

## PRIVATE LAW IN THE GAPS

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*Private law subjects like tort, contract, and property are traditionally taken to be at the core of the common law tradition, yet statutes increasingly intersect with these bodies of doctrine. This Article draws on recent work in private law theory and statutory interpretation to consider afresh what courts should do with private law in statutory gaps. In particular, it focuses on statutes touching on tort law, a field at the leading edge of private law theory.*

*This Article's analysis unsettles some conventional wisdom about the intersection of private law and statutes. Many leading tort scholars and jurists embrace a regulatory conception of private law while also advocating courts' independent judgment in statutory gaps. Much public law theory on statutory interpretation, however, challenges this preference for background law over legislative policy, at least when private law is understood primarily as public regulation. By contrast, the more a court views private law as a coherent practice autonomous from public regulation, the more justification it has to develop that doctrine amid legislative silence. This space for creativity can be most pronounced for statutory formalists like textualists, a counterintuitive implication given the latter approach's association with judicial restraint.*

*Finally, the analysis illuminates the larger question of whether private law adjudication and scholarship need an intervention from public law theory in statutory interpretation. If, as much law and scholarship presumes, private law is simply public regulation by adjudicative means, most every question at the junction of private law and legislation concerns statutory interpretation broadly understood. In that case, private law scholars' indifference about public law scholarship in legislation is difficult to defend. By comparison, private law's innocence of statutory*

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*interpretation theory is more easily justified on noninstrumental assumptions about background doctrine.*

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## INTRODUCTION

The relationship between positively enacted legislation and uncodified, “unwritten” law is a perennial source of puzzles. American law usually frames this problem as reconciling the legislature’s statutes with the judiciary’s repository of common law. Yet this traditional dichotomy oversimplifies matters, given how many species of doctrine exist under the genus “common law.” Most obvious are first-year law school subjects like tort, contract, and property. But commentators also speak of constitutional common law, the common law of statutory interpretation, procedural common law, administrative common law, the common law of conflicts of law, specialized enclaves of federal common law, and even “common-law” statutes.<sup>1</sup> And so on. The differences between these bodies of doctrine might be more significant than the shared absence of codification. For this reason, disaggregating “common law” or “unwritten law” can improve our understanding of the interactions between legislation and judicial doctrine.

This Article carves off a significant slice of unwritten law for such a focused exploration: the rules and principles of “private law,” in contrast to “public law.” Private law subjects like tort, contract, and property are traditionally understood to be at the core of the common law tradition, yet statutes increasingly intersect with these bodies of doctrine. In tort law, legislation codifies, modifies, and abrogates traditional causes of action, while also creating new ones.<sup>2</sup> States’ adoption of parts of the Uniform Commercial Code enmeshes contract and commercial law in legislation.<sup>3</sup> Even first-year property staples like adverse possession and the rule against perpetuities are often governed by legislation, not judicial precedent alone.<sup>4</sup>

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1. See, e.g., Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813 (2008); Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753 (2013); Margaret H. Lemos, *Interpretive Methodology and Delegations to Courts: Are “Common-Law Statutes” Different?*, in INTELLECTUAL PROPERTY AND THE COMMON LAW 89 (Shyamkrishna Balganesh ed., 2013); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985); Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293 (2012); Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657 (2013) (conflicts of law).

2. See, e.g., National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-1 to -34 (2006) (modifying products liability); IND. CODE ANN. § 34-23-1-1 (LexisNexis 2012) (creating wrongful death action); MICH. COMP. LAWS ANN. § 600.2912a (West 2010) (codifying medical malpractice actions).

3. See, e.g., CAL. COM. CODE § 1101 (West 2007).

4. See, e.g., FLA. STAT. ANN. § 95.18 (West 2013) (adverse possession); VA. CODE ANN. § 55-12.1 (2013) (rule against perpetuities).

One of the most pressing questions such interactions raise is what interpreters are to do with gaps—legislative silences—in statutory regimes set against the background of this unwritten private law. This question sharply divides courts.<sup>5</sup> Answering it involves understandings about the nature of private law doctrine, the relationship between courts and legislatures, and proper methods of statutory interpretation. In short, the answer here must integrate theories of private law and statutes.

The resources for this integration are rich but underutilized. In recent years, private law theory has enjoyed a renaissance, with scholars challenging the received wisdom that these bodies of law are merely public regulation by private attorneys general. Few in the debate about the autonomy of private law, however, give sustained attention to legislation. By the same token, much scholarship on statutory interpretation, a field that has also witnessed great theoretical development, considers itself to be operating in the realm of public law. Thus, “the revival of theory in statutory interpretation”<sup>6</sup> (which has yielded the “new public law movement”<sup>7</sup> and the “new textualism”<sup>8</sup>) and the freshly minted “new private law”<sup>9</sup> movement have been revolutions running in parallel. The increasing interaction between private law and statutes demands that these two lines of inquiry intersect. With that goal in mind, this Article draws on recent work in both lines of scholarship to consider anew how courts should apply statutes that intersect with established bodies of private law. In particular, the analysis will focus on tort law, a field at the leading edge of recent arguments about the character of private law.<sup>10</sup>

To undertake such analysis, it is important to grasp two separate dichotomies in legal theory. First, there is the opposition between instrumental and conceptual theories of private law. The instrumentalist

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5. See, e.g., *Bruesewitz v. Wyeth, LLC*, 131 S. Ct. 1068 (2011) (analyzing whether a federal vaccine injury incorporates *Restatement* principles on products liability); *O’Neal v. St. John Hosp. & Med. Ctr.*, 791 N.W.2d 853 (Mich. 2010) (reconciling a tort causation statute with previous jurisprudence); *Perlmutter v. Beth David Hosp.*, 123 N.E.2d 792 (N.Y. 1954) (considering whether a state sales act governs a suit based on negligent blood transfusion); cf. Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 544 (1983) (arguing in the context of federal law that “unless the statute plainly hands courts the power to create and revise a form of common law, the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process”).

6. Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992).

7. William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation As a Postmodern Cultural Form*, 89 MICH. L. REV. 707 (1991).

8. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287 (2010) (defining, tracing the history of, and defending modern textualism).

9. See Symposium, *The New Private Law*, 125 HARV. L. REV. 1639 (2012).

10. See JULES L. COLEMAN, *RISKS AND WRONGS* (1992); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995); John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1998); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997).

approach questions private law's distinctiveness, treating the doctrine as a form of public regulation that happens to be implemented through litigation. In contrast, conceptualist theories understand private law as a body of doctrine that is coherent on its own terms and meaningfully autonomous from the state's legislative aims. The second dichotomy concerns theories of statutory interpretation originating in public law jurisprudence. Functionalist approaches treat the legislature's goals as the lodestar of statutory interpretation. Formalist approaches privilege the "letter" of a statute over underlying legislative "spirit" when the two conflict.

This Article pulls together these dichotomies to examine their implications at the intersection of private law and legislation. The extent of legislation's displacement of background private law, I argue, turns most significantly on the interpreter's theory of private law. If private law fields, like tort, are best understood on instrumentalist terms, the case for differentiating statutes concerning tort law from other legislation is weaker, as are claims to privilege preexisting judicial understandings of that law. So conceived, private law in the gaps is vulnerable to displacement, irrespective of whether an interpreter adheres to a formalist or a functionalist approach to statutes. By contrast, the more interpreters regard private law doctrine as having an autonomous, internally coherent character, the more freedom courts have to develop private law on its own terms where the legislature is silent or has spoken unclearly. This space for creative elaboration of background private law may be most pronounced for courts that embrace formalist approaches to statutory interpretation, such as textualism.

These conclusions challenge received wisdom about the intersection of private law and statutes. For example, many leading tort scholars and jurists embrace instrumentalist theories of private law and scorn formalist approaches to statutory interpretation. At the same time, they also assume broad judicial independence to make tort law in statutory gaps. This Article's analysis challenges that approach to private law in the gaps. If the lodestar of statutory interpretation is elaboration of legislative purpose, and if private law is defeasible legislation by judicial means, it seems that the questions of *statutory* aims and policies should be of overriding concern when courts confront gaps, not the independent judicial policymaking that so often plays an outsized role.

By contrast, judicial creativity in statutory gaps is most readily justified by a conjunction of the statutory formalism and private law conceptualism that these commentators reject. An interpreter's insistence on a principled distinction between a statute's semantic meaning and its unenacted purpose leaves more room for courts to maintain and develop private law in the absence of an explicit contradiction with legislative rules. An understanding that refuses to equate background private law norms with the state's posited regulation, moreover, helps insulate that doctrine from the arguments that modern statutory formalists often use to displace judicial creativity in the gaps. The closer a court's private law theory approaches

the conceptualism derided by legal realists and their progeny, the more resistant that court's private law will be to the preemptive sweep implied by the very different kind of formalism that animates interpretive theories like textualism.<sup>11</sup> In short, a union of formalist methodologies—an approach that defies much conventional wisdom in American private law scholarship—most easily justifies the interstitial creativity that so many private law scholars afford to judges. Furthermore, the strong link between judicial restraint and formalism in statutory interpretation may not be a necessary truth but, rather, a product of interpretive theorists' focus on federal public law, their embrace of legal instrumentalism, or both.

The conclusions above suggest an answer to the larger question of whether private law needs an intervention from public law theory on statutory interpretation. The more firmly one embraces a conceptualist understanding in which private law is politically autonomous and internally coherent, the less the proximity of statutes and private law will implicate questions of statutory interpretation. If, on the other hand, private law is merely public regulation by adjudicative means, private law and scholarship's disinterest in statutory interpretation is much harder to defend. Instrumentalists face the choice of either reconsidering their underlying concept of private law, accepting diminished judicial autonomy in legislative gaps, or offering a justification for current practice that incorporates the insights of public law theory on legislation. The first two options are unlikely to be palatable, and the third, while possible, requires much more work than current commentators have been willing to expend.<sup>12</sup>

This Article proceeds as follows. Part I discusses functionalist and formalist approaches to legislation. Part II.A introduces the traditional distinction between private law and public law. The remainder of Part II categorizes instrumentalist and conceptual theories of private law. Part III explains the problem of gaps at the intersection of uncodified private law and legislation and provides cases exemplifying three very different approaches to that problem. Parts IV and V bring theories of private law and statutory interpretation together. Part IV analyzes how statutory functionalists and formalists, respectively, would approach statutory gaps if they understood background private law in instrumentalist terms. Part V analyzes how those respective approaches to statutory gaps change when the interpreter has a conceptualist stance toward unwritten private law. The Conclusion briefly explores potential implications for both jurisprudence and private law theory more generally.

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11. Compare John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685 (1999) (defending rule-based formalism in legal interpretation), and Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988), with Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988) (reconstructing and defending private law formalism).

12. Cf. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 cmt. f reporters' note, at 165 (2011) ("[T]he theoretical debates that have marked the general project of legislative interpretation . . . have not yet broken out in [torts].").

## I. FUNCTIONALISM AND FORMALISM IN STATUTORY INTERPRETATION

In the past three decades, American statutory interpretation has witnessed a “revival in theory.”<sup>13</sup> Recent scholarship explains that much of this theorization has focused on federal law.<sup>14</sup> State law, however, is the primary region where interpreters will negotiate the borderland between legislation and private law doctrine due both to sheer jurisdictional numbers and to restricted, post-*Erie Railroad Co. v. Tompkins*<sup>15</sup> understandings of federal common law. This rich body of interpretive theory nevertheless offers an excellent starting point for the inquiry, even if it does not provide the last word. This Part provides a high-level sketch of these theoretical debates and, drawing on my prior work, identifies how state courts’ common law powers may alter the implications of those outside the federal context. Finally, it raises the possibility that this state law distinction might be most salient when legislation intersects with background private law.

A. *Statutory Functionalism*

The central part of contemporary debate between interpretive theorists concerns the relationship between the (a) linguistic or semantic meaning of a statute’s enacted text and (b) the statute’s background purpose or policy. A hallmark of functionalist statutory interpretation is prioritizing statutory purpose or policy over the semantic meaning of the text when the two conflict. Formalist statutory interpretation, by contrast, reverses this priority in cases of conflict.<sup>16</sup> Functionalist theories are many, but the most common approach in American courts—purposivism—unifies a conception of law as a purposive enterprise with a commitment to legislative supremacy.<sup>17</sup> For the purposivist, the best reading of a statute is one that effectuates the function or functions the legislature enacted it to serve.

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13. See generally Frickey, *supra* note 6.

14. 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); Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479 (2013).

15. 304 U.S. 64 (1938).

16. This analysis adopts the dichotomy that textualist John Manning draws. See John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006) [hereinafter Manning, *What Divides*]; see also John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 FORDHAM L. REV. 2009 (2006) [hereinafter Manning, *Competing Presumptions*]; Manning, *supra* note 8. This dichotomization is not exclusive to textualists. See Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 406–07 (2012).

17. This discussion does not focus on “dynamic” theories of interpretation in which contemporary public values play an equal role alongside original meaning and purposes at the time of enactment. See, e.g., WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994). The relationship between dynamic interpretation, legislative supremacy, and private law is sufficiently complex to warrant its own article.

## 1. Method

Functionalist statutory interpretation predominated for much of the twentieth century.<sup>18</sup> The most prominent version of this method in American courts was purposive interpretation in the style of Henry Hart and Albert Sacks's *Legal Process*.<sup>19</sup> The legal process method instructs courts first to "decide what purpose ought to be attributed to the statute and any subordinate provision of it."<sup>20</sup> Second, the court must "[i]nterpret the words of the statute immediately in question so as to carry out that purpose the best it can" so long as that interpretation does not give the words "meaning they will not bear" or contravene "any established policy or clear statement."<sup>21</sup> The purpose of the statute—gleaned from text, legislative history, and a presumption of legislative reasonableness—is the polestar of interpretation, with the semantic meaning of the text working as a backend constraint on implementing that purpose. Consequently, an interpretation that, as a matter of ordinary language, is strained but not linguistically impossible can trump a more natural conventional meaning that flouts statutory policy.

The U.S. Supreme Court's decision in *United States v. American Trucking Ass'ns*,<sup>22</sup> which Hart and Sacks praised, exemplifies this approach.<sup>23</sup> There, the statute before the Court gave the Interstate Commerce Commission authority to regulate the "maximum hours of service of employees, and safety of operation and equipment."<sup>24</sup> The Court identified its task as giving "effect to the intent of Congress" and "discovery of the purpose of the draftsman of a statute."<sup>25</sup> Although the Court recognized statutory language to be the best evidence of legislative purpose and intent, when the text created an "unreasonable" result "plainly at variance with the policy of the legislation as a whole," that meaning had to yield unless the text permitted no other reading.<sup>26</sup> For these reasons, the Court held that the agency's jurisdiction over the motor vehicle carrier industry was limited to regulating workers involved with operational safety.

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18. See Frickey, *supra* note 6 (explaining the rise of nonformalist approaches to interpretation from the 1930s and its leading role up until the 1980s); Manning, *Competing Presumptions*, *supra* note 16, at 2009 (describing purposive interpretation as "the post-New Deal consensus on statutory interpretation").

19. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

20. *Id.* at 1374.

21. *Id.*

22. 310 U.S. 534 (1940).

23. *Id.*; HART & SACKS, *supra* note 19, at 1245 ("[T]he Court's decision appears to be entirely sound . . .").

24. *Am. Trucking Ass'ns*, 310 U.S. at 538.

25. *Id.* at 542.

26. *Id.* at 543–44.



It held so even though this interpretation, as a textual matter, was one of substantial “verbal difficulty.”<sup>27</sup>

The purposivist approach prioritizes policy context over semantic meaning in all but the most ironclad of interpretative cases—and perhaps not even there. While recent commentary elucidates how legal process purposivism uses text as a constraint on purposive interpretation,<sup>28</sup> other purposivist decisions seem to privilege background policy even when the words do not readily bear such weight.<sup>29</sup> Hart and Sacks were even sympathetic toward *Riggs v. Palmer*,<sup>30</sup> a decision famous for prioritizing an equitable understanding of legislative purpose even when the enacted text alone excluded such an interpretation.<sup>31</sup>

## 2. Justification

The underlying justification for legal process purposivism begins with a basic premise about the nature of law.<sup>32</sup> Law, Hart and Sacks explain, is “a purposive activity, a continuous striving to solve the basic problems of social living.”<sup>33</sup> For this reason, “every statute and every doctrine of unwritten law . . . has some kind of purpose or objective.”<sup>34</sup> To understand statutes, then, one must understand their purposes and how they fit into the larger, rational legal order.

The interpreter does not move from this purposive understanding about the nature of law to an unmoored, normative framing statutory meaning. Hart and Sacks identify the further principle of “institutional settlement,” which holds that “a decision which is the duly arrived at result of duly established procedure for making decisions of that kind ‘ought’ to be accepted as binding.”<sup>35</sup> In our constitutional order, legislatures enact binding statutes that compel judicial adherence absent unconstitutionality. The need for settlement and coordination leads the purposivist to accept legislative supremacy in framing the policies that law pursues.<sup>36</sup>

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27. HART & SACKS, *supra* note 19, at 1244.

28. See John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 121; Stack, *supra* note 16, at 385–87. For an example of this more modest purposivism, see Justice Stephen Breyer’s opinion for the Court in *Zuni Public School District v. U.S. Department of Education*, 550 U.S. 81 (2007).

29. See, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457, 472 (1892) (“It is the duty of the courts . . . to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.”).

30. 22 N.E. 188 (N.Y. 1889).

31. See *id.*; HART & SACKS, *supra* note 19, at 89–91, 1376 (skeptically questioning critiques of *Riggs* and explaining that textual constraints will rarely prevent an interpreter from narrowing the scope of a statute).

32. See Stack, *supra* note 16, at 388–91.

33. HART & SACKS, *supra* note 19, at 148.

34. *Id.*

35. *Id.* at 5.

36. See Stack, *supra* note 16, at 391.

The task of the interpreter is to advance rationally the legislature's policies. While the statute's enacted text is a critical starting point for identifying this purpose, it is not the end. If the text is unclear, the interpreter undertakes "reasoned elaboration" of the statute to promote its purposes and integrate it into the broader fabric of the law.<sup>37</sup> Due to the limits of language and human foresight, the legislature may at times also speak "clearly but inaccurately in choosing the words to express its aims."<sup>38</sup> In such cases, a purposive interpreter may engage in "imaginative reconstruction," in which the judge thinks "as best he can into the minds of the enacting legislators and imagine[s] how they would have wanted the statute applied to the case at bar."<sup>39</sup> In executing its duty of "figuring out what outcome will best advance the program or enterprise set on foot by the enactment,"<sup>40</sup> the court may depart from the most plausible semantic meaning of the text if it does not promote the legislation's clear purpose.

### B. Statutory Formalism

At risk of oversimplification, formalism in statutory interpretation in American law counsels courts to adhere to the limits of (reasonably) clear semantic meaning of enacted legal texts, even when doing so contradicts the interpreter's understanding of legislative history, nontextually entrenched statutory purpose or policy, or apparent common sense. Central to this formalism is an emphasis on second-order, categorical reasons to refrain from first-order, particularistic reasoning in resolving disputes.<sup>41</sup> The most common variety of this formalism in American statutory interpretation is a textualist approach that privileges the meaning a reasonable reader of legal English would infer from the statutory text at the time of its enactment.<sup>42</sup>

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37. *Id.* at 390.

38. Manning, *Competing Presumptions*, *supra* note 16, at 2010 (characterizing the purposivist assumption).

39. See Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983).

40. Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 191 (1986).

41. See generally Larry Alexander, *Pursuing the Good—Indirectly*, 95 ETHICS 315 (1985); Schauer, *supra* note 11.

42. See, e.g., John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003). Other varieties of statutory formalism do not emphasize original understanding, see Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, or instead focus on original intention, see Larry Alexander & Saikrishna Prakash, "Is That English You're Speaking?" *Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 974–78 (2004) (arguing that textualism is most plausibly understood as rule-restricted intentionalism).

## 1. Method

Statutory formalists concede that statutes can contain ambiguities and gaps and that interpreters must rely on unenacted sources and legislative purpose to resolve unclear cases.<sup>43</sup> They also believe statutory terms *can* have core linguistic meanings capable of separation from statutory policy.<sup>44</sup> Thus, when considering an ordinance banning “vehicles in the park,” the statutory formalist sees a real distinction between easy cases—such as jeeps blasting rock music—and hard cases like roller skates, which may require reference to statutory purpose. If an ambulance falls within the semantic core of “vehicle,” (wheels, self-propelled engine, large, moving) it is banned, however questionable that result may be as a matter of statutory purpose or policy.<sup>45</sup> In the words of Professor John Manning, a leading textualist, “When contextual evidence of semantic usage points decisively in one direction, that evidence takes priority over contextual evidence that relates to questions of policy.”<sup>46</sup>

The Supreme Court’s recent decision in *Astrue v. Ratliff*<sup>47</sup> exemplifies statutory formalism. *Ratliff* concerned a statute that awards fees to “prevailing parties” (and only prevailing parties) in suits against the United States.<sup>48</sup> In *Ratliff*, a successful plaintiff’s fees were subject to an offset due to a preexisting government debt.<sup>49</sup> Her attorney sought to claim the money free of the offset, arguing that an attorney also counts as a “prevailing party” under the statute.<sup>50</sup> The Court unanimously held that the reasonable reader of the statute’s text and structure would understand “prevailing party” as limiting direct recovery to plaintiffs alone.<sup>51</sup> The Court adopted this interpretation in the teeth of plausible arguments—grounded in legislative findings and history—that: (i) Congress would have preferred a different result had it considered the particular problem; and (ii) that the semantic meaning undercut the statute’s remedial purpose.<sup>52</sup>

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43. Manning, *supra* note 8, at 1307–08; cf. Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions*, in *LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY* 357, 384 (Andrei Marmor ed., 1995) (explaining that legal systems provide noninterpretive norms to “handle cases where the authorities have apparently but not really determined what ought to be done” in a statute).

44. See Pojanowski, *supra* note 14, at 518.

45. *Id.* at 514–15 (citing H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958)); see also Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

46. Manning, *What Divides*, *supra* note 16, at 92–93.

47. 130 S. Ct. 2521 (2010).

48. Equal Access to Justice Act, 28 U.S.C. § 2412(d) (2006).

49. *Ratliff*, 130 S. Ct. at 2524.

50. *Id.*

51. *Id.* at 2525–26.

52. See *id.* at 2530–31 (Sotomayor, J. concurring) (finding merit to these arguments but yielding because the text “compell[ed] the conclusion”). For more detailed commentary on this case, see Frederick Liu, *Astrue v. Ratliff and the Death of Strong Purposivism*, 159 U. PA. L. REV. PENNUMBRA 167, 173 (2011) (“Interpretive consensus on the Supreme Court is not impossible. . . . If *Ratliff* is any indication, strong purposivism is dead . . .”).

## 2. Justifications

As a person calling an ambulance in a park might attest, formalist approaches are controversial, even if they now predominate in the U.S. Supreme Court and the high courts in a number of states.<sup>53</sup> This subpart identifies two justifications for statutory formalism.

### *a. Constitutional Formalism*

Textualists like Professor Manning and Judge Frank Easterbrook are formalists not because of blithe indifference to absurd results, but because of second-order reasons rooted in constitutional structure and legislative supremacy. Their starting premise is that, in our constitutional order, statutory interpretation requires faithful agency to the legislature's policy choices. Accordingly, whatever powers courts have to act when there is no legislation, courts lack authority to strike down or modify statutes absent supervening constitutional warrant. They then argue that judicial glosses that smooth the rough edges of statutes to promote the spirit of legislation or to correct unexpected anomalies are no more warranted, even if the court does so under the banner of faithful agency. This is because legislation is often a product of messy and possibly unknowable compromise; legislative choices about textual *means* are significant, for they "reflect the price that the legislature was willing to pay" to achieve a given end; and legislative choice between rules and standards reflects important decisions about means.<sup>54</sup> A court's decision to override clear text in the name of purpose risks upsetting such legislative compromises.<sup>55</sup> Repair to purpose also impedes future compromise, as legislators face the risk of courts abstracting away particular bargains in light of general purpose.<sup>56</sup>

In the federal context, avoiding such risks respects the Constitution's structural features, such as the requirements of bicameralism and presentment, the protection of small states in the Senate, and internal legislative procedures that place compromise at the center of the lawmaking process and give political minorities the power to block legislation or exact compromise.<sup>57</sup> The federal Constitution's explicit and exclusive vesting of the legislative power in Congress also weighs against judicial revision of clear language emerging from such bargains.<sup>58</sup> Constitutional orders that

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53. See Gluck, *supra* note 14, at 1775–1810; Pojanowski, *supra* note 14, at 482–87.

54. Manning, *supra* note 8, at 1310–11; see also Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 93–94 (2002) (describing legislation as a compromise); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 63–65 (1988).

55. See, e.g., Rodriguez v. United States, 480 U.S. 522, 526 (1987) (per curiam) (“[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.”).

56. See Manning, *supra* note 8, at 1314.

57. See *id.*; see also Wyeth v. Levine, 555 U.S. 555, 584–88 (2009) (Thomas, J., concurring) (describing how constitutional structure requires the primacy of statutory text).

58. See Manning, *supra* note 8, at 1305, 1314.

allow judicial departure from semantic meaning in light of purpose or policy are possible. Constitutional formalism in statutory interpretation concludes that the U.S. Constitution creates higher-order reasons precluding such adjustments.

*b. Institutional Competence Formalism*

A second version of statutory formalism relies on the systemic consequences of judicial adjustment of textual provisions. Professor Caleb Nelson, for example, grounds textualism in the belief that a rule-like approach to determining legislative intent will lead to fewer errors than reliance on legislative history or imaginative reconstruction of hypothetical intent.<sup>59</sup> Professor Adrian Vermeule argues that the judiciary's institutional limits recommend "wooden" interpretation that hews closely to the surface meaning of the particular clause in question.<sup>60</sup> Because judges cannot know whether rules or standards generally lead to better consequences, courts should always choose rules to minimize decision costs without losing expected accuracy.<sup>61</sup> For this reason, he concludes that a minimalist rule of plain meaning should trump standard-like inquiries into background purpose or inferences from statutory structure and related statutes.<sup>62</sup>

Objections to courts' competence to depart from semantic meaning for reasons of statutory policy are well known, especially in public law. Courts lack the political legitimacy, expert staff, and general factfinding capacities of legislatures or executives.<sup>63</sup> Courts also face particular institutional hurdles in policy formation. They must take concrete cases as they come, rather than investigating and initiating general proceedings, thus limiting a court's ability to control an agenda or track the effects of policy over time. Adjudication's intense focus on the case's particular facts rather than the broader picture may also lead to blinkered policymaking.<sup>64</sup> For these reasons, formalists will accept minor errors of statutory over- and underinclusion to avoid the wholesale costs of a system in which nonspecialist judges engage in particularistic departures from reasonably clear textual meaning.

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59. See Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 416–17 (2005); see also Schauer, *supra* note 42, at 250–56.

60. ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 4 (2006).

61. See *id.* at 192–93.

62. See *id.* at 202–05.

63. See Jeffrey A. Pojanowski, *Reason and Reasonableness in Review of Agency Decisions*, 104 NW. U. L. REV. 799, 836–37 (2010) (discussing agencies' comparative competence in fact gathering and policymaking).

64. See generally Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006).

### C. Statutory Interpretation Beyond Federal Courts

In the United States, most of the intersections between private law and legislation occurs at the state level, rather than in federal law. To be sure, federal courts often look to general law principles like tort to give meaning to statutory terms or fill gaps in legislative regimes.<sup>65</sup> Similarly, in exceptional but established enclaves, federal courts develop private law when crafting federal common law independent of legislation.<sup>66</sup> Even so, as a practical matter, most of the action occurs against the background of common law practice in state jurisdictions.

This fact is of more than statistical significance. Federal courts, unlike state courts, do not claim the general common law powers of state courts to elaborate private law.<sup>67</sup> The extent of the limitations on federal court authority is a point of complex and longstanding debate. One view is that federal courts “lack constitutional authority to exercise the kind of open-ended, policymaking discretion” characteristic of the pre-*Erie* federal regime and the present state courts,<sup>68</sup> a view that could cast a pall on vigorous reliance on background law. Another is that, notwithstanding the Supreme Court’s protestations to the contrary, federal courts face “no fundamental constraints on the fashioning of federal rules of decision.”<sup>69</sup> A more nuanced approach accepts statutory formalism while maintaining that, *pace Erie*, uncodified general law still pervades the federal legal system.<sup>70</sup>

Untangling these arguments in federal law is difficult and not this Article’s present task. Of immediate interest is whether the fact that state courts undisputedly are “common law courts” points toward interpretive approaches different than ones in federal courts of limited jurisdiction.<sup>71</sup> While claims of state law differentiation are sometimes overstated, it is plausible to believe that a state court’s general common law “powers” may warrant more judicial creativity, at least where a legislative regime has not explicitly covered a matter.<sup>72</sup> This allocation of authority may strengthen

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65. See, e.g., *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 613–14 (2009) (following *Restatement* principles to determine the apportionment of liability under an environmental cleanup statute). See generally Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503 (2006).

66. See, e.g., *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) (applying federal common law in an interstate dispute). See generally Merrill, *supra* note 1.

67. See *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 312 (1981); Pojanowski, *supra* note 14.

68. Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 CALIF. L. REV. 699, 700 (2008).

69. Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 805 (1989).

70. See generally Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921 (2013); Nelson, *supra* note 65.

71. See Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1 (1995).

72. See Pojanowski, *supra* note 14, at 522–27 (discussing such a possibility). Whether common law “powers” are akin to judicial legislation is a contested matter, hence the scare quotes in the accompanying text.

the functionalist's hand, for the legal system's principle of institutional settlement contemplates a stronger, if defeasible, role for the court. Even some formalists might agree that the constitutional fact<sup>73</sup> of a judicial prerogative could rebut the federal formalist's inference against expanding legislative norms beyond their statutory scope.<sup>74</sup>

The validity of these tentative inferences will turn on the character of a common law court's powers—if “powers” is the right term at all. A court's defeasible power to elaborate law would hardly justify the purposive extension of statutory norms to encompass criminal activity falling within the spirit of legislation but not its letter.<sup>75</sup> Others might also doubt the wisdom of a court invoking the common law tradition to take a fresh crack at a complex regulatory scheme governing utility rates or third-party health care reimbursements.<sup>76</sup> These concerns bring us back to “private law,” the core of the common law tradition imparted on first-year law students. Presumably, legislation intersecting with this core would offer the “common law court” the strongest case for differentiating its approach from that of ordinary federal statutory interpretation. How to conceptualize this core of the common law tradition is a subject of great debate, a contest whose outcome has serious implications for the intersection of private law and statute.

## II. INSTRUMENTALISM AND CONCEPTUALISM IN PRIVATE LAW

As a conventional matter, “private law” denotes subjects like tort, contract, and property. Yet even asking the question “what is private law?” is controversial. Some object on ideological grounds to the opposition between “private” and “public” spheres in law and politics (or law as politics). Others, less troubled by labels, nevertheless understand “private law” to be indistinguishable in terms of aims and purposes from the regulatory schemes characteristic of public law. A line of recent scholarship, however, pushes back against strong versions of these arguments and defends the distinctiveness of law that governs interactions between private parties.

To define the scope of this Article's inquiry, this Part identifies legal subjects that traditionally fall under the label “private law” as distinguished from “public law.” This Part then outlines opposing instrumental and conceptual approaches to understanding private law. The primary forum

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73. It is important to note, however, that state constitutions share many of these compromise-forcing features that lead some federal scholars to formalism. They also include additional ones, such as stronger separation-of-powers provisions and additional veto gates like line-item vetoes, detailed drafting rules, single-subject and balanced-budget requirements for legislation, and shortened legislative sessions. *See id.* at 509–11.

74. *See id.* at 524. For interpreters who recognize legislative supremacy, however, the defeasible character of the judicial prerogative could militate against narrowing the scope of a statute to avoid outcomes the court perceives to be inequitable. *See id.* at 523–24.

75. I thank Barry Cushman and Ryan Scott for independently emphasizing this point.

76. *See id.* at 526–27.

for this exploration is tort law, a fertile area for theorizing about private law. The aim here is not to break new ground on these debates, but rather to provide (admittedly rough) contours of these approaches to help understand their implications at the intersection of private law and statutes.

#### A. *Private Law's Domain*

Under the traditional distinction, private law governs the rights, powers, duties, and obligations between private parties.<sup>77</sup> The private law subject of contracts governs obligations arising from certain forms of agreements, whereas tort law governs obligations among private individuals imposed by law.<sup>78</sup> Property law governs the entitlements to and rules for acquiring and transferring things by private parties in society.<sup>79</sup> Public law, by contrast, governs the rights, obligations, and relationships between private individuals or entities and the state.<sup>80</sup> Paradigmatic examples of public law are constitutional law governing when the state can limit free speech or deprive individuals of life, liberty, or property. Others are pollution regulations, highway speed limits, utility ratemaking, taxation, or rules governing eligibility and provision of social welfare benefits.

Even on the traditional account, there are borderline cases. In criminal law, the state makes its own claims against a private person, albeit often for wrongs committed against other private persons.<sup>81</sup> Securities law agglomerates rules originating in tort and contract with public regulation, as does consumer protection law. And some parts of public law implicate private law conceptions. For example, jurisprudence governing Fifth Amendment takings presumes conceptions of property rights,<sup>82</sup> and the First Amendment's protection of free speech can trump tort's protections

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77. See, e.g., John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1640 (2012); Henry E. Smith, *Property As the Law of Things*, 125 HARV. L. REV. 1691, 1691 (2012) ("Private law deals with the interactions of persons in society."); Benjamin C. Zipursky, *Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 623, 649 (Jules Coleman and Scott J. Shapiro eds., 2002) (identifying and defending the distinction).

78. See, e.g., *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1052–53 (N.Y. 1916) (Cardozo, J.) (noting that the "tests and standards" of negligence "are the tests and standards of our law. . . . [I]rrespective of contract"); Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1228 (2001) (identifying this traditional distinction).

79. See Grey, *supra* note 78, at 1228 ("[P]roperty law defines entitlements and regulates their acquisition, use and transfer."); Smith, *supra* note 77, at 1691 (observing that property serves as "a platform for the rest of private law" by providing "baselines" for private interactions).

80. See Goldberg, *supra* note 77, at 1640.

81. Compare Weinrib, *supra* note 11, at 982 n.73 (identifying criminal law as a form of corrective justice which, in his understanding, is the conceptual paradigm for private law), with Zipursky, *supra* note 77, at 650–51 (treating criminal law in contradistinction from private law).

82. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (finding that a takings rule turns on an "antecedent inquiry into the nature of the owner's estate").



against intentional infliction of emotional distress.<sup>83</sup> To keep matters simple, however, we can safely stipulate that private law—to the extent it exists as a coherent domain—includes tort, contract, and property.<sup>84</sup> This core tracks the understanding adopted by proponents of the private law category<sup>85</sup> and its critics.<sup>86</sup> Which brings us to the central matter: what is a legal system doing when it does “private law”?

### B. Private Law Instrumentalism

One approach theorizes private law primarily in terms of the social goals the doctrine effectuates and promotes. To paint in concededly crude strokes, instrumentalist theories of unwritten private law share a few key features. First, they understand private law doctrine primarily as public policy promulgated in the course of resolving disputes and structuring transactions between private parties.<sup>87</sup> Second, they tend to treat the unwritten rules and principles of private law as incoherent or indeterminate on their face to the extent such doctrine does not adopt this policy-focused orientation. At best, doctrinal language offers an incomplete picture of what is *really* happening; at worst, it is a distracting façade. Third, to the extent uncodified private law doctrine frustrates the proper aims of public policy, instrumentalists hold that it should be reformed or reinterpreted to march in step. In sum, private law doctrine is valuable only to the extent it leads to good social policy, and it is understandable only in terms of such instrumental values.<sup>88</sup> It is “public law in disguise.”<sup>89</sup>

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83. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (holding that the First Amendment insulates public speech about a public issue from tort claims for intentional infliction of emotional distress).

84. One could also add restitution, a flourishing field of private law theory in the British Commonwealth that has attracted little interest in the United States. See, e.g., Chaim Saiman, *Restitution in America: Why the US Refuses To Join the Restitution Party*, 28 OXFORD J. LEGAL STUD. 99 (2008).

85. See, e.g., JAMES GORDLEY, *FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT* (2006); Peter Benson, *Misfeasance As an Organizing Idea in Private Law*, 60 U. TORONTO L.J. 731 (2010) (addressing tort, contract, and property); Zipursky, *supra* note 77, at 645–48 (addressing the three subjects).

86. See, e.g., Robert L. Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 POL. SCI. Q. 470 (1923) (discussing property, tort, and contract); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (discussing contract); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988) (discussing property).

87. Zipursky, *supra* note 77, at 625 (explaining that instrumental theories understand private law as a “regulatory enterprise of the state”).

88. See *id.* (“[T]he norms of private law are purely instrumental, in at least two respects, one pertaining to *value*, the other to *content*.”).

89. Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 1 (1959).

## 1. Instrumental Theories Private Law: Tort

Instrumental approaches feature prominently in tort law and theory. There, the instrumentalist stance takes many familiar forms, including the theoretical ambitions of law and economics<sup>90</sup> and the reformist project advocating loss spreading through enterprise liability.<sup>91</sup> For simplicity's sake, this subpart focuses on the *Restatement*-style functionalism that promotes the twin aims of deterring "socially unreasonable" conduct and compensating those injured by such conduct.<sup>92</sup> This "compensation/deterrence" approach, often associated with professor and *Restatement* reporter William Prosser, reflected the scholarly consensus for much of the twentieth century and still shapes much contemporary doctrine.<sup>93</sup>

For Prosser, tort law is "a form of social engineering that deliberately seeks . . . the greatest happiness of the greatest number" by balancing competing interests of plaintiffs and defendants.<sup>94</sup> The "social engineer" that Prosser envisions considers an array of inputs when designing legal rules, including the morality of the defendant's act, the wisdom and stabilizing effect of inherited rules, a rule's administrability, the parties' capacities for bearing losses, and the prevention of future torts.<sup>95</sup> Of these factors, the two-pronged goal of shifting losses from injured parties and deterring unreasonable conduct plays a central role in *Restatement*-style functionalism. The pursuit of these two goals leads to this approach's master doctrine of tort law: the negligence action grounded on an objective, universal, and nonrelational duty of reasonable care, modulated by liability-limiting "duty" and "proximate cause" rulings.<sup>96</sup> Tort law (re)framed in this manner, instrumentalists explain, best serves tort's social functions of compensating injured persons and deterring unreasonable activity.

## 2. Instrumental Tort Law: Duty in Negligence

Discussing the compensation/deterrence theorist's approach to the duty element in the tort of negligence is useful for a number of reasons. First, it will concretize what has thus far been an abstract discussion. Second, duty

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90. See, e.g., GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987).

91. See, e.g., Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967); Fleming James, Jr., *Tort Law in Midstream: Its Challenges to the Judicial Process*, 8 BUFF. L. REV. 315 (1959).

92. See WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 1 (4th ed. 1971).

93. See generally G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 139–79 (2003) (describing the approach and its dominance in the middle of the twentieth century); John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 521–31 (2003) (giving a theoretical account of compensation-deterrence theory).

94. PROSSER, *supra* note 92, § 3, at 15 (quoting Roscoe Pound, *A Theory of Social Interests*, 15 PAPERS & PROCS. OF THE AM. SOC. SOC'Y 16, 28 (1921); JEREMY BENTHAM, *A FRAGMENT ON GOVERNMENT*, at i (London, T. Payne, P. Emily & E. Brooks 1776)).

95. *Id.* § 4, at 16–23.

96. See Goldberg, *supra* note 93, at 526–27.

is a flashpoint in recent debates among tort theorists.<sup>97</sup> Finally, the examples of private law and statutes at the center of Parts III through V concern legislation against a background of tort duty rules.

Negligence requires the plaintiff to prove that the defendant's breach of a duty of care was the proximate cause of the plaintiff's injury.<sup>98</sup> The duty element is a question for the judge, not the jury.<sup>99</sup> Traditionally, the relationship between the parties affected a court's duty inquiry in two ways. An injured plaintiff could not recover based on a defendant's breach of duty to a third party, even if that breach caused the plaintiff's injury.<sup>100</sup> The parties' relationship also could determine the standard of care.<sup>101</sup>

The compensation/deterrence theorist has little patience for this traditional approach. William Prosser found the "artificial character" of a relational conception to be "readily apparent" and to be "so vague as to have little meaning" or "value at all" in deciding cases.<sup>102</sup> This doctrinal artifice concealed how rulings are really based on "the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."<sup>103</sup> These policy considerations, including deterrence and loss shifting, "undoubtedly have been given conscious or unconscious weight" by courts making duty rulings.<sup>104</sup> Duty primarily turns on policy consequences, not prelitigation relationships.

In the hands of the compensation/deterrence theorist, the previous diversity of relational duties in negligence collapse into a single, undifferentiated, and universal duty to take reasonable care under the circumstances.<sup>105</sup> Judge William Andrews's dissent in *Palsgraf v. Long*

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97. See, e.g., W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671 (2008); Dilan A. Esper & Gregory C. Keating, *Abusing "Duty,"* 79 S. CAL. L. REV. 265 (2006); Goldberg & Zipursky, *supra* note 10; Robert L. Rabin, *The Duty Concept in Negligence Law: A Comment*, 54 VAND. L. REV. 787 (2001); Ernest J. Weinrib, *The Passing of Palsgraf?*, 54 VAND. L. REV. 803 (2001).

98. See, e.g., VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS: CASES & MATERIALS 134 (12th ed. 2010).

99. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. a (2011).

100. See, e.g., *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928) (stating that a plaintiff must "sue[] in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another").

101. This is so even though defendants can owe strangers a general duty of reasonable care in the most common negligence cases, namely those in which one's affirmative conduct risks reasonably foreseeable physical injuries to others. See, e.g., *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

102. PROSSER, *supra* note 92, § 53, at 325–26; see also *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 342 (Cal. 1976) ("[L]egal duties are not discoverable facts of nature, but merely conclusory expressions that . . . liability should be imposed for damage done.").

103. PROSSER, *supra* note 92, § 53, at 325–26.

104. *Id.* § 53, at 326.

105. See, e.g., *id.* § 53, at 324 ("[I]n negligence cases, the duty is always the same, to conform to the legal standard of reasonable conduct in the light of the apparent risk."); WHITE, *supra* note 93, at 125 (stating that the "modern negligence case" is one where "a broad universal duty of care is substituted for particularized obligations owed only by certain persons").

*Island Railroad Co.*<sup>106</sup> offers an example of this approach. The case is so famed for its treatment of proximate cause<sup>107</sup> that people often overlook how the case critically concerns the place of duty in negligence. As first-year law students learn, in *Palsgraf*, a man carrying an innocent-looking package ran to catch a moving train. He leapt upon the train with the aid of two railroad guards. The guards jostled free the package, which contained concealed fireworks and exploded. The concussion knocked over large metal scales roughly twenty-five to thirty feet down the platform, injuring Helen Palsgraf and resulting in her negligence suit against the railroad.<sup>108</sup>

The court held that Palsgraf should lose because she was seeking to use the railroad's breach of duty to *the anonymous passenger* to recover for *her* injuries.<sup>109</sup> This sliced matters too finely for dissenting Judge Andrews. Duty "protect[s] *society* from unnecessary danger, not to protect A, B, or C alone," because to be careless is "a wrong to the public at large."<sup>110</sup> In other words, once Palsgraf can establish, as a member of the public, that the railroad was careless, she can show a breach of duty to her.<sup>111</sup> For Andrews, as for Prosser and similar instrumentalists, a general and universal duty of reasonable care makes eminent policy sense.<sup>112</sup> "Unreasonable risk being taken, its consequences are not confined to those who might probably be hurt."<sup>113</sup> Allowing no-duty rules when plaintiffs cannot show some duty to *them* would leave the parties who were injured by carelessness uncompensated and the negligent actors unpenalized.

Accordingly, in most negligence actions, the duty element effectively drops from the prima facie case—but not always. Compensation/deterrence theory also instructs judges to use duty to screen out certain kinds of cases in which the universal duty of care is poor social engineering. Most prominently, the California Supreme Court adopted a multifactor inquiry for identifying exceptional pockets of "no duty."<sup>114</sup> These factors include not only traditional considerations like foreseeability and moral blame, but

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106. 162 N.E. 99 (N.Y. 1928).

107. *Id.* at 103 (Andrews, J., dissenting) (stating that proximate cause concerns "practical politics" and a doctrine "of convenience, of public policy, of a rough sense of justice").

108. *Id.* at 99 (majority opinion).

109. *Id.* at 100.

110. *Id.* at 102 (Andrews, J., dissenting) (emphasis added).

111. *Id.* at 103 ("There needs be duty due the one complaining, but this is not a duty to a particular individual because as to him harm might be expected. Harm to some one [sic] being the natural result of the act . . . all those in fact injured may complain.").

112. See PROSSER, *supra* note 92, § 53, at 324 ("[I]n negligence cases, the duty is always the same, to conform to the legal standard of reasonable conduct in the light of the apparent risk.").

113. *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting).

114. *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968) (stating that the "departure" from the universal duty of care "involves balancing a number of considerations"); *cf.* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM, § 7(b) (2011) ("In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.").

also “policy of preventing future harm,” the social burdens “of imposing a duty,” and whether a defendant will be able to spread risk through insurance.<sup>115</sup>

For an example of such screening, imagine a variation on *Palsgraf*: the injury to Palsgraf prevents her from performing a contract she had with one Malsgraf. As a result, Malsgraf loses millions of dollars and sues the railroad for negligence. Without any constraint besides carelessness and foreseeability, Malsgraf would satisfy the duty element, but later instrumental theorists explain why freestanding economic injuries often should not be compensable. Professor Fleming James provides the quintessential defense of this position.<sup>116</sup> Due to the interconnected nature of modern life, allowing negligence liability for foreseeable, freestanding economic losses would lead to crushing, disproportionate liability and “be an ineffective means of discouraging loss-creating activity or facilitating loss spreading.”<sup>117</sup> Recovery for negligence resulting in physical injuries to persons and property poses no such floodgates problems.<sup>118</sup> Accordingly, while the default universal duty of care should apply in cases concerning physical injuries (*Palsgraf*), sound policy requires a judicial carve-out for claims for economic losses absent injury to the plaintiff’s person or property (*Malsgraf*).<sup>119</sup>

This carve-out resembles the black letter rule of no duty regarding freestanding economic losses.<sup>120</sup> The justification differs from traditional rationales that focus on the plaintiff’s lack of an exclusive right against the particular defendant<sup>121</sup> or hold that negligence duties do not protect interests in economic security absent a special relationship.<sup>122</sup> The instrumental approach finds no intrinsic and decisive significance in the relational status of the parties or differences between interests in physical

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115. *Rowland*, 443 P.2d at 564. For a more recent, defendant-friendly example of duty instrumentalism, see *Lauer v. City of N.Y.*, 733 N.E.2d 184 (N.Y. 2000) (concerning negligent infliction of emotional distress).

116. Fleming James, Jr., *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43 (1972); see Peter Benson, *The Problem with Pure Economic Loss*, 60 S.C. L. REV. 823, 830 (2009) (stating that James offers “the most influential and intuitively compelling approach” to the doctrine).

117. Benson, *supra* note 116, at 831 (characterizing James’s argument).

118. See James, *supra* note 116, at 44; see also John A. Siliciano, *Negligent Accounting and the Limits of Instrumental Tort Reform*, 86 MICH. L. REV. 1929, 1943 (1988) (“[T]he laws of physics generally limit the degree of physical harm caused by a tortious act.”).

119. Cf. *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1023 (5th Cir. 1985) (noting that the pure economic loss rule is “a pragmatic limitation imposed by the Court upon the tort doctrine of foreseeability”).

120. *Id.* at 1022 (“[T]he prevailing rule denied a plaintiff recovery for economic loss if that loss resulted from physical damage to property in which he had no proprietary interest.”).

121. See Benson, *supra* note 116, at 827–28.

122. See Stephen R. Perry, *Protected Interests and Undertakings in the Law of Negligence*, 42 U. TORONTO L.J. 247, 269–71 (1992).

and economic security.<sup>123</sup> Rather, foreseeable economic injuries lose protection on policy grounds.<sup>124</sup> This pattern repeats in other traditional pockets of no duty in negligence. The qualifications on premises liability remain, if at all,<sup>125</sup> because of a “socially desirable policy” protecting the peaceful enjoyment of property,<sup>126</sup> not because of the relationship between owner and the plaintiff. Similarly, the rule denying an affirmative duty to aid stands, if at all, as a product of policy balancing, not because of the absence of a relationship that singles out the defendant as particularly responsible for the plaintiff’s loss.<sup>127</sup>

### 3. Beyond Tort Law Duties

The compensation/deterrence theorist’s treatment of duty bears the hallmarks of private law instrumentalism. Its multifactor balancing frames duty as a question of public policy liquidated through litigation. The instrumentalist’s skeptical eye toward judicial discussion of obligations and relationships is more likely to see doctrine as incoherent on its face and explicable primarily through its policy substructure. Finally, the push for a general, undifferentiated, and nonrelational duty of care shows how, when black letter rules disconnect with sound public policy, the instrumentalist seeks to reform or reinterpret duty to fall in line.

Notably, instrumentalists make similar moves in other areas of tort law, such as actual and proximate cause.<sup>128</sup> Furthermore, while it pays to be careful when drawing parallels across subjects, cognate forms of instrumentalism also crop up in other private law fields like contract<sup>129</sup> and

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123. See *J’Aire Corp. v. Gregory*, 598 P.2d 60, 64 (Cal. 1979); *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968).

124. See Siliciano, *supra* note 118, at 1943–46 (collecting scholarly and judicial rationales along these lines).

125. Compare *Rowland*, 443 P.2d at 568 (replacing premises liability categories with a general duty of ordinary care), with RESTATEMENT (SECOND) OF TORTS §§ 333–44 (delineating common law distinctions for premises liability).

126. PROSSER, *supra* note 92, § 58, at 359.

127. See *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 358–62 (Cal. 1976) (applying *Rowland* to hold that a therapist has a duty to warn a third-party whom he has reason to believe would be harmed by his patient); PROSSER, *supra* note 92, § 56, at 341 (noting that the no-duty rule, while “revolting to any moral sense” persists due to “the difficulties of setting any standards of unselfish service to fellow men”).

128. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103–04 (N.Y. 1929) (Andrews, J., dissenting) (stating that proximate cause concerns “practical politics” and a doctrine “of convenience, of public policy, of a rough sense of justice”); Leon Green, *The Palsgraf Case*, 30 COLUM. L. REV. 789, 791 (1930) (proximate cause); Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 61 (1956).

129. See, e.g., STEPHEN A. SMITH, CONTRACT THEORY 108–36 (2004) (discussing consequentialist theories of contract law). For a classic example of functionalism in contract law, see *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 191 (N.Y. Sup. 1969) (“[U]nconscionability permits a court to accomplish directly what heretofore was often accomplished by construction of language, manipulations of fluid rules of contract law and determinations based upon a presumed public policy.”). See also RICHARD A. POSNER,

property.<sup>130</sup> There is good reason to believe that the instrumentalist's approach to negligence duties is not unique to that corner of private law.<sup>131</sup>

Judicially elaborated private law is characteristically state law. Many scholars and judges also understand that the common law powers of federal courts differ from those of state courts after *Erie*.<sup>132</sup> Nevertheless, enclaves of federal common law remain, and federal courts often read statutes to incorporate background common law.<sup>133</sup> Because much of this doctrine concerns tort, contract, and property law, it is easy to overstate the extent to which federal courts have abandoned the private law business. In fact, canonical, post-*Erie* characterizations of federal common law share the instrumentalist's embrace of functionalism as an alternative to any prelegal realist "brooding omnipresence."<sup>134</sup>

For example, in its first time crafting a post-*Erie* federal common law torts rule, the Supreme Court identified its task as determining "the policy properly to be applied concerning the wrongdoer."<sup>135</sup> More recently, the Court described federal nuisance actions as inextricable from questions of public policy.<sup>136</sup> A foundational opinion similarly views the body of commercial law not as a set of decisive principles, but rather "a convenient source of reference for fashioning federal rules" pursuant to the Court's "own standards."<sup>137</sup> Or, "to put it bluntly," in such cases the Court "may make [its] own law from materials found in common-law sources" to

ECONOMIC ANALYSIS OF LAW 69–71 (2d ed. 1977); Arthur L. Corbin, *Recent Developments in the Law of Contracts*, 50 HARV. L. REV. 449 (1937).

130. See, e.g., Peter Benson, *Philosophy of Property Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, *supra* note 77, at 752–53 (characterizing instrumental theories of property law in these terms); see also, e.g., *State v. Shack*, 277 A.2d 369 (N.J. 1971) (right to exclude); ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 155–56 (1988) (making an economic argument for adverse possession); A.M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107 (A.G. Guest ed., 1961) (disaggregating property as a bundle of rights).

131. See generally Goldberg, *supra* note 77 (drawing methodological parallels across fields).

132. 304 U.S. 64 (1938).

133. See generally Nelson, *supra* note 65 (discussing federal courts); Pojanowski, *supra* note 63 (discussing federal agencies and courts).

134. *Erie*, 304 U.S. at 79 (stating that *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), rests on the fallacious "assumption that there is 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute'" (quoting *Black & White Taxicab v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)); see *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign."). On the connection between Holmes and private law instrumentalism, see John C.P. Goldberg and Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563 (2006).

135. *United States v. Standard Oil Co.*, 332 U.S. 301, 311 (1947).

136. See *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2539 (2011); *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 312 (1981).

137. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943); see Anthony J. Bellia, Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 916 (2005) (discussing *Clearfield Trust* in these terms).

promote public policies extrinsic to background legal principles.<sup>138</sup> The Court views the broader choice between fashioning a unique federal rule and incorporating a state rule for purposes of federal common law as “a matter of judicial policy” and interest balancing.<sup>139</sup> Unsurprisingly, federal common law skeptics and enthusiasts alike often describe the practice as a matter of interstitial policymaking.<sup>140</sup>

### C. Conceptual Theories of Private Law

Instrumental understandings of private law abound in the American legal academy.<sup>141</sup> In recent years, a number of legal theorists have sought to defend afresh private law’s distinctiveness from public law. The particulars vary, but these approaches share the basic premise that a coherent account of private law on its own conceptual terms is not only possible, but is a superior approach for understanding that body of law.<sup>142</sup> Conceptualists further argue that the basic structure of private law and its language of rights and wrongs demonstrate that instrumental accounts of private law are inferior to ones that take seriously private law’s autonomy from public law.<sup>143</sup>

#### 1. Conceptual Theories of Private Law: Tort

Corrective justice theories of tort law are prominent examples of the conceptual approach. These theories understand tort law as a practice or form of justice in which an actor who breaches a duty to respect another’s legal right incurs a further duty to repair that other individuals’ loss flowing from that breach.<sup>144</sup> The corrective justice theorist notes that functionalist accounts of tort law fail to explain the doctrine’s basic structure. One feature is tort law’s “bipolarity” or “bilateralism.” The private plaintiff, not the state, controls whether to bring, settle, or withdraw a suit; the defendant

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138. *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 468 (1942) (Jackson, J., concurring); *see id.* at 472 (“The law which we apply to this case consists of principles of established credit in jurisprudence, selected by us because they are appropriate to effectuate the policy of the governing Act.”).

139. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979).

140. This ascription includes matters of private law. *See, e.g.*, George D. Brown, *Federal Common Law and the Role of Federal Courts in Private Law Adjudication—A (New) Erie Problem?*, 12 PACE L. REV. 229, 233–35 (1992) (federal common law skeptic); Weinberg, *supra* note 69, at 835 (federal common law enthusiast).

141. *See* Goldberg, *supra* note 77, at 1641.

142. *See* Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 WM. & MARY L. REV. 1873, 1882–85 (2011); Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457, 465 (2000); *see also* Gold, *supra*, at 1883 (stipulating further that “a good interpretive account . . . can be expressed in terms of conventional morality”).

143. Zipursky, *supra* note 142, at 466; *see also* JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 38–41 (2001) (positing the “consilience” criterion in which a theory that explains more features of the subject is superior to one that explains fewer).

144. *See, e.g.*, COLEMAN, *supra* note 10; WEINRIB, *supra* note 10; Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992).



pays the plaintiff a judgment, rather than paying a fine to the state; the judgment is particularly suited to the plaintiffs' injuries rather than the general welfare.<sup>145</sup> The functionalist account also ignores the central role of causation in tort law.<sup>146</sup> Social goals of deterrence, compensation, or risk-spreading are not obviously optimized through sanctioning or imposing costs only on those who cause injuries that lead to lawsuits.<sup>147</sup> Far more plausibly, the argument continues, tort law is a system of corrective justice in which a plaintiff who suffers losses caused by a defendant's wrong can require that defendant to compensate her. Corrective justice accounts for tort law's bilateral structure and requirements of causation. Further, it treats the doctrinal language of relational rights, duties, and wrongs as central to the enterprise and coherent, rather than superstructural rhetoric concealing policy goals.<sup>148</sup>

Corrective justice theories do not exhaust noninstrumental approaches. Other important conceptual theories understand tort law as a system of civil recourse or as a means for individuals to exercise moral enforcement rights.<sup>149</sup> An important shared feature of these approaches, however, is an insistence on the relative distinctiveness and political neutrality of private law. Ernest Weinrib, whose legal formalism is the *ne plus ultra* concerning private law's autonomy, denies that tort law has *any* public function at all. The purpose of tort law is to be tort law, an instantiation of corrective justice.<sup>150</sup> Corrective justice is the juridical form of justice in which a given distribution of goods is restored to the status quo predating a defendant's wrongdoing of a plaintiff. This contrasts with distributive justice—which is the realm of public law—and controversial legislative value choices about patterns of distribution and broader social goals.<sup>151</sup>

Professor Benjamin Zipursky offers a more modest defense of private law's autonomy. Private law is private in that the state merely provides a forum for and means to enforce an individual's prepolitical rights to civil recourse for wrongs.<sup>152</sup> As a normative matter, the state is at most committed to the value of providing a civil forum in which parties can exercise the powers of private law, not to the value these powers "exercise or the outcome of that exercise."<sup>153</sup> Thus, claiming that private law

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145. COLEMAN, *supra* note 143, 13–24; Zipursky, *supra* note 142, at 457–58.

146. *See, e.g.*, WEINRIB, *supra* note 10, at 10–12.

147. *See, e.g.*, COLEMAN, *supra* note 143, at 25–40; Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 498–503 (1989).

148. *Cf.* Goldberg & Zipursky, *supra* note 134.

149. *See, e.g.*, Gold, *supra* note 142 (articulating a moral rights theory of private law); Benjamin Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003) (distinguishing the two theories).

150. WEINRIB, *supra* note 10, at 5, 134–36.

151. *Id.* at 210–14.

152. Zipursky, *supra* note 77, at 633–34.

153. *Id.* at 654; *cf.* John Oberdiek, *Method and Morality in the New Private Law of Torts*, 125 HARV. L. REV. F. 189, 190 (2012) (arguing that most corrective justice theorists see the goal of tort law not simply to be tort law, but rather to "effect[] corrective justice").

doctrine and adjudication implicates value choices does not support the conclusion that private law “aims towards states of affairs that courts wish to achieve.”<sup>154</sup> In further contrast to Weinrib’s formalism, Zipursky does not deny that private law takes account of the functions private law serves, nor does he deny that private law theory can critique and seek to reform how the law pursues those goals.<sup>155</sup> What differentiates this moderate form of conceptualism from the instrumentalism it rejects is the insistence that such pragmatism “requires understanding the concepts and principles entrenched in the law” and the way they are deployed in the legal system.<sup>156</sup> Any such instrumental reasoning will take place within the constraint of a coherent doctrinal web or frame that defines, directs, and structures the practice.<sup>157</sup>

## 2. Conceptual Tort Law: Duty

For an appreciation of the tort law conceptualist’s view of duty, it helps to contrast Judge Cardozo’s treatment of duty in *Palsgraf* with Judge Andrews’s undifferentiated, nonrelational approach. For Judge Cardozo, who was willing to assume that *Palsgraf* could establish proximate cause,<sup>158</sup> the problem with the claim was a threshold failure to show that the railroad breached its duty of care to *Palsgraf* when the guards jostled the man carrying an apparently harmless package thirty feet from her. The guards’ carelessness may have breached their duty to the anonymous passenger, but they had no reason to believe they were endangering *Palsgraf*. Thus, her complaint failed because she sought to be “the vicarious beneficiary of a breach of duty to another” rather than to “sue[] in her own right for a wrong personal to her.”<sup>159</sup>

Conceptualists argue that Judge Cardozo’s majority opinion embodies the traditional, noninstrumental approach to duty that they seek to recapture and rehabilitate.<sup>160</sup> First, with its emphasis on rights and wrongs, the opinion is noninstrumental in orientation.<sup>161</sup> Duty concerns a defendant’s obligation to take care to avoid causing the kind of harm suffered by a

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154. Zipursky, *supra* note 77, at 654; *see id.* (“The state is no more endorsing the exercise or the outcome than it is endorsing exercises of the right to self-defence.”); *see also* Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, in *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* 15, 19 (2007) (“From the fact that a ‘private’ realm is a creature of government regulation it does not follow that government action in that realm is normatively indistinguishable from government action in the ‘public’ realm.”).

155. *See* Benjamin C. Zipursky, *Palsgraf, Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757, 1757 (2012); Zipursky, *supra* note 142, at 469.

156. Zipursky, *supra* note 155, at 1757.

157. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette*, 88 IND. L.J. 569, 576 (2013); Oberdiek, *supra* note 153, at 192.

158. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 101 (N.Y. 1928).

159. *Id.* at 100.

160. *See* WEINRIB, *supra* note 10, at 158–64; Weinrib, *supra* note 97, at 805–08.

161. Goldberg & Zipursky, *supra* note 10, at 1826.

person like the plaintiff.<sup>162</sup> These duty rules speak to actual obligations that we owe each other under the law; they are not surreptitious shorthand for commands calibrating some external policy balance of compensation and deterrence.<sup>163</sup> Second, the duty of care is “*analytically relational*” in that it concerns a duty *to* persons or classes of persons (rather than the world).<sup>164</sup> It holds that “[n]egligence, like risk, is thus a term of relation.”<sup>165</sup> Thus, even though the railroad may have been careless when it jostled the man trying to board the train, it was not careless as to Palsgraf, because under the circumstances it was unreasonable to believe that Palsgraf was put in any danger.

The hypothetical suit of Malsgraf also highlights the “*relationship-sensitive*” character of duty.<sup>166</sup> Even if, counterfactually, the railroad breached a duty to take care for Palsgraf’s physical security, that does not entitle Malsgraf to recover his freestanding economic losses based on *that* breach of duty. He would have to show that the railroad owed him a duty to look after his economic interests, which requires a special relationship that is simply not present in this case. This variegation of obligation is linked to “widely shared moral convictions” that “vary the duties we owe to others in accordance with the types of relationships we have,”<sup>167</sup> as well as to corresponding moral distinctions about our obligations regarding different protected interests.<sup>168</sup>

Civil recourse theorists like Professors John Goldberg and Benjamin Zipursky and corrective justice theorists like Weinrib largely agree on this noninstrumental, relational understanding of duty.<sup>169</sup> Their approaches are conceptual in a number of respects. They embrace and find coherent what many courts actually say in traditional accounts of negligence duties.<sup>170</sup> The conceptualist does not claim that these principles resolve all cases with geometric certainty. All she claims is that the *judgment* required in applying stable principles to varying facts is not the same as policymaking *discretion*.<sup>171</sup>

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162. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 699 (2001).

163. See Benjamin C. Zipursky, *Legal Malpractice and the Structure of Negligence Law*, 67 FORDHAM L. REV. 649, 656–57 (1998).

164. Goldberg & Zipursky, *supra* note 162, at 707.

165. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 101 (N.Y. 1928).

166. Goldberg & Zipursky, *supra* note 162, at 707.

167. Zipursky, *supra* note 163, at 661.

168. See Perry, *supra* note 122, at 247 (regarding economic loss).

169. See WEINRIB, *supra* note 10, at 158–64; Weinrib, *supra* note 97, at 805–08. These theorists may disagree about what work relationship sensitivity does in the conceptual account. See Benson, *supra* note 116, at 874 & n.193.

170. See Goldberg & Zipursky, *supra* note 134, at 1579 (noting their approach to duty “encourages us to take the language of tort law at face value”); Goldberg & Zipursky, *supra* note 162, at 658–59 & n.1 (citing cases for forty-eight jurisdictions treating duty as a distinct element).

171. See WEINRIB, *supra* note 10, at 166–67.

A relational understanding of duty also fits the bilateral structure of private tort litigation. It also eschews multifactor policy analysis, focusing instead on the implications of the parties' relationship given the factual setting and existing precedent.<sup>172</sup> This inquiry "may itself involve evaluative thinking" about social norms and "will certainly have policy implications," but it does not demand that judges weigh a host of policy considerations in hopes of crafting a socially optimal rule.<sup>173</sup> Thus, Goldberg and Zipursky conclude that "there is no reason to think that the relational understanding of the duty question is better designed for legislatures than for courts."<sup>174</sup> If anything, separation-of-powers analysis supports judicial shaping of relational duties, given courts' traditional elaboration of such matters through case law.<sup>175</sup> Or, as Weinrib would put it, a relational theory of duty concerns the juridical task of corrective justice, whereas instrumental approaches make determinations of distributive justice that are properly reserved for politically accountable legislators.<sup>176</sup>

### 3. From Tort Duty to Private Law

As with instrumentalism, the conceptualist's approach to negligence duties do not appear unique to that corner of private law. These theorists have challenged instrumentalist understandings of proximate cause and even products liability in favor of conceptual, relational approaches.<sup>177</sup> The emergence of conceptual alternatives to instrumental accounts of contract<sup>178</sup> and property<sup>179</sup> in the common law world further suggests that tort is not an outlier in this respect.

## III. PRIVATE LAW AND STATUTORY GAPS

It is now time to bring these two bodies of legal theory together and think through the intersection of background private law and legislation. In framing this problem, it is helpful to think about law in spatial terms, with legal problems existing as if they were on a grid. If a statute or uncodified

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172. Goldberg & Zipursky, *supra* note 10, at 1840 ("The answer [to a duty inquiry] involves extending these categories and articulating a principle embedded in the law.").

173. *Cf.* Perry, *supra* note 122, at 249 ("[P]rinciples of moral responsibility constitute the main theoretical foundations of tort law . . . . Policy considerations do have a role to play in tort, but it is inevitably a subsidiary one.").

174. Goldberg & Zipursky, *supra* note 10, at 1840.

175. *Id.* at 1843.

176. WEINRIB, *supra* note 10, at 210.

177. *See, e.g., id.* at 221 ("[P]roximate cause is . . . a "juridical concept under which the court comprehends the nexus between the litigants by tracing the proximity of the wrongful act to the injurious effect."); John C.P. Goldberg & Benjamin C. Zipursky, *The Easy Case for Products Liability Law: A Response to Professors Polinsky and Shavell*, 123 HARV. L. REV. 1919, 1923–24 (2010).

178. *See, e.g.,* Stephen A. Smith, *Towards a Theory of Contract*, in OXFORD ESSAYS IN JURISPRUDENCE, 4TH SERIES 107 (Jeremy Horder ed., 2000).

179. *See, e.g.,* J. E. PENNER, *THE IDEA OF PROPERTY IN LAW* (1997).

rule of law addresses a question, we can say that the law “covers” that type of question. Accordingly, a statute’s domain, however defined, is the area of problems “covered” and governed by the legislation. Consistent with textualism and purposivism, this Article assumes that when a statute and uncodified private law doctrine both “cover” a problem but clearly conflict, the statutory norm trumps. Accepting that premise of legislative supremacy does not foreclose difficult questions about the intersection of legislation and background private law. Statutory regimes have gaps—spaces where the statute’s coverage or import is unclear. Courts operating in the gaps must decide whether to fill the gap with background private law, follow the legislature’s lead in crafting law in the gaps, or simply depart the field.

The theoretical frameworks laid out in Parts I and II will help decide how great a preemptive effect courts should give legislation vis-à-vis background private law. Without some understanding of the bounds of legislation’s preemptive reach, we cannot define the negative space in which background private law may persist. Without understanding what background private law is, what it does, and how, if at all, it differs from the forward-looking legislative rules so prominent in our understanding of statutes, it is hard to think clearly about negotiating the borderland between statutes and background private law.

#### A. A Model Problem

To ground the analysis, this Part offers an overview of three U.S. Supreme Court decisions concerning gaps in a statutory regime that provides tort-like actions for wrongful death at sea. This choice of a federal line of cases may appear odd in light of the distinction between state and federal courts discussed in Part I, but there is a method to this apparent mismatch. The maritime cases featured in this Part fall into one of the exceptional enclaves of federal common lawmaking independent of statutory authority. Federal maritime law, like state law, is “a mixture of statutes and judicial standards, ‘an amalgam of traditional common-law rules, modifications of those rules, and newly created rules.’”<sup>180</sup> Furthermore, while concern about displacing state law often restricts federal common lawmaking, that fear played no role in any of these decisions.<sup>181</sup> In that respect, the zone of federal law on which this Article focuses resembles the terrain where state courts negotiate private law and statute.

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180. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 508 n.21 (2008) (quoting *E. River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 865 (1986)).

181. See Nelson, *supra* note 1, at 728–29 (discussing the limited role of state law in maritime jurisprudence); cf. *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 312–13 (1981) (“The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress.” (citing Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 497 (1954))).

Indeed, one scholar has described federal admiralty law as the “last brooding omnipresence” and “the land that *Erie* forgot.”<sup>182</sup>

Substantively, the cases below involve disputes indistinguishable from state tort suits in relevant respects. This resemblance is unsurprising; many leading American tort decisions are federal admiralty cases.<sup>183</sup> (Interestingly, American tort law is also indebted to tort cases from the British Commonwealth concerning accidents near boats.<sup>184</sup>) To be sure, state jurisprudence offers many more examples of the intersection of private law and legislation. We could inquire, for example, how a state statute criminalizing failure to report child abuse affects the background negligence rule limiting affirmative duties to aid strangers.<sup>185</sup> Alternatively, we could consider state decisions on whether a statutory tort action’s explicit remedies are exclusive or can be supplemented by background tort principles.<sup>186</sup>

Nevertheless, the maritime trilogy here is a particularly promising middle ground for a parlay between statutory interpretation and private law theory. The catalyzing case, *Moragne v. States Marine Lines, Inc.*,<sup>187</sup> is legendary in the statutory interpretation literature, has been a frequent focus of state court decisions, and squarely presents questions of duty in tort law. Furthermore, tracking a leading court’s development of one corner of the law over a short period of time offers a clear perspective on our problem. Handled with care, these three federal cases are useful examples for courts with general common law powers. With an eye on these general lessons, and not the particularity of federal maritime law, we turn to the Supreme Court’s trilogical treatment of sunken seafarers.

The context for these three cases is as follows. After the nineteenth-century decision in the *Harrisburg*, the Supreme Court’s admiralty law

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182. See Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1671 (2008); Ernest A. Young, *The Last Brooding Omnipresence: Erie Railroad Co. v. Tompkins and the Unconstitutionality of Preemptive Maritime Law*, 43 ST. LOUIS U. L.J. 1349 (1999).

183. See, e.g., *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975); *In re Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964) (Friendly, J.); *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) (Hand, J.); *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932) (Hand, J.). For the foundational *respondeat superior* case concerning a statutory tort action for injury caused by a drunken sailor, see *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2d Cir. 1968) (Friendly, J.).

184. See *Heaven v. Pender*, (1883) 11 Q.B.D. 503 (Eng.) (duty); *Overseas Tankship (UK) Ltd. v. Morts Dock and Eng’g Co. (Wagon Mound I)*, [1961] A.C. 388 (P.C.) (appeal taken from Austl.) (proximate cause); see also *Jolley v. Sutton London Borough Council*, (2000) 1 W.L.R. 1082 (H.L.) (Eng.) (limiting liability under proximate cause when the plaintiff was crushed by a rotting boat abandoned in a housing project courtyard).

185. Compare *Perry v. S.N.*, 973 S.W.2d 301, 309 (Tex. 1998) (refusing to apply a mandatory reporting statute in a negligence per se context), with *Beggs v. Washington*, 247 P.3d 421, 425 (Wash. 2011) (en banc) (finding an implied right to sue based on violation of such a statute).

186. Compare *Nelson v. Dolan*, 434 N.W.2d 25 (Neb. 1989) (exclusive), with *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983) (not exclusive).

187. 398 U.S. 375 (1970).

followed the majority common law rule barring tort suits for wrongful death.<sup>188</sup> In the meantime, Congress passed two statutes: (i) the Death on the High Seas Act (DOHSA), which created a federal action for relatives of any person who wrongfully perishes “one marine league” beyond the border of any state; and (ii) the Jones Act, which provided for a negligence-based wrongful death action for families of merchant seamen who died on the high seas and in territorial waters alike.<sup>189</sup> The three cases concern the interaction between the Court’s background maritime jurisprudence and gaps in these statutes. Our maritime trilogy gestures toward three different approaches to private law in the gaps: (1) using rules derived from the purposes and policies of adjacent legislation; (2) applying background private law rules independent of legislation; and (3) treating legislation as displacing judicial gap-filling powers.

*B. Extension of Statutory Purpose: Moragne*

*Moragne* is perhaps “the most important judicial decision relying on statutes as premises for legal reasoning.”<sup>190</sup> The accident in *Moragne* concerned a longshoreman who perished in territorial waters.<sup>191</sup> The facts of the accident were such that the decedent’s family could invoke neither DOHSA nor the Jones Act. At best, the suit fell within the residuary of the Court’s admiralty jurisprudence, where the *Harrisburg*’s bar on wrongful death suits awaited. *Moragne* posed the questions of whether the bar should persist and what, if any, effect legislation like DOHSA, the Jones Act, and state wrongful death acts had on the Court’s interstatutory rule.

The Court first criticized the *Harrisburg*’s rule, finding little in its favor besides “the blessing of age.”<sup>192</sup> It explained that the “primary duty” in wrongful death cases was similar to that in nonlethal injury cases. It recognized that wrongful death cases involve a different injury to different beneficiaries, but saw no reason why a family’s losses should not also support “an actionable tort.”<sup>193</sup> It also rejected arguments that the distastefulness or practical difficulties of calculating damages should preclude recovery.<sup>194</sup> Finally, *Moragne* found inapplicable the common law rule that a cause of action expires with its possessor, explaining that a wrongful death claimant seeks recovery for her own distinct injuries.<sup>195</sup>

Just as the Court appeared ready to overrule the *Harrisburg* as unsound tort law from the beginning, it then invoked the “wholesale abandonment of

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188. *Id.* at 375–76 (citing *The Harrisburg*, 119 U.S. 199 (1886)).

189. *Id.* at 393–94.

190. Robert F. Williams, *Statutes As Sources of Law Beyond Their Terms in Common-Law Cases*, 50 GEO. WASH. L. REV. 554, 561 (1982); see *Moragne*, 398 U.S. at 393–94.

191. *Moragne*, 398 U.S. at 376.

192. *Id.* at 386.

193. *Id.* at 382.

194. *Id.* at 385.

195. *Id.*

the rule” in intervening years.<sup>196</sup> Most of this rejection, *Moragne* noted, was legislative: wrongful death statutes in England, individual states, and the above-noted federal maritime statutes.<sup>197</sup> Based on this legislation, *Moragne* discerned “no present public policy against allowing recovery for wrongful death.”<sup>198</sup> Further, a policy favoring wrongful death actions “has become itself a part of our law,” one that merited “appropriate weight not only in matters of statutory construction but also in those of decisional law.”<sup>199</sup> *Moragne* also found no “compelling evidence” that Congress intended to “preclude the judicial allowance of a remedy for wrongful death” in cases like this.<sup>200</sup> The *Moragne* Court thus overruled the *Harrisburg*.<sup>201</sup>

Although distaste for the *Harrisburg*’s rule as a matter of maritime tort law surely played a part in the decision, we can also see *Moragne* as the functional equivalent of statutory analogy. Under that practice, also known as the *casus omissus* doctrine, the court will apply a statute’s rule even though the legislation’s terms do not govern the case at hand.<sup>202</sup> Like analogy from judicial precedent, *Moragne* invokes the wrongful death legislation to provide recovery for marine deaths that are similar in relevant respects to those the statutes specifically contemplate.<sup>203</sup> Viewed from the perspective of statutory interpretation, cases like *Moragne* fill gaps between or beyond statutes by extending the domain of legislation beyond its semantic reach. From the perspective of unwritten private law, a decision like *Moragne* remolds the court’s jurisprudence to resemble an adjacent legislative regime.<sup>204</sup>

### C. Background Private Law: Gaudet

Four years later, in *Sea-Land Services, Inc. v. Gaudet*,<sup>205</sup> the Court gave further content to *Moragne*’s wrongful death action, but in a way that departed from statutes covering similar actions.<sup>206</sup> Like *Moragne*, *Gaudet*

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196. *Id.* at 388.

197. *Id.* at 389–90.

198. *Id.* at 390.

199. *Id.* at 390–91 (citing James Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213, 226–27 (1934)).

200. *Morgane*, 398 U.S. at 393, 396.

201. *Id.* at 409.

202. See Derek Auchie, *The Undignified Death of the Casus Omissus Rule*, 25 STATUTE L. REV. 40, 41 (2004); Hans W. Baade, *The Casus Omissus: A Pre-history of Statutory Analogy*, 20 SYRACUSE J. INT’L L. & COM. 45, 46 (1994).

203. The Court reserved judgment on whether the particulars of the maritime law action should mirror those provided in adjacent legislation. See *Moragne*, 398 U.S. at 405–08.

204. See *id.* at 392 (“It has always been the duty of the common-law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles.”); Roger Traynor, *Statutes Revolving in Common Law Orbits*, 17 CATH. U. L. REV. 401, 419 (1967) (observing that when a court extends a statute by analogy, a “judicial rule takes on a life of its own in the common law”).

205. 414 U.S. 573 (1974).

206. *Id.*



concerned a decedent whose death fell under neither the Jones Act nor DOHSA. *Gaudet* raised the questions of whether the longshoreman's predeath recovery barred any subsequent wrongful death action by his widow and whether his widow could also recover loss of society injuries in addition to pecuniary losses.<sup>207</sup>

Writing for the majority, Justice William Brennan resolved both questions in favor of the widow. The majority read *Moragne* as creating a cause of action that extended "admiralty's special solicitude for the welfare" of those who "venture upon hazardous and unpredictable sea voyages" to families of decedents.<sup>208</sup> Seeing *Moragne* as requiring the Court to honor the "humane and liberal character" of judge-made admiralty actions, the majority allowed the widow to sue even though most courts had interpreted wrongful death statutes as barring suit when decedents recovered damages before death.<sup>209</sup> The majority took a similar tack on damages for loss of society, again citing admiralty law's "special solicitude" for mariners.<sup>210</sup> It did so even though DOHSA, which played a central role in *Moragne*, "has been construed to exclude recovery for the loss of society," due to the statute's explicit reference to pecuniary damages alone.<sup>211</sup>

The dissent chided the majority for ignoring the legislation that guided *Moragne*.<sup>212</sup> As developed in *Gaudet*, the wrongful death action first recognized in *Moragne* began to look less like a product of statutory analogy and more like a creature of judicial background law in the gaps between statutes. By rejecting the limits of adjacent legislation, *Gaudet* treated statutes as potential but not preclusive sources of law, especially when they conflict with the "special solicitude" that unwritten maritime law shows for those who bear the risks of seafaring.

#### D. Displacement of Gap-Filling Powers: Higginbotham

In *Mobil Oil Corp. v. Higginbotham*,<sup>213</sup> the Court returned to the question of whether maritime decedents' families could recover for loss-of-society injuries. Unlike in *Gaudet*, the *Higginbotham* claimant was eligible to bring an action under DOHSA. And unlike *Moragne* and *Gaudet*, which filled statutory gaps with the Court's rules of decision, *Higginbotham* treated legislation as displacing the Court's power to apply background rules of private law—or any other rules at all—in statutory gaps.

DOHSA provided for "fair and just compensation for . . . pecuniary loss" but said nothing explicitly about loss of society.<sup>214</sup> The Court held

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207. *Id.* at 574, 585–87.

208. *Id.* at 577 (quoting *Moragne*, 398 U.S. at 387).

209. *Id.* at 583 (quoting *Moragne*, 398 U.S. at 387).

210. *Id.* at 588.

211. *Id.* at 587.

212. *Id.* at 595–96 (Powell, J., dissenting).

213. 436 U.S. 618 (1978).

214. *Id.* at 620 (quoting Death on the High Seas Act, 46 U.S.C. § 762 (1976)).

that this pecuniary loss remedy was exclusive, barring DOHSA claimants from seeking *Gaudet*'s maritime-law action for loss of society.<sup>215</sup> Writing for the Court, Justice John Paul Stevens drew "a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted."<sup>216</sup> In *Gaudet*, which concerned a matter covered by no particular statute, "the Court made a policy determination" about loss-of-society relief "which differed from the choice" Congress made when it enacted DOHSA.<sup>217</sup> *Higginbotham* recited the "opposing policy arguments" regarding recovery for loss of society but concluded "we need not pause to evaluate" them because "Congress has struck the balance for us" by enacting a statute that covers the dispute and does not include such relief.<sup>218</sup>

While recognizing that "[t]he Act does not address every issue of wrongful-death law," the Court concluded that where Congress has spoken "directly to a question, the courts are not free to 'supplement' Congress' answer."<sup>219</sup> The *Higginbotham* dissenters would not have treated the bare provision of pecuniary damages as preclusive. They contended that, absent explicit language *foreclosing* further remedies, the Court could provide such relief. In so doing, the dissenters appealed to both the legislation's remedial purpose and maritime law's "special solicitude" for those who bear the risks of seafaring.<sup>220</sup>

On one reading, *Higginbotham* distinguishes gaps *between* statutes—the legislative silence between DOHSA and the Jones Act—from gaps *within* statutes, i.e., DOHSA's silence about particular remedies. Judicial gap filling is allowed in the former, but not the latter. A broader reading holds that when the legislature speaks to some facets of a problem but not others, courts generally are barred from filling silences, even if the judicial supplementation does not formally contradict legislative rules. This reading treats the distinction between interstatutory and intrastatutory gaps as artificial: in *Moragne* and *Gaudet*, Congress provided relief to some classes of parties but was silent on others, and in *Higginbotham*, Congress spoke to some remedies, but was silent on others.<sup>221</sup> Whichever reading of *Higginbotham* is best, the case treats legislative action in *some* domain as precluding courts from filling legislative silences with further rules within *some* distance of the statute. Such a stance displaces the swath of background private law in the vicinity of legislation, even when that unwritten doctrine is logically consistent with explicit statutory rules.

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215. *Id.* at 625–26.

216. *Id.* at 625.

217. *Id.* at 622.

218. *Id.* at 623.

219. *Id.* at 625.

220. *Id.* at 626–29 (Marshall, J., dissenting).

221. On this reading, *Higginbotham*'s rule is inconsistent with *Moragne* and *Gaudet*. That does not make such a reading implausible. *Higginbotham* may be engaging in the age-old practice of distinguishing away erroneous precedents without overruling them.

*E. State Law Coda*

State jurisprudence reflects the diversity of approaches in these federal common law decisions. Regarding statutory analogy, courts have applied rules from the Uniform Commercial Code to contractual disputes that do not concern sales of goods.<sup>222</sup> Another prominent example in the literature is analogous extension of a state's probate code to resolve disputes concerning nonprobate estates.<sup>223</sup> In tort law, the most obvious example of this practice is the doctrine of negligence per se, by which courts use violations of statutes that say nothing explicit about civil liability to establish breach.<sup>224</sup> This latter doctrine can divide courts, especially when legislation requires more than negligence law's traditional duties.<sup>225</sup>

Courts that resist the use of criminal statutes to alter tort duties can be understood as exercising an independent judgment approach similar to that of *Gaudet*. Where legislation, however analogous, does not govern a precise dispute, its wisdom is at most a datapoint informing private law and might even be happily ignored. Along the same lines, a noted New York State Court of Appeals decision holds that a sale of goods statute, which does not apply to blood transfusions, neither alters the background tort regime nor precludes a plaintiff from pursuing a negligence action for an injurious transmission.<sup>226</sup> Similarly, state courts have exercised independent judgment where *Higginbotham* would not, refusing to treat a survival statute's provision of pecuniary damages, and its corresponding silence on punitive damages, as displacing judicial authority to allow

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222. See Bruce W. Frier, *Interpreting Codes*, 89 MICH. L. REV. 2201, 2211 (1991) ("In a steadily growing number of decisions, courts have been willing to extend the UCC by analogy, thereby abandoning older doctrine on narrow construction of statutes."); Williams, *supra* note 190, at 586–88 (discussing the judicial practice of extending the UCC by analogy); Traynor, *supra* note 204, at 423 (advocating the use of the UCC as "a source for . . . judicial rules to govern situations not explicitly covered"). Even before the rise of textualism, extension of commercial law statutes by analogy was controversial. See, e.g., Reed Dickerson, *Was Prosser's Folly Also Traynor's or Should the Judge's Monument Be Moved to a Firmer Site?*, 2 HOFSTRA L. REV. 469, 469 (1974) (arguing that "legislative supremacy" requires courts to "respect not only the text" of the UCC, "but [also] its negative implications").

223. See Traynor, *supra* note 204, at 417–19 (discussing *In re Mason's Estate*, 397 P.2d 1005 (Cal. 1957)).

224. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM, § 14 (2011). The related doctrine of implied private rights of action allows direct suits for injuries flowing from such statutory violations. See Pojanowski, *supra* note 14, at 530 (discussing links between implied rights of action and negligence per se); see also Neil Foster, *Statutes and Civil Liability in the Commonwealth and the United States: A Comparative Critique*, in TORT LAW: CHALLENGING ORTHODOXY 169, 208–09 (S.G.A. Pitel, J.W. Neyers & E. Chamberlain eds., 2013) (comparing the two doctrines).

225. Compare *Perry v. S.N.*, 973 S.W.2d 301, 309 (Tex. 1998) (refusing to apply a mandatory reporting statute in the negligence per se context), with *Beggs v. State*, 247 P.3d 421, 425 (Wash. 2011) (finding an implied right to sue based on a violation of a statute criminalizing failure to report child abuse).

226. *Perlmutter v. Beth David Hosp.*, 123 N.E.2d 792, 795–96 (N.Y. 1954).

punitive damages.<sup>227</sup> To the disdain of some tort scholars, however, other state courts have treated similar gaps as displacing any common law power to provide additional remedies.<sup>228</sup>

#### IV. TORT LAW AS PUBLIC LAW

When facing gaps in legislation written against a background of judicially elaborated private law, courts must decide whether legislative silence precludes judicial elaboration of law within the gaps and, if it does not, whether they should fill the gaps with background private law principles, statutory policy, or some accommodation between the two. This Part begins this inquiry using the maritime wrongful death cases and instrumentalist assumptions about private law. The following analysis indicates that private law theorized on those terms is vulnerable to legislative override. Statutory functionalism prioritizes the extension of statutory purpose into legal gaps, while statutory formalism points toward general displacement of the judicial prerogative. The court's independent judgment on unwritten law, when it is primarily policy judgment, sits uncomfortably with either approach to statutory interpretation.

##### A. *Wrongful Death and Duty Rules*

Wrongful death actions generally arise from statutes abrogating the common law's traditional preclusion of such suits. Because legislation does not cover all actions or answer all questions about those suits, it pays to consider such actions independent of legislation. Wrongful death actions concern not merely questions of remedy, but also matters of tort law duty. A court that bars such actions does not hold that the defendant exercised reasonable care, that the plaintiff failed to establish causation, or even that the surviving plaintiff suffers no injury. Instead, it holds that the defendant had no duty of care with respect to the surviving plaintiff's injury.

So understood, the maritime trilogy concerns background tort duty rules in statutory gaps. Recall the instrumentalist's theory of such duty rules: tort law imposes a nonrelational duty of reasonable care, subject only to policy-based judicial exceptions. The instrumentalist will presumptively disfavor a rule against wrongful death actions. The defendant owes the same undifferentiated duty to family members as it does to the decedent: to not cause reasonably foreseeable injuries through carelessness. The only

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227. See, e.g., *State ex rel. Smith v. Greene*, 494 S.W.2d 55, 59 (Mo. 1973) (holding that because a survival statute showed no "overt attempt to change the common law" backdrop, punitive damages were recoverable).

228. See, e.g., *Mattyasovszky v. W. Towns Bus Co.*, 330 N.E.2d 509 (Ill. 1975) (denying punitive damages absent further legislative action); see also Robert E. Keeton, *Statutes, Gaps, and Values in Tort Law*, 44 J. AIR L. & COM. 1, 7 (1978) (describing such an inference as not only an "error," but an "egregious" one); Harvey S. Perlmán, *Thoughts on the Role of Legislation in Tort Cases*, 36 WILLAMETTE L. REV. 813, 832 (2000) ("But legislative silence as to private claims, without more, is as likely to reflect a lack of attention as an intent to foreclose or authorize liability.").

question is whether there are good policy reasons to make an exception to this general rule. An instrumentalist might worry that an unlimited wrongful death duty might create floodgates and proof problems, thus overdetering and disproportionately penalizing defendants, overcompensating plaintiffs, or overwhelming the courts.

To raise such concerns is not to conclude that the policy balance disfavors all wrongful death actions. The wrongful death actions most statutes happen to permit—suits by close family members—resemble the qualified duty rules courts apply in other contexts. Like bystander claims for emotional distress<sup>229</sup> or economic loss claims in the context of special relationships,<sup>230</sup> the instrumentalist could view this limited duty rule as striking a balance that compensates those most likely to have genuine claims while mitigating floodgates problems. The decision whether to exclude recovery for loss of society or mental anguish would be subject to a balancing similar inquiry.

Such instrumental reasoning peppers the maritime trilogy. *Moragne* and *Gaudet* found tolerable the administrative challenges of quantifying pecuniary and loss-of-society damages, respectively, while the *Gaudet* dissent contended that the Court risked speculative awards, repetitive litigation, and double recovery unjustified by any “strong reasons of policy.”<sup>231</sup> *Moragne* and *Gaudet* alike emphasized maritime law’s “special solicitude” for seamen who undertake “hazardous and unpredictable sea voyages,”<sup>232</sup> suggesting a heightened interest in plaintiff compensation, not to mention a risk-spreading measure to ensure that enterprises internalize their social costs. *Higginbotham*, too, identified the “opposing policy arguments” for compensating loss of society, though it found no need to measure the balance.<sup>233</sup>

It is one thing to understand how instrumentalists reason about duty rules in disputes not covered by statutes. It is another to conclude that courts *should* engage in such reasoning when there is legislation covering similar disputes or some issues of one dispute. The following two sections examine these latter matters from the perspectives of statutory functionalism and formalism.

### *B. Instrumental Private Law and Statutory Functionalism*

The statutory functionalist sees the interpretive task as advancing statutory purpose and policy, even if doing so stretches a statute beyond the reach of its semantic meaning.<sup>234</sup> The functionalist’s inclination to extend

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229. See *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968) (confronting bystander claims for emotional distress).

230. See *J’Aire Corp. v. Gregory*, 598 P.2d 60, 63 (Cal. 1979) (using a multifactor test for allowing economic loss claims based on a special relationship).

231. *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 611 (1974) (Powell, J., dissenting).

232. *Id.* at 577 (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 387 (1970)).

233. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 623 (1978).

234. See *supra* Part I.A.

legislative policy into the gaps beyond a statute's semantic borders will increase the number of encounters between statutory purpose and uncodified private law rules, and hence the number of conflicts between a statute's purposes and background private law. The functionalist's commitment to legislative supremacy, combined with the instrumentalist's conception of private law as judicially authored public policy, exposes these private law norms to the sweep of statutory purpose.

Consider *Moragne*, where the Court perceived its restrictive precedent on wrongful death actions to conflict with more generous federal legislation.<sup>235</sup> For purposes of that choice, an instrumentalist conception of duty rules facilitates the migration of statutory norms to nonstatutory private law. "Private law" doctrine and adjacent statutes are both forward-looking, positively enacted instruments of public policy. They are two species of a genus, differing more in their modes of origin—adjudication versus legislation—than in substance. Given this jurisprudential fungibility, segregating these legal worlds makes little sense.<sup>236</sup> Accordingly, *Moragne* states that the "numerous and broadly applicable" wrongful death statutes "establish[] a policy" that "has become itself a part of our law, to be given appropriate weight" in the Court's common law decisionmaking.<sup>237</sup>

What counts as "appropriate weight" is crucial. *Moragne* invokes two scholars, Roscoe Pound and James Landis,<sup>238</sup> who argue that the weight should be significant. Pound reviled judicial protection of common law norms against statutory incursion and hoped courts would apply legislative rules and principles by analogy, treating them as a "more direct expression of the general will, of superior authority to judge-made rules."<sup>239</sup> Similarly, Landis challenged courts to apply analogical reasoning to statutes because the "judgment of legislatures in statutory rules often represent[s] a wider and more comprehensive grasp" of social problems.<sup>240</sup> A court need not disdain judicially crafted private law to reach a similar result; it need only, in the words of Judge Guido Calabresi, not "ignore the gravitational pull of newly enacted statutes in deciding whether an old precedent has continued life."<sup>241</sup> All that is required, to speak in legal process terms, is recognition

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235. *Moragne* concerned a cause of action based on unseaworthiness, a maritime tort different from the negligence tort usually at the center of duty debates. See *Moragne*, 398 U.S. at 376. The Court has held there is "no rational basis, however, for distinguishing negligence from seaworthiness" in determining the scope of duty. *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 815 (2001).

236. Cf. Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429 (bemoaning such segregation).

237. *Moragne*, 398 U.S. at 390–91, 393.

238. *Id.* at 391–92.

239. Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385 (1921); see WILLIAM D. POPKIN, *STATUTES IN COURT* 126 (1999) (describing Pound's preference for legislative purpose over background common law).

240. Landis, *supra* note 199, at 221.

241. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 86 (1982).

that our “*principle of institutional settlement*” gives democratically accountable legislatures the primary task of formulating policy.<sup>242</sup>

An instrumentalism that appreciates the legislature’s legitimacy and competence prefers statutory analogy in the gaps to the independent judgment of the judicial policymaking championed by instrumentalists like Prosser or California Supreme Court Justice Roger Traynor.<sup>243</sup> If duty rules are, as Prosser said, “the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection,”<sup>244</sup> and if an adjacent statute prescribes a duty rule for similarly situated plaintiffs, any preference for judicial doctrine rests on outdated homage to the heroic, common law jurist or highly controversial assumptions about the comparative competence and legitimacy of adjudicative lawmaking. The judicial creativity that founding tort law instrumentalists celebrate, then, is at best a fallback strategy in the absence of the legislative guidance, not the pinnacle of private law development. The confluence of private law instrumentalism and statutory functionalism leads to a strong version of the statutory analogy suggested in *Moragne*. Fittingly, *Moragne* is one of the most prominent citations to the *Legal Process* materials in the *United States Reports*.<sup>245</sup>

*Gaudet*’s explicit rejection of statutory norms in favor of judicial policy balancing is therefore more problematic. For *Gaudet*, the “humane and liberal character” of maritime law and the compensatory judicial “policy underlying” the *Moragne* remedy were sufficient to justify departure from the restrictive norms of other wrongful death statutes.<sup>246</sup> In so doing, the Court considered the administrative challenges of quantifying damages and the risk of excessive verdicts and double liability, but found them no obstacle to effectuating the “humanitarian policy of the maritime law to show ‘special solicitude’” to those who bear the risks of seafaring.<sup>247</sup> Such policy balancing resembles the nonrelational, multifactor duty inquiries in some leading state level instrumental tort duty decisions of the same era.<sup>248</sup>

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242. HART & SACKS, *supra* note 19, at 4 (defining the principle of institutional settlement); *see id.* at cxxxviii (asking “[w]hen is a question one of law for the court and when one of policy for the legislature?”); *see also* Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 13 (1936) (arguing that courts should “treat a statute . . . as both a declaration and source of law, and as a premise for legal reasoning” enacted as “policy by the supreme lawmaking body”).

243. *See* Hans A. Linde, *Courts and Torts: “Public Policy” Without Public Politics*, 28 VAL. U. L. REV. 821, 824 (1994) (“[M]y modest heresy is that an opinion should not invoke public policy unless it can cite a source for it.”); *id.* at 848–49 (stating that *Moragne* is an example of this “search for extrinsic public policy”).

244. PROSSER, *supra* note 92, § 53, at 325–26.

245. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 404 (1970). *Moragne* is the only Warren Court majority opinion to cite the *Legal Process* materials. *See* HART & SACKS, *supra* note 19, at civ n.234, cxv n.290.

246. *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 583 (1974).

247. *Id.* at 588, 588–95.

248. *See J’Aire Corp. v. Gregory*, 598 P.2d 60, 62–63 (Cal. 1979) (employing a multifactor test for allowing economic loss claims based on a special relationship); *Dillon v.*

With federal legislation (as interpreted, at least) disfavoring recovery, however, the Court's policy choice to the contrary resembles the judicial intransigence to legislative norms that Pound and Landis condemned.<sup>249</sup> Even if one were to conclude that the best purposive reading of relevant statutes supported a remedy, *Gaudet* would at best reach the right result for the wrong reasons. The concordance of judicial policy-balancing and statutory norms would be a happy but superfluous coincidence, given the sufficiency and supremacy of legislative policy.

A similar story follows for a case like *Higginbotham*. There, the question was whether and how to fill an alleged silence about the availability of loss-of-society injuries. The dissenters' case for such relief invoked both the "ameliorative" character of the statute and the "humanitarian" tradition of risk spreading inhering in background maritime law.<sup>250</sup> From the functionalist perspective, the dissenters were on better ground when they emphasized legislative purpose, rather than the judicially authored background law, which may or may not comport with adjacent statutory norms. A purposive reading of the statutory policy might prove the *Higginbotham* dissenters correct. Alternatively, if, as the Court has held in other settings, an interpreter sees the "leading purpose" of legislation as creating an "integrated scheme" to "replace[] a patchwork system" of remedies, she will treat Congress's chosen relief as exclusive.<sup>251</sup> Either way, the most a court's instrumental reasoning about duty can do in this gap is to serve as a second-line source when legislative purpose offers little direction.

The combined premises of private law instrumentalism and public law functionalism indicate that statutory norms, not judge-made background law, should fill the gaps between statutes. One might object that this overstates the case. Statutory functionalism, after all, does not pursue legislative policy above everything else. Hart and Sacks also sought "to harmonize" statutes "with more general principles and policies of law."<sup>252</sup> In the absence of an "unmistakably expressed" indication to the contrary, faithful interpretation could involve a "presumption against attributing to [the legislature] a purpose to depart from a general principle or policy of [the] law."<sup>253</sup> Hart and Sacks thus endorsed a presumption against "*sub silentio*" repeal of background law, so long as the interpreter has proper "respect for the legislature and an adequate sense of the statute as a

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Legg, 441 P.2d 912, 912-13 (Cal. 1968) (confronting bystander claims for emotional distress); *Rowland v. Christian*, 443 P.2d 561, 566-67 (Cal. 1968) (abolishing premises liability categories).

249. See also *Pope v. Atl. Coast Line R.R. Co.*, 345 U.S. 379, 390 (1953) (Frankfurter, J., dissenting) (attacking the attitude that statutes present "wilful and arbitrary interference with the harmony of the common law and with its rational unfolding by judges").

250. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 627-28 (1978) (Marshall, J., dissenting).

251. *United States v. Fausto*, 484 U.S. 439, 444, 445 (1988).

252. HART & SACKS, *supra* note 19, at 1209.

253. *Id.* at 1132.



purposive act.”<sup>254</sup> When the statute allows doubts about the particular purpose, background private law might survive in the gaps.<sup>255</sup>

An instrumental understanding of the private law backdrop imperils such survival. Requiring a legislature to speak clearly imposes “conditions on the effectual exercise of legislative power.”<sup>256</sup> To justify such a requirement, it must protect “objectives of the legal system which transcend the wishes of any particular session of the legislature.”<sup>257</sup> Unsurprisingly, Hart and Sacks saw clear statement rules as least controversial for protecting constitutional norms.<sup>258</sup> The same may follow for background private law if it is similarly enduring and foundational, such that a clear statement rule preserves coherence and uniformity in the law.<sup>259</sup> But one hallmark of the instrumentalist critique of private law traditionalism is that the apparently central doctrinal concepts tend toward incoherence and indeterminacy. If so, we gain little in the way of principled coherence by preserving a patchwork of half-baked concepts.

A second tenet of instrumentalism holds that private law is legislative policy by judicial means. Molded by steady hands, this law might approach coherence. Even so, it seems doubtful that such doctrine merits any more protection than that afforded by the canon against implied repeal of legislation.<sup>260</sup> It seems likely to receive even less protection than that relatively weak canon. A margin of appreciation for existing statutes is one thing; insulating the work of defeasible judicial legislation that lacks the legislature’s political accountability and institutional competence is quite another. Clear-statement protection of common law doctrine thus has often been the object of great scorn.<sup>261</sup> A strong presumption in favor of background law, critics maintain, is an unjustified “relic” of judicial hostility toward legislation.<sup>262</sup> Or, as one state court has said, the presumption “denigrates and confines the role of legislative examination, discussion, and enactment of public policies,” and it is “long overdue to be

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254. *Id.* at 1210.

255. *Cf. id.* at 148 (“Doubts about the purposes of particular statutes or decisional doctrines . . . must be resolved, if possible, so as to harmonize them with more general principles and policies.”).

256. *Id.* at 1376.

257. *Id.*

258. *Id.* at 1376–77 (stating that a clear statement “requirement should be thought of as constitutionally imposed” and identifying the rule of lenity as a clear statement policy “call[ing] for particular mention”).

259. *Cf.* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 318 (2012) (characterizing the presumption against legislative change to common law as a “stabilizing canon”).

260. *See id.* (linking the two canons); *cf.* *United States v. Fausto*, 484 U.S. 439, 453–55 (1988) (finding that the preclusion of other statutory remedies by a comprehensive legislative scheme does not violate the canon against implied repeal of statutes).

261. *See, e.g.,* Jefferson B. Fordham & J. Russell Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 *VAND. L. REV.* 438 (1950).

262. SCALIA & GARNER, *supra* note 259, at 318; Fordham & Leach, *supra* note 261, at 440–41.

put to rest.”<sup>263</sup> The cynical acid that instrumentalists find so potent for challenging private law’s distinctiveness also dissolves presumptions that insulate the doctrine from competing legislative purposes.<sup>264</sup>

Overall, a confluence of private law instrumentalism and statutory functionalism extends the reach of statutory policy to cover, or “preempt,” background private law in the gaps.<sup>265</sup> The preemption analogy is apt, for this dynamic is similar to the Supreme Court’s doctrine for preempting state law rules that frustrate federal policies. There, federal law overrides state law when the latter “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>266</sup> To gauge whether the state law is an obstacle, the Court looks to the “federal statute as a whole and identif[ies] its purpose and intended effects.”<sup>267</sup> Such a purposive approach extends the semantic scope of federal statutes to override competing state law norms.<sup>268</sup> In the same fashion, when background private law is in tension with the policy of adjacent legislation, the statutory functionalist will treat the background private law norms as “preempted”—ensuring that the statutory rules of decision govern, rather than, for example, conflicting tort rules on wrongful death or loss of society.

Private law is even more vulnerable to this kind of preemption than its analogue in federalism jurisprudence. In the state/federal context, the thrust of federal legislative purpose is parried with a presumption against preemption rooted in the respect for sovereign states in our federal

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263. *Beaver v. Pelett*, 705 P.2d 1149, 1151 (Or. 1985); *see also* *Ass’n of Unit Owners of Bridgeview Condos. v. Dunning*, 69 P.3d 788, 796 n.3 (Or. Ct. App. 2003) (“We wish that parties would stop invoking that canon of [strict] construction. It is an anachronism reflecting a nineteenth century preference for case law over legislation.”).

264. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461–62 (1897) (“You see how the vague circumference of the notion of duty shrinks and at the same time grows more precise when we wash it with cynical acid and expel everything except the object of our study, the operations of the law.”).

265. This argument is qualified by the caveat that statutory purposivists have become increasingly attentive to the particular ways in which statutes realize their purposes. Accordingly, some purposivists, like Judge Richard Posner, may be more hesitant to extend statutes by analogy based on an understanding of legislation at a high level of abstraction. In this respect, the more modest purposivist would be closer to the statutory formalist’s approach discussed herein. *See* Posner, *supra* note 40, at 203 (criticizing the *Moragne* Court for overreaching and impeding future compromises by Congress); Manning, *supra* note 28, at 115 (characterizing a “new” purposivism that focuses more closely on enacted text than its predecessors).

266. *See* *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *cf.* *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) (finding a federal common law rule that overrode state law to be necessary to protect federal interests).

267. *Crosby*, 530 U.S. at 373.

268. *Cf.* *Wyeth v. Levine*, 555 U.S. 555, 587 (2009) (Thomas, J., concurring) (describing this practice as “expand[ing] federal statutes beyond their terms”).

system.<sup>269</sup> The instrumentalist's assault on the distinctiveness and internal coherence of private law, combined with the public lawyer's doubts about the comparative competence and legitimacy of judicial policymaking, combine to cast doubt on similar protection of private law.<sup>270</sup> Accordingly, while the conflicting values of federal purpose and state sovereignty leave the Court's preemption doctrine unstable in the federal/state context, a functionalist court could more consistently sweep away private law standing in the way of statutory policy.<sup>271</sup>

### C. Instrumental Private Law and Statutory Formalism

The conjunction of private law instrumentalism and statutory formalism also points toward the eclipse of background private law, though the formalist will be more resistant to judicial gap filling of *any* kind.

#### 1. Against Extension of Statutory Policy

The statutory formalist, deploying arguments refined in recent statutory interpretation theory, objects to *Moragne's* use of analogous legislation to fill gaps between statutes.<sup>272</sup> The decision to provide a wrongful death action to sailors in territorial waters, to all on the high seas, but not to nonseamen in territorial waters may reflect the price Congress was willing to pay to protect those who bear the risks of seafaring. As even the noted nonformalist Judge Richard Posner once observed, *Moragne's* smoothing of a crooked statutory rule into a more generous standard may undermine the perhaps unknowable compromise in the legislative scheme and hobble Congress's ability to strike bargains in the future.<sup>273</sup> To the formalist, faithful agency to legislative policy respects those limits, justifying an inference that congressional silence withholds permission for judicial extension of the borders of a statute's domain.<sup>274</sup> Courts should mind the gap, not fill it via statutory analogy.

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269. See *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 387 (2002) (regarding this presumption); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 290 (2000) (arguing that this presumption can counterbalance obstacle preemption).

270. Compare *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2637 (2011) (noting that proximate cause is a doctrine of "convenience, of public policy, of a rough sense of justice" (quoting *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting))), with *id.* at 2638–39 (invoking federal statute's remedial purpose to abrogate traditional proximate-cause requirement).

271. Cf. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011) ("Legislative displacement of federal common law does not require the 'same sort of evidence of clear and manifest congressional purpose' demanded for the preemption of state law." (quoting *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 317 (1981))).

272. See *supra* Part I.B.

273. Posner, *supra* note 40, at 203.

274. See *supra* Part I.B.

## 2. Against Independent Judgment

A court like that in *Gaudet* might instead draw on its trove of private law to fill in the gaps. If we conceive of that doctrine on instrumentalist terms—as positive, forward-looking legislative and regulatory policy—this move only accentuates the statutory formalist’s worries. The objection to statutory analogy is that it carries the worthy goal of faithful agency too far: Congress’s preference for a duty in situations A and B does not warrant recognition of a duty in analogous situation C not covered by legislation. Decisions like *Gaudet* depart even further. They extend a duty to situation C *and* retain judicial freedom to choose a policy different than the one Congress prescribed in A and B. If cloning statutory policy to fill a gap is illegitimate judicial legislation, a court’s imposition of novel, even contradictory rules of judicial policy in the same gap is all the less warranted. That this textualist critique of judicial creativity originates in public law theory is of no moment: the instrumentalist’s regulatory conception of background private law invites rather than repels this intervention by public law theory. Nor is it unique to the federal context; state statutes concerning tort law are frequently partial and episodic products of compromise.<sup>275</sup>

*Higginbotham* embodies the statutory formalist’s rejection of such independent judgment. For suits that fell within DOHSA’s domain, Congress’s explicit treatment of a particular topic was the first and last word. Thus, the statute’s explicit provision of pecuniary damages precluded the courts from granting *Higginbotham* recovery for loss of her husband’s society. As in *Gaudet*, there were policy arguments for and against allowing such recovery, but “Congress has struck the balance for us.”<sup>276</sup> Because DOHSA does not explicitly state that pecuniary loss is the only injury for which DOHSA will provide compensation, one could join the *Higginbotham* dissenters to argue that the statute is merely *silent* on recovery for other losses.<sup>277</sup> Against this objection, a formalist must justify the “unstated premise that when a statute addresses some area of law anything within that area that it does not authorize is forbidden”—a premise that instrumentalist tort scholar Robert Keeton deemed an “egregious” error.<sup>278</sup>

Translated into the formalist’s terms, Keeton’s objection reframes the compromise implicit in legislation. The statutory formalist’s baseline rejection of judicial lawmaking in statutory gaps may make sense for federal courts without general common law powers. This default rule is

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275. See Linde, *supra* note 243, at 835–37.

276. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 623 (1978).

277. See *id.* at 628 (Marshall, J., dissenting) (“Congress made no such determination when it passed DOHSA.”).

278. Keeton, *supra* note 228, at 7; see also Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 905–07 (1982) (criticizing *Higginbotham*’s assumption).

less obvious in state courts or in special enclaves of federal common law, where courts less controversially claim lawmaking power.<sup>279</sup> When such powers are background features of the legal system, it can be reasonable to read silence as permitting judicial gap filling that does not negate other explicit statutory rules.<sup>280</sup> A statute's bare provision of pecuniary damages, without more, is formally consistent with judicial recognition of other legal injuries, such as loss of society. If a legislature wants to forbid all that the statutory regime does not authorize, it can say so. Otherwise, there should be little surprise when courts use powers that were part of the legal backdrop at enactment.

Although this objection is appropriately sensitive to how differences in constitutional contexts shape and legitimize courts' powers, the statutory formalist will still have her doubts. If presumptive permission for judicial lawmaking in the gaps is a proxy for legislative preferences, it is a questionable one. It assumes the legislature would generally prefer to transfer independent decisionmaking power to a branch over which it has no control, rather than reserving that power for itself or an administrative agency over which it has oversight and budgetary influence.<sup>281</sup> Furthermore, if private law lacks the coherence and stability of the conceptualist's vision, a default rule of delegation makes it harder to fix the lines of legislative compromise. Gaps do not frustrate compromise when there is some certainty about how courts will fill in the blanks. The terms of deals are less stable when the legal landscape is in a state of flux and subject to modification by a heterogeneous group of adjudicators—a concern that instrumentalists amplify by advocating policy-based reform of doctrine.<sup>282</sup> For these reasons, a legislature could prefer a default rule that courts fill no silences in legislative regimes.<sup>283</sup>

If the presumption in favor of private law gap filling is based on the systemic desirability of private lawmaking in the gaps irrespective of likely legislative preferences, it faces more fundamental challenges. As discussed in Part IV.B, that presumption recalls an era of judicial intransigence in the face of legislation. The only difference now is that the instrumentalist disclaims any pretense of neutral, juridical reason. The practical politics of adjudication—whether in the form of restrictive no-duty rules or resistance to statutory limitations on liability—squares off against legislative policy without apology.

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279. See Pojanowski, *supra* note 14, at 495–97.

280. See *id.* at 524.

281. See Lemos, *supra* note 1, at 98–99 (explaining why Congress is less likely to delegate authority to courts than to agencies).

282. See ROBERT E. KEETON, *VENTURING TO DO JUSTICE* 13–15 (1969).

283. Keeton's objection, at most, establishes that courts can make *some* law in the gap, rather than none. The statutory functionalists' case for adhering to statutory policy in the gaps still stands in the way of the private law instrumentalists' claim of independent judgment.

Furthermore, while statutory formalism rooted in constitutional structure arose in federal law, it is unclear those worries disappear because state courts have general common law powers. Consider the reasons formalists are skeptical of federal common law. Federalism and the Rules of Decision Act obviously do not bear the validity of state court lawmaking in the gaps, but federal concerns with separation of powers and electoral accountability do, albeit in modified form.<sup>284</sup> While state courts have general common law powers, many state constitutions not only follow the federal model by assigning “the Legislative power” to the legislature,<sup>285</sup> they also go further by including explicit separation-of-powers provisions and embracing the “Whig tradition” of parliamentary supremacy.<sup>286</sup> One could see this embrace of both common law powers *and* parliamentary supremacy as a tension that vigorous instrumentalist lawmaking in the gaps exacerbates. Alternatively, and more plausibly, these two features’ coexistence in state constitutionalism reflects not a tension, but the fact that an understanding of common law adjudication as instrumental policy choice was alien to these traditions’ framers.

Nor do judicial elections in some states obviously allay concerns about politically accountable lawmaking.<sup>287</sup> The topic is complex, yet it suffices to say that the link between judicial elections and political accountability is controversial. Many originally advocated judicial elections due to a belief that voters, not result-oriented legislators, were more likely to select skilled and impartial jurists—elections, in short, sought to take politics *out of* judging.<sup>288</sup> Relatedly, others have argued that elections are less about promoting “accountability” than preserving the equal right of all citizens to seek office, irrespective of political connections.<sup>289</sup> Indeed, the more judicial elections turn on responsiveness to electoral policy preferences, the more they raise due process concerns. Ruling in a fraud action for the coal company that publicly bankrolled one’s campaign, after all, is a form of accountability *in extremis*.<sup>290</sup>

An alternative response to objections like Keeton’s places less emphasis on inferences from constitutional structure and more on institutional competence.<sup>291</sup> Arguments about the limits of policymaking by judicial

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284. See, e.g., Merrill, *supra* note 1, at 12–32 (cataloging those four factors against wide federal common lawmaking).

285. Cf. U.S. CONST. art. I, § 1.

286. See Pojanowski, *supra* note 14, at 508–11 (discussing state constitutional inferences supporting legislative supremacy).

287. Cf. Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1258–67 (2012) (arguing thoughtfully that in some circumstances, judicial elections may justify different approaches to statutory interpretation).

288. See Caleb Nelson, *A Re-evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 210–13 (1993).

289. See Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 1997 (1988).

290. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

291. One scholar has seen institutional competence as having constitutional valence. See Aziz Z. Huq, *The Institution Matching Canon*, 106 NW. U. L. REV. 417 (2012).

adjudication are well known and apply with similar force outside the federal context: courts lack the expert staff of legislatures and executives; courts cannot control their agendas or undertake systematic reform, but rather must resolve cases as they come; the parties' arguments and judicial remedies limit a court's menu of policymaking options; litigated cases may not be representative of broader trends; courts have little systematic way to follow up the results of their policymaking; and so on.<sup>292</sup> In the absence of any legislative activity, judicial lawmaking may be acceptable—imperfect tort rules may be better than no tort rules at all. But if calibrating tort duties, for example, involves complex calculations of social policy, it is hardly obvious that a collection of judges will regularly do a better job than a legislature or regulatory agency that has approached the same matter, even if it has not spoken clearly on all the related issues. A default rule precluding judicial supplementation could lead to better policy across the legal system, even if it is over- or underinclusive in particular cases.

For these reasons, a court might follow *Higginbotham's* approach and refrain from developing not only rules that conflict with a statute, but also rules that touch on matters that the legislature has addressed.<sup>293</sup> To return to preemption analogies, the formalist's approach would resemble the Supreme Court's more sweeping doctrine of field preemption. There, when Congress has legislated, no competing lawmaker can supplement the legislative norms; even in the face of silence, gaps must remain unfilled.<sup>294</sup> Tellingly, while field preemption usually pertains to federal displacement of *state* lawmaking authority—and has become less frequent in that form in recent years<sup>295</sup>—the Court readily treats *its own common law powers* as impliedly displaced in such fashion.<sup>296</sup> In its jurisprudence concerning interstate disputes, for example, the Court regards its own lawmaking powers as preempted whenever federal statutory rules come within proximity of a dispute.<sup>297</sup> Their reasons for invoking such field preemption

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292. See Linde, *supra* note 243, at 824–34 (detailing how “the policy style” of tort adjudication “claims more than it delivers”).

293. Cf. *Carlson v. Green*, 446 U.S. 14, 51 (1980) (Rehnquist, J., dissenting) (“[T]he fact that Congress has created a tort remedy against federal officials at all, as it has done here under the FTCA, is dispositive. The policy questions at issue in the creation of any tort remedies . . . involve judgments as to diverse factors that are more appropriately made by the legislature than by this Court.”).

294. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

295. See Nelson, *supra* note 269, at 227 (“The Court has grown increasingly hesitant to read implicit field preemption clauses into federal statutes.”).

296. See Gluck, *supra* note 1, at 760 (“The U.S. Supreme Court has taken a rather generous view of the extent to which complex federal statutory schemes are intended to displace any past or future judicial gap-filling efforts.”).

297. *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 317 (1981) (treating a “comprehensive regulatory program supervised by an expert administrative agency” as “occup[ying] the field”); see *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 22 (1981) (same); see also *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011).

resemble,<sup>298</sup> and at times echo,<sup>299</sup> *Higginbotham*'s rationale for constraint. This is particularly so when the Court conceptualizes tort actions in instrumental terms or when litigants bring tort actions for injuries implicating complex problems like climate change. The prospect of indeterminate, policy-laden choice leads the Court to refrain from elaborating private law in statutory gaps,<sup>300</sup> even when the proposed rules of decisions would not formally contradict the statute and arguably would advance the legislation's broader purposes.<sup>301</sup>

#### D. Implications of the Public Law Model

Private law instrumentalism, with its skepticism of stable doctrinal concepts and its preference for policy-oriented problem solving, is a creature of American legal realism.<sup>302</sup> Much public law scholarship in recent years, however, regards legal realism as a Copernican revolution displacing the judge from the center of the legal universe. If resolution of legal uncertainty "involves no brooding omnipresence in the sky" but rather is "largely a judgment of policy," then "institutions with democratic

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298. See *Am. Elec. Power Co.*, 131 S. Ct. at 2537 (2011) ("Legislative displacement of federal common law does not require" a "'clear and manifest [congressional] purpose' . . . . '[I]t is primarily the office of Congress, not the federal courts, to prescribe national policy.'" (quoting *Milwaukee II*, 451 U.S. at 317; *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978))); *Milwaukee II*, 451 U.S. at 317 ("[W]e start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.").

299. See *Am. Elec. Power Co.*, 131 S. Ct. at 2537 (citing and quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)); *Milwaukee II*, 451 U.S. at 315 (same).

300. See *Am. Elec. Power Co.*, 131 S. Ct. at 2539 (finding there was no nuisance action for greenhouse gas because "as with other questions of national or international policy, informed assessment of competing interests is required"); *Milwaukee II*, 451 U.S. at 313 (finding there was no nuisance action for water pollution because courts are not "better suited to develop national policy," especially in light of the "usual and important concerns of an appropriate division of functions between the Congress and the federal judiciary"); *id.* at 317 (refusing to assume that Congress has "left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts").

301. See *Am. Elec. Power Co.*, 131 S. Ct. at 2538 (rejecting the argument that "federal common law is not displaced until EPA actually exercises its regulatory authority" because "the field has been occupied" by Congress (quoting *Milwaukee II*, 451 U.S. at 324)); *cf. Milwaukee II*, 451 U.S. at 351–52 (Blackmun, J., dissenting) (arguing that common law nuisance actions would promote the statute's ecological aims and remedy inadequacies in the legislative regime).

302. See, e.g., WHITE, *supra* note 93, at 162 (noting Prosser's "explicitly Realist perspective"); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1255 (1931) (stating legal realists have "a strong tendency" to approach tort questions as "matters of general policy" concerning the allocation and reduction of risks to those "not in court"); *id.* at 1252 & n.70 (citing tort instrumentalist Leon Green's book *Judge and Jury* as exemplifying the legal realist credo that "deduction" from "the authoritative legal tradition" "does not solve cases" and that judicial decisions are thus often a product "choice which *can* be justified only as a question of policy").



accountability and technical expertise”<sup>303</sup> preferably make these decisions. If administrative agencies “have become modern America’s common law courts, and properly so,”<sup>304</sup> we have greater reason to doubt a presumption that a legislative gap implies permission for independent judicial elaboration, as opposed to restraint, to allow the legislature or, increasingly, an administrative agency, to further develop the law.<sup>305</sup> This is so whether one is statutory functionalist or formalist. The only difference is the functionalist would have the court fill a gap with statutory policy, while the formalist would have the court not fill the gap at all.

These lessons are at odds with many private law instrumentalists’ approaches to legislation, at least in tort law. Instrumentalists often assume courts have wide discretion in choosing between statutory purpose and its independent policy judgment when filling gaps.<sup>306</sup> Their discretionary approach has become received wisdom.<sup>307</sup> A more thoroughgoing statutory functionalism, however, prioritizes legislative purpose over the judicial prerogative.<sup>308</sup> Some instrumentalists will concede that point,<sup>309</sup> but even then the admission seems a hasty aside from a broader story of judicial tort policy.<sup>310</sup>

The contrast between these theorists’ approach and the statutory formalism emerging in recent decades is even starker. This is in part because founding instrumentalists wrote before the revival of theory in statutory interpretation that gave rise to textualism. One instrumentalist has recently defended *Moragne* against formalist criticism by stating that the Court was “exercising its own admitted authority” to make law, rather than extending a statute’s domain.<sup>311</sup> Yet this scholar also observes in the next

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303. Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies As Common Law Courts*, 47 DUKE L.J. 1013, 1057–58 (1998).

304. *Id.* at 1019.

305. *Cf.* VERMEULE, *supra* note 60, at 4 (stating that, in the case of uncertainty, “the legal system does best if judges assign authority to interpret those texts to other institutions—administrative agencies in the case of statutes, legislatures in the case of the Constitution”).

306. *See* Traynor, *supra* note 204, at 425 (observing that filling gaps with statutory rules is “a discriminating choice of policy, in sharp contrast to the routine compliance with a legislative policy when the statute encompassing it governs”); *see also* Fleming James, Jr., *Statutory Standards and Negligence in Accident Cases*, 11 LA. L. REV. 95, 119 (1950) (noting that because courts are “entering upon judicial law making” when they incorporate statutory standards, it is “mechanical and doctrinaire” for courts not to “exercis[e] their own judgment as to whether the transplanted standard is appropriate to the new purpose”); William L. Prosser, *Contributory Negligence As Defense to Violation of Statute*, 32 MINN. L. REV. 105, 108 (1948) (similar).

307. *See* RESTATEMENT (SECOND) OF TORTS § 874A & cmt. d. (1979).

308. *Cf.* Linde, *supra* note 243, at 824 (“[M]y modest heresy is that an opinion should not invoke public policy unless it can cite a source for it.”).

309. *See, e.g.*, KEETON, *supra* note 282, at 94 (indicating courts must defer to legislative purpose before crafting policy).

310. *See id.* at 16–18 (explaining how the institutional limits of legislatures require more courts to “overrul[e] precedents” in the name of reform).

311. Perlman, *supra* note 228, at 850. Chancellor Perlman was an adviser for the most recent torts *Restatement*. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM, at v (2011).

breath that duty rules “are inevitably a product of a court’s assessment of policy factors to determine whether liability is appropriate.”<sup>312</sup> As one venerable state judge noted, such judicial “policymaking must be prepared to face *politics*.”<sup>313</sup> Once we flatten private law adjudication onto the plane of legislative policymaking, such invocation of the traditional judicial role appears quaint at best. The instrumentalist’s claim for power to supplement statutory schemes with background private law doctrine trades on the institutional divisions of a disclaimed era where the common law judge was depoliticized and heroic. It is simply not realist enough. At this point, the collapse of private law into public law truly seems complete.<sup>314</sup>

## V. TORT LAW AS PRIVATE LAW

Conceptual theorists who defend the autonomy of private law, unsurprisingly, reject this collapse. It would be more interesting if public law theories of statutory interpretation did so as well. The confluence of private law conceptualism’s premises with interpretive theory’s commitments suggests that, in fact, is the case. The more we understand private law doctrine as having an autonomous, internally coherent logic, the more freedom courts will have to develop private law on its own terms where the legislature is silent or has spoken unclearly. A reexamination of the wrongful death cases under conceptualist premises demonstrates how this effect is true under statutory functionalism and, surprisingly, is most pronounced under statutory formalism, an approach most frequently associated with judicial restraint.

### A. *Reconceptualizing Wrongful Death*

Traditionally, tort law rejected wrongful death claims, holding that the only proper plaintiff could be a living person who suffered injury.<sup>315</sup> Most common law jurisdictions abrogated that rule through statute,<sup>316</sup> but it was not inevitable that reform had to proceed by legislation. Before the Supreme Court decided the *Harrisburg*, some lower federal admiralty courts allowed tort-like suits for wrongful death absent legislation.<sup>317</sup> The

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312. Perlman, *supra* note 228, at 851.

313. Linde, *supra* note 243, at 844 (emphasis added); see Philip P. Frickey, *Honoring Hans: On Linde, Lawmaking, and Legacies*, 43 WILLAMETTE L. REV. 157 (2007) (discussing Linde’s accomplishments).

314. This analysis does not offer a conclusive case against instrumentalist lawmaking in the gaps. Textualism and purposivism, as prominent as they are, do not exhaust contemporary approaches to statutory interpretation. See generally CALABRESI, *supra* note 241; ESKRIDGE, *supra* note 17.

315. See *Baker v. Bolton*, (1808) 170 Eng. Rep. 1033 (K.B.) 1033; RESTATEMENT (SECOND) OF TORTS § 925 cmt. a (1979).

316. See 4 FOWLER V. HARPER, FLEMING JAMES JR. & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS § 24.1, at 536 (3rd ed. 2006) (stating that the traditional rule “has been modified by statute in all of our states” and that “almost all civil remedies for wrongful death derive from statute”); see also Fatal Accidents Act, 1846, 9 & 10 Vict., c. 93 (Eng.).

317. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 387–88 (1970).

same held for some state courts until the middle of the nineteenth century.<sup>318</sup> Courts could have continued recognizing wrongful death actions or abrogated the traditional presumption against such suits as a matter of decisional law. In fact, some more recent state court decisions treat wrongful death actions as part of their common law that would exist without legislation.<sup>319</sup> The natural doctrinal frame for judicial recognition of wrongful death is duty in tort law. The private law conceptualist's relational approach can challenge the common law's resistance to third-party wrongful death actions.

Plaintiffs, if they are at least the decedent's immediate relatives, have plausible arguments that the negligent killing of the decedent breaches a relational duty to them. Despite the facial appeal of the objection that a wrongful death plaintiff sues as "the vicarious beneficiary of a breach of duty to another,"<sup>320</sup> there is a strong argument that family members fall into the duty-defining "orbit of . . . danger as disclosed to the eye of reasonable vigilance."<sup>321</sup> A sailor's death causes highly foreseeable harm to dependents even if they are not present at the time of the careless action.<sup>322</sup> Just as the sale of a negligently manufactured car breaches a duty to the purchaser *and* absent future passengers, careless steering of a ship is a wrong to the sailor *and* to the family who loses him.

The character of the familial relationship also suggests that wrongful death claims will not fail even though the plaintiffs seek relief for economic or emotional injuries. To be sure, a defendant may claim that the spouse is trying to use the sailor's right to bodily integrity to protect her economic and emotional interests absent any special relationship or circumstances.<sup>323</sup> This plausible argument runs up against longstanding tort doctrine allowing family members to bring loss-of-society suits based on nonfatal physical injuries to family members.<sup>324</sup> The familial relationship is sufficiently

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318. See 4 HARPER, JAMES & GRAY, *supra* note 316, § 24.1, at 536 n.1 ("The rule was originally not followed in the United States but came to be adopted only well into the nineteenth century, beginning with an 1848 Massachusetts opinion.").

319. See *Haakanson v. Wakefield Seafoods, Inc.*, 600 P.2d 1087, 1092 n.11 (Alaska 1979); *Hun v. Ctr. Props.*, 626 P.2d 182, 187 n.3 (Haw. 1981); *Gaudette v. Webb*, 284 N.E.2d 222, 229 (Mass. 1972).

320. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928).

321. *Id.*

322. See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916) (finding a duty to a nonpurchaser because the seller "knew also that the car would be used by persons other than the buyer. This was apparent from its size; there were seats for three persons"); *Mussivand v. David*, 544 N.E.2d 265, 270 (Ohio 1989) (finding that a defendant with a sexually transmittable disease has a duty not only to his immediate sexual partner, but also other highly foreseeable victims like the partner's spouse).

323. See *Benson*, *supra* note 116, at 877–78 (stating that *Palsgraf* and the economic-loss rule "stand together as variations of a single theme . . . . [T]he plaintiffs failed because they could not establish a claim that was freestanding with respect to the requirements of duty, but instead attempt to piggyback on their fulfillment through the defendant's relation to a third party").

324. See RESTATEMENT (SECOND) OF TORTS § 693 (1976); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 37–38 (1998).

fundamental that tort law deems the breach to the physically injured person as a breach to her family members for purposes of that action.<sup>325</sup> There may be borderline questions defining immediate family,<sup>326</sup> but the central principle is well established. Why death, as opposed to a nonfatal injury, defeats the principle is unclear. The principle, moreover, can be based on the unity of interests between the deceased and the family, who are linked to the defendant through a normatively significant relationship of suffering and doing harm.<sup>327</sup>

Emotional and economic injuries from the death of loved ones may run on the outer ring of duty's orbit,<sup>328</sup> but the point here is to show the plausibility of relationally grounded duty in the absence of statutes, not to establish it conclusively. More importantly, this framework of preexisting rights, wrongs, obligations, and relationships does not turn primarily on policy balancing or direct engagement with global concerns of distributive justice. The following two sections will analyze how this conception of duty affects the application of statutes like DOHSA, the Jones Act, and cognate state wrongful death statutes.

### *B. Private Law Conceptualism and Statutory Functionalism*

The functionalist's tendency to advance statutory purpose beyond the letter of legislation increases conflicts between statutory and private law norms. Take *Gaudet* or *Higginbotham* as examples. Assume that a relational understanding of duty required redress for loss-of-society injuries in both cases. The court's understanding of the aims of the statutory regime will determine whether private law's generous remedies in the gap are consistent with relevant legislation. DOHSA and the Jones Act's liberal, remedial character may recommend an expansive private law remedy where Congress has not spoken explicitly. On the other hand, the fact that the statutes had been consistently read to preclude such relief raises the possibility that faithful agency requires similar limitations in the background law. If that latter argument prevails, the claimants in *Gaudet*

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325. Zipursky, *supra* note 324, at 38 (describing courts as using a "one person" metaphor in loss-of-consortium suits).

326. *See, e.g.,* *Bulloch v. United States*, 487 F. Supp. 1078 (D.N.J. 1980) (deciding whether a loss-of-consortium action was available when a couple had divorced and reconciled, but not remarried).

327. *Cf.* Martin Stone, *The Significance of Doing and Suffering*, in *PHILOSOPHY AND THE LAW OF TORTS* 131, 131–32 (Gerald J. Postema ed., 2001) (positing that instrumentalism fails to provide the necessary "account of tort law which attaches direct normative significance to the relation that exists between two persons whenever it appropriately can be said, concerning a certain injury, that one person 'did it' and the other 'suffered it'").

328. Zipursky, *supra* note 324, at 37 ("For even in family member cases, the law is . . . uncomfortable permitting a plaintiff t[o] sue for torts to a third person . . .").

and *Higginbotham* might lose even if they would have prevailed as a matter of private law in the absence of any legislation.<sup>329</sup>

Even if statutory purpose points against relief, the plaintiffs might try to leverage the background private law in their favor. While a strain of statutory functionalism is hostile to insulating judicial norms from legislative purpose,<sup>330</sup> purposivism is not uniformly critical. Hart and Sacks recognized the value of “harmoniz[ing]” statutes with “more general principles and policies of law,” even to the point of requiring clear statements to abrogate aspects of the legal system that “transcend the wishes of any particular session of the legislature.”<sup>331</sup> This purposivist proviso has little force when the background private law reflects instrumental judicial policymaking.<sup>332</sup> If we understand such doctrine on conceptual terms, preserving background private law would respect and promote the systemic coherence of legal reason that Hart and Sacks sought to foster.

First, Hart and Sacks instructed interpreters to presume that legislative drafters were reasonable people “pursuing reasonable purposes reasonably.”<sup>333</sup> Imagine now that a statute contains a gap, such as omission (but not explicit exclusion) of nonpecuniary damages. Imagine also that, as conceptualists argue, the law of negligence is a coherent and relatively stable body of doctrine capable of resolving disputes in a principled, disciplined fashion. A presumption preserving this background private law in the gap would promote coherence, reason, and predictability in the body of law as a whole, particularly if arguments from statutory purpose do not point in one direction. A reasonable legislator would want courts to draw on this body of doctrine—a body that “transcend[s] the wishes of any particular legislative session”—to fill out the legislative regime.<sup>334</sup>

Second, the conceptual theorist’s claim that private law is not jurisprudentially fungible with legislation can affect the application of Hart and Sacks’s “*principle of institutional settlement*.” That principle holds that “decisions which are the duly arrived at result of duly established procedures” for making decisions should be “accepted as binding.”<sup>335</sup> That principle appears circular until linked with the related principle assigning decisions to the institutions best suited to decide particular questions.<sup>336</sup>

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329. The same problem occurs if we reverse the positions. If a conceptual inquiry found no right to loss of consortium but DOHSA and the Jones Act did, a purposive approach creates a conflict with the private law rule, however sound it might be on conceptual terms.

330. See *supra* Part IV.B.

331. See HART & SACKS, *supra* note 19, at 1209, 1376; *supra* Part IV.A.

332. See *supra* Part IV.B.

333. HART & SACKS, *supra* note 19, at 1378.

334. *Id.* at 1377.

335. *Id.* at 4.

336. See ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 132 (1998) (noting apparent circularity); Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1150 (2005) (linking institutional competence with settlement).

Legal process theorists aspire to match decisionmaking authority with competence in defining the procedures due for resolving particular questions. With that in mind, recall the claim that private law is the domain of corrective justice suitable to adjudication, while public law concerns matters of distributive justice proper to the legislature. This distinction resembles one drawn by Lon Fuller, whose thought looms large in the legal process tradition. Fuller argued that adjudication is most appropriate for problems amenable to resolution by focused, reasoned argument from principles and presentation of proofs.<sup>337</sup> Adjudication is inappropriate for “polycentric” problems marked by complex, interdependent relationships and repercussions.<sup>338</sup> These tasks, such as setting appropriate wages and prices, are better resolved by market negotiation or managerial direction.<sup>339</sup> The multifactor considerations underlying judgments of distributive justice mark those decisions as quintessentially polycentric, in contrast to corrective justice’s more focused tasks of determining a particular party’s rights and restoring equilibrium. Sound application of the principle of institutional settlement steers such private law disputes toward adjudicative resolution by established juridical principles.

An interpreter can therefore presume that a reasonable legislature, whose core competence concerns distributive justice, did not intend to indirectly disrupt the functioning of this system of corrective justice.<sup>340</sup> Such a stance does not entail denigration or hostility toward the legislature’s prerogative. Even coherent, purposive, and preemptive statutes can leave matters unaddressed in explicit terms; when they do, one can reasonably assume the legislature did not intend to deprive the legal system of preexisting, principled sources of law. Nor does this deny that legislatures can rebut the presumption and modify background private law. Different legal institutions have characteristic forms of norms and modes of action, and a presumption against legislative abrogation of background private law tracks that recognition.

This push and pull between statutory purpose and background private law norms here will resemble the unstable federal doctrine of “obstacle” preemption discussed in Part IV.B. There, a federal court attempts to reconcile respect for the purpose and policies of federal legislation with a background presumption against preemption rooted in respect for state sovereignty. Here, the statutory functionalist similarly looks to extend legislative norms beyond their semantic domain while adhering to a

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337. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978) (identifying the process of “presenting proofs and reasoned arguments” as “the distinguishing characteristic of adjudication”).

338. *Id.* at 394–95.

339. *Id.* at 398–99.

340. The same conclusion follows if tort law is a system of private recourse provided by the state, but whose particular norms the state does not directly endorse. As with corrective justice, civil recourse theories focus on principles of relational rights and obligations. Thus, civil recourse theorists have advanced similar arguments concerning institutional competence. *See* Goldberg & Zipursky, *supra* note 10, at 1839–40.

presumption against displacement of background private law. The underlying reasons for the respective presumptions are not identical, though treating private law as a domain distinct from public law's realm of distributive justice is reminiscent of notions of dual sovereignty.

The conceptualists' understanding of private law as relatively autonomous and coherent, combined with the legal process theorists' valuation of coherence and reason in the legal fabric, lead to a creative tension at the intersection of private law and statute. The results of individual inquiries will be varied and particularistic—much like obstacle preemption in federal law—but the counterbalance that the private law conceptualist adds to the mix will permit persistence of background law in some cases of conflict. This stands in contrast to the regular subordination of private law norms to statutory purpose that is likely to occur when judicial doctrine is understood in instrumental terms.

### C. *Private Law Conceptualism and Statutory Formalism*

Private law conceptualism rejects the instrumentalist's regulatory understanding of the doctrine, while statutory formalists limit a statute's domain to its reasonably clear semantic meaning. These two features offer mutually reinforcing reasons for preserving background private law doctrine in statutory gaps.

#### 1. Against Extension of Statutory Purpose

Textualists are unwilling to expand a statute's reach beyond its reasonably clear semantic meaning, even if doing so advances the statute's policy or purpose. For these reasons, a party seeking to invoke a statute has to rebut a strong presumption *against* its applicability.<sup>341</sup> The statutory formalist would accordingly reject an approach like *Moragne*, in which a court extends the reach of textually inapplicable statutes to govern a dispute. When, as in most federal cases today, courts are understood to lack general common law powers, the inapplicability of any statute entails that a plaintiff fails to state a claim. In state courts, or in enclaves of federal common law, that conclusion does not follow. Rather, the court could treat the question as one governed by private law norms operating within the court's common law residuary. A counterfactual *Moragne* might overrule the *Harrisburg* because of its flawed understanding of duty doctrine. But rather than engaging in compromise-upsetting legislative analogy, the Court would be simply applying private law principles where the legislature has not spoken.

Sometimes, as in *Moragne*, a statutory rule matches what a court could have found as a matter of private law. Other times, background doctrine may depart from the adjacent statute's decisional rules. *Gaudet* offers such an example. Assume that (a) judicially elaborated private law would allow

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341. See Easterbrook, *supra* note 5, at 533–34.

for the *Gaudet* plaintiff's loss-of-society action, but (b) adjacent statutes indicate a policy favoring pecuniary damages only. Extension of statutory purpose would extinguish remedies to which the claimant would have been entitled by a common law court's application of private law principles. In terms of respecting the textual domain of a statute, tamping out a private law remedy here is as problematic as extending such a remedy from a statute. It treats Congress's decision to provide only pecuniary damages under DOHSA and the Jones Act as a decision to also eliminate loss of society in other actions on which Congress did not legislate. The statutory formalist's presumption against a statute's applicability protects preexisting private law rights.

## 2. Against Displacement

Statutory formalism's understanding of a statute's domain does most of the work in rejecting extension of legislative policy beyond a statute's domain. A conceptualist approach to private law is most critical for considering the further argument that *no* judicial elaboration of any kind of law in the gaps is permitted.

The concerned formalist replying to the analysis above may echo *Higginbotham* and argue that allowing claims in *Moragne* and *Gaudet* upsets an implicit compromise that relief in maritime death suits should go as far as legislation provides and no further. On these grounds, statutes extinguish private law within their orbits, even by their silence. This brings us back to the formalist's reasons for inferring from silence a wide margin of preemption of background private law: a constitutional preference for policymaking by legislatures and doubts about courts' comparative competence in lawmaking. Conceptualist understandings of private law have greater immunity from these objections than the instrumentalist approach exemplified by the actual *Gaudet* majority.

Both objections assume that resolution of legal uncertainty requires lawmaking on instrumentalist terms.<sup>342</sup> Remove that premise and the case for a negative inference from silence is weaker. Consider the prophylactic norm protecting the legislature's supremacy. If duty norms are forward-looking, governance-based rules dependent on interest-balancing, policy analysis, or risk-spreading, judicially generated private law in the gaps competes directly with the legislature. By contrast, conceptual justifications rely primarily on backward-looking, well-established norms of relational duty between injurer and sufferer. On these terms, the enterprise of private law is a different "market," so to speak, than prescriptive regulation. As with other markets, the state helps construct private law's forum of civil recourse or corrective justice, but it does not follow that the state promulgates the forum's norms in top-down, legislative

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342. Cf. *Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408, 411 (7th Cir. 1987) (Easterbrook, J.) ("An ambiguous legal rule does not have a single 'right' meaning; there is a range of possible meanings; the selection from the range is an act of policymaking.").



fashion.<sup>343</sup> If statutory formalism turns on constitutional considerations like respect for legislative supremacy and compromise, preserving background private law so conceived is less problematic.

A conceptual understanding of private law also harmonizes apparently inconsistent state constitutional structures that include both inherent common law powers *and* strong norms of legislative supremacy and separation of powers.<sup>344</sup> Allowing a court to elaborate—in common law fashion—noninstrumental rules of private law where the legislature is silent recognizes the traditional judicial prerogative without trenching on the legislature's primacy in policymaking. Similarly, conceptual understandings of private law, with their emphasis on craft, doctrinal facility, and pursuit of principled coherence, mesh with the plausible arguments noted above that the constitutional purpose of state judicial elections is to open public offices to talents irrespective of political connections.<sup>345</sup>

Conceptualism also complicates preemptive arguments grounded in institutional competence. A central argument against instrumentalism is that conceptual approaches do not require courts to undertake the unwieldy policy balancing and unmoored value choice involved in distributive justice by adjudicative means. If, for example, tort law is the legal form of corrective justice, and if corrective justice is particularly well suited to adjudication, the institutional arguments regarding background tort law flow in favor of the courts, not legislatures. In short, while some of the worries animating formalists' hostility toward federal common lawmaking are still germane to state courts' gap filling under instrumentalist premises, conceptual understandings mitigate such concerns across the board.

The conceptualist's emphasis on private law's coherence further reassures the statutory formalist. Just as statutory formalists are willing to assume the absence of an explicit statute of limitations does not entail an unlimited time to file, they could also be willing to look to a stable background law to inform silences on tort law duties and remedies.<sup>346</sup> This is because "statutes fit into the normal operation of the legal system unless the political branches provide otherwise."<sup>347</sup> Textualists seek such integration because their approach treats as authoritative the meaning a

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343. See Goldberg, *supra* note 77, at 1656 ("[Private] law's authority resides as much in its ability to articulate recognizable [extralegal] norms of conduct as in the state's enforcement power."); Zipursky, *supra* note 77, at 650 ("[Civil recourse theory leaves open the possibility that there are many cases where enforcement of private rights of action leads to undesirable or unjust outcomes, yet the state is not necessarily responsible for those outcomes.").

344. See *supra* Part IV.C.

345. See *supra* Part IV.C.

346. Cf. Manning, *What Divides*, *supra* note 16, at 82 n.42 ("[T]extualists read otherwise unqualified statutes of limitations in light of the settled judicial practice of equitable tolling.").

347. Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1913, 1914 (1999).

“reasonable user of language” would attribute to the statute “in the circumstances in which it is used.”<sup>348</sup> To harness that meaning, the interpreter must account for “assumptions shared by the speakers and the intended audience,”<sup>349</sup> and settled principles of background law are essential for grasping that point of view.<sup>350</sup> Even a statutory formalist could then be unwilling to treat a gap as a compromise-precluding repair to general tort principles.

Of course, absent some prepolitical or constitutional right to private law recourse in particular forms,<sup>351</sup> a statute’s terms could extinguish the duty underpinning wrongful death actions or even replace negligence law as a whole.<sup>352</sup> When the background law contradicts express legislative rules covering a dispute, the background must yield law. The legislature can also limit the court’s repair to background law “by enacting a closed list” of remedies, for example.<sup>353</sup> The question is whether the explicit choice of one form of remedy, or of providing a remedy to one class of persons, without more, constitutes a “closed list” precluding other relief that would have been available in a nonstatutory context.<sup>354</sup> The analysis above gives reasons why a statutory formalist need not treat silence as impliedly clearing background law beyond the statute’s semantic domain.

This restrained approach to legislation in the vicinity of private law resembles some statutory formalists’ bid to bring textualism’s interpretive discipline to federal preemption doctrine. They argue that preemption of state law that is an “obstacle” to congressional purpose commits the same sins of the purposive approach in ordinary interpretation.<sup>355</sup> Courts, they argue, should treat state law as preempted only when its rules contradict federal law governing the same matter, not because of purposive emanation of legislative policy.<sup>356</sup> Justice Clarence Thomas, the Court’s sole

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348. Manning, *What Divides*, *supra* note 16, at 81.

349. Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 *CHI.-KENT L. REV.* 441, 443 (1990).

350. *See* Easterbrook, *supra* note 347, at 1913 (“Language takes meaning from its linguistic context, but historical and governmental contexts also matter.”); *see also* Pojanowski, *supra* note 14, at 482–83 (discussing the role of context in textualist theory).

351. *See* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 *YALE L.J.* 524 (2005) (defending such a constitutional right). This Article takes no stance on such claims.

352. *See, e.g.*, The Accident Compensation Act 2001 (N.Z.) (displacing New Zealand’s common law negligence regime for personal injuries with a no-fault reimbursement system).

353. Easterbrook, *supra* note 347, at 1914.

354. *Cf.* *Nat’l R.R. Passenger Corp. v. Nat’l Ass’n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (“This principle of statutory construction reflects an ancient maxim—*expressio unius est exclusio alterius*.”).

355. *See* *Wyeth v. Levine*, 555 U.S. 555, 587 (2009) (Thomas, J., concurring) (describing practice as illicitly “expand[ing] federal statutes beyond their terms”); Nelson, *supra* note 269, at 231 (“[C]onstitutional law has no place for the Court’s fuzzier notions of ‘obstacle’ preemption . . .”).

356. *See* *Wyeth*, 555 U.S. at 588 (Thomas, J., concurring) (stating that “[p]re-emption must turn on whether state law conflicts with the text of the relevant federal statute[s]” understood in terms of “ordinary meanings”); Nelson, *supra* note 269, at 231–32 (arguing

consistent proponent of this approach, has not persuaded his colleagues thus far,<sup>357</sup> but the Court has become less willing to find implied preemption of an entire field of state law, often requiring express statutory language before administering this harsher medicine.<sup>358</sup>

The conceptualist's theses about the distinctiveness and relative autonomy of private law make such analogies possible. Federal preemption doctrine presupposes two legitimate legal domains operating on two different plains, with one body of law capable of displacing the other when the two conflict on the same subject matter. Private law conceptualism allows for this kind of jurisprudential pluralism, while the statutory formalist's restrained approach to interpretation allows that defeasible body of private law to persist even when it conflicts with the spirit, but not the letter, of public legislation.

#### *D. Implications and Further Questions*

Under functionalist and formalist approaches to statutory interpretation alike, background private law is more likely to persist in the gaps of legislation when the interpreter understands that body of doctrine on conceptualist terms. The more formalist the interpreter, the less likely she will be to invoke legislation to displace private law doctrine in the spaces between statutes. This conclusion may be counterintuitive to those steeped in federal jurisprudence, where formalist statutory interpretation and respect for separation of powers are almost synonymous with effacement of the judicial role. Given the premises of traditional private law conceptualism, legislative supremacy and judicial elaboration of law are more than consistent; respect for the compromises struck by a supreme legislator can even require preservation of judicial power to apply private law in the gaps.

For private law, further important questions also remain in the weeds of conceptualist theory, or, more precisely, conceptualist *theories*. Variations in the approaches, smoothed over here to sketch general tendencies, may affect the intersection of private law and statute. Private law's insulation from public legislation appears most secure when theorized in the apolitical abstraction of the conceptual formalism propounded by theorists like Professor Weinrib. Doctrine understood along the lines of civil recourse theorists, whose pragmatism nudges conceptualism closer to the dynamic,

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that "preemption occurs if and only if state law contradicts a valid rule established by federal law" in terms of "the particular words and contexts of the federal statutes," and not merely because "federal law serves certain purposes").

357. Justice Thomas garnered a partial majority for this approach in *Pliva, Inc. v. Mensing*, 131 S. Ct. 2567 (2011), where he found a conflict. *Id.* at 2577. Whether his colleagues will join him when rejection of obstacle preemption protects state law is uncertain. See Daniel Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 6 (2013) ("[I]t is possible, though far from clear, that Justice Thomas's approach will gain support from his colleagues.").

358. See Nelson, *supra* note 269, at 227 & n.12 (collecting cases).

controversial value choices that mark functionalism, may fare differently.<sup>359</sup> Conceptualist theories thus may exist on a spectrum of autonomy from public law theory's interpretive reach. Such a continuum further underscores the provocative possibility that a union of formalist constraint—rule-based, modern formalism in statutory interpretation paired with the abstract principles of classical formalism in private law theory—leaves the widest scope of judicial freedom in the gaps consonant with legislative supremacy and democratic disagreement.

#### CONCLUSION

New private law jurisprudence and public law theories of statutory interpretation have largely remained strangers to each other, raising the question of whether private law needs an intervention from statutory interpretation. The arguments above indicate that answer should depend most importantly on the interpreter's understanding of private law and secondarily on the interpreter's method of statutory interpretation.

For the private law instrumentalist, in most every case the gap-filling interpreter must reconcile the private law prerogative with public law theories of statutory interpretation that are not agnostic about how judicial actors make policy beyond the linguistic boundaries of statutes. All questions of tort law within the vicinity of statutes—in short, most questions in contemporary practice<sup>360</sup>—will also be questions of statutory interpretation. Most tort theorists, including instrumentalists, are not very interested in statutory interpretation.<sup>361</sup> But if the instrumentalists are correct, this indifference to legislation and its interpretation is unjustified.

By contrast, conceptualism entails that fewer problems at the intersection of private law and legislation will in fact be questions of statutory interpretation. For the statutory formalist, interpretation ends at the shores of semantic meaning, leaving disputes in the gaps as questions of unwritten, autonomous private law. On those grounds, private law scholars' disengagement from statutory interpretation theory is more understandable. Matters are more complicated for the statutory functionalist who must reconcile legislative purpose with private law norms. That fact is not surprising, given how nonformalists tend to understand "interpretation" as a task broader than reasonably identifying an enacted text's linguistic

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359. See Oberdiek, *supra* note 153, at 192 (stating that Zipursky's approach is "constrained instrumentalism" that "endorses form over function," but not "to the exclusion of function").

360. See Perlman, *supra* note 228, at 814 ("[I]t may be a rare case where one of the parties [to a tort case] cannot assert some legislative enactment in support of their claim or defense.").

361. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 cmt. f reporters' note, at 165 (Proposed Final Draft No. 1. 2005) ("The task of understanding the purpose or purposes underlying a statute is often difficult. Even so, the theoretical debates that have marked the general project of legislative interpretation in recent years have not broken out in these negligence per se cases.").

meaning.<sup>362</sup> Even conceptualism will not remove private law entirely from the sights of purposive statutory interpretation, but it is more likely to keep that received doctrine intact.

These divergent results from instrumentalism and conceptualism are not isolated phenomena. They mirror, for example, federal and state courts' competing approaches to conflicts-of-law problems like the extraterritorial application of statutes. As Professor Caleb Nelson has detailed, federal courts tend to regard such matters as questions of statutory interpretation, while state courts treat them as presumptively governed by uncodified choice-of-law rules.<sup>363</sup> Professor Nelson explains that this dichotomy is part of a larger pattern of federal courts' "statutification" of problems at the intersection of unwritten law and legislation, in contrast to state court practice of treating uncodified doctrine as outside a statute's domain unless legislation explicitly displaces it.<sup>364</sup>

This parallel is illuminating both for private law theory and for other bodies of unwritten law. Nelson argues that the "federal" model responds to "broad statements about unwritten law in our federal system," particularly *Erie*'s endorsement of Holmes's thesis that "law in the sense in which courts speak of it today does not exist without some definite authority behind it."<sup>365</sup> If no law on those terms can be unwritten, the question of a court's source of *authority* to promulgate law is continually relevant. Modern instrumentalism in private law similarly originates in Holmes's rejection of unwritten law immanent in common law decisions, raising cognate questions about judicial authority and discretion. *Erie*, after all, started as a negligence case about duties to alleged trespassers.<sup>366</sup>

When judicial doctrine is both fungible with and subordinate to the legislature's directives, it behooves the court to always treat adjacent statutes as pertinent. We should not be surprised, then, when considerations of statutory interpretation originating in federal public law theory intrude on even a state court's gap-filling prerogative, at least when that court views background private law on the same kind of instrumental terms. In the words of a leading federal scholar, "[t]he power of positivistic thinking by now ought to have carried us even beyond the declaration in *Erie* . . . . *There is no state general common law, either.*"<sup>367</sup> By impliedly accepting the federal model of unwritten law, private law instrumentalists also take on many of the worries about judicial competence and legitimacy

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362. Cf. Ronald Dworkin, *Law As Interpretation*, 9 CRITICAL INQUIRY 179 (1982).

363. Nelson, *supra* note 1, at 660–61.

364. *Id.* at 666–67, 724.

365. *Id.* at 724 (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938)). Professor Nelson himself has concluded that the reports of the death of unwritten federal law have been greatly exaggerated. See generally Nelson, *supra* note 65.

366. *Erie*, 304 U.S. at 69–70.

367. Weinberg, *supra* note 69, at 819. Professor Weinberg uses this similarity to argue that federal courts should have more freedom to create common law than current doctrines allow.

accompanying that structure, even when the interpreter is a state court.<sup>368</sup> Private law conceptualism's rejection of this reductive understanding of uncodified law leaves its appliers less burdened by those concerns, hence the resemblance between Nelson's "state law model" and the private law conceptualist's inclination to treat legislative gaps as governed by unwritten law.<sup>369</sup>

Finally, this Article's analysis of the relationship between legislation and private law doctrine offers fresh evidence for methodological debates in private law theory. As noted, much of the practice of private law in the vicinity of legislation assumes substantial independent judicial judgment to develop doctrine where the legislature has not spoken.<sup>370</sup> This freedom is most readily justified when that background private law is understood on noninstrumental grounds. By contrast, the obstacles instrumentalist theories pose to accepted practices demand either diminished judicial autonomy in legislative gaps or a fresh justification for the status quo that incorporates public law theories on legislation. For many instrumentalists, the first option may not be palatable and the second, while not without potential resources, requires more work than many commentators have expended thus far.<sup>371</sup> Absent further work along those lines, noninstrumentalist understandings of private law fit more naturally with the contemporary theories of legislation and longstanding practices of common law courts. If theories that explain more of a subject are superior to those that explain less, this analysis of private law and legislation's domain suggests an important interpretive data point favoring conceptualist theories to instrumentalist readings of private law.<sup>372</sup>

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368. Many, but not all. As noted, the concerns about federalism or the Judiciary Act that dog federal common law are inapplicable.

369. As a corollary, the legitimacy of state courts' use of Nelson's "state model" turns on the courts' conception of the unwritten law at stake. The more a jurisdiction's choice-of-law rules reflect the policy-laden interest balancing of the conflicts revolution, and the more a jurisdiction rejects the conceptualism of the first *Restatement* approach, the stronger the argument that that jurisdiction's courts should adopt the federal model and treat legislative gaps as questions of statutory interpretation. Professor Brainerd Currie, one of that revolution's leaders, certainly did. See Nelson, *supra* note 1, at 682.

370. This is so even for textualist state courts. See Pojanowski, *supra* note 14, at 529–32 (identifying tort law practices of state courts in regard to private rights of action and negligence per se that are in tension with the restraint of federal-style textualism).

371. Cf. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 cmt. f reporters' note, at 165 (2011) ("[T]he theoretical debates that have marked the general project of legislative interpretation . . . have not yet broken out [in torts].").

372. See COLEMAN, *supra* note 143, at 38–41 (2001) (positing the "consilience" criterion in which a theory that explains more features of the subject is superior to one that explains fewer); cf. Zipursky, *supra* note 142, at 466 (arguing that conceptualist approaches to tort law offer a superior account of the doctrine's structure and content).