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FRANCIS Palmer died of strychnine poisoning on April 25, 1882, murdered by his sixteen-year-old grandson, Elmer.[1] This family tragedy would not have caused any legal perplexity except for one additional circumstance. Elmer was (not coincidentally) the main beneficiary under his grandfather's will.[2] Could Elmer inherit from the man he murdered? Following what they considered the letter of the law, the lower New York courts ruled in Elmer's favor. But in an unprecedented ruling, the Court of Appeals reversed, denying Elmer his inheritance because of the injustice of allowing him to benefit from his crime.[3] Although the result may seem commonsensical, there was a vigorous dissent, and an earlier North Carolina case had gone the other way.[4] Ever since *Riggs v. Palmer* was decided, scholars have debated whether it was a usurpation of legislative power or a triumph of principle over technicality.

Almost from the beginning, *Riggs* has fascinated students of jurisprudence, including many legal luminaries. Among others, *Riggs* attracted the attention of Pound,[5] Cardozo,[6] Hart and Sacks,[7] Dworkin,[8] and Posner.[9] And little wonder: The case arose near the beginning of what has proved to be an age of statutes.[10] It vividly poses perennial questions

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1. *See* Brief for Appellants at 2, Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889).
2. *See Riggs*, 22 N.E. at 188. Further details can be found in Section I below.
3. *See Riggs*, 22 N.E. at 191.
4. *See* Owens v. Owens, 6 S.E. 794 (N.C. 1888) and *infra* text accompanying notes 17-20.
5. *See* Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 382 (1907). Pound argued vigorously against the ruling, no doubt alarmed that it opened the door for judicial resistance to progressive legislation. A few years earlier, in a precursor to *Lochner*, the author of the majority opinion had struck down an anti-sweatshop law. *See In re* Jacobs, 98 N.Y. 98 (1885).
6. *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 40-43 (1921).
7. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 68-102 (1994). Hart and Sacks use the *Riggs* problem as the basis for a probing analysis of the relationship between judge-made law and legislation.
8. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 23-39 (1977). For further discussion of Dworkin's views, see *infra* text and accompanying note 47.
9. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 105-07 (1990).
10. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 5-7 (1982).

about the judicial role after this statutory eclipse of the common law. Is the judicial role in developing public policy condemned to wither in the shadow of the legislature? Or do courts still have their own part to play in the search for justice? Even today, judges and scholars continue to struggle with these questions, sometimes with results that do not compare very favorably with *Riggs*.[11]

Now, some eleven decades after *Riggs*, seems an appropriate time to take stock of its continuing significance. After a close look at the case itself and its impact on legal doctrine, this essay will examine the implications of *Riggs* in three settings. The first is the jurisprudential dispute between H.L.A. Hart and Ronald Dworkin over how courts fill gaps in legal rules. Hart believes that judges must reach outside the law to fill gaps, acting much like legislatures, while Dworkin thinks they are guided by specifically *legal* principles. The second setting is the ongoing debate over statutory interpretation.[12] Although the debate is complex, at a crude level it can be seen as a contest between those favoring the letter and others favoring the spirit of the law. *Riggs* appears to be a good test case for the "new textualism," though as we will see, that appearance may be deceiving. Third is the relation between common law and legislation. Now that so much law is statutory, the viability of judge-made law is unclear. To what extent has the common law become an anachronism in this age of statutes? All three issues involve, loosely speaking, a clash between formalism and pragmatism. The goal here is not to resolve that clash, but to assess the relevance of *Riggs* to the contending positions.

One reason that *Riggs* has attracted so much scholarly attention for so long is that it can be viewed in several perspectives, seeming to speak to different jurisprudential issues. Little did Francis Palmer know what large issues of legal theory would be put in play by his death.

I. *RIGGS* AND THE SLAYER RULE

The plot summary of *Riggs* is simple: grandpa makes will, boy kills grandpa. Although this simplistic version of the case is enough to raise the basic legal issue, a deeper understanding of the case and its context is helpful. We will begin with a closer look at the case as it came before the New York Court of Appeals, then analyze how the Court of Appeals handled the case, and finally put the case in context within the law of trusts and estates.

Although somewhat more complex than the one-sentence summary

11. For discussion of some parallel contemporary issues, see *infra* text and accompanying notes 37–45.

12. For an overview, see WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (2d ed. 1995). A useful comparative study can be found in INTERPRETING STATUTES: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1991).

above, the facts of *Riggs* are relatively straightforward.[13] Two years before his death, Francis made a will leaving two small bequests to his daughters (one of them Mrs. Riggs). The remainder of his estate was to go to Elmer, who was living with Francis as part of the family. (We know nothing of Elmer's parents. Perhaps he was an orphan.) The will also provided support for his mother, Susan, from the income of a farm owned by Francis. If Elmer survived Francis but later died while still underage and without any family of his own, the property would next go to the two daughters. As estate plans go, this was a simple one.

Francis was a widower at the time of the will, but he later remarried. A prenuptial agreement required him to amend his will to provide support from the farm for his new wife. Just two months later, Elmer murdered him to prevent him from changing his will. Elmer was only sixteen at the time. He was convicted of second-degree murder and sentenced to the reformatory. The will was duly admitted to probate. The two daughters filed suit for an injunction to prevent him from taking the property.

Surprisingly, the issue of inheritance by the testator's murderer seems never to have been the subject of a reported opinion until shortly before *Riggs*.[14] (Maybe, in those days of swift and widespread capital punishment, murderers rarely lived long enough for anyone to worry much about whether they had been unjustly enriched.) There were only two significant precedents, though neither was precisely on point. The first was a decision of the United States Supreme Court three years earlier. The issue in *New York Mutual Life Insurance Co. v. Armstrong*[15] was whether the beneficiary of a life insurance policy was entitled to the proceeds after murdering the insured. The Court held without dissent that the murderer could not recover the policy proceeds, even if he had originally obtained the policy for legitimate reasons. (There was some reason, however to think that he had actually procured the policy in question with murder in mind.) The ruling seemed to be based mostly on the Court's sense of justice. As Justice Field said in his opinion for the Court:

> [I]ndependently of any proof of the motives of [the beneficiary] in obtaining the policy, and even assuming that they were just and proper, he forfeited all rights under it when, to secure its immediate payment, he murdered the assured. It would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had willfully fired.[16]

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13. This description of the facts is drawn from the majority and dissenting opinions, 22 N.E. at 188-89, 191 and the findings of the trial judge, quoted in the Appellant's Brief at 2-3, *Riggs*.

14. *See* Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803, 845 (1993).

15. 117 U.S. 591 (1886).

16. *Id.* at 600.

Armstrong was admittedly a good precedent for the daughters in *Riggs*, but it was decided strictly as a matter of common law, with no applicable statute. Testamentary disposition of property, in contrast, is a creation of statute, and there might be less room for the court's sense of equity to operate.

The other case, which favored Elmer, was somewhat closer factually to *Riggs*. A North Carolina court had been faced with the question of whether a widow forfeited her statutory dower rights by conniving in the murder of her husband.[17] The only statutory ground for forfeiting dowery was running off with another man. The court considered that ground exclusive, on the theory that "it belongs to the law-making power alone to prescribe additional grounds of forfeiture."[18] Property forfeitures for crime, the court said, "are unknown to our law, nor does it intercept for such cause the transmission of an intestate's property to heirs and distributees, nor can we recognize any such operating principle."[19] The absence of prior authority, the North Carolina court added, "affords a strong presumption against the proposition," and the court therefore decided the issue "upon the reason of the thing."[20] The "reason of the thing," apparently being that property forfeitures should be implied.

Because the North Carolina case involved statutory property rules, rather than common law, arguably it was more closely on point than the Supreme Court's insurance case. But the North Carolina case was also arguably distinguishable, besides having the defect of coming from a less exalted forum than the United States Supreme Court. Because the North Carolina case involved dower, which was outside the control of the testator, the testator's presumed intentions were irrelevant. In the testamentary context, however, it might be considered much more relevant that the testator would presumably not have wanted his killer to inherit. If we assume that the statute of wills, unlike the dower statute, is designed to implement testator intent, the North Carolina case might be considered beside the point.

Given the absence of controlling precedent, it is not surprising that the daughters' brief in *Riggs* struck out for higher ground. "[I]t is for this Court to decide," the brief said, "whether the unwritten law, founded upon natural justice and public policy, is sufficient to prevent this murderer from reaping the benefits of his crime by the aid and protection of the law."[21] In a less ethereal moment, the brief also relied on the Supreme Court's insurance ruling.[22] In contrast, Elmer's brief argued that he was clearly entitled to the property under the will statute and that it was not for the courts to increase the penalty for crime by creating

17. *See* Owens v. Owens, 6 S.E. 794, 794 (N.C. 1888).
18. *Id.* at 795.
19. *Id.*
20. *Id.*
21. Appellants' Brief at 4, *Riggs*.
22. *See id.* at 8-9.

additional forfeitures.[23] Neither brief cites the North Carolina case, which may not have been accessible to the lawyers at that point.

Judge Earl wrote the majority opinion in *Riggs*.[24] Unlike the lawyers, he discussed the North Carolina case, but he considered it wrong in principle.[25] He also relied on *New York Mutual Life Insurance Co. v. Armstrong*.[26] As he saw it, the statutes regulating wills "if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer."[27] But he saw no reason to give the statutes this effect. "What could be more unreasonable," he asked, "than to suppose that it was the legislative intention in the general laws passed for the orderly, peaceable, and just devolution of property that they should have operation in favor of one who murdered his ancestor that he might speedily come into possession of his estate?"[28] This legislative intent being "inconceivable," the court need not be constrained "by the general language contained in the laws."[29] "Besides," he continued, "all laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law,"—here, the maxim that no one can profit from his own wrong.[30] These maxims "have their foundation in universal law administered in all civilized countries," and in this particular setting were exemplified by the codes of civil law countries denying murderers their inheritance.[31]

As this brief description indicates, the majority opinion touches different chords. It mentions the legislature's presumptive intent and the ill effects of a mechanical application of the statute of wills. It also relies on overarching legal principles, said to be implicit in the common law and the law of all civilized nations—an argument seemingly based on natural law. It seems unclear, in short, whether the court was trying to carry out the intent of the legislature in circumstances unforseen by the drafters or was trying to impose its own notions of justice despite unhelpful legislation, or some hybrid of the two.

Judge Gray's dissent began by conceding that, if the matter were one of conscience, he would have joined the majority. But instead, he said, "[w]e are bound by the rigid rules of law, which have been established by the legislature, and within the limits of which the determination of this question is confined."[32] Disposition of property at death involves "matters of which the legislature has assumed the entire control, and has un-

23. *See id.* at 6-7.

24. For a discussion of how *Riggs* fit into the nineteenth century history of statutory interpretation, see William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 822 (1985).

25. *See Riggs*, 22 N.E. at 190-91.

26. 117 U.S. 599 (1886). *See Riggs*, 22 N.E. at 190.

27. *Riggs*, 22 N.E. at 189.

28. *Id.* at 190.

29. *Id.*

30. *Id.*

31. *Riggs*, 22 N.E. at 190.

32. *Id.* at 191 (Gray, J., dissenting).

dertaken to regulate with comprehensive particularity."[33] One particularly troubling aspect of the case was the evidence that Elmer killed Francis specifically to keep him from revoking his old will. Still, Judge Gray said, there had been no actual revocation. The statute provides that: "No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked or altered otherwise."[34] No such methods of revocation having been used in the case at hand, "the will of the testator is unalterable."[35] In effect, he concluded, the courts was being asked to write another will for Francis, to further punish Elmer for his crime.[36]

Like the majority opinion, Justice Gray's dissent is open to more than one reading. His reliance on the revocation provision makes the dissent sound to some extent like a plain-meaning interpretation of the wills statute. On the other hand, he also emphasizes the essentially statutory nature of wills law, seemingly suggesting that even apart from specific statutory language there is no room for judge-made rules.

Whatever its rationale, *Riggs* has come to play an important role in property transfer law. The result of a murder might be to position the murderer to receive property directly from the victim, as in *Riggs*, or through insurance or dower, as in the other cases discussed above. There are also endless other permutations: joint tenancy, community property, statutory forced shares, joint bank accounts, powers of appointment, contingent remainders, and other property interests limited only by the ingenuity of lawyers. *Riggs* has not merely been a precedent for the interpretation of wills statutes, but for the treatment of this whole array of property transfers to murderers. In this respect, it seems more akin to a common law ruling than a reading of a particular New York statute.

Riggs became the foundation for what is now known as the slayer rule. Once the issue was raised by the courts, the principle of *Riggs* was largely accepted by legislatures. Except in nine states, the subject is now covered mostly by statute.[37] With the possible exceptions of New Hampshire and Massachusetts, every state accepts some version of the slayer rule, depriving the killer of the benefit of the victim's property.[38] But despite this virtual consensus, many potential problems can arise. First, in a given state, only certain situations may be covered by statute, raising the question whether the statute is the exclusive source of relief or other situa-

33. *Id.*
34. *Id.* at 192
35. *Id.*
36. *See id.* at 192-93.
37. *See* Mary Louise Fellows, *The Slayer Rule: Not Solely A Matter of Equity*, 71 IOWA L. REV. 489, 505 n.55 (1986); *see also* Charlotte K. Goldberg, Estate of Castiglioni: *Spousal Murder and the Clash of Joint Tenancy and Equity in California Community Property Law*, 33 IDAHO L. REV. 513 (1997) (discussing a case in which the court maneuvered around the statutory slayer rule to avoid a situation in which a wife would have received a greater share of property held in joint tenancy by killing him than she could have received by divorcing him).
38. *See* Sherman, *supra* note 14, at 805.

tions remain subject to judge-made doctrines.[39] Second, as mentioned above, there are many possible transfers of property interests that may be triggered by a death, and it is unclear whether they should all be treated the same. It is often particularly difficult to determine whether the slayer's entire interest should be forfeited and who the alternate taker of the property should be.[40] An additional twist occurs when the slayer kills himself as well, so the dispute is between his heirs and those of the testator.[41] Third, there is controversy about whether to apply the rule in cases of mercy killing or assisted suicide.[42] In this context a court cannot rely on a presumed intent of the victim to deny the killer the property; the victim would presumably have no reason to disfavor a killer who acted at his request. Fourth, where the property interest in question is created by an employee-benefit plan, it is an open question whether federal law preempts the state's slayer rule. The language of the federal preemption provision is sweeping, but obviously was not written with homicidal beneficiaries in mind. The preemption issue is essentially a replay of *Riggs* in federal court, with the ultimate outcome yet to be determined.[43]

As my colleague Mary Louise Fellows points out, these complications are not readily dispatched by simply invoking the maxim denying wrongdoers their ill-gotten gains. Instead, they require careful analysis of the impact of a murder in a specific setting on the policies of the property transfer system.[44] She criticizes Judge Gray for portraying the slayer rule as an add-on to property transfer law rather than an intrinsic component of our system for distributing property at death.[45] From the point of view of property law, then, *Riggs* is neither a mere interpretation of a particular statute nor an equitable override of normal property rules. Instead, it is part of a unified system of property law that bridges common law and statute.

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39. This is the focus of HART & SACKS, *supra* note 7. For a recent example, see Gallimore v. Washington, 666 A.2d 1200 (D.C. Cir. 1995).

40. *See* Fellows, *supra* note 37, at 504-05, 521-38; *see also* Grayson M.P. McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 BROOK. L. REV. 1123, 1166-68 (1993) (discussing the effect of Uniform Probate Code revisions).

41. *See* Adam J. Katz, Case Comment, Heinzman v. Mason: *A Decision Based in Equity but Not an Equitable Decision*, 13 QUINNIPIAC PROB. L.J. 441 (1999) (discussing a case in which Indiana Court of Appeals held that when a husband murdered his wife, then killed himself, his heirs are not entitled to inherit the deceased wife's intestate property).

42. *See* Sherman, *supra* note 14, at 808; *see also* Kent S. Berk, Comment, *Mercy Killing and the Slayer Rule: Should the Legislatures Change Something?*, 67 TUL. L. REV. 485 (1992).

43. *See* Metropolitan Life Ins. Co. v. Hanslip, 939 F.2d 904, 907 (10th Cir. 1991) (finding preemption); Mendez-Bellido v. Board of Trustees of Div. 1181, 709 F. Supp. 329, 331-33 (E.D.N.Y. 1989) (finding no preemption); *see also* Sherman, *supra* note 14, at 849 n.218 (proposing that the issue should be governed by federal common law of employee benefits); *see also* Robert D. McClure, Note *Thou Shalt Not Kill (Thy Spouse): A Recent Exception to the ERISA Preemption Doctrine*, 29 J. FAM. L. 129 (1990-1991).

44. *See* Fellows, *supra* note 37, at 490-96.

45. *See id.* at 552.

II. COURTS AS MINI-LEGISLATURES

Assume for the moment that the statute of wills did not dictate any answer in *Riggs*, so that the court had a clear field in which to consider the issue. What method should a court used to decide such "open" questions of law?

One answer was given by H.L.A. Hart, the leading English legal philosopher of the past century.[46] His views are complex, but well encapsulated by Ronald Dworkin in a summary of Hart's position:

> The set of [existing] legal rules is exhaustive of 'the law,' so that if someone's case is not clearly covered by such a rule (because there is none that seems appropriate, or those that seem appropriate are vague, or for some other reason) then that case cannot be decided by 'applying the law.' It must be decided by some official, like a judge, 'exercising his discretion,' which means reaching beyond the law for some other sort of standard to guide him in manufacturing a fresh legal rule or supplementing an old one.[47]

On this view, in the gaps where rules run out, the judge's function is much like that of the legislature's, except for being confined in scope to gap-filling. From a very different jurisprudential perspective, Judge Posner agrees with Hart that judicial gap-filling looks a great deal like legislation. Hard cases, he says, are "frequently indeterminate, rather than merely difficult," so the judge is "bound to be making a value judgment based on intuition and personal experience . . . rather than engaging solely in . . . some special mode of inquiry called 'legal reasoning.'"[48]

Ronald Dworkin has taken quite a different view. He argues that in deciding open issues, courts do not reach outside the law, but instead rely on broad principles that are contained within the legal system itself. One of his main examples is *Riggs*, where "the court cited the principle that no man may profit from his own wrong as a background standard against which to read the statute of wills and in this way justified a new interpretation of that statute."[49]

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46. *See* H.L.A. HART, THE CONCEPT OF LAW 252, 272-73 (2d ed. 1994).

47. DWORKIN, *supra* note 8, at 17.

48. RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 96 (1999). Posner does not think that judges are thereby stepping "outside the law" because he views the making of such value judgments under the appropriate circumstances as part of their accepted institutional role.

49. DWORKIN, *supra* note 8, at 28-29. As we will see in Part III, it is somewhat inappropriate to consider *Riggs* a statutory interpretation case, but Dworkin's main point relates to how courts fill gaps, not to how they read texts. Anthony D'Amato takes a similar position that law includes general principles rather than only explicit rules. *See* Anthony D'Amato, *Elmer's Rule: A Jurisprudential Dialogue*, 60 IOWA L. REV. 1129, 1130 (1975). Dworkin's more recent work continues to rely on *Riggs*, but in more complex ways. For a discussion, see Frederick Schauer, *The Jurisprudence of Reasons*, 85 MICH. L. REV. 847, 851-52 (1987). For a recent critique of Dworkin's view of principles, see Larry Alexander & Ken Kress, *Against Legal Principles*, 82 IOWA L. REV. 739, 785 (1997) ("Legal methodology requires only two types of norms: correct *moral principles* and posited *legal rules*. It does not require *legal principles*.").

Riggs does provide strong support for Dworkin. The majority seems to be at great pains to show that its decision has a "legal" pedigree rather than merely incorporating moral values. The opinion is replete with citations to legal authorities, including Blackstone, treatises on the law of nations, the Supreme Court's opinion in the insurance case, Roman and civil law, and state cases dealing with other inequitable conduct by beneficiaries.[50] A legislative committee report on the slayer rule would hardly have found it necessary to provide such a legal pedigree for disinheriting people who murder their benefactors. Of course, these citations may merely be window-dressing to cover up a personal value judgment. For the window dressing to have any effect, however, the judges must have assumed their audience would view the citations as establishing a specifically "legal" principle available to the court. If they had been seeking only support for their moral view (support that would have been largely redundant), then citations to religious figures or moral tracts would have seemed more appropriate.

Riggs cannot be taken as proof that judges always rely on a narrower range of considerations than legislators. Nor does it prove that ascertainable legal principles, distinguishable from specific rules, actually do exist. But it does show that judges believe in the existence of legal principles that guide their decision when the rules run out (and believe that their audience also prefers them to rely on such principles).

The analogy of judges to legislators is a useful corrective for formalism, but it is an oversimplification. In reality, it seems implausible that judges consider *only* "nonlegal" policies if no clear rule applies. The legislative analogy assumes that true law consists exclusively of rules. This is a mistake that seems endemic among entering law students: they stubbornly believe that "the law" consists of a rule book, which they need only memorize in order to become competent lawyers. Law school would be much simpler if this were true, but in reality becoming a lawyer involves more than simply learning a series of rules. Judges are deeply socialized in the ways of the legal system. Even when no specific rule is exactly on point, they are not likely to suddenly behave indistinguishably from economists, public policy analysts, or moral philosophers. Nor is it likely that a transcript of the judges' conference on a case will be mistaken for the record of a legislative committee meeting. This is not to minimize the reality that judges do make policy, but to call them legislators is a metaphor rather than a literal description of their decisionmaking. Dworkin's own vision of judging may have other flaws, but he seems to be on solid ground in distinguishing the role of judges in open cases from that of legislators.

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50. *See* Riggs v. Palmer, 22 N.E. 188, 189-90 (N.Y. 1889). The breadth of the citations is particularly impressive due to the court's extremely heavy workload, which is said to have led four members of the Court during this period to "work themselves to death." Judith S. Kaye, *"Year in Review" Shows Court of Appeals Continuing Its Great Traditions*, 42 N.Y.L. SCH. L. REV. 331, 333 (1998).

III. TEXTUALISM IN STATUTORY INTERPRETATION

In the previous section, we considered the extent to which judges resemble legislators when they are filling gaps in the law. But this assumes, of course, that there is a gap, so that the case is not covered by some existing rule as properly interpreted. Apart from its statutory context, *Riggs* would have been an easy case, like the Supreme Court's insurance decision. It was only the chilling effect of legislative activity on judicial policymaking that made *Riggs* a problem at all.

To understand the legislation problem posed by *Riggs*, we must begin by considering recent debates over statutory interpretation. Most readers of this Symposium probably have at least a passing familiarity with those debates and with the revival of textualism. For the benefit of newcomers, however, the next two paragraphs offer a brief overview.

The conventional approach to statutory interpretation involves an eclectic mix of reliance on text, legislative history, precedent, canons of interpretation, and policy.[51] In the 1980s, formalists such as Justice Scalia mounted a challenge to this conventional approach in favor of a much more structured method of statutory interpretation.[52] As William Eskridge has explained, "[f]ormalism posits that judicial interpreters can and should be tightly constrained by the objectively determinable meaning of a statute; if unelected judges exercise much discretion in these cases, democratic governance is threatened."[53] Formalists stress that the proper forum for policy making in a democratic society is the legislature. They are dubious of the concept of legislative intent: "Legislation is compromise. Compromises have no spirit; they just are."[54] Hence, when the legislature has failed to speak clearly to an issue, it is useless for a court to try to fill the gap. Nor should courts consult legislative history in a vain effort to determine legislative intent.[55] Knowing that courts will follow only their plain language, legislators will have an incentive to draft carefully and precisely.[56] What this adds up to is, as Judge Easterbrook puts

51. For a fuller discussion, see William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990). A good description of the conventional judicial approach can be found in ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS (1997).

52. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION 18-23 (1997); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994). For a recent overview of the debate, see Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1 (1999).

53. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 646 (1990).

54. Easterbrook, *supra* note 52, at 68. For more on Easterbrook's views, see Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87 (1984).

55. *See* Hon. Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807 (1998).

56. *See* Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1022 (1992).

it, "a relatively unimaginative, mechanical process of interpretation."[57]

The new textualism has not gone unchallenged.[58] Critics have attacked virtually every premise of textualist theory. Perhaps more significantly, even those critics who sympathize with textualist goals attack the implementation of the formalist program by judges. They charge that courts have "begun to use textualist methods of construction that routinely allow them to attribute 'plain meaning' to statutory language that most observers would characterize as ambiguous or internally inconsistent," and even to attribute plain meaning to language that "was nearly universally believed to have a contrary meaning for many decades.[59] Others describe the new textualism as increasing the tension between democracy and the rule of law and serving "as a cover for the injection of conservative values into statutes."[60]

Read against the background of today's debate, *Riggs* may seem a good test case for textualist interpretation. The *Riggs* dissent seemingly echoes the textualist axiom that "[w]e are not free to ignore or augment the legislature's words just because we think it would have said something else, had it but thought of it."[61] The majority, in contrast, apparently sets aside the language of the statute to rely on its purpose. Viewed as a statutory interpretation case, then, *Riggs* looks very much like a replay of *Church of the Holy Trinity v. United States*, in which the Court held that a statute banning the import of employees did not apply to a minister, so ruling in order to avoid what it considered an absurd result.[62]

Indeed, *Riggs* has been given exactly this reading by some distinguished commentators. Reed Dickerson characterizes the *Riggs* court as applying "an exception even though the wills and the intestacy laws of the state recited none," basing the exception on the tacit assumptions of the legislators.[63] Similarly, Judge Posner views the court as having grafted

57. Easterbrook, *supra* note 52, at 67. For a more detailed analysis of formalism, see Edward S. Adams & Daniel A. Farber, *Beyond the Formalism Debate: Expert Reasoning, Fuzzy Logic, and Complex Statutes*, 52 VAND. L. REV. 1243 (1999).

58. *See, e.g.*, CASS SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 182-90 (1996); William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509 (1998); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 549-54 (1992); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 825-31 (1994).

59. Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 752 (1995).

60. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 77 (1994).

61. Justice Alex Kozinski, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1876, 1878 (1999).

62. 143 U.S. 457, 472 (1892). For discussion of *Holy Trinity*, see SCALIA, *supra* note 52, at 18-20; Carol Chomsky, *The True History of the* Holy Trinity *(Case)*, COLUM. L. REV. (forthcoming) (on file with author); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833 (1998).

63. Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1153 (1983).

"an exception onto the statute, the better to carry out . . . the desires the legislators would have had regarding the question if they had foreseen it."[64] More recently, Posner has remarked that to "interpret the statute as entitling the murderer to inherit would have disserved the intentions of testators, the principal interest that the statute protects; it would have been a goofy interpretation."[65] So *Riggs* looks like a classic conflict between the letter and the spirit of the law.

It is not surprising that our reading of *Riggs* should connect with contemporary concerns about textualism. But this reading, while not completely without support in the opinion, risks distorting the real stakes in the *Riggs*. Although it is a seemingly natural approach to the case, we would probably do better to resist viewing *Riggs* as a case about textualism.

To begin with, if the question is textualism, we ought to be able to identify the specific text in question. If the conflict is between the letter and spirit of the law, after all, we should be able to point out the "letter" at issue. But statutory language seems to play only a secondary role in *Riggs*. The majority refers to no specific statutory provisions whatsoever. The dissent does refer to a provision on will-revocation, but seems to be addressing mostly the argument that Elmer intentionally prevented Francis from revoking the will. The revocation provision is much less relevant to the broader question of whether a killer, apart from any specific intent to prevent revocation, should be allowed to benefit under the victim's will. Nor do the briefs focus on any particular language from the statute. Thus, specific statutory provisions seem generally peripheral to the argument, much more so than we would expect if the judges and the parties had conceptualized the issue in terms of fidelity to text. Mimicking Stanley Fish, one is tempted to ask, "Is there a text in this case?"[66] The answer seems to be no.

The case's procedural posture is another reason for questioning whether the decision should be considered an "interpretation" of the wills statute. Francis's daughters did not attempt to prevent the probate of the will and the distribution of the estate. Instead, they sought an injunction against Elmer requiring him to turn over the property. The will statute does not dictate what happens to property after probate ends. If we are going to be true formalists, then, the statute does not even apply. (And if we are not going to be formalists, of course, *Riggs* is an easy case.)

Finally, viewing the problem as one of statutory interpretation provides no guidance in the post-*Riggs* slayer cases. In *Holy Trinity*, the Court had only to construe a statutory term ("labor or service") as having no appli-

64. POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 9, at 106-07 (1990).

65. POSNER, THE PROBLEMATICS OF MORAL AND CONSTITUTIONAL THEORY, *supra* note 48, at 140.

66. STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980).

cation to ministers. Slayer issues come in many permutations and may require judicial ingenuity in devising appropriate remedies. If we want, we can say that in these various cases, the court is interpreting the intestacy statutes, the common law of insurance contracts, the statute of wills, the statutes covering joint ownership of property, and the federal employee benefits statute, though none of these sources of law may happen to say a word about the situation. Realistically, however, except where they have been amended to specifically address the slayer rule, the statutes have little to do with the court's task. We can call this a problem in statutory "interpretation," if we like, but attaching this label does not seem much to advance the analysis.

For these reasons, the current textualism debate seems ultimately beside the point in *Riggs*, despite its initial appearance of relevance. There was no specific statutory provision that would address the availability of injunctive relief against Elmer. Thus, the problem was not one of statutory interpretation, in the sense of attaching meaning to specific statutory language. The objection to *Riggs* is that the court may have undermined a legislative goal of completely defining the legal effect of wills. But this is a functional objection, not a textual one. A true formalist would have no problem with the result in *Riggs* because the statute was not directly applicable anyway.

IV. LEGISLATIVE PREEMPTION OF THE COMMON LAW

The Supreme Court's insurance decision was seemingly noncontroversial because no statute threatened to impinge on the Court's common law authority. *Riggs*, in contrast, was a far more difficult case because the subject of wills is dominated by statute. The worry was seemingly not so much that any particular statutory provision was inconsistent with the result in *Riggs*, but rather that the legislature had preempted the field. The issue of field preemption of the common law by legislation seems to have received little attention—much less attention than that of statutory interpretation strictly defined—but *Riggs* is far from unique in raising it.[67]

Consider two examples at the federal level.[68] The first involves interstate water pollution. In *Illinois v. City of Milwaukee [Milwaukee I]*,[69]

67. An analogous situation involves federal preemption of an entire field, so that even state regulations consistent with specific federal requirements are preempted. *See* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Hines v. Davidowitz, 312 U.S. 52 (1941). For an overview, see 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-31, at 1204-12 (3d ed. 2000). But the federal preemption issue is obviously connected with issues of federalism that have no parallel when the legislature and court in question are part of the same level of government.

68. These two examples are discussed at greater length in Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 888-905 (1991). For a different perspective on some of these issues, see Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767, 785-91 (1991).

69. 406 U.S. 91 (1972).

the Supreme Court ruled that nuisance suits for interstate pollution could be brought under the federal common law of nuisance. Soon after that ruling, Congress substantially revamped the federal water pollution statute, creating a much more comprehensive regulatory scheme. Almost a decade later, the *Milwaukee* litigation returned to the Supreme Court. In *City of Milwaukee v. Illinois [Milwaukee II]*,[70] the Court held that the amendments preempted the federal common law of nuisance. The Court reasoned that the comprehensive federal regulatory scheme left no room for ad hoc judicial supervision of polluters.[71] Although the Court's decision was partly based on considerations of federalism, a New York court adopted similar reasoning to cut back on state nuisance law, reasoning that the public interest in controlling pollution was better pursued through the administrative process.[72]

A second example comes from admiralty law. Congress has created a complex statutory scheme governing tort recovery by maritime workers. The statutes were in part prompted by a flaw in the common law, which did not allow recovery for wrongful death. But the scheme had gaps, as one woman discovered when her husband was killed by an unseaworthy vessel just offshore. One statute covered only negligence but not unseaworthiness; another covered unseaworthiness but only for accidents on the high seas. Undeterred, the Supreme Court created a new common law remedy on her behalf, in *Moragne v. State Marine Lines, Inc.*, overruling the old common law rule against recovery for wrongful death.[73] In a thoughtful opinion by Justice Harlan, the Court concluded that the statutes were not an attempt to address comprehensively, and thereby freeze, the entire field of recovery for maritime torts. Thus, the statutes did not preempt further common law development. Later cases, however, reflect progressively increasing concern that assertive application of the common law could tamper with the statutory scheme.[74]

This issue is not limited to the federal law. Consider a third example, involving state law. The Uniform Commercial Code provides remedies for buyers of defective products, but because of their origins in contract law, these remedies are sometimes less generous than tort law might provide. Some courts have rejected the more expansive tort remedy for fear of upsetting the U.C.C.'s remedial scheme.[75] So great is this concern that

70. 451 U.S. 304 (1981).

71. In retrospect, this holding seems ill-considered. *See* Farber & Frickey, *supra* note 68, at 892-95. *But see* Frank B. Cross, *Common Law Conceits: A Comment on Meiners & Yandle*, 7 GEO. MASON L. REV. 965, 967 (1999) (defending *Milwaukee II* as a safeguard against protectionist litigation by state governments).

72. *See* Boomer v. Atlantic Cement Co., 257 N.E.2d 870, 871 (N.Y. 1970).

73. 398 U.S. 375 (1970).

74. *See* Miles v. Apex Marine Corp., 498 U.S. 19 (1990); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978).

75. *See* McCarthy Well Co. v. St. Peter Creamery, Inc., 410 N.W.2d 312 (Minn. 1987); Hapka v. Paquin Farms, 458 N.W.2d 683 (Minn. 1990); Regents of the Univ. of Minn. v. Chief Indus., Inc., 106 F.3d 1409 (8th Cir. 1997) (applying Minnesota law). For further discussion of the "economic loss" rule, see W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 707-10 (5th ed. 1984); Christopher Scott D'Angelo, *The Eco-*

in a diversity case, the Eighth Circuit has even applied the doctrine to bar recovery for outright fraud.[76] One wonders how that court would have decided *Riggs*.

The issue of field preemption of the common law is surely ripe for more systematic treatment, but some preliminary observations may be useful. It would be unreasonable to assume that every statute is designed to completely preempt the common law in every transaction governed in any respect by that statute. But it would be equally unreasonable to assume that the scope for common law creativity is unaffected by comprehensive legislative treatment of the same subject matter. Although sharply defined standards for field preemption seem unlikely, we can at least point to several relevant factors.

First, courts sometimes assume unreflectively that a statute was meant as a definitive statement of the balance between opposing interests, thereby freezing current common law in place outside of those boundaries. In reality, as *Moragne* illustrates, the limits of the statute may not represent any judgment about what rules should prevail outside those limits. The legislature may simply have decided to take a specific step at a given time, with no desire to preclude further common law development. This may be especially true when the statute was prompted by a perceived defect in the common law. The desire of the legislature to correct this defect in its most egregious form carries no implication of an intent to freeze the common law in its defective form elsewhere. Some statutes do represent a global balance between opposing values or political forces, but not many.

Second, the nature of the statute is also important. A tightly integrated structure like the U.C.C. or the federal pollution laws may be upset by ill-considered judicial innovations regarding matters within their scope. Simpler statutes are less likely to experience unforseen repercussions from well-intended efforts at filling gaps. The hodgepodge of statutes governing recovery by injured maritime workers seems to be at the opposite end of the spectrum from the highly integrated code.

Third, statutes also differ in their purposes. Some statutes are designed to channel transactions or to provide clear rules in order to minimize disputes. Others have different priorities, less likely to be disrupted by innovations in adjacent areas of the common law. When faced by particular cases where the statutory scheme seems inadequate, courts may lose track of the systemic value of a rule-based regime. In any event, to minimize disruption, the court must keep an eye to the policies promoted by the statute, giving them generous consideration in crafting common law rules outside the scope of the statute itself.

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nomic Loss Doctrine: Saving Contract Warranty Law from Drowning in a Sea of Torts, 26 U. TOL. L. REV. 591 (1995); Comment, *Asbestos in Schools and the Economic Loss Doctrine*, 54 U. CHI. L. REV. 277 (1987).

76. *See* AKA Distrib. Co. v. Whirlpool Corp., 137 F.3d 1083 (8th Cir. 1998) (applying Minnesota law).

Based on these three factors, the decision in *Riggs* seems correct. The statute of wills is far from being a comprehensive scheme governing family property transfers or even the implementation of testamentary devises. We have no reason to think that the traditional wills statute (as opposed, perhaps, to today's Uniform Probate Code) was designed as an all-encompassing treatment of the entire subject of property transfer at death. Most importantly, the court's holding was entirely consistent with the main purpose of the statute, which was to provide an efficient means of property transfer at death. Enforcing a devise to the testator's murderer is unlikely to strike many drafters of wills as a helpful aid in implementing their estate plan. The only negative is that the slayer rule is a potential source of litigation, and therefore might increase the transaction costs of testamentary dispositions. But given the rarity with which plausible murder claims could be made against beneficiaries, this seems like a minor concern. Overall, then, the *Riggs* court seems rather clearly to have resolved the preemption issue correctly.

Harkening back to our earlier discussion of "gap filling," it may be helpful to analogize to the problem of filling a physical gap. Consider the problem of what to do with an open lot. The lot may be too small to allow any new building—the existing development has literally "preempted the field." Or it may be that potential construction is tightly constrained by the surrounding development and the available infrastructure. In that situation, the developer's problem is clearly defined by the existing physical context. To be a little metaphorical, we might say his solution was based on his "reading" of the conditions at the site. To the extent he views those conditions as not merely a constraint but an opportunity to contribute to the overall development of the neighborhood, we might even applaud his solution as a creative "interpretation" of the surrounding context. In yet another scenario, the development is located away from existing construction, giving the developer a free hand to pursue his own ideas. Here, the analogy is to the unvarnished common law. As in architecture, so in law, there are many kinds of "gaps," imposing varying degrees of constraint on new development. *Riggs* was an important step in learning to deal with this problem.

At one level, *Riggs* merely presented a technical problem in the law of wills, providing a solution that has been greatly refined over the years. But apart from specialists in property transfer law, that is not why we remember *Riggs* today. The larger question in *Riggs* was how courts and legislatures would relate to each other in the coming age of statutes. It must have been clear, even then, that the legislatures would be more and more in charge of creating public policy. The question was whether, faced by this trend, courts would abandon their traditional role entirely. Perhaps it is a bit ironic that the court chose to address this issue in a case involving a statute of ancient lineage, rather than a modern enactment. But it was with the new wave of statutes that the issue would be most critical.

To shift metaphors, the issue facing the courts was the working relationship between the legislature and the judiciary. *Riggs* was an early indication of the recognition that the legislature needed neither a competitor nor a lackey, but an active junior partner. For that contribution, *Riggs* well deserves its place in the legal canon.