THE CONGRESSIONAL BUREAUCRACY
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ABSTRACT

Congress has a bureaucracy.

This is the first Article to theorize what it means for Congress to have an internal workforce of more than 5,000 nonpartisan, highly specialized, and long-serving experts, without which the modern Congress could not function. These experts—not elected Members or their political staffs—write the text of the laws, audit implementation, research policy, estimate bills’ economic effects, decide which committees control legislation and which amendments can be made, edit and rearrange already-enacted (!) legislation into the law as we see it in the U.S. Code, and much more. We call their offices Congress’s “Underbelly Institutions,” because courts, lawyers and legal scholars have almost entirely ignored their existence. And yet, the congressional bureaucracy preserves the separation of powers, revives theories of Congress as a rational actor, and supplies key insight for statutory interpretation.

This project is based on two years of confidential interviews with high-level staffers in Congress’s seven nonpartisan legislative institutions: the Office of the Law Revision Counsel; the Offices of the Legislative Counsels; the Congressional Research Service; the Government Accountability Office; the Parliamentarians; the Congressional Budget Office; and the Joint Committee on Taxation. It furthers an influential new line of legislation scholarship, which we helped to invigorate, about how Congress actually works. The theories and doctrines of the field, until recently, were entirely focused on only elected Members and an idealized version of the old-fashioned legislative process that is no more. But courts cannot claim the doctrines of statutory interpretation are democratically linked to Congress, as they do, without understanding how it writes legislation.

The congressional bureaucracy has several distinctive features. Classic bureaucracy literature posits that Congress loses power when it delegates. But the congressional bureaucracy was explicitly founded so that Congress could reclaim and safeguard its own powers against an executive branch that was encroaching on the legislative process. The bureaucracy also safeguards what we call Congress’s own internal separation of powers, the salutary decentralization of law-producing responsibilities among a collection of nonpartisan actors, preventing any one aspect of the lawmaking process from coming under undue political or centralized control.

Understanding the congressional bureaucracy’s work also provocatively deconstructs the concept of a “statutory text.” The words Congress enacts are the result of a highly dialogic process that is triggered by and includes assumptions about critical inputs from the Underbelly—e.g., cost and revenue estimates from CBO and procedural rulings from the Parliamentarians. Members and staff focus on substance of legislation at the macro level, not the specific words chosen at the micro level—that is Legislative Counsel’s job. What we see when we open the statute books often is not even what Congress enacted or how Congress arranged it, because OLRC reorganizes and edits the laws after passage. So conceived, the concept of a “statute” is much more capacious than merely the “text” at the moment of the vote. None of this is illegitimate; Congress has set itself up this way. All of these inputs are part of the “text” as Congress intends it to be understood.

Together, these institutions paint a picture of a Congress that is not as irrational as the public considers it to be. They also have on-the-ground lessons for statutory interpretation, highlighting critical inputs that courts miss and numerous statutory cues—from code placement to consistency of language—that courts dramatically overread. The field is now engaged in emerging debates about whether doctrine can absorb this kind of detail about legislative process; understanding the congressional bureaucracy is a critical new piece of this account.
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INTRODUCTION

Congress has a bureaucracy.

Legal scholarship, judicial discourse, and doctrine on Congress and statutes has focused almost entirely on elected members and their intentions and approaches to policymaking and statutory language. In recent years, that perspective has broadened, with emerging scholarship about the on-the-ground facts and realities of the congressional drafting process and the role that staff plays in that process. We have contributed to opening that line of inquiry in scholarship focusing on the work of not only congressional committee counsels—generally the most senior staff accountable to Members on policy making—but also on the work of what we call the Underbelly of Congress. The Underbelly is the collection of nonpartisan offices that, while typically unseen by the general public and ignored by courts and practicing lawyers, injects specialized expertise that makes congressional lawmaking possible and safeguards the legislative process from executive encroachment. The Underbelly is Congress’s bureaucracy.

We have introduced some of these institutions in other work—including the Offices of the Legislative Counsels, the Congressional Budget Office (CBO), and the Office of the Law Revision Counsel (OLRC)—to emphasize how significantly each affects how statutes look and what they mean.\(^1\) We also have written about the changes to and departures from the “textbook” legislative process—the turn toward “unorthodox lawmaking”—that likewise has affected how many statutes get passed (fewer), how they look (longer and more omnibus), and their path through Congress (less transparent, more centralized, and often more rushed).\(^2\) Throughout, we have argued the importance for lawyers and judges of understanding how Congress actually works.

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We now open the lens more widely, moving beyond description of any one institution and theorizing as a whole what it means for Congress to have a bureaucracy—a workforce of nonpartisan, confidential and transparent, expert, and long-serving institutional actors and entities without which Congress as we know it could not function. Our previous work has happily invigorated a new branch of the field focused on the legislative process, with follow-on articles emerging to offer additional introductory descriptive accounts of the work of individual institutions, and with courts starting to recognize how the realities of the legislative process and the actors within it may affect how they interact with, interpret, and adjudicate statutes.

Here, we go further, focusing on the seven nonpartisan legislative institutions inside Congress and theorizing about their work as a whole:

- **The Office of the Law Revision Counsel (OLRC)**—which reorganizes, cleans up, and even adds new detail and definitions to passed legislation as part of the process of transforming Congress’s various statutes into the organized U.S. Code;
- **The Offices of the Legislative Counsels (Legislative Counsel)**—the nonpartisan drafters in each Chamber who actually draft the text of most federal legislation;
- **The Congressional Research Service (CRS)**—the research arm of Congress that provides in-depth legal and policy analysis of existing and proposed legislation or other issues;
- **The Government Accountability Office (GAO)**—Congress’s “watchdog” over the executive branch, conducting audits and informing Congress about the implementation of its laws;
- **The Congressional Budget Office (CBO)**—which provides influential economic analysis, including estimates of the cost of all significant legislation;
- **The Joint Committee on Taxation (JCT)**—a nonpartisan committee with staff that assists with all aspects of tax legislation, including policy analysis, drafting assistance, and revenue estimates;
- **The Offices of the Parliamentarians (Parliamentarians)**—the arbiters of congressional procedure in each chamber, ruling on the appropriateness of amendments, resolving jurisdictional questions among committees and operating as the keeper of legislative precedents.

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Harv. L. Rev. 62 (2015). At the time of the Gluck and Bressman study, we noted that the political science literature on “Unorthodox Lawmaking” (especially Barbara Sinclair’s pathbreaking 1997 book by that name) had not been cited in legal scholarship. Gluck & Bressman, supra note 1, at 917-18. A HeinOnline search reveals that since that time it has been cited nearly two hundred times.

3 This descriptive work just began to emerge towards the end of our two-year study and thus far includes two institutions. See, e.g., Jonathan S. Gould, Law Within Congress, 129 YALE L.J. __ (forthcoming); Jarrod Shobe, Codification and the Hidden Work of Congress, UCLA L. REV. __ (forthcoming).

We select these seven institutions because they are united by their generally nonpartisan nature, their common roles of information- and expertise-sharing with Congress in the context of the legislative process, and their surprisingly common origins in a desire to safeguard Congress’s legislative power from the executive. From 2017-2019, we conducted confidential interviews of staffers with key roles in these institutions to ensure our account reflects how the Underbelly actually works on the ground.5

Why does Congress need this bureaucracy? What roles do the Underbelly Institutions serve, together and apart? What does the bureaucracy teach us about how Congress works and about what is distinctive about modern lawmaking? Some Underbelly Institutions, like JCT, interact with Members; some, like the Office of Law Revision Counsel (OLRC) do not. Some communicate confidentially, like CRS; others are fully transparent, like GAO. Some give neutral expertise, like the Parliamentarians or Legislative Counsel; others express a point of view, like JCT. Some work in the field of policy, like CBO; others don’t, like the OLRC. Some have come under political fire for a long time, like CBO; others have become newly politicized, like CRS; still others remain out of the fray, like Legislative Counsel and OLRC.

In each case, these institutions contribute to a symphony of common functions.6 First and foremost—and different from classic understandings of bureaucracies—the congressional bureaucracy is a critical tool of separation of powers. Classic bureaucracy literature focuses on the tradeoff of control for expertise—Congress loses power when it delegates. But the congressional bureaucracy was explicitly founded so that Congress could reclaim power and safeguard its own autonomy against an executive branch that was encroaching on the legislative process. This bureaucracy also safeguards what we identify here as Congress’s own “internal separation of powers”—described to us by numerous interviewees as the salutary decentralization of law-producing responsibilities across Congress among a collection of nonpartisan actors, preventing any one aspect of the lawmaking process from coming under undue political or centralized control.

More similarly to other bureaucracies, Congress’s bureaucracy also provides necessary information and expertise to a Congress that is too busy, too transient, and staffed with too many (often quite young) nonexperts to have the institutional memory or education needed to do its legislative work. Every drafter in the Offices of Legislative Counsel is an attorney. Ninety percent of Congressional Research Service staffers have graduate degrees.7 The average tenure of a political office staffer is 3 years; the average staff tenure in the Underbelly Institutions is more than 15.8 In their often-invisible status, it is easy to overlook

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5 To preserve anonymity, we refer to interviewees by their institutional affiliation only. We also use the generic term “Staffer Interview” where revealing the institutional affiliation, in context, might compromise individual identity, or where interviewees requested that their institutional affiliation not be shared.
6 To date, only one Article has considered the importance of Congress having nonpartisan staff in multiple Underbelly Institutions, but its theoretical scope was limited to whether they reduce legislative gridlock. George K. Yin, Legislative Gridlock and Nonpartisan Staff, 88 NOTRE DAME L. REV. 2287 (2012).
8 See Staff Tenure in Selected Positions in House Member Offices, 2006-2016, at 7-8, CONG. RESEARCH SERV. (Nov. 9, 2016),
how resource-rich Congress is in many areas of knowledge. Sometimes, it is true, Members hide behind this expertise to avoid accountability. But in many other instances, Members rely on this bureaucracy to provide the work that they and their staffs cannot.

Together, these institutions paint a picture of a Congress that is not quite as irrational and undeliberate as the public would make it out to be. Legal Process titans Henry Hart and Albert Sacks famously argued that courts should assume “that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.” Modern thinkers about legislation pushed that optimism aside decades ago for a view of an irrational Congress that courts could never hope to really understand, and ushered in with that view a highly textualist approach to interpreting statutes.

Our study challenges, at least in part, this cynical view of Congress. Despite changes to the modern legislative process, the congressional bureaucracy still does its work—it just happens at points earlier in the process and further from the public eye. Statutes are still vetted. Expertise is still utilized. Reasonable persons still try to pursue reasonable purposes reasonably.

As to the textualism point, a rich understanding of the congressional bureaucracy provocatively deconstructs what it means to be—and to understand—a “statutory text.” The words on the page are only a small slice of “lawmaking,” and often what we see when we open the statute books is not even what Congress enacted or how Congress arranged it. Sometimes enacted text is really only the beginning of a “statute.” OLRC reorganizes and edits the law after passage. JCT writes the influential explanations of the tax law, utilized by agencies and the tax bar, after passage as well. Statutory context means a lot more than just the surrounding words on the page. The words Congress does pass are the result of a highly dialogic process that is triggered by and includes assumptions about critical inputs and how the statutory text relates to them—cost and revenue, from CBO and JCT; procedural rulings, from the Parliamentarians. Members and staff are concerned throughout with the substance of legislation at the macro level, much more so than the specific words chosen in the end at the micro level (that is Legislative Counsel’s job). So conceived, the concept of a “statute” is much more capacious than merely the words on the page, or the snapshot moment of the vote. Arguably, even those statute-modifying processes that Congress sets up to occur after the vote—precisely because Congress has set them up—are part of the “text” as Congress intends it to be understood.

On the other hand, there are a variety of statutory cues that—once we understand Congress’s bureaucracy—it is clear that even textually expert courts dramatically misinterpret. That includes where statutes are placed in the U.S. Code and focusing on grammar—cues that courts looking for legislator intent might not consult if they understood how OLRC works. It also includes ignoring assumptions of procedural rulings or the CBO or JCT estimates; treating reconciliation laws like coherent pieces of legislation; not understanding that Congress’s siloed workforce develops consistent statutory vocabularies only within


subject matter areas; not giving deference to the special legislative history produced for appropriations bills; and much more.

To be sure, the congressional bureaucracy is bigger than the Underbelly described here. We have left out of this initial inquiry other institutions that may be nonpartisan and have their own particular expertise but that do not contribute to Congress’s legislative work, such as the Office of Senate Legal Counsel and Office of the General Counsel of the House of Representatives, which litigate on behalf of Congress, and the Government Printing Office, which prints official legislative documents.

We also have left out the political staff in Congress—the staffers in Members’ individual offices, on committees, and in Leadership offices who do the bulk of constituent and policy work. Although the work of political staff is critical to understanding Congress as an institution and the supports that Members have, we omit them here, not only because one of us has detailed their role elsewhere, but also because we do not, at least in this first analysis, conceptualize political staff as “bureaucracy” in the same way.

There has indeed been much written (mostly in political science) about the “delegation” of subject matter expertise to the various congressional committees, and some academics and judges have argued that reliance on congressional staff—any staff—impermissibly delegates Members’ lawmaking power, but these concerns strike us as off the mark. Members rely on staff in much the same way that CEOs rely on staff; each Member is ultimately responsible for his or her own votes or decisions. Committees are run by Members themselves and their staff is visible to the public as the key policy personnel. In contrast, our interest here is in the nonpartisan, expert staff who offer much less visible inputs, whose duties for Congress are generally ex ante defined by statute, and who generally cannot be dismissed by any single Member or election outcomes. The congressional bureaucracy is the result of how Congress sets itself up, putting in play a series of autonomous steps and checks (sometimes hurdles) to inform and accomplish what turns out to be the exceedingly holistic task of modern “lawmaking.”

How much of this is known by lawyers and courts trafficking in statutes? It is long past time to enter the sausage factory.

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10 See Gluck & Bressman, supra note 1, Bressman & Gluck, supra note 1, and Cross, Legislative History, supra note 1.
11 We also have left out advisory commissions such as MedPAC, which Congress typically creates for a limited time to produce recommendations for particularly pressing policy issues.
14 Robert Pear, If Only Laws Were Like Sausages, N.Y. TIMES (Dec. 4, 2010), https://www.nytimes.com/2010/12/05/weekinreview/05pear.html (repeating the famous quote from Von Bismarck, “If you like laws and sausages, you should never watch either one being made.”).
I. THE SEVEN UNDERBELLY INSTITUTIONS: A BRIEF OVERVIEW

To set the stage for our discussion, we provide here a summary glance at the duties and organization of the congressional bureaucracy. We reserve for Part III a deeper discussion of their modern roles and their functions as separators of power.

A. Offices of the Legislative Counsels

The Offices of the Legislative Counsels, created by the Revenue Act of 1918, are the oldest Underbelly Institutions. They are Congress’s legislative drafters, tasked with taking the policy decisions of Members and policy staff—often provided as no more than bullet points—and transforming them into “clear, concise, and legally-effective language.”

The organic statute divided the Office into two independent branches, with one serving each Chamber of Congress. In 1946, Congress increased appropriations for the Office, allowing for more hires. The Offices have tripled in size since 1975 alone: the House Office now employs forty-nine drafters, and the Senate Office thirty-four.

Each Office is led by a Legislative Counsel who is appointed by the House Speaker or the Senate President pro tempore, respectively, and who is required by law to be appointed without regard to partisan affiliation. By tradition, the Legislative Counsel is promoted from within the Office and is one of its longest-tenured members.

While use of the Offices’ drafting services is entirely optional, Members and committees now use these drafting services with respect to nearly every bill, resolution, and amendment introduced in Congress.

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17 Legislative Reorganization Act of 1946 § 204 (1946).
(including amendments for each stage of the legislative process).\textsuperscript{22} As the Gluck/Bressman study emphasized, Members are generally not involved in the actual drafting of legislation; even senior policy staff do not generally write the words. Going beyond legislative text, the Offices also draft conference committee reports, appropriations bills’ legislative history, and special portions of committee reports and motions in the House.\textsuperscript{23}

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\item \textbf{B. Office of the Law Revision Counsel}

OLRC is the custodian of the U.S. Code. Its organic statute charges it to “develop and keep current an official and positive codification of the laws of the United States.”\textsuperscript{24} Before the Code, the only way to determine “all the laws currently in force” was “slogging through all of the session laws” of Congress.\textsuperscript{25} It was not enough to know that a law had been passed a century ago; one had to search all laws passed since that time to ensure no amendments had been made in the intervening years. The Office was deemed necessary as this research process became—and this is an understatement—“increasingly cumbersome.”\textsuperscript{26}

OLRC’s primary function is to create what we know as the U.S. Code. To do this, it organizes titles of the U.S. Code for enactment by Congress as “positive law.” This work requires surveying the myriad already-enacted federal statutes and determining which statutes fall within a general cohesive subject-matter area. OLRC then takes those statutes apart and reassembles them—moving sections around to integrate those statutes into a single, coherent new title for the Code. Congress must then pass a bill repealing the myriad underlying statutes and enacting the codification bill itself as the law instead. This process transforms a title of the U.S. Code into “positive law.” Congress has enacted twenty-seven titles of the U.S. Code into positive law,\textsuperscript{27} with the most recent enacted in 2014.

There are twenty-seven additional titles that OLRC has also organized as subject-matter-cohesive titles, and that most lawyers view as indistinguishable from the enacted titles (for instance, Title 42 of the U.S. Code, which contains the Civil Rights Act, Medicare, and Medicaid). But they have not been formally

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\item \textsuperscript{22} See Bressman & Gluck, supra note 1, at 740 (quoting staffer interviews that “99% [of statutory text] is drafted by Legislative Counsel,” and that: “No staffer drafts legislative language. Legislative Counsel drafts everything.”); See also https://rules.house.gov/amendments (directing that “[t]he assistance of the Office of the Legislative Counsel . . . should be sought in drafting [of all amendments submitted to the House Committee on Rules]”).
\item \textsuperscript{23} Our Services, OFFICE OF THE LEGISLATIVE COUNSEL: U.S. HOUSE OF REPRESENTATIVES (accessed Aug. 1, 2019), https://legcounsel.house.gov/HOLC/About_Our_Office/Our_Services.html (describing duties as including portions of committee reports that show the changes a bill makes to existing law (known within Congress as “Ramseyers” and certain motion text, including some motions to suspend the rules, motions to recommit, and motions to instruct conferee).
\item \textsuperscript{24} Committee Reform Amendments of 1974, H. Res. 988, 93d Cong. (1974).
\item \textsuperscript{25} Mary Whisner, The United States Code, Prima Facie Evidence, and Positive Law, 101 L. LIB. J. 545, 550 (2009).
\item \textsuperscript{26} Id.
\item \textsuperscript{27} See Browse the United States Code, OFFICE OF THE LAW REVISION COUNSEL (accessed Aug. 1, 2019), https://uscode.house.gov/browse.xhtml (titles marked with an asterisk are positive law).
\end{enumerate}
enacted as codified law by Congress and so do not count as positive law. For all titles, OLRC prepares and publishes updated versions of the Code that incorporate recent amendments.

OLRC has significant editorial discretion in the performance of these functions that most people are unaware of. It will alter or even add statutory text in order to correct errors, resolve ambiguities, and make it easier to understand and navigate. It also has discretion to omit provisions from the Code entirely that it deems not “general and permanent,” such as appropriations bills, and move outside the text of the Code and into side notes parts of statutes that ORLC deems minor or nonoperative—a determination that surprisingly often includes some rather important provisions, like effective dates and findings.

When Congress first created the U.S. Code in 1926, it initially entrusted management and oversight of this project to the House Committee on the Revision of the Laws. It was not until 1974 that OLRC was created and assigned these codification tasks.

Due largely to its origin in a House resolution, the Office remains technically housed in the House of Representatives, and it submits its codification bills specifically to the House Judiciary Committee. The Office is headed by an individual known as the “Law Revision Counsel” who is appointed by the House Speaker, and who the Speaker must appoint without regard to partisan affiliation. In practice, the Office has significant autonomy in its daily operations. The Office currently employs thirteen attorney codifiers—a significant increase over earlier numbers, but one that is dwarfed by the staffing increases seen in many other congressional offices.

C. Congressional Research Service

CRS is often described as Congress’s “think tank.” It is directed by statute “to advise and assist . . . in the analysis, appraisal, and evaluation of legislative proposals,” “to collect and analyze “data having a bearing on legislation,” and “to prepare and provide information, research, and reference materials . . . to

31 Pub. L. No. 93-554, 88 Stat. 1771, 1777 (1974). Today, the Office continues to operate under the charter provided by that Act—a charter that, ironically, is in a portion of the U.S. Code that has not been enacted into positive law. 2 U.S.C. §§ 285-285g.
32 See H. Res. 988, 93d Cong. § 405(c)(1) (1974) (requiring submissions of titles to House Judiciary Committee); id. § 405(c)(2) & (7) (requiring submissions of recommendations to House Judiciary Committee).
assist [Members and committees] in their legislative and representative functions.” CRS’s research may be conducted either in response to requests from Members or committees of Congress, or on issues proactively selected by the Service as topics of likely interest to Congress.

Statutory authority for the Service is provided by the Legislative Reorganization Act of 1946—although that fact can be misleading. Since 1915, Congress had consistently required (via appropriations bills) that certain reference functions be performed by the Library of Congress. Until 1946, the Librarian of Congress had committed these functions to a “Legislative Reference Service”; the 1946 Act transformed that Service into a separate, legally-recognized department within the Library of Congress. Twenty-four years later, the Legislative Reorganization Act of 1970 remade the Service into a robust center for research and policy analysis—a transformation signaled by its renaming as the “Congressional Research Service.”

Today, CRS has nearly 700 employees. Ninety percent of its analysts hold advanced graduate degrees, and have relatively long tenures, with one estimate putting the average tenure at twelve to fifteen years. The Director is appointed by the Librarian of Congress after consultation with the Joint Committee on the Library—an enduring feature of the Service’s continued organizational location within the Library of Congress. The Librarian is required by law to “grant and accord to the Congressional Research Service complete research independence and the maximum practicable administrative independence.”

CRS analysts produce several types of written products. The most well-known are its CRS Reports, which provide “[c]omprehensive research and analysis” on major policy issues. (Committee reports regularly copy-and-paste material from these Reports.) It also writes the bill summaries found on congress.gov; an annotated version of the Constitution that contains legal analysis; summaries of legal and policy topics; congressional distribution memoranda; and blog posts for Members and staffs. In

36 2 U.S.C. § 166(d), paragraphs (1), (4), (5).
38 Id.
41 Evans, supra note 7, at 422.
42 On advanced degrees, see id. On staff tenure, see CRS Interview.
43 2 U.S.C. § 166(c).
44 Id. § 166(b)(2).
46 CRS interview.
48 MAZANEC, supra note 45, at 10 (discussing CRS Insights, Legal Sidebars, and In Focus).
49 Id.
50 CRS Interview.
response to requests from Members or their staff, CRS also provides tailored confidential memoranda and email responses, as well as in-person and telephone consultations, staff briefings, policy seminars and workshops, and congressional testimony. The Service fielded over 62,000 research requests in fiscal year 2017, and virtually every Member and standing committee office consults with the Service every year.

D. Congressional Budget Office

CBO is Congress’s economic and budgetary analyst. The Office provides analyses, reports, and studies designed to inform Congress about the fiscal impacts of policies (whether enacted or proposed). The Office performs these functions particularly with respect to spending legislation—i.e., non-tax legislation, due to the complementary role played by JCT.

The Office was created, and it receives its present-day authorization, under the Congressional Budget and Impoundment Control Act of 1974. CBO analyses today include: (1) a cost estimate for nearly every bill that is approved by a committee; (2) ten-year and thirty-year forecasts of the budgetary and economic outcomes anticipated to result under continuation of current law; (3) economic analysis of the President’s budget; (4) examination of options to reduce the federal deficit; and (5) analysis of the economic impacts of federal mandates upon state, local, and tribal governments and the private sector, as required by the Unfunded Mandates Reform Act of 1995. CBO often works proactively with legislative staff to assist in the design of legislation that will not exceed desired expenditure levels.

CBO has approximately 250 employees, most of whom are economists or public policy analysts with advanced degrees. The Office is headed by a Director who is jointly appointed by the House Speaker and Senate President pro tempore (with recommendations from the Budget Committees) and who legally must be appointed without regard to political affiliation.

51 Id.
52 MAZANEC, supra note 45, at 8, 17.
53 MAZANEC, supra note 45, at 10 (stating that “99% of Member/standing committee offices received custom CRS services”).
55 See infra section II.E.
59 Gluck, supra note 1.
60 Organization and Staffing, CONG. BUDGET OFFICE, https://www.cbo.gov/about/organization-and-staffing. The Office also employs lawyers, information technology specialists, editors, and others.
61 2 U.S.C. § 601(a)(2). In practice, the House and Senate Budget Committees have alternated in recommending a nominee to the Speaker and Senate President pro tempore, and the Committees’ recommendations have been followed.
Congress itself has hard-wired the work of the Office into the legislative process with rules and laws requiring legislation to be cost-estimated before passage. As a result, the “CBO score” often plays a pivotal role in a bill’s success or failure.\(^{62}\)

CBO publishes its formal cost estimates and analytic reports,\(^{63}\) materials outlining its underlying data and analytical methods,\(^{64}\) comparisons of its projections with a variety of sources,\(^{65}\) and chart books, slide decks, and infographics about the budget and the economy to make its projections more accessible.\(^{66}\) Any preliminary analyses CBO conducts at the behest of Members or committees to assist in the development of legislation are confidential.\(^{67}\)

E. Joint Committee on Taxation

The JCT staff assists Congress at every step of the tax legislative process by contributing legal, policy, behavioral, administrative, and economic analysis. Unlike most committee staffs, JCT staff serves both chambers of Congress, is nonpartisan, and aids all Members and committees of Congress. JCT staff’s role in the tax process is central enough that, unlike most of the congressional bureaucracy to date, it has caught the attention of at least a few legal scholars—most prominently, George K. Yin.\(^{68}\)

JCT staff works with Members and committees to develop tax policies, and it then collaborates with the Offices of the Legislative Counsels to translate these policies into statutory text.\(^{69}\) It also supports the committee at markups, floor debates, and committee meetings, and drafts the legislative history for tax

The Director serves for a fixed term of four years, although the Director can be removed earlier by a resolution in either chamber. Id. § 603(a)(3)-(4).


\(^{65}\) Id.

\(^{66}\) Id.

\(^{67}\) Processes, CONG. BUDGET OFFICE, (accessed Aug. 1, 2019), https://www.cbo.gov/about/processes#release. If these relate to publicly-available legislative proposals, they will be made available only to Members of Congress; if not, they will remain wholly confidential. Id.

\(^{68}\) Yin, a former head of the JCT, has profiled Committee and its staff in a number of excellent articles. Yin, supra note 19, George K. Yin, Crafting Structural Tax Legislation in a Highly Polarized Congress, 81 J.L. & CONTEMP. PROB. 241 (2018); George K. Yin, How Codification of the Tax Statutes and the Emergence of the Staff of the Joint Committee on Taxation Helped Change the Nature of the Legislative Process, 71 TAX L. REV. 723, 725-26 (2018); George K. Yin, James Couzens, Andrew Mellon, the “Greatest Tax Suit in the History of the World,” and the Creation of the Joint Committee on Taxation and Its Staff, 66 TAX L. REV. 787, 790-91 (2013); George K. Yin, The Joint Committee on Taxation and Codification of the Tax Laws, Draft prepared for the United States Capitol Historical Society’s program on The History and Role of the Joint Committee: the Joint Committee and Tax History (Feb. 2016), https://uschs.org/wp-content/uploads/2016/02/USCHS-History-Role-Joint-Committee-Taxation-Yin.pdf.

\(^{69}\) JCT Interview (“We get in a room with Legislative Counsel, the staff of the Committee’s Chairman, sometimes Treasury, and we go from concept to words.”).
bills. It prepares written summaries of the bill and of proposed amendments at each stage of the legislative process; provides hearing testimony and produces “hearing pamphlets” that summarize and analyze potential reforms; and describes the proposals before the committee at markup. If the legislation reaches either chamber floor, JCT staff provides an official revenue estimate for the legislation (a function analogous to CBO’s role on spending legislation). At conference committee, the staff drafts the markup document, conference report and revenue table. At various points in the legislative process, it also prepares distributional analyses of tax provisions, macroeconomic analysis of tax bills; and analyzes these bills’ impact on GDP, unemployment, and the budget. Outside the legislative process, JCT staff also conducts oversight functions, including ensuring that the IRS implements federal tax legislation in compliance with congressional intent.

JCT staff also publishes the influential “Bluebook,” a document “written for the tax bar” and widely used by it, that provides explanations of the tax legislation enacted by that Congress. It also produces a description of revenue provisions contained in the President’s annual budget, and an annual overview of expiring tax provisions, among other materials.

These published materials notwithstanding, JCT staff interacts with Members and staff confidentially. Much like CBO, the JCT staff will develop informal cost estimates for early tax proposals, and collaborate with Members to assist them in developing bills to reach the Members’ revenue goals. In addition to its routine work, the staff receives approximately 6,000 to 7,000 requests from Members each year.

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71 Id.
72 Id.
73 Section 201(g), as amended by the Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings). These JCT estimates are calculated by reference to the CBO revenue baseline. Although the cost estimates in committee reports for tax bills may nominally be attributed to CBO, they are produced in practice by JCT staff. JCT Interview.
74 JCT Interview.
75 Overview of Revenue Estimating Procedures and Methodologies Used by the Staff of the Joint Committee on taxation, JOINT COMMITTEE ON TAXATION (Feb. 2, 2005), http://www.jct.gov/x-1-05.pdf.
77 See IRC §§ 8021-8023. This oversight work includes monitoring the IRS and Treasury for compliance with intent, consulting with these agencies to explain intent, reviewing unusually large tax refunds, collaborating with GAO to conduct studies of IRS implementation, and conducting specific reviews at the request of Members. To this end, the Joint Committee has authority to hold hearings, issue subpoenas, and take testimony under oath. See id.
78 In the development of the Bluebook, JCT staff will consult with Treasury, Ways and Means, Finance, and the IRS. JCT Interview.
81 JCT interview.
year, the majority of which are requests for revenue estimates, and all of which are confidential unless released by the Member.82

JCT was created by the Revenue Act of 1926,83 and its current statutory authorization is in the Internal Revenue Code.84 JCT has statutory authority to appoint the Chief of Staff and additional staff.85 In practice, the Chief of Staff is selected alternately by the chair of the House or Senate committee with jurisdiction over tax issues (with the other chair assenting), and the Chief of Staff selects all additional committee staff.86 Currently, the JCT has sixty-five staff members.87

F. Offices of the Parliamentarians

The Parliamentarians’ Offices are each chamber’s experts on congressional procedure. In their role as the “keeper of the precedents,” they have sole responsibility for collecting, maintaining, and knowing volumes of procedural history.88

In their public-facing role, a member of the Office will advise the presiding officer of a chamber on the correct responses to procedural issues that arise in real-time on the chamber floor.89 But they also deliver advice through private consultations with Members and their staffs held in advance of a bill’s consideration.

Procedural recommendations by the Parliamentarians’ Offices carry no inherent, binding authority. Chamber rules bestow the presiding officer in each chamber with the power to make procedural rulings—and custom alone dictates that, in making these rulings, the presiding officer follows the recommendations of the relevant Parliamentarian’s Office.90 Nonetheless, these recommendations are unwaveringly followed by the presiding officer—and the presiding officer’s ruling, in turn, is almost never appealed and overturned by a chamber majority.91

84 26 U.S.C. § 8001 et seq.
85 Id. § 8004.
86 Yin, supra note 6, at 1298-99.
88 House Parliamentarian Interview.
90 See HOUSE RULES, r. I(5); FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE, S. DOC. NO. 101-28, at 989 (Alan S. Frumin, ed., rev. ed. 1992); HOUSE RULES, r. XII(2).
91 House Parliamentarian Interview; see also Gould, supra note 3, at 18.
The Parliamentarians make procedural recommendations on some particularly consequential matters. First, they make committee referral decisions for each introduced bill that determine the allocation of power and control across congressional committees—a source of fierce contestation within Congress. The Offices handle approximately ten thousand referrals each Congress.

Second, the House Office makes important determinations on the “germaneness” (and hence allowability) of proposed amendments to bills. While the rule itself is a single sentence, it has generated “thousands of pages of precedent.”

Third, because budget reconciliation bills cannot be filibustered in the Senate, they are an increasingly popular mode of legislating in a time of intense partisan gridlock. The Parliamentarian has the authority (applying the so-called “Byrd rule”) to determine which bills comply with six important budgetary rules that must be met to satisfy the conditions for reconciliation. Analogous fast-track procedures existing in current law also are providing fertile new battlegrounds for procedural battles.

Although parallel in their roles and functions, the two Parliamentarians’ Offices exist upon different legal foundations. The House Parliamentarian’s Office, which had existed since 1927, now is statutorily authorized by the Legislative Branch Appropriations Act for 1978. By contrast, the Senate Parliamentarian’s Office—which has existed since 1935—has never been given separate statutory authorization, and so it operates instead under the authority of the Secretary of the Senate. As a result, while federal statute provides that the House Parliamentarian will be appointed by the House Speaker and chosen “without regard to political affiliation,” no comparable statute provides for the method of selecting the Senate Parliamentarian. In practice, however, both chambers have selected Parliamentarians via internal promotions of existing employees.

As the smallest of the Underbelly Institutions, the Senate Office employs just two attorneys and one clerk, and the House Office employs six attorneys and two clerks (as well as a small support staff). The

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93 Gould, supra note 3.
95 See infra note 401 and accompanying text.
98 2 U.S.C. § 6531 et seq.
100 See Gould, supra note 3, at 34.
House Office maintains one subsidiary office, the Office of Compilation of Precedents. It publishes a number of materials related to chamber rules and precedents.

G. Government Accountability Office

The GAO is the “congressional watchdog.” It is easily the largest of the Underbelly Institutions, with a whopping 3,000 employees spread across its Washington, D.C. headquarters and eleven field offices.

GAO oversees and evaluates federal programs and how federal dollars are spent. It also undertakes traditional financial audits to determine whether agencies are spending funds in an efficient and effective manner. A broader range of investigations also fall within the Office’s ambit, including examining redundancies in federal programs and possible illegalities. The majority of the Office’s studies and investigations now result from specific congressional requests, although the Office does retain latitude to undertake audits and investigations at its own behest.

GAO also submits policy recommendations for legislative action to Congress. These can include recommendations that Congress enters into entirely new areas of legislation. The Office is unique in this respect; it is the only permanent congressional agency that officially makes such recommendations to Congress. The solicitation of these recommendations by Congress is not simply pro forma—Congress regularly acts upon the GAO’s recommendations. In 2018, for example, Congress adopted the GAO’s

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102 The House Office publishes the House Rules and Manual; House Practice; Precedents; and How Our Laws Are Made. Id. The Senate Office periodically publishes Standing Rules of the Senate, and it also publishes Riddick’s Senate Procedure.
107 Id.
110 GAO Interview.
111 Bruce Bimber, The Politics of Expertise in Congress 91 (1996). Congress will from time to time establish advisory committees to offer specific recommendations on particular issues—e.g., MedPAC on Medicare.
recommendations to direct the Veterans Health Administration to research overmedication, update the DOD’s prescription drug buying programs, and develop metrics on border security for DHS. 112

GAO’s work is structured by transparency with respect to its analyses and methodology. It publishes nearly all of its reports and studies for public consumption—even if Members of Congress would prefer the reports to be suppressed. 113

The Office was created by the Budget and Accounting Act of 1921. 114 The head of the Office (known as the “Comptroller General”) is appointed by the President and subject to Senate confirmation. 115 Prior to this appointment-and-confirmation, a congressional commission must recommend a list of at least three possible candidates to the President. 116 While it is unclear whether the President is required to choose a name from the provided list, all three Comptrollers General selected since the institution of this process have been so selected. The Comptroller General serves a non-renewable term of fifteen years.

GAO’s main work products are detailed reports, which typically range from 10 to 100 pages in length. 117 The Office also issues a “high-risk list,” which identifies programs where GAO believes Congress is at risk of high financial loss. 118 Among other things, it also publishes its “Red Book,” an influential guide to appropriations law and rulings cited numerous times by the Supreme Court. 119

GAO carries out a variety of additional responsibilities less immediately tied to the legislative process. It adjudicates thousands of “bid protests”—challenges to awards or solicitations of government contracts—each year. 120 Per the Federal Vacancies Reform Act, the Comptroller General notifies Congress, the President, and OPM if an acting official has served longer than the 210-day allowance without official

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113 GAO Interview. The only thing a Member requesting GAO work can do is put a 30-day hold on the report. But GAO respects the committee request and interest in making public the work GAO did for them, so they will wait the 30 days, but no more. The only notable exceptions to this practice of transparency arise in the contexts of investigations and audits of intelligence community. Id.
115 Id. § 703.
116 Id.
118 GAO Interview.
appointment and confirmation. 121 The Office is sometimes also asked to opine on whether the Congressional Review Act applies to certain agency actions. 122

In FY 2018, GAO received 786 requests for work from 90 percent of the standing committees of the Congress, issued 633 reports, and made 1,650 new recommendations. Senior executives were asked to testify 98 times before 48 separate committees or subcommittees. Agencies implemented 77 percent of GAO’s recommendations (increased from 73 percent in fiscal year 2016). 123

II. WHY A BUREAUCRACY?

Why might Congress create a bureaucracy for itself? While there is little literature on the concept of a “congressional bureaucracy,” there is of course a broad literature on agencies in the executive branch, and we see common themes as well as important divergences. We begin with an exceedingly brief overview of that literature here. 124

The executive branch literature focuses mostly on Congress’s own deficiencies as reasons for delegation in that context—including limited time, 125 limited information, 126 and limited courage. 127 The desire to remedy these deficiencies, the literature posits, motivates Congress to accept the particular tradeoff that bureaucracy offers. Congress relinquishes policy control to the executive branch 128 in the hope of receiving some countervailing benefit—particularly when it is a benefit that Congress, due to some innate

121 PERFORMANCE AND ACCOUNTABILITY REPORT FISCAL YEAR 2018, supra note 112, at 47.
124 The following survey is focused on the political science literature on bureaucracy, but it also is informed by excellent legal studies by Nicholas Parrillo and Anne O’Connell. See Nicholas Parrillo, Testing Weber: Compensation for Public Services, Bureaucratization, and the Development of Positive Law in the United States, in COMPARATIVE ADMINISTRATIVE LAW (Susan Rose Ackerman & Peter L. Lindseth, eds. 2010); Nicholas R. Parrillo, Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950, 123 YALE L.J. 266, 338 (2013); Anne Joseph O’Connell, Bureaucracy At The Boundary, 162 U. PA. L. REV. 841 (2014).
128 Terry M. Moe, Delegation, Control, and the Study of Public Bureaucracy, 10 FORUM 1, 15 (discussing tradeoff between expertise and policy control).
deficiency, is incapable or unwilling to achieve by itself. According to this literature, bureaucracy emerges when a benefit of this sort outweighs the risks associated with loss of political control.

The literature emphasizes several benefits that may prove sufficient for Congress under this calculus. These include benefits of increased efficiency (and other time-related benefits), benefits of quality (resulting, for example, from enhanced institutional memory or managerial experience), and benefits of greater political leeway to pursue additional policy achievements. They also include, more cynically, the benefit of decreased accountability, where bureaucracy functions as a scapegoat that Congress can hide behind to avoid political blame for difficult decisions.

But the most touted benefit is expertise. Expertise gained from the bureaucracy, the theory goes, outweighs the loss of political control.

This executive-branch literature also looks at the controls that Congress uses to bring the bureaucracy into closer alignment with its own political positions. Congress has ex post controls—oversight tactics to shape the behavior of existing agencies—and ex ante controls, initial decisions about the structure of the bureaucracy that can orient the bureaucracy toward Congress’s political preferences or otherwise “stack the deck” in favor of Congress’s preferred outcomes. These procedures often are thought to be designed specifically in the effort to insulate the bureaucracy from presidential influence, as that influence is assumed to undermine continued congressional control.

Ironically (predictably?) as we next, detail, Congress’s excessive reliance on the executive bureaucracy it created was largely the reason it needed a lawmaking bureaucracy of its own.

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130 Herbert A. Simon, *Administrative Behavior* 218 (Fourth ed. 1997) (“[O]rganizations, to a far greater extent than individuals, need artificial “memories.”).


135 Id. at 15.


III. SEPARATION OF POWERS AND THE STRUCTURES OF CONGRESSIONAL BUREAUCRATIC EXPERTISE

Now back to the Underbelly. Does the congressional bureaucracy serve the same functions that classic bureaucracy theory emphasizes are served by delegations to the executive branch? Yes—and No.

If there is one overarching theme in our study, it is something that we have not found in bureaucracy theory or anywhere else—and that is the role of bureaucracy in the congressional context as a tool to safeguard and separate powers.

The notion of knowledge as power is common, and there has been much written about the power of the executive branch bureaucracy in general. But Congress’s bureaucracy story is different. Creating a bureaucracy inside Congress did not pose the same kind of tradeoff between knowledge and control that external delegation is normally understood to pose. Each one of the Underbelly Institutions we study was created and then strengthened during the same two periods—the 1940s and 1970s—periods in which Congress was openly concerned that it was ceding too much power to the executive branch. Establishing its own bureaucracy to draft, research, organize, estimate, and audit legislation was viewed as key to safeguarding its legislative autonomy and preserving the separation of powers. The alternatives—seeing executive branch or third party assistance for information-gathering and drafting help—had already been tried and had created a sense inside Congress that it was losing its status as a co-equal branch because it was not self-sufficient and could not adequately check an executive whose power continued to expand. We begin with that story in this Part.

We then move to thinking about the different kinds of expertise that each Underbelly Institution offers, the roles those different sources of expertise serve, and how Congress has structured them. Although all the Underbelly Institutions share a commitment to nonpartisanship and are marked by a particular form of highly specialized knowledge, there are critical differences across them. Some are policy experts, some are not. Some that do work in the policy space are steadfastly neutral in their advice and reporting, others take firm positions. Some expertise they provide is confidential, some is public. Some offer their expertise before legislation is enacted, others’ expertise comes in ex-post. Some expertise is only suggestive and can be discarded by Members at will; others’ is authoritative and constraining. Some Underbellies have become the subject of political attention and, with visibility, criticism; others have escaped attention almost entirely. Members interact directly with some Underbellies; for others, they never see them and may not even know they exist. Each of these differences contributes to how Congress controls its own bureaucracy.

Some functions are obvious and common to bureaucracies in general, such as the provision of technical and subject-specific expertise needed to legislate. So, too, the Underbellies can be used by Members to avoid accountability—Members hide behind expert opinions to shift blame.\textsuperscript{139} Although much has been written about Congress’s blame-avoidance strategy\textsuperscript{140} of delegating decisions involving high risks,\textsuperscript{141}

\textsuperscript{139} JCT Interview.
\textsuperscript{140} See, e.g., KIEWEIT & MCCUBBINS, supra note 125; DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993); Gluck et al., supra note 2, at 1841.
\textsuperscript{141} See, e.g., GORMLEY & BALLA, supra note 133, at 57 (“[b]y placing responsibility for aviation security in the hands of DOT, Congress has distanced itself from culpability should there be a catastrophic breakdown in the system.”).
inevitable unpopularity, or adversarial adjudications to executive agencies, those insights have not yet been extended to the legislative branch bureaucracy, likely because it has been so understudied. Members use Underbelly expertise as a sword as well as a shield. One interviewee explained: “There is a lot of value to having a memo on CRS letterhead in support of a position” because it “can be used as leverage over other Members or the public.”

But the congressional bureaucracy has other, less obvious functions. In addition to the fascinating common origins of it in external separation of powers, the congressional bureaucracy also serves a subtler type of separation of powers that we introduce here: *internal* separation of powers. Legislative bureaucracy disperses lawmaking power among all of these nonpartisan institutions, and simultaneously prevents it from being centralized in any single political office.

In other words, Congress could have brought these functions even closer inside. The work of the bureaucracy could have been accomplished by Leadership staff, or other partisan staff under Members’ direct control, or that could be divided between different staffs for majority and minority, with each side providing its own competing estimates, drafts, statutory re-organizations, and so on. Instead, by creating a cadre of nonpartisan dedicated bureaucrats whose mission is to serve the institution as a whole, including both parties, and who cannot be removed by any one faction in Congress, Congress decentralizes power within itself and removes a piece of the legislative process from partisan politics. In a sense, that is indeed a tradeoff of control for expertise. As one high-level staffer put it: “You do not want to have the collection of power where everyone functions under a single secretary general.”

### A. Congressional Concern of Executive Encroachment

Is bureaucracy power? Despite their different functions, the seven Underbellies were created and molded for one common, overarching purpose: protecting congressional autonomy. At critical moments of the twentieth century, Congress realized that to reassert power from an encroaching executive, it had to fashion itself a substratum of independent nonpartisan expertise.

The 1940s was the first key period. The years leading up to and through the New Deal had seen an explosion of legislative activity—and a concomitant explosion in the size of the executive branch—yet Congress’s own staff had remained relatively small and almost entirely partisan. Even the partisan staffs

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143 See, e.g., Weaver, * supra* note 133, at 386-87 (“Independent regulatory commissions are delegated responsibility for many of the most sensitive economic conflicts that pit one firm or industry’s interests directly against others (e.g., mergers, rate-making).”).

144 CRS Interview.

145 House Parliamentarian Interview.

146 Harrison W. Fox, Jr. & Susan Webb Hammond, *The Growth of Congressional Staffs*, 32 PROCEEDINGS ACADEMY POL. SCI. 112, 115 (1975). For information on personal and committee staff levels between 1977 and the present, see R. Eric Petersen & Amber Hope Wilhelm, *Senate Staff Levels in Member, Committee, Leadership, and Other Offices, 1977-2016*, CONG. RESEARCH SERV. (2016), [https://www.everycrsreport.com/files/20160913_R43946_9d82f82510af41260ed64c6994c959debaeb8a4e.pdf](https://www.everycrsreport.com/files/20160913_R43946_9d82f82510af41260ed64c6994c959debaeb8a4e.pdf); *House of Representatives Staff Levels in Member, Committee, Leadership, and Other Offices, 1977-2016*, CONG.
at the time were not substantive experts; their work usually was confined to only clerical tasks.\textsuperscript{147} It was estimated that there were fewer than 200 employees in Congress in 1941 who could actually be considered legislative professionals or experts.\textsuperscript{148} Without in-house expertise, Congress had to rely during this period on executive branch for expertise, information, and drafting assistance.\textsuperscript{149}

Congress increasingly came to view this executive-branch dependence as intolerable. In a 1942 floor speech entitled “What Is Wrong With Congress,” Representative Everett M. Dirksen voiced these frustrations with this dependence:

[W]e are constantly fishing with the bureaus and we put on a great quiz program, and they tell us what they think we ought to know and not a great deal more. . . . Do you think the legislative branch of the Government can function independently and properly with the kind of prestige it ought to enjoy on that kind of a basis? The Congress today, in my judgment, needs a great, big dose of B, in the form of a staff or an instrumentality so we can make out a case after gathering information and rebut cases that are presented to us. . . .

So, answering the query with which I started: What is wrong with Congress? It is not implemented; it is not staffed; it does not have the weapons with which to do the best kind of job. So I say to you now: Let us spend a little money on ourselves; let us provide legislative tools to get the facts, the data, the information, and then control, supervise, and survey the operations of the Government . . . .\textsuperscript{150}

Dirksen’s calls for legislative action translated into the most notable reform of the period: the Legislative Reorganization Act of 1946. In addition to providing the first authorization for committees to retain professional staff,\textsuperscript{151} the 1946 Act expanded the size and role of the Underbelly Institutions, as detailed below.\textsuperscript{152} Explaining the logic of these 1946 reforms, Representative Moroney observed that Congress’s work used to be the stuff of administrating post offices and improving rivers, but that:

Today we are confronted and confounded by the problems of a $35,000,000,000 government trying to do the job with tools so absolutely obsolete and antiquated that 435 saints could not possibly do with our present equipment and organization. . . . We cannot be coequal; we cannot do this fundamental task of supervision that the framers of the Constitution had in mind unless the Congress is virile, strong enough and well equipped enough to handle this magnitude of work that is dumped on us. Five hundred and thirty-one men that compose the membership of the House and Senate are going to have a pretty hard time in handling, in supervising, in surveying the work of over 3,000,000 men

\textsuperscript{149} Gladys Marie Kammerer, Congressional Committee Staffing Since 1946, at 3 (1951).
\textsuperscript{150} Statement of Representative Dirksen, 88 Cong. Rec. 7696 (1942).
\textsuperscript{151} Fox & Hammond, supra note 147, at 14; Kammerer, supra note 149, at 4. Professional aides to Representatives would not be recognized until 1970. Fox & Hammond, supra note 147, at 12.
scattered throughout the executive department. It is like trying to move a battleship with a jeep or a model T Ford.\textsuperscript{153}

The committee report for the Act reiterated these goals. As the report put it:

> When the [branches] were created, they were more or less equal. But the executive branch of the Government has mushroomed into the greatest governmental bureaucracy not only this country but any other country in the world has known. The legislative branch has relatively stood still.\textsuperscript{154}

The 1970s brought another wave of reform. During this period, rising disenchantment with the executive branch (which would culminate mid-decade with the Watergate scandal) brought fresh concerns about congressional dependence on the executive. These frustrations generated a number of laws to augment Congress’s resources. Most notable among these was the Legislative Reorganization Act of 1970.\textsuperscript{155} Describing the motivation for the Act, numerous Members made comments similar to this one, from Rep. Schwengel: “The efficiency and effectiveness of our operation has decreased to the point where many people consider us to be a rubberstamp for the Executive.”\textsuperscript{156} In response to this frustration, the 1970 Act provided Representatives with statutory recognition of their ability to retain professional partisan staff, and made changes to the committee system to empower the use of expert committee staffers.\textsuperscript{157} At the nonpartisan level, it transformed and expanded the Underbellies.

As noted, while these reforms may have returned power to Congress vis-à-vis the executive branch, they also dispersed power inside Congress. After all, Congress could have built its bureaucracy simply by adding experts into existing centers of congressional power. It could have added partisan staff positions to Members and committees, for example. Or it could have consolidated research, drafting, accounting, procedural, budget, and revenue expertise beneath the Speaker of the House and the Senate Majority Leader. Instead, it dispersed these roles across a collection of nonpartisan institutions that, because of their statutory authority and hard-wiring into congressional procedures, often are not easily manipulated or cowed by Congress. Several interviewees explicitly volunteered—without prompting—this internal separation of powers benefit.

\textsuperscript{153} Statement of Representative Moroney, 92 CONG. REC. 10039 (1946).
\textsuperscript{155} Title V of the Legislative Reorganization Act of 1970 (\textit{codified at 2 U.S.C. § 281-282e}).
\textsuperscript{156} 116 CONG. REC. 23914 (1970) (statement of Rep. Schwengel). \textit{See, e.g., 116 CONG. REC. 26031 (1970) (statement of Rep. Waldie) (“The power of the executive branch is awesome today compared to the legislative branch.”); 116 CONG. REC. 24061 (1970) (statement of Rep. Hanna) (“Mr. Chairman, in the almost 200 years since the Constitution was ratified, the executive branch of the Government and the court system have undergone radical changes, adapting themselves to the changing society in which they operate. Unfortunately, very little has been done in this regard in the third coequal branch of our Government, the Congress.”).}
B. Underbelly Institutions’ Common Origins in Safeguarding Congressional Power

1. CRS: “Do You Think the Legislative Branch of the Government Can Function Independently and Properly with the Kind of Prestige It Ought to Enjoy on that Kind of a Basis?”

As Part I explained, the Legislative Reference Service was established in the Library of Congress via administrative order in 1915; but it was not until 1946 that Congress realized the need to transform and empower it to be a coequal branch of government. Again from Representative Dirksen:

“How can the Aegean stables be cleansed unless we are equipped and staffed to secure basic information? Do you think the legislative branch of the Government can function independently and properly with the kind of prestige it ought to enjoy on that kind of a basis? . . . What good does [the Library] do, unless we have senior experts to digest [the information in the collection] when legislation is before the committees? That is what the people expect, and that is the use we should make of our Library. It is designed, of course, to bring information, to bring data, and to bring a finer degree of efficiency in the discharge of our legislative responsibilities.”

The Act also increased the size and scope of the Service and established LRS as a separate department in the Library of Congress. These reforms transformed LRS from a service that handled about 1,100 research requests per year in its early years, and roughly 5,000 annual requests in the late-1930s, to one that handled 36,000 requests per year by 1950.

The Chair of the House Rules Committee remarked, “Congress needed, but did not have, the capacity to evaluate the policy results of its work and suggested various ways of accomplishing the objectives of its programs.” In the decade following the passage of the Act, CRS more than doubled in size.

CRS told us that today views as parts of its mission providing information to safeguard autonomy, not only from the executive, but also from outside interest groups. As recently as June 2019, the President of the Congressional Research Employees Association testified before the Committee on House Administration that an important role of CRS is to “help sort through the facts and opinions and provide an unbiased overview” of the various interest group positions lobbying Congress.
2. Legislative Counsel: “To Help Draft the Bill It Was Necessary to Seek Technical Assistance from the Executive Branch”

The Offices of the Legislative Counsels had their origin largely outside of Congress. In 1911, the Legislative Drafting Research Fund was established at Columbia University to promote the “scientific study and investigation of legislative drafting.”167 This included a commitment to “laboratory work” whereby the Fund would provide drafting work for governments.168 To this end, the Fund dispatched Middleton Beaman, a Columbia law professor and Library of Congress law librarian, to Congress in 1916.169

By the time of Beaman’s arrival to Congress, various states—spurred on by the Progressive movement—already had created legislative drafting offices.170 Beaman soon found a receptive audience with the Ways and Means Committee and became a trusted drafting resource who eventually would be relied upon throughout the Congress.171

In the Revenue Act of 1918, Congress decided to create a permanent office modeled on Beaman’s service. A product of the congressional desire for self-sufficiency, the new office resulted partly from the fact that “[t]he Committee on Ways and Means felt that Congress should not be a mendicant on Columbia University nor receive favors at its hand, however gladly offered.”172

The 1918 Act dispersed power, mandating that the Service be divided into two independent branches—one serving each chamber of Congress—largely out of concern that the Senate would dominate drafting resources at the House’s expense.173 The Act also provided that the head of each drafting office was to be appointed “without reference to political affiliations.”174

In the succeeding decades, Congress largely failed to expand Legislative Counsel’s capacity to meet the growing drafting needs that accompanied the New Deal and Great Society agendas.175 As a result,

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167 Letter from Joseph P. Chamberlain to President Nicholas Murray Butler of Columbia University (April 27, 1911). On Chamberlain’s role in starting the fund, see John M. Kernochan, A University Service to Legislation: Columbia’s Legislative Drafting Research Fund, 16 LA. L. REV. 623, 624 (1956).

168 See Kernochan, supra note 167, at 624-25; see also Frederic P. Lee, The Office of the Legislative Counsel, 29 COLUM. L. REV. 381, 381 (1929).


170 For state-level antecedents, see, for example, WISCONSIN LEGISLATIVE REFERENCE BUREAU, https://legis.wisconsin.gov/lrb (last visited Mar. 19, 2019) (on the 1901 founding of the Wisconsin drafting office).

171 See Charles B. Nutting, Department of Legislation, 51 ABA J. 493, 493 (1965); see also Lee, supra note 168, at 38.


173 Section 1303(a) of the Revenue Act of 1918, 40 STAT. 1057, 1141-2. On the decision to create separate branches, see Lee, supra note 168, at 387.

174 Section 1303(a) of id.

executive agency officials stepped into the gap, taking leading roles in drafting congressional legislation during this period.176

By the time of the Legislative Reorganization Act of 1970, Congress’s balance-of-powers frustrations extended to bill drafting. As a member of the Committee put it:

In the past 3½ decades we have seen a persistent—if sometimes sporadic—accretion of power in the executive branch . . . . [Even in a bill that originated in Congress,] the irony of the situation is that to help draft [the bill] it was necessary to seek technical assistance from the executive branch; namely, the Department of Agriculture, whose corps of bill drafters exceeds the entire number of legal counsel available to the House legislative counsel. [This] reflects executive rather than legislative branch oversight, power, allocation of funds, and precedence.177

State legislatures were even ahead of Congress, as Rep. Rees explained:

When I was a member of the California Senate, we had a legislative counsel’s office in the California Legislature that had 46 attorneys. I think we have 14 attorneys in the Legislative Counsel Office for the House of Representatives.178

Fulfilling the commitment it made in the 1970 Reorganization Act, Congress in 1972 provided the House Office with increased funding for hires.179 Thus began the Office’s steady expansion through today, where there are more than 80 staff across both chambers.180 For major legislative proposals, the executive branch now sometimes borrows Legislative Counsel’s drafters (rather than vice versa).181

3. **GAO: “The Committees of Congress Have No Way of Getting Down to the Actual Facts . . . We Have No Check at All”**

In the late-nineteenth and early-twentieth centuries, the responsibility for the auditing and oversight of federal expenditures belonged to the Comptroller of the Treasury. In the debate over the legislation that ultimately would create the GAO, Representative Good (who would sponsor that legislation) told a story that highlighted his concern for the Comptroller’s executive-branch dependence, remarking:

I think it was under the administration of President Cleveland that the President desired to use a certain appropriation for a given purpose, and was told by his Comptroller of the Treasury, who happened to be a little independent of this system, that he could not do it.

179 H.R. Rep. No. 92-236, at 7. The Act also provided a new charter for the House Legislative Counsel—fully separating the operations of each chamber. See supra note 15..
But the President insisted and finally said, “I must have that fund, and if I cannot change the opinion of my comptroller, I can change my comptroller.” With less independence all comptrollers, no matter to which political party they owe allegiance, have been forced to face the same practical situation.\footnote{67 CONG. REC. 982 (statement of Rep. Good) (May 3, 1921).}

In 1920, Congress passed a bill to create a new office to address these concerns and relocate the oversight and auditing functions outside the executive branch. President Wilson objected to a provision allowing Congress to remove the new Comptroller General through concurrent resolution, claiming it was unconstitutional, and vetoed the bill.

As Wilson’s presidency drew to a close, Members continued to voice displeasure with the current Comptroller’s relationship to the executive. As Rep. Good again explained:

> We believe that the Committee on Appropriations and the committees on expenditures and on revenue that are investigating matters under their jurisdiction should have at all times something more than an ex parte statement with regard to expenditures. . . . Every bureau chief who is worth anything wants his department to grow . . . . So year after year they come and ask for new activities and additional money to perform those activities, and most frequently Congress and the committees of Congress have no way of getting down to the actual facts, except as we dig them out from an unwilling witness, a witness naturally unwilling because he wants the money, and in his attempt to get the money will cover up all the defects of his office, all the shortcomings of his organization, simply to get the appropriation for his department. We have no check at all upon this method.\footnote{Id.}

With the Budget and Accounting Act of 1921, Congress proposed a “Government Accounting Office” that would be instructed by statute to: “[I]nvestigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds” and to “make such investigations and reports as shall be ordered by either house of the Congress or by any committee of either House having jurisdiction over revenue, appropriations, or expenditures.”\footnote{The Budget and Accounting Act of 1921, Pub. L. No. 67-13 § 312, 42 STAT. 20 (1921).} The Act retained the design of removal power to which Wilson had objected.

Representative Byrns remarked: “The [proposed] comptroller general is the representative of Congress. He does not represent the Executive in any sense of the word, and the whole idea of the Budget Committee was to make him absolutely and completely independent of the Executive.”\footnote{67 CONG. REC. 1081 (statement of Rep. Byrns) (May 5, 1921).} Representative Fess similarly explained: “This bill removes from the spending department the right to audit its own books.”\footnote{67 CONG. REC. 977 (statement of Rep. Fess) (May 3, 1921).}

The House committee report for the Act expressly discussed GAO’s role in the separation of powers:

> The Executive having the power to initiate the budget, certainly an independent audit is necessary to insure at all times a businesslike execution of the budget . . . . The creation of
this office will, it is seen, serve as a check, not only on useless expenditures but will keep
the bureau more keenly alive to a rigid performance of its duties and obligations.187

Nonetheless, to secure the signature of the new President, Warren G. Harding, the bill made
compromises. The Office also would have some independence even from Congress, as its head—the
Comptroller General—would be appointed by the President (though Congress would supply a list of
nominees).188 Moreover, its creation came as part of a larger set of tradeoffs with the executive; as one
historian wrote, “Many congressmen, probably most, viewed the independent audit as the ‘quid pro
quo’ for instituting an executive budget.”189

The GAO’s early work focused on a mostly clerical review of “vouchers,” which were forms used
by executive branch administrative officials and disbursing officers to record information on spending.190
By the 1940s, however, the GAO supervised the creation and holistic auditing of accounting systems in
executive agencies.191 In 1946, its workforce reached nearly 15,000.192 Simultaneously, in the 1946
Reorganization Act, Congress reasserted its control over the Office, declaring it officially part of the
legislative branch and giving it additional powers to oversee executive branch implementation of the
budget.193

By the 1970s, Congress had honed the GAO into a formidable watchdog. Congress more than
tripled its budget and, in the 1970 Legislative Reorganization Act, mandated that it carry out full-fledged
“program evaluations.”194 The Office transitioned from hiring only accountants to instead recruiting
scientists, policy specialists, and technical experts to aid in its modern mission of monitoring the substance
and effectiveness (rather than just the accounting) of executive programs.195

While the 1990s’ Republican Revolution pared back the GAO’s budget and personnel significantly,
the Office remains the largest Underbelly Institution, with about 3,000 employees.196

GAO staff in interviews repeatedly emphasized its role in safeguarding “Congress’s constitutional
prerogatives.”197

187 NATIONAL BUDGET SYSTEM: REPORT OF THE SELECT COMMITTEE ON THE BUDGET, U.S. HOUSE OF
REPRESENTATIVES, TO ACCOMPANY H. R. 30, at 7-8 (Apr. 25, 1921)
190 GOVERNMENT ACCOUNTABILITY OFFICE, GAO: WORKING FOR GOOD GOVERNMENT SINCE 1921, at 2 (2001),
191 MOSHER, supra note 189, at 121-22.
192 Id. at 124.
193 MOSHER, supra note 189, at 104-05; TRASK, supra note 188, at 33.
194 MOSHER, supra note 189, at 176.
195 GOVERNMENT ACCOUNTABILITY OFFICE, GAO: WORKING FOR GOOD GOVERNMENT SINCE 1921, at 18 (2001),
196 BROOKINGS, VITAL STATISTICS ON CONGRESS tbl.5-8 (2019). The Gramm-Rudman-Hollings Act, passed in 1985,
gave the Comptroller General the authority to bind the President to reduce federal spending for deficit reduction
purposes. But the Supreme Court struck down this arrangement in BOWSHER v. SYNAR, 478 U.S. 714
(1986).
197 GAO Interview.
4. **JCT: “Congress Ought Not to Be Dependent Absolutely on What May Be Reported to it by the Officials and People Engaged in the Administration Side Alone”**

The JCT Committee on Taxation emerged from a personal feud between congressional and executive actors. In 1924, as George Yin has chronicled, Treasury Secretary Andrew Mellon proposed to reduce surtax rates—and Senator James Couzens responded with well-publicized critiques of the proposal. This dispute turned personal and culminated in a Senate investigation into the Bureau of Internal Revenue. As Yin has chronicled, the investigation awoke Congress to broader concerns about the drafting and implementation of tax policy.

In the Finance Committee’s hearing on the Couzens investigation, Senator Jones articulated the key concern: “[T]he Congress ought not to be dependent absolutely on what may be reported to it by the officials and people engaged in the administration side alone.” Jones admitted, “I am not an expert engineer; I am not an expert auditor; nor have I the time to do the work myself,” and so concluded that the committee should hire some experts of its own.

Second, Jones also observed that the investigation had revealed Congress’s need for a staff to provide Congress with greater autonomy in developing and drafting tax legislation: “Unless this committee has an agency on the job all the time to see what is going on [at the Bureau of Internal Revenue], we will not get very far. . . . We want an agency under our jurisdiction so we know what is going on.”

These ideas would become key pillars of the committee’s proposal for a “Joint Committee on Internal Revenue Taxation,” enacted into law by the Revenue Act of 1926. By the 1970s, the JCT’s successful navigation of its many stakeholders and pressures led one commentator to remark that its Chief had, “on tax legislation[,] . . . more influence than the President, the Secretary of State, the assistant secretary in charge of taxation, [and] the chairmen of the tax-writing committees in Congress—separately or combined.”

5. **CBO: “[T]he Congress Has, in the Eyes of Many, Lost the Power of the Purse to the Executive Branch”**

The Budget and Accounting Act of 1921 required the President to submit an annual budget proposal, and so largely entrusted the President with responsibility for budget planning. The 1921 Act

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198 Yin, James Couzens, Andrew Mellon, the “Greatest Tax Suit in the History of the World,” and the Creation of the Joint Committee on Taxation and Its Staff, supra note 68.
199 Id. at 849 (citing Revenue Act of 1926: Hearings Before the S. Comm. on Fin., 69th Cong. 213-16 (1926))
200 Id. (same).
201 Id. (same).
203 Yin, James Couzens, supra note 68 (citing E.W. Kenworthy, Colin F. Stan: A Study in Anonymous Power, in ADVENTURES IN PUBLIC SERVICE 107 (Delia & Ferdinand Kuhn eds., 1964)).
also established the Bureau of the Budget (later renamed as the Office of Management and Budget), which gave the president significant control over budgetary information. In subsequent decades, economic analyses for legislative and budgetary issues (such as cost estimates for bills) typically were produced by executive agencies. Those calculations, it often was suspected, would vary based on the President’s level of support for the underlying legislation. This era of “presidential dominance” over the budget process continued unabated into and throughout the 1960s.

Congress became increasingly concerned about this allocation of budgetary power in the 1960s. The Vietnam War and the Great Society policies placed new strain on the budget, and Congress grew increasingly dissatisfied with executive branch budgetary tactics that it viewed as coercive.

These inter-branch tensions reached a boiling point when, in 1972, President Nixon threatened to withhold significant appropriations from certain federal programs. These impoundments, along with a concern among some that OMB could not be trusted after the Watergate scandal, led to new congressional interest in reclaiming its budgetary and economic powers.

Congress formed a Joint Study Committee on Budget Control, drawing on the template of California’s Joint Legislative Budget Committee, which in 1973 recommended the creation of a nonpartisan joint staff and director to work beneath two new budget committees. This approach, the committee hoped, might finally “give Congress its own center of congressional budgetary operations.”

A year later, Congress enacted the Congressional Budget and Impoundment Control Act of 1974. The Joint Explanatory Statement of the Committee of Conference observed: “[T]he Congress has, in the eyes of many, lost the power of the purse to the Executive Branch.” Elaborating on this situation, the statement observed: “[C]ongressional enactments [have] permitted the Executive to achieve a great concentration of financial and policymaking authority . . . . Yet the Congress did little to improve its own budget capabilities.”

As part of this effort, the Act created the Congressional Budget Office. Rep. Annunzio explained that the CBO would “aid in redressing the imbalance of information which the executive branch commonly uses to its advantage and our embarrassment.” Similarly, Senator Muskie commented that the Office

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205 Id. (both above cites).
207 Id.
208 JOYCE, supra note 54, at 14.
209 Id. at 15.
210 Id. at 16.
211 Waxman, supra note 206.
212 Recommendations for Improving Congressional Control Over Budgetary Outlay and Receipt Totals, H. Rept. 93–147, 2-3 (Apr. 18, 1973).
213 Id.
215 Id.
would “provide Congress with the kind of information and analyses it needs to work on an equal footing with the executive branch.”

In subsequent years, CBO gradually accreted authority, largely by inserting itself into major legislative proposals and taking a firmly nonpartisan stance. President Carter’s energy policy was the important first milestone. As CBO historian Philip Joyce put it, CBO proactively got involved by “proposing to do an analysis of the plan, and by generating requests for this analysis from the committees of jurisdiction.” Ultimately, the CBO determined that the Carter estimates were too optimistic. The newly created CBO even angered some Members of Congress by drawing power away from the very influential congressional budget committees. But one of the most important early CBO directors, Alice Rivlin, openly embraced this internal separation of powers function for the new office, famously stating: “[T]he CBO was not set up to work solely for the Budget Committees. I work for the whole Congress and have responsibilities to all committees and indeed to all Members.”

Despite the controversy, CBO’s work on Carter’s plan solidified CBO’s independence, especially because the entire federal government, including CBO, was headed by Democrats. CBO likewise made controversial forecasts relating President Reagan’s budget policy (particularly projecting a deficit when Reagan promised his budget would balance), as well as damning forecasts that contributed to the failure of President Clinton’s health reform legislation in 1994.

6. Parliamentarians: Decentralizing Power

Throughout the nineteenth century, chamber clerks and messengers would assist Members with floor procedures and provide point-of-order clarifications. The work of these informal advisors, combined with the procedural knowledge of Members themselves, was sufficient for many decades to “keep some semblance of uniformity” in each chamber, as one Parliamentarian has put it.

217 Id. at 2000. See also JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 63 (2017); JOYCE, supra note 54, at 6.
218 Id.
219 Congressional Budget Office Oversight, Hearing before S. Comm. on the Budget, 94th Cong. 10 (Jan. 23, 1976).
221 Id. at 7.
224 Id. at 62.
By the 1920s, however, the emergent committee system had channeled Members away from the chamber floors, particularly in the House, and thus from familiarity with their own procedures. The new institution of Parliamentarians’ Offices—created in 1927 in the House and 1935 in the Senate—would compensate for this diminution in Member knowledge, saving Members from having to personally master arcane procedural rules. It was thought at the time that freeing up Members to focus more on substantive policymaking would empower Congress to better resist executive encroachments into policymaking.

The second reason for the new offices relates to internal separation of powers. Members wanted a professional parliamentarian to curb the centralization of procedural power by Speaker Joseph “Boss” Cannon. On the Senate side, the concern was about the centralized procedural control of Vice President John Nance Garner.

The separation into two distinct Parliamentarians’ Offices is the largely product of an internal form of separation of powers mandated by the Constitution: bicameralism. Article I, Section 5 provides that “Each House may determine the Rules of its Proceedings.” As a result, each chamber built up a distinct body of rules and precedents. And even within each chamber, the Parliamentarians’ adjudicatory function is separated from the legislative leadership—it may surprise readers to learn that House Parliamentarian has basically “no interface with the Speaker.”

7. OLRC: “The Bulk of the Revision Done is Done by Lawyers in the Executive Branch”

Congress first created the U.S. Code in 1926. In so doing, it joined many state legislatures that, around the same time, also had begun to prepare and adopt topically-arranged legal codes or revisions. As noted, Congress originally entrusted management and oversight of the Code to the House Committee on the Revision of the Law, but it did not provide the Committee with any significant staff to perform this task.

Throughout the 1950s and 1960s, even as the federal statutory landscape was exploding, the work of preparing codification bills was assigned to only two individuals. As a result, Congress often outsourced this work to non-congressional actors, including West Publishing Company. With respect to the

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225 Gould, supra note 3, at 12.
227 Gould, supra note 3, at 12; see also KING, supra note 92, at 87 (1997).
229 House Parliamentarian Interview.
232 On the evolution of this committee assignment, see Will Tress, Lost Laws: What We Can’t Find in the U.S. Code, 40 GOLDEN GATE U. L. REV. 129, 143-44 (2010).
preparation of Code titles for re-enactment, “[t]he bulk of the revision done is done by lawyers in the executive branch,” as Rep. Ketcham put it in 1974, because executive agencies had more staff.234

In 1974, as part of the House effort to take a fresh look at its committee structure,235 the Office of the Law Revision Counsel was created to address, as the committee report made clear, concerns about the lack of institutional capacity amidst the rising complexity of federal law.236 Echoing the congressional self-sufficiency,237 the report laments: “To assist in the Judiciary Committee’s codification and revision work the West Publishing Company has, for some 50 years, more or less donated its services to the committee.” A few months later, Congress made the provision creating the OLRC “permanent law” sanctioned by bicameralism and presentment,238 thereby situating the Office in both chambers. In so doing, Congress ensured that the Law Revision Counsel could not be abolished via unilateral action by the House.

C. Different Types and Structures of Congressional Bureaucratic Expertise

In structuring its bureaucracy, Congress sought specialization and nonpartisan for all of its Underbelly Institutions. Specialization was an answer to its self-sufficiency needs; nonpartisanship (including restrictions on how chief bureaucrats can be hired and removed) was a way to protect against bureaucracy running amok. A core staff devoted to long-term interests of the institution would be unlikely to further political position or party.

In other aspects of structure, however, Congress differentiated across the Underbelly Institutions, again both to make them most useful to Congress but also to ensure some controls. This section details these differences. For instance, some of the Institutions have relevance only if Members choose to use their inputs. Others have mandatory inputs, but transparency rules that allow Congress to police their work. Congress also votes on statutes after most (but not all) of the bureaucratic input. That is of course another significant control. We do not hear much about this internal bureaucracy running amok, and so that it not our main focus here, but questions about control are salient in the general bureaucracy literature.

1. Nonpartisanship: “You’d Never Go Down This Road If You Had a Partisan Bone in Your Body”

All seven of the Underbelly Institutions emphasized nonpartisanship as the defining character of their work. One interviewee described nonpartisanship as the “core of their legitimacy.” Two heads of offices told us that nonpartisanship is what makes their offices “valuable” to Congress. And a deputy head of one Underbelly Institution remarked:

235 Specifically, it considered proposals from a bipartisan Select Committee on Committees tasked with looking at House Rules X and XI. These rules “establish[ed] the standing committees of the House, define[d] their jurisdictions, and regulate[d] their procedures.” COMMITTEE REPORT, supra note 233, at, at 3.
236 See id. at 88 (explaining that the production of the Code had become a “massive task”); id. (describing the exceedingly “large body of Federal laws”).
237 See id. at 90.
The nonpartisan nature of the work infuses every conversation we have here every day, so both sides of the aisle know no matter who calls us first to ask the question we give the same answer. It is so ingrained in everything we do here every day. Nonpartisan is the core of what we are.\(^{239}\)

This nonpartisanship is anchored in a patchwork of legal requirements. Five of the institutions (out of nine, with single-chamber offices counted individually) have statutory requirements that their office head be appointed without regard to political affiliation.\(^{240}\) Six have statutory requirements that their staffs be so appointed.\(^{241}\) While statutory rules for eight provide a role for political actors in the appointment of office heads, they provide for the head of one (CRS) to be appointed by a nonpartisan actor.\(^{242}\) Similarly, while statutory rules detail a potential role for political actors in staff hiring for five Underbelly Institutions, they explicitly omit such a role for three such Institutions (and are silent regarding one).\(^{243}\) GAO also pointed toward the absence of political appointees below the Comptroller General, for example, as a feature that contributed to the GAO’s nonpartisan culture.\(^{244}\)

Culture mission commitment also contributes. All of the Underbelly Institutions reported that they hire and promote on a nonpartisan basis. The Senate Office of the Legislative Counsel is typical; it lacks statutory protections for nonpartisanship in staff hiring, yet it reports on its website that: “No change in personnel of the Office has resulted from any change in political control of the Senate.”\(^ {245}\) Prior research

\(^{239}\) Staffer Interview.

\(^{240}\) The five that do are: House Legislative Counsel; OLRC; CRS; CBO; House Parliamentarians. Those that do not are: JCT; Senate Parliamentarians; GAO; and Senate Legislative Counsel. For the relevant statutory provisions, see supra Part I.

\(^{241}\) They are: House Legislative Counsel; OLRC; CBO; House Parliamentarians; CRS; GAO (must hire based on merit and fitness).

\(^{242}\) The only one without a role for a political actor is CRS, whose head is appointed by the Librarian of Congress. Those appointed by House Speaker: House Legislative Counsel; Senate Legislative Counsel; House Parliamentarians. Appointed by Speaker Pro Tempore: Senate Leg Counsel. Appointed by House Speaker and Senate President pro tempore, with recommendations from Budget Committee: CBO. Appointed by President, with Senate confirmation, after congressional submission of recommendations: GAO. Appointed by Joint Committee: JCT.

\(^{243}\) Those with role for political actor: Senate Legislative Counsel (subject to President pro tempore approval); House Legislative Counsel (subject to Speaker approval); Law Revision Counsel (with approval of Speaker); JCT (power to hire lodged in Joint Committee); House Parliamentarian (with Speaker approval). Those without a role: CBO (power vested in Director); CRS (power vested in Librarian of Congress, upon Director’s recommendation); GAO (power in Comptroller, or in Inspector General for Inspector General staff). Statute is silent for Senate Parliamentarian’s Office.


has found that JCT, GAO, and the Senate Parliamentarian’s Office—each of which lacks statutory protections for nonpartisanship in the selection of office heads—nonetheless all appoint leadership and hire without regard to partisanship and also explicitly avoid hiring individuals who previously have done partisan work. Self-selection also happens at the hiring stage, as the positions typically lack appeal for individuals with strong partisan inclinations. As one staffer in a Parliamentarian’s Office remarked: “You would never go down this road if you had a partisan bone in your body.”

Office culture further cultivates the view that the primary allegiance is to the institution of Congress as a whole. We see similar descriptions in the general bureaucracy literature. The head of one Institution said:

There could be three senators in my office arguing about something, but there is always a fourth entity in that meeting and [that is the Congress as] an institution. You are trying to be the guardian or steward of its unseen needs and traditions, and looking around the corner and trying to take a long view, when most folks coming in are just trying to get something done for today.

246 Notably, even though JCT staff are nested within a committee, all sources agree that they are “assiduously nonpartisan.” Victor Fleischer, The State of America’s Tax Institutions, 81 J.L. & CONTEMP. PROBLEMS 7, 21-22 (2018). See also Yin, Tax Legislation, supra note 68, at 265 (reporting that JCT staff is “increasingly viewed like staff of a legislative support organization (such as CBO, CRS, and GAO) rather than committee staff”); Yin, supra note 19, at 2298 (“From the beginning, the JCT staff has been nonpartisan, although the legislative background does not clearly explain the reason. . . . Unlike most committee staffs, [] the JCT staff is not affiliated with any party and is not separated into majority and minority party staff Members.”).

247 While the President (a political actor) appoints the Comptroller General, early heads of the GAO made it clear that their watchdog role was apolitical, and that norm persists today. See ROGER R. TRASK, DEFENDER OF THE PUBLIC INTEREST 49-65 (1996).

248 Gould, supra note 3, at 43 (“[A]lthough removals of the parliamentarian have at times been partisan in nature, appointments have always been promotions from within the office, and therefore have not been expressly partisan.”).

249 See, e.g., Careers, supra note 245 (“Since the Office provides technical legal services on a nonpolitical and confidential basis, and must be impartial in appearance as well as in fact, active public participation in political matters is regarded as a disqualification for appointment or retention.”); JCT Interview (“We are nonpartisan. In hiring, if someone says ‘I’d like to work for you because I worked on so-and-so’s campaign and really want to advance these ideas,’ we reject that application.”).

250 House Parliamentarian Interview.

251 See, e.g., Alberto Alesina & Guido Tabellini, Bureaucrats or Politicians? Part II: Multiple Policy Tasks, 92 J. PUB. ECON. 426, 434 (2008) (“Bureaucrats tend to care more about the long run consequences of policies…[O]ften bureaucrats are appointed for longer than electoral cycles, precisely to avoid short-termist policies. Second, even when bureaucrats have short terms of office, the blame for myopic policies may reach and hurt them later on. The reason is that bureaucrats care about their professional reputation in the eyes of their peers. This gives bureaucrats a strong incentive to focus on the long term goal.”).

252 Staffer Interview.
2. **Specialization: “A Real Cadre of People with Institutional Loyalty and Knowledge”**

Specialization is another commonly touted feature of bureaucracies, and the Underbelly Institutions are marked by a very high degree of it and were founded because Congress was desperately in need of it. Today, their size gives them capacity for heightened specialization: GAO has more than 3,000 employees, CRS more than 700, CBO 250, Legislative Counsel more than 90, and JCT approximately 75. This capacity enables impressive output. GAO has produced thousands of sophisticated analyses in topics from energy (2,593 reports) to health care (5,105) to space policy (920). The Dodd-Frank Act alone required the GAO to conduct more than 40 studies. CRS estimates that every year it fields over 60,000 informational queries from Members on “whatever is hot” at the moment. In 2018, CBO completed 947 formal cost estimates, several thousand informational requests, and 150 scorekeeping estimates for appropriations bills.

Legislative Counsel divides drafters into teams that focus on specific content areas. CBO is organized into nine divisions that are oriented around particular modes of analysis or subject-matter topics. CRS partitions its analysts into six research divisions, as well as four research support offices. JCT divides its staff into six divisions. GAO, in addition to having several internal management divisions, boasts twelve “mission teams” that each have a special area of policy expertise. Even Law Revision Counsel, one of the smallest Underbelly Institutions, divides its workforce into a codification team and a Code-updating team.

Most of the congressional bureaucracy requires employees to hold advanced degrees in specific fields. The Parliamentarians’ Offices, the Offices of the Legislative Counsels, and the Office of the Law

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255 Evans, supra note 7, at 422.
260 Dodaro, supra note 150, at 133.
261 CRS Interview.
264 MAZANEC, supra note 66.
265 GOV’T ACCOUNTABILITY OFFICE, supra note 254, at 13.
Revision Counsel all are staffed by attorneys with law degrees.\textsuperscript{266} GAO’s employees have (often advanced) academic degrees in fields including accounting, law, engineering, economics, and science.\textsuperscript{267} JCT staff includes economists, attorneys, and experts in accounting and tax analysis.\textsuperscript{268} Over ninety percent of CRS’s staff holds graduate degrees in law, policy, or other fields of expertise.\textsuperscript{269}

Long tenure is another feature the congressional bureaucracy shares with other bureaucratic career staff.\textsuperscript{270} In CRS, for example, current employees have spent an average of 15 years in the Service, with several working for the Service for over 50 years.\textsuperscript{271} Legislative Counsel and GAO employees are of similar longevity.\textsuperscript{272} OLRC employees noted that: “Generally, we’ve been here a long time, [and so] there is a real cadre of people with institutional loyalty and knowledge . . . who interact with each other informally to get stuff done.”\textsuperscript{273} Cooperation between experts can even have an inter-branch flavor. JCT staff, for example, emphasized that they pride themselves on “good tax policy,” and that they relatedly have a commitment to working with their field-specific counterparts in the executive branch—the nonpartisan Treasury staff.\textsuperscript{274}

JCT’s comments are typical: “Our comparative advantage is our specialization in tax statutes. We have 16 lawyers who are specialized. Legislative Counsel brings drafting expertise. Political staff, on the other hand, bring a closer understanding of politics and Members’ preferences.”\textsuperscript{275} The staff in a Parliamentarian’s Office told us: “We are the procedural navigators. Our knowledge isn’t replicated anywhere else.”\textsuperscript{276} A GAO interviewee added: “We have a multidisciplinary workforce, and the majority have advanced degrees. We have specialties that are represented, and because we don’t have to respond to the political process, we can engage in the issues in a very orderly fashion.”\textsuperscript{277}

This high degree of specialization stands in contrast with the political policy staff, and also Members. Interviewees emphasized that Congress now is experiencing “more churning of [partisan] congressional staff, more folks coming in [who] we need to get [____] up to speed.”\textsuperscript{278} The relative youth of that staff was also emphasized, as was their transient nature.\textsuperscript{279} Interviewees also told us that political staff

\textsuperscript{266} HOUSE DIRECTORY, supra note 257; House Parliamentarian Interview; Career Opportunities, OFFICE OF THE LEGISLATIVE COUNSEL (accessed Aug. 1, 2019), https://legcounsel.house.gov/HOLC/Careers/Careers.html; Careers, OFFICE OF THE LEGISLATIVE COUNSEL (accessed Aug. 1, 2019), https://www.slc.senate.gov/Careers/careers.htm.\textsuperscript{267} GOV’T ACCOUNTABILITY OFFICE, supra note 254, at 12.\textsuperscript{268} See supra note 258\textsuperscript{269} Evans, supra note 7, at 422.\textsuperscript{270} The median tenure of federal employees is over eight years. Employee Tenure Summary, BUREAU LABOR STATISTICS (Sept. 20, 2018), https://www.bls.gov/news.release/tenure.nr0.htm. This has positive consequences. See supra note 335.\textsuperscript{271} CRS Interview.\textsuperscript{272} Author to provide citation.\textsuperscript{273} LRC Interview.\textsuperscript{274} We cannot resist here flagging an idea of “picket fence administrative law” — the cooperative relationships between nonpartisan bureaucrats across branches that seems to parallel the concept of picket fence federalism in the political science literature. Cf. TERRY SANFORD, STORM OVER THE STATES (1967)).\textsuperscript{275} JCT Interview.\textsuperscript{276} House Parliamentarian Interview.\textsuperscript{277} GAO Interview.\textsuperscript{278} CRS Interview.\textsuperscript{279} Many Members’ political staff are “young, right out of college.” Bressman & Gluck, supra note 1, at 756. The average age of congressional staff is under 30. Jennifer M. Jensen, Explaining Congressional Staff Members’ Decisions to Leave the Hill, 38 CONGRESS & PRESIDENCY 39, 44 (2011). See also supra note 8.
“doesn’t have time” to cultivate expertise or specialized knowledge, and that “more Members today come from nontraditional [i.e., non-legal or policy] backgrounds with different types of expertise, and that changes how we need to get them up to speed.”

3. Nonpartisan Is Not Necessarily Neutral

But there are different ways to be nonpartisan, specialized expertise. For starters, there is a difference between nonpartisan and being neutral. Legislative Counsel, OLRC, and to some extent the Parliamentarians are neutral in the sense of not taking positions on one side of a question or another. JCT, GAO, CBO, CRS, and (to some extent again) the Parliamentarians issue work product that may favor one side or another.

Legislative Counsel typifies what we mean by neutral. We do not mean that these offices will do whatever Members ask them to do—to the contrary, they will utilize their technical expertise to execute Members’ preferences in the ways their expertise deems correct. For example, Legislative Counsel interviewed for the Gluck/Bressman study reported that it is common for a single counsel to help members of both parties draft opposing legislation on the same policy question, often simultaneously. Legislative Counsel may have views about how to write clear language, use cross references, and so on, but those views will be neutral across the majority and minority. Similarly, OLRC’s mission is the same regardless of whose law it is working on. As they described their role: “It doesn’t matter to us whether a policy is liberal or conservative, wise or stupid. We are looking for clarity of expression and that’s it.”

On the other side, congressional bureaucrats that are nonpartisan but not neutral issue conclusions about legislative proposals that may favor one side or another. In many cases, these are conclusions about whether the proposals comport with rules or goals that Congress has articulated for itself. CBO and JCT issue conclusions about the fiscal impact of proposed legislation—conclusions that are used, among other things, to determine if legislation comports with Congress’s stated fiscal goals. The Parliamentarians’ Offices similarly will reach procedural conclusions about bills to determine whether proposed legislation is in accord with chamber procedural rules.

CBO, as noted, established its independence early in its tenure by issuing estimates at odds with the policy goals of Congress and the Administration from the CBO director’s own party. But it still takes a position on the cost of legislation. CRS likewise told us:

We are not the decision maker. We can draw pros and cons and arrive at conclusions, but we don’t advocate. . . . We are an objective organization. We don’t tell Members what the best option is and what they should vote for. That’s not our job. But it is not uncommon for us to come to a rather firm conclusion. . . . We have to present the minority position in order to fully inform Members about any given issue.

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280 CRS Interview.
281 Bressman & Gluck, supra note 1, at 739.
282 OLRC Interview.
283 CRS Interview.
These non-neutral institutions—and Congress in overseeing them—on their methodologies to establish their objective legitimacy even in the face of side-taking. Parliamentarians operate based on the inherently neutral principle of precedent, and publish their precedents, but render decisions applying precedents that will favor one side or the other. As one interviewee remarked:

I’ve always seen a tendency to ascribe advice that is not what they wanted to some political motive. I think the only way we can combat that is be available to go over that with them and use precedents and so on to show them that we have history of doing things this way.284

CBO and JCT emphasize the same principle of relying upon a consistent, published and justified methodology. Congress has had hearings on both Institutions methodologies by way oversight. As JCT staff told us:

What does nonpartisan mean? This is why there’s lots of pressure on modeling and transparency. Some Members are disturbed that the way they think the world’s going to work doesn’t square with our estimates, so [we say to them,] here are our methods and our evidence for why we are lining up a certain way.285

4. Policy versus Procedure

Does the congressional bureaucracy do “policy” work? Within Congress, the political staffs (for Members, committees, and Leadership) undoubtedly are the primary specialists in policy development. But it would be naïve to conclude that the Underbelly Institutions do not affect legislative policy, even if through different means. Some Underbelly Institutions explicitly provide policy development work for Congress. Congress tends to control those Institutions policy work by making the Members use of it optional. Others primarily play a procedural role—assisting a policy idea on its journey toward legislative enactment—but even procedural work can have policy implications.

CRS and GAO provide the most direct substantive policy. Both offices independently (i.e., without specific congressional solicitation) produce policy report that Congress can use as it wishes.286 GAO has documented that many of its reports have played a mobilizing role in the ideation of legislation.287 JCT staff, while more reactive than proactive, supply an enormous amount of tax policy direction to the Committee’s members.288

Some straddle the policy-procedure divide. Legislative Counsel, for instance, is tasked only with taking Members’ policy ideas and “translat[ing] those ideas into statutory language and legalese.”289 In practice, however, the Offices’ deep knowledge of statutory regimes—and their institutional memory of

284 House Parliamentarian Interview. See generally Gould, supra note 3.
285 JCT Interview.
287 See supra note 112.
288 See supra notes 69-74.
289 Legislative Counsel Interview.
past congressional successes and failures—often leads political actors to seek their input on how best to address policy concerns.

OLRC occupies a similar position. Its assigned task is to capture the already-enacted intent of Congress, not to develop new policy ideas. Nonetheless, it still engages in something that bleeds into policy when it conceptualizes whole sections of the Code as “belonging” together. So, too, the Office makes significant policy-implicating determinations when it decides which parts of a statute will be inserted into the main text of the U.S. Code versus those parts that will be relegated to largely-invisible side notes (a function of OLRC, surprising and unknown to many, that we detail below290). These editorial and conceptual functions are critical to shaping how legislation reads and is understood by the public after enactment, but they do not go to the underlying policy decisions leading up to enactment.

The Parliamentarians’ Office engages mostly in procedure. While the work of these Offices has high-stakes policy implications—such as which committee takes jurisdiction or what amendments are permissible—the Offices themselves are almost never enlisted to assist in policy development.

5. Confidential versus Transparent: “The Atmosphere Has Changed”

Not all expertise-giving is apparent to the public. As we discuss in Part IV, massive changes in how Congress operates—most importantly, departures from the regular-order, textbook process of lawmaking—have pushed much expertise-giving by Underbelly Institutions earlier in the process and made it generally less visible. But here we wish to highlight another distinction: some expertise that these Institutions develop is intended to be confidential, some is not.

Each approach comes with its own risks. Confidential expertise can be manipulated (another way Congress can control its bureaucracy) and used to shift blame. Transparent expertise can get politicized.

Congress has written confidentiality obligations into the organic statutes of CRS, the House’s Legislative Counsel, and the CBO.291 Private consultations with CRS and JCT are totally confidential292; Members can use information they glean if helpful, but never release it if harmful to their position. Staffers from both agencies told us that Members “find us useful. They can hide behind us sometimes or use us to delay. They can tell constituents they submitted a question and haven’t heard back.”293 And: “Yes, they can request [information] and choose to release or not if it comports with their political purposes. If they hear something from us they don’t like, we won’t tell anyone we spoke to them.”294

GAO, by contrast, operates under transparency norms agreed to ex ante with Congress; virtually everything except for informal consultations happens publicly. GAO emphasized the transparency of its actions as a core feature of its credibility.295

290 See infra Section V.A.1.
292 CRS, JCT Interviews.
293 Staffer Interview.
294 Id.
295 GAO Interview.
Members and staff may always consult informally—and confidentially, per custom—with all parts of the congressional bureaucracy. They routinely ask CBO about projections, or the Parliamentarians about jurisdictional and procedural questions, before seeking formal, public opinions from those entities. This dialogic process of informal and typically confidential expertise-giving and subsequent legislation-changing—whether to get the bill to particular budget number or to tweak the subject matter for a particular committee referral—greatly impacts what is ultimately written into the statute’s text.

Notably, legislative reforms in recent years have called for more transparency in the various Underbelly Institutions, with respect to both their processes and their work products. But our interviews suggest some caution is warranted. In recent years, the CBO has found that publication of its cost estimates has dragged the Office into the partisan fray. CRS reports were totally confidential until 2018; once they started becoming public, CRS came under increasing political attack for its positions—CRS staff told us they “noticed a change when we made the reports public.”

Parliamentarians have come under media and political scrutiny precisely at moments of high-stakes, public procedural rulings.

Staffers from all seven underbellies told us that congressional bureaucrats “would never take those jobs so they can carry out some [political] purpose, but the atmosphere has changed” and “nonpartisan staff ‘are being impugned.’” They worried about the “huge effort to minimize CBO and GAO and other organizations we use to function every day.” The more transparent the Underbelly work has been, the public the oversight, more it has come under this kind of pressure.

6. **Authoritative versus Permissive—and When “No Members Know We’re Here”**

Some Underbelly Institutions have few mandated responsibilities: Member use of them is entirely optional. Other are a statutorily required step in the legislative process.
Use of CRS and the Legislative Counsel is voluntary. CBO, on the other hand, is a necessary hurdle most bills must clear. Federal law mandates that each bill or resolution approved by any congressional committee (other than an appropriations committee) receive a CBO cost estimate. House rules additionally require these estimates to be published in committee reports, and that legislation may be considered in the House only if, over various time frames, that legislation does not increase the deficit or reduce the surplus—a determination that, partly by statutory mandate and partly by custom, is made by reference to CBO’s cost estimates. The Joint Committee on Taxation plays an analogous, mandatory, role with respect to revenue-raising legislation.

GAO publishes a “Redbook” of appropriations opinions that are viewed as precedential inside Congress. These opinions are not binding on the judiciary, and GAO has no enforcement powers, but courts do give them “‘give special weight.’” When the Comptroller General exercises her statutory power to “settle all accounts of the United States Government and supervise the recovery of all debts,” the balance she certifies is “conclusive on the executive branch.”

Notably, all the Underbelly Institutions with authoritative powers are required to exercise those powers transparently, through public reports or opinions. We think it is no coincidence that those Institutions are the ones most at risk of politicization. The combination of their visibility and the importance of their rulings puts them in the oversight spotlight. The Senate Parliamentarian has come under political attack as the Office’s rulings have become increasingly consequential. On a few procedural matters over the last few decades, Senators have ignored (or overturned by a majority vote) Parliamentarians’ decisions and, on rare occasions, have fired the Parliamentarian outright. More recently, some Members have argued that the Vice President should play the role of Parliamentarian—a threat possible

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302 This is in contrast to many other countries where legislators are required to use professional drafters. France, Germany, and the EU share the American model, but the U.K., Canada, India, Australia, New Zealand, and other countries do all drafting exclusively through a professional staff. Edward C. Page, Their Word is Law; Parliamentary Counsel and Creative Policy Analysis, PUBLIC L. 790, 791-92 (2009); see also Reed Dickerson, Legislative Drafting: American and British Practices Compared, 44 A.B.A. J. 865, 865, 907 (1958).

303 Section 402 of the Congressional Budget and Impoundment Control Act of 1974.

304 Rule XIII.3(c)(3). For tax legislation, CBO simply publishes the estimate made by the JCT. JCT interview.

305 Technically, the Committee on the Budget determines, relative to a baseline calculated by the Congressional Budget Office, whether the legislation complies. In practice, CBO determines both the baseline and the impact of the legislation.


308 See Gould, supra note 3, at 21. By one count, such an appeal has been successfully carried out seventeen times between 1980 and 2013. Wallner, supra note 223, at 391.

309 Wallner, supra note 223, at 392; Gould, supra note 3, at 40.

by virtue of the fact the Senate Parliamentarian exists only for the grace of Congress. 311 As we were told, the Senate Parliamentarian “is out there without a net.”312

CBO likewise drew major heat after its influential Affordable Care Act forecasts.313 CRS has also recently come under political scrutiny for its internal turbulence—driven in large part by the Service’s managers discouraging employees from giving Members authoritative answers in order to avoid ending up like CBO.314

It is worth noting that ORLC inhabits an odd place on this spectrum. OLRC is required to prepare the U.S. Code for publication; that aspect of its work is mandatory. But another aspect of the Office’s services is permissive. Congress is not required to take any action on those codification bills prepared by the Office—OLRC must organize and reclassify all enacted statutes into coherent legal titles, but it is up to Congress whether to formally enact those titles as so-called “positive law.” As noted, many titles of the U.S. Code (including important titles like Title 42, which contains the civil rights laws) are not formally enacted. Indeed, OLRC told us several times there is a “total lack of political will” to enact codification bills:

Members don’t care about positive law codification bills. Members care about, at best, policy and constituents, but making law easier to read and understand and navigate or correcting technical errors?—they don’t care about that. . . . What member ever went back to town hall meeting and said, you know, ‘I got a U.S. Code title codified!’?315

Due to this lack of political salience, the OLRC is not sought out by Members, and the Office has been unable to get fully-completed codification bills passed because there is little congressional interest in them. As they put it: “No members know we are here.”316

311 The Senate Parliamentarian has no independent originating statute, but exists per the statutory authority of the Secretary of the Senate to establish positions under her purview. 2 U.S.C. § 6539. There is also a statutory provision setting forth the maximum compensation for the Senate Parliamentarian. 2 U.S.C. § 6535.
312 Staffer Interview.
315 LRC Interview.
316 Id.
Why have an office no one cares about enough to use? The need to organize the U.S. Code in ways that make statutes and their amendment accessible to the public is uncontroversial. But why give that responsibility to a nonpartisan agency? Why not the Speaker’s Office?

One reason is precisely because “no one is watching.” As one interviewee put it: “Someone needs to do this. You need someone to run this stuff down. You have to have someone who isn’t going to sneak something by. Congress isn’t going to be tracking it down.”\(^\text{317}\) In other words, the nonpartisan, neutral, and politically dull stance of OLRC, ex ante, gives it the credibility to do work that is needed, but that Congress does not care about enough to supervise. As with other studies of bureaucracies, OLRC’s institutional design enables it to take on projects with long-term, diffuse benefits (but correspondingly low political salience); its staff are incentivized not by the electoral connection, but by their own professional reputation far beyond the next election cycle.\(^\text{318}\)


Finally, expertise comes in all stages of the legislative process—including both pre- and post-enactment. The timing of congressional bureaucracy intervention is particularly interesting because, in addition to shedding light on the modern Congress, it also creates a far more nuanced view of where “lawmaking” stops and starts. We return to this point in Part V.

Some Underbelly Institutions play a mobilizing role in the generation of legislation. The GAO, as noted, produces policy reports containing specific recommendations that can inspire legislators and staff to take action.\(^\text{319}\) CRS submits to Congress a list of expiring provisions in current law, thereby identifying possible topics for legislation. And the LRC even notifies Members and Legislative Counsel of errors and inconsistencies in the law as enacted so that corrective measures can be passed.

The Parliamentarian interjects expertise very early when called upon to make the critical decision about referrals to committee. (Consistent with the findings in the Gluck/Bressman study, were told “referral to committee remains hugely important.”\(^\text{320}\) Legislative Counsel translates policy staff goals into statutory language, and CBO and JCT cost out the legislation. JCT staff, as noted, is directly involved in nearly all stages of the legislative process.\(^\text{321}\) CRS drafts the bill summaries that appear on Congress.gov after their introduction.\(^\text{322}\) Germaneness rules and the Byrd rule create an important role for the Parliamentarians’ Offices.

During this iterative process, the Underbelly Institutions have different roles—but they do not operate as silos. CBO relies on JCT estimates in the tax context. Partisan staff bring the Parliamentarians’

\(^{317}\) Id.

\(^{318}\) See Alesina & Tabellini, supra note 251, at 434.

\(^{319}\) See supra note 112.

\(^{320}\) Id.

\(^{321}\) See supra note 251.

\(^{322}\) Id.

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Offices into dialogue with Legislative Counsel to develop statutory text that receives a desired committee referral. CRS may draft a report on proposed legislation that partisan staff will pass to Legislative Counsel to draft. JCT describes their role as one of transforming a concept into a concrete plan, but told us they then work hand in hand with Legislative Counsel to translate that plan to text. Language and substance are tweaked and tweaked again to get legislation within the budget and revenue goals Members have set. A GAO staffer remarked:

_We talk to each other all the time. We are very supportive of each other; we want to be sure we stay in our lanes. At the end of the day, we are all here to serve Congress and support congressional prerogatives. We do it in our own way. Some of CBO’s work overlaps with GAO; everyone is respectful of that. Same with CRS. Congressional staff know how to use us._

A CRS staffer similarly noted: “There are complementary relations of GAO, CBO, [and CRS] in term of our various mission spaces as defined by Congress.”

Later in the process, JCT also drafts the legislative history for the bill before it is passed. CRS may be called in at any stage, whether to assess new ideas, analyze proposed legislation, or evaluate already passed legislation. CRS also provides data and analysis for committee reports.

OLRC begins its enormously influential work only after enactment. As we further elaborate in Part V, OLRC acts as Congress’s editor at that stage: it fixes errors, corrects ambiguities, reorganizes titles, and even adds definitions (!). Other Underbelly Institutions have post-enactment roles as well. JCT comes back into the picture to draft the “Bluebook,” its influential post-enactment synthesis. And the GAO, in its role as the watchdog that oversees agency implementation, often begins the cycle anew by producing policy reports that contain specific recommendations for new legislative action—whether to address gaps in in oversight or to reign in agencies who are implementing laws improperly.

**IV. UNORTHODOX LAWMAKING, NEW ORTHODOX LAWMAKING, AND THE BUREAUCRACY**

Legal academics in recent years have (after a significant lag) started to recognize the modern Congress’s increasing tendencies to deviate from the textbook, “schoolhouse rock” legislative process. One of us has expanded on this concept—which Barbara Sinclair labeled “unorthodox lawmaking”—and brought it into legislation scholarship. Gluck and coauthors raise questions that underscore just how important it is for courts (and the public) to understand how Congress really works in practice, as well as questions about whether, from a democracy perspective, departures from so-called “regular order” bring losses in transparency, deliberation, and precision—in exchange for getting policy made—that merit more attention.

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323 GAO Interview.
324 CRS Interview.
325 _Id._ Interviewees noted that committee requests tend to be more complex and robust than most other queries. _Id._
326 See _supra_ note 112.
327 See _supra_ notes 1-3.
The Underbelly Institutions studied in this Article both complete and complicate the unorthodox lawmaking account. On the one hand, they substantiate the notion that the textbook process, so-called “regular order,” is increasingly rare and that new procedure—which may already even be the new orthodox lawmaking—has replaced it. Each of the Underbelly Institutions we studied volunteered these congressional process changes as extremely significant and pervasive.

On the other hand, our Underbelly account adds nuance to some criticisms of the modern unorthodoxy and may be cause for at least some optimism. “Unorthodox,” we learn from the Underbelly Institutions, does not necessarily mean “uninformed.” Regular order—the now-traditional process that emerged in the 1970s to publicly vet a bill through committee, hearings, floor debates, bicameral conference and more—was designed to ensure that legislation was studied, deliberated, transparent, precise, and error-free. Today, these processes have largely stopped serving these good-governance functions. But the congressional bureaucracy, and its expertise, continue be utilized, even if they are less visible. As Gluck and O’Connell detailed, unorthodox lawmaking changes the timing and transparency of legislative interventions, and often the structure, complexity, and legislative materials that accompany legislation. This proves to be as true for the Underbelly Institutions’ role. As one staffer put it:

The expectation today is totally different. Before, it used to be the joke was the complexity of the tax code, but now that is spreading to other areas of the law. This creates more challenges for practitioners. The amount of time spent on legislating, having to do everything in one large bill, ram it all in, in fewer steps, leads to more mistakes, more inconsistencies.

Parliamentarians are increasingly doing their work off the floor. Legislative Counsel still drafts bills, but rarely has the chance now to draft amendments from the floor or clean bills up in Conference. JCT still provides the policy backbone of tax legislation and the accompanying legislative materials, but legislative history is evaporating thanks to unorthodox processes, and JCT puts those materials in other formats, including the post-enactment Bluebook, in the absence of legislative history. CBO has an iterative back-and-forth with drafters before an official score is released as drafters “slice and dice” to get a statute within target score. The public cannot see any of that. The public just sees legislation rushed from formal introduction to passage.

Sometimes, bills simultaneously undergo the more public journey through the steps of the old orthodox lawmaking process. Some legislative reformers, nostalgic for the olden days, have called for changes to bolster those old steps. But, in reality, the older steps typically do not contribute much to the

328 See Gluck et al., supra note 1.
329 Staffer Interview.
sharpening of legislative policy. Today, most tools of old orthodox lawmaking—hearings, markups, and floor debates—are for C-SPAN cameras, not spaces for internal fact-gathering and deliberation.\textsuperscript{331} Congress has remade these old orthodox steps into opportunities for external communication with constituents—and, in so doing, has largely abandoned them as spaces for internal congressional deliberation and refinement. The real deliberation and refinement occur now largely off the radar. But they occur—and to a great extent, they occur in the Underbelly.

Why does this matter? As a matter of basic civics, we believe the legal profession should take it upon itself to understand how laws are made. Period. But for those seeking more tangible payoff, an appreciation of the hidden congressional processes yields rich insights into statutory interpretation, institutional legitimacy, and legal process. Courts make assumptions about how Congress works when they interpret statutes. Legal analysis loses legitimacy when it ignores the falsity of the premises on which it is based. Legal experts also increasingly call for Congress to be more rational and more deliberative, and disparage fast track, omnibus, and other modern procedures. If there is in fact information sharing and deliberation happening that we cannot see, we should consider whether that’s enough to support a view that Congress is more rational and reasonable than it is currently cast. The Gluck/O’Connell study expounds of myriad ways the realities of unorthodox lawmaking might affect statutory interpretation. Here, we highlight just a few of particular relevance to the Underbelly.

A. Timing and “Preconference”

The new timing is different, not only with respect to compressed timeframes for legislating, but also with respect to the point in the process at which expertise is sought and utilized. The Parliamentarians’ Offices told us: “Now we negotiate things out [ahead of time] rather than fight them out on the floor.”\textsuperscript{332} GAO, even as most of its work is transparent, gives more nonpublic, early “informal technical assistance than we have in the past.”\textsuperscript{333} We were told that procedural decisions are “becoming a lot more front loaded. Decisions about germaneness are happening earlier in the process;”\textsuperscript{334} and that “We don’t get vetoes anymore, because the administration sends out statements of policy and the Senate and House are coordinating. Things are scheduled and done ahead of time. We are dealing with this stuff earlier;” and: “It’s more pointing out landmines in advance, rather than on the floor.”\textsuperscript{335}

We were told: “Fast track processes can feel like cheating. You are never going to spend three weeks on an energy bill, again.”\textsuperscript{336} And also: “For example, the defense authorization process used to be a

\textsuperscript{331} See Cross, Legislative History, supra note 1.
\textsuperscript{332} House Parliamentarian Interview.
\textsuperscript{333} GAO Interview.
\textsuperscript{334} House Parliamentarian Interview; See also Gould, supra note 3, nn.108-30 and accompanying text (reporting similar references to “front loading”).
\textsuperscript{335} Id.
\textsuperscript{336} Staffer Interview.
robust amendment process in committee and on the floor. Today we do it one day before or in two weeks.”

JCT staff told us: “Under regular order, JCT had a role with conference [i.e., to reconcile House and Senate versions] in olden days. Behind the scenes, bills still look different now on the House and Senate side, but now we do ‘preconference’ more” to reconcile bills before they come out.” It was added: “Senate staff may negotiate more informally to get a bill the House can pass after Senate [passage]. We are ‘amending’ back and forth.” We heard reference to this term—“preconference”—from many staff without prompting (as the new norm); it seems already entrenched as part of the new orthodox lawmaking and substantiates conclusions in the Gluck/Bressman study about the virtual disappearance of the formal Conference process.

B. Different Personnel

Next, unorthodox processes change the nature of the personnel involved to some extent. Members (or their staffs) still do consult directly with the Parliamentarians, JCT, and Legislative Counsel, as they did before. But CRS told us: “The nature of work is largely unchanged, but the avenue by which they come to us is different. We traditionally worked with Members through the committee construct, but now it’s coming through Leadership.” The Gluck/Bressman study likewise detailed how unorthodox lawmaking has shifted power away from committees and toward the party leaders. The Underbelly account paints a picture of an even deeper shift, as it suggests the same centralization might be happening with respect to bureaucratic information and expertise. That centralization might also undermine some of the internal separation of powers benefits the congressional bureaucracy brings, as detailed in Part III.

In a different (but aligned) vein, with the decline of public opportunities to vet legislation—even if those opportunities are “for show”—Members now much less frequently take center stage in public (as they did in hearings and markup or on the floor) in deliberating over, talking about, and questioning legislation or engaging with Underbelly outputs. Instead, policy staff exchange notes and negotiate changes behind the scenes, often before the bill goes to the floor, to avoid a preconference. Policy staff may continually adapt the proposed legislation outside of the public view to account for the feedback, debates, and discussions that these entities now facilitate more informally—whether through early projections of a budget score, or procedural advice on germaneness, or the drafting of language.

337 House Parliamentarian Interview.
338 JCT Interview.
339 Staffer Interview.
340 CRS Interview.
341 See Bressman & Gluck, supra note 1.
342 Hearings and markups occurred before congressional committees, for example, while debate over solutions occurred both in committee rooms and on the floor of Congress.
C. Transparency—Less and More

Under old orthodox lawmaking, much of Congress’s expertise-seeking occurred in display of the public. Congress undertook these activities, for the most part, on chamber floors or in committees. Today, with most vetting, changing, and analyzing of legislation now happening before a bill hits the floor, there is less opportunity for outsiders to see Congress actually grappling with difficult issues and tradeoffs, less formal procedural precedent being created, less explanatory material to inform other Members and later readers of statutes, and the perception that Congress isn’t doing its job in a thoughtful way.

We were told, for instance, that “Appropriations has traditionally had a more open process. Legislative Counsel used to come to the floor to be ready to write amendments, but that is relic of the past.” But this does not mean that appropriations bills are not being amended, or that Legislative Counsel is not writing the amendments. It just means that the negotiations and drafting happen before the bills come to the floor.

Courts have only started to engage with this perception problem. The most notable example to date is King v. Burwell, the 2015 challenge to the Affordable Care Act’s insurance subsidies. Dealing with a likely amalgamation error in the ACA—an ambiguity caused by the sloppy merger of two different versions of the law without an opportunity for Conference to clean up errors—Chief Justice Roberts opined:

Congress wrote key parts of the Act behind closed doors, rather than through “the traditional legislative process.” . . . And Congress passed much of the Act using a complicated budgetary procedure known as “reconciliation.” As a result, the Act does not reflect the type of care and deliberation that one might expect of such significant legislation.

For all the Court’s salutary interest in Congress, it largely got this wrong. First, the ACA’s unorthodox history was no aberration; plenty of legislation had gone through reconciliation before. Second, the statue was exceedingly deliberated—by a record-breaking five congressional committees for two years (including hundreds of hours of hearings). Legislative Counsel was intimately involved in the drafting of every detail, as was CBO. It is true there was no conference, and as such the opportunity to correct errors was forgone. Arguably that means Congress was sloppy, but not necessarily that the law was not carefully considered and deliberated.

And unorthodox lawmaking is not solely about doing things behind closed doors. It has actually elevated the visibility of some of the Underbelly Institutions—and not always in ways that are beneficial. For the Senate Parliamentarian, the increasingly frequent resort to special procedures that get around the filibuster and other hurdles has made a difference in the public perception of the role. We were told: “The job is the same, but it’s gotten a higher profile largely because of the Byrd rule and fast track [procedures]. More light will be shone . . . where expedited procedures have been written. And [they] have to make Solomonic decision here and there.” Budget reconciliation proceedings, it was emphasized, “are very high profile, and criticized in the news . . . the Byrd rule is the thing that makes Parliamentarians almost

343 House Parliamentarian Interview.
345 Staffer Interview. Accord Gould, supra note 3.
‘Washington famous’ every few years based on decisions that [they’re] making about what is or isn’t appropriate in reconciliation bills.  

In this context, transparency actually undermines one of the core values of most of the Underbelly Institutions—their neutrality and lack of politicization. Just as CBO became more politicized once the importance of its reports became more salient, and just as CRS came under public fire once its reports were made public, the Parliamentarian becomes a divisive figure when unorthodox processes put pressure on complex procedural workarounds.

D. How Statutes Look and Should be Understood

Unorthodox lawmaking has changed how statutes look, even as Underbelly Institutions still have their hands on them. These changes have critically important implications for courts and other later interpreters.

First, as noted, expect more errors and gaps. We were told by several offices that, for Legislative Counsel, usually charged with cleaning up statutes, it is now “harder to fix problems in bills on the floor,” and that as a result, statutes may be more “Delphic.” We were also told by OLRC that “As Congress has become a contentious place, it’s hard to get the law passed. Departures from regular order can get the bill passed. But they come out messier and are at end of session.” In the 114th Congress, we were told, 75% of the passed legislation was passed at the end of the session. In addition, OLRC observed: “They can throw things in omnibus bills; those bills tend to be more complicated, have more errors. This has complicated things for us.”

As one of us has previously detailed, the federal courts do not have a clearly articulated doctrine of legislative mistakes. Instead, the courts have an exceedingly harsh rule—effectively, if the statutory language reads in plain English, apply it—that they mitigate with case-by-case exceptions meted out with little rhyme or reason apart from the fact that it is most often high-stakes cases, like King, that get the leniency. The quality-enhancing effects of the Underbelly Institutions notwithstanding, the rise of unorthodox lawmaking may mean that courts must develop a more rigorous and well-considered approach to legislative mistakes.

Second, we must appreciate the very careful language slicing that occurs to bring bills with the desired procedural or budgetary goals. One staffer compared it to “slicing garlic with a razor blade.” When it comes to procedures for reconciliation, our interviewees emphasized that, to get a bill within the

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346 Id.
347 OLRC Interview.
348 Id.
349 Cross, Staffer’s Error, supra note 1.
351 Staffer Interview.
rules: “We are ripping things out of it like weeds in a garden.” Anyone looking at the law, they emphasized, “has to presume that the [text] changes are not just [about] pleasing a particular constituency; it’s about reconciliation.” Any interpretation that would not have fit within the constraints of the reconciliation process is a misinterpretation of the law Congress tried to pass, plain and simple. We elaborate on this idea in Part V.

For OLRC, unorthodox lawmaking has made that Office’s job much more complex. Omnibus bills are the current favorite vehicle for passing mega-legislative deals together, and, as such, they bring together many different subjects. OLRC’s job is basically the opposite—that is, to cohere the U.S. Code by subject matter. What OLRC must now do, then, is effectively reverse-engineer Congress’s omnibus process. They told us: “We are breaking up what they are bringing together.”

JCT and Legislative Counsel emphasized the important legislative materials that are lost in the modern processes. Many omnibus bills do not have legislative history at all, or they bring together previously-written, separate bills with legislative history that may be old and outdated. JCT said that, in particular, “[w]ithout the conference report you lose an important part of the legislative history.” JCT also told us that unorthodox lawmaking consequently increases the importance of the Bluebook—the influential summary of tax legislation produced by JCT after statutes are enacted. The Bluebook takes on greater significance in conveying congressional intent to agencies and the tax bar, we were told, “when there is no regular order, because often there is no conference report, no committee report.” This is the case even though the Bluebook has often “been more aggressively expansive than legislative history, it makes bigger statement.”

The House Parliamentarian’s Office similarly emphasized that legislative history looks different now:

When looking to legislative history, there needs to be a modern look that takes into account [the fact] that the process [on the House floor] is much more structured [now]. The amendments and remarks need to be construed using modern lens . . . [T]he amount of remarks on the floor that are generated for purpose of legislative history has shrunk tremendously and is reserved to bills where there are likely to be practitioners: judiciary committee, election law. . . . I don’t think the process is as static as some academics or judicial branch folks may have learned in civics.

E. So What?

In the next and final Part of the Article, we offer more takeaways for courts, both for purposes of statutory cases and for overarching conceptualizations and assumptions about Congress’s rationality. Our purpose in this Part has not been to advocate for specific legislative reforms, or even to criticize unorthodox lawmaking. The Gluck/O’Connell study has already detailed potential benefits of unorthodoxies, as well as

352 Id.
353 OLRC Interview.
354 JCT Interview.
355 Id.
the dangers. Our purpose here is to teach—to continue the effort to educate the legal professionals operating in the age of statutes about how Congress actually works. Understanding that the legislative process has changed—and that, even though it has changed, that does not mean that all the inputs have changed, even if they are not as visible—is an important part of that.

Our focus on education notwithstanding, however, we cannot resist a closing observation that we do believe has reform implications. We did not hear from anyone that Congress is eschewing Underbelly consultations due to unorthodox lawmaking. But Congress could always pass rules requiring consultation with the Underbelly Institutions, if that were to become the case—just as it has in requiring a CBO score.356 Congress could also develop a practice of noting in the materials accompanying legislation which Underbelly Institutions were in fact consulted—a practice that might assuage rising public concerns about the lack of deliberation in our lawmaking process. At the same time, as we have noted throughout the Article, there are risks to elevating the profile of the Underbelly Institutions—risks to their perceived neutrality and the lack of politicization around them. Some might also take the view that rules mandating use of Underbelly Institutions would introduce new pathologies into the process—just as some have argued that PAYGO has skewed the drafting process by excessively elevating the importance of the CBO score.357

V. A RATIONAL CONGRESS AND STATUTORY INTERPRETATION

In this final part, we offer some high-level theoretical implications of our study, as well as a few practical takeaways for lawyers and courts. This Article’s broad introduction to the concept of the congressional bureaucracy is not the place to list every implication of what we learned for statutory interpretation. Our goal, rather, is to enter the Underbelly Institutions squarely into discussions about the theories and doctrines of the field, and thereby to generate further debates on the value of understanding how Congress actually works—a goal we ourselves think is essential for lawyers practicing in the age of statutes.

We recognize that others disagree—that others think that courts will never be able to understand the sausage factory, and so there is no hope in trying. As Gluck has emphasized before, however, those other scholars (mostly textualists) do not offer an alternative justification for relying instead on a fictitious account of Congress, or for using interpretive methods wholly delinked from how Congress actually functions. Instead, textualists still contend that their see-no-reality approaches effectuate the Court’s role as a “faithful agent” of Congress, and they still claim that Congress knowingly operates in the shadow of the Court’s interpretive theories, even though those theories do not reflect how Congress works. The Gluck/Bressman study undermined those assumptions, but here is the larger point: even textualism is based on assumptions about how Congress operates. This is a broader debate than we have space for here, but we think it makes the case for, at a minimum, all lawyers at least understanding the existence and functions of the congressional bureaucracy.

356 Section 402 of the Congressional Budget and Impoundment Control Act of 1974, while not framed as a rule binding on Congress, has a similar effect. It directs CBO to estimate the costs of bills and resolutions approved by Congressional committees other than the House and Senate Appropriations Committees, thereby cementing a default practice of soliciting CBO input.
357 See, e.g., John B. Wells, As It Applies to Veterans, It is Time for Pay-Go to Go, THE HILL (Jan. 24, 2019, 11:30AM EST).
A. A Rational Congress

The famous assumption about Congress advanced by Legal Process titans Henry Hart and Albert Sacks was that: “the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.”

Modern textualism pushed that assumption aside, grounding interpretation instead in realist and economic based theories of Congress as an impenetrable, deal-making, compromise-driven, incoherent institution that courts can never hope to understand.

While few on the Court today consider themselves heirs to the Legal Process (some have argued that Chief Justice Roberts is precisely that), the current Court’s interpretive doctrines still do implicitly attribute rationality to Congress. The assumption of a reasonable Congress underpins the Court’s most central interpretive doctrines—including the canons of interpretation embraced by textualists. Among the presumptions that federal courts (including judges of all stripes) routinely apply, are assumptions that Congress legislates constitutionally; does not bury elephant-sized changes in statutory mouseholes; does not unnecessarily repeat itself; uses similar words in the same way throughout statutes; and so on. The Gluck/Bressman study has shown that some of these assumptions are mistaken, but that does not change the larger point that even textualists, despite themselves, maintain an idealized vision of a rational Congress.

The rise of unorthodox lawmaking has complicated this view. Congress is routinely disparaged. The Chief Justice in King v. Burwell, even as he strove—for the first time in a major Supreme Court case—to bend interpretation to the realities of a statute’s unusual legislative process, incorrectly concluded that the law was undeliberated and uninformed because of its process. In other contexts, as others have pointed out, courts scour the legislative record for proof that Congress deliberated, seemingly unaware that those...
public documents today serve mostly a constituent-facing function, whereas the actual expert inputs in Congress largely happen outside the public eye.

The congressional bureaucracy challenges these pessimistic views of the institution. When it comes to a broad swath of legislative activities (including drafting, estimating, auditing, analyzing, and following the procedures for amending legislation), Congress continues to seek out rational deliberation and expertise—even within unorthodox lawmaking. Of course, the Underbelly Institutions are not Congress’s main source of substantive subject-matter expertise—except for JCT when it comes to tax, and perhaps CRS on occasion. Future scholars therefore still bear the burden of showing that the partisan policy staff, who provide the bulk of Congress’s substantive policy expertise, act in ways that contribute to a rationality account of Congress. But to say that modern federal statutes are not vetted or deliberated is simply wrong. Reasonable legislators still try to pursue reasonable purposes reasonably—just not in the ways the old orthodox model recognizes.

B. Deconstructing the Idea of a Statutory “Text”

Perhaps the most provocative output of our study is how the various duties of the Underbelly Institutions contribute to—and destabilize—our common understanding of what statutory “lawmaking” and statutory “text” are.

Everyone knows that words must be understood in context, but the context of legislative language is much more than the surrounding words on the page. In fact, in many instances what we see when we pull up “statutes” on Westlaw is not what Congress wrote or how Congress arranged it. Final text reflects, incorporates, and assumes the various inputs from the Underbelly Institutions, some of which are provided after enactment. Congress directs these Institutions to interpret its language purposively, not literally, in carrying out their tasks. Congress thinks about law more as “topics” or fields, than as individually coherent or consistent texts. That is not how our dictionary-wielding, statutory-interpreting courts think about text.

Lawmaking does not begin with the vote, and neither does it end with it. Statutory text is changed, reorganized, and reconceptualized by OLRC after enactment—and also explained and interpreted by JCT at that time. Members focus on only the broad brushstrokes of the policy, then leave Legislative Counsel to write the textual language. The entire process is iterative, with inputs from all the Underbelly Institutions. The text we see on the page is the end result of this process, but does not fully reveal it. The real work of the modern legislative process has more to do with figuring out large-scale policy for complicated problems, not debating individual words and phrases. Two cheers to Chief Justice Roberts in

[437x273]Burwell

for seeing that, but no third to the Court for reverting to strict hypertextualism immediately afterward.366

The JCT staff emphasizes the importance of “congressional intent,” as reflected not only in the text but also in the revenue estimates, the legislative history and other explanatory materials that accompany tax legislation. It thinks carefully about “what words should be in the statutes, and what words should be in the legislative history,” but it does not view them as separate, or as one being the law and one being external

366 See Lockhart v. United States, 577 U.S. ___ (2016). For contrasts of

Burwell

and

Lockhart,

see Frank H. Easterbrook,

The Absence of Method in Statutory Interpretation,

83 U. CHI. L. REV. 81 (2017); Abbe R. Gluck,

Justice Scalia’s Unfinished Business in Statutory Interpretation: Where Textualism’s Formalism Gave Up,

to it. Congress itself directs OLRC to edit the law so that it “conforms to the understood policy, intent, and purpose of the Congress” rather than insisting that the precise words enacted be frozen in stone.

Experts in Legislative Counsel, CRS, JCT, CBO, and GAO specialize in subject-matter areas and so are able to bring coherence across statutes enacted within a subject field (even when different committees work on them). One of OLRC’s primary missions is to pull apart the individual texts that Congress enacts and recombine and reorganize them with other texts enacted at different times into coherent subject matter areas. The OLRC organic statute actually uses the term “restatement”—not faithful reproduction but rational reorganizing—to describe this task. JCT staff emphasizes tax’s special “coherence” not because of the way individual tax laws are written but rather because they are stitched together in a single “code.”

What, then, is the “text?” Consider the Medicare statute. There is no “text” of that statute. The “text” of the Medicare law is a concept—one made up of many different statutory texts enacted over time. It is only the custodial work of OLRC that creates the illusion of a single, coherent text. They are the ones who take the original, thirty-six page Medicare statute enacted in 1965, along with the thousands of laws amending this original statute, and transform them into a single 1,183 page tome. However, this is simply their best guess at the “text” of the Medicare law. So is anyone else’s attempt to assemble that “text.” This is true of any law that has been amended—positive or non-positive law. Statutory law’s complexity—all of these layers—may be its modern defining feature. Understanding the Underbelly helps to reveal this.

Getting more granular, a statute that is parsed “like slicing garlic with a razor blade” to get the Parliamentarian to refer it to the jurisdiction of a certain committee incorporates an understanding of what subjects that statute is supposed to cover, because each committee only has jurisdiction over certain subjects. A statute that is repeatedly amended to get within a revenue or budget score incorporates the assumptions of those estimates. Statutes drafted with purpose clauses that no longer appear in the Code because OLRC moves purpose clauses to small side notes does not make those statutes less purposive. To understand that Legislative Counsel drafts only operative statutory text, and never legislative history except in the case of appropriations legislative history, is to understand that appropriations history carries special operative weight—and is more akin to text than legislative history—in Congress (a fact actually reflected by Congress’s own rules but ignored by courts). This, and more, is what we can learn about statutory interpretation by understanding Congress, Underbelly and all.

The Congressional Bureaucracy’s inputs are not illegitimate. They are sanctioned by the Constitution itself, in Article I, which intentionally leaves Congress incomplete. The text of Article I does not specify the rules, procedures, positions, or offices to create a functional legislature; instead, it gives Congress the power to construct the institution it finds most useful, including the power to create and choose its own officers, create its own rules, and use any necessary and proper powers to execute its functions.

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367 Even the original statute was actually just an amendment of an older text, the Social Security Act.
369 The Gluck/Bressman study likewise showed that committee jurisdiction is clearly a proxy for which agency—the one under the committee with jurisdiction—is a statute’s primary delegate.
The fruits of those efforts are evident in Title 2 of the U.S. Code, where one finds the organic statutes for
the Underbelly Institutions, and within those statutes, where Congress goes so far as to mandate that the
Underbellies be utilized.

1. Deeper illustrative example: OLRC

The best way to fully understand our point about deconstructing “text” may through an example.
Due to the post-enactment nature of OLRC’s work, the formidable role it plays in shaping the language of
the U.S. Code, and how courts simply do not understand what OLRC does or how it affects text (a point
we have made in previous work), we use it as our example here.

The OLRC has more discretion to change the text of federal law after enactment than most lawyers
and judges realize. OLRC has broad statutory mandates to rearrange federal law for various ends, such as
to “remove ambiguities, contradictions, and other imperfections both of substance and of form.” We
noted earlier, as has Jarrod Shobe, the often-overlooked distinction in federal law between the “positive
law” and “non-positive law” titles of the U.S. Code. Positive law titles are arranged and edited by OLRC
and then formally enacted as titles of the U.S. Code by Congress, which is also supposed to repeal the
various underlying statutes collected therein at the same time. By contrast, a non-positive law title of the
Code has still been arranged and edited by OLRC, but the newly arranged title does not go through this
bicameralism-and-presentment process (the underlying statutes of course did previously).

In codifying titles, and in publishing both positive and non-positive law titles, OLRC makes
consequential determinations that affect what we understand as the “text.” First, OLRC’s statutory mandate
is to codify only “general and permanent” laws—and so it must use its judgment as to which provisions of
federal law meet these criteria. The charter for the Office of National Drug Control Policy included an
expiration date for the Office, for example—yet the Office has continued to exist (and be funded) beyond
that date. Is the provision providing for the Office functionally “permanent” law? The answer matters:
anything OLRC deems nonpermanent does not appear in the Code at all! So, for example, the Hyde
Amendment, an influential appropriations rider which bars the use of federal funds to pay for abortions,

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372 2 U.S.C. § 166 et seq. (Congressional Research Service); 2 U.S.C. 281a et seq. (House Office of the Legislative
Counsel); 2 U.S.C. § 275 (Senate Office of the Legislative Counsel); 2 U.S.C. § 601 et seq. (Congressional Budget
Office); 26 U.S.C. 8021 (Joint Tax Committee); 2 U.S.C. § 287 et seq. (House Parliamentarian); 2 U.S.C. § 6531 et
seq. (Secretary of the Senate, which includes Senate Parliamentarian); 2 U.S.C. § 285a (Office of the Law Revision
Counsel); 31 U.S.C. §§ 701 et seq. & 3511 et seq. (Government Accountability Office).

373 See, e.g., Rule XIII.3(c)(3) (requiring committee reports to include a CBO-determined cost estimate); Rule
XIII.3(d)(2)(B) (same); 2 U.S.C. § 285b (requiring all statutes, regardless of whether positive or non-positive, to
undergo revision by the OLRC).

374 Gluck, supra note 1, introduces OLRC’s work into the new vein of legislation scholarship, at 208-09. Tobias
Dorsey previously offered a pair of important meditations on the Code, but their principal thrust was to remind readers
that the Statutes at Large provide a truer source of law than the non-positive titles. Tobias A. Dorsey, Some Reflections
on Not Reading the Statutes, 10 GREEN BAG 283 (2007); Tobias A. Dorsey, Some Reflections on Yates and the Statutes
We Threw Away, 18 GREEN BAG 377 (2015). A new follow-on project, Shobe, supra note 3, offers extremely valuable
and detailed descriptions of OLRC’s functions See infra for our disagreement with some of his conclusions.


and which is re-enacted every year, appears in the Code per OLC’s judgment, but the appropriations rider that defunded part of the Affordable Care Act in 2014 does not.

Second, the OLRC decides the breadth of the topic that each title will encompass—and usually decides which statutes are part of that topic. This work typically requires OLRC to split up the provisions of a single federal statute, pulling out specific provisions for inclusion that fall within the title’s conceptual ambit while leaving behind other provisions that fall outside it.

Third, OLRC is directed to capture the presumed intent of Congress—including by modifying statutory language. Describing OLRC’s view of this task, an interviewee said: “The idea is to carry forward the precise meaning and effect without any change [in that meaning] . . . but to make any adjustments to make it easier to understand and to navigate, to correct technical errors, and to resolve ambiguities.”

In furtherance of this goal, the OLRC changes enacted statutory text in ways that, to the outsider, may be surprising. OLRC may even insert what it calls a “no source” provision into a new positive title that it is preparing for Congress—i.e., a provision that did not exist in any congressionally-enacted law, but that OLRC instead creates out of whole cloth. For example, if OLRC concludes that a new defined term will help it more easily articulate the policies that it is assembling in the title, it may invent a definition and insert it into the title, and then use its new defined term throughout the title. While these “no source” provisions are flagged in the Revision Notes (more on these below), those notes are hard to find and do not appear in the main text—whereas the “no source” provisions do appear in the main text of the Code, just like provisions that Congress actually had enacted in prior law. “In a positive law codification bill,” an interviewee reported, “we create these definition sections pretty frequently.” Indeed, some codified titles—such as Title 10 (Armed Forces)—contain a long list of these “no source” definitions.

OLRC also exercises its editorial discretion by formulating novel provisions to clarify what otherwise might be only implicit. Consider, again, Title 10, which contains a chapter entitled “Retirement of Warrant Officers for Length of Service.” This chapter contains three provisions. Under section 1293, it authorizes the Secretary to retire a warrant officer (upon their request) after 20 years of creditable active service, and under section 1305, it provides that warrant officers shall be retired after 30 years of service (with some exceptions). These sections, OLRC believed, implied that warrant officers would receive retired pay (e.g., by discussing eligibility for such pay). However, sections 1293 and 1305 never made that entitlement explicit. Consequently, in preparing Title 10 for codification in 1956, the OLRC created a “no source” provision to be added to the chapter: section 1315, which would “make explicit the entitlement to retired pay upon retirement” for warrant officers under the chapter. Again, this OLRC-drafted provision sits in the main text of the Code as enacted law (now that Congress has passed the codification bill)—even though it was drafted, without statutory precedent, by OLRC.

377 See id. 2 U.S.C. § 405(c).
378 Id.
379 See, e.g., 51 USC §10101(2) (no-source provision defining the “Administrator” of NASA).
380 LRC interview.
OLRC also pulls out what it deems to be minor and nonoperative provisions into statutory notes below the Code’s main text. That includes effective dates of law (!) and statements of findings and purpose. Those notes do not appear as part of the main text when one pulls up the title on Westlaw, either. Jarrod Shobe insightfully has considered these notes and posited that ORLC’s editing work in pushing prefatory and purposes language to the sidelines makes the Code look less purposive than it really is and gives courts more leeway to ignore congressional intent than they might otherwise.384

In combining, reorganizing, and restructuring statutes into new subject-matter documents, OLRC determines statutory structure, and it inserts cross references, section divisions, and even headings. We see all those items when we look at statutes, and courts derive much meaning from them—where a provision is placed, what provisions it is near, what the title of the section is, and so on.385 To be sure, in the case of codified titles, Congress formally votes on the title and its structure. But that distinction gives too much credit to the kind of vetting it is assumed Congress does in the process of codification (we disagree with Shobe that enactment or nonenactment makes a dramatic difference in how little weight should be given to Code placement in statutory interpretation). As OLRC told us, there is “no political will” for its work, and in fact Congress has not taken up a codification bill in more than 5 years. In reality, it is OLRC that edits, reorganizes, and adds to both positive and nonpositive law. OLRC sometimes also drafts rules of construction to help courts minimize the effects of OLRC’s work, but the courts tend to overlook those provisions or not even realize Congress did write them.386

OLRC does flag the changes that it has made, via historical and revision notes, disposition tables, and source credit tables. But those are hard to locate on third-party sites, and they are not listed in the main text of the law. Notes appear in the sidebar of the “book,” in the various sections below the OLRC’s online Code, and, in annotated versions, are hidden in separate tabs (Westlaw’s “Editor’s and Revisor’s Notes”) or below the codified text (Lexis’s “Annotations”). Most lawyers, including judges, do not even realize those words were part of enacted statutory law.

For example, suppose a hospital’s general counsel is searching for her hospital’s Medicare classification. Searching for “hospital Medicare payment” on Lexis or Westlaw would bring up 42 U.S.C. § 1395ww, “Payments to hospitals for inpatient hospital services,” and the familiar-looking text of that section of the U.S. Code:

385 A glaring example of here is Yates, in which the Supreme Court relied heavily on the structure of the Sarbanes-Oxley Act, even though the OLRC (not Congress) organized that statute, and that the OLRC (not Congress) had added a “no source” provision stating that no intent should be imputed to statutory placement in the Code. See Shobe, supra note 3; Daniel B. Listwa, Uncovering the Codifier’s Canon, 127 YALE L.J. 464 (2017).
386 See Dorsey, Some Reflections on Yates, supra note 374.
The text goes on for dozens of pages, but the counsel will find not anything about classification unless she takes the additional step to “read below the line,” and scroll through to Lexis’s “Annotations” Section (which comes after the source notes):

Once in the Annotations, the general counsel would still need to scroll through dozens of pages of other notes—amendment histories, OLRC editorial explanations, effective dates, and rules of construction—before she would find this provision, “Application § 15008(a) of Act Dec. 13, 2016”: 60
This is where her Medicare classification is found—duly enacted statutory text, but far outside the bounds of the “law” as displayed in the U.S. Code, and buried beneath more than one hundred pages of other material.

Westlaw does not even display statutory notes on the landing page for each U.S. Code section. If she had searched there instead, she would have had to affirmatively navigate a drop-down menu (under the “History” tab and then the “Notes” tab), then scroll through the dozens of pages before the “Effective and Applicability Provisions,” which contain the relevant provisions of law, would appear.\footnote{Required navigation shown here:}
These changes to Medicare classification were passed by bicameral presentment along with the rest of the statute, and carry the full force of the law, yet they are nowhere to be found in the “text” of the law as encountered by most practitioners and judges. And this is not a one-off example. These statutory notes—enacted law not found in the Code’s text!—now comprise about half of the U.S. Code.\footnote{Harlan Yu, Designing Software to Shape Open Government Policy 90 (Sept. 2012) (unpublished dissertation), https://dataspace.princeton.edu/jspui/handle/88435/dsp01cf95jb50f.}

OLRC sometimes even inserts entire laws into statutory notes—so they do not appear as law to the uninformed when a title is pulled up on Westlaw. This occurs when Congress drafts a freestanding law that may have related to a topic within a codified title. If Congress does not amend the codified title directly, the new freestanding law cannot just be added to it. But OLRC wants like subjects together, so it appends the new law as a note to the codified title for subject matter-coherence. The Wounded Warrior Project is an example of this problem.\footnote{Shobe, supra note 3, at 34, uses it as well.} It is drafted as a freestanding law, but it plainly related to the topic of medical care for the armed services—a topic within Title 10, a positive law title. Because the bill that passed the law did not explicitly amend Title 10, however, OLRC was forced to locate the program wholly in a statutory note under that title.\footnote{10 U.S.C. § 1071 note.} Through the use of these notes, OLRC manages to keep seemingly similar subject-matters grouped together in the Code, while also keeping Congress’s enacted, positive law intact. It accomplishes this at the cost of accessibility, however, as lawyers and judges easily overlook these out-of-the-way provisions.

With respect to non-positive titles, the OLRC’s editorial role is expansive, even beyond the elements described above. And it still makes use of statutory notes, despite its control over the content of the Code’s main text. The Belarus Democracy Act of 2004 contained mostly Sense of Congress provisions, reporting requirements, and quasi-temporary provisions, for example—and so it was put entirely in a statutory note.\footnote{Public Law 108-347, codified at 22 U.S.C. § 5811.} Even when OLRC puts a shorter provision into a non-positive statutory note, meanwhile, it can be a provision of significant consequence. As shown above, under the Medicare program, for
example, hospital classification rules with important payment consequences sit in statutory notes.\textsuperscript{392} As one interviewee put it:

Should someone trying to understand the law skip over the notes? No! You’re not going to understand what [the law] is. If there is a [provision] saying that “the above amendments only apply to people with blue eyes” or “[only apply] after such a year,” where do we put that information? In the notes.\textsuperscript{393}

This is just one brief example of how understanding an Underbelly Institution deconstructs our understanding of statutory text, and it does not even come close to including all the other inputs. Simply by looking at OLRC, one can see that the “statutes” we see are not a comprehensive collection of all duly-enacted federal laws. A variety of laws are relegated to statutory notes, while others are excluded entirely. Nor does the Code necessarily contain the text of laws as they were enacted by Congress. Nor does statute construction stop with a vote. We could offer many more examples, using the work of other Underbelly Institutions. The “text” has more inputs than most courts and lawyers assume.

C. Statutory Interpretation Doctrine

This is not the place to spin out every possible implication of our study for statutory interpretation doctrine. We reserve those efforts mostly for future work, and instead offer some big-picture points, as well as some low-hanging-fruit, for lawyers and courts by way of conclusion.

The biggest picture question is the same one that our other efforts in this vein have already raised: Is there value to courts, in the task of statutory interpretation, to understanding how Congress works? There is no mainstream method of interpretation that does not claim some link to congressional practice, regardless of what judges say. If there was, judges would admit that they create interpretive rules (rather than derive them from congressional practice) and impose those presumptions atop Congress’s work. Gluck has shown that judges resist that activist, “quasi-legislative” conception of their statutory interpretation work, and instead feel a democratic obligation to at least claim that their interpretive practice is linked to Congress (even textualists embrace the label “faithful agent” for the courts’ role).\textsuperscript{394} We do not aim to win this battle here; only to document its importance and the relevance that comes with it for knowledge of legislative process.

The second question is, if courts were to try to consider legislative-process realities, which aspects of the congressional bureaucracy are most relevant? For instance, there may be a potential dividing line between pre- and post-enactment underbelly work. If courts want to understand what elected members thought they were voting on, pre-enactment inputs like the CBO score, legislative history, and committee jurisdiction assignments are most relevant to the operating assumptions of elected members. If courts were

\textsuperscript{392} 42 U.S.C. § 1395ww note.
\textsuperscript{393} OLRC interview.
concerned about Underbelly Work after the vote, it could construct “anti-deference” rules, as they have in other contexts to police that work.\textsuperscript{395}

On the other hand, if we were to truly embrace the Underbelly account and look at how Congress actually has set itself up, we might also include \textit{post}-enactment changes—like the JCT bluebook interpretation of tax laws and all the changes made by OLRC—that members do not directly vote on. The theory would be that Congress, as an institution, has established these practices and included them as part of its definition of “lawmaking.” Consequently, courts should respect Congress’s right—safeguarded in Article I of the Constitution—to establish its own procedures. In other words, precisely because Congress has created OLRC and charged it with making those post-enactment edits, we should view those delegated responsibilities to be legitimate contributions to the statutory text that results. That is much a more expansive view of the lawmaking process than one cabined by the discrete moment vote.

Another option, of course, is to ignore the work of Underbelly Institutions entirely, and assume the enacted words on the page reflect everything about the process that members knew when they voted. This approach is simplest, but most fictitious—and arguably illegitimate without a justification for the fiction.

More practically, there are some specific moves we can suggest as a start. Courts have actually proven quite willing to consider drafting realities when presented in small-scale form, case by case. As one example, after the Gluck/Bressman study’s finding that Congress often legislates with intentional repetition, some courts have stopped applying the presumption against redundancy.

1. \textit{Canons Galore}

In 2012, one of us suggested a “CBO canon,” which would require courts to take into account assumptions about the statute—including the understandings of its words—that CBO used in computing the budget score.\textsuperscript{396} The CBO canon is especially appropriate when the score is a matter of serious attention (the Affordable Care Act is a modern prominent example). Subsequent scholars have followed upon this approach, and we now have a recent proposal for a JCT canon,\textsuperscript{397} which would look to JCT’s understanding of the tax law to resolve ambiguities; another for a legislative codifier’s canon,\textsuperscript{398} which would direct courts to use captions and placement only when Congress itself (as opposed to OLRC) specifies them; and another for a Parliamentarian’s canon, which would resolve ambiguities by interpreting them consistently with parliamentary precedent and “especially rulings from the chair.”\textsuperscript{399}

It may be that continuing down this path of institution-by-institution rules is wise. But the incompleteness of these efforts illustrates the challenge inherent with starting to peel the onion. The Parliamentarians’ rulings are relevant to a lot more than just bills that survive an explicit challenge via a point of order. Committee referrals are as important, and can give as much insight into what topics Congress

\textsuperscript{395} This is essentially what Listwa suggests with respect to ORLC code placement decisions. \textit{See infra.}
\textsuperscript{396} Bressman & Gluck, \textit{supra} note 1, at 782. \textit{See also} Gluck, \textit{The “CBO Canon,” supra} note 1; Gluck, \textit{Congress, Statutory Interpretation, and the Failure of Formalism, supra} note 1.
\textsuperscript{398} Listwa, \textit{supra} note 385. We disagree with Listwa, \textit{see infra} notes.
\textsuperscript{399} Gould, \textit{supra} note 3.
thought it was trying to cover with its words. For instance, if an interpretation would have pushed a statute out of its committee of jurisdiction, that interpretation surely does not comport with Congress’s understanding of the law. The staffers told us they “hel[p] them put their finger on the scale to rewrite [bills] to address jurisdictional concerns” and that, when reading a reconciliation bill, one “has to presume that the changes are not just [about] pleasing a particular constituency; it’s about reconciliation.”400 We also have seen that the most consequential rulings of late are not from the public chair at all; most of the issues we discuss here are typically resolved before a bill ever reaches the floor.

We would go farther still and emphasize special rules for reconciliation. Reconciliation bills, once unorthodox, are now a central means of legislating Recent major statutes—e.g., the ACA and the 2017 tax bill—were passed using this special process. Recall that, under the “Byrd rule,” a reconciliation bill cannot include any “extraneous” provisions (a complex standard more fully set out in the notes).401 When points of order are raised about language that does not fit this requirement, Legislative Counsel works with staff to modify the bill text (sometimes quite creatively) in to bring it into compliance with the rule. The result? As one interviewee colorfully told us: Full quote: “If it’s reconciliation, they are ripping things out of there left and right. It’s only when you see the final product and say, ‘What is this crap?’”402

This process alone evinces a number of concrete interpretive takeaways. First, do not interpret a reconciliation bill in a way that would have clearly violated the Byrd rule. Second, do not assume any internal consistency or coherence when interpreting a reconciliation bill. Gluck and O’Connell made the same suggestion about ditching the presumption of consistency for omnibus legislation. Even more extreme than omnibus bills, however, interpreters cannot not assume consistency even within provisions in a reconciliation bill. Because the Byrd rule is applied on a provision-by-provision basis, drafters often will unnaturally cram together unrelated (or only semi-related) rules into a single provision for Byrd rule purposes.403 Third, courts should have a heightened sense of budgetary windows when interpreting reconciliation bills, since reconciliation bills often are unnaturally contorted in order to comply with year-specific fiscal rules.

Moving to JCT, the “JCT canon” that has been proposed (by Clint Wallace) is laudably sophisticated. It urges courts to defer to the interpretation given to an ambiguous provision by JCT, as revealed through not only the revenue estimate but also the various other materials JCT produces (including legislative history and other explanatory statements). As with Gluck’s CBO canon, Wallace notes that his

\[400\] Staffer Interview.
\[401\] 2 U.S.C. § 644. A provision is defined as “extraneous” if it:
   a) does not produce a change in outlays or revenues;
   b) produces an increase in outlays or decrease in revenues that dose not follow the reconciliation instructions in the budget resolution;
   c) is not in the jurisdiction of the committee that reported the provision;
   d) produces changes in outlays or revenues that are merely incidental to the non-budgetary components of the provision;
   e) increases the deficit in any fiscal year after the period specified in the budget resolution;
   f) recommends changes to Social Security.
\[402\] Staffer Interview.
\[403\] In particular, this is done to satisfy subsection (a) of the Byrd rule (which requires each provision to have a budgetary impact). Here, a policy with no budgetary impact is combined with one that has such an impact, and so the provision is treated as compliant with the Byrd rule—thereby smuggling a “non-scoring” provision into the bill. The effect of this practice, however, is to make provisions less internally consistent.
approach has "democratic bona fides" of having been generated and required by Congress itself. Ultimately, however, he predicates the canon on the unique ability of JCT to add agency-like virtues to tax, and to thereby compensate for the broken IRS rulemaking system. We do not believe that JCT’s importance to statutory interpretation is limited to periods of agency failure. JCT is interesting for interpretation not because it recreates an agency, but because it helps create legislation.

What about Legislative Counsel canons? The Gluck/Bressman study offered some prospects. For example, Legislative Counsel drafts only one type of legislative history: appropriations legislative history. By Congress’s own rules, appropriations bills list only outlays; the legislative history provides the programmatic direction. That is why Legislative Counsel drafts the history—in this unique context, the history is effectively an operative provision. But courts do not give this kind of history any special deference.

Legislative Counsel has its own drafting manuals, too. They include directions that contradict some judicial presumptions. For example, the Senate manual says that statutes need not have severability clauses to be presumed severable. Courts, however, sometimes attribute false meaning to the lack of a severability clause, especially if the House version of a bill has one and the Senate does not.

It is true that a multitude of new canons could emerge from this kind of inquiry, and some judges might balk at the further complication of statutory interpretation. But the courts already apply more than 100 presumptions to statutes, so concerns about volume are thus something of a straw man. And there are limiting principles. We do not suggest canons based on Underbelly expertise that is merely an input—like CRS—but instead focus on those stages in the lawmaking process that are mandatory turning points for legislation or member focus. All of this comes with the important caveat that Gluck and others have noted—namely, that elevating Underbelly Institutions in this way could inject more pathologies into the legislative process—unhealthily skewing statutes, for instance by leading Congress to draft bills even more to the CBO score than they already are.

2. **Anti-Canons:** “A court that would look at placement in the Code to somehow imbue meaning into what a provision says is barking up the wrong tree.”

The above quote comes from OLRC. If the goal is to effectuate the intent of elected members, courts should emphatically reject any continuing use of the code placement as evidence of that intent. Courts should not presume that statutory section arrangement, headings, or title structure has anything to do with

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404 Wallace, supra note 397.
406 The district court judge in the case that would become *NFIB v. Sebelius* made this mistake, reasoning that the fact that an early version of the ACA had a severability clause but the enacted one did not “can be viewed as strong evidence that Congress recognized the Act could not operate as intended without the individual mandate.” Fla. ex rel. Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1301 (N.D. Fla.).

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statutory meaning unless those details come from the public law enacted by Congress before it was reorganized in the U.S. Code.

Contra Shobe, we think it matters little whether a title has been enacted into positive law or not. OLRC does the editing and arranging regardless, with little member or policy staff interest. Indeed, some statutes even have provisos telling courts not to infer any intent from structure. No one seems to realize those provisions are written and inserted by ORLC precisely for this reason. And yet, courts still grasp onto structure and placement because doing so “feels” more textualist than looking to legislative history, CBO scores and so on—that is, Congress’s actual inputs and assumptions.

Likewise, we suggest abandoning grammar canons. Grammar is often changed after enactment by OLRC. Even beforehand, to assume that any staff or member other that legislative counsel focused on comma placement is pie in the sky.

For the same reasons—and here we agree with Shobe—we are disturbed by the practice of courts undervaluing or even overlooking entirely purpose provisions and findings enacted by Congress. We also agree that understanding OLRC reveals Congress to be a more purposive institution than courts typically acknowledge and that OLRC’s practice of shunting purposive (but enacted) materials into notes likely contributes to the court’s propensity to underemphasize them.

We do not mean this as a critique of OLRC. Throughout our study, the Underbelly staff spoke of “statutes” far more holistically than legislation scholars commonly do. There are customs and views about what belongs in the “words” and what is better put in legislative history, notes, or other materials. We heard that from JCT, Legislative Counsel, and OLRC, even as each of those entities emphasized the importance of consulting those other materials in understanding the law. This desire not to overcomplicate the words in the “text” seems to have been overread by courts and scholars to view statutes unduly narrowly. At a minimum, Westlaw and Lexis could change the way it displays these materials to highlight them more.

As far as a purposive legislature goes, recall that Congress itself directs OLRC to draft a U.S. Code that “conforms to the understood policy, intent, and purpose of the Congress in the original enactments,” rather than a Code that preserves enacted statutory text exactly. This seems to be statutory evidence that Congress shares three beliefs that are central to intentionalist theory: (1) that Congress has an intent or purpose when enacting laws; (2) that statutes are, above all, an expression of intent and purpose; and (3) that Congress’s overriding desire is to see that intent or purpose carried forward. If courts wish to position themselves as “faithful agents” to Congress, they ought to consider this evidence of their principal’s principles.

Finally, we second the Gluck/Bressman study’s cry to abandon the courts’ beloved “whole code rules” and other canons that presume consistency and coherence across the U.S. Code. First of all, the “U.S.

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407 See Dorsey, Some Reflections on Yates, supra note 374
408 Shobe likewise seems unaware that OLRC inserts these provisions.
409 Listwa seems to advocate use of statutory structure only where Congress specifies where in a positive law title a statute should be placed. Fair enough, but Lista assumes that interpreters are not using the code for non-positive law titles, which of course they are and seems to ignore congressional placement decisions when Congress drafts the initial public law.
410 Shobe, supra note 384.
Code” is a construct made after legislation is enacted. Second, even OLRC told us they try to carry consistent language within titles, but not further than that. We think there is much be said about resituating methods of interpretation around subject matter areas, a point one of us has made elsewhere. Agencies operate differently in different subject areas and even deploy different interpretive presumptions; Congress organizes its own work (committees) and expertise (nearly all the Underbelly Institutions, who divide themselves into subspecialty areas) by topic areas. The titles of the U.S. Code itself are the very result of ripping statutes apart to reconceptualize them this way.

Fig X. Interpretive Takeaways of the Underbelly Study

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CONCLUSION

We recognize the can of worms a study like this opens. But we do not think that an ostrich burying her head in the sand is any better a metaphor for how lawyers and judges should interpret statutes than the sausage factory is for the legislative process.

Congress founded its own bureaucracy to be self-sufficient, resist an encroaching executive, and meet the needs of the increasingly complex statutory state. Shouldn’t courts respect the inputs that Congress set out for itself in meeting courts’ own obligations to legislative supremacy, and how Congress exercises that supremacy in the face of the challenges of the modern era?

We could go much further than we have. The exemplary canons and anti-canons we offer, for instance, are based on the rather limited conception that what matters are the inputs relevant before any vote (as opposed to post-enactment bureaucratic work). It would be wildly richer and more provocative to reconceptualize “lawmaking” and the resulting statutory “text” to actually include all the inputs Congress sets up for itself, ex ante, when it creates and puts in motion its massive, important, and—until now—overlooked bureaucracy.

412 Table summarizing takeaways (canons, anti-canons, etc.) tk.