The Federalist No. 80* that there should be federal courts based upon "the mere necessity of uniformity in the interpretation of national laws."[249]

The Supreme Court has long recognized that federal statutes should have a uniform meaning in state and federal courts, even in the first instance, in cases addressing the obligation of state courts to

244. Clark, *supra* note 233, at 1324 (quoting Erie R.R. v. Tompkins, 304 U.S. 64, 80 (1938)).

245. *Id.* at 1342-43.

246. *Id.* at 1324.

247. U.S. CONST. art. VI.

248. *See supra* notes 239-43 and accompanying text.

249. THE FEDERALIST NO. 80, at 535 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). For another example, see A Landholder V, *reprinted in* 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 483 (Merrill Jenson ed., 1978) ("A perfect uniformity must be observed thro the whole Union, or jealousy and unrighteousness will take place, and for a uniformity, one judiciary must pervade the whole.").

apply federal common law or to enforce certain federal procedural requirements. In the 1952 decision of *Dice v. Akron, Canton & Youngstown Railroad Co.*,[250] for example, the Court addressed whether a state court should apply state law or federal common law to determine the validity of releases of claims under the Federal Employers' Liability Act. In holding that federal law governs, the Court explained that "only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes."[251] More recently, in *Felder v. Casey*,[252] the Court addressed whether a state court could enforce a state notice-of-claim statute in a civil rights case under 42 U.S.C. § 1983. In holding that the state court could not enforce the statute, the Court explained that "enforcement of such statutes in § 1983 actions brought in state court will frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court. States may not apply such an outcome-determinative law when entertaining substantive federal rights in their courts."[253] These kinds of cases are based on an apparent constitutional presumption that a federal statute should have the same meaning in the first instance whether enforced in a state or a federal court. An interpretive methodology that enables a state or federal court to make law for strategic, policy-based reasons—reasons that by their nature are not based on a metric that all other state and federal judges could reasonably be expected to employ if deciding the same case—would appear to be inconsistent with this principle.

It is worth noting that there is also an apparent constitutional presumption that state law should have the same meaning whether enforced in a state or federal court. In the watershed case of *Erie Railroad Co. v. Tompkins*,[254] the Court held that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."[255] Today, the United States Courts of Appeals uniformly interpret state statutes in the way that they believe that the state's highest court would interpret the same statute in the same context. For example, in *KLC, Inc. v. Trayner*,[256] the United States Court of Appeals for the Second Circuit

250. 342 U.S. 359 (1952).
251. *Id.* at 361.
252. 487 U.S. 131 (1988).
253. *Id.* at 141.
254. 304 U.S. 64 (1938).
255. *Id.* at 78.
256. 426 F.3d 172 (2d Cir. 2005).

recently explained that "[i]n determining the meaning of state law, we must carefully predict how the state's highest court would rule if confronted with the issue, including how it would resolve any ambiguity in the statute."[257] Every other circuit court appears to take the same approach.[258] A premise of this approach is that state law should have the same content in the same context as a rule of decision in both state and federal courts.

If an inferior federal court were to self-consciously make new federal law in strategic ways in interpreting federal law, it would deny to the federal law so made the very supremacy that characterizes a law as "federal" under the Constitution. Such law would not operate upon its making as the "supreme Law of the Land." On this point, the Supreme Court of course stands on different footing than inferior federal courts that lack nationwide jurisdiction. The Supreme Court has nationwide jurisdiction. When the Supreme Court declares something to be the applicable federal rule of decision, it states a federal law that it can purport to be the law that every state and federal court should apply in the future in the same context. There would be two problems or anomalies, however, with recognizing a

257. *Id.* at 175-76.

258. *See* United States v. Atiyeh, 402 F.3d 354, 369 (3d Cir. 2005) ("Because we are interpreting a state statute, we must determine how the Pennsylvania Supreme Court would rule if presented with this case."); Marvin Lumber and Cedar Co. v. PPG. Indus., 401 F.3d 901, 917 (8th Cir. 2005) ("[T]he decision here, one interpreting the Minnesota statute, is reviewed de novo. Because the Minnesota Supreme Court has not decided the issue before us, we must predict how the state's highest court would rule if faced with the same question."); United States v. Riccardi, 405 F.3d 852, 871 (10th Cir. 2005) ("This court is bound to interpret Kansas law as would a Kansas Court. . . . . Where no controlling state court decision exists, the federal court must attempt to predict what the state's highest court would do.") (internal quotation marks and citation omitted); Bogosian v. Woloohojian Realty Corp., 323 F.3d 55, 71 (1st Cir. 2003) ("Absent state-court case law on point, wherever practicable we undertake a fair prediction as to the course the highest state court would take were it presented with the same legal issue."); Himmel v. Ford Motor Co., 342 F.3d 593, 598 (6th Cir. 2003) ("Because the question at issue has not yet been resolved by the Ohio courts, we must attempt to predict what the Ohio Supreme Court would do if confronted with the same question."); Dyack v. N. Mariana Islands, 317 F.3d 1030, 1034 (9tb Cir. 2003) ("In construing a state statute, we are bound by the pronouncements of the state's highest court. . . . If the state's bighest court has not addressed the issue, then we must predict bow that court would interpret the statute.") (citation omitted); Freeman v. First Union Nat'l, 329 F.3d 1231, 1232 (11tb Cir. 2003) ("We decide novel questions of state law the way it appears the state's highest court would.") (internal quotation marks and citation omitted); Wells v. Liddy, 186 F.3d 505, 527-28 (4th Cir. 1999) ("As a court sitting in diversity, we have an obligation to interpret the law in accordance with the Court of Appeals of Maryland, or where the law is unclear, as it appears that the Court of Appeals would rule."); Brownsburg Area Patrons Affecting Change v. Baldwin, 137 F.3d 503, 507 (7th Cir. 1998) ("Federal courts must interpret a state statute as that state's courts would construe it."); Occidental Chem. Corp. v. Elliott Turbomachinery Co., 84 F.3d 172, 175 (5tb Cir. 1996) ("Our interpretation of a state statute is not accomplished with unfettered discretion. The federal court is bound to answer the question the way the state's highest court would resolve the issue.").

power in the Supreme Court to make new law in interpreting federal statutes in ways that inferior federal courts or state courts may not. First, the Supreme Court would appear to owe the same respect to the federal lawmaking procedures that the Constitution specifies as state courts and inferior federal courts owe them. If the existence of such procedures operates as a limitation on the lawmaking authority of state courts and inferior federal courts, it may operate as a limitation on the lawmaking authority of the Supreme Court as well.

Second, if the Supreme Court has power to make federal law that state courts and inferior federal courts lack, the Court must be justified in applying a rule of decision that a state court or an inferior federal court would not have been justified in applying in the first instance. In other words, the Supreme Court must be justified in reversing a state court or an inferior federal court for the "error" of not applying a federal rule of decision that the state or inferior federal court had no authority to apply in the first instance. The Supreme Court has held that, in exercising its appellate jurisdiction, it may apply different law than a lower court could have applied when Congress has retroactively changed the law during the pendency of litigation.[259] It has justified this practice, however, on the ground that courts have a duty to "decide according to existing laws" no matter what the stage of litigation is.[260] This ground of decision—that all courts must "decide according to existing laws"—seemingly contradicts any claim that the Supreme Court is uniquely justified in dynamically interpreting federal statutes to set new federal policy.

Again, none of this is to deny the reality that different courts give different interpretations to the same statute in materially similar contexts. The constitutional presumption that animates cases like *Dice*, *Felder*, and *Erie* is that a state or federal court *should strive*, as far as is possible, to interpret state or federal statutory law, at the appropriate level of generality, as it exists relative to the governed transaction, not as it should be going forward from the interpretive decision. Though in fact different courts might give the same statute a different meaning in the same context under this principle, they would do so as a consequence of trying to implement statutory law as Congress made it, not because it is proper for a court to self-

259. *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 226 (1995).

260. *See id.* at 227 ("It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must 'decide according to existing laws.'" (quoting United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 109 (1801) (Marshall, J.))).

consciously make a statute serve a policy going forward that the court believes it should serve.

Indeed, legal philosophers have described the idea that underlies anti-forum-shopping measures—essentially that courts should treat like cases alike—as a fundamental principle of fairness for any legal system.[261] As put by Chief Justice John Marshall in 1817 in a letter advocating that judicial decisions be reported, "[i]t is certainly to be wished that independent tribunals having concurrent jurisdiction over the same subject should concur in the principles on which they determine the causes coming before them."[262] If this notion is correct, constitutional limitations on the way in which state courts properly interpret federal statutes should inform our understandings of the judicial power of federal courts in interpreting federal statutes. Specifically, if the Constitution contemplates that state courts must interpret federal statutes as faithful agents of Congress and that federal and state courts must strive to interpret federal statutes in the same manner, it would stand to reason that state courts and federal courts should strive to interpret federal statutes in such a way as to give effect to actual legislative directives.

CONCLUSION

The question of how courts ought to interpret federal statutes implicates not only the horizontal relationship between the legislative power of Congress and the judicial power of federal courts; it also implicates the vertical relationship between the federal legislative power and state judicial powers. In the first three decades following

261. *See* RONALD DWORKIN, LAW'S EMPIRE 165 (1986) (arguing that political morality "requires government to speak with one voice, to act in a principled and coherent manner toward all its citizens, to extend to everyone the substantive standards of justice or fairness it uses for some"); NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 150 (1978) (describing it as a "principle of justice in adjudication . . . to treat like cases alike, and therefore to treat this case in a way in which it will be justifiable to treat future like cases"); John Finnis, *Natural Law: The Classical Tradition*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 55 (Jules Coleman & Scott Shapiro eds., 2002) ("[J]udges confronted by an issue not settled by the plain meaning of a constitution or statute ought to try to settle it in the way that it would be settled by any other judges hearing the case on the same day in the same realm."). Similarly, Finnis points out that: "In the working of the legal process, much turns on the principle—a principle of fairness—that litigants (and others involved in the process) should be treated by judges (and others with power to decide) *impartially*, in the sense that they are as nearly as possible to be treated hy each judge as they would be treated by every other judge." John Finnis, *Natural Law and Legal Reasoning*, *in* NATURAL LAW THEORY: CONTEMPORARY ESSAYS 134, 150 (Robert P. George ed., 1992).

262. Letter from Chief Justice John Marshall to Congress (Feb. 7, 1817), *in* 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1246 (1953).

ratification, state courts interpreted federal statutes in ways understood to be geared toward implementing actual congressional directives. If state courts interpreted their own statutes in certain cases without apparent regard for actual legislative expectations, the practice of state courts in interpreting federal statutes may well evidence an understanding that state courts were bound to interpret federal statutes according to manifest congressional expectations. This understanding certainly accords with the import of the Supremacy Clause: to ensure that state courts faithfully enforce as the "supreme law of the Land" federal statutes that Congress has properly enacted. This understanding may have implications for the interpretation of federal statutes by federal courts. Specifically, it may suggest that to respect the federal lawmaking procedures that the Constitution provides and to safeguard the supremacy of federal law enacted pursuant to those procedures, federal courts should strive to interpret federal statutes as faithful agents of Congress as well.

This Article does not address whether, today, some form of textualism or purposivism would better serve as a means of implementing congressional directives in any given case. As explained, there are examples of state courts in the decades following ratification seeking to implement actual congressional intent through both textual and purposive analyses. The point for now is that state courts, employing various interpretive principles, appear to have understood their role in interpreting federal statutes during the first three decades of the Union to be to implement actual directives of Congress.