R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory

Bernard W. Bell

R-E-S-P-E-C-T*: RESPECTING LEGISLATIVE JUDGMENTS IN INTERPRETIVE THEORY

BERNARD W. BELL**

New textualists argue that judicial refusal to consult legislative history will ameliorate several pathologies of the contemporary legislative process, including the increasing imprecision in legislative drafting and the excessive influence of legislative minorities, congressional staff members, and lobbyists due to the ability of these groups to manipulate legislative history. In this Article, Professor Bell argues that new textualists have failed to address a fundamental question raised by their approach: whether courts should attempt to diagnose and remedy legislative pathologies in the first place. He examines three widely recognized theories of constitutional jurisprudence that potentially could justify new textualists' approach to statutory interpretation, but concludes that these approaches—original intent theory, process theory, and underenforced norms theory—do not justify new textualists' disregard for congressional judgments. Professor Bell proposes an approach to legislative history that accords legislative history significance because Congress uses such history to justify its statutes to the public. Such a "public justification" approach not only possesses normative appeal, Professor Bell argues, but also accords respect to congressional judgments regarding the structure of the legislative process.

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* ARETHA FRANKLIN, *Respect, on* I NEVER LOVED A MAN THE WAY I LOVE YOU (Atlantic Records 1967). The song was first performed by Otis Redding. Otis Redding, *Respect/Ole Man Trouble* (Volt Records 1965).

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INTRODUCTION

Help wanted, immediately!! Guru/babysitter needed to oversee and discipline unruly organization that produces excessively vague rules, publishes unreliable documents that frustrate high-level decisions, allows top personnel to delegate excessive authority to staff, and allows outsiders undue influence. Judges and law professors preferred.

This fanciful "Help Wanted" ad seeks a manager to oversee and, when necessary, discipline Congress. We frequently are told that congressional judgments deserve respect and that courts accordingly must defer to those judgments, employ sparingly their authority to invalidate statutes, and constrain their impulses to infuse their own value judgments into their decisions. More colloquially, many have embraced the mantra that judges should enforce, not make, the law;[1]

1. *See* 144 CONG. REC. S11,883 (daily ed. Oct. 8, 1998) (statement of Sen. Thurmond regarding the nomination of William A. Fletcher to the Ninth Circuit Court of Appeals) ("I firmly believe that the role of the judge is to interpret the law as the legislature intended, not to interpret the law consistent with the judge's public policy objectives. A

the mantra becomes especially popular when the Senate considers judicial nominations. Surprisingly, however, some professed devotees of judicial restraint have already arrogated the responsibilities outlined in my fanciful "Help Wanted" ad. In particular, new textualist[2] judges, like Justice Antonin Scalia, have assumed the task of disciplining Congress to correct its inadequacies. These judges have concluded that Congress produces excessively vague statutes (reflecting its refusal to make meaningful decisions),[3] publishes explanatory documents that distort the majority's views,[4] delegates

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judge does not make the law and is not a public policy maker."); 144 CONG. REC. S646 (daily ed. Feb. 11, 1998) (statement of Sen. Ashcroft regarding the nomination of Margaret M. Morrow to the District Court for the Central District of California) ("[T]he question is ... whether this candidate will say the legislature is the place to make the law, and whether she will recognize that courts can only make decisions about the law."); 140 CONG. REC. 27,526 (1994) (statement of Sen. Gramm regarding the nomination of H. Lee Sarokin to the Third Circuit Court of Appeals) ("I believe judges ought to be in the business of interpreting laws, not making them."); 140 CONG. REC. 27,470 (1994) (statement of Sen. Hatch regarding the nomination of H. Lee Sarokin to the Third Circuit Court of Appeals) ("What are judges for other than to implement the laws, to abide by them, to interpret them, not to make them."); 140 CONG. REC. 7509 (1994) (statement of Sen. Hatch regarding the nomination of Rosemary Barkett to the Eleventh Circuit Court of Appeals) ("[W]e do not need another [judge] who ignores the laws and starts to put his or her own emotional predilections into the law instead of interpreting the laws made by elected representatives...."); 139 CONG. REC. 18,133 (1993) (statement of Sen. Grassley regarding the nomination of Ruth Bader Ginsburg to the Supreme Court) ("For me, [judicial restraint] is being very cautious to make sure you only interpret the law and do not make the law...."); 137 CONG. REC. 25,264 (1991) (statement of Sen. Specter regarding the nomination of Clarence Thomas to the Supreme Court) ("Justices are supposed to interpret the law rather than make the law."); 137 CONG. REC. 23,612 (1991) (statement of Sen. Specter regarding the nomination of Clarence Thomas to the Supreme Court) ("[T]he Court is supposed to interpret law, not to make law."). The statement that judges should not make law has been something of a mantra for conservatives since the Warren Court. *See* Address to the Nation Announcing Intention to Nominate Lewis F. Powell, Jr. and William H. Rehnquist to be Associate Justices of the Supreme Court of the United States, 1971 PUB. PAPERS 1053, 1054 (Oct. 21, 1971).

2. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990) (coining the phrase "new textualism").

3. *See infra* notes 36–39 and accompanying text (discussing new textualists' concerns that judicial reliance upon legislative history in interpreting statutes encourages sloppy, imprecise drafting).

4. *See infra* notes 40–47 and accompanying text (discussing new textualists' concerns that reliance upon legislative history in statutory interpretation allows legislative minorities to frustrate legislative majorities by manipulating legislative history). The new textualists also argue that legislative intent is irrelevant in interpreting statues. *See, e.g.*, Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not the intentions of legislators."); *In re* Sinclair, 870 F.2d 1340, 1343–44 (7th Cir. 1989) ("Desires become rules only after clearing procedural hurdles designed to encourage deliberation and expose proposals (and arguments) to public view and recorded vote."). I have addressed that argument in an earlier article. *See* Bernard W. Bell, *Legislative History*

excessive authority to its staff,[5] and allows lobbyists to exercise inordinate influence.[6] New textualists seek to reverse these disturbing trends by disregarding legislative history altogether.[7]

Legislative history's defenders challenge the merits of these new textualist claims.[8] These critics of new textualism argue that the new textualists embrace an oversimplified view regarding the causes of statutory vagueness while ignoring many other contributing factors.[9] They express skepticism about new textualist claims of pervasive distortion of legislative history by legislative minorities.[10] New textualism's critics also dispute the argument that legislative staffers and lobbyists hold inordinate power. They argue, moreover, that

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Without Legislative Intent: The Public Justification Approach to Statutory Interpretation, 60 OHIO ST. L.J. 1 *passim* (1999).

5. *See infra* notes 48–51 and accompanying text (discussing new textualists' argument that reliance on legislative history has allowed congressional staff to establish policies that were never chosen by the elected representatives whom they serve).

6. *See infra* notes 52–54 and accompanying text (discussing new textualists' argument that judicial reliance on legislative history has increased the power of interest groups who seek to have their policies inserted in the legislative history).

7. The general approach is outlined in *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527–30 (1989) (Scalia, J., concurring in the judgment), and reiterated in *Chisom v. Roemer*, 501 U.S. 380, 404–05 (1991) (Scalia, J., dissenting). *See* Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 406–08 (1994). New textualists argue that courts should interpret statutes based on the ordinary meaning of the words contained in the statutory text. *See Green*, 490 U.S. at 528 (Scalia, J., concurring in the judgment). Such an analysis includes consideration of various grammar and syntax rules. *See* Karkkainen, *supra*, at 407–08, 445–50. If such an analysis does not yield an interpretation, the court should fit the statute into the larger context of the law. *See Green*, 490 U.S. at 528 (Scalia, J., concurring in the judgment); Karkkainen, *supra*, at 408–11. For an extensive list of opinions by Justice Scalia applying the approach described above, see Karkkainen, *supra*, at 441–45.

Some state judges have begun to echo the skepticism about the propriety of using legislative history. *See* Hayes v. Continental Ins. Co., 872 P.2d 668, 673–74 (Ariz. 1994) (en banc); People v. Bransford, 884 P.2d 70, 75, 80 (Cal. 1994) (in bank) (Kennard, J., concurring in part and dissenting in part); Morris v. Franchise Tax Bd., 22 Cal. Rptr. 2d 577, 583 (Cal. Ct. App. 1993), *review granted and opinion superseded*, 861 P.2d 1107 (Cal. 1993); People v. Vaughan, 19 Cal. Rptr. 2d 152, 153 (Cal. Ct. App. 1993), *review granted and opinion superseded*, 854 P.2d 721 (Cal. 1993) (in bank); Mozo v. State, 632 So. 2d 623, 637 (Fla. Dist. Ct. App. 1994) (Farmer, J., concurring); Marposs Corp. v. City of Troy, 514 N.W.2d 202, 207 n.2 (Mich. Ct. App. 1994) (Taylor, J., dissenting), *overruled by* Bendix Safety Restraints Group v. City of Troy, 544 N.W.2d 481 (Mich. Ct. App. 1996); Omaha Pub. Power Dist. v. Nebraska Dep't of Revenue, 537 N.W.2d 312, 320–23 (Neb. 1995) (Caporale, J., concurring).

8. *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 862–64 (1992); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 445–46 (1988); Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585, 593–615 (1994).

9. *See infra* note 244 (noting several theorists' explanations for increased statutory vagueness).

10. *See infra* notes 276–78 and accompanying text.

even if the new textualists' claims are true, it is not clear that refusing to consult legislative history will have any effect on staffers' and lobbyists' influence.[11] In short, the debate between new textualism and its critics has focused on whether the new textualists' perceptions of the pathologies afflicting modern legislatures are correct and whether refusing to consider legislative history in statutory interpretation will minimize those maladies.

This Article asks a more fundamental question: are courts the appropriate institution to identify and remedy legislative shortcomings?[12] I will explore whether concerns like those raised by

11. Leading scholars have critiqued this position. *See* Farber & Frickey, *supra* note 8, at 445–46; Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1302–04 (1990).

12. Others have suggested that new textualists exhibit disrespect toward legislative judgments by replacing legislators' preferred legislative process with judges' notions about the ideal process. *See Statutory Interpretation and the Uses of Legislative History: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong. 7, 67 (1990) (Sup. Docs. No. Y4. J89/1:101/107) [hereinafter *Statutory Interpretation and the Uses of Legislative History*] (statement of Chief Judge Patricia M. Wald of the D.C. Circuit Court of Appeals); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 306–07 (1990); *see also Statutory Interpretation and the Uses of Legislative History*, *supra*, at 117–18 (statement of Professor Stephen F. Ross) ("[T]he textualist argument appears to be based on either a naive understanding of the operation of the modern legislature or a normative view that Congress *should* operate in the manner described in high school civics texts. This view ... should not be imposed on Congress by the courts ...."); *id.* at 143 (testimony of Professor Stephen F. Ross) ("It strikes me that the new textualists are very dissatisfied with the way Congress is run.... I find some hypocrisy in this view from those who are so quick to advocate separation of powers, deference to elected members, and such concern in other areas of jurisprudence ...."); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 98–99 (1991) ("No doubt, congressional staff exceed their appropriate role. What that role should be is, however, surely the primary concern of the legislative rather than the judicial branch." (citation omitted)); HENRY J. FRIENDLY, BENCHMARKS 216 & n.114 (1967) (questioning whether policing legislative history to ensure that it accurately reflects the will of the majority is a judicial responsibility and describing the legislature's own failure to do so as an "abdication of legislative responsibility"); James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 45–46 (1994) (arguing that legislative history should be honored because "considerations of deference toward Congress would seem to warrant respect for its designated legislative processes as well" (citation omitted)); *id.* at 40 (noting that "rejecting or systematically discounting legislative history is countermajoritarian, ... in declining to consult materials that are integral to Congress's chosen lawmaking process"); George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 67 ("If Congress chooses to rely heavily on committees in selecting and shaping legislation, why should courts deny the importance of the committee system when called upon to give meaning to the product that emerges from that system?"

new textualists should be left for congressional resolution, free from judicial interference. By attempting to diagnose and remedy these problems through interpretive technique, new textualists may usurp legislative prerogatives no less than do the "judicial activists" they regularly excoriate for invalidating government actions on constitutional grounds.

Part I describes the instrumentalist approach to statutory interpretation by contrasting it with the traditional intrinsic approach to interpreting statutes. Then, focusing on new textualism as an instrumentalist approach, I examine the costs that embracing such an approach entails by denigrating the principle of majority rule and sacrificing the interests of individual litigants who invoke the courts' authority to resolve their disputes.

Part II outlines the conundrum that new textualists face. On the one hand, new textualism embodies a disrespect for congressional judgments. Its assessment of the defects of the legislative process—the production of unnecessarily vague statutes, the drafting of misleading legislative history, and the dominant role of congressional staff and interest groups—may be too harsh and does not reflect Congress's assessment of itself. On the other hand, courts in general and new textualists in particular purport to defer to congressional judgments in a wide array of areas. Specifically, when engaging in equal protection and due process review of statutes, when considering direct challenges to legislative procedures, and when addressing claims that the enactment of a statute was procedurally deficient, new textualists and the courts accord great deference to legislative judgments.

Part III examines whether three traditional approaches to constitutional jurisprudence can save the new textualists from the tension created by their inconsistent attitudes toward legislative judgments. Specifically, Part III explores whether original intent theory, process theory, or underenforced constitutional norms theory can reconcile the tension between new textualists' disregard of legislative judgments when interpreting statutes and their embrace of legislative judgments in other areas.

(citation omitted)); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2207–08 n.233 (1990) ("Justice Scalia's [new textualist] challenge might be thought to rest on a normative view of the appropriate external constraints on Congress's legislative process, with such constraints perhaps grounded in controversial understandings of the structural constraints on lawmaking that the Constitution might be understood to impose." (citation omitted)).

Part IV explores the new textualists' major criticisms of the contemporary legislative process. As the analysis will reveal, each of the new textualists' claims is contestable. Perhaps just as significantly, with respect to some of the new textualists' concerns—statutory vagueness and legislative staff power, in particular—the federal courts have already proven themselves unable to police the political process.

Finally, Part V suggests a different interpretive approach that, unlike new textualism, respects congressional judgments. This "public justification" approach honors legislative history primarily by binding Congress to the justification that it publicly provides for a statute. After describing this approach, I will then apply it in the context of two United States Supreme Court cases: the Supreme Court's recent five-to-four decision in *Department of Commerce v. United States House of Representatives*,[13] which addressed the legality of using census figures partially derived from sampling to apportion representatives between states, and the classic *Rector of Holy Trinity Church v. United States*,[14] the leading case establishing the legitimacy of consulting legislative history as an aid in construing federal statutes.[15]

I. INTERPRETIVE TECHNIQUE AND LEGISLATIVE PROCESS

Traditionally, legislative interpretation has focused on an intrinsic inquiry; such an inquiry focuses on which interpretive method produces the most legitimate interpretation of statutes.[16] Legal theorists asked the following types of questions: Should courts primarily act as agents of the legislature, seeking to effectuate its intent? Should courts view statutory text as the only legitimate source of law? Should courts acknowledge the discretion they possess and proceed accordingly, by giving authoritative weight to neither the statutory text nor their perception of legislative intent? Recently, however, scholars increasingly have viewed interpretive techniques as tools to shape the legislative process—an instrumental approach[17]

13. 525 U.S. 316 (1999).

14. 143 U.S. 457 (1892).

15. *See* Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 15 (1998); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1835 (1998).

16. *See, e.g.*, AMERICAN HERITAGE DICTIONARY 946 (3d ed. 1992) (defining "intrinsic" as "of or relating to the essential nature of a thing").

17. "Instrumental" theories justify actions in terms of their likely consequences. *See, e.g.*, 7 OXFORD ENGLISH DICTIONARY 1052 (2d ed. 1991).

that seeks to justify particular interpretive techniques by their potential salutary effect on the legislative process.[18] While this Article focuses on Justice Scalia's approach, such instrumental approaches abound.[19]

Scholars have failed to consider fully the legitimacy of grounding proposed interpretive techniques in instrumental reasoning. Instrumental approaches require judges to use statutory interpretation to impose their own conception of the optimal

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18. *See* John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565, 579–82 (1992); Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, TULSA L.J. (forthcoming 2000); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 608 (1995). In an earlier article, I noted that the prevalence of agency interpretations of statutes and the deference courts give to those interpretations preclude these new textualist canons of interpretation from influencing the legislative process. *See* Bernard W. Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-*Chevron *Era?*, 13 J.L. & POL. 105, 128–32 (1997).

19. For example, Professor Sunstein has developed an elaborate set of interpretive canons to encourage legislative deliberation. *See* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1581–83 (1988) [hereinafter Sunstein, *Beyond the Republican Revival*]; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 437–41, 454–60 (1989) [hereinafter Sunstein, *Interpreting Statutes*]. Professor Sunstein views deliberation as a key to effective democracy and believes that courts should encourage deliberation by the manner in which they interpret statutes. *See* Sunstein, *Beyond the Republican Revival*, *supra*, at 1549–51, 1558–64, 1581–83. He seems to base his interpretive principles both on the instrumental concerns of improving the governmental process and on the intrinsic concern of identifying the most legitimate interpretation of statutes within the structure of government. Thus, he might not abandon his interpretive approach even if it had no prospect of changing legislative behavior. He suggests, however, that the most important attribute of his approach is its prospect of improving the manner in which government operates. *See* Sunstein, *Interpreting Statutes*, *supra*, at 412 ("Above all, it is important to develop principles that improve the performance of modern government....").

Professor Macey argues that courts should rely upon legislative history in interpreting statutes because doing so will reduce interest group domination of the legislative process. *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 226–27, 253–57 (1986). Macey may view his approach as premised on legitimacy; that is, all other things being equal, the public-regarding interpretation of a statute is the most legitimate. Macey, however, also seems to view the courts' role as encouraging the passage of public-regarding laws and discouraging the enactment of rent-seeking laws. *See id.* He reasons that interest groups will ordinarily pursue legislation for selfish, private-regarding reasons that they do not wish to expose publicly, *see id.* at 232–33, and that the judiciary's practice of giving credence to statutes' public-regarding facades makes enacting private-regarding legislation more difficult, *see id.* at 238–40. If, however, one views statutory text as the only legitimate source of legislative commands, adopting Macey's theory would require adoption of interpretations of questionable legitimacy in the belief that, over time, Macey's approach would diminish interest group dominance. Later in this Article I present my own public justification approach, which resembles Macey's. *See infra* notes 325–64 and accompanying text. My approach, however, is grounded in an intrinsic, rather than an instrumental, logic.

legislative process on legislatures.[20] Yet, the courts eloquently and frequently assert a lack of both authority and competence to structure the legislative process.[21] Such assertions call into question instrumental approaches to statutory interpretation.

Jurists who adopt new textualism purely for instrumental reasons impose severe societal costs by frustrating majority rule and denigrating the traditional role of courts in dispute resolution. Every time judges refuse to adhere to congressional desires because of imprecise statutory language or because Congress placed those desires in legislative history rather than in statutory text, judges denigrate majority rule. For judges who prize majority rule,[22]

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20. Scholars rarely acknowledge this problem, although, on occasion they do. *See supra* note 12.

21. In the area of interpretive methodology, judicial and legislative responsibilities converge. *See* Bernard W. Bell, *Mademocratic Interpretation and Separation of Powers*, 2 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 27–28 (1999). The judiciary's role as the authoritative expounder of law, *see, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 146 (1803), implicitly includes the prerogative of determining the methodology used in interpreting statutes—at least in the absence of a statute purporting to specify the appropriate interpretive methodology, *see, e.g.*, United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1871). Moreover, courts can hardly resolve questions of interpretive methodology without at least considering the potential impact such methodologies have upon the legislative process. *See* RONALD DWORKIN, LAW'S EMPIRE 319–20 (1986). Finally, legislative practice may sometimes adversely affect the courts. The rampant unreliability of congressional documents arguably could lead courts to illegitimate interpretations so that courts would no longer be agents of a majority but, instead, agents of the cleverest distorter of legislative documents. Alternatively, an unreliable record could require courts to fill in statutory gaps that they are unsuited to fill. *See infra* notes 266, 269–70 and accompanying text.

Nevertheless, legislatures also must have authority to speak to interpretive methodologies. Legislatures cannot establish statutory rights and obligations if they cannot exert at least some control over the methodology used to construe those statutes. *See* Bell, *supra*, at 30–31. Perhaps just as importantly, each branch of government must retain some autonomy, including the power to structure its own procedures. *See id.* at 31–33. Congress's legitimate institutional autonomy surely includes deciding matters such as the need to establish committees to review legislation prior to consideration by the House or the Senate, the degree of influence any such committees will enjoy, staffing needs and the influence any staff will possess, and the need for controls to ensure that congressional documents accurately reflect the majority's views. Congress can hardly remain independent if another branch of government prescribes its procedures.

The scope of judicial discretion to establish interpretive methodology despite contrary congressional action largely has been left unexplored, as legislatures tend not to prescribe interpretive methodology. *See* Alan R. Romero, Note, *Interpretive Directions in Statutes*, 31 HARV. J. ON LEGIS. 211, 219 n.38 (1994).

While the above discussion focuses on judicial authority, instrumentalist theories also raise questions of judicial competence, because the judiciary arguably lacks the competence to address questions of legislative procedure. *See infra* notes 157–59 and accompanying text.

22. *See* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 243–44, 249 (1997).

determining how a majority of the enacting legislature would have decided the issue had it arisen is central to proper interpretation. To them, the text of a statute has little inherent importance—its importance stems from its reflection of the policy of the enacting legislative majority. When the text of the statute does not reflect majority desires, either because of imprecision in the use of language or the legislature's failure to consider fully the nuances of problems, citizens are governed not by the policies reflecting majority views but by random policies that result from the legislature's poor draftsmanship. In effect, focusing on statutory text despite convincing evidence that the statute's words inadvertently fail to reflect the majority's decision exalts form over substance by giving precedence to Congress's form of expression rather than the ideas it sought to convey.[23]

By privileging text, the publicly expressed or otherwise-clear majority views regarding citizens' rights and responsibilities may be violated.[24] Eventually, the principle desired by the majority may be established, and Congress may even learn to draft statutes more precisely. In the meantime, however, costs are imposed upon individual litigants seeking resolution of their disputes. While the courts interpret statutes strategically to encourage greater congressional responsibility, these individual litigants will suffer unjustly or benefit undeservedly because of poor congressional drafting. In a sense, individual litigants become pawns in the judicial effort to force legislative precision, to increase legislative deliberation, or to decrease dependence upon legislative staff.[25]

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23. *Cf. In re* Erickson, 815 F.2d 1090, 1092–93 (7th Cir. 1987). In *Erickson*, Judge Easterbrook had to construe the meaning of the word "haybine," a type of farm equipment that, through technological advancement, had become disassociated from legislators' understanding of the word when they placed it in the statute. *See id.* at 1092. Judge Easterbrook asserted that a statutory word of description, such as "haybine," does not designate a particular item, but rather a class of items that has some important characteristic, and that the usage of the word in everyday language cannot be determinative when language usage is changing. *See id.* at 1092–93. Using the fanciful example of an item that comes to be known as a "stereolounger," a piece of furniture on which to recline which also plays music, Judge Easterbrook argued that a "stereolounger" may nevertheless be a "chair" for purposes of a statute dealing with chairs. *See id.*

24. *See* Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 111–13, 114–15, 117–18 (1989).

25. Judge Ralph K. Winter's dissent in *United States v. University Hospital*, 729 F.2d 144, 161–63 (2d Cir. 1984) (Winter, J., dissenting), provides an example of this potential problem. In that case, the Second Circuit considered whether the Rehabilitation Act, 29 U.S.C. §§ 701–794 (1994), which prohibits federally funded programs from discriminating against the handicapped, precludes a federally funded hospital from foregoing surgery to correct one of two severe birth defects afflicting an infant. *See University Hosp.*, 729 F.2d

Injuries to litigants who rely on impartial justice to resolve their disputes are a significant price to pay for a judge's instrumentalism,[26] particularly if the interpretive strategies used to force change are likely to prove ineffective.[27]

For example, the Supreme Court's insistence upon textual clarity deprived many litigants of the benefits of policies that congressional majorities sought to establish by enacting the Age Discrimination in Employment Act of 1967 (ADEA).[28] The Supreme Court twice construed the ADEA provision that prohibited employee benefit plans from requiring mandatory retirement as a means of avoiding the ADEA.[29] After each decision, Congress legislatively reversed the result of the cases by amending the statutory text to include policies

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at 146. The congressional majority that enacted the Rehabilitation Act probably did not envision that their admittedly categorical language would override parental and medical judgments about the medical treatment to be provided infants suffering from multiple, severe birth defects. *See id.* at 157. As the majority noted, Congress did not discuss the treatment of infants suffering from birth defects when it enacted the statute. *See id.* at 157; *see also* American Academy of Pediatrics v. Heckler, 561 F. Supp. 395, 401 (D.D.C. 1983) ("[N]o congressional committee or member of the House or Senate ever even suggested that [the Rehabilitation Act] would be used to monitor medical treatment of defective newborn infants or establish standards for preserving a particular quality of life."). Moreover, Congress and the President previously had expressed concern about interfering in medical decisionmaking in other contexts. *See University Hosp.*, 729 F.2d at 157, 160. In addition, requiring operations on infants would have displaced state police power over such matters, which the court thought Congress likely would not have done without expressing such an intent explicitly. *See id.* at 160.

In his dissent, Judge Winter argued that the court should nevertheless construe the Rehabilitation Act as it would construe Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d (1994), on which the Rehabilitation Act's categorical language was based, and require the defendant hospital to treat a child with spina bifida and microcephaly despite the contrary judgment of the parents and the hospital. *See University Hosp.*, 729 F.2d at 163 (Winter J., dissenting). Such a ruling, he explained, would encourage Congress to consider seriously all aspects of proposed statutes without expecting courts to save them from the folly of passing poorly conceived symbolic legislation. *See id.* (Winter, J., dissenting). Granted, because Judge Winter's primary argument was that his textualist approach produced the most legitimate interpretation of the statute, *see id.* at 161–63 (Winter, J., dissenting), instrumentalist reasoning assumed only a secondary role in his opinion. Enough such rulings might lead Congress to become more deliberative, but only at the expense of forcing parents to submit their children to operations that, in the parents' judgment, will provide little benefit.

26. *See* Bell, *supra* note 21, at 8–9.

27. As noted earlier, given judicial deference to agency construction of statutes, instrumentalist theories of statutory interpretation may accomplish little. *See supra* note 18; *see also infra* note 265 (outlining several reasons to doubt that judicial endorsement of new textualism will produce more precise legislative drafting).

28. Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C.A. §§ 621–634 (West 1999 & Supp. 1999)).

29. *See* Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 168 (1989); United Air Lines, Inc. v. McMann, 434 U.S. 192, 203 (1977).

Congress had previously expressed only in legislative history.[30] Unsuccessful plaintiffs, whose cases were decided before Congress could convert the legislative history into statutory text, suffered.[31] The plaintiffs could not bring actions that a congressional majority thought it had authorized. While this result is just from an intrinsically based, new textualist perspective, this series of judicial decisions and legislative reversals assumes disturbing proportions for those who view intent as the touchstone of interpretation. Moreover, the disturbing nature of the harm to the individuals cannot be justified by the conviction that the courts' interpretive approach will eventually lead to better legislation for all.[32]

In short, as an instrumental technique, new textualism involves significant sacrifices. It denigrates majority rule and subordinates the responsibilities courts owe individual litigants to further jurists' strategic efforts to improve the legislative process. Even if these costs are arguably justifiable, new textualism embodies a skepticism of legislative judgments that, in other contexts, courts eschew and new textualists disclaim.[33]

II. THE NEW TEXTUALIST CONUNDRUM

Justice Scalia and the new textualists' assault on the use of legislative history highlights the tension between instrumentalist interpretive techniques and the deference that courts customarily accord legislatures. The tension is all the more dramatic because Justice Scalia ordinarily urges great judicial deference to legislative judgments.[34]

A. New Textualist Arguments

In addition to arguing that only statutory text should create legal

30. *See* Brudney, *supra* note 12, at 15–16.

31. Professor Brudney notes the cost imposed upon Congress by the Court's disregard of the congressional majority's intent, as expressed in the legislative history. *See id.* at 16–26.

32. The phenomenon of a series of judicial decisions followed by statutory amendments to correct misinterpretations has been addressed by scholars. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 284–85 (1994); John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 819–35 (1995) [hereinafter Nagle, *Waiving Sovereign Immunity*]; *see also* John Copeland Nagle, *Corrections Day*, 43 UCLA L. REV. 1267, 1274 n.25 (1996) [hereinafter Nagle, *Corrections Day*] (cataloging the academic literature regarding congressional responses to apparent judicial mistakes in statutory interpretation).

33. *See infra* notes 63–103 and accompanying text.

34. *See infra* notes 69, 87–103 and accompanying text.

obligations and that legislative history does not provide a legitimate source of legal obligations,[35] new textualists assert four instrumentalist arguments for disregarding legislative history. First, new textualists argue that reliance upon legislative history discourages legislatures from enacting clear, easily understood statutes.[36] Because legislators can use legislative history to address ambiguities in statutory text, they lack the incentive to eliminate those ambiguities.[37] Accordingly, judicial recognition of legislative history encourages sloppy drafting. The resulting statutory vagueness both increases the relevant audience's difficulty in ascertaining the law and allows legislatures to delegate to the judiciary the task of resolving difficult policy issues that elected officials should resolve.[38] Indeed, new textualists explicitly acknowledge their desire to compel more precise congressional drafting.[39]

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35. *See* Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment); Center for Auto Safety v. Peck, 751 F.2d 1336, 1351 (D.C. Cir. 1985). *See generally* Bell, *supra* note 4, at 48–59 (describing the assumptions underlying new textualism).

36. *See, e.g., In re* Sinclair, 870 F.2d 1340, 1342–43 (7th Cir. 1989) (stating that legislative history is a "crutch" that allows legislatures to enact imprecise statutes); *Interbranch Relations: Hearings Before the Joint Comm. on the Organization of Congress*, 103d Cong. 85 (1993) (Sup. Docs. No. Y4.3:OR3/IN8) [hereinafter *Interbranch Relations*] (statement of Judge Kozinski of the Ninth Circuit Court of Appeals) (decrying the legislative practice of "purposely leav[ing] . . . statutory language vague, and then tak[ing] every opportunity to salt the legislative record with hints, clues, nudges, and shoves all intended to influence later judicial interpretations of the statute"); Eskridge, *supra* note 2, at 677 (summarizing and criticizing Justice Scalia's view that strictly applied textualism will lead to clearer statutes); Michael Herz, *Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation*, 16 HARV. ENVTL. L. REV. 175, 204 (1992) ("One often-cited goal of textualism is to induce Congress to legislate with great care and precision." (citation omitted)); William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1143, 1149 (1992) (discussing how Justice Scalia's technique may coerce legislatures into more careful drafting); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 253 (1992) (arguing that rigorous judicial application of textualism will probably lead legislators to enact "plainer and more meaningful" statutes); Sunstein, *Interpreting Statutes*, *supra* note 19, at 457 ("Clear-statement principles force Congress expressly to deliberate on an issue and unambiguously to set forth its will . . . ."); Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1022 (1992) ("If Congress is told that it no longer can communicate through legislative history, it will have an incentive to be more thorough and precise in the statutory text.").

37. *See* W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 393, 397 (1992) (describing an instance in which legislative history was inserted in a House debate in lieu of amending the text of a statute).

38. *See infra* note 269–72 and accompanying text.

39. For instance, the Office of Legal Policy has suggested that the new textualist approach "would likely, if adopted, encourage Congress to place a greater emphasis on

Second, new textualists have expressed concern about the unreliability of legislative history as an expression of Congress's actual desires, noting that legislative minorities can manipulate legislative history in ways that frustrate the majority will.[40] New textualists posit that members concentrate on the text of statutes and that legislative majorities express their policy preferences in that text.[41] In contrast, legislators never formally vote to approve legislative history, which assumes a lower profile than text. By

draftsmanship and to specify more carefully in the statute the rules it wishes the executive and the judiciary to follow." OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION v (1989); *see also id.* at 63–64 ("By forcing Congress to pay greater attention to draftsmanship, a commitment to the plain meaning rule results in more carefully drawn legislation.").

40. *See Conroy*, 507 U.S. at 521 n.3 (Scalia, J., concurring in the judgment) (citing to a "supposed floor statement [which was] shown by internal evidence never to have been delivered"); Federal Election Comm'n v. Rose, 806 F.2d 1081, 1090 (D.C. Cir. 1986) ("[The D.C. Circuit] has condemned the well-recognized phenomenon of deliberate manipulation of legislative history at the committee level to achieve what likely cannot be won before Congress as a whole." (citation omitted)); OFFICE OF LEGAL POLICY, *supra* note 39, at 53–55 (critiquing judicial reliance on legislative history because it encourages legislators to manipulate the legislative history); Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1132 (1983) ("Reliability is further undermined by the widespread practice, at least in Congress, of allowing legislators to amend or supplement their remarks in the published version of the *Congressional Record.*"); Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TULANE L. REV. 1, 24–28 (1988) (asserting that unreliability concerns provoked by the use of legislative history suggests that care should be taken with the use of those materials); Zeppos, *supra* note 11, at 1310, 1347 (describing the new textualist position); *see also* William T. Mayton, *Law Among the Pleonasms: The Futility and Aconstitutionality of Legislative History in Statutory Interpretation*, 41 EMORY L.J. 113, 151–52, 153–54 (1992) ("Special interest litigation is today commonly acknowledged as a palpable vice of the [legislative history] system."); Spence, *supra* note 8, at 591–93 ("According to public choice theory, legislation is chiefly the product of deals made by groups seeking to advance their own economic interests."); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 376–77 ("[T]echnocrats, lobbyists, and attorneys have created a virtual cottage industry in fashioning legislative history so that Congress will appear to embrace their particular views in a given statute.").

41. The argument's factual predicate is questionable. First, members and their staffs may devote more attention to some elements of the legislative history, such as committee reports or the statements of floor managers, than they do to the statutory text. *See* Bell, *supra* note 21, at 53 & n.195. Second, a legislative majority can convincingly indicate its disapproval of an explanation in a report despite the absence of a formal ability to amend the report. *See id.* The new textualist position more convincingly rests on a normative proposition that legislators *should* pay attention to the statutory text, and only the statutory text, regardless of whether they actually do so. *See id.* at 52–58. Accordingly, members' failure to focus on the text of the statute is a failure of the members to fulfill their responsibilities. I have discussed extensively the reasons for rejecting such a normative proposition in an earlier piece. *See id.* at 53 & n.195.

relying on legislative history, courts give effect to policies that were not formally considered by all legislators and may even not have come to the attention of many legislators.

Committee reports provide an illuminating example. The full membership of the legislative chamber can neither vote on nor amend a committee report during consideration of a bill[42]—indeed, even the standing committee that reports the bill does not vote on the report.[43] Typically, members do not read committee reports in detail.[44] Thus, clever legislators—or, even worse, clever staff members or lobbyists—can insert their own policy prescriptions in committee reports, even if these policies would never garner support from a majority of legislators.

Likewise, new textualists disdain congressional floor statements. New textualists note that few legislators even hear floor statements because few of them attend floor debates.[45] Moreover, the *Congressional Record*, the official record of floor debates, can be manipulated. Members can revise their remarks to include statements that they never made and that other members would not

42. *See* Wallace v. Christensen, 802 F.2d 1539, 1559–60 (9th Cir. 1986) (Kozinski, J., concurring in the judgment); 128 CONG. REC. 16,918 (1982) (statement of Sen. Armstrong); CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 182 (1989); *see also* Jerrold Zwirn, *Congressional Committee Reports*, 7A GOV'T PUBLICATIONS REV. 319, 326 (1980) ("[Although] reports are formal statements whose importance often rivals the bills they accompany, the fact that they consist of argument and explanation and do not have the force of law means that they are not themselves acted upon by the parent body during floor consideration of a bill.").

43. *See* Hirschey v. Federal Energy Regulatory Comm'n, 777 F.2d 1, 7–8 & n.1 (D.C. Cir. 1985) (Scalia, J., concurring); TIEFER, *supra* note 42, at 181–82.

44. *See* Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 620 (1991) (Scalia, J., concurring in part and concurring in the judgment); Blanchard v. Bergeron, 489 U.S. 87, 98 (1989) (Scalia, J., concurring); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 32, 33 (Amy Gutmann ed., 1997); *see also* Omaha Pub. Power Dist. v. Nebraska Dep't of Revenue, 537 N.W.2d 312, 321 (Neb. 1995) (Caporale, J., concurring) (discussing Justice Scalia's views as expressed in *Mortier*).

45. *See* Friedrich v. City of Chicago, 888 F.2d 511, 517 (7th Cir. 1989) ("Floor debates are not a reliable guide to the meaning of statutes. They are poorly attended and members of Congress can make additions to the *Congressional Record* after debate without notice to their colleagues."), *judgement vacated and remanded*, 499 U.S. 933 (1991); *Omaha Pub. Power Dist.*, 537 N.W.2d at 321 (Caporale, J., concurring) (arguing that remarks made during floor debate are unreliable indices of majority intent because few members attend floor debates); Scalia, *supra* note 44, at 32 (arguing that if "legislative intent" exists, it cannot be discerned by examining the records of legislative debates because "the floor is rarely crowded for a debate").

have heard even if they had attended the floor debate.[46] In short, legislative history provides a vehicle that legislative minorities can use to create law without risking defeat by majority vote in the House or the Senate or veto by the President.[47]

Third, the interpretive use of legislative history increases the power of congressional staff by allowing staff to set policies in documents that legislators never review.[48] Legislative history, particularly committee reports—the most prized legislative history[49]—are often drafted by staff with little involvement by members.[50] Justice Scalia has warned that reliance on committee

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46. *See Friedrich*, 888 F.2d at 517; TIEFER, *supra* note 42, at 235–36; James Nathan Miller, *Congress's License to Lie*, READER'S DIG., Feb. 1983, at 72, 72–73.

47. *See In re* Sinclair, 870 F.2d 1340, 1342–43 (7th Cir. 1989); Federal Election Comm'n v. Rose, 806 F.2d 1081, 1090 (D.C. Cir. 1986); Wallace v. Christensen, 802 F.2d 1539, 1559–60 (9th Cir. 1986) (Kozinski, J., concurring in the judgment); National Small Shipments Traffic Conference, Inc. v. Civil Aeronautics Bd., 618 F.2d 819, 828 (D.C. Cir. 1980); Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 341–42 & n.51 (1990); Zeppos, *supra* note 11, at 1302–04.

48. *See Blanchard*, 489 U.S. at 98–99 (Scalia, J., concurring); *Sinclair*, 870 F.2d at 1342–43; *Hirschey*, 777 F.2d at 7 (Scalia, J., concurring); Breyer, *supra* note 8, at 862–64; *see also* Roger H. Davidson, *What Judges Ought to Know About Lawmaking in Congress*, *in* JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 90, 101 (Robert A. Katzmann ed., 1988) [hereinafter JUDGES AND LEGISLATORS] (commenting on the difficulty of ascertaining when legislative documents "reflect the considered judgment of the legislators, and to what extent they embody the objectives of unelected staff members"); *id.* at 102 ("Staff influence is at its peak in low-visibility products—technical language, provisions of lengthy omnibus bills, committee reports, correspondence, and verbal communications with executive agencies.").

Some anecdotal evidence supports this claim. *See* ROBERT A. KATZMANN, INSTITUTIONAL DISABILITY: THE SAGA OF TRANSPORTATION POLICY FOR THE DISABLED 50–54 (1986) (describing how staff-drafted report language went far beyond the provisions of the Rehabilitation Act of 1973, creating confusion in the courts and administrative process); Robert A. Katzmann, *The Underlying Concerns*, *in* JUDGES AND LEGISLATORS, *supra*, 7, 11 & n.11 (describing a situation in which Senator Moynihan asserted that staff placed a comment in a footnote of a conference committee report that was not discussed by members of Congress).

49. *See* Zuber v. Allen, 396 U.S. 168, 186 (1969); *see also* JAMES WILLARD HURST, DEALING WITH STATUTES 42 (1982) ("Most influential are the reports of the legislative committees that considered the bill that became the statute. It is an appropriate emphasis, because the committee is normally the workplace in which members have hammered out the particular content of the measure." (citation omitted)).

50. In *Hirschey v. Federal Energy Regulatory Commission*, 777 F.2d 1 (D.C. Cir. 1985), then-Judge Scalia popularized a colloquy between two Senators that exemplified the lack of committee-member involvement in the preparation and review of committee reports. *See id.* at 7–8 n.1 (Scalia, J., concurring). In part, the discussion proceeded as follows:

> Mr. ARMSTRONG. Mr. President, will the Senator tell me whether or not he wrote the committee report?
>
> Mr. DOLE. Did I write the committee report?

reports is "converting a system of judicial construction into a system of committee-staff prescription."[51] In contrast, if legislative history were disregarded, policies could gain authoritative recognition only if set forth in legislation voted on by members of Congress and signed by the President.

Fourth, courts' use of legislative history allows lobbyists to smuggle their policies into the law.[52] Lobbyists attempt to persuade staff members to place language favorable to their positions in committee reports.[53] Because members do not involve themselves in the drafting of committee reports, they do not review these interest

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Mr. ARMSTRONG. Yes.

Mr. DOLE. No; the Senator from Kansas did not write the committee report.

Mr. ARMSTRONG. Did any Senator write the committee report?

Mr. DOLE. I have to check.

Mr. ARMSTRONG. Does the Senator know of any Senator who wrote the committee report?

Mr. DOLE. I might be able to identify one, but I would have to search. I was here all during the time it was written, I might say, and worked carefully with the staff as they worked....

Mr. ARMSTRONG. Mr. President, has the Senator from Kansas, the chairman of the Finance Committee, read the committee report in its entirety?

Mr. DOLE. I am working on it. It is not a bestseller, but I am working on it.

Mr. ARMSTRONG. Mr. President, did members of the Finance Committee vote on the committee report?

Mr. DOLE. No.

Id. (Scalia, J., concurring) (quoting 128 CONG. REC. 16,918 (1982)).

51. *Id.* at 7–8 (Scalia, J., concurring).

52. *See Wallace*, 802 F.2d at 1559–60 (Kozinski, J., concurring in the judgment) (noting that committee reports "are usually written by staff or lobbyists"); *National Small Shipments Traffic Conference, Inc.*, 618 F.2d at 828 (noting that interest groups that fail to persuade a majority of Congress can now get language inserted into the legislative history in an attempt to persuade the courts of their view); ABNER MIKVA & PATTI B. SARIS, THE AMERICAN CONGRESS: THE FIRST BRANCH 216 (1983) ("Staff members use the language in a [committee] report as a significant bargaining tool. An interest group is sometimes content to get its language into the report, knowing that somewhere down the line it can point to the language in a court challenge...."); TIEFER, *supra* note 42, at 182 (reporting lobbyists' efforts to get staff members to place favorable language in committee reports); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 327 (1990) ("Interest groups often have their legislative allies pack committee reports and stage planned colloquies to suggest a meaning for the statute that they cannot place in the [actual] statutory language." (citation omitted)); Note, *supra* note 36, at 1005 ("Justice Scalia eschews legislative history for several reasons, including his doubt about the coherence of the concept of congressional will and his concern that committee staff members and lobbyists often write these histories." (citations omitted)).

53. *See* Robert A. Katzmann, *Summary of Proceedings*, *in* JUDGES AND LEGISLATORS, *supra* note 48, at 162, 174 (reporting a statement by Michael Remington, chief counsel for the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, that "Washington lawyers ... 'spend a lot of time drafting report language ... and trying to plant it' ").

group policies. Thus, by recognizing committee reports as authoritative, judges allow interest groups and their lobbyists to secure the "enactment" of policies that could not garner a majority if openly debated.[54]

With respect to the issues outlined above—the vagueness of statutes, the reliability of congressional documents, and the role of staff and interest groups—the new textualists appear willing to impose their own judgments upon legislatures. Significantly, and overlooked by the new textualists, Congress has not reached the same conclusions as the new textualists on such issues; in fact, members of Congress appear to support the continued use of legislative history in interpreting statutes.[55] Members of Congress sometimes view legislative history as a helpful tool in crafting legislation.[56] Moreover, nothing prevents legislators from addressing either the authority of legislative history or the manner in which it is compiled, yet, at most, Congress has made modest changes regarding legislative history.

Despite the vocal statements of new textualist academics and jurists, members of Congress do not seem to have concluded that the use of legislative history is problematic. To the contrary, while there have been some changes in the compilation of *Congressional Record*[57] and a few proposals regarding committee reports,[58] legislative history has hardly been the central battleground of internal or public pressure for congressional reform.[59] Congress could address the new

54. These last three points apply to committee reports more than to other valued legislative history, such as floor manager statements or sponsor statements.

55. Congress has embraced the use of imprecise statutes supplemented by legislative history; and it frequently enacts legislation in just such a manner. Congress also has established the procedures for compiling committee reports and the *Congressional Record* and seemingly has determined that staff and interest groups do not wield excessive power—or at least such influence does not warrant changing the significance accorded to or the manner of compiling legislative history. *See, e.g., infra* notes 277–83 and accompanying text.

56. *See, e.g.*, Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J. L. & PUB. POL'Y 43, 47 (1988).

57. *See infra* notes 277–83 and accompanying text.

58. *See Statutory Interpretation and the Uses of Legislative History*, *supra* note 12, at 119–21 (statement of Stephen Ross) (proposing that committee members sign committee reports); *id.* at 90 (statement of William N. Eskridge, Jr.) (proposing that committees be required to vote on committee reports as well as the text of statutes).

59. *See, e.g.*, Noman J. Ornstein & Amy L. Schenkenberg, *Congress Bashing: External Pressures for Reform in the 1990s*, *in* JAMES A. THURBER & ROGER H. DAVIDSON, REMAKING CONGRESS: CHANGE AND STABILITY IN THE 1990S, at 116, 116 (1995). One new textualist concern that has captured the attention of the public, the media, and some members of Congress is the influence of interest groups in the political process. Yet reform efforts to address even that concern have not focused on the influence of special interests in the process of compiling legislative history. *See, e.g.*,

textualist concerns about legislative history if it perceived them to be a problem, yet Congress has not done so.[60] Instead, legislators appear to support the continued use of legislative history in interpreting statutes.[61] New textualists, however, seek to impose their own judgment about the proper role of legislative history in statutory interpretation,[62] even though their judgment may at times conflict with the views of legislators.

B. The Conundrum

The new textualist willingness to review legislative judgments appears to conflict with the deference that the courts in general, and the new textualists in particular, accord legislative judgments in a wide variety of contexts. When addressing due process and equal protection challenges to substantive legislation, federal and state courts often exhibit great deference to legislative judgments. When litigants challenge congressional procedures, federal courts show great deference to legislative judgment, dismissing most such cases without even considering the challenge's merits. When litigants challenge certification by the presiding officers of the House and the

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Candice J. Nelson, *Campaign Finance Reform*, *in* THURBER & DAVIDSON, *supra*, at 145, 145–48.

60. Congress could abolish committee reports or specify that they no longer be relied upon. Indeed, Congress has done so in at least one instance. *See* 5 U.S.C. § 801(g) (1994) (providing that courts may not draw any inference from Congress's refusal to veto a statute under a new legislative veto law).

61. *See, e.g.*, *Statutory Interpretation and the Uses of Legislative History*, *supra* note 12, at 2 (statement of Rep. Kastenmeier); *id.* at 2–3, 65 (statements of Rep. Moorhead); Hatch, *supra* note 56, at 43; Katzmann, *supra* note 53, at 171 (reprinting a statement by Judge Mikva); Abner J. Mikva, *Reading and Interpreting Statutes*, 48 U. PITT. L. REV. 627, 631, 633–34 (1987).

Even Justice Scalia moderated his views on the issue during his Senate confirmation hearings. *See Nomination of Judge Antonin Scalia: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong. 65–68 (1986) (Sup. Docs. No. Y4.J89/2:S.hrg.99-1064) (conversation between Sen. Grassley and then-Judge Scalia); *see also id.* at 74–75 (colloquy between Sen. Heflin and then-Judge Scalia) (discussing then-Judge Scalia's statements that courts should not accord great weight to committee reports when interpreting statutes); *id.* at 105–07 (conversation between Sen. Mathias and then-Judge Scalia) (discussing then-Judge Scalia's position that he will not "utterly ignore" or categorically refuse to refer to legislative history as a member of the Supreme Court).

Some states have, by statute, authorized courts to refer to legislative history in interpreting statutes. *See, e.g.*, COLO. REV. STAT. ANN. § 2-4-203(1) (West 1999); IOWA CODE ANN. § 4.6.3 (West 1995); MINN. STAT. ANN. § 645.16 (West 1947); PA. STAT. ANN. tit. 1, § 1921(c) (West 1995); TEX. GOV'T CODE ANN. § 311.023(3) (West 1998).

62. New textualists may disclaim any desire to tell Congress how to legislate. *See, e.g.*, *Interbranch Relations*, *supra* note 36, at 95 (testimony of Judge Alex Kozinski of the Ninth Circuit Court of Appeals) (denying the charge that new textualists are "somehow ... telling Congress how to legislate").

Senate that bills have been adopted in accordance with governing procedures, the courts do not permit such challengers to proffer supporting evidence. Each of these doctrines offers a striking contrast to new textualism's dismissal of congressional judgments.

When a citizen challenges the constitutionality of a statute, the courts presume that the statute can pass constitutional muster.[63] Unless a statute impairs a fundamental interest, such as freedom of speech, or employs a suspect classification, such as race,[64] courts will uphold any statute that has a rational basis. The requirement that government action have a rational basis is not a demanding one, and under it the political branches enjoy a great deal of deference. A court will hold that a statute has a rational basis if there is any reasonably conceivable justification for the statute.[65] In effect, courts

63. *See, e.g.*, Heller v. Doe, 509 U.S. 312, 320 (1993); Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 461–62 (1988); New York State Club Ass'n v. City of New York, 487 U.S. 1, 17 (1988).

64. When a statute impairs the exercise of fundamental rights or employs suspect classifications, the Court does not presume the constitutionality of the statute and engages in more exacting scrutiny. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978) (plurality); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1970); HURST, *supra* note 49, at 99–102; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-6 to -7 (2d ed. 1988). In particular, the Court ordinarily will not uphold such a statute unless it meets the test for strict scrutiny—that it is narrowly tailored to further a compelling state interest. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995) (holding that racial classifications are constitutional only if they "serve a compelling governmental interest, and [are] narrowly tailored to further that interest"); *Bakke*, 438 U.S. at 357 (plurality) (stating that under strict scrutiny a governmental action can be upheld "only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available"); *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3, at 602 (5th ed. 1995) (stating that a statute must be necessary or narrowly tailored to further a compelling interest to survive strict scrutiny).

The court also engages in intermediate scrutiny, which is more rigorous than that under the "rational basis" test, but less rigorous than that under strict scrutiny. *See* TRIBE, *supra*, § 16-33, at 1610; Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 297–301 (1992).

65. *See* Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 646 (2000); Central State Univ. v. American Ass'n of Univ. Professors, 526 U.S. 124, 127–28 (1999) (per curiam); *Heller*, 509 U.S. at 320; FCC v. Beach Communications, Inc., 508 U.S. 307, 313–14 (1993). The Court will even uphold a statute on the basis of hypothetical reasoning not thought of by the legislature or different from that indicated in the legislative history. *See* McGowan v. Maryland, 366 U.S. 420, 426 (1961); H.R. REP. NO. 103-613, vol. 2, at 170 (1993) (Sup. Docs. No. Y1.1/8:103-613/vol.2) (noting that many times the effect of the Court's deference in judicial review of statutes "leads the Court to sustain a statute on a basis of legitimacy that was not at all what underlay congressional action"); TRIBE, *supra* note 64, § 8-7, at 582; *id.* § 17-2, at 1681; Gerald Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 21, 33, 47 (1972). However, sometimes the Court is more stringent. *See* TRIBE, *supra* note 64, § 17-3, at 1684; Gunther, *supra*, at 33.

The rational basis test rarely results in the invalidation of statutes. *See* TRIBE,

leave Congress free to resolve issues on which reasonable people can disagree.[66] Such deference minimizes the counter-majoritarian difficulty.[67] Thus, when deferring to legislative judgments, the Supreme Court explains that it cannot engage in more aggressive judicial review without assuming the role of a "superlegislature" or "Council of Revision" that merely substitutes its own value judgments for the legislature's.[68] In particular, Justice Scalia often berates his colleagues for failing to accord appropriate deference to the political branches of government when considering claims that governmental actions violate the individual rights clauses of the Constitution.[69] Indeed, in these substantive constitutional challenges,

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supra note 64, § 16-3, at 1443. The test's lack of rigor can be attributed to a concern that the courts are not the appropriate institution to determine the proper goals of government. *See* Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 682–83 (3d Cir. 1991); TRIBE, *supra* note 64, § 8-7, at 582–84; *id.* § 16-2, at 1440; MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 60–61 (1999); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 207–22 (1976); Lawrence Gene Sager, *Insular Majorities Unabated:* Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, Inc., 91 HARV. L. REV. 1373, 1411–12 (1978).

66. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938).

67. For classic statements of the countermajoritarian difficulty, see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (Yale Univ. Press 2d ed. 1986); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 7–9, 43–72 (1980); TRIBE, *supra* note 64, § 1-7, at 10–12. For a more recent statement, see JOHN ARTHUR, WORDS THAT BIND: JUDICIAL REVIEW AND THE GROUNDS OF MODERN CONSTITUTIONAL THEORY 48 (1995). One intellectual historian has noted that addressing the countermajoritarian difficulty has taken a great deal of the attention of many leading constitutional law scholars. *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 6, 37–38, 59, 232 (1996).

68. *See Heller*, 509 U.S. at 319 (proclaiming that the Supreme Court is not a superlegislature); Ferguson v. Skrupa, 372 U.S. 726, 731 (1963) (same); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) (same). *See generally* United States v. Richardson, 418 U.S. 166, 188–89 & n.9 (1974) (Powell, J., concurring) (observing that allowing "[u]nrestrained standing in federal taxpayer or citizen suits would create a remarkably illogical system of judicial supervision of the coordinate branches of the Federal Government" that would be worse than the proposal for a "Council of Revision" rejected by the Constitutional Convention).

69. *See* Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 299–301 (1990) (Scalia, J., concurring) (arguing that there is no constitutional right to die); Burnham v. Superior Court, 495 U.S. 604, 622–28 (1990) (plurality) (discussing the limits of procedural due process); Employment Div., Or. Dep't of Human Resources v. Smith, 494 U.S. 872, 890 (1990) (resolving a free exercise claim); Webster v. Reproductive Health Servs., 492 U.S. 490, 532–37 (1989) (Scalia, J., concurring in part and concurring in the judgment) (criticizing the Court's abortion jurisprudence); Stanford v. Kentucky, 492 U.S. 361, 377–79 (1989) (plurality) (analyzing an Eighth Amendment claim); CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 95–96 (1987) (Scalia, J., concurring in part and concurring in the judgment) (discussing the Dormant Commerce Clause). *See generally* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 78 VA. L. REV. 747, 823 (1991) (noting Justice Scalia's "espousal across a wide variety of constitutional contexts of

the Court refuses to consider claims that the statutory text reflects the intent of a mere legislative minority or the undue influence of interest groups.[70] The new textualists' willingness to express disapproval of congressional decisions regarding the reliability of legislative history, the appropriate level of statutory precision, and the role of staff and interest groups seems inconsistent with the deference courts—and new textualists—give to congressional judgments when addressing due process or equal protection challenges.

Courts also defer to congressional judgments regarding appropriate legislative procedures when legislators or citizens challenge the validity of those procedures directly. Such procedural challenges perhaps more closely resemble the new textualist challenges than do the substantive constitutional challenges discussed above. Often, in reliance on the Constitution's Rulemaking Clause,[71] the Court refuses to entertain challenges to congressional procedures.[72] Lower courts have refused to consider challenges to the

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a radical opposition to judicial superintendence of legislative decision making," but arguing that Justice Scalia has departed unjustifiably from that approach in addressing affirmative action).

70. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980).

71. U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . ."). For discussions of the original purpose of the Rulemaking Clause, see James E. Castello, Comment, *The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure*, 74 CAL. L. REV. 491, 529–30 (1986), and Michael B. Miller, Comment, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 CAL. L. REV. 1341, 1357–63 (1990).

72. *See* Nixon v. United States, 506 U.S. 224, 226 (1993) (holding a claim that challenged Senate impeachment procedures to be nonjusticiable); United States v. Ballin, 144 U.S. 1, 5 (1892) (stating that so long as constitutional constraints are not ignored nor fundamental rights violated, the House of Representatives has discretion to set its own rules of procedure, and "it is no impeachment of [those] rule[s] to say that some other way would be better, more accurate or even more just"); United States v. Durenberger, 48 F.3d 1239, 1243 (D.C. Cir. 1995) (observing "that a federal court may not decide a lawsuit asking it to impose judicially-formulated rules of conduct on the legislative branch" because the Constitution provides that each house of Congress may set its own rules); Gregg v. Barrett, 771 F.2d 539, 549 (D.C. Cir. 1985) (refusing to consider a claim that the compiling of the *Congressional Record* resulted in an inaccurate official record of congressional debates because even attempting to resolve the claim on the merits would interfere with Congress's constitutional power to manage its own affairs); Moore v. United States House of Representatives, 733 F.2d 946, 956 (D.C. Cir. 1984) ("We are reluctant to meddle in the internal affairs of the legislative branch, and the doctrine of remedial discretion properly permits us to consider the prudential, separation-of-powers concerns posed by a suit for declaratory relief against the complainant's colleagues in Congress." (citation omitted)); Vander Jagt v. O'Neill, 699 F.2d 1166, 1182 (D.C. Cir. 1983) (Bork, J., concurring) (refusing to adjudicate a claim of maldistribution of committee seats in the U.S. House of Representatives because "[t]here is a very real problem of a lack of judicial competence to arrange complex, organic, political processes within a legislature"); Exxon Corp. v. FTC, 589 F.2d 582, 590 (D.C. Cir. 1978) (refusing to enter an order requiring a

practice of allocating the majority party more than its proportional share of seats on congressional committees,[73] the congressionally authorized practice of concealing Central Intelligence Agency appropriations in other budget accounts,[74] and the establishment of a rule requiring a three-fifths majority vote to raise federal income tax rates.[75] When courts do not summarily dismiss procedural claims, they accord extraordinary deference to the legislature. For example,

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congressional committee to safeguard the confidentiality of valuable corporate information that the committee had subpoenaed and explaining that although the court would protect constitutional rights from infringement by congressional committees, there was otherwise "no warrant for the judiciary to interfere with the internal procedures of Congress"); Consumers Union v. Periodical Correspondents' Ass'n, 515 F.2d 1341, 1350–51 (D.C. Cir. 1975) (holding that an organization's challenge to a refusal to accredit *Consumer Reports* to the press gallery of the Congress was nonjusticiable); Skaggs v. Carle, 898 F. Supp. 1, 2 (D.D.C. 1995) (observing that for at least a decade, the D.C. Circuit has consistently held that "the separation-of-powers principle precludes [courts] from reviewing congressional practices and procedures when they primarily and directly affect the way Congress does its legislative business" (internal quotation marks and citation omitted)). *See generally* National Ass'n of Social Workers v. Harwood, 69 F.3d 622, 632–33 (1st Cir. 1995) (concerning a challenge to a Rhode Island House of Representatives rule limiting nonlegislator access to the floor of the chamber); Davids v. Akers, 549 F.2d 120, 122 (9th Cir. 1977) (concerning a challenge to the maldistribution of committee seats by the Speaker of the Arizona House of Representatives); French v. Senate of the State of California, 80 P. 1031, 1032 (Cal. 1905) (noting that the inherent capacity of a legislative body to control its own proceedings is so basic that "if [the] provision were omitted [from the California Constitution], and there were no other constitutional limitations on the power, the power would nevertheless exist, and could be exercised by a majority").

The Court of Appeals for the D.C. Circuit has reached the merits of two such suits. *See* Michel v. Anderson, 14 F.3d 623, 632 (D.C. Cir. 1994) (allowing delegates from the District of Columbia and U.S. territories to vote in the Committee of the Whole House); Kennedy v. Sampson, 511 F.2d 430, 436 (D.C. Cir. 1974) (holding that a U.S. Senator has standing to challenge the validity of a pocket veto). One of the two cases, *Kennedy v. Sampson*, was really an interbranch conflict, not merely a conflict over legislative procedure.

73. *See Vander Jagt*, 699 F.2d at 1181–82.

74. *See* Harrington v. Bush, 553 F.2d 190, 215 (D.C. Cir. 1977); *see also* United States v. Richardson, 418 U.S. 166, 180 (1974) (dismissing a taxpayer's suit to compel publication of the Central Intelligence Agency budget for lack of standing). In *Harrington* the Court explained that:

> Art I., § 5, cl. 2 of the Constitution provides that "[e]ach House may determine the rules of its own proceedings." This provision gives a specific constitutional base—a constitutional status, if you prefer—to the rules that Congress provides for its own proceedings. In deference to the fundamental constitutional principle of separation of powers, the judiciary must take specific care to avoid intruding into a constitutionally delineated prerogative of the Legislative Branch. What [the] appellant would have us do here is to intervene on behalf of one member of the Legislative Branch to change "the rules of its proceedings" adopted by the entire body of the House. This we should not do.

553 F.2d at 214 (citation omitted).

75. *See Skaggs*, 898 F. Supp. at 2–3.

the Supreme Court has held that the Senate, in considering articles of impeachment, has discretion either to hear testimony itself or to delegate the task to a Senate committee.[76] Likewise, the federal courts uphold revenue statutes against claims brought under the Constitution's Origination Clause[77] after only the most cursory examination of legislative records.[78]

Some rejected procedural challenges have raised issues resembling the complaints offered by the new textualists. For instance, *Gregg v. Barrett*[79] addressed claims resembling new textualists' concerns about the *Congressional Record*'s manipulability.[80] In *Gregg*, the D.C. Circuit dismissed the plaintiff's challenges to the procedures for compiling the *Congressional Record*.[81] In rejecting the claim, Judge Abner J. Mikva, writing for the court, explained that "our deference and esteem for [Congress] and for the constitutional command that [Congress] be allowed to manage its own affairs precludes us from even attempting a diagnosis of the problem."[82]

Likewise, the courts have refused to address questions of the proper role of legislative staff, albeit in the context of challenges to the use of staff for nonlegislative purposes. Thus, in *United States* ex rel. *Joseph v. Cannon*,[83] the D.C. Circuit refused to entertain a *qui tam* action seeking to recover from Senator Howard Cannon the salary his congressional office paid a staff member who allegedly engaged solely in activities relating to Senator Cannon's re-election.[84] In doing so, the court explained that the judiciary must avoid questions for which it is "fundamentally underequipped" and refused to "develop standards of conduct for matters not legal in nature."[85] The court concluded that a "challenge to the interworkings of a Senator and his staff member raises at the outset the specter that such a question lurks."[86]

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76. *See Nixon*, 506 U.S. at 238.

77. *See* U.S. CONST. art. I, § 7, cl. 1. The Origination Clause requires that all bills raising revenue originate in the House of Representatives.

78. *See* United States v. Munoz-Flores, 495 U.S. 385, 387–88 (1990); Texas Ass'n of Concerned Taxpayers, Inc. v. United States, 772 F.2d 163, 165, 168 (5th Cir. 1985).

79. 771 F.2d 539 (D.C. Cir. 1985).

80. *See id.* at 540–41.

81. *Id.* at 549.

82. *Id.*

83. 642 F.2d 1373 (D.C. Cir. 1981).

84. *See id.* at 1385, 1386.

85. *Id.* at 1379–80.

86. *Id.* at 1380; *see also* Vander Jagt v. O'Neill, 699 F.2d 1166, 1181 (D.C. Cir. 1983) (Bork, J., concurring) (speculating that once courts began reviewing legislative process,

New textualists agree with the judiciary's refusal to entertain challenges to the legislative process. For example, Justice Scalia, perhaps the premier new textualist, has argued that legislative judgments about legislative and electoral procedures deserve great deference. In *Moore v. United States House of Representatives*,[87] then-Judge Scalia wrote a separate opinion concurring in the dismissal of a suit challenging a statute as violating the Origination Clause.[88] In arguing that the suit should have been dismissed on standing grounds, he reasoned that the courts must refrain from supervising the internal workings of the political branches of government—at least until an individual who suffers a concrete injury brings suit.[89] Otherwise, he argued, the courts would exceed their judicial authority. In *McIntyre v. Ohio Elections Commission*,[90] when the Court held that states could not constitutionally prohibit anonymous leafletting, Justice Scalia lamented the lack of deference given to legislative judgments.[91] He accused the majority of following its own views rather than those of "state legislatures and the Federal Congress" on a "practical matter that bears closely upon the real life experiences of elected politicians and *not* upon that of unelected judges."[92]

Even with respect to the validity of legislative documents, courts do not second-guess legislative bodies. The federal courts have long employed the enrolled bill rule, which precludes them from questioning presiding legislative officers' certification that the

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they would have to address questions of staff allocation). The D.C. Circuit took a similar approach with respect to the use of staff in the executive branch in *Winpisinger v. Watson*, 628 F.2d 133 (D.C. Cir. 1980), by refusing to entertain a claim that members of the Carter Administration were using federal funds to pursue the re-election of the President because it would "unquestionably bring the court and the executive branch into conflict [as] the court would be placed in the position of evaluating every discretionary consideration . . . for traces of political expediency." *Id.* at 140.

Admittedly, the concerns raised in these cases are somewhat different than the new textualist concerns. In *Cannon* and *Winpisinger*, the challenged practices threatened to distort the political process by giving incumbents the special privilege of relying on government resources during election campaigns. The new textualist concerns focus on staff members' ability to make law in the legislative process. *See supra* notes 48–51 and accompanying text. Nevertheless, the courts probably would not entertain a suit seeking to limit staff involvement in the legislative process. Indeed, if anything, courts have more reason to limit legislators' use of their legislative staff in connection with an election than the use of such staff in connection with their legislative duties.

87. 733 F.2d 946 (D.C. Cir. 1984).

88. *See id.* at 956–65 (Scalia, J., concurring).

89. *See id.* at 958–59 (Scalia, J., concurring) (arguing for according deference to legislatures in direct challenges to congressional procedures).

90. 514 U.S. 334 (1995).

91. *See id.* at 370 (Scalia, J., dissenting).

92. *Id.* at 381 (Scalia, J., dissenting).

respective legislative chambers have passed a bill pursuant to proper procedure.[93] Several justifications have been offered for this rule,[94] however, the justification most relevant for our purposes is that the courts would show disrespect for legislatures if they questioned the certification that the bill had been properly enacted.[95]

In *United States v. Munoz-Flores*,[96] Justice Scalia endorsed the enrolled bill rule, arguing that courts should not independently

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93. *See* 1 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 15.03, at 748–53 (5th ed. 1994); J. A. C. Grant, *Judicial Control of the Legislative Process: The Federal Rule*, 3 W. POL. Q. 364, 380–84 (1950). *See generally* 1 SINGER, *supra*, §§ 15.01–.18, at 743–74 (providing an overview of the enrolled bill rule). Such certifications appear on enrolled bills, which are bills that have been formally printed for presentation to the President. *See* Field v. Clark, 143 U.S. 649, 672 (1892). These certifications are not voted on by the relevant chamber, but are signed solely by the presiding officer. The First Congress established rules requiring the presiding officer of each House to sign the enrolled bill in open session. *See* 1 ANNALS OF CONGRESS 57 (Joseph Gales ed., 1789); Grant, *supra*, at 366. By 1947, however, the presiding officers of both houses had abandoned the practice. *See* Grant, *supra*, at 366, 381 n.99. For a description of the enrolling process, see *id.* at 365–68. For a novel approach to claims that a statute was not properly enacted, see N.J. STAT. ANN. §§ 1:7-1 to -5 (West 1992). The statute gives the Attorney General (at the Governor's direction) or any citizen one year to challenge a statute's procedural validity. *See id.* §§ 1:7-1, -4. *See generally* J. A. C. Grant, *New Jersey's "Popular Action" In Rem to Control Legislative Procedure*, 4 RUTGERS L. REV. 391 (1950) (discussing the New Jersey statute).

In *Field*, the Court refused to entertain a claim that Congress had not voted upon part of the Tariff Act of 1890, ch. 1244, § 30, 26 Stat. 567, 619, because the Justices refused to question the Speaker of the House's certification that the bill had been properly enacted. *Field*, 143 U.S. at 668–72; *see also* Harwood v. Wentworth, 162 U.S. 547, 557–62 (1896) (applying the enrolled bill rule to a bill enrolled by a territorial legislature); United States v. Ballin, 144 U.S. 1, 3–4 (1892) (stating that, even assuming that the journal of Congress could be referenced to support an argument that a duly enrolled bill was not enacted lawfully, a court may not consider evidence outside the journal to impeach the matters recorded in the journal). In *Field*, the Court explicitly acknowledged that the presiding officer of each chamber has a legal obligation to refrain from falsely certifying compliance with proper procedures, explaining:

> There is no authority in the presiding officers of the House of Representatives and the Senate to attest by their signatures, nor in the President to approve, nor in the Secretary of State to receive and cause to be published, as a legislative act, any bill not passed by Congress.

Field, 143 U.S. at 669. The Court noted, however, that the judiciary simply was not the proper institution to police legislative leaders. *See id.* at 670–73.

94. Several justifications have been offered for this rule. One justification focuses upon citizens' reliance interests in bills that have been enrolled. If enrolled bills were subject to the attack that procedural requisites had not been met, citizens would have to inquire extensively into the legislative process before they could rely on the statute. *See* United States v. Munoz-Flores, 495 U.S. 385, 408–10 (1990) (Scalia, J., concurring). *See generally* D & W Auto Supply v. Department of Revenue, 602 S.W.2d 420, 423 (Ky. 1980) (discussing four historical rationales for the enrolled bill rule).

95. *See Munoz-Flores*, 495 U.S. at 408–10 (Scalia, J., concurring); *Field*, 143 U.S. at 672.

96. 495 U.S. 385 (1990).

investigate the origins of revenue raising measures notwithstanding the constitutional requirement that all bills raising revenue originate in the House of Representatives.[97] He suggested that if the bill number indicated that it had originated in the House, the Court should end its inquiry.[98] To do otherwise, he argued, would require that the courts "manifest a lack of respect due a coordinate branch [of government] and produce uncertainty."[99]

New textualists' deference to legislative judgments when legislative procedures are directly challenged clashes with the antipathy for legislative judgments reflected in their interpretative approach.[100] New textualists, however, do seek some consistency between their constitutional jurisprudence and their approach to statutory interpretation. For example, Justice Scalia not only criticizes judicial imposition of substantive values divorced from the Constitution during substantive review of statutes for constitutionality, but he also questions judges' reliance on their own notions of good substantive policy in interpreting statutes.[101] In a recent essay, he explains that "[i]t is simply not compatible with

97. *See id.* at 408–10 (Scalia, J., concurring). He began his opinion by reference to *Field v. Clark* and the enrolled bill rule. *See id.* at 408 (Scalia, J., concurring).

98. *See id.* at 408–10 (Scalia, J., concurring).

99. *Id.* at 409–10 (Scalia, J., concurring).

100. The new textualists' approach perhaps could be defended by asserting that the two contexts are so different that comparison is irrelevant. Such an assertion is unjustified, however, and surely even new textualists would ultimately reject it.

101. *See* Scalia, *supra* note 44, at 18–22. For example, Justice Scalia questions the legitimacy of interpretive theories advanced on this basis by then-Professor Guido Calabresi and Professor William N. Eskridge, Jr. *See id.* at 21–22 (discussing GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 80–83, 101–15, 163–66 (1982) (arguing that courts should exercise the power to overrule statutes more than twenty years old just as they exercise the power to overrule judicial decisions); ESKRIDGE, *supra* note 32, *passim* (arguing that that statutory interpretation should be dynamic and should not necessarily be tied to the interpretation that the enacting legislature would have preferred, especially when enactment and interpretation are separated by long periods of time)). For similar reasons, Justice Scalia questions courts' authority to establish substantive canons of interpretation. *See* Scalia, *supra* note 44, at 28–29. Justice Scalia, however, favors some "clear statement" rules, *see infra* note 228, although most of those appear to be quasi-constitutional. Thus, one can imagine Justice Scalia's and other new textualists' responses to metademocratic theories that advocate interpreting statutes in favor of groups not likely to enjoy political power. *Cf.* Schacter, *supra* note 18, at 622–26 (describing such theories). Surely new textualists would argue that a court should no more use statutory interpretation to further such goals than to use the *Carolene Products*' "discrete and insular" minority analysis for heightened constitutional review. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938). For instance, among the canons that Justice Scalia criticizes as evidencing judicial usurpation of legislative authority is the traditional canon of construction that statutes regarding Native Americans should be construed in favor of Native Americans. *See* Scalia, *supra* note 44, at 27–29.

democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is."[102] Justice Scalia also criticizes the use of many substantive canons of interpretation, asserting that such judicially created, substantive presumptions usurp legislative authority.[103] Thus, we need to explore the new textualists' readiness to disregard legislative judgments when crafting their theory of statutory interpretation. Three popular theories of constitutional jurisprudence could justify the difference in the new textualists' approach to constitutional jurisprudence and statutory interpretation: originalism, process theory, and underenforced norms theory. In the next Part, I examine whether any of these theories justify the aggressive review of congressional procedural decisions implicit in new textualism.

III. JUSTIFYING NEW TEXTUALISTS' HEIGHTENED SCRUTINY

A. Original Intent

New textualists could invoke original intent jurisprudence to justify their implicit disregard of legislative judgments. Some have argued that courts should construe the Constitution in accordance with the intent of the Framers and give great weight to evidence of the Framers' intent.[104] The original intent school contends that practices the Framers engaged in cannot be considered unconstitutional, at least absent some compelling justification. If, for example, the early Congresses, which included many alumni of the Constitutional Convention, began legislative sessions with a prayer, then the contemporary practice of beginning legislative sessions with similar prayers cannot offend the Establishment Clause of the First Amendment.[105] Likewise, current narcotics forfeiture laws, which

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102. Scalia, *supra* note 44, at 22.

103. *See id.*

104. *See, e.g.*, OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 1–5 (1987) (Sup. Docs. No. J1.95:J97) (advocating that judges decide cases according to the original meaning of the Constitution). Indeed, the Court has on occasion relied on an original intent argument to uphold practices that apparently enjoyed the Founding Fathers' approval, but would otherwise be difficult to justify under contemporary constitutional jurisprudence. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 786–92 (1983) (upholding the start of legislative sessions with a prayer); *see also* OFFICE OF LEGAL POLICY, *supra*, at 50–57 (describing 15 Supreme Court cases in which a majority or dissenting opinion employs an original intent approach).

105. Indeed, this reasoning was precisely the basis of the Supreme Court's decision in *Marsh*, in which the Court failed to even mention three-prong test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), that has served as the starting point for analysis in virtually

allow the government to seize property used to violate drug laws, would not compromise the right to due process because when the Fifth and Fourteenth Amendments were adopted such forfeitures were an accepted practice.[106]

New textualists could rely on original intent to justify their rejection of congressional judgments by arguing that the Framers' intent regarding the use of legislative history and the procedural issues calling into doubt the use of legislative history is clear, while the Framers had no clear intent with respect to the practice of homosexuality,[107] the right to die,[108] or the distribution of committee seats between political parties. Justice Scalia, at least, does embrace originalism.[109] Moreover, he has noted the relative modernity of

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every Supreme Court establishment case since *Lemon*. *Marsh*, 463 U.S. at 786–92. The result in *Marsh* would have been hard to reach under *Lemon*. *See Marsh*, 463 U.S. at 796–801 (Brennan, J., dissenting) ("I have no doubt that[] if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional.").

106. *See* Bennis v. Michigan, 516 U.S. 442, 453–55 (1996) (Thomas, J., concurring).

107. *See* Romer v. Evans, 517 U.S. 620, 626 (1996) (invalidating a provision of Colorado's Constitution prohibiting any state or local governmental entity from recognizing homosexuality as entitling any person to a "protected status").

108. *See* Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 279 (1990) (asserting that the logic of Supreme Court precedent suggests that a competent person has a constitutionally protected right to refuse administration of lifesaving medical treatment, hydration, and nutrition); Scalia, *supra* note 44, at 39; Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION, *supra* note 44, at 129.

109. *See* Board of County Comm'rs v. Umbehr, 518 U.S. 668, 686–90 (1996) (Scalia, J., dissenting); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 517–18 (1996) (Scalia, J., concurring in part and concurring in the judgment); Rutan v. Republican Party, 497 U.S. 62, 95–97 (1990) (Scalia, J., dissenting); Scalia, *supra* note 44, at 37–47; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989). *See generally* Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 572–82 (1998) (discussing Justice Scalia's original intent jurisprudence); Arthur Stock, Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160, 177 (discussing Justice Scalia's approach to constitutional interpretation, in which he ordinarily "seeks to interpret the Constitution as the Framers would have understood it," and contrasting Justice Scalia's nonoriginalist textual approach to interpreting statutes). Justice Thomas, another new textualist, is also a devotee of originalism. *See Bennis*, 516 U.S. at 454–55 (Thomas, J., concurring); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 360–69 (1995) (Thomas, J., concurring); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 363–64 (1994); *see also Umbehr*, 518 U.S. at 687 (Scalia, J., dissenting) (hailing Justice Thomas' arrival as "the addition to the Court of another Justice who believes that we have no basis for proscribing as unconstitutional practices that do not violate any explicit text of the Constitution").

Originalism has been subjected to cogent attacks. *See, e.g.*, ARTHUR, *supra* note 67, at 31–38; ELY, *supra* note 67, at 11–41; Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 229–38 (1980). *See generally* PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW: CASES AND MATERIALS

reliance on legislative history and the practice's poor historical pedigree.[110]

Three problems, however, undermine an original intent justification for new textualists' rigorous scrutiny of legislative judgments in the course of justifying their interpretive approach. First, the basis for arguing that original intent should preclude any of the legislative practices that new textualists wish to deter is tenuous at best. Second, even Justice Scalia acknowledges that original intent, by itself, does not justify intrusion into legislative prerogatives. Third, new textualists seem to ground their approach on quite contemporary political theory rather than on a devotion to the Framers' intent.[111]

1. Absence of Original Intent

Reliance on original intent confronts new textualists with a difficult task. In the typical original intent argument, the advocate seeks to demonstrate the permissibility of a practice by tracing its ancient roots. New textualists seeking to craft an originalist challenge to legislative history face a more daunting task—deriving an "original" intent to prohibit a practice from the Framers' failure to engage in that practice. Making such an original intent argument is particularly difficult because the Framers may have had many reasons for failing to adopt, or even for rejecting, practices that have since become popular. Thus, those who pursue originalist arguments must show that the Framers intended the Constitution to prohibit future generations, facing different challenges, from adopting such practices. Any attempt to uncover original intent regarding statutory precision, staff responsibility, legislative record reliability, lobbyist influence, or the use of legislative history to construe statutes produces no clear answer. Moreover, the Constitution as a whole, unlike some state constitutions, appears to leave unresolved virtually all issues of legislative procedure.[112]

11–12 (1996) (briefly describing the original intent approach to constitutional interpretation).

110. *See* Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 622 (1991) (Scalia, J., concurring); Note, *supra* note 36, at 1008.

111. New textualists do not attempt to make much of a historical case for ignoring legislative history or for support of their judgments about legislative procedure. Indeed, new textualism is very heavily influenced by public choice theory, a contemporary theory. *See* FARBER & FRICKEY, *supra* note 12, at 38–42; Bell, *supra* note 4, at 50–52 n.183; Schacter, *supra* note 18, at 637, 641.

112. More specific limitations upon state legislative procedures appear to be a response to nineteenth-century problems. *See* BYRON R. ABERNATHY, CONSTITUTIONAL LIMITATIONS OF THE LEGISLATURE 46, 67–68 (1959); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 465–66, 486 (1988); ROBERT LUCE,

Admittedly, the role or existence of congressional staff is not mentioned in the Constitution.[113] The same, however, can be said for political parties[114] and standing congressional committees—institutions which play a vital and legitimate role in American government.[115] With that in mind, the absence of a reference to staff hardly shows an original intent that there be no legislative staff or that their roles be limited in the way that the new textualists suggest. Legislative records are mentioned only in passing in the Constitution's text, and the Constitution merely requires that Congress keep a journal and periodically publish a statement of accounts.[116] Little evidence suggests that the Framers envisioned the judiciary assuming a substantial role in monitoring the production and maintenance of legislative records.[117] Nor does an original intent

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LEGISLATIVE PROCEDURE 11 (1922); ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 54 (1950); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 543, 553–59 (1988). The state constitutions adopted in the years surrounding the framing of the United States Constitution specified little in the way of legislative procedure. *See* DE. CONST. (1792); DE. CONST. (1776); GA. CONST. (1779); GA. CONST. (1777); MD. CONST. (1776); MASS. CONST. (1780); N.H. CONST. (1784); N.H. CONST. (1776); N.J. CONST. (1776); N.Y. CONST. (1777); N.C. CONST. (1776); S.C. CONST. (1790); S.C. CONST. (1778); S.C. CONST. (1776); VA. CONST. (1776). The constitutions are reprinted in volumes one through six of SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS (William F. Swindler ed. 1973, 1974, 1975, 1976, 1978, 1979).

113. Members and committees did not have staff until the mid-1800s. 1 FINAL REPORT OF THE JOINT COMM. ON THE ORGANIZATION OF CONGRESS, H.R. REP. NO. 103-413, at 59 (1993) (Sup. Docs. No. Y1.1/8:103/413); JOINT COMM. ON THE ORGANIZATION OF CONGRESS, 103D CONG., BACKGROUND MATERIALS: SUPPLEMENTAL INFORMATION PROVIDED TO MEMBERS OF THE JOINT COMM. ON THE ORGANIZATION OF CONGRESS 1379–80 (Comm. Print 1993) [hereinafter BACKGROUND MATERIALS].

114. The Framers may well have disapproved of political parties; James Madison expressed disapproval of factions in the *Federalist Papers*. *See* THE FEDERALIST NO. 10 (James Madison); George Washington, Farewell Address (Sept. 17, 1796), *in* 35 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES: 1745–1799, at 225, 226–28 (John C. Fitzpatrick ed., 1940).

115. *See* RALPH VOLNEY HARLOW, THE HISTORY OF LEGISLATIVE METHODS IN THE PERIOD BEFORE 1825, at 22–23, 78, 116, 126, 129, 135–36 (1917); STEVEN S. SMITH & CHRISTOPHER J. DEERING, COMMITTEES IN CONGRESS 25–30 (2d ed. 1990); Thomas F. Broden, Jr., *Congressional Committee Reports: Their Role and History*, 33 NOTRE DAME LAW. 209, 217–29 (1958).

116. *See* U.S. CONST art. I, § 5, cl. 3 (Journal Clause); *id.* art. I, § 7, cl. 2 (regarding contents of legislative journal); *id.* art. I, § 9, cl. 7 (Statement of Accounts Clause).

117. The courts have not asserted any such role. *See* United States v. Richardson, 418 U.S. 166, 178 n.11 (1974) (holding that the public lacked standing to assert a violation of the Statement of Accounts Clause of the Constitution); Field v. Clark, 143 U.S. 649, 667–73 (1892) (explaining that matters concerning what is included in the legislative journal are left to the discretion of Congress); Gregg v. Barrett, 771 F.2d 539, 549 (D.C. Cir. 1985) (involving the accuracy of the *Congressional Record*); Harrington v. Bush, 553 F.2d 190,

argument aid new textualists with regard to their view of lobbyists; the Framers did not give the courts power to control or limit lobbying.[118] It seems unlikely that the Framers meant either to foreclose future Congresses from considering additional necessary congressional procedures and practices or to empower the courts to review those decisions.

Perhaps the new textualists' concern about statutory vagueness can lay claim to stronger historical support. Some evidence suggests that post-Revolutionary Americans regarded specificity as a virtue.[119] Moreover, courts currently hold that the Due Process Clauses of the Constitution preclude the enforcement of excessively vague statutes.[120] Yet even these arguments have limited value. Neither the *Federalist Papers* nor the debates at the Constitutional Convention and the state ratifying conventions suggest that the Constitution was

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214 (D.C. Cir. 1977) (refusing "to provide a second opinion" on the optimal procedure for legislative action).

118. The First Amendment provides that the right to petition the government shall not be abridged, *see* U.S CONST. amend. I, and some have argued that this provision accords constitutional protection to lobbying. *See, e.g.*, HOPE EASTMAN, LOBBYING: A CONSTITUTIONALLY-PROTECTED RIGHT 1, 3–4, 23 (1977). Modern lobbying, however, bears little resemblance to traditional petitioning and arguably does not fall within the meaning of the First Amendment. *See* Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2160–61 (1989).

119. *See* EDWARD DUMBAULD, THOMAS JEFFERSON AND THE LAW 152 (1978); Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 303 (1989) ("A variety of traditions encouraged Americans to seek clarity in language. Seventeenth- and Eighteenth-century political disputes about the effect of statutes and charters, religious quarrels over the meaning of the Bible, and the inclinations and habits of lawyers had all for centuries inculcated an appreciation of linguistic precision."); *id.* at 305 (discussing Madison's desire for precision); *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 91 (2d ed. 1985) (ascribing the valuing of clarity to colonists' religious beliefs); Gordon S. Wood, *Comment*, *in* A MATTER OF INTERPRETATION, *supra* note 44, at 49, 50 (noting that Thomas Jefferson believed that statutes should be written so that the judge becomes " 'a mere machine' " (quoting Letter from Thomas Jefferson to Edmund Pendleton (Aug. 26, 1776), *in* 1 THE PAPERS OF THOMAS JEFFERSON 503, 505 (Julian P. Boyd ed., 1950))).

In fact, the Privy Council, which reviewed all colonial laws, sometimes invalidated laws on ground that they were excessively vague. *See* ELMER BEECHER RUSSELL, THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL 142–43 (1915) (noting colonial legislation that was invalidated by the Board of Trade for being vague or loosely worded); Stefan A. Riesenfeld, *Law-Making and Legislative Precedent in American Legal History*, 33 MINN. L. REV. 103, 137 (1949) (same). On the other hand, Professors Atiyah and Summers assert that there is a tradition in the United States of drafting statutes in relatively broad language to establish broad general principles. *See* P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 323 (1987). They rely, in part, on the vagueness of the Constitution. *See id.*

120. *See, e.g.*, Winters v. New York, 333 U.S. 507, 509 (1948); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

intended to prohibit vague statutes.[121] In fact, little suggests that the Framers believed that legislation would necessarily be precise.[122] Moreover, the belief that excessively vague statutes offend the Constitution arose long after the founding period.[123] In short, substantial questions remain as to whether original intent justifies judicial review of Congress's precision in drafting statutes.

Though the Framers did not intend to resolve the specific concerns new textualists raise about the legislative process, the Framers might have held a firm conviction that legislative history should have no significance. Such an argument is perhaps the best originalist argument that textualists can advance. In 1769, British courts adopted a rule barring consideration of legislative history in interpreting statutes;[124] American courts adhered to that rule into the mid-1800s.[125] Nevertheless, the existence of such a judicial rule does not conclusively establish the Framers' intent to preclude later generations from revisiting the issue of the role of legislative history in statutory interpretation. During the formative years of our nation, legal understanding remained heavily influenced by the common law, and even judicial constructions of statutes were often heavily laden

121. In England, statutes were not invalidated because of vagueness, and there is no record of the application of the "void-for-vagueness" doctrine in the colonial period. *See, e.g.*, *Note, Void for Vagueness: An Escape from Statutory Interpretation*, 23 IND. L.J. 272, 274–75 (1948). The significance of these points is somewhat questionable, however, because English and colonial courts did not engage in "constitutional" review of statutes.

122. The first Congresses enacted statutes giving the executive branch broad discretion under relatively imprecise standards. *See, e.g.*, Act of June 4, 1794, ch. 41, 1 Stat. 372 (giving the President the authority to lay embargoes when the "the public safety shall so require"); Field v. Clark, 143 U.S. 649, 681–90 (1892) (discussing statutes that give the President broad discretion under relatively imprecise standards in the area of trade and commerce). *But see* THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY 128–43 (1969) (noting the clear standards of discretion that apply to modern governmental agencies).

123. Some trace the origins of the doctrine to 1830s state court decisions and date its recognition by the federal courts in the late 1880s. *See* Joseph E. Bauerschmidt, Note, *"Mother of Mercy—Is This the End of Rico?"—Justice Scalia Invites Constitutional Void-for-Vagueness Challenge to RICO "Pattern,"* 65 NOTRE DAME L. REV. 1106, 1113 n.51 (1990); Note, *supra* note 121, at 275, 278. The first state case employing vagueness to invalidate a statute was *Drake v. Drake*, 15 N.C. (4 Dev.) 110, 115, 116 (1833). The first explicit statement of the doctrine in federal court was in *Chicago & Northwest Railway Co. v. Dey*, 35 F. 866, 876 (C.C.S.D. Iowa 1888). Two earlier cases also mention vagueness in an analysis of a statute. *See* United States v. Sharp, 27 F. Cas. 1041, 1043 (C.C.D. Pa. 1815) (No. 16,264); *In re* The Enterprise, 8 F. Cas. 732, 734 (C.C.D.N.Y. 1810) (No. 4499). The Supreme Court first invalidated a statute as a violation of the Due Process Clause on vagueness grounds in 1914 in *International Harvester Co. of America v. Kentucky*, 234 U.S. 216, 222–24 (1914).

124. *See* Millar v. Taylor, 98 Eng. Rep. 201, 217 (K.B. 1769).

125. *See* Note, *supra* note 36, at 1008–09.

with common-law notions.[126] Consequently, judges enjoyed great discretion when interpreting statutes. Given the discomfort with the type of judicial decisionmaking that was commonplace during the framing of the Constitution,[127] as well as the change in the roles of courts and legislatures—reflecting the transition from a common-law to a largely statutory legal system—the Framers may have embraced

126. *See* THE FEDERALIST NO. 78, at 398–400 (Alexander Hamilton) (Max Beloff ed., 1987) (arguing that the courts were well suited to interpret statutes because of their role as a check on the legislature's power); William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 803 (1985) (noting the prevalence of equity considerations in statutory interpretation); Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 682–88 (1996) (tracing the evolution of the American attitude toward the judiciary from the Revolution to the framing of the Constitution); John Choon Yoo, Note, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L.J. 1607, 1611–12 (1992) (discussing Hamilton's view that the courts could employ statutory interpretation as a means to protect the people from unfair congressional action); Note, *supra* note 36, at 1008–09 n.26 (noting the understanding among early English jurists that statutory interpretation was not limited to the expressed language of a statute). *See generally* Hans W. Baade, *The* Casus Omissus*: A Pre-History of Statutory Analogy*, 20 SYRACUSE J. INT'L L. & COM. 45, 65–91 (1994) (discussing the development of statutory interpretation in Great Britain prior to the American Revolution); Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1, 6–9 (1993) (discussing nonliteral approaches to interpreting statutes from the sixteenth through the nineteenth centuries, including approaches focusing on the equity of the statute, the purpose of the statute, and the intent of the legislature); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 894–99 (1985) (noting that the rules of statutory construction in existence at the time of the establishment of the Constitution permitted looking beyond the text for "reasonable evidence" of its meaning, though this ordinarily meant attempting to read the acts of Parliament against the background of the common law), *reprinted in* INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 53, 58–60 (Jack N. Rakove ed., 1990); Yoo, *supra*, at 1615–29 (noting that the Marshall Court resolved the differences between two divergent approaches to statutory interpretation prevalent in American legal thought—one focusing on judicial discretion and the other directing courts to consider legislative intent).

127. *See* Badaracco v. Commissioner, 464 U.S. 386, 397–98 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement." (citation omitted)); Tennessee Valley Auth. v. Hill, 437 U.S. 153, 193–95 (1978) ("Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute."); United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 542 (1943) ("Sound rules of statutory interpretation exist to discover and not to direct the Congressional will."); United States v. Hong-Liang Lin, 962 F.2d 251, 257 (2d Cir. 1992) (stating that "[t]he government is asking us to improve upon Congress's work" by giving a statute a broad reading and that to do so would be inappropriate); Gonzalez, *supra* note 126, at 688–89 (describing the "honest agent" approach to statutory interpretation, in which the court has no authority to depart from the legislative will in interpreting a statute, and arguing that the "honest agent" approach is inconsistent with the role of the courts implicit in the popular sovereignty and separation-of-powers models ratified in the Federal Constitution).

the use of legislative history to provide the context previously provided by the common law.[128] Given the profound change in our legal system,[129] transposing the Framers' view of the role of legislative history to today poses great peril. In any event, there is little evidence that the Framers sought to preclude future generations from relying on legislative history,[130] and nothing in the Constitution's text clearly resolves these issues.

2. Original Intent and Legislative Prerogatives

Even the existence of clear original intent on the issues new textualists raise would not justify a refusal to defer to congressional judgments. As the courts have recognized, respect for legislative autonomy requires courts to refrain from interfering in legislative processes even when there is a clear constitutional mandate governing that legislative process.[131] Justice Scalia has recognized this principle as well. For example, the Origination Clause, which *requires* that tax bills originate in the House of Representatives, provides a clear constitutional mandate, yet in urging the rejection of an Origination Clause challenge in *Munoz-Flores*, Justice Scalia accorded Congress great deference by invoking the enrolled bill rule.[132] More generally, Justice Scalia has forcefully argued that some constitutional violations have no judicial remedy. In *Webster v. Doe*,[133] for example, he explained that the text of the Constitution itself commits some questions to the political branches of

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128. *See* Blatt, *supra* note 126, at 808–09.

129. *See* Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 383–88 (1908) (analyzing early legislative interpretive methods employed by courts during the shift from common law to a statutory-based legal system in the United States); Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381–86 (1907) [hereinafter Pound, *Spurious Interpretation*] (contrasting the type of interpretation necessary in "formative periods" of a legal system because of the "feebleness of legislation" with the type of interpretation appropriate during "periods of legislation," when legislation becomes "stronger and more frequent"); Scalia, *supra* note 44, at 13 ("We live in an age of legislation, and most new law is statutory law.").

130. *See* Blatt, *supra* note 126, at 813. To some extent Americans reacted against equity jurisprudence without fully rejecting it and sought a more literal approach to interpretation. *See* Gonzalez, *supra* note 126, at 682–84; Wood, *supra* note 119, at 49, 50–51. But this reaction arose out of a desire to curb judicial power vis-a-vis the legislature, rather than the types of concerns new textualists emphasize (or, for that matter, any other legislative dysfunction). Ironically, textualism results in the very same increase in judicial authority (by removing one basis of determining intent) feared by the early American figures who advocated literalism. *See* Bell, *supra* note 4, at 60–62.

131. *See supra* notes 74, 77–78 and accompanying text.

132. *See* United States v. Munoz-Flores, 495 U.S. 385, 408–09 (1990) (Scalia, J., concurring).

133. 486 U.S. 592 (1988).

government, and, thus, constitutional violations involving some issues may remain unredressable because of the respect due coordinate branches.[134] For instance, Justice Scalia noted that judges cannot address the constitutional claim that "an election has been stolen"[135] because the Constitution commits the review of election results to Congress.[136] Justice Scalia went further, arguing that respect for the coordinate branches sometimes requires courts to disregard constitutional claims even when the issue is not explicitly committed to another branch.[137]

Thus, a historical argument cannot compel courts to act—that is, a court should not decide controversies unsuited to judicial resolution merely because an originalist constitutional claim exists. Of course, in *Webster* and *Munoz-Flores*, Justice Scalia addressed only direct constitutional challenges, and the new textualists express disapproval of congressional practices in the course of interpreting statutes rather than by entertaining direct constitutional challenges. Perhaps courts may appropriately exhibit disapproval of congressional practices in the course of interpreting statutes. After all, unlike constitutional rulings, statutory rulings constitute, at worst, a "suspensive veto" that Congress can override by reenacting the statute in clearer terms.[138] Moreover, the judiciary has a legitimate interest in interpretive methodology.[139] I will address such arguments later,[140] but they do

134. *See id.* at 606 (Scalia, J., dissenting).

135. *Id.* at 612 (Scalia, J., dissenting); *accord* Morgan v. United States, 801 F.2d 445, 447 (D.C. Cir. 1986) (holding that the Elections Clause of the Constitution precluded judicial review of the House of Representatives' determination that a Representative had not been lawfully elected). *See generally* Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 406–08 (1984) (observing that "[a]lthough the Constitution is concerned with the policing of governmental processes, it does not make the judiciary the sole or even the dominant institution to carry out this function," and noting that some structural decisions are beyond the control of any future decisionmaker while others are explicitly assigned to one or both of the political branches of government).

136. *See* U.S. CONST. art. I, § 5 ("Each House shall be the Judge of the elections, returns and qualifications of its own members . . . .").

137. *See Webster*, 486 U.S. at 612–13 (Scalia, J., dissenting). Justice Scalia suggests that the standing doctrine is useful in part because it allows courts to protect individuals and minorities while excluding the judiciary from the role of prescribing how the other two branches of government should function to serve the interests of the majority. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 892, 894–97 (1983).

138. *See infra* notes 191–92, 217–18. Congress could even overturn interpretive canons by contrary legislation, although it is unclear how new textualists would react. *See infra* note 192.

139. *See supra* note 21.

140. *See infra* notes 191–220 and accompanying text.

not rest on the claim that the clarity of the Framers' intent justifies the new textualists' aggressive attempt to reform the legislative process.

3. Textualism and Contemporary Political Theory

Finally, new textualists do not purport to base their approach solely on the intent of the Constitution's Framers. New textualists assert that a legislative process in which only statutory text has significance comports more closely with the ideals of democracy. Thus, Justice Scalia has argued that disregarding legislative history furthers the democratic process, asserting that the Court has "an obligation to conduct [its] exegesis [of statutes] in a way which fosters the democratic process."[141] Similarly, in attacking the practice of using legislative history, Justice Kennedy has argued that the examination of legislative history is inappropriate because "rummag[ing] through" legislative history does not further "democratic exegesis."[142] Yet, this conception of the threat to democracy posed by legislative history is primarily a contemporary concern.

New textualists' skepticism about group choice—their doubt about the coherence of rationales for legislative action—derives from modern public choice theory.[143] Public choice theory argues that group choice is not rational.[144] In particular, public choice theorists argue legislative choices are the fortuitous result of the order in which legislative proposals are voted on or merely the result of manipulation by agenda setters. If public choice theorists are correct, they provide good reason to be skeptical about the use of legislative

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141. United States v. Taylor, 487 U.S. 326, 346 (1988) (Scalia, J., concurring in part and concurring in the judgment); *see also* Eskridge, *supra* note 2, at 677 (describing Justice Scalia's argument); Scalia, *supra* note 44, at 18–23 (arguing that reliance on legislative intent is "nothing but an invitation to judicial lawmaking"); Stock, *supra* note 109, at 167 (noting Justice Scalia's argument).

142. Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 473 (Kennedy, J., concurring in the judgment); *accord* United States v. University Hosp., 729 F.2d 144, 161–63 (2d Cir. 1984) (Winter, J., dissenting) (arguing that the majority would "facilitate the democratic legislative process" if it construed congressional statutes literally because doing so would encourage legislatures to "address and resolve the highly delicate issues which may lurk in seemingly unobjectionable legislative proposals").

143. *See generally* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547–48 (1983) (grounding the argument that legislatures cannot have any "intent" on public choice theory); Frank H. Easterbrook, *The Supreme Court 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 14–18 (1984) (using public choice theory to criticize reliance on the legislative history of most statutes) [hereinafter Easterbrook, *The Court and the Economic System*].

144. *See, e.g.*, FARBER & FRICKEY, *supra* note 12, at 38.

history. Accordingly, several of those who attack the use of legislative history challenge its use based on public choice theory's lessons about group choice.[145] Whether public choice theory is an ultimately sound political theory, it surely lacks the imprimatur of the Framers' intent.

In fact, new textualists' concerns about minority dominance of legislatures stand in striking contrast to the Framers' concerns.[146] While the Framers focused on preventing legislative majorities from oppressing minorities, new textualists focus on preventing legislative committees, legislative minorities, and interest groups from enshrining policies in legislative history that the majority of legislators might not support. The fears of new textualists reflect both public choice theory and concerns about the atomization and specialization within Congress resulting from the position of committees in the legislative process.[147]

In short, originalism does not help new textualists. The intent of the Framers regarding legislative history cannot be readily discerned or easily transposed to the contemporary American legal system. Moreover, the existence of Framers' intent alone would not justify judicial interference in internal legislative processes.

B. Process Theory

A second school of constitutional theorists has suggested that in a democracy the judiciary should ensure merely that the political system works properly and should assume a more limited role in reviewing the political branches' substantive decisions.[148] John Hart

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145. *See id.* at 38–42; Bell, *supra* note 4, at 37–43; Shepsle, *supra* note 36, at 244.

146. *See, e.g.*, THE FEDERALIST NO. 10 (James Madison).

147. *See* Brudney, *supra* note 12, at 53–55. For a discussion of committee autonomy in relation to the House and Senate, see WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 103–06, 121–22 (4th ed. 1996), SMITH & DEERING, *supra* note 115, at 169–71, and ARTHUR MAAS, CONGRESS AND THE COMMON GOOD 32–35, 43–44 (1983).

Traditionally courts placed great weight on committee intent for a given statute. *See, e.g.*, Zuber v. Allen, 396 U.S. 168, 186 (1969). In contrast, Justice Scalia has asserted that the meaning of terms in statutes "ought to be determined ... on the basis of which meaning" most likely comports with the understanding of "the *whole* Congress which voted on the words of the statute." Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment). Others have suggested that courts primarily should be interested in the views of typical majority members or in legislators who provide the swing votes rather than the views of committee members. *See, e.g.*, Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 63 (1988); *see also* Costello, *supra* note 12, at 61–62 (discussing Judge Easterbrook's view).

148. *See* ARTHUR, *supra* note 67, at 48–49; Jed Rubenfeld, *Reading the Constitution as*

Ely, a leading process theorist, argues that courts should invalidate statutes only if they distort the political process or result from typical pathologies of the democratic process.[149] Admittedly, Ely's concern—majority dominance of minorities—is the converse of the new textualists' fear, which is that legislative minorities frustrate legislative majorities by using legislative history.[150] Daniel Farber and Phillip Frickey likewise advocate process review rather than substantive review because "[r]ather than scrutinizing the results of the legislative process for signs of taint, it may be better for the courts to police the process itself."[151]

Spoken, 104 YALE L.J. 1119, 1132 (1995).

149. *See* ELY, *supra* note 67, at 102–03. *See generally* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (suggesting heightened scrutiny of laws that "restrict[] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" or laws that reflect prejudice against "discrete and insular minorities" and thus seriously "curtail the operation of those political processes ordinarily to be relied upon to protect minorities"). Like Ely, a second major process theorist, Jesse H. Choper, published a book in 1980. *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980). Ely's and Choper's books have been subjected to extensive commentary and symposia discussion. *See, e.g.*, *Symposium on Democracy and Distrust: Ten Years Later*, 77 VA. L. REV. 631 (1991); Symposium, *Judicial Review Versus Democracy*, 42 OHIO ST. L.J. 1 (1981).

Ely presents his theory of constitutional adjudication as an alternative to the constitutional approach of original intent theorists. *See* ELY, *supra* note 67, at 11–41. Indeed, many consider process theory and original intent theory as distinct, and somewhat conflicting, approaches to constitutional interpretation. *See* ARTHUR, *supra* note 67, at ix, 43; Rubenfeld, *supra* note 148, at 1132. In theory, original intent jurists could comfortably argue that a court should act more assertively in crafting its interpretive methodology to ensure that the political process operates properly than in crafting interpretive methodology to further substantive ends. That is, originalists can believe that courts, in interpreting statutes, should play a greater role in furthering democratic processes than in pursuing substantive outcomes.

150. Ely's argument for aggressive judicial review rests on his concern that minorities must be protected from majorities. Indeed, Ely been criticized for ignoring the potential minority dominance of a majority that results from the probability that small groups will make more of an effort than large, diffuse groups to influence legislators. *See* Komesar, *supra* note 135, at 412–13 n.141, 414–25. New textualists question Congress's procedural choices largely out of fear that minorities will dominate the majority. They assume that majorities cannot and do not protect themselves in structuring congressional procedures.

151. FARBER & FRICKEY, *supra* note 12, at 73; *see also id.* at 119 & n.6 ("We agree with Hans Linde that the courts seem more capable of constructing 'a blueprint for the due process of deliberative, democratically accountable government' than of assessing, in all but exceptional cases, whether legislation properly promotes public values." (quoting Linde, *supra* note 65, at 253)); Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 365 (1982) ("Process-based judicial review seems a good deal less ambitious than its substantive counterpart. It seeks merely to ensure that value choices arguably in conflict with those of the Founders be made by an appropriate government body pursuant to appropriate rules." (citation omitted)); Susan Rose-Ackerman, *Progressive Law and Economics—And the New Administrative Law*, 98 YALE L.J. 341, 354 (1988) (proposing that courts "reinforce democratic representation by

Citizens, acting through their elected representatives, do not lose their interest in deciding issues merely because those issues can be characterized as procedural. Therefore, process theorists offer three justifications for the judiciary's assumption of a more active role in reviewing procedural, rather than substantive, decisions. First, the judiciary possesses greater expertise in addressing procedural issues than substantive issues.[152] Second, procedural issues are more amenable to resolution by "neutral principles"[153] and thus do not require courts to make value judgments that elected officials should make.[154] The third process theory justification does not assume heightened judicial competence, but diminished legislative competence. Process theorists argue that legislative resolution of procedural issues warrants distrust because elected officials have incentives to determine these issues in a manner that is neither deliberate nor unbiased.[155]

Some justifications of process theory are problematic in general. Others have force in some circumstances, but not when used to justify heightened judicial scrutiny of legislatures' internal processes. Concerns about protecting legislatures' institutional autonomy may counsel added caution in pursuing a process theory approach.

Although courts reputedly possess special competence to judge

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adding greater realism to judicial interpretation of statutes and review of the legislative process").

152. *See* ELY, *supra* note 67, at 21, 102.

153. *Id.* at 54–55. There is a tradition of seeking to discover neutral principles on which to ground constitutional law. *See generally* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 35 (1971) ("The Supreme Court's constitutional role appears to be justified only if the Court applies principles that are neutrally derived, defined, and applied."); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) (arguing that courts have the power and the duty to analyze cases on "grounds of adequate neutrality and generality").

154. Some process scholars rely on another, purely temporal argument: the judiciary should assume a greater role in addressing procedural issues because specification of the process precedes resolution of substantive issues. *See* Neuborne, *supra* note 151, at 366–67; Frederick Schauer, *Judicial Review of the Devices of Democracy*, 94 COLUM. L. REV. 1326, 1343 (1994). In other words, procedures must be established before substantive issues can be resolved. For example, before the U.S. Government could begin to address substantive issues, a Federal Constitution had to be drafted and ratified—the establishment of procedural requirements for legislation had to precede the adoption of statutes. Similarly, the first order of business in the House of Representatives in each Congress is to enact its standing rules for that Congress, *see* CHARLES W. JOHNSON, III, HOW OUR LAWS ARE MADE 2 (rev. ed. 1998), and the first order of business in legislative debate is to debate and vote upon the special rule proposed by the House Rules Committee, *see* OLESZEK, *supra* note 147, at 165; BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 26 (1997).

155. *See* ARTHUR, *supra* note 67, at 49–52; ELY, *supra* note 67, at 101–04; Schauer, *supra* note 154, at 1336–37 & n.3.

procedural issues,[156] the procedural issues that fall within that expertise relate to adjudicative proceedings. Significantly, process theorists have not shown that judges have acquired any special competence with regard to issues of legislative procedure.[157] Nor have process theorists made such a showing with respect to the various nonlegislative matters that fall within the jurisdiction of one

156. *See* Nixon v. United States, 506 U.S. 224, 248 (1993) (White, J., concurring in the judgment) ("One might think that if any class of concepts would fall within the definitional abilities of the Judiciary, it would be the class having to do with procedural justice."); Hi-Craft Clothing v. NLRB, 660 F.2d 910, 914–16 (3d Cir. 1981) (comparing judicial and agency competence); ELY, *supra* note 67, at 21, 87–88, 102 (critiquing the assumption that the courts have unique expertise regarding questions of how the political system allocates "voice and power"); Komesar, *supra* note 135, at 379 (positing that given the selection and training of judges, they are better at resolving procedural issues, or at least they feel most comfortable dealing with such issues); Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEG. STUD. 627, 643 (1994) (noting that judges generally "have significant expertise in existing procedural norms"). *See generally* 5 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 29.14, at 393 (2d ed. 1984) (emphasizing judicial competence regarding issues of procedural fairness); Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 59–62 (1985) (observing that some writers' belief that the courts should exercise independent judgment when reviewing agency procedural decisions is consistent with "the widely repeated but controversial claim that judges are the 'experts' on procedural fairness").

157. *See* Vander Jagt v. O'Neill, 699 F.2d 1166, 1182 (D.C. Cir. 1983) (Bork, J., concurring); ALEXANDER BICKEL, REFORM AND CONTINUITY 2 (1971); Davidson, *supra* note 48, at 94; Katzmann, *supra* note 53, at 177; Katzmann, *supra* note 48, at 11, 15, 19. *See generally* Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (stressing that political branches are accorded deference in determining what process is due); 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.5, at 61–62 (3d ed. 1994) (arguing that courts are not as competent as legislatures and agencies in performing cost-benefit analysis such as the three-part test in *Mathews v. Eldridge*); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 47–49 (1976) (same); Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973, 1998 (1996) (asserting that legislatures and agencies are better suited than courts to the task of selecting decisionmaking procedures that guarantee that claimants for government benefits receive due process); Richard A. Posner, *Democracy and Distrust Revisited*, 77 VA. L. REV. 641, 649–50 (1991) (arguing that process theorists' assertion that lawyers and judges are better equipped to deal with questions of process than with questions of substance is true only with respect to trial and hearing procedures, not with respect to the design of political institutions); Todd D. Rakoff, Brock v. Roadway Express, Inc. *and the New Law of Regulatory Due Process*, 1987 SUP. CT. REV. 157, 197 (questioning whether the courts are any more competent to make judgments regarding procedural issues than to make judgments on substantive issues when procedural issues arise in the administrative rather than the judicial context). Indeed, perhaps the courts possess special competence with respect to the adjudicatory process and similarly functioning processes, rather than the legislative process. *See generally* ELY, *supra* note 67, at 102 (arguing that judges are not the only decisionmakers who can claim some expertise about "how the political process allocates voice and power"); Komesar, *supra* note 135, at 406–08 (noting that a legislature can also address questions of its procedure).

or both Houses of Congress, such as the consideration of nominations to government positions and agency oversight.[158] The courts themselves often acknowledge their limitations in resolving such procedural quandaries.[159]

The resolution of procedural issues, like the resolution of substantive issues, involves choices among contested values. No "neutral principles" enable courts to avoid reconciling contested values in the course of resolving procedural issues.[160] Issues such as the composition of election districts, the method of electing members of multimember bodies, the requirement of holding a run-off if a candidate prevails by only a plurality, the requirements for registration of voters and candidates, and the power of various institutions in the legislature involve reconciliation of competing values that cannot be accomplished by resorting to any value-neutral formulas. Issues regarding the drawing of district lines may involve questions of whether racial minorities will fare better if they constitute a majority or near-majority in a few districts or a significant minority in a number of districts.[161] Whether elections are at-large or

158. There is little reason to believe that process theorists could support such a claim.

159. *See supra* notes 72, 74, 85–86 and accompanying text (discussing the judiciary's reluctance to involve itself in legislative procedure).

160. *See* Neuborne, *supra* note 151, at 366; Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721 (1991); Schauer, *supra* note 154, at 1327 & n.2.; *see also The Electoral College and Direct Election: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong. 42, 57 (1977) (Sup. Docs. No. Y4.J89/2E12/9/Supp) (testimony of Judith A. Best) ("No electoral system is neutral. Every electoral system, as a practical matter, favors certain groups and interests and discriminates against others."). Even a devotee of Ely's approach concedes that process theory can only identify the areas in which the courts should make decisions; it does not tell us what those decisions should be. *See* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 782–88 (1991) (stating that Ely tries to prove too much when he uses political process theory to purport to find the results that the court should come to rather than the areas in which the court has authority to decide).

161. *See, e.g.*, Voinovich v. Quilter, 507 U.S. 146, 153–55 (1993) ("[T]he creation of majority-minority districts does not invariably maximize or minimize minority voting strength."); KEITH J. BYBEE, MISTAKEN IDENTITY: THE SUPREME COURT AND THE POLITICS OF MINORITY REPRESENTATION 52–54 (1998) (discussing some of the arguments for and against the creation of majority-minority electoral districts); LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 36–37 (1994) (discussing the advancement of minority interests by majority-minority electoral districts); ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 234, 243–44 (1987) (arguing that the creation of majority-minority districts has reduced the influence of racial minorities); MELISSA S. WILLIAMS, VOICE, TRUST, AND MEMORY 70–75, 110–15 (1998) (same). More generally, Justice Frankfurter described legislative apportionment as "the product of legislative give-and-take and of compromise among policies that often conflict." Baker v. Carr, 369 U.S. 186, 349 (1962) (Frankfurter, J., dissenting).

by single member districts requires a reconciliation of the importance of the representation of geographically concentrated minorities and the importance of having representatives who can consider the interests of the whole community or who can represent geographically dispersed minorities.[162] Legislative procedures involve trade-offs between efficiency and promoting deliberation and equality among legislators.[163] Whether courts should have a role in resolving these questions surely does not turn on the existence of any "neutral principle" that can eliminate the need to choose between competing values. Neutral principles cannot guide decisions with regard to legislative procedure, any more than neutral principles can guide substantive decisions.

Process theorists' third justification for aggressive review, diminished legislative competence, provides some support for new textualist arguments. Process theorists' assessment that legislative consideration of some political issues probably will reflect some bias is sound.[164] For example, Ely fears that those holding power will rig

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162. *See* City of Port Arthur v. United States, 459 U.S. 159, 167–68 (1982) (upholding a lower court decision that a particular majority-vote system was designed with discriminatory animus); Rogers v. Lodge, 458 U.S. 613, 616 (1982) ("At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district."); Whitcomb v. Chavis, 403 U.S. 124, 157–60 (1971) (stating that both multimember and single member schemes are problematic).

163. The size of the House and the difficulty in managing it require compromising individual legislators' abilities to amend statutes and participate in debate. *See, e.g.*, Joseph Cooper, *Congress in Organizational Perspective*, *in* CONGRESS RECONSIDERED 140, 140–59 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 1977); Nelson W. Polsby, *The Institutionalization of the U.S. House of Representatives*, 62 AM. POL. SCI. REV. 144, 164–65 (1968) (noting that traditionally, political scientists have seen congressional procedural changes as compelled by institutional needs); Charles Stewart, *Responsiveness in the Upper Chamber: The Constitution and the Institutional Development of the Senate*, *in* THE CONSTITUTION AND AMERICAN POLITICAL DEVELOPMENT 63, 63–96 (Peter F. Nardulli ed., 1992) (discussing the resiliency and responsiveness of the Senate in the political process). *But see* Sarah A. Binder, *The Partisan Basis of Procedural Choice: Allocating Parliamentary Rights in the House, 1789–1990*, 90 AM. POL. SCI. REV. 8 *passim* (1996) (concluding that changes in the rules of the United States House of Representatives suggest that partisanship lay behind the decisions). Many congressional procedures necessary to help manage the House accord some individual members extraordinary power, thereby undermining the ideal of equality among legislators. *See* Bell, *supra* note 4, at 49–50 & n.144; Larry Evans et al., *Congressional Procedure and Statutory Interpretation*, 45 ADMIN. L. REV. 239, 247–53 (1993).

164. Such a consideration, for instance, has led most countries to place control over monetary policies in institutions insulated from elected officials. In particular, monetary policies are decided by central banks, such as the Federal Reserve Board in the United States or the Bundesbank in the Federal Republic of Germany, whose directors are insulated from the government of the day. *See, e.g.*, PAUL KRUGMAN, PEDDLING PROSPERITY: ECONOMIC SENSE AND NONSENSE IN THE AGE OF DIMINISHED

procedures in their favor in order to retain power—that is, they will seek to close the "channels of political change."[165] His concern is not without justification. The history of congressional reform measures shows that those enjoying extraordinary power likely will prevent procedural reforms that would make the institution more amenable to changes in leadership. In particular, the fate of efforts to change congressional rules and practices regarding seniority, committee power, and jurisdiction, and the Speaker's prerogatives illustrate this phenomenon.[166] The same phenomenon arises with issues involving the electoral system—such as reform of campaign finance rules and control of franking privileges.[167]

Some new textualist concerns involve aspects of the legislative process that may well entrench those who already enjoy extraordinary, undemocratic power. For instance, committee and subcommittee chairs probably have much greater influence over committee reports than other legislators, and committee staff likely entrench a bias toward the majority party viewpoint to the extent that majority party committee members control inordinate numbers of committee staff members. Accordingly, sound process-based arguments could justify judicial assumption of a more aggressive role on at least some of the issues new textualists press.

New textualists' arguments, however, raise distinctive institutional autonomy concerns because, unlike traditional process theorists, new textualists focus on legislatures' internal processes. For

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EXPECTATIONS 118–21 (1994) (discussing the power of the Federal Reserve Board and its independence from the political branches of government); Richard W. Stevenson, *Divorcing Central Banks and Politics: Independence Helps in Inflation Fight*, N.Y. TIMES, May 7, 1997, at D6 (contending that the separation of federal reserve policy from politics is beneficial to the American economy).

Interestingly, in the context of congressional decisions regarding disputed congressional elections, Justice Scalia has rejected the argument that the likelihood of biased legislative decisionmaking justifies judicial intervention. *See* Morgan v. United States, 801 F.2d 445, 447 (D.C. Cir. 1986).

165. ELY, *supra* note 67, at 105–34.

166. *See* LEROY N. RIESELBACH, CONGRESSIONAL REFORM: THE CHANGING MODERN CONGRESS 77–79 (1994).

167. See Paul S. Hernson et al., *Interest Groups at the Dawn of a New Millennium*, *in* THE INTEREST GROUP CONNECTION: ELECTIONEERING, LOBBYING, AND POLICYMAKING IN WASHINGTON 327, 332–34 (Paul S. Hernson et al. eds., 1998); *see also* Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1074 n.156 (1996) ("Incumbents will always have powerful personal incentives to set spending caps at a level that disadvantages their challengers."); W. Duane Benton, Note, *Congressional Perquisites and Fair Elections: The Case of the Franking Privilege*, 83 YALE L.J. 1055, 1060–62, 1077–79 (1974) (suggesting that the franking privilege aids incumbents).

example, much of Ely's discussion of the role of heightened judicial review of procedure does not relate to internal legislative procedures.[168] Rather, Ely calls for heightened judicial scrutiny on two bases. The first is designed to ensure that the structure of government remains uncompromised,[169] but its focus is on protecting the integrity of the electoral processes. For instance, Ely concentrates on the freedom of expression[170] and the rights to vote and seek elective office.[171] Ely's second basis for heightened judicial scrutiny involves substantive review of statutes that disadvantage minorities.[172] Ely argues that such a principle addresses a pathology of democracy—majoritarian institutions' tendency to reflect the prejudices of popular majorities and neglect the interests of groups with whom popular majorities cannot empathize.[173] Thus, Ely argues for heightened scrutiny of legislative classifications based on alienage,[174] poverty,[175] and race,[176] as well as heightened scrutiny of statutes that disadvantage citizens of other states.[177]

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168. *See* ELY, *supra* note 67, at 105–34. However, Ely seems willing to allow courts to interfere with legislatures' autonomy over legislative operations. For instance, while he ultimately rejects the judicial imposition of a requirement that legislatures articulate the purposes of their statutes, he does so because such an articulation requirement probably would not improve the legislative process. *See id.* at 128. Nevertheless, Ely does not suggest that imposing such a requirement would infringe improperly upon legislative prerogatives. On the other hand, even with respect to requiring legislatures to articulate purposes, Ely's concern is not with the allocation of power between legislators, but with the assurance that legislative actions are "visible" in order to facilitate accountability to the electorate. *See id.* at 125–31.

169. *See id.* at 103 (arguing that this is "critical to the functioning of an open and effective democratic process").

170. *See id.* at 105–16.

171. *See id.* at 116–25.

172. *See id.* at 152–54. *See generally id.* at 135–70 (presenting an argument that heightened judicial scrutiny is needed to ensure that some minorities are treated fairly in the political process).

173. *See id.* at 151, 153.

174. *See id.* at 161–62.

175. *See id.* at 162. Ely notes that such heightened scrutiny of explicit wealth classifications is not likely to provide much help to the poor because their problems generally do not arise from explicit statutory classifications. *See id.*

176. *See id.* at 150–53.

177. *See id.* at 83–84, 90–91. This second prong of Ely's theory has been the one most subject to attack. The first prong has been somewhat less controversial and is considered quite limited in its implications. *See, e.g.*, Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 133 (1981) (ignoring the first prong of Ely's argument and focusing on the second prong); Klarman, *supra* note 160, at 748 (asserting that "the access, but not the prejudice, prong of political process theory has emerged relatively unscathed from the barbs of Ely's critics"); Ortiz, *supra* note 160, at 729 (arguing that Ely's theory that judicial review is necessary to core formal or process imperfections that choke off the channels of change justifies "only a small part of the area of judicial review that process theory

The new textualist challenge to the use of legislative history invades the legislature's institutional autonomy. The questions that new textualists raise regarding the use of staff, the reliability of congressional documents, and the influence of lobbyists in the legislative process all involve the internal operation of the legislature to a much greater extent than do issues of free speech, voting rights, and the right to run for office.[178] Courts have recognized a distinction between enforcement of rules or constitutional provisions that relate to the rights of nonlegislators and those that relate solely to the power of legislators,[179] and the judiciary has been much more willing to

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traditionally defends"); *see also* ARTHUR, *supra* note 67, at 62–74, 140–41 (critiquing Ely's process theory).

178. To the extent that the new textualists base their challenge on views about the appropriate precision of statutes, their challenge is not an exclusively institutional concern and is one that Ely addresses. Although Ely addresses this challenge in the context of ensuring that the electoral process is meaningful, he argues that voting is meaningful only if elected representatives make significant governmental decisions. *See* ELY, *supra* note 67, at 131–34. Votes can be diluted as much by altering legislative responsibilities as by changing voting procedures. *Cf.* Presley v. Etowah County Comm'n, 502 U.S. 491, 521–25 & n.27 (1992) (Stevens, J., dissenting) (arguing that a county commission that delegated its powers to appointed officials after the election of an African-American to the commission violated the Voting Rights Act by diluting the votes of African-Americans); Hardy v. Wallace, 603 F. Supp. 174, 178–79 (N.D. Ala. 1985) (holding that a statute that transferred authority to appoint the county racing commission from the delegation representing the county in the state legislature to the governor was subject to review); County Council of Sumter County v. United States, 555 F. Supp. 694, 696–98 (D.D.C. 1983) (asserting that the elimination of certain elected county supervisory positions in conjunction with an at-large voting system for a county council was subject to review); GUINIER, *supra* note 161, at 179–80 (criticizing the Supreme Court's holding in *Presley*, in which the Court upheld white incumbent commissioners' decision to reduce the power of county commissioners after the election of the first African-American county commissioner since Reconstruction).

179. *See* United States v. Smith, 286 U.S. 6, 33 (1932) (stating that whenever a Senate committee's interpretation of Senate rules "affects persons other than members of the Senate, the question presented is of necessity a judicial one"); Exxon Corp. v. FTC, 589 F.2d 582, 590 (D.C. Cir. 1978) ("Although the courts will intervene to protect constitutional rights from infringement by Congress, ... where constitutional rights are not violated, there is no warrant for the judiciary to interfere with the internal procedures of Congress."); Skaggs v. Carle, 898 F. Supp. 1, 2 (D.D.C. 1995) (noting that the D.C. Circuit has long refused to intrude on the internal affairs of Congress at the behest of lawmakers complaining of their colleagues' unconstitutional conduct); Castello, *supra* note 71, at 522 ("Under doctrines of abstention and jurisdiction, courts usually decline to enforce legislatures' internal rules. Nevertheless, in cases where private parties' rights are at issue, courts have made it clear that legislatures' rules are legally binding."); Miller, *supra* note 71, at 1347 (observing that legislative rules are rarely justiciable because they typically are challenged to vindicate legislators' interests rather than the interests of citizens); *id.* at 1374 ("The 'political' political question doctrine recognizes the political nature of legislative rules of procedure, but it also recognizes the necessity of limiting the legislature's ability to affect through the use of procedural rules the rights and liabilities of non-legislators."). *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166, 167, 170

protect the rights of nonlegislators than to protect the rights of legislators.

Christoffel v. United States[180] and *Exxon v. FTC*[181] highlight this distinction. In *Christoffel*, the Court reviewed a perjury conviction appealed by a defendant who claimed that he could not have committed perjury because he had provided false testimony to a congressional committee that lacked a quorum at the time he testified and thus was not "a competent tribunal."[182] In holding that the defendant could raise the absence of a quorum as a defense, the Court disregarded the congressional rule that the presence of a quorum at the beginning of a committee session conclusively establishes the presence of a quorum for the entire session. The Court explained that "[i]n a criminal case *affecting the rights of one not a member* [of Congress], the occasion of trial is an appropriate one" to contest the lack of a quorum.[183] A challenge to the conclusive presumption by a member of Congress or a member of the public who disapproved of the practice but was not a criminal defendant would probably have failed.[184] The Court's lack of deference in *Christoffel* contrasts starkly with the deference accorded Congress in the challenges to legislative procedure cited earlier.

By contrast, in *Exxon* a congressional committee sought confidential information, including trade secrets, that the Federal Trade Commission had previously received from Exxon pursuant to subpoena. Expressing concern about potential committee disclosure of its confidential information, Exxon sought a court order requiring the committee: (1) to give citizens ten days notice before it subpoenaed their files from the FTC; and (2) to establish safeguards to prevent public disclosure of Exxon's confidential information. In denying relief to Exxon,[185] the D.C. Circuit cited *Christoffel* and *Yellin v. United States*[186] and explained that the judiciary will intervene to

(1803) ("The province of the court is, solely, to decide on the rights of individuals, not to inquire how [public officials perform discretionary duties].").

180. 338 U.S. 84 (1949).

181. 589 F.2d 582 (D.C. Cir. 1978).

182. *Christoffel*, 338 U.S. at 85.

183. *Id.* at 88 (emphasis added).

184. Similarly, in *Yellin v. United States*, 374 U.S. 109 (1963), the Supreme Court reversed a defendant's conviction for contempt of Congress. *See id.* at 124. The Court held that the committee seeking the defendant's testimony had violated his right to testify in private, which was guaranteed by the committee's rules. *See id.* at 123. In doing so, the Court rejected the interpretation of the committee rule offered by the committee itself, as the dissent pointedly noted. *See id.* at 143 (White, J., dissenting).

185. *See Exxon*, 589 F.2d at 590.

186. *See id.*

protect a citizen's constitutional rights from infringement by congressional committees.[187] By acting in the absence of such a threat to an individual's constitutional rights, the court would be intruding upon the internal operations of Congress, which it was loath to do.[188] In short, "requir[ing] guarantees of specific congressional procedures in advance of any concrete threat to [Exxon's] vital interest" would "exceed [the court's] jurisdiction."[189]

These cases show that, in essence, when an injured private party claims that Congress failed to provide a privilege or right granted by a legislative procedural rule, "[t]he political nature of the rule gives way to [the rule's] function as a nonpolitical guarantee of individual protections."[190] Even if the process theory advocated by Professor Ely is justified to protect the interests of individual citizens, reliance on process theory to interfere with legislative autonomy regarding the relative powers of legislators or regarding internal legislative

187. 374 U.S. 109 (1963).

188. *See Exxon*, 589 F.2d at 590. Had Exxon claimed imminent disclosure of its trade secrets, the court might have entertained the action. *See id.* at 587.

189. *Id.* at 590. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975), calls into question the distinction suggested above. In *Eastland*, the First Amendment freedom of association rights of members of an unpopular political group were threatened by a congressional subpoena. *See id.* at 493. The committee subpoena ordered a bank to provide information that would have identified members of the group. While the Court had recognized such claims in the context of challenges to judicial subpoenas in *NAACP v. Alabama*, 357 U.S. 449 (1958), it held in *Eastland* that the Speech and Debate Clause precluded it from quashing a congressional committee subpoena based on such First Amendment claims. *See Eastland*, 421 U.S. at 510. The varying results in *Christoffel*, *Yellin*, *Eastland*, and *Exxon* potentially can be explained by the types of liability at stake. Those faced with criminal liability can challenge legislative procedures; those who face civil liability cannot. Alternatively, the varying results could be explained by the types of people complaining about legislative procedures. Holders of information can challenge legislative procedures, while someone who will be harmed by the use of information held by another cannot challenge legislative procedures. The cases also could be explained plausibly by their historical context—perhaps the courts more aggressively policed committee proceedings in the McCarthy Era and the years immediately preceding and succeeding that era than at other times.

190. Miller, *supra* note 71, at 1370; *see also* United States v. Smith, 286 U.S. 6, 33 (1932) ("[When] the construction to be given to the rules affects persons other than members of the Senate, the question presented is of necessity a judicial one."); Gregg v. Barrett, 771 F.2d 539, 542 (D.C. Cir. 1985) (stating that the court does not "review[] congressional practices and procedures *when they primarily and directly affect the way Congress does its legislative business*" (emphasis added)); Skaggs v. Carle, 898 F. Supp. 1, 2 (D.D.C. 1995) (reiterating that the separation-of-powers principle prevents courts from reviewing internal congressional rules at the behest of legislators); Gregory Frederick Van Tatenhove, Note, *A Question of Power: Judicial Review of Congressional Rules of Procedure*, 76 KY. L.J. 597, 615 (1988) ("*Yellin* illustrates once again the Court's willingness to review congressional rules for compliance when a private party is involved." (citation omitted)).

institutions is difficult to justify. In sum, process theory does not justify the new textualists' heightened scrutiny of Congress's decisions regarding the reliability of legislative history and the role of staff or interest groups in the legislative process.

C. *Underenforced Constitutional Norms*

Aggressive review of legislative practices in the course of interpreting statutes might be appropriate because statutory decisions, unlike constitutional decisions, may be reversed by legislators. If a congressional majority disagrees with a court decision grounded in the Constitution, it may reverse that decision only by initiating the arduous process of amending the Constitution, but if that majority disagrees with a court's construction of a statute, it can revise the statute by ordinary legislative processes.[191] Thus, the judiciary can aggressively pursue constitutional values in the course of interpreting statutes because such decisions can be "overturned" by Congress.[192] The courts may opt for such an approach because they cannot fashion a judicially administrable yet robust standard to use in deciding the constitutionality of statutes threatening a particular constitutional value. Such a statutory interpretation approach would serve merely to encourage the legislature to consider fully the

191. This constitutional-statutory dichotomy has been used as a basis for advocating an absolute rule of stare decisis with regard to statutory rulings. *See, e.g.*, Neal v. United States, 516 U.S. 284, 295–96 (1996) ("One reason that we give great weight to *stare decisis* in the area of statutory construction is that 'Congress is free to change this Court's interpretation of its legislation.' " (quoting Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977))); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 641 (1983) (Stevens, J., dissenting) ("For when the Court unequivocally rejects one reading of a statute, its action should be respected in future litigation."); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO L.J. 1361, 1364–69 (1988) (claiming that a "super-strong presumption" of stare decisis exists in the Supreme Court); Frank E. Horack, Jr., *Congressional Silence: A Tool of Judicial Supremacy*, 25 TEX. L. REV. 247, 251–52 (1946) (arguing that judicial reversal of a prior judicial construction of a statute usurps Congress's legislative power); Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 183 (1989) (arguing that the Supreme Court should "adopt an absolute rule of stare decisis for all of its statutory and federal common law decisions").

192. Although Congress could overturn the Court's substantive interpretation of a statute, it is not clear that the new textualists would allow Congress to overturn their judgments about the deficiencies of the legislative process and the deleterious effects of legislative history. It is also not clear that new textualists would uphold a statute purporting to require the courts to use legislative history when interpreting ambiguous language. *See Statutory Interpretation and the Uses of Legislative History*, *supra* note 12, at 92–93, 144 (statement of William N. Eskridge, Jr.) (suggesting that a statute providing that the federal courts should consider legislative history would be considered unconstitutional by Justice Scalia).

constitutional value, without risking excessive intrusion into legislative prerogatives.

Hampton v. Mow Sun Wong[193] provides a classic example of the underenforced constitutional norms approach—although not in the context of statutory interpretation.[194] In *Hampton*, a group of resident aliens contended that a regulation[195] barring noncitizens from federal government employment violated the Equal Protection and Due Process Clauses. The Court acknowledged that the federal government's power over aliens is "subject only to narrow judicial review,"[196] because of "the political character of the power over immigration and naturalization."[197] The Court also acknowledged that the Civil Service Commission "ha[s] identified several interests which the Congress or the President might deem sufficient to justify the exclusion of noncitizens from the federal service."[198] These interests included the President's use of employment as a bargaining tool in negotiating treaties and encouraging aliens to seek citizenship.[199] The Court nevertheless invalidated the provision, reasoning that only Congress or the President could invoke the interests justifying such an exclusion from employment—and that the Civil Service Commission could point to no congressional or presidential consideration of the issue.[200] Moreover, the Civil Service Commission's responsibilities did not include the type of foreign affairs and naturalization concerns that could justify such a limitation on employment.[201] The Court concluded that:

> Since these residents were admitted as a result of decisions made by the Congress and the President, implemented by the Immigration and Naturalization Service acting under the Attorney General of the United States, due process requires that the decision to impose th[e] deprivation of an important liberty interest [in potential federal employment] be made at a comparable level of government or, if it is to be permitted to be made by the Civil Service Commission, that it be justified by reasons which are properly the concern of the

193. 426 U.S. 88 (1976).

194. *See* FARBER & FRICKEY, *supra* note 12, at 119–21; MARK V. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 202–03, 208 (1988); Sager, *supra* note 65, at 1412–14.

195. *See* 5 C.F.R. § 338.101 (1976).

196. *Hampton*, 426 U.S. at 101 n.21.

197. *Id.* at 101 (citation omitted).

198. *Id.* at 103–04.

199. *See id.* at 104.

200. *See id.* at 104–05, 105–14.

201. *See id.* at 104–05, 114–15.

agency.[202]

Thus, in an area in which constitutional principles are underenforced[203] because the issues involve "political questions" dedicated to other branches of government, the Court encouraged adherence to those principles by requiring Congress and the President to consider explicitly whether to contravene those principles.[204]

Courts have refrained from directly enforcing some principles because of institutional competence concerns, while nevertheless furthering them in the process of interpreting statutes.[205] For example, courts have fashioned clear statement rules to further underenforced constitutional norms.[206] Clear statement rules specify that courts will interpret statutes to contravene certain principles only if the legislature clearly indicates its intention to contravene those principles.[207] For instance, the Supreme Court has held that courts should interpret a statute to abrogate Eleventh Amendment

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202. *Id.* at 116 (citation omitted).

203. The Court already had held, for instance, that a state could not ban noncitizens from state employment, *see* Sugarman v. Dougall, 413 U.S. 634, 646 (1973), or from admission to the bar, *see In re* Griffiths, 413 U.S. 717, 729 (1973).

204. A similar approach has been taken with respect to equal protection review of affirmative action plans. *See* Fullilove v. Klutznick, 448 U.S. 448, 549–52 (Stevens, J., dissenting); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (Powell, J., concurring); Mark S. Kende, Note, *Principles of Competence: The Ability of Public Institutions to Adopt Remedial Affirmative Action Plans*, 53 U. CHI. L. REV. 581, 586–92 (1986).

205. *See* FARBER & FRICKEY, *supra* note 12, at 70 n.22. Professors Farber and Frickey discuss underenforced constitutional norms—constitutionally based norms that "may well be binding upon legislators, administrators, and judges but because of institutional differences ha[ve] far more practical relevance outside the judiciary." *Id. See generally* TUSHNET, *supra* note 65, at 163–65 (arguing that in the absence of judicial review of the constitutionality of government actions, courts could restrain governmental actions by employing an ultra vires doctrine like that used in Great Britain and the Netherlands or by employing statutory interpretation).

206. *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 546 (1992) (Scalia J., concurring in part and dissenting in part); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND L. REV. 593, 597 (1992) (claiming that clear statement rules are "a practical way for the Court to focus legislative attention" on underenforced constitutional values); Nagle, *Waiving Sovereign Immunity*, *supra* note 32, at 805 (suggesting that the Court uses clear statement rules to "guard values deserving special judicial protection").

207. *See* Sunstein, *Interpreting Statutes*, *supra* note 19, at 457–58; Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2109, 2110–11 (1990); *see also* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 504 (1996) (describing the concept of "clear statement" rules and observing that they reroute delegated lawmaking authority back to Congress). *See generally* TUSHNET, *supra* note 65, at 126 (discussing "clear statement" rules as a means of encouraging the political branches of government to further constitutional norms).

sovereign immunity from suit only if the statute abrogates that immunity explicitly.[208] Thus, a court may not find that a federal statute imposes monetary liability on a state unless the statute does so unambiguously. However, when Congress provides statutory text that satisfies the clear statement rule, expressly making states liable for damages, the courts will find that states are amenable to such suits.[209]

Federalism norms have traditionally been underenforced. For most of the last century, the Supreme Court found it difficult to craft robust constitutional doctrines that constrained national government encroachments upon state power, but the Court has protected the states by establishing several clear statement rules.[210] The clear statement rule regarding abrogation of the states' Eleventh Amendment immunity described above provides one example. A second example of such a clear statement rule is the requirement that Congress enact an express provision before the courts will interpret the statute as effectively imposing a condition on federal monetary grants to the states.[211] Of course, over the last few years the Court vigorously has begun to enforce federalism principles, in a variety of contexts, by invalidating statutes.[212]

The Supreme Court also has established a clear statement rule to

208. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985); *see also* Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 101 (1989) ("[T]o abrogate the States' Eleventh Amendment immunity from suit in federal court . . . Congress must make its intention 'unmistakably clear in the language of the statute.' " (quoting *Atascadero*, 473 U.S. at 242)). The Court has employed a similar approach with regard to the federal government's common-law immunity from suit. *See* Lehman v. Nakshian, 453 U.S. 156, 160 (1981).

209. *See, e.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1, 7–13 (1989), *overruled by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

210. *See* Eskridge & Frickey, *supra* note 206, at 619–28, 642–43.

211. *See* Board of Educ. v. Rowley, 458 U.S. 176, 190 n. 11 (1982); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

212. *See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999) (holding that "states retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation"); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2233 (1999) (holding that the Trademark Remedy Clarificaton Act, 15 U.S.C. § 1122 (1994), does not abrogate states' sovereign immunity, nor does a state voluntarily waive its immunity by its "activities in interstate commerce"); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2210 (1999) (holding that the Patent and Plant Variety Protection Remedy Clarification Act, 35 U.S.C. § 271 (1994 & Supp. III 1997), does not abrogate state soverign immunity); United States v. Lopez, 514 U.S. 549, 552 (1995) (holding that the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A) (1994), *current version at id.* (Supp. IV 1998), violates the Commerce Clause).

address the constitutional concerns raised by retroactive legislation,[213] making most statutes prospective only, unless Congress clearly expresses its intent to make a statute retroactive.

Justice Scalia is a proponent of clear statement rules, though perhaps not solely because they allow the courts to further constitutional values.[214] Thus, this underenforced constitutional norms approach might form part of the basis for Justice Scalia's more aggressive review of legislative judgments in the interpretive process. New textualists could argue that while a court should neither entertain constitutional challenges to statutes because of staff or lobbyist involvement,[215] nor police the compilation of legislative documents to ensure their accuracy,[216] courts may adopt interpretive approaches that encourage salutary practices.[217] By merely remanding the decision to a democratic body, such an approach is less intrusive than traditional judicial review.[218]

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213. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 286 (1994); DANIEL E. TROY, RETROACTIVE LEGISLATION 27–28, 32–33, 40–43 (1998); Bernard W. Bell, *In Defense of Retroactive Laws*, 78 TEX. L. REV. 235, 242 (1999).

214. *See Landgraf*, 511 U.S. at 286 (Scalia, J., concurring); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 260 (1991) (Scalia, J., concurring); Karkkainen, *supra* note 7, at 450–51. Justice Scalia's enthusiasm for clear statement rules may stem from his preference for precision over flexibility and from the focus clear statement rules require of text.

215. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980).

216. *See* Gregg v. Barrett, 771 F.2d 539, 549 (D.C. Cir. 1985).

217. I make a similar argument in defending the judiciary's use of legislative history to interpret statutes. In particular, I have argued that legislative bodies have an obligation to explain the justification for the statutes they enact, and I believe that this obligation is implicit in our form of government. I argue, however, such an obligation should not be enforced by exercising the power of judicial review of the validity of statutes, rather courts should interpret statutes as if the justifications set forth in legislative history were important. *See* Bell, *supra* note 4, at 26–33. This underenforced norms approach is popular. *See* Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1, 61 (1998); Schacter, *supra* note 18, at 595, 606–11 (1995); Sunstein, *Interpreting Statutes*, *supra* note 19, at 468; Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 912–17 (1979). Indeed, Professor Tushnet recently has argued that reliance on underenforced norms techniques should replace judicial review of the constitutionality of statutes. *See* TUSHNET, *supra* note 65, at 95–176.

218. *See* Neuborne, *supra* note 151, at 366. Professor Neuborne states that, "[a]dditionally, in many—perhaps most—settings, the impact of process-based review will be merely to remand an issue to one or another democratic forum for reconsideration in a procedurally correct manner. As such, it casts a suspensive veto that slows, but does not derail, majority will." *Id.*; *see* FARBER & FRICKEY, *supra* note 12, at 122 n.28 (arguing that Justice Stevens, in his affirmative action jurisprudence, has embraced the concept that courts should exercise a " 'suspensive veto' " over constitutionally questionable legislation); TUSHNET, *supra* note 194, at 210 (arguing that structural review, involving courts merely requiring government to take a "second look" at actions disadvantaging certain suspect or quasi-suspect groups, is salutary because it is merely "suspensory"). Although Professor Neuborne discusses this as "process-based review," *see* Neuborne,

Justifying the new textualist approach on this ground is promising but ultimately problematic because even an underenforced norms approach usurps majoritarian judgments with judicially imposed policies.[219] Generally accepted or textually based principles, such as state sovereignty, nondelegation, and avoidance of retroactivity pose fewer problems than do more controversial principles.[220] As we shall see below, new textualist ideals of legislative procedure are sufficiently controversial to call into question any new textualist reliance on underenforced constitutional norms theory. Moreover, new textualists have a particular problem in seeking to rely on underenforced norms theory to the extent that they profess a heightened sensitivity to the countermajoritarian difficulty atypical of most theorists. In short, underenforced norms theory has potential, although it certainly betrays new textualists' claims of greater fidelity to the principle of limiting judicial intrusions upon majoritarian institutions.

IV. REVISITING THE NEW TEXTUALIST CRITIQUE OF THE LEGISLATIVE PROCESS

In this Part, I discuss the controversial nature of the new textualists' claims. I do not seek to prove the new textualists wrong, but rather merely seek to show that the principles they espouse are just as controversial as the principles they vigorously attack other theorists for seeking to further by means of judicial review. That is, the new textualist principles are subject to the same challenge that new textualists so often assert against others—that decisions regarding recognition of theorists' principles and balancing those principles against other interests should be left to the political

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supra note 151, at 366, it is also a form of underenforced norms. That is, courts will not directly decide whether the constitutional norm was violated because of institutional competence issues, but will instead ensure legislative adherence to certain procedures that encourage democratic bodies to protect the norm.

219. Professor Mashaw has criticized this approach. *See* Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1690–94 (1988). He argues that pursuing underenforced norms through statutory interpretation rather than constitutional adjudication substitutes judicial policy for legislative policy. The legislative process makes it difficult for simple majorities to draft precise statutory language. By refusing to interpret statutes to harm certain interests, the courts give the advocates of those interests an advantage in the legislative process. The result is that advocates of a judicially protected interest need not ensure that a statute explicitly adopts their position; rather they need only preclude opponents from having the statutes explicitly adopt the opposite position. In this way, clear statement rules shift power away from the legislative process and to the judiciary. *See, e.g.*, Eskridge & Frickey, *supra* note 206, at 636–40.

220. *See* Nagle, *Waiving Sovereign Immunity*, *supra* note 32, at 808–13.

branches of government.

A. *Rules vs. Standards*

The new textualists' claim that contemporary statutes suffer from excessive vagueness and thereby grant excessive power to administrative agencies is highly contestable.[221] In several contexts, courts have demonstrated an inability to review the political branches' determinations regarding the appropriate specificity of law, and consequently, courts have left those decisions largely unreviewed.[222] In three areas in particular, the judiciary has failed to supervise legislative or executive determinations regarding specificity. Those are: (1) the constitutionality of Congress's delegation of legislative power; (2) the discretion of administrative agencies to proceed by adjudication or rulemaking; and (3) the constitutionality of claims that statutes are excessively vague in violation of the Due Process Clause.[223]

The nondelegation doctrine limits congressional delegation of legislative authority. The Constitution assigns to Congress "all legislative [p]owers" granted the federal government.[224] Thus, arguably, it implicitly limits Congress's power to delegate such legislative power to noncongressional institutions, such as the President and administrative agencies.[225] The federal courts,

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221. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 57 (1990) ("[I]t is not obvious that the combination that predominates in federal income taxation—extremely detailed statutory specifications with frequent amendments and executive rule making—is always to be preferred to judicial administration of flexible standards."); Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 843 (discussing the benefits of statutes that give agencies discretion in promulgating regulations); Stock, *supra* note 109, at 173 & n.59 (arguing that new textualism has led Congress to draft in too much detail).

222. *See* Bernard W. Bell, *Dead Again: The Nondelegation Doctrine, the Rules/Standards Dilemma, and the Line Item Veto*, 44 VILLANOVA L. REV. 189, 193–95 (1999).

223. Critical legal theorists see the tension between rules and standards as irreconcilable, and argue that the tension pervades many areas of the law. *See, e.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15, 17, 40–54 (1987). Professor Kelman describes this tension in the law of contracts, criminal law, welfare rights, occupational safety, environmental protection, taxation, torts, and property. *See id.* at 17–40.

224. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.").

225. *See* J.W. Hampton, Jr. & Co. v. U.S., 276 U.S. 394 (1928) (holding that a delegation is proper only if Congress sets forth intelligible principles by which it can be implemented); Field v. Clark, 143 U.S. 649, 692 (1892) (upholding delegation of authority); TRIBE, *supra* note 64, § 5-17, at 363 (discussing the limitations of delegation);

however, have been unable to fashion any standard for determining the appropriate extent of congressional delegation and accordingly do not seriously enforce the nondelegation doctrine.[226] The Supreme Court has not held that a statute unconstitutionally delegates legislative power since 1935,[227] and new textualist Justice Scalia has expressed agreement with this approach. In *Mistretta v. United States*,[228] Justice Scalia, invoking the words of Chief Justice Taft, observed that the "limits of delegation 'must be fixed according to common sense and the inherent necessities' " of government cooperation.[229] He continued:

> Since Congress is no less endowed with common sense than we are, and better equipped to inform itself of the "necessities" of government; and since the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political . . . it is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.[230]

The courts face the same problem, in a slightly different form, when asked to review agency decisions regarding whether to proceed by using standards or rules.[231] While standards set forth factors for decisions made on a case-by-case basis, rules provide precise prescriptions that do not vary greatly according to the situation. Sometimes private parties seek judicial orders to force agencies to

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see also JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 141 (Peter Laslett ed., 2d ed. 1967) (1690) (arguing that legislative bodies lack the authority to delegate the legislative power entrusted to them).

226. *See* Federal Power Comm'n v. New Eng. Power Co., 415 U.S. 345, 352–53 (1974) (Marshall, J., concurring); ELY, *supra* note 67, at 132–33; *see also* FARBER & FRICKEY, *supra* note 12, at 78–79 (noting that since 1935 the federal courts have rejected every challenge "no matter how sweeping the congressional grant of power"). *See generally* JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 75–79 (3d ed. 1992) (describing the debate regarding the nondelegation doctrine).

227. *See* Mistretta v. United States, 488 U.S. 361, 373 (1989); Byrd v. Raines, 956 F. Supp. 25, 36 (D.D.C. 1997).

228. 488 U.S. 361 (1989).

229. *Id.* at 416 (Scalia, J., dissenting) (citations omitted).

230. *Id.* (Scalia, J., dissenting). Indeed, given the inability of courts to enforce directly the nondelegation doctrine, Justice Scalia believes that "structural restrictions that deter excessive delegation" should be enforced in a "particularly rigorous" manner. *Id.* at 416–17 (Scalia, J., dissenting). The "major" structural restriction, in Scalia's view, is that "the power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive ors judicial power." *Id.* at 417 (Scalia, J., dissenting).

231. *See* 1 DAVIS & PIERCE, *supra* note 157, § 6.8, at 266–78.

proceed by rules, rather than by standards and adjudication;[232] at other times, the converse is true.[233] The Court, while at times proclaiming the value of standards[234] and at other times praising the advantage of rules,[235] has left the choice to proceed by rules or standards to administrative agencies and generally dismisses such claims.[236] The Court adopted such a deferential approach because of the difficulty of articulating judicial standards for determining when an agency should adopt standards or rules.[237]

Courts have had difficulty with the same issue—the appropriate specificity of law—when attempting to determine whether statutes are so vague as to offend the Due Process Clause.[238] Outside of the criminal and First Amendment contexts, courts virtually never find a

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232. *See* SEC v. Chenery Corp., 332 U.S. 194, 199–200 (1947).

233. *See* Air Line Pilots Ass'n Int'l v. Quesada, 276 F.2d 892, 894–95 (2d Cir. 1960).

234. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (suggesting that adjudication can provide an effective means of establishing standards that are most appropriate in a given situation); *Chenery*, 332 U.S. at 201–04 (explaining the necessity of adjudication and the need for flexibility in rules); *see also* 1 DAVIS & PIERCE, *supra* note 157, § 6.8, at 267–68 (discussing case law regarding agency obligations to proceed by rulemaking).

235. *See* Morton v. Ruiz, 415 U.S. 199, 231–32 (1974); National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 681–83, 686–91 (D.C. Cir. 1973); *Quesada*, 276 F.2d at 896. *See generally* 1 DAVIS & PIERCE, *supra* note 157, § 6.7, at 260–66 (discussing various benefits of rules and rulemaking).

236. *See* 1 DAVIS & PIERCE, *supra* note 157, § 6.8, at 272–73 ("The Court has not even suggested that a court can constrain an agency's choice between rulemaking and adjudication in any opinion since *Bell Aerospace*."); MASHAW ET AL., *supra* note 226, at 553–59, 566 (noting that "[j]udicial consideration of 'appropriate specificity' has made little doctrinal headway" either with respect to legislation or administrative action).

237. This same problem afflicted the Court's short-lived irrebuttable presumption doctrine, a due process doctrine limiting the government's power to establish rules that obviate the need for individualized consideration (which, in effect, required the use of flexible standards combined with individualized adjudication). *See, e.g.*, Vlandis v. Kline, 412 U.S. 441, 452–54 (1973). The Court quickly abandoned the doctrine as unworkable. *See* NOWAK & ROTUNDA, *supra* note 64, § 13.6, at 545–47; TRIBE, *supra* note 64, § 16-32, at 1609; *id.* § 16-34, at 1618–25. *See generally* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 133–34, 141–43 (1996) (discussing the view that due process includes giving people an opportunity "to urge that their case is different from those that have gone before, and that someone in a position of authority ought to pay heed to the particulars of their situation"); Bell, *supra* note 222, at 199–208 (discussing the courts' inability to specify the appropriate level of precision in statutes or judicial doctrines).

238. *See* Rex A. Collings, Jr., *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195, 195 (1955); Anthony Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 70–71 (1960); Jeffrey Merle Evans, Recent Development, *Void-for-Vagueness—Judicial Response to Allegedly Vague Statutes*—State v. Zuanich, 56 WASH. L. REV. 131, 140 (1980); Leon S. Hirsch, Comment, *Reconciliation of Conflicting Void-for-Vagueness Theories Applied by the Supreme Court*, 9 HOUS. L. REV. 82, 85 (1971).

statute to be unconstitutionally vague.[239] Here again, in essence, the judiciary leaves the decision regarding the appropriate specificity of statutes to the legislature.[240] Admittedly, Justice Scalia and others seek to invoke the doctrine more frequently and also would declare unconstitutional some statutes that have been found sufficiently definite.[241] It is not clear, however, that Justice Scalia or other new textualists would demand substantially more precision in statutory drafting than the Supreme Court currently requires.

New textualists assume that the general vagueness of contemporary statutes is unjustifiable. The vagueness of contemporary statutes, they claim, results from one of two political pathologies: (1) elected representatives' desire to avoid accountability;[242] or (2) legislators passing statutes despite fundamental disagreements that should prevent them from acting until a more substantial consensus is reached.[243]

New textualists are correct in their belief that vague statutes can

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239. *See* Smith v. Goguen, 415 U.S. 566, 572–73 & n.10 (1974); *see also* Bauerschmidt, *supra* note 123, at 1118–20 (asserting that with one exception "no civil statute . . . has been found unconstitutionally void-for-vagueness"); Jeffrey I. Tilden, Note, Big Mama Rag*: An Inquiry Into Vagueness*, 67 VA. L. REV. 1543, 1553–59 (1981) (observing that while the vagueness doctrine nominally applies to civil statutes as well as criminal statutes, the threat of criminal punishment traditionally has been the fact that has triggered a vagueness analysis). In his leading constitutional law treatise, Laurence Tribe does not even discuss the doctrine outside the context of the criminal law and First Amendment contexts. *See* TRIBE, *supra* note 65, § 12-31, at 1033–35.

240. *See* Bauerschmidt, *supra* note 123, at 1118–20.

241. *See* H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 254–56 (1989) (Scalia, J., concurring in the judgment) (suggesting that a portion of the Racketeer Influenced & Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1967–1968 (1994 & Supp. IV 1998), may be unconstitutionally vague); Georgia Ass'n of Retarded Citizens v. McDaniel, 716 F.2d 1565, 1581–82 (11th Cir. 1983) (Hill, J., dissenting) (arguing that the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1491 (1994 & Supp. IV 1998), should be declared unconstitutional).

242. *See* American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543–48 (1981) (Rehnquist, J., dissenting); Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 685, 687–88 (1980) (Rehnquist, J., concurring in the judgment); ELY, *supra* note 67, at 131–34; FARBER & FRICKEY, *supra* note 12, at 80; LOWI, *supra* note 122, at 126, 148–49, 155; DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 84–94 (1993); Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. REV. 477, 537–40 (1994). *See generally* RIESELBACH, *supra* note 166, at 196 (arguing that Congress plays a subordinate role to the executive branch in formulating policy in part because members of Congress lack the courage to take the political risk of asserting their policy preferences and accepting the consequences if those policies turn out badly).

243. *See Statutory Interpretation and the Uses of Legislative History*, *supra* note 12, at 68 (statement of Judge Buckley of the D.C. Circuit Court of Appeals) (commenting that difficult issues are often resolved by legislative decisions to "let the courts decide").

help legislators who wish to avoid responsibility for making difficult choices between competing aims. By enacting vague statutes, legislators can claim to have addressed a problem while delegating the hard choices to administrative agencies or courts. However, statutory vagueness—and the attendant discretion conferred upon administrative officials and judges—does not stem merely from a congressional desire to avoid responsibility.[244] Vagueness also stems from the tendency of rules to be both underinclusive and overinclusive.[245] Rules are underinclusive because they often do not cover situations or people that the rule is intended to address. They are also overinclusive because they cover situations or people that do not pose the harm that the rule is intended to ameliorate. While rules make law determinate, they may do so by treating dissimilar people similarly.[246] Moreover, precise rules allow, and even encourage, evasion[247] and may be rendered ineffectual, or even harmful, by rapidly changing circumstances.[248] Not surprisingly, then, scholars vigorously debate the relative merits of vague and specific rules.[249]

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244. Statutes have become less precise, but commentators have suggested a number of possible reasons for this phenomenon that have little to do with the judicial recognition of legislative history. *See* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 497–98 (1989); Hatch, *supra* note 56, at 43; Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. 187, 196 (1992); Miriam R. Jorgensen & Kenneth A. Shepsle, *A Comment on the Positive Canons Project*, LAW & CONTEMP. PROBS., Winter & Spring 1994, at 43, 44–46; Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 383–84, 394, 395–96 (1989). These reasons for imprecise drafting will continue to exist even if the courts refuse to recognize legislative history.

245. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION MAKING IN LAW AND IN LIFE 31–34, 100–02 (1991); SUNSTEIN, *supra* note 237, at 130–33.

246. *See* SCHAUER, *supra* note 245, at 42–43, 47–49; SUNSTEIN, *supra* note 237, at 132.

247. *See* TOM DIAZ, MAKING A KILLING: THE BUSINESS OF GUNS IN AMERICA 132 (1999); SUNSTEIN, *supra* note 237, at 133.

248. *See* SUNSTEIN, *supra* note 237, at 131–32.

249. *See, e.g.*, REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 49–50 (1975); Brudney, *supra* note 12, at 10, 28–29, 30, 39, 39–40, 57; Farber & Frickey, *supra* note 8, at 458; Hatch, *supra* note 56, at 43; Spence, *supra* note 8, at 599; *see also* KELMAN, *supra* note 223, at 15–63 (discussing the contradictory impulses in the legal system to resolve issues by rules and by standards); SUNSTEIN, *supra* note 237, at 101–47 (discussing extensively the relative merit of vague and specific legal rules).

An archetypal example of excessive statutory specificity is the Delaney Clause, which bars cancer-causing substances from foods. *See* 21 U.S.C. § 348(c)(3)(A) (1994). The law not only prohibits foods containing substances that induce cancer in human beings, but also prohibits all food containing substances that might cause cancer in laboratory animals. *See id.* As a result, the statute appears to require the banning of many beneficial substances, such as saccharine. *See* Public Citizen v. Young, 831 F.2d 1108, 1111, 1122 (D.C. Cir. 1987); MASHAW ET AL., *supra* note 226, at 122–40.

The judiciary has not adopted a purely rule-based approach even with respect to common-law[250] or constitutional doctrines—areas in which courts enjoy some quasi-legislative power.[251] Breach of duty questions in negligence actions provide a prime example of open-ended, common-law inquiries. Balancing tests and multi-factor standards have gained ascendancy in constitutional law.[252] Thus, the courts themselves have failed to fashion judicial rules that avoid delegation—either to lower courts or juries. Even Justice Scalia, one of the most ardent judicial advocates of rules,[253] has acknowledged the advantages of a discretion-conferring approach as opposed to a rule-bound approach in crafting judicial doctrine,[254] and he has conceded that determining the appropriateness of rules or standards in a given situation poses great difficulty.[255]

Similarly, judicial decisions regarding when to adopt rules and standards have not been consistent or uncontroversial. For instance, the Court adopted contradictory positions on the appropriate specificity of rules governing motorists' conduct at railroad crossings

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The problems with specificity are also shown by the line of cases in which the Court has engaged in irrebuttable presumption analysis. *See supra* note 237.

250. The classic example of the contest between rules and standards are the two conflicting United States Supreme Court cases, separated by a mere seven years, involving the standards of conduct for drivers at rail crossings. *Compare* Baltimore & Ohio R.R. Co. v. Goodman, 275 U.S. 66, 69–70 (1927) (noting that when a driver reaches a railroad grade crossing, if the "driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle"), *with* Pokora v. Wabash Ry. Co., 292 U.S. 98, 104–06 (1934) (discussing the reasonableness of a driver's failure to stop and exit his vehicle to survey the situation when his vision at a railroad crossing is limited). For an argument that standards are generally replacing rules in contemporary tort law, see James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 477 (1976).

251. I use the term quasi-legislative power to encompass: (1) the power to promulgate and change legal standards independently of the provisions of a statute; and (2) the exercise of lawmaking power explicitly or implicitly delegated by a legislature. The courts' role in such circumstances can be contrasted with the other areas in which courts make law by interpreting statutes that set forth legislative policies and acting as agents of legislatures.

252. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 943–44, 963–72 (1987).

253. *See* RICHARD A. BRISBIN, JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL 294–95 (1997); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177–80, 1185 (1989); Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 78, 82–84, 87 (1992).

254. Justice Scalia acknowledges that the adaptability standards allow is thought to be the genius of the common law approach. *See* Scalia, *supra* note 253, at 1177–78. Justice Scalia also acknowledges that law cannot be entirely rule-bound and that discretion-conferring standards are sometimes necessary. *See id.* at 1186–87.

255. *See id.* at 1186–88.

within a decade.[256] Similarly, the major disagreement between Justices Cardozo and Andrews in the famous *Palsgraf*[257] case turned on whether proximate cause should be governed by an overarching legal rule, foreseeability—the Cardozo approach—or a multi-factor standard—the Andrews approach.[258] More recently, courts have disputed whether to adhere to the rule-bound scheme of categorizing plaintiffs who suffer injuries while on other people's property or to adopt a more flexible "reasonableness" standard to guide such negligence inquiries.[259] The controversy over rules and standards is even more pronounced in contemporary constitutional law, as Justices regularly disagree among themselves about the appropriate specificity of constitutional doctrine.[260]

A second explanation for statutory vagueness is the existence of fundamental disagreements between legislators during enactment of a statute. When such disagreements occur, legislators are often satisfied by enacting a vague, broad statute with interpretive guidance in the form of legislative history. Judicial reliance on legislative history encourages this practice. At first glance, new textualists appear to have identified a clear instance of legislators' failure to acquit their responsibilities. Upon a second look, the new textualists complaints are more debatable. The Supreme Court itself long has recognized that legislatures should be allowed to proceed "one step at a time" in addressing problems.[261] Such an incremental approach has

256. *See supra* note 250 and accompanying text.

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

258. *Compare id. at* 100–01 (finding no proximate cause because the defendant could not reasonably foresee that the plaintiff would be injured and explaining that "the risk to be perceived defines the duty to be obeyed"), *with id.* at 103–04 (Andrews, J., dissenting) (arguing that proximate cause is a question of "expediency" with "no fixed rules to govern" courts' judgments and that the existence of proximate cause may not be solved "by any one consideration").

259. *Compare* Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968) (abandoning traditional categories in determining landowner liability), *with* Younce v. Ferguson, 724 P.2d 991, 997 (Wash. 1986) (adhering to traditional categories).

260. *See* Sullivan, *supra* note 253, at 83–95, 100–12. Generally, the argument about specificity is made with respect to specific statutes or subject areas, and the attack of legislative history is very blunt, basically applying equally to all statutes. Perhaps the question of the appropriate specificity of legislation cannot really be addressed except on a subject-by-subject basis, as the Court does with respect to judicial doctrine. This argument has been made with respect to administrative rules. *See* Colin Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 106–09 (1983).

261. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466–68 (1981); New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). *See generally* SUNSTEIN, *supra* note 237, at 35–38 (arguing that much of lawmaking is possible only because of "incompletely theorized agreements" in which people can agree on specific outcomes without agreeing on the abstract theoretical

two benefits. First, it allows a legislature to avoid becoming mired in a stalemate because its members cannot agree on all issues. By sanctioning such an incremental approach, courts ensure that legislatures retain the power, necessary for practical government, of forging coalitions behind second-best policies while leaving unresolvable issues for another day.[262] Second, new problems often can best be addressed incrementally by prescribing rules of increasing specificity as a governmental entity gains experience.[263] The Court has shown an appreciation of this notion; in particular, it has recognized the risk of establishing a rule too precipitously.[264] Thus, attempting to prevent the use of vague statutory text may both frustrate Congress's ability to reach necessary compromises and prevent it from gaining experience before comprehensively legislating in an area.

The new textualists' critique of contemporary statutes surely is not so compelling that reasonable people must accept their assessment of the current quality of laws.[265] Nevertheless, courts have

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underpinnings of the outcomes); Tim Atkeson, Note, *Reforming the One Step at a Time Justification in Equal Protection Cases*, 90 YALE L.J. 1777, 1779–80 (1981) (discussing equal protection jurisprudence that allows the legislature to address problems incrementally and arguing that decisions upholding statutes under such justifications remain in effect for a limited period).

262. *See* Marshall L. Breger, *Introductory Remarks*, 1987 DUKE L.J. 362, 365 (noting that ambiguity is often a planned part of drafting because "[w]hen problems become too sticky, one solution is to leave matters to the courts—each side creating its legislative record as ammunition for the interpretive lawsuit it knows will surely come"); Davidson, *supra* note 48, at 114–15 (discussing vagueness and its importance in consensus-building); Mikva, *supra* note 61, at 636–37 (observing that judges should not be critical of statutory ambiguity because sometimes a bill can be passed only if legislators use ambiguous language); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 206 (1983) ("Key provisions may purposely be left vague or unsettled, or debate kept to a minimum, to achieve consensus.").

263. *See* Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 CASE W. RES. L. REV. 1129, 1174 n.151 (1992) (noting that Congress typically legislates incrementally).

264. *See* SEC v. Chenery Corp., 332 U.S. 194, 202 (1947) (announcing a standard and stating that developing the standard through case-by-case adjudication was justified because "the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule"); Pokora v. Wabash Ry., 292 U.S. 98, 105–06 (1934) ("[There is] need for caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which standards have emerged."); OLIVER WENDELL HOLMES, THE COMMON LAW 124 (Boston, Little, Brown, & Co. 1881) ("A judge who has long sat a *nisi prius* ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances far better than an average jury.").

265. Moreover, suggest Professors Farber and Frickey, if requirements of specificity

some justification for taking action with regard to at least one new textualist concern—the concern that legislative history gives courts too much discretion.[266] Courts must protect their own institutional integrity. The judiciary not only has the power to prevent legislative and executive encroachment upon its legitimate powers, but also has the right to refuse to perform functions that conflict with its judicial role.[267] For example, the Supreme Court has expressed concern regarding statutes granting federal courts' power to appoint executive branch officials and has precluded judges from making appointments when an "incongruity" exists "between the functions normally performed by the courts and the performance of their duty to

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were enforced, members of Congress might nevertheless avoid responsibility by leaving the drafting of detailed statutes to agencies or congressional staff, thereafter serving their constituents by intervening on the constituents' behalf in the process. *See* FARBER & FRICKEY, *supra* note 12, at 80.

In addition, there is some reason to doubt whether new textualism could successfully induce legislatures to engage in more precise drafting. William Eskridge provides two bases for such doubt. *See* Eskridge, *supra* note 2, at 677–78. First, difficult interpretive issues result either from deliberate legislative decisions to leave conflicting decisions to legislatures or courts or from social or legal developments that are not reasonably foreseeable. *See id.* at 677. Professor Eskridge asserts that adoption of the new textualist approach will not decrease any statutory imprecision that stems from such a legislative evasion or lack of omniscience. *See id.* Second, Professor Eskridge doubts whether the judiciary will consistently apply syntax canons, which are crucial to new textualist interpretation, and without such consistency, legislative practice will not be affected. *See id.* at 677–78.

266. *See Statutory Interpretation and the Uses of Legislative History*, *supra* note 12, at 68 (statement of Judge Buckley of the D.C. Circuit Court of Appeals).

267. *See* Muskrat v. United States, 219 U.S. 346, 352–57, 360–62 (1911) (holding that Congress had given the Court a nonjudicial role, in violation of Article III, when it conferred jurisdiction upon the Court in such a manner that the Court's sole function was issuing a determination regarding the constitutionality of a statute); Hayburn's Case, 2 U.S. (2 Dall.) 408, 410 (1792) ("[N]either the legislative nor the executive branches can constitutionally assign to the Judicial any duties, but such as are properly judicial, and to be performed in a judicial manner."); CHOPER, *supra* note 149, at 404–15 (arguing that courts vigorously should exercise judicial review of a statute when that statute either augments the judiciary's power beyond Article III's narrow confines or "otherwise unconstitutionally undermine[s]" the Supreme Court's critical role in American government). The Justices' refusal to advise President Washington in *Hayburn's Case* is the best known example of a refusal to accept an incompatible role. *See* Correspondence of the Justices, Letter from Chief Justice John Jay and the Associate Justices to President George Washington (Aug. 8, 1793), *in* 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486, 486–89 (New York, Henry Johnson ed., 1891); *see also Muskrat*, 219 U.S. at 355 ("[W]hile [the Supreme Court] executes firmly all the judicial powers intrusted [sic] to it, the court will carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to it by the Constitution."). Nevertheless, both before and after the letter to President Washington, members of the Court provided legal opinions. *See* RICHARD H. FALLON ET AL., THE FEDERAL COURTS AND THE FEDERAL SYSTEM 95–96 (4th ed. 1996); NOWAK & ROTUNDA, *supra* note 64, §2.12(b), at 54.

appoint."[268]

Thus, courts can appropriately preclude Congress from burdening judges with grants of excessive discretion in statutory interpretation.[269] Arguably, excessively general statutes impose nonjudicial duties upon courts. In construing such statutes courts must essentially engage in legislative duties of deciding how to address broad societal problems.[270] For instance, in *Georgia Association of Retarded Citizens v. McDaniel*,[271] Judge Hill complained that Congress, in legislation, merely declared that education for handicapped children was a problem, leaving fundamental questions about addressing that problem to the

268. Morrison v. Olson, 487 U.S. 654, 676 (1988) ("Congress' decision to vest the appointment power in the courts would be improper if there was some 'incongruity' between the functions normally performed by the courts and the performance of their duty to appoint." (citation omitted)).

269. New textualists have argued that the use of legislative history has increased the power of the courts in relation to the political branches of government and has led to excessive judicial discretion because a court can find support for almost any interpretation of a statute in legislative history. *See* Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring in the judgment); *In re* Sinclair, 870 F.2d 1340, 1342–43 (7th Cir. 1989); *Interbranch Relations*, *supra* note 36, at 84–85, 94–95 (statement of Judge Kozinski of the Ninth Circuit Court of Appeals); Easterbrook, *The Court and the Economic System*, *supra* note 143, at 62–64, 66; Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1663, 1677 (1991); Scalia, *supra* note 109, at 863; Sunstein, *Interpreting Statutes*, *supra* note 19, at 457; Wald, *supra* note 262, at 214.

270. *See* H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 254–56 (1989) (Scalia, J., concurring in the judgment) (stating that the RICO statute, 18 U.S.C. §§ 1961–1968 (1994 & Supp. IV 1998) may be unconstitutionally vague); Georgia Ass'n of Retarded Citizens v. McDaniel, 716 F.2d 1565, 1581–82 (11th Cir. 1983) (Hill, J., dissenting) (arguing that by intentionally enacting a vague statute, the political branches conferred legislative duties on the courts); Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 424–27 (1984) ("[The courts] are choking, not on statutes in general, but on ambiguous and internally inconsistent statutes."); Romero, *supra* note 21, at 211, 227–28 (discussing the argument that constitutional principles limit legislative delegation of lawmaking powers to courts). On the other hand, the Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (1994 & Supp. IV 1998), is a vague statute that has been very successful in achieving its statutory purpose. Its prohibitions have been interpreted by the judiciary to permit the courts to determine which restraints on trade are "reasonable," and it has been viewed as the archetypal grant of common-law power to the judiciary. *See* United States v. Associated Press, 52 F. Supp. 362, 370 (S.D.N.Y. 1943); ATIYAH & SUMMERS, *supra* note 119, at 323–24; WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 419–20 (1993). However, there is some question about whether this interpretation is what members of Congress envisioned. *See* Standard Oil Co. v. United States, 221 U.S. 1, 83, 89–91, 103–06 (1911) (Harlan, J., concurring in part and dissenting in part); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 340–41 (1897).

271. 716 F.2d 1565 (11th Cir. 1983).

judiciary.[272] Making such broad unstructured policy judgments is arguably incompatible with the courts' judicial role. However, Courts are perhaps the most appropriate institution to make the judgment of when statutory vagueness forces courts into essentially legislative duties that conflict with their judicial ones.

Ultimately, however, this argument for judicial control of statutory vagueness cannot justify disregarding legislative history entirely. New textualists would have courts disregard legislative history even when a statute is relatively precise and when the legislative history may enhance the court's understanding of the statute's goals.[273] Courts could more appropriately protect themselves, however, by construing vague provisions narrowly or by declaring them unconstitutional, rather than by ignoring legislative history altogether.

B. Reliability

The new textualists' thesis about the deceptive nature of legislative history is difficult to assess. Clearly the *potential* exists for the abuse of legislative history by legislative minorities seeking to establish their policies by subterfuge.[274] Few legislators read

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272. *See id.* at 1582 (Hill, J., dissenting).

273. While new textualism seeks to decrease judicial discretion over the long term by encouraging Congress to draft more precise statutes, it may increase judicial discretion over the short term. Depriving judges of legislative history may require them to use policy arguments more frequently to resolve interpretive difficulties. If most judges could resolve most issues based on text, as Justice Scalia asserts that he can, *see* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521, new textualism might well reduce judicial discretion even in the short term. Many, however, view statutory language as less determinate. *See, e.g.*, Karkkainen, *supra* note 7, at 401, 444–45, 475–76; Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 752, 778–79 (1995). More importantly, most judges probably view text as largely indeterminate. *See* National R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407, 418 (1992); *see also* Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 98 (1984) (noting that for many reasons statutes "are bound to speak poorly or not at all to essential questions" and that "[w]ords often do not have fixed meanings"); Farina, *supra* note 244, at 460–61 ("One need not . . . [believe] in the indeterminacy of language or . . . in the inevitability of statutory vagueness to appreciate that, if the court's independent role ends whenever ambiguity is discovered or analogy must be employed, the agency's judgment will virtually always control the interpretive outcome."). If that is so, new textualism will instead more often require judges to resolve cases by relying upon their own policy views without any guidance from Congress, even though such guidance may be available in legislative history. *See* Bell, *supra* note 4, at 61–62.

274. For instance, the use of legislative history may allow a committee chair to make "law" in the form of report language that conflicts with the desires of a majority of committee members. The staff that prepares reports, normally committee staff, are

legislative history, and congressional staff and lobbyists influence much of its content.[275] Nevertheless, the mere potential for abuse or manipulation of legislative history does not warrant rejection of it altogether. Courts can easily disregard particular legislative history that is misleading or the product of manipulation. The new textualist position—to reject legislative history in favor of statutory text—should be adopted only if legislative history is in fact routinely misleading, but new textualists have not established that legislative history is demonstrably misleading. Admittedly, such a showing would be difficult to make. Some scholars have concluded that legislative history is not inherently misleading.[276] At the very least, assessments of the reliability of various aspects of legislative history conflict.

Just as importantly, however, the judiciary should be able to rely on Congress to police the accuracy of its own legislative history. Members of Congress certainly have some interest in ensuring that procedures protect majoritarian judgments from subversion by minority tricks.[277] In fact, Congress has made some efforts to increase the accuracy of legislative history[278] by adopting a series of reforms with respect to the compilation of the *Congressional Record*.[279] Until the mid-1970s, Congress imposed no limits on members' ability to

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accountable not to the committee, but to the committee chair (and such staffs have become more like personal staffs). *See* MICHAEL J. MALBIN, UNELECTED REPRESENTATIVES: CONGRESSIONAL STAFF AND THE FUTURE OF REPRESENTATIVE GOVERNMENT 21, 55 (1980). This control by the chair has the potential for preventing some information from getting to all the members of the committee. *See id.* at 126–27; Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 386.

275. Of course, the same can be said with regard to statutory text.

276. *See* FARBER & FRICKEY, *supra* note 12, at 98, 100; Stock, *supra* note 109, at 175 & nn.69–71.

277. *See generally* Katzmann, *supra* note 48, at 7, 12 ("[T]he various interests have some incentive to ensure that the record reflects their preferences."). To the extent that the general populace is not likely to have much interest in such procedural issues and to the extent that the power to produce change is skewed in the direction of those most likely to attempt to doctor legislative history to mislead the courts—senior legislators—perhaps congressional consideration of procedures will be inadequate.

278. *See* Brudney, *supra* note 12, at 59–60 (discussing actual and proposed congressional actions to control manipulation of legislative history in a manner that frustrates the will of the majority); Correia, *supra* note 263, at 1157–59 ("In short, legislatures have self-regulatory procedures for insuring reliability of extra-textual explanations of statutory text."); Katzmann, *supra* note 53, at 174 ("[Majority counsel] has defended the report-drafting process by citing a number of safety checks."); *id.* (noting that minority counsel agreed with majority counsel and outlining a process of "political" safeguards to ensure the report was representative).

279. A similar occurrence happened with respect to the revision of remarks in proceedings of the House Committee on Science and Technology. *See* Davidson, *supra* note 48, at 107 & n.37.

revise their remarks, and nothing in the *Congressional Record* indicated whether a particular speech actually had been delivered on the House or Senate floor. The House and the Senate adopted reforms that provided for a textual "bullet" in the *Congressional Record* indicating statements that had not been made on the floor of the relevant legislative chamber.[280] The "bullet" system, it soon became evident, was also subject to abuse. Legislators could avoid having their remarks "bulleted" if they made a brief statement and subsequently "revised" those remarks to include a lengthy statement never made on the floor.[281] In 1985, the House replaced the "bullet" system with a system in which legislators, while on the floor, asked for permission to revise and extend their remarks for the record. Material inserted under such permission was to be printed in different typeface from the substantially verbatim presentation of the representatives' remarks made on the floor of the House.[282] In 1995, the Republican majority in the House of Representatives again changed the rules for compiling the *Congressional Record* to reduce further representatives' power to edit their remarks.[283]

A second example of Congress's effort to address the problem of misleading legislative history involves the Civil Rights Act of 1991 ("the Act").[284] The question of whether the Act would apply retroactively became one of the most contentious issues that arose during consideration of the legislation.[285] Proponents and opponents of retroactive application attempted to manipulate the legislative history to suggest that Congress had resolved the issue, even though the text of the statute was silent. Congress addressed one aspect of this problem by specifying, in the Act itself, the legislative history that could be relied upon and by expressly precluding reliance on other

280. *See* Correia, *supra* note 263, at 1153–54 n.85; Costello, *supra* note 11, at 55; Starr, *supra* note 40, at 376–77.

281. *See* Correia, *supra* note 263, at 1153–54 n.85; Katzmann, *supra* note 53, at 175.

282. *See* H. Res. 230, 99th Cong. (1985) (Sup. Docs. No. Y1.4/7:99-230). The change was made permanent in 1986. *See* H. Res. 514, 99th Cong. (Sup. Docs. No. Y1.4/7:99-514), *reprinted in* 132 CONG. REC. 20,981 (1986).

283. *See* OLESZEK, *supra* note 147, at 193; David S. Cloud, *GOP, to Its Own Great Delight, Enacts House Rules Changes*, CONG. Q. WKLY. REP., Jan. 7, 1995, at 13, 13–15. A House Committee report on the Organization of Congress had recommended such a change a year earlier. *See* 1 FINAL REPORT OF THE JOINT COMM. ON THE ORGANIZATION OF CONGRESS, H.R. REP. NO. 103-413, at 17 (1993) (Sup. Docs. No. Y1.1/8:103/413).

284. 42 U.S.C. § 1981 (1994).

285. Indeed, President Bush vetoed the initial version of the legislation largely because of its retroactive effects. *See* Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 1990 PUB. PAPERS 1437, 1439 (Oct. 22, 1990).

material in the legislative record.[286]

Notwithstanding Congress's efforts, the new textualist concerns about manipulation of legislative history continue to have some merit. New textualists have not successfully made the case, however, that so much of legislative history is misleading that courts must disregard it.

C. *Congressional Staff*

New textualists likewise are concerned with congressional staff members' involvement in the legislative process. Undoubtedly, such staff involvement is pervasive.[287] Staff members routinely participate in resolving policy differences among members of Congress.[288] Committee reports are primarily written by staffers[289] and often are not fully reviewed by the whole committee or even a substantial portion of it.[290] Nevertheless, reasonable people have long differed on the appropriate role of staff, and resolving the issue requires weighing competing considerations.

Many have decried congressional staff's increasing role in the legislative process.[291] At the most basic level, legislators—not staff

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286. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(b), 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 1981 (1994)).

287. HEDRIK SMITH, THE POWER GAME 280–81 (1988). As Hedrik Smith noted:

> Nowadays, staffers are a ubiquitous presence, riding elevators and congressional subways beside senators and House members rushing to a vote; at their elbows, giving advice; behind them at hearings, whispering questions; prepping their bosses for press interviews or shoving speeches into their hands; giving them political and substantive guidance; handling constituents; screening lobbyists; setting the agenda for committees; briefing members on the budget or haggling over its provisions; formulating proposals; making decisions; mastering procedure; managing hearings; cross-examining generals; probing the Central Intelligence Agency; negotiating with the White House.

Id. at 281.

288. *See* MALBIN, *supra* note 274, at 46–47, 63–71, 73–74, 88–93, 247–48; DAVID WHITEMAN, COMMUNICATION IN CONGRESS: MEMBERS, STAFF, AND THE SEARCH FOR INFORMATION 37–38 (1995).

289. *See* KENNETH KOFMEHL, PROFESSIONAL STAFFS OF CONGRESS 121, 125–26 (3d ed. 1977); MALBIN, *supra* note 274, at 92; Bradford L. Ferguson et al., *Reexamining the Nature and Role of Tax Legislative History in Light of the Changing Realities of the Process*, 67 TAXES 804, 809, 823 (1989); Mikva, *supra* note 274, at 385–86.

290. *See* KOFMEHL, *supra* note 289, at 121–22, 125–26. There may be some safeguards. *See* Katzmann, *supra* note 53, at 174. Staff members on at least some committees consult interested members regarding disputed sections of committee reports. *See* KOFMEHL, *supra* note 289, at 121–22.

291. *See, e.g.*, *infra* notes 292–95 and accompanying text. Congressional staff, however, is not monolithic. Staff members can be divided into three very distinct categories. The first is the staffs of individual members of Congress, whom the members control. The second category consists of the staffs of the various congressional committees, who traditionally were controlled almost exclusively by committee chairs. *See* Robert H.

members—are elected to make laws. To the extent that "law" derives from staff decisions, it does not deserve the respect due "law" that is adopted by elected representatives.[292] This complaint closely reflects new textualists' concerns.[293]

Salisbury & Kenneth A. Shepsle, *Congressional Staff Turnover and the Ties-That-Bind*, 75 AM. POL. SCI. REV. 381, 383–84 (1981); Robert H. Salisbury & Kenneth A. Shepsle, *U.S. Congressman as Enterprise*, 4 LEGIS. STUD. Q. 559, 560–61 (1981) [hereinafter Salisbury & Shepsle, *U.S. Congressman as Enterprise*]. As a result, staffers sometimes withheld information from other committee members. *See* MALBIN, *supra* note 274, at 126–27, 130–31. Members of the committee were thus dependent on the committee chair. More recently, the ranking member of the minority party has been given some control over a portion of the committee staff, and the House of Representatives has authorized the chairs of subcommittees to hire limited numbers of staff. *See* H. Res. 6, § 101(c)(4), 104th Cong. (Sup. Docs. No. Y1.4/7:104–6), *reprinted in* 141 CONG. REC. 462 (1995); H. Res. 5, 94th Cong. (Sup. Docs. No. Y1.4/7:94:5), *reprinted in* 121 CONG. REC. 4 (1975); JOINT COMM. ON THE ORGANIZATION OF CONGRESS, 103D CONG., BACKGROUND MATERIALS: SUPPLEMENTAL INFORMATION PROVIDED TO MEMBERS OF THE JOINT COMM. ON THE ORGANIZATION OF CONGRESS 1381 (Comm. Print 1993). The third category consists of employees of congressional support agencies, such as the Congressional Research Service and the Congressional Budget Offices. The staffers who are employed by support agencies do not seem to have drawn the attention of new textualists.

292. Paul Campos argues that staff involvement may create what he calls a "pseudotext." Paul F. Campos, *The Chaotic Pseudotext*, 94 MICH. L. REV. 2178, 2213–14 (1996). Pseudotext are rules promulgated by individuals (such as congressional staff members) who lack the authority to issue rules. Thus, when staff members create "text" that courts treat as binding, pseudotext is created. *See* POPKIN, *supra* note 270, at 426–27; Campos, *supra*, at 2213–14; Davidson, *supra* note 48, at 101–02; Harold L. Wolman & Dianne Miller Wolman, *The Role of the U.S. Senate Staff in the Opinion Linkage Process: Population Policy*, LEGIS. STUD. Q., Aug. 1977, at 281, 284. The title of Michael Malbin's book, *Unelected Representatives*, starkly highlights such a concern. *See* MALBIN, *supra* note 274.

Indeed, a parallel argument is used by courts in refusing to defer to the construction of statutes presented by agency counsel under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As the Court explained in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988):

> We have never applied the principle [of *Chevron* deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands."

Id. at 212 (quoting Investment Company Inst. v. Camp, 401 U.S. 617, 628 (1971)).

293. In response to the new textualists, some commentators argue that the role that staff assumes in the legislative process is no less justified than the role that law clerks play in the adjudicatory process. *See Statutory Interpretation and the Uses of Legislative History*, *supra* note 12, at 59 (statement of Rep. Kastenmeier); Katzmann, *supra* note 53, at 174; *see also* Stock, *supra* note 109, at 174 (arguing that the task of drafting written material commonly is delegated to staff in all three branches of government and concluding "[w]hat should count is not who operates the word processor, but whether the proper elected [or appointed] official accepts responsibility for the words, according to proper procedures"). Just as members of Congress do not write committee reports, judges

Michael Malbin has identified a more subtle injury produced by staffers' ubiquitous presence. He argues that deliberation, the exposure of legislators to their fellow legislators' views, forms a crucial part of the legislative process.[294] The ascendancy of legislative staffs has reduced members' direct contact with one another. Issues legislators once would have resolved by direct contact are now resolved in discussions among staff. Malbin argues that hearing arguments indirectly through staff rather than directly from fellow legislators reduces the likelihood that a member will seriously consider those views.[295]

The increased number of staffers and their greater involvement in the legislative process produces benefits, however. Given the relatively small number of legislators and the great demands on their time, staff surely reduces legislators' dependence on the executive branch, congressional leadership, committee chairs, and interest groups, and it also allows them to exercise more independent judgment.[296] Staff may also enable members to consider more issues in greater depth than they could without staff assistance. In periodically expanding the size of various legislative staffs since the 1960s, Congress has clearly concluded that the presence of staff provides a necessary enhancement of Congress's ability to make independent and informed judgments and that those benefits outweigh concerns about increasing the role of staff vis-a-vis

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often allow their law clerks to draft judicial opinions. Judges, however, ultimately sign, or at least formally join, opinions. Legislatures do not formally vote on committee reports, and even the committees that report bills to the full chamber do not sign or formally vote on the reports.

294. *See* MALBIN, *supra* note 274, at 240–42; *see also* Davidson, *supra* note 48, at 101–02 (noting that by allowing negotiations regarding legislation to be conducted by staff members, "Congress sacrifices the advantages of direct deliberation by its elected members"); Sunstein, *Beyond the Republican Revival*, *supra* note 19, at 1548–51, 1558–64, 1581 (discussing the central role of deliberation in the republican conception of politics and American constitutionalism and the judiciary's ability to encourage deliberation by the manner in which it construes statutes).

295. *See Interbranch Relations*, *supra* note 36, at 128–29 (statement of former Rep. John O. Marsh, Jr.); MALBIN, *supra* note 274, at 240–48.

296. *See* RIESELBACH, *supra* note 166, at 182–83; SMITH, *supra* note 287, at 282–83; WHITEMAN, *supra* note 288, at 186; Salisbury & Shepsle, *U.S. Congressman as Enterprise*, *supra* note 291, at 565. Although new textualists do not necessarily advocate staffing reductions, arguments have been made that staff reductions will increase the role of interest groups. *See* JOINT COMM. ON THE ORGANIZATION OF CONGRESS, 103D CONG., BACKGROUND MATERIALS: SUPPLEMENTAL INFORMATION PROVIDED TO MEMBERS OF THE JOINT COMM. ON THE ORGANIZATION OF CONGRESS 1462 (Comm. Print 1993); AMERICAN ENTER. INST. & BROOKINGS INST., A SECOND REPORT OF THE RENEWING CONGRESS PROJECT 69 (1993).

members of Congress.[297]

The concern about the democratic pedigree of agreements made between unelected representatives is ameliorated by members' absolute control over staff.[298] Staff have no formal independence and must be careful not to displease the congressperson for whom they work, and there may well be informal mores and pressures that ensure that staff members do not act in ways that are contrary to their employers' interests. For instance, Malbin concludes that staffers efforts as policy entrepreneurs generally reflect the legislators' interests, not those of the staffs.[299]

Given the members' time constraints, as well as the breadth and complexity of issues they must address, it may not be possible to reduce the current level of staff involvement in the legislative process.[300] Indeed, the Supreme Court long ago reconciled itself to

297. *See* WHITEMAN, *supra* note 288, at 2, 186. Of course, greater staff resources may also increase members' workloads by increasing the number of tangents that members or committees can follow. *See* JOINT COMM. ON THE ORGANIZATION OF CONGRESS, 103D CONG., BACKGROUND MATERIALS: SUPPLEMENTAL INFORMATION PROVIDED TO MEMBERS OF THE JOINT COMM. ON THE ORGANIZATION OF CONGRESS 1385 (Comm. Print 1993).

298. *See* 2 FINAL REPORT OF THE JOINT COMM. ON THE ORGANIZATION OF CONGRESS, H.R. REP. NO. 103-413, at 71 (1993) (Sup. Docs. No. Y1.1/8:103/413); *see also* MALBIN, *supra* note 274, at 21 (noting that staff is vulnerable because they can be fired at any moment—they have a feudal relationship with Congress members); *id.* at 47, 74 (noting that Senators retain control over staff negotiations by the way they set the ground rules for those negotiations). *But see* MALBIN, *supra* note 274, at 4, 118 (noting that members theoretically have right to hire and fire, but their actual control over staff is tenuous because of time constraints).

Recently enacted legislation subjecting Congress to federal laws may provide staff members with more protection. *See, e.g.*, Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3 (1995) (codified at scattered sections of 2 U.S.C. (Supp. IV 1998). Moreover, this absolute control may not ensure either that staff members share the policy views of their legislators or even that they accurately perceive those legislators' views. *See* Wolman & Wolman, *supra* note 292, at 287–89.

299. *See* MALBIN, *supra* note 274, at 32.

300. Given the right of legislators to control their staff members, perhaps such staff involvement should not even cause concern. *See* Gravel v. United States, 408 U.S. 606, 616–17 (1972); *Interbranch Relations*, *supra* note 36, at 129 (statement of former Congressman John O. Marsh, Jr.); Brief for the Senate of the United States at 11, Gravel v. United States, 408 U.S. 606 (1972) (No. 71-107), *reprinted in* 74 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 387–410 (Philip B. Kurland & Gerhard Casper eds., 1975); Brudney, *supra* note 12, at 33 & n.129, 49–50; Costello, *supra* note 12, at 67; Spence, *supra* note 8, 604–08.

Congress itself has focused on this issue. *See* H.R. REP. NO. 91-1215, at 15 (1970) (Sup. Docs. No. Y1.1/8:91-1215) ("The staffs of committees of the House make vast contributions to the legislative, investigative, and oversight work all committees perform each Congress. But while the quality of the staffs is high, their numbers are insufficient to meet the increasing workload of the committees they serve."), *reprinted in* 1970 U.S.C.C.A.N. 4417, 4431; 2 FINAL REPORT OF THE JOINT COMM. ON THE

the high level of staff participation in agency decisionmaking.[301] The Court, in a series of decisions from 1936 to 1941, decided that the degree of staff involvement in administrative decisionmaking does not provide a basis for challenging those decisions.[302] Initially, the Court declared that the agency official "who decides must hear," meaning that the official who decides an issue must personally consider and appraise the relevant evidence.[303] Thus, in the first of four decisions in *Morgan v. United States*,[304] the Supreme Court held that the trial court had erred in dismissing a claim that the Secretary of Agriculture's order setting the maximum livestock prices could not stand because the Secretary had not personally heard or read any of the relevant evidence.[305] In the succeeding series of decisions revisiting the controversy, the Court ultimately found its effort to police the level of staff involvement in administrative decisionmaking to be unworkable.[306]

The legitimate difference of opinion concerning the costs and benefits attendant to legislative staffs' current role suggests that the issue of the level of staff involvement is not an appropriate one for judicial resolution. Moreover, Congress has not ignored staffing issues.[307] Rather, Congress revisits and acts on the subject periodically[308] and even considered the subject during the recent comprehensive examination of its organization.[309] In 1995, the House

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ORGANIZATION OF CONGRESS, H.R. REP. NO. 103-413, at 72–95, 74–75 (1993) (Sup. Docs. No. Y1.1/8:103/413).

301. *See* United States v. Morgan ("Morgan IV"), 313 U.S. 409, 422 (1941); Morgan v. United States ("Morgan II"), 304 U.S. 1, 17–18 (1938), *overruled by* 313 U.S. 409 (1941); 1 DAVIS & PIERCE, *supra* note 157, § 8.6, at 395–96.

302. *See Morgan IV*, 313 U.S. at 422; *Morgan II*, 304 U.S. at 17–18.

303. Morgan v. United States ("Morgan I"), 298 U.S. 468, 481–82 (1936), *rev'd by* 304 U.S. 1 (1938).

304. 298 U.S. 468, 481–82 (1936), *rev'd by* 304 U.S. 1 (1938).

305. Morgan alleged that the Secretary of Agriculture had relied solely on consultations with his subordinates in making the challenged decision. *See id.* at 474–46 & n.1, 482.

306. *See Morgan IV*, 313 U.S. at 422; *Morgan II*, 304 U.S. at 17–18.

307. *See Interbranch Relations*, *supra* note 36, at 127 (statement of former Congressman John O. Marsh, Jr.) ("There has been considerable discussion about the role [staff] play in the legislative process . . . ."); JOINT COMM. ON THE ORGANIZATION OF CONGRESS, 103D CONG., BACKGROUND MATERIALS: SUPPLEMENTAL INFORMATION PROVIDED TO MEMBERS OF THE JOINT COMM. ON THE ORGANIZATION OF CONGRESS 1385 (Comm. Print 1993) (discussing the controversy regarding congressional staffing practices).

308. *See* 2 FINAL REPORT OF THE JOINT COMM. ON THE ORGANIZATION OF CONGRESS, H.R. REP. NO. 103-413, at 59–61 (1993) (Sup. Docs. No. Y1.1/8:103/413).

309. *See id.* at 59–79.

reduced committee staffs by one-third.[310]

Finally, the disregard of legislative history would not cure the problem of excessive staff involvement in the legislative process, even if we were to concede the correctness of the new textualists' perceptions and judgments about the excessive influence of staff. The ubiquity of staff and the time constraints on legislators mean that staff are no less involved in drafting and negotiating statutory text than in drafting and negotiating legislative history.[311] Members of Congress have no more time to parse statutory language than they do to consider the more readable legislative history. Thus, an exclusive focus on legislative history will almost certainly not change the congressional dynamic that has led to the omnipresent and central role of staff. In short, the new textualist argument for disregarding legislative history because of staff involvement again involves improper intrusion into congressional judgments about issues on which reasonable people can disagree.

D. Interest Groups and Lobbyists

The new textualists' last major instrumentalist argument involves

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310. H. RES. 6, 104th Cong. (1995) (enacted) (Sup. Docs. No. Y1.1/8:104-6). Congress not only has periodically considered its staffing needs, but also has addressed the issue of dominance of committee staff by committee chairs. The effort to ameliorate this problem has involved funding minority staff positions. Thus, currently in the Senate, staff are distributed between majority and minority members of the committee in proportion to the majority and minority membership on any particular committee. *See* S. RES. 281, 96th Cong. (1980) (enacted) (Sup. Docs. No. Y1.4/2:96-281). In the House, one third of the statutory committee staff resources must be allocated to the minority party, and the ranking member of each subcommittee receives one investigative staff member. *See* JOINT COMM. ON THE ORGANIZATION OF CONGRESS, 103D CONG., BACKGROUND MATERIALS: SUPPLEMENTAL INFORMATION PROVIDED TO MEMBERS OF THE JOINT COMM. ON THE ORGANIZATION OF CONGRESS 1380–81, 1400 (Comm. Print 1993). However, the allocation of staff to the minority party members on committees has long been an issue in controversy. *See id.* at 1381. *But see* RIESELBACH, *supra* note 166, at 167 (noting that the House majority has ignored the rule that one-third of staff must be allocated to the minority with impunity).

311. *See* MALBIN, *supra* note 274, at 46–47, 53, 60–61, 68, 70, 74, 89; Campos, *supra* note 292, at 2209 (citing WILLIAM N. ESKRIDGE JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 757–58 (2d ed. 1995)); Ferguson et al., *supra* note 289, at 809, 823. As Ferguson, Hickman, and Lubick note:

> In the case of federal tax legislation, the fact that committee report language and other legislative history is written by the staff has nothing to do with its legitimacy. Everything authoritative in tax legislation—statute and history alike—is written by staff, and to the extent that legislators are acting on their understandings of particular provisions, they are relying on narrative committee reports and colloquies rather than on statutory language.

Ferguson et al., *supra* note 289, at 823.

the role of interest groups and lobbyists. If viewed as a broad allegation that legislative history makes interest groups and their lobbyists too powerful, the new textualist claim is highly contestable. The proper role of interest groups and the degree of their influence have been matters of controversy since the framing of the Constitution.[312] The new textualists' claim, however, should be viewed as a more narrow and less contestable one—namely that interest groups should not be allowed to achieve their objectives by smuggling policies into legislative history to avoid the majoritarian process. Yet, even this limited claim suffers from two defects. First, the strategy of planting favorable legislative history is probably not essential for interest groups and lobbyists. Second, it is unclear whether the strategy is ordinarily a successful one.

First, the tactic of planting favorable legislative history is

312. James Madison thought that one of the major threats to the new Republic would be the danger of faction, and much of the structure of government was devised to mediate the expected problem of factions. *See* THE FEDERALIST NOS. 10, 51 (James Madison). Ultimately, Madison believed that the competition among interest groups would lead to policies in the public interest. *See id.* The Gilded Age dominance of legislatures by business interests lead to renewed concerns about the public interest being lost amid the efforts of interest groups to secure favorable policies and to the Progressive Movement's push for direct democracy and other mechanisms to secure the public interest. *See* THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 44–45 (1989); FONER, *supra* note 112, at 465–66, 486, 493, 518–19; JAMES A. MORONE, THE DEMOCRATIC WISH: POPULAR PARTICIPATION AND THE LIMITS OF AMERICAN GOVERNMENT 107–12 (1990). Scholars, at least, became more sanguine about interest groups in the 1950s, with advocates of pluralism arguing that interest groups provided a manner of organizing the populace's preferences between elections. *See* DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS 519–21 (1951); *see generally* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 131–35, 146, 150–51 (1956) (arguing that the genius of the American system of government is that "the making of governmental decisions is not a majestic march of great majorities" but rather "the steady appeasement of relatively small groups"). Public choice theorists expressed some skepticism, arguing that some groups were more likely to organize than others. *See* POSNER, *supra* note 221, at 354–55; Easterbrook, *The Court and the Economic System*, *supra* note 143, at 14–18. In particular, small groups, in which each member has much to lose or to gain by supporting particular legislation, find it much easier to organize than larger groups of more diffuse interests; thus, concentrated interests will be able to secure policies that advance their own narrow interests at the expense of the interests of the larger, unorganized public. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 54–57, 172–73, 192 (1994); Easterbrook, *The Court and the Economic System*, *supra* note 143, at 15–16; Macey, *supra* note 19, at 230–32. In addition, there has been popular concern about the power of special interests. Certainly the popular press and the results of opinion polls, suggest that the press and the citizenry have concluded that interest groups exercise excessive influence. *See, e.g.*, ALAN ROSENTHAL, THE THIRD HOUSE: LOBBYISTS AND LOBBYING IN THE STATES 5–8 (1993); PRINCETON SURVEY RESEARCH ASSOCS., MONEY AND POLITICS SURVEY SUMMARY AND OVERVIEW (visited June 1, 2000) <http://www.crp.org/pubs/survey/s2.htm>.

probably not a sufficiently significant weapon in the lobbyist's arsenal to warrant judicial concern. In fact, interest groups' legislative efforts are quite open.[313] Interest groups and their lobbyists need not prevail by subterfuge; they generally obtain favorable policies by securing legislative votes and by persuading legislators or their staffs to incorporate their policies into statutory text.[314]

Thus, some of the major popular and scholarly concerns about interest group dominance center upon interest groups' abilities to secure favorable statutory text and influence legislators' votes.[315]

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313. Interest groups' efforts to influence statutes are often quite visible. Interest groups' efforts with regard to gun control, telecommunications, and health care reform have been quite overt. Indeed, some bills are passed only after the respective interest groups and lobbyists agree on the substance of the bills. *See* Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 860–61 (1987).

314. Many identify the campaign finance system as the key element of interest group power, alleging that there is an implicit quid pro quo between campaign contributions and legislators' votes. *See* PHILIP M. STERN, *STILL* THE BEST CONGRESS MONEY CAN BUY 69–82, 149 (1992); Center for Responsive Politics, *10 Myths About Money in Politics* (visited June 1, 2000) <http://www.opensecrets.org/pubs/myths/contents.htm>; Laura I. Langbein & Mark A. Lotwis, *The Political Efficiency of Lobbying and Money: Gun Control in the U.S. House, 1986*, LEGIS. STUD. Q., Aug. 1990, at 413, 434 (concluding that campaign contributions influence congressional votes); Nancy Watzman et al., *Cashing In: A Guide to Money, Votes, and Public Policy in the 104th Congress* (visited June 1, 2000) <http://www.opensecrets.org/pubs/cashingin_104th/contents.html>. Comments by members of Congress acknowledging the effect that campaign contributions have on their votes buttress the quid pro quo theory. *See* ELIZABETH DREW, POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION 1–4, 38, 41, 45, 49–52, 79–81, 84 (1983); STERN, *supra*, at 69–82, 149; Center for Responsive Politics, *supra*.

The correlations between legislators' votes and campaign contributions, however, simply may reflect contributors' ability to identify candidates and legislators that will likely favor their interests. Thus, legislator votes may not follow the money, as the quid pro quo theory suggests, but rather the money may follow the votes—that is, favorable voting records attract funding from certain groups. *See* Smith, *supra* note 167, at 1067–69. Some argue that such campaign contributions may therefore merely lead to contributors obtaining greater access to legislators. *See* JEFFREY H. BIRNBAUM, THE LOBBYISTS: HOW INFLUENCE PEDDLERS WORK THEIR WAY IN WASHINGTON 131, 161–69 (1993); DREW, *supra*, at 49, 59, 77, 79; KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 164–65 (1986).

Still others, of course, attribute the success of various interest groups and lobbyists to strengths unrelated to their willingness to make campaign contributions, namely their expertise and their ability to mobilize of segments of the members' constituency. *See, e.g.*, BIRNBAUM, *supra*, at 146–47, 269; HAYNES JOHNSON & DAVID S. BRODER, THE SYSTEM: THE AMERICAN WAY OF POLITICS AT THE BREAKING POINT 145 (1996); SCHLOZMAN & TIERNEY, *supra*, at 7–9, 297–99, 310–17; *see also* Langbein & Lotwis, *supra*, at 413–15 (noting that "scientific research designs have produced mixed evidence about the direct influence of money on congressional votes"). These last reasons are, of course, quite benign reasons for the success of interest groups and lobbyists. *See* BIRNBAUM, *supra*, at 6, 24; Peter H. Schuck, *Against (and for) Madison: An Essay in Praise of Factions*, 15 YALE L. & POL'Y REV. 553, 583–86 (1997).

315. In addition, many make the more general complaint about their ability to block

Members and their staff have long used bill language drafted by lobbyists and interest groups,[316] and, in fact, there has been some recent concern about the presence of lobbyists during the drafting process.[317] In contraposition to the assumptions of new textualists, some public choice theorists have even suggested that interest groups are more likely to succeed in incorporating their policies in statutory text than in legislative history. Professor Macey, for example, argues that legislative history is likely to outline public-regarding justifications for legislation, whereas the statutory text will likely reflect the interest groups' real desires.[318]

None of these observations suggest that interest groups and lobbyists need to adopt strategies of subterfuge to ensure that their preferred interpretations escape legislators' attention. In fact, the literature regarding interest groups does not appear to cite influencing legislative history as a major interest group or lobbyist tactic.[319] In short, the ability to plant favorable legislative history does not add much to the arsenals of interest groups, and they are unlikely to resort to such strategies with a frequency that would justify disregarding legislative history outright.

Second, planting favorable legislative history probably does not provide a reliable method for interest groups to obtain their desired policies absent the involvement and approval of influential legislators. Legislators and their staffs control the production of committee reports and other legislative history. Staff members know that interest groups and lobbyists attempt to smuggle their policies into legislative history and presumably are wary of such efforts. As discussed earlier, it is not clear that staffers act in a manner that subverts the intent of legislators when drafting committee reports and other legislative history.[320] It also is not clear that legislative

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legislation that is in the public interest.

316. *See* BIRNBAUM, *supra* note 314, at 117–21, 125–26, 146–47.

317. *See* 141 CONG. REC. 16,820 (1995) (statement of Rep. Skaggs); ELIZABETH DREW, SHOWDOWN: THE STRUGGLE BETWEEN THE GINGRICH CONGRESS AND THE CLINTON WHITE HOUSE 116–17, 114 (1996); Stephen Engelberg, *100 Days of Dreams Come True for Lobbyists in Congress*, N.Y. TIMES, Apr. 14, 1995, at A12; Stephen Engelberg, *Business Leaves the Lobby and Sits at Congress's Table*, N.Y. TIMES, Mar. 31, 1995, at A5; George Miller, *Authors of the Law*, N.Y. TIMES, May 24, 1995, at A21. Such involvement does not have its genesis in the Republican control of Congress. *See* BIRNBAUM, *supra* note 314, at 117, 118.

318. *See* Macey, *supra* note 19, at 232.

319. The new textualists do not cite to the political science literature or even to major works of journalists and others outside the academic world. My own (far from exhaustive) reading has not uncovered much discussion about such a strategy.

320. *See supra* notes 298–99 and accompanying text.

majorities will allow their wills to be routinely subverted by misleading legislative history.[321] In addition, the prospect that an interest group and their lobbyists will succeed in planting favorable legislative history is at least diminished by the diversity of interest groups. The diversity of interest groups and their policy positions provides an incentive for interest groups and lobbyists to prevent each other from using subterfuge to establish policies that could not gain majority approval.[322]

New textualists certainly have not shown that lobbyists or, for that matter, staffers place matters in legislative history without the concurrence or involvement of at least some key members of the relevant committee, most notably the committee chair. This collaboration, however, does not satisfy new textualist concerns, but their remaining concerns cannot really be attributed to the role of interest groups, lobbyists, or even staff. Instead, those concerns should be attributed to new textualists' discomfort with committee dominance of legislatures.

New textualists' concerns about committee dominance stems from the potentially anti-majoritarian effect that committee dominance has on the legislative process. Voting on the floor of a legislative chamber is strictly majoritarian because each legislator's vote counts equally. However, in the legislative process that precedes the floor vote—especially the committee process—some legislators have more power than others. Members of congressional committees, and the chairs of those committees, in particular, have greater power to influence the contours of legislation than do rank-and-file members of the legislature. New textualists view committees and their chairpersons as dictatorial agenda-setters who manipulate the membership of the legislature by the manner in which they package issues,[323] and for interpretive purposes, new textualists assume that floor proceedings are the only important aspect of the legislative process.[324] These concerns about the excessive influence of committees are hardly a matter for the courts to resolve. Rather, resolving questions regarding the proper role of committees and

321. *See supra* notes 276–86 and accompanying text.

322. *See* FARBER & FRICKEY, *supra* note 12, at 98. *See generally* ROSENTHAL, *supra* note 312, at 216 (discussing the proliferation of interest groups with conflicting positions and the concomitant reduction in the influence of individual interest groups). Clearly the multitude of competing interest groups does not obviate concern about the manipulation of legislative history because some interests are still underrepresented or not represented at all.

323. *See* FARBER & FRICKEY, *supra* note 12, at 50.

324. For a full statement of this argument, see Bell, *supra* note 4, at 49–50.

committee chairs in the legislative process should remain the province of legislators, who are not only more competent to solve them but also more entitled to do so.

In sum, the new textualists' argument that recognition of legislative history enhances interest group and lobbyist influence in troubling ways may be the least contestable of all their arguments. Nevertheless, the ability of interest groups to manipulate legislative history appears to be so insignificant that new textualists' fears about interest group and lobbyist distortion of legislative history do not justify their radical solution.

V. RESPECTING BOTH LEGISLATIVE JUDGMENTS AND NORMATIVE PRINCIPLES: THE PUBLIC JUSTIFICATION APPROACH

As we have seen, while new textualists deploy normative arguments in support of their approach, they dismiss reasonable legislative judgments about contestable issues of legislative process. Yet interpretive theory can rest on *both* respect for legislative judgments and independent normative judgments about the legislative process. I have previously proposed such a methodology—the public justification approach to statutory interpretation.[325] Unlike the new textualist approach, my approach values some elements of legislative history. Under my approach, statements in legislative history are accorded significance not because they necessarily reflect some subjective intent; rather, statements in legislative history are accorded significance merely because they were made—much as we accord significance to promises. Such an approach toward legislative history rests on the twin premises that legislatures have an obligation to justify statutes they enact and that at a minimum legislatures should not mislead the public. Because legislatures have an obligation to justify statutes or at least not provide misleading justifications, portions of legislative history that provide such explanations should not be disregarded as irrelevant, nor should they be considered relevant only if a court can conclude that they reflect some agreed-upon subjective intent of a majority of legislators.[326] The twin premises underlying my approach are normatively attractive and comport with congressional expectations. In this Part, I discuss my approach's normative underpinnings as well as its consistency with congressional judgments.

325. *See id.* at 76–83.

326. New textualists doubt that there is such shared intent except in the most extraordinary circumstances. *See id.* at 55–59.

Congress's obligation to explain, the first of the twin premises, rests on two propositions. First, Congress's obligation to explain derives from the respect that government owes its citizens. In democracies, citizens are sovereign, and legislatures merely act on the behalf of citizens. Accordingly, legislatures owe the public a justification for actions taken in their name.[327] Ordinarily, actors have no obligation to explain their actions to those who are not the source of their authority. For example, military commanders need not explain their commands to subordinates, because they do not derive their authority from those subordinates. Yet, because legislatures derive their authority from the people they govern, the proper analogy is to those relationships, such as the principle-agent relationship, in which explanations are owed.[328] Indeed, knowledge of the rationale for an agent's action is essential to maintaining control over the agent. Thus, knowledge of legislative rationales is critical to the citizenry's ability to control its government.[329]

In addition, providing explanations to citizens affected by governmental actions is necessary to respect their status as autonomous human beings.[330] Professor Laurence Tribe has observed that

> both the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to interchange express the elementary idea that to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one.[331]

Similarly, Mortimer Kadish and Stanford Kadish argue that "the principle that people must justify undertaking an action when others are affected ... flows from an underlying commitment that other people are entitled to be treated as autonomous and free beings rather than manipulable things—a commitment that has informed ... the entire Western liberal tradition."[332]

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327. The Pennsylvania Constitution of 1776 made this explicit, providing that "for the ... satisfaction of the public, the reasons and motives for making such laws shall be fully and clearly expressed in preambles." PA. CONST. of 1776, § 15.

328. For example, shareholders have the right to demand explanations from corporate officers for decisions those officers make in managing the corporation. *See* Bell, *supra* note 4, at 12 & n.25. It seems an unlikely argument that the Congress would owe less explanation to citizens than a corporation owes to its shareholders.

329. This obligation to explain is closely related to the proposition that the public must have access to governmental information. *See id.* at 14–18.

330. *See id.* at 15–16.

331. TRIBE, *supra* note 64, § 10-7, at 666.

332. MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY 12–13 (1973).

The second of the twin premises for according legislative explanations an independent significance is that democratic governments have a duty not to mislead their citizens. Lying, even more than refusing to provide an explanation, exhibits disrespect for citizens as sovereigns. Moreover, government lies invalidate the consent of the citizenry underlying decisions made by democratic governments. Democracy ultimately requires the consent of the governed, but that consent surely lacks validity if it is based on preferences manufactured by government manipulation of information. Thus, even if there were no affirmative obligation to explain its actions, the government surely has an obligation to avoid misstating the rationales for its actions. According significance to legislative explanations discourages deceit. Interpretations that disregard the legislative justifications may more accurately reflect the substantive preferences of the winning legislative coalition, but only at the expense of reducing the consequences of legislative deceit.

The legislature's obligation to explain statutes as well as to enact them has two corollaries that inform my public justification approach. First, the obligation to explain and the publication of explanations requires a reconceptualization of each legislator's vote on proposed legislation. We can no longer view such votes merely as indicating approval of only the statutory text. Instead, we must view the legislator's vote as a vote to approve the text of the statute as well as its publicly proclaimed rationale. Second, we can find legal significance in the legislative history even if legislators' subjective reasons for casting their votes in favor of particular legislation vary, because legislators have a duty to respond to the justification the legislature has publicly offered.

We can see how a duty to explain forces the reconceptualization of the meaning of legislators' votes by examining the consequences of an acknowledged legislative duty—ensuring that statutes embody understandable commands.[333] A legislature can satisfy its duty to provide understandable commands only if each legislator has a corresponding obligation in casting his vote. That obligation consists of expressing assent or dissent, in the form of his vote, to the meaning of the proposed statute in customary English usage. A legislator who votes based upon his own idiosyncratic use of language breaches that obligation.

333. Lanzetta v. New Jersey, 306 U.S. 451, 453, 458 (1939); OFFICE OF LEGAL POLICY, *supra* note 39, at 51–52; Robert H. Jackson, *Problems of Statutory Interpretation*, 8 F.R.D. 121, 124–25 (1948).

To illustrate, if each of the eleven members of a legislative body conceptualize the term "motor vehicles" differently, a statute prohibiting people from bringing "motor vehicles" into a park would be unclear if the legislators' only obligation were voting based on their own subjective use of the term "motor vehicles." Legislators would have attained no meeting of the minds—each legislator could insist that the courts adopt his interpretation of the language because he had no duty to consider the ordinary meaning of the statutory text. In contrast, the statute would have meaning, regardless of the legislators' divergent understanding of the term "motor vehicles," if legislators had a duty to assent or to dissent to the statute's customary meaning. Even if no legislator understood the term "motor vehicles" to mean motorized means of transportation, the term "motor vehicles," as used in the statute, would assume that meaning. In short, the legislators constructively assented to banning "motorized means of transportation," and only such objects, from the park, making legislators' actual subjective states of mind irrelevant.

The implications of the legislature's duty to provide public justification can now be explored. Such a duty requires each legislator to participate in the creation of both the statutory text and the public justification. Then, once that public justification is promulgated, each legislator has a duty to express assent or dissent, by means of her vote, to both the ordinary meaning of the terms used in the statute and the public justification provided for it. If a legislator votes for a statute while holding a subjective view of the statute's rationale that differs from the public justification offered by the entire legislature, then she cannot legitimately demand that a court honor her subjective view of the statute's rationale any more than she could legitimately demand that a court honor her subjective understanding of the terms in the text of the statute. Her duty as a legislator makes her act of voting for the statute without expressing disagreement with the publicly offered rationale irresponsible—and in interpreting the statute, a court need not assume that legislators behave irresponsibly. In effect, courts must reconceptualize the meaning of legislators' votes, no longer treating those votes as expressions of assent to merely the customary meaning of the statutory text, but as assent to the meaning of the text *and* the justification provided.

Viewing legislatures as having an obligation to explain statutes also allows courts to rely on public justifications of statutes appearing in the legislative history, notwithstanding legislators' varying subjective understandings of a statute. Indeed, legislators rarely

share a common subjective understanding of a statute's meaning. First, most legislators do not consider statutory language in sufficient detail to formulate a position on numerous specific issues that will arise under it.[334] Second, members follow the cues of others, such as the relevant committee chair, party leaders, or the administration, in casting their votes.[335] Third, many members cast votes for reasons that bear little relationship to their view of a statute's merits.[336] For example, a member might vote for a statute in exchange for a colleague's vote on another measure or to gain favor with his party's leadership.[337]

Although new textualists highlight these matters in challenging the concept of legislative intent, their own reliance on statutory text is vulnerable to precisely the same challenges.[338] Few, if any, legislators read an entire statute before they vote on it; indeed, often they read none of it.[339] Many members may give little thought to the text of the bill because they will ultimately vote based on other members' positions.[340] Moreover, even if all members read the statutory text, they probably would understand that text differently.[341]

If a legislator wishes a statute to reflect his subjective intent, he must ensure that the statute in fact conveys that intent to the reasonable reader. No reasonable legislator who votes for a statute could expect the courts to give the statute the meaning he subjectively ascribes to it if that subjective understanding departs from the customary meaning of the words used in the statute.[342] New

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334. *See* Karkkainen, *supra* note 7, at 416.

335. *See* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 557 (1985); Evans et al., *supra* note 163, at 247–57.

336. *See* Edwards v. Aguillard, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting); Breyer, *supra* note 8, at 864–66; Diver, *supra* note 335, at 558; Mayton, *supra* note 40, at 144–45 & n.99; Shepsle, *supra* note 36, at 244, 248, 249–50.

337. *See Edwards*, 482 U.S. at 637 (Scalia, J., dissenting).

338. *See Statutory Interpretation and the Uses of Legislative History*, *supra* note 12, at 60 (question by Rep. Kastenmeier to Judge Buckley of the D.C. Circuit Court of Appeals); Wald, *supra* note 12, at 307.

339. *See Statutory Interpretation and the Uses of Legislative History*, *supra* note 12, at 33, 111 (statements of then-Judge Stephen Breyer and Professor Stephen F. Ross); *Interbranch Relations*, *supra* note 36, at 76–78 (testimony of former Rep. Robert Kastenmeier); *id.* at 91 (testimony of Rep. Eleanor Holmes Norton); ARTHUR MAASS, CONGRESS AND THE COMMON GOOD 115–16 (1983).

340. *See supra* note 335 and accompanying text.

341. For instance, members of a legislative body might interpret the term "motor vehicles" to mean any one of the following: (1) all motorized vehicles; (2) all motorized vehicles that operate on the Earth's surface, including land or water; (3) all motorized vehicles that operate on land, but not water; (4) all motorized vehicles that operate on land except trains; or (5) all motorized wheeled vehicles.

342. *See* Charles B. Nutting, *The Ambiguity of Unambiguous Statutes*, 24 MINN. L.

textualists, therefore, presume that all of the legislators both knew the meaning the reasonable person would attach to the statutory text and voted on that basis.[343] Given their vision of legislators' responsibilities, new textualists can treat legislators' failures to read and to recognize the customary meaning of statutory texts as a dereliction of duty rather than a conceptual flaw in their theory.[344]

Positing a normative duty to explain statutes, a similar argument can be advanced with respect to the legislative history that comprises the statute's public justification. The absence of a shared subjective intent is unimportant because that does not determine a statute's public meaning. Moreover, a public justification *is available* to each legislator, *as is* the text of the statute. Just as each legislator has a duty to become aware of the statutory text and its ordinary English meaning, under the public justification approach, each individual legislator also has a duty to become aware of the public justification offered for the statute and to vote on the basis of that public justification. Accordingly, if a legislator votes for the statute without dissenting from the public justification, he has implicitly assented to that public justification. Legislators who fail to familiarize themselves with the public justification of a statute or who fail to challenge any perceived inaccuracies in it, have not fulfilled their duties as legislators. A legislator's actual views of the statute's rationale are thus irrelevant.

My approach requires the interpreter to examine both the statute's text and its public justification.[345] In identifying the materials that constitute a statute's public justification, three criteria should be employed. First, the material must be available to all legislators. Because each legislator has a right to participate in the development of the public justification, each legislator must have access to that justification. Second, only material to which members can respond before casting their votes can be considered a part of a statute's

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REV. 509, 516–17 (1940).

343. *See* United States v. Taylor, 487 U.S. 326, 345 (1988) (Scalia, J., concurring in part); *Statutory Interpretation and the Uses of Legislative History*, *supra* note 12, at 60 (colloquy between Rep. Kastenmeier and Judge Buckley of the D.C. Circuit Court of Appeals).

344. *See* Conroy v. Aniskoff, 507 U.S. 511, 528 (1993) (Scalia, J., concurring in the judgment) ("The language of the statute is entirely clear, and if that is not what Congress meant *then Congress has made a mistake* and Congress will have to correct it." (emphasis added)).

345. Commentary outside the public justification should not be considered binding. Yet after examining the text and the public justifications and nonetheless finding a statute ambiguous, a court may then want to consider outside commentary to arrive at the most efficacious statutory interpretation.

public justification. Of course, members cannot formally amend much of the legislative history in the same way they can formally amend bills under consideration.[346] Nevertheless, treating only materials subject to formal amendment as potential elements of the public justification is unwarranted. A document should qualify for inclusion in the public justification if members can disavow the document, in whole or in part, before voting. Thus, although members cannot formally amend committee reports, a legislative majority can disavow them.[347] In particular, members may express disagreement with committee reports on the floor of the legislature.

Third, only material considered authoritative by the legislators themselves should gain recognition as a part of a statute's public justification—that is, the documents should be ones that members frequently rely upon in casting their votes. For example, Congress delegates to committees the tasks of both reporting statutory text, in the form of a bill, and providing an explanation of the bill that members can consult in deciding how to vote.[348] Senators and Representatives regularly rely on such committee reports as well as floor manager statements as authoritative expositions of statutory meaning.[349] Indeed, members have come to depend on committee reports so heavily that they often do not consult the actual text of a statute.[350] Moreover, members of Congress surely realize that courts,

346. For example, floor debate is an important element of legislative history. Members who gain recognition can shape the content of floor debate. The *Congressional Record*, however, is not amended merely because a majority disagrees with the rationale for a statute set forth on the record by some legislators.

347. *See* Zwirn, *supra* note 42, at 326 (noting that although a committee report "cannot be formally amended by legislators who may disagree with some of its contents," there are several informal approaches that can have the effect of amending committee reports). Ultimately, however, this second requirement excludes little—except post-enactment materials—because during debates members of Congress can express disagreement with any document that discusses the statute.

348. Thus, a committee report is required by the rules of the House of Representatives, *see* H.R. RULE 11, cl.2, and customarily provided in the Senate, *see* OLESZEK, *supra* note 147, at 206; Broden, *supra* note 115, at 215–16; Zwirn, *supra* note 42, at 322. Conference reports are published in the *Congressional Record* and made available to each Senator or Representative before they vote on the corresponding bill. *See* OLESZEK, *supra* note 147, at 289.

349. *See* Broden, *supra* note 115, at 210, 212.

350. *See* FRIENDLY, *supra* note 12, at 215–16; ERIC REDMAN, THE DANCE OF LEGISLATION 140 (1973); Brudney, *supra* note 12, at 28, 53, 63; Farber & Frickey, *supra* note 8, at 448; Zeppos, *supra* note 11, at 1311–14; Zwirn, *supra* note 42, at 320. Indeed, there are occasions when the text of a bill has been misleading because the chamber looked at the report, not the text of the bill. *See Interbranch Relations*, *supra* note 36, at 90 (testimony of former Rep. Robert Kastenmeier); *id.* at 91 (testimony of Rep. Eleanor Holmes Norton); *Statutory Interpretation and the Uses of Legislative History*, *supra* note

members of the public, and agencies consider such documents authoritative.[351] Conversely, statements made at hearings, set forth in party caucus documents, or made outside Congress often are seen as expressing only the views of individuals members (or their parties), not necessarily that of Congress as an institution.[352]

With respect to the United States Congress, then, the materials that provide the public justification of statutes are: (1) committee reports; (2) statements of the floor manager; and (3) statements of sponsors of an amendment or a bill, when the amendment has not been considered by the appropriate committee.[353] Thus, members of Congress have a duty to familiarize themselves with the explanations contained in these three types of documents.[354] They also have a duty to object to the explanations with which they disagree.[355] Such an

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12, at 33, 111 (statements of then-Judge Stephen Breyer and Professor Stephen F. Ross); MAASS, *supra* note 339, at 115–16.

351. *See* JOHNSON, *supra* note 154, at 14 ("Committee reports are perhaps the most valuable single element of the legislative history of the law. They are used by courts, executive departments, and the public generally, as a source of information regarding the purpose and meaning of the law."); Breyer, *supra* note 8, at 871–72.

352. This reasoning may appear somewhat circular—the public, administrative agencies, and legislators may have begun to rely on committee reports and floor manager statements because courts began to rely on such materials, and in turn, the widespread reliance on such material is now being used to justify continued judicial reliance upon it. Even assuming, however, that the judicial practice produced widespread reliance on such documents, Congress could have expressed disapproval of the trend or even enacted a statute precluding the consideration of legislative history. *See* Civil Rights Act of 1991, 42 U.S.C. § 1981 note (1994) (setting forth portions of legislative history to which courts may refer); 5 U.S.C. § 801(g) (Supp. IV 1998) (providing that courts may not draw any inference from Congress's refusal to veto a statute); Romero, *supra* note 21, at 213–17. So, while the courts may have provided the initial impetus for reliance upon committee reports and floor manager statements, the continued reliance upon such documents may be attributed, at a minimum, to Congress's acquiescence.

353. The final category includes situations when the Senate or the House adopts an amendment proposed by a member that changes the bill recommended by the relevant committee. Proposal and adoption of such amendments typically occur during floor debate. *See* Breyer, *supra* note 8, at 873.

354. Ultimately, the categories of material considered part of the institutional justification of statutes must be somewhat limited so that legislators' duty to respond to that justification remains manageable. Courts should not require legislators to review and comment publicly upon numerous documents on pain of being found to have assented to all the statements therein. However, if the legislative process is to be a discussion of policy rather than merely a registration of preferences, legislators should have a duty to review a limited number of documents discussing statutory rationales produced by those with authority in the institution.

355. Requiring every member who disagrees with a statement in a public justification to express that disagreement is unnecessary and unwise. If several legislators disavow the offending statement, a member who agrees with them should not also need to express disagreement with the public justification. Such a requirement would needlessly extend debate. Thus, if several legislators argue that the statute's rationale is broader, narrower,

expression of disagreement will probably provoke a discussion and a clearer resolution of the issue. Several scenarios are possible. The floor manager may provide a more thorough explanation of the statute. That explanation might convincingly demonstrate that either the floor manager's initial statement or the committee report provides the best explanation of the statute. Alternatively, the legislative body might consider amending the text of the bill.

The public justification approach has sound normative underpinnings, and, unlike new textualism, the approach does not conflict with Congress's conception of its responsibilities. Congress clearly feels obligated to offer justifications for the statutes it enacts. Often, of course, Congress declares its purposes in the form of statutory preambles. Congress also regularly provides for the production and publication of committee reports to explain the rationale for legislation. Congress has recognized the use of committee reports and has done nothing to discourage the practice. Indeed, members of Congress appear to believe that courts should rely upon legislative history in interpreting statutes.[356] More generally, Congress has required agencies, in promulgating regulations, to provide a justification for those regulations.[357] Indeed, Congress has recognized openness in government as a normative ideal. In the Government in the Sunshine Act,[358] Congress declared it "the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking process of the Federal Government."[359] Congress has legislated to satisfy that policy by enacting the Freedom of Information Act[360] and the Federal

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or simply different than that identified in the public justification, other members need not add their voices in support.

Nevertheless, the statement of one legislator should not lead a court to question the public justification, as it does not suggest substantial disagreement with the public justification. The public justification should be questioned only if several members disavow it, because vocal dissent may suggest a significant difference of opinion within the legislative chamber. The position stated by those challenging the public justification should not be accepted by the interpreter as the statute's rationale. Rather, such a dispute means only that the court will have to resolve textual ambiguities without reliance upon the text of the explanatory materials.

356. *See supra* note 61.

357. *See* Administrative Procedure Act, 5 U.S.C. § 553(c) (1994 & Supp. IV 1998). *See generally id.* § 555(e) (1994 & Supp. IV 1998) (requiring that a decision in an agency adjudication that denies relief must be accompanied by "a brief statement of the grounds for denial").

358. *Id.* § 552(b) (1994 & Supp. IV 1998).

359. *Id.*

360. *Id.* § 552.

Advisory Committee Act.[361] Consistent with this philosophy, the House and Senate have adopted rules opening committee proceedings to the public.[362] In short, the public justification approach, which accords significance to some legislative history, has both a strong normative underpinning and is generally consistent with Congress's own views about the manner in which it legislates.

The public justification approach provides a novel perspective on two notable Supreme Court cases. The first case, the Court's recent five-to-four decision in *Department of Commerce v. United States House of Representatives*,[363] raises interpretive questions that not only have importance in their own right, but that also typify interpretive issues involved in attempting to draw inferences from legislative silence. In such cases, the public justification approach has particular power because it provides an alternative justification for according significance to congressional silence. The second case, the classic *Rector of Holy Trinity Church v. United States*,[364] involves a more conventional interpretive problem—interpreting a statute when the rationale provided in the legislative history arguably limits the breadth of the statute suggested by the plain meaning of the statutory text.

A. *Using Sampling to Conduct the Census:* Department of Commerce v. United States House of Representatives

In its last term, the Supreme Court considered whether federal law allows the Census Bureau to employ sampling techniques in determining each state's populations for purposes of apportioning seats in the House of Representatives.[365] Historically, the federal government based the population count on direct contact with every household included in the census, accomplished either by census takers' personal visits to dwellings or the households' return of census

361. 5 U.S.C. app. (1994 & Supp. IV 1998).

362. *See* S. RULE 26.5b; H.R. RULE X, cl. 4(a)(1)(A); H.R. RULE XI, cl. 2(g)(1). The 1976 rule changes that opened committee proceedings were adopted because Congress believed that citizens were not merely entitled to knowledge of statutory enactments, but also entitled to know the reasons for those statutory enactments. *See* S. REP. NO. 94-354, at 5–6 (1975) (Sup. Docs. No. Y1.1/5:94-354), *reprinted in* SENATE COMM. ON GOV'T OPERATIONS & HOUSE COMM. ON GOV'T OPERATIONS, GOVERNMENT IN THE SUNSHINE ACT SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 200, 200–01 (1976).

363. 525 U.S. 316 (1999).

364. 143 U.S. 457 (1892).

365. *See* Department of Commerce v. United States House of Representatives, 525 U.S. 316, 320 (1999).

forms by mail.[366] The resulting population figures significantly undercounted the population—particularly urban dwellers and racial minorities.[367] The Census Bureau's plan to use statistical sampling in conducting the 2000 Census to address the undercount resulted in a lawsuit that required the courts to determine whether the Census Act authorized sampling.[368] In resolving that question, the Court revisited a methodological issue that has arisen previously: what inference should be drawn from legislative silence?[369]

At the center of the case was whether the Census Bureau possessed the legal authority to use sampling to adjust census figures that would be used in apportioning the House of Representatives under the Census Act of 1957. Section 141(a) of the Act, which had been added by Congress in 1976, authorized the Secretary of Commerce to take a decennial census of the population "in such form and content as he may determine, including the use of sampling procedures."[370] Section 195 of the Act, which had been amended in 1976, provided that "[e]xcept for the determination of population for purposes of congressional apportionment, the Secretary shall, where he deems it appropriate, authorize the use of statistical sampling in carrying out the Census Act."[371] The House of Representatives and

366. *See* MARGO J. ANDERSON, THE AMERICAN CENSUS: A SOCIAL HISTORY 201 (1988). Until 1950, the census was conducted exclusively by census takers who visited households. After 1950, the Census Bureau began using forms that were mailed to households, completed, and returned. *See id.*

367. *See* Samuel Issacharoff & Allan J. Lichtman, *The Census Undercount and Minority Representation: The Constitutional Obligation of the States to Guarantee Equal Protection*, 13 REV. LITIG. 1, 6–9 (1993); Sheldon T. Bradshaw, Note, *Death, Taxes, and Census Litigation: Do the Equal Protection and Apportionment Clauses Guarantee a Constitutional Right to Census Accuracy?*, 64 GEO. WASH. L. REV. 379, 386–88 (1996). The undercount of African-Americans goes back to at least the 1870s. *See* ANDERSON, *supra* note 366, at 89.

368. *See Department of Commerce*, 525 U.S. at 324.

369. *See infra* notes 382–411 and accompanying text.

370. In 1976, Congress amended the Census Act, changing the word "may" to "shall." *See* Act of Oct. 17, 1976, Pub. L. No. 94-521, § 195, 90 Stat. 459, 464 (1976) (codified at 13 U.S.C. § 195 (1994)). In 1976, Congress also amended § 141(a) of the Act, which, in revised form, provides:

> The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date," in such form and content as he may determine, including the use of sampling procedures and special surveys.

13 U.S.C. § 141(a) (1994).

371. As originally enacted, § 195 of the Act provided that: "Except for the determination of population for purposes of congressional apportionment purposes, the Secretary *may*, where he deems it appropriate, authorize the use of ... statistical ... 'sampling' in carrying out the [Act]." 13 U.S.C. § 195 (1958) (current version at *id.* § 195 (1994)) (emphasis added).

several voters residing in states that stood to lose seats in the House challenged the Census Bureau's plans to use sampling to derive state population figures in the 2000 Census, arguing that the Census Act barred the use of sampling for purposes of reapportioning the House.[372] In response, the Census Bureau argued that the Act authorized sampling even for reapportionment purposes.[373]

In support of their respective positions, each party advanced textual arguments. Significantly, two textual approaches supported conflicting interpretations. One approach focused on the current text of § 195.[374] The phrasing of this section suggests that sampling is prohibited for purposes of reapportionment. In particular, a proviso preceding a mandatory prescription (i.e., a sentence using the "except/shall" structure used in § 195) ordinarily means that one rule applies to matters generally covered by the prescription and that matters within the proviso must be treated differently. For example, suppose one instructed a person named Jane controlling a gate to a park as follows: "Except for purposes of maintaining public safety, you shall not allow any motor vehicle into the park." The most natural reading of the order, the argument goes, is that generally Jane must not allow motor vehicles to enter the park, but that for situations covered by the proviso—when furthering public safety—Jane must allow motor vehicles to enter.

What qualifies as the most natural reading of the "except/shall" formulation is contestable, as the Census Bureau argued. In particular, a proviso to a mandatory prescription may signify that matters covered by the mandatory prescription should be dealt with in a particular manner and that the person to whom the mandatory prescription is directed has discretion to treat matters covered by the proviso either similarly or differently. In effect, the proviso does not compel different treatment, but confers discretion on a decisionmaker. Thus, in my example of the instruction to Jane at the park gate, the instruction might be interpreted to mean that Jane cannot ordinarily permit motor vehicles into the park, but she has discretion on whether to admit motor vehicles that seek to enter to maintain public safety. The parties provided conflicting examples of the usage of the "except/shall" formulation in the United States Code.[375] Nevertheless, one of the two district judges who addressed the issue found the "except/shall" structure dispositive in holding for

372. *See Department of Commerce*, 525 U.S. at 328.
373. *See* Brief for the Appellants at 25–39, *Department of Commerce* (No. 98-404).
374. *See id.* at 27–39.
375. *See Department of Commerce*, 525 U.S. at 339.

the plaintiffs.[376] The other district judge concluded that, while not dispositive, the "except/shall" structure weighed in favor of the plaintiffs' argument that the Census Bureau lacked authority to employ sampling for reapportionment purposes.[377]

The Census Bureau relied upon a second textual argument, focusing on the 1976 change in the language of § 195 of the Census Act.[378] Until 1976, § 195 provided that statistical sampling *may* be used for purposes other than congressional apportionment.[379] The statute unquestionably precluded the Census Bureau from employing sampling for apportionment purposes, by permitting the Bureau to use sampling (i.e. "the Secretary may ... authorize the use of statistical sampling") *except* for determining the apportionment of representatives. By changing the word "may" to "shall" in 1976 and not otherwise modifying § 195 to reaffirm explicitly the ban on the use of sampling for apportionment purposes, Congress, in effect, revised the ban by changing a provision clearly banning the use of sampling for apportionment to one that arguably does not. Moreover, the general policy of encouraging sampling, embodied in the 1976 amendments to the Census Act, further supports such a reading.[380]

In *Department of Commerce*, none of the Justices was willing to place exclusive reliance on such textual arguments.[381] Accordingly, the case turned on other considerations, bringing the issue of the role of legislative intent to the fore. A majority of Justices attempted to determine the 1976 Congress's intent: did Congress intend to allow, but not require, sampling for apportionment, while requiring

376. *See* Glavin v. Clinton, 19 F. Supp. 2d 543, 552–53 (E.D. Va. 1998), *aff'd by* Department of Commerce v. United States House of Representatives, 525 U.S. 316 (1999).

377. *See* United States House of Representatives v. Department of Commerce, 11 F. Supp. 2d 76, 99–100 ("An exception from a command to do 'X' more often than not represents a prohibition against doing 'X' with respect to the subject matter covered by the exception."), *appeal dismissed*, 525 U.S. 316 (1999).

378. Act of Oct. 17, 1976, Pub. L. No. 94-521, § 195, 90 Stat. 459, 464 (1976) (codified at 13 U.S.C. § 195 (1994)).

379. *See* 13 U.S.C. § 195.

380. The text of the 1976 amendment clearly embodied a view that sampling should be used more frequently. The change in § 195 mandated that the Secretary use sampling when feasible. The legislative history also sets forth Congress's pro-sampling policy. *See, e.g.*, S. REP. NO. 94-1256, at 4 (1976) (Sup. Docs. No. Y1.1/5:94-1256) (noting that § 141 as amended was intended to "encourage the use of sampling and surveys in the taking of the decennial census").

381. However, Chief Judge Hilton of the District Court for the Eastern District of Virginia, in resolving the challenge to the Census Bureau's plans brought in that court, found the statutes unambiguous and thus dispositive. *See Glavin*, 19 F. Supp. 2d at 552–53.

sampling to the extent feasible for all other purposes? Alternatively, did Congress merely intend to compel the use sampling for nonapportionment purposes while leaving the prohibition on the use of sampling for reapportionment purposes intact? Congress did not address these questions directly, so the Court had little or no legislative history to guide its decision. The Justices debated the inferences that can be drawn from congressional silence, a topic the Court has discussed on several occasions in recent years.[382]

Ultimately, the Supreme Court split four ways on the interpretive question. Only three of the four positions staked out—those presented in the opinions of Justices O'Connor, Scalia, and Stevens—merit discussion here.[383] Justice O'Connor announced the opinion of the Court, but only Chief Justice Rehnquist and Justice Kennedy fully concurred in her analysis. She frankly acknowledged that, as a matter of textual interpretation of the type that Justice Scalia employs, the question before the Court could be resolved in either party's favor.[384] She reasoned that the tradition of using direct contact to produce census figures for purposes of reapportionment suggested that the statute required the Census Bureau to continue that tradition.[385] In addition to relying on tradition, Justice O'Connor

382. *See* Bell, *supra* note 4, at 91. The District of Columbia District Court judge had relied on such silence to draw the inference that Congress meant to leave the prohibition of sampling unchanged, invoking the Supreme Court's favorite analogy for this type of situation, " 'the dog that did not bark,' " from one of Sir Arthur Conan Doyle's Sherlock Holmes mysteries. *United States House of Representatives*, 11 F. Supp. 2d at 100–02 (quoting Chisom v. Roemer, 501 U.S. 380, 396 n.23 (1991) (referencing Sir Arthur Conan Doyle, *Silver Blaze*, *reprinted in* SHERLOCK HOLMES: THE COMPLETE NOVEL AND STORIES (1986))). In *Silver Blaze*, Holmes determined the murderer's identity by noting that the victim's dog did not bark on the night of the murder. *See* Doyle, *supra*, at 471–72. Holmes inferred that the murderer was someone with whom the dog was familiar. The district court concluded that given the importance of apportionment, some legislator surely would have objected if members of Congress had understood the statute to allow sampling. *See United States House of Representatives*, 11 F. Supp. 2d at 101–02. Moreover, the oblique nature of the change in § 195's text surely did not alert members of Congress that the statute would make such a momentous change in the law.

383. Justice Breyer argued that the Act authorized the Census Bureau's plans because § 195(a) merely prohibited using sampling as a "substitute" for direct contact (whether by dwelling visits or by mail) rather than as a "supplement" for direct contact, which § 195(a) did not prohibit. *Department of Commerce*, 525 U.S. at 349–50 (Breyer, J., concurring in part and dissenting in part). Because the Census Bureau's proposal merely used sampling to supplement calculations based upon direct contact, Justice Breyer argued, the Bureau's plan was permissible. *See id.* at 350 (Breyer, J., concurring in part and dissenting in part).

384. *See id.* at 339 ("Absent any historical context, the language in the amended § 195 might reasonably be read as either permissive or prohibitive with regard to the use of sampling for apportionment purposes.").

385. *See id.* at 340. Justice Scalia joined this portion of the opinion. *See id.* at 344 (Scalia, J., concurring in part).

relied on inferences about Congress's intent—inferring that Congress did not intend to change the apportionment proviso from a prohibitory to a permissive clause. In particular, she noted that "[a]t no point during the debates over these amendments did a single Member of Congress suggest that the amendments would so fundamentally change the manner in which the Bureau could calculate the population for purposes of apportionment."[386] Justice O'Connor posited that if members of Congress had understood the Act to authorize the Census Bureau to use sampling for apportionment purposes for the first time in the nation's history, some member of Congress would have voiced an objection to the amendment. Justice O'Connor based her inference on three factors: (1) the profound effect such sampling could have on the apportionment of seats among states and on the district lines within states; (2) the momentous nature of the change, which Justice O'Connor described as "arguably ... the single most significant change in the method of conducting the decennial census since its inception;"[387] and (3) the subtlety of the change in the statute's phraseology that allegedly produced such a momentous change.[388]

Justice Scalia also concluded that the statute did not remove the prohibition on sampling for apportionment purposes, but dismissed as foolhardy any attempt to construe legislative silence.[389] In so doing, he adhered to his position in *Chisom v. Roemer*,[390] where he argued that drawing inferences from congressional silence is normatively illegitimate because Congress need not proclaim its actions.[391] In *Chisom*, Justice Scalia also noted his unwillingness, as an empirical matter, to assume that everything of significance was noted in legislative history or would have sparked debate.[392]

In *Department of Commerce*, Justice Scalia parsed the statutory text with extreme precision, reasoning that the statutory mandate generally requiring the Census Bureau to use sampling is subject to

386. *Id.* at 342.
387. *Id.* at 343.
388. *See id.*
389. *See id.* at 344 (Scalia, J., concurring).
390. 501 U.S. 380, 404–17 (1991) (Scalia, J., dissenting).
391. *See id.* at 417 (Scalia, J., dissenting). In *Chisom*, Justice Scalia explained that reasoning based on inferences from legislative silence rests upon the erroneous proposition that "Congress cannot be credited with having achieved anything of major importance by simply saying it, in ordinary language, in the text of a statute 'without comment' in the legislative history." *Id.* at 406 (Scalia, J., dissenting).
392. *Id.* (Scalia, J., dissenting).

two exceptions.[393] The first exception is obvious—the mandate does not apply to apportionment.[394] The second is more subtle—the Census Bureau is excused from the mandate if it considers sampling infeasible.[395] Justice Scalia presumed that the exceptions should be construed similarly—either they both permit, but do not mandate sampling, or they both preclude sampling.[396] Because Congress surely did not intend the Census Bureau to engage in sampling when infeasible, he reasoned that the exceptions must preclude sampling in the situations they cover. Thus, under Justice Scalia's reading of the text, sampling is also precluded for apportionment.[397]

In addition, Justice Scalia drew inferences from the structure of the Census Act. He noted that § 181 of the Act, governing the compilation of certain nonessential data, limits the Secretary's ability to use sampling data to situations in which the Secretary could determine that it will produce "current, comprehensive reliable data."[398] If §§ 141(a) and 195 were read to allow the Census Bureau complete discretion regarding sampling for reapportionment, Justice Scalia argued, the Act would place fewer constraints on the Census Bureau in performing the central function of apportionment than in performing the "useful but hardly indispensable function" of compiling annual and biennial interim data.[399] Justice Scalia thus refused to read into the statute a meaning that, in his words, "swallows a camel and strains out a gnat."[400]

To the extent that the statutory text did not resolve the argument, Justice Scalia resorted to an argument based on constitutional considerations. He reasoned that the Constitution's Census Clause, which requires Congress to prescribe the manner in which an "actual enumeration" of the population is to occur,[401] raises a substantial doubt as to the constitutionality of employing

393. *Department of Commerce*, 525 U.S. at 344–49 (Scalia, J., concurring in part).
394. *See id.* at 344–49 (Scalia, J., concurring in part).
395. *See id.* at 344–46 (Scalia, J., concurring in part).
396. *See id.* at 346 (Scalia, J., concurring in part).
397. *See id.* (Scalia, J., concurring in part).
398. *Id.* (Scalia, J., concurring in part) (quoting 13 U.S.C. § 181(a) (1994)).
399. *Id.* (Scalia, J., concurring in part).
400. *Id.* (Scalia, J., concurring in part).
401. Article I, Section 2, Clause 3 of the Constitution provides:

> Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers . . . . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

U.S. CONST. art I, § 2, cl. 3.

apportionment-related sampling.[402] His rationale stemmed largely from the colonial-era meaning of the word "enumeration," which he derived by consulting dictionaries extant at the time.[403] Additionally, he argued that requiring population counts to reflect direct contact with every household, whether in person or by mail, serves a structural function. This direct-contact mandate precludes elected officials from protecting their positions by manipulating the population counts that determine the composition of electoral districts.[404] Consequently, Justice Scalia concluded that because the constitutional status of sampling was questionable, the statute should be construed to prohibit it.[405]

Justice Stevens, in a dissent joined by Justices Souter and Ginsburg, found the arguments based on legislative silence inapposite.[406] In fact, Justice Stevens argued that Congress had not been silent—it had amended the relevant statutory provision and proclaimed its desire to encourage sampling.[407] He noted that the Senate report on the 1976 amendments states that the amended § 141(a) was intended to "encourage the use of sampling and surveys in the taking of the decennial census."[408] Nevertheless, the dissent's reasoning is not flawless.

For starters, the report's language does not reference § 195, in which the proviso regarding the use of sampling for apportionment appears. In addition, while the decennial census produces population figures, it also produces other information. Thus, the passage in the Senate report may indicate little more than Congress's desire to encourage sampling for purposes other than reapportionment. Justice Stevens acknowledged the lack of any other specific reference to the use of sampling in conducting the decennial census, but he instead relied upon more general statements in the legislative history

402. *See Department of Commerce*, 525 U.S. at 346 (Scalia, J., concurring in part).

403. *See id.* at 346–47 (Scalia, J., concurring in part) (quoting the definition of "enumeration" as iterated in dictionaries published in 1828, 1773, and 1796).

404. *See id.* at 347 (Scalia, J., concurring in part).

405. *See id.* at 346–48 (Scalia, J., concurring in part). *See generally* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) (stating that statutes should be construed to avoid constitutional doubt).

406. *See Department of Commerce*, 525 U.S. at 357 (Stevens, J., dissenting). Justice Stevens asserted that Justice O'Connor did not use such an approach. *See id.* at 360 (Stevens, J., dissenting). Justice O'Connor did, however, use such reasoning but refrained from explicitly referencing the well-worn analogy to the Sherlock Holmes mystery. *See id.* at 342; *see also supra* note 382 (discussing the use of the Sherlock Holmes story).

407. *See Department of Commerce*, 525 U.S. at 357–58 (Stevens, J., dissenting).

408. *Id.* at 359 (Stevens, J., dissenting) (quoting S. REP. NO. 94-1256, at 4 (1976) (Sup. Docs. No. Y1.1/5:94-1256)).

that advocated the use of sampling whenever possible. Justice Stevens presumed that Congress understood the statutory text and legislative history, and he found it unsurprising that no legislator would object to the potential use of sampling for reapportionment purposes. He suggested that Justice O'Connor's view of the change as controversial was colored by the political disagreements over the reliability of sampling that have emerged since 1976, and he argued that the current controversy surrounding sampling "sheds no light on the views of the legislators who enacted the authorization to use sampling in 1976."[409] He also noted that in contrast to the lack of protest about use of sampling in the census, opposition to the use of mid-decade census figures for reapportionment purposes was clearly expressed in the legislative history.[410] Although his inference remains unstated, implicit in Justice Stevens's opinion is the conclusion that members of Congress knew that sampling-based figures could be employed for reapportionment purposes, but they were concerned only about such use in the context of mid-decade census figures. Furthermore, Justice Stevens refused to view the 1976 amendment of §§ 195 and 141(a) as an indirect means of granting the Census Bureau the authority to use sampling in connection with the census. Thus, Justice Stevens concluded that the prohibition had been lifted, and he disagreed with Justice O'Connor's assessment of the scant evidence she cited to support her position.[411]

My public justification approach would acknowledge the pre-1976 prohibition on sampling in apportionment and would accord significance to Congress's failure to discuss or explain the ending of that prohibition and the lodging of discretion in the Census Bureau. Given the obligation to explain statutes, courts sometimes should find Congress's silence dispositive. When Congress fails to mention a change supposedly mandated by ambiguous statutory text, courts sometimes should conclude that such silence alone justifies a refusal to give the ambiguous statutory text such a broad meaning. However, Congress surely must not be held to the obligation of anticipating every potential application of statutory language; such an approach would often unduly restrict statutory language.

Of course, changes of a certain magnitude should not be presumed to have been made merely on the basis of ambiguous statutory language. A decision about which applications of a

409. *Id.* (Stevens, J., dissenting).
410. *See id.* at 361 n.3 (Stevens, J., dissenting).
411. *See id.* at 361–62 (Stevens, J., dissenting).

statutory change are of sufficient magnitude to call for congressional explanation cannot rest on legislative intent or inferences about legislators' subjective states of mind, but rather must rest on the court's own analysis of the issue's importance. It requires the exercise of judicial judgment informed by a variety of factors. Justice O'Connor's judgment about the significance of a potential change in the legitimacy of sampling for apportionment purposes, while sound, ultimately cannot be traced to any real evidence about legislators' states of mind in 1976. Rather, because a change in the prohibition is substantial and significant, making such changes without explanation is insufficient. The departure from tradition and the significant implications of sampling suggest that Congress should be expected to explain or discuss the issue. The determination that this is the type of change that must be explained is a question for the courts rather than a conclusion somehow compelled by legislative intent.

Justice O'Connor's approach is flawed. She attempts to relegate her inferences regarding legislative intent to a secondary role, relying instead on tradition. Her effort to invoke tradition, however, fails. Tradition has little relevance if detached from both Justice Scalia's constitutional argument and Justice O'Connor's own inferences about Congress's intent based on its silence.[412] Reliance on tradition as an interpretive tool makes little sense in analyzing a statute that clearly alters tradition.[413] Justice O'Connor cannot and does not explain the logic behind giving more weight to the traditional manner of conducting the census than to Congress's expressed desire to change that tradition. When a statute mandates changes in traditional practices, tradition is interpretively important *only* as a basis for inferring that the statute did not change certain aspects of tradition, as Congress would not have done so without clearly and unambiguously stating its intent.

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412. Justice O'Connor probably separated her discussion of tradition from her discussion of drawing inferences regarding legislative intent from silence because Justice Scalia would not concur in any discussion of legislative intent. *See* Kenneth R. Dortzbach, *Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 MARQ. L. REV. 161, 182 (1996); William N. Eskridge, Jr., *Should the Supreme Court Read* The Federalist *but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1306 (1998).

413. In many ways such an approach resembles the approach of construing statutes in derogation of common law narrowly, *see supra* note 129, which Professor Pound critiqued at the turn of the twentieth century and which the courts have largely abandoned. *See* ESKRIDGE & FRICKEY, *supra* note 311, at 656–57 (noting that courts have largely abandoned the interpretive canon that statutes in derogation of common law should be construed narrowly); POUND, *supra* note 112, at 47, 61 (critiquing the approach); Pound, *Spurious Interpretation*, supra note 129, at 386 (critiquing the approach).

Justice O'Connor's reliance on legislative intent is flawed because she presents little support for the inferences she draws from congressional silence. It is difficult to distinguish between Justice O'Connor's own beliefs regarding the types of changes warranting explanation from what she concludes about the 1976 Congress's beliefs regarding the types of changes warranting explanation. She offers no real evidence to suggest that eliminating the prohibition on sampling for reapportionment was an issue that Congress thought worthy of discussion or explanation.[414] In light of the limited evidence of any subjective intent by any member of the legislature, the debate between Justice Stevens and Justice O'Connor over "legislative intent" has a rather anemic quality, and Justice Scalia indeed seems to have a point about the ephemeral nature of evidence of "legislative intent."

Justice Stevens's approach is also problematic because he ignores the absence of any stated intent to revoke the prohibition on sampling for reapportionment purposes or to grant discretion over such matters to the Census Bureau. General statements regarding the benefits of sampling do not convincingly establish a congressional intent to make the purported change. More importantly, even if we magically learned that a majority of legislators subjectively believed that they were allowing sampling for reapportionment purposes, we nevertheless should disregard such information because such a significant change *should* be made explicitly rather than obliquely. Congress fails in its normative duty when it makes changes of such consequence without explanation or debate. While the judiciary should enforce changes of such magnitude if they are made clearly in

414. The tepid quality of Justice O'Connor's argument regarding legislative intent is a bit paradoxical. In *Department of Commerce*, she dealt with one of the subjects about which members of Congress are likely to have an intense self-interest, based upon their interest in retaining their legislative positions and promoting the power of their political parties or states. Census figures are not only used to apportion seats in the House of Representatives among the states, but to construct electoral districts both for the House and for state legislatures. *See* Benjamin J. Razi, Comment, *Census Politics Revisited: What to Do When the Government Can't Count*, 48 AM. U. L. REV. 1101, 1102 (1999). As Margo Anderson shows, reapportionment of the House of Representatives frequently has been a political issue, and, indeed, it took Congress until July 1929 to enact a reapportionment bill after the 1920 Census indicated the electoral implications of population shifts. *See* ANDERSON, *supra* note 366, at 149–56. In this case, then, an observer may have particularly strong reasons to surmise that no change in any matter having such electoral implications could be accomplished without a fight. Interestingly, however, Justice O'Connor did not rely heavily on members of Congress's electoral interests—her mention of those interests is oblique; she merely notes that the change in the manner of compiling census figures would likely change the configuration of congressional districts. *See Department of Commerce*, 525 U.S. at 343.

the text of a statute, when in doubt, courts should construe language conservatively when Congress fails to explain the significance of the statutory language.

Justice Scalia errs in refusing to accord significance to the absence of any legislative history regarding use of sampling for reapportionment purposes. As I have argued above, Congress has a duty to explain major statutory changes.[415] Courts should not invalidate statutes merely because Congress fails to explain their rationale. Courts, however, should consider a legislative failure to acquit the legislative duty to explain statutory changes when called upon to construe that statute. Accordingly, courts should only reluctantly conclude that statutory text works major changes in the law that have not been identified in the statute's legislative history.[416]

Justice Scalia's strained textual arguments also show the onerous nature of the duty new textualism places on legislators who draft statutes. No doubt few, if any, legislators parsed the statutory text as finely as Justice Scalia did in his opinion. Legislators should not be required to pursue the type of precise analysis that Justice Scalia applies on pain of having the statute misconstrued by the courts.

Furthermore, Justice Scalia's reliance on the Census Clause to interpret the scope of the Census Act is misplaced. His textualist argument, which focuses on the use of the word "enumeration," is not compelling because one can locate other dictionaries that give different definitions of "enumeration." For instance, the *Oxford English Dictionary* gives the primary definition of the word "enumeration," as "the action of ascertaining the number of something; esp[ecially] the taking [of] a census of population."[417] In arguing on behalf of the Census Bureau, the Solicitor General not only noted the different definitions of "enumeration" and explained that the word had been used in both ways since 1577,[418] but he also noted that the definition that Justice Scalia relied upon was a secondary definition.[419]

Justice Scalia's construction of the Census Clause in such a way as to cast doubt upon the constitutionality of the Census Act as

415. *See supra* notes 325–44 and accompanying text.

416. In addition, Justice Scalia's dismissal of the inference that the legislature rarely does anything important without explanation conflicts with Congress's view of its practices. Members of Congress appear to believe that they have an obligation to explain the important aspects of statutes in the legislative history to guide those who must follow as well as apply the law. *See supra* notes 356–62.

417. 5 OXFORD ENGLISH DICTIONARY 311 (2d ed. 1989).

418. Brief for the Appellants at 40, *Department of Commerce* (No. 98-404).

419. *See id.*

interpreted by the Department of Commerce is problematic for other reasons. Surely nothing in the Census Clause validates a census because of the manner in which it is taken. Given the purpose of the Clause—allocation of representation to the states—the accuracy of the numbers produced would seem to be more important than the method used to produce those numbers. Indeed, the text of the Constitution left broad discretion to Congress regarding the manner in which the census was to be conducted.[420]

Moreover, the Constitution's specific delegation of the authority to determine the manner of enumeration surely includes the discretion to decide that "actual enumeration" means a determination of the population figures either by sampling or by individual counting.[421] Indeed, the Constitution specifically delegates the task to Congress, by providing that Congress shall prescribe the manner in which the census is conducted. Surely such discretion includes the power to adopt methods that differ from those used traditionally.

Although the risk exists that elected officials would frustrate the influence of newly emerging majorities by manipulating population counts, this concern by itself should not deprive the politically accountable branches of government of the power to make such decisions. Indeed, individual counting poses many of the same risks of unfairly entrenching incumbent officeholders. For example, undercounts of black citizens in the South during the 1870s were intended to reduce their political influence.[422] In fact, congressional Republicans' current resistance to sampling appears motivated, in large part, by a desire to retain the majority status that would be imperiled if urban areas gained increased representation.

The structural issues are more complex than Justice Scalia acknowledges.[423] The historically undercounted—racial minorities,

420. Interestingly, in 1782, five years before the Constitutional Convention, Thomas Jefferson provided an official estimate of Virginia's population using a rudimentary type of statistical sampling. *See* HYMAN ALTERMAN, COUNTING PEOPLE: THE CENSUS IN HISTORY 168–70 (1969).

421. *See* Wisconsin v. City of New York, 517 U.S. 1, 19 (1996).

422. *See* ANDERSON, *supra* note 366, at 89 (reporting that blacks in the South in 1870 were egregiously undercounted). Periodically, complaints have been raised about biased counting, such as the allegations made in the 1920s. *See id.* at 151.

423. Moreover, Justice Scalia's structural analysis cannot be grounded in the Framers' conceptions. The Framers realized that population numbers could be manipulated; they did not put their faith in the particular manner in which the census was conducted. *See, e.g.*, THE FEDERALIST NO. 54 (Alexander Hamilton). Rather, the Framers tied both a significant benefit and a significant burden to each state's respective population figures. Not only would the size of a state's constitutional delegation turn on its population, but its tax burden would as well. *See id.*; ALTERMAN, *supra* note 420, at 167, 186, 191. That

the homeless,[424] and recent immigrants—are likely to suffer at the hands of majoritarian institutions. Such groups may qualify as "discrete and insular" minorities whose position in majoritarian bodies warrants heightened protection.[425] On the one hand, sampling may decrease the probability that those holding political power can entrench themselves regardless of population changes. On the other hand, the uncounted are presumably less likely to vote than those who are counted because people who do not respond to census surveys as a result of time constraints, lethargy, fear, or some other circumstance[426] are probably less likely to vote than those who do respond. Thus, the undercounted increase their neighbors' electoral power and entitlement to representation without diluting the weight of their neighbors' votes.[427] This situation might provide a form of constructive representation by giving greater power to voters who sympathize with and who benefit from such populations.[428] Creating

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structural protection has eroded. Taxation is no longer allocated on the basis of a state's population. *See* U.S. CONST. amend. XVI; ANDERSON, *supra* note 366, at 111. In addition, many programs that provide grants-in-aid to states and localities for various purposes are now tied to the census—thus, there is an added incentive to increase an area's population figures. *See* ANDERSON, *supra* note 366, at 203–04, 210. Thus, the structural protections that the Framers envisioned no longer exist.

424. *See* National Law Ctr. on Homelessness & Poverty v. Kantor, 91 F.3d 178, 179 (D.C. Cir. 1996).

425. United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938); *see* ELY, *supra* note 67, at 151–70. The homeless make up another such group. *See, e.g., Carolene Prods. Co.*, 304 U.S. at 179.

426. *See* Tucker v. United States Dep't of Commerce, 958 F.2d 1411, 1418 (7th Cir. 1992).

427. *See id.* at 1418–19. A prime historical example was the apportionment of Representatives at the end of Reconstruction. White southerners stood to gain representation based on the sizeable number of newly freed slaves, even though they excluded blacks from voting. *See* ANDERSON, *supra* note 366, at 72–82. To address that problem, Section 2 of the Fourteenth Amendment provided that

> when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any male inhabitants of such State being twenty-one years of age, and citizens of the United States, or in any way abridged except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such .male. citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, § 2. The quoted portion of Section 2 has never been enforced. *See* ANDERSON, *supra* note 366, at 82. Later, complaints were made about northern states counting resident non-naturalized aliens, who were not entitled to vote. *See id.* at 156 n.31.

428. *See Tucker*, 958 F.2d at 1418–19 (observing that "a census undercount may reduce the voting power of voters who are the natural allies of the undercounted, since an adjustment might give more representation to voters in states in which the undercounted are concentrated"); Dennis L. Murphy, Note, *The Exclusion of Illegal Aliens from the*

districts having unusually high numbers of the historically undercounted, however, may simply enhance the power of those who have little sympathy for, or who are actively hostile to, their political interests. Such a state of affairs could result if such people form a majority of the district into which the historically undercounted are placed.[429]

In the final analysis, my public justification approach allows resolution of the *Department of Commerce* even though Congress did not speak to the key issue, chronic undercounting of sub-populations. My public justification approach also avoids the problems introduced by positing and trying to discern some legislative intent shared by a majority of the legislators.

B. *Revisiting an Old Chestnut:* Rector of Holy Trinity Church v. United States

My public justification approach also may change our perspective on more conventional interpretive issues, such as those arising in the classic *Rector of Holy Trinity Church v. United States*.[430] The statute at issue in *Holy Trinity* prohibited anyone from assisting in the immigration of any alien who had, before immigrating, contracted to "perform labor or services of any kind."[431] The United States sued Holy Trinity Church, which had hired an English cleric as its rector.[432] The Supreme Court was forced to decide whether such employment constituted the performance of "labor or services of any kind" under the statute. As the Court noted, the text of the provision seemed to encompass such employment.[433] However, the Court focused on

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Reapportionment Base: A Question of Representation, 41 CASE W. RES. L. REV. 969, 991–92 (1991) (discussing constructive representation).

429. Moreover, because states need not include some categories of people who either are ineligible to vote or have a tenuous connection with the locality, historically undercounted groups, such as illegal aliens, could be used to increase a state's congressional delegation, but could not be taken into account when the state fashions congressional districts. *See* Kirkpatrick v. Preisler, 394 U.S. 526, 534–35 (1969) ("[A]ssuming without deciding that apportionment may be based on eligible voter population rather than total populations."); Burns v. Richardson, 384 U.S. 73, 92 (1966) (stating that the Court has never "suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured").

430. 143 U.S. 457 (1892).

431. Alien Contract Labor Laws of 1885, ch. 164, 23 Stat. 332, 332 (codified as amended at 29 U.S.C. § 2164 (1901) (repealed 1952)).

432. *See Holy Trinity Church*, 143 U.S. at 457–58.

433. *See id.* at 458. The plain meaning argument was strengthened by the statute's explicit exemption of some professionals, including actors, artists, lecturers, singers, and

congressional intent, asserting its belief that Congress did not intend to prohibit transactions between churches and rectors.[434] The Court explained: "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within *the intention of its makers.*"[435] The Court held that the statutory phrase "labor or service of any kind" covered only manual labor, relying on its knowledge of the circumstances surrounding the statute's enactment, the problems that prompted Congress to act,[436] and the statute's legislative history, which focused on immigrants who engaged in physical labor.[437] The Court noted that the relevant Senate committee realized that the text of the statute might include immigrants other than manual laborers and yet had refused to narrow the statute's language.[438] The committee had explained that it did not wish to delay the bill by redrafting it and expressed its confidence that the courts would interpret the bill to bar only manual laborers.[439]

Although no Justice dissented in *Holy Trinity*, Justice Kennedy criticized the *Holy Trinity* Court's approach almost a century later in his concurrence in *Public Citizen v. United States Department of Justice.*[440] Justice Kennedy argued that legislative materials are unauthoritative and that judicial "rummag[ing] through" legislative history does not further "democratic exegesis."[441] He also observed that the determinations of legislative intent generally rest on so little evidence that judges' conclusions about legislative intent often reflect their own views rather than those of the enacting legislature.[442]

Justice Kennedy's dissent offers telling criticisms to the extent

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domestic servants. *See* Alien Contract Labor Laws of 1885, ch. 164, § 5, 23 Stat. at 333; *Holy Trinity Church*, 143 U.S. at 458.

434. *See Holy Trinity Church*, 143 U.S. at 459.

435. *Id.* (emphasis added).

436. *See id.* at 463–64. In the Court's view, the problem Congress sought to remedy was big business's use of imported labor to depress wages. *See id.*

437. *See id.* at 464–65.

438. *See id.* at 464.

439. *See id.* at 464–65. The Court also expressed concern about the statute's impact on religious freedom and said that it did not believe Congress meant to inhibit the practice of religion. *See id.* at 471–72.

440. 491 U.S. 440, 467 (1989) (Kennedy, J., concurring). In a recent essay, Justice Scalia echoed Justice Kennedy's criticisms of *Holy Trinity Church*. *See* Scalia, *supra* note 44, at 18–23.

441. *Public Citizen*, 491 U.S. at 473 (Kennedy, J., concurring).

442. *See id.* (Kennedy, J., concurring). Justice Kennedy, analogizing efforts to determine legislative intent to seances, quipped: "The problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice." *Id.* (Kennedy, J., concurring).

that the *Holy Trinity* Court professed to use legislative history to determine the actual intent of a legislative majority. The factual basis for a conclusion that most of the members in Congress that enacted the immigration bill intended the statute to apply only to manual labor does not seem fully convincing, and it may, in fact, reflect the views of the judges more than it reflects any serious factual inquiry into the intent of the enacting majority.[443]

On the other hand, the new textualist approach, as exemplified by Justice Kennedy's argument in *Public Citizen*, inappropriately discounts the importance of public justification. Because a majority vote on the general text is not the only relevant part of the legislative process, Justice Kennedy's view is too restrictive. Contrary to his conclusion, the public justification for the statute is an appropriate source to use in determining the scope of the statute. Judges must acknowledge that this determination is not a factual inquiry into intent. Rather, courts must determine the proper scope of the statute in light of the public justification provided for it; the scope of the statute will broaden or contract depending on the public justification.[444] Thus, judges will have to acknowledge their own discretion; they will have to acknowledge that their interpretations are not merely the interpretations that some amorphous legislative intent compels them to accept, but are chosen based on an interpretation of the statute's text and the public justification provided.

CONCLUSION

New textualists have mounted a two-pronged attack on the conventional view of statutory interpretation. They have argued that statutory text provides the only legitimate basis for statutory construction, relying heavily on the importance of the rule of law. That aspect of their theory is not new, though perhaps the public choice insight about the irrationality of group choice and the Supreme Court's emphasis upon the central nature of presentment[445] add some

443. *See* Gerald C. MacCallum, Jr., *Legislative Intent*, 75 YALE L.J. 754, 778 (1966) ("While judges and administrators obviously utilize evidence of the intentions of various individual legislators, they make no serious attempts to discover the actual intentions of the voting majorities.").

444. Given the use of general language in a statute's text, such a statute clearly cannot be interpreted to cover only the specific matters or situations addressed in the public justification. *See* Win-Chiat Lee, *Statutory Interpretation and the Counterfactual Test for Legislative Intention*, 8 LAW & PHIL. 383, 389–90, 403–04 (1989).

445. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 951 (1983).

weight to the argument. The second prong of the new textualists' challenge consists of instrumentalist arguments founded upon their observation of pathologies in contemporary legislative processes—the incentives to enact vague statutes, the use of legislative history to distort majority desires, the excessive influence of staff members who never face an electorate, and the opportunities that the use of legislative history provides interest groups. They would have us believe that all of these pathologies would somehow be diminished simply by embracing the new textualists' nostrum—disregarding legislative history.

While the new textualists' intrinsic argument that text provides the only legitimate basis for interpreting statutes lacks merit,[446] my arguments in this Article have focused on the new textualists' instrumentalist challenge. In making their challenge, new textualists face a dilemma. On the one hand, they seek to impose their view of the ideal legislative process on Congress, albeit by the subtle approach of using statutory interpretation. On the other hand, the new textualists' challenge is vulnerable to many of the same claims about the lack of judicial authority and competence that many new textualists interpose when they challenge other theories of constitutional interpretation.

Those who believe that legislative history has an important function in the interpretation of statutes, either because they take an intentionalist approach of seeking to find legislative intent or because, like me, they value certain aspects of legislative history independent of any attempt to determine legislative intent, should reject the new textualists' other attacks, even if on balance they find them persuasive. That rejection should rest on the principle of according appropriate respect to the legislature's judgment about the appropriate manner of fulfilling its constitutional duties.

446. *See* Bell, *supra* note 4, at 48–49.