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MADISON LECTURE STATUTES

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In his James Madison Lecture, Judge Robert A. Katzmann argues that federal courts have much to learn from Congress and agencies about how statutes should be interpreted. In the voluminous discussion of how courts should construe statutes, there has generally been little consideration given to an appreciation of how Congress actually functions; how Congress signals its meaning; and what Congress expects of those interpreting its laws. In examining that lawmaking process, Judge Katzmann looks to how legislators signal their legislative meaning to the first interpreters of statutes—agencies—and to how agencies regard Congress's work product in interpreting and executing the law. He contends that Congress intends that its work be understood through its institutional processes and reliable legislative history. In our constitutional system in which Congress is charged with enacting laws, the methods by which Congress makes its purposes known—through text and reliable accompanying materials—should be respected, lest the integrity of legislation be undermined. Agencies well appreciate and are responsive to Congress's perspective that such materials are essential to construing statutes. By understanding statutory interpretation as an enterprise involving other institutions, we can better address the question of how courts ought to interpret statutes. Against that background, Judge Katzmann examines two approaches to the judicial interpretation of statutes—purposivism and textualism—and concludes with a discussion of practical ways in which Congress may better signal its meaning and how courts may better inform Congress of the problems courts identify in the statutes they review.

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INTRODUCTION

I am deeply honored to be with you tonight as the James Madison lecturer. Following the many distinguished Supreme Court Justices and appellate judges who have been at this podium is indeed humbling. I can well remember the first Madison Lecture that I attended at this great law school, nearly a quarter century ago, given by my friend, collaborator, and a mentor, Frank Coffin. This evening, I thank Ricky Revesz—an extraordinary and brilliantly accomplished dean, scholar, and teacher—for his generous words. And, of course, I am indebted to Professor Norman Dorsen, the distinguished guiding force of the Madison Lecture, who has had such a substantial impact on the law, legal education, and the legal profession, not just as a lawyer and academic, but also as an institution-builder of international, indeed, legendary renown.

This is the first Madison Lecture since the passing of Norman's wife Harriette Dorsen. We think this evening of Harriette, whose lively intelligence added much to these proceedings in years past. It is wonderful to see so many family and friends, and my federal judicial colleagues: Judges Cabranes, Carney, Edwards, Feinberg, Garaufis, Leval, Newman, and Rakoff. I know that some colleagues from the state bench are with us too, including my brother, Judge Gary S. Katzmman of the Massachusetts Appeals Court. I very much

appreciate that you are here. Many of my clerks are in the audience, as is my judicial assistant, Dominique Welch; your presence means a lot to me. Thank you all for coming.

I owe much to James Madison, that diminutive giant, one of the founding architects of our constitutional structure. In my pre-bench, academic days, much of my work focused on the challenges of governance, on the ways that our institutions operate, and on the obstacles to and steps toward the more effective functioning of government. My research and writing concentrated on a range of subjects having to do with governance, including the determinants of agency discretion,¹ and how the institutions of national government—the legislative, executive, and judicial branches—affect outcomes over time.² I viewed lawmaking as a continuum of institutional processes, which interact with one another in complex and subtle ways. My appreciation for interbranch inquiry was heightened when Judge Coffin became chair of the Committee on the Judicial Branch of the Judicial Conference of the United States (a statutory group of twenty-six federal judges, as well as the Chief Justice, that makes national administrative policy for the federal courts). Judge Coffin, who represented Maine in the House of Representatives, called for a systematic examination of the full range of judicial-legislative relations—past, present, and future. Judge Coffin asked that I assist in devising and implementing the Committee's research agenda. In time, we and some colleagues created the Governance Institute as the vehicle for our work.³

¹ See generally ROBERT A. KATZMANN, *REGULATORY BUREAUCRACY: THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY* (1980).

² See generally ROBERT A. KATZMANN, *INSTITUTIONAL DISABILITY: THE SAGA OF TRANSPORTATION POLICY FOR THE DISABLED* (1986) [hereinafter KATZMANN, *INSTITUTIONAL DISABILITY*] (examining how legislative, administrative, and judicial processes have dealt with problems of mobility for the disabled).

³ Created in 1986, the Governance Institute is a small nonprofit organization in Washington, D.C., concerned with exploring, explaining, and easing problems associated with both the separation and the division of powers in the American federal system. The Institute's focus is on institutional process—a nexus linking law, institutions, and policy. Products of the Governance Institute's program on judicial-legislative relations include: ROBERT A. KATZMANN, *COURTS AND CONGRESS* (1997) [hereinafter KATZMANN, *COURTS AND CONGRESS*]; JUDGES AND LEGISLATORS: *TOWARD INSTITUTIONAL COMITY* (Robert A. Katzmann ed., 1988) [hereinafter JUDGES AND LEGISLATORS]; Frank M. Coffin, *Communication Among the Three Branches: Can the Bar Serve as Catalyst?*, 75 JUDICATURE 125 (1991); Frank M. Coffin & Robert A. Katzmann, *Steps Towards Optimal Judicial Workways: Perspectives from the Federal Bench*, 59 N.Y.U. ANN. SURV. AM. L. 377 (2003); Robert A. Katzmann & Russell R. Wheeler, *A Mechanism for "Statutory Housekeeping": Appellate Courts Working with Congress*, 9 J. APP. PRAC. & PROCESS 131 (2007) [hereinafter Katzmann & Wheeler, *A Mechanism for "Statutory Housekeeping"*]; Robert A. Katzmann & Russell R. Wheeler, *A Primer on Interbranch Relations*, 95 GEO. L.J. 1155 (2007). Russell Wheeler is currently the president of the Governance Institute. Katzmann & Wheeler, *A Mechanism for "Statutory Housekeeping," supra*, at 131.

The first product of that enterprise was *Judges and Legislators: Toward Institutional Comity*,⁴ a symposium that brought together scholars, judges, legislators, and others to examine relations between the first and third branches. And, two years before becoming a judge, I published *Courts and Congress*,⁵ which represented my thinking to date on that subject.

Now, having been on the bench for a dozen years, I return to the subject of courts and Congress, with a focus on federal statutes—that is, the laws enacted by Congress. As a federal circuit judge, I spend a considerable amount of time interpreting federal statutes, construing what the laws of Congress mean. Indeed, a substantial majority of the Supreme Court's caseload involves statutory construction (two-thirds of its recent docket by one estimate).⁶ This steady diet of statutory cases reflects the simple reality that just as Congress produces legislation, so courts are called on to interpret those laws, especially when they are vague, ambiguous, or seemingly contradictory.

In the best of all possible worlds, the language of the statute is plain on its face, pristine, and brimming with clarity. Then, the job of the judge is generally straightforward. Consider this statute, which I had to interpret: "It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of . . . pseudoephedrine base . . . in a scheduled listed chemical product."⁷ The appellant in the case before me purchased 24.48 grams in a thirty-day period from six different pharmacies. My task in this case was simple. Under the plain words of the statute, he violated the law.⁸

But when—as often happens—the statute is ambiguous, vague, or otherwise imprecise, the interpretative task is not obvious. Now, consider these statutes I had to construe. In one case,⁹ the statute says

⁴ JUDGES AND LEGISLATORS, *supra* note 3, at vii.

⁵ KATZMANN, COURTS AND CONGRESS, *supra* note 3 (examining "key aspects of the relationship between the courts and Congress," including "the confirmation process, communications, statutory interpretation, and statutory revision").

⁶ William Eskridge, Jr. estimates that in 2008, two-thirds of the Supreme Court's caseload consisted of pure statutory cases, and just one-fourth consisted of pure constitutional cases. E-mail from Prof. William N. Eskridge, Jr., John A. Garver Prof. of Jurisprudence, Yale Law Sch., to author (Aug. 8, 2011, 10:12 EST) (on file with the *New York University Law Review*).

⁷ 21 U.S.C. § 844 (2006).

⁸ See *United States v. Morgan*, 412 F. App'x 357, 359–60 (2d Cir. 2011) (rejecting appellant's claim that his purchase of pseudoephedrine for personal consumption did not violate the statute because Congress's purpose, on his argument, was to prevent the manufacture of methamphetamine).

⁹ *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 333 (2d Cir. 2005) (holding that expert fees are compensable costs under the statute), *rev'd*, 548 U.S. 291 (2006).

that a court may award a prevailing party “reasonable attorneys’ fees as *part of costs*.”¹⁰ The parents of a disabled child who won relief sought compensation for the costs of expert fees. Are those expert fees compensable as “costs” under the statute? Or consider this statute in another case before me: The law bars suits against the government as to “any claim arising out of the loss, miscarriage or *negligent transmission* of letters or postal matter.”¹¹ A postal customer seeks to recover for injuries suffered when she tripped over mail left on her porch by the mail carrier.¹² The question before the panel was: What constitutes “negligent transmission” under the statute? And then there was this issue before a panel on which I sat: Under a statute, “[i]t shall be unlawful for any person[,] . . . who has been *convicted in any court* of[] a crime punishable by imprisonment for a term exceeding one year . . . [,] to . . . possess in or affecting commerce, any firearm or ammunition . . . which has been shipped or transported in interstate or foreign commerce.”¹³ Does the language “convicted in any court” mean any prior conviction in any court anywhere in the world, or does it only apply to convictions in courts of the United States?¹⁴ How should I, as a judge, interpret such statutes? Should the judge confine herself to the text? Should the judge, in seeking to make sense of the ambiguity or vagueness, go behind the text of the statute to legislative materials, and if so, which ones? Should the judge seek to ascertain Congress’s purposes and intentions?

These questions of statutory construction are of fundamental importance because the methodology of interpretation can affect the outcome in a case and thus whether the law has been construed consistently with Congress’s meaning—to the degree that it can be divined.

Not only have these questions sparked considerable discussion within the federal judiciary itself, but also congressional hearings have been devoted to the subject.¹⁵ Senators ask judicial nominees for their

¹⁰ 20 U.S.C. § 1415(i)(3)(B) (2006) (emphasis added).

¹¹ 28 U.S.C. § 2680(b) (2006) (emphasis added).

¹² See *Raila v. United States*, 355 F.3d 118 (2d Cir. 2004) (holding that the plaintiff’s claims under the Federal Tort Claims Act were not barred by the statute’s postal matter exception); *Dolan v. USPS*, 546 U.S. 481 (2006) (upholding *Raila*).

¹³ 18 U.S.C. § 922 (emphasis added).

¹⁴ See *United States v. Gayle*, 342 F.3d 89, 90 (2d Cir. 2003) (holding that convictions in foreign courts did not satisfy the “convicted in any court” element of the statute (quoting 18 U.S.C. § 922 (2006))); *United States v. Small*, 544 U.S. 385 (2004) (upholding *Gayle*).

¹⁵ See *Statutory Interpretation and the Uses of Legislative History: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. (1990); *Interbranch Relations: Hearings Before the Joint Comm. on the Org. of Cong.*, 103d Cong. 76, 298 (1993) [hereinafter *Interbranch Relations*].

views on how they would construe statutes,¹⁶ and law journals are filled with learned articles on statutory construction.¹⁷ When Congress reverses a statutory decision of the Supreme Court, the mainstream media may cover it. That was the case, for example, when Congress enacted the Lily Ledbetter Fair Pay Act of 2009,¹⁸ which states that the 180-day statute of limitations for filing an equal-pay lawsuit regarding pay discrimination resets with each new discriminatory paycheck.¹⁹ Then Congress heeded Justice Ruth Bader Ginsburg's dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*²⁰ and objections from many civil rights groups to the Supreme Court's ruling that pay discrimination claims under Title VII of the Civil Rights Act of 1964²¹ are time-barred if the pay-setting decision was made outside of the 180-day statute of limitations period.²²

Judicial interpretation of statutes has been part of this nation's constitutional experience from early days. In a Madison Lecture on statutory construction, I would be remiss in failing to note the famous case bearing Madison's name, *Marbury v. Madison*,²³ in which Chief Justice John Marshall interpreted section 13 of the 1789 Judiciary Act to be unconstitutional. He thus avoided the dilemma of ordering Madison to deliver William Marbury his judicial commission (which President Jefferson would have overridden) or refusing to issue the writ—either way exposing the Court's limited power.

Attention to statutes is not surprising. Statutes affect all manner of life, including the most pressing public policy issues of the day. They are the basis of much governmental activity—"the beginnings," in Charles Jones's words, "of life through law."²⁴ The numbers and kinds of statutes are enormous. Some statutes mandate particular

¹⁶ See *infra* text accompanying notes 165–70 (discussing various theories of congressional intent).

¹⁷ See App. B (noting publications on statutory interpretation over the last fifteen years).

¹⁸ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (to be codified at 42 U.S.C. § 2000e-5).

¹⁹ See, e.g., Gail Collins, *Lilly's Big Day*, N.Y. TIMES, Jan. 29, 2009, at A27; Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES (Jan. 30, 2009), <http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html>.

²⁰ 500 U.S. 618, 667 (2007) (Ginsburg, J., dissenting) ("As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII.").

²¹ 42 U.S.C. § 2000e-2(a) (2006).

²² 500 U.S. at 618–19.

²³ 5 U.S. (1 Cranch) 137 (1803); see MARK TUSHNET, *ARGUING Marbury v. Madison* (2005) (presenting historical background and analysis of *Marbury* scholarship); William Michael Treanor, *The Story of Marbury v. Madison: Judicial Autonomy and Political Struggle*, in *FEDERAL COURTS STORIES* 29–56 (Vicki C. Jackson & Judith Resnik eds., 2010).

²⁴ Charles O. Jones, *A Way of Life and Law*, 89 AM. POL. SCI. REV. 1, 8 (1995).

actions;²⁵ others prohibit particular behaviors;²⁶ and still others give considerable discretion to agencies to implement the legislature's meaning.²⁷ A few statutes specifically provide for court tests.²⁸ Some statutes affect states directly by conditioning federal aid on local government's acceptance of particular responsibilities or agreement to implement particular policies.²⁹ How statutes are drafted—tightly or loosely—can give executive branch agencies more or less discretion to make policy.³⁰

Statutes can address everything from the seemingly trivial to matters of fundamental significance with substantial impact.³¹ Legislation is the basis for the administrative state as we know it. The Administrative Procedure Act,³² for example, established the essential framework for the regulatory process of the past sixty-five years. The

²⁵ See, e.g., Federal Trade Commission Act of 1914, 15 U.S.C. § 45(a)(1) (2006) (establishing requirements designed to “prevent unfair or deceptive acts or practices in or affecting commerce”).

²⁶ See, e.g., 42 U.S.C. § 2000e (proscribing discrimination on the basis of race, color, religion, sex, or national origin); Americans with Disabilities Act of 1990, 42 U.S.C. § 12112 (2006) (proscribing discrimination on the basis of disability).

²⁷ See, e.g., Clean Water Act of 1972, 33 U.S.C. § 1362(7) (2006) (prohibiting the discharge of any pollutant into “navigable waters,” defined without further elaboration as “the waters of the United States, including the territorial seas”).

²⁸ See, e.g., Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. § 922 (2006) (authorizing members of Congress to file a suit challenging the constitutionality of the Act and providing for challenge to be heard by a special three-judge federal court with direct appeal to the Supreme Court); see generally CHARLES R. SHIPAN, *DESIGNING JUDICIAL REVIEW* 97–121 (1999) (examining legislative provisions for judicial review).

²⁹ See, e.g., 23 U.S.C. § 158 (2006) (directing the Secretary of Transportation to withhold a percentage of federal highway funds otherwise allocable from States “in which the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful”); *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987) (holding that 23 U.S.C. § 158 was a valid exercise of Congress’s spending power).

³⁰ See Robert A. Katzmann, *The American Legislative Process as a Signal*, 9 J. PUB. POL’Y 287, 292 (1989) (“As a signal of government, legislation affects both the substance and process of policymaking.”); see also Michael Herz, *Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clear Air Act Interpretation*, 16 HARV. ENVTL. L. REV. 175, 180 (1992) (noting Congress’s tendency to micromanage environmental agencies through extremely detailed legislation).

³¹ On the impact of statutes on the administrative state in the twentieth century, see JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW* 419–23 (1950), where the author explains that the “sheer bulk” of legislation and the need for expertise drove the creation of specialized agencies in the years after 1910. See also JAMES WILLARD HURST, *DEALING WITH STATUTES* (1982); CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* (1990). Grant Gilmore famously described the “orgy of statute making” in GRANT GILMORE, *THE AGES OF AMERICAN LAW* 95 (1977).

³² Pub. L. No. 79-404, 60 Stat. 237 (1946) (current version at 5 U.S.C. §§ 500–59 (2006)).

Americans with Disabilities Act of 1990,³³ in another instance, is a civil rights statute that was meant to afford broad protections to persons with disabilities. The Clean Air Act³⁴ and the Clean Water Act³⁵ have been cornerstones of the environmental movement. Title IX of the Education Amendments of 1972³⁶ led to major changes in education such that women and girls had new opportunities in the classroom and on the athletic field.³⁷

William N. Eskridge Jr. and John Ferejohn observed in their monumental work, *A Republic of Statutes*,³⁸ that some statutes transform constitutional baselines, going beyond filling in gaps. Thus, the principle of *Brown v. Board of Education*³⁹ that de jure racial segregation violated the Constitution has been realized through a panoply of statutes, such as the Civil Rights Act of 1964,⁴⁰ which entrenched the principle that discrimination on the basis of race is unacceptable. Given the vital issues that statutes address—civil rights,⁴¹ national

³³ Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12,101–213 (2006)).

³⁴ Pub. L. No. 88-206, 77 Stat. 392 (1963) (current version at 42 U.S.C. §§ 7401–8146 (2006)).

³⁵ The Clean Water Act of 1977 was at first called the Federal Water Pollution Control Act Amendments, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251–376 (2006)).

³⁶ 20 U.S.C. § 1681 (2006).

³⁷ Barbara Winslow, *The Impact of Title IX*, THE GILLER LEHRMAN INST. OF AM. HISTORY, <http://www.gilderlehrman.org/history-by-era/seventies/essays/impact-title-ix> (last visited Apr. 26, 2012) (noting that Title IX is “[o]ne of the great achievements of the women’s movement” and that its impact extends beyond sports to higher education, employment, learning environment, math and science, sexual harassment, standardized testing, and technology). For more information on Title IX’s impact on education, see generally KATHERINE HANSON, VIVIAN GUILFOY & SARITA PILLAI, *MORE THAN TITLE IX: HOW EQUITY IN EDUCATION HAS SHAPED THE NATION* (2009), where the author examines the broader societal changes that followed Title IX and its focus on gender equity in education.

³⁸ WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010); see also DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002*, at 4 (2d ed. 2005) (arguing that whether Congress is unified or divided has made little difference in the incidence of highly publicized congressional investigations or important legislation); Forrest Maltzman & Charles R. Shipan, *Change, Continuity, and the Evolution of the Law*, 52 AM. J. POL. SCI. 252, 252 (2008) (examining the political conditions that influence whether a law comes under review or is changed in subsequent years).

³⁹ 347 U.S. 483 (1954).

⁴⁰ Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e (2006)).

⁴¹ See, e.g., *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 870 (2011) (holding that an employee who claims he was terminated because his fiancée had filed a discrimination charge against their mutual employer may pursue a retaliation claim under Title VII); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438–39 (1968) (holding that 42 U.S.C. § 1982 (1964) prohibits racial discrimination in housing by private, as well as governmental, housing providers).

security,⁴² the environment,⁴³ the economy,⁴⁴ voting rights,⁴⁵ and gender discrimination⁴⁶ to name a few—how courts construe legislation is a matter of great consequence and thus attention. The phenomenon of “statutorification” of the law, as my colleague Guido Calabresi put it, is common to both the federal and state levels.⁴⁷ (My topic tonight is federal statutes and their interpretation by federal courts, realizing, however, that state legislative and judicial activity⁴⁸ is extensive and profoundly important.)

When a court interprets a statute, it articulates the meaning of the words of the legislative branch. Although, over the years, considerable ink has been spilled about how courts should interpret statutes, there has been scant consideration given to what I think is critical as courts discharge their interpretative task—an appreciation of how Congress actually functions, how Congress signals its meaning, and what Congress expects of those interpreting its laws. Although in a formal

⁴² See, e.g., *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 74–75 (2d Cir. 2009) (upholding, under section 6 of the National Security Agency Act of 1959, 50 U.S.C. § 402 (2006), a denial of a request under the Freedom of Information Act, 5 U.S.C. § 552 (2006), for information gathered under the Terrorist Surveillance Program because the requested information would reveal activities of the National Security Agency).

⁴³ See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (holding that section 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521(a)(1) (2006), gives the Environmental Protection Agency authority to regulate emissions of greenhouse gases from new motor vehicles).

⁴⁴ See, e.g., *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2888 (2010) (holding that section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (2006), does not provide a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges).

⁴⁵ See, e.g., *Bartlett v. Strickland*, 556 U.S. 1, 14–15 (2009) (holding that a racial minority group that constitutes less than fifty percent of a proposed district's population cannot state a vote dilution claim under section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006)).

⁴⁶ See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986) (holding that a plaintiff could establish a violation of Title VII “by proving that discrimination based on sex has created a hostile or abusive work environment”).

⁴⁷ GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1 (1982) (arguing that “many disparate current legal-political phenomena are reactions” to the fundamental change of American law from a legal system once dominated by common law to a system dominated by statutes); see also 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) (discussing the role of state judges in interpreting state statutes and constitutions).

⁴⁸ State court cases interpreting statutes are numerous. See, e.g., *Commonwealth v. Gomez*, 940 N.E.2d 488, 492–93 (Mass. App. Ct. 2011) (explaining that statutes on the same subject matter should be read as a whole to produce internal consistency); *Gordon v. Registry of Motor Vehicles*, 912 N.E.2d 9, 13 (Mass. App. Ct. 2009) (determining that whether a statute is criminal or civil depends on the legislature's intent, which is a matter of statutory construction); *Kramer v. Zoning Bd. of Appeals of Somerville*, 837 N.E.2d 1147, 1152 (Mass. App. Ct. 2005) (“[S]tatutes are to be interpreted in a common-sense way which is consistent with the statutory scheme, and in a way which avoids constitutional issues.”).

sense the legislative process ends with legislative enactment of a law, in their interpretative role courts inescapably become participants in that process. For the judiciary, understanding that process is essential if it is to construe statutes in a manner that is faithful to legislative meaning. Hence, Part I of this Lecture focuses on how Congress works and on the lawmaking process as it has evolved.

In examining that process, I look in Part II to how legislators who comprise Congress signal their legislative meaning to agencies—the first interpreters of statutes—and, another subject deserving full empirical inquiry, how agencies regard Congress's work product in interpreting and executing the law. That context should be instructive to courts as they interpret statutes. By understanding statutory interpretation as an enterprise involving other institutions, we can better address the question of how courts ought to interpret statutes. Against that background, I examine in Part III two approaches to the judicial interpretation of statutes—purposivism and textualism. I conclude in Part IV with a discussion of practical ways in which Congress may better signal its meaning, and how courts may better inform Congress of problems they perceive in the statutes they review.

By way of preview, it is my contention that in its practices, Congress intends that its work should be understood through its institutional processes and legislative history. These include, for example, committee and conference committee reports that accompany legislative text. Agencies well appreciate and are responsive to Congress's perspective that such materials are essential to construing statutes. What follows, then, reinforces my view that a purely textualist approach, which maintains that judges should restrict themselves only to the words of the statute, is inadequate when interpreting ambiguous laws.

I

CONGRESS AND THE LAWMAKING PROCESS

Madison and his colleagues offered a general blueprint on the structure of government, but they provided little about the internal workings of institutions themselves. Our founders envisioned governance as a process of interaction among institutions, at the federal level—legislative, executive, and judicial branches—and between the federal and state levels. In Madison's and the other founders' design, each institution would have its own structure, purposes, and interests. The members of each branch would have the self-interest to resist the other branches' encroachments upon their prerogatives; yet, these institutions would in practice operate interdependently. And that

system—characterized by both the constructive tension arising from the separation of powers, as well as institutional interdependence—would produce informed and deliberative outcomes. Although each institutional element would have its own structures, workways, interests, and purposes, together those parts would yield a balanced system. Senator Daniel Patrick Moynihan, another great mentor of mine, remarked on “the degree to which the founders of this nation thought about *government*.”⁴⁹ It was to the institutions of government, he observed, that they “looked to confine and to moderate” the political struggle they feared.⁵⁰

Congress is the engine of statutes. The Constitution defines the powers of the legislative branch, the qualifications and terms of members, the circumstances in which legislators may be held to account for their speech and actions, the presentment of enacted bills to the President, and the requirements for overturning presidential vetoes. Madison asserted that the legislative institution should be designed so that legislators would “study . . . the comprehensive interests of their country,”⁵¹ as well as more immediate needs. *The Federalist* argued that the legislative branch needed to develop procedures so that its members would develop specialized competence and experience devising “a succession of well-chosen and well-connected measures.”⁵² As envisioned, the legislative body should have a relatively stable composition with its members acquiring thorough mastery of the public business over time.⁵³ Madison cautioned:

It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulged, or undergo such incessant changes that no man who knows what the law is to-day can guess what it will be to-morrow.⁵⁴

But the Constitution hardly delineated how the lawmaking process was to be organized within each chamber. It limited such instruction to a few clauses: “The House of Representatives shall chuse their Speaker and other officers”;⁵⁵ “The Vice President of the United

⁴⁹ DANIEL PATRICK MOYNIHAN, *CAME THE REVOLUTION: ARGUMENT IN THE REAGAN ERA* 66 (1988).

⁵⁰ *Id.*

⁵¹ THE FEDERALIST NO. 62, at 445 (James Madison) (Pocket Books ed., 2004).

⁵² THE FEDERALIST NO. 63, *supra* note 51, at 451 (James Madison).

⁵³ *See* THE FEDERALIST NO. 53, *supra* note 51, at 388 (James Madison) (“The greater the proportion of new members, and the less the information of the bulk of the members, the more apt will they be to fall into the snares that may be laid for them.”).

⁵⁴ THE FEDERALIST NO. 62, *supra* note 51, at 447 (James Madison).

⁵⁵ U.S. CONST. art. I, § 2, cl. 6.

States shall be President of the Senate, but shall have no vote, unless they be equally divided";⁵⁶ "Each house may determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two-thirds, expel a member";⁵⁷ "Each house shall keep a journal of its proceedings";⁵⁸ "Neither house, during the session of Congress, shall without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting";⁵⁹ "All bills for raising revenue shall originate in the house of representatives."⁶⁰

Beyond these words, it was up to succeeding Congresses to determine their lawmaking processes. The framers who lived through the frailties of the Articles of Confederation thought that through the institutional learning that would come with time, the branches could best craft the procedures which would enable effective governance. As Gouverneur Morris of New York wrote about the Constitution: "Nothing human can be perfect . . . Surrounded by difficulties, we did the best we could; leaving it with those who should come after us to take counsel from experience . . ." ⁶¹ And, in thinking about the first Congresses, which would create those initial processes, the framers might very well have felt that the task was manageable, because the legislature's universe was small and thus more conducive to deliberation—a mere sixty-five members in the House and twenty-six in the Senate in the first Congress.⁶²

Congressional committees have been central to lawmaking since the early nineteenth century. Without committees, Congress could not function. By the mid-1820s, each legislative chamber had established standing committees that could expect that bills within their substantive jurisdiction would be referred to them.⁶³ In 1885, a young scholar,

⁵⁶ *Id.* § 3, cl. 4.

⁵⁷ *Id.* § 5, cl. 2.

⁵⁸ *Id.* § 5, cl. 3.

⁵⁹ *Id.* § 5, cl. 4.

⁶⁰ *Id.* § 7, cl. 1.

⁶¹ JAMES L. SUNDQUIST, *CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT* 1 (1986) (quoting Letter from Gouverneur Morris to W. H. Wells (Feb. 24, 1815), in 3 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 421–22 (Max Farrand ed., rev. ed., 1937)).

⁶² *House History: 1st Congress (1789–1791)*, OFF. CLERK U.S. HOUSE REPRESENTATIVES, http://artandhistory.house.gov/house_history/index.aspx (last visited Apr. 26, 2012) (noting the number of members in the first House of Representatives); *The Senate Moves to Philadelphia*, U.S. SENATE, http://www.senate.gov/artandhistory/history/minute/The_Senate_Moves_To_Philadelphia.htm (last visited Apr. 26, 2012) (noting the number of members in the first Senate).

⁶³ See JOSEPH COOPER, *THE ORIGINS OF THE STANDING COMMITTEES AND THE DEVELOPMENT OF THE MODERN HOUSE* (1971) (analyzing the impact of the standing committee system in the House of Representatives); David T. Canon & Charles Stewart III,

Woodrow Wilson, wrote: "Congress in session is Congress on public exhibition, whilst Congress in its committee rooms is Congress at work."⁶⁴ Richard Fenno, Jr., a contemporary observer, commented that members seek committee assignments that fit with their policy interests and constituent concerns.⁶⁵ The committee system can channel the pursuit of the individual interest of legislators to the good of Congress itself. Political scientist and Congressman David Price observed: "The committee system . . . accommodates the aspirations of disparate members but also represents a corrective of sorts to congressional individualism—a means of bringing expertise and attention to bear on the legislature's task in a more concerted fashion than the free enterprise of individual members could accomplish."⁶⁶

Congressional staffs, on committees or in the personal offices of legislators, importantly assist members in their legislative work.⁶⁷ Today there are some 126 standing committees and subcommittees of various kinds in the House and ninety-six in the Senate.⁶⁸ Some committees are authorizing committees, charged with making substantive policy as well as recommending spending levels to fund programs in their jurisdiction. Appropriations committees, responsible for

The Evolution of the Committee System in Congress, in CONGRESS RECONSIDERED 163 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 2001) (presenting evidence on the influence of select committees in the nineteenth century); Jeffery A. Jenkins & Charles H. Stewart III, *Order from Chaos: The Transformation of the Committee System in the House, 1816–1922*, in PARTY, PROCESS, AND POLITICAL CHANGE IN CONGRESS 195 (David W. Brady & Mathew D. McCubbins eds., 2002) (examining the social choice problems that contributed to the rise of the early nineteenth-century committee system); Eric Schickler, *Institutional Development of Congress*, in THE LEGISLATIVE BRANCH 35, 37–41 (Paul J. Quirk & Sarah A. Binder eds., 2005) (explaining the rise of the standing committee system in both the House of Representatives and the Senate); Gerald Gamm & Kenneth Shepsle, *Emergence of Legislative Institutions: Standing Committees in the House and Senate, 1810–1825*, 14 LEGIS. STUD. Q. 39, 39 (1989) (discussing and applying institutional development theories to the development of standing committees in Congress). On the study of the modern committee system and changes in modern scholarship on committees, see C. Lawrence Evans, *Congressional Committees*, in THE OXFORD HANDBOOK OF THE AMERICAN CONGRESS 396 (Eric Schickler & Frances E. Lee eds., 2011).

⁶⁴ WOODROW WILSON, CONGRESSIONAL GOVERNMENT 79 (15th prtg. 1901).

⁶⁵ See RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES xiv–xv (1973).

⁶⁶ DAVID E. PRICE, THE CONGRESSIONAL EXPERIENCE: A VIEW FROM THE HILL 152 (1992).

⁶⁷ NORMAN J. ORNSTEIN, THOMAS E. MANN & MICHAEL J. MALBIN, VITAL STATISTICS ON CONGRESS 2008, at 109–21 (2008); see also ROGÉR H. DAVIDSON, WALTER J. OLESZEK & FRANCES E. LEE, CONGRESS AND ITS MEMBERS 204–05 (13th ed. 2012) (discussing the influence and importance of committee staff in drafting, negotiating, and shaping legislation).

⁶⁸ ORNSTEIN ET AL., *supra* note 67, at 102. Here, "committees" include standing committees, subcommittees of standing committees, select and special committees, subcommittees of select and special committees, joint committees, and subcommittees of joint committees. *Id.*

determining how much money will be allocated to those programs, can very much affect policy through the power of the purse. As part of the lawmaking function, committees examine how laws are being implemented through their oversight of the executive branch (and, to a lesser degree, oversight of the administration of the judicial branch). Because so many issues are cross-cutting, committee jurisdictional categories can make lawmaking difficult. Hence, with greater frequency, especially in the House of Representatives, alternative arrangements assist or even supplant existing committee processes—for example, multi-committee arrangements, task forces, leadership-organized panels, outside blue-ribbon commissions, and “high level ‘summit’ conferences between legislative leaders and the executive branch.”⁶⁹

Congressional decision making is the product of multiple decision points; it is the product of both centrifugal and centripetal forces. The latter is characterized by the decentralization of the committee system, and the former by efforts towards centralization, leadership at the top, and party discipline. Judge Coffin, a former legislator, once noted: “What complicates matters is that both movements coexist today, something like the various shiftings of the tectonic plates underlying the continents.”⁷⁰ There are many reasons which account for ambiguous or vague legislation: the difficulty of foreseeing all problems; the legislature’s decision to identify an issue generally and then to delegate the issue to the executive branch for resolution; and the nature of coalition politics which, in cobbling together the necessary majority, may yield legislation that is deliberately vague and ambiguous. Congressional organization—with its many decision points—can frustrate coherent decision making, producing muddy statutory language. And political polarization further complicates deliberation.

Drawing upon the invaluable compilation of vital congressional statistics produced by Ornstein, Mann, and Malbin,⁷¹ I offer this snapshot of the 111th Congress (2009–2010) to give a sense of the congressional institution.⁷² In that Congress, 383 public bills were enacted,

⁶⁹ Roger H. Davidson, *The House of Representatives: Managing Legislative Complexity*, in *WORKWAYS OF GOVERNANCE: MONITORING OUR GOVERNMENT’S HEALTH* 24, 33 (Roger H. Davidson ed., 2003).

⁷⁰ Frank M. Coffin, *Working with the Congress of the Future*, in *THE FEDERAL APPELLATE JUDICIARY IN THE TWENTY-FIRST CENTURY* 199, 201–13 (Cynthia Harrison & Russell R. Wheeler eds., 1989).

⁷¹ ORNSTEIN ET AL., *supra* note 67. For compiling these data, I am grateful to Andrew Rugg, who works as a researcher for Norman J. Ornstein, Thomas E. Mann, and Michael J. Malbin, on *Vital Statistics on Congress*. *Id.*

⁷² E-mail from Andrew Rugg, Research Assistant, Am. Enter. Inst., to author (July 12, 2011, 11:06 EST) (on file with the *New York University Law Review*).

with a total of 7679 pages, averaging thirteen pages per statute.⁷³ In the House of Representatives, 6677 bills were introduced (including joint resolutions), and 861 passed, with a 0.129 ratio of bills passed to bills introduced.⁷⁴ In the Senate, 4149 bills were introduced and 454 bills passed, with a ratio of 0.109 bills passed to bills introduced.⁷⁵ Additionally, the Senate held 2374 committee and subcommittee hearings.⁷⁶

In recent decades, Congress has more frequently enacted legislation through large omnibus bills or resolutions, packing together a wide range of disparate issues.⁷⁷ The omnibus mechanism is a departure from the traditional approach of handling individual pieces of legislation.⁷⁸ In part, Congress uses omnibus bills to facilitate passage of overdue measures.⁷⁹ For example, in 2009 and again in 2010, Congress packaged several appropriations bills that were considerably past timely consideration into a single omnibus bill, lessening opportunities for further delay than if each bill had been individually considered. This process, in the view of some, lets legislators avoid individual hard votes on controversial issues by packaging those issues with other measures that command broad support.⁸⁰ Each chamber has its own rules of procedure for referring legislation to committees and calling up measures for floor consideration. The House's rules and procedures are far more extensive than the Senate's. The Senate, owing to its smaller membership, is more flexible in relaxing standing rules to accommodate the interests of individual Senators than the House, which structures rules that encourage representatives to accede to the will of the leadership and the majority.⁸¹

⁷³ *Id.*

⁷⁴ E-mail from Andrew Rugg, Research Assistant, Am. Enter. Inst., to author (Jan. 24, 2012, 16:38 EST) (on file with the *New York University Law Review*).

⁷⁵ E-mail from Andrew Rugg, Research Assistant, Am. Enter. Inst., to author (Aug. 12, 2011, 11:06 EST) (on file with the *New York University Law Review*).

⁷⁶ *Id.*

⁷⁷ DAVIDSON ET AL., *supra* note 67, at 172.

⁷⁸ *See id.* at 219 (noting that omnibus bills "contain an array of issues that were once handled as separate pieces of legislation").

⁷⁹ *See id.* at 221 (noting that omnibus bills "minimize the opportunities for further delay").

⁸⁰ *See* ROGER H. DAVIDSON, WALTER J. OLESZEK & FRANCES E. LEE, CONGRESS AND ITS MEMBERS 241 (12th ed. 2010) (quoting a former chair of the House Budget Committee as saying that "[l]arge bills can be used to hide legislation that otherwise might be controversial").

⁸¹ *See generally* WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 28 (8th ed. 2011) (discussing the congressional lawmaking process and how Congress's rules and procedures affect policy). For case studies of the legislative process, see the following sources. *See* BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR 26–58 (1981) (discussing the process of amending the Clean Air Act);

Congressional life is marked by incredible pressure—such as the pressures of the permanent campaign for reelection,⁸² raising funds, balancing work in Washington and time in the district, balancing committee and floor work in an environment of increasing polarization, and balancing work and family responsibilities. Consider these statistics: In 1955, the number of recorded votes in the House was 147;⁸³ in 2009, it was 991; and in 2010, it was 664.⁸⁴ In 1955, the number of recorded votes in the Senate was 88;⁸⁵ in 2009, it was 400;⁸⁶ and in 2010, it was 307.⁸⁷ At times, these votes take place in the dead of night, especially as the legislative session moves at a frenetic pace to recess or end. In the 1960s and 1970s, the average Congress was in session 323 days; from 2001–2006, the average was 250 days.⁸⁸ But the hours per day in session have substantially risen. In the House, the session day consisted of an average of 7.84 hours per day in 2009,⁸⁹ as compared to 4.1 hours per day in 1955–1956.⁹⁰ In the Senate, the session day consisted of 7.44 hours per day in 2009,⁹¹ as compared to 6.1 hours per day in 1955–1956.⁹² In 1955–1956, the average total of committee assignments for members of the House was 3.0;⁹³ in 2011, it was 5.10 (1.72 standing committee assignments, 3.27 subcommittee assignments, and 0.10 other committee assignments).⁹⁴ Similarly, in the Senate, the average number of committee assignments was 7.9 in 1955–1956;⁹⁵ in 2011, it was 13.82 (3.52 standing committee

PAUL C. LIGHT, *FORGING LEGISLATION* 169–71 (1992) (describing the approval of the Department of Veterans Affairs Act); KATZMANN, *INSTITUTIONAL DISABILITY*, *supra* note 2, at 15–78 (describing disjointed congressional efforts to enhance mobility for the disabled in the 1970s); PHILIP G. SCHRAG, *A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA* (2000) (charting an effort to restrict political asylum in the 104th Congress).

⁸² David Brady & Morris Fiorina, *Congress in the Era of the Permanent Campaign*, in *THE PERMANENT CAMPAIGN AND ITS FUTURE* 134 (Norman J. Ornstein & Thomas E. Mann eds., 2000).

⁸³ ORNSTEIN ET AL., *supra* note 67, at 126 tbl.6-3.

⁸⁴ E-mail from Andrew Rugg (Jan. 24, 2012, 16:38 EST), *supra* note 74.

⁸⁵ ORNSTEIN ET AL., *supra* note 67, at 126 tbl.6-3; E-mail from Andrew Rugg (July 12, 2011, 11:06 EST), *supra* note 72.

⁸⁶ E-mail from Andrew Rugg (Aug. 12, 2011, 11:06 EST), *supra* note 75.

⁸⁷ *Id.*

⁸⁸ ORNSTEIN ET AL., *supra* note 67, at 18.

⁸⁹ E-mail from Andrew Rugg (Aug. 12, 2011, 11:06 EST), *supra* note 75.

⁹⁰ ORNSTEIN ET AL., *supra* note 67, at 124 tbl.6-1.

⁹¹ E-mail from Andrew Rugg (Aug. 12, 2011, 11:06 EST), *supra* note 75.

⁹² ORNSTEIN ET AL., *supra* note 67, at 125 tbl.6-2.

⁹³ *Id.* at 104 tbl.4-4.

⁹⁴ E-mail from Andrew Rugg (Aug. 12, 2011, 11:06 EST), *supra* note 75.

⁹⁵ ORNSTEIN ET AL., *supra* note 67, at 104 tbl.4-5.

assignments, 9.59 subcommittee assignments, and 0.71 other committee assignments).⁹⁶

The key point is that the expanding, competing demands on legislators' time reduce opportunities for reflection and deliberation.⁹⁷ In that circumstance, beyond the work of their own committees, of which legislators have direct knowledge, members operate in a system in which they rely on the work of colleagues on other committees.⁹⁸ They accept the trustworthiness of statements made by their colleagues on other committees, especially those charged with managing the bill, about what the proposed legislation means. They cannot read every word of the bills they vote upon, but they, and certainly their staffs, become educated about the bill by reading the materials produced by the committees and conference committees from which the proposed legislation emanates. These materials include, for example, committee reports, conference committee reports, and the joint statements of conferees who drafted the final bill.

Committee reports accompanying bills have long been important means of informing the whole chamber about proposed legislation; they are often the principal means by which staffs brief their principals before voting on a bill.⁹⁹ Committee reports are generally circulated at least two calendar days before legislation is considered on the floor.¹⁰⁰

⁹⁶ E-mail from Andrew Rugg (Aug. 12, 2011, 11:06 EST), *supra* note 75.

⁹⁷ For a discussion on the challenges of deliberation, see generally SARAH A. BINDER, *STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK* (2003); PAUL J. QUIRK & GARY MUCCIARONI, *DELIBERATIVE CHOICES: DEBATING PUBLIC POLICY IN CONGRESS* (2006).

⁹⁸ For theoretical analyses of the congressional committee system, see for example KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* (1991); David P. Baron, *Legislative Organization with Informational Committees*, 44 AM. J. POL. SCI. 485 (2000); Thomas W. Gilligan & Keith Krehbiel, *Organization of Informative Committees by a Rational Legislature*, 34 AM. J. POL. SCI. 531 (1990); Forrest Maltzman, *Meeting Competing Demands: Committee Performance in the Post-reform House*, 39 AM. J. POL. SCI. 653 (1995).

⁹⁹ James L. Buckley, a former Senator from New York and judge on the D.C. Circuit, remarked as Senator that, "My understanding of most of the legislation I voted on was based entirely on my reading of its language and, where necessary, on explanations contained in the accompanying report." *Statutory Interpretation and the Uses of Legislative History: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 21 (1990) (statement of James L. Buckley, J., D.C. Cir.). In the words of another former legislator and judge, Abner Mikva, a committee report is "the most useful document in the legislative history." *JUDGES AND LEGISLATORS*, *supra* note 3, at 171.

¹⁰⁰ ANDREA LARUE, *SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE*, S. DOC. NO. 107-1, at 17 (1st Sess. 2001). This period of two days does not include Sundays and legal holidays. *Id.*; see also JOHN V. SULLIVAN, *CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES*, H.R. DOC. NO. 108-241, at 623 (2d Sess. 2004).

Those reports provide members and their staffs with explanatory material about a bill's context, purposes, policy implications, details, as well as information about who the committee supporters of a particular bill are and about possible minority views.¹⁰¹ Conference committee reports represent the views of legislators from both chambers who are charged with reconciling bills that have passed both the House and the Senate and presenting them for final legislative consideration.¹⁰² Members and their staffs will also hear from interest groups about particular bills—including groups they find credible—and the executive branch.¹⁰³ The system works because committee members and their staffs will lose influence with their colleagues as to future bills if they do not accurately represent the bills under consideration within their jurisdiction.

Although any legislator can introduce a bill, it is the committee of jurisdiction which generally processes the proposed measure. In drafting bills, legislators and their staffs look to multiple sources. All but the appropriations committees are aided by professional drafters in each chamber's Office of Legislative Counsel; these drafters are trained in the nuances of statute writing.¹⁰⁴ Although legislators and their staffs are not required to consult with legislative counsel, doing so is prudent because a poorly drafted bill can lead to all manner of problems for agencies and courts charged with interpreting the

¹⁰¹ See, e.g., GEORGE MILLER, LILLY LEDBETTER FAIR PAY ACT OF 2007, H.R. REP. NO. 110-237.

¹⁰² See, e.g., DON YOUNG, SAFE, ACCOUNTABLE, FLEXIBLE, EFFICIENT TRANSPORTATION ACT: A LEGACY FOR USERS, H.R. REP. NO. 109-105 (2005) (Conf. Rep.).

¹⁰³ Clyde Wilcox, *The Dynamics of Lobbying the Hill*, in 1 THE INTEREST GROUP CONNECTION: ELECTIONEERING, LOBBYING, AND POLICYMAKING IN WASHINGTON 89 (PAUL S. HERRNSON, RONALD G. SHAIKO & CLYDE WILCOX EDS., 1998) (noting that members of Congress are interested in obtaining views of interest groups on proposed legislation).

¹⁰⁴ TOBIAS A. DORSEY, LEGISLATIVE DRAFTER'S DESKBOOK: A PRACTICAL GUIDE § 2.16 (2006); M. Douglass Bellis, *Drafting in the U.S. Congress*, 22 STATUTE L. REV. 38 (2001). For examples of drafting manuals created by the Offices of Legislative Counsel, see OFFICE OF THE LEGISLATIVE COUNSEL, UNITED STATES SENATE, LEGISLATIVE DRAFTING MANUAL (1997), available at [http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual\(1997\).pdf](http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual(1997).pdf); OFFICE OF THE LEGISLATIVE COUNSEL, HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE, H.L.C. DOC. NO. 104-1 (1995), available at www.house.gov/legcoun/pdf/draftstyle.pdf; BJ Ard, Comment, *Interpreting by the Book: Legislative Drafting Manuals and Statutory Interpretation*, 120 YALE L.J. 185, 187-93 (2010) (describing how the manuals recommend formatting legislation and incorporating canons of construction). The Supreme Court has from time to time made reference to the drafting manuals in its decisions. See, e.g., Carr v. United States, 130 S. Ct. 2229, 2244-46 (2010) (Alito, J., dissenting) (discussing widely accepted legislative drafting conventions); Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 60-61 (2004) (citing the House and Senate drafting manuals in differentiating between a subparagraph and a clause).

statute. Typically, a committee staffer will contact the office for assistance in framing the bill so that it is technically correct. The legislative counsel thinks of the committees as clients.¹⁰⁵ Its role is not to offer views about the merits of a particular proposal; it is to determine how best to commit the bill's purposes to writing.¹⁰⁶

Not all bills emanate from the committees themselves: Some originate with the executive branch; others from interest groups, lobbyists, businesses, and state and local governments. These various interests may assist in drafting bills as well, but not necessarily with the care that the Office of Legislative Counsel provides. Not all bills are drafted in the committee; bills can also be drafted, or at least substantially revised, on the floor and in conference committee.¹⁰⁷ In the Senate, flexible procedures allow senators to draft bills in the course of debate. When bills are drafted on the floor, for example, the pressures of time mean that legislators do not generally check with the legislative counsel, and thus there is more likely to be problematic drafting language.¹⁰⁸ In conference committee, the pressure to come to closure and produce a law can compromise technical precision.

A case study by Nourse and Schacter, focusing on the Senate Judiciary Committee, reveals that committee staffers are well aware that how they construct statutes will affect how agencies and courts interpret them. The staffers view their task not primarily as creating technically correct statutes, but as addressing political and policy issues through legislation.¹⁰⁹ Lawmaking, as legislators and staffs understand it, involves not just the text of legislation, but also legislative history—such as the reports and debates associated with the legislative text. In the view of legislators and staffs, legislative history is an essential part of Congress's work product. As I described, committee reports and conference committee reports accompanying bills can provide guidance to legislators in the enactment process.¹¹⁰ As I will discuss below, they can also be helpful post-enactment by providing direction to agencies as to how to interpret and implement legislation.

¹⁰⁵ Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 588 (2002) (noting that legislative counsel view their involvement as “‘strictly up to the client’ (i.e., the senator or the committee)”).

¹⁰⁶ Katzmann, *supra* note 30, at 288–89.

¹⁰⁷ Nourse & Schacter, *supra* note 105, at 592–93 (2002).

¹⁰⁸ See, e.g., Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309, 309, 311–19 (2001) (pointing out an error in the federal venue statute).

¹⁰⁹ Nourse & Schacter, *supra* note 105, at 600, 615.

¹¹⁰ See *supra* notes 97–100 and accompanying text.

II

CONGRESS AND AGENCIES: INTERPRETING AND
IMPLEMENTING STATUTES

The debate within the academy and the federal judiciary—as to whether judges should consult only the laws’ text in ascertaining meaning or go beyond the text to legislative materials that accompany the text—must seem odd not only to those in Congress and their staffs, but also to agencies responsible for administering the law. Through laws and lawmaking, Congress communicates to those charged with construing and interpreting its work. Congress’s immediate objects in that exercise are generally not courts, which may someday be called on to construe statutes, but agencies, which more immediately grapple with how to implement the law. Statutes may express the sense of Congress, but agencies must translate that sense into action. As Peter Strauss observed some years ago, agencies are generally the first—often the primary—interpreters of statutes.¹¹¹ And agencies are constantly looking for clues as to what particular statutes mean. Herbert Kaufman wrote in his classic, *The Administrative Behavior of Federal Bureau Chiefs*:

¹¹¹ Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility To Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 321 (1990). See also Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889, 903 (2007) [hereinafter Mashaw, *Agency-Centered or Court-Centered*] (rejecting the idea that the focus of administrative law should be “even more judicio-centric than it currently is”); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 25–26 (1983) (noting pre-*Chevron* judicial deference to agency interpretation of law); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1190 (2006) (“Statutory interpretation is not the exclusive province of the courts; it is a core function of the executive branch as well.”); Cass R. Sunstein, *Beyond Marbury: The Executive’s Power To Say What the Law Is*, 115 YALE L.J. 2580, 2583 (2006) (stating that the executive branch is initially responsible for statutory interpretation); Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1068 (1998) (“[A]dministrative agencies have become America’s common law courts.”); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 926–27 (2003) (describing Strauss’s defense of *Chevron*); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 373 (1989) (noting that statutes vest agencies with implementation authority). But see Richard J. Pierce, Jr., *How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss*, 59 ADMIN. L. REV. 197, 204 (2007) (disagreeing with Strauss and Mashaw that agencies are “‘the primary official interpreters of federal statutes’” (quoting Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 501–02 (2005) [hereinafter Mashaw, *Norms, Practices, and the Paradox of Deference*])). For more insight into how agencies approach the task of statutory interpretation, see Mashaw, *Norms, Practices, and the Paradox of Deference*, *supra*, where the author argues for the study of agency statutory interpretation as an autonomous enterprise.

The [agency bureau] chiefs were consciously looking over their shoulders, as it were, at the elements of the legislative establishment . . . estimating reactions to contemplated decisions and actions, trying to prevent misunderstandings and avoidable conflicts, and planning responses when storm warnings appeared on the horizon. Not that cues and signals from Capitol Hill had to be ferreted out; the denizens of the Hill were not shy about issuing suggestions, requests, demands, directives, and pronouncements.¹¹²

Congress and agencies share an understanding as to how to discern legislative meaning that goes beyond statutory text. In communicating with agencies about legislation, Congress has a variety of tools at its disposal, such as confirmation hearings, oversight hearings and investigations, reports, floor debates at the time of legislative consideration of a bill, and a variety of non-statutory controls.¹¹³

The confirmation process provides senators with a venue to press nominees to commit to interpreting statutes in particular ways as a condition for affirmative votes. At confirmation hearings, nominees may be pressed to undertake specific actions or to refrain from specific actions under the statutes they are charged with enforcing.¹¹⁴ The cost for the nominee of not adhering to her promise post-confirmation may be appropriations cuts or legislative changes. Committee reports and conference committee reports accompanying legislation will often require that the agency undertake or refrain from particular actions. Statements of bill managers can also provide direction in floor debate as a measure nears passage. Oversight hearings provide opportunities for legislators to monitor executive interpretation and implementation of statutes and to take corrective action if the laws are not being executed as legislators envisioned.¹¹⁵ Similarly, investigations offer

¹¹² HERBERT KAUFMAN, *THE ADMINISTRATIVE BEHAVIOR OF FEDERAL BUREAU CHIEFS* 47 (1981).

¹¹³ For more background on how Congress exercises influence over agencies, see generally LAWRENCE C. DODD & RICHARD L. SCHOTT, *CONGRESS AND THE ADMINISTRATIVE STATE* 155–211 (2d ed. 1986); JOSEPH P. HARRIS, *CONGRESSIONAL CONTROL OF ADMINISTRATION* (1964); Charles R. Shipan, *Congress and the Bureaucracy*, in *THE LEGISLATIVE BRANCH* 432, 438–46 (Paul J. Quirk & Sarah A. Binder eds., 2005).

¹¹⁴ See ARTHUR MAASS, *CONGRESS AND THE COMMON GOOD* 183–88 (1983) (“[T]he committees require nominees, as a condition of confirmation, to make policy-related promises during confirmation hearings.”); Steven V. Roberts, *A Lesson in Advising and Consenting*, N.Y. TIMES, Apr. 14, 1983, at B10 (quoting Senator Carl Levin as saying that “[w]e all ask questions at confirmation hearings, hoping to obtain answers that affect future actions”).

¹¹⁵ See generally JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* (1990) (discussing trends in congressional oversight as well as the politics and processes underlying such oversight); DANIEL CARPENTER, *REPUTATION AND POWER* 333–34 (2010) (explaining that congressional hearings play a critical role in determining a federal agency’s reputation due to the adversarial nature of the hearings and

another kind of congressional review: In their aftermath, legislators may press the executive to interpret the law in a different way, or legislators may move to change the law itself.¹¹⁶ Congress can mandate that agencies issue reports detailing compliance with the laws as a way of checking on executive performance.¹¹⁷

Nonstatutory controls include informal means to monitor executive behavior, such as letters and telephone calls.¹¹⁸ Although almost three decades ago the Supreme Court declared the legislative veto unconstitutional in *INS v. Chadha*,¹¹⁹ committee and subcommittee vetoes continue to exist. Louis Fisher reports that since *Chadha* there have been hundreds of such vetoes provided for in legislation or through informal and nonstatutory means, whereby Congress grants agencies considerable discretion in exchange for a system of review and control by the committees of jurisdiction.¹²⁰ Through such congressional entities—such as the Government Accountability Office (GAO), which undertakes audits and reports of governmental agen-

the public testimony presented in them); DANIEL CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY* 1–3 (2002) (describing an instance in which favorable publicity for a federal agency, generated in part by the agency head, resulted in the transfer of jurisdiction over the forest reserves to the agency even in the face of strong opposition by some members of Congress); CHRISTOPHER H. FOREMAN, JR., *SIGNALS FROM THE HILL: CONGRESSIONAL OVERSIGHT AND THE CHALLENGE OF SOCIAL REGULATION* 2 (1988) (exploring “the formal tools that Congress employs to oversee administration”); WILLIAM T. GORMLEY, JR. & STEVEN J. BALLA, *BUREAUCRACY AND DEMOCRACY: ACCOUNTABILITY AND PERFORMANCE* 83 (2d ed. 2008) (noting that oversight as a percentage of total committee activity increased from 9.1% in 1971 to 25.2% in 1983); DAVID H. ROSENBLUM, *BUILDING A LEGISLATIVE-CENTERED PUBLIC ADMINISTRATION: CONGRESS AND THE ADMINISTRATIVE STATE 1946–1999*, at 60–103 (2000) (discussing Congress’s role in oversight hearings and general oversight over agencies); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984) (arguing that Congress exercises “fire-alarm oversight” over the less effective “police-patrol” oversight); Morris S. Ogul & Bert A. Rockman, *Overseeing Oversight: New Departures and Old Problems*, 15 LEGIS. STUD. Q. 5 (1990) (arguing “that an institutional focus broader than the legislature is essential” for resolving basic problems in legislative oversight).

¹¹⁶ PAUL C. LIGHT, *GOVERNMENT’S GREATEST INVESTIGATIONS: CONGRESS, THE PRESIDENT, AND THE SEARCH FOR ANSWERS, 1945–2012* (forthcoming 2013) (on file with the *New York University Law Review*).

¹¹⁷ DAVIDSON ET AL., *supra* note 67, at 338.

¹¹⁸ *Id.*

¹¹⁹ 462 U.S. 919 (1983).

¹²⁰ LOUIS FISHER, CONG. RESEARCH SERV., RS22132, *LEGISLATIVE VETOES AFTER Chadha* 3–6 (2005). See also JESSICA KORN, *THE POWER OF SEPARATION: AMERICAN CONSTITUTIONALISM AND THE MYTH OF THE LEGISLATIVE VETO* 13 (1996) (arguing that “the legislative veto shortcut was inconsequential to congressional control of the policy making process”).

cies—the legislative branch conveys its concerns about the operations of those units to the executive branch.¹²¹

Legislators quite clearly view these various techniques as legitimate components of the legislative process. Members expect that agencies will follow their directives, not just expressed in legislation, but also in legislative history, through a variety of statutory and non-statutory devices. And agencies recognize the importance of being sensitive to the signals and directives that members of Congress send beyond words in statutes. Agency administrators appreciate that they undertake activities pursuant to statutory authority and that having a full understanding of what Congress expects helps the agency discharge its functions consistent with statutory meaning. Agencies are charged with implementing legislation that is often unclear and the product of an often-messy legislative process. Trying to make sense of the statute with the aid of reliable legislative history is rational and prudent.

And thus, agency officials carefully monitor how the legislative branch expresses itself, not just in statutes but also through other means as well. Not surprisingly, legislative history materials can be key resources. For instance, if Congress passes energy legislation with an accompanying committee report providing detailed direction to the Department of Energy, it is unfathomable that the Secretary of Energy or any other responsible agency officials would ignore the report, let alone not read that report. Agency sensitivity to Congress's workways reflects an often-intimate involvement in the legislative process. Executive branch staffers often draft bills that Congress considers, and even assist committee staffers in drafting committee report language.

Agency responsiveness to congressional signals that go beyond statutory text makes sense from a policy and good-governance perspective of trying to interpret and implement the law consistent with legislative meaning. It also makes sense from the perspective of practical politics. Agency administrators know that their budgets and legislative goodwill could be threatened if they ignore congressional communications. And, hence, agency staffers commonly consult with committee staffers in the ordinary course of business as to what actions the agency is contemplating and as to how it is interpreting the law. Agency preparation for congressional hearings will typically involve close review of legislative directives in legislative history

¹²¹ See WILLIAM T. GORMLEY, JR., *TAMING THE BUREAUCRACY* 159–64 (1989) (describing the effect of the Government Accountability Office (GAO) reports on agencies).

materials. Any administrator who ignores a directive in a committee report, or in a communication from the congressional committee, may suffer the consequences at the next congressional hearing, if not before.

Attention as to what legislators and agencies view as the work product of the legislative branch needing to be followed is instructive as we consider judicial interpretation of statutes. Supreme Court doctrine indicates that generally courts should defer to an agency's interpretation of an ambiguous statute that it administers, as long as that interpretation is reasonable or permissible.¹²² Judges, I am suggesting here, would do well to understand the methodology of agency interpretation of statutes, to understand how agencies use pre-enactment legislative history accompanying proposed legislation, and to take stock of that learning when they construe legislation in the full range of cases before them, apart from those involving review of agency interpretation of statutes.¹²³ Although there has been some thoughtful writing on agency construction of statutes,¹²⁴ there is a dearth of empirical knowledge about the methodology of agency interpretation. I would urge a full empirical inquiry across agencies.

It is, as I noted, striking that while agencies view legislative history as essential reading, there has in recent years been a vigorous debate within the federal judiciary as to whether legislative history materials should carry weight as judges interpret statutes, and if so, the measure of that weight. This discussion has taken place in a vacuum, largely removed from the reality of how Congress actually functions. An understanding of how Congress operates and how agencies and their respective committees interact, reinforces the view that courts, when interpreting statutes, should respect legislators' sense of their own work product. Having set the stage with an examination of the workways of Congress, I turn now to an examination of two

¹²² See, e.g., *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

¹²³ In arguing that courts can learn from agencies, I emphasize that I focus on pre-enactment legislative history accompanying legislation. While a court's inquiry into legislative history is essentially limited to pre-enactment materials, I note that agencies are also sensitive to post-enactment signals of legislators in the current and succeeding Congresses.

¹²⁴ See, e.g., Mashaw, *Agency-Centered or Court-Centered*, *supra* note 111; Pierce, *supra* note 111; Strauss, *supra* note 111. Mashaw discusses how such an inquiry might be undertaken. See Mashaw, *Norms, Practices, and the Paradox of Deference*, *supra* note 111, at 524-36 (querying the Federal Register rules database using key search terms as a rudimentary means of identifying agency interpretative methodologies). Pierce rejects the view of Strauss and Mashaw that agencies are primary interpreters of statutes. Pierce, *supra* note 111, at 204.

differing conceptions—purposivism and textualism—of how courts should interpret statutes and the materials to be used in interpreting statutes.¹²⁵

III

JUDICIAL INTERPRETATION OF STATUTES

Having argued that courts should respect Congress's work product, it will not surprise you that I find legislative history, in reliable form, useful as I interpret statutes. I start with the premise that the role of the courts is to interpret the law in a way that is faithful to its meaning. The role of the court is not to substitute its judgment or to alter the terms of the statute. When statutes are unambiguous, as I have noted earlier, the inquiry for a court generally ends with an examination of the words of the statute.¹²⁶ At times, even when the statute is plain on its face, the judge may find legislative history helpful in reinforcing the court's understanding of the words. If, for example, the result seems absurd, then a broader inquiry, including consideration of legislative history, might be in order. But if that inquiry leads to the same result, then a court cannot alter it.

Generally, the interpretative problem arises because the statute is ambiguous.¹²⁷ From the start, the founders understood that legislation

¹²⁵ See generally WILLIAM D. POPKIN, *STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION* 2–3 (1999) (detailing the evolution of statutory interpretation in the United States and recommending the adoption of a “discretionary judicial role” in statutory interpretation); William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799 (1985) (chronicling the history of statutory interpretation in the United States and noting the shifting emphasis that courts have placed on form over substance). There are, of course, other theories of statutory construction, apart from those discussed in the succeeding pages, advanced by prominent law professors. See, e.g., WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 9 (1994) (endorsing dynamic statutory interpretation, which holds that “the meaning of a statute is not fixed until it is applied to concrete circumstances, and [that] it is neither uncommon nor illegitimate for the meaning of a provision to change over time”); RONALD DWORKIN, *LAW’S EMPIRE* 313–54 (1986) (advocating an approach to statutory interpretation that accounts for questions of fit, integrity, and political morality).

¹²⁶ Judge Henry J. Friendly observed: “Illogical though it was to hold that a ‘plain meaning’ shut off access to the very materials that might show it not to have been plain at all, it was equally wrong to deny the natural meaning of language its proper primacy; like Cardozo’s ‘Method of Philosophy,’ it ‘is the heir presumptive. A pretender to the title will have to fight his way.’” HENRY J. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, in *BENCHMARKS* 206 (1967) (quoting Benjamin N. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 9, 32 (1921)). See also Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 232 (“[T]he reliance on plain meaning serves a stabilizing function . . . bringing together to some suboptimal equilibrium a process [of coordinating multiple judicial decisionmakers] that might otherwise be much better, but also might otherwise be much worse.”).

¹²⁷ See, e.g., *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1411 (2010) (Sotomayor, J., dissenting) (“In my view, the Court

would often be unclear and admit of differing interpretations. Madison wrote in *The Federalist* No. 37, describing laws in general:

All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of objects, and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other, adds a fresh embarrassment. . . . [N]o language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence, it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined.¹²⁸

Scholars have debated what role the founders conceived the judiciary as having—whether it was to be a faithful agent of Congress or a co-equal partner with authority to depart from the words of a statute.¹²⁹ But how judges were to resolve ambiguities was not something that preoccupied the founders, concerned as they were with broad principles of governing. Although they understood that natural law principles and canons of statutory construction could aid judges, the framers were under no illusion that such tools necessarily dictated

misreads the statutory text and gives insufficient weight to contextual and historical evidence of Congress' purpose"); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 472 (2002) (Stevens, J., dissenting) ("There are occasions when an exclusive focus on text seems to convey an incoherent message").

¹²⁸ THE FEDERALIST NO. 37, at 255 (James Madison) (Cynthia Brantley Johnson ed., 2004). It merits a note that Madison and other founders proposed an active role for judges in the legislative process by having members of the Supreme Court serve on a council of revision to help the President exercise the veto power. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 73–80 (Max Farrand ed., 1911). Such a scheme, argued Madison, would help "preserv[e] a consistency, conciseness, perspicuity & technical propriety in the laws, qualities peculiarly necessary; & yet shamefully wanting in our republican Codes." *Id.* at 74. With respect, I think that is one proposal whose rejection was well advised.

¹²⁹ See, e.g., William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 990–98 (2001) (providing an historical overview of statutory interpretation at the founding and arguing that judges are agents of as well as partners with Congress, with interpretative authority not confined to the text); John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1648–53 (2001) (contending that although the founders did not definitively resolve the judiciary's relationship with Congress, they developed a constitutional structure that fits better with the faithful agent theory and textualism than the co-equal partner model).

particular results.¹³⁰ Judges—members of the Supreme Court, other federal judges if Congress authorized them, and state judges—however, could fill the interpretative void through the exercise of sound judgment. But the framers did not set forth the precise methodology of how judges would do so.¹³¹ It was inevitable, however, that as ambiguous statutes were crafted, the question of how to interpret them would become important.

It seems to me that at bottom, the task for the judge is to determine what Congress—in particular the bill's sponsors and others who worked to secure its approval by a majority of the members—was trying to do in passing the law. In other words, the task is to construe language in light of the statute's purpose as enacted by elected legislators.¹³²

The dominant mode of statutory interpretation over the past century has been one premised on the view that legislation is a purposive

¹³⁰ See Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 954 (1993) (“[F]ar from being a practicable measure for determining which laws accorded with a constitution and which did not, natural law tended to be a theoretical explanation of limitations on natural rights.”).

¹³¹ See Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149 (2001) (arguing that courts have changed their interpretative practices with some frequency).

¹³² As Justice Breyer stated: “Only by seeking that purpose can we avoid the substitution of judicial for legislative will. Only by reading language in its light can we maintain the democratic link between voters, legislators, statutes, and ultimate implementation, upon which the legitimacy of our constitutional system rests.” *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 323–24 (2006) (Breyer, J., dissenting). Justice Breyer has written that he finds “purposes and consequences . . . most helpful most often . . . to help unlock the meaning of a statutory text.” STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 88 (2010). As to consequences, he writes: “The judge also examines the likely consequences of a proposed interpretation, asking whether they are more likely to further than to hinder achievement of the provision’s purpose.” *Id.* at 92. Judge Posner is of the view that “[g]ood pragmatic judges balance two types of consequence, the case-specific and the systemic.” RICHARD A. POSNER, *HOW JUDGES THINK* 202–03 (2008); see also RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 57–96 (2003) (promoting legal pragmatism, which “involves consideration of systemic and not just case-specific consequences”). Posner endorses Learned Hand’s view that judges should reconstruct imaginatively the legislature’s purposes. See LEARNED HAND, *The Contribution of an Independent Judiciary to Civilization*, in MASS. BAR ASS’N, *THE SUPREME JUDICIAL COURT OF MASSACHUSETTS 1692–1942*, at 59 (1942), reprinted in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 155, 157 (Irving Dilliard ed., 3d ed. 1960) (“Courts must reconstruct the past solution imaginatively in its setting and project the purposes which inspired it upon the concrete occasions which arise for their decision.”). In Judge Posner’s words, a “judge should try to put himself in the shoes of the enacting legislators.” RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 286 (1985). If that is not possible, “then the judge must decide what attribution of meaning . . . will yield the most reasonable result . . . bearing in mind . . . that it is [the legislators’] conception of reasonableness, to the extent known, rather than the judge’s, that should guide decision.” *Id.* at 287.

act, and judges should construe statutes to execute that legislative purpose. This approach finds lineage in the sixteenth-century English decision, *Heydon's Case*, which summons judges to interpret statutes in a way "as shall suppress the mischief, and advance the remedy."¹³³ From this perspective, legislation is the product of a deliberative and informed process. Statutes in this conception have purposes or objectives that are discernible. The task of the judge is to make sense of legislation in a way that is faithful to Congress's purposes. When the text is ambiguous, a court, as Congress's agent, is to provide the meaning that the legislature intended. In that circumstance, the judge gleans the purpose and policy underlying the legislation and deduces the outcome most consistent with those purposes.

The classic exposition of this approach is found in *Church of the Holy Trinity v. United States*.¹³⁴ The statute in question, the Alien Contract Labor Act, made it unlawful to "prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States . . . to perform labor or service of any kind."¹³⁵ In arranging for an English minister to come to New York to serve as the church's rector and pastor, Holy Trinity seemingly violated the explicit language of the statutory prohibition. But the Supreme Court, in an opinion by Justice Brewer, held that Congress only sought to bar manual labor, not professional services: "[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."¹³⁶ In reaching its conclusion that the law did not apply to the minister's services, the Court went beyond the text of the statute to an inquiry into underlying purposes. Thus, the Court determined that the statute's title made reference to "labor," not professionals, and that the law was meant to remedy the problem of "great numbers of an ignorant and servile class of foreign laborers."¹³⁷ The Court looked to legislative history—to committee hearings, to the House report, which referred to workers "from the lowest social stratum," and to the Senate Labor Committee report, which, in the Court's view, understood the bill to apply only to manual labor.¹³⁸ It also reasoned that because of the role of religion in this country—"this is a Christian nation,"¹³⁹ wrote Justice Brewer—

¹³³ *Heydon's Case*, (1584) 76 Eng. Rep. 637 (K.B.) 638; 3 Co. Rep. 7a, 7b.

¹³⁴ 143 U.S. 457 (1892).

¹³⁵ Alien Contract Labor Act of 1885, ch. 164, § 1, 23 Stat. 332, 332 (amended 1888).

¹³⁶ 143 U.S. at 459.

¹³⁷ *Id.* at 462.

¹³⁸ *Id.* at 464–65.

¹³⁹ *Id.* at 471.

Congress could not have intended to make the hiring of a cleric illegal. With its inquiry beyond the text into the underlying purposes of the statute and with resort to legislative history,¹⁴⁰ *Holy Trinity* became paradigmatic of how federal courts in the twentieth century interpreted legislation.¹⁴¹ It would also, in the view of its critics, such as Justice Scalia, become a prime example of supposed deficiencies in the purposive approach.¹⁴²

Judge Learned Hand of the U.S. Court of Appeals for the Second Circuit echoed *Holy Trinity*:

All [legislators] have done is to write down certain words which they mean to apply generally to situations of that kind. To apply these literally may either pervert what was plainly their general meaning, or leave undisposed of what there is every reason to

¹⁴⁰ See William S. Blatt, *Missing the Mark: An Overlooked Statute Redefines the Debate over Statutory Interpretation*, 104 NW. U. L. REV. COLLOQUY 147, 150 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/36/> ("Long after it was decided, *Holy Trinity* was regarded as an important case, both for its willingness to depart from text, and for its reliance on legislative history."). Professor Blatt notes that pre-*Holy Trinity*, the 1891 edition of Sutherland's *Statutes and Statutory Construction* did not make specific reference to use of committee reports. *Id.* at n.23; 1 J.G. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* 382–84 (1891). However, the 1904 edition stated that committee reports were "proper sources of information in ascertaining the intent or meaning of an act." *Id.* (quoting 2 J.G. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 470, at 879–80 (John Lewis ed., 2d ed. 1904) (citing *Holy Trinity*)). See Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901, 907 (2000) ("*Holy Trinity Church* establishes the importance of recourse to legislative history and affords a . . . foundation for non-textualist approaches to statutory interpretation . . ."); Bradley C. Karkkainen, "*Plain Meaning*": *Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 434 n.132 (1994) ("The earliest Supreme Court case commonly cited for the use of legislative history to construe a statute is *Church of the Holy Trinity v. United States*."); Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 97 (1998) (noting that "*Holy Trinity* presaged a gradual change in the Supreme Court's methodology" toward greater reliance on legislative history in statutory interpretation). For a critique of the use of legislative history in *Holy Trinity*, see Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1836 (1998), where the author uses *Holy Trinity* as the starting point to argue that the structural constraints of governing the adjudicatory process undermines the judiciary's ability to accurately discern legislative intent from legislative history.

¹⁴¹ See, e.g., William N. Eskridge, Jr., "*Fetch Some Soupmeat*," 16 CARDOZO L. REV. 2209, 2217 n.38 (1995) ("*Church of the Holy Trinity* has . . . been the focal point of the debate between the Supreme Court's 'new textualists' and more purpose-based interpreters."); Frederick Schauer, *Constitutional Invocations*, 65 FORDHAM L. REV. 1295, 1307 (1997) ("*Church of the Holy Trinity v. United States* is not only a case, but is the marker for an entire legal tradition, . . . [one which emphasizes that] there is far more to law than the plain meaning of authoritative legal texts . . .").

¹⁴² See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE FEDERAL LAW 3, 22 (Amy Gutmann ed., 1997) (criticizing *Holy Trinity* and its inquiry beyond the text into legislative intent).

suppose they meant to provide for. Thus it is not enough for the judge just to use a dictionary. If he should do no more, he might come out with a result which every sensible man would recognize to be quite the opposite of what was really intended; which would contradict or leave unfulfilled its plain purpose.¹⁴³

The champions of the purposive approach, post-World War II, were two Harvard Law School professors, Henry M. Hart, Jr. and Albert M. Sacks, whose compilations of materials on the legal process influenced generations of jurists and scholars, including Norman Dorsen—the Madison Lecture’s impresario who developed extensive supplemental materials to the Hart and Sacks work.¹⁴⁴ They wrote that a court’s role is to interpret the statutes “to carry out the purpose as best it can,” subject to the caveat that it does not give the words either “a meaning they will not bear, or . . . a meaning which would violate any established policy of clear statement.”¹⁴⁵ In contrast to the legal realists of the 1930s, who believed that judges make law, the proponents of the legal process approach viewed judges as agents of the legislature with the ability to discern Congress’s purposes and to interpret laws consistent with those purposes. Although the canons of construction can be “useful as reassurances about the meaning which particular configurations of words *may* have in an appropriate context,” they should not be treated as rigid rules that dictate what these configurations “invariably *must* have” regardless of context.¹⁴⁶ This approach allows for an examination of legislative history so as to better understand the legislation under review. Understanding the underlying purposes of the legislation allows for the laws to be applied in situations not necessarily anticipated by the enacting Congress. I agree with Justice Breyer that, if courts are faithful to the statute’s objectives, Congress will view the third branch as a cooperating

¹⁴³ LEARNED HAND, *How Far Is a Judge Free in Rendering a Decision?*, in NAT’L ADVISORY COUNCIL ON RADIO IN EDUC., LAW SERIES 11 (1935), reprinted in THE SPIRIT OF LIBERTY 103, 106 (Irving Dilliard ed., 1952).

¹⁴⁴ See HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). Hart and Sacks’s materials had, until 1994—when they were formally published through the efforts of William N. Eskridge, Jr. and Philip P. Frickey—been disseminated as “a [t]entative [e]dition.” Erwin N. Griswold, *Preface* to HART & SACKS, *supra*, at vii, vii–ix (describing the decades-long effort to publish Hart and Sacks’s work). The 1994 publication consists of the 1958 tentative edition. William N. Eskridge, Jr. & Philip P. Frickey, *Publication Editors’ Preface* to HART & SACKS, *supra*, at xi, xi.

¹⁴⁵ HART & SACKS, *supra* note 144, at 1374.

¹⁴⁶ *Id.* at 1376. For a discussion of the legal process school, see Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319, 1332–36 (2010).

partner—a perspective that can only promote the fair and effective administration of justice.¹⁴⁷

Critics of the purposive approach argue that because the laws of Congress are often ambiguous, it is not possible to say with any certainty what the purposes of the legislature were. There may be many purposes, with ambiguity permitting legislators of differing views to vote for a bill, each interpreting it in ways to support their differing conceptions. In the words of Kenneth Shepsle, “Congress [i]s a ‘[t]hey,’ [n]ot an ‘[i]t,’” and legislative intent is an oxymoron.¹⁴⁸ Legislation—particularly large omnibus bills passed with great speed at the end of a legislative session—may at points be contradictory. As to these large omnibus measures that contain a hodgepodge of unrelated measures, a legislator may vote for the whole bill because she supports certain parts, even though she would vote against other parts if considered separately. In these circumstances, critics of the purposive approach contend that it blinks reality to assert that legislation has knowable purposes that courts can identify.

That legislation is the institutional product of a collection of individuals with a variety of motives and perspectives should not foreclose the effort to discern purposes. Just as intentions are attributed to other large entities—such as local governments, trade associations, and businesses—so too do linguistic protocols, every day mores, and context facilitate an inquiry into what Congress intended to do when statutory text is vague or ambiguous. At times, it is difficult to ascertain purposes, and the search for purpose as to particular statutes may be elusive. But to jettison the inquiry altogether, because of the difficulty in particular cases, means that judges will interpret statutes unmoored from the reality of the legislative process and what the legislators were seeking to do.

Most judges, in my experience, are neither wholly textualists nor purposivists (that is, seekers of purpose). Purposivists tend not to go beyond the words of an unambiguous statute; at times, textualists look to purposes and extratextual sources such as dictionaries. What sets

¹⁴⁷ See BREYER, *supra* note 132, at 88 (linking “whether [the Court’s] interpretations will effectively carry out the statute’s objectives” to “whether its relationship with Congress will tend more toward the cooperative or the confrontational”); Linda Greenhouse, *Making Congress All It Can Be*, N.Y. TIMES OPINIONATOR BLOG (Oct. 7, 2010, 9:38 PM), <http://opinionator.blogs.nytimes.com/2010/10/07/making-congress-all-it-can-be/> (noting that Justice Breyer views the Supreme Court as helping Congress). See generally KATZMANN, COURTS AND CONGRESS, *supra* note 3 (advancing the view that courts and Congress should work together); JUDGES AND LEGISLATORS, *supra* note 3 (same).

¹⁴⁸ Kenneth A. Shepsle, *Congress is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 239 (1992).

them apart is a difference in emphasis and the tools they employ to find meaning.

In approaching the interpretative task, I have, as a judge, several tools I can use, including: text, statutory structure, history, word usage in other relevant statutes, common law usages, agency interpretations, dictionary definitions, technical and scientific usages, lay usages, canons, common practices, and purpose.¹⁴⁹ The judge's work takes place not on the lofty plane of grand, unified theory, but on the ground of practical, common-sense inquiry.¹⁵⁰ The judge pulls from the toolbox those instruments that can help extract "[u]seful [k]nowledge,"¹⁵¹ as Benjamin Franklin termed it, about what the statute means in light of congressional purposes. The toolbox can help the judge, for example, appreciate the institutional context that can serve as a guide to understanding a statute's meaning. Statutes vary in design and substance,¹⁵² and so, the interpretative task may change and the tools used may vary depending on the particular statutory issue at hand.

Thus, as I have noted, some statutes are precise, specific, and closed-ended, such that the text itself provides definitive direction. Justice Souter said: "The language is straightforward, and with a straightforward application ready to hand, statutory interpretation has no business getting metaphysical."¹⁵³ Some statutes deal with subjects where words have specialized meanings. Tax law is an example, as its subtleties are not necessarily obvious in the text itself. Still other statutes are more open-ended in construction, such that agencies and courts must go beyond the text in the interpretative process. For instance, it is not self-evident as to what constitutes "unfair methods of competition in or affecting commerce, and unfair or deceptive acts

¹⁴⁹ For a thoughtful discussion recognizing the legitimacy of multiple approaches and factors, see Todd D. Rakoff, *Statutory Interpretation as a Multifarious Enterprise*, 104 Nw. U. L. REV. 1559, 1569, 1570–86 (2010).

¹⁵⁰ Commenting on the challenge of developing a "grand theory" of judicial decision making, Judge Frank Coffin wrote: "I suspect that any such attempt is about as likely to succeed as trying to shoehorn an elephant's foot into a ballet slipper." Frank M. Coffin, U.S. Senior Circuit Judge, My Judicial Key Ring: Remarks upon Receipt of the Morton A. Brody 2006 Award for Distinguished Judicial Service at Colby College 4 (Mar. 19, 2006) (transcript on file with the *New York University Law Review*).

¹⁵¹ BENJAMIN FRANKLIN, A PROPOSAL TO PROMOTE USEFUL KNOWLEDGE AMONG THE BRITISH PLANTATIONS IN AMERICA 1 (1743), available at <http://nationalhumanitiescenter.org/pds/becomingamer/ideas/text4/amerphilsociety.pdf>.

¹⁵² See, e.g., FRIENDLY, *supra* note 126, at 203–04 (1967) (emphasizing that statutes come in varying levels of specificity and open-endedness); Pierre N. Leval, *Trademark: Champion of Free Speech*, 27 COLUM. J.L. & ARTS 187, 195–98 (2004) (describing "micromanager" statutes and delegating statutes that adopt common law or make "new policy").

¹⁵³ *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 37 (1998).

or practices in or affecting commerce.”¹⁵⁴ Nor is it self-evident as to what constitutes a “reasonable accommodation” under the Americans with Disabilities Act.¹⁵⁵ In deciphering statutes, we would do well to remember, as Justice Frankfurter wrote: “Unhappily, there is no table of logarithms for statutory construction. . . . One or another [item of evidence] may be decisive in one set of circumstances, while of little value elsewhere.”¹⁵⁶ If judges exclude legislative history they will eliminate a useful source of information about the law’s meaning. Legislative history is not the law, but can help us understand what the law means. Depriving judges of what appeared to animate legislators risks having courts interpret the legislation in ways that the legislators did not intend. The danger, as Justice Breyer observed, is that a court will “divorce[] law from life.”¹⁵⁷ Textualists have argued that it is difficult to discern the purposes of 535 legislators, but by eliminating authoritative materials such as committee reports and conference committee reports as interpretative tools—which can provide valuable guides in understanding purpose—they make their interpretative task not only that much harder, but also more prone to incorrect outcomes. Earlier, I explained how those who deal most frequently with statutes—that is, agencies—look to legislative history so as to be faithful to Congress’s meaning. Courts should be no different in examining pre-enactment legislative sources that assist the interpretative task.

Legislative history can help provide meaning when a statute is silent or unclear about a contested issue. I have found this to be true in a number of cases on which I have worked on the Second Circuit, including some I mentioned at the outset of this Lecture.¹⁵⁸ Legislative history can be especially valuable when construing a specialized term or phrase in statutes dealing with complex matters beyond the ordinary ken of the judge. In that circumstance, it can aid the judge in understanding how the legislation’s congressional proponents wanted the statute to work, what problems they sought to address, what purposes they sought to achieve, and what methods

¹⁵⁴ 15 U.S.C. § 45(a)(1) (2006).

¹⁵⁵ Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(9) (2006).

¹⁵⁶ Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 542, 543 (1947), reprinted in JUDGES ON JUDGING: VIEWS FROM THE BENCH 221, 229 (David M. O’Brien ed., 1997).

¹⁵⁷ *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 324 (2006) (Breyer, J., dissenting).

¹⁵⁸ See *supra* notes 9–14 and accompanying text. In another case, I found legislative history useful in assessing whether the jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A) (2006), applies when the plaintiff’s allegations are based on materials produced in response to a Freedom of Information Act, 5 U.S.C. § 552 (2006), request. *United States ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94, 108–10 (2d Cir. 2010).

they employed to secure those purposes.¹⁵⁹ Legislative history can be helpful, Justice Stevens commented, “when an exclusive focus on text seems to convey an incoherent message, but other reliable evidence clarifies the statute and avoids the apparent incoherence.”¹⁶⁰ And, at times, as I indicated earlier, authoritative legislative history can be useful, even when the meaning can be discerned from the statute’s language, to reinforce or to confirm a court’s sense of the text.¹⁶¹

When courts construe statutes in ways that respect what legislators consider their work product, the judiciary promotes comity with the first branch of government. It is a bipartisan institutional perspective within Congress that courts should consider reliable legislative history and that failing to do so impugns Congress’s workways. Several years ago, then-Congressman Robert W. Kastenmeier (D-WI), the longtime chair of the House Judiciary Subcommittee on Courts, put it this way: Disregarding legislative history “is an assault on the integrity of the legislative process.”¹⁶² Senators Orrin Hatch (R-UT), Charles E. Grassley (R-IA), and Arlen Specter (as R-PA), as Republican chairs or ranking members, and Senators Joseph Biden (D-DE) and Patrick Leahy (D-VT), as Democratic chairs or ranking members have consistently supported judicial resort to legislative history; indeed, senators often press that view on judicial nominees at confirmation hearings.

Senator Grassley, currently ranking member of the Judiciary Committee, has long defended legislative history. In 1986, at the confirmation hearing of Antonin Scalia for Supreme Court Justice, he

¹⁵⁹ See A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 71, 77 (1994) (explaining how analysis of legislative history supplements rigorous textual analysis by enabling a judge to “test[] his tentative construction of the statutory language”). For an example of how legislative history has been used to construe the meaning of a specialized term in the context of a complex statutory scheme, see *Solite Corp. v. EPA*, 952 F.2d 473, 492–93 (D.C. Cir. 1991), where the court analyzes whether the Bevill Amendment to Subtitle C of the Resource Conservation and Recovery Act applies to various waste categories, including lightweight aggregate air pollution dust, lead process wastewater, or chrome tailings.

¹⁶⁰ *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 472 (2002) (Stevens, J., dissenting).

¹⁶¹ See, for example, Justice Sotomayor’s opinion in *Carr v. United States*, 130 S. Ct. 2229, 2241–42 (2010), where the Court used legislative history to supplement textual analysis in determining whether a provision of the Sex Offender Registration and Notification Act that criminalized interstate travel of unregistered sex offenders was intended to apply to sex offenders who traveled before the passage of the Act, and Justice Kagan’s opinion in *Tapia v. United States*, 131 S. Ct. 2382, 2391 (2011), where the Court observed that the legislative history provided further confirmation of the use of textual analysis in determining whether the Sentencing Reform Act precludes federal courts from lengthening a prison term to promote rehabilitation.

¹⁶² *Interbranch Relations*, *supra* note 15, at 277 (statement of Robert W. Kastenmeier, Fellow, Governance Inst.).

expressed concern about the then-D.C. Circuit judge's "pretty dog-gone strong language" in his opposition to legislative history: "[A]s one who has served in Congress for 12 years, legislative history is very important to those of us here who want further detailed expression of that legislative intent."¹⁶³ Nearly two decades later, Senator Grassley pressed nominee John G. Roberts, Jr., with a series of questions about legislative history, noting:

Justice Scalia is of the opinion that most expressions of legislative history, like Committee reports or statements by the Senators on the floor, or in the House, are not entitled to great weight because they are unreliable indicators of legislative intent. Presumably, Justice Scalia believes that if the members don't actually write a report or don't actually vote on a report, then there is no need to defer to this expression of congressional intent.

Now, obviously, I have great regard for Justice Scalia, his intellect and legal reasoning. But, of course, as I told you in my office, I don't really agree with his position.¹⁶⁴

Senator Hatch, who for many years was chair or ranking member of the Senate Judiciary Committee, commented that "[t]ext without context often invites confusion and judicial adventurism."¹⁶⁵ As an example of how legislative history might be useful, he pointed to a bail law that did not incorporate a reference to the Speedy Trial Act, but where "[t]he legislative history . . . imparted the additional information necessary to preserve the basic goal of pretrial detention."¹⁶⁶ Then-Senator Specter of Pennsylvania stated: "I think when justices disregard that kind of material [legislative history], it is just another way to write their own law"¹⁶⁷

¹⁶³ *Nomination of Judge Antonin Scalia: Hearings Before the S. Comm. on the Judiciary on the Nomination of Antonin Scalia, To Be Associate Justice of the Supreme Court of the United States*, 99th Cong. 65–66 (1986) (statement of Sen. Charles E. Grassley).

¹⁶⁴ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 318–19 (2005) (statement of Sen. Charles E. Grassley). A few months later, Senator Grassley would question Judge Samuel Alito on his views of legislative history. See *Confirmation Hearing on the Nomination of Judge Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 503 (2006) (statement of Sen. Charles E. Grassley).

¹⁶⁵ Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J.L. & PUB. POL'Y 43, 43 (1988).

¹⁶⁶ *Id.* at 47.

¹⁶⁷ Joan Biskupic, *Scalia Takes a Narrow View in Seeking Congress' Will*, 48 CONG. Q. WKLY. REP. 913, 917 (1990) (alteration in original). At the most recent Supreme Court confirmation hearing, that of Elena Kagan, Senator Al Franken (D-MN), criticized a Supreme Court decision for not looking into legislative history, and urged the nominee to consider such history, observing that "we spend a lot of time in hearings and on the floor debating legislation." *The Nomination of Elena Kagan To Be an Associate Justice of the*

The approach I advocate has not gone unchallenged. Indeed, within the judiciary, a sustained attack on the use of legislative history began in the 1980s, largely led by Antonin Scalia, first as a D.C. Circuit judge and then as a Supreme Court Justice. In a 1993 Supreme Court opinion, he wrote: "We are governed by laws, not by the intentions of legislators. . . . 'The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself'"¹⁶⁸ Justice Scalia agrees with the view that because legislation often consists of a brew of deals, compromises, and inconsistencies, the search for coherent purpose is elusive. Thus, it is the statute's final wording that must prevail; he has argued over "unenacted legislative intent."¹⁶⁹ Textualism, as Justice Scalia championed it, involves an assault on the dependence of any extratextual source in determining statutory meaning. Legislative history became a central target. "We are a Government of laws, not of committee reports," he asserted.¹⁷⁰ In another case, he explained:

I am confident that only a small proportion of the Members of Congress read either one of the Committee Reports in question . . . [and] that very few of those who did read them set off for the nearest law library to check out what was actually said in the four cases at issue (or in the more than 50 other cases cited by the House and Senate Reports) As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction. What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself.¹⁷¹

This textualist critique of legislative history has at least four parts. The first, which is premised on the Constitution, is the idea that the only legitimate law is text that both chambers and the President have approved (or passed by a two-thirds vote of Congress over the

United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 219 (2010) (statement of Sen. Al Franken).

¹⁶⁸ *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (emphasis omitted) (quoting *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845)).

¹⁶⁹ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 453 (1987) (Scalia, J., concurring).

¹⁷⁰ *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 620 (1991) (Scalia, J., concurring in the judgment).

¹⁷¹ *Blanchard v. Bergeron*, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring in part and concurring in the judgment).

President's veto). This view looks in part for support from *INS v. Chadha*, in which the Supreme Court held legislative vetoes unconstitutional because they evaded procedures of bicameralism and presentment. Because (so the narrative goes) legislators do not review legislative history, that history lacks authority. Legislative history materials, Justice Scalia stated, are "frail substitutes for bicameral vote upon the text of a law and its presentment to the President. It is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions."¹⁷² A system that relies on committee reports delegates power to unelected staff at the expense of the whole chamber, so textualists claim.¹⁷³ The use of legislative history, the argument continues, violates the constitutional rule prohibiting congressional self-delegation.¹⁷⁴ Committee reports should not be looked to when interpreting the statute, and neither should materials such as floor debates and statements in the Congressional Record. In the view of legislative history critics, apart from the fact that statements in the Congressional Record are not the laws themselves, the Congressional Record is suspect as a guide to legislative meaning because it does not differentiate between remarks made by those who were involved in crafting the legislation—such as bill managers—and those who were not; it can include statements inserted by legislators who were not present on the floor; and legislators can revise for publication statements that colleagues heard them make on the floor.

Second, critics of legislative history argue that its use impermissibly increases the discretion of judges to roam through the wide range of often-inconsistent materials and rely on those that suit their position.¹⁷⁵ By so choosing, critics charge judges with substituting their policy preferences for those of elected officials, with whom such a choice properly resides.

A third component of the assault on legislative history is grounded in the idea that legislators will be compelled to write

¹⁷² *Thompson v. Thompson*, 484 U.S. 174, 192 (1988) (Scalia, J., concurring) (citation omitted).

¹⁷³ As then-D.C. Circuit Judge Scalia wrote: "[R]outine deference to the detail of committee reports . . . [is] converting a system of judicial construction into a system of committee-staff prescription." *Hirschey v. Fed. Energy Regulatory Comm'n*, 777 F.2d 1, 8 (D.C. Cir. 1985) (Scalia, J., concurring).

¹⁷⁴ See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 698 (1997) ("[T]extualists have opened a second front in pressing their constitutional objections to the authority of legislative history—Lockean nondelegation principles.").

¹⁷⁵ Scalia, *supra* note 142, at 36 ("In any major piece of legislation, the legislative history is extensive, and there is something for everybody. . . . The variety and specificity of result that legislative history can achieve is unparalleled.").

statutes with more precision if they know that courts cannot consult such materials.

Fourth, underlying the criticism of legislative history is a decidedly negative conception of the legislative process, based on the "public choice" school, which employs principles of market economics to explain decision making.¹⁷⁶ Like many schools, its scholars are not all of one mind and cannot be simply characterized.¹⁷⁷ Generally though, it characterizes the legislative process as fueled by rational, egoistic, utility-maximizing legislators whose primary objective is to be reelected. From this perspective, legislators enact laws that tend to transfer wealth and reduce efficiency at the expense of the public good to special interest groups that lobby the legislature. Evading responsibility—the narrative continues—members of Congress pass unclear statutes, leaving it to administrators and courts to resolve unsettled issues.¹⁷⁸ Laws benefitting society will be few and far between because of a collective action problem. As Mancur Olson put it, "rational, self-interested individuals will not act to achieve their common . . . interests"¹⁷⁹ by lobbying for legislation that benefits the general public because the benefits being sought are collective to the

¹⁷⁶ See generally JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962) (outlining principles of public choice theory); DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 21–33 (1991) (same); William C. Mitchell & Michael C. Munger, *Economic Models of Interest Groups: An Introductory Survey*, 35 AM. J. POL. SCI. 512 (1991) (reviewing several scholars' earlier models of how interest groups influence policies); Susan Rose-Ackerman, Comment, *Progressive Law and Economics—and the New Administrative Law*, 98 YALE L.J. 341, 344–47 (1988) (outlining public choice theory).

¹⁷⁷ See, e.g., Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 45–51 (1984) (observing that the Supreme Court has, through its opinions, become more sympathetic to the public choice/interest group approach toward legislation); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 704 (1984) (noting that an interest group's ability to influence legislation has been used as a justification for very limited constitutional protection of economic liberties); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 226 (1986) (arguing that the judiciary, through its interpretation of statutes, serves as a critical check on the ability of private interest groups to advance their particular interests at the expense of the public); Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CALIF. L. REV. 83 (1989) (applying public choice principles to examine the history of the American dairy industry's efforts to pass laws discriminating against margarine).

¹⁷⁸ See, e.g., Peter H. Aronson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislation Delegation*, 68 CORNELL L. REV. 1, 37–62 (1982) (describing responsibility-shifting and lottery models). But see Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 85–91 (1985) (critiquing opponents of the delegation doctrine).

¹⁷⁹ MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 2 (1971) (emphasis omitted).

group as a whole; thus the rational individual is content to be a free rider. It is thus by no means obvious that interest groups will arise to press legislators to enact “public interest” legislation, echoing in part Madison’s concern in *The Federalist* No. 10.

Sharply different from the “public interest” conception, this vision of the legislature is grim.¹⁸⁰ On this conception, legislators—motivated by the goal of reelection—evade choices on critical issues that could provoke opposition from well-organized groups. They do not develop well-conceived legislation, preferring instead to satisfy interest groups through ad hoc bargaining. This view is manifested in Justice Scalia’s lament about committee report language written by lawyer-lobbyists, at the behest of client groups, and about committees that serve client interests rather than Congress itself.¹⁸¹

Over time, the textualist critique has become more nuanced. John Manning, who has contributed many distinguished writings in the field, observed that textualists have focused more on formal constitutional arguments such as bicameralism, presentment, and nondelegation. While they continue to look askance at legislative history, they are less inclined to draw upon public choice theory. Rather, they emphasize the importance of judges’ “respect[ing] the terms of an enacted text *when its semantic meaning is clear*, even if it seems contrary to the statute’s apparent *overall purpose*.”¹⁸² They take as given the bargaining of the legislative process—whatever the motivations of legislators—and argue that adherence to text is appropriate in part because of legislative compromises, which may make the search for coherent purpose a fool’s errand. In interpreting statutes, textualists seek to understand language in context, looking to dictionary definitions,¹⁸³ colloquial meanings, the technical definitions of terms of art, and background conventions associated with certain phrases or types of legislation.¹⁸⁴

¹⁸⁰ See, e.g., MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* 39–49 (1977) (describing a self-interested congressional establishment concerned primarily with its own reelection).

¹⁸¹ *Blanchard v. Bergeron*, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring in part and concurring in the judgment).

¹⁸² John F. Manning, *Second Generation Textualism*, 98 CALIF. L. REV. 1287, 1309–10 (2010).

¹⁸³ See Adam Liptak, *Justices Turning More Frequently to Dictionary, and Not Just for Big Words*, N.Y. TIMES, June 14, 2011, at A11 (noting that Supreme Court justices have increased their use and citation of dictionaries to aid in interpreting statutory language).

¹⁸⁴ In earlier writings, Professor Manning did leave open a narrow window for the use of legislative history when it supplies “an objective unmanufactured history of a statute’s context.” Manning, *supra* note 174, at 731. He wrote:

If such legislative history *persuasively* describes that objective context (rather than merely offering the committee’s or sponsor’s own idiosyncratic expression

Although I agree that dictionaries can be helpful—especially when dealing with a specialized term or a term of art, or a word usage at the time of the law’s enactment—more often than not, the interpretative challenge comes from the ambiguity of the word as situated in a sentence. In that situation, resort to dictionaries can hardly be definitive. In any event, if it is appropriate to look to dictionaries as an extraneous source, it is not at all clear why legislative history—in its reliable forms—should be excluded.

That textualists have moved away from public choice theory is understandable, given the inability of that theory to capture the complexity of the decision-making process. There is a substantial literature, to which I have offered some writings, that questions the underlying factual assertions for its sweeping propositions.¹⁸⁵ The calculus of Congress cannot be reduced only to the idea that interest groups dictate the behavior, votes, and agenda of legislators eager for the financial support necessary for reelection.¹⁸⁶ A variety of case studies track the passage of legislation where interest group involvement was not decisive.¹⁸⁷ And where groups have had a role, their interests, as James Q. Wilson has written, have not necessarily been

of intent), a court may consider that history for “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors [sic] which give it power to persuade, if lacking power to control.”

John F. Manning, *Putting Legislative History to a Vote: A Response to Professor Siegel*, 53 VAND. L. REV. 1529, 1529 n.2 (2000) (quoting John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 733 n.252 (1997) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

¹⁸⁵ See, e.g., FARBER & FRICKEY, *supra* note 176, at 116–17 (discussing the limitations of public choice theory); KATZMANN, COURTS AND CONGRESS, *supra* note 3, at 52–53 (criticizing the public choice view as oversimplified and noting that Congress sometimes acts without interest group support or despite powerful opposition); THE POLITICS OF REGULATION (James Q. Wilson ed., 1980); Robert A. Katzmann, *Comments on Levine and Forrence, “Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis,”* 6 J.L. ECON. & ORG. 199 (1990) (discussing several possible reasons for legislative and regulatory outcomes outside of the paradigmatic public choice analysis).

¹⁸⁶ On agenda setting, see BRIAN D. JONES & FRANK R. BAUMGARTNER, *THE POLITICS OF ATTENTION* (2005), where the author examines how policymakers obtain and use information to set the agenda, and JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (2d ed. 2011), where the author explores how issues become part of the public agenda.

¹⁸⁷ R. Shep Melnick found little interest group involvement in his studies of the food stamp program, aid to families with dependent children, and special education. See R. SHEP MELNICK, *BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS* 259–60 (1994) (noting that legislators’ desires to advance what they believed to be good public policy were driving forces in the development of these policies as well as broader public opinion).

economic.¹⁸⁸ Moreover, some legislation predated interest groups' activity and, indeed, led to the creation of particular interest groups. One example is section 504 of the Rehabilitation Act of 1973, outlawing discrimination against those with disabilities in programs receiving federal aid or assistance.¹⁸⁹ And certainly, Congress has enacted a variety of legislation in spite of the opposition of large powerful economic interests. Examples include laws having to do with airline and trucking deregulation and measures that address health, environmental, and safety concerns.¹⁹⁰ Surely, legislators are concerned about reelection,¹⁹¹ and public choice theory quite usefully draws attention to how incentives can affect behavior. It would be naive to think that legislators would not well consider how interest groups can affect, positively or negatively, their hopes to return to office. But legislators also have policy objectives that cannot simply be understood as interest group driven. Even where interest groups have a substantial impact on the legislative process, it does not follow that their goals are against the public interest.¹⁹² Legislation that benefits the personal interests of an interest group may, depending on the measure, also benefit the wider public.

Textualists have appropriately identified misuses and manipulation of legislative history. Without doubt, language is on occasion put into committee reports unnoticed by the whole legislative chamber or even by members of relevant committees. Martin Ginsburg, for example, pointed to such excesses in the area of tax legislation,¹⁹³ and Senator Moynihan once expressed concern over how report language in one particular piece of legislation was not reviewed by the

¹⁸⁸ See James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION*, *supra* note 185, at 357, 357–72 (assessing non-economic reasons driving the politics of regulation).

¹⁸⁹ See KATZMANN, *INSTITUTIONAL DISABILITY*, *supra* note 2, at 189 n.1 (arguing that in the case of the disability rights movement, “policy origination owe[d] little to ‘interest group liberalism’”).

¹⁹⁰ See MARTHA DERTHICK & PAUL J. QUIRK, *THE POLITICS OF DEREGULATION* 16–19 (1985) (noting that industry interests were vehemently opposed to the deregulation of the air transport, trucking, and wireline telephone industries); Wilson, *supra* note 188, at 357–72 (reviewing various regulatory proposals and analyzing their sources of political support).

¹⁹¹ DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 13 (1974).

¹⁹² See, e.g., MELNICK, *supra* note 187, at 260 (noting that legislators' desires to advance what they believed to be good public policy were driving forces in the development of these policies as well as broader public opinion).

¹⁹³ Martin D. Ginsburg, Luncheon Speech at the New York State Bar Association Tax Section Annual Meeting Luncheon (Jan. 24, 1991), in *Interbranch Relations*, *supra* note 15, at 293–95 (noting that in the area of tax legislation, many provisions in the committee reports are not read by members of Congress).

legislators on the relevant committee.¹⁹⁴ By putting a spotlight on legislative history, the textualist critique has had some effect on individual legislators. Representative Barney Frank (D-MA) reportedly ward off an effort to insert compromise language in a committee report rather than in the bill itself.¹⁹⁵ He did so with two words: "Justice Scalia."¹⁹⁶ Although among Supreme Court Justices, pure textualists can claim only Antonin Scalia and Clarence Thomas as faithful supporters,¹⁹⁷ the textualist critique has had an undeniable impact. Today, it is commonplace for a statutory opinion of a federal court to state: "where the statutory language provides a clear answer, it ends there as well."¹⁹⁸

Gone are the days when a Supreme Court opinion would declare, as it did in 1971:

The legislative history of both § 4(f) of the Department of Transportation Act, 49 U.S.C. § 1653(f) (1964 ed., Supp. V), and § 138 of the Federal-Aid Highway Act, 23 U.S.C. § 138 (1964 ed., Supp. V), is ambiguous. . . . Because of this ambiguity, it is clear that we must look primarily to the statutes themselves to find the legislative intent.¹⁹⁹

By 2005, Justice Kennedy, in an opinion of the Court, to which Justices Stevens, O'Connor, Ginsburg, and Breyer dissented, would exclaim:

¹⁹⁴ Observing that he was "considerably involved in writing" the "uniform capitalization rules" on authors, Senator Moynihan contended that the rules—designed to provide a better matching of income and expenses of manufacturing property—did not apply to books. Daniel Patrick Moynihan, Letter to the Editor, *How To Tell a Manufacturer from a Writer*, N.Y. TIMES, Sept. 6, 1987, at E14. However, a footnote in a conference committee report that later became law did appear to encompass books. Senator Moynihan was moved to write:

I was a member of the conference committee. I do not ever recall the subject's having been raised, nor does any senator or representative with whom I've talked. My best guess is that staff members wrote it into the report thinking it was *already* law It is not law, and must not be construed as law.

Id.

¹⁹⁵ Joan Biskupic, *Congress Keeps Eye on Justices as Court Watches Hill's Words*, 49 CONG. Q. WKLY. REP. 2863, 2863 (1991).

¹⁹⁶ *Id.*

¹⁹⁷ When Justice Scalia rebuked Justice Alito's use of legislative history in *Zedner v. United States*, 547 U.S. 489, 509–11 (Scalia, J., concurring in part and concurring in the judgment), the mainstream media took notice. See Tony Mauro, *Alito the Latest To Feel Scalia's Sting*, LEGAL TIMES, June 12, 2006, at 8.

¹⁹⁸ *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999); see also *United States v. Gayle*, 342 F.3d 89, 92 (2d Cir. 2003) ("Statutory construction begins with the plain text and, if that text is unambiguous, it usually ends there as well.").

¹⁹⁹ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 412 n.29 (1971) (emphasis added).

Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms. Not all extrinsic materials are reliable sources of insight into legislative understandings . . . and legislative history in particular is vulnerable to two serious criticisms. First, [it is] often murky, ambiguous, and contradictory. . . . [It often becomes, in] Judge Leventhal's memorable phrase, an exercise in "looking over a crowd and picking out your friends." . . . Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.²⁰⁰

While judges still use legislative history,²⁰¹ they tend to give it more of a supporting rather than a leading role in statutory interpretation.²⁰² Courts tend to approach legislative history with what Justice Ginsburg termed "hopeful skepticism."²⁰³

Although textualists have helpfully shown some of the pitfalls of legislative history, I do not think they have made the case for its exclu-

²⁰⁰ *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (quoting Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983)).

²⁰¹ See, e.g., William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from Chevron to Hamdan*, 97 GEO. L.J. 1083, 1135–36 (2008) (noting that the Supreme Court uses legislative history in the *Chevron* inquiry).

²⁰² See generally FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 59 (2009) (noting that even proponents of legislative history acknowledge that its use must be grounded first in the text, for they "do not disregard the text, they seek to illuminate it"); James J. Brudney, *Confirmatory Legislative History*, 76 BROOK. L. REV. 901 (2011) (discussing the use of legislative history as a tool for judges to confirm and complete conclusions they have already reached); James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Berger and Rehnquist Eras*, 89 JUDICATURE 220 (2006) (noting the sharp decline in the Court's interest in legislative history over time); James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231 (2009) (identifying an overall decline in the use of legislative history, but pointing out that the Court continues to use legislative history to identify congressional bargains or to borrow expertise from a more knowledgeable branch, depending on the substantive area of law); Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 369 (1999) (positing that Justice Scalia has "contributed significantly to a sharp reduction in the Court's use of legislative history"); David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653 (2010) (discussing the use of legislative history generally).

²⁰³ *Nomination of Ruth Bader Ginsburg, To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 224 (1993).

sion. I question their view that restricting interpretation to the text will lead to more responsible legislating and more clearly drafted laws. Certainly, textual ambiguity may be a consequence of carelessly drafted laws. And sometimes rather than confront difficult problems in text, legislative drafters may address them in committee reports. But ambiguity is often the product of the simple fact that the issues are difficult and Congress, having identified the general problem, leaves it to an agency or court to determine how best to address the problem.²⁰⁴ As Richard Stewart observed: "The demands on Congress' agenda far exceed its capacity to make collective decisions."²⁰⁵ Given policy complexities, it is unreasonable to expect Congress to anticipate all interpretive questions that may present themselves in the future.²⁰⁶ Inadvertence as a result of time pressures may be the explanation, especially when fast-moving amendments are added to larger bills. In other circumstances, it may be that the sponsors were unable or deliberately chose not to craft legislation that was both precise and enactable. The language may be imprecise to facilitate the bill's passage, such that even competing interests can find language in the bill that supports their positions. Ambiguity, as Herbert Kaufman remarked, can be the solvent of disagreement, at least temporarily.²⁰⁷ In these circumstances, textualists should

²⁰⁴ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2255 (2001) (discussing the inability or unwillingness of Congress to legislate specific solutions to problems and noting its preference for general delegations of power); Rubin, *supra* note 111, at 411 (expressing a preference for goal-oriented statutes that leave the precise implementation to agencies, given the complexity of the issues that face Congress). On the politics of delegation, see generally JAMES H. COX, REVIEWING DELEGATION: AN ANALYSIS OF THE CONGRESSIONAL REAUTHORIZATION PROCESS (2004), and DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS* (1999). For the view that Congress sometimes crafts legislation recognizing that courts will ultimately have to resolve open questions, see GEORGE I. LOVELL, *LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY* 253 (2003).

²⁰⁵ Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 331 (1987).

²⁰⁶ See Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 387 ("An absence of textual specification may equally reflect the incapacity of legislators, no matter how willing to try to resolve statutory uncertainties, to anticipate all of the uncertainties that will arise, as well as the difficulties of crafting language that, in the myriad context to which it is applied, will avoid ambiguity.").

²⁰⁷ HERBERT KAUFMAN, *TIME, CHANCE AND ORGANIZATIONS: NATURAL SELECTION IN A PERILOUS ENVIRONMENT* 52 (1985). See also Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1681 (2004) ("Another reason may be the incentive of any institution (and of those who champion that institution) to prefer ambiguity when clarity might diminish its power or prestige.") (citing Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627 (2002) (explaining the role of ambiguity in reaching compromise in Congress)).

be under no illusions that decrying ambiguity will change legislative behavior.²⁰⁸

As to constraining judicial preferences, it seems to me that excluding legislative history when interpreting ambiguous statutes will just as likely expand a judge's discretion as reduce it. When a statute is unambiguous, resorting to legislative history is generally not necessary; in that circumstance, the inquiry ordinarily ends. But when a statute is ambiguous, barring legislative history leaves a judge only with words that could be interpreted in a variety of ways without contextual guidance as to what legislators may have thought. Lacking such guidance increases the probability that a judge will construe a law in a manner that the legislators did not intend. It is seemingly inconsistent that textualists, who look to such extratextual materials as the records of the Constitutional Convention and *The Federalist* in interpreting the Constitution, would look askance at the use of legislative history sources when interpreting legislation.²⁰⁹

The contention that the use of legislative history violates the constitutional proscription against self-delegation is premised on a mistaken view of the legislative process. Legislative history accompanying proposed legislation precedes legislative enactment. When Congress passes a law, it can be said to incorporate the materials that it or at least the law's principal sponsors (and others who worked to secure enactment) deem useful in interpreting the law.²¹⁰ After all, Article I of the Constitution gives each chamber the authority to set its own procedures for the introduction, consideration, and approval of bills. And each chamber has established its own rules and practices²¹¹ governing lawmaking—some favoring certain proceedings over others—establishing “a resultant hierarchy of internal communications.”²¹² Those rules and procedures give particular legislators—such as com-

²⁰⁸ See Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, 34 TULSA L.J. 679, 688 (1999) (calling for more empirical scholarship on how Congress functions to test theories such as textualism).

²⁰⁹ As scholars have pointed out, the records of the Constitutional Convention consulted by textualists are incomplete. See, e.g., James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 63 TEX. L. REV. 1 (1986).

²¹⁰ James J. Brudney, *Intentionalism's Revival*, 44 SAN DIEGO L. REV. 1001, 1009–10 (2007); Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1480 (2000). But see Manning, *supra* note 174, at 706–25 (arguing that interpretative reliance on legislative history creates an opportunity for legislative self-delegation, contrary to the clear assumption of constitutional structure).

²¹¹ See *supra* note 104 and accompanying text (noting established drafting rules and practices in the Senate and House). For an interesting view suggesting that Congress could legislate doctrines of statutory construction, see Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

²¹² Brudney, *supra* note 202, at 1010.

mittee chairs, floor managers, and party leaders—substantial control over the process by which legislation is enacted. Communications from such members as to the meaning of proposed statutes can provide reliable signals to the whole chamber. And, as I noted earlier, members and their staffs have every incentive to accurately represent the meaning of proposed statutes to colleagues, as written and discussed in legislative history.

Chief Justice Roberts, who makes use of legislative history, stated at his confirmation hearing that “[a]ll legislative history is not created equal. There’s a difference between the weight that you give a conference report and the weight you give a statement of one legislator on the floor. You have to, I think, have some degree of sensitivity in understanding exactly what you’re looking at”²¹³ I concur. The task, as Senator Hatch commented, is to draw upon legislative history “properly applied” in “reliable forms,”²¹⁴ and to separate the wheat from the chaff among legislative materials. For courts, that means in part having a better understanding of the legislative process and appreciating the internal hierarchy of communications. Conference committee reports and committee reports should sit at the top, followed by statements of the bill’s managers, with ersatz statements of legislators on the floor—who had heretofore not been involved in consideration of the bill—at the bottom of reliable authority. For Congress, the challenge is to communicate its meaning in ways that assure that the “[d]ignity of [l]egislation,”²¹⁵ in Jeremy Waldron’s felicitous phrase, is preserved and respected.

IV

PROMOTING UNDERSTANDING

At some basic level, each institution—that is, the courts and the legislature—could benefit from a deeper appreciation of how the other operates. Congress, which writes the laws, might find it useful to learn more about how the judiciary interprets its laws. The judiciary, for its part, could find it useful to learn more about the legislative process. The lineage of jurists with legislative experience stretches back across the centuries, including the English Lord Mansfield in the

²¹³ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 319 (2005) (statement of Sen. Charles E. Grassley).

²¹⁴ Hatch, *supra* note 165, at 43.

²¹⁵ JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 5 (1999).

eighteenth century.²¹⁶ Today—in contrast to a generation ago—only two federal judges have served as members of Congress.²¹⁷ And in the Congress, there is only one former federal judge and one state supreme court justice, though some federal legislators clerked for judges.²¹⁸ To aid the judiciary in understanding Congress, it might be worthwhile if some entity such as the Congressional Research Service of the Library of Congress, perhaps in conjunction with the legislative counsels' offices in both legislative chambers, sponsored periodic seminars for judges and law clerks about the legislative process, even developing a manual and videos about lawmaking in Congress. (A start on this task is a pamphlet for judges on legislative drafting conventions by M. Douglas Belliss, long-time member of the House legislative counsel's office.)²¹⁹ Similarly, to assist Congress in understanding how the courts work, the Federal Judicial Center and the Administrative Office of the U.S. Courts might develop programs for legislators and their staffs about how the judiciary functions. Optimally, such activities for legislators, judges, and staffs could be incorporated into orientation programs for new judges, legislators, and staffs.

While mutual appreciation and deeper knowledge are always desirable, it would, of course, be fanciful to think that Congress would—or even could—do away with ambiguity in its laws. As I noted earlier, ambiguity may be a deliberate strategy to secure the necessary

²¹⁶ See JAMES OLDHAM, *ENGLISH COMMON LAW IN THE AGE OF MANSFIELD* 31–32 (2004) (discussing Mansfield's legislative and judicial experience). For this reference, I am grateful to Professor Bernadette Meyler of Cornell Law School.

²¹⁷ Magistrate Judge Edward G. Bryant of Tennessee was a member of the House of Representatives from Tennessee and Judge Gregory Carman of the Court of International Trade was a member of the House of Representatives from New York. In the 1980s, judges who had been members of Congress included Frank M. Coffin, Abner Mikva, Thomas Meskill, James L. Buckley, Donald Russell, Oren Harris, Charles Wiggins, William Hungate, and Gregory Carman.

Several federal judges have had substantial legislative experience as congressional staffers, including Justice Breyer, but they comprise a small percentage of judges as a whole. On this point, I am grateful to Daniel Holt of the Federal Judicial Center's History Office, see E-mail from Richard Jaffe to author (Oct. 12, 2011, 17:50 EST) (on file with the *New York University Law Review*), as well as to Judge Richard Eaton of the Court of International Trade, himself a former congressional chief of staff, and to Richard Jaffe of the Administrative Office of the U.S. Courts, for their insights.

²¹⁸ Representative Alcee Hastings of Florida was a federal district court judge, and Senator John Cornyn of Texas was a Texas Supreme Court justice. Legislators who clerked for federal judges include Senator Richard Blumenthal of Connecticut, Senator Kirsten Gillibrand of New York, Senator Mike Lee of Utah, and Representative Judy Biggert of Illinois.

²¹⁹ M. DOUGLASS BELLIS, *FED. JUDICIAL CTR., STATUTORY STRUCTURE AND LEGISLATIVE DRAFTING CONVENTIONS: A PRIMER FOR JUDGES* (2008), available at [http://www.fjc.gov/public/pdf.nsf/lookup/draftcon.pdf/\\$file/draftcon.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/draftcon.pdf/$file/draftcon.pdf).

votes, or it may be a product of the policy and political challenges surrounding the problem at hand.²²⁰ Nevertheless, there may be ways for Congress to help clarify legislative meaning, through both the drafting and the statutory revision processes, as well as the development of more reliable legislative histories.

A. *Drafting and Statutory Revision*

Ideally, legislators and their staffs should make greater use of the offices of legislative counsel, trained and skilled legislative drafters. If all legislative drafting were funneled through those offices, which apply accepted linguistic conventions and standards, then courts would have an easier time interpreting statutes. But that is not the reality of the legislative process. For those who do not avail themselves of the legislative drafting services, a checklist of common issues might be prepared—for example, dealing with such matters as attorneys' fees, private rights of action, preemption, and exhaustion of administrative remedies. There have already been several proposals for such a checklist.²²¹ When not addressed in the law, such issues are resolved in court. While such a checklist would not prevent strategic, deliberate omissions, it could be useful in avoiding drafting oversights, clarifying legislative intent, and reducing burdens on the courts.

Similarly, the offices of legislative counsel could prepare a drafting guidebook for members and staffs. Seminars with legislative counsel and judges could be useful. Law school courses and continuing legal education programs on drafting would also be helpful, not only for those who work in Congress, but also for those in interest groups and organizations urging legislators and staffs to introduce bills for which they have crafted language.

Finally, as a way to provide more precision, Congress might resort more to default positions, which would become effective when Congress has not dealt with the particular issue in a specific substantive statute. For example, as to civil statutes, Congress has declared: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of

²²⁰ See *supra* notes 185–91 and accompanying text.

²²¹ See JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 126 (1995), available at <http://www.uscourts.gov/uscourts/FederalCourts/Publications/FederalCourtsLongRangePlan.pdf> (proposing a checklist of potential technical problems for use by legislative staff); JOSEPH F. WEIS, JR. ET AL., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 91–92 (1990), available at [http://www.fjc.gov/public/pdf.nsf/lookup/repfsc.pdf/\\$file/repfsc.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/repfsc.pdf/$file/repfsc.pdf) (same); Peter H. Schuck, *Trimming Litigation*, AM. LAW., Dec. 2008, at 79 (discussing the cost savings and other benefits of a checklist aimed at common, inadvertent problems with legislative drafting).

action accrues.”²²² Hence, the default position is triggered if a particular statute has not addressed the time limitations on the commencement of civil actions arising under it.

The flip side of drafting before bills are enacted is the statutory revision process. Interbranch understanding of statutes can also be enhanced through the process of statutory revision. Supreme Court justices will from time to time identify an opinion meriting further congressional attention, as Justice Ginsburg did, to prominent effect, in the *Lilly Ledbetter* case.²²³ Congress is generally aware of Supreme Court decisions, as evidenced by legislative reversals of decisions of our highest tribunal.²²⁴ But the first branch tends to give little attention to the large number of statutory opinions of the lower courts. This lack of attention—while understandable given Congress’s workload—is curious in view of the role that courts play in construing statutes.

“Most of the work currently done by the federal courts, including the Supreme Court,” commented Justice Ginsburg, “involves not grand constitutional principle, but the interpretation and application of laws passed by Congress, laws that are sometimes ambiguous or obscure.”²²⁵ She further observed:

When Congress is not clear, courts often invite, and are glad to receive, legislative correction. The law Congress declares, as the Chief Justice recently stated, is by and large the law federal courts

²²² 28 U.S.C. § 1658(a) (2006).

²²³ *Ledbetter v. Goodyear Tire & Rubber Co.*, 500 U.S. 618, 643, 667 (2007) (Ginsburg, J., dissenting) (“As in 1991, the Legislature may act to correct this Court’s parsimonious reading of Title VII.”). See also, e.g., *Schindler Elevator Corp. v. United States ex rel. Daniel Kirk*, 131 S. Ct. 1885, 1896, 1898 (2011) (Ginsburg, J., dissenting) (“After today’s decision, which severely limits whistleblowers’ ability to substantiate their allegations before commencing suit, that question is worthy of Congress’ attention.”).

²²⁴ See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 334 (1991) (“Congress and its committees are aware of the Court’s statutory decisions, devote significant efforts toward analyzing their policy implications, and override those decisions with a frequency heretofore unreported.”); Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 425 (1992) (noting Congress’s willingness to override Supreme Court decisions with which it disagrees). For a rich case study of how Congress responds to Supreme Court decisions, see Elizabeth Garrett, *The Story of TVA v. Hill: Congress Has the Last Word*, in STATUTORY INTERPRETATION STORIES 58 (William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett eds., 2011). On occasion, the Supreme Court invites Congress to review its statutory decisions. Lori Hausegger & Lawrence Baum, *Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation*, 43 AM. J. POL. SCI. 162, 164 (1999) (noting that such invitations are diffuse or vague).

²²⁵ Ruth Bader Ginsburg, *Communicating and Commenting on the Court’s Work*, 83 GEO. L.J. 2119, 2125 (1995).

apply. When Congress has been delphic or dense, or simply imprecise, legislative clarification can ward off further confusion.²²⁶

Nearly five decades ago, Judge Henry J. Friendly of the Second Circuit, writing about the importance of statutory law, lamented "the problems posed by defective draftsmanship," especially in uncontroversial legislation.²²⁷ He wrote about "the occasional statute in which the legislature has succeeded in literally saying something it probably did not mean,"²²⁸ observed that "even the best draftsman is likely to have experienced the occasional shock of finding that what he wrote was not at all what he meant,"²²⁹ and commented on the legislative time pressures that result in "neglect of the undramatic type of legislative activity."²³⁰ Three decades later, another circuit judge, James Buckley of the D.C. Circuit and also a former Senator, remembered that in Congress, "[w]ith time often the enemy, mistakes—problems of grammar, syntax, and punctuation—are made in the drafting of statutes and affect the meaning of legislation."²³¹

Over the years, several proposals have been made to facilitate statutory revision.²³² Justice Ginsburg and her coauthor Peter Huber recommended that a "second look at laws" committee be created, and that the Office of Law Revision Counsel, which has had a ministerial role of correcting citations, assist in "statutory housekeeping."²³³ Judge Frank M. Coffin urged that a unit within the judiciary collate and sift judicial opinions with suggestions for the legislative branch and send them to Congress.²³⁴ Then-Chief Judge James L. Oakes of the U.S. Court of Appeals for the Second Circuit seconded the proposal.²³⁵ Judge Wilfred Feinberg called for the Judicial Conference to "designate a handful of law professors working on a part-time basis as

²²⁶ *Id.* (footnote omitted).

²²⁷ HENRY J. FRIENDLY, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, in BENCHMARKS 41, 49 (1967).

²²⁸ *Id.* at 47.

²²⁹ *Id.* at 47–48.

²³⁰ *Id.* at 58.

²³¹ James L. Buckley, Commentary, *The Perspective of a Judge and Former Legislator*, 85 GEO. L.J. 2223, 2224 (1997).

²³² For a review of such mechanisms, especially in the states, see Shirley S. Abrahmson & Robert L. Hughes, *Shall We Dance? Steps For Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1059–81 (1991), where the author discusses mechanisms for legislative monitoring of judicial opinions interpreting statutes.

²³³ Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1428, 1432 (1987) (internal quotation marks omitted).

²³⁴ Interview with Chief Judge Frank M. Coffin, THE THIRD BRANCH (Admin. Office of the U.S. Courts, Washington, D.C.), June 1982, at 1, 6.

²³⁵ James L. Oakes, *Grace Notes on "Grace Under Pressure,"* 50 OHIO ST. L.J. 701, 714–15 (1989).

a committee to call attention to . . . conflicts [among the circuits].”²³⁶ Justice John Paul Stevens suggested that Congress create a legislative mechanism to resolve intercourt conflicts.²³⁷

These thoughts have a distinguished lineage. In 1921, Benjamin Cardozo, then an associate judge on the New York Court of Appeals, drawing upon Roscoe Pound and Jeremy Bentham, recommended the creation of ministries of justice to facilitate law revision.²³⁸ In the early 1960s, Judge Friendly stated that “[i]t would seem elementary that an agency whose task is to [help] formulate legislation . . . should be attached to the legislature.”²³⁹

An approach that promotes improved drafting and may also lead to statutory revision is a practical effort, designed over twenty years ago by the Governance Institute.²⁴⁰ Through this project of “statutory housekeeping”²⁴¹—in Justice Ginsburg’s apt phrase—courts of appeals send opinions that identify possible technical problems in statutes to Congress for its information and whatever action it wishes to take.²⁴² The effort informs those who draft bills of the technical problems that judges identify in opinions applying statutes.

The project began in 1988 when some judges of the U.S. Court of Appeals for the D.C. Circuit invited Judge Frank Coffin, then chair of the Judicial Conference’s Judicial Branch Committee, and me,²⁴³ to analyze what happened in Congress after the courts issued statutory decisions that referred to problems in grammar, apparent “glitches,” ambiguous terminology, and omissions of key details, such as effective

²³⁶ Wilfred Feinberg, *A National Court of Appeals?*, 42 BROOK. L. REV. 611, 627 (1976) (recognizing that if conflicts among the circuits can be brought to Congress’s attention, then they may be easily resolved by a “formal expression of legislative intent”).

²³⁷ See John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982) (discussing the efficiency and appropriateness of a congressional role in the resolution of intercourt conflicts on questions of statutory construction).

²³⁸ Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 114 (1921) (citing Roscoe Pound, *Juristic Problems of National Progress*, 22 AM. J. SOC. 721, 729, 731 (1917)); 9 THE WORKS OF JEREMY BENTHAM 597–612 (John Bowring ed., 1843)); see also Larry Kramer, *“The One-Eyed Are Kings”: Improving Congress’s Ability To Regulate the Use of Judicial Resources*, 54 LAW & CONTEMP. PROBS. 73, 90–97 (1991) (discussing the need for an interbranch agency to reconcile discrepancies between Congress and the judiciary).

²³⁹ FRIENDLY, *supra* note 227, at 62.

²⁴⁰ See *supra* note 3 and accompanying text (discussing the work of the Governance Institute).

²⁴¹ Ginsburg & Huber, *supra* note 233, at 1428.

²⁴² Here, I draw upon Katzmman & Wheeler, *A Mechanism for “Statutory Housekeeping,”* *supra* note 3 (arguing that Congress finds helpful the courts of appeals’ program, which serves to alert Congress of potential drafting problems).

²⁴³ At the time, I was president of the Governance Institute and a Brookings Institution fellow, and taught at Georgetown.

dates.²⁴⁴ After identifying a small body of relevant opinions, with the aid of the D.C. Circuit judges, we assessed legislative awareness of these opinions. We discovered that committee staff did not know about judicial opinions concerning technical aspects of the statutes under the committee's jurisdiction, although they knew about decisions on broad, policy-oriented issues of statutory interpretation or decisions that a losing party with influence had asked Congress to reverse.²⁴⁵

Working with legislators and their staffs, we—along with the counsel of Governance Institute Distinguished Fellow and former House member Robert W. Kastenmeier—conceived of a pilot project, whereby the D.C. Circuit Court of Appeals would transmit its relevant statutory opinions to the House of Representatives.²⁴⁶ Chief Justice Rehnquist backed the pilot project in 1993,²⁴⁷ and two years later the Judicial Conference recommended that all courts of appeals participate.²⁴⁸

In the early 2000s, more than half of the courts of appeals had transmitted opinions to Congress. Participation declined, however, because the project had not been fully institutionalized within the judiciary. In May 2006, the legislative counsel in both houses of Congress asked the Governance Institute, led by Russell Wheeler, to revitalize the project.²⁴⁹ The result was a June 2007 memorandum

²⁴⁴ Proceedings of the Forty-Ninth Judiciary Conf. of the D.C. Cir., 124 F.R.D. 241, 312–36 (1988).

²⁴⁵ KATZMANN, COURTS AND CONGRESS, *supra* note 3, at 73–74.

²⁴⁶ *Id.* at 76–77 (noting the meeting between congressional members and D.C. Circuit Judges Wald, Buckley, Ginsburg, and Mikva).

²⁴⁷ See William H. Rehnquist, *Chief Justice Issues 1992 Year-End Report*, 25 THIRD BRANCH 1, 5–6 (Jan. 1993) (noting that the Supreme Court decided in 1993 to make the pilot project permanent).

²⁴⁸ See JUDICIAL CONFERENCE OF THE U.S., *supra* note 221, at 127 (setting out Implementation Strategy 91e). The early days of the project were the subject of a special report in the *Georgetown Law Journal*. See Robert A. Katzmann & Stephanie M. Herseth, Special Report, *An Experiment in Statutory Communication Between Courts and Congress: A Progress Report*, 85 GEO. L.J. 2189 (1997). The issue included individual commentaries by M. Douglass Bellis, Frank Burk, Mark J. Langer, and Judge James L. Buckley. See M. Douglass Bellis, Commentary, *A View from the House of Representatives*, 85 GEO. L.J. 2209 (1997); Frank Burk, Commentary, *Statutory Housekeeping: A Senate Perspective*, 85 GEO. L.J. 2217 (1997); Mark J. Langer, Commentary, *Implementing the Project: A Court Administrator's Role*, 85 GEO. L.J. 2219 (1997); James L. Buckley, Commentary, *The Perspective of a Judge and Former Legislator*, 85 GEO. L.J. 2223 (1997).

²⁴⁹ The Offices of Legislative Counsel in the House and the Senate are nonpartisan units that provide confidential drafting services requested by individual legislators and legislative committees. See OFFICE OF LEGISLATIVE COUNSEL, U.S. HOUSE OF REPRESENTATIVES, <http://www.house.gov/legcoun/>; OFFICE OF LEGISLATIVE COUNSEL, U.S. SENATE, <http://slc.senate.gov/index.htm>. Background of the legislative counsels' interest in the project is set forth in Memorandum from James C. Duff, Dir., Admin. Office of U.S. Courts, D. Brock Hornby, J., U.S. Dist. Court for Dist. of Me., & Robert A.

from the Director of the Administrative Office of the U.S. Courts, James Duff, and from the leadership of the U.S. Judicial Conference Committee on the Judicial Branch, to all circuit judges, along with letters from the bipartisan leadership of both Judiciary Committees, asking all courts of appeals to participate.²⁵⁰ Statutory opinions that are appropriate for transmission include those where the court has identified possible grammatical problems that affect meaning and where the statute requires courts to fill in a gap (for example, whether Congress intended the statute to be retroactive). They also include statutes that may present ambiguities in language or ambiguities arising from having to interpret related statutes, or statutes with a perceived problem, about which a judicial opinion suggests the possibility of legislative action.

The questions raised in the opinions²⁵¹ have been far-ranging. For instance, one opinion confronted the question of whether the Immigration and Nationality Act's (INA) requirement that an individual "lawfully resided continuously" for seven years, necessary for a waiver of inadmissibility, begins when an alien applies for adjustment of status or when that status is actually granted.²⁵² Another case examined whether, pursuant to chapter 13 of the U.S. Bankruptcy Code, debtors, who own rather than lease a vehicle, may deduct ownership costs from repayment plans.²⁵³ In still another example, the

Katzmann, J., U.S. Court of Appeals for the Second Circuit, to Judges, U.S. Courts of Appeal, and Clerks of Court, U.S. Courts of Appeal, Project To Provide Congress with Appellate Opinions Bearing on Technical Matters of Statutory Construction 1, 2 (July 19, 2007) [hereinafter Memorandum from Duff, Hornby & Katzmann] (on file with the *New York University Law Review*).

²⁵⁰ The Memorandum also announced that the Administrative Office's Assistant General Counsel would help institutionalize the project by tracking the number of opinions sent and consulting periodically with the legislative counsels and the appellate courts as to whether the project needed adjustment. Memorandum from Duff, Hornby & Katzmann, *supra* note 249, at 2.

²⁵¹ See Memorandum from Russell R. Wheeler, President, Governance Institute, on Statutory Housekeeping Project 5–28 (Aug. 1, 2011) (on file with the *New York University Law Review*) (providing a list and description of cases).

²⁵² *Rotimi v. Holder*, 577 F.3d 133, 134 (2d Cir. 2009) (upholding a Board of Immigration Appeals decision which held that an applicant for a waiver of inadmissibility had not "lawfully resided continuously" in the United States as required by the statute during the period in which his visitor visa had expired, and noting that the fact that the applicant had applied for asylum and for adjustment of status had no bearing).

²⁵³ See *Ross-Tousey v. Neary* (*In re Ross-Tousey*), 549 F.3d 1148, 1150 (7th Cir. 2008) (holding that "an above-median-income debtor who has no monthly vehicle loan or lease payment can claim a vehicle ownership expense deduction when calculating . . . disposable income"). *But see Ransom v. MBNA, Am. Bank, N.A.* (*In re Ransom*), 577 F.3d 1026, 1031–32 (9th Cir. 2009) (holding that a debtor is not entitled to a vehicle ownership expense deduction for a vehicle that he owned free and clear of liens). In January 2011, the Supreme Court held that car owners are not entitled to the deduction. See *Ransom v. FIA*

Seventh Circuit considered whether the Sex Offender Registration and Notification Act's registration requirement applies to travel by offenders that occurred before the Act's passage²⁵⁴ (a gap that the Supreme Court resolved in *Carr v. United States*²⁵⁵) and whether conviction for failure to register requires evidence that the defendant "knowingly" violated the registration provision.²⁵⁶ Grappling with a provision in the Class Action Fairness Act of 2005,²⁵⁷ appellate courts split as to the meaning of "not less than 7 days after the entry of the order" where a court of appeals "may accept an appeal from an order of a district court granting or denying a motion to remand a class action . . . if application is made to the court of appeals not less than 7 days after entry of the order."²⁵⁸ The Third Circuit read the statute as meaning "not more than,"²⁵⁹ while the Seventh Circuit read the statute literally.²⁶⁰ Ultimately, Congress amended the section to read "not more than 10 days" after entry of the order.²⁶¹

Under protocols worked out with legislative personnel, clerks of the courts of appeals send opinions identified by the clerk, staff attorney, or the three-judge panel, to the House Speaker and Senate President Pro Tempore. The letter, which is in the nature of an executive communication, does not comment on the opinion, saying only: "Enclosed please find an opinion of the United States Court of Appeals for the [X] Circuit, which may be of interest to the Congress."²⁶² At the same time, the clerk sends electronic copies of the letters and opinions to the respective House and Senate Legislative Counsels (and to Governance Institute President Russell

Card Servs., N.A., 131 S. Ct. 716, 730 (2011) (holding that a debtor who does not make loan or lease payments may not take the car ownership deduction).

²⁵⁴ See *United States v. Dixon*, 551 F.3d 578, 582–83 (7th Cir. 2008) (holding that section 2250 of the Act does not require that the defendant's travel postdate the Act), *rev'd*, 130 S. Ct. 2229 (2010).

²⁵⁵ See *Carr v. United States*, 130 S. Ct. 2229, 2242 (2010) (holding that section 2250 does not apply to sex offenders whose interstate travel occurred before the Sex Offender Registration and Notification Act's effective date).

²⁵⁶ See *United States v. Vasquez*, 611 F.3d 325, 328 (7th Cir. 2010) (holding that the government was not required to prove that the defendant had specific knowledge that he was required to register under the Sex Offender Registration and Notification Act).

²⁵⁷ Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

²⁵⁸ 28 U.S.C. § 1453(c)(1) (2006) (effective Feb. 18, 2005).

²⁵⁹ *Morgan v. Gay*, 466 F.3d 276, 277 (3d Cir. 2006).

²⁶⁰ See *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 983–84 (7th Cir. 2008) (noting that an imprecisely stated deadline in the statute does not constitute a sufficient basis for courts to simply disregard the language of the actual statute).

²⁶¹ Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16, 123 Stat. 1607, 1608 (to be codified at 28 U.S.C. § 1453(c)(1)).

²⁶² Memorandum from Duff, Hornby & Katzmman, *supra* note 249, at 3 attach.1.

Wheeler and to Brett Saxe in the Office of the General Counsel in the Administrative Office of the U.S. Courts).²⁶³ The legislative counsel uses the opinions as teaching tools about how the courts of appeals deal with drafting problems.²⁶⁴ The counsel offices also transmit the opinions to the House and Senate committees with jurisdiction over the legislation in question for any action those committees may wish to take.²⁶⁵

Legislative support has been vital to this project throughout its history. Both legislative counsels had participated enthusiastically in the pilot project.²⁶⁶ Legislators themselves have been consistently positive.²⁶⁷ Most recently, in September 2010, in remarks to the Judicial Conference, Senator Jeff Sessions, then-ranking member of the Senate Judiciary Committee, urged the participation of all circuits as a good government project.²⁶⁸

²⁶³ *Id.*

²⁶⁴ *See id.* at 2 (“[T]he opinions help Congress understand how statutes may be drafted to make legislative intent as clear as possible. . . . The House and Senate legislative counsel . . . are principally responsible for analyzing the drafting issues identified in each opinion . . .”).

²⁶⁵ *Id.*

²⁶⁶ *See* Bellis, *supra* note 248, at 2209 (noting that the House Office of Legislative Counsel has been “involved with the project since its inception”); Burk, *supra* note 248, at 2217 (noting that the Senate Office of Legislative Counsel’s participation in the project “has been a success”).

²⁶⁷ *See, e.g.,* Letter from Rep. Thomas S. Foley, U.S.H.R. Speaker, Richard A. Gephardt, U.S. Sen. Majority Leader, & Sen. Robert H. Michel, U.S. Sen. Republican Leader, to David Meade, Legis. Couns. (Sept. 28, 1992), in *Interbranch Relations*, *supra* note 15, at 309 (1993); Letter from George J. Mitchell, U.S. Sen. Majority Leader, Robert Dole, U.S. Sen. Republican Leader, & Robert C. Byrd, U.S. Sen. President Pro Tempore, to Frank L. Burk, Jr., Legis. Couns., U.S. Sen., in *Interbranch Relations*, *supra* note 15, at 310; H.R. REP. NO. 103-413(I), at 25 (1993) (encouraging “the appropriate committees of jurisdiction in the House and Senate to monitor regularly and systematically Federal court decisions and to report periodically to their respective Chambers on the significant issues that merit review in this relationship”); S. REP. 103-215(I) (1993); Letter from John Conyers, Jr., U.S.H.R. Chairman of Judiciary Comm. & Lamar S. Smith, U.S.H.R. Ranking Member, to M. Pope Barrow, Legis. Couns., U.S.H.R. 2 (May 23, 2007) (on file with the *New York University Law Review*) (recommending that the Office of Legislative Counsel “continue its participation in the project”) [hereinafter Conyers & Smith Letter]; Letter from Orrin Hatch, Chairman, U.S. Sen. Comm. on the Judiciary, & Patrick Leahy, Ranking Democratic Member, U.S. Sen. Comm. on the Judiciary, to James Fransen, Legis. Couns., U.S. Sen. (Mar. 21, 2001) (on file with the *New York University Law Review*); Letter from Patrick Leahy, Chairman, U.S. Sen. Comm. on the Judiciary, and Arlen Specter, Ranking Republican Member, U.S. Sen. Comm. on the Judiciary, to James Fransen, Legis. Couns., U.S. Sen. (Feb. 14, 2007) [hereinafter Leahy & Specter Letter] (on file with the *New York University Law Review*) (recommending that the Office of Legislative Counsel “continue its participation in the project”).

²⁶⁸ Email from Danielle Cutrona, Chief Nominations Counsel for Senator Jeff Sessions, Senate Judiciary Comm., to author (Sept. 14, 2010, 10:41 EST) (indicating Senator Jeff Sessions’s remarks to the Judiciary).

The strongest indicator of the project's value is the legislative testimonials calling for all courts of appeals to participate. Legislators and their staffs, including the Offices of Legislative Counsel, have much to do. That they would call for all circuits to participate, suggests that the transmitted opinions benefit the drafting process.

A second measure of the project's worth derives from the ways that the Legislative Counsel uses the transmissions. Having examined how courts apply statutory language in specific contexts, the Legislative Counsel can be more sensitive to drafting issues that result in litigation. Frank Burk, head of the Senate Office of Legislative Counsel in the 1990s, reported that the project "helped stimulate a comprehensive two-year review of the basic rules of legislative drafting" ²⁶⁹ by his office. He further stated that the office "developed a drafting manual that compiles the drafting rules and conventions identified during the review," and that the office used transmitted opinions as teaching devices for "beginning staff attorneys."²⁷⁰ James Fransen, Burk's successor, has been similarly supportive.²⁷¹ House Legislative Counsel M. Pope Barrow concurred, observing that "[t]he opinions of judges would be especially useful if they can identify persistent patterns in drafting errors."²⁷² Deputy Legislative Counsel M. Douglass Bellis, who has overseen the project in the House for many years, has said that: "The greater the communication between the judicial and legislative branches of government, the more the courts and Congress will grow to understand each other and the more the public can examine what its agents are doing on its behalf."²⁷³ Both Bellis and Fransen circulate transmitted opinions to their respective staffs because of the opinions' instructive value.²⁷⁴

At first glance, one might think that the most important metric of the project's effectiveness would be the number of statutes passed to remedy problems identified in the opinions. From the outset, however, the project's creators cautioned that its principal purpose was not to produce legislative change, but rather to inform busy legislators and their staffs of possible technical problems in statutes. And, as Bellis noted, Congress may do nothing because it may determine that

²⁶⁹ Burk, *supra* note 248, at 2217.

²⁷⁰ *Id.*

²⁷¹ See *Feedback Requested on Technical Aspects of Law*, 39 THIRD BRANCH 7, 9 (Aug. 2007), available at http://www.uscourts.gov/News/TheThirdBranch/07-08-01/Feedback_Requested_on_Technical_Aspects_of_Laws.aspx (discussing how Fransen believes in the usefulness of the project).

²⁷² *Id.*

²⁷³ Bellis, *supra* note 248, at 2215.

²⁷⁴ Katzmann & Wheeler, *A Mechanism for "Statutory Housekeeping," supra* note 3, at 140.

the relevant court “is making good decisions in hard cases,”²⁷⁵ thereby creating no reason for Congress to intervene. The goal of the project “is not to find ‘mistakes’ that Congress made and should correct . . . [but] to open communication so that Congress can learn how the courts are reacting to and interpreting statutes.”²⁷⁶ He observed that the feedback is invaluable: “[I]t calls our attention to drafting situations that are capable of repetition,” suggesting that the referrals may “have a greater ultimate influence on the language of statutes than when (and to the extent) they lead to an amendment of the particular law.”²⁷⁷

In sum, the mechanism for transmitting opinions has the following virtues: (1) it is a neutral mechanism of communication, merely a transmission belt of communication; (2) it does not require the creation of a body or committee; (3) Congress has encouraged it; and (4) it promotes good government. In the words of the chair and ranking members of the House and Senate Judiciary Committees: “These modest efforts have supplied pertinent and timely information to Congress that it might not otherwise receive,” including information about “possible technical problems in statutes that may be susceptible to technical amendment; and, in any case, how statutes might be drafted to reflect legislative intent most accurately.”²⁷⁸ Although it is inherent in the system that there will be occasional tensions between courts and Congress, this effort promotes inter-branch comity and dialogue in a way that reduces conflict. Indeed, it may well be worth considering whether it might be useful to develop a parallel transmission process between the executive branch and Congress, whereby agency general counsels sifting through judicial opinions identify issues of relevance to Congress, perhaps with suggestions for Congress to consider. The Administrative Conference of the United States²⁷⁹ might play a useful role in examining the feasibility of this idea and its implementation.

²⁷⁵ Bellis, *supra* note 248, at 2213.

²⁷⁶ *Id.*

²⁷⁷ Robert Katzmann & Russell Wheeler, *More About the “Statutory Housekeeping Project,”* IN CAMERA, FED. JUDGES ASS’N (Fed. Judges Ass’n), Aug. 31, 2010, available at http://www.federaljudgesassoc.org/egov/docs/newsletters/38_167_716.asp; *Feedback on Technical Matters Aids Legislation*, 42 THE THIRD BRANCH 4 (Admin. Office of the U.S. Courts, Washington, D.C.), Feb. 2010, at 4, available at <http://www.uscourts.gov/News/TheThirdBranch/TTBViewer.aspx?doc=/uscourts/news/ttb/archive/2010-02%20Feb.pdf>.

²⁷⁸ Conyers & Smith Letter, *supra* note 267; Leahy & Specter Letter, *supra* note 267.

²⁷⁹ The Administrative Conference of the United States, currently chaired by the well-known legal scholar and administrator, Paul Verkuil, is an independent federal agency dedicated to improving the administrative process. ADMIN. CONFERENCE OF THE U.S., <http://www.acus.gov/> (last visited Apr. 26, 2012).

B. Making Legislative History More Reliable

To better signal its meaning, legislative leadership could also more clearly identify legislative history that courts should take into account. For instance, the floor managers of a bill could indicate what constitutes the definitive legislative history, including floor statements and colloquies. Such signaling would simplify a court's task in reviewing the Congressional Record.

Moreover, as Stephen Ross proposed several years ago, having committee members sign committee reports, with signature sheets attached to the document, could effectively meet the charge that those reports are not endorsed by a majority of the committee. This could address the concern that committee members are not aware of the reports, or just do not read them.²⁸⁰ Now, generally, only those offering additional views sign the reports.

Identifying authoritative legislative history, moreover, will make it easier for courts to assess amicus briefs of legislators that are filed to persuade the courts about what Congress meant in passing the statute. For legislators to try to achieve through such briefs what they could not in Congress itself is something Representative Kastenmeier deemed "a questionable procedure."²⁸¹ The more authoritative the legislative history is, the more likely that courts can review amicus briefs and interpret statutes in ways, as Senator Hatch put it, that do not result in "'slippage' from agreements reached in Congress."²⁸²

CONCLUSION

In conclusion, my points are simply these. In our constitutional system in which Congress is charged with enacting laws, how Congress makes its purposes known—through text and reliable accompanying materials—should be respected, lest the integrity of legislation be undermined. The experience of the executive branch in interpreting statutes can be helpful to courts. And practical ways should be pursued to further the objective of promoting statutory understanding. With greater sensitivity to the workings of the branches in the law-making process, we will be closer to realizing Publius's—most likely Madison's—vision in *The Federalist* No. 62: "A good government

²⁸⁰ See Stephen F. Ross, *Where Have You Gone Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 575–76 (1992) (noting that conference committee reports are signed by members).

²⁸¹ Robert A. Katzmann, *Summary of Proceedings*, in JUDGES AND LEGISLATORS, *supra* note 3, at 167.

²⁸² Hatch, *supra* note 165, at 48.

implies two things: first, fidelity to the object of government, which is the happiness of the people[;] secondly, a knowledge of the means by which the object can be best attained.”²⁸³

²⁸³ THE FEDERALIST NO. 62, *supra* note 51, at 445 (James Madison).

APPENDIX A: SELECTED COMMENTARY OVER THE LAST THREE
DECADES BY FEDERAL JUDGES ON STATUTORY CONSTRUCTION

A. *Congressional Documents*

Statutory Interpretation and the Uses of Legislative History, Hearing Before the Subcomm. on Courts, Intellectual Prop. and the Admin. of Justice of the H. Comm. on the Judiciary., 101st Cong. 24 (1990) (statement of James L. Buckley, J., U.S. Court of Appeals for the District of Columbia Circuit).

B. *Books and Articles in Collected Works*

STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 85–101 (2005).

STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* 88–105 (2010).

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

RICHARD A. POSNER, *HOW JUDGES THINK* 191–203 (2008).

Antonin Scalia, *Common-Law Courts in a Civil-Law System*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (Amy Gutmann ed., 1997).

C. *Articles*

Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1 (2004).

Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983).

Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994).

Ruth Bader Ginsburg, *Communicating and Commenting on the Court's Work*, 83 GEO. L.J. 2119 (1995).

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

Pierre N. Leval, *Trademark: Champion of Free Speech*, 27 COLUM. J.L. & ARTS 187 (2004).

Diarmuid F. O'Scannlain, *Lawmaking and Interpretation: The Role of a Federal Judge in Our Constitutional Framework*, 91 MARQ. L. REV. 895 (2008).

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

- A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL'Y 71 (1994).
- Kenneth W. Starr & Abner J. Mikva, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371.
- John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177 (1982).
- John M. Walker, Jr., *Judicial Tendencies in Statutory Construction: Differing Views of the Role of the Judge*, 59 N.Y.U. ANN. SURV. AM. L. 203 (2001).
- Stephen F. Williams, *Restoring Context, Distorting Text: Legislative History and the Problem of Age*, 66 GEO. WASH. L. REV. 1366 (1998).

APPENDIX B: SELECTED COMMENTARY SINCE 1997 ADDRESSING
STATUTORY INTERPRETATION

Since 1997, when I last surveyed the field in research for *Courts and Congress*, there have been hundreds of articles and many books addressing in some fashion statutory interpretation. Given the proposition that a subject matter's importance can in part be measured by the amount of attention paid to it, I list many of the articles and books here to establish that statutory interpretation is surely a matter of importance.

A. Books

- MICHAEL A. BAILEY & FORREST MALTZMAN, *THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE* 103–08 (2011).
- FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* (2009).
- WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* (2d ed. 2006).
- WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (2007).
- R. KENT GREENAWALT, *LEGISLATION: STATUTORY INTERPRETATION: 20 QUESTIONS* (1999).
- ABNER J. MIKVA & ERIC LANE, *LEGISLATIVE PROCESS* (3d ed. 2009).
- PETER L. STRAUSS, *LEGISLATION: UNDERSTANDING AND USING STATUTES* (2006).
- ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006).
- JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).
- JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999).
- STATUTORY INTERPRETATION STORIES (William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett eds., 2011).

B. Articles

- Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1 (1999).
- James J. Brudney, *Confirmatory Legislative History*, 76 BROOK. L. REV. 901 (2011).
- James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV. 1199 (2010).

- James J. Brudney, *The Supreme Court as Interstitial Actor: Justice Ginsburg's Eclectic Approach to Statutory Interpretation*, 70 OHIO ST. L.J. 889 (2009).
- James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231 (2009).
- James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 19 BERKELEY J. EMP. & LAB. L. 117 (2008).
- James J. Brudney, *Below the Surface: Comparing Legislative History Usage by the House of Lords and the Supreme Court*, 85 WASH. U. L. REV. 1 (2007).
- James J. Brudney, *Intentionalism's Revival*, 44 SAN DIEGO L. REV. 1001 (2007).
- James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220 (2006).
- William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171 (2000).
- Maura D. Corrigan & J. Michael Thomas, "Dice Loading" Rules of Statutory Interpretation, 59 N.Y.U. ANN. SURV. AM. L. 231 (2003).
- Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971 (2007).
- Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002).
- Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027 (2002).
- William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990 (2001).
- William N. Eskridge, Jr., *Textualism and Original Understanding: Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301 (1998).
- William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from Chevron to Hamdan*, 97 GEO. L.J. 1083, 1135-36 (2008).
- Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 NW. U. L. REV. 1409 (2000).
- Philip P. Frickey, *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1971 (2005).

- Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1 (2007).
- Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010).
- Senator Charles Grassley & Jennifer Shaw Schmidt, Policy Essay, *Practicing What We Preach: A Legislative History of Congressional Accountability*, 35 HARV. J. ON LEGIS. 33 (1998).
- Abner S. Greene, *The Missing Step of Textualism*, 74 FORDHAM L. REV. 1913 (2006).
- Robert J. Gregory, *Overcoming Text in an Age of Textualism: A Practitioner's Guide To Arguing Cases of Statutory Interpretation*, 35 AKRON L. REV. 451 (2001–02).
- Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627 (2002).
- Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843.
- Michael P. Healy, *Spurious Interpretation Redux: Mead and the Shrinking Domain of Statutory Ambiguity*, 54 ADMIN. L. REV. 673 (2002).
- Edward Heath, Essay, *How Federal Judges Use Legislative History*, 25 J. LEGIS. 95 (1999).
- Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 MICH. ST. L. REV. 89.
- John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 FORDHAM L. REV. 2009 (2006).
- John F. Manning, Response, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648 (2001).
- John F. Manning, *Putting Legislative History to a Vote: A Response to Professor Siegel*, 53 VAND. L. REV. 1529 (2000).
- John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419 (2005).
- John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001).
- John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006).
- Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005).
- Mathew D. McCubbins & Daniel B. Rodriguez, *What Is New in the New Statutory Interpretation? Introduction to The Journal of Contemporary Legal Issues Symposium*, 14 J. CONTEMP. LEGAL ISSUES 535 (2005).

- Paul E. McGreal, *A Constitutional Defense of Legislative History*, 13 WM. & MARY BILL RTS. J. 1267 (2005).
- Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239 (2002).
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