

2022

## **When a Statute Comes with a User Manual: Reconciling Textualism and Uniform Acts**

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# WHEN A STATUTE COMES WITH A USER MANUAL: RECONCILING TEXTUALISM AND UNIFORM ACTS

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## ABSTRACT

*This Article develops an interpretive theory for statutes that originate as Uniform Acts promulgated by the Uniform Law Commission. Although overlooked in the literature on statutory interpretation, state-enacted Uniform Acts are ubiquitous. They shape our life cycles—governing marriage, parentage, divorce, and death—and structure trillions of dollars in daily commercial transactions.*

*Largely focusing on textualism, today’s dominant form of statutory interpretation, we analyze the interpretive consequences of two unusual features of state-enacted Uniform Acts. First, the text of every Uniform Act directs courts to interpret it to “promote uniformity.” Second, each provision is accompanied by an official explanatory comment, analogous to a user manual for interpreters. We argue that, in light of these features, foundational textualist principles obligate courts to consider legislative intent as expressed in the official comments—what textualists would otherwise dismiss as legislative history—when they interpret a statute originating as a Uniform Act.*

*More specifically, this Article explores what we call the “directives” and “signals” that state legislatures send when they enact a Uniform Act. As enacted statutory text, the promote-uniformity clause directs courts to treat the official comments as persuasive authority on the statute’s meaning. Moreover, even if a*

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The authors thank David Barron, Turney Berry, Ruth Bloch Rubin, Albert Choi, John Coates, Bill Eskridge, Tom Gallanis, Tara Leigh Grove, Howell Jackson, Louis Kaplow, Alex King, John Langbein, John Manning, Ruth Okediji, John Pottow, Tim Schnabel, Robert Stein, Jeff Sutton, Mark Tushnet, Adrian Vermeule, Larry Waggoner, and workshop participants at Harvard, Michigan, and the Annual Meeting of the American Law and Economics Association for helpful comments and suggestions, and Eric Zilber for excellent research assistance.

In accordance with Harvard Law School policy on conflicts of interest, Sitkoff discloses certain outside activities, one or more of which may relate to the subject matter of this paper, at <https://tinyurl.com/ycuut88c>. Sitkoff serves as a Uniform Law Commissioner, and he served on the drafting committee for some of the Uniform Acts discussed in this article. The views expressed in this paper are those of the authors and do not necessarily reflect the views of the Uniform Law Commission.

*legislature enacts only a portion of a Uniform Act, the legislature signals that courts should treat the comments as persuasive authority by virtue of the choice to incorporate language from a Uniform Act rather than some alternative text.*

*Moving from theory to practice, we develop a canon of construction for interpreting this significant but under-studied species of positive law. We also present a series of puzzles and complications arising from “hybrid” enactments of bespoke and Uniform statutory language. More generally, by colliding textualist theory with the two-step political economy of state-enacted Uniform Acts, the Article broadens our understanding of textualism and adapts it to this critical but overlooked category of statute.*

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## INTRODUCTION

Every day, courts across the country interpret a distinctive species of statute—a state-enacted Uniform Act. These statutes are first drafted by the Uniform Law Commission (ULC) and then enacted by state legislatures.<sup>1</sup> A quasi-public legislative body constituted by members appointed under state law, the ULC drafts and promulgates for enactment by the states model statutes “on subjects on which uniformity across the states is desirable and practicable.”<sup>2</sup>

Americans encounter Uniform Acts all the time. They help to structure our life cycles, from birth and adoption to marriage, divorce, and death.<sup>3</sup> Broadly adopted Uniform Acts govern, among other things, parentage, child custody, premarital and marital agreements, inheritance, and even the definition of what it means to be legally deceased.<sup>4</sup> Our daily commercial dealings, too, are shaped by the ULC’s work, including the Uniform Commercial Code, which governs the sale of goods and secured transactions,<sup>5</sup> and the Uniform Electronic Transactions Act, the foundation for trillions of dollars in digital commerce.<sup>6</sup> Because the ULC’s work is integral to contemporary life, the task of developing

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<sup>1</sup> *FAQs: What Is the Uniform Law Commission?*, UNIF. L. COMM’N [hereinafter ULC, *FAQs: What Is the Uniform Law Commission*], <https://www.uniformlaws.org/aboutulc/faq#What%20is%20the%20Uniform%20Law%20Commission?> (last visited May 11, 2022). The ULC has historically been known as the National Conference of Commissioners of Uniform State Laws (NCCUSL).

<sup>2</sup> *Id.*

<sup>3</sup> One measure of increased recent attention to the importance of Uniform Acts is Professor Thomas W. Mitchell’s selection as a recipient of the MacArthur Foundation’s “genius” grant for his work as the reporter for the Uniform Partition of Heirs Property Act, designed to address abuses in the partition of property held via tenancies in common. *See Thomas Wilson Mitchell*, MACARTHUR FOUND., <https://www.macfound.org/fellows/class-of-2020/thomas-wilson-mitchell> (last visited May 11, 2022); Thomas W. Mitchell, *Restoring Hope for Heirs Property Owners: The Uniform Partition of Heirs Property Act*, 40 STATE & LOC. L. NEWS 6, 6 (2016). Recent editions of the Bluebook also reflect increased awareness of the ULC’s role in statutory drafting. *See, e.g.*, THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 12.9.4, at 131 (Columbia L. Rev. et al. eds., 21st ed. 2020) (instructing that, “[w]hen citing to a uniform act itself, and not as the law of a particular state,” writers should “cite it as a separate code” and “[i]ndicate the author’s name parenthetically,” and giving as an example “UNIF. TR. CODE § 105 (UNIF. L. COMM’N 2000)”).

<sup>4</sup> *See, e.g.*, UNIF. ANATOMICAL GIFT ACT § 3 (UNIF. L. COMM’N 2009); UNIF. CHILD CUSTODY JURISDICTION AND ENF’T ACT § 101 cmt. (UNIF. L. COMM’N 1997); UNIF. DETERMINATION OF DEATH ACT § 1 (UNIF. L. COMM’N 1980); UNIF. MARRIAGE AND DIVORCE ACT § 102(1) (UNIF. L. COMM’N 1973); UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT § 3 (UNIF. L. COMM’N 2012); UNIF. PROB. CODE § 1-102 (UNIF. L. COMM’N 2010); UNIF. SIMULTANEOUS DEATH ACT § 2 (UNIF. L. COMM’N 1993).

<sup>5</sup> U.C.C. § 2-102 (AM. L. INST. & UNIF. L. COMM’N 1951); U.C.C. § 9-101 (AM. L. INST. & UNIF. L. COMM’N 2010).

<sup>6</sup> *See* UNIF. ELEC. TRANSACTIONS ACT § 6 cmt. (UNIF. L. COMM’N 1999).

a comprehensive, theoretically sound approach to interpreting state-enacted Uniform Acts is critical. This Article begins that work.<sup>7</sup>

Our central claim is that state-enacted Uniform Acts are meaningfully different from conventional statutes in ways that bear directly on how they should be interpreted. Start with content. Every Uniform Act includes a provision that directs courts to give “consideration” to “promot[ing] uniformity of the law” in construing the text.<sup>8</sup> And every Uniform Act is promulgated by the ULC as an integrated package of both blackletter text and official explanatory comments. Much like a user manual, the comments elaborate how the text is meant to operate, discussing the provision’s purpose and intended meaning.<sup>9</sup> The enactment process is also different. Unlike the standard Schoolhouse Rock legislative model,<sup>10</sup> in which state lawmakers craft and then enact bespoke statutory language, a state-enacted Uniform Act follows a two-step model in which legislatures either accept the ULC’s off-the-rack terms or modify them.<sup>11</sup> Often, a legislature will simply enact the ULC’s text—including the promote-uniformity language—verbatim.

For nontextualists (whether intentionalists or purposivists), these features that distinguish Uniform Acts from other kinds of statutes are largely congenial to the interpretive enterprise.<sup>12</sup> Nontextualists are increasingly attentive to the

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<sup>7</sup> In so doing, this Article builds on a growing literature that seeks to move the field of statutory interpretation beyond an exclusive focus on federal courts and the federal lawmaking process. *See, e.g.*, Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *YALE L.J.* 1750 (2010) (state statutes); Tara Leigh Grove, *Presidential Laws and the Missing Interpretive Theory*, 168 *U. PA. L. REV.* 877 (2020) (presidential directives); Lumen N. Mulligan & Glen Staszewski, *Civil Rules Interpretive Theory*, 101 *MINN. L. REV.* 2167 (2017) (Federal Rules of Civil Procedure); Jennifer Nou, *Regulatory Textualism*, 65 *DUKE L.J.* 81 (2015) (agency regulations); Kevin M. Stack, *Interpreting Regulations*, 111 *MICH. L. REV.* 355 (2012) (same); Jane S. Schacter, *The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy*, 105 *YALE L.J.* 107 (1995) (statutes promulgated via ballot initiative). The Article also contributes to a growing recognition that not all statutes are drafted by lawmakers themselves. *See, e.g.*, Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 *N.Y.U. L. REV.* 575, 583 (2002) (finding that even in Congress, “lobbyists are regularly involved in drafting”). Indeed, because states are increasingly becoming sites of methodological interpretive innovation, examining state interpretive practice can reshape the assumptions underlying academic debates over statutory interpretation and thereby “bring to the fore an entirely new category of methodological questions.” Gluck, *supra*, at 1862.

<sup>8</sup> *See, e.g.*, UNIF. TR. CODE § 1101 (UNIF. L. COMM’N 2010) (“In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.”).

<sup>9</sup> *See infra* Part I.B.

<sup>10</sup> *See I’m Just a Bill*, WIKIPEDIA, <https://perma.cc/X97T-47AS> (last visited Apr. 21, 2022).

<sup>11</sup> *See infra* Part I.C.

<sup>12</sup> In using the terms “intentionalism” and “purposivism” and grouping them together, we follow the

specific features of particular legislative processes.<sup>13</sup> The ULC’s expression of its intent or purpose via the comments provides useful information about what the statute’s drafters wanted it to do.<sup>14</sup> The same goes for the promote-uniformity clause, which can help interpreters identify “how the particular statute . . . fit[s] into the legal system as a whole.”<sup>15</sup> For nontextualists, therefore, the official comments to a Uniform Act slot in easily as persuasive authorities to the statute’s intended purpose and meaning.

Things look quite different for textualists. In using this term (like purposivism or intentionalism), we are describing in broad strokes what is an increasingly rich and diverse interpretive approach.<sup>16</sup> Nevertheless, textualists

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standard conventions of the literature on statutory interpretation. *See, e.g.*, Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 124 (2009) (characterizing the central debate among statutory interpretation theorists as “between textualists on the one side and intentionalists and purposivists on the other”); Michael Francus, *Digital Realty, Legislative History, and Textualism After Scalia*, 46 PEPP. L. REV. 511, 513 (2019) (emphasizing the role of legislative history in the debate between purposivists and textualists). As reflected in the moniker, purposivists seek to discern a statute’s purpose(s). *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (instructing interpreters to “[d]ecide what purpose ought to be attributed to the statute and to any subordinate provision of it”); ROBERT A. KATZMANN, *JUDGING STATUTES* 31 (2014) (“The task of the judge is to make sense of legislation in a way that is faithful to Congress’s purposes.”); Stack, *supra* note 7, at 385 (making a similar argument as to Congress’s formal statements of purpose). Meanwhile, intentionalists prioritize (at least when compared to textualists) the intentions of the enacting legislature. *See, e.g.*, Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 351–52 (2005) (“[I]ntentionalists call upon courts to try to enforce the directives that members of the enacting legislature understood themselves to be adopting.”).

<sup>13</sup> *See, e.g.*, KATZMANN, *supra* note 12, at 54 (arguing in favor of “discern[ing] legislative meaning” by “drawing upon the materials of the legislative process”); VICTORIA NOURSE, *MISREADING LAW, MISREADING DEMOCRACY* 2 (2016) (arguing that American lawyers need to develop “greater understanding about how Congress works”).

<sup>14</sup> *See* HART & SACKS, *supra* note 12, at 1377 (counseling that interpreters should “accept[ ]” any “formally enacted statement of purpose”); KATZMANN, *supra* note 12, at 31 (arguing that “the fundamental task for the judge is to determine what Congress was trying to do in passing the law”).

<sup>15</sup> HART & SACKS, *supra* note 12, at 1377.

<sup>16</sup> As is true of any mature area of scholarly inquiry, textualism is increasingly characterized by robust within-tradition debate. *See, e.g.*, Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 267 (2020) (describing interpretive divisions within textualism). A salient contemporary example is the Supreme Court’s decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which exposed disagreements about the assumptions and principles that undergird textualist interpretation, including about what it means to apply the original public meaning of a statute. *Compare id.* at 1750 (arguing that the dissenting justices’ view amounted to the contention that “few in 1964 expected [the] result” that Title VII protects against discrimination on the basis of sexual orientation), *with id.* at 1767 (Alito, J., dissenting) (arguing that “[i]n 1964, ordinary Americans reading the text of Title VII” would have understood the phrase “discrimination because of ‘sex’” as “discrimination because of a person’s biological sex, not sexual orientation or gender identity”). *See generally*, *e.g.*, Josh Blackman & Randy Barnett, *Justice Gorsuch’s Halfway Textualism Surprises and Disappoints in the Title VII Cases*, NAT’L REV. (June 26, 2020, 6:30 AM), <https://www.nationalreview.com/2020/06/justice-gorsuch-title-vii-cases-half-way-textualism-surprises-disappoints/> (criticizing the majority’s decision from a textualist

share some foundational understandings about how to interpret a statute.<sup>17</sup> In particular, textualists tend to deny that materials other than the statutory text, including legislative history, may be used to determine the statute's meaning.<sup>18</sup> For textualists of all stripes, therefore, the official comments to Uniform Acts would seem to be out of bounds.

Not so. Put in its most provocative form, our claim is that textualism's core commitments require textualists interpreting an enacted Uniform Act to treat the Act's official comments as persuasive guides to the state's meaning.<sup>19</sup> More specifically, we argue that when a legislature enacts a Uniform Act unmodified, the statute's promote-uniformity provision *directs* courts to ascribe juridical status to the official comments of an enacted Uniform Act. The text itself requires courts to treat the commentary as persuasive (albeit not binding) authority in interpreting a state-enacted Uniform Act.<sup>20</sup>

Of course, a legislature need not adopt the ULC's promulgated text wholesale. It may modify the ULC's text. These modifications may be minor, such as tinkering with the language to fit the state's drafting conventions, or major, including explicit rejection of key statutory terms because of outright policy disagreement.<sup>21</sup> In either case, we contend, the statutory text charges

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perspective); Mitchell N. Berman & Guha Krishnamurthi, *Bostock Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 72 (2021) (arguing that the majority's decision was inconsistent with textualist principles); Nelson Lund, *Unleashed and Unbound: Living Textualism in Bostock v. Clayton County*, 21 FEDERALIST SOC'Y REV. 158, 167 (2020) (calling *Bostock*'s "application of textualis[m] . . . fatally flawed"). So, too, across the states, there are differences in how textualist theory has been implemented. *See, e.g.*, Gluck, *supra* note 7, at 1755–56. For a recent critique of textualism as fundamentally indeterminate, see Cary Franklin, *Living Textualism*, 2021 SUP. CT. REV. 119 (discussing the *Bostock* decision).

<sup>17</sup> *See infra* Part II.

<sup>18</sup> *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 33 (2012) [hereinafter SCALIA & GARNER, *READING LAW*] (arguing that the "purpose" of the text "is to be gathered only from the text itself"); *id.* at 388 ("[U]se of legislative history is not just wrong; it violates constitutional requirements of nondelegability, bicameralism, presidential participation, and the supremacy of judicial interpretation in deciding the case presented."); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 31 (Amy Gutmann ed., 1997) [hereinafter SCALIA, *MATTER OF INTERPRETATION*] ("I object to the use of legislative history on principle, since I reject the intent of the legislature as the proper criterion of the law."); *see also* KATZMANN, *supra* note 12, at 39 (reflecting that "[t]extualism . . . involves an assault on the dependence on any extratextual source in determining statutory meaning," with "[l]egislative history . . . a central target").

<sup>19</sup> *See infra* Part III.A.

<sup>20</sup> *Cf.* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2090 (2002) (contending that Congress may and should promulgate interpretive rules); Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 871 (2015) (defending a "purposivist theory of agency statutory interpretation" on the ground that "[r]egulatory statutes . . . impose a duty on agencies to carry out [their] powers in accordance with the principles or purposes the statutes establish").

<sup>21</sup> *See infra* Part I.C.

courts with assessing the strength of the *signal* the legislature sends by adopting some portion of the ULC's language.<sup>22</sup> The stronger the signal—that is, the less the enacted text departs from the Uniform Act—the more that textualist commitments point to treating the ULC's accompanying commentary as persuasive (but again, not binding) authority. Put another way, the more of the Uniform Act the legislature adopts, the stronger the inference that, by virtue of enacting *these* words rather than some alternative, the text's meaning at the time of its enactment by the state reflects whatever meaning the ULC ascribed to that text.

This argument has significant practical stakes. Textualism is today's reigning interpretive approach.<sup>23</sup> But courts have struggled to find a consistent way to fit Uniform Acts into a textualist framework. Some have overlooked the distinctive nature of state-enacted Uniform Acts, treating them like bespoke, Schoolhouse Rock statutes. Thus, for instance, in a case involving a provision taken verbatim from the Uniform Probate Code, the Alabama Supreme Court warned, “[W]e are not at liberty to ponder whether and how *the legislature might have written* the statute differently to further its intention in the case now before us.”<sup>24</sup> By not recognizing that the legislature enacted the ULC's text wholesale,

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<sup>22</sup> See *infra* Part III.B.

<sup>23</sup> See Harv. L. Sch., *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg> (“[W]e’re all textualists now . . . .”) (timestamp: 8:28); see also, e.g., William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 532 (2013) (“[V]irtually all theorists and judges are ‘textualists,’ in the sense that all consider the text the starting point for statutory interpretation and follow statutory plain meaning if the text is clear.”); Gluck, *supra* note 7, at 1758 (characterizing textualism as the “controlling interpretive approach” in many states). One way to appreciate textualism’s ascendancy is to see how deeply textualist critiques have penetrated opponents’ own arguments and assumptions. Cf. Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 2 (2006) (discussing the success textualists have had in discrediting purposivism). Both textualists and nontextualists “alike give every indication of caring *both* about the meaning intended by the enacting legislature *and* about the need for readers to have fair notice of that meaning, as well as about some additional policy-oriented goals.” Nelson, *supra* note 12, at 353. John Manning, Dean of Harvard Law School and today’s leading academic textualist, similarly observes that contemporary nontextualists all “pay close attention to text, structure, sources of technical or specialized meaning, and maxims of [statutory] construction.” John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 85 (2006) [hereinafter Manning, *What Divides*]. Abbe Gluck and Richard Posner suggest another way to measure the increasing influence of textualism. They note that younger judges—those who went to law schools in the 1980s or later—are more subject to the “general influence of formalism” than their older colleagues. Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1312 (2018). Gluck and Posner comment, “Trends in legal education, including the new courses in statutory interpretation that tend to highlight the influence of textualism on the field, alongside the virtual disappearance of legal process theory from most American law school curricula, are likely playing an important role in this generational shift.” *Id.*; see also Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 793 (2018) (arguing that “most judges begin the interpretive inquiry with the words of a statute”).

<sup>24</sup> Gray v. Gray, 947 So. 2d 1045, 1050 (Ala. 2006) (emphasis added).



these courts risk maladroit application of textualist principles, such as looking to unrelated nonuniform statutes to give meaning to a similar term, while remaining oblivious to answers given in the official comments.<sup>25</sup> Such an approach, we argue, is inconsistent with the legislature's choice to enact the ULC's text rather than another text.<sup>26</sup> For these courts, our analysis reconciles the superficial tension between textualist theory on the one hand and treating the official comments as persuasive authority on the other.

Other courts, in contrast, have recognized that the distinctive content and two-step political economy of a state-enacted Uniform Act have important interpretive consequences. Thus, some courts, including the U.S. Supreme Court, have relied on the accompanying commentary to shed light on the meaning of a state-enacted Uniform Act.<sup>27</sup> But these courts have done so haltingly and ad hoc, lacking a conceptual architecture and accompanying vocabulary to justify their approach.<sup>28</sup> The closest they come are statements such as this one from the New Hampshire Supreme Court: "When interpreting a uniform law . . . 'the intention of the drafters of a uniform act becomes the legislative intent upon enactment.'"<sup>29</sup> For these courts, our approach provides a conceptual foundation to ground their interpretive instincts. While some courts now hold that they *may* look to the comments because they are interpreting text that began life as part of a Uniform Act,<sup>30</sup> we show that on textualist grounds they *must* do so.

Against this backdrop, we propose a new canon of construction for textualist courts confronting uncertain statutory language originating in a Uniform Act. Courts should first determine whether the provision at issue is part of a state-enacted Uniform Act and whether it is governed by a promote-uniformity clause. If so, they should acknowledge the legislature's textual directive by treating the official comments as persuasive guides to the provision's meaning. In the absence of a promote-uniformity clause, courts should treat the comments as persuasive authority in proportion to the strength of the legislature's signal,

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<sup>25</sup> See *infra* Part III.C. They also risk methodological inconsistency across cases. See, e.g., *Norwood v. Barclay*, 298 So. 3d 1051, 1054–55 (Ala. 2019) (observing that the provision at issue was "modeled" on a provision in the Uniform Probate Code and considering the comment accompanying that provision).

<sup>26</sup> See *infra* Parts III.A, III.B.

<sup>27</sup> See, e.g., *Sveen v. Melin*, 138 S. Ct. 1815, 1821 (2018) (citing comment to § 2-804 of the Uniform Probate Code).

<sup>28</sup> See *infra* Parts III.C, IV.

<sup>29</sup> *Hodges v. Johnson*, 177 A.3d 86, 93 (N.H. 2017) (quoting *In re Ball & Ball*, 123 A.3d 719, 722 (2015)).

<sup>30</sup> See, e.g., *William Baude & Ryan D. Doerfler, The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 540 (2017) (observing that "[m]any tenets of statutory interpretation . . . allow consideration of outside information . . . *only* if the statute's text is unclear or ambiguous").

assessing the closeness of the provision as enacted to the version as promulgated by the ULC. The smaller the legislature's departure from the ULC's promulgated text, the stronger the signal that the comments should be treated as persuasive guides to the statute's meaning.

Finally, we present a series of puzzles and complications arising from "hybrid" cases in which the legislature combines Uniform and bespoke texts. These statutes are difficult to interpret because a legislature's choice to draw on the ULC's text abrades against other types of textual evidence. Consider two examples. What if a legislature updates preexisting statutory language by inserting language from a Uniform Act, giving rise to a hybrid statute that includes both legacy and Uniform text? What if a legislature omits some of the Uniform text without enacting a substitute provision? These and other similarly thorny questions are complex admixtures, difficult to place on the spectrum from fully customized statutory language to wholesale adoption of the ULC's statutory terms. The ambiguous nature of the legislature's signal makes them difficult (if not impossible) to resolve conclusively. For these questions, our aim is to identify and frame, teeing them up for further analysis. We also consider how courts should treat the ULC's internal legislative history, including early drafts or floor statements by commissioners, and why they are different from the official comments that accompany a promulgated act.

While beyond the scope of this paper, our analysis bears on other sources of domestic and international positive law that, like Uniform Acts, also contain user manuals in the form of accompanying commentary. For instance, the advisory notes to the Federal Rules of Civil Procedure, Criminal Procedure, and Evidence are often treated as persuasive sources of authority when interpreting the blackletter text.<sup>31</sup> Indeed, the Supreme Court has observed that the notes are "particularly relevant" when Congress makes no changes to the Advisory Committee's initial draft of the rules—a similar two-step drafting process to the one that produces state-enacted Uniform Acts.<sup>32</sup> But the Court has not provided

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<sup>31</sup> See, e.g., *Tome v. United States*, 513 U.S. 150, 160 (1995) (explaining that the Supreme Court "relie[s]" on the "well-considered [Advisory] Notes as a useful guide in ascertaining the meaning of the [Federal] Rules [of Evidence]"); *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986) (holding that the "construction given by the [Advisory] Committee" to a provision of the Federal Rules of Criminal Procedure "is 'of weight'") (quoting *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 444 (1946)); *Oviedo v. Wash. Metro. Area Transit Auth.*, 948 F.3d 386, 396 (D.C. Cir. 2020) (considering the advisory notes accompanying the 2010 revision to the Federal Rules of Civil Procedure); see also Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1158 (2002) (arguing that the Advisory Committee Notes to the Federal Rules of Civil Procedure are authoritative source materials for textualists).

<sup>32</sup> *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 165 n.9 (1988).

a conceptual frame for *why* the notes are especially relevant in such circumstances.<sup>33</sup> Our analysis could be adapted in future work to fill that void.<sup>34</sup>

International law also contains relevant analogues. For example, much like the ULC in the domestic context, the United Nations Commission on International Trade Law (UNCITRAL) was established in the mid-1960s “to further the progressive harmonization and unification of the law of international trade.”<sup>35</sup> Provisions of the U.S. Code adopting UNCITRAL’s model laws, including chapter 15 of the Bankruptcy Code, contain direct analogues to the ULC’s promote-uniformity clauses.<sup>36</sup> And UNCITRAL’s model laws are accompanied by “travaux préparatoires”—rough equivalents of the ULC’s comments. These materials are often treated by domestic courts as important guides to the intended operation of the blackletter text.<sup>37</sup> Our conceptual framework may therefore be readily adapted for interpreting model acts promulgated by the ULC’s international equivalents.

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<sup>33</sup> For instance, though Justice Scalia wrote for the majority in *United States v. Owens*, 484 U.S. 553 (1988), which treated the Advisory Committee’s Notes on Rule 801 of the Federal Rules of Evidence as authoritative sources of legislative intent, *id.* at 562, he revisited the issue in a later concurrence. He wrote the following:

Having been prepared by a body of experts, the Notes are assuredly persuasive scholarly commentaries—ordinarily the most persuasive—concerning the meaning of the rules. But they bear no special authoritative weight as the work of the draftsmen, any more than the views of Alexander Hamilton (a draftsman) bear more authority than the views of Thomas Jefferson (not a draftsman) with regard to the meaning of the Constitution. It is the words of the Rules that have been authoritatively adopted—by this Court, or by Congress if it makes a statutory change.

*Tome*, 513 U.S. at 167 (Scalia, J., concurring in part and concurring in the judgment).

<sup>34</sup> Our approach also has potential state-level extensions. For example, when interpreting state law, California state courts often look to the comments made by the state’s Law Revision Commission. *See, e.g.*, *Est. of Eimers v. Eimers*, 262 Cal. Rptr. 3d 639, 642–43 (Cal. Ct. App. 2020), *review denied* (July 29, 2020). The Commission is an “independent state agency,” whose mission is to “assist[] the Legislature and Governor by examining California law and recommending needed reforms. *See General Information*, CALIF. L. REVISION COMM’N, <http://www.clrc.ca.gov> (last visited May 11, 2021).

<sup>35</sup> *Frequently Asked Questions—Mandate and History*, UNITED NATIONS COMM’N ON INT’L TRADE L., [https://uncitral.un.org/en/about/faq/mandate\\_composition/history](https://uncitral.un.org/en/about/faq/mandate_composition/history) (last visited May 11, 2022). Our thanks to John Pottow and Tim Schnabel for drawing our attention to this issue.

<sup>36</sup> *See, e.g.*, 11 U.S.C. § 1508 (implementing domestically UNCITRAL’s Model Law on Cross-Border Insolvency and providing that “[i]n interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions”); Convention on Int’l Interests in Mobile Equip., art. 5.1., Nov. 16, 2001, T.I.A.S. 06-301.2, 2307 U.N.T.S. 285 (ratified by the United States as a self-executing treaty) (“In the interpretation of this Convention, regard is to be had to its purposes as set forth in the preamble, to its international character and to the need to promote uniformity and predictability in its application.”).

<sup>37</sup> *See, e.g.*, *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) (“Because a treaty ratified by the United States is not only the law of this land, . . . but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) . . .”).

The remainder of this Article proceeds as follows. Part I describes the unique content and political economy of state-enacted Uniform Acts, beginning with the ULC's drafting process and ending with enactment at the state level. Part II provides a brief overview of textualist theory, identifying foundational assumptions common across textualism's various flavors. Part III turns to the consequences of the distinctive content and two-step political economy of Uniform Acts for textualist theory. In developing our proposed interpretive canon, we focus first on a legislature's decision to enact a Uniform Act without modification, including the promote-uniformity clause, and then turn to the complications that result when the legislature omits the promote-uniformity clause. Part IV explores a series of challenging hybrid cases and other puzzles that arise outside the heartland of a clean enactment of a full Uniform Act. A brief conclusion follows.

## I. THE MAKING OF UNIFORM ACTS

We begin with a primer on the making of Uniform Acts, including the ULC's history, institutional structure, and operating procedures. We then turn to an overview of the two-step process for a Uniform Act to become a state statute.

### A. *The Origins and Influence of the ULC*

The ULC “is best described as a legislative drafting consortium of the state governments, operating in fields of law in which multi-state contacts or multi-state concerns make uniformity desirable.”<sup>38</sup> The organization owes its origins to the United States' rapid industrialization in the postbellum period.<sup>39</sup> In 1889, American Bar Association president David D. Field, whose work in spurring the codification of New York procedural law is often credited with promoting a distinctively American mode of trans-substantive civil procedure, created a

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<sup>38</sup> John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1, 3 (2012). It receives the “major portion of its financial support” from state appropriations. See UNIF. L. COMM'N, REFERENCE BOOK 13–14 (2020-2021) [hereinafter ULC, REFERENCE BOOK].

<sup>39</sup> See generally ROBERT A. STEIN, FORMING A MORE PERFECT UNION: A HISTORY OF THE UNIFORM LAW COMMISSION 133 (2013) [hereinafter STEIN, MORE PERFECT UNION] (explaining that after the Civil War there was a “need for more uniform and predictable state laws as industrialization increased and commercial relations among states expanded”); Robert A. Stein, *Strengthening Federalism: The Uniform State Law Movement in the United States*, 99 MINN. L. REV. 2253, 2255 (2015) [hereinafter Stein, *Strengthening Federalism*] (noting that the American Bar Association was in part created because of “the need to promote greater uniformity of state law”).

“Special Committee on Uniformity of State Legislation.”<sup>40</sup> In response, six states—Delaware, Massachusetts, Michigan, New Jersey, New York, and Pennsylvania—created commissions on uniform laws.<sup>41</sup>

These efforts bore fruit with the first meeting of the ULC, then known as the Conference of State Uniform Law Commissioners, in Saratoga, New York, on August 24, 1892.<sup>42</sup> Twelve representatives from seven states attended.<sup>43</sup> Two years later, state representation had more than tripled, with representatives from twenty-two states attending the ULC’s August 1894 meeting.<sup>44</sup> In 1896, the ULC adopted its first legislative product, the Uniform Negotiable Instruments Law, ultimately enacted in every state, territory, and the District of Columbia.<sup>45</sup> By 1900, the ULC boasted a membership of thirty-five states and territories, with all forty-eight states, as well as Alaska, Hawaii, the Philippines, and Puerto Rico joining by 1912.<sup>46</sup>

During its first several decades, several giants of American law and politics, such as John Barr Ames, Louis Brandeis, Roscoe Pound, John Wigmore, Samuel Williston, and Woodrow Wilson, served as commissioners.<sup>47</sup> In later years, a new generation of luminaries has taken on this responsibility, including Chief Justice William Rehnquist and Associate Justices Sandra Day O’Connor and David Souter, as well as former Solicitor General Ted Olson.<sup>48</sup>

The ULC has had a significant hand in shaping American law. The Uniform Commercial Code (UCC), often called the ULC’s “crown jewel,” emerged in the aftermath of the Supreme Court’s *Erie* decision and Congress’s failure to pass a federal statute governing interstate sales transactions.<sup>49</sup> A statute every first-year law student studies, the UCC “governs a major share of the commercial transactions in all jurisdictions in the country.”<sup>50</sup> In the postwar era,

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<sup>40</sup> STEIN, MORE PERFECT UNION, *supra* note 39, at 5. On Field’s influence, see AMALIA D. KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877, at 144–50 (2017).

<sup>41</sup> STEIN, MORE PERFECT UNION, *supra* note 39, at 6.

<sup>42</sup> *Id.* at 7.

<sup>43</sup> *Id.*; Stein, *Strengthening Federalism*, *supra* note 39, at 2256.

<sup>44</sup> STEIN, MORE PERFECT UNION, *supra* note 39, at 9.

<sup>45</sup> *Id.* at 9; Stein, *Strengthening Federalism*, *supra* note 39, at 2258.

<sup>46</sup> STEIN, MORE PERFECT UNION, *supra* note 39, at 11, 21; Stein, *Strengthening Federalism*, *supra* note 39, at 2256.

<sup>47</sup> STEIN, MORE PERFECT UNION, *supra* note 39, at 33–35, 226.

<sup>48</sup> *Id.* at 285–86, 288, 317.

<sup>49</sup> *Id.* at 80–81; Stein, *Strengthening Federalism*, *supra* note 39, at 2262. In fairness, the UCC was a joint project of the ULC with the American Law Institute. See *Uniform Commercial Code*, UNIF. L. COMM’N, <https://www.uniformlaws.org/acts/ucc> (last visited May 10, 2022).

<sup>50</sup> Stein, *Strengthening Federalism*, *supra* note 39, at 2266.

the ULC has also been responsible for advancing the development—and the statutory codification—of laws governing marriage, divorce, reproduction, adoption, child custody, and inheritance, as well as providing additional commercial infrastructure, including for electronic transactions.<sup>51</sup> Thus, “[e]very day, when a person conducts business, enters a contract, makes a purchase or sale, obtains or transfers property, or takes care of a family matter, it is likely that a ULC law applies.”<sup>52</sup>

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

Formal authority to approve a Uniform Act lies with the ULC’s Commissioners, who are typically appointed by state governors, but occasionally by state legislatures or other state officials, as prescribed by state statute.<sup>53</sup> Owing to their appointment by elected political officials, ULC Commissioners are, like federal judges, indirectly subject to the “electoral connection.”<sup>54</sup> States may appoint as many Commissioners as authorized by state law.<sup>55</sup> In the ULC’s plenary sessions, however, each state (including the District of Columbia, Puerto Rico, and the U.S. Virgin Islands) is allocated only one vote.<sup>56</sup>

#### *1. Scope and Program*

The process of drafting and promulgating a Uniform Act begins with the ULC’s Committee on Scope and Program, which has formal “responsibility to

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<sup>51</sup> See *supra* note 4 (giving examples of Uniform Acts).

<sup>52</sup> ULC, *FAQs: What Is the Uniform Law Commission*, *supra* note 1.

<sup>53</sup> Langbein, *supra* note 38, at 3 n.7.

<sup>54</sup> See generally DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5–6 (2d ed. 2004) (arguing that members of Congress are “single-minded seekers of reelection”). Commissioners are, in the first instance, members of state-level Commissions on Uniform State Laws. They serve without compensation. See ULC, REFERENCE BOOK, *supra* note 38, at 14. This feature, scholars have argued, “removes the commissionerships from pressures for political patronage.” JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 856 (2009).

<sup>55</sup> Langbein, *supra* note 38, at 3 n.7; *About ULC: Overview*, UNIF. L. COMM’N, <https://www.uniformlaws.org/aboutulc/overview> (last visited May 11, 2022) (“Each jurisdiction determines the method of appointment and the number of commissioners actually appointed.”).

<sup>56</sup> See *Constitution*, UNIF. L. COMM’N [hereinafter ULC, *Constitution*], <https://www.uniformlaws.org/aboutulc/constitution> (last visited May 11, 2022) (§ 8.02); *FAQs: How Does an Act Receive Final ULC Approval?*, UNIF. L. COMM’N [hereinafter *FAQs: How Does an Act Receive Final ULC Approval?*], <https://www.uniformlaws.org/aboutulc/faq#How%20does%20an%20act%20receive%20final%20%20A0ULC%20approval?> (last visited May 11, 2022).

determine whether [a] subject merits consideration by the ULC.”<sup>57</sup> The committee solicits proposals several times a year, with the bulk coming from ULC commissioners.<sup>58</sup>

Proposals must satisfy two main criteria. First, the subject matter “must be appropriate for state legislation in view of the powers granted by the Constitution . . . to Congress.”<sup>59</sup> Second, the subject matter “must be such that approval of the act . . . would be consistent with the objectives of the ULC . . . ‘to promote uniformity in the law among the several States on subjects where uniformity is desirable and practicable.’”<sup>60</sup> Several additional factors guide the committee’s consideration, including: (1) “[w]hether there [is] a need for an act on the subject”; (2) the “probability” that, if promulgated, a Uniform Act on the subject “either will be accepted and enacted into law by a substantial number of states or, if not, will promote uniformity indirectly”; and (3) possible “benefits to the public,” including “facilitating interstate economic, social, or political relations” and “avoiding significant disadvantages likely to arise from diversity of state law.”<sup>61</sup>

Ultimately, proposals that receive the Committee on Scope and Program’s recommendation are forwarded to the ULC’s Executive Committee, which “must find that a proposed act: (A) comports with the criteria of the ULC; (B) has the potential . . . of substantially contributing to the objectives of the ULC;

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<sup>57</sup> *Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Uniform and Model Acts*, UNIF. L. COMM’N [hereinafter ULC, *Statement of Policy*], <https://www.uniformlaws.org/projects/overview/newprojectcriteria> (last visited May 11, 2022) (“Whenever a subject for an act is proposed to the ULC, the proposal must first be submitted to the Committee on Scope and Program . . . .”); see also ULC, REFERENCE BOOK, *supra* note 38, at 14 (“Proposals that uniform acts be drafted, received from many sources, are referred to a Committee on Scope and Program . . . .”); *FAQs: How Are Subjects for New Acts Selected?*, UNIF. L. COMM’N [hereinafter *FAQs: How Are Subjects for New Acts Selected?*], <https://www.uniformlaws.org/aboutulc/faq#How%20are%20subjects%20for%20new%20acts%20selected?> (last visited May 11, 2022) (“The ULC Committee on Scope and Program welcomes proposals from state bars, state government entities, private groups, uniform law commissioners, and private individuals. The committee may assign a proposal to a Study Committee, which researches the topic and decides whether to recommend that an act be drafted. . . . An approved recommendation leads to creation of a ULC Drafting Committee.”). Section 4.04 of the ULC Constitution provides that “[t]he Committee shall recommend to the Executive Committee the work the Conference should undertake and the general plan and scope of its activities.” ULC, *Constitution*, *supra* note 56 (§ 4.04). The Committee is appointed by the ULC’s president and consists of nine members. *Id.*

<sup>58</sup> *New Project Proposals*, UNIF. L. COMM’N, <https://www.uniformlaws.org/projects/overview/newprojectproposal> (last visited May 11, 2022).

<sup>59</sup> ULC, *Statement of Policy*, *supra* note 57.

<sup>60</sup> *Id.* (quoting ULC, *Constitution*, *supra* note 56 (§ 1.02)).

<sup>61</sup> *Id.*

and (C) will have adequate agenda time for its consideration.”<sup>62</sup> If approved, a ULC Drafting Committee is formed.<sup>63</sup>

## 2. *Drafting Committees and Plenary Sessions*

ULC drafting committees are comprised of a chair (herself a ULC commissioner), several additional commissioners, and a reporter—almost always a member of the legal academy and an expert in the relevant subject matter.<sup>64</sup> An advisor from the American Bar Association (ABA) is usually assigned.<sup>65</sup> The chair is responsible for coordinating with the drafting committee’s assigned ABA advisor, whose role “is to solicit input from all parts of the ABA that may have an interest in the act and to discuss the drafts of the act with those constituencies.”<sup>66</sup>

Both to win the support of key constituencies and to tap into additional expertise, relevant interest groups are typically invited to participate in the drafting process. As the ULC explains, “A key group or constituency that is not aware of the project may later oppose the act, while inclusion of all groups and constituencies will provide an opportunity for consensus and facilitate enactment.”<sup>67</sup> Committee chairs, often in concert with the reporter, are responsible for “[i]dentifying and contacting relevant stakeholders to seek their participation” in the drafting process.<sup>68</sup> Though not formally granted a vote,

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<sup>62</sup> *Id.*; *FAQs: How Are Subjects for New Acts Selected*, *supra* note 57.

<sup>63</sup> *FAQs: How Are Subjects for New Acts Selected*, *supra* note 57.

<sup>64</sup> See Unif. L. Comm’n, Committee Procedure Manual 1–10 (2021) [hereinafter ULC, Committee Procedure Manual] (unpublished manual) (describing the work and operating procedures of drafting committees) (on file with authors); Langbein, *supra* note 38, at 6 (“When the Commission does decide to draft a uniform law, . . . [it] appoints a drafting committee, composed of commissioners, to work with a reporter, who is commonly a specialist academic.”); ULC, REFERENCE BOOK, *supra* note 38, at 14 (“If the ULC decides to accept a subject, a special committee of commissioners is appointed to prepare a draft of an act.”). Formally, the ULC’s Constitution provides that special committees are appointed by the president, who “specif[ies] the number of their members, and designate[s] their chairpersons.” ULC, *Constitution*, *supra* note 56 (§ 5.02).

<sup>65</sup> See ULC, *Constitution*, *supra* note 56 (§ 2.09(a)) (“The Executive Committee may appoint as advisory members of the Conference representatives from the American Bar Association, the American Law Institute, or governmental organization or agencies designated by the Executive Committee.”); *Bylaws*, UNIF. L. COMM’N, <https://www.uniformlaws.org/aboutulc/constitution> (last visited May 11, 2022) (§ 10.01) (“During the preparation of an Act, the Special Committee having it under consideration shall notify and confer with the appropriate committee or section of the American Bar Association or, in the absence of an appropriate committee or section, with the Secretary of the Association.”).

<sup>66</sup> Nat’l Conf. of Comm’rs on Unif. State L., Guidelines for Drafting Committee Chairs 3 (rev. ed. Feb. 2007) [hereinafter NCCUSL, Drafting Chair Guidelines] (unpublished guidelines) (on file with authors); ULC, Committee Procedure Manual, *supra* note 64, at 4 (“The ULC (via the president or executive director) requests ABA participation in an advisory capacity for every study and drafting committee.”).

<sup>67</sup> ULC, Committee Procedure Manual, *supra* note 64, at 3.

<sup>68</sup> *Id.* at 1.



designated group-affiliated observers are urged to attend and participate in drafting sessions.<sup>69</sup> To ensure representativeness, members of the drafting committee are encouraged to “determine whether additional organizations are likely to support or may oppose an act and thus should be invited to participate.”<sup>70</sup>

For critics of the drafting process, such as Alan Schwartz and Robert Scott, interest group involvement constrains the scope of the ULC’s work, creating a “strong status quo bias” and raising the prospect of interest-group capture.<sup>71</sup> Larry Ribstein and Bruce Kobayashi similarly suggest that the ULC “provides camouflage for interest group legislation.”<sup>72</sup> In their view, “the drafting process may be biased toward business rather than consumer groups,” particularly because business groups—unlike consumer groups—are likely to benefit from “scope economies of representation.”<sup>73</sup>

Not all scholars view the involvement of interest groups in the enactment process as a negative, however. Some, such as John Langbein and Lawrence Waggoner, argue that interest group buy-in ensures that the ULC’s work achieves its intended goals. On their account, interest groups guarantee that “real lawyers [are] put in charge of the academics.”<sup>74</sup> Because “[u]niform laws are political orphans[,] . . . [t]he ideal is to identify relevant interests and to satisfy their concerns . . . in order to have a legislative product that takes account of the real problems and that does not beget needless opposition.”<sup>75</sup>

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<sup>69</sup> NCCUSL, Drafting Chair Guidelines, *supra* note 66, at 3; ULC, Committee Procedure Manual, *supra* note 64, at 6 (“Observers are invited to attend committee meetings . . . and may participate in the discussions at those meetings. Written comments from observers are also welcomed . . .”).

<sup>70</sup> ULC, Committee Procedure Manual, *supra* note 64, at 3.

<sup>71</sup> Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 650–51 (1995).

<sup>72</sup> Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 147 (1996).

<sup>73</sup> *Id.* at 143. Kathleen Patchel, too, argues that “the history of the [UCC] raises the concern that the uniform laws process simply may be unable to accommodate the interests of consumers at all because provisions protecting consumer interests routinely have been excluded to avoid the possibility that their inclusion would impair enactment.” Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 124 (1993). Patchel adds that the ULC’s “focus on enactment, and the concomitant need to enlist the support of others in order to have its law enacted” fundamentally constrains the nature of ULC’s interventions. *Id.* at 92.

<sup>74</sup> John H. Langbein & Lawrence W. Waggoner, *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 ALA. L. REV. 871, 876 (1992).

<sup>75</sup> *Id.* at 877.

In any event, once a drafting committee is in place, drafting begins in earnest and ordinarily lasts two years.<sup>76</sup> Meetings take place twice a year—once in the fall and once in the spring—and typically involve a line-by-line discussion of the draft blackletter text.<sup>77</sup> The chair moderates the discussion, supported by the reporter, and decisions are usually reached by consensus.<sup>78</sup> The draft is then presented for plenary floor debate at one of the ULC’s annual meetings.<sup>79</sup> All the commissioners are present for this line-by-line reading.<sup>80</sup> Normally, a Uniform Act is formally promulgated only after it has been read on the floor during two separate annual meetings.<sup>81</sup>

Responsibility for drafting and revising the blackletter text and the accompanying comments falls to the reporter, who serves as a “resource for drafting committees.”<sup>82</sup> The reporter also prepares notes to guide committee members in evaluating the proposed blackletter text.<sup>83</sup> Nevertheless, because the reporter is not typically a member of the ULC, she is not afforded a formal vote in committee.<sup>84</sup> Indeed, the ULC is clear that, “[a]lthough the reporter is the principal drafter of a uniform act, the process is based on the substantive decisions of, and collaboration with, the committee.”<sup>85</sup>

All told, the first step in the life cycle of a state-enacted Uniform Act resembles its more conventional counterpart. Just as in a traditional legislature, primary drafting responsibility falls to select individuals—here, the reporter, sometimes assisted by the chair. Next, a responsible committee performs an extensive mark-up, carefully scrutinizing the proposed draft over the course of

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<sup>76</sup> Langbein, *supra* note 38, at 6.

<sup>77</sup> STEIN, MORE PERFECT UNION, *supra* note 39, at 205; NCCUSL, Drafting Chair Guidelines, *supra* note 66, at 4.

<sup>78</sup> E-mail from Tim Schnabel, Exec. Dir., Unif. L. Comm’n, to Robert H. Sitkoff, Professor of L., Harvard Univ. (Feb. 27, 2022, 2:11 AM) (confirming the current procedures of the ULC drafting committee) (on file with authors).

<sup>79</sup> See *FAQs: How Does an Act Receive Final ULC Approval*, *supra* note 56.

<sup>80</sup> See *id.*; ULC, *Constitution*, *supra* note 56 (§ 8.01(a)(1)).

<sup>81</sup> See *FAQs: How Does an Act Receive Final ULC Approval*, *supra* note 56; ULC, *Constitution*, *supra* note 56 (§ 8.01(a)(2)); ULC, REFERENCE BOOK, *supra* note 38, at 14. The two-reading rule may be waived on the floor. ULC, *Constitution*, *supra* note 56 (§ 8.01).

<sup>82</sup> STEIN, MORE PERFECT UNION, *supra* note 39, at 205; Lawrence J. Bugge, Theodore J. St. Antoine & Lawrence W. Waggoner, *Tributes to William J. Pierce, Executive Director, National Conference of Commissioners on Uniform State Laws*, 89 MICH. L. REV. 2073, 2074 (1991).

<sup>83</sup> NCCUSL, Drafting Chair Guidelines, *supra* note 66, at 2; ULC, Committee Procedure Manual, *supra* note 64, at 1 (“Notes are primarily to inform the members of the committee about issues . . .”).

<sup>84</sup> ULC, Committee Procedure Manual, *supra* note 64, at 6 (“Only commissioners are permitted to vote officially on committee decisions.”).

<sup>85</sup> *Id.* at 2. For that reason, “[i]n making public comments about the work of the drafting committee or the act, the reporter should avoid portraying himself or herself as the author of the act and should ensure that his or her employer does the same (e.g., in any information made available by law libraries).” *Id.*

several meetings. Finally, the ULC's plenary body—with authority to promulgate the act—conducts a broader review, making modifications as it deems necessary during a floor debate preceding a vote. This multiyear process is responsible for the ULC's principal legislative outputs: the blackletter text and accompanying official comments.<sup>86</sup>

### 3. Drafting Output

The ULC drafting process yields two types of textual outputs. First, the committee drafts the blackletter portion of a proposed Uniform Act.<sup>87</sup> The blackletter text is subject to the ULC's style manual, which governs the Act's overall structure, as well as the word choice, syntax, and formatting of each provision.<sup>88</sup> The blackletter text must be approved by the ULC and is subject to the Commission's majoritarian voting procedures. For the ULC to promulgate a Uniform Act, a majority of the jurisdictions present (at minimum, twenty) must vote in favor.<sup>89</sup>

Crucially, the blackletter text always contains a provision instructing courts that, “in applying and construing [the] . . . Act, consideration must be given to promoting uniformity of the law with respect to its subject matter among States that enact it.”<sup>90</sup> The ULC has included variations on this directive in every

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<sup>86</sup> Those outputs are typically followed by secondary commentary in the form of a summary article authored by the reporter, chair, or both. This article typically reflects their view of the Uniform Act's primary purpose. ULC, Committee Procedure Manual, *supra* note 64, at 2 (“Ideally, once the act has been promulgated, a reporter will also prepare an appropriate article for publication discussing the act, its development, and the reasons behind its provisions.”); *see also, e.g.*, John D. Morley & Robert H. Sitkoff, *Making Directed Trusts Work: The Uniform Directed Trust Act*, 44 ACTEC L.J. 3 (2019) (explaining the Uniform Directed Trust Act); Donald J. Weidner & John W. Larson, *The Revised Uniform Partnership Act: The Reporters' Overview*, 49 BUS. LAW. 1 (1993) (explaining the Revised Uniform Partnership Act). In seeking to provide additional “guidance to readers of the draft [text],” the reporter may describe the assumptions and debates animating the drafting process and provide additional context for the comments. NCCUSL, Drafting Chair Guidelines, *supra* note 66, at 2.

<sup>87</sup> *FAQs: How Is an Act Drafted?*, UNIF. L. COMM'N, <https://www.uniformlaws.org/aboutulc/faq#How%20does%20an%20act%20receive%20final%20A0ULC%20approval?> (last visited May 11, 2022).

<sup>88</sup> Unif. L. Comm'n, Drafting Rules and Style Manual 1 (2021) [hereinafter ULC, Drafting Rules] (unpublished manual) (on file with authors).

<sup>89</sup> ULC, REFERENCE BOOK, *supra* note 38, at 14.

<sup>90</sup> *See, e.g.*, UNIF. TR. CODE § 1101 (UNIF. L. COMM'N 2010); *see also* ULC, Drafting Rules, *supra* note 88, at 34 (instructing Uniform Act drafters to include a promote-uniformity clause “[t]o foster uniformity after enactment”). In 2021, the standard promote-uniformity clause was revised to read as follows: “In applying and construing this uniform act, a court shall consider the promotion of uniformity of the law among jurisdictions that enact it.” *Id.*

Uniform Act since 1910.<sup>91</sup> The blackletter text may also contain bracketed language communicating to enacting legislatures that some of it is “optional.”<sup>92</sup>

Second, the committee drafts the official comments that accompany the blackletter text. Intended for “legislatures, courts, practitioners, and others who are considering the act for enactment or need to construe or apply it,”<sup>93</sup> a comment typically accompanies each provision.<sup>94</sup> Written “to inform ultimate users of the act about the committee’s intentions,” the official comments describe the ULC’s reasons for adopting the provision’s blackletter text, the meaning of key terms, the extent to which the blackletter represents a departure from the status quo, and important potential criticisms.<sup>95</sup> Here is an example, drawn from section 705 of the Uniform Trust Code (UTC), of how the ULC packages the blackletter text and official comment together:

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<sup>91</sup> The first version of this instruction, published in 1906 as Section 74 of the Uniform Sales Act, provides as follows: “Interpretation shall give effect to purpose of uniformity. This act shall be so interpreted and construed, as to effect its general purpose to make uniform the laws of those states which enact it.” See E-mail from Benjamin Orzeske, Chief Couns., Unif. L. Comm’n, to Robert H. Sitkoff, Professor of L., Harvard Univ. (Oct. 24, 2017, 6:08 PM) (on file with authors). The same language was later used in the Uniform Desertion and Non-Support Act of 1910 and the Uniform Law Relating to the Cold Storage of Certain Articles of Food of 1914.

<sup>92</sup> See, e.g., UNIF. TR. CODE § 411 cmt. (UNIF. L. COMM’N 2010) (“By the 2004 amendment, [subsection (c)] was placed in brackets and therefore made optional . . . .”). The ULC’s Drafting Rules provide as follows: “To indicate that a choice is given to the enacting state in adopting or omitting language, place the language affected by the choice within brackets.” ULC, Drafting Rules, *supra* note 88, at 37.

<sup>93</sup> ULC, Committee Procedure Manual, *supra* note 64, at 9. But “[c]omments are not to be used as a substitute for or to modify a substantive provision in an act.” *Id.* Thus, “[t]he statutory text always governs a conflict or inconsistency between the text and the comments.” *Id.*

<sup>94</sup> The ULC’s practice of providing authoritative commentary began with Karl Llewellyn, the UCC’s reporter. Laurens Walker, *Writings on the Margin of American Law: Committee Notes, Comments, and Commentary*, 29 GA. L. REV. 993, 995 (1995). For Llewellyn, the comments were “an indispensable part of the UCC framework . . . . [G]iven the intentional flexibility built into the Code, . . . [t]he drafters designed them to provide a bridge between often confusing or sparse Code language and the facts of specific cases.” Sean Michael Hannaway, Note, *The Jurisprudence and Judicial Treatment of the Comments to the Uniform Commercial Code*, 75 CORNELL L. REV. 962, 967 (1990).

<sup>95</sup> ULC, Committee Procedure Manual, *supra* note 64, at 1–2.

**SECTION 705. RESIGNATION OF TRUSTEE.**

(a) A trustee may resign:

- (1) upon at least 30 days' notice to the qualified beneficiaries, the settlor, if living, and all cotrustees; or
- (2) with the approval of the court.

(b) In approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.

(c) Any liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of the trustee is not discharged or affected by the trustee's resignation.

**Comment**

This section rejects the common law rule that a trustee may resign only with permission of the court, and goes further than the Restatements, which allow a trustee to resign with the consent of the beneficiaries. See Restatement (Third) of Trusts § 36 (Tentative Draft No.2, approved 1999); Restatement (Second) of Trusts § 106 (1959). Concluding that the default rule ought to approximate standard drafting practice, the Drafting Committee provided in subsection (a) that a trustee may resign by giving notice to the qualified beneficiaries, a living settlor, and any cotrustee. A resigning trustee may also follow the traditional method and resign with approval of the court.

Restatement (Third) of Trusts § 36 cmt. d (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts § 106 cmt. b (1959), provide, similar to subsection (c), that a resignation does not release the resigning trustee from potential liabilities for acts or omissions while in office. The act of resignation can give rise to liability if the trustee resigns for the purpose of facilitating a breach of trust by a cotrustee. See *Ream v. Frey*, 107 F.3d 147 (3rd Cir. 1997).

Regarding the residual responsibilities of a resigning trustee until the trust property is delivered to a successor trustee, see Section 707.

In the case of a revocable trust, because the rights of the qualified beneficiaries are subject to the settlor's control (see Section 603), resignation of the trustee is accomplished by giving notice to the settlor instead of the beneficiaries.

**2001 Amendment.** By a 2001 amendment, subsection (a)(1) was amended to require that notice of a trustee's resignation be given to a living settlor. Previously, notice to a living settlor was required for a revocable but not irrevocable trust. Notice to the settlor of a revocable trust was required because the rights of the qualified beneficiaries, including the right to receive a trustee's resignation, are subject to the settlor's exclusive control. See Section 603.

Given their importance in construing the blackletter text of the Uniform Act, individual comments may be subject to robust discussion and debate within the drafting committee.<sup>96</sup> They may also play a role in the bargaining process, as drafting committee members may condition their approval of certain blackletter text on the inclusion of certain language in the comments.<sup>97</sup> And just as the blackletter text evolves over the course of the drafting process, so do the comments.<sup>98</sup> Draft comments must be updated to conform to the final version of the blackletter text as approved by the plenary body at an annual meeting. Thus,

<sup>96</sup> E-mail from Tim Schnabel, Exec. Dir., Unif. L. Comm'n, to authors (Dec. 8, 2020, 5:15 PM) (on file with authors).

<sup>97</sup> *Id.*

<sup>98</sup> ULC, Committee Procedure Manual, *supra* note 64, at 1 (instructing that comments should be "updated as drafts are revised").

“[c]omments are subject to revision by the reporter and chair of the drafting committee with appropriate consultation . . . up to the time of their official publication by Thomson Reuters.”<sup>99</sup>

Admittedly, the official comments depart in several respects from more familiar models of traditional legislative history like congressional committee reports. For one, comments are “*mostly* final,” but not necessarily completed, “when the act is submitted to the ULC for final approval.”<sup>100</sup> But as we have just seen, this follows from the explanatory function of the comments, which requires that they be finalized only after the blackletter text is finalized. For another, there is variation in how closely individual chairs and drafting committees review the comments as drafted by the reporter. In some cases, therefore, the comments may elevate (relatively speaking) an individual reporter’s views about the proposed statute’s intended operation.

Nevertheless, once finalized the comments become inextricable components of the statutory products the ULC offers. The ULC’s constitution provides that a Uniform Act “*must* . . . be accompanied so far as practicable by historical, explanatory, and tentative official comments.”<sup>101</sup> In consequence, state legislatures deciding whether to enact the Uniform Act (and how much of it to enact) receive the blackletter text together with the comments as an integrated package both with the imprimatur of the ULC.<sup>102</sup>

### C. *Step Two: State Enactment*

After a Uniform Act is promulgated, state legislatures decide whether to enact it. At this stage, commissioners serve as advocates for the Act’s adoption in their respective home jurisdictions.<sup>103</sup> Here, too, interest groups are often heavily involved, with some groups holding effective “veto power.”<sup>104</sup> Some Uniform Acts, such as the Uniform Electronic Transactions Act and the Uniform

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<sup>99</sup> *Id.* at 9. Comments may be revised after the Uniform Act’s publication, but only “to correct errors, update references and make non-substantive changes.” *Id.*; see also ULC, Drafting Rules, *supra* note 88, at 13 (similar).

<sup>100</sup> ULC, Committee Procedure Manual, *supra* note 64, at 2 (emphasis added).

<sup>101</sup> ULC, Constitution, *supra* note 57 (§ 8.04) (emphasis added).

<sup>102</sup> *Cf.* ULC, Drafting Rules, *supra* note 88, at 13 (noting that “in some states,” comments “are treated in some circumstances as a part of the act”).

<sup>103</sup> See ULC, Constitution, *supra* note 57 (§ 6.01(f)) (requiring Commissioners “to seek introduction and enactment of Uniform Acts promulgated by the Conference that are appropriate for their State”).

<sup>104</sup> Langbein, *supra* note 38, at 6.

Anatomical Gift Act, enjoy nearly universal enactment.<sup>105</sup> Others, such as the Uniform Marital Property Act, have had few, if any, enactments.<sup>106</sup> The enactment pattern for most Uniform Acts falls somewhere in between.<sup>107</sup>

When enacting a Uniform Act, legislatures often choose to leave the ULC's promulgated text unaltered.<sup>108</sup> But they may also choose to alter or amend it. Often, the modifications are merely cosmetic changes necessary to conform the text to a state's legislative conventions. For example, the Legislative Drafting Manual in Maine observes that "when complex uniform laws are enacted as Maine statutes, the basic numbering system, the mechanical structure and the internal organization . . . are usually altered to conform with the Maine Revised Statutes standards."<sup>109</sup> Recognizing variation in state drafting conventions and background law, Uniform Acts may contain legislative notes that provide guidance to states on how to absorb the promulgated act.<sup>110</sup>

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<sup>105</sup> See *Electronic Transactions Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034> (last visited May 11, 2022) (showing adoption in each of the fifty states, the District of Columbia, and the U.S. Virgin Islands); *Anatomical Gift Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=015e18ad-4806-4dff-b011-8e1ebc0d1d0f> (last visited May 11, 2022) (showing adoption in forty-eight states).

<sup>106</sup> It has since been recast as a Model rather than Uniform Act. See *Model Marital Prop. Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=b9e6d3ce-9365-496e-bf98-fedd48a35a6a> (last visited May 11, 2022).

<sup>107</sup> See ULC, REFERENCE BOOK, *supra* note 38, at 207–15.

<sup>108</sup> Indeed, the legislative drafting manuals of several states instruct drafters to depart as little as possible from the ULC's promulgated text. See, e.g., ARIZ. LEG. COUNCIL, THE ARIZONA LEGISLATIVE BILL DRAFTING MANUAL 66 (2020), [https://www.azleg.gov/alisPDFs/council/2019-2020\\_bill\\_drafting\\_manual.pdf](https://www.azleg.gov/alisPDFs/council/2019-2020_bill_drafting_manual.pdf) ("Consistent with the goal of uniformity, uniform laws should be drafted with as few changes as possible."); MONT. LEGIS. SERVS. DIV., BILL DRAFTING MANUAL 9 (2018), <https://leg.mt.gov/content/Publications/2018-bill-drafting-manual.pdf> (observing that uniform acts are "intended to be followed exactly in substance"); OR. LEGIS. COUNS. COMM., BILL DRAFTING MANUAL 15.5–15.6 (2018), <https://www.oregonlegislature.gov/lc/PDFs/draftingmanual.pdf> ("Uniform Acts . . . are probably best left alone in order to ensure the sought-after uniformity. Do not make substantive changes to Uniform Acts unless the changes are clearly requested by the draft or amendment requester.").

<sup>109</sup> ME. OFF. OF THE REVISOR OF STATUTES, MAINE LEGISLATIVE DRAFTING MANUAL 156 (2016), <https://legislature.maine.gov/doc/1353>; see also, e.g., COLO. OFF. OF LEGIS. LEGAL SERVS., COLORADO LEGISLATIVE DRAFTING MANUAL 12-1 (2021), <https://leg.colorado.gov/sites/default/files/drafting-manual-20211029.pdf> ("[U]niform acts are usually written in ways that are inconsistent with [Colorado Revised Statutes] format and the procedures and practices [of the state's Office of Legislative Legal Services], and questions often arise about when it is appropriate to change something in a uniform act."); S.D. LEGIS. RSCH. COUNCIL, GUIDE TO LEGISLATIVE DRAFTING 3 (2021), <https://sdlegislature.gov/docs/referencematerials/draftingmanual.pdf> ("The drafting of a uniform act may require a great deal of additional work on the part of the drafter to remove contradictory existing provisions that may already exist in state law, as well as minor style and format changes.").

<sup>110</sup> See, e.g., ULC, Drafting Rules, *supra* note 88, at 38 (discussing legislative notes); see also, e.g., ILL. LEGIS. REFERENCE BUREAU, ILLINOIS BILL DRAFTING MANUAL 171 (2012), <https://www.ilga.gov/commission/lrb/manual.pdf> ("A Uniform Act may also contain a 'legislative note' advising that certain language in the Uniform Act should be omitted or modified under certain circumstances."). By way of illustration, Section 2 of

Sometimes, however, legislatures make substantive changes designed to alter—or negate—how the ULC intended the provision to work. For example, multiple states have altered a controversial pair of Uniform Probate Code (UPC) and UTC provisions that were meant to reverse background common law, thereby preserving the common law by statute.<sup>111</sup> These modifications reversed the effect of the Uniform Act versions of those provisions.

Crucially, state legislatures typically retain the ULC’s standard promote-uniformity clause when enacting a Uniform Act. For example, all fifty states, plus the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands, have enacted the Uniform Interstate Family Support Act—and all the enactments include the directive that the act must be interpreted in light of “the need to promote uniformity of the law with respect to its subject matter among states that enact it.”<sup>112</sup> Likewise, of the fifty-two states and territories that have enacted the Uniform Electronic Transactions Act (UETA)—excluding Illinois, but including D.C., Puerto Rico, and the Virgin Islands—all have incorporated the UETA’s promote-uniformity provision.<sup>113</sup>

Some states even have an omnibus promote-uniformity command that applies to all state-enacted Uniform Acts. For example, Texas’s provides that “[a] uniform act included in a code shall be construed to effect its general

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

<sup>111</sup> *See* ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS AND ESTATES 370, 738–39 (11th ed. 2022) (discussing UNIF. PROB. CODE § 2-603(b)(3) (UNIF. L. COMM’N 1990) and UNIF. TR. CODE § 411(c) (UNIF. L. COMM’N 2010)).

<sup>112</sup> *See* UNIF. INTERSTATE FAM. SUPPORT ACT § 901 (UNIF. L. COMM’N 2008). For states adopting section 901 verbatim, see, e.g., 750 ILL. COMP. STAT. 22/901 (2019); MINN. STAT. ANN. § 518C.901 (2019); N.H. REV. STAT. ANN. § 546-B (2016); UTAH CODE ANN. § 78B-14-901 (2009); TEX. FAM. CODE ANN. § 159.901 (2014); WASH. REV. CODE § 26.21A.905 (2016).

<sup>113</sup> *See supra* note 105 (listing jurisdictions enacting the UETA); *see, e.g.*, ARK. CODE ANN. § 25-32-106(c) (2020) (“This chapter must be construed and applied . . . to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among States enacting it.”); FLA. STAT. ANN. § 668.50(6)(c) (2021) (same); IND. CODE ANN. § 26-2-8-105(3) (2015) (same); ME. REV. STAT. ANN. tit. 10, § 9406(3) (2009) (same); MINN. STAT. ANN. § 325L.06(3) (2022) (same); N.J. STAT. ANN. § 12A-12-6(c) (2004) (same); OKLA. STAT. ANN. tit. 12A, § 15-106(3) (2015) (same); TENN. CODE ANN. § 47-10-106(3) (2021) (same); UTAH CODE ANN. § 46-4-106(3) (2014) (same).



purpose to make uniform the law of those states that enact it.”<sup>114</sup> Hawaii, Illinois, Minnesota, North Dakota, Pennsylvania, South Dakota, and Wyoming all have similar rules; Hawaii’s applies even to stand alone “*provisions of uniform acts adopted by the State.*”<sup>115</sup>

Reflecting the tight connection between the blackletter text and the official comments, some state legislatures also have a standing instruction that the comments must be printed in the official statutory reporter along with the text of an enacted Uniform Act. For example, North Carolina’s enacted version of Article 9 of the UCC directs the state’s Revisor of Statutes to “cause to be printed as annotations to the published General Statutes, all relevant portions of the Official Comments to the 2010 Amendments to Article 9 of the Uniform Commercial Code”<sup>116</sup> In Colorado, the Office of Legislative Legal Services “publish[es] the URL to the ULC’s website where the official ULC comments

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<sup>114</sup> TEX. GOV’T CODE ANN. § 311.028 (2015); *Equistar Chems., LP v. ClydeUnion DB, Ltd.*, 579 S.W.3d 505, 517 (Tex. App. 2019) (“When reviewing a uniform act such as the UCC, we must construe the act to effect its general purpose and to make uniform the law of those states that enact it.”).

<sup>115</sup> See HAW. REV. STAT. ANN. § 1-24 (2008) (providing that statutory provisions taken from Uniform Acts “shall be so interpreted and construed as to effectuate their general purpose to make uniform the laws of the states and territories which enact them”); *In re Marriage of Gulla & Kanaval*, 917 N.E.2d 392, 399 (Ill. 2009) (noting that the Illinois Supreme Court has “long recognized that in construing uniform legislation, a court must interpret the statutory language so as to give effect to the beneficent legislative purpose of promoting harmony in the law”); MINN. STAT. ANN. § 645.22 (1950) (“Laws uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them.”); N.D. CENT. CODE ANN. § 1-02-13 (2008) (“Any provision in this code which is a part of a uniform statute must be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.”); 1 PA. CONSOL. STAT. ANN. § 1927 (2008) (providing that “[s]tatutes uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them”); S.D. CODIFIED LAWS § 2-14-13 (2019) (“Whenever a statute appears in the code of laws enacted by § 2-16-13 which, from its title, text, or source note, appears to be a uniform law, it shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.”); WYO. STAT. ANN. § 8-1-103(a)(vii) (2007) (“Any uniform act shall be interpreted and construed to effectuate its general purpose to make uniform the law of those states which enact it.”); see also *Swaps, LLC v. ASL Properties, Inc.*, 791 S.E.2d 711, 713 (N.C. Ct. App. 2016) (“*As with other uniform laws*, the Uniform Declaratory Judgment Act ‘shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.’”) (emphasis added) (quoting N.C. GEN. STAT. § 1-266) (2011)); *Minnesota ex rel. Monroe v. Monroe*, No. 17042, 1995 WL 411393, at \*2 (Ohio Ct. App. July 5, 1995) (“As a uniform act, URESA is to be ‘interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.’”) (citation omitted). While beyond the scope of this Article, a potential empirical extension would be to examine whether courts in states with these omnibus promote-uniformity provisions are more likely to identify a state statute as originating with the ULC and to give effect to the accompanying comments.

<sup>116</sup> H.R. 1068, 149th Gen. Assemb., Reg. Sess. (N.C. 2011).

appear in a cross reference after each [corresponding] section” of a Uniform Act as enacted in that state.<sup>117</sup>

## II. TEXTUALISM: THEORY AND ASSUMPTIONS

To frame our adaptation of textualism for the unique content and two-step political economy of a state statute that originates as a Uniform Act, we review contemporary textualism’s foundational principles, nevertheless mindful of the internal diversity of this mature interpretive approach.<sup>118</sup> These principles can be distilled into three propositions. First, the text is the law, although allowance is made for textual context. Second, no identifiable legislative intent or purpose may be discerned by aggregating the preferences of individual legislators. Third, judges should avoid discretionary policy judgments when interpreting statutory texts.<sup>119</sup>

### A. *The Text Is the Law*

Textualism’s defining commitment is the proposition that “only the words on the page constitute the law.”<sup>120</sup> In Justice Antonin Scalia’s formulation, the “supremacy-of-text principle” provides that “the words of a governing text are of paramount concern, and what they convey . . . is what the text means.”<sup>121</sup> Grounded in the view that “[w]ords . . . have a limited range of meaning,” textualism discourages adopting an “interpretation [of a statute] that goes beyond that range.”<sup>122</sup> Textualists demand that courts “enforce the conventional

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<sup>117</sup> COLO. OFF. OF LEGIS. LEGAL SERVS., *supra* note 109, at 12-6 (“Until 2017, the practice of the CCUSL and the Office was that, if a uniform law bill became law, the Office would publish official comments to the uniform law as prepared by the ULC, but only if the bill included either a statutory or nonstatutory requirement for the revisor of statutes to do so.”). In South Carolina, comments are included with the enrolled bill enacting a Uniform Act. *See, e.g.*, S.B. 422, 116th Gen. Assemb., Reg. Sess. (S.C. 2005) (describing the role of Comments in the South Carolina Trust Code).

<sup>118</sup> *See supra* note 16 and accompanying text.

<sup>119</sup> *See, e.g.*, Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2199 (2017) [hereinafter Barrett, *Congressional Insiders*] (arguing that textualists emphasize “text, legislative supremacy, and faithful agency”).

<sup>120</sup> *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020); *see also, e.g.*, Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 60 (1988) [hereinafter Easterbrook, *Original Intent*] (arguing that it is the “words of the statute, and not the intent of the drafters” that count as “the ‘law’”); Siegel, *supra* note 12, at 131 (arguing that textualism’s “prime directive” is that “the text of a statute *is* the law”).

<sup>121</sup> SCALIA & GARNER, *READING LAW*, *supra* note 18, at 56; *see also, e.g.*, Lawson v. FMR LLC, 571 U.S. 429, 459–60 (2014) (Scalia, J., concurring in principal part and concurring in the judgment) (“Because we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended, the sole object of the interpretive enterprise is to determine what a lay *says*.”).

<sup>122</sup> SCALIA, *MATTER OF INTERPRETATION*, *supra* note 18, at 24.

meaning of a clear text, even if it does not appear to make perfect sense of the statute's overall policy."<sup>123</sup> Thus, when contemporary textualists analyze the "meaning" of the statutory text, they seek to recover its original public meaning—that is, the meaning that "comes from the ring the words [of the statute] would have had to a skilled user of words at the time, thinking about the same problem."<sup>124</sup>

This rigorous formalism is grounded on the claim that "the text, and only the text" is constitutionally legitimate.<sup>125</sup> Textualists emphasize the primacy of the "statutory text alone" because only that text—unlike any "unenacted legislative intentions or purposes"—has "survived the constitutionally prescribed process of bicameralism and presentment."<sup>126</sup> Giving effect to extratextual materials risks "bypass[ing]" this "gauntlet" and so violates the process for making law the Constitution prescribes.<sup>127</sup> As Justice Neil Gorsuch recently put it in *Bostock*, "[i]f judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives."<sup>128</sup>

To be sure, textualists acknowledge that other materials may be necessary to understand the broader context in which the text is embedded.<sup>129</sup> "Words," Scalia observed, "are given meaning by their context."<sup>130</sup> Interpreters must therefore read a word or phrase against the backdrop of "specialized conventions

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<sup>123</sup> John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 4 (2001) [hereinafter Manning, *Equity of the Statute*].

<sup>124</sup> Easterbrook, *Original Intent*, *supra* note 120, at 61; *see also Bostock*, 140 S. Ct. at 1738 ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."); *id.* at 1766 (Alito, J., dissenting) (characterizing the textualist inquiry as one that seeks to answer how the "terms of a statute [would] have been understood by ordinary people at the time of enactment"); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 361 (7th Cir. 2017) (Sykes, J., dissenting) ("Statutory interpretation is an objective inquiry that looks for the meaning the statutory language conveyed to a reasonable person at the time of enactment."); SCALIA & GARNER, *READING LAW*, *supra* note 18, at 78 ("Words must be given the meaning they had when the text was adopted.").

<sup>125</sup> FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 34 (2009).

<sup>126</sup> Manning, *What Divides*, *supra* note 23, at 73.

<sup>127</sup> *Herrmann v. Cencom Cable Assocs., Inc.*, 978 F.2d 978, 982 (7th Cir. 1992) (Easterbrook, J.).

<sup>128</sup> *Bostock*, 140 S. Ct. at 1738.

<sup>129</sup> Manning, *Equity of the Statute*, *supra* note 123, at 71.

<sup>130</sup> SCALIA & GARNER, *READING LAW*, *supra* note 18, at 56; *see also Bostock*, 140 S. Ct. at 1767 (Alito, J., dissenting) ("[W]hen textualism is properly understood, it calls for an examination of the social context in which a statute was enacted because this may have an important bearing on what its words were understood to mean at the time of enactment."); Manning, *What Divides*, *supra* note 23, at 81 (noting that "modern textualism necessarily—and quite properly—draws upon contextual cues"); Grove, *supra* note 16, at 279 ("Modern textualists have, for example, long insisted that the method is not literalism. Instead, one can understand language only in context.").

and linguistic practices peculiar to the law,” including “the often elaborate (but textually unspecified) connotations of a technical term of art.”<sup>131</sup>

Nevertheless, textualists largely eschew reliance on extratextual statements of purpose—committee reports, for instance, or floor statements.<sup>132</sup> This skepticism is motivated by two principal concerns. One is conceptual. As Justice Amy Coney Barrett notes, “[t]extualists have long objected to the use of legislative history on the ground that it is designed to uncover a nonexistent, and in any event irrelevant, legislative intent.”<sup>133</sup> The other is constitutional. At least when it comes to the federal lawmaking process, treating Congress’s extratextual statements of purpose as authoritative guides to the statute’s meaning “is tantamount to lawmaking by Congressional subgroups” and thus forbidden under *INS v. Chadha* and *Bowsher v. Synar*.<sup>134</sup> In this sense, textualists seek to respect “Congress’s own procedural choice[.]” to bring only the “dull, technical, formal final text” to a floor vote, rather than the “other texts that [Congress] generates . . . but chooses not to bring before the body as a whole.”<sup>135</sup>

### B. *The Fiction of Legislative Purpose*

Textualists argue that bringing together a winning coalition within a legislature demands too many tradeoffs to generate a traceable, nontextual logic. On this account, assembling a legislative majority requires a series of “awkward” drafting compromises that “attempt to split the difference between competing principles.”<sup>136</sup> These compromises ultimately assure passage. As

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<sup>131</sup> Manning, *What Divides*, *supra* note 23, at 81; John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2457 (2003) [hereinafter Manning, *Absurdity Doctrine*] (“[T]extualists do believe that statutes convey meaning only because members of a relevant linguistic community apply shared background conventions for understanding how particular words are used in particular contexts.”).

<sup>132</sup> This is, admittedly, an over-simplification. Scalia, for example, acknowledged that legislative history could be used “for the same purpose as one might use a dictionary or a treatise,” SCALIA & GARNER, *READING LAW*, *supra* note 18, at 382, and Manning has suggested that “legislative history may be informative or persuasive,” particularly in prompting “a judge to investigate whether a seemingly ordinary term or phrase, in fact, has specialized meaning in legal parlance,” John F. Manning, *Why Does Congress Vote on Some Texts but Not Others?*, 51 TULSA L. REV. 559, 570–71 (2016) [hereinafter Manning, *Why Does Congress Vote*]. Nevertheless, the broader point holds that textualists disclaim the use of these materials as guides to the statute’s meaning.

<sup>133</sup> Barrett, *Congressional Insiders*, *supra* note 119, at 2205.

<sup>134</sup> William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 671 (1990) [hereinafter Eskridge, *New Textualism*]; John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 706, 717 (1997) [hereinafter Manning, *Nondelegation Doctrine*].

<sup>135</sup> John F. Manning, *Inside Congress’s Mind*, 115 COLUM. L. REV. 1911, 1947 (2015) [hereinafter Manning, *Inside Congress’s Mind*]; John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2427 (2017) [hereinafter Manning, *Without the Pretense*].

<sup>136</sup> Manning, *Absurdity Doctrine*, *supra* note 131, at 2411.

Judge Frank Easterbrook explains, “[l]egislation is compromise. Compromises have no spirit; they just are.”<sup>137</sup> The explicit point of reference is a statute that Congress drafts and then enacts. In this model, “[b]ills take their final shape” in Congress, even if that may involve “multiple committees, behind-the-scenes logrolling, the threat of a Senate filibuster or presidential veto, the need to fight for scarce floor time, the need for unanimous consent to expedite votes in the Senate, and countless other factors.”<sup>138</sup>

Textualists draw an important distinction between the legislature as a collective and the individual lawmakers that compose it. According to Scalia, “collective intent is pure fiction because dozens if not hundreds of legislators have their own subjective views on the minutiae of bills they are voting on—or perhaps no views at all because they are wholly unaware of the minutiae.”<sup>139</sup> The consequence is that the content of a given statute results as much from arbitrary or idiosyncratic procedural sequencing, including how leaders choose to set the legislative agenda, as it does from the policy views of its members.<sup>140</sup> In William Eskridge’s formulation, “[t]he statutes that result from th[e] process of sequential deals and trade-offs tend to be filled with complex compromises which cannot easily be distilled into one overriding public purpose.”<sup>141</sup>

It follows that courts must give up on the fiction that as outside observers they can identify the goal that animates a legislative majority by analyzing the stated preferences of individual legislators.<sup>142</sup> There is nothing behind the text; it reflects the “delicate compromise between legislative objectives; attempts to extrapolate the ‘spirit’ of a law may upset this balance.”<sup>143</sup> And courts can best enforce the actual bargain the legislature struck by giving primacy to the statute’s text. The words themselves—the “semantic detail[s]” of legislation—

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<sup>137</sup> Frank H. Easterbrook, *Text, History and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 68 (1994) [hereinafter Easterbrook, *Statutory Interpretation*].

<sup>138</sup> Manning, *Inside Congress’s Mind*, *supra* note 135, at 1919.

<sup>139</sup> SCALIA & GARNER, *READING LAW*, *supra* note 18, at 392; *see also* Manning, *Absurdity Doctrine*, *supra* note 131, at 2412 (arguing that the preferences of the legislature as a whole “cannot realistically be aggregated into a coherent collective decision”); Manning, *Nondelegation Doctrine*, *supra* note 134, at 685 (similar).

<sup>140</sup> Manning, *Absurdity Doctrine*, *supra* note 131, at 2113, 2412 (“The procedures for considering legislation . . . play a crucial role in determining its content.”).

<sup>141</sup> WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 27 (1994).

<sup>142</sup> Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112 (2010) [hereinafter Barrett, *Substantive Canons*] (“The defining tenet of textualism is the belief that it is impossible to know whether Congress would have drafted the statute differently if it had anticipated the situation before the court.”).

<sup>143</sup> CROSS, *supra* note 125, at 32; *see also* E. Associated Coal Corp. v. United Mine Workers, 531 U.S. 57, 68–69 (2000) (Scalia, J., concurring in the judgment) (“The final form of a statute or regulation, especially in the regulated fields where the public policy doctrine is likely to rear its head, is often the result of compromise among various interest groups, resulting in a decision to go so far and no farther.”).

are “the only effective means that legislators possess to specify the limits of an agreed-upon legislative bargain.”<sup>144</sup>

### C. *The Proper Role of Courts*

For textualists, courts have a necessarily limited role to play under the Constitution. By and large, they view courts as the faithful agents of legislative principals.<sup>145</sup> “[I]n our system of government,” John Manning explains, “federal judges have a duty to ascertain and implement as accurately as possible the instructions set down by Congress (within constitutional bounds).”<sup>146</sup> Rooted in a robust conception of the separation of powers, textualism insists that lawmaking is the province of the democratically elected legislature. Assuring lawmakers that the “lines of inclusion and exclusion” they draw will be enforced in court,<sup>147</sup> textualism guarantees that the “function of the popular branches” is not “diminished.”<sup>148</sup> Put differently, looking past the words of a statute risks “render[ing] democratically adopted texts mere springboards for judicial lawmaking.”<sup>149</sup>

Textualism is therefore meant to discipline judges. Dissenting in *Bostock*, Justice Brett Kavanaugh reflected that “[i]f judges could rewrite laws based on their own policy views, . . . the critical distinction between legislative authority and judicial authority that undergirds the Constitution’s separation of powers would collapse.”<sup>150</sup> The hypothesized alternative to textualism—a free-floating

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<sup>144</sup> Manning, *What Divides*, *supra* note 23, at 92; Manning, *Absurdity Doctrine*, *supra* note 131, at 2410 (“The legislative process . . . is too complex, too path-dependent, and too opaque to allow judges to reconstruct whether Congress would have resolved any particular question differently from the way the clear statutory text resolves that question.”).

<sup>145</sup> See, e.g., Barrett, *Congressional Insiders*, *supra* note 119, at 2208 (“Textualists have routinely described courts as the faithful agents of Congress.”); Barrett, *Substantive Canons*, *supra* note 142, at 110 (“[T]extualists . . . understand courts to be the faithful agents of Congress.”). For Scalia, however, courts are not “agents of the legislature,” but instead “agents of the people, charged with remedying the harm that a person claims to have suffered at the hands of another person or of the government.” SCALIA & GARNER, *READING LAW*, *supra* note 18, at 138–39. The bottom line remains the same, however. In their capacity as agents of a popular principal, “[i]t is no part of [the judicial] charge to write laws that the legislature has not written.” *Id.*

<sup>146</sup> John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 430 (2005) [hereinafter Manning, *Textualism and Legislative Intent*]; Manning, *Equity of the Statute*, *supra* note 123, at 61 (“[T]he sharp separation of legislative and judicial powers was designed, in large measure, to limit judicial discretion—and thus to promote governance according to known and established laws.”).

<sup>147</sup> Manning, *Without the Pretense*, *supra* note 135, at 2424.

<sup>148</sup> SCALIA & GARNER, *READING LAW*, *supra* note 18, at 83.

<sup>149</sup> SCALIA, *MATTER OF INTERPRETATION*, *supra* note 18, at 25; see also *id.* at 17 (“[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant rather than by what the lawgiver promulgated.”).

<sup>150</sup> *Bostock v. Clayton County*, 140 S. Ct. 1731, 1824 (2020) (Kavanaugh, J., dissenting).

inquiry into Congress's objectives—is thought to unduly “liberate[]” courts.<sup>151</sup> As Eskridge observes, “consideration of legislative history creates greater opportunities for the exercise of judicial discretion. . . . A focus on the text alone, it is argued, is a more concrete inquiry which will better constrain the tendency of judges to substitute their will for that of Congress.”<sup>152</sup>

In this vein, textualists also argue that excluding legislative history improves predictability. For example, Kavanaugh has suggested that when “courts . . . seek the best reading of the statute by interpreting the words of the statute,” the result is that “each [judicial] umpire is operating within the same guidelines,” and so “we will need to worry less about who the umpire is when the next pitch is thrown.”<sup>153</sup> Working from the same closed and discrete set of materials better ensures that any jurist confronted with the same issue will reach the same result.

### III. AN INTERPRETIVE CANON: APPLYING TEXTUALISM TO UNIFORM ACTS

Having canvassed the political economy of Uniform Acts and the foundational assumptions of textualism, we are now able to apply textualist theory to the unique content and two-step political economy of a state-enacted Uniform Act. We develop an interpretive canon appropriate to this distinctive species of positive law. Put most provocatively, we contend that textualist principles obligate courts to treat the official comments—which textualists would otherwise dismiss as non-authoritative legislative history—as persuasive guides to the statute's meaning.

In developing our interpretive canon, we begin with the simplest case. The text of a Uniform Act enacted in its entirety, including the ULC's promote-uniformity clause, directs courts to look to the official comments accompanying the blackletter text for interpretive guidance. We then complicate the story, examining the enactment of provisions from a Uniform Act but without the promote-uniformity command. Such an enactment, we argue, signals to reviewing courts to treat the Act's official comments as persuasive authority. The strength of that signal, however, depends on how much of the Uniform Act's statutory text the legislature adopts. The more text it enacts wholesale, the stronger the signal; the less, the weaker.

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<sup>151</sup> Easterbrook, *Statutory Interpretation*, *supra* note 137, at 63.

<sup>152</sup> Eskridge, *New Textualism*, *supra* note 134, at 674; *see also* KATZMANN, *supra* note 12, at 41 (“[C]ritics of legislative history argue that its use impermissibly increases the discretion of judges to roam through the wide range of often inconsistent materials and rely on those that suit their position.”).

<sup>153</sup> Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) (emphasis omitted).

With this conceptual architecture in place, we illustrate the practical payoffs of our proposed interpretive canon for state-enacted Uniform Acts by reference to three cases interpreting the UPC and UTC. We defer until Part IV further puzzles and complications, such as if a state modifies the text of a Uniform Act or otherwise enacts a hybrid or blended statute.

*A. Directives: Implementing the Promote-Uniformity Clause*

We begin with the simplest case: enactment by a state legislature of the entirety of a Uniform Act without modification. Such an enactment would include the ULC's promote-uniformity clause: the command that courts must give "consideration . . . to the need to promote uniformity of the law" in construing Uniform Acts.<sup>154</sup> For textualists, this command, embedded directly in "the very words" of the statute, must be given effect.<sup>155</sup> It is, as one state supreme court explained, a "legislative directive that the [Act] be construed to make uniform the law among the jurisdictions enacting it."<sup>156</sup>

Implementing this directive requires courts to use the comments in the way the ULC meant them to be used—as persuasive sources of authority about the text's meaning.<sup>157</sup> As we have seen, the ULC drafts the blackletter text with the expectation that interpreters will use the comments to inform their construction of that text. Indeed, the ULC's Committee Procedure Manual provides that it is "[t]he final copy of an approved act, with comments" that is submitted to state legislatures for enactment.<sup>158</sup> Because the comments accompanying a Uniform Act are, by design, an integral part of the statutory package, a legislature does not adopt the blackletter text in isolation from the supporting official comments.<sup>159</sup>

To be sure, legislatures only rarely instruct courts specifically to treat the comments as authoritative.<sup>160</sup> But the meaning we are attributing to the text of

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<sup>154</sup> See *supra* notes 90 & 91 and accompanying text.

<sup>155</sup> SCALIA & GARNER, *READING LAW*, *supra* note 18, at 56.

<sup>156</sup> *Mortg. Specialists, Inc. v. Davey*, 904 A.2d 652, 664 (N.H. 2006).

<sup>157</sup> See ULC, *Committee Procedure Manual*, *supra* note 64, at 9 ("Comments are not to be used as a substitute for or to modify a substantive provision in an act. The statutory text always governs any conflict or inconsistency between the text and the comments.").

<sup>158</sup> See *id.* (emphasis added).

<sup>159</sup> See *In re Trust of Shire*, 907 N.W.2d 263, 268 (Neb. 2018) ("[W]hen the Legislature provides a direct reference to a section of a uniform law code when adopting that code, it incorporates the comments explaining that section.").

<sup>160</sup> Kentucky's enacted version of the Uniform Commercial Code, for instance, provides, "Official comments to the Uniform Commercial Code . . . represent the express legislative intent of the General Assembly



the promote-uniformity command is in accord with textualist commitments. Recall that contemporary textualists embrace reliance on text in context.<sup>161</sup> In so doing, textualists recognize that courts should “give effect to terms of art—phrases that acquire specialized meaning through use over time as the shared language of specialized communities.”<sup>162</sup> So, too, they may “draw upon settled background conventions of the legal system.”<sup>163</sup> Adopting the ULC’s promote-uniformity command does just this kind of work. It is a form of legal shorthand: a way for the enacting legislature to direct courts—via the text itself—to give effect to the accompanying explanatory packaging with the aim of ensuring that the text is interpreted in a manner consistent with the meaning the ULC ascribed to the text.<sup>164</sup>

The key is that courts will be more likely to achieve substantive uniformity, as commanded by the text of the promote-uniformity clause, if they treat the comments as persuasive authority. Comments provide important explanation and background about how a particular provision is supposed to work,<sup>165</sup> sometimes even describing rejected alternatives.<sup>166</sup> Aided by the ULC’s official

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and shall be used as a guide for interpretation of this chapter, except that if the text and the official comments conflict, the text shall control.” KY. REV. STAT. ANN. § 355.1-103(3) (2006). Pennsylvania is unique (as far as we know) among states in specifying by statute that it is permissible to consider comments, but only if the materials were available to the enacting legislature. See 1 PA. STAT. AND CONSOL. STAT. ANN. § 1939 (1972) (“The comments or report of the commission, committee, association or other entity which drafted a statute may be consulted in the construction or application of the original provisions of the statute if such comments or report were published or otherwise generally available prior to the consideration of the statute by the General Assembly, but the text of the statute shall control in the event of conflict between its text and such comments or report.”); Trust Under Agreement of Taylor, 164 A.3d 1147, 1160 (Pa. 2017) (“The heading for section 7740.1 contains a reference to the corresponding UTC section number (UTC 411), and we may thus consider the UTC’s Uniform Law Comment as evidence of the General Assembly’s intent with respect to the proper application and scope of section 7740.1.”); Lessner v. Rubinson, 592 A.2d 678, 680 n.4 (Pa. 1991) (“Official comments are to be given weight in the construction of statutes.”).

<sup>161</sup> See *supra* note 130 (discussing textualists’ recognition of context).

<sup>162</sup> Manning, *Equity of the Statute*, *supra* note 123, at 112; see also SCALIA & GARNER, *READING LAW*, *supra* note 18, at 73 (“Sometimes context indicates that a technical meaning applies. . . . Where the text is addressing a scientific or technical subject, a specialized meaning is to be expected[,] . . . which often differs from common meaning.”).

<sup>163</sup> Manning, *Equity of the Statute*, *supra* note 123, at 113.

<sup>164</sup> Cf. Manning, *Non-Delegation Doctrine*, *supra* note 134, at 730 (“Just as the Sentencing Commission itself adopts both the Sentencing Guidelines and the official commentary accompanying them, Congress itself (as opposed to its agents) could more routinely enact official commentary that authoritatively explains the primary statutory text.”).

<sup>165</sup> See, e.g., UNIF. PROB. CODE § 2-503 cmt. (UNIF. L. COMM’N 2019) (“By way of dispensing power, this new section allows the probate court to excuse a harmless error in complying with the formal requirements for executing or revoking a will.”).

<sup>166</sup> See, e.g., UNIF. TR. CODE § 105 cmt. (UNIF. L. COMM’N 2010) (“During the drafting of the Uniform Trust Code, the drafting committee discussed and rejected a proposal that the ability of the settlor to waive

comments, courts in different states are more likely to reach the same answer to an interpretive question and to be confident they have done so for the right reasons. By analogy, courts routinely (and without controversy) implement the directive to promote uniformity in another way: by treating other jurisdictions' judicial interpretations of the same Uniform Act provision as persuasive guides to the meaning of their own state's enacted version.<sup>167</sup>

What matters here is that the directive to promote uniformity is found in the statutory text. Looking to the comments best guarantees that courts will implement that textual directive.<sup>168</sup> The Connecticut Supreme Court has explained:

Only if the intent of the drafters of a uniform act becomes the intent of the legislature in adopting it can uniformity be achieved. Otherwise, there would be as many variations of a uniform act as there are legislatures that adopt it. Such a situation would completely thwart the purpose of uniform laws.<sup>169</sup>

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required notice be based on the nature of the beneficiaries' interest and not on the beneficiaries' age."); *id.* § 505 cmt. ("Consequently, the drafters rejected the approach taken in States like Alaska and Delaware, both of which allow a settlor to retain a beneficial interest immune from creditor claims."); *id.* § 705 cmt. ("This section rejects the common law rule that a trustee may resign only with permission of the court, and goes further than the Restatements, which allow a trustee to resign with the consent of the beneficiaries.").

<sup>167</sup> See, e.g., *Savage v. Zelent*, 777 S.E.2d 801, 806 (N.C. Ct. App. 2015) ("Finally, for the sake of uniformity of interpretation, the legislature endorses examination of cases from other jurisdictions in interpreting the North Carolina Recognition Act.") (citing N.C. GEN. STAT. § 1C-1859 (2015), the state's version of the ULC's promote-uniformity clause); *Altavion, Inc. v. Konica Minolta Sys. Lab'y, Inc.*, 171 Cal. Rptr. 3d 714, 725 (Cal. App. Ct. 2014) ("In 1984, the Legislature 'adopted without significant change' the Uniform Trade Secrets Act (UTSA). Nearly all states have adopted the UTSA; although there are some variations, case law applying UTSA enactments in other states is generally relevant in applying California's UTSA.") (citations omitted); *In re Schneider*, 268 P.3d 215, 223 (Wash. 2011) (en banc) ("Because this is a matter of first impression in Washington of interpreting a uniform law adopted by all 50 states, we may consider how these other states have addressed the issue."); *Sternlicht v. Sternlicht*, 876 A.2d 904, 911 n.3 (Pa. 2005) ("[I]n construing a uniform law, this Court must consider the decisions of our sister states who have adopted and interpreted such uniform law and must afford these decisions great deference.").

<sup>168</sup> This contention has particular force in those states where the comments are "included with the printing of the statute." *Miller v. First Bank*, 696 S.E.2d 824, 827–28 (N.C. Ct. App. 2010) (holding that although the official comment to the statute was "not enacted into law," it was nevertheless "relevant in construing the intent of the statute"); *Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n*, 805 S.E.2d 147, 151 n.6 (N.C. Ct. App. 2017) (similar).

<sup>169</sup> *Yale Univ. v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993) (citations omitted).

As this case illustrates, some courts have recognized the informational value of the official comments.<sup>170</sup> But lacking a grounding in the conceptual foundations of textualism, they have done so in a halting, ad hoc manner.<sup>171</sup>

The second, public choice-based, rationale undergirding textualism strengthens the point. Ordinarily, textualists tell us, courts cannot discern a statutory purpose because many “statutes are little else but backroom deals.”<sup>172</sup> Indeed, “the complex compromises endemic in the political process suggest that legislation is frequently a congeries of different and sometimes conflicting purposes.”<sup>173</sup> When it comes to a state-enacted Uniform Act, however, we do not need to know “how most legislators ‘would have voted’ on issues they never actually considered”<sup>174</sup> or fear they would not have endorsed a purpose a court later ascribed. Rather, we need know only that the legislature enacted a Uniform Act, adopting the ULC’s blackletter text, including the promote-uniformity clause, against the backdrop of the official commentary to that text.<sup>175</sup>

One way to frame this point is by analogy to the so-called borrowed statute rule, an interpretive canon providing that a legislature that enacts another state’s statute verbatim also imports that state’s courts’ interpretations of the statute.<sup>176</sup> Textualists have expressed skepticism about the merits of the rule on the ground that the “competent lawyer” cannot know “that a statute has been ‘copied’ from

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<sup>170</sup> See, e.g., *In re Trust of Shire*, 907 N.W.2d 263, 272 (Neb. 2018) (“[W]e must construe a statute in pari materia with other sections of the same act and in light of UTC comments when the Legislature has incorporated them.”); *In re Bradley K. Brakke Trust*, 890 N.W.2d 549, 554 (N.D. 2017) (“When we interpret and apply provisions in a uniform law, we may look to official editorial board comments for guidance.”); *Gerber & Gerber, P.C. v. Regions Bank*, 596 S.E.2d 174, 177 n.1 (Ga. App. Ct. 2004) (similar); *Universal Motors, Inc. v. Neary*, 984 P.2d 515, 517 (Alaska 1999) (similar).

<sup>171</sup> See, e.g., *infra* Part III.C (discussing the practical interpretive pitfalls of failing to consider the comments).

<sup>172</sup> William N. Eskridge, Jr., & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 335 (1990).

<sup>173</sup> *Id.*; see also Manning, *Textualism and Legislative Intent*, *supra* note 146, at 450 (describing the legislative process as “complex and path dependent”); Manning, *Absurdity Doctrine*, *supra* note 131, at 2415 (observing that “idiosyncrasies of the process may sometimes shape the content of legislation”).

<sup>174</sup> Eskridge, *New Textualism*, *supra* note 134, at 643; see also SCALIA & GARNER, *READING LAW*, *supra* note 18, at 376 (calling the notion that the legislature necessarily had a view on the matter at issue before the court “pure fantasy” and commenting that “most legislatures could not possibly have focused on the narrow point before the court” while “[t]he few who did undoubtedly had varying views”).

<sup>175</sup> See Nelson, *supra* note 12, at 348 (“[J]udges whom we think of as textualists construct their sense of objective meaning from what the evidence that they are willing to consider tells them about the subjective intent of the enacting legislature.”).

<sup>176</sup> CONG. RSCH. SERV., *STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS* 61 n.615 (2018), <https://crsreports.congress.gov/product/pdf/R/R45153> (defining the borrowed statute rule).

that of another state.”<sup>177</sup> But that concern is absent in the case of a Uniform Act enacted wholesale because the text’s provenance is apparent on its face. Thus, as the New Hampshire Supreme Court has reasoned, “[w]hen interpreting a uniform law . . . ‘the intention of the drafters of a uniform act becomes the legislative intent upon enactment.’”<sup>178</sup>

Treating the comments as persuasive interpretive aids also enables courts to play their assigned role in the separation of powers framework. Looking to the comments is the mechanism that the ULC has established for resolving difficult interpretive problems. And when a legislature adopts the ULC’s text, including the promote-uniformity command, the related principles of legislative supremacy and faithful agency strongly suggest that courts should make use of the official comments when interpreting the text. Taken together, the text and the comments comprise a holistic legislative scheme. By using the comments to interpret the blackletter text, courts best implement the legislature’s directive to promote uniformity.

Increased interpretive predictability is a related payoff. To return to Justice Kavanaugh’s metaphor, treating the official comments as persuasive authority reduces the likelihood that different umpires will set different strike zones. By looking to the statutory package in its entirety, including the comments, courts work from a rich, but nevertheless closed, set of materials. On this view, the comments provide a shared frame of reference for courts interpreting the same Uniform Act’s text, ensuring that they are fluent in the same technical language. Making use of a common corpus in this way facilitates uniformity across different jurisdictions in accordance with the text’s directive to promote uniformity.

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<sup>177</sup> SCALIA & GARNER, *READING LAW*, *supra* note 18, at 326. Some scholars have suggested that this concern is overstated, insofar as it is not uncommon for states to borrow other states’ laws with the express purpose of adopting their judicial interpretations. *See, e.g.*, Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1067 (2000); Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 488 (1987). *But see* Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 132 n.81 (2008) (arguing that these accounts exaggerate the extent of borrowing).

<sup>178</sup> *Hodges v. Johnson*, 177 A.3d 86, 93 (N.H. 2017) (citations omitted); *see also* *Yale Univ. v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993) (“[I]t is manifest that the legislature in enacting [the Uniform Management of Institutional Funds Act (‘UMIFA’)] intended to implement the intention, meaning and objectives of the commission that drafted UMIFA.”); *In re Butler*, 552 N.W.2d 226, 231 (Minn. 1996) (“The intention of the drafters of a uniform act becomes the legislative intent upon enactment.”).

## B. *Signals: Recovering Original Public Meaning*

Now suppose that a state legislature enacts some portion of a Uniform Act verbatim but not the full act with the promote-uniformity clause. In such a case, the legislature has indicated through formal, constitutionally prescribed means that it prefers the ULC's language to an alternative text. This preference, expressed through the legislature's adoption of the Uniform Act's provisions, signals to courts to construe those provisions in light of their accompanying official comments. Consistent with the textualist principle that courts must "assume that [a legislature] picks its words with care,"<sup>179</sup> the signal arises from the legislature's choice to enact the ULC's words rather than a different statutory formulation.

Receiving the signal requires first that courts identify when statutory text originates from a Uniform Act.<sup>180</sup> Next, the strength of the signal depends on (a) how much of the Uniform Act's text the legislature enacts, and (b) how much the legislature modifies that text. Thus, when a legislature adopts much of a Uniform Act unmodified, the absence of a promote-uniformity instruction is not as consequential as it may seem. But when the legislature adopts only a few provisions from a Uniform Act, or substantially modifies the text of those provisions it does adopt, the absence of the promote-uniformity command becomes more significant.<sup>181</sup> To see why, we consider both the logic and consequences of state enactment.

### 1. *The Logic of State Enactment*

Why might a legislature choose to "buy" legislative language from the ULC rather than "make" it themselves?<sup>182</sup> Using a simple rational choice framework in which legislators are motivated primarily by reelection and career

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<sup>179</sup> Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1613 (2012).

<sup>180</sup> See, e.g., *State v. Davison*, 900 N.W.2d 66, 69 (N.D. 2017) ("The statute is adopted verbatim from Section 7 of the Uniform Act on Prevention of and Remedies for Human Trafficking drafted by the National Conference of Commissioners on Uniform State Laws.").

<sup>181</sup> See *infra* Part IV.

<sup>182</sup> See, e.g., Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 393–98 (1937) (arguing that transaction costs may make it more efficient for a firm to produce goods or services in-house rather than contract out for them). In 1991, Coase was awarded the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel in part for this work. *The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1991*, THE NOBEL PRIZE, <https://www.nobelprize.org/prizes/economic-sciences/1991/summary/> (last visited May 11, 2022). For a recent study assessing why state policymakers might choose to "invent" their own policy rather than borrow it, see Srinivas C. Parinandi, *Policy Inventing and Borrowing Among State Legislatures*, 64 AM. J. POL. SCI. 852 (2020).

advancement, we propose three overlapping possibilities: uniformity, expertise, and efficiency.

Adopting off-the-shelf text from a Uniform Act rather than bespoke provisions allows legislators to benefit from the uniformity that the Uniform Act is designed to achieve. Legislators can be reasonably assured that the subject matter of any proposed Uniform Act is “consistent” with the ULC’s core objective “to promote uniformity in the law.”<sup>183</sup> As Ribstein and Kobayashi highlight, uniformity can reduce the costs that would otherwise result from differences in state laws, including inefficiencies stemming from “inconsistent mandatory rules”; lack of information about applicable law; choice-of-law issues and related “deadweight litigation costs” related to forum-shopping; uncertainty about the likelihood of legal change; and externalities imposed on out-of-state actors.<sup>184</sup> As a result, lawmakers may choose to shepherd a Uniform Act through the legislative process rather than draft a statute from scratch to claim credit for helping to eliminate costly jurisdictional differences.<sup>185</sup>

Legislators may also support provisions from a Uniform Act to benefit from the ULC’s expertise.<sup>186</sup> As we have seen, the ULC’s drafting process brings together subject-matter experts—from the chair and reporter to individual commissioners, representatives of key interest groups, and leading practitioners. The text that results from the ULC’s intensive, multi-year drafting process thus reflects substantive vetting by the Commissioners themselves and by leading subject-matter experts from across the country.<sup>187</sup> When lawmakers rely on the ULC’s handwork, claims that “their proposals are well-designed and mainstream” are made more credible.<sup>188</sup> As Katerina Linos argues, “referencing [external] models . . . can help politicians signal . . . that a proposal has been

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<sup>183</sup> ULC, *Statement of Policy*, *supra* note 57 (citation omitted).

<sup>184</sup> Ribstein & Kobayashi, *supra* note 72, at 138–39.

<sup>185</sup> See MAYHEW, *supra* note 54, at 73 (“These, then, are the three kinds of electorally oriented activities congressmen engage in—advertising, credit claiming, and position taking.”).

<sup>186</sup> The ULC can thus perform a similar function to that played by congressional committees. For the concept of “informational” committees, see, e.g., KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION 76 (1992); Gerald Gamm & Kenneth Shepsle, *Emergence of Legislative Institutions: Standing Committees in the House and Senate, 1810-1825*, 14 LEGIS. STUD. Q. 39, 59–60 (1989).

<sup>187</sup> The ULC’s drafting process also takes notice of relevant social science evidence where it is available. See, e.g., UNIF. PROB. CODE § 2-102 cmt. (UNIF. L. COMM’N 2019) (“Empirical studies support the increase in the surviving spouse’s intestate share, reflected in the revisions of this section.”); UNIF. PRUDENT INV. ACT pref note (UNIF. L. COMM’N 1994) (noting the Act’s reliance on modern portfolio theory).

<sup>188</sup> KATERINA LINOS, THE DEMOCRATIC FOUNDATIONS OF POLICY DIFFUSION: HOW HEALTH, FAMILY, AND EMPLOYMENT LAWS SPREAD ACROSS COUNTRIES 13 (2013).

carefully vetted by disinterested outsiders and is not an ill-thought-out experiment or a giveaway to fringe ideologues or special interest groups.”<sup>189</sup>

Finally, Uniform Acts also promote legislative efficiency.<sup>190</sup> State lawmakers, particularly those in less-professionalized legislatures, have limited time and resources. Just as lobbyists subsidize legislators by “enlarg[ing] the resources that [they] have to work on behalf of their constituents,”<sup>191</sup> the ULC can free lawmakers from having to spend their time crafting and vetting statutory language. The details of the ULC’s drafting process, and the fact that ULC commissioners are political appointees, can help to provide cover against charges that, in relying on the ULC, legislators have abdicated their responsibilities. And because key interest groups have an opportunity to provide input into the content of the Uniform Act, legislators can rely on their continued buy-in during the state-enactment process—so long as the ULC’s language is largely kept intact. At minimum, lawmakers can feel secure that voting for legislation that has already been through the ULC’s drafting process will not expose them to unexpected backlash.

To be sure, state legislators frequently rely on extra-legislative actors (often lobbyists) to draft legislation.<sup>192</sup> To appease particular constituencies or interest groups, they may even enact language these groups supply.<sup>193</sup> While this practice may superficially resemble legislators’ reliance on the ULC, there are two critical differences.

First, unlike lobbying groups, the ULC is a governmental body authorized by statute in each of the fifty states as well as several territories.<sup>194</sup> It is funded through state-level appropriations for precisely this purpose.<sup>195</sup> And the ULC’s commissioners are appointed by state governors or other elected officials.<sup>196</sup> The ULC is thus best understood as an auxiliary legislative body recognized by state

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<sup>189</sup> *Id.* at 13–14.

<sup>190</sup> *Cf.* Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69, 72 (2006) (observing that no legislator “can engage in all of the activities needed to make maximum progress toward all of the objectives that they and their constituents care about”).

<sup>191</sup> *Id.* at 81.

<sup>192</sup> *Id.* at 74 (explaining that one way lobbyists assist legislators is through their ability to analyze, synthesize, and summarize issues, which, in turn, “enables [them] to make a greater effort on the issue”).

<sup>193</sup> *Id.*

<sup>194</sup> *See supra* Part I.B.

<sup>195</sup> *See supra* Part I.B.

<sup>196</sup> *See supra* Part I.B.

law.<sup>197</sup> In consequence, its output represents a legitimate source of positive law in a way that interest group proposals do not.

Second, the work of the ULC is public, formal, and transparent.<sup>198</sup> Meetings of the ULC are open to all. Language drafted by the ULC must receive formal approval within the drafting committee to be referred to the full body and then must be promulgated in accordance with the ULC's state-by-state voting procedures.<sup>199</sup> These procedures differ substantially from the more ad hoc (and often secret) processes that characterize interest group drafting.

Taken together, these differences strengthen the inference that legislators are deliberately drawing on the ULC's unique juridical status and authority when they enact Uniform Acts in whole or in part—that is, they are consciously choosing to adopt the ULC's promulgated statutory text with specific attention to its origins. Reflecting this point, many state drafting manuals treat Uniform Acts distinctively from other sources of legislation.<sup>200</sup>

## 2. *The Consequences of State Enactment*

A legislature's enactment of the ULC's statutory language instead of an alternative text signals to courts that the accompanying comments should be treated as persuasive interpretive guides. Begin with textualism's primary rationale: that courts must prioritize the statutory text because only the text has passed through the constitutionally prescribed hurdles for making law.<sup>201</sup> On our account, the text itself is the source of the legislative signal.

The overwhelming inference, arising from the text itself, is that the legislature enacted these words rather than other words owing to their provenance and the accompanying shared, specialized conventions for such text. By virtue of the legislature's choice to enact the ULC's text and not a competing alternative, the statute's meaning at the time of its enactment is whatever meaning the ULC ascribed to it. It follows that courts can best identify the enacted text's original public meaning by making use of the interpretive tools

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<sup>197</sup> Langbein, *supra* note 38, at 3 (describing the ULC as “a legislative drafting consortium of the state governments”).

<sup>198</sup> *See supra* Part I.B.

<sup>199</sup> *See supra* Part I.B.

<sup>200</sup> *See, e.g.,* ILL. LEGIS. REFERENCE BUREAU, *supra* note 110, at 171 (instructing drafters not to “use ‘Uniform’ as the first word in an Act’s short title or otherwise state that an Act may be cited as a Uniform Act unless the Act is recommended by [the ULC]”); *cf.* ARIZ. LEG. COUNCIL, *supra* note 108, at 66 (“Unlike uniform acts, model acts may originate from any number of sources and are prepared with varying degrees of skill and quality.”).

<sup>201</sup> *See supra* Part II.A.



the ULC provides—namely, the official comments. As the Missouri Supreme Court has said, “[w]hen ‘construing uniform and model acts enacted by the [state legislature], we must assume it did so with the intention of adopting the accompanying interpretations placed thereon by the drafters of the model or uniform act.’”<sup>202</sup>

Put differently, the ULC’s text is what secured a winning coalition in each chamber of the legislature and the signature of the state’s executive. Because the ULC’s text is part of a package that is meant to be read in light of its official comments, courts should view the legislature’s adoption of that text as a signal—consistent with its technical context—to treat the accompanying comments as persuasive guides to the text’s meaning.<sup>203</sup> The official comments convey the ULC’s understanding of the text’s meaning—and that meaning becomes the text’s meaning upon the enactment of the ULC’s language. This insight provides a conceptual foundation for the intuition sometimes (but not always) expressed by courts that “[i]n the case of a statutory enactment patterned after a uniform law drafted by the [Uniform Law Commission], a court may properly consider the official comments . . . as a source for determining the meaning to be attributed to an ambiguous provision.”<sup>204</sup> Doing so accords respect to the legislature as a collective lawmaking body that chooses its words carefully and to account for the “term-of-art sense” in which the ULC’s words are used.<sup>205</sup>

To be sure, textualists ordinarily reject as a fiction the idea that a legislative purpose can be identified by aggregating the preferences of individual legislators. But the concern that the legislative process is too “delicate” to yield a definable intent does not apply to these circumstances.<sup>206</sup> No complex guesswork is required in discerning the signal the legislature sent by enacting

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<sup>202</sup> *In re Nocita*, 914 S.W.2d 358, 359 (Mo. 1996) (en banc) (emphasis added) (quoting *John Deere Co. v. Jeff Dewitt Auction Co.*, 690 S.W.2d 511, 514 (Mo. Ct. App. 1985)). The court explained that, in consequence, the “comments accompanying a uniform code when adopted have great weight.” *Id.*; see also, e.g., *May v. Ellis*, 92 P.3d 859, 862 (Ariz. 2004) (en banc) (“When . . . ‘a statute is based on a uniform act, we assume that the legislature intended to adopt the construction placed on the act by its drafters,’ and ‘[c]ommentary to such a uniform act is highly persuasive.’”) (alteration in original) (emphasis added) (citation omitted).

<sup>203</sup> As a general rule, this is precisely the use of legislative history that even sympathetic textualists reject. See Manning, *Why Does Congress Vote*, *supra* note 132, at 571 (“The questions I have about Judge Katzmann’s approach lie in the margin in which a judge credits legislative history not because of what it says but rather because of who has generated it.”).

<sup>204</sup> *Griffin v. S.W. Devanney & Co.*, 775 P.2d 555, 559 (Colo. 1989) (citations omitted).

<sup>205</sup> SCALIA & GARNER, *READING LAW*, *supra* note 18, at 76; see also *Murphy v. Smith*, 138 S. Ct. 784, 788 (2018) (“[R]espect for Congress’s prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of our own.”); Manning, *Absurdity Doctrine*, *supra* note 131, at 2424 (discussing the presumption that “Congress . . . chose its words with care”).

<sup>206</sup> CROSS, *supra* note 125, at 32.

some portion of a Uniform Act verbatim. The best available inference is that it intended to secure the benefits of the ULC's product.<sup>207</sup>

This inference, which flows directly from the assumption that a legislature chooses its words carefully, rests on a textual foundation, not a legislative-historical one.<sup>208</sup> The text reflects the legislature's choice to forgo a customized legislative solution in favor of a specific, prefabricated one. That sacrifice of legislative autonomy is worthwhile only if the legislature can thereby secure the benefits that flow from enacting a Uniform Act. These benefits, as discussed above, include achieving uniformity across state lines; codifying other states' best practices; capitalizing on the political networks and expertise of the ULC's commissioners, the Act's reporter, and the interest groups that helped to shape the Act; and the expediency of adopting non-bespoke legislation from an authoritative source. Treating the comments as persuasive authority helps to obtain each of these benefits, not only by ensuring that courts will interpret Uniform Act provisions in a manner that reflects the ULC's (and so an enacting legislature's) intended meaning, but also by ensuring substantively uniform outcomes and reasoning across jurisdictions.

### 3. *The Extent of State Enactment*

The ULC does not present Uniform Acts on a take-it-or-leave-it basis. Rather, a legislature may incorporate specific provisions of a Uniform Act or even portions of individual provisions.<sup>209</sup> The choice of how much of a Uniform Act to enact thus has important interpretive consequences. For courts to play their appropriate role in our separation of powers system, they must recognize that the strength of the legislature's signal is variable in a manner that affects the persuasive weight of the comments.

As the Iowa Supreme Court has explained, “[w]e can determine legislative intent from selective enactment or divergence from uniform acts.”<sup>210</sup> The more of the ULC's promulgated language a legislature incorporates (even without the promote-uniformity command), the more confident courts can be that the legislature made a considered choice to adopt the integrated package of blackletter text and comments, and the more interpretive traction the official

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<sup>207</sup> Patchel, *supra* note 73, at 139 (“After all, the whole idea behind the uniform laws process is for the states all to enact the *same* law.”).

<sup>208</sup> See Manning, *Textualism and Legislative Intent*, *supra* note 146, at 438 (“Textualists focus on the end product of the legislative process . . .”) (emphasis omitted).

<sup>209</sup> See, e.g., *Freedom Fin. Bank v. Estate of Boesen*, 805 N.W.2d 802, 813–14 (Iowa 2011) (discussing Iowa's selective incorporation of provisions of the UPC).

<sup>210</sup> *Id.* at 814 (citations omitted).

comments provide. As another court put it, when a Uniform Act has “been adopted all but verbatim by the legislature,” the comments serve “as the most informed source explaining provisions of the original enactment.”<sup>211</sup>

By contrast, the more the legislature departs from the ULC’s text, the weaker the inference that it deliberately enacted the Uniform Act as an integrated package and the less interpretive traction the comments provide. The logic is grounded, once again, on the textualist presumption that the legislature chooses its words with care.<sup>212</sup> “[W]hen the Legislature models a statute after a uniform act, but does not adopt particular language, courts [must] conclude the omission was deliberate.”<sup>213</sup> Assessing the signal’s strength thus entails a comparison of the statutory provision as enacted with the version as promulgated by the ULC.<sup>214</sup> When confronted with a difference between a Uniform Act and the state legislature’s enactment of that act, the question becomes whether the change is “so substantial as to render the comment to the corresponding section of the Uniform Act inapplicable.”<sup>215</sup>

To illustrate how this proposed canon might work in practice, consider the following brief example. In a recent South Dakota case, the state’s supreme court was asked to determine whether the state’s short statute of limitations governing challenges to the validity of a revocable trust applied to claims for lack of capacity or undue influence.<sup>216</sup> The plaintiff argued that it applied only to claims putting “document formalities” at issue; for questions involving capacity or undue influence, the state’s more general and longer statute of limitations should

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<sup>211</sup> *Holifield v. BancorpSouth, Inc.*, 891 So. 2d 241, 248 (Miss. Ct. App. 2004); *see also ClearOne Commc’ns v. Biamp Sys.*, 653 F.3d 1163, 1184–86 (10th Cir. 2011) (referring to the comments because the relevant provision was “identical” to the Uniform Act).

<sup>212</sup> *See supra* note 205 and accompanying text.

<sup>213</sup> *John A. Sheppard Mem’l Ecological Rsrv., Inc. v. Fanning*, 836 S.E.2d 426, 431 (W. Va. 2019) (quoting 2B NORMAN J. SINGER & J.D. SHAMBLE SINGER, *STATUTES & STATUTORY CONSTRUCTION* § 52:5) (first alteration in original); *Sallee v. Stewart*, 827 N.W.2d 128, 142 (Iowa 2013) (same); *see also Heirs of Ellis v. Estate of Ellis*, 71 S.W.3d 705, 713–14 (Tenn. 2002) (“When the legislature enacts provisions of a uniform or model act without significant alteration, it may be generally presumed to have adopted the expressed intention of the drafters of that uniform or model act. However, when the legislature makes significant departures from the text of that uniform act, we must likewise presume that its departure was meant to express an intention different from that manifested in the uniform act itself.”) (citation omitted); *Hughes Elecs. Corp. v. Citibank Delaware*, 15 Cal. Rptr. 3d 244, 257 (Cal. Ct. App. 2004) (similar).

<sup>214</sup> Legislative drafters can aid in this endeavor. Recognizing the state’s omnibus promote-uniformity provision, Minnesota’s legislative drafting manual provides that “[b]ecause a uniform law is intended to be interpreted and construed in a consistent manner among the states enacting it, it is useful to have some numbering scheme or other matching system to coordinate provisions of the state act with their counterparts in the uniform act on which they are based.” MINN. OFF. OF THE REVISOR OF STATUTES, *MINNESOTA REVISOR’S MANUAL* 10–11 (2013), <https://www.revisor.mn.gov/static/office/2013-Revisor-Manual.pdf>.

<sup>215</sup> *Peter v. State*, 531 P.2d 1263, 1268 (Alaska 1975).

<sup>216</sup> *In re Elizabeth A. Briggs Revocable Living Trust*, 898 N.W.2d 465, 467 (S.D. 2017).

apply.<sup>217</sup> To answer the question, the court took notice that the legislature had “copied” the short limitations provision for a challenge to the validity of a revocable trust “nearly verbatim” from the corresponding provision in the UTC.<sup>218</sup> The court therefore looked to the official comment accompanying that provision. Observing that the comment “uses claims of undue influence and lack of capacity as specific examples of claims that are subject to [the provision’s] time limits,” the court ruled against the plaintiff.<sup>219</sup> The court, in other words, received the signal the legislature sent by enacting a virtually unmodified version of the ULC’s text and gave it effect by treating the comments as persuasive guides to the statute’s meaning.

### C. *Practical Payoffs*

To this point, we have argued that there are conceptual and theoretical merits to treating the official comments to a Uniform Act as persuasive authority given the directive a legislature issues when it adopts a promote-uniformity clause or the signal it sends by adopting substantially unmodified portions of a Uniform Act. Doing so also has significant practical benefits. Most obviously, applying our proposed canon and attending to these directives or signals can bring consistency to interpretations of the same provisions by courts in different jurisdictions (or even in the same jurisdiction). This approach can also inform courts about the policy approaches their legislature chose not to adopt in making material modifications to the text of a Uniform Act. Perhaps most important, it can help courts to avoid making easy cases hard through maladroit application of textualist interpretive tools that do not fit the unique content and two-step political economy of a state-enacted Uniform Act. We illustrate with three recent cases,<sup>220</sup> two in which the courts were oblivious to the uniform law context for the question presented and one in which the court was sensitive to it.

#### I. *Macool*

We begin with *In re Probate of Will & Codicil of Macool*.<sup>221</sup> Here is the relevant background (applicable to the next case, too). Traditional law requires

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<sup>217</sup> *Id.* at 469.

<sup>218</sup> *Id.* at 469 n.4.

<sup>219</sup> *Id.* at 470 n.7.

<sup>220</sup> All three cases involve trusts and estates, an area of law in which the ULC has been unusually influential. *See, e.g.*, Langbein, *supra* note 38, at 2 (commending that uniform laws and restatements “are the main sources that shape the law of trusts and estates at the national level”); SITKOFF & DUKEMINIER, *supra* note 111, at 71 (“The Uniform Law Commission, which promulgates uniform laws for enactment by the states, has had a profound influence on the development of the law of wills, trusts, and estates.”).

<sup>221</sup> 3 A.3d 1258, 1261 (N.J. Super. Ct. App. Div. 2010).

the execution of a will to comply with several statutory formalities.<sup>222</sup> For example, UPC section 2-502 requires a “formal” will to be in writing and signed by the decedent (the “testator,” in wills jargon) and two witnesses; a “holographic” will, by contrast, must be handwritten but need be signed only by the decedent.<sup>223</sup> Traditional law also requires strict compliance with these statutory formalities. “Unless every last statutory formality is complied with exactly, the instrument is” deemed invalid “even if there is compelling evidence that the decedent intended the instrument to be his will.”<sup>224</sup>

To alleviate this harsh result, UPC section 2-503 reforms the strict compliance rule by prescribing a “harmless error” rule. It provides that a “document or writing is treated as if it had been executed in compliance” with the statutory formalities of UPC section 2-502 “if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended [it] to constitute . . . the decedent’s will.”<sup>225</sup> The official comment explains that the harmless error rule is meant to soften the formalism of the strict compliance rule: “By way of dispensing power, this new section allows the probate court to excuse a harmless error in complying with the formal requirements for executing or revoking a will.”<sup>226</sup> Even if the decedent did not strictly comply with the prescribed statutory formalities, the court may nonetheless probate the will if there is clear and convincing evidence that the decedent intended the instrument to be her will.

The comment clarifies that the “larger the departure” from the formalities required by UPC section 2-502, “the harder it will be to satisfy the court that the instrument reflects the testator’s intent.”<sup>227</sup> For example, the absence of the decedent’s signature would be difficult to overcome but not impossible. Taking notice of how foreign courts applied the harmless error rule, the comment observes that the rule could be invoked to “excuse[] signature errors,” particularly those arising in so-called “switched wills” cases in which two testators, usually spouses, mistakenly sign each other’s will.<sup>228</sup>

Against this backdrop, the court in *Macool* was asked to decide as a matter of law whether New Jersey’s enactment of UPC section 2-503 permits a court

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<sup>222</sup> See, e.g., SITKOFF & DUKEMINIER, *supra* note 111, at 144–49.

<sup>223</sup> UNIF. PROB. CODE § 2-502(a)–(b) (UNIF. L. COMM’N 2019).

<sup>224</sup> SITKOFF & DUKEMINIER, *supra* note 111, at 167.

<sup>225</sup> UNIF. PROB. CODE § 2-503 (UNIF. L. COMM’N 2019) (emphasis added).

<sup>226</sup> *Id.* cmt.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

to probate a purported will lacking the decedent's signature.<sup>229</sup> To answer this question, the court emphasized in textualist fashion the need to “turn to the words chosen by the Legislature.”<sup>230</sup> Oblivious to the origin of those words in a Uniform Act, the court missed the legislature's strong signal, stemming from its nearly verbatim enactment of UPC section 2-503 rather than a bespoke provision, to treat the comments accompanying UPC section 2-503 as persuasive authority.<sup>231</sup> Had the court been attuned to that signal, it would have recognized that the official comment provided a clear answer to the question presented.

Instead, the court compared the text of the state's enactment of section 2-503 to other nearby text in the state's probate code—a standard textualist technique that, on the assumption of common authorship, finds context from other duly enacted text.<sup>232</sup> In this case, the court looked to the state's enactment of section 2-502.<sup>233</sup>

Recall that section 2-502 permits not only a formal will but also a holographic one (that is, a handwritten will signed by the testator). Reasoning that handwriting is “the essence of a holographic will,” the court concluded that

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<sup>229</sup> *In re Probate of Will and Codicil of Macool*, 3 A.3d 1258, 1265 (N.J. Super. Ct. App. Div. 2010).

<sup>230</sup> *Id.* (emphasis added).

<sup>231</sup> *Compare* N.J. STAT. ANN. § 3B:3-3 (West 2005) (“Although a document or writing added upon a document was not executed in compliance with N.J.S.3B:3-2, the document or writing is treated as if it had been executed in compliance with N.J.S.3B:3-2 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent's will; (2) a partial or complete revocation of the will; (3) an addition to or an alteration of the will; or (4) a partial or complete revival of his formerly revoked will or of a formerly revoked portion of the will.”), *with* UNIF. PROB. CODE § 2-503 (UNIF. L. COMM'N 2019) (“Although a document or writing added upon a document was not executed in compliance with section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent's will, (2) a partial or complete revocation of the will, (3) an addition to or an alteration of the will, or (4) a partial or complete revival of [their] formerly revoked will or of a formerly revoked portion of the will.”).

<sup>232</sup> *See* SCALIA & GARNER, *READING LAW*, *supra* note 18, at 168 (noting that, “[p]roperly applied,” this canon “typically establishes . . . that one of the possible meanings [of a statutory provision] would cause [it] to clash with another portion of the statute”); *see also* ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 203 (2006) (discussing the “strong presumption of textual coherence” undergirding textualist interpretation); *accord* *Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (alteration in original) (citation omitted); *Lukhard v. Reed*, 481 U.S. 368, 376 (1987) (plurality opinion) (explaining that “the fact that Congress was silent in the [specific provision at issue] but has elsewhere been explicit when it wished to exclude personal injury awards from income tends to refute rather than support a legislative intent to exclude them from AFDC computations”); *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991) (plurality opinion) (“[I]t is not our function to eliminate clearly expressed inconsistency of policy and to treat alike subjects that different Congresses have chosen to treat differently.”).

<sup>233</sup> N.J. STAT. ANN. § 3B:3-3 (West 2005).

“the only conceivable relief” that the harmless error rule could offer the proponent of a defective holographic will would be to dispense with the signature requirement.<sup>234</sup> And because the harmless error rule of section 2-503 applies to all of section 2-502 (i.e., to both holographic and formal wills), *Macool* generalized the point. Under section 2-503, the court held, a document “need not be signed by the testator in order to be admitted to probate,” regardless of whether the testator intended the document to be a holographic or formal will.<sup>235</sup>

While the court was right about the bottom line, its blinkered textualism and obliviousness to the accompanying comment added needless complexity and risk of error. Rather than detouring through the requirements of holographic wills under section 2-502 to divine the meaning of section 2-503 as applied to a non-holographic will, the court need only have looked to the comment to section 2-503 for the answer to the question presented. As we have seen, the comment to section 2-503 makes clear that its harmless error rule can forgive the absence of a signature.<sup>236</sup> Looking to the comment would have been in accord with the strong signal the state legislature sent by enacting section 2-503 nearly verbatim.

Even on its own terms, the court’s reasoning was flawed. The court was wrong that “the only conceivable relief” under the harmless error rule for a holographic will is dispensing with the signature requirement. The state’s enactment of section 2-502, like the uniform version, permits a holograph if “the signature and material portions of the document are in the [decedent’s] handwriting.”<sup>237</sup> A purported holograph for which a “material” portion was not in the decedent’s handwriting would fail for want of strict compliance with section 2-502. But, under section 2-503, it could be saved by the harmless error rule with clear and convincing evidence that the decedent intended the insufficiently handwritten instrument to be their will.

There is yet another reason why the court’s reasoning was faulty. Suppose the state legislature had dropped the holographic will provision of section 2-502 from its enactment of that section—in other words, suppose the state recognized only formal wills and not holographs.<sup>238</sup> The court’s reasoning suggests that this choice would have led it to conclude that the harmless error rule could not

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<sup>234</sup> *Macool*, 3 A.3d at 1266.

<sup>235</sup> *Id.*

<sup>236</sup> See *supra* note 226 and accompanying text.

<sup>237</sup> N.J. STAT. ANN. § 3B:3-2(b) (West 2005) (emphasis added).

<sup>238</sup> “[A] little more than half of the states” recognize holographic wills. SITKOFF & DUKEMINIER, *supra* note 111, at 205.

forgive the absence of a testator's signature in a formal will. But it would make little sense to determine whether the harmless error rule can be invoked to excuse the absence of a signature in a formal will by looking to whether the state permits holographic wills.

All told, *Macool* ignored the legislature's strong signal to treat the official comment accompanying section 2-503 as persuasive authority by failing to appreciate that the legislature enacted the provision virtually unmodified. The court reached the result intended by the ULC's drafters—but only out of sheer luck, relying on a rigid textual analysis that was wrong on its own terms rather than the clear statement of intent set forth in the accompanying comment.

## 2. Stoker

*In re Estate of Stoker* also involved a state-enacted version of UPC section 2-503.<sup>239</sup> And it is also an example of a court misreading the signal its legislature sent by adopting the ULC's operative language.<sup>240</sup> At issue was a dispute over the estate of Steven Wayne Stoker that pitted his children from a previous relationship against a more recent ex-girlfriend. While the ex-girlfriend was the beneficiary of a will Stoker executed in 1997,<sup>241</sup> the children had a 2005 document signed by Stoker that purported to revoke his earlier will and stated his intention to leave them the entirety of his estate.<sup>242</sup> The 2005 document, however, was neither witnessed (as required for a formal will) nor was it in Stoker's handwriting (as required for a holographic will).<sup>243</sup>

At trial, a close friend of Stoker's explained how the 2005 document was prepared. One night in 2005, as talk turned to "estate planning," Stoker asked her to "get a piece of paper and a pen" so that he could dictate a new will cutting out the ex-girlfriend.<sup>244</sup> The friend testified that Stoker first signed the document, then declared that it was his "last will and testament."<sup>245</sup> For the avoidance of doubt, Stoker urinated on and then set fire to his copy of the 1997 will that had favored the ex-girlfriend.<sup>246</sup> Although the friend saw Stoker sign the 2005 document, neither she nor the other witness signed it.

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<sup>239</sup> 122 Cal. Rptr. 3d 529, 533–34 (Cal. Ct. App. 2011).

<sup>240</sup> See *infra* note 250.

<sup>241</sup> *In re Estate of Stoker*, 122 Cal. Rptr. 3d at 532–33.

<sup>242</sup> *Id.* at 532.

<sup>243</sup> *Id.* at 533–34.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*



There was no dispute that the 2005 writing could not be probated as a formal will (for want of witnesses) or as a holograph (for want of Stoker's handwriting).<sup>247</sup> But could it be probated under California's enactment of section 2-503's harmless error rule? The ex-girlfriend argued that it could not be, on the ground that "the Legislature never intended this provision to apply to cases involving handwritten documents."<sup>248</sup> The court disagreed,<sup>249</sup> but gave no acknowledgement of the provision's origin in the UPC or the clear purpose as stated in its official comment. Rather than attend to the signal the legislature sent in adopting the operative language of section 2-503,<sup>250</sup> the court instead treated the provision as bespoke text drafted by the California legislature. That approach resulted in a disjointed interpretation cobbled together from a confusing blend of textualist principles and hoary maxims.

The court opened with standard textualist recitations of the need to discern the "legislative intent underlying a statute" from "its language."<sup>251</sup> "Where the statute is inclusive,"<sup>252</sup> the court explained, "containing no limiting or qualifying language to exclude persons from its scope, the words the legislators used should control."<sup>253</sup> And in this case, it concluded, "[t]he statute contains no language to indicate that the wills covered by this section are limited to typewritten wills. Consequently, handwritten non-holographic wills are not excluded from the scope of this statute."<sup>254</sup>

Despite the court's ostensible commitment to textualism, it then shifted to a more purposive register. Invoking without apparent support the legislature's "broad and remedial goal" in enacting the harmless error provision, the court

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<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 534.

<sup>249</sup> *Id.*

<sup>250</sup> Compare CAL. PROB. CODE § 6110(c)(2) (2009) ("If a will was not executed in compliance with paragraph (1), the will shall be treated as if it was executed in compliance with that paragraph if the proponent of the will establishes by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator's will."), with UNIF. PROB. CODE § 2-503(1) (UNIF. L. COMM'N 2019) ("Although a document or writing added upon a document was not executed in compliance with section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute . . . the decedent's will."). The legislative history of California's harmless error provision makes clear that it is a "modified" version of UPC section 2-503. See S. Comm. on the Judiciary, Analysis of A.B. 2248 (2007-2008 Reg. Sess.) (June 10, 2008) ("The language of the harmless error rule in AB 2248 is a modified version of the Uniform Probate Code (UPC) 2-503 . . ."). Nevertheless, California's version of the provision, unlike the Uniform version, does not excuse the absence of a signature.

<sup>251</sup> *In re Estate of Stoker*, 122 Cal. Rptr. 3d at 534.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* (emphasis added).

<sup>254</sup> *Id.*

explained that the legislature intended to “give preference to the testator’s intent instead of invalidating wills because of procedural deficiencies or mistakes.”<sup>255</sup> Thus, because section 2-503 was a “[r]emedial statute,” the court was obligated to construe it “broadly and liberally . . . to promote the underlying legislative goals.”<sup>256</sup> And this liberal construction rule redounded to the benefit of Stoker’s children.

Had the court been attuned to the signal the legislature sent by adopting the key portions of the ULC’s version of section 2-503 and treated the official comments as persuasive authority, it would not have needed to stitch together textualism and purposivist interpretive maxims to justify its divination of legislative intent. As we have seen, the comment makes clear that a will may be probated so long as the proponent has clear and convincing evidence that the decedent intended the written instrument—however prepared—to be their will.<sup>257</sup> As in *Macool*, the *Stoker* court’s obliviousness to the origin of the provision at issue in a Uniform Act led it to undertake needless interpretive gymnastics, turning an easy case into a hard one.

### 3. Darby

One final example, *In re Trust D Under Last Will of Darby*, brings together much of the analysis developed thus far.<sup>258</sup> Here is the relevant background. UTC section 411 sets forth conditions for modifying or terminating a noncharitable trust in certain circumstances. Subsection (b) describes one such circumstance: a court may terminate a noncharitable trust “upon consent of all of the beneficiaries,” provided that it “concludes that continuance of the trust is not necessary to achieve any material purpose of the trust.”<sup>259</sup> Subsection (c) provides that a “spendthrift provision,” a provision that protects a beneficiary’s interest in the trust from her creditors, “is not presumed to constitute a material purpose of the trust.”<sup>260</sup>

As explained in the official comment, subsection (c) is meant to confirm that a spendthrift clause, which is customary boilerplate, may—but need not—signal that the trust’s creator (the “settlor,” in trust jargon) had a material purpose of

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<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> See *supra* note 226 and accompanying text.

<sup>258</sup> 234 P.3d 793 (Kan. 2010).

<sup>259</sup> UNIF. TR. CODE § 411(b) (UNIF. L. COMM’N 2010). This is the *Claflin* rule, after *Claflin v. Claflin*, 20 N.E. 454 (Mass. 1889).

<sup>260</sup> UNIF. TR. CODE § 411(c) (UNIF. L. COMM’N 2010) (emphasis added). On spendthrift provisions, see SITKOFF AND DUKEMINIER, *supra* note 111, at 709–17.

creditor protection.<sup>261</sup> Under subsection (c), therefore, discerning whether “spendthrift protection might have been a material purpose” is “a matter of fact to be determined on the totality of the circumstances,” rather than categorically presumed from the fact of such a clause.<sup>262</sup> When the Kansas legislature enacted the UTC, however, it deleted the word “not” from its version of subsection (c).<sup>263</sup> In Kansas, therefore (at least at the time *Darby* was decided), a spendthrift provision was presumed to constitute a material purpose of the trust, precluding a court from modifying or terminating the trust even upon consent of all the beneficiaries.<sup>264</sup>

The court in *Darby* was asked to determine whether the settlor’s daughter could modify her father’s trust to increase her annual distributions.<sup>265</sup> Her own daughters (the settlor’s granddaughters), who were slated to receive distributions from the trust upon their mother’s death, consented to the change.<sup>266</sup> Even though they stood to receive less from their grandfather’s trust under the modification, they agreed with their mother that the money she was receiving from the trust (her primary source of financial support) was “no longer sufficient to satisfy [her] basic living expenses.”<sup>267</sup>

Notwithstanding the granddaughters’ consent, the court rejected the proposed modification because the trust contained a spendthrift provision. “In Kansas,” the court explained, “a spendthrift provision is presumed to constitute a material purpose of the trust.”<sup>268</sup> Noting that this was “in material contrast to the Uniform Trust Code, which specifically negates any such presumption,” *Darby* held that the modification sought by the daughter would be “inconsistent with the material purpose manifested by the spendthrift provision.”<sup>269</sup>

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<sup>261</sup> UNIF. TR. CODE § 411 cmt. (UNIF. L. COMM’N 2010).

<sup>262</sup> *Id.*

<sup>263</sup> Compare KAN. STAT. ANN. § 58a-411(c) (2006) (“A spendthrift provision in the terms of the trust *is* presumed to constitute a material purpose of the trust.”) (emphasis added), with UNIF. TR. CODE § 411(c) (UNIF. L. COMM’N 2010) (“A spendthrift provision in the terms of the trust *is not* presumed to constitute a material purpose of the trust.”) (emphasis added). In 2012, the Kansas legislature amended the state’s enacted version of UTC section 411 to undo this deletion. Thus, the current, post-*Darby*, version of the statute is identical to the version promulgated by the ULC. See KAN. STAT. ANN. § 58a-411(c) (2012).

<sup>264</sup> Responding to similar changes made by state legislatures across the country, the ULC ultimately made the provision “optional” by placing it in brackets. UNIF. TR. CODE § 411 cmt. (UNIF. L. COMM’N 2010). Other states have enacted UTC section 411(c) with the bracketed “not.” See, e.g., *In re Pike Family Trusts*, 38 A.3d 329, 332 (Me. 2012) (noting that, “[e]ven in the absence of any presumption, a court may conclude that a spendthrift provision was a material provision of the settlor”).

<sup>265</sup> *In re Trust D Under Last Will of Darby*, 234 P.3d 793, 797–98 (Kan. 2010).

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 798 (alteration in original).

<sup>268</sup> *Id.* at 799.

<sup>269</sup> *Id.* at 800.

*Darby*'s straightforward—and, in our view, correct—analysis flows directly from the court's receptivity to the signal sent by the Kansas legislature when it enacted a materially modified version of UTC section 411(c). The court recognized that the Kansas legislature largely chose to adopt the ULC's off-the-rack text.<sup>270</sup> But it also recognized that the legislature made a key modification, reversing the ULC's rule that spendthrift provisions are not presumptive material purposes.<sup>271</sup> Even in this context, however, the comment could have proved useful to the court in making clear exactly what policy the legislature had chosen to reject by deleting the word "not" in the blackletter text.

In all events, the court's doctrinal moves reflect a textualism sensitive to the two-step political economy undergirding Kansas's enactment of the UTC. Its holding reflects an awareness of the ULC's role in promulgating state statutes and the possible complications that result from state enactment, including outright rejection of the ULC's policy choices. That kind of awareness should result in treating the ULC's comments as persuasive guides to the meaning of the statutory text. Of course, that the Kansas UTC is not entirely "Uniform" is suggestive of broader puzzles and extensions, to which we now turn.

#### IV. INTERPRETIVE CHALLENGES AND LIMITS

*Darby* points to a broader set of puzzles and complications arising from hybrid cases in which a legislature modifies the ULC's text and, in so doing, potentially generates a mixed signal. In *Darby*, the legislature's signal was clear. By enacting the UTC but deleting the word "not" in the provision at issue, the legislature indicated through the text that it rejected the ULC's policy choice. *Darby* read that signal correctly, recognizing that it was not encountering a bespoke provision but instead a modified version of text initially promulgated by the ULC. In other hybrid cases, however, recognizing the Uniform origin of the legislative text does not generate a clear interpretive logic. In these situations, the text makes it difficult to discern the strength of the signal, or even to determine whether a signal is being sent at all. Examining these cases therefore allows us to mark some of the boundaries of our interpretive canon and to be frank about its limitations.

To that end, we now take up four problems stemming from the collision of textualism and the unique content and two-step political economy of state-enacted Uniform Acts. These illustrations, which are not exhaustive, are

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<sup>270</sup> *Id.* at 799–800.

<sup>271</sup> *Id.*

suggestive of the myriad challenges facing courts charged with interpreting a Uniform Act outside of the heartland case of clean enactment. Indeed, we have only scratched the surface of possible puzzles and complications. Our aim is to identify the sort of provocative complexities that result from applying our interpretive canon to a range of difficult cases outside of a clean enactment of a Uniform Act.

The first two problems arise from a legislature's combining text from a Uniform Act with bespoke statutory language, either assimilating Uniform text into an existing bespoke statute or simultaneously enacting related Uniform and bespoke provisions. The third problem concerns legislative silence. What signal is sent when the legislature does not enact part of a Uniform Act, remaining silent on the subject matter of the omitted provision, even as it embraces the rest of the ULC's promulgated text? Finally, the fourth problem concerns how textualists should treat the ULC's own legislative history, including earlier drafts or floor statements by Commissioners.

#### A. *The Problem of Assimilation*

State legislatures regularly assimilate text from a Uniform Act into their existing body of law, updating non-Uniform "legacy" statutes with language from the (usually) newer Uniform Act.<sup>272</sup> This kind of assimilation results in a hybrid statute that blends legacy and Uniform Act statutory text. In contrast to a clean enactment of text from a Uniform Act, these Uniform-legacy hybrids send a fuzzier textual signal about the proper role of the Uniform Act's accompanying commentary.

To make this point more concrete, consider the following scenario based on *In re Estate of Castro*, a much-discussed Ohio case.<sup>273</sup> A dying man asked his two brothers to help him make a will. At his direction, one used an electronic tablet to write out the text of the will with a stylus. The tablet captured the stylus movements as a digital image. The dying man then used the stylus to sign his name at the bottom, as did his two brothers plus a third witness. After the man died, one of the brothers preserved the tablet image. As is typical, the applicable

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<sup>272</sup> See, e.g., ILL. LEGIS. REFERENCE BUREAU, *supra* note 110, at 173 ("An Act may be partly derived from a Uniform Act but may have other material that is not derived from a Uniform Act.").

<sup>273</sup> *In re: Estate of Javier Castro, Deceased*, 27 QUINNIPIAC PROB. L.J. 412, 414 (2014) [hereinafter *In re Castro*] (decided June 19, 2013 in the Probate Division of Lorain County, Ohio). *Castro* is discussed in SITKOFF & DUKEMINIER, *supra* note 111, at 200–01 (with an image of the will), and in the prefatory note to the Uniform Electronic Wills Act. See UNIF. ELECTRONIC WILLS ACT pref. note (UNIF. L. COMM'N 2019). We have freely simplified from the actual case for expositional clarity.

will formalities statute required that a will be “in writing” but did not define the term.<sup>274</sup>

The threshold question, therefore, was whether a digital image of stylus movements on a tablet was a “writing” within the statute’s meaning. The statute was a hybrid of legacy text from the state’s preexisting will formalities statute and additional text drawn from section 2-502 of the UPC.<sup>275</sup> In substance, it closely resembles UPC section 2-502(a).<sup>276</sup> Indeed, although the requirement of a “writing” was prescribed by the preexisting legacy text,<sup>277</sup> section 2-502 also contains that same requirement.<sup>278</sup> Thus, for our purposes, the key question is this: Did the assimilation into the preexisting statute of portions of section 2-502—but not the specific term at issue (a “writing”), which was already in the statute and so predated the assimilation—signal that overlapping terms, such as a “writing,” should be given the meaning that the ULC ascribed to them? The official comment to section 2-502 explains that “[a]ny reasonably permanent record is sufficient” to qualify as a “writing.”<sup>279</sup> If applicable, this comment would likely have made short work of the case, as there was no dispute that the digital image had captured the words of the will and signatures and that it had been preserved unaltered.<sup>280</sup>

What makes the question difficult is the ambiguous nature of the textual signal. On the one hand, the legislature assimilated language from UPC section 2-502 into the legacy statute, making the resulting hybrid substantively identical

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<sup>274</sup> OHIO REV. CODE ANN. § 2107.03 (2006) (emphasis added).

<sup>275</sup> See 2008 Ohio Laws 100 (S.B. 302) (effective Sept. 11, 2008) (adding “conscious presence” from UNIF. PROB. CODE § 2-502 (UNIF. L. COMM’N 2019)); 2006 Ohio Laws 96 (H.B. 265) (effective July 20, 2006) (enacting a version of the harmless error rule set forth in UNIF. PROB. CODE § 203 (UNIF. L. COMM’N 2019)).

<sup>276</sup> Compare OHIO REV. CODE ANN. § 2107.03 (2006) (“Except oral wills, every will shall be in writing, but may be handwritten or typewritten. The will shall be signed at the end by the testator or by some other person in the testator’s conscious presence and at the testator’s express direction. The will shall be attested and subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator’s signature. For purposes of this section, ‘conscious presence’ means within the range of any of the testator’s senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication.”), with UNIF. PROB. CODE § 2-502(a) (UNIF. L. COMM’N 2019) (“Except as otherwise provided in subsection (b) and in Sections 2-503, 2-506, and 2-513, a will must be: (1) in writing; (2) signed by the testator or in the testator’s name by some other individual in the testator’s conscious presence and by the testator’s direction; and (3) either: (A) signed by at least two individuals, each of whom signed within a reasonable time after the individual witnessed either the signing of the will as described in paragraph (2) or the testator’s acknowledgment of that signature or acknowledgement of the will; or (B) acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgements.”).

<sup>277</sup> See *supra* note 275 (describing the 2008 amendments to Ohio’s will formalities statute).

<sup>278</sup> UNIF. PROB. CODE § 2-502(a)(1) (UNIF. L. COMM’N 2019).

<sup>279</sup> *Id.* cmt.

<sup>280</sup> *In re Castro*, *supra* note 273, at 415.

to its UPC cousin.<sup>281</sup> In addition, the legislature enacted a version of section 2-503, the UPC's harmless error provision.<sup>282</sup> A plausible inference from the text, therefore, is that the legislature was assimilating the new language with attention to its source. If true, this case should be treated as though it were a clean enactment of a Uniform Act provision. That is, the choice to enact these words, yielding a legacy-uniform hybrid statute that in substance closely resembles section 2-502, is persuasive evidence that the new, hybrid provision should be interpreted in a manner consistent with the way the ULC intended section 2-502 to work.

On the other hand, the signal here is weaker than in a heartland signals case, as the state legislature did not adopt section 2-502 in its entirety.<sup>283</sup> Perhaps the decision to assimilate language from the UPC, rather than enact it as a stand-alone provision, reflected the legislature's reluctance to tinker with preexisting statutory language that was sufficiently similar to the ULC's legislative product as not to warrant a wholesale change. But perhaps it was a deliberate choice to depart from the ULC's approach.

Ignoring these complexities, and seemingly oblivious to the hybrid nature of the text, the court looked to how the term "writing" was used in a provision of the state's criminal code pertaining to theft and fraud.<sup>284</sup> Reasoning that the preserved tablet image would satisfy the criminal statute's definition of a "writing," the court held it was also a "writing" for purposes of the will formalities statute.<sup>285</sup> The court gave no explanation for why this definition from the criminal code was apt other than implied common legislative authorship.

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<sup>281</sup> See *supra* note 276 and accompanying text.

<sup>282</sup> Compare OHIO REV. CODE ANN. § 2107.24(A) (2012) ("If a document that is executed that purports to be a will is not executed in compliance with the requirements of section 2107.03 of the Revised Code, that document shall be treated as if it had been executed as a will in compliance with the requirements of that section if a probate court, after holding a hearing, finds that the proponent of the document as a purported will has established, by clear and convincing evidence, all of the following: (1) The decedent prepared the document or caused the document to be prepared. (2) The decedent signed the document and intended the document to constitute the decedent's will. (3) The decedent signed the document under division (A)(2) of this section in the conscious presence of two or more witnesses."), with UNIF. PROB. CODE § 2-503 (UNIF. L. COMM'N 2019) ("Although a document or writing added upon a document was not executed in compliance with section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent's will, (2) a partial or complete revocation of the will, (3) an addition to or an alteration of the will, or (4) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.")

<sup>283</sup> See *supra* note 276.

<sup>284</sup> *In re* Castro, *supra* note 273, at 416 (quoting OHIO REV. CODE ANN. § 2913.01(F)).

<sup>285</sup> *Id.*

We have already seen a version of this move in *Macool*, in which both the statute at issue and the comparison provision were taken verbatim from the UPC.<sup>286</sup> As such, it was appropriate to apply the presumption of textual coherence grounded in common legislative authorship.<sup>287</sup> But unlike in *Macool*, in which the court drew a flawed inference from a reasonable comparison, here our canon suggests that the court in *Castro* made a category error. Although the hybrid will formalities statute is formally bespoke, the legislature's assimilation of Uniform text, such that the hybrid statute closely resembles UPC section 2-502, suggests that it should be interpreted as if it were a provision of a Uniform Act. On this view, the provision at issue and the comparison provision in the state's criminal code lack the common author that underlies the presumption of textual coherence. There is little reason to think that the meaning of the term "writing" in the bespoke criminal provision sheds any light on the meaning of that same term in the effectively Uniform will formalities statute.

To be sure, the term "writing" in the hybrid will formalities statute predates the state's assimilation of other text from UPC section 2-502.<sup>288</sup> But the textual similarity between the hybrid statute and UPC section 2-502 suggests that the resemblance is not coincidental. And to the extent the text suggests an intent to align existing state law with the UPC—that is, to draw on the ULC's language by virtue of its provenance—it follows that common terms in the hybrid statute were meant to have the same meaning as in the Uniform version. At a minimum, the textual evidence suggests that the comment to section 2-502 would seem a more apt interpretive source than drawing inferences from a comparison to an unrelated criminal provision. On legislative supremacy or faithful agency grounds, the court should have accounted for the extent of the substantive resemblance between the hybrid statute and its Uniform counterpart and interpret it accordingly.

### *B. The Problem of Simultaneous Enactment*

State legislatures can also produce a hybrid statute by simultaneously enacting a bespoke statutory provision and a Uniform one that address a related topic. This kind of enactment challenges our argument that courts make a category error by drawing inferences from a comparison of Uniform and

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<sup>286</sup> See *supra* Part III.C.1.

<sup>287</sup> See *supra* note 232 (describing the presumption); see also SCALIA & GARNER, *supra* note 18, at 173 (explaining that "the more connection the cited statute has with the statute under consideration, the more plausible" the presumption of consistent usage).

<sup>288</sup> See *supra* note 275.



bespoke statutory text. In this situation, drawing a meaningful inference from a comparison of the Uniform and bespoke provisions seems more plausible.<sup>289</sup>

To illustrate, take the following example based on *In re Heller*, decided by New York's high court.<sup>290</sup> Here is the relevant context. Trusts are commonly drafted to provide "income" to a life beneficiary (often the settlor's surviving spouse), with the remainder, known as the "principal," to be paid to successor beneficiaries (often the settlor's children).<sup>291</sup> Under traditional law, the classification of trust property as "income" or "principal" was based on form rather than economic substance.<sup>292</sup> As a result, trustees often had to skew the trust portfolio to produce returns with the desired ratio of income to principal, even if a different portfolio offered a better overall return.<sup>293</sup> Such skewing was especially fraught in the recurring case of a second spouse as the income beneficiary and children from a first marriage as the remainder principal beneficiaries.<sup>294</sup>

To resolve the problem, two reforms took hold. One, a 1997 revision to the Uniform Principal and Income Act, gives a trustee the power to adjust between income and principal.<sup>295</sup> With this reform, a trustee can invest for maximum total return and then allocate those returns to either income or principal. The second is the so-called "unitrust."<sup>296</sup> Under this reform, which the ULC did not adopt in the 1997 revision to the Uniform Principal and Income Act but many states later adopted with bespoke language, the "income" beneficiary is paid a set percentage of the value of the trust corpus. By transforming the "income" interest into a percentage claim on the total value, the unitrust reform allows the trustee to invest for total return without worrying about its form.<sup>297</sup>

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<sup>289</sup> See SCALIA & GARNER, *supra* note 18, at 173 (noting that the presumption of consistent usage is "persuasive" when the statute at issue "was enacted at the same time, and dealt with the same subject" as the comparison statute).

<sup>290</sup> 849 N.E.2d 262 (N.Y. 2006). We have freely simplified from the actual case for expositional clarity.

<sup>291</sup> See SITKOFF & DUKEMINIER, *supra* note 111, at 675–76.

<sup>292</sup> See *id.* For example, interest, cash dividends, and rent were considered income, while appreciation in stocks, bonds, or land was considered principal. See *id.*

<sup>293</sup> *Id.*

<sup>294</sup> See *id.*

<sup>295</sup> UNIF. PRINCIPAL AND INCOME ACT § 104(a) (UNIF. L. COMM'N 1997) ("A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the [formal principal and income rules], that the trustee is unable to comply with [the duty of impartiality].").

<sup>296</sup> See SITKOFF & DUKEMINIER, *supra* note 111, at 676.

<sup>297</sup> See *id.* The ULC finally adopted a unitrust provision in 2019. See UNIF. FIDUCIARY INCOME AND PRINCIPAL ACT §§ 301–309 (UNIF. L. COMM'N 2019).

In *Heller*, the question presented was whether the trustees of a classic principal-and-income trust could invoke the state's unitrust provision.<sup>298</sup> The trustees were children from the settlor's first marriage and the remainder principal beneficiaries; the income beneficiary was the settlor's second wife, their stepmother. The case arose because the conversion would reduce the stepmother's yearly distributions while increasing the value of the trustees' own remainder interest—arguably a form of impermissible self-dealing.

To answer the question, the court observed that the legislature enacted both a unitrust conversion statute and an adjustment power statute in the same legislative session.<sup>299</sup> The adjustment power statute, a verbatim enactment of the 1997 revision to the Uniform Principal and Income act, “expressly prohibits a trustee from exercising this power if ‘the trustee is a current beneficiary or a presumptive remainderman.’”<sup>300</sup> But, “[t]ellingly,” the court explained, “the Legislature included no such prohibition in the simultaneously enacted optional unitrust provision.”<sup>301</sup> Based on this textual comparison of the two statutes, one Uniform and the other bespoke, the court inferred that “the Legislature did not mean to prohibit trustees who have a beneficial interest from electing unitrust treatment.”<sup>302</sup>

Was the court's negative inference sound? Ordinarily, we have argued, courts should be wary of a negative inference that, like this one, is drawn from a comparison between Uniform and bespoke provisions. As we explained in criticizing *Castro*'s recourse to a bespoke criminal provision to define the term “writing,” the concern stems from the weakened presumption of common authorship. But that concern of category error has less force here. During the single legislative session in which it enacted both provisions, each addressing the same issue, the legislature could have made conforming changes to either the bespoke provision or the Uniform one. Given the textualist axiom that a legislature chooses its words with care, the legislature's decision not to do so is meaningful. The unitrust statute does not contain the corresponding prohibition contained in the state's enactment of the Uniform Principal and Income Act. On faithful agency or legislative supremacy grounds, reviewing courts must respect

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<sup>298</sup> *In re Heller*, 849 N.E.2d 262, 263 (N.Y. 2006).

<sup>299</sup> *Id.* at 264–65.

<sup>300</sup> *Id.* at 265–66 (quoting N.Y. EST. POWERS & TRUSTS LAW § 11-2.3(b)(5) (McKinney 2002)). Instead, lawmakers set forth “a list of factors to be considered by the courts in determining whether unitrust treatment should apply to a trust.” *Id.*

<sup>301</sup> *Id.* at 266.

<sup>302</sup> *Id.*

the legislature's choice to prescribe a difference between these two related provisions.

Nevertheless, given that the two provisions at issue here do in fact have different authors, we cannot rule out the possibility that the textual distinction the court identified sheds no interpretive light at all. It may simply be an artifact of the provisions' different origins. Our proposed canon therefore leads us to this modest conclusion. Had the court made reference to the statutes' different origins and acknowledged it was making the best of the textual evidence at hand, the negative inference it drew might have been more credible. In the end, it is not apparent that in this situation there were better inferences to be drawn from the text.<sup>303</sup>

### C. *The Problem of Omission*

Let us turn now to yet another complication. Instead of negating a Uniform Act provision in duly enacted text, as the Kansas legislature did in *Darby*, state legislatures sometimes omit a provision without enacting anything in its place, even while enacting substantially all of the rest of the Uniform Act. What kind of signal does this send to reviewing courts?

To explore this question, consider the following scenario, loosely drawn from *Wilson v. Wilson*.<sup>304</sup> A settlor established a trust for the benefit of his two children. In the trust instrument, he provided that the trustee would not be required to make account statements available to the beneficiaries, even upon their request. The beneficiaries later sued the trustee, alleging that he squandered the trust assets in a series of bad investments and demanding a complete accounting. Pointing to the trust instrument's terms, the trustee refused to provide discovery, so the beneficiaries sought a ruling from the court.

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<sup>303</sup> As a coda, we observe that *Heller's* holding finds strong support in both background common law and policy. As to the former, while the common law categorically prohibits conflicted action by a trustee, that prohibition does not apply to a conflict that is authorized by the settlor, which is instead subject to enhanced scrutiny. See Restatement (Third) of Trusts § 78 cmt. c(2) (2007). By naming his sons as remainder beneficiaries and successor trustees, the settlor impliedly authorized the relevant conflict. As to policy, in contrast to the highly discretionary adjustment power, the fixed formula of a unitrust confers limited freedom of movement on the trustee. Once converted to a unitrust, the formula itself allocates returns between the "income" and "principal" beneficiaries without trustee discretion. For this reason, it makes sense to encourage structurally conflicted trustees to resolve the principal-income problem with a unitrust. The court, however, did not consider this common law background and policy context, resting its holding on a textual negative inference from presumptive common authorship.

<sup>304</sup> 690 S.E.2d 710, 711 (N.C. Ct. App. 2010). We present simplified facts inspired by the actual case for expositional clarity.

The state legislature had largely enacted the UTC as promulgated. But it made a crucial modification. In both the Uniform and the state-enacted versions, UTC section 105(b) prescribes a set of mandatory rules that cannot be varied by the terms of a trust.<sup>305</sup> In contrast to the Uniform version, however, which (in brackets) makes mandatory the trustee's duty to inform and report as codified by UTC section 813,<sup>306</sup> the state's enacted version of section 105(b) omitted the reference to section 813 from its list of mandatory rules.<sup>307</sup> Unlike in *Darby*, therefore, the state legislature did not enact a textual reversal of the ULC's rule that settlors cannot modify the trustee's duty to inform and report. Instead, it omitted the rule from its enactment, replacing it with nothing.

Some courts have suggested that a legislature's decision to omit part of a Uniform Act is equivalent to a *Darby*-like reversal. As the West Virginia Supreme Court has said, "when a uniform or model act in an area of law contains a certain provision, but the Legislature fails to adopt that provision when adopting other parts of the act, courts usually conclude that the Legislature intended to reject the provision and the policy goals that accompanied the provision."<sup>308</sup> This view is often grounded in the twin textualist principles of legislative supremacy and faithful agency. Consider this explanation from the Nebraska Supreme Court:

The intent of the Legislature is expressed by omission as well as by inclusion. Had the Legislature desired to apply [the relevant bespoke statute, which by its terms applied only to wills] to trusts, it could have adopted § 112 of the [UTC]. But it did not. Nor will we do so by judicial fiat in the guise of statutory interpretation.<sup>309</sup>

On this view, by omitting the duty to inform and report from the list of mandatory rules that cannot be varied by the terms of the trust, the legislature rejected the ULC's policy choice and permitted the settlor to negate the beneficiaries' right to the discovery they sought.

But, as we have seen, textualists also argue that making law requires the legislature to enact text that clears the constitutional hurdles of bicameralism and

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<sup>305</sup> See UNIF. TR. CODE § 105(b) (UNIF. L. COMM'N 2010).

<sup>306</sup> See *id.* § 105(b)(8)–(9).

<sup>307</sup> Compare N.C. GEN. STAT. ANN. § 36C-1-105 (West 2021) (omitting any reference to the state's enacted version of UTC § 813 in listing provisions of state law that "prevail" over a trust's terms), with UNIF. TR. CODE § 105 (UNIF. L. COMM'N 2010) (listing UTC § 813 as among the provisions of the UTC that "prevail" over a trust's terms).

<sup>308</sup> See, e.g., *John A. Sheppard Mem'l Ecological Rsrv., Inc. v. Fanning*, 836 S.E.2d 426, 431 (W. Va. 2019); *In re Marriage of Thatcher*, 864 N.W.2d 533, 541 (Iowa 2015) (similar).

<sup>309</sup> *In re Estate of Radford*, 933 N.W.2d 595, 599 (Neb. 2019) (emphasis added).

presentment.<sup>310</sup> Treating a legislative non-enactment as law—that is, treating omission as equivalent to a textual negation—would allow the legislature to make law without following the constitutionally prescribed steps. To see why, compare the enactment process here to the one in *Darby*. In that case, proponents of deleting the word “not” succeeded in cobbling together a winning coalition such that the enacted text reflected the opposite of the ULC rule.<sup>311</sup> In this one, by contrast, proponents of making nonmandatory the duty to inform and report succeeded only in deleting the ULC’s rule rather than explicitly negating it. On this view, owing to the omission, there was no statutory text to answer the question presented, leaving it to be resolved by application of background common law principles.<sup>312</sup>

Other textual clues may help in adjudicating between these two possibilities. In the case on which this discussion is based, the court looked to the enacted parts of UTC section 105(b). It observed that, even under the state-enacted version, the terms of the trust may not override either the trustee’s “duty . . . to act in good faith . . . and in the interests of the beneficiaries” or the court’s “power . . . to take such action as may be necessary in the interests of justice.”<sup>313</sup> The court seized on these unmodified provisions to rule in the beneficiaries’ favor.<sup>314</sup> It held that, taken together, the mandatory rules prescribed by these provisions trumped the terms of the trust and conferred on the court “the power . . . to compel discovery where necessary to enforce the beneficiary’s rights under the trust or to prevent or redress a breach of trust.”<sup>315</sup>

This approach has the virtue of being grounded in duly enacted text. But the court’s refusal to make anything of the legislature’s exclusion of the duty to inform and report from the list of mandatory rules is at least potentially in tension with the textualist ideals of legislative supremacy and faithful agency. After all, the legislature could have adopted the UTC rule but did not.<sup>316</sup> We are left to conclude that our proposed interpretive canon reveals an uncomfortable tension

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<sup>310</sup> See *supra* Part II.A.

<sup>311</sup> See *supra* note 263 and accompanying text.

<sup>312</sup> In the specific case of the UTC, this result is mandated by the text of section 106, which the state legislature enacted nearly verbatim. Compare N.C. GEN. STAT. ANN. § 36C-1-106 (2013) (“The common law of trusts and principles of equity supplement this Chapter, except to the extent modified by this Chapter or another statute of this State.”), with UNIF. TR. CODE § 106 (UNIF. L. COMM’N 2010) (“The common law of trusts and principles of equity supplement this [Code], except to the extent modified by this [Code] or another statute of this State.”) (brackets in original).

<sup>313</sup> *Wilson v. Wilson*, 690 S.E.2d 710, 714–15 (quoting N.C. GEN. STAT. § 36C-1-105 (2009)).

<sup>314</sup> *Id.* at 716.

<sup>315</sup> *Id.*

<sup>316</sup> See *In re Estate of Radford*, 933 N.W.2d 595, 599 (Neb. 2019).

within textualism itself. When a reviewing court privileges the enacted parts of the Uniform Act over omissions, it risks sacrificing these ideals in favor of fidelity to text. But when it prioritizes omissions, it risks treating unenacted text as if it were law, without the legislature having followed the constitutionally prescribed steps necessary to make it so.<sup>317</sup>

#### *D. The Problem of the ULC's Internal Legislative History*

We have argued that textualist principles obligate courts to treat the official comments accompanying a Uniform Act—a form of legislative history—as persuasive authorities to a statute's meaning. But what about other legislative history internal to the ULC, such as early drafts of Uniform Acts or debates within the drafting committee or on the chamber floor?

To illustrate, consider the following scenario, loosely drawn from *In re Last Will and Testament of Moor*.<sup>318</sup> UPC section 2-513 permits a testator to reference in her will a “written statement or list,” separate from the will itself, “to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money.”<sup>319</sup> This provision, which is “premised on the assumption that tangible personalty is typically of small value,”<sup>320</sup> relaxes the traditional will formalities for such items,<sup>321</sup> permitting a testator to use an unwitnessed, unsigned document to distribute personal property.

Invoking this provision, a testator appended an unwitnessed memo to her will directing that certain tangible personal property was “to be auctioned,” with the cash proceeds (\$160,000) distributed to certain named recipients.<sup>322</sup> The testator's niece and a friend challenged this directive, contending that it was in effect an impermissible bequest of “money” via an unsigned, unwitnessed

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<sup>317</sup> Beyond the question of whether non-enactment is equivalent to rejection, a second question is worthy of brief mention. May a textualist court draw a negative inference from comparing an enacted Uniform Act provision with a related provision (in the same Uniform Act) that the legislature has not enacted, given that both were drafted in the first instance by the ULC? This is another variant on the ambiguities arising from textual comparisons involving a Uniform Act and a bespoke statute. Traditional textualism would view the decision not to enact as a signal that the unenacted provision may not be considered. But does the unenacted provision nevertheless provide meaningful contextual information about the ULC's intent in promulgating the enacted one (i.e., the intent that the legislature endorsed in duly enacted text)?

<sup>318</sup> 879 A.2d 648, 649–50 (Del. Ch. 2005). We have freely simplified from the actual case for expositional clarity.

<sup>319</sup> UNIF. PROB. CODE § 2-513 (UNIF. L. COMM'N 2019) (emphasis added); see *Moor*, 879 A.2d at 653–54 n.9 (discussing differences between the Florida statute and UPC § 2-513).

<sup>320</sup> See Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1106 n.142 (1996).

<sup>321</sup> *Moor*, 879 A.2d at 654.

<sup>322</sup> *Id.* at 650.

document.<sup>323</sup> Notably, an early draft of UPC section 2-513 prescribed a dollar limit on the value of the property that could be “disposed of” in this fashion.<sup>324</sup> But the ULC did not adopt the limit in the final, promulgated version (and neither did the state legislature).<sup>325</sup> On the facts of *Moor*, this legislative history would tend to validate the testator’s directive, which well exceeded the proposed limit, even accounting for inflation.<sup>326</sup>

There is a textualist case that the ULC’s legislative history—as distinct from that of the state legislature—is permissible evidence for courts to consider. As we have argued, the text of an enacted Uniform Act either directs or signals courts to interpret the statute in a manner consistent with the ULC’s policy design. And, in principle, the ULC’s decision not to adopt the limit could be helpful in determining how the ULC meant for the provision to work.<sup>327</sup> To that extent, taking the ULC’s internal legislative history into account could help courts implement the legislature’s textual directive or receive its textual signal. Much like the official comments, this evidence can help assure substantive uniformity across jurisdictions and so give effect to the legislature’s intent in enacting a Uniform Act.

But because the ULC disclaims this kind of legislative history (including early drafts or records of drafting committee or floor debates) as not authoritative,<sup>328</sup> the ULC’s legislative history does not count for exactly the

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<sup>323</sup> *Id.* at 651.

<sup>324</sup> Hirsch, *supra* note 320, at 1106 n.9; SITKOFF & DUKEMINIER, *supra* note 111, at 261.

<sup>325</sup> Hirsch, *supra* note 320, at 1106 n.9; SITKOFF & DUKEMINIER, *supra* note 111, at 261. California has enacted dollar limits on the property that can be passed by separate document or list. No single item can be worth more than \$5,000 and the total cannot exceed \$25,000. CAL. PROB. CODE § 6132 (West 2007).

<sup>326</sup> The actual case was resolved on textual grounds. The court rejected the challengers’ argument, holding that they “would read into the statutory text words of restriction that were not included by the relevant legislatures.” *Moor*, 879 A.2d at 652. *Moor* reasoned that the statute “use[d] the broad term ‘dispose’ of . . . to refer to an elastic range of activities.” *Id.* In fact, the text “preclude[ed]” only “*intangible* property . . . from being devised through a separate writing.” *Id.* at 653. But “[a]ll of the property covered” by the memo was “*tangible*.” *Id.* The only tweak was that the testator used the memo to direct that the tangible property first be sold and then the proceeds transferred to those identified in the memo. As the court put it, she “‘disposed of’ her personal property by directing her executors to sell that property and distribute the proceeds to specific persons.” *Id.*

<sup>327</sup> See Baude & Doerfler, *supra* note 30, at 548 (suggesting that considering legislative history even when the meaning of the text is clear is at worst harmless and at best illuminating).

<sup>328</sup> See, e.g., *Directed Trust Act*, UNIF. L. COMM’N (June 2016), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=58f2c268-8d67-9c9d-b5e7-4c9e98a9e1c3&forceDialog=0> (“The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter’s notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. *Proposed statutory language*

same reason the official comments do. Relying on the ULC's legislative history is inconsistent with the ULC's intent about how a Uniform Act should be interpreted. As we have argued throughout, the enactment of a Uniform Act makes the meaning the ULC ascribed to a provision controlling, and the ULC says explicitly that its legislative history is off limits in determining that meaning.

We have also argued that relying on the official comments better enables courts to respect the principles of legislative supremacy and faithful agency precisely because all of them will be working from the same, closed set of materials. But taking into account the ULC's own legislative history vastly expands the universe of available evidence, increasing the discretion of individual courts. Which early draft best reflects the ULC's intent? Should later drafts get priority? What of conflicts between recorded floor statements that commissioners might make? Looking to the ULC's legislative history could make it less likely that two courts looking at the same provision will truly act as neutral umpires applying the same strike zone.<sup>329</sup>

This discussion delimits an important boundary of our proposed interpretive canon. Given the foundational commitments of textualism, the official comments should be treated as persuasive guides to a statute's meaning, but previous drafts of a Uniform Act, together with any other legislative-historical materials the ULC might preserve, such as floor or committee statements, should not be considered.<sup>330</sup>

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*may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.*") (emphasis added).

<sup>329</sup> See *supra* note 153 and accompanying text. As D.C. Circuit Judge Harold Leventhal famously put it, the challenge in this context is that using legislative history is sometimes akin to "looking over a crowd and picking out your friends." Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214–15 (1983).

<sup>330</sup> Post-enactment emanations from the ULC are also interesting. For example, may a textualist court consider a nonsubstantive technical amendment to the text of an enacted Uniform Act made by the ULC after the state legislature enacted the original version? See, e.g., UNIF. TR. CODE § 603 cmt. (UNIF. L. COMM'N 2010) (noting that a further clarifying amendment to UTC section 603 changed the phrase "While a trust is revocable" in what had been subsection (a) and is now subsection (b) to "To the extent a trust is revocable" and commenting further, "*No substantive change was intended by this amendment.* The revised language more clearly recognizes that a trust may be revocable in part and irrevocable in part or that a trust may have more than one settlor. In such a trust, a settlor's powers enumerated in this section apply only to the extent the trust is revocable by that settlor" (emphasis added)). Likewise, may a textualist court consider amendments to the official comments of a Uniform Act made by the ULC after the legislature enacted the Act? See, e.g., UNIF. TR. CODE § 413 cmt. (UNIF. L. COMM'N 2010) ("The penultimate paragraph of this Comment was amended in 2017 to cite the Restatement of Charitable Nonprofit Organizations and to disapprove of dictum in *Williams v. City of Kuttawa*."). These questions point to some possible tensions within textualism about whether the original public meaning of a state-enacted Uniform Act is subject to change because of the ULC's subsequent legislative activity.



## CONCLUSION

Textualism is often justified as a one-size-fits-all methodology. Any text can be interpreted by applying its straightforward precepts. But context matters, as contemporary textualists readily acknowledge. When courts fail to attend to the unique content and two-step political economy of Uniform Acts, they risk violating the central tenet of this interpretive approach—to give meaning to the legislature’s choice to enact these words, rather than some other alternative.

When a state legislature adopts a Uniform Act, it usually includes the Act’s promote-uniformity clause. The clause directs reviewing courts to treat the comments accompanying each blackletter provision of the Act as persuasive guides to the statute’s meaning. But even in cases in which the legislature does not enact the promote-uniformity clause, the enacted text nevertheless signals to reviewing courts that they should treat the accompanying comments as persuasive authorities on the statute’s meaning. The strength of that signal depends on the nature and extent of the modifications, if any, that the legislature makes to the Uniform Act as promulgated by the ULC.

Taken together, these directives and signals transform what observers have long considered to be a core principle of textualism: its rejection of legislative history. Applied to state statutes originating as Uniform Acts, textualism’s foundational commitments suggest that courts must embrace the ULC’s statement of intent as laid out in the official comments accompanying the blackletter text. On our account, courts committed to textualist orthodoxy must not ignore the ULC’s discussion of why the blackletter text was adopted, including how it was meant to operate and what problems it was designed to solve. Sometimes, the details of particular legislative processes have surprising consequences.