THE THIRD PRECEDENT

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INTRODUCTION

The traditional approach to legal authorities divides the world into two types of precedent: binding (mandatory) and non-binding (persuasive). This binary division is attractive because its simplicity gives the impression that it is comprehensive. But it is not comprehensive. Rather, it is overly simplistic. It neglects nuances in the precedential value of certain judicial opinions. This Article identifies one such area that does not fit well into either of the traditional categories of precedent.

In state statutory law, uniform acts are widespread, both in terms of breadth of subject matter and in terms of legislative adoptions.[1] Many of these acts contain a mandatory uniformity provision that requires courts to apply and construe the statute "to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it."[2] By enacting this language, a state's legislature commands its judiciary to interpret the statute in accordance with how it has been interpreted in *other* states. This directive presents a precedential puzzle: does the case law of other enacting states qualify as binding precedent, non-binding precedent, or something else?

This Article concludes that prior out-of-state case law from a state's highest court should take on a new character in this situation. It should neither be binding nor non-binding on the judiciaries of other enacting states. Rather, it should be recognized as a new precedential category: "interstitial authority."[3] This Article proposes a two-step test for courts to follow when weighing interstitial authority to interpret a uniform act that contains a mandatory uniformity provision.[4] First, the court should determine whether

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[1] *See infra* Part I.B.2.

[2] *E.g.*, UNIF. TRADE SECRETS ACT § 8 (ULC 1985).

[3] As explained in more detail below, the concept of interstitial authority is meant to fill the small gap between binding and non-binding precedent. *See infra* Part IV.

[4] This proposed two-step test repurposes the *Chevron* deference test from administrative law, which guides courts in determining how much weight to give to prior statutory interpretations by

the statutory language is clear. If it is clear, then the court should apply the statute's clear meaning. If the statute is ambiguous, then the court should adopt the same interpretation as the out-of-state court as long as the out-of-state court's interpretation is a permissible construction of the statute. This approach comports with the statutory requirement that the law be interpreted to further the purpose of uniformity among the enacting states, but it provides enough leeway to ensure that a manifestly incorrect interpretation will not be automatically perpetuated around the country. Plugging this precedential gap would resolve the inconsistency that currently occupies this area of the law.[5]

In Part I, this Article provides some necessary background on the traditional binary labels of binding and non-binding precedent, reviews the Uniform Law Commission ("Commission") and its drafting process, and provides an introduction to uniformity provisions. Part II describes the lack of a consistent judicial response to mandatory uniformity provisions and examines empirical data regarding out-of-state citations when courts apply the Uniform Trade Secrets Act and its mandatory uniformity provision. Part III addresses the limitations that the separation of powers doctrine places on the legislature's ability to direct the judiciary in its choice of precedent. Finally, Part IV of this Article makes the normative case for adopting the test described in the preceding paragraph to fill the precedential gap. It details how the proffered test would be applied and how the test would lead to beneficial results.

I. SOME NECESSARY BACKGROUND

Some background is necessary to understand the precedential hole that needs plugging. This Part first overviews the traditional distinction between binding and non-binding authority. It then describes the Uniform Law Commission, the proliferation of uniform acts across state statutory law, and the various forms that uniformity provisions take within uniform acts.

A. *Binding and Non-Binding Authority*

A binding authority is one that must be followed by the court of decision, whereas a non-binding authority is one that the court of decision need not follow.[6] Under the doctrine of *stare decisis*, a previous court opinion

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regulatory agencies. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

5 *See infra* Part II.A.

6 *See* ALEXA Z. CHEW & KATIE ROSE GUEST PRYAL, THE COMPLETE LEGAL WRITER 430, 440 (2016); Fredrick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1940 (2008); *see also* MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 151-53 (2008).

is generally binding on a court's ruling if it is published and issued by a court to which the ruling could be appealed.[7] For example, a federal district court is bound by decisions of the federal court of appeals for the circuit within which the district is located.[8] It is not bound by decisions of the other geographic federal courts of appeals, even though those courts are "higher" courts.[9] An appellate court is usually bound by its own previous decisions, but trial courts generally are not.[10] Even if an opinion is binding, however, dicta are non-binding.[11]

A non-binding authority is anything that the court of decision does not have to follow.[12] The idea is broad enough to include a grocery list or, indeed, this Article. In the realm of judicial opinions, however, a non-binding precedent is generally an opinion that was not designated for publication or was issued by a lower court or a court from another jurisdiction.[13] The persuasive value of these non-binding precedents depends upon a number of factors, including the timeliness of the opinion, the reputation of the authoring judge, the level of the issuing court, and the geographic proximity of the issuing court to the court of decision.[14] In short, a court may choose to follow a non-binding authority if it finds the authority's reasoning persuasive, but a court must follow a binding authority simply based on the source's authoritativeness.[15]

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7 CHEW & PRYAL, *supra* note 6, at 60-61, 64-65; Ellie Margolis, *Authority Without Borders: The World Wide Web and the Delegalization of Law*, 41 SETON HALL L. REV. 909, 915-16 (2011).

8 MARY BETH BEAZLEY & MONTE SMITH, LEGAL WRITING FOR LEGAL READERS 57-58 (2014).

9 *Id.* One caveat in the federal system is that all district courts are bound by decisions of the U.S. Court of Appeals for the Federal Circuit with regard to issues that fall within the compass of the Federal Circuit's subject matter jurisdiction. A district court's decision on an issue within the Federal Circuit's subject matter jurisdiction will be reviewed on appeal by the Federal Circuit rather than the court of appeals for the circuit in which the district court is geographically located. *See* 28 U.S.C. § 1295(a) (2012) (setting forth the Federal Circuit's jurisdiction); South Corp. v. United States, 690 F.2d 1368, 1370-71 (Fed. Cir. 1982) (adopting the decisions of its predecessor courts, the Court of Claims and the Court of Customs and Patent Appeals, as binding precedent).

10 CHEW & PRYAL, *supra* note 6, at 64-65. Even when a court is bound by its own prior decisions, it often possesses the power to overrule itself. *See id.* at 441; BEAZLEY & SMITH, *supra* note 8, at 43.

11 CHEW & PRYAL, *supra* note 6, at 61, 79.

12 *Id.* at 440; Schauer, *supra* note 6, at 1940.

13 *See* CHEW & PRYAL, *supra* note 6, at 60-61, 64-65.

14 *Id.* at 61-67; Kevin Bennardo, *Testing the Geographical Proximity Hypothesis: An Empirical Study of Citations to Nonbinding Precedent by Indiana Appellate Courts*, 90 NOTRE DAME L. REV. ONLINE 125, 126 (2015); *see also* Margolis, *supra* note 7, at 916 ("[T]he strength of persuasive authority depends on the reader's perception of its value.").

15 *See* Schauer, *supra* note 6, at 1940-45; *see also* Margolis, *supra* note 7, at 914 ("Sources are considered 'authority' because of where they come from as much as for what they say.").

B. *Uniform Acts*

1. The Uniform Law Commission and Its Drafting Process

Uniform acts play a significant role in state statutory law.[16] Uniform acts are drafted by the Uniform Law Commission, formerly known as the National Conference of Commissioners on Uniform Laws.[17] The Commission was formed in 1892 to "provide[] states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of the law."[18]

As a state governmental organization, the Commission is funded primarily by state governments, with expenses apportioned among the states.[19] Each state determines how many commissioners to appoint, the method of appointment, and the term of appointment.[20] The only organizational-level requirement is that all commissioners must be members of the bar.[21] Commissioners are not compensated for their work on the Commission.[22]

The Commission solicits proposals for new drafting projects, and refers proposals to its internal committees for consideration.[23] If a project is approved for drafting, a drafting committee is appointed.[24] The commissioners selected for the drafting committee may or may not have subject-matter expertise in that particular area of law.[25] A reporter is also appointed for each drafting project.[26] The reporter is usually a non-commissioner with considerable subject-matter expertise, such as a law

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16 *See* Thomas P. Gallanis, *Trusts and Estates: Teaching Uniform Law*, 58 ST. LOUIS U. L.J. 671, 673 (2014) ("The [Uniform Law Commission] is active in all fields of state law."). Professor Gallanis' article provides an excellent general overview of the Commission and its drafting process. *See id.* at 672-73, 676-78.

17 *See* ULC, OBSERVER'S MANUAL 1 (2013) [hereinafter ULC OBSERVER'S MANUAL].

18 *Id.*

19 *See id.* at 2; *see also Frequently Asked Questions*, ULC, http://www.uniformlaws.org/Narrative.aspx?title=Frequently Asked Questions (last visited Nov. 17, 2017) [hereinafter ULC, *Frequently Asked Questions*]. Here, the term "state" includes the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. ULC OBSERVER'S MANUAL, *supra* note 17, at 2.

20 *See* ULC, *Frequently Asked Questions*, *supra* note 19. A typical term is three or four years. ULC OBSERVER'S MANUAL, *supra* note 17, at 2.

21 *See* ULC OBSERVER'S MANUAL, *supra* note 17, at 2.

22 *Id.* Commissioners are reimbursed for the expenses incurred in attending meetings. *Id.*

23 *Id.*

24 *Id*.

25 *See* Gallanis, *supra* note 16, at 677.

26 *See* ULC, *Frequently Asked Questions*, *supra* note 19. For the ruminations of one reporter, *see* Joan Heifetz Hollinger, *The Uniform Adoption Act: Reporter's Ruminations*, 30 FAM. L.Q. 345 (1996).

professor in the field.[27] The Commission also invites the American Bar Association to appoint an advisor to each drafting committee, and other interested groups are invited to send representatives to observe or advise.[28]

Because each uniform act must be read aloud at least twice at the Commission's annual meeting, the drafting process spans multiple years.[29] The drafting committee meets throughout the drafting process and invites input from outside interested parties and experts.[30] When a draft act is presented for final approval, each state has one vote regardless of its number of commissioners.[31] A draft act is approved if it receives affirmative votes from a majority of the states represented at the annual meeting (and a minimum of at least twenty votes).[32] Once a draft act is approved, it becomes a uniform act that is sent to state legislatures for consideration.[33] At that point, the commissioners advocate to enact the uniform act in their home jurisdictions.[34] Of course, state legislatures are free to enact or not enact a uniform act, to borrow portions of a uniform act, or to modify its language.[35] The Commission may also update uniform acts with amendments.[36]

2. The Abundancy of Uniform Acts and Uniformity Provisions

Uniform acts are widespread, both in terms of subject matter and enactments. According to the Commission's most recent public data, its one hundred uniform acts have garnered 2,111 enactments in fifty-three jurisdictions.[37] These acts relate to subjects as varied as business organizations and regulations; civil procedure and the courts; commerce and finance; consumer protection and labor; criminal law and procedure; family law; international law; medical and public health law; probate, trusts, and

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27 ULC, *Frequently Asked Questions*, *supra* note 19; *see also Types of Committees*, ULC http://www.uniformlaws.org/Narrative.aspx?title=Types of Committees (last visited Nov. 17, 2017).

28 *See* ULC OBSERVER'S MANUAL, *supra* note 17, at 2-4. For example, representatives of the National Council for Adoption, the American Academy of Adoption Attorneys, and the American Adoption Congress served as additional advisors to the Uniform Adoption Act's drafting committee. UNIF. ADOPTION ACT (ULC 1994), http://www.uniformlaws.org/shared/docs/adoption/uaa_final_94.pdf.

29 *See* ULC OBSERVER'S MANUAL, *supra* note 17, at 2.

30 *See* ULC, *Frequently Asked Questions*, *supra* note 19.

31 *See* ULC OBSERVER'S MANUAL, *supra* note 17, at 2.

32 *Id.* at 2-3.

33 *See* ULC, *Frequently Asked Questions*, *supra* note 19.

34 *See* ULC, *About the ULC*, ULC http://www.uniformlaws.org/Narrative.aspx?title=About the ULC (last visited Nov. 19, 2017).

35 *See* Gallanis, *supra* note 16, at 678.

36 *Id.* at 679-80.

37 *See* ULC, 2015-2016 GUIDE TO UNIFORM AND MODEL ACTS 6-29 (2015), http://www.uniformlaws.org/Shared/Publications/GUMA_2015web.pdf (surveying enactments in fifty states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands) [hereinafter ULC, 2015-2016 GUIDE]. The ULC also reports eighty-two enactments of its twenty-eight model acts. *Id.*

estates; real property; mortgages and liens; tax and miscellaneous; and tort and alternative dispute resolution.[38]

The drafting rules governing uniform acts ensure that uniform acts follow a uniform structure.[39] Under the current drafting rules, a uniform act may not include a statement of the purpose of the act in the text.[40] In addition, each uniform act should contain a section, entitled "uniformity of application and construction," that reads: "In applying and construing the uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states enacting it."[41] This language requires courts to *consider* uniformity with other enacting jurisdictions when interpreting a state's enactment of a uniform law, but does not require uniform construction. Under this provision, an out-of-state interpretation of the same statutory language would squarely be non-binding precedent, although a deciding court would at a minimum have to "consider" it.

About half of uniform acts contain an older version of the uniformity clause. Although language differs among some acts, the older version of the uniformity clause mandates that the "Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject matter of this Act among the States enacting it."[42] This "mandatory

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[38] *Id.* at 30-33. Uniform acts play a meaningful role in many sectors of state statutory law. Examples range from the Uniform Certification of Questions of Law Act to the Uniform Military and Overseas Voters Act to the Uniform Collateral Consequences of Conviction Act to the Uniform Manufactured Housing Act to the Uniform Estate Tax Apportionment Act.

[39] *See* ULC, DRAFTING RULES (2012), http://www.uniformlaws.org/Shared/Publications/DraftingRules_2012.pdf.

[40] *See id.* at 38 (Rule 501).

[41] *Id.* at 40 (Rule 601); *see, e.g.*, UNIF. CHILD ABDUCTION PREVENTION ACT § 11 (ULC 2006); UNIF. MANUFACTURED HOUS. ACT § 12 (ULC 2012).

[42] The following uniform acts contain a mandatory uniformity provision: UNIF. COMMON INTEREST OWNERSHIP ACT § 1-110 (UNIF. LAW COMM'N, AMENDED 2014); UNIF. VOIDABLE TRANSACTIONS ACT § 13 (UNIF. LAW COMM'N, AMENDED 2014); UNIF. PROB. CODE § 1-102 (UNIF. LAW COMM'N, AMENDED 2010); UNIF. COMPUT. INFO. TRANSACTIONS ACT § 106(A)(4) (UNIF. LAW COMM'N, AMENDED 2002); U.C.C. § 1-103(A)(3) (AM. LAW INST. & UNIF. LAW COMM'N 2001); UNIF. ELEC. TRANSACTIONS ACT § 6 (UNIF. LAW COMM'N 1999); UNIF. MULTIPLE-PERS. ACCOUNTS ACT § 32 (UNIF. LAW COMM'N, AMENDED 1998); UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 12 (UNIF. LAW COMM'N 1995); UNIF. CONTROLLED SUBSTANCES ACT § 706 (UNIF. LAW COMM'N, AMENDED 1995); UNIF. STATUTE AND RULE CONSTR. ACT § 24 (UNIF. LAW COMM'N 1995); UNIF. UNCLAIMED PROP. ACT § 29 (UNIF. LAW COMM'N 1995); UNIF. ADOPTION ACT § 8-101 (UNIF. LAW COMM'N 1994); UNIF. PRUDENT INV'R ACT § 12 (UNIF. LAW COMM'N 1994); UNIF. CORR. OR CLARIFICATION OF DEFAMATION ACT § 11 (UNIF. LAW COMM'N 1993); UNIF. HEALTH-CARE DECISIONS ACT § 15 (UNIF. LAW COMM'N 1993); UNIF. SIMULTANEOUS DEATH ACT § 8 (UNIF. LAW COMM'N 1993); UNIF. VICTIMS OF CRIME ACT § 501 (UNIF. LAW COMM'N 1992); UNIF. TESTAMENTARY ADDITIONS TO TRS. ACT § 3 (UNIF. LAW COMM'N 1991); UNIF. TRANSFER OF LITIG. ACT § 301 (UNIF. LAW COMM'N 1991); UNIF. MARKETABLE TITLE ACT § 12 (UNIF. LAW COMM'N 1990); UNIF. PERIODIC PAYMENT OF JUDGMENTS ACT § 20 (UNIF. LAW COMM'N 1990); UNIF. STATUTORY RULE AGAINST PERPETUITIES ACT § 7 (UNIF. LAW COMM'N 1986, 1990); UNIF. FOREIGN MONEY CLAIMS ACT § 14 (UNIF. LAW COMM'N 1989); UNIF. TOD SEC. REGISTRATION ACT § 11(2) (UNIF. LAW COMM'N 1989, 1998); UNIF. CONSTR. LIEN ACT § 101(A)(4) (UNIF. LAW COMM'N

uniformity provision" contains much stronger language than the modern version described in the preceding paragraph. The older version names uniformity as the overarching purpose of the act and *requires* courts to interpret the act's language in the way that best achieves the goal of uniformity. In other words, uniformity is mandatory under the language of the old provision.

Some jurisdictions have legislated generally applicable canons of statutory construction that mandate uniformity in the interpretation of *all* uniform acts. For example, in Pennsylvania, all "[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."[43] Similarly, in Wyoming, "[a]ny uniform act shall be interpreted and construed to effectuate its general purpose to make uniform the law of those states which enact it."[44] These clauses direct the judiciary to prioritize uniformity in interpreting every statute based on a uniform act.

II. THE EFFECT OF MANDATORY UNIFORMITY CLAUSES ON JUDICIAL INTERPRETATION

It is natural to expect state courts to consider out-of-state case law when interpreting a uniform act. When a state court interprets a uniform act that contains a mandatory uniformity provision, however, the out-of-state case

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1987); UNIF. CUSTODIAL TR. ACT § 20 (UNIF. LAW COMM'N 1987); UNIF. DORMANT MINERAL INTERESTS ACT § 9 (UNIF. LAW COMM'N 1986); UNIF. CRIMINAL HISTORY RECORDS ACT § 14 (UNIF. LAW COMM'N 1986); UNIF. TRANSFERS TO MINORS ACT § 23 (UNIF. LAW COMM'N, AMENDED 1986); UNIF. TRADE SECRETS ACT § 8 (UNIF. LAW COMM'N, AMENDED 1985); UNIF. FRAUDULENT TRANSFER ACT § 11 (UNIF. LAW COMM'N 1984); UNIF. MARITAL PROPERTY ACT § 21 (UNIF. LAW COMM'N 1983); UNIF. FED. LIEN REGISTRATION ACT § 6 (UNIF. LAW COMM'N 1978, 1982); UNIF. CONSERVATION EASEMENT ACT § 6 (UNIF. LAW COMM'N 1981); UNIF. CONDO. ACT § 1-110 (UNIF. LAW COMM'N 1980); UNIF. DETERMINATION OF DEATH ACT § 2 (UNIF. LAW COMM'N 1980); UNIF. INFO. PRACTICES CODE § 1-102 (UNIF. LAW COMM'N 1980); UNIF. AUDIO-VISUAL DEPOSITION ACT § 7 (UNIF. LAW COMM'N 1978); UNIF. COMPARATIVE FAULT ACT § 7 (UNIF. LAW COMM'N 1977); UNIF. CONSUMER CREDIT CODE § 1.102(2)(G) (UNIF. LAW COMM'N 1974); MODEL EMINENT DOMAIN CODE § 1603 (UNIF. LAW COMM'N 1974); UNIF. MARRIAGE AND DIVORCE ACT § 103 (UNIF. LAW COMM'N, AMENDED 1974); UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 1.102(3) (UNIF. LAW COMM'N 1972); UNIF. DUTIES TO PERS. WITH MED. ID DEVICES ACT § 8 (UNIF. LAW COMM'N 1972); UNIF. ALCOHOLISM AND INTOXICATION TREATMENT ACT § 36 (UNIF. LAW COMM'N 1971); UNIF. DISPOSITION OF CMTY. PROP. AT DEATH ACT § 10 (UNIF. LAW COMM'N 1971); UNIF. CONSUMER SALES PRACTICES ACT § 1(5) (UNIF. LAW COMM'N 1970); UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT § 7 (UNIF. LAW COMM'N 1964); UNIF. FOREIGN MONEY JUDGMENTS RECOGNITION ACT § 8 (UNIF. LAW COMM'N 1962); UNIF. FACSIMILE SIGNATURES OF PUB. OFFICIALS ACT § 5 (UNIF. LAW COMM'N 1958); UNIF. DIVISION OF INCOME FOR TAX PURPOSES ACT § 19 (UNIF. LAW COMM'N 1957); UNIF. ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT A STATE IN CRIMINAL PROCEEDINGS § 5 (UNIF. LAW COMM'N 1936); UNIF. DECLARATORY JUDGMENTS ACT § 15 (UNIF. LAW COMM'N 1922).

43 1 PA. CON. STAT. ANN. § 1927 (1972).

44 WYO. STAT. ANN. § 8-1-103(a)(vii) (2008).

law takes on a different character. This Part will describe case law and empirical data regarding the effect of mandatory uniformity clauses on out-of-state precedent.

A. *Mandatory Uniformity Clauses in Case Law*

Modern courts have failed to converge on a clear or cohesive treatment of mandatory uniformity clauses in uniform acts. However, as chronicled below, older decisions are more likely to construe the language of a mandatory uniformity clause as requiring something closer to its literal meaning. In a 1916 interpretation of the Uniform Warehouse Receipts Act, the U.S. Supreme Court noted that, if uniform acts are permitted to be construed according to the local views of each state, "we shall miss the desired uniformity and we shall erect upon the foundation of uniform language separate legal structures as distinct as were the former varying laws."[45] In 1923, the Supreme Court of Utah found that the mandatory uniformity provision of the Uniform Sales Act rendered it a "duty of this court" to follow constructions by "the court of last resort of any state in which the Uniform Sales Act is in force."[46] In the words of the court, "[i]t would be utterly futile for the Legislatures of the several states to adopt uniform laws upon any subject if each court of the several states followed the notion of its members with regard to how a particular provision should be construed and applied."[47] In 1930, the Supreme Court of Nebraska interpreted the same provision as an "express mandate" from the legislature to construe the statute "in harmony with the previous decisions rendered by the courts of our sister states prior to its adoption here."[48] The Nebraska approach marks the beginning of a shift away from strict uniformity in statutory interpretation because it only requires adherence to out-of-state authority that was present at the time the state legislature adopted the uniform act.

The Vermont Supreme Court spoke more equivocally in its 1937 description of the mandatory uniformity provision of the Uniform Declaratory Judgment Act: "[u]nder the . . . provision, decisions of the highest courts of other states are, speaking generally, precedents by which we are more or less imperatively bound in cases where similar questions are presented."[49] Language in this vein, which identifies the mandatory uniformity provision but does not identify the precise weight of out-of-state opinions, is typical of modern opinions. For example, the Indiana Supreme Court has stated:

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45 Commercial Nat'l Bank of New Orleans v. Canal-La. Bank & Tr. Co., 239 U.S. 520, 528 (1916).

46 Stewart v. Hansen, 218 P. 959, 960 (Utah 1923).

47 *Id.*

48 Int'l Milling Co. v. N. Platte Flour Mills, Inc., 229 N.W. 22, 24 (Neb. 1930).

49 Town of Manchester v. Town of Townshend, 192 A. 22, 23 (N.H. 1937).

> It is . . . apparent that Indiana legislators, adopting the [Uniform Trade Secret Act], sought the uniform application of UTSA definitions of trade secret consistent with the application of the act in other adopting jurisdictions. Therefore, case law from other UTSA jurisdictions becomes *relevant authority* for construction of trade secret law in Indiana.[50]

The court went on to cite to numerous out-of-state opinions in its effort to construe and apply the definition of a trade secret.[51] Unfortunately, the court failed to elaborate on the precedential weight of that outside "relevant authority." Other Indiana courts have likewise referenced out-of-state opinions as "relevant" without further explaining the weight of that relevance.[52] Numerous other state courts have recognized the special precedential situation created by mandatory uniformity clauses but have stopped short of articulating a useful standard for assessing the weight of out-of-state opinions.[53]

One lower court's attempt to take a stand against following out-of-state interpretations merely to maintain consistency in construction was rejected from above. In construing a provision of the Uniform Arbitration Act, the intermediate appellate court of Maryland parted ways with the majority of out-of-state interpretations, stating that it "decline[d] to move like lemmings toward the precipice of erroneous interpretation of an unambiguous statute by summarily subscribing to uniformity for uniformity's sake, when other

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50 Amoco Prod. Co. v. Laird, 622 N.E.2d 912, 917-18 (Ind. 1993) (emphasis added).

51 *Id.* at 918-21.

52 *See, e.g.*, HDNET, LLC v. N. Am. Boxing Council, 972 N.E.2d 920, 923 (Ind. Ct. App. 2012); N. Elec. Co. v. Torma, 819 N.E.2d 417, 425 (Ind. Ct. App. 2005).

53 Like Indiana, the Supreme Court of New Hampshire has held that a mandatory uniformity provision makes out-of-state interpretations "relevant." In re Ball, 123 A.3d 719, 722 (N.H. 2015) (construing the Uniform Interstate Family Support Act). The Supreme Court of Vermont has stated that it "draw[s] from the decisions of our sister states." Dicks v. Jensen, 768 A.2d 1279, 1282 (Vt. 2001) (construing the Uniform Trade Secrets Act). The Supreme Court of Minnesota gives "great weight to other states' interpretations of a uniform law." Citizens State Bank Norwood Young Am. v. Brown, 849 N.W.2d 55, 61 (Minn. 2014) (quoting Johnson v. Murray, 648 N.W.2d 664, 670 (Minn. 2002)). Minnesota has a statute directing that all "[l]aws 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." MINN. STAT. § 645.22 (2017). The Supreme Court of North Dakota looks to other state courts' interpretations of uniform acts "for interpretive guidance," Rydberg v. Johnson, 583 N.W.2d 631, 633 (N.D. 1998) (construing the Uniform Parentage Act), and considers those interpretations "highly persuasive." Milbrath v. Milbrath, 508 N.W.2d 360, 363 (N.D. 1993) (construing the Uniform Probate Code). The Supreme Court of South Dakota finds analysis from other courts to be "persuasive" despite noting that uniform interpretation is "statutorily mandated" by the mandatory uniformity provision. In re Estate of Geier, 809 N.W.2d 355, 359 (S.D. 2012) (construing the Uniform Probate Code). Given a mandatory uniformity provision in a District of Columbia statute, the U.S. District Court for the District of Columbia stated that "it is appropriate to consider how the courts in [other] states have interpreted their states'" enactment of the same uniform act. Catalyst & Chem. Servs., Inc. v. Glob. Ground Support, 350 F. Supp. 2d 1, 7 n.3 (D.D.C. 2004) (construing the Uniform Trade Secrets Act).

sound principles of statutory construction mandate a different result."[54] The state's high court reversed, finding the term at issue ambiguous, and followed the interpretation of the majority of out-of-state jurisdictions.[55]

In contrast, the Wisconsin Supreme Court has been criticized for its lack of concern for uniformity in interpreting the state's enactment of the Uniform Trade Secrets Act ("UTSA"). The court has twice focused its attention on the mandatory uniformity provision of its state's enactment of the UTSA.[56] The weight it afforded to prior out-of-state case law seemed to shift depending on whether the court agreed with the out-of-state interpretations. In a 2002 opinion, the court noted the act's mandatory uniformity provision and dubbed a prior New Hampshire opinion with which it agreed "highly persuasive."[57] However, only four years later, the same court faced a situation in which it disagreed with the majority approach to the interpretation of a different provision of the same uniform act.[58] This time, the court did not note the high persuasive value of out-of-state interpretations, but rather said that other adopting states' "interpretations of similar statutes may serve as useful extrinsic sources to assist in statutory construction, *if required*."[59] The court found that it was unnecessary to consult such "extrinsic sources," however, because the meaning of the statute was plain[60] and "cases from other jurisdictions cannot substitute for [the court's own] construction of the relevant Wisconsin Statute."[61] The majority's disregard for the mandatory uniformity provision has been criticized by a sharply written dissent,[62] by other courts,[63] and by commentators.[64]

The decisions described above mindfully determined how to interpret statutes in the face of a mandatory uniformity provision. In other cases, courts simply neglect to mention the clause. These courts either do not recognize

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54 Blitz v. Beth Isaac Adas Israel Congregation, 694 A.2d 107, 120 (Md. Ct. Spec. App. 1997), *rev'd*, 720 A.2d 912 (Md. 1998).

55 Blitz v. Beth Isaac Adas Israel Congregation, 720 A.2d 912, 916-18 (Md. 1998).

56 *See* Burbank Grease Servs. LLC v. Sokolowski, 717 N.W.2d 781, 785 (Wisc. 2006); World Wide Prosthetic Supply, Inc. v. Mikulsky, 640 N.W.2d 764 (Wisc. 2002).

57 *World Wide Prosthetic Supply, Inc.*, 640 N.W.2d at 768.

58 *See Burbank Grease Servs. LLC*, 717 N.W.2d at 788-94.

59 *Id.* at 792 (emphasis added).

60 *Id.*

61 *Id.* at 793.

62 *See id.* at 799 (Bradley, J., dissenting) ("Why does the majority ignore the legislative directive that [the statute] be construed to further a uniform interpretation of UTSA among the states?").

63 *See, e.g.*, BlueEarth Biofuels, LLC v. Hawaiian Elec. Co., 235 P.3d 310, 320-21 (Haw. 2010); Mortg. Specialists, Inc. v. Davey, 904 A.2d 652, 664 (N.H. 2006).

64 *See, e.g.*, Robert C. Denicola, *The New Law of Ideas*, 28 HARV. J.L. & TECH. 195, 216 (2014) ("Courts cannot achieve the uniformity sought by the UTSA's drafters if the protection of some commercial information remains subject to the vagaries of common law."); Sarah Gettings, Note, Burbank Grease Services, LLC v. Sokolowski*: Frustrating Uniformity in Trade Secrets Law*, 22 BERKELEY TECH. L.J. 423, 440 (2007) (opining that the Wisconsin Supreme Court had "reverted trade secret law to its pre-UTSA state, leaving trade secret protection state-specific, uneven, and uncertain").

that the clause demands consideration of outside precedent when interpreting the statute or simply fail to communicate that recognition. Either way, the failure of an interpreting court to consider prior out-of-state interpretations when applying a state statute that contains a mandatory uniformity clause disregards the language of the statute.

B. *Empirical Data Regarding Uniformity under the Uniform Trade Secrets Act*

The UTSA is a worthy subject to test the effect of a mandatory uniformity provision. The UTSA is one of the more successful uniform acts (if success is measured by adoptions). After nine years of drafting, the UTSA was finalized in 1979.[65] Since then, it has been adopted in whole or in part in forty-seven states.[66] It has, in many important respects, achieved a convergence of the statutory law governing trade secrets across the country.

The UTSA mandates uniformity in its construction. It states: "[t]his [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it."[67] Numerous states have enacted this mandatory uniformity provision into law.[68]

Previous empirical research has analyzed the frequency with which courts cite to out-of-state precedent in cases involving the UTSA. One study of trade secret litigation in the federal courts found that persuasive authority was cited in 27 percent of a sample of trade secret opinions from 1950-2007 and in 26 percent of a sample of trade secret opinions from 2008.[69] The study's authors defined persuasive authority as "authority from a jurisdiction other than the jurisdiction whose law the court applied."[70] The authors found the high rate of citations to persuasive authority "surprising because each state has its own autonomous body of trade secret law and thus need not cite any other law."[71] The authors hypothesized that some courts may have looked to persuasive authority because the home jurisdiction lacked sufficient trade

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65 *See* Sharon K. Sandeen, *The Evolution of Trade Secret Law and Why Courts Commit Error When They Do Not Follow the Uniform Trade Secrets Act*, 33 HAMLINE L. REV. 493, 513 (2010). The UTSA was then amended in 1985. *Id.* at 536.

66 *See* ULC, 2015-2016 GUIDE, *supra* note 38, at 38 (showing enactment of the UTSA in some form in all states except Massachusetts, New York, and North Carolina). The UTSA has also been enacted by the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. *Id.*

67 UNIF. TRADE SECRETS ACT § 8 (ULC 1985).

68 *E.g.*, CAL. CIV. CODE § 3426.8 (West 2017); FLA. STAT. § 688.009 (2017); TEX. CIV. PRAC. & REM. CODE ANN. § 134A.008 (West 2017).

69 Davis S. Almeling et al., *A Statistical Analysis of Trade Secret Litigation in Federal Courts*, 45 GONZ. L. REV. 291, 311 (2010).

70 *Id.* The substantive law of trade secrets "is almost always state law." *Id.* at 306.

71 *Id.* at 311.

secret jurisprudence to sustain a self-contained universe of precedent.[72] Another potential explanation was that courts could cite to persuasive precedent "without much difficulty" if the trade secret law was sufficiently similar from state to state.[73] A third potential reason for the seemingly high rate of citations to persuasive authority was the possibility that courts sought out the most factually analogous cases to cite, even if those cases came from another jurisdiction.[74] Although the authors were unable to arrive at a conclusive reason based on their data, they advised that "the consequences are clear: litigants should research and cite the law nationwide, as courts may use that law in reaching their decisions."[75]

In a separate study of trade secret litigation in state courts, however, the same authors found a very different result: unlike their federal counterparts, state courts cite out-of-state authority relatively rarely in trade secret opinions.[76] Only 7 percent of the trade secret opinions in the state court sample cited to out-of-state authority.[77] Within that set of data, 16 percent of the opinions of a state's highest court cited to out-of-state authority, while 6 percent of the opinions of a state's intermediate appellate court cited to out-of-state authority.[78] Just as the authors had been surprised by the high rate of citations to persuasive authority in trade secret litigation in the federal courts, they were likewise surprised by the low rate of citations to out-of-state authority in the state courts, particularly given the "dearth of [binding] precedent" in the area of trade secret law in many states.[79] Despite the low rate of citations to non-binding in state courts, the authors recommended that advocates cite to out-of-state precedent given the goal of uniformity embedded in the UTSA.[80]

A drawback to these previous studies is the lack of a control set. It is difficult to contextualize the significance of the above-stated citation rates without knowing how often federal and state courts cite to persuasive authority in non-trade secret litigation. In order to shed some light in this

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72 *See id.* (noting that, from 2000-2009, Wyoming had one trade secret opinion, North Dakota had four, and Vermont had five).

73 *Id.*

74 *See id.*

75 Almeling et al., *supra* note 69, at 311.

76 *See* Davis S. Almeling et al., *A Statistical Analysis of Trade Secret Litigation in State Courts*, 46 GONZ. L. REV. 57, 77 (2011). Notably, the opinions in the state court study were appellate opinions, whereas the opinions in the federal court study were trial-level opinions. *Id.* at 59. The authors explained that state trial court opinions were often unpublished and not well suited to analysis. *Id.*

77 *Id.* at 77. The sample included 358 state court opinions from 1995-2009. *Id.* at 59.

78 *Id.* at 77.

79 *Id.* at 78. The authors found that only nineteen states had four or more published appellate opinions that met their definition of a "trade secret case" over the fourteen-year period studied. *Id.* at 77-78.

80 *See id.* at 78.

regard, data from a previous citation study of Indiana appellate court decisions provides a useful baseline.

An earlier study, prepared by the author, analyzed the citations in 1,324 opinions from Indiana appellate courts from 2012 and 2013.[81] These cases were drawn from all areas of the law, with the exception of attorney discipline matters. Of this opinion set, 687 opinions (51.9 percent) cited only to Indiana opinions.[82] The balance of the opinions contained 738 distinct citations[83] to judicial opinions from the other forty-nine states.[84] The overall rate of citation was 0.56 out-of-state citations per opinion.[85] The Indiana opinions also contained 1,789 citations to distinct federal opinions.[86] Thus, each opinion contained an average of 1.91 citations to opinions that were not from an Indiana state court.[87] This baseline citation rate can be compared to the citation rate from UTSA cases to ascertain whether Indiana courts look to out-of-state authority more often in UTSA cases.

Indiana enacted the UTSA in 1982.[88] Since then, Indiana appellate courts have cited Indiana's enactment of the UTSA in forty-six opinions.[89] Out of those forty-six opinions, twenty cite only to Indiana state opinions. The remaining twenty-six opinions contain thirty-six distinct citations to judicial opinions of the other forty-nine states. The overall rate of citation was 0.73 out-of-state citations per opinion.[90] The Indiana trade secret opinions also contained eighty-eight citations to distinct federal opinions.[91] Thus, each Indiana trade secret opinion had an average of 2.69 citations to opinions that were not from an Indiana state court.[92] While not comprehensive, this data indicates that Indiana appellate courts are more likely to cite to a non-Indiana state court opinion when interpreting or applying Indiana's enactment of the UTSA than in other cases in general.

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81 Bennardo, *supra* note 14, at 126.

82 *Id.* at 133.

83 Each reference to a discrete opinion in each Indiana opinion was counted as one citation. *See id.* & n.52.

84 *Id.* at 133.

85 Calculated by dividing 738 out-of-state citations by 1324 opinions.

86 The federal citations broke down as follows: 1093 citations to U.S. Supreme Court opinions, 525 citations to federal court of appeals opinions, and 171 citations to federal district court opinions.

87 Calculated by adding 738 out-of-state citations to 1789 federal citations and dividing the sum by 1324 opinions.

88 *See* IND. CODE §§ 24-2-3-1 to -8 (2017); *see also* Amoco Prod. Co. v. Laird, 622 N.E.2d 912, 917 (Ind. 1993).

89 The new data cited in this paragraph was compiled through Lexis Advance searches run on July 15, 2015.

90 Calculated by dividing thirty-six out-of-state citations by forty-six opinions.

91 The federal citations broke down as follows: eight citations to U.S. Supreme Court opinions, thirty-four citations to federal court of appeals opinions, and forty-six citations to federal district court opinions.

92 Calculated by adding thirty-six out-of-state citations to eighty-eight federal citations and dividing the sum by forty-six opinions.

Given the mandatory uniformity provision in the statute,[93] this result is unsurprising.

III. SEPARATION OF POWERS AS A LIMIT ON A LEGISLATURE'S ABILITY TO DICTATE STATUTORY INTERPRETATION

Uniformity provisions raise separation-of-powers concerns. May a legislature dictate to the judiciary which authorities to consult when interpreting a statute? In a concurrence, Michigan Supreme Court Justice Stephen Markman noted his view regarding the legislature's ability to dictate the judiciary's method of statutory interpretation:

> [W]hen the Legislature purports to exercise its *legislative* power to dictate a rule of interpretation to this Court, as some might read [the applicable mandatory uniformity provision] as doing, the Legislature exceeds its authority and impinges on the *judicial* power, which is the power to interpret the law and say what that law means. It is this Court's responsibility to exercise the judicial power and to give reasonable meaning to the law by examining its language, structure, organization, and purpose. I do not believe that the Legislature can impose any different rules of interpretation upon this Court. Although on occasions I have acquiesced in the application of legislative rules of interpretation, I am increasingly of the view that such rules are not only incapable of coherent application, but that they trespass upon the authority of the judiciary . . . . If it is the Legislature's intent that the law be interpreted in a particular manner, the most reliable means of securing this result is for the Legislature to write the law in that manner.[94]

Of course, every state's constitution and separation of powers jurisprudence is distinct.[95] What follows is an attempt to broadly capture the potential constitutional concerns attendant to the legislative directives contained in uniformity provisions.

A. *Jellum's Separation of Powers Framework*

Separation of powers analyses are rarely models of clarity.[96] As a helpful aid, Professor Linda Jellum constructed a useful framework under which to assess separation of powers concerns for directives in which the legislature commands the judiciary regarding statutory interpretation.[97] This Part will

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93 IND. CODE § 24-2-3-1(b) (2017) ("This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject matter of this chapter among states enacting the provisions of this chapter.").

94 People v. Thompson, 730 N.W.2d 708, 715-16 (Mich. 2007) (Markman, J., concurring).

95 *See, e.g.*, David A. Carrillo & Danny Y. Chou, *California Constitutional Law: Separation of Powers*, 45 U.S.F. L. REV. 655, 655-56 (2011).

96 *See* Linda D. Jellum, *"Which is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 855 (2009).

97 *See generally id.*

summarize separation of powers analyses generally as well as under Jellum's framework.

Jellum identifies two approaches to separation of powers analyses: formalist and functionalist.[98] The formalist approach "emphasizes the need to maintain three distinct branches of government based on function," while the functionalist approach "emphasizes the need to maintain pragmatic flexibility to respond to modern government" and "posits that overlap beyond the core functions [of each branch] is practically necessary and even desirable."[99] Formalists simply identify the functions of each branch and find that the principle of separation of powers is violated if one branch exercises another branch's core function.[100] Functionalists, on the other hand, "minimize, but do not bar completely, encroachments into the core functions of each branch" by the other branches.[101] Thus, under functionalism, the legislature and the judiciary are partners in the law-making and law-interpreting processes. The judiciary may exercise some law-making power (through interpretation and the promulgation of the common law) and the legislature may exercise some interpretive power (through announcing policy objectives and other guidance in statutory interpretation).[102] Under a strictly formalistic approach, the legislature makes the law, the judiciary interprets it, and the legislature rewrites the law after the fact if it is unhappy with the judiciary's interpretation.[103] Both doctrines coexist in American jurisprudence, and neither has emerged as the clear path.[104]

Jellum identifies numerous characteristics of statutory directives. First, directives may be definitional, interpretive, or theoretical.[105] Second, directives may be specific or general.[106] Lastly, directives may be mandatory, presumptive, or permissive.[107]

Definitional directives are statutory definitions of terms.[108] These definitions may either be specific to a particular statute or apply generally to all statutes in a code.[109] Interpretive directives tell judges how to interpret

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98 *See id.* at 854-55.

99 *Id.* at 854-55, 860-61.

100 *See id.* at 861-62.

101 *Id.* at 870.

102 *See* Jellum, *supra* note 96, at 872.

103 *Id.* at 871-72.

104 *Id.* at 855, 878-79.

105 *Id.* at 847.

106 *Id.* Specific directives are specific to a particular statute while general directives apply to all statutes in a code. *Id.*

107 *Id.* Mandatory directives must be followed; presumptive directives create a presumption that courts may avoid under certain conditions; permissive directives need not be followed. *Id.* at 852-53.

108 *See* Jellum, *supra* note 96, at 847.

109 *See id.* at 847-48. For example, the Indiana Code has certain definitions that "apply to the construction of all Indiana statutes, unless the construction is plainly repugnant to the intent of the general assembly or of the context of the statute." IND. CODE § 1-1-4-5 (2017). Specific acts within the Indiana

statutes, and again may either apply to a specific statute or generally to an entire code.[110] For example, an interpretive directive might tell courts to interpret a statute narrowly or to prefer the ordinary meaning of words.[111] Theoretical directives "tell judges what process to use to interpret statutes,"[112] that is, which theoretical approach to apply in construing language.[113] A key distinction among each theory of interpretation involves which sources may be consulted in the interpretive process.[114] Thus, a hallmark of theoretical directives is a command to judges regarding "which . . . sources of meaning, or 'evidence,' they may consider when interpreting a statute."[115]

Under Jellum's analysis, definitional directives do not violate separation of powers under either the formalistic or the functionalistic approach.[116] Definitional directives are legislative in nature because the law-making power includes the power to say what words and phrases are intended to mean.[117] In short, "[d]efinitional directives are articulations of law rather than interpretations of law because definitional directives help ensure that the law and all of its contours are clearly understood by judges and litigants."[118]

Theoretical directives, on the other hand, violate the principle of separation of powers under both the formalistic and the functionalist approaches.[119] A theoretical directive's purpose is "to tell the judiciary what evidence to consider when interpreting statutes."[120] Such directives impermissibly encroach on the judiciary's core function of interpreting the law. Intrusions by the legislature into the judicial realm are treated with more concern than other separation of powers issues.[121] Commanding which sources are relevant to statutory interpretation is an attempt to control the judiciary and regulate its inner workings.[122] It may also circumvent the executive's veto power by permitting sources that were not the product of the legislative process to dictate statutory meaning.[123] Consider legislation that directs that its meaning shall be dictated by some extrinsic source, such as a

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Code also list definitions limited to only those specific acts. *E.g.*, IND. CODE § 24-2-3-2 (2017) (listing definitions for purposes of the Indiana Trade Secrets Act).

110 *See* Jellum, *supra* note 96, at 848.

111 *Id.*

112 *Id.*

113 *Id.* at 848-49. The three dominant theories of statutory interpretation are textualism, purposivism, and intentionalism. *Id.* at 849.

114 *Id.* at 849-50.

115 *Id.* at 851.

116 *See* Jellum, *supra* note 96, at 880-82.

117 *Id.* at 880-81.

118 *Id.* at 881.

119 *Id.* at 882-90.

120 *Id.* at 882.

121 *Id.* at 859 (noting that, at least in the federal scheme, the Framers were most troubled by intrusions by the legislature into the judicial sphere).

122 *See* Jellum, *supra* note 96, at 883-84.

123 *Id.* at 886-87.

particular dictionary or even a newspaper. Changes to the extrinsic source would alter statutory meaning without legislative action (including executive oversight through the veto power) and without any judicial input into interpretation. At a minimum, such a process robs the judiciary of its core interpretive function and therefore violates the separation of powers doctrine.[124]

Interpretive directives are the most difficult to analyze. Jellum opines that interpretive directives likely violate the separation of powers doctrine under a strict formalistic approach, but not under a functionalistic approach.[125] The formalistic analysis is relatively straightforward: interpretive directives are not legislative in nature, but rather direct the method of interpreting statutory language.[126] Because statutory interpretation is the function of the judiciary, these directives violate the separation of powers doctrine under the formalistic approach.[127]

Jellum finds that interpretive directives would likely be found constitutional under a functionalistic approach because these directives further the law-making and interpreting partnership between the legislature and the judiciary.[128] Viewed through this lens, interpretive directives may be seen simply as the legislature's legitimate clarification of its policy choices rather than a usurpation of judicial power.[129] Such clarification is not problematic under the functionalist approach because functionalists recognize that the legislature possesses the authority to dictate policy even when it encroaches to some extent on the judiciary's role of interpreting the law.[130]

B. *Applying Separation of Powers Doctrine to Mandatory Uniformity Provisions*

Under the above separation of powers framework, the central issue for uniformity provisions is whether such provisions are interpretive or theoretical directives. If they are theoretical directives, then they violate separation of powers. If they are interpretive, then the outcome depends on whether the formalistic or the functionalist approach is employed.

Consider a mandatory uniformity provision that requires that the statute "shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject matter of this Act among the States enacting it."[131] On its face, such a provision is interpretive. It

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124 *Id.* at 888-90.

125 *Id.* at 890.

126 *Id.* at 891.

127 *Id.* at 891-92.

128 *See* Jellum, *supra* note 96, at 892.

129 *Id.* at 893.

130 *Id.* at 893-94.

131 *See, e.g.*, UNIF. TRADE SECRETS ACT § 8 (ULC 1985).

enumerates the legislative purpose behind the statute and directs the judiciary to apply the statute consistent with that purpose. However, depending on how such a provision operates in practice, it could be read as a theoretical directive that commands the court to follow the edicts of a particular extrinsic source (out-of-state judicial opinions). If such were the case, then a mandatory uniformity provision would almost certainly violate the separation of powers doctrine by usurping the judiciary's interpretive function.

Thus, in order to avoid a serious separation of powers problem, a mandatory uniformity provision should not be read to require a court to automatically follow the prior interpretations of another state's judiciary. Such a requirement strips the home state's judiciary of its core interpretive function altogether. To be constitutional, uniformity provisions should permit the home state's judiciary to exercise at least some independent interpretive function. This important limitation should be recognized when applying mandatory uniformity provisions.

IV. THE NORMATIVE PART: A TEST FOR APPLYING MANDATORY UNIFORMITY PROVISIONS

Given that courts have failed to clearly converge on a unified treatment of mandatory uniformity provisions[132] and the potential separation of powers concerns that surround taking the language of the mandatory uniformity provisions literally,[133] this Part makes a normative proposal on the weight that should be afforded to out-of-state precedents when interpreting a statute that contains a mandatory uniformity provision. The following framework is designed to accommodate the statute's stated goal of uniformity with the flexibility necessary to permit the judiciary to properly fulfill its interpretive duties.

In short, out-of-state case law in this situation should not be regarded as traditionally binding nor non-binding precedent. This distinction has traditionally been governed by the relationship between the court of decision and the court that rendered the prior opinion.[134] Such a relationship-based test does not adequately address the situation created by mandatory uniformity provisions.

When coupled with a mandatory uniformity provision, out-of-state case law should occupy a special precedential posture, one that this author calls "interstitial authority."[135] The following Part develops a two-step test for

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132 *See supra* Part II.A.

133 *See supra* Part III.B.

134 *See supra* Part I.A.

135 An interstice is an intervening space, especially a very small one. Interstitial authority fills the small gap between binding and non-binding precedent. Credit to Alexa Chew for suggesting the nomenclature.

courts to use when applying this category of precedent. The proposed test is modeled after the *Chevron* deference standard that guides courts in determining how much weight to afford prior statutory interpretations by regulatory agencies.[136] Under the proposed test, an interpreting court should first determine whether the statutory language is clear. If it is clear, then the court should apply the statute's clear meaning. If the statute is ambiguous, then the court should adopt the same interpretation as the out-of-state court as long as the out-of-state court's interpretation is a permissible construction of the statute. If the prior interpretation is not a permissible one, however, the court should not be required to adopt it. This approach comports with the statutory requirement that the law be interpreted to further the purpose of national uniformity, but it provides enough leeway to avoid separation of powers concerns and to ensure that manifestly incorrect interpretations will not be mechanically perpetuated around the country.

A. *Step One: Inspecting for Ambiguity*

Under the first step, an interpreting court should determine whether the legislature's intent is clear. If so, the court should simply apply the statutory language according to the clear will of the legislature. Even a mandatory uniformity provision should not bind a court to follow another jurisdiction's interpretation if it runs counter to the clearly-expressed statutory text. As explained above, binding a home judiciary to an outside judiciary's interpretation regardless of the propriety of the outside judiciary's interpretation would almost certainly run afoul of the separation of powers doctrine.[137]

Moreover, binding all later courts to a patently erroneous interpretation is a dangerous policy that carries the potential to ultimately undermine the Uniform Law Commission's goal for uniformity on a broader scale. If the first court's interpretation always sets binding precedent for all other jurisdictions, then the first court better do an exemplary job. Not only would the first court set precedent for its home state, but it would also set the

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136 For comparison's sake, the *Chevron* deference standard states:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issues. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issues, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (internal footnotes omitted).

137 *See supra* Part III.B.

precedent for all other states that enacted the same uniform act with a mandatory uniformity provision. Other jurisdictions' judiciaries would have no way to "overrule" the first court's interpretation, no matter how irregular or erroneous it was. It is easy to imagine a manifestly erroneous interpretation permeating across the country under an overly strict approach to mandatory uniformity provisions. Such a result would give legislatures pause when considering future uniform acts—or at least acts containing mandatory uniformity provisions[138]—because some faraway state judiciary may exercise ultimate control over the act's interpretation. Indeed, state legislatures may enact *fewer* uniform acts as a result, which would ultimately undermine the overall goal of national uniformity in certain areas of state law.

The heart of step one of the analysis involves inspecting the clarity of legislative intent.[139] While many state statutes have scant recorded legislative history, each uniform act comes pre-packaged with helpful interpretive commentary by the drafter.[140] In this case, the statutory 'drafter' refers not to the state legislature, but to the Uniform Law Commission. Although this commentary is rarely enacted by a state legislature or accessible anywhere in the enacted code, courts have nonetheless found it a helpful and appropriate source to discern legislative intent.[141] And, because the commentary is drafted contemporaneously with the uniform act by the same body, it is exceedingly strong evidence of what the statutory text was intended to mean.[142] To ignore it would be folly. Thus, courts should look beyond the four corners of the statutory text—and specifically should focus on the uniform act's commentary—when analyzing whether the legislative intent is clear.[143]

One nuance to this first step ambiguity analysis arises under the borrowed statute rule. Under this rule, "when a legislature adopts a statute

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138 Recall though that some states have generally applicable mandatory uniformity provisions that govern the interpretation of *all* uniform acts. *See supra* notes 43-44 and accompanying text.

139 There are generally two approaches to this task: the textualist approach, which looks only to the statutory text, and the intentionalist approach, which looks to other indications of legislative intent. *See* RUTH ANN WATRY, ADMINISTRATIVE STATUTORY INTERPRETATION: THE AFTERMATH OF *CHEVRON V. NATURAL RESOURCES DEFENSE COUNCIL* 8-9 (2002); *see also* FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 110-12 (2009); ROBERT A. KATZMANN, JUDGING STATUTES 27-28 (2014); WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 323-25 (2000). As explained in the text, this Article favors following the intentionalist approach when interpreting state statutes based on uniform acts.

140 *See* Gallanis, *supra* note 16, at 679 (explaining that uniform act commentary is written by the uniform act's reporter and approved by the chair of the drafting committee).

141 *See, e.g.*, Basileh v. Alghusain, 912 N.E.2d 814, 821 (Ind. 2009) (stating that a uniform act's commentary is "a strong indicator of the legislative intent when [the state legislature] enacted" it into law); Havens v. Portfolio Inv. Exch. Inc., 983 F. Supp. 2d 1007, 1011 (N.D. Ind. 2013); Kevin Bennardo, *Special Considerations When Interpreting Uniform Acts*, RES GESTAE, Jan./Feb. 2015, at 28.

142 Indeed, under the borrowed statute rule, explained *infra*, there is a strong argument that a state legislature that enacts a uniform act implicitly accepts the commentary that goes with it.

143 To be clear, a textualist approach would be workable if a jurisdiction decided to adopt it. The intentionalist approach is not imperative to the functioning of the overall two-step framework.

from a foreign jurisdiction, it implicitly incorporates the settled interpretations of the foreign statute's judiciary."[144] Like any statutory adoption, a uniform act should carry with it the previous settled interpretations of the statutory language. The focus here, however, must be on whether previous interpretations were truly "settled." Enacting a foreign jurisdiction's statute does not incorporate prior judicial interpretations unless they were "known and settled."[145] Where a provision of a uniform act has been consistently interpreted by the high courts of multiple other jurisdictions, the jurisprudence should be regarded as settled.[146] Thus, the pre-existing interpretation should govern the statutory language even if it runs counter to the unambiguous meaning of the text.

However, when another jurisdiction's interpretation does not occur until *after* the act's enactment in the home jurisdiction, the borrowed statute rule has no application. The home judiciary's first task should be to determine whether the statutory meaning is unambiguous. If so, the home judiciary should simply follow the clear meaning of the statute. In essence, the home judiciary should disregard a mandatory uniformity provision if it finds that the text is unambiguous. Doing otherwise would permit the legislature to overreach into the judiciary's core interpretive function.

B. *Step Two (*if necessary): Turning to Interstitial Authority in Cases of Ambiguity*

When statutory language is unclear, a mandatory uniformity provision should play a much greater role in the construction of the statute. After all, the legislature that chose to enact the mandatory uniformity provision deemed uniformity to be *the* paramount purpose of the statute and has commanded the judiciary to construe the statute to effectuate that goal. This statement of legislative intent should carry weight.

Upon deeming statutory language ambiguous under first step analysis described above, a construing court should look to the jurisprudence of the high courts of other enacting jurisdictions. If another jurisdiction's high court has already construed the statutory language, then that precedent should be given the weight of interstitial authority. Interstitial authority should be followed if it is a permissible construction of the statute. If there are no permissible interpretations from the high courts of other enacting jurisdictions, then the court's interpretive task is not burdened by mandatory

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144 Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 351 (2010); *see also* ESKRIDGE, JR. ET AL., *supra* note 139, at 283-85.

145 Capital Traction Co. v. Hof, 174 U.S. 1, 36 (1899).

146 *But see* Yates v. United States, 354 U.S. 298, 310 (1957) (holding that the Court should not assume that Congress was aware of prior interpretations by lower state courts in the absence of legislative history indicating otherwise).

precedent. In that case, the construing court should simply engage in its usual course of statutory interpretation as a matter of first impression, including giving appropriate weight to any non-binding authority.[147]

1. Restricting Interstitial Authority to Courts of Last Resort

The interstitial authority designation should be reserved for decisions of courts of last resort. Lower courts' opinions should be regarded as non-binding precedent because they are generally afforded less respect than decisions of courts of last resort and are susceptible to being overruled.[148]

Decisions of higher courts are generally more respected than those of lower courts.[149] The system of precedent depends greatly on the respect afforded across its various levels. Because higher courts garner more respect than subordinate courts, a later out-of-state court will likely be more comfortable granting deference to another court's decision when the other court is at least on the same level. A court of last resort understandably may have difficulty adopting the decision of another state's intermediate appellate court as interstitial authority. Courts of last resort generally rely on a numerically greater number of decision-makers (justices) than the three-judge panels that are common in intermediate appellate courts.[150] Asking a high court to subordinate itself to the prior opinion of a lower court in another state conflicts so sharply with traditional notions of *stare decisis* that it seems imprudent to suggest it as a potentially viable system of precedent.

Secondly, when considering whether to include an intermediate appellate court decision in the category of interstitial precedent, the possibility of the decision being overruled in the future poses a significant problem. Consider a situation in which an intermediate appellate court has the first opportunity to interpret a uniform act (this jurisdiction is the 'original jurisdiction').[151] If that interpretation was treated as interstitial authority, then

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147 Here, non-binding authority might take the form of a previous interpretation by a lower court in another enacting jurisdiction.

148 For example, when applying state law, a federal court must follow decisions of the state's highest court, but not of the state's lower courts. *See* BEAZLEY & SMITH, *supra* note 8, at 58-59.

149 *See* CHEW & PRYAL, *supra* note 6, at 61, 64-65 (identifying "the level of the court that decides the case" as relevant to authoritativeness); RICHARD K. NEUMANN, JR. & SHEILA SIMON, LEGAL WRITING 51 (2011) (identifying the level of court as the third most important factor to a non-binding opinion's persuasiveness); HELENE S. SHAPO, MARILYN R. WALTER & ELIZABETH FAJANS, WRITING AND ANALYSIS IN THE LAW 21 (6th ed. 2013) ("The level of the court that decided the previous case is important."); *see also* BEAZLEY & SMITH, *supra* note 8, at 61-62 (identifying "the identity of the source of the authority" as relevant to persuasiveness).

150 All state courts of last resort have between five and nine justices. *See State Court Organization*, NATIONAL CENTER FOR STATE COURTS, http://www.ncsc.org/sco (select Interactive State Court Organization App; select Table 2.2a (Number of Appellate Court Judges); select Court of Last Resort filter).

151 Indeed, such would almost always be the case because almost all states have intermediate appellate courts and the task of statutory interpretation begins in the lower courts.

other jurisdictions—including other jurisdictions' highest courts—would follow that interpretation unless it was impermissible. If the same interpretive issue was later appealed to the highest court of the original jurisdiction in a different case, what weight would the intermediate appellate court's prior interpretation hold? It is from a lower court from the same jurisdiction, so a mandatory uniformity provision would not force the higher court to follow it. But it has gained a following from other jurisdictions, which could arguably be interstitial precedent for the original jurisdiction's highest court. If the original jurisdiction's highest court overruled the intermediate appellate court's original interpretation, what would that mean for all of the decisions that followed the intermediate appellate court's interpretation as interstitial authority in the interim? Would its interpretation be effectively overruled? In short, there are too many difficult questions that lead to inherently arbitrary answers in this scenario. It is better to limit the designation of interstitial authority to precedents that are at least settled within the jurisdiction and are not subject to being revisited by a higher court.

2. Identifying Permissible Constructions

Under this proposal, interstitial precedent must be followed if it is a permissible construction of the statutory language. Thus, determining whether an interpretation is permissible or impermissible is a critical step in the analysis. In the administrative law context, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[152] In determining whether an agency's interpretation is a permissible one, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."[153]

This standard would work well in the context of assessing whether a court should be bound to follow interstitial precedent. If mandatory uniformity provisions carry any meaning, the later court should not approach the statute free from the baggage of the prior interpretation. It should not decline to follow a prior high court's interpretation simply because it would have reached a different result as a matter of first impression. Rather, it should assess whether the prior interpretation is a reasonable one—that is, whether the interpretation is supported by the statute, even if other interpretations could also be supported by the statute. If the prior interpretation is a reasonable one, then the later court should be bound to

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152 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

153 *Id.* at 843 n.11; *see also* AT & T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 388-92 (1999) (finding agency interpretation of statute to be unreasonable).

follow it in accordance with the mandatory uniformity provision.[154] Such is the essence of interstitial authority.

CONCLUSION: THE BENEFIT OF INTERSTITIAL AUTHORITY IN CONSTRUING UNIFORM ACTS

Any consistent standard would be better than the current regime of unreliable application of mandatory uniformity provisions. Uniformity is the hallmark of uniform acts. The variable and often uncertain weight that courts have afforded to out-of-state interpretations of uniform acts has undermined the uniformity principle that is at the heart of such legislation—and is explicitly expressed by these statutes' mandatory uniformity provisions. The entire endeavor of enacting uniform statutory language is jeopardized if courts lack guidance on what weight to give prior interpretations by other enacting jurisdictions.

Of course, identifying the need for *a* standard does little to advance the claim that this Article's proposed test should be adopted as *the* standard. This Article's proposal strikes an important balance. Mandatory uniformity provisions should be afforded weight—even significant weight—but they cannot be both the starting and the ending point of statutory interpretation. These provisions should be a guiding light rather than a blinding one.

Under this Article's proposal, a mandatory uniformity provision would require a court to follow a previous interpretation of the highest court of another jurisdiction when the statutory language is ambiguous and the previous interpretation is a permissible one. When the statutory language is not ambiguous, a court should adhere to the plain meaning of the statute. When a previous interpretation is not a permissible construction of the statute, a later court should not be bound to follow it.

Affording such great weight to a previous out-of-state interpretation furthers uniformity. This approach is consistent with the language of mandatory uniformity provisions, which state that the statutory language should be construed and applied "to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it."[155] Uniformity across jurisdictions is the general purpose of the statute. Thus, giving great weight to other jurisdictions' interpretations is important. Uniform statutory language on the books means little if the words are not

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154 The reason for deference is different in the present context than in the agency-regulatory context. Deference is granted to agencies' gap-filling regulations because "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron*, 467 U.S. at 843-44 (discussing deference to express and implicit delegations of legislative authority). In the case of mandatory uniformity provisions, deference does not arise because of the legislature's express delegation of authority to fill statutory gaps. Rather, a mandatory uniformity provision expressly adopts another jurisdiction's reasonable construction of the same statutory language in the name of furthering the legislature's overarching goal of uniformity.

155 *See, e.g.*, UNIF. TRADE SECRETS ACT § 8 (ULC 1985).

uniformly interpreted to have the same meaning. Uniform law is not achieved unless both the statutory language and judicial construction of that language are consistent across enacting jurisdictions.

But all must not be sacrificed at uniformity's altar. There must be a limiting principle. Without any limiting principle, a single dreadful interpretation could permeate the country in the name of uniform construction. This result would deter legislatures from enacting uniform acts in the future, or at least those with mandatory uniformity provisions. The standard proposed by this Article safeguards the language of the statute by freeing courts from following manifestly incorrect interpretations. If a prior interpretation is unreasonable—either because the meaning of the statute is plain or because the interpretation cannot be reconciled with the statutory text—then a later court is not bound to follow it. This approach balances uniformity with flexibility in a way that gives meaning to the mandatory uniformity provision while still respecting the judiciary's constitutional role as the interpreter of laws.